A

SELECTION OF CASES

ON

EVIDENCE

FOR THE USE OF STUDENTS OF LAW

COMPILED AND EDITED BY

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BOSTON

LITTLE, BROWN, AND COMPANY

1906

Printers
S. J. Parkhill & Co., Boston, U. S. A.

PREFACE

This Collection is based upon the needs of a class in Evidence as experienced by the compiler in his own work. In choosing the specific cases, probably no two instructors would precisely agree; and it is hardly worth while to attempt to give the reasons for this particular selection.

Only one or two explanations need to be made. As to the comparative brevity of the cases, it will be found that, while irrelevant material has been carefully pruned out, the effort has been made to retain as full a statement of the facts as is necessary for mental discipline in studying the issue before the solution is reached in the judge's exposition. For the preliminary statements of fact the compiler is responsible; but they are made up of *verbatim* excerpts from the report itself, wherever possible.

As to the lack of citations of additional authorities by case-title in the notes, these are supplied by references to the appropriate sections of the compiler's treatise on Evidence. This method seemed to be more satisfactory; for it saved much space for additional cases, and it provided with sufficient convenience many more citations than could have been here printed; it also avoided the disadvantages of a fragmentary list of authorities, which might be misleading for lack of the accompanying explanations to be found in the treatise.

As to the order of topics, the compiler ventured to follow that of his own treatise above-mentioned; for it naturally seemed to him to be the most satisfactory. The only variations have been two, and these were based on an experience as to the needs of students. First, the topic of Authentication of Documents has been placed so that it will be studied before the Hearsay exception for Proof by Official (Certified) Copies. Secondly, the subject of Conduct as evidence of Guilty Consciousness has been placed

under the head of Admissions by Conduct; where, indeed, it has some claim to belong in legal theory also.

Since a collection like this must have some relation to the instructor's own plan and method of teaching the subject of Evidence, it may be worth while to explain the plan of the course actually employed by the compiler in connection with the use of this book. It falls into three parts, with a possible fourth part not yet put into practice:

1. *Reading in Legal History.* The first four chapters of Professor Thayer's Preliminary Treatise on Evidence are to be read, in private study, during the first term, and the reading tested by a simple examination at the end of the term.

2. *Study and Discussion of Cases.* The staple of the course consists in the study and discussion of the book of cases, with lectures and additional references. The examination consists in a paper of problems or hypothetical cases, and occurs at the end of the course.

3. *Practical Drill.* This consists of two parts:

a. During the first term, and after finishing the topic of Impeachment of Witnesses: One student, supplied by the instructor with a memorandum of answers, takes the witness' chair; two others act as counsel; the facts of a supposed case, in ten or twenty words, are stated by the instructor; a question involving some rule is read to the witness (either by the instructor or by the offering counsel); the opposing counsel, immediately objecting, must state the ground of his objection, and the offering counsel must answer the objection; the instructor then rules upon it. Neither counsel knows beforehand what question will be asked. Two or three such exercises can be finished in the first quarter of the hour. They have proved to be extremely useful in familiarizing the student with the practical and personal handling of the rules and in forcing a ready knowledge of them. The danger of a false appearance of certainty in them and of the inaccuracy inherent in rough-and-ready rulings can be counteracted by the comments of the instructor.

b. In the second term, but not until finishing the rules affecting proof of documents, advanced exercises with the same general

object as the foregoing ones. Here the work is assigned some days or weeks beforehand, and the cases are taken up in turn, during the first quarter-hour, either in arbitrary order or on a court calendar. Simple examples, abbreviated, are these: "In such-and-such a case, impeach Witness A by conviction of petit larceny"; "In such-and-such a case, introduce a press-copy of a letter sent by the plaintiff to the defendant"; "Prove a judgment rendered in the M. County Court of Iowa"; "Offer the Revised Statutes of Indiana"; "Prove a deed from A to B recorded in M. County, etc."; "Offer the deposition of A, taken in a cause, etc." Some use of common forms will thus occasionally be involved; but this element need play only a small part in the work, and should not be over-emphasized. A main object is to cultivate the doing of such things intelligently according to principle, and thus to save the student from later falling into the slavery of printed forms and arbitrary local habits, as he is perhaps apt to do if he leaves the law school without having made any attempt to bridge the gap between principle and practice.

The foregoing parts can be covered in a course occupying two lecture-hours a week for two terms, *i. e.* one year, or about sixty-four hours. If an additional hour for half a year can be obtained, the following further part seems worth taking up:

4. *Study of Evidential Strategy and Tactics in Trials.* Two complete trials may be taken, one English and one American, both to be of classical merit as examples and of great interest in their facts. The class is first to peruse the trial as a whole; then to take it up in parts, and to analyze and discuss the various problems of management of proof; asking, first as to the plaintiff or prosecutor and then as to the defendant, what were from his point of view the strong and the weak points of his case, what the proper features of emphasis, what the preparatory caution, and what the best order of presenting the witnesses. Then the testimony of individual witnesses is to be examined and discussed, the need or utility of specific questions, the total effect of his testimony. Then the proper lines of closing argument on the testimony would be considered, and the actual arguments compared therewith. In these and other ways, the analysis would

develop in useful fashion a comprehension of the strategy and the tactics necessary in some degree or other in every trial, and practised with more or less conscious skill by every experienced trial-advocate.—But there are two almost insuperable obstacles in the way of this valuable adjunct to a course in Evidence; first, it must be conducted by a practitioner who unites a warm interest in the art as such and a large experience in trials; and this combination is rare; secondly, two suitable trials must be found, and a reprint must be in the hands of each member of the class. The present compiler had hoped to include in this volume two such trials, with a view to making feasible this branch of the work; but no American trial, suitable in compass and in other necessary features, and fully reported, has thus far met his search. The plan is mentioned here in the hope that it will attract the attention of some one interested in the subject, who may be more fortunate.

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Northwestern University Law School,
Chicago, March 4, 1906.

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ABBREVIATIONS.

Citations of Reports are made by the usual abbreviations.

The abbreviation "W.," followed by a figure, refers to the sections of the Compiler's Treatise on Evidence, published in 1904-5, by the same publishers.

CASES ON EVIDENCE.

INTRODUCTORY.

JEREMY BENTHAM, *Rationale of Judicial Evidence (1827), b. IX, pt. VI, c. V (Bowring's ed. vol. VII, p. 560):* "The question, on what facts
1 the decision turns, is a question, not of evidence, but of the substantive branch of the law: it respects the *probandum,* not the *probans:* it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved; it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim. This circumstance, obvious as it is, might easily be overlooked by one who has studied the subject only in the compilations of the English institutional writers; who, not content with directing that the evidence be confined to the points in issue, have farther proceeded, under the guise of laying down rules of evidence, to declare, on each occasion, what the points in issue are. One whole volume out of two which compose Mr. Phillipps's treatise on the Law of Evidence,—with a corresponding portion of the other treatises extant concerning that branch of the law,—is occupied in laying down rules concerning the sort of evidence which should be required in different sorts of actions or suits at law. But why should different forms of action require different sorts of evidence? The securities by which the trustworthiness of evidence is provided for, and the rules by which its probative force is estimated, if for every sort of cause they are what they ought to be, must be the same for one sort of cause as for another. The difference is not in the nature of the proof; it is in the nature of the facts required to be proved. There is no difference as between different forms of action, in reason, or even in English law, in respect of the rules relating to the competency of witnesses; nor, in general, to the admissibility or the proof of written documents; nor in respect of any other of the general rules of evidence. What Mr. Phillipps (I mention him only as a representative of the rest) professes, under each of the different forms of action, to tell you, is, what facts, in order to support an action in that form, it is necessary that you should prove . . . But, to enumerate the facts which confer or take away rights, is the main business of what is called the civil branch of the law; to enumerate the acts by which rights are violated—in other words, to define offenses—is the main business of the penal branch. What, therefore, the lawyers give us, under the appellation 'law of evidence,' is really, in a great part of it, civil and penal law. . . . Under the title Burglary, Mr. Starkie begins by saying, that on an indictment for burglary, it is essential to prove, 1st,

A felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night time; 4thly, with intent to commit a felony. He then proceeds to inform us, that there must be evidence of an actual or constructive breaking; for if the entry was obtained through an open door or window, it is no burglary . . . Who does not see that all this is an attempt—a lame one, it must be confessed (which is not the fault of the compiler), but still an attempt—to supply that definition of the offense of burglary which the substantive law has failed to afford?"

Mr. Justice Oliver Wendell Holmes, *The Common Law (1881), 120:* "The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. Thus, in Crafton v. Metropolitan Railway Co.,[1] the plaintiff slipped on the defendant's stairs and was severely hurt. The cause of his slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe by reason of this circumstance and the absence of a handrail. There was nothing to contradict this except that great numbers of persons had passed over the stairs and that no accident had happened there, and the plaintiff had a verdict. The Court set the verdict aside, and ordered a nonsuit. The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and it did in fact mean, that the railroad company had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will be found in the text-books. On the other hand, if the Court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability or prevented a recovery, as the case might be. Thus, it is said to be actionable negligence to let a house for a dwelling knowing it to be so infected with small-pox as to be dangerous to health, and concealing the knowledge."

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Scope of the Law of Evidence:[2]—"The question, therefore, 'Of what Propositions may Evidence be offered?' is not answered by the law of evidence, except in a subordinate way. The answer to it is made in four parts. Evidence may be offered of such Propositions of fact as

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1—L. R. 1 C. P. 300.

2—Quoted from W., §§ 2, 3.

"(*a*) Are material by the substantive law to any right or duty, claim or defence;

"(*b*) Are issuable in the case at bar by the terms of the pleadings under the rules of pleading;

"(*c*) Are effective to relieve a party from the establishment of one of the preceding propositions;

"(*d*) Are admissible by the law of evidence as evidentiary facts, and thus may become in turn Propositions to be proved.

"The first and the second of these classes clearly do not involve the law of evidence. The third class is concerned with judicial admissions and their congeners; such are really equivalent to a pleading, because they formally waive proof; they are therefore no part of the law of evidence except for the necessity of distinguishing them from other things miscalled admissions. The fourth class alone concerns intrinsically the law of evidence. It rests on the self-evident corollary that, since any Evidentiary Fact may in its turn become a Proposition, evidence to prove it may then be offered. Thus the law of evidence is legitimately concerned solely with the relation between Evidentiary Facts and Propositions; how a given Proposition comes to be eligible for proof is not a part of the law of evidence.

"The Propositions of which evidence may be offered being thus given by the rules of substantive law and of pleading, and the law of evidence concerning itself solely with the relation between Evidentiary Facts and such Propositions, the settlement of that relation involves obviously four distinct questions:

"I. *What Facts may be presented as Evidence?* This is the question of Admissibility.

"II. *By whom must Evidence be presented?* This is the question of Burden of Proof, and, incidentally, of Presumptions.

"III. *To whom must Evidence be presented?* This involves the relation of function between Judge and Jury, as respectively deciding upon Law and Fact.

"IV. *Of what Propositions in issue need no Evidence be presented?* This includes the topics ordinarily termed Judicial Notice and Judicial Admissions. The former (as will be seen) is in essence nothing more than a rule of burden of proof. The latter (as already noted) is in effect equivalent to a rule of pleading.

"All of the last three topics verge towards the border line of what is in strictness the law of evidence. They involve and rest upon certain larger aspects of procedure which are independent of the evidential material. The question who has the burden of proof, for example, is of a piece with the questions who shall open and close the argument and whether certain allegations require an affirmative or negative pleading. They form a part of a treatise on evidence merely because their material is chiefly evidential material and because their problems have constantly to be discriminated from the strictly evidential problems.

"There are, indeed, still other topics which, because their material is partly or chiefly evidential, might by a broad treatment be included in a system of evidence, For example, the rules of procedure in preparation for trial may raise the question whether an expected witness may be detained or bonded before trial begun, or whether testimony can be preserved by deposition taken before trial, or whether documents needed for evidence can be prevented from being carried out of the jurisdiction. So far as any of these rules of procedure affect the subsequent admissibility of the evidence, they plainly belong here; but as rules of procedure—*i. e.* telling whether a thing can or cannot be done before trial—they are in strictness not rules of evidence. Again, the deliberations of the jury are governed by certain rules, prescribing the place of retirement, the behavior during retirement, the form of the verdict, and the like. Among these rules may be some which prescribe what effect of persuasion is to be attached to different sorts of evidence, and how the total strength or sufficiency of the jurors' persuasion is to be measured. All these rules belong together, and it is only incidentally that some of them concern evidential material. Still again, a verdict and judgment may on appeal be set aside for various errors and defects; some of these errors may involve the circumstance that improper evidence has been considered. But only as a part of the general system of appeal and revision can such rules be satisfactorily dealt with. They are a part of that system and not of the system of evidence."

LORD MELVILLE'S TRIAL (1806).

29 How. St. Tr. 746.

Prosecution for the misapplication of public funds as Treasurer of the Navy. Certificates were offered, signed by the paymaster, the defendant's subordinate, acknowledging the receipt of £45,000 from
4 the Exchequer; these were objected to as not competent in a criminal case to affect the defendant with responsibility. Mr. Serjeant *Best,* for their reception: "We must first prove that the money has been received, and after we have satisfactorily proved that, then comes the evidence to prove what has been its application after it has been received. . . . The learned counsel have endeavored to distinguish between civil and criminal cases. . . . There is a considerable distinction between civil and criminal cases, but that distinction consists rather in the number of fasts to be proved than in the manner of proving any of them. It is necessary that more facts should be proved, for the purpose of showing that a man has money in his possession or has had money come into his possession, than to make him civilly responsible; but though more facts should be proved in one case than is necessary to be proved in the other, each particular fact is to be proved by precisely the same evidence." Mr. *Plumer,* on the opposite side: "I desire it may be distinctly understood that I do not dispute that the rules of evi-

dence are the same in both. . . . What is the distinction, then? . . . It is not that the rules of evidence are at all altered, but that when you are looking at the individual who stands in a civil relation, and are pursuing it with that view, there is an identity of persons between the agent and principal, and all that one has done or said is done or said by the other; . . . [but otherwise for criminal responsibility]. We are not contending that the rules of law are different in the two cases, but that the ultimate result of the inquiry makes that which is competent, legal, and proper in one case not so in the other."

Lord Chancellor ERSKINE took the view that the certificate was admissible to show the authorized reception of the monies by the agent, but not that the money actually reached the defendant; and proceeded: "This first step in the proof must advance by evidence applicable alike to civil as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or a civil consequence. But it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."[3]

UNITED STATES REVISED STATUTES *1878*, § *721* (repeating St. 1789, c. 20, s. 34): "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise re-
5 quire 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." Ibid. § 858 (combining statutes of 1862, 1864, and 1865); after enacting certain provisions as to qualifications of witnesses, it continues: "In all other respects the laws of the State in which the trial is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."[4]

GENERAL SURVEY OF THE HISTORICAL DEVELOPMENT OF THE RULES OF EVIDENCE.[5] "It is worth while to notice here summarily the historical development of the general system of evidence in its
6 main features, and the relative chronology of the different rules. Some notion can thus be obtained of the influence of certain external

3—C. P. COOPER, *Notes to Reports of Lord Cottenham's Cases in Chancery (circa* 1846), *I, 509:* "Conclusions drawn by the author from the various authorities in the books: Conclusion 1. That what is evidence in a court of law is evidence in a court of equity, and that evidence which is admissible in a court of law is admissible in a court of equity. Conclusion 2. That when it is said in some of the cases that the Court rejected evidence or held evidence to be inadmissible which would have been received or would have been held admissible at common law, it must not be understood that such evidence was absolutely rejected or was held entirely inadmissible, but only that it was laid aside, that it was put out of consideration, as regarded any decree or order binding the interest of the party against whom it was adduced."

Compare the authorities cited in W., § 4.

4—Compare the authorities cited in W., § 6.

5—Quoted from W., § 8.

circumstances on the rules at large, and of some of the individual principles upon the others.

"The marked divisions of chronology, for our law of evidence, may be said to be seven,—from primitive times to 1200 A. D., thence to 1500, thence to 1700, to 1790, to 1830, to 1860, and to the present time:

"(1) *A. D. 700-1200.* Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei,* and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses;[6] for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document,—these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

"(2) *A. D. 1200-1500.* With the full advent of the jury, in the 1200s, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests. The change is of course gradual; and trial by jury is as yet only one of several competing methods; but at least a system for the process of persuasion becomes possible. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths and documentary originals is developed. The rule for the conclusiveness of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision; for they are not commonly caused to be informed by witnesses, in the modern sense.

"(3) *A. D. 1500-1700.* By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered system-

6—This is indeed elaborately denied by Declareuil, in Nouvelle revue hist. du droit fr. et etr. 1898, XXII, 220 ff.; but all prior students have assumed the contrary. It is no doubt difficult to replace ourselves in the primitive mental attitude.

less jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500s the foundations were laid for all the rules of disqualifications which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple failure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsory if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the Crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period,—the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period—the end of the 1600s—an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the 'parol evidence' rule enlarged its scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the Restoration of 1660 than with the Revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Crudities which Matthew Hale permitted, under the Commonwealth, Scroggs put aside, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of evidence—find their first full recognition in the last days of the Stuarts.

"(4) *A. D. 1700-1790.* Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical efficiency. On the one hand, the final establishment of the right of cross-examination by counsel, at the beginning of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture,—that great instrument of the continental system,—it is almost equally powerful for the creation of false impressions). A notable consequence was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came thus into new prominence. All through the 1700s this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence;[8] but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later Lord Chancellor) were printed, under the significant title of the 'Theory of Evidence.' But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's 'Trials at Nisi Prius') the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the 'best evidence' doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century Mr. Burke could argue down the rules of evidence, when attempted to be enforced upon the House of Lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable.[9] But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents—such as the authorization

8—Hawkins, in 1716, and Hale, in 1680, in their treatises on the criminal law, had had short chapters on evidence at these earlier dates.

9—"As to rules of law and evidence, he did not know what they meant; . . . it was true, something had been written on the law of Evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes" (1794, Hastings' Trial, Lords' Journal, Feb. 25).

of certified (or office) copies and the conditions dispensing from the production of originals—now also received their general and final shape.

"(5) *A. D. 1790-1830.* The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiæ relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings.[10] This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806, Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were 'more often quoted than acknowledged.' The room for new treatises were rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie,—in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while Phillipps and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

"(6) *A. D. 1830-1860.* Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time

10—Compare Campbell's account of the conditions when he began to report in 1807 (Life, I, 214).

exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the irrational rules. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that sometimes the contrary is true,—if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects,—the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853, on the common law procedure, is perusing epoch-making deliverances of the century.[11] The other circumstance that favored Bentham's cause was the radical readiness of the times. The French Revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was resolved to achieve a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came about,—in the economic, or the political, or the juridical field,—if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice,—criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chrono-

11—"The great controversy now [1851] is upon the Evidence Bill, allowing the parties to be examined against and for themselves. . . . If it passes, it will create a new era in the administration of justice in this country" (Campbell's Life, II, 292). "Our new procedure (which is in truth a juridical revolution) is now [1854] established, and people submit to it quietly" (Ib., II, 328).

logical order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform Bill, in 1832, under Russell and Grey; next the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not before the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch,—a beginning which would doubtless have culminated more rapidly if urgent economic and political crises had not intervened to absorb the legislative energy.

"In the United States, the counterpart of this period came only a little later. It seems to have begun all along the line and was doubtless inspired by the accounts of progress made and making in England, as well as by the writings of Edward Livingston, the American Bentham, and by the legislative efforts of David Dudley Field, in the realm of civil procedure. The period from 1840 to 1870 saw the enactment, in the various jurisdictions in this country, of most of the reformatory legislation which had been carried or proposed in England.

"(7) *A. D. 1860.* After the Judicature Act of 1875, and the Rules of Court (of 1883) which under its authority were formulated, the law of evidence in England attained rest. It is still overpatched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demands of justice, and above all to be so certain and settled in its acceptance that no further detailed development is called for. It is a sub-stratum of the law which comes to light only rarely in the judicial rulings upon practice.

"Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common law rules and of statutory reforms, were re-stated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports,—partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended,—partly because of the moral compulsion upon the the judiciary, in new communities, to vindicate by intellectual effort its right to supremacy over the bar,—and partly also because of the advent, coincidently, of the same rationalizing spirit which led to the reformatory legislation,—this very necessity of restatement led to the elaboration of a finely reasoned system. The 'mint, anise, and cummin' of mere precedent[12] were not unduly revered. There was always a reason given,—even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exem-

12—Lumpkin, J., in 33 Ga. 306.

plified, that 'so far as evidence is concerned, the English practice needs no improvement but from its own stores. Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished.'[13]

"But the newest States in time came to be added. New reports spawned a multifarious mass of new rulings in fifty jurisdictions,—each having theoretically an equal claim to consideration. The liberal spirit of choosing and testing the better rule degenerated into a spirit of empiric eclecticism in which all things could be questioned and requestioned *ad infinitum*. The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency. Added to this was the supposed necessity in the newer jurisdictions of deciding over again all the details that had been long settled in the older ones. Here the lack of local traditions at the bar and of self-confidence on the bench led to the tedious reexposition of countless elementary rules. This lack of peremptoriness on the supreme bench, and (no less important) the marked separation of personality between courts of trial and courts of final decision, led also to the multifarious heaping up, within each jurisdiction, of rulings upon rulings involving identical points of decision. This last phenomenon may be due to many subtly conspiring causes. But at any rate the fact is that in numerous instances, and in almost every jurisdiction, recorded decisions of Supreme Courts upon precisely the same rule and the same application of it can be reckoned by the dozens and scores. This wholly abnormal state of things—in clear contrast to that of the modern English epoch—is the marked feature of the present period of development in our own country.

"Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice—by slow formation of professional habits—or in the direction of attempted legislative relief from the mass of bewildering judicial rulings—by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting, until there has been more explicit discussion of the reasons for the rules and more study of them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the profession, 'every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.' "[14]

13—Rationale of Judicial Evidence, b. X, conclusion. Bentham never failed to preach the impropriety of not furnishing reasons. "'I think, therefore I exist,' was the argument of Descartes; 'I exist, therefore I have no need to think or be thought about,' is the argument of jurisprudence" (b. II, c. X, § 12; so also in b. III, c. IV, note).

14—Mr. Justice Holmes.

BOOK I.

WHAT FACTS MAY BE PRESENTED AS EVIDENCE.

(ADMISSIBILITY.)

INTRODUCTORY.

CLASSIFICATION OF THE RULES OF ADMISSIBILITY.[1] "It follows, from the foregoing considerations, that the rules of admissibility may be grouped under three heads, the first dealing with the probative
7 value of specific facts, the second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and the third covering all those rules which rest on extrinsic policies irrespective of probative value.

"The first group of rules (Part I, *post*) attempts to define, for legal purposes, the amount of probative value which suffices to entitle a fact to be regarded as evidential. Here the law is concerned with the rules of logic and inference as applied in practical experience, *i. e.*, with Relevancy. Circumstantial, Testimonial, and 'Real' evidence are the three great classes; and each has its special problems.

"The second group of rules (Part II, *post*) lays down auxiliary tests and safeguards, usually for particular kinds of facts, over and above the required minimum probative value. The hearsay rule, the rules of quantity, the rule of the oath, and a dozen others, belong here. An analysis of the general policy and relation of this group to the others is elsewhere made (§ 1171, *post*).

"The third group of rules (Part III, *post*) invokes, for the exclusion of certain kinds of facts, extrinsic policies which override the policy of ascertaining the truth by all available means. These rules concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. Most of these rules consist in giving cer-

1—Quoted from W., § 11.

tain kinds of persons an option—*i. e.* a Privilege—to withhold the evidential fact.

"Finally a group of rules (Part IV, *post*) known as the Parol Evidence rule, but belonging really to the substantive law, remains to be considered, since by tradition it has been ranked among the rules of evidence."

Professor James Bradley Thayer, *Preliminary Treatise on Evidence* (*1898*), *pp. 198, 264, 268*: "There is one precept to be mentioned,
8 which is not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical systems, viz., that nothing which is not supposed to be relevant, *i. e.*, logically probative, shall be received. . . . Reasoning, the rational method of settling disputed questions, is the modern substitute for certain formal and mechanical tests which flourished among our ancestors for centuries, and in the midst of which the trial by jury emerged. When two men to-day settle which is the 'best man' by a prize-fight, we get an accurate notion of the old Germanic trial. Who is it that 'tries' the question? The men themselves. There are referees and rules of the game, but no determination of the dispute on the grounds of reason,—by the rational method. So it was with 'trial by battle' in our old law; the issue of right, in a writ of right, including all elements of law and fact, was 'tried' by this physical struggle, and the judges of the Common Pleas sat, like the referee at a prize-fight, simply to administer the procedure, the rules of the game. So of the King's Bench in criminal appeals; and so sat Richard II at the trial of the appeal of treason between Bolingbroke and Norfolk, as Shakespeare represents it in the play. So of the various ordeals; the accused party 'tried' his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath; the question, both law and fact, was 'tried' merely by the oath, with or without fellow-swearers. The old 'trial by witnesses' was a testing of the question in like manner by their mere oath. So a record was said to 'try' itself. And so when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that 'tried' the case. . . . There is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that, unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system of evidence, . . . but yet . . . it is important to notice this also as being a fundamental proposition. In a historical sense, it has not been the fundamental rule to which the various exclusions were exceptions. . . . [But] the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind."

IRISH SOCIETY v. DERRY (1846).

12 Cl. & F. 641, 673.

Lord BROUGHAM: "The main error which ran through the argument of the very learned and ingenious counsel . . . was that they seemed to confound the purpose for which evidence was tendered and
9 admitted, with the admissibility of that evidence. The evidence tendered to prove any point may be perfectly inadequate to prove that point. It may be such that if the learned judge put it to the jury as sufficient proof, his directions to them upon that point might well be a subject of exception. Yet the same evidence might be perfectly well admitted and received, for such purposes to which it was strictly and correctly applicable. . . . Suppose that in a cause at Nisi Prius, the defendant produces a letter under my hand; that letter is received in evidence, though it may be very true it does not prove the fact for which purpose the defendant put it in. If the judge refuses to receive it, his direction is liable to be excepted against for that refusal. If he receives and states erroneously to the jury that it proves the point which it does not, his direction is liable to be excepted against upon another ground. But still it may be properly receivable in evidence, though it does not prove the matter, to prove which it was offered in evidence."

PEOPLE v. DOYLE (1870).

21 Mich. 221, 227.

"Whenever a question is made upon the admission of evidence, it is indispensable to consider the object for which it is produced, and the point intended to be established by it. . . . It frequently happens
10 that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another which it would naturally tend to establish. And when this occurs, the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue."[1]

1—Compare the following:

Goodhand v. *Benton*, 6 G. & J. 481, 488 (1834); *Dorsey*, J.: "For the purpose for which the account was offered in evidence, we think it clearly inadmissible and approve of its rejection by the County Court. . . . In the Court's rejection of the account, they do not declare it admissible evidence for no purpose; but simply that it was inadmissible for the purpose for which it was offered. It was still open to the appellant to offer it as evidence for any other purpose for which it was legally competent. Had the defendant offered the account generally, without specifying his object, or had stated it to be to contradict or discredit the testimony of the witness given on his examination in chief, . . . there could not have been a doubt as to its legal admissibility."

Compare the authorities cited in W., § 13.

CHICAGO CITY R. CO. v. CARROLL (1903).

206 Ill. 318, 68 N. E. 1087.

The plaintiff having been allowed, after the close of both cases, to offer evidence of the defendant's ownership of the car on which the injury occurred, and the defendant then desiring to offer, for the
11 first time, evidence of the due inspection of the cars, the defendant's attorney said: "We desire to offer evidence on the question of inspection," and the Court replied: "I will not receive any evidence, except as to the ownership of this line, at this stage"; this was held not a sufficient offer. RICKS, J.: "No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the Court. Such procedure as that does not amount to an offer of evidence, and the remarks of the Court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered; and counsel cannot, by engaging in a mere conversation with the Court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the Court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough till the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allowed the Court to rule upon it, and then offered what was expected to be proved by the witness, if he was not allowed to answer the question asked."[2]

RUSH v. FRENCH (1874).

1 Ariz. 99, 123, 25 Pac. 816.

DUNNE, C. J.: "A party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection.
12 . . . He will not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide haphazard, or else stop the trial of the cause, with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of the legislature, to see if they can discover any valid objection to the testimony. The opposing counsel can make no reply to a general objection, except to throw the whole responsibility upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in.

2—Compare the authorities cited in W., § 17.

Many trials under such a system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice. . . . An objection that the testimony is 'irrelevant' without specifying wherein or how or why it is irrelevant will not be considered in the Supreme Court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. An objection that the testimony is 'inadmissible' may be disregarded; it amounts to no more than the assertion that the evidence is illegal; the objection should fully and specifically point out how it is inadmissible. When an objection is that the evidence offered is 'incompetent and illegal,' it is the duty of the court to overrule it if the evidence was admissible for any purpose. An objection that evidence is 'incompetent' does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. . . . The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that is incompetent, the incompetency may be removed; if that is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time—and thus appeals could often be saved, delays avoided, and substantial justice administered."

WOLVERTON v. COMMONWEALTH (1821).

7 S. & R. 273, 276.

Scire facias on a sheriff's recognizance; the breach being that the defendant had suffered the escape of one Forbes, a debtor held under an execution. Gibson, J.: "The plaintiffs further offered parol
13 evidence of the contents of the execution, on which Forbes (for whose escape the suit was brought) was committed; having first given notice to the defendants to produce the said execution; the admission of which testimony was then and there objected to by the counsel of the defendants, on the ground that a record could not be proved by parol evidence. The objection in this court is, that parol evidence was inadmissible, before the execution was shown to have come to the defendants' possession, or to be lost or destroyed; and I, at once, admit, that if it had been put on that ground at the trial, it ought to have prevailed; but I apprehend there has been a total change of position, since the

cause came here. Now I take it to be an inflexible rule, and one of the utmost value, both in pleading and evidence, that whatever is not denied or made special ground of objection is conceded. Thus, if a party being called on for that purpose opens the particular view with which he offers any part of his evidence, or states the object to be attained by it, he precludes himself from insisting on its operation in any other direction, or for any other object; and the reason is, that the opposite party is prevented from objecting to its competency in any view different from the one proposed. In like manner, a party may be called on to state the particular ground on which he rests an objection to competency, and if it fails him, it is not error to receive the evidence, although it be incompetent on other grounds. Where, therefore, there is a special objection, or, what is the same in effect, a general objection resting, not on collateral circumstances, but on the supposed existence of an abstract principle admitting of no exception, as was the case here, every ground of exception which is not particularly occupied, is to be considered as abandoned. For instance, a deposition is offered, and it is resisted exclusively on the ground, that the witness is interested, or that the evidence is irrelevant; would it not be palpably unjust in a court of error, to listen to an objection, that it did not appear there had been proof of notice, or that the deposition had in all respects been regularly taken? If the defect were pointed out in time, it might be supplied by further proof; or if that were impossible, the party would, at least, be apprised of the danger to ultimate success, which is necessarily incurred by pressing the admission of incompetent testimony. Here, if instead of urging the abstract operation of the rule, the defendants had objected that the case did not fall within the particular exception to it, now relied on, the plaintiffs might have been prepared to show that the execution actually came to the hands of the sheriff, or that it was lost or destroyed; but, as to that, the silence of their antagonists at the trial, had a direct tendency to lead them into a surprise."[3]

WRIGHT v. SHARP (1709).

1 Salk. 288.

"A corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced
14 to writing; so the trial proceeded, and a verdict was given for the plaintiff. Next term the Court was moved for a bill of exceptions, and it was stirred and debated in Court. It was urged, that the law requires *quod proponat exceptionem suam,* and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions. On the other side it was

3—Compare the authorities cited in W., § 18.

said, that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides the words of the act are in the present tense, and so is the writ formed on the act. HOLT, C. J.: 'If this practice should prevail, the judge would be in a strange condition: He forgets the exception, and refuses to sign the bill, so an action must be brought: You should have insisted on your exception at the trial: You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point. The statute indeed appoints no time, but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record.'"

RUSH v. FRENCH (1874).

1 Ariz. 99, 121, 25 Pac. 816.

DUNNE, C. J.: "The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: 1. When the party objecting was overruled and he appeals. 2. When the
15 party objecting was sustained and the other side appeals. In the first case, where the party objecting was overruled and he appeals, he must show by the record: (1) What the question was, and what answer was given to it, or what the evidence was which was introduced against his objection. This is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible, but he must show that the evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this Court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. (2) He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. (3) He must show what kind of an objection was made, and to avail him here he must show that the objection as made was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party depends upon the nature of the objection. If the party objecting interpose merely a general objection, all that is necessary is to show enough to obviate the general objection. If the

objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this, we cannot in reason require him to go. He should defend himself against the particular attack made, but we cannot ask him to fortify himself against all possible attacks which might have been made. 2. In the second case, where the party objecting was sustained, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: (1) What question he asked or what evidence he sought to introduce; (2) Sufficient of the other evidence to illustrate the admissibility of that offered; (3) That the evidence so offered was excluded; (4) That there is reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds of exclusion."[4]

4—Compare the authorities cited in W., § 20.

PART I.

RELEVANCY.

INTRODUCTORY.

THOMAS STARKIE, *Evidence, I, 13 (1824)*: "Where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a bygone fact can be
16 ascertained: 1st, By information derived either immediately or mediately from those who had actual knowledge of the fact; or, 2dly, by means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established. In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ."

COMMONWEALTH v. WEBSTER (1850).

5 Cush. 295, 296, 299, 310.

The defendant, professor of chemistry, in the medical college, in Boston, attached to the university at Cambridge, was indicted in the municipal court at the January term, 1850, for the murder of Dr.
17 George Parkman, at Boston, on the 23d of November, 1849. The government introduced evidence, that Dr. George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut street in Boston in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before two o'clock of that day, when he was seen going towards and about to enter the medical college: That he did not return to his home: That on the next day a very active, particular and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were

offered for information about Dr. Parkman: That on the 30th and 31st of November, certain parts of a human body were discovered, in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory; That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November; That the parts of a human body so found resembled in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which has been dissected; That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted to his mouth by the same dentist a fortnight before his disappearance; That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant had said that on the 23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house, that if he would come to the medical college at half past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half past one o'clock on that day, at his laboratory in the medical college; That the defendant then had no means of paying, and that the notes were afterwards found in his possession. Several witnesses, called for the defence, testified that they saw Dr. Parkman at various places in Boston, at different times between the hours of a quarter before two and five, in the afternoon of the 23d of November. The attorney-general, in rebutting the evidence for the defendant, proposed to call witnesses to show that there was a person about the streets of Boston, at the time of Dr. Parkman's disappearance, who bore a strong resemblance to him, in form, gait, and manner; so strong that he was approached and spoken to, as Dr. Parkman, by persons well acquainted with the latter. The Court excluded the evidence.

Shaw, C. J.: "The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused. Under the first head we are to inquire and ascertain, whether the party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence. When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise. Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most in-

stances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character, and relations of the deceased, will put this beyond doubt. This case is to be proved, if proved at all, by circumstantial evidence; because it is not suggested that any direct evidence can be given, or that any witness can be called to give direct testimony, upon the main fact of the killing. Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood. But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence."

TITLE I.

CIRCUMSTANTIAL EVIDENCE.

Professor ALFRED SIDGWICK, *Fallacies: a View of Logic from the Practical Side, pp. 270, 339 (1884)*: "There is at bottom one primary source of fallacy in the inductive argument, call it by whatever
18 name may be most convenient. We may name it, for instance, the danger of overlooking plurality of causes, or of neglecting possible chance or counteraction, or the possibility of unknown antecedents, or of arguing either *post hoc ergo propter hoc* or *per enumerationem simplicem,* or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation, or of stating the law too widely, or of failing to see below the surface, or—perhaps on the whole the best of all—of unduly neglecting points of difference. . . . [The form of argument is] a case or cases brought forward of which such law is asserted to be the best explanation. If, then, some better explanation is possible, the theory as stated is impeachable. . . . By the best explanation is meant . . . that solitary one out of all possible hypotheses which, while explaining all the facts already in view, is narrowed, limited, hedged, or qualified, sufficiently to guard in the best possible way against undiscovered exceptions. . . . Hence, the 'best' explanation of the facts A and B and C is that explanation which, while neglecting certain points of difference among them, and thus forming some generalization, neglects only those differences which are 'unessential.' The best explanation of (*i. e.* generalization from) one solitary sequence observed is that which neglects only its unessential elements or features. . . . It is in every case, then, through undue neglect of the essential difference between the specific case or cases observed and the wider genus to which the assertion professes to refer, that we rise to a generalization not sufficiently guarded against possible exceptions. . . . All positive proof depends . . . on the care, the precautions with which observation has been interpreted and experiment conducted. So far only as these exclude alternative possibilities are they of real value. . . . Because all positive assertion can only justify itself . . . when mistakes have been either one by one eliminated or in a body prevented, the burden of doubt to be removed by evidence consists essentially in the group of alternative theories remaining undiscarded. . . . The important point is, always, to show that all other possible theories are weighed in the balance and found wanting,—that is to say, that all

precautions have been taken against that crudest kind of unchecked generalization which the least trained mind possesses in the greatest abundance. This objection against a theory, that alternative theories are not yet discarded, appears, however, more directly applicable, more fruitful of results, against a concrete or an abstract-concrete thesis than against a directly abstract one. . . . And the right of the theory chosen, over all its possible rivals, depends entirely upon the depth of our insight into the conditions under which the experiment or observation was really made. This is the main lesson of Logic as regards Induction. . . .[2] These alternatives have to be faced as possible explanations of each observed case; and the immediate question in each case is, What certainty can we obtain that the alternative chosen is the right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question."

COHN v. SAIDEL (1902).

71 N. H. 558, 53 Atl. 800.

Malicious prosecution; an instruction that the mere fact of the present defendants' submission to nonsuit in the former action warranted a conclusion that they had no probable cause in the beginning was held to have been properly refused. WALKER, J.: "The argument is that that fact alone warrants the inference of a want of probable cause. But the fact of the nonsuit alone is direct evidence of no mental state on the part of the defendants, except that they did not desire to carry on the litigation at that time. It may be said that it establishes that fact conclusively. If it does, and if it might be inferred that they became nonsuit because, as then informed, they did not think they had a probable cause of action, it is necessary to go a step further in this mental operation, and to infer from this inference that the defendants, when they brought the suits, nearly a year before, upon information they then possessed, did not, as reasonable and prudent men, honestly believe they had a cause of action. There is no open and visible connection between the fact first proved, viz., that the defendants desired to withdraw their suits in April, 1900, and the fact to be proved, viz., that they had no probable cause of action in July, 1899. A great variety of reasons exist which may induce a plaintiff to become nonsuit, one of which may be that he has discovered or become convinced that he has no case. This, however, is but a mere conjecture. It is but one of a large number of sufficient reasons for such action. It cannot even be said to be the common or ordinary reason that induces a plaintiff to become nonsuit. In a particular case it may or it may not be the true reason. Unconnected with other evidence, it is pure conjecture. But one conjecture cannot be treated as a proved fact in order to reach another conjecture. In view of the fact that the reasons for becoming nonsuit are numerous, and that the plaintiff's

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belief that he had no cause of action in the beginning is probably a very rare one, the above rule would not seem to be reasonable, unless it is reasonable to require the defendant to prove his nonliability in the first instance. The logic of legal procedure does not lead to such a result."[1]

AMOSKEAG MANUFACTURING CO. v. HEAD (1879).

59 N. H. 332.

Petition for damages to be assessed for flowing the plaintiff's land by the building of a dam. On the issue of value, the defendant offered to show the sums paid to thirty-two other parties for damage
20 done by the same dam. This was excluded. Doe, C. J.: "The evidence offered by the defendant, of the sums paid by the plaintiffs to thirty-two persons for thirty-two rights of flowage, would be ineffective and immaterial if unaccompanied by other evidence tending to show the damage done in those cases, and such a state of facts as would enable the jury to draw a fair inference as to the value of the defendant's land from the value of the other tracts. If such other evidence were offered, one question would be, whether the thirty-two other cases should be opened for trial in this case. The practice of trying collateral issues has been considerably extended in this State during the last forty years. . . . But how far a trial can justly and reasonably go upon such issues is often a question of fact. The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed, upon collateral issues, an equal range, amply sufficient for the purposes of justice, under the circumstances of the particular case, they are not necessarily entitled, as a matter of law, to go further in that direction. The evidence of the sums paid for flowage in the thirty-two other cases, if, as a matter of law, it was not incompetent, might be excluded on the ground that, as a matter of fact, it had so slight or remote a bearing on this case that it would be unjust or unreasonable

1—*Stone,* J., in *Mattison* v. *State,* 55 Ala., 224, 232 (1876): "In inquiries of fact dependent on circumstantial evidence for their solution, no certain rule can be laid down which will define with unerring accuracy what collateral facts and circumstances are sufficiently proximate to justify their admission in evidence. Human transactions are too varied to admit of such clear declaration of the rule. Whatever tends to shed light on the main inquiry, and does not withdraw attention from such main inquiry by obtruding upon the minds of the jury matters which are foreign or of questionable pertinency, is as a general rule admissible evidence. On the other hand, undue multiplication of the issues is to be steadily guarded against, as tending to divert the minds of jurors from the main issue."

to prolong and complicate the trial by such an investigation of those cases as would be necessary for obtaining from them any useful information."[2]

SUB-TITLE I:

EVIDENCE TO PROVE A HUMAN ACT.

Topic A: Moral Character, as Evidence.

T. McNally, *Evidence, 320 (1802, Ireland):* "It has been heretofore held that a prisoner cannot examine to character, except in *favorem vitæ*, when charged on a capital indictment; but the
21 rule is now wisely extended to all cases of misdemeanors. And this appears to have been the ancient practice. In R. v. Brown, 1798, . . . the point appears finally settled. . . . Lord Carlton, C. J. C. P., said he had conversed with many of the judges on the subject now before the court, who thought, as he did, that . . . evidence of such a nature might be very material; for example, suppose a man of very great property was indicted for perjury, where the object to be attained by the perjury was a mere trifle, for instance a shilling; or suppose a man to be charged with a riot or assault who was known to be of a peaceable and quiet disposition; evidence of character in such cases, directly encountering the nature of the charge in the indictment, must be of the last importance. . . . Lord Kilwarden, C. J. K. B., agreed with Lord Carlton, and observed that the reason generally assigned for the admission of such evidence in capital cases only was altogether unsatisfactory to his mind. It was said to be *'in favorem vitæ,'* but he had no conception, according to the principles of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, and his reputation."

COMMONWEALTH v. HARDY (1807).

2 Mass. 317.

Parsons, C. J., "said that he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all [crim-

2—*Rolfe*, B., in *Attorney-General* v. *Hitchcock*, 1 Exch. 91, 105 (1847): "The laws of evidence on this subject as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature, and the time which it is practicable to bestow upon them. If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn."

22 inal] cases; for he did not see why it should be evidence in a capital case and not in cases of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue; and in such case there can be no examination as to particular facts."[1]

R. v. ROWTON (1865).

Leigh & C. 520, 540.

WILLES, J.: "[Character] is strictly relevant to the issue; but it is not admissible upon the part of the prosecution because, as my brother

23 Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine." MARTIN, B.: "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offense charged."[2]

TURNER'S TRIAL (1817).

32 How. St. Tr. 1007.

High treason. Mr. *Cross* (for the defense): "What has been his general character as far as you have known him?" Mr. *Gurney* (opposing): "I submit to your lordships that the proper question

24 is as to loyalty." Mr. *Denman* (for the defense): "If he is generally a respectable man, an inference arises that he is a loyal man." Mr. *Gurney:* "If a man is indicted for felony, evidence is produced to his honesty; if for rape, to his chastity; and so on." ABBOTT, J.: "As far as my experience goes, the inquiry into character is always adapted to the charge." Mr. *Denman:* ". . . A man who had conducted himself peaceably and respectably was not likely to enter into

1—Compare the authorities cited in W., § 56.

2—Compare the authorities cited in W., § 57.

wild schemes." ABBOTT, J.: "The question was objected to as too general and therefore not applicable; it was not whether he was a peaceable man, but as to his general character."[3]

THOMPSON v. CHURCH (1791).

1 Root 312.

Qui tam for an assault; the defendant's character as a malicious, quarrelsome man was rejected. *Per Curiam:* "The general character is not in issue. The business of the court is to try the case, and
25 not the man; and a very bad man may have a very righteous cause."

HEIN v. HOLDRIDGE (1900).

78 Minn. 468, 81 N. W. 522.

START, C. J.: "This is an action by a father for the alleged seduction of his daughter by the defendant. . . . Did the trial court err in excluding evidence offered by the defendant to show that his
26 general reputation for chastity was good? . . . The charge against the defendant involved the commission of a crime by him, and if this were a criminal case, it is certain that the excluded evidence would have been admissible. The accused in a criminal case, whether the charge be a felony or misdemeanor, may always prove his previous good character, of which his general reputation is evidence, as tending to disprove the commission of the offense; that is, as tending to show the improbability of a person of his previous character committing the act charged. . . . There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with a crime. But the accepted general rule is that evidence of the general character of parties to civil actions, where character is not a part of the issue, is inadmissible. The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. On principle, however, it would seem that there ought to be exceptions to this general rule. . . . Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character, or, in other words, that such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases. Civil actions for an indecent assault, for seduction, and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The conse-

3—Compare the authorities cited in W., § 59.

quences to the defendant of a verdict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a case to be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the State charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? . . . [But the doctrine] ought not to be extended to civil actions where the issue relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions."[4]

TENNEY v. TUTTLE (1861).

1 All. 185.

Tort for an injury received from a collision of carriages in the highway. At the trial in the superior court the plaintiffs offered evidence tending to prove, that the defendant left his horses, harnessed to
27 a wagon, standing on his own land within about fifteen feet of his house and within the enclosure adjoining the same, without being tied, or under the charge of any person; and went into the house, out of sight of the horses, to give directions to the workmen employed therein; and that the horses started and ran into the road and against the wagon in which the plaintiffs were riding, and thereby injured the female plaintiff. The defendant offered to show his own character as a careful, prudent and cautious man, as bearing on the question of whether he used ordinary care on this occasion. To this last the plaintiffs objected. METCALF, J.: " . . . Evidence of the defendant's being a careful, prudent and cautious man was not admissible for the purpose of showing that he used, in this instance, such care of his horses as the law requires in order to exempt him from responsibility for the mischief produced by their escape into the highway. When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain. If such evidence . . . is ever admissible in a case like this, we incline to the opinion that it is only when the plaintiff attempts to prove the defendant's negligence by merely circumstantial evidence, or, perhaps, by witnesses shown to be of doubtful veracity."[5]

4—Compare the authorities cited in W., § 64.

5—Compare the authorities cited in W., § 65.

STATE v. MANCHESTER & LAWRENCE RAILROAD (1873).

52 N. H. 528, 532, 549.

SARGENT, C. J.: "Some of the general allegations in the indictment are, that, in the town of Salem, there is a certain public highway, which is properly described; that the track of the defend-
28 ants' railroad crosses said highway at a place called Ballard's crossing, in said Salem, upon the grade or level of said highway; that, on December 17, 1870, the defendants were proprietors of said railroad, and by their servants and agents ran a locomotive steam engine and a train of cars upon said railroad and across said public highway; that Benjamin Woodbury, of said Salem, not being in the employment of said railroad, was then passing along said public highway, at the crossing aforesaid, when the defendants, with said engine and train, suddenly surprised, overtook, struck, threw down, and instantly killed the said Woodbury. . . . The same rules of evidence and the same principles of law should be applied in such cases where the form is criminal, as in like cases where the redress is sought by a civil action for damages. . . . The first question raised by the case is as to the admissibility of the testimony as to the same train, run by the same engineer and fireman, having sometimes passed the same crossing where the accident happened, during the preceding year, without sounding the whistle or ringing the bell, as tending to show that the same men would be more likely to have neglected the performance of these duties upon the occasion in question. The regulations required that upon each occasion when this crossing was passed the bell should be rung and the whistle sounded. There was direct evidence on one side that neither of these signals was given upon the occasion of the accident, while there was just as direct evidence upon the other side that both these signals were properly given. Here was a direct conflict in the evidence. Which shall the jury believe? . . . It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one; it cannot apply to acts that are done intentionally, wilfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. . . . But when the question is, did these servants of the road, without any intention whatever and through mere negligence or carelessness, omit to give these signals on that occasion, we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible,—not as evidence of character, not as evidence of fitness or unfitness, but simply as having some

tendency to show that on this particular occasion these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity and had thus become habitually negligent in that regard."[6]

SCOTT v. SAMPSON (1882).

L. R. 8 Q. B. D. 491.

29 The statement of claim alleged that plaintiff was a dramatic critic engaged in that capacity in connection with The Daily Telegraph newspaper, and the proprietor of a monthly magazine called The Theatre; that defendant was the proprietor and publisher of a weekly paper called The Referee; that defendant published of the plaintiff in his occupation of a journalist and dramatic critic in The Referee the words following (setting out an article extracted from the paper), meaning that the plaintiff had obtained from Admiral Carr Glyn £500 under a threat of publishing facts injurious to the memory of Miss Neilson (an actress), and systematically abused his position as a dramatic critic and a journalist for the purpose of extorting money. The fourth paragraph of the statement of defense stated that the allegations in the article were true in substance and in fact. Reply joining issue. Verdict for the plaintiff, damages £1,500. A rule was obtained calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the ground that the learned judge at the trial improperly refused to receive evidence relating to the character of the plaintiff.

CAVE, J.: "Speaking generally, the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would,' as is observed in Starkie on Evidence, 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honorable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential.' It is said that the ad-

6—Compare the authorities cited in W., § 92.

mission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading, which requires that all material facts shall be pleaded; and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good. On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities previously cited it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject."[7]

Topic B: Other Kinds of Evidence.

PEOPLE v. ARNOLD (1860).

15 Cal. 476, 481.

The defendant was indicted and tried for feloniously killing one John M. Sweeney. His plea was that the homicide was in self-defense.

30 On the trial, one Lawrence Morris testified that he was present on the twenty-fourth of August, 1859, at a difficulty that then occurred between this defendant and Sweeney, in the course of which the defendant discharged a double-barreled shotgun at Sweeney; he then says the pistol that he saw lying on the ground after Sweeney fell, Sweeney borrowed from Mr. Cordes, some time before the twenty-fourth of August, 1859; that Cordes had, in the presence of witnesses, given the pistol to Sweeney, who said he would clean it. The defendant's counsel then asked this witness the following question: "At the time Cordes gave the pistol to Sweeney, was anything said by Sweeney with reference to using the pistol against the defendant, Philander Arnold?" To this question the counsel for the people objected, on the ground that it was irrelevant and incompetent. The Court decided that the testimony was inadmissible, unless evidence was produced tending to show that the thing said had come to the knowledge of the defendant, and sustained the objection; to which decision the defendant excepted.

Baldwin, J.: "[The defendant urged] that this assault was not made by him, but that it was made by Sweeney [the deceased]; and to prove this he proposed to show that Sweeney had armed himself with this pistol, that he had borrowed it, and that it was found at the place of the rencounter. He was permitted to show these facts, but he proposed to show a further fact, and that was that, at the time of

7—Compare the authorities cited in W., § 70.

Sweeney's getting the pistol, he declared what he meant to do with it. . . . This leads to the inquiry, whether the fact that A procures a weapon for a particular purpose conduces at all to show, in a question of conflicting proofs as to the manner in which he used it, what that manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencounter happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal, as to which one of the two commences the affray, that some light might be thrown upon this question, conducing to or towards its solution, by the proof of these facts as to A's procuring it and his motives in doing so. The jury might possibly, with some reason, conclude that as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault, in other words, was made in pursuance of the intended purpose when the weapon was procured, and especially if other facts in corroboration of this conclusion existed. It is true there would be nothing conclusive in this. But the fact of the conclusiveness of this proof to establish the proposition which it is introduced to prove is not the decisive question; that question is, whether this item of fact be a matter proper to be considered by the jury in arriving at their conclusion upon this mooted point. And we have no doubt that it is."[8]

COMMONWEALTH v. WEBSTER (1850).

5 Cush. 295, 318, Bemis' Rep. 469 (1850).

The facts of this case are stated *ante,* in No. 17. Several witnesses, called for the defence, testified that they saw Dr. Parkman at various places in Boston, at different times between
31 the hours of a quarter before two and five, in the afternoon of the 23d of November. The attorney-general, in rebutting the evidence for the defendant, proposed to call witnesses to show that there was a person about the streets of Boston, at the time of Dr. Parkman's disappearance, who bore a strong resemblance to him, in form, gait, and manner; so strong that he was approached and spoken to, as Dr. Parkman, by persons well acquainted with the latter. The Court excluded the evidence. SHAW, C. J.: "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence, upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defense usually called an *alibi;* that is,

8—Compare the authorities cited in W., § 105.

that the accused was *elsewhere* at the time the offense is alleged to have been committed. If this is true, it being impossible that the accused could be in two places at the same time, it is a fact inconsistent with that sought to be proved, and excludes its possibility. . . . We now come to consider that ground of defence on the part of the defendant which has been denominated, not perhaps with precise legal accuracy, an *alibi;* that is, that the deceased was seen elsewhere out of the medical college after the time, when, by the theory of the proof on the part of the prosecution, he is supposed to have lost his life at the medical college. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the court are of opinion that this proof is material."[9]

REGINA v. EXALL (1866).

4 F. & F. 922.

Burglary. On the night of the 21st of December, the premises were broken open, and some time after eleven that night, the money and articles mentioned stolen. The prisoners were seen together on that
32 night at a public-house not far off, and they were seen together early in the morning. In the morning, two of them, Edwards and Exall, were apprehended together on suspicion; and on one of them, Exall, the watch was found. The other prisoner, Skelton, was taken some time afterwards, and upon him was found a piece of money, identified as part of the money stolen, and which he said he had from Edwards, which Edwards did not deny. POLLOCK, C. B., to the jury: "The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery. And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.

"The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession,—that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong that it almost amounts to proof, because the reasonable inference is

9—Compare the authorities cited in W., §§ 136-139.

that the person must have stolen the property; in the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. . . . Such evidence is, no doubt, not conclusive. As an illustration of this, I may mention that I remember hearing the late Baron Gurney say that he once picked up something lying in the road and observed, 'Now if this has been stolen and I am found with it, I might be charged with the robbery.' The other circumstances in the case, however, will always aid or rebut the presumption, and it is not the less evidence because it is not conclusive evidence. It is *some* evidence, if its weight depends upon the circumstances, and especially on the nature of the possession, whether it is open and avowed or secret and concealed, and what is the nature of the account given of it. What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is under the circumstances reasonable and probable or otherwise."[10]

SUB-TITLE II:

EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION.

Topic A: Conduct, to Evidence Character.

HARRISON'S TRIAL (1692).

12 How. St. Tr. 833, 864.

Murder; the crier called Mr. Bishop, who was sworn for the prosecution. *Bishop:* "About three years ago the prisoner came to my master's shop to cheapen some linen; and when—"

33 Holt, L. C. J.: "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

ALEXANDER DAVISON'S TRIAL (1808).

31 How. St. Tr. 187.

Fraud in public accounts by a former commissary-general. Lord *Moira* (formerly general-in-command) sworn for the defense: "I never had the remotest ground for suspicion [against the ac-

34 cused]. . . . Shall I state the particulars?" L. C. J. Ellenborough: "One is very unwilling to diminish the scope of these in-

10—Compare the authorities cited in W., §§ 152, 153.

quiries, but the general inquiry is as to the general character." *John Martin Leake* sworn; examined by Mr. *Holroyd:* "I believe you are one of the comptrollers of the army accounts?" "I am." "In that character have you at any time had Mr. Davison's accounts before you?" "Yes." "Have those been examined by you?" L. C. J. ELLENBOROUGH: "I really must interfere. It would be dangerous as a precedent to permit particular instances to be given in evidence where there can have been no notice. General evidence of general character is admissible; but this is certainly contrary to all rule." Mr. *Holroyd:* "I ask this question to show Mr. Leake's means of knowledge." L. C. J. ELLENBOROUGH: "You ask as to his knowledge of the examination of public accounts. Now would it be proper to try a collateral issue for which the other side cannot be prepared? It is as clear a rule of evidence as can be that you must not examine to particular facts." . . . Mr. *Holroyd:* "I ask this only as introductory of general character." L. C. J. ELLENBOROUGH: "If you mean only to ask whether the witness has had such means of knowing him as to form the judgment he is about to give, I have no objection to that." Mr. *Holroyd:* "Had you opportunities, from examining Mr. Davison's accounts, of knowing his general character?" "I have seen many of his accounts, and many of them were extremely regular; in the years 1794, 1795, and 1796, they were before the comptrollers." L. C. J. ELLENBOROUGH: "I cannot admit this; you must go into general character."[11]

R. v. ODDY (1851).

2 Den. Cr. C. 264.

Indictment with counts for breaking and stealing, for larceny, and for knowing receipt of stolen goods; after evidence of the acts as charged, on the dates of March 7 and 10, 1851, the counsel for
35 the prosecution proposed further to prove, that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search, two other pieces of cloth were found in the house; and also that on the 13th of December, 1850, the defendant had been in possession of two more pieces of cloth, and that these four pieces of cloth had been stolen in the night between the 4th and 5th of December, 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment. The counsel for the defendant objected to the reception of this evidence. It was held inadmissible on any of the counts.

CAMPBELL, L. C. J.: "The moral weight of such evidence in any individual case would no doubt be great. But the law is a system of general rules; and it does not admit such evidence, because of the inconvenience which would result from it." Mr. *Pickering,* for the pros-

11—Compare the authorities cited in W., §§ 192-194.

ecution: "But in several analogous cases the law does admit such evidence, notwithstanding the inconvenience; and there the inconvenience, which is confessedly the only ground of exclusion, is tolerated in order that justice may not be defeated. The inconvenience is put upon two grounds; first, that of the prisoner being taken by surprise; secondly, of many different issues being raised." CAMPBELL, L. C. J.: "Yes; that is so." Mr. *Pickering:* "If in such cases [as previous utterings of forgeries to show intent] justice is not permitted to be defeated by the argument drawn from the inconvenience of raising different issues, why should it in the present case?" CAMPBELL, L. C. J.: "It would have been evidence of the prisoner being a bad man, and likely to commit the offenses there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence."[12]

PEOPLE v. SHAY (1895).

147 N. Y. 78, 41 N. E. 508.

PECKHAM, J.: "Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence
36 in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. . . . In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

CLARKE v. PERIAM (1742).

2 Atk. 337.

HARDWICKE, L. C.: "The original bill is brought to have satisfaction out of the personal estate of the late Mr. *Periam,* for the bond. The cross bill is brought by the widow of Mr. *Periam,* and is
37 to be relieved against this bond, and to have it cancelled; and the equity is founded upon this, that it was given by Mr. *Periam* to Mrs. *Clark, ex turpi causa,* and that she was a lewd woman of an infamous character, and therefore it is insisted the court should relieve against it.

12—Compare the doctrine of Nos. 44-48, *post.*

"The counsel insist . . . that the plaintiff is not entitled to examine to anything but her character in general, because it is impossible for Mrs. C. to be prepared to give an answer to the particular facts charged; for though everybody is supposed to be ready, to support a general character, yet not a particular fact. . . . As to the reason of the thing: In criminal prosecutions it comes in only collaterally and incidentally and is not the particular thing to be tried; and when that is the case, they are not supposed to be prepared with evidence. But compare this with cases where the character is the particular issue to be tried; suppose in the case of an indictment for keeping a common bawdy-house, without charging any particular fact; though the charge is general, yet at the trial you may give in evidence particular facts and the particular time of doing them; the same rule as to keeping a common gaming-house. This is the practice in all cases where the general behavior or quality or circumstance of the mind is in issue; as for instance, in *non compos mentis,* it is the experience of every day, that you give particular acts of madness in evidence, and not general only, that he is insane; so where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined in general to his being a drunkard, but particular instances are allowed to be given. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally you shall be confined to general evidence. This seems to me to be the distinction, and the grounds of it; and if I was of a different opinion, I should overturn the constant course of this Court and make the greatest confusion."[13]

UNITED STATES v. HOLMES (1858).

1 Cliff. 98, 108, 26 Fed. Cas. 349, 352.

Murder by a ship-master on the high seas; the defense was that the accused was insane. CLIFFORD, J.: "Inquiries were made of this witness, in his examination in chief, not only as to the acts, conduct,
38 and declarations of the prisoner during the attacks, but on other occasions throughout the voyage. In the course of the cross-examination he was asked whether any difficulty occurred during the voyage between the prisoner and the mate. That question was objected to by the counsel for the prisoner, and was admitted by the court. Various acts, conduct, and declarations of the prisoner, during those difficulties, were stated by the witness in answer to the questions propounded by the district attorney. It is insisted by the counsel for the prisoner that the question objected to should have been ruled out, and that all the testimony of this witness, so far as respects the acts, conduct, and declarations of the prisoner during these difficulties, was improperly admitted.

13—Compare the authorities cited in W., §§ 202-207.

(1) They contend that the effect of the rulings was to allow the government to establish the offence charged against the prisoner, by proving that he had committed other acts of violence of a like kind. (2) In the second place, they insist that the rulings authorized an illegal attack upon the character of the prisoner, when, in fact, and in truth, he had offered no evidence putting his character in issue. (3) And lastly, they contend that the evidence was a surprise upon the prisoner, who could not be expected to come to trial on the charge in the indictment, prepared to defend his whole life. All the answer that need be given to the first proposition is, to state that the theory of fact on which it is based is not correct, and to refer to what has already appeared in verification of the statement. It is a mistake to suppose that the evidence in question, or any part of it, was admitted, or even offered as having any bearing whatever upon the question whether the prisoner was the guilty agent who committed the act of homicide charged in the indictment. On the part of the prisoner many witnesses had been called and examined, and his acts, conduct and declarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced into the case. His counsel, in offering his acts, conduct and declarations, accordingly selected, as was very properly admitted at the argument, the dark spots in his life, or those most peculiar and least in accordance with the ordinary conduct of men, as best suited to support the defence set up by the prisoner in this case. All of the testimony objected to, and now under consideration, was admitted in reply to that which had previously been introduced by the prisoner to support that ground of defence.

". . . Beyond doubt the precise question to be tried in all such cases is whether the accused was insane at the time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation. . . . One of the suggestions . . . was that the government, in attempting to rebut the testimony offered by the prisoner on this point [of insanity] should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defense. . . . [It] cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange and peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious that if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape and justice be often defeated, because the means of ascertaining the truth are excluded from the jury. . . . [Whenever the accused has offered his acts, conduct, and declarations before and after the homi-

cide,] the government may offer evidence of other acts, conduct, and declarations of the accused within the same period to show that he was sane and to rebut the evidence introduced by the defense."[14]

MILLER v. CURTIS (1893).

158 Mass. 127, 131, 32 N. E. 1039.

Action of tort for indecent assault and battery upon a married woman; the defendant denied the assault, and offered evidence to show that the claim was only an attempt at blackmail. KNOWLTON, J.:

39 "The defendant was allowed to introduce evidence of several transactions and conversations with the plaintiff, all occurring more than twenty years ago, which tended to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men. The defendant denies the charge made against him in the suit, and contends that the plaintiff is trying unjustly to obtain money from him. In any case, where the question is whether the defendant has committed a crime, it would naturally affect the opinion of jurors to know that he had often committed similar crimes; but evidence of such facts is never admitted to prove a defendant's guilt. That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first; and a person charged with one offence cannot be expected to come to court prepared to meet a charge of another. If the doing of one wrongful act should be deemed evidence to prove the doing of another of a similar character which has no connection with the first, issues would be multiplied indefinitely without previous notice to the defendant, and greatly to the distraction of the jury. It is too clear for argument, under the authorities, that most of the evidence excepted to was not competent on the question of liability, and the defendant does not seriously contend that it was.

"It is argued, however, that it was competent on the question of damages, and the jury were instructed to consider it only on that question. There is much authority for the proposition, that in a suit of this kind, when a plaintiff seeks damages for an injury to her feelings, growing out of the indecency of the defendant's conduct, her character in regard to chastity is in issue, and her damages depend somewhat on the question whether she is a virtuous woman, who would be greatly shocked at the peculiar nature of the assault, or a woman who is accustomed to yield herself to illicit intercourse. If it were permissible to show specific acts of criminal intercourse on the part of the plaintiff to affect the damages to be awarded in actions for an indecent assault, it would not follow that the evidence excepted to in the present case should have been admitted. Most, if not all, of this testimony tended to prove, not that the plaintiff had had criminal inter-

14—Compare the authorities cited in W., § 228.

course with other men, but that she had falsely pretended that others had indecently assaulted her, with a view to extort money from them. The rule contended for certainly should not be extended so far as to admit testimony of common crimes and ordinary wrongful acts, merely to show general depravity.

"But we are inclined to hold the evidence incompetent on broader grounds. It is a general rule, which has been adhered to with great strictness in this Commonwealth, that when character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts. . . . The principal reason for this rule is that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was and what effect should be given it. It would be impossible for the opposing party to come prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by bearing biased and false testimony to which no answer could be made."[15]

CUNNINGHAM v. RAILROAD CO. (1895).

88 Tex. 534, 31 S. W. 629.

DENMAN, J.: Appellant seeks to recover damages for the death of her husband, James Cunningham, a conductor on one of appellee's trains, caused by a wreck occasioned by the breaking of a car
40 wheel on a car running from Llano to Austin on the 22d day of December, 1892. The witness, Rownie, for defendant, testified that he inspected the wheel on the morning of the accident, at Llano. On cross-examination the witness Rownie testified that the reason he said he inspected it on December 22d was because he understood the accident was on that date, and because he inspected that car every day it was in Llano. Counsel for appellant thereupon asked the witness whether he inspected the cars at Llano on the 23d and 27th days of December, 1892, January 6, 1893, February 21, 1893, March 9, 1893, and April 4, 1893, all subsequent to the date of the accident; counsel stating that the object of the question was to prove by Rownie that on said dates he had not inspected the wheels of appellee's trains at Llano; and, if he stated that he had inspected them on any one or all of the above dates, then to offer witnesses who would testify that he did not inspect them on either of said dates. If there was no issue in this case as to Rownie's competency, we are of the opinion that there would be no causal connection between the negligence of Rownie on days subsequent to the injury and the death of Cunningham. Such subsequent neglect of duty to inspect cars might raise a moral probability that he failed to inspect the car on the morning of the accident, but

15—Compare the authorities cited in W., §§ 210-212.

such probability alone would not connect such negligence with the chain of circumstances resulting in the death. In order to prevent confusion and surprise in the trial of causes of this character, courts have, as a general rule, confined the evidence to circumstances tending to establish facts constituting links in the chain of circumstances having a causal connection with the injury.

"The pleadings and evidence, however, raise the issue as to Rownie's competency as a car inspector which involves, first, his skill; and, second, his attentiveness to duty. If he was lacking in either of these qualities, he could not be said to be competent to perform the important duties required of him. It is a matter of common knowledge that some persons are by nature inattentive or thoughtless, and, as a result thereof, frequently neglect the performance of important duties, without any intention so to do. This mental quality can only be evidenced by the outward acts of the person, and, where its existence or non-existence is in issue, evidence of such acts is admissible. If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident. . . . Thus it seems that frequent failures to perform this duty at different times would be competent evidence tending to prove this mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident. The question here is the existence or non-existence of a mental condition or quality of the servant; inattentiveness or thoughtlessness, rendering him incompetent, such incompetency being direct evidence on the main issue in the case. We see no reason why specific acts cannot be given in evidence upon such issue, just as they could upon the issue of testamentary or contractual capacity."[16]

Topic B: Conduct, to Evidence Other Qualities than Moral Character (Knowledge, Plan, Intent, Motive, Etc.)

CHICAGO v. POWERS (1866).

42 Ill. 169, 173.

Walker, C. J.: "This was an action on the case brought by Margaret Powers, administratrix of Mary Powers, deceased, against the city of Chicago, in the Cook Circuit Court. The action was
41 brought to recover damages claimed to have accrued from negligence of the city, which produced the death of intestate. It appears that the city, on the 18th of October, 1865, and prior thereto, maintained a bridge, with its appurtenances, across the Chicago river connecting north and south Clark street; that the bridge is so constructed

16—Compare the authorities cited in W., § 208, and the doctrine of No. 42, *post.*

as to swing on its center, so as to permit the passage of vessels navigating the river; that on the night of the 18th of October, 1865, deceased, in attempting to pass over the bridge, while near the north approach, the bridge being on the swing, stepped or fell through the opening into the river and was drowned. It is claimed by appellee that the night was dark, and that the lights on the bridge, which had been furnished by appellant were insufficient. It is insisted that the court erred in admitting evidence that another person had fallen through the same bridge. If this evidence was admissible for any purpose, then it was not error. The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate, at the same place, and from a like cause, it would tend to show a knowledge on the part of the city, that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide further means for the protection of persons crossing on the bridge. As it tended to prove this fact, it was admissible."[17]

BAULEC v. RAILROAD CO. (1874).

59 N. Y. 356, 358.

This action was brought to recover damages for the alleged negligent causing the death of Thomas Hammond, plaintiff's intestate.
42 Hammond was, at the time of his death, in the employ of defendant as a fireman upon a locomotive running upon its road. The accident occurred at a junction of defendant's road with the New York and New Haven road, and, as the evidence tended to show, was occasioned by the negligence of defendant's switchman at that point, one McGerty, who, after the passage of the New Haven train, changed the signal so that it indicated that the switch was right for the Harlem train without changing the switch. Plaintiff offered evidence upon the trial that some six or seven months before this accident a New Haven freight train met with a similar accident at this same switch. ALLEN, J.: "When as here the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employes, whose acts and omissions of duty are the subject of investigation, have been

17—*Knowlton*, J., in *Chase* v. *Lowell*, 151 Mass. 422, 426, 24 N. E. 212 (1891): "The fact that it [the highway-defect] was generally talked about in the community is a circumstance which may properly be considered. In such a case, notoriety derives its force as evidence, not merely from its suggestion that the defect was of such a kind that the authorities would have been likely to discover it in the first instance with their own eyes, but quite as much from the probability that their attention would have been brought by others to a matter which was generally talked about and in which they were interested."

Compare the authorities cited in W., §§ 245, 252; and the doctrine of Nos. 53-55, *post*.

held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view.

"When character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts . . . that the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are known. . . . [But only a single instance of carelessness in eight years' service was here shown.] A single act of casual neglect does not *per se* tend to prove the party to be careless and imprudent and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a railroad crossing; but such fact would not tend to prove him a careless and negligent servant of the company. . . . The question in this case was whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant, in the exercise of proper care and prudence such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to go to the jury."[18]

REGINA v. COOPER (1849).

3 Cox Cr. C. 547.

43 The prisoner was indicted for feloniously accusing one H. C. S. of having assaulted him with intent to commit b———y, with intent to extort money. There were other counts for accusing the said H. C. S. of having attempted and having solicited him to commit the said crime. It appeared in evidence that on the night in question the prosecutor was taking shelter from the rain under one of the porticoes of Buckingham Palace, when he was accosted by the prisoner, who was the sentry on duty there. After some conversation the prisoner seized the prosecutor by the collar, and charged him with having indecently touched or assaulted him; he then took the prosecutor to the guard-house, and said to the serjeant, "I charge this man with indecently asaulting me." The prosecutor was then taken to the police station-house, where the prisoner made the same charge. A bill of indictment was presented at the next Middlesex Sessions against the

18—Compare the authorities cited in W., §§ 249-250.

prosecutor for indecently assaulting Samuel Cooper, but it was ignored by the grand jury, Cooper, the then prosecutor, not appearing.

In the course of the trial, *Bodkin* (with whom was *Richards,* for the prosecution), asked one of the witnesses for the prosecution whether he had ever, upon former occasions when the prisoner had come off guard, seen money in his possession.

Ballantine (for the prisoner), submitted that such a question could not be put. It had no relevancy to the present inquiry. On such a charge no evidence of other transactions could be adduced, because its only tendency could be to prejudice the minds of the jury—to ask them to judge from past conduct what was likely to have been done by the prisoner on this occasion.

Bodkin contended that the question was quite regular. Where part of the issue to be tried was the knowledge or the intention of the accused at the time he did a particular act, matters having no immediate bearing on that act become material and relevant, if they in any way tended to explain his motives. Here the prisoner's conduct on other like occasions was very material in enabling the jury to determine with what object this particular proceeding was taken by him. The evidence was admissible in the same way that proof of other utterings was offered to show guilty knowledge although they might be totally disconnected with the one under consideration.

CRESSWELL, J.: "Are you not asking the jury to infer guilty knowledge from remote and independent facts? Suppose a man was charged with wounding with intent— the intention there is of the essence of the charge—could you prove that he had cut a man's head open the week before?"

Bodkin submitted that he could, if both wounds were given with the same instrument.

CRESSWELL, J.: "How would that show the intention otherwise than by showing knowledge?"

Bodkin: "Just as the possession of other counterfeit coin may be proved in an indictment for uttering."

CRESSWELL, J.: "There knowledge, and not intention, is the subject of the proof. But suppose the witness gives an affirmative answer to your question, what is your next step?"

Bodkin: "I shall then ask what he said as to the means by which he obtained the money."

Ballantine said that he objected to any such question, on the grounds before urged.

CRESSWELL, J.: "But if the prisoner is proved to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?"

Ballantine: "To prove guilty knowledge is not to prove a guilty intention. Proof of a man's previous character would, in the ordinary

affairs of life, have some bearing upon the question of whether he had committed a particular crime, but it is admissible in law."

CRESSWELL, J.: "If a man administers a certain drug to another, and it produces death, and afterwards administers the same drug to another person, may not the former conduct be proved to show that he well knew the consequences of the subsequent act?"

Ballantine: "Not where it is simply used as evidence to prove intention. The prisoner may have used threats on a previous occasion, and have obtained money by so doing, but that does not show that he had an intention to obtain money at this particular time. The offence here charged is a single and specific one. Suppose the charge was breaking into a house with intent to steal, the fact of his having broken into the house before would show that he knew how the offence was to be accomplished, but it could not be adduced to show what his intention was on the second occasion, and this shows the difference between proof of knowledge and that of intention. The broad rule that two felonies cannot be proved on the trial of one indictment is clearly recognized, and there is nothing in this instance to show that it should be departed from."

CRESSWELL, J.: "I do not think that this is at all a question of character. The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did not act with the design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow, and if it can be proved out of his own mouth that he was aware that such result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he had attempted to procure abortion: the same medicine might be administered with that intention or without it. If it could be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him. Or if, on a charge of wounding, a certain instrument had been used, and the same weapon had before been used by the prisoner with a dangerous result, would not that be admissible to show that he knew the consequences of using it? . . . His whole conduct is to be interpreted with reference to the charge made against him, and I think what was said by him under similar circumstances to the present is admissible."

Evidence was then given of declarations by the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house and accuse him of an unnatural crime.[19]

19—1882, *Devens*, J., in *Com.* v. *Jackson*, 132 Mass. 18: "It is the knowledge which it may be inferred he must have derived from other transactions . . . that makes the evidence admissible as affording just ground for inference against him as to intent in the matter under examination."

Compare the authorities cited in W., § 352.

COLEMAN v. PEOPLE (1873).

55 N. Y. 81, 90.

Indictment for receiving 22 bars of pig-iron, the property of one Burke, knowing them to have been stolen. The fact that pieces of iron railing, stolen from one Briggs, were also found in the
44 accused's possession, was offered.

ALLEN, J.: "The circumstances that boys brought pieces of iron railing to the prisoner's store in the evening, although in his absence, which had been stolen from Briggs, which were afterwards found in the prisoner's possession and taken by Briggs from there, was a circumstance of suspicion as evidence of criminal complicity against him. The general rule is against receiving evidence of another offence. A person cannot be convicted of one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. There are, however, some exceptions to this rule when guilty knowledge is an ingredient of the crime; and the question is, whether this evidence falls within any recognized exception. King v. Dunn & Smith (1 M. C. C., 146) is a leading authority upon the subject. The report says: 'As all the property had been stolen from the same persons and had all been brought to her by the prisoner, Dunn, the learned judge thought it was admissible and proper to be left to the jury as an ingredient to make out the guilty knowledge.' It is unnecessary to say that all these qualifications must exist; but to warrant the introduction of such evidence there must be such a connection of circumstances as that a natural inference may be drawn, that if the prisoner knew that one article was stolen he would also be chargeable with knowledge that another was. The Briggs iron had no connection with the pig-iron; it was taken from another place, belonged to another person, was of a different character, and received at another time, and, for aught that appears, some of it from different persons. Assuming therefore, that the prisoner received the Briggs iron and was chargeable with knowledge that it had been stolen, would that circumstance logically or legally charge him, or tend to charge him, with knowledge that the pig-iron was also stolen? We think it would be carrying the exception too far, and beyond the authorities to so hold, and would be a dangerous innovation upon the general rule."[20]

20—*Ellenborough*, L. C. J., in *R.* v. *Whyley*, 2 Leach, 4th ed. 985, (1804): "The observations respecting prisoners being taken by surprise and coming unprepared to answer or defend themselves against extrinsic facts is not correct. The indictment alleges that the prisoner uttered this note knowing it to be forged; and they must know that, without the reception of other evidence than that which the

BOTTOMLEY v. UNITED STATES (1840).

1 Story 135, 3 Fed. Cas. 971.

Information for fraudulent importation of goods, by misrepresenting the ownership and the cost of the goods. STORY, J.: "In respect to the evidence admitted at the trial, I am clearly of opinion that
45 the whole of it was admissible to substantiate the fraud. It divides itself into four heads: . . . (4) The evidence of the importation of other goods of the same character, cost, and value, as those imported by the claimant in the Roscoe, shipped about the same time with those in the Roscoe, marked with the same marks, and numbered in an exact and progressive continuation of the cases of the goods of the claimant in the Roscoe; and, also, evidence, that the same goods arrived in four different shipments soon after the seizure of the claimant's goods in the Roscoe, and before the news of the seizure could have reached England; that the same goods were not then entered at the custom house, but were entered by one William Bottomley, as being the property of James Bottomley, senior, after full knowledge of the seizure must have been known in England; and that they were then entered at a greatly enhanced price and rate beyond those imported in the Roscoe. This last evidence was avowedly offered as tending to establish two important facts: (1) That the claimant was the real owner of these shipments; (2) that the cost of the goods by the Roscoe, as entered by the claimant, was knowingly and fraudulently set forth in the entry.

"The objection taken to all these three last portions of the evidence excepted to, is, that it is *res inter alios acta,* and upon other occasions; and therefore, not properly admissible to establish a fraud in the case of the importation of the goods now before the court. But it appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible, first, to establish the fact that there is such a conspiracy and fraud; and, secondly, to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent or purpose or design in the act done whether innocent or illegal whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency and often occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose, or design with which the act was done, or upon his guilty knowl-

mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which show their minds to be free from that guilt."

Compare the authorities cited in W., §§ 324-326.

edge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. Thus, in a prosecution for uttering a bank note, or bill of exchange, or promissory note, with knowledge of its being forged, proof, that the prisoner had uttered other forged notes or bills, whether of the same or of a different kind, or that he had other forged notes or bills in his possession, is clearly admissible as showing, that he knew the note or bill in question to be forged. The same doctrine is applied to a prosecution for uttering counterfeit money, where the fact of having in his possession other counterfeit money, or having uttered other counterfeit money, is proper proof against the prisoner to show his guilty knowledge. Many other cases may be easily put, involving the same considerations. Thus, upon indictment for receiving stolen goods, evidence is admissible that the prisoner had received, at various other times, different parcels of goods, which had been stolen from the same persons, in proof of the guilty knowledge of the prisoner. In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence."

BLAKE v. ASSURANCE CO. (1878).

L. R. 4 C. P. D. 94, 14 Cox Cr. C. 254.

Action to recover money obtained by the fraud of one Howard, the defendant's agent, in offering to loan money on insurance policies.

46 The evidence of several other persons from whom money had been obtained under similar circumstances was tendered on behalf of the plaintiff to prove a system of fraud; that Howard was a secret agent of the defendants, and that they had obtained the money paid to them by the plaintiff through the fraud of Howard committed for them and with their knowledge. This evidence was objected to, by counsel for the defendants, but the learned judge admitted it. The substance of it was that advertisements signed either by Howard, Gard, Wood, Rogers, Preston, Seymour, Holland, or some other name, and often expressed in the identical words of the advertisement seen by the plaintiff, appeared offering an advance of money; that the witness placed himself in correspondence with the advertisers, insured his life in the office of the defendants, and paid them a premium, which they divided with the person who had offered the loan; that unreasonable requisitions for further securities were made and the loan never advanced; that the policies were not renewed by the insurer; that they would not have been paid had they fallen in; that the names of the advertisers were all aliases of a man called "Wood," who was constantly for hours together, and, week after week for years had been,

in close communication with the managing director and secretary and sometimes other directors of the company.

GROVE, J.: "When the question is whether an act was or was not fraudulent, acts of a similar kind are given in evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found under suspicious circumstances in a bedroom; it was set up that he was there courting the servant; to show a guilty intention, Erle, C. J., admitted evidence of the fact that he was seen in the house a week before under circumstances equally suspicious and which rebutted the idea that he was there for the purpose of courting. . . . To take the common instance of fraud committed by means of begging letters. If a single letter to one individual only were proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing twenty times before, and that in each case he has told false stories and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act; as, for instance, in cases of uttering counterfeit coin, even in some cases of murder, and generally wherever it is necessary to show the intent with which the act was done. . . . [So in this case] if you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed, and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case."

LINDLEY, J.: "I agree that in order to prove that A has committed a fraud on B, it is neither sufficient nor even relevant to prove that A committed fraud upon C, D, and E. Stopping there, I admit that proposition. But let it be shown that the fraud on B is one of a class of other transactions having common features, then I disagree altogether with that proposition. . . . The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being a false pretense and a knowledge of that false pretense on the part of the defendant company; and the moment that is shown the plaintiff's case is established."[21]

21—1878, *Coleridge*, L. C. J., in the same case: "In any but an English court, and to any one but an English lawyer, the controversy whether this evidence is admissible or not, would seem, I imagine, supremely ridiculous; because it is admitted that it is most cogent and material to the plaintiff's claim."

Compare the authorities cited in W., §§ 340, 341.

STATE v. LAPAGE (1876).

57 N. H. 245.

Murder in October, 1875, in attempting rape on Josie Langmaid. The prosecution offered to show that the accused had committed a rape on Julienne Rousse, in St. Beatrice, Canada, in June, 1871, at a
47 deserted rural spot similar to the one at which the present murder was committed. The exception to the admission of this evidence was sustained. Mr. *Clark,* Attorney-General, arguing: "Suppose the defendant were tried for breaking and entering the store at the north end of Elm Street in Manchester—the most northern of all the stores on that street—with intent to steal; suppose it were proved that he broke and entered that store; that he was arrested as soon as he entered it, and the only question was whether he intended to steal; suppose there were one hundred other stores on that street, and he had broken and entered every one of them, and stolen something in every one of them, beginning at the south end of the street and taking the stores in succession, on his burglarious march from one end of the street to the other; suppose he did all this in one night, and was completing his night's work when arrested; on the question of his intent in entering the one hundred and first store, would any one think of objecting to evidence of his one hundred larcenies in the other one hundred stores? His robbing one hundred stores would tend to show that he intended to rob the one hundred and first, just as his passing counterfeit money in the one hundred would tend to show that he intended to pass counterfeit money found in his possession in the one hundred and first. There would be no difference between his presence in the one hundred and first store, and his having counterfeit money in his pocket in that store, that would, on the question of intent, affect the admissibility of the evidence of what he had done in the other hundred stores. Suppose, instead of robbing stores, he had robbed persons, going from one end of the street to the other, and knocking down and robbing one hundred men, one after the other, and not touching a single woman; suppose when he had knocked down the one hundred and first man, and before he had had time to rob him, he had been arrested, and the question were whether he intended to rob him,—whether his last offence were an attempt to rob, or a mere assault, or an assault with intent to kill; would anybody suppose his robbing the other hundred men, after he knocked them down, was no evidence of the intent with which he knocked down number one hundred and one? Suppose the one hundred and one persons whom he assaulted were women; suppose he touched no man; suppose he had unsuccessfully attempted to ravish one hundred of them, and were arrested at the instant of his knocking down the one hundred and first, and the question were whether his last assault were a mere assault, or an assault with intent to commit a robbery, or an assault

with intent to commit a rape; suppose the last woman assaulted should die of her injuries, and the defendant were indicted for her murder; . . . how would you expect, if you were the prosecuting officers, to find any better evidence of the defendant's intent than his attempts upon the other one hundred women? . . . If a ship-master lands in Congo, obtains a cargo of blacks, and carries them to Cuba, and four years and four months afterwards he is found at another place on the African coast, as far from Congo as Pembroke Academy is from St. Beatrice, with a hundred blacks in his possession,—would anybody think that his proved intent on the former occasion had, as a matter of fact, no tendency to show what he intended to do on the latter occasion? . . . No man on earth would refuse to hear it, or to consider it, unless he were bound by some arbitrary and irrational rule overriding his understanding, and dictating a course at war with his common sense. . . . It is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention; a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness."

Mr. *Norris,* arguing for the defence: "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offence. Next premise: this general disposition in him. Inference: he committed this particular offence. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if more likely to be guilty of rape, and if there was a murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an *ex-parte* conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a motive or occasion of the murder. We can find nothing like it in the books."

LADD, J.: "It is argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen

my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature—the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise."

CUSHING, C. J.: "I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determine its relevancy. I take it to be generally true, that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the State, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue.

"I think we may state the law in the following propositions: (1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evi-

dence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. . . . The cases cited by counsel for the government admit of being classified into several distinct groups. In the first place is the class of cases in which other offences are shown for the purpose of proving guilty knowledge. To this class belong those cases in which, in the trial of indictments for uttering forged bank-notes, or counterfeit coin, the proof of other offences of the same kind is admitted. It might well happen that a person might have in his possession a single counterfeit bill or coin without knowing it to be such; but he would be much less likely to do so twice, and every repetition of such an act would increase the probability that he knew that the bills or coins were counterfeit. . . . Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental,—*e. g.* where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable. So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased. . . . There is another class of cases in which proof of the commission of one crime tends to show a motive for the commission of the crime with which the prisoner is charged. . . . Another class of cases consists of those in which the evidence tends to show a general plan or conspiracy, one act of which was that which is in issue. . . . In the case of sexual crimes, as fornication and adultery, where the object is to prove that the respondent has committed a crime with a particular individual, evidence tending to show previous acts of indecent familiarity would have a tendency to prove the breaking down and removal of the safeguards of self-respect and modesty, and the gradual advance step by step, to the crime. . . . It should also be remarked that this being a matter of judgment, it is quite likely that Courts would not always agree, and that some Courts might see

a logical connection where others could not. But, however extreme the case may be, I think it will be found that the Courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other. In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon Julienne Rousse and the murder of Josephine Langmaid, as the law requires. I am unable to see any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude."

SMITH, J.: "Proof that he committed a rape in Canada, four years previously, upon Julienne Rousse, shows what? Not that he then had any design or intent to perpetrate a rape four years afterwards upon another woman whom he had never seen or heard of, or in a place two hundred miles distant where he had never been; not that he had then formed a design to rape and murder women whenever he might have opportunity; not that he had ever before or since committed that crime,—but that the defendant had a disposition to commit the crime of rape four years previously. No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he had at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime."[1]

COMMONWEALTH v. ROBINSON (1888).

146 Mass. 571, 16 N. E. 452.

Indictment for the murder of Prince Arthur Freeman by poisoning. At the trial, before Field and Knowlton, JJ., there was evidence tending to prove the following facts:

48 In February, 1885, Freeman occupied a tenement in South Boston with his wife, Annie Freeman, who was a sister of the defendant, and their two children. On February 20, 1885, the defendant called upon her sister, staying but a short time, and on February 23, 1885, again went to her sister's house to take care of her, and there stayed until Mrs. Freeman died on February 26, 1885, after an illness of about three weeks. The children had been taken to the defendant's house in Cambridge on February 22, and, immediately after the death of his wife, Freeman went to live with the defendant, and there remained,

1—Compare the authorities cited in W., § 357.

with his children. The baby died in April, 1885. In 1882 Freeman had taken out a certificate of insurance for $2,000 in the United Order of Pilgrim Fathers, his wife being the beneficiary named in the certificate, and after her death, on or about May 13, 1885, appointed the defendant his beneficiary under the certificate, as authorized by the by-laws of the order. Freeman, while still an inmate of the defendant's family, died, on June 27, 1885, after an illness of about six days, from the effects of arsenic administered to him by the defendant. On July 23, 1886, the boy, Thomas Arthur, died. From a period prior to 1885, the defendant had been indebted to different persons to the amount of six or seven hundred dollars, which she was unable to pay, and for which she had been hard pressed by her creditors, and this indebtedness she paid off out of Freeman's insurance, which she duly received from the order on September 23, 1885. (1) The prosecution offered, for the sole purpose of establishing the defendant's motive in killing her brother-in-law, to prove that prior to the death of Annie Freeman the defendant had formed the plan and intention of securing to her own use the $2,000 of insurance, and as a means of accomplishing this result, and as a part of the scheme, determined first to kill her, then to induce Freeman to make her the beneficiary under the certificate, and then to kill him. Mr. Stevens, District Attorney, stated the object of the offer as follows: FIELD, J.: "Do you offer it for the purpose of rendering it more probable that she committed the murder charged, or for the purpose of showing the intent of the murder with which she is charged, six months before committing; for the purpose of showing the same motive operating?" Mr. *Stevens:* "I put it as the strongest piece of evidence which has a tendency in this case in showing what was the motive." . . . FIELD, J.: "Does the force of the evidence stop with proving that she formed the intent of killing her brother-in-law before her sister died?" Mr. *Stevens:* "Certainly." . . . FIELD, J.: "But the fact that she killed her sister, is that offered for any purpose except to show that she had the intent of killing her brother-in-law at that time? Is it offered to show if she killed her sister, she killed her brother-in-law?" Mr. *Stevens:* "Not in the slightest degree."

The Court, by FIELD, J., admitted this evidence, in the following terms: "If evidence, direct or circumstantial, is offered and admitted tending to show that this defendant knew before her sister's death of the existence of the insurance, and that it could be transferred on the death of her sister to herself and made payable to herself on the death of her brother-in-law; and that she, before the sister's death, had formed in her own mind a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist and be operative up to the time of the death of her brother-in-law; then we are of the opinion that evidence may be offered that her sister died of poison and that this defendant administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence

that she administered poison to her brother-in-law as another part of the same plan or intention."

(2) The prosecution afterwards offered further to prove that after the death of her brother-in-law and her receipt of the insurance money in her own right, as beneficiary, she poisoned the remaining child, Thomas Arthur, in July, 1886. This offer was stated and opposed in the following terms: Mr. *Stevens:* "The government has already offered evidence that this money was received for the purpose of taking care of Thomas Arthur Freeman, and the position of the government is that the motive which induced this woman to kill Prince Arthur Freeman was for the purpose of getting two thousand dollars to use for her own benefit. . . . Now, this testimony of the death of Thomas relates back and explains more fully the real motive and the strength of the motive which induced her to kill Prince Arthur. It shows that she did not receive the money for the purpose of using it to take care of Thomas Arthur, but has a tendency to show that the real purpose and the real motive was, not the alleged motive by which she had received it, for the purpose of taking care of Thomas Arthur, but was for her own personal benefit." . . . FIELD, J.: "Does it not amount to this, that you show she killed Thomas Arthur for the purpose of getting rid of the burden of supporting him?" Mr. *Stevens:* "Not entirely. I do not think it would be admissible simply for that purpose. I do not think it is admissible except on the ground that it relates back to the original motive." . . . FIELD, J.: "Suppose you prove that she wanted the money for the purposes of the expenses of the family generally, then can the death of any member of her family at any subsequent time be shown in order to relate back and help to prove the original motive?" . . . Mr. *Stevens:* "I should say no, on general principles, unless there was some particular circumstance. It seems to me that that differs from this case." . . . FIELD, J.: "You know the rule of law is, that you shall not submit the evidence of one crime to prove another. The general rule of law is undoubtedly against it. If you are indicted for assaulting A, it is not competent to prove that you have assaulted B, C and D." Mr. *Stevens:* "Because ordinarily it has not any natural tendency to satisfy the reasonable mind that the prisoner committed that crime." FIELD, J.: "It has some tendency to show that he is a man who is habitually assaulting people." Mr. *Stevens:* "I tried to argue,—but I did not argue successfully, —in the former trial, that under certain combinations I thought that was admissible, but the Court overruled it, and of course I cannot argue that now." FIELD, J.: "Suppose you are indicted for cheating A in a horse trade, the fact that you have cheated twenty-seven other persons within three months, is, independently of legal rules, some evidence to the point that you have cheated the last person; but yet, it is not admissible if there is no connection between the different acts." Mr. *Stevens:* "I don't know about that; but the Court says it is not. But if I pass a piece of counterfeit money, and if it is a fact that I had another piece of

counterfeit money in my possession, that would be evidence against me. I do not think the rules of law are always consistent." FIELD, J.: "That is an exception, and it goes simply to the point of whether you knew it was counterfeit. The ground is that a man may have one counterfeit half-dollar and not know it; but if he has a good many in his possession and on successive days, it is evidence that he knows that the money is counterfeit." Mr. *Stevens:* "Where a distinct crime is committed, we do not put it in that position. But does it not have a natural tendency, and is it not connected circumstantially with the principal fact, in so far as it tends to go back and explain the motive?" FIELD, J.: "Is it not more reasonable, on general principles, that if there be any evidence that she killed the son, the motive to do that was formed after the death of the father, than that it was formed before,—on general principles? Is it not merely collateral as connected with the original motive?" Mr. *Stevens:* "I do not think it is, if you go along step by step." . . . Mr. *Goodrich,* for the defence: "It is admitted that there was no contract in writing, there was no trust created by any instrument, but she simply acknowledged that she had the care and the charge of the child and was to take care of the child, and she recognized the expense of it. . . . If evidence of the death of Thomas Arthur Freeman is competent in this case, it is because that death was a part of the original scheme. Now, if the original scheme was to get possession of the money, then to make this evidence competent it must appear that it would serve that end,—the scheme of getting the money. Therefore it would be material whether or not the money had been got and spent; because if the prisoner had obtained the money at the time of Thomas Arthur Freeman's death, and had spent it and it was gone, then some other motive except the obtaining of the money must have been the motive for Thomas Arthur's death. Now, in point of fact, it is proper for me to say that the money had been spent and was gone; and, therefore, her only object and motive in committing the murder of Thomas Arthur Freeman must have been to get rid of her responsibility of taking care of him." . . . The justices went out for consultation. They then returned and said, by FIELD, J.: "The justices have considered the question submitted to them and are divided in opinion. The result is that in a capital case, where the point does not concern the general administration of justice, but is dependent upon the particular facts of a particular case, *in favorem vitæ*, the evidence must be excluded."

In the Supreme Court, the admission of the first part of the evidence above was held proper, in the following terms:

C. ALLEN, J.: "While it is well settled in this Commonwealth that on the trial of an indictment the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose or in

pursuance of it. In such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats or declarations of intentions, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear,—as, if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts the last of which was the criminal act on trial. In such case, no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. In such a case it makes no difference whether the preliminary acts are criminal or not; otherwise, the greater the criminal, the greater his immunity. Such preliminary acts are competent because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent. It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan or induced by the same motive."[2]

2—*Brewer*, J., in *State* v. *Adams*, 20 Kan. 319 (1878): "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, though it also tends to show him guilty of another and distinct offence. A party cannot by multiplying crimes diminish the volume of competent testimony against him."

Beatty, C. J., in *People* v. *Walters*, 98 Cal. 138, 141, 32 Pac. 864 (1893), and *People* v. *Tucker*, 104 id. 440, 442, 38 Pac. 195: "It is true that in trying a person charged with one offence it is ordinarily

HOLLINGHAM v. HEAD (1858).

4 C. B. N. S. 388.

Action for the price of a quantity of artificial manure sold by the plaintiff to the defendant. At the trial before Williams, J., at the last Assizes for Sussex, it appeared that the plaintiff, who represented
49 himself to be the agent of a company styled The Sussex Manure Company, was in the habit of traveling about to the different market towns to sell an article called Rival Guano; that he met with the defendant, who was the occupier of a farm in the county of Sussex, adjacent to a farm which had formerly been in the occupation of the plaintiff, and prevailed upon him to purchase a quantity of this guano; and that it turned out to be altogether worthless. The defence set up was, that the article had been purchased by the plaintiff subject to a condition that it was not to be paid for unless it proved equal to Peruvian guano: and it was proposed, on cross-examination, to ask the plaintiff whether he had not made contracts with other persons for the sale of his Rival Guano upon the terms that the purchasers should not pay for it unless it turned out to be equal to Peruvian guano. The learned judge permitted the question to be put, *for the purpose of testing the plaintiff's credit.* The defendant's counsel then proposed to call witnesses to prove that the plaintiff had made contracts with other persons for the sale of his guano upon the terms suggested. The learned judge ruled that this evidence was not admissible, as not being relevant to the issue, and *res inter alios acta.*

Willes, J.: "I am of opinion that the evidence was properly disallowed as not being relevant to the issue. It is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. . . . Now it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus: Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. . . . If such evidence were held admissible it would be difficult to say that the defendant might not, in any case where the

inadmissible to offer proof of another and distinct offence; but this is only because the proof of a distinct offence has ordinarily no tendency to establish the offence charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. . . . When such evidence is offered, the same considerations arise as upon the offer of other testimony: Is the evidence relevant and competent? Does it tend to prove any fact material to the issues?"

Compare the authorities cited in W., § 363.

question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual and therefore that it was highly probable that the particular charge of assault was well-founded. The extent to which this sort of thing might be carried is inconceivable."[3]

STATE v. KENT, *alias* PANCOAST (1896).

5 N. D. 516, 67 N. W. 1052.

The accused was charged with the murder of his second wife, Julia C. Kent, in 1894. He had formerly lived in Medina, Ohio, and was cashier of a bank there, in 1873, when his first wife died and he
50 left for other regions; the alleged motive of the murder was his fear that the second wife was about to discover the facts of his murder of the first wife twenty years before, his robbing of the bank, and the falsity of his present name and pretensions; proof of these past misdoings was received.

BARTHOLOMEW, J.: "This case is unusual in its facts. The proof of the commission of the crime or crimes at Medina, Ohio, would not, as we view it, have had any legal tendency to furnish a motive for the murder of Julia C. Kent, but for the declared state of mind, according to Swidensky's testimony, under which Kent was laboring. It was the theory of the State that Kent believed that Mrs. Kent was suspicious of something; that he was haunted with a fear or dread that she might become cognizant of certain crimes that he had committed in Ohio; and that this fear was the motive that actuated him in conspiring for her death. Obviously, this theory of the motive would be greatly strengthened by proof that he had committed the specified crimes in Ohio. While it is true that, in the cases where proof of a collateral

3—*Peters*, J., in *Eaton* v. *Telegraph Co.* (1878), 68 Me. 63, 67 (whether A had sold to B, or was merely holding for B, certain certificates of stock in the former's possession; the certificates were in A's name and bore assignments to B, the facts of A's possession as custodian of other certificates of the same stock made out in B's name was received): "The difficulty is to decide what is and what is not relevant evidence. The best authorities clearly sustain the doctrine that 'the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion.' It is sometimes permissible to show, however, what men generally have done under certain circumstances and conditions, as showing how a particular man might act under the same surroundings. . . . Here the dealing inquired about was between the same persons at the same time and related to the same kind of property. The reason of the rule which excludes irrelevant testimony admits such as this."

Compare the authorities cited in W., § 377.

crime has been admitted for the purpose of showing motive, the relation between the two crimes was usually such as to indicate that the latter was committed in order to prevent an investigation into and an exposure of the former crime, that it was feared would be followed by prosecution and punished, yet we can discover no reason in principle for the limitation of the rule to that class of cases strictly. Any strong incentive must furnish an equally cogent reason for the admission of such testimony. . . . Whoever reads the record in this case, and particularly Kent's letters, will be irresistibly impressed with the thought that Kent at all times assumed high moral grounds, with an exalted standard of personal purity. There is evidence tending to show that he claimed for himself a higher social position than he was willing to concede to his wife. Under these circumstances, it would be intolerably galling to him to have his wife learn that he was in fact a felon, that he had married her under an assumed name, and that during all these years he had led a life of duplicity and hypocrisy. . . . Nor can we sanction the views of the learned counsel that these collateral crimes were too remote in time to furnish any motive for the commission of the crime here charged. Motive may or may not be affected by the lapse of time. Ordinarily, a man who had committed a murder 20 years in the past would be just as much concerned to prevent exposure and punishment for that crime as though it were but one year in the past. And in this case, if the discovery by Mrs. Kent, at the time of her death, of these dark and criminal spots in her husband's life, would have been just as galling and humiliating to him as if discovered the first year of their married life, then his motive to prevent such discovery would be just as strong at the former time as at the latter."[4]

SUB-TITLE III.

EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE (EVENTS, CONDITIONS, CAUSES, QUALITIES, AND EFFECTS OF THINGS AND PLACES).

EMERSON v. LOWELL GASLIGHT CO. (1862).

3 All. 410.

At the trial in the Superior Court, before Putnam, J., it appeared that in January, 1857, the gas escaped from the defendant's main pipe in Middlesex Street in the city of Lowell, under the same circumstances stated in Hunt v. Lowell Gas Light Co. (1 Allen 343), and passed under the frozen earth through sewers and drains into the cellar and house occupied by the plaintiffs, on Middlesex

51

4—Compare the authorities cited in W., § 390.

Street, of which the defendants had notice; and that it was several days after they received notice of the escape of the gas, before they discovered the place of the leak in their main pipe. The plaintiffs offered to show that a large number of houses in the neighborhood, the drains of which connected with these sewers, were filled with gas, and that wherever the gas entered sickness followed, but the judge rejected the evidence.

MERRICK, J.: "The evidence offered by the plaintiffs to show that wherever the gas which escaped from the fracture in the defendants' pipe entered any dwelling-house in the neighborhood of the plaintiffs, sickness followed, was properly excluded. Each separate and individual case must stand upon, and be decided by, the evidence particularly applicable to it. The attending circumstances may be so different, that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another. If such evidence was admissible, the issues in a single cause might be indefinitely multiplied; and this would tend only to confusion, and to mislead the jury."

GEORGE L. HUNT v. LOWELL GASLIGHT CO. (1864).

8 All. 169.

At the trial, before Metcalf, J., the evidence tended to show that the plaintiffs lived in New Hampshire, and on the 4th of February, 1857, came to the house of Aaron Hunt in Lowell and remained
52 there for nine days; that gas had escaped into the house under the circumstances stated in 1 Allen 344, and the plaintiffs became ill, and returned home, where they were sick for several weeks. The plaintiffs were allowed to prove, against the defendants' objection, that up to that time the family of said Aaron had been in perfect health, and that immediately or soon after the escape of the gas into the house every member of the family became seriously sick; but no evidence of the particulars of the sickness of any of them was admitted.

CHAPMAN, J.: "The plaintiffs were visitors in the family of Aaron Hunt at the time when the defendants' gas escaped into the house, and they were permitted to offer evidence that Aaron Hunt and his family had been in perfect health up to the time when the gas began to escape into their house, and that, immediately or soon after, every member of the family became seriously sick. The admission of this evidence is excepted to. But evidence of this character was held to be admissible in the case of Aaron Hunt against these defendants (1 Allen 344). The plaintiffs were not allowed to give evidence of the particulars of the sickness of any one of these persons; and it is objected that, if the evidence was admissible to any extent, the particulars should have been inquired into. But the sickness of these persons is a collateral fact, and is admissible merely for the purpose of showing the nature of the

gas which came into the house, to the influence of which all the inmates were subjected alike. Evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in the defendants' pipes has been held to be inadmissible: Emerson v. Lowell Gas Light Co. (3 Allen 410). The evidence should be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it. How far the plaintiff shall be permitted to go into particulars in offering such evidence should depend somewhat on the circumstances of the case, and must, within reasonable limits, be left to the discretion of the presiding judge. If it falls short of proving that the gas caused the sickness of the other persons, it amounts to nothing. But it might be very unreasonable to permit the case to branch out into several collateral issues on such a point."[1]

DARLING v. WESTMORELAND (1872).

52 N. H. 401.

Case by Charles Darling against the town of Westmoreland, for an injury caused by defects in a highway. Verdict for the defendants, and motion of the plaintiff for a new trial. The defects alleged
53 by the plaintiff were, a pile of lumber by the side of the road likely to frighten horses, and an insufficient railing of a bridge. His claim was, that his horse was frightened by the lumber as he crossed the bridge, and ran back, and backed off the bridge. One ground of defence was, that the horse was vicious and unsafe, and much evidence was offered on that point on both sides. The plaintiff introduced the testimony of a Mr. Cressy, who testified that he rode past this pile of lumber with a Mr. Fletcher, and he offered to prove by him that Fletcher's horse was frightened by the lumber; but the court rejected the evidence, and the plaintiff excepted.

Doe, J.: "One question of fact was, whether the pile of lumber was likely to frighten horses. . . . Was the fright of Fletcher's horse competent evidence on the question whether the lumber was likely to frighten horses? . . . On the independent and general question of the horse-frightening capacity of a certain pile of lumber, what rule of law considers the fright of [the plaintiff's] horse as important and disregards the fright of Mr. Fletcher's horse as of no consequence at all? . . . If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses and wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of law, why its ability

1—Compare the authorities cited in W., § 457.

to frighten horses should not be tested out of court, and proved in court in the same manner. When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported? The very few authorities tending to sustain the exclusion of the fright of Fletcher's horse in this case, are based upon the authority or the reason of the decision in Collins v. Dorchester (6 Cush. 396), and two other Massachusetts cases which rest upon that case. . . . A consideration, substantially disposing of the very few authorities that have any considerable tendency to sustain the ruling in this case, is, that Collins v. Dorchester, on which the others are based, is no authority for the exceptional doctrine it has been supposed to establish. That case being no foundation for the others, and they having no other foundation, they all fall together. In that case, 'the highway in question passed through a marsh, and was made smooth and passable for the width of at least thirty-one feet; and, on each side, at the edge of and along the road, there was a row of posts about six feet apart, extending on each side for twenty rods or more, which had been standing for many years. The plaintiff drove his chaise against one of the posts, so that one wheel passed outside of and locked upon the post; and this accident was the occasion of the injury complained of. It appeared that two or three of the posts, at about the place where the accident occurred, were broken down or removed. The alleged defect was the want of a railing at the place where the accident occurred. . . . The plaintiff . . . proposed to prove by one Sprague, that, before the happening of the accident complained of, the witness was riding over the same road, at or near the same place, and under similar circumstances, and that an accident similar to the one in question then occurred, which was caused by the same alleged defect, and without any neglect or fault on the part of the witness.' The judge ruled that this evidence was not competent 'for the purpose of proving the

way defective.' The whole of the decision of the question raised by that ruling was this: 'The testimony of Sprague, that he, before the injury complained of by the plaintiff, received a similar injury at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. Standish v. Washburn (21 Pick. 237). Even a judgment recovered by Sprague against the defendants for damages sustained by him by reason of a defect in the road, would not be admissible in evidence in favor of the plaintiff.'

"In that case, a sufficient railing on the posts would have prevented the plaintiff's wheel going outside of the post with which his carriage came in contact. The question was, whether, in the undisputed condition of the road, the absence of such railing, exposing travellers to the danger of their wheels going outside of and locking upon the posts, was a defect. No experiment or experience of the plaintiff, or Sprague, or any one else, was necessary to show that the posts were capable of being run against. It does not appear that any such experiment or experience would assist the judgment of the jury on the question whether, in the undisputed condition of the road, the posts were likely to be run against. Such a case is no authority for holding that the disputed horse-frightening capacity of a certain pile of lumber cannot be shown by experience. . . .

"The only rule relied upon to exclude experimental knowledge in such a case as this, is the rule requiring the evidence to be confined to the issue,—that is to the facts put in controversy by the pleadings, prohibiting the trial of collateral issues,—that is, of facts not put in issue by the pleadings, and excluding such evidence as tends solely to prove facts not involved in the issue. This rule merely requires evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge. A fact as relevant and as directly involved in the issue of guilty or not guilty between these parties, as any fact in controversy, was the likelihood or probability of the lumber frightening ordinary horses. There was nothing collateral—that is, nothing irrelevant—in that. . . .

"When a trial is likely to be unreasonably protracted by a great number of witnesses impeaching or sustaining the character of other witnesses, the evil is not remedied by any principle of law prescribing the exact number. Many evils of that kind must necessarily be avoided by the judge determining, as a matter of fact, upon the circumstances of the case, where the line of reasonableness is. As to the number of experiments or experiences on many points, collateral in a certain sense, but relevant in the legal sense, it is impossible in the nature of

the case for a limit to be fixed as a matter of law. But it does not follow that the law excludes all evidence of which it cannot measure a reasonable quantity."

PHILLIPS v. WILLOW (1887).

70 Wis. 9, 34 N. W. 731.

COLE, C. J.: "This is an action to recover damages for injuries sustained by the female plaintiff while passing along a public highway in the defendant town. She and her husband were riding in a
54 cutter, which was overturned by the runner striking or going over a stone. It was claimed that this stone was in, or very near, the traveled track of the highway, and constituted a defect or dangerous obstruction thereof. On the part of the plaintiffs, witnesses were allowed to testify, against the objection of the defendant, that, near the time the accident occurred, they drove along the highway,—in one case with a wagon, and struck the stone in question, and came near tipping over; in the other case, the witness was in a cutter, and ran against the stone, and was tipped over. It is claimed by the defendant's counsel that this testimony as to what happened to others in driving against the alleged defect was inadmissible, and was calculated to prejudice the town, and for this reason a new trial should be awarded. We think this position is sound and must prevail. . . . It must be admitted that the cases are not in accord upon this question. In some it is held that the evidence of other accidents, or of the effect on carriages driven by other persons than the plaintiff over the same road, is competent, because it has a tendency to show its fitness or unfitness for public travel, (Kent v. Town of Lincoln, 32 Vt. 591; Quinlan v. City of Utica, 11 Hun, 217;) or tends to prove that the object was or was not naturally calculated to frighten horses, (Darling v. Westmoreland, 52 N. H. 401; House v. Metcalf, 27 Conn. 632;) or to show knowledge on the part of the city that a bridge was not properly lighted so as to be safe to persons crossing it, (City of Chicago v. Powers, Adm'r, 42 Ill. 169;) or to show the result of experience or experimental knowledge of the possibility of the negligent act relied on as causing the injury (Piggot v. Railway Co., 3 C. B. 229, and Morse v. Railway, 16 N. W. Rep. 358.) Other courts have held, as this court did in the Bloor Case, that all evidence as to collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded, because such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, because the adverse party, having had no notice of such a course of examination, is not presumably prepared to meet it. . . . It is apparent that if this testimony was relevant to prove a defect . . . , it would have been competent [in answer] to show that these persons were not driving

carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So issue after issue would be raised, and facts collateral to the main issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground which take root and form new stocks till the tree itself covers great space by its circumference." [1]

BEMIS v. TEMPLE (1894).

62 Mass. 342, 38 N. E. 970.

Tort for injuries caused by the fright of the plaintiff's horse at a flag suspended by the defendant across a street. The plaintiff called as a witness one Hamilton, who testified that he was
55 a teamster residing in Spencer; and that during the summer and fall of 1892 he drove frequently through that portion of Main Street over which the flag was suspended, sometimes as often as five or six times daily. The plaintiff then asked him the following question: "Have you ever observed other horses than the plaintiff's, which were reasonably safe and gentle for driving, to be frightened at this flag when it was being swayed gently by the breeze, and not being blown violently?" The defendant objected to this question; the judge excluded it; and the plaintiff excepted.

KNOWLTON, J.: "To maintain his case the plaintiff was obliged to show that the flag hung across the street was an object which was so likely to frighten horses as to render driving upon the street unsafe, and that in its position there it was a public nuisance. . . . To ascertain the truth, the jury must either use such knowledge as they happen to have on the subject without the aid of testimony, or experts must be called to give their opinions if the subject is one in regard to which experts can be found, or witnesses must be permitted to state particular facts which they have observed, each one of which is an illustration and example of the general fact in dispute. The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testimony. Whenever a line of inquiry will give rise to collateral issues of such number and difficulty that they will be likely to confuse and distract the jury and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relations to the other facts and circumstances in the case, whether it should be received. It may be

1—Compare the authorities cited in W., § 458.

remote from the real issue or closely connected with it, and in many cases its competency depends upon the decision of questions of fact, affecting the practical administration of justice in the particular case, such that a Court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion." [2]

CENTRAL VERMONT R. CO. v. SOPER (1894).

8 C. C. A. 341, 59 Fed. 879.

Action for the value of grain in an elevator destroyed by fire. The plaintiffs claimed, in the opening of their case, that the fire originated at the foot of what was known as the "lofting leg." This lofting
56 leg was a piece of machinery by which the grain was carried from the bottom to the top of the elevator. The pulley at the bottom of the lofting leg made about ninety-six revolutions per minute; and the claim of the plaintiffs was that the bearings at the sides of this pulley had become heated, and thereby ignited the dust which had accumulated upon them, from which the fire was communicated to the building. The plaintiffs introduced as a witness one Aaron Linton, who testified that he was for many years foreman in this elevator, and well acquainted with its construction and method of operation. The witness testified among other things, that the bearings of this pulley at the foot of the lofting leg were beneath the elevator floor, and were oiled by pouring oil into two pieces of pipe, about two feet long, which led from above the floor down into the bearings. He was allowed to testify, against the objection and exception of the defendant, that while he was foreman of the elevator these bearings frequently became heated, that there was a tendency for dust to accumulate at that point, and that there was also a tendency for the pipes to become clogged and filled with dust and grease.

PUTNAM, J.: "[The facts objected to] relate entirely to the tendency of things, inanimate things, being in this case machinery. The plaintiff in error argued as though they related to the peculiar habits of certain specified human beings. The distinction is a broad one; and, if it is kept in mind, the evidence was clearly admissible for the purpose, not of showing that the employees of the defendant below were negligent, but of showing . . . that it is the tendency of certain parts of rapidly-running machinery to get heated, and of dust in mills where grain is ground or stored to be of a highly inflammable character, . . . both for the purpose of showing a point where the fire might have originated and also of showing the necessity of care to guard that point." [3]

2—Compare the authorities cited in W., § 457.

3—Compare the doctrine of No. 40, *ante*.

MAYNARD v. BUCK (1868).

100 Mass. 40.

Action in contract for the value of a pair of steers alleged to have been lost through the defendant's negligence. It appeared that the defendant was a drover engaged in driving cattle from Brighton
57 to various points between that place and Worcester; that on November 9, 1865, the plaintiffs by their agents intrusted to him a pair of steers to drive from Brighton to Northborough for a stipulated price; that he received the same, marked them by cutting in the hair the letter H, and left Brighton, according to his custom, on the afternoon of that day, with a drove of one hundred and twenty-three cattle. The evidence left it uncertain whether the steers were in the drove or had been stolen from the defendant's yard at Brighton before he started. The defendant offered evidence, not controlled by the plaintiff's evidence, tending to show that, at about dusk of said day, as he was proceeding with his drove, assisted by two men and a boy, when he had reached a point near the Boston and Worcester Railroad in Newtonville a passing train of cars frightened and stampeded the drove into the adjoining fields; that, as soon as he could with the aid of his men, he got the drove back in the road and proceeded to the place where he stopped with it for the night; and that upon counting the drove it was found that nine cattle were missing. The defendant testified that the next morning he proceeded with his drove towards his destination; that he had cattle to deliver at various points, as far as Worcester, at which last place he arrived with the remainder of the drove on Friday evening, November 11; and that early the following morning he returned to seek the lost cattle, found seven of them, but was unable to find the steers in question. There was also evidence tending to show that the usual practice or ordinary mode of proceeding of drovers, driving on routes from Brighton forty or fifty miles therefrom, when one or a small number of cattle stray from the drove and cannot be immediately found, was to deliver the rest of the drove before returning to seek for the lost cattle.

WELLS, J.: "The defendant insisted that the jury should be instructed that, 'if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action.' But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. . . . The effect and purpose of the evidence is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judg-

ment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable. We think the instruction asked for, in this particular, was not such as should have been given." [4]

4—Compare the authorities cited in W., § 461.

TITLE II.

TESTIMONIAL EVIDENCE.

[1]ANALYSIS OF ELEMENTS OF A TESTIMONIAL ASSERTION; OBSERVATION, RECOLLECTION, NARRATION.—"There are three general groups of rules to be considered, which correspond to these three general
58 processes of inference in using witnesses:

I. Admissibility of Testimonial Assertions, *i. e.* Witness-Qualifications;

II. Impeachment of Testimonial Assertions;

III. Rehabilitation of Testimonial Assertions.

"Before proceeding to the consideration of these rules, an analysis is desirable of the elements of a piece of testimonial evidence; for upon this analysis will depend the grouping of topics, and from it may be surmised something of the necessary requirements of such evidence.

"When a witness' statement is offered as the basis of an evidential inference to the truth of his statement—for example, the statement of A that B struck X—, it is plain that at least three distinct elements are present; or, put in another way, that there are three processes, in the absence of any one of which one cannot conceive of testimony. *First,* the witness must *know* something, *i. e.* must have observed the affray and received some impressions on the question whether B struck X; to this element may be given the generic term Observation. *Secondly,* the witness must have a recollection of these impressions, the result of his Observation; this may be termed Recollection. *Thirdly,* he must communicate this recollection to the tribunal; that is, there must be Communication, or Narration, or Relation (for there is no single term entirely appropriate). Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness,—Observation, Recollection, Communication.[2] Whatever rules, therefore, limit the ac-

1—Quoted from W., §§ 478-430.

2—*Evans,* Notes to Pothier, II, 202 (1806): "All regard to testimony supposes the general proposition that witnesses, not having any motives for asserting what is false or suppressing what is true, having had an adequate opportunity of observing the subject to which they depose, having actually observed it with adequate attention, and having a distinct and perfect memory with respect to it, relate what they have seen or heard with accuracy and fidelity."

ceptance of testimonial assertions must have reference to some one or more of these elements.

"Moreover, in the function fulfilled by each of the three elements or processes is to be found in general form the fundamental canons of which the various detailed rules will be the applications and from which they are sometimes direct deductions Thus, the notion of Observation is that the external event has in some way or other impressed itself on the witness' mind, to be now reproduced to us, in court. This impression of the witness, then (knowledge, observation, or whatever it be called), should adequately represent or correspond to the fact itself as it really existed or exists; and the practical rules under this head will be found to have, for their common purpose, the object of ensuring the probability of a fairly accurate knowledge on the part of the witness. Again, the function of Recollection is to recall or reproduce the original impressions of observation; and such rules as the law has laid down under this head are usually therefore merely applications of this fundamental notion that Recollection must fairly correspond with or reproduce the original Knowledge or Observation. Finally, the function of Narration or Communication is to reproduce for the apprehension of the tribunal the Recollected results—themselves already reproduced from Observation—; and the common purpose of the varied rules under this head is to ensure that the story as told shall represent with fair accuracy what the witness once observed and now recollects.

"The rules, thus analyzed, would however deal with the simple question, Does this witness *actually* know, recollect, communicate with sufficient accuracy?—a question requiring in each instance anew an investigation, and a decision based on the facts brought out. But experience has carved out certain rough rules of convenience which, if applied at the outset, may save the necessity of a detailed investigation as to the sufficiency of *actual* knowledge, recollection, and communication; for it is obvious that if we find the witness *incapable*—*i. e.* lacking in the very power—of acquiring adequate knowledge or of sufficiently recollecting or of properly telling, then further inquiry whether he did in fact know or does in fact recollect or well relate, is useless and may be omitted. For instance, if A is put on the stand to testify to the color of a horse, it will be unnecessary to inquire whether and where and when he saw the horse, if it appears at the outset that he has been blind from birth. So, too, it would be unnecessary to ask B, who is put forward to testify to the results of a post-mortem examination, whether he was present and took part, if it appears at the outset that he knows nothing of medicine or of surgery. When the witness is found to lack the proper capacity or power, it becomes not only unnecessary but improper to consider whether he actually knows, for it is impossible for him to know; we do not trust his statement that he does know. Thus, in addition to the rules defining the requirements as to actual knowledge, recollection, and communication, there arise other

rules defining the kinds of incapacity to know, recollect, and communicate, which exclude the witness at the outset without further inquiry.

"Of this incapacity there are three distinct sorts: *First,* there is an incapacity affecting the general mental or moral powers,—of which insanity, infancy, dumbness, and the like, are instances. This sort of incapacity may affect the witness' power of knowing or of recollecting or of communicating or of doing all three, and must be examined with reference to each. *Secondly,* there is an incapacity involving a lack of power to judge rightly on particular subjects, and arising from lack of experience or training. This incapacity extends to particular topics only, not necessarily to the whole subject of litigation. *Thirdly,* there is an incapacity arising from the witness' relation to the controversy, *i. e.,* from marital relationship or from pecuniary interest in the subject of the suit. This incapacity—now always recognized to a limited extent only—is supposed to involve an inability to give any credible testimony on the subject of the particular cause, and, when it exists, affects all three elements alike. As for the names to be applied to these three sorts of incapacity, there are none of general acceptance, nor is it easy to select proper ones. The first may be termed Organic, as affecting mental and moral functions or powers; the second Experiential, as involving a lack of sufficient experience or training; the third Emotional, as involving the dominance of untrustworthy motives.

"In accordance with the preceding analysis, the order of topics under the general title of Testimonial Evidence becomes:

Sub-title I: Qualifications of Witnesses.

Topic I: Organic Capacity; including
Sub-topic A: Mental Derangement (Insanity, Disease, Idiocy);
Sub-topic B: Mental Immaturity (Infancy);
Sub-topic C: Moral Depravity (Sex, Religion, Race, Infamy);

Topic II: Experiential Capacity;

Topic III: Emotional Capacity;
Sub-topic A: Pecuniary Interest;
Sub-topic B: Domestic Relationship.

Topic IV: Observation, or Knowledge.

Topic V: Recollection.

Topic VI: Narration, or Communication.

Sub-title II: Impeachment of Witnesses; with further subdivisions.

Sub-title III: Rehabilitation of Witnesses; with further subdivisions."

SUB-TITLE I:

QUALIFICATIONS OF WITNESSES.

Topic I: Organic Capacity.[1]

REGINA v. HILL (1851).

2 Den. & P. C. C. 254.

The proposed witness said: "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire—I can, where I am; I know which are mine. Those ascend from my
59 stomach to my head, and also those in my ears. . . . They speak to me constantly; they are now speaking to me. . . . I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear"; he was then sworn, and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed; he was in some doubt as to the day of the week on which it took place, and said: "These creatures insist upon it it was Tuesday night, and I think it was Monday. . . . The spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve,—Tuesday; but I was an eye-witness"; the defence contended that the witness was *non compos mentis,* and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent; the Court of Criminal Appeal negatived this. Campbell, L. C. J.: "It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency and the jury the credibility . . . The rule which has been contended for would exclude the testimony of Socrates, for he had one spirit always prompting him." Talfourd, J.: "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions." [2]

1—Typical statutes affecting this topic will be found *post,* in the Appendix.

2—*Walker,* J., in *Worthington* v. *Menser,* 96 Ala. 310, 11 So. 72 (1892): "One's infirmity may be such as to render it expedient to place him under guardianship, and even to subject him to personal restraints, and yet he may be fully competent to understand the nature of an oath, to observe facts correctly, and to relate them intelligently and truly. A sweeping rule of disqualification which excludes such a person as a witness would be arbitrary and unsupported by sound reason. The true reason for not admitting the testimony of a person *non compos mentis* in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness. When the reason for the exclusion of the witness does not exist, he should be permitted to testify."

Compare the authorities cited in W., §§ 492-497, and the statutes quoted *post,* in the Appendix.

WALKER'S TRIAL (1794).

23 How. St. Tr. 1153.

Re-examination of Thomas Dunn, an informer: *Dunn* (answering a question, to explain his past behavior): "I went there when I was intoxicated, the same as I am now." Mr. Justice HEATH:
60 "How long have you been intoxicated?" "Not very long; I have my recollection about me, though it may seem to the Court that I may be ill or may not." "Were you intoxicated when you gave your evidence just now?" "I was not. . . . Drunk or sober, I will speak the truth." Mr. Justice HEATH: "I do not know that we can examine a man that is drunk"; the counsel for the prosecution, Mr. Law, proceeded to ask further questions; Mr. Justice HEATH: "How can you, Mr. Law, examine him after he has told you he is intoxicated? He has made himself so exceedingly drunk, it is impossible to examine him"; but the cross-examiner, Mr. Erskine, was allowed to proceed.[3]

REX v. BRASIER (1779).

1 Leach Crown Law, 4th ed., 199.

This was a case reserved for the opinion of the twelve judges by Mr. Justice Buller, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to com-
61 mit a rape on the body of Mary Harris, an infant under seven years of age. "The judges assembled at Serjeants'-Inn Hall, 29th April, 1779, were unanimously of opinion, that no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received."[4]

3—Compare the authorities cited in W., § 499.

4—*Brewer*, J., in *Wheeler* v. *U. S.*, 159 U. S. 523, 16 Sup. 93 (1895): "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligation of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous."

Compare the statutes cited *post*, in the Appendix; also the authorities cited in W., §§ 505-508; and the rules for Oath—capacity, *post*, No. 376.

Chief Baron GILBERT, *Evidence, 139* (*ante* 1727): "The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish
62 that the party is ever afterwards unfit to be a witness, . . . and the reason is very plain, because every plain and honest man affirming the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit, . . . but where a man is convicted of falsehood and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, . . . and he is rather to be intended as a man profligate and abandoned than one under the sentiments and convictions of those principles that teach probity and veracity."

Professor SIMON GREENLEAF, *Evidence, §§ 373-378* (1842): "It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to re-
63 quire, that the *publicum judicium* must be upon an offence, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath.' But the difficulty lies in the specification of those offences. The usual and more general enumeration is, *treason, felony,* and the *crimen falsi.* In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice. But the extent and meaning of the term, *crimen falsi,* in our law, is nowhere laid down with precision. In the Roman Law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit. If the offence did not fall under any other head, it was called *stellionatus,* which included 'all kinds of cozenage and knavish practice in bargaining.' But it is clear, that the Common Law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news, and several others. On the other hand, it has been adjudged, that persons are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy, to accuse one of a crime and barratry. And from these decisions it may be deduced, that the *crimen falsi* of the Common Law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. At least it may be said, in the language of Sir William Scott, 'so far the law has gone,

affirmatively; and it is not for me to say where it should stop, negatively.' . . .

"We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of a Jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment,* and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. And it must appear that the judgment was rendered by a Court of competent jurisdiction. Judgment of outlawry for treason or felony will have the same effect; for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or, by his plea of guilty, whch has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility.

"The disability thus arising from infamy may, in general, be removed in two modes; (1) by reversal of the judgment; (2) by a pardon; [and (3) by serving the sentence]." [5]

VANCE v. STATE (1902).

70 Ark. 272, 68 S. W. 37.

RIDDICK, J.: "We take this occasion, also, to call attention to the backward state of the law in this State in reference to the competency of witnesses convicted of felony. The statutes which render such witnesses incompetent belong to a class of antiquated laws which suppress evidence, and which the wisdom of modern ages has discredited and shown to be unreasonable and injurious. They are of the same class as the laws which formerly forbade the parties to the suit from testifying, and closed the mouth of the defendant on trial for his life, and should be repealed, as these laws have been repealed, for such matters should go only to the credit or impeachment of the witness, not to the exclusion of his testimony. There is no valid reason why a person who knows anything material to the decision of a case on trial should not be permitted to tell it, whatever may be his character, the jury being allowed to weigh his testimony in connection with his character and antecedents. These statutes not only suppress evidence, but the application of them often presents difficult and doubtful questions, which, being decided in the hurry of trial, frequently results on appeal in reversals, and in this way justice is often thwarted.

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5—Compare the authorities cited in W., §§ 519-523.

There are very few States that now retain such laws and we think our legislators might well consider whether they should not be repealed in this State also."[6]

Topic II: Experiential Capacity.

KELLEY v. RICHARDSON (1888).

69 Mich. 436, 37 N. W. 514.

Campbell, J.: "The phrase 'expert testimony' is not entirely fortunate as designed to cover all cases where a witness may give his opinions. . . . [First, as to impressions of cold or heat, and
65 the like,] any person can give such impressions without special experience or special intelligence. Beyond these every-day matters, known to all men, are things which most, if not all persons can become qualified to judge by more or less opportunities of observation, local or habitual, but which require no peculiar intelligence. [Secondly,] then, there are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may properly be termed 'experts,'—a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training."

VANDER DONCKT v. THELUSSON (1849).

8 C. B. 812, 824.

Issue as to the existence of a law of Belgium requiring the place of payment of a promissory note to be the place of presentment. The plaintiff called a witness named De Keyser, who stated that he
66 was a native of Belgium; that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London; and that he was well acquainted with the Belgian law upon the subject of bills and notes. On the part of the defendant, it was objected that M. De Keyser was not an admissible witness to prove the foreign law, he neither being a lawyer, nor a person who was bound, by reason of his holding any office, to have a knowledge of the law of Belgium.

6—Typical statutes altering the common law rule will be found *post*, in the Appendix.

MAULE, J.: "The question is whether he is a person having special and peculiar means of knowledge of the law of Belgium with regard to bills of exchange and promissory notes, one whose business it was to attend to and make himself acquainted with the subject. I think that, inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he does fall within the description of an expert. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject—though they have not filled any official appointment, such as judge or advocate or solicitor—be deemed competent to speak upon it? . . . All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as experts are required."[7]

EVANS v. PEOPLE (1858).

12 Mich. 27, 36.

Manslaughter; an issue was whether the deceased died of erysipelas or of injuries inflicted by the accused. CAMPBELL, J.: "The remaining ground of error alleged is, that one John Hendershot,
67 not being shown to possess any special qualifications, was allowed to answer a question involving an inquiry of medical science, having an important bearing upon the cause of Balch's death. It had been shown that he died of erysipelas, claimed by the prosecution to have resulted from the injuries inflicted by Evans. The defense had introduced medical witnesses, whose evidence tended to prove the existence of that disease in an epidemic form in Balch's neighborhood, previous to his visit to Grand Rapids, where he died two days after the assault upon him. Hendershot was called as a rebutting witness, and was asked, under objection, whether there was 'any case of erysipelas about the neighborhood of the residence of the deceased, before his coming to Grand Rapids, in February last;' the witness answered, 'No, sir; neither before nor since; no sickness within five or six miles of Coban Balch's residence during the month of February, nor until after that time.' The greatest difficulty encountered, in determining questions of competency of testimony on subjects connected more or less with medical science, is in ascertaining how far it is safe to suppose unprofessional observers are able to form a reliable judgment. There are some simple disorders which all persons are familiar with. Others require the very highest degree of medical skill to distinguish them from disorders having some resembling appearances or symptoms. . . . In the view of evidence now entertained by the best authorities, it is settled that a jury should be allowed to have placed before them

7—Compare the authorities cited in W., § 564.

all the means of knowledge which can be had without involving the danger of leading them to form conclusions not based on solid truth and not reliable as reasonably certain. . . . Circumstances may make whole communities familiar with diseases not known elsewhere, . . . and it often happens that persons having no general skill become very familiar with particular subjects. It would be very unwise to exclude such evidence merely because the range of the witness' knowledge is limited. There are as many grades of knowledge and ignorance in the professions as out of them. The only safe rule in any of these cases is to ascertain the extent of the witness' qualifications, and within their range to permit him to speak. Cross-examination and the testimony of others will here, as in all other cases, furnish the best means of testing his value. The circumstances of the case, therefore, must be looked at to determine the admissibility, not only of the question put to Hendershot, but also of his answer. As he was not examined concerning his knowledge of erysipelas, or of diseases generally, he could not be asked such a question, if the issue materially required from the witness any such knowledge. . . . But Hendershot's answer, denying the existence of any disease whatever in that vicinity, stands on a different footing. The difference between health and any sickness whatever can hardly be regarded as open only to medical knowledge; and his contradiction of the medical testimony is a contradiction of common facts, and not of science."[8]

Topic III: Partisanship, as Affecting Capacity.

Chief Baron Gilbert, *Evidence,* 119 (*ante* 1727); Lofft's ed. 223: "Where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust, than any just
68 cause of belief; for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, 'which, though on the sum of things really best for the individual,' is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief. If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to

8—Compare the authorities cited in W., § 568; and the doctrine of the Opinion Rule *post,* No. 418.

the competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the jury; whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biased even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected."

Professor Simon Greenleaf, *Evidence*, § 421 (1842): "In regard to the time of taking the objection to the competency of a witness, on the ground of interest, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency, if he should dislike his testimony. He has his election, to admit an interested person to testify against him, or not; but in this, as in all other cases, the election must be made as soon as the opportunity to make it is presented; and, failing to make it at that time, he is presumed to have waived it forever. But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered. Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant to take the objection. But if it is not discovered until after the trial is concluded, a new trial will not, for that cause alone, be granted; unless the interest was known and concealed by the party producing the witness. The rule on this subject, in criminal and civil cases, is the same. Formerly, it was deemed necessary to take the objection to the competency of a witness on the *voir dire;* and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the Judge to permit the adverse party to cross-examine the witness, as to his interest, after he has been examined in chief; but the usual course is not to allow questions to be asked upon the cross-examination, which prop-

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erly belong only to an examination upon the *voir dire*. But if, notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, it afterwards should appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out, and the jury will be instructed wholly to disregard it. The rule in equity is the same as at law; and the principle applies with equal force to testimony given in a deposition in writing, and to an oral examination in court. In either case, the better opinion seems to be, that if the objection is taken as soon as may be after the interest is discovered, it will be heard; but after the party is *in mora*, it comes too late. One reason for requiring the objection to be made thus early is, that the other party may have opportunity to remove it by a release; which is always allowed to be done, when the objection is taken at any time before the examination is completed. It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory."

Jeremy Bentham, *Rationale of Judicial Evidence*, b. IX, pt. III, c. III (Bowring's ed. vol. VII. pp. 393 ff.): "In the view taken of the subject by the man of law,—to judge of trustworthiness, or
70 at least, of fitness to be heard, *interest* or *no interest* is (flagrant and stigmatized improbity apart) the only question. . . . Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one. But if a choice were unavoidable, the absurdity would be less gross to say: 'No man who is exposed to the action of interest will speak false,'—than to say, 'No man who is exposed to the action of interest will speak true.' Of a man's, of every man's, being subject to the action of divers mendacity-restraining motives, you may be always sure; of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure. But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed; but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty: but will he obey the impulse? That will depend upon the forces tending to confine him to that path—upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there. All mountains have a tendency to fall into a level with the plains; yet, notwithstanding, there are mountains. All waters seek a level; yet, notwithstanding, there are waves. . . . Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say,

any horse or dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a running at the pace of a mail-coach. . . . Take what everybody understands, money: for precision's sake, take at once £10; the £10 of the day, whatever be the ratio of it to the £10 of yesterday: to the present purpose, depreciation will not affect it. This £10, will its action be the same in the bosom of Crœsus as of Irus? in the bosom of Diogenes, as in that of Catiline? No man will fancy any such thing for a moment: no man, unless, peradventure, it may have happened to him to have been stultified by legal science. . . . In the eyes of the English lawyer, one thing, and one thing only, has a value: that thing is money. On the will of man, if you believe the English lawyer, one thing, and one thing only, has influence: that thing is money. Such is his system of psychological dynamics. If you will believe the man of law, there is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; no such thing as ambition; no such thing as the love of power; no such thing as filial, no such thing as parental, affection; no such thing as party attachment; no such thing as party enmity; no such thing as public spirit, patriotism, or general benevolence; no such thing as compassion; no such thing as gratitude; no such thing as revenge. Or (what comes to the same thing) weighed against the interest produced by the value of a farthing, the utmost mass of interest producible from the action of all those affections put together, vanishes in the scale. . . . For a farthing—for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science: this in Westminster Hall is law. According to the prints of the day, £180,000 was the value of the property left by the late Duke of Bridgewater. For a fraction of a farthing, Aristides, with the duke's property in his pocket, would have perjured himself. One decision I meet with, that would be amusing enough, if to a lover of mankind there could be anything amusing in injustice. A man is turned out of court for a liar, not for any interest that he has, but for one which he supposed himself to have, the case being otherwise. Instead of turning the man out of court, might not the judge have contented himself with setting him right? Would not the judge's opinion have done as well as a *release?* The pleasant part of the story is, that the fact on which the exclusion is grounded could not have been true. For, before the witness could be turned out of court for supposing himself to have an interest, he must have been informed of his having none: consequently, at the time when he was turned out, he must have ceased to suppose that he had any. Another offence for which I find a man pronounced a liar, seems to make no bad match with the foregoing: it was for being a man of honour. 'Oh ho! you are a man of honour, are you? Out with you, then—you have no business here.' Being asked whether he did not look upon himself as

bound in honour to pay costs for the party who called him, supposing him to lose the cause, and whether such was not his intention,—his answer was in the affirmative, and he was rejected. It was taken for granted that he would be a liar. Why? Because he had shown he would not be one. . . . Exceptions, self-contradictions, spring up everywhere under their feet: exceptions, and, as far as they extend, all reasonable. Reasonable, and why? Because, the rule itself being fundamentally absurd, everything must be reasonable which goes to narrow its extent. . . . . V. Exception the fifth:— . . . Question: A man who at the time of his examination has an interest in the cause,—is he an admissible witness, he having had no interest at the time of the supposed fact? Decision in the affirmative. Because he was under no temptation when he had not to speak, therefore, when he is to speak, knowing him to be under temptation, you are to suppose him not to be so. Just as if a pilot were to say in a storm, the vessel among the breakers, Sit still, there is no danger. Why so? Because yesterday it was a dead calm. VI. Exception the sixth: *Voire dire.* Truth expected, in spite of interest. . . . When a witness produced against you has an interest in the business (meaning always a pecuniary interest), and you cannot get other evidence of it, or do not care to be at the expense, you address yourself to the witness himself, and ask him whether he has or no: if he speaks truth, he is turned out; if he perjures himself, he is heard. This operation is called examining a witness upon the *voire dire. Voire dire* is, in law French, to tell the truth. A man might look a good while, even in the vocabulary of English law, before he would find so silly a one. 'Come, my honest friend, I am going to put some questions to you. To the first of them, the court expects you to speak the truth; to the others, as you please' "[1]

STEPHENS v. BERNAYS (1890).

District Court of the United States for the Eastern District of Missouri.

42 Fed. 488.

THAYER, J.: "The testimony of C. C. Crecilius, taken in connection with other testimony offered by the plaintiff, clearly shows that the deceased assigned his stock in the insolvent bank to Crecilius, the
71 cashier, with intent to evade his liability as a shareholder. According to the testimony of Crecilius, the deceased had not only been

1—*English Common Law Practice Commissioners,* Second Report, 1853, p. 10: "It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into court and there wrongly decided in consequence of the exclusion of evidence, hut in numberless cases in which the parties silently submitted to wrongs from inability to avail themselves of proof which, though morally conclusive, was in law inadmissible. From the time, however, when the late Mr. Bentham first turned the attention of the public to the defects of the English law of evidence, the system of exclusion has been crumbling away before the power of discussion and improved legislation."

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advised before the sale that the bank had sustained considerable losses, but he declared at the time of the sale that his purpose in selling was to avoid his liability as a stockholder. The sale appears to have been made only two days before the bank closed its doors, and no change took place in the condition of the bank in the mean time. Crecilius gave his notes for the stock, instead of paying for the same in money; and according to his statement the notes were to be surrendered, and the sale cancelled, if at the end of sixty days the deceased was then assured that the bank was all right. Crecilius himself had little or no means, at the time of the purchase, and was rendered utterly insolvent by the failure of the bank two days later. His object in making the purchase in question was to withdraw the stock from the market, and save the credit of the bank, which was then in a precarious condition. These facts, most of which were established by the testimony of Crecilius, warrant the conclusion that the pretended sale was and is voidable as to creditors of the insolvent bank, who are represented in this proceeding by the receiver.

"A question arises, however, and was reserved at the trial, touching the competency of Crecilius to testify against the executrix concerning transactions between himself and the testator. The Federal [Revised] Statutes [of 1878] provide (section 858), that— 'No witness shall be excluded . . . in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, . . . in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, . . . unless called to testify thereto by the opposite party. . . . In all other respects the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in Courts of the United States.' The State law on the subject (section 8918, Rev. St. Mo. 1889) provides that— 'No person shall be disqualified as a witness in any civil suit . . . by reason of his interest in the event of the same, as a party or otherwise: . . . provided that, in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or . . . insane, the other party to such contract or cause of action shall not be admitted to testify . . . in his own favor; . . . and, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify.'

and Pleadings, First Report, 1848, p. 246: "England has outstripped us in this most necessary reform. Five years ago, an act of Parliament obliterated the rule from the laws of that country. . . . Lord Brougham has spoken of it, in the following language: 'This is certainly the greatest measure that has been carried under the head of judicial procedure since the statute of frauds, that is, since the Restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves'."

Typical statutes on this subject will be found *post*, in the Appendix to this volume.

"The first clause of the proviso of section 8918, *supra,* as heretofore construed by the State Courts, has much greater scope than the Federal statute above referred to. Thus, in Meier v. Thieman (90 Mo. 434, 2 S. W. Rep. 435), it was held that by the proviso in question a person was rendered incompetent to testify as to transactions with a decedent in a suit brought by his heirs, although the person tendered as a witness was not a party to the suit. The decision appears to be based on the ground that a witness, to be excluded by the State law, need not be a party to the record, but will be excluded as a witness to all contracts or transactions between himself and a deceased person, when the witness has an interest in the result of the suit, whether he is or is not a party to the record. Hence it is important to determine, in the first instance, whether the competency of Crecilius to testify as to transactions between himself and the decedent is to be tested by Federal or State law. The rule is that, where Congress has legislated on the subject,—that is, has enacted a law covering the particular case,—such law must prevail in the Federal Courts, notwithstanding it differs from the State law. The State laws control in determining the competency of witnesses only in cases like that of Packet Co. v. Clough (20 Wall. 537), which do not fall within any provision of the Federal laws.

"The case at bar is clearly within the terms of section 858. The effort is to exclude Crecilius as a witness on the ground of interest; but the first clause of the section declares that interest shall be no disqualification 'in any civil action,' and the only exception to that rule is that mentioned in the proviso,—that a person called as witness shall not be allowed to testify as to any transactions with or statement by a decedent, if the suit is against his executor or administrator, and the witness is himself an opposing party to the suit, unless the witness is called upon to testify by the executor or administrator. Whatever view, therefore, the Court might entertain as to the competency of the witness under the State law, it is compelled to hold that he is made a competent witness by the Federal statutes. Judgment will accordingly go against the executrix for the amount of the comptroller's assessment; that is, for $3,500, with interest at 6 per cent per annum, to be computed from September 24, 1889, to this date."[1]

1—*Haymond,* J., in *Owens* v. *Owens,* 44 W. Va. 88, 95 (1878): "The law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous."

Corliss, J., in *St. John* v. *Lofland,* 5 N. D. 140, 64 N. W. 930 (1895): "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature,

PEOPLE v. TYLER (1869).

36 Col. 528.

The Court was asked to construe the following statute of 1865-6, p. 865:

"SECTION 1. In the trial of all indictments, complaints, and other
72 proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court.

"SEC. 2. Nothing herein contained shall be construed as compelling any such person to testify."

SAWYER, C. J.: "The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony."

COLLINS v. PEOPLE (1881).

98 Ill. 584, 587.

SCHOLFIELD, J.: "Herman Young, Alexander Lacomb, and plaintiff in error, were jointly indicted, by the grand jury of Cook county, for burglariously entering the store of Cohn, Wampold & Co., in the
73 city of Chicago, on the night of the 11th of May, 1879, and stealing therefrom certain goods. Young and plaintiff in error were placed upon their trial, and, by the verdict of a jury, they were found guilty, and the punishment of each was fixed at ten years' confinement in the

and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods,—the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

penitentiary. The Court awarded plaintiff in error a new trial, but as to Young judgment was entered upon this verdict. Subsequently, plaintiff in error was placed upon trial under the indictment, alone, and he was again found guilty, by the verdict of the jury, and his punishment, this time, was fixed at twelve years' confinement in the penitentiary. The Court overruled motions for a new trial and in arrest of judgment, and entered judgment upon this verdict. This writ brings before us, for review, the record of that judgment. The only evidence directly and positively connecting plaintiff in error with the burglary, is that furnished by the testimony of Lacomb, his co-defendant. No *nolle prosequi* has been entered as to Lacomb, and he has never been tried under the indictment. He has pleaded not guilty, and the issue thus presented is still pending. It is therefore insisted that he was incompetent as a witness. We do not deem it necessary to inquire what was the common law in this respect, since we are of opinion that the question is conclusively settled against plaintiff in error by our statute. It provides: 'No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness.' . . . If at common law Lacomb would have been an incompetent witness, it must have been because he was interested in the event of the suit, and under the above language it is wholly unimportant whether that interest arose from his being a party or otherwise, for in either event he is rendered competent. The proviso adds force to this view; it shows that it was intended that *all* defendants should be *allowed* to testify, for otherwise the proviso was wholly unnecessary. Under that section a defendant is unquestionably entitled to have the benefit, for what it is worth, of the evidence of a co-defendant; and the same right is equally clearly given to the State. The infamy arising from convicted guilt, and the interest resulting from being a party to the same case or proceeding, may now be considered for the purpose of determining what credence should be given to the testimony of the witness, but they no longer furnish any ground for excluding his testimony."[1]

Chief Baron GILBERT, *Evidence*, 133 (*ante* 1727): "The second corollary to this general rule [of exclusion from interest] is that husband and wife cannot be admitted to be witnesses for or against each other; for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other than when any man attests for himself."

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1—Compare the authorities cited in W., § 580.

WILLIAM & MARY COLLEGE v. POWELL (1855).

12 Gratt. 372, 383.

LEE, J.: "Thomas J. Powell is offered as a witness [for his wife's estate] in support of the settlement made by him upon his wife,
75 [which is now sought to be set aside as void against creditors, the husband being insolvent]. For this purpose he was clearly incompetent. . . . That he was not himself personally interested because he was bound for the college debt in any case, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest, but upon other and different principles. Indeed, the incompetency has been maintained even where the husband's interest was the other way. Thus, in an action by the trustee for a wife against the sheriff for taking goods which were her separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff (the wife being regarded as the real plaintiff), although he had an interest on the other side, in having his debt satisfied by the levy of the execution."[2]

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[1] ENGLISH COMMON LAW PRACTICE COMMISSIONERS, Second Report, 1853, p. 11: "The highly satisfactory result of these more enlarged views [represented by the abolition of disqualification by interest
76 in general] induces us to consider whether an exception preserved by the late statute, namely, the exclusion of husband and wife as witnesses for or against each other, may not be abolished. . . . The incompetency of husband and wife to be witnesses for one another is said to rest on three grounds: 1st, Identity of interest; 2d, the consequent danger of perjury; 3d, the policy of the law, which, as it is said, 'deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice,' and which rejects such evidence, because its admission would lead to domestic disunion and unhappiness. The first two grounds are manifestly no longer tenable, since the parties to suits have been themselves made competent to give evidence. It remains to be considered how far the third ground should be allowed to exclude testimony which may be essential to justice. In the first place, it seems clear that no disturbance of domestic happiness need be apprehended from permitting husband and wife to call one another as witnesses. The evidence may in many cases be indispensable. A wife often keeps her husband's books, conducts his business in his absence, pays or receives money for him. Even in matters in which she may take a less active part, her testimony may be the only one to prove facts essential to the vindication of her husband's rights, or it may be valuable as confirmatory of the evidence

2—Compare the authorities cited in W., §§ 600-620.

of other witnesses: so, the testimony of the husband may be material to the wife in matters relating to her separate estate, to the proof of her coverture, if sued as a feme sole, and the like. It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be; the only danger that can be suggested is, that evidence might be extracted from the witness, by the adverse party, prejudicial to the interest of the married plaintiff or defendant, and that some bitterness of feeling might arise in consequence; but of the probability of such a result the married couple are themselves the best judges. Should any fact be thus brought to light which would otherwise have remained unproved, the interests of truth will be thereby promoted, and any transient interruption of conjugal harmony from such a circumstance or from disappointment occasioned by the evidence falling short of what was expected, would be a trifling evil compared to the mischief which must result from the exclusion of testimony essential to the ends of justice and truth."[3]

Topic IV: Testimonial Knowledge.

[4]"Observation, Opportunity to Observe, and Knowledge. It is obviously impossible to speak with accuracy of a witness' 'knowledge' as that which the principles of testimony require. When a
77 thing is known to be, it is; and that would be the end of inquiry. witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows. But it will ask that each one offered shall be one prima facie likely to know,—in short, shall have had an opportunity of observing what was or what happened and shall have directed his attention or observation to the matter. This is as far as the law can go. Accordingly, the rules upon the subject in hand are all concerned, not strictly with the witness' knowledge, but with his opportunities of observing and his actual observation. For example, if it is a question of the aggressor in an affray, what the tribunal will ask for is, not persons who know who the aggressor was, but persons who have been so situated that they had an opportunity of observing and did observe the affair."

BUSHNELL'S TRIAL (1656).

5 How. St. Tr. 633, 641.

Bushnell, arguing: "William Pinchin acknowledgeth himself to be absent, and yet he swears [to my unlawful act at Box] as if he had

3—Typical statutes affecting the subject will be found in the Appendix of this volume. Compare the privileges, *post*, Nos. 464, 509.

4—Quoted from W., § 650.

78 been at Box. I am not so much a lawyer as to know how far forth an oath will extend, or to what it will amount, if a man depose nothing but what he hath received by hearsay. . . . 'He is a false witness, not only he who tells a lie, but also he who testifies a truth whereof he hath not a certain and undoubted knowledge,—that is, if he testify that which he hath neither seen nor heard nor hath had any experience of.' Which I speak . . . only to evidence thus much unto thee, that, be it true or be it false, yet William Pinchin could be no competent witness of it, because by his own confession he was at the same time at another place about four or five miles off."

BUSHEL'S CASE (1670).

6 How. St. Tr. 999, 1003.

VAUGHAN, C. J.: (noting the difference between a juryman and a witness): "A witness swears but to what he hath heard or seen,—

79 generally or more largely, to what hath fallen under his senses."

THOMAS STARKIE, *Evidence, 79, 127* (1824): "To render the communication of facts perfect, the witnesses must be both able and willing to speak or to write the truth. It is necessary that they

80 should possess, in the first place, the means and opportunity of acquiring a knowledge of the facts. . . . A witness who states facts ought to state those only of which he has personal knowledge; and such knowledge is supposed, if not expressly stated, upon the examination in chief; and upon cross-examination his means of knowledge may be fully investigated, and if he has not sufficient and adequate means of knowledge, his evidence will be struck out."

PARNELL COMMISSION'S PROCEEDINGS (1898).

36th day, *Times' Rep. pt. 10, p. 18.*

The Irish Land League and its leaders being charged with complicity in certain crimes, particularly in the Phœnix Park assassination of 1882, certain of the known criminals testified that their

81 body, the Invincibles, had received assistance-money from the League; it had turned out, on cross-examining one of them, that his testimony to the receipt of this money from the League officers, was not based on his own knowledge at all, but merely on what he had heard from others; another of these persons was now asked on direct examination as follows: Sir *H. James:* "Tell me of your own knowledge whether you know of his receiving any money from the Land League." Sir *C. Russell:* "My Lords, I would ask my learned friend to be particular as to that question 'of his own knowledge' after the experience we had of Delaney's evidence. 'Did he

see any one pay him?' is the proper form of question." Sir *H. James:* "I think not." Sir *C. Russell:* "With great deference, my Lords, it is. We had a deliberate statement the other day in answer to a similar question put to a witness, 'Did you know this?' and 'Did you know that?' and afterwards in cross-examination, it turned out that he did not know it of his own knowledge, but it was what had been told him. I want to guard against a repetition of that. The proper form of question as I submit is, 'Did he see any money paid?'" Sir *H. James* (to the witness): "You understand what I mean—do you know this of your own knowledge?" Sir *C. Russell:* "I am objecting to the form of the question." President HANNEN: "It is a very usual form of question." Sir *C. Russell:* "I respectfully say, in view of the reasons I have given, that the proper question is, 'Did he see any money paid?'" President HANNEN: "I shall not interfere with the discretion of counsel in asking a question in a manner which is quite usual." Sir *C. Russell:* "I have pointed out the danger—the great danger—of putting the question in the form in which my learned friend is putting it." President HANNEN: "Precisely so; and you have also shown where the safeguard lies, namely, in cross-examination."[2]

CARPENTER'S ESTATE (1892).

94 Cal. 414, 29 Pac. 1101.

A will was contested on the grounds of insanity and undue influence. TEMPLE, C.: "The allegation of mental incompetency was supported, in a large degree, by the opinion of witnesses claimed
82 to be intimate, as to his mental condition. Objection was made in the case of each witness on the ground that the witness was not shown to be an intimate acquaintance, within the meaning of subdivision 10, § 1870, Code Civil Proc., which makes competent 'the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.' What is an 'intimate acquaintance' has not been very clearly settled. The requirement that such an acquaintance shall be an intimate acquaintance does not seem to exist elsewhere. The witnesses are [at common law] only required to have had sufficient opportunity to observe the person whose sanity is in question. Different rulings have been made as to what shall be considered a sufficient showing of opportunity of observation to enable a witness to form an opinion which can be received as evidence; or, expressed in the language of our Code, what degree of intimacy there must be. In general, the idea seems to be that no rule can be prescribed on this subject. . . . Now, when we take into consideration the rule as it exists in most juris-

2—Compare the authorities cited in W., §§ 657-659.

dictions where the common law prevails, we must conclude that our Code has attempted what has been said to be impracticable,—to establish a rule as to what opportunities of observation shall entitle a witness to speak. . . . Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite. A very large discretion must be conceded to the trial Court."[3]

LORD FERRERS v. SHIRLEY (1731).

Fitzgibbon, 195.

"Amongst other witnesses was called one J. J., who would have swore to the handwriting of one J. Cottington, whose name was to the deed [of Robert Earl Ferrers] as a witness, because
83 he had seen several letters wrote by J. Cottington. Thereupon he was asked, whether he had ever seen the said Cottington write; to which he answered, that he never did, nor never saw the person that wrote the said letters; but that his master, to whom the said letters were wrote for the rent of a part of the estate of the late Earl Robert Ferrers, which his said master held, informed him, they were the letters of J. Cottington, the Lord Ferrers's steward, who was the person pretended to have attested the deed in question. Hereupon it was objected to his testimony, because he could not say with any certainty, whether or no the writer of the letters was the same person that attested the deed; for that the J. Cottington, that was supposed to write the letters, might get some other person to write those very letters for him; and the counsel insisted, that in all cases, where a witness would swear to the handwriting, he must be able to say, that he saw such person write. The Court rejected the said J. J. because he could not ascertain the identity of the person. But my Lord RAYMOND said, that it is not necessary in all cases that the witness have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and that it can be made out that the party writing such letters is the same man, that attested a deed, that will entitle a witness to swear to that person's hand, tho' he never saw him write. PAGE, Justice, said, if a subscribing witness to a deed lives in the West-Indies, whose handwriting is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person wrote by him to his correspondent in England, because under the special circumstances of that case, there is no other way, or at least, the difficulty will be great, to prove the handwriting of such subscribing witness. But my Lord RAYMOND differed, and said, that those special circumstances could not vary the reason of the thing."

3—Compare the authorities cited in W., § 680.

EAGLETON v. KINGSTON (1803.)

8 Ves. Jr. 473.

ELDON, L. C.: "When I first came into the profession, the rule as to handwriting in Westminster Hall in all the Courts was this: You called a witness, and asked whether he had ever seen the party
84 write. If he said he had, whether more or less frequently, that was enough to introduce the further question, whether he believed the paper to be his handwriting. . . . Or you might ask a witness who had not seen him write for a length of time, if you could not get a witness of a subsequent date. . . . This rule was laid down with so much clearness that till very lately I never heard of evidence in Westminster Hall of comparison of handwriting by those who had never seen the party write." The same judge, in WADE v. BROUGHTON, *3 Ves. & B. 172* (1814): "Where there has been correspondence by letters the contents of which are such as to render it probable that they were received [by the genuine person], perhaps impossible to suppose the contrary, that course of correspondence will do; and that has grown up in modern times."

ROWT'S ADMINISTRATRIX v. KILE'S ADMINISTRATOR (1829).

1 Leigh 225.

COALTER, J.: "The reason why a witness must see another write in order to form an opinion of the character of his handwriting is not, I apprehend, because seeing the party write gives you a knowledge
85 of the character of his hand; he must see the handwriting itself, after the act of writing is performed, in order to acquire that knowledge. But when he sees the manual operation himself, he knows that the handwriting which he at the same time or afterwards inspects is the handwriting of the party. He thus acquires a knowledge . . . of a handwriting which he knows to be that of a certain individual. . . . Being accustomed to see the operation is only full evidence that the writing which you have thus seen and the character of which is more or less distinctly impressed on your mind, according to circumstances, is the character of the manual writing of that individual. [On the other hand] in the course of business and correspondence you acquire an equally perfect knowledge of the *handwriting* of the individual. . . . But this writing may have been performed by the clerk of the person in whose name it is; and if so, you have no knowledge of the handwriting of *that person*, though you have of that of his clerk. . . . [and the relevancy of such knowledge] would be en-

tirely defeated by proof that the letters were written by the clerk, and is weakened in proportion to any doubts that may exist whether the party whose handwriting is to be proved wrote the letters or not."[4]

DE BERENGER'S TRIAL (1814).

Gurney's Rep., 188.

In this celebrated trial for swindling, De Berenger, Lord Cochrane, and others were charged with having falsely circulated a report of the death of Napoleon in order temporarily to raise the price of stocks
86 and sell on the risen market. It was proved that on the day of the rise the defendants had sold more than £1,600,000 of stocks, recently bought; to prove the prices on those days, a witness was called who had been "employed by the House to take the prices of the day at the Stock Exchange." *Q.* "Where do you get those accounts from?" *A.* "I collect them from the Stock Exchange." *Q.* "Do you go about all day long taking the prices?" *A.* "I collect them at different times in the course of the day." *Q.* "You go about taking an account from all the persons who are there?" *A.* "I take them from different persons who are in the market." On objection by Mr. Serj. *Best,* Ellenborough, L. C. J., replied: "It is all hearsay; but it is the only evidence we can have; it is the only evidence we have of the price of sales of any description. I do not receive it as the precise thing, but as what is in the ordinary transactions of mankind received as proper information; and I suppose there is hardly a gentleman living who would not act on this paper."[5]

Topic V: Testimonial Recollection.

STATE v. FLANDERS (1859).

38 N. H. 324, 332.

Indictment for forgery in altering a bond payable to one Webber with one Andrews and one Aiken as sureties; Webber testified positively that Aiken's signature was upon the bond before the alteration was made. Aiken testified that he read the bond hastily
87

4—*Doe* v. *Suckermore,* 5 A. & E. 727 (1836): *Williams,* J.: "I adverted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters *'must have been acted upon.'* If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, *act done,* the observation is without foundation, for nothing of the sort is necessary. . . . Anything, I presume, from which the identity of the writer is established may suffice."

Compare the authorities cited in W., §§ 699-705.

The rule for *expert testimony based on specimens* is considered under the Opinion rule, *post,* of Nos. 427-436.

5—Compare the authorities cited in W., §§ 712-719.

when he signed it, and could not say whether it had then been altered or not, although he had an impression in regard to it. The Court thereupon permitted the counsel for the government to ask him, against the respondent's objection, what his impression was, and he testified that his impression was that it had not then been altered, but contained an indemnity against the Barron attachment only as originally written.

SAWYER, J.: "An impression as to a past fact may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection. . . . In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge, because of the dimness of the inscription. If, therefore, the objection is to be considered as one taken to the general competency of such testimony, it is clear that it was properly overruled. An impression, however, may mean an understanding or belief of the fact, derived from some other source than personal observation, as the information of others; or it may mean an inference or conclusion of the mind as to the existence of the fact, drawn from a knowledge of other facts. When used in these senses, it is not evidence."[6]

ACKLEN'S EXECUTOR v. HICKMAN (1879).

63 Ala. 494.

Action by James Hickman for the amount due on an account for services rendered to Acklen as agent, money paid, etc. The book-
88 keeper, Hinds, testified for the plaintiff, as to the account drawn by him, that the first indorsement on said account was in his handwriting; that, having refreshed his memory by reading said memorandum, he could now testify from memory that said statement was true, and that the same was correctly dated October 30, 1867, and that he drew off said account from the books of the day of the date of said memorandum; that on or about the 30th of October, 1867, he presented said account, with said indorsement on it, to said Acklen, at his residence in Huntsville; and that said Acklen admitted that he owed the account, and that said account was correct. Thereupon, plaintiff offered to read in evidence the said memorandum, or indorsement, dated October 30, 1867. To this the defendant objected, because said memorandum was not legal evidence; admitting that the witness could refer to said memorandum to refresh his memory, but insisting that the same could not be properly received as evidence, because it was an *ex parte* statement of the

6—Compare the authorities cited in W., §§ 726-729.

witness. The court overruled the objection, and admitted the memorandum; to which the defendant excepted.

The witness further testified that several years afterwards, some four or five years, the plaintiff came to Huntsville, from Nashville, and, at his request, witness went with him to the residence of said Acklen in Huntsville; that the account was the subject of conversation between Hickman and said Acklen; that Hickman told Acklen, he must have some money to go home on, and did not have money to pay his expenses; that Acklen thereupon handed something to Hickman, but he (witness) can not say whether it was a bank-bill, or the account sued on, or both; that he does not remember what it was; and that Acklen, when he handed this something to plaintiff, said, "I will pay you the balance soon." The witness said, that he could not remember the day, the month, or the year, when he went with Hickman to see Acklen; and that the second indorsement on said account (the credit of $20) was in the handwriting of said Hickman. The court allowed the witness, against the objection of the defendant, to testify that he saw Hickman make said indorsement on said account, in Huntsville, on the same day, and soon after he and Hickman left Acklen's house, and went up town on the public square; to which ruling the defendant excepted. The court also allowed the witness, against the objection of the defendant, in the presence of the court and jury, to look at said indorsement in the handwriting of Hickman, and refresh his memory by the use of said memorandum, and then to testify, against the objection of the defendant, that the said visit of witness and Hickman to said Acklen was made on the 10th November, 1869. The defendant objected to this evidence of the date of said visit, and his reference to said indorsement to refresh his memory; because the effect was, indirectly, to get said indorsement before the jury; and because no memorandum, made by said Hickman, could be properly referred to by said witness; and because it was not shown that the witness knew said indorsement was true. These objections were overruled, and the defendant excepted.

Stone, J.: "The law recognizes the right of a witness to consult memoranda in aid of his recollection under two conditions: *First*, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class the witness testifies to what he asserts are facts within his own knowledge, and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made

known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason.

"In the *second* class are embraced cases in which the witness after examining the memorandum cannot testify to an existing knowledge of the fact, independent of the memorandum,—in other words, cases in which the memorandum fails to refresh and revive the recollection and thus constitute it present knowledge. . . . [If the witness] testify that at or about the time the memorandum was made he knew its contents and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum.

"Under these rules, the Circuit Court erred in allowing the memorandum to be given in evidence to the jury. The court erred, also, in allowing the witness to refresh his recollection, by the credit indorsed in the handwriting of Hickman. True, he stated he saw the indorsement made; but he did not testify that he knew, or ever had known, it contained a true statement of the facts. If he had testified that he saw the indorsement made, and observed its contents, and knew at the time that they were true, this would have brought the testimony within the second of the rules stated above and would have let in both the testimony and the memorandum, notwithstanding the witness, at the time of the trial, had no independent recollection of the facts shown by the indorsement."[7]

REX v. ST. MARTIN'S (1834).

2 A. & E. 210.

The witness looked at a memorandum of a lease; "he had no memory of these things but from the book, without which he should not of his own knowledge be able to speak to the fact; but
89 on reading the entry he had no doubt the fact really happened." *Counsel,* opposing this: "Even supposing this to be a mere memorandum such as the witness might refresh his memory from, still his evidence does not go far enough. He says, after looking at the memorandum, that he has no doubt, but that he

7—*Rowell,* J., in *Davis* v. *Field,* 56 Vt. 426 (1884): "Nor was it necessary that the witness should have had an independent recollection. . . . The old notion that the witness must be able to swear from memory is pretty much exploded. All that is required is that he be able to swear that the memorandum is correct. There seem to be two classes of cases on this subject: 1. Where the witness by referring to the memorandum has his memory quickened and refreshed thereby, so that he is enabled to swear to an actua recollection; 2. Where the witness after referring to the memorandum undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum.

has no memory of these things; so that his memory, after being refreshed, does not supply the proof." TAUNTON, J.: "When a bond is put into the hands of an attesting witness, and he says that he does not recollect attesting, but that, from seeing his name there, he has no doubt that he did, is not that proof of his attestation?" *Counsel,* replying: "A naked fact may be so proved; but here the question was as to the proof of the contents of an instrument, or of particulars appearing from those contents only." But the Court unanimously overruled his objection.

DOE v. PERKINS (1790).

3 T. R. 754.

The issue being the time of expiration of certain tenant-holdings, one Aldridge was offered to prove certain declarations of the tenants, as minuted by him in a book at the time. When Aldridge was
90 examined the original book was not in court; but he spoke concerning the dates of the several tenancies from extracts made by himself out of that book, confessing upon cross-examination that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts was founded altogether upon the extracts which he had made from the above mentioned book. This evidence was objected to at the time on the part of the defendants, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not be permitted to give evidence from any extracts, but that the original book from whence they were taken ought to be produced. *Law* and *Lowndes,* arguing, "insisted on the known distinction between cases (1) where the witness swears from his own [present] knowledge of the facts, though his memory may be assisted by memoranda, and (2) where he does not speak from any recollection which he has, but merely from such memoranda; in the latter case it has always been required that the original minutes should be produced, because of the great door which might otherwise be opened to fraud and concealment;" and the Court approved the objection. The Court were clearly of opinion that Aldridge, the witness, ought not to have been permitted to speak to facts from the extracts which he made use of at the trial.

BURROUGH v. MARTIN (1809).

2 Camp. 112.

Action on a charter-party; a witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he
91 had written it himself, he said, that he had not, but that from time to time he examined the entries in it while the events recorded

were fresh in his recollection, and that he always found the entries accurate. The *Attorney-General* contended, that the witness could make no use of the log-book during his examination, notwithstanding his former inspection of it, and that the only case where a witness could refer to a written paper for the purpose of giving evidence, was where he had actually written it himself, and had thus the surest means of knowing the truth of its contents.

Ellenborough, L. C. J.: "If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent, and fresh in his recollection, it is as good as if he had written the whole with his own hand. This collation gave him an ample opportunity to ascertain the correctness of the entries, and he may therefore refer to these, on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written."[8]

MAYOR, ETC., OF NEW YORK v. SECOND AVENUE RAILROAD CO. (1886).

102 N. Y. 572.

Action to recover damages for breach of a contract to keep certain parts of the street in repair. Notice had been served upon the defendant that if it did not repair within thirty days the depart-
92 ment of public works would make the necessary repairs, and defendant would be held responsible for the expense. The defendant having failed to comply with the notice, the work was done by the department, and the expense thereof plaintiff claimed to recover herein.

Andrews, J.: "A more serious question is raised by exceptions to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed and the quantity of material used. Wilt was a foreman, in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about ten men employed on the work. Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day, in the morning and afternoon, remaining from a few minutes to half an hour each time, and he testified that while there he checked on

8—*Hayes*, J., in *Lord Talbot* v. *Cusack*, 17 Ir. C. L. 213 (1864): "['To refresh the memory of the witness'], that is a very inaccurate expression; because in nine cases out of ten the witness' memory is not at all refreshed; he looks at it again and again, and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes."

For the foregoing cases, compare the authorities cited in W., §§ 734-754.

the time-book the time of each man, as reported to him by the gang foremen. He also testified that he marked the men's names as he saw them, and that he knew their faces. The gang foremen did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and if any did not work full time, they reported that fact also. Upon this proof, the trial judge admitted the time-book in evidence, against the objection of the defendant. The trial judge also admitted in evidence, under like objection, a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information furnished by the gang foremen, on the occasions of his visiting the work, and that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific quantities so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that when the reports were made, he had personal knowledge of the facts reported. Coughlan also testified in general terms that he reported the items correctly. But on further examination it appeared that his reports to Wilt of the stone delivered at the work, were made upon information derived by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

"1. The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case, was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge, from personal observation, was manifestly incomplete, and the time-book was made up, mainly, at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen, or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing upon his testimony alone, the entries were mere hearsay. But combining the testimony of Wilt and the gang foremen, there was, first, original evidence that laborers were employed, and that their time was correctly

reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and second, evidence by the person who received the reports, that he correctly entered them as reported, in the time-book, in the usual course of his business and duty. . . . We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not personally cognizant of the facts, and from reports made by others. The admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested.

"2. In respect to the admission of the account of material, we think that part of the account based upon the reports of Madden was admissible on the same grounds upon which we have justified the admission of the time-book. Madden, in substance, testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported. The part of the account of materials, the items of which were furnished by Coughlan, was not strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carman, and his reports to Wilt were based upon the reports of the carman to him. The carman was not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and objection

had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Madden, and, we think, the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others."[1]

Sir G. A. LEWIN, *Note to* LAWES v. REED, *2 Lew. Cr. C. 152* (1835): "Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is
93 difficult to understand why any means should be excepted to whereby that object may be attained. Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. . . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?"

HENRY v. LEE (1810).

2 Chitty 124.

At the time of the trial, a material witness said he did not recollect a fact; but having looked at a paper which he himself had not written, he said that he distinctly recollected the circumstances,
94 though he had before said that he did not know whether he should recollect the circumstances after looking at the paper; and *Topping* contended, that this was neither sufficient, nor the best evidence.

ELLENBOROUGH, L. C. J.: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

1—The Hearsay use of such memoranda as regular entries, where one of the persons is deceased or absent, is considered under the Hearsay rule, *post*, No. 311.

HUFF v. BENNETT (1852).

6 N. Y. 337.

Libel, in reporting certain judicial proceedings before the Recorder of New York. On the trial, before OAKLEY, J., after proof of publication, and in reply to testimony on the part of the defendant,
95 as to the correctness of the published reports, the plaintiff called the recorder as a witness, and having placed in his hands a copy of the alleged libellous report of the proceedings before him, asked the following question: "Wherein, as you now remember, is that report incorrect?" The defendant's counsel objected to the question.

JEWETT, J.: "It was insisted, that the rule was, that a witness could only testify to such facts as were within his knowledge and that his recollection of the facts could only be refreshed by examining memoranda, either made by himself, or in his presence. Although the rule is, that a witness, in general, can testify only to such facts as are within his own knowledge and recollection, yet it is well settled that he is permitted to assist his memory by the use of any written instrument; and it is not necessary that such writing should have been made by himself, or that it should be an original writing, providing after inspecting it he can speak to the facts from his own recollection."[2]

REX v. RAMSDEN (1827).

2 C. & P. 603.

Indictment for a conspiracy to sue out a fraudulent commission of bankruptcy against two of the defendants. The petitioning creditor, who was called on the part of the prosecution, stated, that he bought
96 the debt upon which he became petitioning creditor six months ago. In his cross-examination, *F. Pollock,* for the defendant *Ramsden,* put a paper into his hand, which he acknowledged to be of his handwriting, and then asked him if he had not bought the debt nine months before; which he admitted he had. *Scarlett,* A. G., for the prosecution, wished to look at the paper. *F. Pollock:* "I submit my friend has no right to see it, unless he will read it in evidence." TENTERDEN, L. C. J.: "You put the paper into the witness' hands to refresh his memory. It is very usual for the opposite counsel to see it and examine upon it, and I think he has a right to see it." *Scarlett,* A. G., having looked at the paper, asked the witness if he would swear that it was written at the time it bore date. *F. Pollock:* "I submit that this question cannot be asked without the paper being read." Lord TENTERDEN, C. J.: "I think it may. You put the paper into the witness's hand, and I think the other side may ask when it was written, without being bound to read it."[3]

2—For the foregoing cases compare the authorities in W., §§ 758-764.

Topic VI: Testimonial Narration.

"The third element forming an essential part of all testimony is the process of laying before the tribunal the witness' results of his Observation and his Recollection, *i. e.*, the process of Narration
97 or Communication. In this element, as in the other two, there are many opportunities for defects fatal to testimonial trustworthiness. Its office is to make intelligible to the tribunal the knowledge and recollection of the witness, whatever that may amount to, affirmative or negative, useful or trivial. Its prime and essential virtue, then, consists in *accurately reproducing and expressing the actual and sincere Recollection.* When the statement is found plainly or probably lacking in either of these respects, namely, in its correspondence to recollected knowledge or in its intelligibility, then it should be rejected. For the purpose of grouping these various rules, it may be remembered that the simplest form of testimonial statement (from which others may be conceived of as deviations) is an (1) uninterrupted narrative (2) expressed in words (3) uttered orally (4) and intelligible directly by the tribunal. The inquiry therefore concerns the rules which become necessary when there is a variance in one or another of the four respects. That is to say, testimony may be (1) furnished upon systematic *interrogations;* and not as a spontaneous utterance; or (2) it may be non-verbal, *i. e.*, expressed *dramatically,* in conduct or gestures; or (3) it may be furnished in *writing,* not orally; or, finally, (4) it may require *interpretation,* before it becomes intelligible to the tribunal. Various rules will arise according as the variation lies in one or another of these four features."[2]

Joseph Chitty, *Practice of the Law, III, 892* (1835): "The assigned reason in support of the rule [against leading questions] is that a witness usually has a strong feeling in favor of the party who has
98 subpœnaed him, and is disposed to swear anything that he thinks will serve that party, and that a leading question in effect suggests to the witness the answer that he is desired to give and invites misrepresentation. The reason imputes to the counsel an unworthy motive, and to every witness a supposition that he would be guilty of perjury; but perhaps the better and more comprehensive reason is that many witnesses, either from complaisance or indolence, are too much disposed to assent to the proposition of the counsel and answer as he may suggest, instead of reflecting and answering after an exertion of their own memory."

2—Quoted from W., § 766.

ELLENBOROUGH, L. C. J., in *25 Hansard Parl. Deb. 207* (1813), answering criticisms on the procedure of a Commission inquiring into the charges against the Princess of Wales: "Folly, my lords, **99** has said that in examining the witnesses we put leading questions. The accusation is ridiculous; it is almost too absurd to deserve notice. In the first place, admitting the fact, can it be objected to a judge that he put leading questions? Can it be objected to persons in the situation of the Commissioners that they put leading questions? I have always understood, after some little experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favor the party for whom he is adduced. The counsel on the other side, however, may put what questions he pleases, and frame them as best suits his purpose, because then the rule is changed; for there is no danger that the witness will be too complying. But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the party calling him, then again the rule does not prevail, and the most leading interrogatories are allowed.[3] But to say that the judge on the bench may not put what questions and in what form he pleases can only originate in that dullness and stupidity which is the curse of the age."

GAINES, J., in LOTT v. KING, *79 Tex. 292, 299, 15 S. W., 231* (1891). The question put was, "State whether or not you ever sold and conveyed the headright certificate of John B. Bulrese for **100** one league and one labor of land to said Barnes Parker": "It does not properly admit of an answer 'yes' or 'no.' . . . Whether a question in that or a similar form be leading or not depends upon the determination of the inquiry whether it suggests any particular answer; and we think questions in that form which have been held leading are not such as inquire into a single fact, but such as enable the witness to state in two words, such as 'he did' or 'he did not' a series or group of facts. . . . As to the questions now under consideration, we think it would puzzle the astutest lawyer who is uninformed as to the issues in the case to determine from the question alone whether the examiner desired to prove that the witness had or had not transferred the certificate."[4]

3—*Wilson's Trial*, 2 Green (Scotland), 119 (1820). Mr. *Murray:* "I am surely entitled to lead in cross-examination?"; Lord *President:* "No; I never heard that with us"; Mr. *Murray:* "I remember hearing a judge in England, upon that being stated to him, saying, "Good God, what a country!' "

4—On the foregoing quotations, compare the authorities cited in W., §§ 768-779.

PARNELL COMMISSION'S PROCEEDINGS, 19th day, *Times' Rep. pt. 5, p. 221* (1888). The Times having charged the Irish Land League with complicity in crime and outrage, a constable testifying to
101 outrages was cross-examined by the opponents as to his partisan employment by the Times in procuring its evidence. Mr. *Lockwood:* "How long have you been engaged in getting up the case for the Times?" Sir *H. James:* "What I object to is that Mr. Lockwood, without having any foundation for it, should ask the witness 'How long have you been engaged in getting up the case for the Times?'" Mr. *Lockwood:* "I will not argue with my learned friend as to the exact form of the question, but I submit that it is perfectly proper and regular. If the man has not been engaged in getting up the case for the Times he can say so." Sir *H. James:* "I submit that my learned friend has no right to put this question without foundation. Counsel has no right to say 'When did you murder A. B.?' unless there is some foundation for the question. In this same way he has no right to ask 'How long have you been engage in getting up this case?' for it assumes the fact." . . . President HANNEN: "I do not consider that Mr. Lockwood was entitled to put the question in that form and to assume that the witness has been employed by the Times."

LORD KEEPER COVENTRY, in BISHOP OF LINCOLN'S TRIAL (1637), *3 How. St. Tr. 769, 802* (the Bishop being charged with tampering with witnesses): "Now it may be said, said he [the defendant],
102 'May not a man meddle nor question with a witness?' Yes; but with certain limitations, for else, if witnesses be made and corrupted, the jurors and judges both of them may be abused; and if that witnesses may be led and instructed by questions, or the like, it comes to all one as subornation. A solicitor may warn witnesses to come in, he may incite them, and enforce them, and one as well as the other. . . . But a solicitor must not instruct a witness, nor threaten him, nor carry letters to him, to induce him this way or that. Yet he may discourse with him, and ask him what he can say to this or that point, and so he may know whether he be fit to be used in the cause or no; by which means this Court is freed from the labor of asking many idle questions of the witnesses to no end, if they can say nothing to them and so spend good time to no end nor purpose. Yet he may not persuade him or threaten him to say more or less than he of himself was inclined unto and was by his conscience beforehand bound to deliver as truth."

ALLEN v. SEYFRIED (1877).

43 Wis. 414, 418.

Action for the price of lumber sold. COLE, J.: "The motion to suppress the depositions was founded principally on the objection

103 that it appeared that the witnesses had been allowed to take and read the direct and cross interrogatories before they were examined by the commissioners. The witness Becker says, in answer to cross interrogatories: 'I read the direct and cross interrogatories here, to-day, before the examination began.' The witness Glaser says: 'I read the direct and cross interrogatories, here, to-day, and several days ago.' Now, it is said that this shows such a fraudulent or improper execution of the commission as to warrant the court in suppressing the depositions. The practice of allowing a witness to read or to know, previous to examination, what questions will be asked him, is doubtless liable to abuse, and may sometimes almost destroy the value of a cross-examination. A hostile or dishonest witness, knowing in advance what questions were to be asked, would be put upon his guard, and might so prepare his answers as to suppress the truth, conceal his bias, or avoid self-contradiction. This is all very evident. But still it is absolutely necessary, in certain cases where a witness is to be examined in reference to a transaction which was the subject of correspondence, or which involved numerous items or dates, that he should be informed beforehand of the nature and scope of the questions he will be called upon to answer, in order that he may be prepared for the examination; for it is obvious that without some previous preparation to refresh his memory in such cases, his testimony would be nearly or quite valueless. We think, therefore, to lay down a rule that it is sufficient ground for suppressing a deposition, if it appear that the witness was allowed to read and examine the direct and cross interrogatories before he gave his evidence, would be inconvenient and dangerous as a rule of practice."

INGS' TRIAL (1820).

33 How. St. Tr. 957, 999.

Mr. *Adolphus,* cross-examining an alleged accomplice: "I think you told us some things then [Monday, at another trial for the same plot] that did not come to your recollection today?" *A.* "That may be. **104** I will not pretend to say, that the next time I come up here I can communicate everything as I have done to-day." *Q.* "Certainly not; there are people that proverbially ought to have a good memory?" *A* "Yes, certainly." *Q.* "You make your evidence a little longer or shorter, according as the occasion suits?" *A.* "Yes, I mention the circumstances as they come to my recollection." . . . Mr. *Gurney:* "That is observation, and not question." Mr. *Adolphus:* "I am asking him a question." . . . L. C. J. DALLAS: "You should not now observe on the evidence." Mr. *Adolphus:* "This about the digging entrenchments you did not state on Monday?" *A.* "No, I forgot that." *Q.* "The next time there will be a new story?" Mr. *Gurney:* "I must interpose, my lord." L. C. J. DALLAS: "All these observa-

tions are certainly incorrect." Mr. *Adolphus:* "He has said it himself; 'when next I come into the box, I shall recollect other things,' and upon that I put the question, whether he would tell another story the next time he comes." L. C. J. DALLAS: "Ask him the question if you wish it." Mr. *Adolphus:* "Shall you tell us a new story the next time?" *A.* "No. If anything new occurs to my mind when I come to stand here, I will state it."[5]

ARCHER v. RAILROAD CO. (1887).

106 N. Y. 589, 603, 13 N. E. 318.

Action for personal injuries received while on a railroad platform. DANFORTH, J.: "The plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident. The appellant alleges error in its admission. Upon the trial this occurred: The plaintiff, being on the witness stand, was asked to look at the photograph and 'see if that describes fairly the locality?' Before answering he was questioned by defendant's counsel, and said: 'This was not made by me; I don't know from what point it was taken; I don't know to what point, as a focus, this instrument was directed. (Objected to by defendant's counsel; objection overruled, and defendant's counsel excepted.) *A.* Yes, sir.' The proposition now submitted by the appellant to show error is, that 'there was not sufficient proof of the point from, or the time at, which the photograph was taken to entitle it to be submitted to the jury as a picture of the premises as they existed at the time of the accident.' The objection at the trial was a general one and within our decision in the Cowley Case (83 N. Y. 464, 476), unavailing. If a fair representation of the premises, it was admissible as an aid in the investigation, as much so as a map or other diagram, and served in like manner to explain or illustrate and apply testimony. Such drawings are uniformly received and are useful, if not indispensable, to enable courts and juries to comprehend readily the question in dispute as affected by evidence. (People v. Buddensieck, 103 N. Y. 487, 501.) Of course, its value, like the value of other evidence, depends upon its accuracy."[6]

105

5—On the foregoing cases, compare the authorities cited in W., §§ 780-788.

6—*Folger,* C. J., in *Cowley* v. *People,* 83 N. Y. 478 (1881): "A witness who speaks to personal appearance or identity tells in more or less detail the minutia thereof as taken in by his eye. What he says is a description thereof by one mode of signs, by words orally uttered. If his testimony be written instead of spoken and is offered as a deposition, it is a description in another mode of signs, by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury as a description of the person by the witness in another mode of signs?"

Compare the authorities cited in W., §§ 789-797.

ALLEN v. RAND (1824).

5 Conn. 322.

To prove a material fact, the defendants offered in evidence the deposition of Mary Trowbridge; to the admission of which the plaintiffs objected, on the ground, that it was written by the agent
106 of the defendants, or of one of them. The circumstances were these: On Monday, previous to the taking of the deposition, the parties met at the house where Mrs. Trowbridge resided, with the magistrate who ultimately took the deposition. He attempted then to take it; but after writing a few lines, Mrs. Trowbridge became faint and exhausted; and the business was adjourned to the next evening. Afterwards, in the absence of the plaintiffs and their counsel, and of the magistrate, Rand, one of the defendants, requested Cornelia Hall, who was living in the house with Mrs. Trowbridge, to write her deposition, from time to time, as she was able to give it. With this request Miss Hall complied; and, at the time adjourned to, the plaintiff not having attended, the paper thus written by her, was presented to the magistrate, and being read to Mrs. Trowbridge, was signed by her, and sworn to. HOSMER, Ch. J.: "The only question raised in this case, is, whether the deposition of Mrs. Trowbridge was legally rejected. . . . Miss Hall was an agent and attorney, authorized by her principal to do this specific act; for what is an agent but a substitute or deputy, and an attorney but one who is put in the place, stead or turn of another? 3 Black. Com. 25. A general agent cannot be permitted to draw up a deposition; *a fortiori*, is a special agent objectionable, who, in the situation of Miss Hall, must be influenced, in some degree, by the wishes, feelings and interest of her employer. . . . The law will not trust an agent to draw up a deposition for his principal, as by the insertion of a word the meaning of which is not correctly understood, or by the omission of a fact that ought to be inserted, the testimony thus garbled and discolored will be false and deceptive. Nor is there a possible argument in favor of such a proceeding. The deponent may write the deposition, or procure it to be written by a disinterested person, or it may be drawn up by the magistrate who takes it, or the parties may agree on a fit person for this purpose. . . . As the witness ought to be disinterested, so must the evidence be impartial, comprising the whole truth and nothing but the truth; and this can never rationally be expected when a deposition is drawn up by an attorney or agent, or, what is little less exceptionable, by the party himself. Sickness constitutes no reason for the relaxation of this rule, as it produces no actual necessity; and if it did, it would make no difference, as no such exception to the general rule is admissible. It is much preferable that in particular instances the party should even be deprived of testimony than that a principle leading to widespread mischief should

be adopted; as private disadvantage is a less evil than general inconvenience."[7]

SUB-TITLE II:

TESTIMONIAL IMPEACHMENT.

MODES OF IMPEACHMENT.[1]—"First, as preliminary to the whole subject of impeachment, must be considered what persons as witnesses are open to impeachment. In the process of discrediting
107 a witness, the first inference must always be from some defective testimonial quality to the assertion's incorrectness. The different possible testimonial qualities are thus to be passed in review (Topic I),—Moral Character, Mental Capacity (Insanity, Intoxication), Emotional Capacity (Bias, Interest, Corruption), and Experiential Capacity. These discrediting deficiencies become in their turn the object of circumstantial proof,—first (Topic II), such sorts of evidence as are not forbidden to be offered by extrinsic testimony,—circumstances indicating Interest, Bias, and Corruption; following these (Topic III), all such evidence as is more or less liable to the rule excluding extrinsic testimony.—Particular Instances of Conduct to show Character,—the principles here involved having an influence over the whole group; next, similar facts to show Experiential Defects and the like; (Topic IV) Specific Errors of assertion used indefinitely to show some general capacity for mistake or misstatement; (Topic V) Prior Self-Contradictions used indefinitely for a similar purpose; and, finally, (Topic VI) Admissions, *i. e.*, prior self-contradictions of parties."

INTRODUCTORY: PERSONS IMPEACHABLE.

FLETCHER v. STATE (1874).

49 Ind. 124, 130.

Forgery. BUSKIRK, C. J.: "Upon the trial of the cause below, the defendant offered no evidence of his general character, but chose to rest upon the presumption which the law indulged in his favor. He
108 went upon the stand as a witness, and testified in his own behalf. After he had closed his evidence, the State introduced a witness who, in answer to a question propounded to him, testified that he knew the general character of appellant, and that it was bad. . . . The law invests every person accused of crime with a presumption in favor of good character, and the State cannot offer evidence to impeach such character until the accused has put his general character in issue by offering

7—Compare the authorities cited in W., § 803.

1—Quoted from W., § 881.

evidence in support of it. . . . These were familiar principles, well known in the profession prior to the passage of the act of March 10th, 1873, which gave to a defendant in a criminal cause the privilege of testifying in his own behalf. We are required, for the first time, to determine what changes, if any, have been produced in the rules of practice by the passage of said act. Prior to such enactment, the rights of a defendant and the privileges of a witness were separate and distinct; but since its passage, a defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privileges of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness he is entitled to the same rights, and is subject to the same rules, as any other witness. In his character of defendant, he has the same rights, and is entitled to the same protection, as were possessed and enjoyed by defendants before the passage of the act in question. When we are considering the rights of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness; and when his privileges as a witness are called in question, they should be decided without reference to the fact that he is a defendant also."[2]

BULLER, J., *Trials at Nisi Prius, 297* (*ante* 1767): "A party never shall be permitted to produce general evidence to discredit his own wit-
109 ness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying the credit if he spoke against him."

WHITAKER v. SALISBURY (1834).

15 Pick. 545.

PUTNAM, J.: "When a party calls a witness whose general character for truth is bad, he is attempting to obtain his cause by testimony
110 not worthy of credit; it is to some extent an imposition upon the Court and jury. The law will not suppose that a party will do any such thing, but will rather hold the party calling the witness to have adopted and considered him as credible. . . . [But] a party is not obliged to receive as unimpeached truth everything which a witness called by him may swear to. If his witness has been false or mistaken in his testimony, he may prove the truth by others. It would evidently be a rule that would operate with great injustice, that a party calling a witness should be bound by the fact which was sworn to. No one would contend for a rule so inexpedient."

2—Compare the authorities cited in W., §§ 889-892.

CHIEF JUSTICE MAY: "*Some Rules of Evidence*," 11 Amer. Law Rev. 264 (1876): "But does common experience show that, from the given fact that a witness is brought into court by a party, it is to be
111 inferred that he not only knows his character, but also that that character is such that in 'in general' he is worthy of belief? . . . Witnesses are not made to order,—at least, not by honest people. The only witnesses who can properly be called are those who happen to have knowledge of relevant facts; and who these may be is predetermined by the history and course of the events which are to come under examination. . . . The witnesses to the material facts in dispute are such persons as happen to have been cognizant of the facts, and are not such as the parties have selected at their pleasure. In point of fact, it is substantially true that parties call particular persons as witnesses simply because they are obliged to and can call no others. If a lawsuit was a manufacture, and the party bringing it could select his materials—facts and witnesses—, there might be some propriety in holding him responsible for the character of these materials; but, as both are beyond his control, his responsibility for their character is out of the question. . . . [Moreover,] Courts are not established to give that party his case who behaves best in court. If they were, it seems to us that the plaintiff stands quite as well in such a case, on the score of fairness, as the defendant, who lies in wait for the profits of treachery. . . . [It is improper that] an untruthful or incredible or unreliable witness by reason of moral infirmity may not be unmasked by any party in interest. . . What more absurd than to ask a jury to find the truth upon the testimony of a witness notorious for not speaking the truth, all the while concealing from them the fact that he is or may be a false witness? And how can it be of importance to the main purpose of the trial how or by whom the fact that the witness is not to be relied upon is made known?"

WRIGHT v. BECKETT (1834).

1 Moo. & Rob. 414, 418.

Action of trespass *quare claus. freg.* The question between the parties was, whether the plaintiff had the exclusive right to the soil of a piece of marshy land. The plaintiff's counsel having examined
112 four witnesses to prove that the plaintiff and his predecessors had immemorially exercised acts of ownership over it, called a fifth person, of the name of Warrener, with a view to establish the same fact. Warrener, however, on being examined, contradicted the other four witnesses; and the plaintiff's counsel thereupon asked him, whether he had not given a different account of the facts to the plaintiff's attorney two days before? The question was objected to by *Jones* Serjt., for the defendant, on the ground that the obvious tendency of the question put by the plaintiff was to discredit his own witness. Lord *Denman*, C. J. however, over-ruled the objection, and the question was put. The

witness gave an evasive answer to the question.. The plaintiff's counsel, thereupon, called the plaintiff's attorney, and proposed to ask him whether the witness Warrener had not given to him, upon the occasion referred to, an account of the facts different from that now given by him in court? *Jones,* Serjt., for the defendant, again objected: but the Lord Chief Justice allowed the question to be put. The plaintiff's attorney answered it in the affirmative, and added, that he took down in writing the account so before given by Warrener, and that it was read over to Warrener, who said it was quite correct, and the plaintiff's attorney now read that written account to the jury.

The Lord Chief Justice, in summing up the case to the jury, told them, that they were not to look upon the statement given by Warrener to the attorney before the trial, and read at the trial by the attorney, as evidence of facts therein stated; they were only to receive that statement by way of neutralizing the effect of the evidence which Warrener had unexpectedly given in court.

The jury having found a verdict for the plaintiff, *Jones,* Serjt., on the following morning, moved for and obtained a rule, to shew cause why the verdict should not be set aside and a new trial had, upon the ground that the evidence of the plaintiff's attorney had been improperly received. In the course of Hilary vacation, 1834, the learned Judges, differing in opinion on the case, delivered their respective judgments to the following effect:

Lord Denman, C. J.: "The question which has been argued before us, arose in this manner:—Four witnesses, examined on the plaintiff's part, gave evidence which, if believed, established his case; he then called a fifth, whose testimony, if believed, defeated the plaintiff's case, and fully proved that of the defendant. It was then proposed by the plaintiff to shew that this same witness had formerly given a completely different account at another time. The mode of doing this was by producing the statement taken down shortly before the trial, from his own lips, by the plaintiff's attorney. The object of the evidence tendered, was to shew the untruth of what he swore upon the trial: we are now to consider whether I did right in permitting this contradiction to be proved.

"Notwithstanding my respect for the different opinion which is entertained by my learned brother now present, and, as I believe, by others of great weight and authority, I retain that on which I acted at Lancaster. The case was brought by what occurred to this simple point,—to which of the witnesses credit was due. If to the first four, the plaintiff was entitled to the verdict; if to the last, the defendant. On this issue alone the event of the cause depended. The defendant enjoyed the privilege of assailing the credit of those who were opposed to his interest; the plaintiff must have the same right with respect to that witness who unexpectedly turned against him, unless he is debarred by some strict rule of law. I find no such rule, but

many decisions which have proceeded on the opposite principle.

"There is a passage, indeed, upon this subject in Buller's Nisi Prius, to which, as I understand it, I most fully describe (on p. 297): 'A party never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.' But I consider the meaning to be, that no party shall produce a witness whom he knows to be infamous, and whom he has, therefore, the means of discrediting by general evidence. No inference arises, that I may not prove my witness to state an untruth, when he surpries me by doing so, in direct opposition to what he had told me before. In this case the discredit is consequential, and the evidence is not general but extremely particular, and subject to any explanation which the witness may be able to afford. The rule laid down in Buller's Nisi Prius, therefore appears to me inapplicable.

"Two dangerous consequences are, however, apprehended from admitting the former statement of a witness, in contradiction to his testimony on the trial. The most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath, for the mere purpose of contradicting by that statement the truth, which, when sworn as a witness, he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty. But there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made, and then the witness might tender himself to the opposite party, for whom he might be first set up, and afterwards prostrated by his former statement. This far more effectual stratagem could be prevented by no rule of law.

"The other danger is, that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger equally arises from the contradiction of an adverse witness: It is met by the Judge pointing out the distinction to the jury, and warning them not to be misled. It is not so abstruse but that Judge may explain it, and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him who has stated falsehoods, whether sworn or unsworn. . . .

"They say that the reason of the rule, as laid down in Buller's Nisi Prius, extends to the exclusion, not merely of general evidence, but of all evidence which is offered merely for the purpose of discrediting

witness, and which is not *per se* evidence in the cause. But neither do I agree that this larger rule would have followed as a consequence of the reason assigned. For the word 'credit' appears to me manifestly to be employed in the sense of general character; and, thus understood, the rule and the reason go well together, and are perfectly consonant to common sense; 'You shall not prove that man to be infamous whom you endeavored to pass off to the jury as respectable.' But how can this prevent me from showing that he states an untruth on a particular subject by producing the contrary statement previously made by him, which gave me just cause to expect the repetition of it now? If his character is injured, it is not directly but consequentially. But perhaps no injury may arise; there may be a defect of memory; there may be means of perfect explanation. If not,—if the witness professing to be mine has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly invented falsehood, which defeats my just right and throws discredit on all my other witnesses, must I be prevented (from) showing the jury facts like these? . . . Can any reason, then, be assigned why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which (from whatever motive) he had fallen? It is clear that in civil cases the exclusion might produce great injustice, and in criminal cases improper acquittals and fraudulent convictions. . . . The inconvenience of precluding the proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose the truth when brought into Court, and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story."

Bolland, B.: "The rule applicable to this question is, as it seems to me, that which has been relied upon by my brother, Jones; viz., that a party in a cause is not to be permitted to give evidence of a fact, for the purpose of discrediting his own witness, unless such fact would of itself be evidence in the cause; but that where such fact is relevant to the issue, and so *per se* evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness. . . .

"I think that great weight is due to the argument founded on the danger of collusion; it is, indeed, in my mind, the main object to the reception of the evidence. With the exception of the opinion of the two learned Judges in Rex v. Oldroyd, the authorities are uniform in establishing, that a party cannot contradict his own witness but by giving evidence of facts bearing upon the issue. It was open to the plaintiff to do so in the present case, but he was not at liberty to prove that his witness, Warrener, had previously made a different statement to

the attorney, because that was a matter not relevant to the issue in the cause; nor was the statement entitled to such weight as a contradiction, as to have the power of neutralizing the evidence (one of the reasons urged for its admission), it not having been given upon oath. It furnished a sufficient apology for putting Warrener in the brief, and calling him, but could go no farther. For these reasons I am of opinion, the evidence of the witness, Mallady, was improperly received at the trial; but, as the Court is divided, there cannot, of course, be any rule."

BULLARD v. PEARSALL (1873.)

53 N. Y. 231.

A witness was called by the plaintiff to prove that a certain conversation took place between the witness and the defendant previous to the 17th of July, 1868, but to the surprise of the plaintiff the wit-
113 ness testified that the conversation took place on the twenty-fourth of July. The date was material. The plaintiff was permitted to ask the witness whether he had not upon a prior examination sworn that the occasion upon which the conversation took place occurred in June. The witness answered that on the first examination referred to he supposed that the occurrence was prior to the seventeenth of July, but on subsequently consulting a memorandum he had found himself mistaken and that it was on the twenty-fourth of July. He further testified on his second examination to a reply made by the defendant, during the conversation in question, to an offer then made by the witness, in which reply the defendant mentioned the transaction out of which this action arose, which occurred on the seventeenth of July. The plaintiff's counsel then asked the witness whether he had not previously said in the presence of the plaintiff's counsel and others that he did not know that the defendant made much reply to that offer. This question was objected to, and the objection was sustained.

Rapallo, J.: "The question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in con-

tradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. . . . Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible. As a matter of course, such previous unsworn statements are not evidence. . . . [In the present case] the only effect which could have been claimed from a favorable answer would have been to discredit the witness on the ground that he was testifying to matters of which he had previously disclaimed any knowledge, and that his latter evidence was fabricated. The plaintiff was allowed to ask whether at the time inquired of he recollected the reply to which he testified on his last examination, and this was, we think, as far as the plaintiff was entitled to go. We are, therefore, of opinion that no error was committed in sustaining the objection."

Statutes. *England:* 1854, St. 17 & 18 Vict. c. 125 § 22: "[1] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; [2] but he may, in case the
114 witness shall in the opinion of the judge prove adverse, [3] contradict him by other evidence, [4] or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony."

California: C. C. P. 1872 § 2049: "The party producing a witness . . . may also show that he has made at other times statements inconsistent with his present testimony."

Topic I: Moral Character.

Lord Chancellor Macclesfield's Trial, *16 How. St. Tr. 1239* (1725); *Common Serjeant:* "We desire that Mr. Price may give your Lordships an account of what he knows of the character of Mr.
115 Cothingham and how long he hath known him." Mr. *Price:* "My lords, I have known him upwards of twenty years; I never knew anybody say anything amiss of him. . . . I know no man in his place behaved himself better than he hath done." *Common Serjeant:* "We desire to ask not only to what Mr. Price's opinion is, but to what is the opinion of others, as to his general character." Mr. *Price:* "I believe,

if you ask his character of an hundred people, ninety of them will give him rather a greater character."

REX v. WATSON (1817).

32 How. St. Tr. 1, 495, 2 Stark. 154.

ABBOTT, J.: "The usual question put for the purpose of discrediting the testimony of a witness is, Would you believe that witness upon his oath?" BAYLEY, J.: "The witnesses may state that he is not a
116 man to be believed upon his oath."

James Lawson sworn.—Examined by Mr. *Wetherell.* "Do you know a person of the name of John Heyward, alleged to abide at No. 6, Stangate-wall, Lambeth, in the county of Surrey, stock-broker?" "I know the person you allude to." "How many years have you known him?" "Upwards of ten years; in fact, I have known him from a boy." "Would you believe him upon his oath; or in your judgment, is he a person to be believed upon his oath?" "I believe not; I would not believe him upon his oath." "You would not; and you believe he is not a person to be believed upon his oath?" "I do."

STATE v. RANDOLPH (1856).

24 Conn. 363, 367.

ELLSWORTH, J.: "Another subject has been discussed, respecting which there is a diversity in the practice of the courts of justice. We mean, the proper question to be put to a witness, who is called
117 to impeach the character of another witness. One thing, however, is obvious, that in all courts, whatever be the form or extent of the enquiry, the thing aimed at is one and the same, the character of the witness for truth; and where the question assumes a more general form, it is allowed only for its supposed bearing on the truthfulness, or the reverse of the witness; his character for truth is all that is pertinent and material to the point, and all that the jury should enquire after; other facts, other offences, tried or untried, not being *crimen falsi,* have no bearing upon the enquiry whatever, and should not be brought into the case. In the English courts, the enquiry is in this form: 'Are you acquainted with the character of the witness?—what is his general character?—would you believe him under oath?' As a general rule of practice this has been found satisfactory in that country, and elsewhere, and doubtless would be so here, if our courts had not, at an early period, adopted a different rule, which has proved to be satisfactory and sufficient, and which we are not willing, at this late day, to abandon for another, certainly not better, if as good. . . . The more general enquiry in England is adopted to learn the witness' char-

acter for truth; ours is adopted for the same purpose, but is more simple and direct. In our courts the enquiry put is, 'Is the character for truth on a par with that of mankind in general?' The English rule has this advantage, that it brings the general character of the witness before the triers, which is important where the witness has not acquired a specific character on the subject of truth; and hence it is urged with some force that in such a case the general enquiry is essential, for no other will reach the case. . . . General bad character is undoubtedly a serious blemish in a witness, and might justly detract from the weight of his testimony; and so might the character of a witness for the specific blemish of licentiousness, especially in the female sex. But where shall we stop the enquiries? Witnesses, who can have no opportunity to exculpate themselves or give explanations of their acts, ought not to be exposed to unjust obloquy, nor should the trial be complicated and prolonged by trying collateral issues. If it were wise and just to enquire for one's reputation for virtue, why not for gambling, horse-racing, drunkenness, sabbath-breaking, etc.?"[1]

Topic II: Evidence to Prove Bias, Interest, Etc.

ELLSWORTH v. POTTER (1869).

41 Vt. 689.

Trespass *q. c. f.*, by breaking into the plaintiff's premises and making a disturbance. On trial the defendant introduced Dwight H. Rudd as a witness in their behalf, who testified to material facts tend-
118 ing to prove that some of the defendants were not at the plaintiff's house on the occasion referred to. On cross examination he was inquired of by the plaintiff's counsel if he had had any difficulty with the plaintiff, and testified that he had not. The plaintiff in her rebutting testimony offered to show the state of feeling or feelings of hostility existing toward her on the part of the witness—that there had been a quarrel between them, and that she turned the witness out of her house,—which was objected to by the defendants, but admitted by the court, for that purpose only; to which decision the defendants excepted.

Steele, J.: "Dwight Rudd, a witness for the defendants, testified that he had no difficulty with the plaintiff. The plaintiff was at liberty not only to contradict this in general terms, but also and under the direction of the Court to state enough to indicate the extent

1—Compare the authorities cited in W., §§ 922-924.

The witness' *personal opinion* of character is considered under the Opinion rule, *post*, Nos. 424-426.

The use of *reputation* to evidence character is considered under the Reputation exception to the Hearsay rule, *post*, Nos. 319-322.

or degree of the difficulty and consequent ill-feeling. . . . This testimony was not intended or calculated to show which party was in fault, but only the degree of estrangement between them. It is impracticable by any general rule to fix a precise limit which should govern the admission of such evidence, and necessarily it must be left to a considerable extent to the discretion of the *nisi prius* Court."[2]

TRINITY COUNTY LUMBER CO. v. DENHAM (1895).

88 Tex. 203, 30 S. W. 856.

BROWN, J.: "If it be admitted, however, that Borden had parted with his interest in the suit before he first gave his testimony, still we think it was permissible to show that he had been interested in the case, the extended character of that interest, and the time and circumstances under which he parted with his interest, all of which would go to his credibility. At common law a witness was rendered incompetent to testify by reason of his interest in the result of the suit. A release would restore his competency, but it is by no means certain that it would remove from his mind the bias, if any, that such interest would occasion; and every fact or circumstance which would tend to show to the jury his relation to the case or the parties was admissible, in order that they might determine what weight they ought to give to his evidence."

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TOPIC III: CONDUCT, AS EVIDENCE OF CHARACTER.

ROOKWOOD'S TRIAL (1696).

13 How. St. Tr. 209.

Sir B. *Shower* (for the defendant): "We will call some other witnesses to Mr. Porter's [the chief witness for the Crown] reputation and behavior; we think they will prove things as bad as an attainder." . . . L. C. J. HOLT: "You must tell us what you call them to." Sir B. *Shower:* "Why, then, my lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if buggery, if any of these irregularities will take off the credit of a man, I have instructions in my brief of evidence of crimes of this nature and to this purpose against Mr. Porter; and we hope that by law a prisoner standing for his life is at liberty to give an account of the actions and behavior of the witnesses against him. I know the objection that Mr. Attorney [-General] makes,—that a witness does not come prepared to vindicate and give an account of every action of his life, and it is not commonly allowed to give evidence of particular actions. But if those actions be repeated, and a man lives in the practice of them, and this practice is

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2—Compare the citations in W., §§ 951, 952.

continued for several years, and this be made out by evidence, we hope that no jury that have any conscience will upon their oaths give any credit to the evidence of a person against whom such a testimony is given." . . . Mr. Attorney-General *Trevor:* "My lord, they themselves know that this sort of evidence never was admitted in any case, nor can be, for it must tend to the overthrow of all justice and legal proceedings; for, instead of trying the prisoner at the bar, they would try Mr. Porter. It has been always denied, where it comes to a particular crime that a man may be prosecuted for; and this, it seems, is not one crime or two, but so many and so long continued, as they say, and so often practised, that here are the whole actions of a man's life to be ripped up; which they can never show any precedent when it was permitted, because a man has no opportunity to defend himself. Any man in the world may by this means be wounded in his reputation, and crimes laid to his charge that he never thought of, and he can have no opportunity of giving an answer to it because he never imagined there would be any such objection. It is killing a man in his good name by a side-wound, against which he has no protection or defence. My lord, this must tend to the preventing all manner of justice; it is against all common sense or reason; and it never was offered at by any lawyer before, as I believe,—at least, never so openly; and therefore I wonder that these gentlemen should do it, who acknowledge—at least one of them did—that as often as it has been now offered it has been overruled; and I know not for what end it is offered but to make a noise in the Court." . . . Sir B. *Shower:* "My lord, . . . we conceive, with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common, lewd, disorderly fellow, one that frequently swears to falsehood for his life. We know it is a common rule in point of evidence that against a witness you shall only give an account of his character, at large, of his general conversation. But that general conversation arises from particular actions; and if the witnesses give you an account of such disorderly actions repeated, we hope that will go to his discredit; which is that we are now laboring for." L. C. J. Holt: "Look ye, you may bring witnesses to give an account of the general tenor of his conversation; but you do not think sure that we will try now at this time whether he be guilty of robbery or buggery."

OXIER v. UNITED STATES (1896).

1 Ind. T. 85, 38 S. W. 331.

Lewis, J.: "There is a clear distinction recognized by the authorities cited above, between impeaching a witness by proof of facts which discredit him, made independently of his examination, and by proof
121 of the same facts elicited in his cross-examination. Proof of particular facts tending to impair his credibility, made independently of his

own examination, is excluded for the reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove. But these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies."

PEOPLE v. JACKSON (1857).

3 Park. Cr. 396.

STRONG, J.: "[Conduct derogatory to the witness' character] may be proved provided it does not raise or tender a collateral issue. Thus, it may be proved that a proposed witness has been convicted of an
122 infamous offence, by producing the record. That raises no collateral issue of fact, as the record is conclusive, and there can be no further inquiry. But it is not competent to prove that the witness has in fact committed a crime, if he has not been convicted, although the actual perpetration of the crime is what renders him unworthy of belief. That, if permitted, might raise a collateral issue for trial."

STATE v. GREENBURG (1898).

59 Kan. 404, 53 Pac. 61.

JOHNSTON, J.: "Jacob Greenburg was convicted in the district court of Bourbon county for feloniously receiving stolen goods, knowing them to have been stolen. . . . Meyer Berkson, who testified in behalf
123 of the defendant, was cross-examined as to his past life and conduct, with a view of impairing his credit; and, after stating that he had been under arrest, he was asked what he had been arrested for, when an objection was made that the record was the best evidence, and, further, that it was only a civil arrest. . . . Granting that the objections were sufficient to raise the question, the testimony was permissible, under the rule which has long been recognized in this state. For the purpose of judging the character and credit of a witness, he may be cross-examined as to specific facts tending to disgrace or degrade him, although collateral to the main issue, and touching on matters of record. Such questions are allowed when there is reason to believe that it will tend to the ends of justice, and are asked for the purpose of honestly discrediting the witness. It is the duty of the court to see that the rule is not abused, or the cross-examination unreasonably extended."

DOSTER, C. J. (dissenting): "An arrest is nothing more than an accusation of crime or other act of turpitude. That it is made in the form of a forcible restraint of the person, based upon a sworn complaint, makes it, for purposes of disgrace or discredit, no stronger evi-

dence of the truth of the accusation than an oral statement by the accuser would be. No one would contend that a witness could be asked whether another person had not orally accused him of crime. Why should the rule be different when the accusation has been written out and sworn to? It is but an accusation in each case. Why should it be different when the sworn accusation is followed by an arrest? The arrest is but a reassertion of the accusation in another form. It is quite different, however, when the accusation has been proved. When the proceeding has passed from accusation to conviction, evidence of the turpitude of the witness exists,—not what somebody said of him, but what the judicial tribunals sitting in judgment upon the accusation have found against him."

WATSON'S TRIAL (1817).

32 How. St. Tr. 295, 297.

That his friends were felons; that he was a bigamist; that he had been employed in a house of ill-fame, etc., were allowed to be the subjects of questioning; then limits were drawn; Mr. *Wetherell,* cross-
124 examining: "Did you [being married] ever make proposals of marriage to any person within these three or four years?" L. C. J. Ellenborough: "How can that question be asked? I will put it to your own feelings, your own good sense." Mr. *Wetherell:* "I will not carry it further." Another witness admitted one Dickens to have been his companion. Mr. *Wetherell,* cross-examining: "Do you not know that it is the same Dickens that was discharged at the Old Bailey as the associate of a man of the name of Vaughan in hatching up those conspiracies?" *A.* "I do not know." L. C. J. Ellenborough: How can we know this?" Mr. *Wetherell:* "My object is, to show that this man's associates are all felons or the most base of mankind." L. C. J. Ellenborough: "This is really very irregular. . . . It is really corrupting all justice when such prejudices are introduced. The Court are of opinion that the question should not be put."

R. v. CASTRO, *alias* TICHBORNE (1873).

32d day, *Kenealy's ed., I, 396, Report of the Charge, II, 720, 722.*

Lord B., who had testified to the tattoo-marks on Roger Tichborne, was cross-examined: Dr. *Kenealy,* for defendant: "Did you play a practical joke [on Captain H.]?" . . . L. C. J. Cockburn: "It
125 *may* be a practical joke of such a nature that the jury would disbelieve the evidence on his oath, on its being made known to them. We must leave that to the discretion of Dr. Kenealy." . . . Dr. *Kenealy:* "It was not a practical joke. Did you take away his wife." Lord *B.:* "I cannot answer that question." . . . Dr. *Kenealy:* "Did you seduce

his wife and make her elope from her husband? . . . I am sorry to have to ask my lord to tell you you must answer it." L. C. J. COCKBURN: "I certainly shall not." Dr. *Kenealy:* "Indeed you must, my lord! It goes to the witness' credit. I must have it answered, my lord." . . . L. C. J. COCKBURN: "I am afraid, if the question is pressed, you [the witness] must answer it. It is one of the consequences of being brought into a court of justice as a witness that whatever he has done may be brought up against him." Upon charging the jury, L. C. J. COCKBURN adverted to this examination as follows: "Lord B. has committed a wofully sad sin; . . . another man's wife left her husband and joined him, and they have lived together; . . . [Counsel] asks you deliberately to come to the conclusion that because of this offence Lord B. is not to be believed upon his oath,—nay, more, that you must assume him to be perjured. Is that, do you think, a view that you can properly adopt? Is it because a man has committed a breach of morality, however flagrant, that those to whom his testimony may be important in a court of justice are to be deprived of it? . . . There are crimes and offences which savor so much of falsehood and fraud that they do go legitimately to the credit of witnesses. There are offences of a different character, and grievous offences if you will, but which do not touch that particular part of a man's moral organization—if I may use the phrase—which involves truth; and there is an essential distinction between this species of fault and those things which go to the very root of honesty, integrity, and truth, and so do unfortunately disentitle witnesses to belief."[1]

THIRD GREAT WESTERN TURNPIKE CO. v. LOOMIS (1865).

32 N. Y. 127, 132.

The trial Court had excluded, as immaterial to the main issue, questions attacking the witness' character, no privilege having been claimed; the question of law was whether this could be done "in the sound discretion" of that Court; on intermediate appeal the answer was

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1—*Sir James Stephen,* History of the Criminal Law, I, 433 (1883): "The most difficult point as to cross-examination is the question how far a witness may be cross-examined to his credit by being asked about transactions irrelevant to the matter at issue, except so far as they tend to show that the witness is not to be believed upon his oath. No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesses from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the latitude which at present exists upon the subject, without doing cruel injustice. I have frequently known cases in which evidence of decisive importance was procured by asking people of apparent respectability questions which, when first put, appeared to be offensive and insulting in the highest degree. I remember a case in which a solicitor's clerk was indicted for embezzlement. His defence was that his employer had brought a false charge against him to conceal (I think) forgery committed by himself. The employer seemed so respectable and the prisoner so discreditable that the prisoner's counsel returned his brief rather than ask the questions suggested by his client. The prisoner thereupon asked the questions himself, and in a very few minutes satisfied every person in court that what he had suggested was true."

negative, but the trial Court's ruling was on further appeal sustained. PORTER, J.: "If the judgment of the Court below be upheld by the sanction of this tribunal, it will embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no cencern, to irresponsible accusation and inquisition in respect to every transaction of his life affecting his honor as a man or his character as a citizen. It has heretofore been understood that the range of irrelevant inquiry for the purpose of degrading a witness was subject to the control of the presiding judge, who was bound to permit such inquiry when it seemed to him in the exercise of a sound discretion that it would promote the ends of justice, and to exclude it when it seemed unjust to the witness and uncalled for by the circumstances of the case. The judgment now under review was rendered on the assumption that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege or to self-vindication from unworthy imputations wholly foreign to the issue on which he is called to testify. The practical effect of such a rule would be to make every witness dependent on the forbearance of adverse counsel for that protection from personal indignity which has been hitherto secured from our courts, unless the circumstances of the particular case made collateral inquiries inappropriate. This rule . . . would perhaps operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of personal responsibility. . . . The practice which has heretofore prevailed in this respect has been satisfactory to the community, the bench, and the bar. Questions of this nature can be determined nowhere more safely or more justly than in the tribunal before which the examination is conducted. Justice to the witness demands that the Court to which he appeals for present protection shall have the power to shield him from indignity, unless the circumstances are such that he cannot fairly invoke that protection. . . . [The opposite view] ignores the indignity of a degrading imputation when there is nothing in the circumstances of the case to justify it. It ignores, too, the humiliation of public arraignment by an irresponsible accuser, misled by an angry client, and shielded by professional privilege. Few men of character or women of honor could suppress, even on the witness-stand, the spirit of just resentment which such an examination, on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled often leads to injurious misconstruction. A question which it is alike degrading to answer or to decline to answer should never be put, unless in the judgment of the Court it is likely to promote the ends of justice. A rule which would license indiscriminate assaults on private character, under the forms of law,

would contribute little to the development of truth and still less to the furtherance of justice. . . . Unless there be a plain abuse of discretion, decisions of this nature are not subject to review on appeal."[2]

Topics IV, V: Error, as Shown by Contradiction or Self-Contradiction.

WHITEBREAD'S TRIAL (1679).

7 How. St. Tr. 311, 374.

The defendant offered to prove that the principal crown witness, Oates, had made a false statement as to his companions, in his testimony at a prior trial for the Popish Plot. L. C. J. North: "That is
127 nothing to the purpose. If you can contradict him in anything that hath been sworn here, do." *Defendant:* "If we can prove him a perjured man at any time, we do our business." L. C. J. North: "How can we prove one cause in another? . . . Can he come prepared to make good everything that he hath said in his life?" *Another defendant:* "All that I say is this, If he be not honest, he can be witness in no case." L. C. J. North: "But how will you prove that? Come on, I will teach you a little logic. If you will come to contradict a witness, you ought to do it in a matter which is the present debate here; for if you would convict him of anything that he said in Ireland's trial, we must try Ireland's cause over again."

EARL OF CASTLEMAINE'S TRIAL (1680).

7 How. St. Tr. 1067, 1081, 1101.

Treason; the chief witness for the prosecution, Titus Oates, was cross-examined as to having said things about the accused's divorce, and witnesses were then called to contradict his answers. *Attorney-*
128 *General:* "If he may ask questions about such foreign matters as this, no man can justify himself; . . . any man may be catched thus." *Defendant:* "How can a man be catched in the truth?" L. C. J. Scroggs: "We are not to hearken to it. The reason is this, first: You must have him perjured, and we are not now to try whether that thing sworn in another place be true or false; because that is the way to accuse whom you please, and that may make a man a liar that cannot imagine this will be put to him; and so no man's testimony that comes to be a witness shall leave himself safe."[3]

2—Compare the authorities cited in W., §§ 979-987.

The witness' *privilege not to answer* questions involving *moral disgrace* is considered *post*, Nos. 456, 457; and his privilege not to answer *criminating* questions is considered *post*, Nos. 492, 493.

3—*Anon.*, Green Bag, 1898, X, 53: "My

BLAKEY'S HEIRS v. BLAKEY'S EXECUTRIX (1859).

33 Ala. 611, 613, 619.

Probate of a will. The contestants introduced evidence conducing to show that the will was procured by the exercise of undue influence over the testator by the proponent; and for this purpose they
129 adduced proof of the testator's declarations, both before and after the execution, to the effect that he did not wish to make such a will, but was induced to make it by his wife's importunities, "and for the sake of peace in the family." One Stanley, a witness for the contestants, who testified to these declarations of the testator, further stated, "that Dr. Gradick attended him [testator] in his sickness, and that Dr. Gradick then lived in Centreville in said county;" also, "that he [witness] had known the testator for about twenty years, lived within a mile of his house, and had always been very friendly and intimate with him, until three or four years before his death, when a coolness sprang up between them on account of a school." The proponent, in rebuttal of the evidence adduced by the contestants, introduced a witness who testified, "that he [witness] came to Centreville in March, 1853, and that Dr. Gradick did not reside there during any portion of the balance of that year;" and another witness who testified to declarations of the witness Stanley, made fifteen years before the trial, to the effect that unfriendly relations then existed between him and the testator. The contestants objected to the competency of the testimony of each of these witnesses, and reserved exceptions to the rulings of the court in admitting it.

R. W. Walker, J. (holding the ruling to be erroneous): "In Dozier v Joyce[4] it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters for the mere purpose of contradicting the witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions; and that, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule was founded, but it is not the only or even the chief one. The principal reasons of this rule are, undoubtedly, that but for its enforcement the issues in a cause would be

poor old confessor, Father Grady," said O'Connell, "who resided with my uncle when I was a boy, was tried in Tralee on the charge of being a Papish priest, but the judge defeated Grady's prosecutors. There was a flippant scoundrel who came forward to depose to Father Grady's having said mass. 'Pray, sir,' said the judge, 'how do you know he said mass?' 'Because I heard him say it, my Lord.' 'Did he say it in Latin?' asked the judge. 'Yes, my Lord.' 'Then you understand Latin?' 'A little.' 'What words did you hear him say?' 'Ave Maria.' 'That is the Lord's Prayer, is it not?' asked the judge. 'Yes, my Lord,' was the fellow's answer. 'Here is a pretty witness to convict the prisoner,' cried the judge. 'He swears Ave Maria is Latin for the Lord's Prayer.' The judge charged the jury for the prisoner, so my poor old friend Father Grady was acquitted."

4—8 Porter 303.

multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable. An additional reason is found in the fact that, the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in responce to questions calling for it."[5]

BERKELEY PEERAGE TRIAL (1811).

Sherwood's Abstract, 189, 192, 273.

The issue was whether Lord and Lady Berkeley were married before their eldest son was born, and this again turned mainly upon the genu-
ineness or forgery of an entry in the marriage register made in
130 the name of Hupsman, the parish vicar; Lady Berkeley claimed its genuineness; Nicholas Hicks, an attorney, was offered to prove this, and swore convincingly, as being well acquainted with the writing; he was asked at the beginning of his cross-examination: "Have you been conversing with anybody lately as to this handwriting?" "I have not;" the time of the trial being May. "You have not been at Spring Gardens, [Lady Berkeley's residence], lately, have you?" "I have not; not to converse with anybody on the subject." "Have you been there?" "I have been there several times." "Whom did you go to there?" "I saw Lady Berkeley." "Do you mean to say you have not talked with anybody since you came to London as to the manner in which Hupsman wrote?" "I have not." After a long series of questions on other matters, the cross-examiner finally returned and asked how he came to be a witness, when he said that he had told Lady Berkeley that he could identify the register entry. "When?" "I think in the month of April." "It was in Spring Gardens you went to Lady Berkeley?" "Yes." "And you there told her you could swear to Hupsman's handwriting?" "Yes." "And that was what passed between you?" "Yes." Whereupon his first answers above were read; and he was later committed to Newgate for contempt of the House.

ATTORNEY-GENERAL v. HITCHCOCK (1847).

1 Exch. 91.

Information at the suit of the Attorney-General, which charged the defendant, a maltster, with having used a certain cistern for making
malt without having previously entered it, as required by statute.
131 At the trial, before Pollock, C. B., a witness of the name of

5—Compare the authorities cited in W., §§ 1003-1007.

Spooner, who deposed to the fact of the cistern having been used by the defendant, was asked, on cross-examination by the defendant's counsel, whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used. Spooner denied having said so, and thereupon the defendant's counsel proposed to ask another witness of the name of Cook, whether Spooner had not said so. The Attorney-General objected to this question, and the Lord Chief Baron, being of opinion that the question was irrelevant to the issue, and that it also tended to raise a collateral issue, held the objection good, and ruled that it could not be put. This ruling was sustained.

POLLOCK, C. B.: "My view has always been that the test whether the matter is collateral or not is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him. . . . I think the expression 'as to any matters connected with the subject of inquiry' is far too vague and loose to be the foundation of any judicial decision. And I may say I am not all prepared to adopt the proposition in those general terms, that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness' testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of the inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected toward the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he said,—not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness or his connection with either of the parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue."

ALDERSON, B.: "The question is this, Can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue. . . . The witness may also be asked as to his state of equal mind or impartiality between the two contending parties,— questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality; [and these answers may be contradicted]. . . . Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person; the circumstance of a witness having offered or accepted a bribe shows that he is not equal and impartial. . . . But with these exceptions I am not aware that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral. . . . Perhaps it ought to be received, but for the inconvenience that would arise from the witness being called upon to answer to particular acts of his life, which he might have been able to explain if he had had reasonable notice to do so, and to have shown that all the acts of his life had been perfectly correct and pure, although other witnesses were called to prove the contrary. The reason why a party is obliged to take the answer of a witness is, that if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues."[6]

THE QUEEN'S CASE (1820).

2 B. & B. 313.

ABBOTT, C. J.: "If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which in our opinion is the most convenient course. . . . [If the witness denies the utterance or claims the privilege of silence], the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity

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6—Compare the authorities cited in W., §§ 1020-1022.

of answering and of offering such explanatory or exculpatory matter as I have before alluded to; . . . not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost, for a witness who has been examined and has no reason to suppose that his further attendance is requisite often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done, . . . and one of the great objects of the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."[7]

DOWNER v. DANA (1847).

19 Vt. 345.

Debt on a bail bond; the plaintiff had introduced the deposition of one Rutter. The defendants, for the purpose of impeaching the witness Rutter, offered to prove declarations made by him pre-
133 vious to the giving of the deposition used in the case by the plaintiffs, but in reference to which no preliminary inquiry had been made of him. To this the plaintiffs objected; but the evidence was admitted by the court. DAVIS, J.: "Were the question *res integra,* I confess I could see no advantages to the cause of truth and justice, from the adoption of this rule of evidence, which are not equally well secured by the old practice of allowing the party whose witness has in that way been attacked to recall him, if he chose, for the purpose of contradicting or explaining the conduct or declarations imputed to him. Indeed, I have seen no objections of consequence to that course, except that it may sometimes happen that the witness may have departed from court supposing his attendance no longer necessary. Such an objection practically is entitled to very little weight, as it would be provided against by requiring, as is in fact generally done for other reasons, witnesses to remain in court until the testimony is finished. On the other hand, this rule would be productive of intolerable mischiefs, were it not mitigated by the somewhat awkward and inconvenient expedient of suspending the regular course of testimony, for the purpose of recalling the witness proposed to be impeached and laying a foundation for the impeaching testimony by interrogating him whether he did or said the things proposed to be proved. Besides, the privilege of doing this will be lost in all those cases where the witness has left court and cannot be found; the opposite party has every inducement to cut off this opportunity by immediately discharging all such as he may have reason to suspect are liable to be impugned. In addition to this, the avowed attempt to pro-

7—Compare the authorities cited in W., §§ 1025-1029.

duce self-impeachment, made of course in a tone and manner evincing distrust of the general narrative, too often both surprises and disconcerts a modest witness. He answers hastily and confusedly, as is natural from having such a collateral matter hastily spring upon him. Every one conversant with judicial proceedings must have often observed with pain an apparent contradiction produced in this way, when he is satisfied none would have existed under a different mode of proceeding. . . . To my mind these considerations present very formidable objections to the practice first authoritatively developed on the trial of the Queen in the House of Lords. . . . [But, assuming the rule to be in general a part of the law, its enforcement in the particular case now before the Court] would impose on a party wishing the privilege of impeachment the necessity of attending, in person or by counsel, at the taking of every deposition to be used against him, within or without the State, which on any other account he might not be disposed to do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to until actually given; the notice of the taking may be barely sufficient to enable him to reach the place perhaps hundreds of miles distant, in season to be present. It would be idle under such circumstances to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony and cannot be called upon to contradict or explain it. This may be an evil, but it is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions unless under regulations which would reduce the right to a nullity."[8]

Topic VI: Admissions.

STATE v. WILLIS (1898).

71 Conn. 293, 41 Atl. 820.

Hamersley, J.: "Admissions are not admitted as testimony of the declarant in respect to any facts in issue. . . . They are admitted because conduct of a party to the proceeding, in respect to the matter in
134 dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue."[9]

8—Compare the authorities cited in W., §§ 1030-1034.

9—*Truby* v. *Seybert*, 12 Pa. St. 101 (1849): *Bell*, J.: "A man's acts, conduct, and declarations wherever made, provided they be voluntary, are admissible against him, as it is fair to presume they correspond with the truth; and it is his fault if they do not."

HEANE v. ROGERS (1829).

9 B. & C. 577, 586.

BAYLEY, J., referring to an admission of the title of an assignee in bankruptcy: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are
135 evidence, and strong evidence, against him. But we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

CORSER v. PAUL (1860).

31 N. H. 24, 31.

BELL, C. J.: "There is a class of admissions which may be either express or implied from silence, or acquiescence, which are conclusive. Such are admissions which have been acted upon, or those which
136 have been made to influence the conduct of others, or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith. As if, for example, in the present case, the defendant had stood by and seen this note offered to the bank for discount; and, being aware of what was doing, had been silent; or if, before the discount he had been spoken to by any of the officers of the bank in relation to the note, and, being aware of the facts, had forborne to deny the signature—by these tacit admissions he would be forever concluded to deny the note to be his, in case the bank discounted it. This is but an application of the same principle that is applied in the case of deeds of real estate, that he who stands by, at the sale of his property by another person, without objecting, will be precluded from contesting the purchaser's title."

COLLINS v. MACK (1877).

31 Ark. 684.

Breach of promise of marriage. The plaintiff had been delivered of a child, of which the defendant was the father. Verdict for the plaintiff. ENGLISH, C. J.: "Appellant called as a witness Dr. Joshua
137 Henly, who testified that he was a practicing physician, and was called to attend appellee in her confinement at the time she was delivered of the child spoken of by her in her testimony. Appellant offered to prove by this witness that during said visit and attendance, and about six hours after she was delivered of her child, appellee told witness that

she and appellant never had been engaged, and that he never had promised to marry her. Upon the objection of appellee, the Court excluded this evidence, but upon what ground, does not appear in the transcript. Not, surely, on the ground that the admission was a confidential communication to the witness, necessary to enable him to prescribe for appellee as a physician, or to do any act for her as a surgeon, (Gantt's Digest, sec. 2485,) for her statement to him was not of that character. Nor do we think that the admission could properly have been excluded on the ground that appellee had not, while on the stand as a witness, been asked if she had made such admission. She sustained two relations to the suit: First, as plaintiff; second, as a witness in her own behalf. By becoming a witness, she did not lose her character as plaintiff. The acts and declarations of a party to a suit, when they afford any presumption against him, may be proven by the opposing party. Appellee has stated, on her examination, that appellant had promised to marry her. Had she been a witness in the cause only, and not a party, appellant could not have discredited her, by proving that she had made a contrary statement on some former occasion, without first interrogating her as to such former statement. By making herself a witness in her own behalf, appellee could not cut off, or impair, the full right of the appellant to prove her admissions or declarations as a party. Had the proposed evidence of her admission been admitted, she could have been recalled and examined by her counsel in regard to it."[9]

FRANKLIN BANK v. PENNSYLVANIA D. & M. S. N. Co. (1839).
11 G. & J. 28, 33.

In an action for the loss of a package sent by the plaintiff through the defendant, the cashier, Mitchell, of the bank to which the package was consigned testified: that he was absent from Philadelphia
138 from about the 10th until the 27th of November, 1834; that on his return he found two letters at the Mechanics' Bank, addressed to him from the cashier of the plaintiffs; the first of the 17th of November, 1834, advising him of the forwarding of the package by the steam boat line of the defendant, which had been received at the bank, and opened in his absence, which it was the duty of the president to do; and the second of the 21st of the same month, requesting him to make inquiry at the office of the steam boat line, by which the package had been forwarded; that within a day or two after his return, he applied at the office, to Davidson the agent of the defendants, for the package, and thinks he showed him the letter from the cashier of the plaintiffs of the 21st of November 1834, who told him, that on the evening of the 18th of November 1834, there were a number of persons in the office, when the trunk was opened by the clerk, and the packages handed out

9—Compare the authorities cited in W., § 1051.

by the porter to the clerk; that there was a package addressed to Mr. Mitchell; but whether to Mr. Mitchell the witness, or to a dry goods merchant of that name, he did not know, nor did he know that it contained bank notes; and that the package was thrown upon the desk, and which was the last that he, Davidson, knew of it.

BUCHANAN, J.: "The evidence offered in this case and rejected by the court below, is of a conversation alleged to have taken place between Davidson, the agent of the defendants, and the witness, some eight or ten days after the transaction to which it relates, and after the loss of the package in question, when the agency for the delivery of it to the person to whom it was addressed had ceased, not constituting a part of the transaction, but a subsequent account only of what had before occurred respecting it. It cannot therefore be treated as a statement or admission by the defendants, and as such binding upon them, and admissible in evidence; but must be considered as a mere narrative of facts by Davidson, of his own authority, to be proved by him on oath, if within his own knowledge, or by some other witness, and not by evidence of his statement of them, which is forbidden by the general rule of law in relation to hearsay evidence. The principle upon which the declarations or representations of an agent, within the scope of his authority, are permitted to be proved, is, that such declarations, as well as his acts, are considered and treated as the declarations of his principal. What is so done by an agent, is done by the principal through him, as his mere instrument. So whatever is said by an agent, either in the making a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent; but on the ground, that being made at the time of and accompanying the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestæ*, a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal not being part of the *res gestæ*, and not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done,—not a part of the transaction, but only statements or admissions respecting it."[10]

10—*Wilde*, C. J., in *Watson* v. *King*, 3 C. B. 608 (1846): "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was (the defendant having been proved to have held the premises at a certain rent) that one of the plaintiff's witnesses heard the plaintiff's attorney say that there was an agreement in writing. That clearly was no evidence at all to affect the plaintiff."

GIBBLEHOUSE v. STONG (1832).

3 Rawle 436, 445.

Frederick Stong, the defendant in error, brought an ejectment against the plaintiffs in error, John Gibblehouse and John Brandt, to recover two lots of ground in Whitpain township, one of them
139 containing three-quarters of an acre, with a dwelling-house, and other buildings erected on it, and the other containing five acres. The plaintiff below claimed under a deed dated 1st of April, 1813, from David Johnson, in whom it was admitted the legal title to both the lots was vested, one of them by deed dated the 1st of April, 1811, from S. Slingluff, and wife, the other by deed dated the 13th of May, 1811, from Samuel Ashmead to him. Gibblehouse was the tenant of Brandt, who alleged that David Johnson was the mere trustee of his brother Edward Johnson, for whose use he held the legal title to the lots in dispute, and that he Brandt, had purchased them as the property of Edward Johnson at a sheriff's sale under an execution upon a judgment obtained by Brandt against Edward Johnson. The defendant's counsel offered to prove declarations made by David Johnson, after the purchase from Slingluff and Ashmead, and before the sale of the property to any person, that he, David Johnson, never paid any part of the purchase money, but that he held the title as trustee for Edward Johnson, and that Edward Johnson had paid the purchase-money for it. The court decided that the witness could not give any evidence of any declarations made by David Johnson, unless such declarations were made at the time, or immediately before, or immediately after the execution of the deeds to him, or by him to the plaintiff, or in the presence of the opposite party; David Johnson being a competent witness, and from anything which appears to the contrary, in full life, and within reach of the process of the court.

Kennedy, J.: "In the case before us the testimony offered and rejected was not of that character which in a technical and legal sense comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit or his privies, that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is privy, are evidence, so far as they afford any presumption against him, whether such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. . . . The confessions of the party himself (which I do not understand to be denied) have always been considered good and admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding

the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence, and who might all appear to be in the court-house at the time when such confessions should happen to be offered in evidence against the party making them. And this rule of admitting the confessions or declarations of the party extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privity. There are four species of privity: privity in blood, as between heir and ancestor; privity in representation, as between testator and executor, or the intestate and his administrators; privity in law, as between the commonwealth by escheat and the person dying last seised without blood or privity of estate; and privity in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee, etc. . . . Upon this same principle it is, that executors and administrators, as also devisees, legatees, heirs and next of kin, are all bound by the promises, whether written or verbal, of their respective testators or intestates, so far as they may have received estates from them that are liable, and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates which have passed to them. Privies in estates, such as vendee and vendor, assignee and assignor, stand upon the same footing in this respect to each other that privies in blood do. I know of no distinction. That which is binding upon the vendor will generally be equally so upon his vendee; and whatever would have been admissible as evidence against the former, ought not only to be so against the latter, but ought to have the same effect too."[11]

CUYLER v. McCARTNEY (1869).

40 N. Y. 221, 227.

The action was brought by the plaintiff, as assignee of William T. Cuyler, to recover for the alleged conversion of certain personal property, included in the assignment, but seized by the defendant,
140 McCartney, sheriff of the county of Livingston, under executions in his hands, issued upon certain judgments recovered by the other defendants against the assignor. William T. Cuyler, about the 31st of August, 1857, conveyed to George W. Cuyler and William B. Wooster, the original plaintiffs, all his real and personal property, in trust for his creditors, giving certain preferences. The assignees took, or claimed to have taken, possession of the assigned property on the same day. In October following, the defendant, McCartney, then sheriff of Livingston county, levied on about $45,000 worth of the

11—Compare the authorities cited in W., §§ 1080-1085.

assigned property, to satisfy certain executions then in his hands. This levy the plaintiff insists was a wrongful taking; and the defendants justify, alleging that the assignment was fraudulent and void, as made with intent to hinder, delay, and defraud the creditors of William T. Cuyler, the assignor. Upon the trial numerous exceptions were taken by the plaintiff to the admission of evidence offered by the defendants, especially of declarations and acts of the assignor, subsequent to the assignment.

WOODRUFF, J.: "I concur fully in the proposition that after the execution and delivery of an assignment for the benefit of creditors, and the entry of the trustees upon the performance of a trust, by taking possession of the assigned property, the assignor cannot, by his declarations or admissions, out of court, invalidate the assignment or furnish evidence of his own or the trustees' fraudulent intent in making or receiving it, for the purpose of defeating the claim of the trustees to hold and administer the property according to the trust. . . . [The admissibility of these declarations is insisted upon for the reason] that other evidence showed that the assignor and assignees were combined in a conspiracy to defraud the creditors of William T. Cuyler, and therefore the acts and declarations of either conspirator, while carrying the common intent into execution, and in furtherance thereof, are competent evidence to affect all the co-conspirators. This rule is not questioned. . . . [But] it is not and cannot be successfully claimed that mere proof that assignor and assignee have concurred in an assignment providing for the payment of debts, establishes a conspiracy within the rule. Delivering and accepting such an assignment establishes a common intent, but not a common intent to defraud. If mere proof of concurrence in the execution and delivery of the assignment established a common intent within the principle making the acts and declarations of the conspirators, while carrying their common design into execution, evidence against each other, then the rule first above stated [*i. e.* that declarations after transfer of title are inadmissible] is made a nullity. No sooner is an assignment made than the assignor may, by his acts or declarations out of court, defeat it, if he be dishonest enough to collude with any creditor, or to resent any dissatisfaction with the trustees, and defeat it by such means. To make such admissions or declarations competent evidence, it must stand as a fact in the cause, admitted or proved, that the assignor and assignees were in conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfilment, are competent against either of them. The principle of its admissibility assumes that fact. It necessarily follows that those declarations or admissions cannot be received to prove the fact itself."[12]

12—Compare the authorities cited in W., § 1086.

For the admissibility of such declaration of transfer under the Verbal Act rule, see *post*, No. 363.

COMMONWEALTH v. KENNEY (1847).

12 Metc. 235.

Larceny of a bag of money. John S. Brewer was called by the attorney for the commonwealth, and testified that he was in one of the watch houses, in Boston, between eleven and twelve o'clock in
141 the evening of September 5th, 1846, and that while he was there two of the watchmen of the city, having the defendant in custody, came in; that one of the watchmen said, "here is a man that has been robbing a man;" that presently Russell, the person named in the indictment as having been robbed, came in crying, and said, "that man" pointing to the defendant, "has stolen my money;" . . . that the witness . . . saw a bag, which he took up, and thereupon said, "here is the bag;" the defendant then being on the stairs, going down cellar, and within hearing; that Russell immediately said, "that is my bag;" that Baxter then took the bag, and counted the money in it; and that while Baxter was counting the money—the defendant then standing in the watch house—Russell said, "that was all the money I had in the world;" and that the defendant made no reply to any of the aforesaid declarations.

SHAW, C. J.: "The admissibility of the evidence depends on the question whether the statements of Russell in the hearing of the defendant, and the silence of the latter, do amount to a tacit admission of the facts stated. It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the *reply,* because it is the act of the party, who will not be presumed to admit any thing affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the *declaration,* because it may give meaning and effect to the reply. . . . In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by

his silence; then no inference of assent can be drawn from that silence. perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance to decide ultimately upon them. . . . The circumstances were such, that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watch house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence,) was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say any thing until regularly called upon to answer."[13]

JOHN HORNE TOOKE'S TRIAL (1794).

25 How. St. Tr. 1, 120.

Treason; a certain paper, addressed to Mr. Tooke and found at his house, was offered against him; Mr. *Tooke* "I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?" L. C. J. Eyre: "Being found in your possession, they undoubtedly are producible as evidence; but, as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and whether answers to them can be traced, or whether anything has been done upon them. A great number of papers may be found in a man's possession which will be, *prima facie,* evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation that nothing appears to have been done in consequence of the paper being sent to him. But all papers found in the possession of a man are, *prima facie,* evidence against him, if the contents of them have application to the subject under consideration." Mr. *Tooke:* "The reason of my asking it is, I am very much afraid that, besides treason, I may be charged with blasphemy." L. C. J. Eyre: "You are not tried for that." Mr. *Tooke:* "It is notorious I do not answer common letters of civility, but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall,* and he endeavoured to prove to me that he was God the Father, Son, and Holy Ghost. He proved it from the Old Testament; in the first place he was God the Father, because God is *O Veral;*

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13—Compare the authorities cited in W., § 1072.

that is, God over all. He proved he was God the Son, from the New Testament—verily, verily I am he; that is *Veral I, Veral I,* I am he. Now, if these letters, written to me, which I, from curiosity, have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me." L. C. J. EYRE: "If you can treat all the letters that have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even if that letter should be brought against you."[14]

FAIRLIE v. DENTON (1828).

3 C. & P. 103.

Money had and received. Plea — General issue. The plaintiff had sent a letter to the defendants, demanding a sum of money as due to him. But no answer had been returned by the defendants. The plaintiff's counsel called for the letter under a notice to produce, with a view to reading it in evidence, as a part of their case.

Scarlett, A. G., for the defendants, objected, that "an unanswered letter, written by the plaintiff, was not evidence in his own favour; for otherwise a party would only have to write a letter to make evidence for himself." *F. Pollock, contra:* "Certain things are stated in this letter, which the defendants might deny by answering it; and I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer." L. C. J. TENTERDEN: "I am slow to admit that. What is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it. But the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. . . . You may have that single line read, in which the plaintiff makes a demand of a certain amount, but not any other part which states any supposed fact or facts."[14]

HARTFORD BRIDGE CO. V. GRANGER (1822).

4 Conn. 142, 148.

Action on a covenant to build a drawbridge according to plans. The plaintiffs offered to prove by James R. Woodbridge, that long after the first of March, 1819, the defendant Granger came to his,
144 Woodbridge's store, where he met with Ward Woodbridge, one of the directors of the company, who complained to Granger, that the draw was not such as it ought to be; to which Granger replied, that he

14—Compare the authorities cited in W., § 1073.

knew it was not such an one as they wanted, and that if the directors would furnish him with a plan, he would conform the draw to such plan, but that he could not make it conformable to the plan of Eli Whitney, because it would cost too much. The defendant's counsel, for the purpose of raising an objection to this evidence, asked James R. Woodbridge, if such conversation was not had with a view to a compromise; to which the witness answered, that in the conversation, Granger asked Ward Woodbridge how much money he would accept, and discharge him from doing anything more to the draw. The defendants then urged their objections to the evidence offered by the plaintiffs; and the judge rejected it. HOSMER, C. J.: "The law on this subject has often been misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, *because it is a fact,* the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark, it may be observed, that if A. offer to B. ten pounds, in satisfaction of his claim of an hundred pounds, merely to prevent a suit, or purchase tranquillity; this implies no admission that any sum is due; and therefore, testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A. admit a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered is, what was the view and intention of the party in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist. There is no point of honour guarded by the Court, nor exclusion of evidence, lest it should deter from a free conversation. But testimony of admissions or declarations taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible; truth being the object of evidence."[15]

CRAIG dem. ANNESLEY v. EARL OF ANGLESEA (1743).

17 How. St. Tr. 1217.

In this celebrated case the plaintiff claimed to be the legitimate son of the defendant's brother, and the true heir to the estates and peerage.

145 He showed that at the age of fourteen he had been kidnapped by the defendant's procurement and transported to Pennsylvania, and after fifteen years' slavery had escaped back to England and instituted a suit to obtain his rights; while on the way to begin proceedings, he joined the gamekeeper of a friend in catching some poachers, and one of

15—Compare the authorities cited in W., § 1062.

them was killed by a shot from his gun, which he claimed went off accidentally; he had been tried for murder and acquitted. He now proposed to show "that the relations of the deceased, being convinced that the killing was only accidental, had intended a very slight prosecution, but that the defendant, who was in no way related to or acquainted with the person killed, employed a solicitor and carried on a severe prosecution against Mr. Annesley at a very great expense, and declared 'he would spend £10,000 to get him hanged' ", the purpose of this evidence was to "strengthen that evidence of the defendant's spiriting away the lessor of the plaintiff, and show the defendant's continued design of removing this gentleman from any possibility of asserting his birthright."

MOUNTENEY, B.: "The foundation of my opinion is this: Every act done by the defendant, which hath a tendency to show a consciousness in him of title in the lessor of the plaintiff, must I think be admitted, beyond all controversy, to be pertinent and legal evidence in the present cause. I think that the evidence now offered hath that tendency, and consequently is proper to be admitted. This evidence of the prosecution, in my apprehension, stands exactly on the same footing with the evidence of the kidnapping, . . . for I can by no means enter into the distinction of lawful and unlawful acts, which seems to have so much weight with my lord chief baron. That unlawful act was not therefore, in my apprehension, to be admitted in evidence because unlawful, but because it had a tendency to show such a consciousness as I have mentioned in the defendant; and if the carrying on the prosecution (which must be admitted to be a very extraordinary, though lawful, act of the defendant) hath the same tendency, it ought upon the same principle to be admitted."

BOWES, C. B. (charging the jury): "You will also consider whether these acts are not evidence to satisfy you that the defendant, in his own thoughts and way of reasoning, considered the staying of the boy here as what might some way prejudice his title. But whether, as insisted upon by the plaintiff's counsel, you ought to take this as an admission on the part of the defendant that the plaintiff was the lawful son of Lord Altham [earl of Anglesea], will deserve further consideration. Undoubtedly there is a violent presumption, because no man is supposed to be wicked without design, and the design in this act must be some way or other relative to the title; but whether or no it was the opinion of the trouble he might have from this lad that induced him to do the act, or a consciousness that the lad was the son of Lord Altham, must be left to your determination."[16]

16—*Shaw*, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 376 (1850): "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons,—all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

STARR v. UNITED STATES (1897).
164 U. S. 627, 17 Sup. 224.
ALBERTY v. UNITED STATES (1896).
162 U. S. 499, 16 Sup. 864.

PARKER, J., in the Federal District Court for Western Arkansas, charging the jury: "The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some
146 extent. If he flees from justice because of that act, if he goes to a distant country, and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as an evidence of guilt, because he is an eyewitness to the occurrence, he knows how it did transpire, he is presumed to have a consciousness of that act. . . . It is a principle of human nature—and every man is conscious of it, I apprehend—that, if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course, not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is—and it is an old scriptural adage—'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them. It will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt."[17]

ARMORY v. DELAMIRIE (1722).
1 Strange 505.

A chimney-sweeper's boy, finding a jewel, took it to the defendant, a jeweler, for appraisal, but the defendant would not restore it. In an action of trover, in proving the value, "the Chief Justice [PRATT]
147 directed the jury that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did."[18]

M'REYNOLDS v. M'CORD (1837).
6 Watts 288, 290.

Ejectment for the undivided half of 250 acres of land. It appeared in evidence that James Dill and Matthew Dill were the owners of this

17—Compare the authorities cited in W., §§ 273-284.

18—*Young* v. *Holmes*, 1 Stra. 70 (1718); Ejectment for a leasehold: "It

148 land, and that Matthew's title afterwards became vested in James. The plaintiffs allege that the title to the land was in dispute sometime between 1811 and 1815, when an agreement in writing was entered into between James Dill and Daniel Rees, by which the latter was to have one-half of the land in dispute for his services and expenses in carrying on the lawsuit for the land to conclusion, in case it should be recovered. This, in connection with proof of performance by Daniel Rees, and that the plaintiffs were his heirs at law, formed the foundation of the plaintiff's claim to recover. The principal question in the cause in this court arose out of the attempt of the plaintiffs to establish the written agreement referred to. The plaintiff called a witness who said: "There was an agreement between James Dill and Daniel Rees; it was concerning this land, the 'Buckhorn Tract.' My brother (James Dill) burnt the agreement. He let on he wanted to see some of the papers, and he got them and destroyed them, and said it would do me no good, and no matter what became of it. He then burnt it. I never read that paper; it was not read over to me. This was the spring after my husband's death; he died in November, 1821." And the other witness testified: "I think about the year 1817 or 1818, Daniel Rees came to Buckthorn farm, he showed me what he said was his title to it; it was a paper with the signature of James Dill. I was not acquainted with the handwriting of James Dill; never saw him write. I read the paper; it purported to be signed by James Dill. Daniel Rees was then living on the land when he showed me the paper: he told me he claimed by virtue of it; claimed half." The plaintiff's counsel then proposed to ask the witness, what were the contents of the paper? The defendant's counsel objected to the evidence, on the ground that the execution of the paper had not been proved. The Court overruled the objection.

Gibson, C. J.: "Preliminary to proof of contents [of a lost document], and involving proof of execution, stands proof of the pre-existence in the state of a valid instrument. This is a rudimental principle, which is not contested. Now there was no specific proof of execution; and what was there else? Everything is to be presumed *in odium spoliatoris;* and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission of subsequent evidence of its contents. . . . It

being proved the defendant had the lease in her custody, and refusing to produce it, an attorney who had read it was allowed to give evidence of its contents; and the C. J. [*Parker*] said, he would intend it made against the defendant, it being in her power, if it was otherwise, to show the contrary."

Barker v. *Ray,* 2 Russ. 63, 73 (1826); *Eldon,* L. C.: "To say that if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be in a great many instances going a great length."

Best, J., in *R.* v. *Burdett,* 4 B. & Ald. 122 (1820): "If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just . . . The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them."

seems clear on principle that, if there be no subscribing witness, the act of destruction is itself the best evidence of which such a case is susceptible, because it has put it out of the party's power to submit the paper to witnesses of the handwriting; and the act of a spoiler is in is nature equipollent to a confession. But, before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been; . . . there are few men who have not papers which it would be not only innocent but prudent to destroy. . . . If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper [as proved by another witness] . . . [But the witness to destruction appeared not to have read the paper destroyed, and thus to be unable to identify it.] It would seem, therefore, that the plaintiffs, in making out a circumstance to stand for proof of execution, ought to have shown a competent degree of knowledge [of identity] in the witness, drawn from the declarations of him who destroyed the paper or from some other source equally satisfactory if such there were. Had that been done, it would have produced a presumption of identity and consequent execution."[19]

Topic VII: Confessions.

STATE v. NOVAK (1899).

109 Ia. 717, 79 N. W. 465.

Murder; the body of Edward Murray, the deceased, was found in the ruins of the defendant's store, after it was burned down. Defendant, while returning in custody of the officer who had arrested him,
149 to the place of the homicide, stated to the officer that he had met with financial losses, and had expected to go the day after a fire which destroyed his store to an uncle to get him to endorse a note for him; that his safe had been robbed; that, to prevent further robberies, he had, after consulting a physician as to how much morphine in a bottle of whisky would knock out a person without killing him, prepared a bottle of whisky, and placed it where it would be likely to be seen and drunk by a robber working on the safe; that Murray came into his store, and in his absence drank from the bottle; that defendant on his return discovered this, and that Murray was in a stupor, whereupon he took him up to his room over the store, and put him in his bed; that he then laid down on the counter in the store, and slept until he awoke in the night to find the store on fire; that he attempted to get Murray out, but that the smoke and heat prevented his doing so; that he returned to the store, and took $160 from the cash drawer; that, in groping his way out, he ran

19—Compare the authorities cited in W., §§ 285-291.

against a shotgun, which he had placed there to take with him when he went to see his uncle, as he expected to hunt on the way, and took it with him; that when he got outside of the store he realized that Murray was in there; that he was heavily embarrassed, and that he thought the best thing that he could do was to fall off the earth for awhile; and then related to the officer the course which he took in going from the place of the homicide in Iowa to Dawson City, Alaska. It further appeared from the testimony of the officer that defendant, when arrested, denied his true name, gave a fictitious one, and, on being informed that he was under arrest for the murder of Murray committed in Iowa, denied that he had ever lived there, and claimed that he was from Ohio.

GRANGER, J.: "Inaccurate use of such words as 'confessions,' 'admissions,' and 'declarations' has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term 'confession.' A confession is a voluntary admission or declaration by a person of his agency or participation in a crime. . . . To make an admission or declaration a confession, it must in some way be an acknowledgement of guilt. . . . The manifest purpose of [the defendant's] statements was to show himself innocent, and, if his statements are true, he is innocent of the crime charged; so that by no possibility could he have been induced, because of the promise of secrecy, to relate what was untrue, to his prejudice."[20]

WARICKSHALL'S CASE (1783).

1 Leach Cr. L., 3d ed., 298.

A confession was obtained by a promise of favor. "It was contended by her counsel that as the fact of finding the stolen property in her custody had been obtained through the means of an inadmis-
150 sible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged could be violated, and the prisoner made the deluded instrument to her own conviction." NARES, J., and EYRE, B.: "It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. The idea is novel in

20—*Currey*, C. J., in *People* v. *Strong*, 30 Cal. 157 (1866): "The word 'confessions' is not the mere equivalent of the words 'statements' or 'declarations.' The defendant made statements to several of the witnesses, as they testified, respecting the departure of Holmes [the murdered man] for San Francisco, and of their appointment to meet at that place, etc.; but it is nowhere to be found in the testimony of the witnesses that he admitted or confessed to any participation in the homicide."

Compare the authorities cited in W., § 821.

theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it, and therefore it is rejected."[21]

REGINA v. MOORE (1852).

2 Den. Cr. C. 522.

Wilful murder of a new-born child by its mother; verdict of guilty of concealing its birth. There was offered in evidence against her a confession made by her, in the presence of her mistress, to a surgeon
151 who attended her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found, with the thread around its neck. Her mistress had told her, before the surgeon came in, that 'she had better speak the truth,' and, in answer, she said she would tell it to the surgeon. An objection was taken, that any subsequent confession was inadmissible. After consulting COLERIDGE, J., his Lordship received the evidence, being of opinion that in this case, her husband not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth. Mr. *Creasy,* for the accused: "We must not look at the case as lawyers, but consider what would be the natural result of an inducement by such a person. The test is not, it is submitted, Who is the party to set justice in motion?, but, Who is most likely to have influence? Who is most natural that the prison should look to?"

PARKE, B., for the eight Judges: "Perhaps it would have been better to have held (when it was determined that the Judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the

21—*Shaw,* C. J., in *Com.* v. *Morey,* 1 Gray 462 (1854): "The ground on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted."

character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, if the threat or inducement is held out, actually or constructively, by a person *in authority,* it cannot be received, however slight the threat or inducement. And the prosecutor, magistrate, or constable, is such a person; and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. . . . But it is only where the offence concerns the master or mistress that their holding out the threat or the promise renders the confession inadmissible. . . . In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house; she was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence."[22]

REGINA v. BALDRY (1852).

2 Den. Cr. C. 430.

At the Spring Assizes for the county of Suffolk, the prisoner was tried before *Lord* CAMPBELL, C. J., upon an indictment charging him with having administered poison to his wife with intent to murder her. On the part of the prosecution a police constable was called whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him." The admission of this was objected to.

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POLLOCK, C. B.: "Where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable,—the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. This was decided in the case of Reg. v. Garner, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

PARKE, B.: "I entirely agree with the Lord Chief Baron and with the view taken by Lord Campbell at the trial. . . . By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole

22—Compare the authorities cited in W., §§ 829-830.

to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were *res nova* I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him."

ERLE, J.: "I think that the statement of the prisoner was properly received. In my opinion the best defence of innocence is founded on the statement which he is shown to have used when first accused; and I am of opinion that when a confession is well proved it is the best evidence that can be produced; and that unless it be clear that there was either a threat, or a promise to induce it, it ought not to be excluded. I am much inclined to agree with Mr. Pitt Taylor; and according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt. The words 'will' or 'may' as used in the caution are, in effect, the same; one being absolute, the other contingent. In the able argument that has been addressed to us, it has been contended that the assurance that the statement *will* be used, promises an advantage, and should therefore exclude the confession; whilst it is admitted that this supposed advantage promised contingently does not exclude it. But if it be an advantage when promised positively, it is also a promise of advantage when made contingently, and if it does not exclude in one, neither ought it in the other."[23]

HENDRICKSON v. PEOPLE. (1854).

10 N. Y. 13.

The accused had been examined as a witness before the coroner, not being under arrest or charge, but was not cautioned by the magistrate as to his privilege not to answer incriminating questions; his answers on this examination were received by a majority of the Court.

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PARKER, J.: "I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate, could be rejected. It ought not to be excluded on the ground that it was taken upon oath.

23—Compare the authorities cited in W., §§ 832-838.

The evidence is certainly none the less reliable because taken under the solemnity of an oath. . . . Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person at the time the testimony was taken; that would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be secured, as of the impossibility of refuting it. . . . The witness may refuse to answer, and his answers are to be deemed voluntary unless he is compelled to answer after having declined to do so; in the latter case only will they be deemed compulsory and excluded."

SELDEN, J., dissenting: "The mental disturbance produced by a direct accusation, or even a consciousness of being suspected of crime, is always great, and in many cases incalculable. The foundation of all reliance upon human testimony is that moral sentiment which universally leads men, when not under some strong counteracting influence, to tell the truth. This sentiment is sufficiently powerful to resist a trifling motive, but will not withstand the fear of conviction for crime. Hence, the moment that fear seizes the mind, the basis of all reliance upon its manifestations is gone.. . . . The mind, confused and agitated by the apprehension of danger, cannot reason with coolness, and it resorts to falsehood when truth would be safer, and is hurried into acknowledgements which the facts do not warrant. Neither false statement nor confessions, therefore, afford any certain evidence of guilt when made under the excitement of an impending prosecution for crime."

PEOPLE v. McMAHON (1857).

15 N. Y. 38.

The accused had been examined as a witness before coroner, but was at the time in custody charged as the offender; his answers on this examination were rejected.[24] SELDEN, J.: "The word 'voluntary' in
154 judicial examinations means] 'proceeding from the spontaneous suggestion of the party's own mind,' 'free from the influence of any disturbing cause.' . . . It is considered that a judicial oath, administered when the mind is disturbed and agitated by a criminal charge, may have that effect [of preventing free and voluntary mental action], and hence the exclusion. . . . [Hence, such an examination under oath is not to be rejected] unless that oath was administered in the course of some judicial inquiry in regard to the crime itself for which the prisoner is on trial; . . . [while it is also necessarily admissible] if at the time it was made the prisoner was not himself resting under any charge or suspicion of having committed the crime."

24—The membership of the Court had changed since the decision in *People* v. *Hendrickson.*

TEACHOUT v. PEOPLE (1869).

41 N. Y. 11.

The accused had been examined as a witness before the coroner, while under suspicion and after notice that he would probably be arrested, and the coroner had cautioned him as to his right not to answer;
155 two judges, dissenting, invoked the ruling in People v. McMahon; the majority, repudiating the reasoning of that opinion, held the answers admissible. WOODRUFF, J., for the majority: "If the declarations made under consciousness of suspicion are for that reason unreliable, they must be unreliable whenever and wherever made . . . and equally when the suspected party encounters that suspicion while fully at large among third parties, as when called as a witness to state if he sees fit what he knows of the cause of the death. And if consciousness of suspicion renders proof of his declarations unreliable, so also should it render proof of his acts unreliable, and they should be equally excluded. And yet it has not, I think, been doubted that proof of the acts of the party under the very pressure of suspicion is competent. . . . [Flight, concealment, etc.] may be proved as some indication of conscious guilt, and yet it is consistent with innocence, and may be the mere result of fear, and the pressure of circumstances may lead the innocent man to resort to this as a measure of safety. This is quite as true as that suspicion will lead a man to false statements for the same purpose. There must be some limit to the rule excluding declarations, short of the test that they be made when he is under no consciousness that he is under suspicion; else the whole conduct of the party, from the moment he is apprised that he is suspected, must be declared to be too unreliable to be made the subject of any inference whatever."[25]

SUB-TITLE III.

TESTIMONIAL REHABILITATION.

(SUPPORTING THE CREDIT OF AN IMPEACHED WITNESS.)

PEOPLE v. RECTOR (1838).

19 Wend. 569, 600, 611.

Murder in a bawdy-house. One Matthew Gillespie, who was in adjoining house and saw the affray, testified on behalf of the accused.
156 On his cross-examination he testified that he had a wife and children in the *fifth* ward of the city, but that for the last two years he

25—Compare the authorities cited in W., § 852.

had lived in adulterous intercourse with a woman who was with him on the night in question, and that during all that time he had slept and ate in the house wherein he then was, which was in the *second* ward of the city; that he was in the habit of frequenting porter-houses at unseasonable hours, and that during the last two years he had been in no business, and had lived upon a fund of from three to five hundred dollars which he had before accumulated, and if he had paid his debts he would have had but little if any money. . . . The counsel for the prosecution, after proving by two witnesses that Gillespie had, previous to giving his testimony, disavowed all knowledge of the transaction, and contradicting his testimoney in other respects, called one Britton B. Tallman as a witness, and inquired of him as to the general character of Gillespie for truth and veracity; to which he answered that he knew nothing against it, never having heard his character for truth called in question. The counsel for the prisoner then called a witness, and avowed their object to adduce testimony to maintain the character of Gillespie, and offered to prove by the witness and by several others then present, that his general character for truth stood perfectly fair and that they would give as full credit to his testimony as to that of any other individual. The Court excluded the testimony offered.

Bronson, J.: "There are several ways of impeaching the credit of a witness. The party against whom the witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character for truth. In answer to evidence against character, the other party may cross-examine the witnesses as to their means of knowledge, may attack their general character, or by fresh evidence support the character of his own witness. The credit of a witness may be shaken, and perhaps entirely destroyed by his own cross-examination, or by disproving the fact to which he has disposed. But in neither of these cases can the witness be supported by proving his general good character as a man of truth. With only one or two exceptions at most, and those resting on special considerations not applicable to this case, such evidence is only admissible in answer to evidence of general character, first given by the other party.

"Why should such evidence be received, when the witness is on the stand to give any explanation of his conduct which the truth of the case will permit? G. was not obliged to proclaim his own infamy. . . . But aside from this consideration, if there was anything to extenuate his conduct in abandoning his family and living in adultery, he was at liberty to state it. He stood there to make a picture of himself, and it is not to be presumed that he would draw it in darker colors than the truth of the case absolutely required. Neither the party who produces a witness nor the witness himself has any right to complain that compurgators are not allowed, when there has been no impeachment beyond the facts disclosed by the witness himself."

Nelson, C. J., opposing, (after pointing out that good character,

though an essential element of testimony, is assumed, and must first be attacked by the opponent): "Now what is the ground and reason for allowing a party to introduce general evidence in reply to fortify and support a witness who has been impeached? It is surely not because the impeachment has been effected by the testimony of witnesses, or by general evidence as to character, or in a particular way,—all this of itself can be of no importance; but it is because the impeachment, the effect of the proof, in whatever way introduced, tends directly to overcome the presumption of good character upon which the party had a right in the first instance to rely; because a material part of his proof is struck at by shaking confidence in the integrity and truth of the witness upon whom it depends. . . . If that [impeachment] can be removed, the presumption revives, and the facts are again sustained upon the good character of the witness. Regarding, then, the principle upon which testimony in reply to the impeachment of a witness is admitted, and the grounds and reasons upon which it rests, the Court should rather look to the effect of the impeachment than to the mode and manner in which it is brought about. It can be of little concern to a party whether the moral character of his witness is destroyed by the testimony of others called to speak to it, or by a cross-examination; the effect upon him, to the extent of the impeachment, is exactly the same; he loses the benefit of the evidence in both cases, and for the same cause,—the discredit of the witness. . . . But it is urged that, as the witness is upon the stand, he may be examined himself in explanation of the impeaching facts. The obvious answer to this is that the character of the witness for truth in the given case is proposed to be sustained by the evidence in reply notwithstanding the existence of the facts called out on the cross-examination. The case supposes explanation impossible, but that still his character for truth may be upheld by his neighbors and acquaintances."[26]

GERTZ v. FITCHBURG R. CO. (1884).

137 Mass. 77.

Tort for personal injuries.

HOLMES, J.: "In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876, in the United States District Court, of the crime of falsely personating
157 a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was

26—*Dodd* v. *Norris*, 3 Comp. 519 (1814); seduction; the daughter, on cross-examination, having admitted indelicate conduct with the defendant, her good character was not admitted in her support; *Ellenborough*, L. C. J.: "The questions put to herself on cross-examination there was an ample opportunity of explaining, as far as the truth would permit, when she came to be re-examined;" upon this ruling the following note by the reporters is made in 1 C. & P. 100 (*Bate* v. *Hill*), where Park, J., had made the opposite ruling: "The course allowed by Mr. Justice Park in the present case is much more conducive to the attainment of justice. . . . Lord Ellenborough says that it is to be set right in re-examination. This

excluded, subject to his exception. We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible, for instance, to rebut evidence of contradictory statement; or where the witness is directly contradictory as to the principal fact by other witnesses. In such cases it is true that the result sought to be reached is the same as in the present,—to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For, while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contradicted witness in the minds of the jury, the proof is not direct to the point. The purpose and only direct effect of the (impeaching) evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence. On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit."[27]

STEWART v PEOPLE (1871).

23 Mich. 63, 74.

Burglary; one Meyers had testified that the defendant had told him where the stolen goods were concealed, and a letter of Meyers was offered to be proved in corroboration of his testimony.

158 Cooley, J: "The writer of the letter, it appears, was the principal witness against the prisoner, and had testified to a conversation had with him in Chicago, in which the prisoner made statements indicat-

looks very well in theory. Those used to courts of justice well know that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a jury often believe that though denied there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much to allow a defendant to blast the character of a person he has seduced by his insinuations and then not to allow her to clear her character by the best means in her power."

Compare the authorities cited in W., § 1106.

27—Compare the authorities cited in W., § 1109.

ing his participation in this offense. On his cross-examination he was asked whether he did not have a conversation with Edward O'Connor, Robert McKinney and Michael Kilduff, one morning during the examination of the prisoner before the justice, in which he told said O'Connor, McKinney and Kilduff that the prisoner was not the man with whom he had the conversation at Chicago; and he replied in the negative. He made, however, the following statement: McKinney, Kilduff, and one Hamilton were his bail on a criminal charge pending against him at the time Stewart was arrested on his complaint, on the charge now being tried. O'Connor, Kilduff and McKinney came to his house and told him if he gave evidence against Stewart they would throw up his bail. He did give such evidence and was surrendered by his bail as they had threatened. These three persons were then called by the defense and testified that the witness did say to them at the time inquired about that the prisoner was not the man with whom he had the conversation in Chicago. In reply to this testimony, the prosecution claimed the right to put in evidence the letter in question, which was written by the witness in Chicago to his brother in Bay City, after the time of the alleged conversation with the prisoner in Chicago, and which spoke of the prisoner being there, and said, "If you want him send word." The prosecution also offered to show by the jailer that before the prisoner was arrested, and before there was any talk of arresting him, the witness had made the same statement in regard to the conversation at Chicago which he has sworn to in court. The circuit judge admitted his evidence, and the defense excepted. The question upon this branch of the case appears to be this: Whether after an attempt to impeach a witness by showing that he has made out of court statements inconsistent with those sworn to, his evidence can be supported by the testimony of witnesses who show that on other occasions his account of the transaction has corresponded with that given in court.

"This question appears to us to be one of no ordinary difficulty. If it were an established fact that the witness had made the contradictory statement, we should say that he supporitng evidence here offered was not admissible. If a witness has given different accounts of an affair on several different occasions, the fact that he has repeated one of these accounts oftener than the opposite one can scarcely be said to entitle it to any additional credence. A man untruthful out of court is not likely to be truthful in court; and where the contradictory staements are proved, a jury is generally justified in rejecting the testimony of the witness altogether. But in these cases the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witness impeaching him. The jury, therefore, before they can determine how much the contradictory statements ought to shake the credit of the witness, are required first to find from conflicting evidence whether he made them or not. . . . Now there are many cases in which, if evi-

dence is given of statements made by a witness in conflict with those he has sworn to, his previous statements should not only be received in support of his credit, but would tend very strongly in that direction. If, for instance, the witness is himself the prosecutor, and has already made sworn complaint, there could be no doubt, we suppose, that the pendency of this complaint, its contents and the relation of the witness to it, might be put in evidence, and that they would raise a strong probability that the testimony as to conflicting accounts as having been given about the same time, was either mistaken or corrupt. Suppose a person to be testifying in a case in which he had spent a considerable period of time and a large sum of money in pursuing an alleged criminal to conviction, and he is confronted with evidence of his own conflicting statements; the rule would be exceedingly unjust, as well as unphilosophical, which should preclude his showing, at least by his own evidence, such circumstances of his connection with the case as would make the impeaching evidence appear to be at war with all the probabilities. And other cases may readily be supposed in which, under the peculiar circumstances, the fact that the witness has always previously given a consistent account of the transaction in question might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to for the purpose of impeachment. It is impossible to lay down any arbitrary rule which could be properly applied to every case in which this question could arise; but we think that there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration; and the fact that the previous statement was put in writing—as it was in this instance—at a time when it would be reasonably free from suspicion might very well be a controlling circumstance. We think the circuit judge ought to be allowed a reasonable discretion in such cases, and that though such evidence should not generally be received, yet that his discretion is receiving it ought not to be set aside except in a clear case of abuse."[28]

28—Compare the authorities cited in W., §§ 1122-1131.

TITLE III.

REAL EVIDENCE (AUTOPTIC PROFERENCE.)

GENTRY v. McMINNIS (1835.)

3 Dana 382, 386.

ROBERTSON, C. J.: "The plaintiff in error asks the reversal of a judgment for costs and nominal damages, obtained against him by the defendant in error on an issue involving her liberty or slavery, in
159 an action of trespass, which, for trying her claim to freedom, she had instituted in consequence of his claiming her to be his slave, and exercising over her the dominion of a master. The Circuit Judge refused, on the motion of the plaintiff in error, to instruct the jury that the color of the defendant, also, was *prima facie* evidence of her being a slave; but told them, that if, upon their own view, they should be of the opinion, that she was a white woman, they should find for her. The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability and indeed the only perfect and indubitable certainty of the existence of any sensible fact. . . . [Jurors,] when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. . . . Hence the policy of having a jury of the vicinage; and hence, too, jurors have not only been permitted but required to decide on autoptical examination wherever it was practical and convenient. A white person of unmixed blood cannot be a slave, here, where there can be no conventional slavery. But a person apparently white may, nevertheless, have some African taint, and may, consequently, have descended from a mother who was a slave; the apparent color is but *prima facie* evidence; and consequently, when a jury, on their view, decide that the color is white, testimony will be admissible to prove that, notwithstanding the visible complexion, there is African blood in the veins sufficient to doom to slavery. If on inspection, the jury had, without considering other evidence, believed that the defendant was a

white woman, they would have been bound by law to have found that she was free, unless the legal deduction from color had been defeated or rebutted by some evidence showing, or legitimately tending to show, that, notwithstanding her apparently white skin, she had some African taint, and was, *de jure*, a slave."[1]

INGS' TRIAL (1820.)

33 How. St. Tr. 1051, 1088.

The "Cato-street Conspiracy;" indictment for high treason. The defendant claimed that he was ignorantly drawn into the movement, and did not know of the specific murderous designs of the lead-
160 ers. A constable produced the conspirators' weapons. "Are there now placed upon the table the things which were taken in Cato-street?" "Yes."—"You gave us an enumeration yesterday of thirty-ball-cartridges, firelock and bayonet, one powder-flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunder-buss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbord, one carbine and bayonet, two swords, one bullet, ten hand-grenades; [two fire-balls, nine hundred and sixty-five ball cartridges, eleven bags of gunpowder of a pound each;] I do not see them?" "Here they are," producing a bag.—"We must have them on the table." They were emptied out, and the jury inspected the various articles, the hand-grenades being broken open, and other weapons displayed. No objection was made to this proceeding, which was taken as a matter of course; but the counsel for the defence, Mr. *Adolphus*, thus referred to it in his address: "You have had that which produces always a sort of mechanical effect. I do not mean to pay an ill compliment to your understandings; but you have had a display of visible objects, pikes and swords, guns and blunderbusses, have been put before you, to the end that this feeling may be excited in every man's mind, 'How should I like to have this sort of thing put to my breast! How should I feel if this applied to my chimney! And that to my stair-case!', and so on; that is, that the individual feeling of each man may make him separate

1—Lord *Eldon*, in Twiss' Life of Eldon, I, 354: "When I was Chief Justice of the Common Pleas (I did like that court!) a cause was brought before me for the recovery of a dog, which the defendant had stolen in that ground [lying in the fields beyond his house] and detained from the plaintiff, its owner. We had a great deal of evidence, and the dog was brought into court and placed on the table between the judge and witnesses. It was a very fine dog, very large, and very fierce, so much so that I ordered a muzzle to be put on it. Well, we could come to no decision; when a woman, all in rags, came forward and said, if I would allow her to get into the witness-box, she thought she could say something that would decide the cause. Well, she was sworn just as she was, all in rags, and leant forward towards the animal, and said, 'Come, Billy, come and kiss me!' The savage-looking dog instantly raised itself on its hind legs, put its immense paws around her neck, and saluted her. She had brought it up from a puppy. Those words, 'Come, Billy, come and kiss me,' decided the cause."

Compare the authorities cited in W., § 1154.

himself from society,—may make him, through the medium of his own personal hatred of violence or apprehension of danger, think that this contemptible exhibition of imperfect armoury could operate on a town filled by a million of loyal inhabitants or could give the means of overwhelming the empire. When touched by reason, they shrink to nothing, and will never produce a verdict contrary to the evidence of facts. It is like displaying the bloody robe of a man who has been stabbed or murdered; it is like the trick practised at every sessions, where we see a witness pull out some cloak or handkerchief dipped in blood of the person, to produce conviction through the medium of commiseration. They do not trust to description, but rely upon display. That is the effect of the production of these arms."[2]

MANSFIELD, L. C. J., *Rules for Views*, 1 Burr. 252, (1757): "Before the 4 and 5 Anne, c. 16, § 8,[3] there could be no view till after the cause had been brought on to trial. If the Court saw the question in-

161 volved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or judge, at the trial, 'that the nature of the question made a view not only proper but necessary'; for the judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper,—without going into the proof

2—Mr. *David Paul Brown*, in "The Forum," II, 448 (1856); the famous Philadelphia advocate is recounting the story of a *cause celebre* of 1834,—the homicide, by a disappointed lover, of the woman he loved: "During the course of the trial there was an occurrence which is entitled to notice. When I first called upon the prisoner, after he had furnished me with some of the prominent details, I asked him how the deceased was dressed at the time of the blow. He said, 'In black.' I observed, 'That was better than if the dress had been white.' Upon which the prisoner turned hastily round, and asked what difference that could make. The reply was, 'No difference, in regard to your offence; but a considerable difference in respect to the effect produced upon the jury by the exhibition of the garments, which, no doubt, will be resorted to.' And so upon the trial it turned out. The black dress was presented to the jury,—the eleven punctures through the bosom pointed out; but no stain was observable, no excitement was produced. At last, however, they went further, and produced some of the white undergarments—corsets, etc., all besmeared with human blood. Upon this exhibition there was not a dry eye in the court-house. And the current of opinion continued to run against the defendant from that moment until the close of the case, and finally bore him into eternity."

Compare the authorities cited in W., §§ 1157, 1158. For the right to *compel discovery* from an accused, see *post*, No. 479.

3—By this statute, "in any action" at Westminster, where it shall appear to the Court that it will be "proper and necessary" that the jurors who are to try the issues should have the view of the lands or place in question, "in order to their better understanding the evidence" to be given at the trial, the Court may order special writs of *distringas* or *habeas corpora*, commanding the selection of six out of the first twelve of the jurors therein named, or a greater number, to whom the matters controverted shall be shown by two persons appointed by the Court.

so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 and 5 Anne, c. 16, 8, impowered the Courts at Westminster to grant a view in the first instance previous to the trial, . . . The Courts are not bound to grant a view of course; the Act only says 'they may order it, where it shall appear to them that it will be proper and necessary.' "[4]

4—*Craig*, J., in *Springer* v. *Chicago*, 135 Ill. 553, 561, 26 N. E. 514 (1891): "If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court shall not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or a photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive, or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power), as we have adopted the common law in this State, our Courts have the same power."

Compare the authorities cited in W., §§ 1162-1166.

PART II.

RULES OF AUXILIARY PROBATIVE POLICY.

162 [1]NATURE OF THE RULES: "Assume that these principles of Relevancy have been satisfied, and that certain facts, so far as concerns their logical bearing and probative value, have passed the gauntlet and are evidentially worthy to be considered. There still may remain for them another gauntlet to pass. They may be amenable to certain other rules, applicable to specific classes of evidential material, and designed to strengthen here and there the evidential fabric and to secure it against dangers and weaknesses pointed out by experience. These auxiliary rules have nothing to do with Relevancy as such, *i. e.* regarded as the minimum requirement for admissibility. They assume Relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of Relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable.

"These rules of Auxiliary Policy, then, form a set of rules over and above and independent of the rules depending on the principles of Relevancy. They are distinguished from the rules of Relevancy (Part I) in resting not upon an analysis of the process of inference, but upon expedients designed to avoid special dangers irrespective of the nature of the inference and affecting in common various kinds of evidence resting upon various inferences. They are distinguished from the rules of Extrinsic Policy (Part III) in having for their purpose the strengthening of the mass of evidence and avoidance of probative dangers, and not the avoidance of collateral disadvantages unconnected with the object of securing good evidence. They include the most characteristic features of the Anglo-American law of evidence; and they are, on the whole, and apart from minor abuses, justified by experience as a valuable part of the system.

"These rules seem divisible into five classes, according to their mode of operation: I, Quantitative (or Synthetic); II, Preferential; III, Analytic; IV, Preventive (or Prophylactic), and V, Simplificative.

"There is no one term traditionally given to this group of auxiliary

1—Quoted from W., § 1171.

rules, here termed rules of Auxiliary Probative Policy; but a phrase has long been used to cover some of them,—the 'best evidence' principle."

Professor JAMES BRADLEY THAYER, *Preliminary Treatise on Evidence* (1898), pp. 489 ff.: "The phrase ['best evidence'] continued to hold a great place throughout the eighteenth century. Chief
163 Baron Gilbert introduced the expression into his book on Evidence, and recognized the rule which requires of a party the best evidence that he can produce, as the chief rule of the whole subject. . . . It is said in Gilbert's book that 'the first, therefore, and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of, . . . The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this, that no such evidence shall be brought which *ex natura rei* supposes still a greater evidence behind, in the parties' own possession and power. Why did he not produce the better evidence? he asks; and he illustrates by what was always the stock example, the case of offering 'a copy of a deed or will where he ought to produce the original.' . . . The courts also were using the same and even more emphatic language. In 1740, Lord Hardwicke declared that 'the rule of evidence is that the best evidence that the circumstances of the case will allow must be given. There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing to be proved will admit of.' And in 1792 Lord Loughborough said 'that all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree.' But the great, conspicuous instance in which this doctrine was asserted and applied was in the famous and historical case of Omychund v. Barker, in 1744, growing out of the extension of British commerce in India, where the question was on receiving in an English court the testimony of a native heathen Hindoo, taken in India, on an oath conformed to the usage of his religion. In this case, Willes, J., resorted to this rule, and Lord Hardwicke, sitting as Chancellor, with great emphasis said: 'The judge and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.' . . .

"An old principle which has served a useful purpose for the century while rules of evidence had been forming and were being applied, to an extent never before known, while the practice of granting new trials for the jury's disregard of evidence had been developing, and judicial control over evidence had been greatly extended,—this old principle, this convenient, rough test, had survived its usefulness. A crop of specific rules and exceptions to rules had been sprouting, and hardening into an independent growth. It had become perfectly true that in many cases it made no difference whatever whether a man offered

the best evidence that he could or not,—the best evidence that the nature of the case admitted, the best *ex natura rei,* as some judges said, or the best, *rebus sic stantibus,* as others said; none the less it was, in many cases, rejected. . . . As regards the main rule of the Best Evidence, in its general application, the text-books which followed Gilbert, beginning with Peake in 1801, and continuing with the leading treatises of Phillips in 1814, Starkie in 1824, Greenleaf in 1842, Taylor in 1848, and Best in 1849 all repeat it. But it is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed it would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts and does not hold out in its application; and in so far as it does apply, it is unnecessary and uninstructive. It is roughly descriptive of two or three rules which have their own reasons and their own name and place, and are well enough known without it."

TITLE I.

QUANTITATIVE (OR SYNTHETIC) RULES.

164 [1]General Scope of Quantitative (or Synthetic) Rules. "Some of the auxiliary rules of evidence operate by requiring, in specific situations, that a certain quantity of evidential material be provided. This or that piece of evidence, admissible in itself so far as all the foregoing rules are concerned, is declared to be insufficient unless joined sooner or later with other pieces of evidence. It is conditionally admissible; but its admissibility will prove of no avail, because, before the jury is allowed to retire and consider it, all the evidence on that point will be rejected unless the remaining evidential elements have been supplied. Regarded as requiring more than a single piece of admissible evidence, these rules may be termed Quantitative; regarded as requiring various pieces of evidence to be associated in presentation, in order that any one of them may ultimately be of service, these rules may be termed Synthetic.

"The various Quantitative or Synthetic rules may best be classified for practical purposes under four heads; the first and second concern testimonial evidence only; the third concerns all kinds of evidence whatsoever, as well as all material forming a part of the issue itself; the fourth concerns circumstantial evidence only.

1—Quoted from W., § 2030.

"First, there are rules as to the Number of Witnesses required; the question throughout being whether a single witness is in certain situations sufficient, and if not, what other evidence will suffice therewith. Secondly, there are rules as to the Kind of Witness required; the question here being whether for certain issues a certain kind of witness must always be present among the general mass of evidence; practically, the only kind of necessary witness recognized in our law is the eye-witness. Thirdly, there is a rule of Verbal Completeness, *i. e.* that the whole of a document or of an oral utterance must be offered, in order that any part of it may be received. Fourthly, in the Authentication of documents (*i. e.* proving their genuineness, or due execution), there are rules which declare certain kinds of circumstantial evidence to be insufficient or necessary.

SUB-TITLE I.

NUMBER OF WITNESSES REQUIRED,

ROMAN AND CANON LAW. *Digesta, xxii, 5, 12,* Ulpian: "Ubi numerus testium non adiicitur, etiam duo sufficiunt; pluralis enim elocutio duorum numero contenta est"; *Codex, iv. 20, 4,* A. D. 283, "so-
165 lam testationem prolatam, nec aliis legitimis adminiculis causa approbata, nullius esse momenti certum est"; *ib. 9,* § *1,* A. D. 334; "Simili modo sanximus ut unius testimonium nemo judicum in quocunque causa facile patiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiatur, etiamsi præclare curiæ honore præfulgeat."

Corpus Juris Canonici, Decret. Greg., lib. ii, tit. xx, de testibus, c. 23 (ante 1400); "licet quædam sint causa, quæ plures quam duos exigant testes, nulla est tamen causa, quæ unius tantum testimonio, quamvis legitimo, rational biliter terminetur."

Gibson, Codex Juris Ecclesiastici Anglicani (1713), p. 1054: "In the spiritual court, they admit no proof but by two witnesses at least; in the temporal court, one witness, in many cases, is judged sufficient."[2]

ALGERNON SIDNEY'S APOLOGIA, *9 How. St. Tr. 916, 927,* (1683). *Sidney,* arguing against the rule then obtaining that the two treason wit-
nesses might testify to different overt acts: "I must ever insist
166 upon the law of God given by the hand of Moses, confirmed by

2—"The canonists erroneously supposed that the [orthodox] Roman jurists understood the maxim *testis unus testis nullus* in the sense that a single witness did not suffice for proof. It was Constantine who first laid down the arbitrary rule that one witness did not suffice; and the canon law accepted the principle with the more respect because it was sanctioned in Deuteronomy" (Glasson, Histoire du droit et des institutions de la France, VI, 543; 1895).

Christ and his Apostles, whereby two witnesses are necessarily required to every word and every matter. . . . The reason of this is not because two or more evil men may not be found,—as appears by the story of Susanna; but because it is hard for two or more so to agree upon all circumstances relating unto a lye as not to thwart one another. And whosoever admits of two testifying several things done or said several times or places conducing—as is said of late—unto the same ends, destroys the reason of that law, takes away all the defence that the most innocent men can have for their lives, and opens a wide gate for perjury by taking away all possibility of discovering it."[3]

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167 Sir James Stephen, *History of the Criminal Law, I, 400* (1883): "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (*i. e.* a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Scroggs says]: 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the book, and calling God to witness to the truth of what is said.' . . . Scroggs was right as to what it [the practice of juries] actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

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168 W. M. Best, *Evidence*, §§ *597-601* (1849): "Those who take the civil-law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness, since by this means any person, even the most vile, can swear away the liberty, honor, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when ex-

3—*Professor* J. B. Thayer, *Preliminary Treatise on Evidence*, 23, (1898): "We read [in an English case of *cui in vita*, in 1308], that they were at issue *issint cesti qui mieulx prove mieulx av*, and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof *'fuit greindr* than the demandant's, it was awarded,' etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."

amined apart, is a powerful protection to the party attacked. . . . Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is intrusted to a single judge, or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury; but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are usually corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanour of the accused while on his trial. . . . Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecution, oppression, or fraud, and in certain cases of preappointed evidence (where parties about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act), the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness. Cases, too, must now and then, though extremely seldom, occur, in which the grossest injustice is done by giving credence to the story of a single witness. . . . On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a casual nature,—above all, where, being in violation of law, as much clandestinity as possible would be observed,—it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty; by telling the murderer and felon that they may exercise their trade, and the knave that he may practise his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subordination of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to react on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight. . . . On the whole, we trust our readers will agree with us in thinking that any attempt to lay down a universal rule on this subject which shall be applicable to all countries, ages and causes, is ridiculous; and that, although so far as this country is concerned, the general rule of the common law—that judicial decisions should proceed on the intelligence and credit, and not on the number

of the witnesses examined or documents produced in evidence—is a just one, there are cases where, from motives of public policy, it has been wisely ordained otherwise."

CALLANAN v. SHAW (1868).

24 Ia. 441, 444.

BECK, J., disapproving an instruction "that no important fact can be proved without at least the testimony of one credible and unimpeached witness": "It is impossible, from the nature of things, for the
169 law to provide rules which shall determine the quantity or amount of evidence necessary to establish a fact in judicial proceedings. There can be devised no standard—no unit of measurement, whereby we may determine just what measure of evidence shall be required to prove a fact in issue. To say that one credible witness is necessary, is a very unsatisfactory and indefinite rule indeed. As a matter of fact, evidence can usually be brought before a jury only through the medium of human testimony; there must, of necessity, be a witness, or one standing in that position, through whom the fact can be brought to the mind of a court or jury. . . . There must be, then, in most cases, to establish a fact, a witness, whether that fact be important or unimportant. But this rule gives no measure for the quantity of evidence, for knowledge, intelligence, qualities of memory, and all other attributes that make up ability, together with those moral qualities which constitute credibility, are most unequally united in men, so that one possessing all the attributes of ability and credibility in the highest degree, and so known to the tribunal before whom he testifies, would, in his evidence, outweigh an indefinite number of witnesses who possess the same attributes in the lowest degree. It is also true, that a witness, in order to prove a fact by his evidence, must be credible—he must be such a witness as will be entitled to receive the belief, the faith of others. But here again, from the very nature of the case, there are indefinite degrees in this character we call credibility. One may possess it in the highest degree, another in the lowest. It follows, therefore, that when evidence is weighed to determine whether a fact has been proven thereby, all the qualities going to make up what is termed ability and credibility to a witness must be fully considered in order to arrive at a truth. And who should so weigh and consider these qualities? Most evidently the jury. The Court cannot discharge this duty for them, because the very opinion which they may form upon these questions of ability and credibility in truth determines their finding. . . . If the witness, from want of intelligence, or from any other cause, is incompetent under the rules of law, the Court will not permit him to testify, but when the evidence of the witness is before the jury, all questions of credibility are for them, and for them alone."

BOURDA v. JONES (1901).

110 Wis. 52, 85 N. W. 671.

Action of replevin for a quantity of hotel furniture. The cause was tried before a referee. Appellant, to establish his cause of action, testified that all the property described in the complaint
170 belonged to him and that the various articles were worth the amounts set opposite them respectively in a list attached to the complaint, the agregate being $822; that he fixed the value as indicated because it was the property cost. The referee found in favor of the plaintiff, that he was entitled to recover certain specified articles, not including a large part of the property claimed and much of the property for which judgment was tendered. The value of the articles found to belong to the appellant, at the rate testified to by him, was over $300. The value found by the Court was $50. The only evidence of damage was a general statement by plaintiff that he was damaged $200.

MARSHALL, J.: "It is contended that the evidence of value on the part of the plaintiff was clear, satisfactory and undisputed, and that there was no evidence whatever to warrant the court in finding the value of $50 or any less than the amount indicated by the testimony of plaintiff. We are unable to find the clear and satisfactory evidence spoken of. Appellant testified that the property, though it had been in use in a hotel from one to five years, was worth as much as when new, and his values were put upon that basis. The evidence was clear, to be sure, but clearly outside the realms of all reasonable probabilities. It has often been said that courts and juries are not obliged to find that a fact exists, and cannot properly do so, merely because there is evidence to that effect from the mouth of a witness or any number of witnesses. A sworn statement, which is obviously false when viewed in the light of reason and common sense and facts within common knowledge, cannot be received in court as true because some witness willfully or ignorantly or recklessly so testifies. . . . It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts—testimony which no sensible man can believe—goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded. If it is the only evidence in respect to the fact involved, it is ordinarily deemed sufficient to establish such fact. . . . Where the value in controversy relates to an article the value of which is within common knowledge, the fact may be found by court or jury without direct testimony thereto, the article being sufficiently described by evidence to enable one to apply to it

common knowledge of value. At the same time evidence of witnesses, though uncontradicted, placing the value of an article beyond all reason, should be entirely ignored. . . . The testimony of appellant that his property was worth as much as when new, did not prove or tend to prove the true value. So the referee, without any accurate description of the property or its condition, was left to guess at the value thereof. The burden of proof was on plaintiff. . . . As we view it, there was practically a failure of proof on the subject of value."

STATUTES. *England: 1552, St. 5 & 6 Edw. VI, c. 11, § 12:* No person is to be indicted or arraigned for treason, "unless the same offender or offenders be thereof accused by two lawful ac-
171 cusers, which said accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused and avow and maintain what they have to say against the said party . . . unless the said party arraigned shall willingly without violence confess the same." *1696,* St. *7 W. III, c. 3, § 2:* No person shall be indicted or tried for high treason working corruption of blood, or misprision, "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to the one and the other of them to another overt act of the same treason," unless the accused "shall willingly, without violence, in open court confess the same, or stand mute or refuse to plead"; *c. 7:* the foregoing provision is not to extend to counterfeiting the coin.

Constitution of the United States (1787), Art. III, § 3: "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]

R. v. MUSCOT (1714).

10 Mod. 192.

PARKER, C. J.: "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case
172 the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favor of either party. But in the former, presumption is ever to be made in favor of

1—*Madison's Journal of the Federal Convention,* Scott's ed., II, 564, 566 (1787): "It was then moved to insert, after 'two witnesses' the words 'to the same overt act.' Dr. Franklin 'wished this amendment to take place. Prosecutions for treason were generally virulent, and perjury too easily made use of against innocence.' Mr. Wilson: 'Much may be said on both sides. Treason may sometimes be practised in such a manner as to render proof extremely difficult,—as in a traitorous correspondence with an enemy.' On the question," the vote was 8 to 3 for the amendment.

Compare the authorities cited in W., §§ 2036-2034.

innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath."

W. M. Best, *Evidence*, §§ *605-606* (1849): "The reason usually assigned in our books for requiring two witnesses in perjury—viz., that the evidence of the accused having been given on oath,
173 when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against oath—is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition may be much stronger with reference to the event on the one side than the motives for a false accusation of perjury on the other. . . . The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offense of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law with the co-operation of society to enforce them,—we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts."[2]

PEMBER v. MATHERS (1778).

1 Bro. Ch. C. 52.

Thurlow, L. C.: "I take the rule to be that, where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived,
174 there the Court will neither make a decree nor send it to a trial at law. . . . The original rule stands on great authorities; so does the manner of liquidating it; I do not see great reason in either."

2—Compare the authorities cited in W., §§ 2040-2043.

R. N. Gresley, *Evidence in Equity*, 4, (1837): "Where a material fact was directly put in issue by the answer, the Courts of equity followed the maxim of the civil law, *responsio unius*
175 *non omnino audiatur*, and required the evidence of two witnesses as the foundation for a decree. But of late years the rule has been referred more closely to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, 'positively, clearly, and precisely given,' and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness."

ATTWOOD v. SMALL (1838).

6 Cl. & F. 232, 297.

Lord Brougham: "It is said that you must have recourse to the answer . . . [because of a rule that if the defendant denies on oath] you must have more than one witness, or some circumstances
176 more than one witness, in order to rebut the denial. But I take it that the denial is *not* read as evidence in the cause, and the Court does *not* use it as evidence; it is rather considered as a general denial in the nature of a plea of not guilty,—a sort of general issue which puts the plaintiff to the proof in a particular way."[3]

Swinburne, J., *Wills, pt. I.*, § 9 (1640): "[By the Roman law a will] must be proved forsooth by seven witnesses. Wherefore with good reason was this excesse reformed first by the ecclesiasticall
177 law, which did reduce the number of seven witnesses to three (the parochiall minister being one) and in some cases two; and then by the general [ecclesiasticall] custom of this realm, which distinctly requireth no more witnesses than two, so they be free from any just cause of exception. . . . So we are no further tyed than to the observation of those requisites that be necessary *jure gentium*, which requireth but two witnesses. . . . [A man,] if he will, he may procure the witnesses to subscribe their names to the testament; . . . but no man is tyed to the observation of these cautels."

Statute of Frauds and Perjuries (1678), *29 Car. II. c. 3*, § 5: devises of lands or tenements "shall be attested and subscribed in the presence of the said devisor by three or four credible
178 witnesses, or else they shall be utterly void and of none effect."[4]

3—Compare the authorities cited in W., § 2047.

4—Compare this provision in the same statute: St. 29 Car. II. c. 3, § 19; no nuncupative will of an estate exceeding £30 is to be valid "that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will, or to that effect."

DOE v. HINDSON (1765).

1 Day 41, 49.

PRATT, L. C. J. (*Lord* CAMDEN): "Here I must premise one observation, that there is a great difference between the method of proving a fact in a court of justice, and the attestation of that
179 fact at the time it happens. These two things, I suspect, have been confounded; whereas it ought always to be remembered that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the Statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and though that witness must be a subscriber, yet that is owing to the general common-law rule that where a witness hath subscribed an instrument, he must always be produced because it is the best evidence. This we see in common experience, for after the first witness has been examined, the will is always read."[5]

SUB-TITLE II.

KINDS OF EVIDENCE REQUIRING CORROBORATION.

R. v. ATWOOD & ROBINS (1788).

1 Leach Cr. L. 4th ed. 464.

Robbery on the highway. The prosecutor deposed, That on the day laid in the indictment he was met by three men, who, after using him with violence, and threatening his life, demanded
180 his money; and that in consequence of their threats he delivered to them the property mentioned in the indictment; but that it was so dark at the time, he could not swear that the prisoners at the bar were two of the men who robbed him. An accomplice was, under this circumstance, admitted to give his testimony; and he deposed, that he and the two prisoners at the bar had, in the company of each other, committed this robbery. The jury, upon the evidence of these two witnesses, found the prisoners guilty; but the judgment was respited, and the case submitted to the consideration of the twelve judges.

BULLER, J.: "I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was whether the evi-

5—Compare the authorities cited in W., §§ 2048, 2049.

For the number of attesting witnesses to be called, as required by the *rule for attesting witnesses*, see *post*, Nos. 263-4.

dence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction. And the judges are unanimously of opinion that an accomplice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and credit of a witness has long been settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of objection go to his credit only, his testimony must be received and left to the jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision in the case."

REGINA v. FARLER (1837).

8 C. & P. 106.

Abinger, L. C. B.: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material particular. . . . The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."

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Chief Baron Joy, *Evidence of Accomplices*, 4, (1844): "How the practice which at present prevails could ever have grown into a general regulation must be a matter of surprise to every person who considers its nature, or inquires into the foundation on which it rests. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed, unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason. But, that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had ever seen that witness; before he had observed his look, his manner, his demeanour; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the contrition with which it was

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followed;—that a judge, I say, should come prepared beforehand, to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath. . . . Nor, if we inquire into the foundation of the rule, shall we find in it anything certain or fixed, such as ought to be the basis of an uniform and never varying rule. We shall be told by one that it is the moral guilt of the witness which produces this, as it were, practical incompetency; whilst another ascribes it to the desire which he has to purchase impunity for his own transgression. If it be the moral guilt of the witness that affects his credit, the degree to which his credit is affected must depend upon and vary with the magnitude of the crime of which each witness confesses himself to be guilty. Crimes are of every different shade, from the most venial petit larceny to the most atrocious murder. Yet to all the rule equally applies. The witness who on cross-examination confesses that he has been engaged in many murders, appears more stained with guilt than he who comes forward as an accomplice in the petit larceny then under trial; yet the former is without the scope of the rule, while the latter comes entirely within the sphere of its application. The testimony of the same witness may in one trial be absolutely rejected under the operation of the rule, and in the very next trial, in the course of the same day, it may be permitted to go the jury; yet his moral character has undergone no change in the interval. Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and to the lowest degrees of that guilt. But an accomplice, we are told, comes forward to save himself, and his credit is affected by the temptation which this holds out to forswear himself. But who is it that establishes his guilt? he himself—he is his own accuser; and the proof, and often the only proof which can be had, of his guilt, comes from his own lips. He is generally admitted as a witness from the necessity of the thing, and from the impossibility without him of bringing any of the offenders to justice. If this be the foundation of the rule, it rests on a drifting sand. The temptation to commit perjury which influences his credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty. But the rule applies with equal force to the accomplice who may apprehend but a month's imprisonment for the most trifling petit larceny, and to him who may reasonably dread death for an atrocious murder. Universal and undiscriminating, the rule levels all distinctions. Where then is the necessity for, or good sense in, such a rule? Why not leave the credit of the accomplice to be dealt with by the jury, subject to such observations upon it from the judge as each particular case may suggest?"[1]

1—Compare the authorities cited in W., §§ 2056-2060.

REX v. READING (1734).

Lee temp. Hardewicke 79.

Order of filiation of a child born of a married woman; it was objected, "that the wife is the only evidence [offered], and that she is not a competent witness in law to exonerate her husband
183 of the charge and burthen of this child."

HARDWICKE, L. C. J.: "[The wife] may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy that it will admit of no other evidence; . . . but then in the present case it is gone further, for the wife is [here] the only evidence to prove the absence and want of access of her husband, whereas this might be made to appear by other witnesses. . . . It must be a very dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child and to discharge her husband of the burthen of his maintenance; but the opinion the Court is of at present will not be a precedent to determine any other case wherein there are other sufficient witnesses as to the want of access; but the foundation that is now gone upon is the wife's being a sole witness."

GOODRIGHT *dem.* STEVENS v. MOSS (1777).

Cowper 592.

The lessor of the plaintiff claimed to be entitled to the premises for which the ejectment was brought, as cousin and heir-at-law of Ann Stevens, who died seised. And the only question in the
184 cause was, whether the lessor of the plaintiff was the legitimate son of Francis and Mary Stevens, or was born of Mary before their marriage. For the plaintiff the register of the marriage of Francis Stevens and Mary Packer, dated November 2d, 1703, and the register of the birth of the lessor of the plaintiff, in the following words, "Christenings, 1704, Samuel, son of Francis and Mary Stevens, baptized July 3d," were produced. It was insisted, on the part of the defendant, "that the lessor of the plaintiff was born and privately baptized before the marriage, and that there was a public baptism after the marriage," which accounted for the register. They first offered witnesses to general declarations by the father and mother, that Samuel, the lessor of the plaintiff, was born before marriage, which evidence Mr. Baron Eyre was of opinion to reject. It was argued for the plaintiff that "though the testimony of parents in their lifetime of their declarations after their decease might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation or general reputation, yet neither their declarations nor their personal testimony [of birth before marriage]

could be admitted to bastardize their issue where as in this case the fact of the marriage was actually proved [by the register-entry]."

MANSFIELD, L. C. J.: "All the cases cited are cases relative to children born in wedlock; and the law of England is clear that the declarations [or testimony on the stand] of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party."[2]

CANON 105, *at the* CONVOCATION OF CANTERBURY (1603), *Wolcott's Constitutions and Canons, p. 145*:

185 "Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony having been in the church duly solemnized is required upon any suggestion or pretext whatsoever to be dissolved or annulled, We do strictly charge and enjoin that, in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as it is possible) be sifted out by deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath either within or without the court."

THOMAS OUGHTON, *Ordo Judiciorum*, tit. 213, p. 316 (1738):

186 "Since in our days (by the Devil's persuasion) a great many divorces are sought on the ground of adultery, in order by that pretext that the divorced parties may be able to proceed to another marriage, and since (in order thus the more easily to obtain a divorce) the wife is used to confess the adultery of which she is by collusion charged, though in truth none has been committed; and sometimes also the husband (that he may take a new wife) induces the wife by threats, blows, blandishments, or some other unlawful mode, to confess the adultery, though she had committed none, Therefore, to avoid and obviate this craft and fraud, the judge, in this class of cases, is accustomed to search out the woman's mind in private (all other persons, especially the husband, being withdrawn), and to examine her carefully as to the truth and as to the motive for such a confession, and by every lawful means and mode to elicit the truth; and if he finds craft and fraud of this sort, or even

2—Compare the authorities cited in W., § 2063.

some probable suspicion of it, he is accustomed to refuse a judgment of divorce, unless the petitioner for the divorce shall have proved the alleged adultery by witnesses, or at least by vehement presumptive circumstances and public repute, or otherwise informed the judge's conscience (because the alleged crime may be true), from which the judge may believe that the woman's confession of the adultery has not proceeded from craft or fraud."[3]

BERGEN v. PEOPLE (1856).

17 Ill. 426.

Incest. SKINNER, J.: "The court refused to instruct the jury on the part of the defendants, that he could not be convicted upon his
187 mere confessions, made out of court, uncorroborated by facts or circumstances. The elementary books generally state the law to be, that confessions alone are sufficient to convict; yet it is believed no court would permit a conviction for felony upon mere confessions, made out of court, without some proof that a crime had been committed, or of circumstances corroborating and fortifying the confession. . . . Proof of any number of these facts and circumstances consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had not the crime been committed, necessarily corroborate it. . . . The corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the *corpus delicti*. . . . In this case, from the nature of the crime, proof of the *corpus delicti,* independently of the confession, except by the guilty participant, and, in fact, without proving also the defendant guilty of the crime charged, would be impossible. There is necessarily no victim—nothing visible or tangible, the subject or consequence of the wrong, capable of ascertainment and of proof. To require it would be to require, independently of the confession, proof of defendant's guilt. The corroborative evidence, therefore, must consist of facts or circumstances, appearing in evidence, independent of the confession, and consistent therewith, tending to confirm and strengthen the confession. Without proof, *aliunde,* mere confessions that the crime charged has been committed by some one, or of some fact or circumstance confirmatory of the confession, a party accused of crime cannot be found guilty, unless such confession be judicial or in open court. The instruction should therefore have been given."[4]

Sir MATTHEW HALE, *Pleas of the Crown, II, 290* (*ante* 1680): "I would never convict any person for stealing the goods *cujusdam*
188 *ignoti* merely because he would not give an account how he came by them, unless there was due proof made that felony

3—Compare the authorities cited in W., §§ 2067-2069.

4—Compare the authorities cited in W., §§ 2070, 2071.

was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact was proved to be done, or at least the body found dead,—for the sake of two cases, one mentioned in my lord Coke's P. C. cap. 104, p. 232, a Warwickshire case, another that happened in my remembrance in Staffordshire."

REGINA v. BURTON (1854).

Dears. Cr. C. 282.

The defendant was found, with pepper in his pocket, coming out of a warehouse containing a large quantity of similar pepper, both loose and in bags; it was impossible to ascertain directly
189 whether there was any shortage in the warehouse amount. Mr. *Ribton,* of counsel: "It is submitted that the *corpus delicti* must be proved in every case, and you cannot make any difference in the application of the rule." MAULE, J.: "The offense must be proved. If a man go into London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove [by direct testimony] that any wine was stolen or any wine missed." Mr. *Ribton:* "The *corpus delicti* must be proved"; MAULE, J.: "Where is the rule that the *corpus delicti* must be expressly proved?"; Mr. *Ribton:* "In Lord Hale it is so laid down"; MAULE, J.: "Only as a caution in cases of murder"; JERVIS, C. J.: "We are all of opinion that there is nothing in the objection."

COMMONWEALTH v. WEBSTER (1850).

5 Cush. 295, 308, and Bemis' Rep. 473.

[5]SHAW, C. J.: "The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first,
190 whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused. Under the first head we are to inquire and ascertain, whether the party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence. When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise. Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most

5—The facts of this case have already been stated in No. 17, *ante.*

instances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character, and relations of the deceased, will put this beyond doubt. In a charge of criminal homicide, it is necessary in the first place by full and substantial evidence to establish what is technically called the *corpus delicti*, —the actual offense committed; that is, that the person alleged to be dead is in fact so; that he came to his death by violence and under such circumstances as to exclude the supposition of a death by accident or suicide and warranting the conclusion that such death was inflicted by a human agent; leaving the question who that guilty agent is to after consideration. . . . It has sometimes been said by judges that a jury ought never to convict in a case of homicide unless the dead body be found and identified. This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory; as in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder."[6]

STATE v. BARRETT (1898).

33 Or. 194, 54 Pac. 807.

Homicide committed in a drinking-saloon. BEAN, J.: "The district attorney having closed the case for the state without calling any of the persons who were in the saloon at the time of the homicide, on the ground that they were the associates and employés of the defendant, and in his opinion their testimony would be unworthy of belief, although one of them was then in custody in default of an undertaking to appear and testify on behalf of the state at the trial, and another was on bail for that purpose, the defendant's counsel moved the court to require such persons to be called as witnesses for the state. The court declined to do so, and the defendant excepted. The parties referred to were then called by the defense, and testified, and the ruling of the court in not compelling the state to produce them on the stand is assigned as error. There is a diversity of judicial opinion as to whether, in a criminal case, the prosecuting officer is compelled to call as witnesses all the persons present at the commission of the alleged crime. There are some early English cases which seem to lay down the rule with more or less distinctness to that effect. . . . And in this country it is the rule in Michigan and Montana that the prosecuting

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6—Compare the authorities cited in W., §§ 2072, 2081.

officer is bound to show by res gestæ, or entire transaction, by calling all the obtainable witnesses present at the time, unless it appears that the testimony of those not called would be merely cumulative. . . . But this doctrine is denied and repudiated, and we think rightfully, by a great majority of the courts in which the question has come up for adjudication. . . .It probably came into use in England at a time when the right of a defendant in a criminal case to be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did, exist in this country. Here the right of the accused to appear by counsel, and to have compulsory process for obtaining witnesses in his favor, is everywhere recognized, and generally guaranteed by the fundamental law. There is therefore no necessity for requiring the State to call all the persons who were present when the offense was committed, or any particular number of them. The rights of the defendant are not in any way abridged by a failure to do so. He has the assistance and advice of counsel selected by himself, if able to employ one, and, if not, appointed by the Court, and compulsory process for obtaining witnesses at the public expense. In addition to this, the State is bound to make out its case beyond a reasonable doubt; and if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission; and if he calls only such witnesses as are favorable to the State, the defendant has a right to call any others which he may suppose will relate the facts favorable to him."[7]

DOE v. FLEMING (1827).

4 Bing. 266.

PARKE, B.: "The general rule is that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so
192 well established ought at least to furnish cases in support of his position."

BREADALBANE CASE (1867).

L. R. 1 Sc. App. 182, 192, 196, 211.

James Campbell, of the Glenfalloch family, an ensign in the 40th Foot, then stationed at Bristol, became acquainted with Eliza Maria
193 Blanchard, the young wife of a middle-aged grocer, named Ludlow. With James Campbell she eloped from her husband, who

7—Compare the authorities cited in W., § 2079.

did not long survive her departure, for he died in January, 1784. The guilty parties, however, proved constant and true to each other. In 1782, they went to America, with James Campbell's regiment, he representing her as his wife. In 1783, an elder brother of James Campbell, writing from Scotland to another brother in Jamaica, stated that "He had had a letter from James in America," and that "he and Mrs. Campbell were both well;" the writer adding, "that he had not seen her, but that she was exceeding well spoke of." In February, 1784 (a month after Ludlow's death), James Campbell and Eliza Maria Blanchard arrived in England, with his regiment which returned from Canada. It was then open to them to join hands, but, judging from the evidence, they abstained from doing so. In 1788, they had a son, their eldest; and the great question was as to his status—whether he was legitimate or not—that question depending on another question—whether his parents had ever lawfully intermarried. After many wanderings in England, they settled ultimately in Scotland, the country of James Campbell's domicil. Residing there constantly from 1793 till his death, in 1806, they were universally reputed to stand towards each other in the sacred relation of husband and wife, although no formal marriage was ever shewn to have taken place between them.

L. C. Chelmsford: "There appears to be the most conclusive evidence that from the first period of their cohabitation Eliza Maria Blanchard passed as the wife of James Campbell, and that for many years they were generally reputed to be husband and wife. But the evidence of the reputation of a marriage having existed between the parties does not end with the death of James Campbell. If they were not married, William John Lambe Campbell was illegitimate, and therefore every acknowledgment of his legitimacy by those who must have been acquainted with the way in which his parents were received and reputed in society is evidence in favour of their having been lawfully married. . . . It may be assumed, from the letter of Colin Campbell to his brother Duncan, that in September, 1783, it was believed by the family of the Campbells that James Campbell was married, and therefore, so far as the family was concerned, that he and Eliza Maria Blanchard were considered to be husband and wife. But this did not amount to habit and repute, which arises from parties cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are really married persons. Now, during the whole time of the cohabitation, down to the death of Christopher Ludlow, James Campbell and Eliza Maria Blanchard were not living in the neighbourhood and society of his family, and therefore the reputation in the family of their being married was nothing more than the private opinion of the members of it. But if this is sufficient to constitute habit and repute, so far as the family of

the Campbells was concerned, yet as, according to Lord Redesdale, in the case of Cunningham v. Cunningham, 'repute must be founded, not in singular but in general opinion' of relations, and friends, and acquaintances, the whole family of the Ludlows must have known that the parties could not be lawfully married during the lifetime of Christopher Ludlow. . . .

"The case, therefore never began with habit and repute; nor could it have had any origin at all in the sense in which it induces a presumption of marriage, until after the death of Ludlow. That event happened in January, 1784, and opened the way to a change from an adulterous connection to a lawful marriage. . . .

"From 1793 down to 1806, the evidence is clear and distinct of an universal recognition of the parties as husband and wife by every member of the family, and by all persons with whom they associated; and there is nothing whatever to break in upon the uniformity of this recognition. If the case were confined to the period between the year 1793, and the death of James Campbell, in 1806, it would be amply sufficient to establish a conclusive presumption of marriage by habit and repute."

Lord WESTBURY: "Cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged."

MORRIS v. MILLER (1767).

4 Burr. 2057.

The opinion of the Court was asked "upon the following question, 'whether to support an action for criminal conversation, there must not be proof of an actual marriage'; the fact was, they were
194 married at Mayfair chapel; the register or books could not be admitted in evidence; Keith, who married them, was transported; and the clerk, who was present, was dead; so that the plaintiff could not prove the actual marriage by any evidence." Counsel for the plaintiff argued that "we proved articles [of post-nuptial settlement]. . . . cohabitation, name, and reception of her by everybody as his wife; though we did not indeed prove it by any register or by witnesses who were

present at the marriage". *Lord* MANSFIELD, C. J., said: "It certainly may be done so in all cases except two,"—namely, bigamy and criminal conversation. The plaintiff's counsel then argued that the defendant's admission of the marriage sufficed. The defendant's counsel argued that the reputation-evidence (1) "does not come up to the rule of being the best evidence in the plaintiff's power," (2) it was not an actual, *i.e.* ceremonial marriage. MANSFIELD, L. C. J.: "Proof of 'actual marriage' is always used and understood in opposition to proof by cohabitation and reputation and other circumstances from which a marriage may be inferred.[8] . . . We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation, are not sufficient to maintain this action. . . . It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the party himself. . . . Inconvenience might arise from a contrary determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action. . . . Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact,—as, by a person present at the wedding dinner, if the register be burnt and the parson and clerk are dead."

MANSFIELD, L. C. J., in BIRT *v.* BARLOW, *1 Doug. 171, 174* (1779): "An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage; in other cases, cohabita-
195 tion, reputation, etc., are equally sufficient since the Marriage Act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purpose by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of Morris v. Miller, that in such an action a marriage in fact must be proved."

HAM'S CASE (1834).

11 Me. 391, 394.

Indictment charging the respondent with the crime of adultery. To prove the marriage the government relied on evidence of the following facts:—The respondent moved into the town of Fayette, in
196 this State, more than twenty years ago, representing at that time, to the person of whom he hired the house, that he had a small

8—*Gilchrist*, J., in *State* v. *Winkley*, 14 N. H. 480, 495 (1843): "In criminal prosecutions, like indictments for bigamy, adultery, etc., direct evidence of the marriage is required, and this may appear from the testimony of witnesses who were present at the ceremony. This constitutes proof of a 'marriage in fact,' and is merely direct evidence of the marriage, as contradistinguished from cohabitation, etc., which is indirect evidence of the marriage."

family, only a wife and one child. Soon after hiring said house, he moved into it with a woman and one child about five or six months old, and continued to live with that woman, as his wife, until about three years since, when he left her and came into this County, or the County of Penobscot. In 1807, he built a house in Fayette, moved his family into it, continued to reside there until he left the town. During their cohabiting together, they were reputed to be husband and wife, and were supposed to be married; and the woman had five or six children which were reputed to be his. He called the woman "Miss Ham," and treated her as a wife. . . . The counsel for the prisoner objected to all evidence tending to prove a marriage by reputation, but the objection was overruled. The counsel also contended that this evidence was insufficient to prove the marriage.

Mellen, C. J.: "The question which at once presents itself on this occasion is, Why should not the defendant's deliberate and explicit confession of his marriage, in such a prosecution, be as competent evidence to prove such marriage as a similar confession is to prove the crime of adultery charged? If either fact exists, it must certainly be within his own knowledge; and, as a general proposition it is certainly true that a deliberate and voluntary confession, understandingly made, is the best evidence; for he who makes it speaks from his actual knowledge of the fact; no one has any interest in its truth or interest in disputing it. . . . Viewing the question under consideration independently of decided cases, there would seem but one reason why the deliberate confession of his marriage, made by defendant in a prosecution against him for bigamy or adultery, should not be received as competent and satisfactory evidence of such marriage,—namely, that the person solemnizing the marriage had no legal authority to do it, and yet the want of authority might not have been known by the person officiating or by the defendant himself when he made the confession. . . . In no other cases, however, do we perceive that any unfavorable consequences could ensue which would not follow upon a conviction upon undisputed proof of a legal marriage. . . . [Yet] the plea of guilty is a confession of the crime, which includes a confession of the marriage, that being essential to the existence of the crime; the Court receives such a plea and passes sentence on the offender, though even this solemn confession in open court may be made under a mistaken belief that the marriage was solemnized by a person duly authorized, though the fact was otherwise. . . . The question then is, whether a deliberate confession of marriage is not as convincing evidence of the fact as the testimony of a witness present; for in the case of confession [as well as of eye-witnesses] the question of identity can never arise. . . . When we take all the foregoing circumstances into consideration, together with the known fact that marriages are seldom recorded as the law requires, and the difficulty of ascertaining who were present at the marriage, especially among the lower classes and after the lapse of a few years, we appre-

hend that the interests of public justice would be advanced by a relaxation of the rules of evidence touching the point before us and by a more liberal principle applied in the investigation of facts, so that the laws of the land may be more surely enforced against unprincipled offenders and the public morals be more faithfully and effectually guarded. . . . We now proceed to examine the evidence. . . . The report states, that more than twenty years ago the defendant said he had 'only a wife and one child,' that soon after it was proved, he moved into a house with "a woman and a small child," and lived with her as man and wife, that they were reputed as such, and had several children, that he called her Miss Ham, and treated her as a wife. It does not necessarily appear that the woman he lived with was the same person that he had before spoken of. His calling her 'Miss Ham,' or his wife, is no proof that she was his wife. It is far from a deliberate and explicit confession that he was ever married to her. As before has been observed, if he had 'a wife' more than twenty years ago, it does not appear that she was living at the time the alleged offence was committed; nor does it appear that she was the 'woman' with whom he afterwards lived, and called 'Miss Ham.' The confession is not sufficient, according to the principles above stated, to justify a conviction. It does not amount to a distinct and deliberate confession of a marriage, continuing to the time of the offence charged in the indictment. Accordingly the verdict is set aside, and as agreed, a *nolle prosequi* is to be entered."

Statutes. *California,* P. C. 1872, § 1106; in bigamy, "it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof."

197 *Illinois,* Rev. St. 1874, c. 38, § 29; St. 1845; in bigamy, "it shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases."

Massachusetts, Pub. St. 1882, c. 145, § 31: "When the fact of marriage is required or offered to be proved before a Court, evidence of the admission of such fact by the party against whom the process is instituted, or evidence of general repute or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent"; Rev. L. 1902, c. 151, § 39: "Marriage may be proved by evidence of the admission thereof by an adverse party, by evidence of general repute or of cohabitation by the parties as married persons, or of any fact from which the fact may be inferred."[9]

9— Compare the authorities cited in W., §§ 2084-2088.

SUB-TITLE III.

VERBAL[10] COMPLETENESS.

READ v. HIDE (1613).

Coke's Third Institute, 173.

"It was resolved that no exemplification ought to be of any letters patent or of any other record, or of the inrolment thereof, but the whole record or the inrolment thereof ought to be exemplified;
198 so that the whole truth may appear, and not of such part as makes for the one party and nothing that makes against him or that manifesteth the truth."

ALGERNON SIDNEY'S TRIAL (1683).

9 How. St. Tr. 817, 829, 868.

Seditious libel; Mr. *Williams,* his counsel, had instructed the accused: "In the evidence against you for your writing, take care that all that was writt by you on that subject be produced, and that
199 it be not given in evidence against you by pieces, which must invert your sense"; on the trial, one of the passages read against Sidney from his manuscript was: "The general revolt of a nation from its own magistrates can never be called rebellion." At the trial, *Sidney,* arguing against using these passages piecemeal, said: "My lord, if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying, 'There is no God,' and accuse the Evangelists of saying, 'Christ was a blasphemer and a seducer,' and the Apostles, that they were drunk". JEFFRIES. L. C. J.: "Look you, Mr. Sidney; if there be any part of it that explains the sense of it, you shall have it read. Indeed, we are trifled with a little. It is true, in Scripture it is said, 'There is no God'; and you must not take that alone, but you must say, '*The fool hath said* in his heart, There is no God.' Now here is a thing imputed to you in the libel; if you can say there is any part that is in excuse of it, call for it."

THOMAS STARKIE, *Evidence, 7th Am. ed., II, 549* (1824): "Of all kinds of evidence, that of extra judicial and casual observations is the weakest and most unsatisfactory. Such words are often spoken
200 without serious intention, and they are always liable to be mis-

10—"Verbal" is here used in its proper sense of "consisting in words," whether spoken or written. "Oral" signifies "consisting in speech."

taken and misremembered, and their meaning is apt to be misrepresented and exaggerated. I once heard a learned judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, 'I *am* the drawer, the acceptor, and the indorser of the bill.' Whilst the learned judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was that the prisoner had said, 'I *know* the drawer, the acceptor, and the indorser of the bill.' Had the witness, and not the judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted.[11]

COMMONWEALTH v. KEYES (1858).

11 Gray 323, 324.

MERRICK, J.: "It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his favor, and the whole should be taken and considered together. This is essential to a complete understanding of what he intended to express by the particular phrases and languages which he used. To give effect to general statements, without regard to the qualifications with which they are accompanied, and by which they may be materially modified, would manifestly lead to error, and be likely to be directly productive of injustice. All therefore is to be heard and weighed before it can be affirmed that the force and effect of language, whether written or spoken, are fully and justly apprehended. In the construction of contracts, the same principle prevails, requiring that each particular part shall be examined and considered, in order to learn and comprehend the scope and purport of the whole. All writings, whether of a public or private character, are to be subjected to the same kind of scrutiny. No provision of a statute, however minute, is to be overlooked when searching for the design and object of the Legislature in its enactment, and in considering how it ought to be interpreted and explained; just as particular covenants in a deed, or devises in a will, are to be construed according to the intent of the parties in the one case, and of the testator in the other, so far as it can be ascertained by bringing into view all the expressions and provisions contained in these respective instruments."

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11—*Neilson*, J., in *Tilton* v. *Beecher*, Abbott's Rep. II, 837 (1875), on certain quotations being cited to him: "When you and I were boys, we found that general principle cited in all the text-books very much after the form that you have put it. . . . Perhaps the best statement of that has been given in Starkie on Evidence, to the effect that this kind of testimony is dangerous, first, because it may be misapprehended by the person who hears it; secondly, it may not be well-remembered; thirdly, it may not be correctly repeated."

(A) COMPULSORY COMPLETENESS

EATON v. RICE (1836).

8 N. H. 378, 380.

Issue as to a dividing line between two lots of land. It appeared that in the spring of 1835 the parties were together upon the land now in dispute, and had a conversation about the line; and a witness
202 who was present at that time stated that he understood, by their conversation, that they then agreed where the true line was. RICHARDSON, C. J.: "It is objected, in this case, that the defendant's witness was improperly permitted to state generally what he understood the agreement between the parties to have been, as to the line between their lands, from their conversation on the subject. . . . If a witness should undertake to state in detail all that was said by two persons in making a contract, in the precise order in which it was said, and exactly as said, it would amount to nothing more than stating what he understood them to say. But it can rarely happen that a witness who was present when a conversation was had between two individuals can at any time afterwards, and particularly at any distant time, state precisely what was said by them, although he may recollect distinctly an agreement made between them at the time. If, then, in all cases the witness is required to state what was said so accurately that the jury may be enabled to judge by the terms used what a contract was, it must frequently happen that a contract not in writing cannot be proved at all. . . . The recollection of a witness as to what an agreement between parties was, according to his understanding of what was said by them at the time, may be very satisfactory evidence, although he may not be able to recollect distinctly one word that was said. . . . The credit that may be due to a witness in these cases may depend much on his being able to detail enough of the conversation to show that his understanding of the matter was probably right. But what he understood is in all cases evidence to be weighed by the jury."

SUMMONS v. STATE (1856).

5 Oh. St. 325, 346, 351.

Murder by poisoning. One Mary Clinch, a witness at the first trial, had since died. Thomas A. Logan was offered, on the third trial, to prove her former testimony. He testified that he was present
203 at the first trial, and was the student and clerk of Judge Walker, one of the counsel for the state; that he heard all the testimony given by Mary Clinch, and thought he had taken it all down in writing, and could give the substance of all she testified from his recollection, aided by reference to his notes. On cross-examination as to this point, he

stated that he took down, as nearly as possible, the substance of all that Mary Clinch testified on examination, cross-examination, re-examination, and in rebutter. That he recollected, without reference to his notes, the main points of her testimony, and recollected the substance of all of it, by refreshing his recollection with his notes. That he could not say he took everything, but he thought he took the substance of everything. That the cross-examination was rapid, but Judge Walker frequently stopped the witness, Mary Clinch, to enable him to get it all down. . . . Logan was then requested by counsel for the state to give the testimony of Mary Clinch from his recollection, refreshed by his notes, which he had with him in court, but the notes were not offered in evidence. Defendant's counsel objected. BARTLEY, C. J.: "There would seem to be no sound reason for subjecting it [former testimony] to a rigid rule amounting to its almost total exclusion, which is inapplicable in other cases where testimony showing words spoken or the statements of a party or other person is admissible. In prosecutions for perjury, the testimony of the accused upon which perjury is assigned is not required to be *ipsissimis verbis,* but allowed to be given in substance; so with the declarations of a co-conspirator, declarations made *in extremis,* or the admissions or confessions of a party. So also with testimony of a verbal slander, or the declarations or statements of a party or witness, offered for purposes of contradiction or impeachment. . . . What sufficient reason can exist for a departure from the rule in case of the testimony of a deceased witness on a former trial? . . . It is apparent, from a review of the decisions on this question, that the weight of authority is very decidedly against the rule which requires an exact recital of the words used by the deceased witness. The difficulty which appears to have troubled courts so long on the question, has been a controversy about *words,* rather than *facts.* The efficacy of the testimony consists, not in the mere *words* used, but the *matters of fact* stated by the deceased witness. If the facts stated by the deceased witness on the former trial, can be narrated with substantial accuracy in all their material particulars, there would seem to be no good reason for cavil about the very words. . . . There is a distinction, however, between narrating the statements made by the deceased witness and giving the effect of his testimony. This distinction may be illustrated thus: If a witness state that A, as a witness on a former trial, proved the execution of a written instrument by B, that would be giving the effect, which is nothing else than the result or conclusion produced by A's testimony. But if the witness states that A testified that he had often seen B write, that he was acquainted with his handwriting, and that the name subscribed to the instrument of writing exhibited was B's signature, that would be giving the substance of A's testimony, though it might not be in the exact words. . . . While, therefore, a witness should not be trammeled by a rule restricting him to the words used by the deceased witness,

he should not be allowed the latitude of giving the mere effect or result of the deceased witness' testimony..

THOMSON v. AUSTEN (1823).

2 Dowl. & R. 361.

Assumpsit for goods sold and delivered. The plaintiff having proved a prima facie case of demand upon the defendant for goods sold him to the amount of 630*l.*, a clerk of the defendant's attorney was
204 called, for the purpose of showing, that in an interview between the clerk and the plaintiff, the latter had said, "he was so anxious to get out of law that he would refer the question in dispute to the witness, as an arbitrator;" and upon that being declined, added, "he had received 800*l.* from Mr. Campbell, on Mr. Austen's (the defendant's) account, which he meant to set off against some bad debts owing to him from some other persons." . . . It was objected on the part of the plaintiff that the evidence could not be received, because it was in the nature of a confidential communication, made with a view to a compromise, and was therefore protected by the general rules of evidence; and the learned judge yielding to the objection, the evidence was rejected.

ABBOTT, C. J.: "Upon the best consideration I have been able to give to this case, I am of opinion that the mode in which the learned judge, who tried this cause, left the point at issue to the jury, was not altogether correct; and therefore it is our duty to send it down for further inquiry before another jury. It appears that the former part of the conversation to which the witness was a party, was received in evidence, and was so summed up to the jury; and that the latter part, which has been the subject of argument to-day, was rejected. . . . It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

PARNELL COMMISSION'S PROCEEDINGS, 1st, 4th, 6th, 7th, 83d days (1888), *Times' Rep. pt. 1, p. 236, pt. 2, pp. 28, 104, 109; pt. 23, p. 60.*

The Land League and its leaders were charged with encouraging
205 outrage and crime, and numerous speeches of the leaders were offered to prove this; repeated discussion took place, during the trial, as to the fair and proper way of using the passages relied upon; in the Attorney-General's opening, the following statements were made; the *Attorney-General:* "I have not got the whole of the speeches; I have only reports. A man may speak for two hours, but I may have only a few lines of his speech"; President HANNEN: "If you have not got the whole of them, it will be open to Sir Charles Russell to correct you

by referring to such reports as do exist; but what you do use [in your opening address] you will put in the whole of it [in evidence later]"; the *Attorney-General:* "Without exception, the whole extract at my command of every speech I read shall be put in." Then at a later day, when certain speeches were put in evidence by Sir *H. James* from constables' notes, Mr. *Healy* having claimed that "the proper course is to read the entire speech," President HANNEN said: "It is not necessary for you, Sir Henry, to read the whole speech, but only those portions on which you rely. . . . The only regular course is this (and whatever it leads to, it must be followed): You, Sir Henry, will call attention to what you consider the material parts of the speech, and Sir C. Russell can on cross-examination refer to other portions which he may consider, and, if necessary, the cross-examination can be postponed until he has had an opportunity of seeing the full speeches." Shortly afterwards, the counsel for the *Times* proposed an arrangement by which copies of all the reports of speeches were to be prepared and underlined and furnished to all parties for convenient reference when Mr. *Healy* inquired: "Some of the speeches made would cover two or three columns if taken verbatim, but they have been condensed [in the constable's notes] into three or four sentences. What is the intention with regard to them?" Sir *H. James:* "We can only present the short report in those cases, because that is all we have got." On a still later occasion, Mr. *Reid,* the counsel for Mr. O'Brien, read passages from his speeches showing his opposition to criminal methods, and was interrupted by the *Attorney-General:* "You have omitted a passage which precedes that"; Mr. *Reid:* "I thought the rule was that what you wished to read should be read subsequently;" *Attorney-General:* "I was only suggesting that the course which has been pursued on every other occasion by Sir Charles Russell and yourself should be pursued now"; President HANNEN (to Mr. Reid): "This question arose before, and there was great complaint on your part that the Attorney-General did not read all, and then you read, or Sir C. Russell read something. But I have laid down the rule that, unless you can come to a compromise, the true rule is for you to read what you attach importance to and for the other side to do the same."[1]

EATON'S TRIAL (1794).

23 How. St. Tr. 1030.

Sedition. Mr. *Gurney,* for the defence: "I desire that the whole of the [alleged seditious] speech of Mr. Thelwall may be read [by the prosecution], a part only of which is included in the indictment". Mr. *Fielding,* for the prosecution: "You may read it as part of your evidence." Mr. *Gurney:* "I know I may; but I conceive I have a right to have it read as part of yours. Whenever a

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1—Compare the authorities cited in W., §§ 2097-2100.

part of a paper is read in evidence by one party, the other party has a right to insist upon the whole being read at that time." Mr. RECORDER: "I think you [to Mr. *Gurney*] must read it as a part of *your* evidence, if you wish to have it read."

TILTON v. BEECHER (1875).

N. Y., Abbott's Rep. II, 270.

Action for criminal conversation. Mr. *Evarts* (cross-examining): "Look at this article, Mr. Tilton, . . . and say if it was written by you and published in your newspaper?" A. "Yes, sir." Mr.
207 *Shearman:* "It is an article entitled, 'Mr. Tilton's Rejoinder to Mr. Greeley.'" Mr. *Fullerton:* "If we have the sermon, let us have the text." Mr. *Beach:* "I think it is the rule, sir, that where an answering letter is read, the letter to which it was a reply should be read also." Judge NEILSON: "That is the rule. Perhaps if counsel will look at it they can judge whether it is material." Mr. *Evarts:* "Your Honor, we understand exactly what the rule is. All that can be claimed by our learned friends is that it gives them a right to read any part of the paper to which it is a reply, if they see fit. They cannot make us read it." Judge NEILSON: "I have had occasion to say that where one party puts a paper in they were at liberty to read a part of it. But it was deemed all put in by *them,* and the other side could read any portion of it they thought proper." Mr. *Fullerton:* "That does not present this case." Mr. *Evarts:* "How does it fail to present this case? Supposing it is all in, are we obliged to read it all? . . . I do not understand that we are obliged to read the whole article to get at the point which is important to us." Judge NEILSON: "The whole must be deemed put in by you." Mr. *Evarts:* "That may be." Judge NEILSON: "And you read such part as you now think proper, and they can afterwards call attention to other parts. I think that will answer."[2]

PERRY v. BURTON (1884).

111 Ill. 138.

Bill for partition of a tract of land. SCHOLFIELD, C. J.: "The tract was entered by Isaac Cook on the 30th of November, 1835, and he conveyed the undivided half thereof to Asa M. Chambers and Shel-
208 don Benedict, by warranty deed, on the 7th of February, 1836. In November, 1848, Benedict conveyed his interest in the tract to Chambers, and on the 10th of November, 1871, Chambers conveyed his interest in the tract to the appellants, James S. Perry and John N. Henderson. No question is made as to any of these conveyances, except

2—Compare the authorities cited in W., § 2102.

that by Benedict to Chambers. The deed effecting that conveyance was lost, and its execution and contents were proved by oral evidence only, and counsel for appellees insist that such evidence was not sufficiently full and satisfactory. We can not concur in this view. The facts that the deed was executed and was afterwards lost were clearly proved. . . . His testimony as to the contents of the deed, we think, is sufficiently full. A witness testifying to the contents of a lost deed is not to be expected to be able to repat it *verbatim* from memory. Indeed, if the were to do so, that circumstance would, in itself, be so conspicuous as to call for an explanation. . . . All that parties, in such cases, can be expected to remember is that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what party. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed."[3]

VANCE v. REARDON (1820).

2 N. & McC. 299, 303.

Trover for a slave, claimed by the plaintiff under a sheriff's sale under an execution on a judgment against William Harville, at Orangeburgh, in 1806. The plaintiff produced a paper purporting to be
209 an exemplification of the proceedings, certified by the clerk. It contained a literal copy of the process, (being within the summary jurisdiction,) the judgment and the first execution. This execution was for $95, including debt, interest, and costs, and was entered in the sheriff's office the 5th November, 1806. Instead of a literal copy of the second execution, the clerk furnished only an abstract, containing the names of the parties, the amount of debt, interest, and costs, with a memorandum of an entry in the sheriff's office, 2d July, 1808; and a return of *nulla bona,* without date; and also, that a third execution was signed, 19th March, 1808. There was also a similar abstract of a third execution, entered in the sheriff's office, 19th March, 1808, on which the following return was stated to have been made, "levied on a negro man named Joe, sold the same on the 4th April, 1808, purchased by William Vance, for $251.10." The certificate of the clerk to these exemplifications were in these words: "I, Samuel P. Jones, Clerk of the Court of Common Pleas, for the district of Orangeburgh, do hereby certify, that the two sheets of paper hereunto annexed, do contain a true copy (or extract), of the proceedings in a certain cause, wherein Robert Tutle is plaintiff, and William Harville is defendant," etc. Upon closing this evidence the motion was made for a nonsuit by the defendant, on the ground, that the exemplification was only legal evidence so far as it professed to give a copy of the proceedings, and there being only

3—Compare the authorities cited in W., §§ 2105, 2106.

an abstract of the execution, under which the sale, if any, was made, the plaintiff had failed in the proof of property.

JOHNSON, J.: "The Act of the Legislature of 1721, P. L. 117, 1 Brev. Dig. 315, authorizes attested copies of all records, certified by the clerks of the Courts, to be given in evidence. . . . It appears to me obvious that the Legislature never intended by the term *copies,* to make *extracts* evidence; the terms themselves are of different import, and besides the mischief of confounding them appear to me too manifest to need exposure. A party is not presumed, nor is he bound, to know what evidence his adversary will adduce against him; and if he [the adversary] be permitted to extract from a record only so much as he may deem necessary to his own side of the question and to give it in as evidence, he will always take care to leave out that which makes against him. By the same rule, the opposite party would have the same right to extract so much as was subservient to his side of the question, which, from the specimen of extraction furnished by this case, would produce inexplicable difficulties. Thus, in this case, we find that on the first *fi. fa.,* when only $95 was due, $110 had been paid, and yet an *alias* issued, and also a *pluries;* and, as if to force conviction upon me of the necessity of a literal copy, the extract represents the *pluries* to have been entered in the sheriff's office on the 19th March, 1808, and the *alias,* which must necessarily precede it, as having been entered on the 2d July, 1808, nearly four months after. But it has been argued, that these extracts were permissible as *prima facie* evidence of the existence of such judgments and executions. I confess I do not understand how this sort of evidence can apply to a case, when the court sees from the evidence produced, that better and more ample proof of the fact does exist, and is in the power of the party."[4]

(B) OPTIONAL COMPLETENESS.

THE QUEEN'S CASE (1820).

2 B. & B. 297.

ABBOTT, C. J.: "The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit. and if a counsel chooses to ask a witness as to any-
210 thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation,—not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-

4—Compare the authorities cited in W., §§ 2108-2110.

matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion."

PRINCE v. SAMO (1838).

7 A. & E. 627.

DENMAN, L. C. J.: "This was an action for malicious arrest on a false suggestion that money was lent by defendant to plaintiff, when it had been in fact given. The plaintiff called his attorney as a wit-
211 ness; he happened to have been present at the trial of a prosecution for perjury instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination, the same witness was asked whether plaintiff had not also on that occasion, given an account of the circumstances out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause, and malicious, of both which facts there was scarcely any, if any, evidence whatever. This question, expressly confined to that purpose, was whether plaintiff did not say, in the course of his examination, that the money was given, and not lent. To this question the defendant's counsel objected, not on account of its leading form, but because the defendant's having proved one detached expression that fell from the plaintiff when a witness does not make the whole of what he then said evidence in his own favour. My opinion was that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it. . . . Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved. . . . We cannot assent to [the above passage of the opinion in The Queen's Case]. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extrajudicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord Eldon or any of the other Judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority."

ATHERTON v. DEFREEZE (1902).

129 Mich. 364, 88 N. W. 886.

Title to horses; a witness for the plaintiff testified to the defendant's admission that the horses were not his; on cross-examination by the defendant's attorney, the witness, in reply to the question, "What
212 else did he say?" said: "He said he was so blind he couldn't see; and I asked him about how much the colts were worth, and he said about $300, and if he didn't get them he would go to the poor-house." GRANT, J.: "Parts of a conversation, having no reference whatever to the issue upon trial, are not admissible under the rule that a party is entitled to the entire conversation. The rule means only that he is entitled to the entire conversation bearing upon the subject in controversy. Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine. Defendant's blindness and poverty had nothing to do with the title to the property."[5]

DEWEY v. HOTCHKISS (1864).

30 N. Y. 497, 502.

Action for the price of goods sold and delivered. The plaintiff's clerks proved from his account-books items amounting to $1,269.72. The defendant having, on the cross-examination, shown that the
213 books so produced, were the plaintiff's books of original entry, read therefrom certain items of credit, amounting to $152.09; and the plaintiff's counsel, thereupon, offered to read from the said books, other charges against the defendant, which had not been proved by the plaintiff's witnesses. The defendant objected to the reading of these entries, but the referee overruled the objection, and an exception was taken. HOGEBOOM, J.: "The plaintiff's account-books, it is conceded, were properly in evidence. In connection with the oral testimony of the clerks, they established the larger part of the plaintiff's claim. Being in evidence, the defendant availed himself of them, to prove thereby credits in his own favor. There were equally well established, whether they were in the plaintiffs' handwriting or not. The plaintiffs had brought them forward as their books, claiming for them authenticity and credit, and could not deny their admissibility and force, even when they operated against themselves. In using them for his purpose, the defendant apparently traveled over their entire contents, selecting his items wherever he pleased, without reference to dates or subject-matter, or their connection or relation to the charges read by the plaintiffs. Thus, he selected from the day-books three different items, each of con-

5—Compare the authorities cited in W., §§ 2113-2116.

siderable amount, of the respective dates of 2d May 1848, 22d March 1849, and 27th October 1849. He selected from the cash-book eight different items, ranging between the dates of 21st July 1848, and 19th November 1851. He had, therefore, used the whole of the books indifferently for his purpose. He had taken the entire account between the plaintiffs and the defendant, adopted it for his own benefit, and was not, I think, at liberty to renounce it, where it made against him. . . . The books constituted one entire series of accounts between these parties, and, for the purpose of this case, may be regarded as if they contained nothing else whatever—indeed, as if they had all been presented in court by the plaintiffs on a single paper or account current. In such case could the defendant be permitted to cull particular entries from the account and exclude the residue? I think not. The rule that a party whose oral declarations, in a conversation are improved in evidence by his adversary, is not thereby permitted to introduce in his own favor disconnected portions of the same conversation having reference to distinct and independent matters, has no close application to such a case; 1st, Because the account must be regarded as the single, entire and continuous statement of the party offering it, presenting his version of the true state of the business transactions between the parties,—not necessarily entitled to credit in every part, if discredited by other evidence, but admissible for the consideration of the jury; 2d, Because the defendant, having adopted the whole statement by ranging through its entire scope and contents, has given currency to the whole, and has made it necessary to examine and take in the whole, in order to determine how far the portions rejected by him bear upon, affect, or qualify the portions selected. There is no evidence that the portions of the account introduced by the plaintiff, after those introduced by the defendant, do not materially qualify the effect of the latter items, and do not in fact relate to the same precise subject-matter."[6]

CALVERT v. FLOWER (1836).

7 C. & P. 386.

Mr. *Kelly,* for the defendant, having called for the plaintiff's ledger, due notice to produce having been given, Mr. *Campbell,* for the plaintiff, said: "I will produce it, if it is called for as your evidence"; Mr. *Kelly:* "I call for it, but subscribe to no condition"; DENMAN, L. C. J.: "If it is produced and given to Mr. Kelly, it will be for me to decide whether Mr. Kelly makes such use of it as will compel him to use it as his evidence." The book was produced, and Mr. Kelly turned over several pages of it, so as to look at the contents of them. DENMAN, L. C. J.: "I ought now to say that if Mr. Kelly looks at the book, he will be bound to put it in as his evidence"; Mr. *Kelly:* "Certainly, I am fully aware that I must do so"; DENMAN, L. C. J.: "I have men-

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6—Compare the authorities cited in W., §§ 2118-2120.

tioned this because it has been supposed by some, that an opposite counsel may look at the papers or books called for under a notice to produce, and then not use them."[7]

SUB-TITLE IV.

AUTHENTICATION OF DOCUMENTS.

HORNE TOOKE'S TRIAL (1794).

25 How. St. Tr. 78.

High treason. A book purporting to be the minutes of the Constitutional Society, at a meeting of March 28, 1794, with Mr. Tooke as chairman, was offered to be read by the prosecution, after some evi-
215 dence of the handwriting:

Mr. *Tooke:* "Is the insertion of my name in that book evidence of my being present at the time?"

Lord Chief Justice Eyre: "It is certainly evidence to go to the jury of your being present."

Mr. *Tooke:* "My name being found in any book! that will be the most extraordinary evidence I ever heard of; the bulk of the trash that is to be found in that book I never saw or heard of before; but that every time that my name is to be found in the book, that that is to be evidence that I was present is a most extraordinary proposition; if I wrote my name in the book, that would be evidence that I was there when I wrote it, but my name being written in a book does not prove my being there when it was wrote. . . . If this evidence were to be admitted in a charge of high treason, and it should therefore follow that I partake of whatever is over or under my name, it would be the most extraordinary evidence that ever was admitted in a court of justice."

Lord Chief Justice Eyre: "You are perfectly right, if the state of the evidence depended entirely upon your name being found in a book in possession of a Daniel Adams; undoubtedly, in order to prove your being present at these meetings, they must go a great deal farther —they must show that these are the books of the society, they must give probable evidence that these were books which you had access to, which you acted upon, and that you gave credit to the entries that were

7—*Bartlett*, J., in *Austin* v. *Thomson*, 45 N. H. 113, 117 (1863): "The only reason given for the supposed rule is [the unconscionable advantage of prying without responsibility]. . . . But as the party notified is not obliged to produce the papers, and as he may if he produce them decline to allow them to be examined except upon condition that if examined they shall be read in evidence, parties notified seem amply protected from any such unconscionable advantage, and the reason stated entirely fails; and we see no sufficient reason for a rule that is at variance with the general course of our practice and that can hardly facilitate the administration of justice, since if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the Court to allow incompetent evidence to go to the jury."

Compare the authorities cited in W., § 2125.

in it by some conduct of yours. This is only one step toward the evidence, to fix you with being a person present at this meeting."

Mr. (later L. C.) *Erskine,* arguing against the reading of the treasonable paper: "Would it be said that this should be read as evidence against the prisoner before his connexion with it is proved to have had an existence? I take the reason of that to be this—and I take the reason of it to be founded in great wisdom, in that which in my opinion forms the glory of the English law in all its parts, in an acquaintance with the human character, in the recognition of all that belongs to the principles of the human mind, in the recollection of our wise ancestors that men are not angels, that they carry about them (and your lordships even carry about you) all the infirmities of humanity, and that is therefore shall not be permitted to make a strong impression upon the minds of men by reading matters at which . . . the mind of man revolts, and so in the course of a long trial the jury afterwards cannot discharge from their recollection what they have heard. They do not remember with precision whether that which was read was brought home to the prisoner; and then they mix up in their imagination and recollection matters which they may disapprove with disapprobation of the person who is on trial before them. I take that, with humility to be the principle. . . . It must first of all be brought home to the person who is to be affected by it, before it is suffered to be read; for after it is read, the effect is had, and that is the danger I complain of." *L. C. J.* Eyre: "If the question is whether it is now to be read, I think the objection is good. If the question is whether it is evidence admissible, not yet to be read, but to be read or not as other evidence shall bring the matter of it sufficiently home to the prisoner, then the objection is ill-founded."

STAMPER v. GRIFFIN (1856).

20 Ga. 312, 320.

Benning, J.: "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or of the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence."[8]

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8—*Jeremy Bentham, Rationale of Judicial Evidence, b. vii, c. iii* (1827), Bowring's ed., vol. vii, p. 179: "When from an individual more or less known to me in person or by reputation, I receive a letter, bearing his signature—that is, when I receive a letter with a signature purporting to be that of a person known to me as above,—on what supposition can such a letter have emanated from any other hand than his? On no other than that of forgery,—a crime not to be presumed, or so much as suspected, without special ground, in any single instance; much less in a number of unconnected instances."

Bronson, C. J., in *Willson* v. *Betts,* 4 Den. 201, 213 (1847): "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof."

SIEGFRIED v. LEVAN (1820).

6 S. & R. 308, 311.

DUNCAN, J.: "This was an action for debt on bond; the plea, non est factum. The plaintiff gave evidence, as stated in the bill of exceptions, and then offered the bond (of which he had made profert
217 and given oyer) to the jury in evidence; this was objected to, and the court sustained the objection, and would not suffer the bond to be read in evidence. The exception to be considered is to this opinion of the court. . . . The mistake arises from supposing that the court, in suffering the deed to go in evidence to the jury, decide the issue; nothing can be more unfounded. . . . All that is done by the Court, in admitting the deed in evidence, is this, that if the execution of the deed is proved by the subscribing witness, the party has made out a *prima facie* case, not a conclusive one, or, in cases where recourse is had to the secondary evidence, the collateral proof is such that a jury might presume [*i. e.* infer] the execution; and then these facts are submitted to the jury to exercise their own judgment, to draw their own conclusion of the sealing and delivery. . . . If the bond is proved by the subscribing witness, it is read in evidence. Why? Not because the Court pronounce, by admitting it in evidence, that it is the deed of the party; but because the party has given evidence of its execution. So, where the execution is to be made out by facts and circumstances, it is admitted, not because the Court draw any conclusion of the fact in issue, but because *some evidence* is offered from which the jury might presume [*i. e.* infer] the fact in issue, the sealing and delivery of the bond. If there be no evidence of the execution, the Court will not permit the bond to be read in evidence. But if there be any fact or circumstance tending to prove the execution or from which the execution might be presumed, then like other presumptive evidence it is open for the decision of the jury."

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[1]MODES OF AUTHENTICATING DOCUMENTS. "Some of the various possible modes of proving a document's genuineness are, of course, never questioned to be sufficient to entitle it to go to the jury.
218 Those about which question has arisen are only certain kinds of circumstantial evidence. It will be necessary therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

"Evidence may be of three different sorts; namely, 'real evidence,' testimonial evidence, and circumstantial evidence.

"(1) Autoptic proference (or *'real evidence'*), occurs, for the execution of writings, when the *act of writing* is done *in the presence of the tribunal.* The sufficiency of this is plain.

"(2) *Testimonial evidence* is always regarded as sufficient; the only

1—Quoted from W., § 2131.

questions being the ordinary ones as to the qualifications of the witness by knowledge.[2] Ordinary *admissions* of a party are a sort of evidence always regarded as sufficient to admit a document to the jury, but they are to be distinguished from judicial admissions.[3]

"(3) *Circumstantial evidence* is of various sorts; and first, of those not here involved:

"(*a*) *Style of handwriting, i. e.* similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.[4]

"(*b*) *Sundry circumstances* preceding or following the act of writing may be appealed to as evidence. For example, if an unsigned writing is left in a room with pen and ink, and Doe goes alone into the room, then comes out with fresh ink-marks on his hand, and the writing is then found to bear his name in signature, this would be regarded, no doubt, as sufficient evidence to go to the jury; it is the same sort of evidence that might be used to prove a murder or any other act done in that room.[5] For evidence of this sort there seem to be no specific rules of sufficiency.

"(*c*) The remaining sorts of circumstantial evidence are those which give rise to quantitative rulings of sufficiency. They consist of groups of circumstances, each by itself perhaps insufficient, but all combined amounting in common experience to a sufficiency. They fall, roughly, under four heads: (A) *age;* (B) *contents;* (C) *custody;* (D) *signature* or *seal.*"

PEARCE v. HOOPER (1810).

3 Taunt. 60.

Trespass for breaking and entering the plaintiff's close, called Coldrinick Wood, and cutting down the coppice and underwood there growing, and seizing, taking, and carrying away the same. The de-
219 fendant pleaded not guilty. The defendant gave notice to the plaintiff to produce, upon the trial, the indenture of lease and release, wherein the vendor had conveyed to him Coldrinick estate, by a description limited to a specific number of acres, which would necessarily exclude Coldrinick Wood. The plaintiff accordingly produced these deeds; but the defendant not being prepared with the attesting witnesses to prove the execution of them, it was contended on the part of the plaintiff, that without such proof they could not be received in evidence. On the other hand, the defendant contended, that since these instruments came out of the hands of the plaintiff, under a notice to produce them, and contained his title to the premises (if he had any title), it must be considered that further proof of the execution of them

2—*Ante,* Nos. 83-85.
3—*Post,* Nos. 219, 646.
4—*Post.* Nos. 427-433.
5—*Ante,* No. 32.

was unnecessary. Graham, B., was inclined to receive the evidence, but, upon the authorities cited, rejected it, reserving the point; and the jury found a verdict for the plaintiff.

Mansfield, C. J.: "There can be no doubt in this case. The mere possession of an instrument does not dispense with the necessity which lies on the party calling for it, of producing the attesting witness; an instance is properly put in the case of a will, cited in Gordon v. Secretan [8 East, 548], as having been tried before Lord Kenyon: for, supposing that an heir-at-law is in possession of a will, and the devisee brings an ejectment, and calls on the heir to produce the will; there the heir claims, not under the will, but against the will, and it would be very hard that the will should be taken to be proved against him, because he produces it. But that is very different from the case where a man is called on to produce the deed under which he holds an estate. The plaintiff has no interest in the fee-simple of the estate, if this deed does not convey it; consequently, if he produces the deed under which he claims, shall it not be taken to be a good deed so far as relates to the execution, as against himself? There must necessarily, therefore, be a new trial in this cause."[6]

(A) AUTHENTICATION BY AGE.

MEATH v. WINCHESTER (1836).

3 Bing. N. C. 183, 200.

Tindal, C. J.: "The first and second questions proposed by your lordships to his majesty's judges are these:—In quare impedit to recover the presentation to the church of K., the advowson whereof
220 is claimed to be part of the temporalities of the Bishop of M., a deed was offered in evidence purporting to be brought from the custody particularly described in the bill of exceptions to which we are referred by your Lordships; and also a case, purporting to be a case stated for the opinion of counsel on the part of a former Bishop of M., and brought from the same custody; and whether such deed and such case were respectively admissible in evidence against the successors to the Bishop of M. in that see, are the first and second questions proposed to us by your lordships. With your lordships' permission we shall reverse the order of considering the two questions, and give our answer, first to the question, whether the case was admissible in evidence; for as the deed and the case were found at the same time, by the same persons, at the same place, and, indeed, in the very same parcel of papers, the question of admissibility, so far as it depends upon the custody, is precisely the same with respect to both. . . . Both the documents to which exceptions have been taken were found tied up together with

6—Compare the authorities cited in W., §§ 1297, 1298, and the doctrine of *judicial admissions by failure to plead in denial* (*post*, No. 646).

other papers relating to the see, in a house called Lowton House, which was the family mansion of the Doppings, that is, the mansion house of the family of which Anthony Dopping, formerly Bishop of Meath, was one member, and of which the witness who gave the testimony was another: that this house was occupied by a member of the Dopping family at the time the papers were found there: and, lastly, that it was the house in which the Dopping family papers were kept. . . . It is the proper and necessary intendment that there is nothing upon the face or in the condition of the documents themselves which excites suspicion as to their genuineness; for in this stage of the proceedings credit must be given to the Court below that they would not have allowed the documents to be read if they had borne upon their face or in their condition any evidence against their admissibility. The result of the evidence, upon the bill of exceptions, we think is this,—that these documents were found in a place in which and under the care of persons with whom papers of Bishop Dopping might naturally and reasonably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less. And in those cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

MIDDLETON v. MASS (1819).

2 N. & McC. 55.

This was an action of trespass, to try the title to a tract of land originally granted to Wm. Bull, in 1737. The grant to Bull was produced on the part of the plaintiff, and he then offered in evidence
221 a deed from Bull to James Oglethorpe, under whom he claimed, and from whom he deduced a title, dated in 1739, which had been proved before a magistrate, and recorded in the auditor's office, a few days after its execution; but he offered no proof of its execution, nor did he prove any possession of the land, or any act of ownership over it, by himself or any other person, through or from whom he deduced his title: so that the question was, whether it was admissible as an ancient deed, without proof of its execution? The presiding judge being of

opinion that it was not, the plaintiff then offered to prove that the deed had been in the possession of himself and those under whom he claimed, for more than thirty years, and contended that it ought to be admitted on this proof; but the Court thought otherwise, and the plaintiff was nonsuited. A motion was now made to set aside the nonsuit, on the ground that the deed ought to have been received in evidence, as an ancient deed, on proof of the possession of the deed, alone, for the time mentioned.

JOHNSON, J.: "Until this case occurred, I did not suppose that this question admitted of any doubt; for the converse of the proposition contained in the motion, is certainly recognized in the case of Thompson v. Bullock, 1 Bay, 357, and the practice so far as I have been conversant with it, accords with that view of it. . . . Independent, however, of authority, it appears to me the reason and propriety of the rule is apparent, and the more so from the only reason which I have seen in opposition to it. It is because old things are hard to be proved. Now, if this be a good reason, it operates with a twofold force on the opposite side of this question: for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. . . . No such indulgence [as to presume due execution] is due to him who, as in the present case, neglects for almost a century to assert his claim, by one single act of ownership. The doctrine contended for on the part of the motion might in its consequences be productive of incalculable mischiefs; for, although it is not now usual to enter upon a course of villainy the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry."[7]

(B) AUTHENTICATION BY CONTENTS.

SINGLETON v. BREMAR (1824).

Harp. 201, 209.

Action on promissory notes made by F. Bremar to Tabitha Singleton; defence, that they were void because given in consideration of unlawful cohabitation. The plaintiff's mother was known as Lucy Sorrel.
222 With a view to the introduction of certain letters, the defendant then read the evidence of Mr. Glover, which showed that Bremar was

7—*Daniel*, J., in *Caruthers* v. *Eldridge*, 12 Gratt. 670, 687 (1855): "A presumption may be the result of a single circumstance or of many circumstances. Why say that in the case of an ancient deed there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from other circumstances the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of the deed is established, being no longer attainable, and the rule which requires their production being dis-

accustomed to take out of the office at Orangeburg, letters with a private mark; and proved that the letters now offered, having such a mark, had also the post-office stamp, and were found among Mr. Bremar's papers. The defendant submitted the letters themselves, to show by the internal evidence, that they were the letters of the plaintiff; although she cannot write, and the letters were not signed, and the handwriting not identified. The internal evidence was found, in the language of jealousy towards Mr. Bremar's wife; the mention of Lucy Sorrel, and of plaintiff's brother, and the importunate tone in which they were written. But the presiding judge refused to look at the contents, and the letters were rejected for want of proof of the handwriting.

NOTT, J.: "The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of handwriting. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would have been lessened. Some other method must therefore be resorted to, and why not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances which go to strengthen the presumption. In ordinary cases such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the handwriting therefore is higher evidence. But in the present case the evidence offered was the best which the nature of the case could afford."[8]

HOWLEY v. WHIPPLE (1869).

48 N. H. 487.

Issue as to a boundary line between lands of C. Bellows and Ira Gould. The defendant attempted to prove a mutual agreement as to the line. Defendants introduced two witnesses who testified, in
223 substance, that . . . Ira Gould and Bellows agreed that the surveyor should go on and run out and establish the line, and that they would abide by it; that after making this agreement Ira Gould said he was obliged to go to Montreal on business, but that his son Joseph would remain with the surveying party, and that

pensed with, it seems to me wholly at war with the spirit of the law, which under such exigency allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed."

Compare the authorities cited in W., §§ 2138-2141.

8—Compare the authorities cited in W., §§ 2149-2152.

he would acquiesce in whatever Joseph might do; and that Joseph remained through the running of the line. Plaintiff subsequently called Wm. K. Richey, who testified that, at the time which, from his description, the jury might have found to be the time the line was run, he passed down the road, and saw Bellows, Joseph Gould, the surveyor, and others, in the pasture, engaged in running the line; . . . that he saw nothing of Ira Gould there. Plaintiff then offered to show by this witness that a telegram was then sent by Joseph Gould to Ira Gould at Montreal, and that a telegraphic answer was received very soon, purporting to come from Ira Gould, and to be sent from Montreal. The Court excluded the evidence, and plaintiff excepted.

SARGENT, J.: "In Connecticut v. Bradish, 14 Mass. 296, a letter was admitted, as evidence against a party, where there was no evidence of the handwriting, except the testimony of a witness that it was the same he had received in reply to a letter which he had addressed to the same party, and this ruling was sustained. It is claimed that, as in the case of a letter, so in case of a telegraphic despatch, the person who answers a despatch is so generally and uniformly the person to whom the communication was addressed that it may be safely acted upon, and that it is thus acted upon in all the business arrangements of the country. But there is a difference in principle between the two cases. . . . There is nothing about the handwriting here that could indicate that the message came from Gould, nor is there anything in the case to make this message evidence any more than there would be if Gould had sent a verbal message by one man who had communicated it to another, and the latter had at length conveyed the message to the party for whom it was designed and to whom it was originally sent. This message might be received as it was sent, and would ordinarily be acted on in the business of life; but the only way to prove such a message in a court of law would be to summon both the intermediate agents or bearers of the message and in that way trace the message from the lips of the one party until it was received in the ear of the other party. Anything short of that would be to rely upon hearsay evidence of the very loosest character."[9]

OBERMANN BREWING CO. v. ADAMS (1890).

35 Ill. App. 540.

GARNETT, J.: "This is a suit in assumpsit by appellees for the price of liquors alleged to have been sold by them to appellant. From the judgment in plaintiffs' favor, the appellant brings this appeal.
224 The circumstances of the sale of the liquors were these: About May 12, 1886, a man by the name of O'Brien went to appellees' store and told Albert L. Smith, one of the firm, that he was authorized by

9—Compare the authorities cited in W., §§ 2153-2154.

appellant to purchase a stock of liquors and cigars for a saloon, which appellant intended to open for him at 194 Randolph street, in Chicago, and at the same time presented a card upon which G. J. Obermann, the vice-president of appellant, had written:

'Th. O'Brien is fitting up a saloon, No. 194 Randolph; we guarantee payment for any fixtures or work done for the place, ordered by him. J. Obermann Brg. Co.'

"While Smith was talking to O'Brien, Tanner, another of the appellees, called up appellant through the telephone. On the trial in the Circuit Court, Tanner was permitted, over the objection and exception of appellant, to testify to the conversation he held through the telephone with the person at the other end of the wire, and Smith was allowed to testify to what Tanner said while at the telephone. Tanner admitted he did not recognize the voice of the person who spoke to him through the telephone, as he never knew any of the 'people' before, and that he could not tell whether it was in Obermann's voice or not, as he did not meet him until some months afterward. Smith did not hear the voice and consequently could not say who the party was. Tanner testified, however, that he asked through the telephone if O'Brien had authority to buy goods for the Obermann Brewing Company for their saloon at No. 194 Randolph street, and an affirmative answer was given. O'Brien's authority to purchase the goods on appellant's credit was the very point in issue. Now, the admission of the evidence went to the merits of the case, and was clearly error, and its evil effect was not neutralized by anything found in the record. The parties in charge of appellant's office, and having authority to speak for it in such matters, testified that they received no such communication by telephone, and denied O'Brien's authority to make the purchase for appellant or on its credit. For aught that appears the inquiry of Tanner may have been answered by a teamster or laborer who then happened to be in appellant's office, but having no right whatever to answer questions of that kind."[10]

(C) AUTHENTICATION BY OFFICIAL CUSTODY.

ADAMTHWAITE v. SYNGE (1816).

4 Camp. 372, 1 Stark. 183.

Debt on a judgment recovered in the Court of Exchequer in Ireland. The witness called to prove an examined copy of the judgment, stated,
225 that at the request of an attorney in Dublin, he went to the building where the four courts are held, and there compared the copy produced with a parchment roll produced by the attorney.

Lord Ellenborough deemed this evidence insufficient, without either showing that the original came from the proper place of deposit or out

10—Compare the authorities cited in W., § 2155.

of the hands of the officer in whose custody the records of the Exchequer were kept.

Courthope, for the plaintiff, suggested, that from the contents of the copy, it would appear, that the original was a record of the Exchequer.

Ellenborough, L. C. J.: "It must in the first place be proved by the witness that the original came out of the proper custody; this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found."

It then appeared, that the records of the different courts in Dublin were all kept in one room, but in different presses.

Ellenborough, L. C. J.: "Since the records are kept in different presses, the same difficulty still presents itself; it is very distressing to strain the rules of law, when evidence might so easily have been procured. If the witness had stated, that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place; till then I cannot look upon it as a record. To admit this evidence would afford a precedent for laxity of proof in other cases." Plaintiff nonsuited.[11]

(D) AUTHENTICATION BY OFFICIAL SEAL.

J. C. Jeaffreson, *A Book about Lawyers,* I, 21 (1867); "The Great Seal": "In days when writing was an art almost entirely confined to religious persons, sealing was a far more important and
226 efficacious means of testifying the genuineness of documents than it is at present. . . . In the feudal ages any needy clerk who had turned his attention to caligraphy, could have perpetrated forgeries in perfect confidence that they would endure the scrutiny of the most accurate and skilful of living readers. But the necessity for sealing placed almost insuperable obstacles in the way of those who were best qualified and most desirous to triumph over right by fictitious deeds. It was no easy matter to procure seals of any kind; it was very difficult to obtain for dishonest ends the temporary possession of well-known seals. . . . Great barons, ecclesiastical dignitaries, secular and religious corporations, had distinctive seals at an early date; but they were confided to the care of trusty keepers, and were guarded with jealousy. When an official seal was used, its keeper brought it with reverential care from its customary place of concealment, and it was not applied to any document without satisfactory cause shown why its sanction was required. An obscure tamperer with parchments could not hope to lay his hand on one of these important seals. If he procured an impression of a respected seal, he could not obtain a fac-simile of the original. Seal-engraving was an

11—Compare the authorities cited in W., §§ 2158, 2159.

art in which there were but few adepts; and the artists were for the most part men to whom no rogue would dare propose the hazardous task of counterfeiting an official device. . . . The forger of deeds in older time had not overcome all difficulties, when he had surreptitiously obtained a seal. The mere act of sealing was by no means the simple matter that it is now-a-days. To place the seal on fit labels rightly placed, and in all respects to make the fictitious deed an accurate imitation of the intended deeds to which the particular seal of a particular great man was applied, were no trifling feats of dexterity ere scriveners had congregated into fraternities, and law-stationers had been called into existence. To get a supply of suitable wax was an undertaking by no means easy in accomplishment. Sealing-wax was not to be bought by the pound or stick in every street of feudal London. *Cire d'Espagne* —sealing-wax akin to the bright, vermilion compound now in use—was not invented till the middle of the sixteenth century. William Howe assures his readers that 'the earliest letter known to have been sealed with it was written from London August 3, 1554, to Heingrave Philip Francis von Daun, by his agent in England, Gerrand Herman,' and long after that date the manufacture of sealing-wax was a secret known to comparatively few persons. In feudal England there were divers adhesive compounds used for sealing. Every keeper of an official seal had his own recipe for wax. Sometimes the wax was white; sometimes it was yellow; occasionally it was tinged with vegetable dyes; most frequently it was a mess bearing much resemblance to the dirt-pies of little children. But its combination was a mystery to the vulgar; and no man could safely counterfeit a sealing-impression who had not at command a stock of a particular sealing-earth or paste, or wax. Eyes powerless to detect the falsity of a forger's handwriting could see at a glance whether his wax was of the right colour. Moreover, this practice of attesting private deeds by public or well-known seals gave to transactions a publicity which was the most valuable sort of attestation. A simple knight could not obtain the impression of his feudal chieftain's seal without a formal request, and a full statement of the business in hand. The wealthy burgher, who obtained permission to affix a municipal seal to a private parchment, proclaimed the transaction which occasioned the request. The thriving freeholder who was allowed the use of his lord's graven device, had first sought for the privilege openly. 'Quia sigillum meum plurimis est incognitum' were the words introduced into the clause of attestation; and the words show that publicity was his object. And to attain that object the seal was pressed in open court, in the presence of many witnesses."[12]

12—"When a document bearing a purporting official seal—a notary's certificate of protest, for example—is offered in court, the acceptance of it for the offered purpose involves the assumption of four things, namely, (1) that there is an official of that name, (2) that this is genuinely his seal's impression, (3) that this seal-impression was affixed by him; and, furthermore, (4) that it is allowable to receive his hearsay official statement as testimony to the fact stated by him. The first three of these elements go to the matter of the genuineness of the docu-

Chief Baron GILBERT, *Evidence 19* (*ante* 1726): "The distinction is to be made between seals of public and seals of private credit; for seals
227 of public credit are full evidence in themselves, without any oath made; but seals of private credit are no evidence but by an oath concurring to their credibility. Seals of public credit are the seals of the King, and of the public courts of justice, time out of mind."

GRISWOLD v. PITCAIRN (1816).

2 Conn. 85, 90.

Assumpsit on a charter party; plea in bar, a judgment of the same cause in the Supreme Court of Denmark, at Copenhagen, affirming a
228 judgment of the Sea Court. A purporting copy of this record was offered. The record was authenticated by the great seal of Denmark. There was no certificate that the decree, &c. offered in evidence, was a copy of record, but below the seal was the signature Colbiornsen, without any addition of his official character. The translator of the record, deposed, that he knew the seal attached to the original to be the royal seal of the kingdom of Denmark. J. M. Forbes, Esq. agent of the United States at Copenhagen, certified, that the signature at the foot of the record was that of the counsellor of conferences, Colbiornsen, chief judge of the highest court. To the admission of this record the plaintiffs objected.

GOULD, J.: " . . . It is first objected that the record in question is not duly authenticated,—*i. e.* not accompanied with sufficient evidence of its being genuine. But, in the proof of foreign documents, there must from the nature and necessity of the case be some ultimate limit, beyond which no solemnity of authentication can be required. And the public national seal of a Kingdom or sovereign State is, by the common consent and usage of civilized communities, the highest evidence and the most solemn sanction of authenticity, in relation to proceedings either diplomatic or judicial, that is known in the intercourse of nations. The seals of foreign municipal courts, on the contrary, must be proved by

ment; that is to say, the document purports to be that of J. S., a notary, asserting a certain fact, and the net result of the first three elements is that we accept as a fact that J. S., a notary, did make this written assertion. If there were a signature only, with no seal, and the document was similarly accepted, the second and third elements would merge (*i. e.*, the purporting J. S.'s signature is accepted as written by him); it is only in the case of a seal that they are distinct (for it might be his seal's impression and yet another person might have affixed it). Thus it is that the second and third elements are always judicially united, *i. e.*, any presumption of genuineness, whenever made, covers both elements; there is no case presuming the seal's impression to have been of his seal but not affixed by him, nor *vice versa*. Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated: (1) that there is an *official of that name;* (2) (3) that this document was genuinely *executed by him.* The remaining element (4), that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule only, and may therefore be dismissed as having no present relation with the principle of Authentication." (W. § 2161).

extrinsic evidence. . . . In the present case, the proof of the genuineness of the record, given in evidence, is, in point of solemnity, the highest possible, the national seal of the kingdom of Denmark. And, as if the production of the seal were not, of itself sufficient; its genuineness has been proved by evidence *aliunde*, to which there was no objection. . . . But there is no evidence, it is said, that the seal was affixed by a proper officer. Assuming the seal to be genuine, that fact must of course be presumed, unless the contrary is shown. For any higher evidence of the fact, appearing upon the face of the record, than the seal itself imports is impossible, and to require extrinsic evidence of it would be to subvert the rule itself that a national seal is the highest proof of authenticity."

COMMONWEALTH v. PHILLIPS (1831).

11 Pick. 28, 30.

Information praying for additional punishment for one convicted for the third time of larceny. The prior convictions were to be proved. It
229 was objected that the exemplification of the record of the conviction, before the Supreme Judicial Court in Middlesex, certified by the clerk, under the seal of the court, was not properly authenticated without the certificate of the chief justice, that the person certifying was the clerk duly authorized, and that it was not competent evidence of such conviction to go to the jury. On this point the prisoner's counsel remarked, that the clerk is appointed by the Supreme Court; that his certificate used before another tribunal, in a different place, has no validity *proprio vigore*, because the judges of other courts have no means of knowing whether he is the clerk lawfully appointed, or a usurper of the office; and that the seal of the court, without a clerk's signature, is insufficient, for a stranger might get possession of the seal.

SHAW, C. J.: "Without expressing any opinion as to the requisites for giving authenticity to records of other governments and states so as to entitle them to be received as evidence in this commonwealth, the Court are of the opinion, that a copy of the proceedings of any court of record in this Commonwealth, certified to be a true copy of the record of such court, by the clerk of such court, under the seal thereof, is competent evidence of the existence of such record in every other judicial tribunal in the Commonwealth."[13]

WALDRON v. TURPIN (1840).

15 La. 552, 555.

MORPHY, J.: "This action is brought on two promissory notes, dated at Grand Gulf, in the State of Mississippi, drawn to the order of plaintiff, by the firm of White,
230 Turpin & Nephew, of which defendant was a member, and made payable at the Grand Gulf Railroad and Banking Company, in

13—Compare the authorities cited in W., § 2164.

that State. Defendant pleaded the general issue and novation, as to one of the two notes. Judgment being rendered in favor of the plaintiffs, this appeal was taken. To prove the demand at the place mentioned in the body of the notes sued on, two documents were offered in evidence, purporting to be notarial protests of the notes. Their introduction was opposed, on the ground that no proof had been adduced of the signature and official capacity of the person who made them. This objection having been overruled by the judge, a bill of exceptions to his opinion was taken, to which our attention has been particularly requested. We understand the general rule on this subject to be, that the signature and official capacity of persons assuming the character of public officers in foreign countries, must be proved when contested in a court of justice. The different States of the Union must, we apprehend, be viewed in the light of foreign countries, with regard to each other, so far as their municipal laws, and the individual sovereignty retained by each of them, are concerned; and the Courts of one State can have or be presumed to have no more knowledge of the signature and capacity of the public officers of another State than of any other foreign country. To the above rule there exists an exception as regards notarial protests of foreign bills of exchange. It has been introduced in aid of commerce, founded wholly upon the custom of merchants and public convenience; it has been acknowledged and maintained by the Courts of law, and such protests receive credit everywhere without any auxiliary evidence. We are now asked to extend this exception to the protests of two notes, executed and payable in the State of Mississippi, and to receive such protests as evidence *per se,* of a demand of payment at the indicated place. No adjudged cases have been shown to us, nor have we been able to find any in which the extension contended for has been allowed, nor do we see any good reason why it should. The importance and almost universal use of bills of exchange as the means of remittances from one country to another; the great commercial facilities they have found to offer; and the delay and trouble of procuring evidence from distant places are among the grounds upon which this exception has grown up. They do not apply to promissory notes, or other moneyed obligations, more limited in their circulation and general usefulness to foreign trade."[14]

STOUT v. SLATTERY (1850).

12 Ill. 162.

TREAT, C. J.: "Slattery sued out an attachment against Stout, from a justice of the peace. There was service on a garnishee, and a publication of notice to the
231 defendant. On the fifth of February, 1849, a judgment was entered against the defendant, for $94.62, and, on the twelfth of the

14—Compare the authorities cited in W., § 2165.

same month, a judgment was entered against the garnishee in the same amount. On the sixteenth of March, 1849, the defendant obtained an order for a *certiorari,* and filed the same, and an appeal bond, in the Circuit Court. He stated, in his petition for the *certiorari,* that, by reason of absence from the state, he had no actual knowledge or notice of the pendency of the attachment, or of the rendition of the judgments therein, until the time allowed for an appeal had expired, and that he was not in any manner indebted to the plaintiff. The jurat to the petition was subscribed, 'Calvin A. Warren, notary public for said county of Adams.' No writ of *certiorari* was ever issued. . . . The notary public, before whom the petition was verified did not affix his seal of office to the jurat, and it is insisted, that his omission to do so, presents an insuperable objection to the proceedings; in other words, that a notary can perform no official act without evidencing it by his notarial seal. This position cannot be maintained. We are clearly of the opinion, that the failure of the notary to annex his official seal to the jurat does not vitiate the proceedings based on the petition. Within the county of Adams the addition of the seal was not necessary [even to evidence genuineness]. If the petition was to be used in another county, the seal of the notary, or some other evidence of his official character, would be indispensable. . . . The power to administer oaths is expressly conferred by statute and is not one of the incidents of office. The affixing of the notarial seal is not essential to the validity of his acts, except in cases where it is required by some rule of the common law or some provision of the statute. In all other cases his official acts, at least within the State, are none the less valid because they are not authenticated by his notarial seal. The only difference relates to the proof of his authority. If the act is not evidenced by the seal of the notary, his signature and official character must be established by some other legitimate evidence. . . . It is only when it becomes necessary to *prove* the making of the oath that the seal of the officer or some competent evidence of his authority must be produced."

DEN *dem.* TOURS v. VREELANDT (1800).

7 N. J. L. 352, 353.

Ejectment. Title was claimed under a case from the Reformed Bergen Church to Tours. KINSEY, C. J.: "On the trial of this cause, the plaintiff offered in evidence a lease from the Reformed Bergen
232 Church, under what purported to be the seal of the corporation, without adducing any proof of the authenticity of the seal. The sufficiency of this evidence being objected to, it was overruled by the presiding judge, and, on this failure to make out his case, the plaintiff suffered a nonsuit.

"The question, therefore, now before the court is, whether this evidence was properly overruled? A case has been cited from Viner which was originally reported by Skinner, and which, when examined in this last book, does not appear to warrant the construction that has been put upon it. So far as respects the present question, it is thus given by Skinner. 'In ejectione firmæ between Lord Brounker and Sir Robert Atkyns for the mastership of the hospital of St. Catharines, which is a corporation consisting of the master, brethren, and sisters: and in this case it was said, that where there is a common seal put to a deed, that is title enough of itself, without any witness to prove it, or that the major part of the college be agreed; and if it be said, that it was put to by the hand of a stranger, that shall be proved on the side that says so.' This report is certainly not so free from ambiguity as might be wished, but I think the meaning may be collected from a careful examination of the case, and it appears to me to go no further than to declare, that when a corporation seal is affixed to a deed, it is full evidence against the corporation of a title under them, or that it was their deed, and conveyed their title. The words of the report are, 'it is evidence of itself, without witness to prove it;' that is, to prove the deed to be really executed by them, that a major part of the corporation assented to the act; the seal proves it as evidence of the corporate act. The subsequent language is confirmatory to this construction. 'If it is said, that it was put to by the hand of a stranger, this must be proved by the objector.' So that all that is established by this case is, that when a corporation seal is put to an instrument, its execution as a deed of the corporation is sufficiently proved to be given in evidence in an action of ejectment. I have been thus full in my examination of this case, because it has furnished, when stated by Viner in his inaccurate manner, the principal ground on which the counsel for the plaintiff has placed his case.

"The question now before us is wholly different. It does not turn upon the effect or legal operation of a deed legally proved and admitted in evidence. It is, whether a deed, having a seal which is called the seal of the corporation, ought to have been admitted in evidence, without proving that it actually was what it purported to be? The point determined at the trial was, that such a seal did not prove its own authenticity, but that evidence must be given to shew that it really was the seal of the corporation. It has been usual to allow deeds and other instruments relating to real estate to go to the jury when authenticated under the seals of the cities of London, Edinburgh, or Dublin; . . . this may be owing to the recognition of these corporations by the legislature, or to the difficulty of making out the proof of the fact with the necessary precision, or perhaps to the almost utter impossibility of imposing a false or counterfeit for the genuine seal. . . . [But since the reason for

recognizing public seals, as given by Gilbert, is their immemorial use and general familiarity] the seals of private Courts or of private persons are not evidence of themselves; there must be proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them. Under which description or class of cases does the seal of the Bergen corporation fall? Can it be called a public court or corporation? Has it existed from time immemorial? Are its proceedings and acts sanctioned by the same length of time, and do they stand on the same foundation as the common law? And are they known, and can they be legally presumed to be known by every member of the community? It does not fall within this description, and its seal is not therefore entitled to universal credit."

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[15]Mode of Authenticating when Genuineness Is Not Presumed; Certificates of Attestation; Statutes Presuming Genuineness. "Suppose, now, that the seal or signature is one of a
233 kind which does not sufficiently evidence its own genuineness,—a tax-collector in another State, for example. Its genuineness therefore remains to be proved by testimony. The inconvenience of producing a witness who of his knowledge can testify to the genuineness of the seal or signature would be intolerable, and a resort to hearsay testimony in the shape of official statements has long been accepted as proper. But who is the appropriate officer to make such statements? Naturally, at common law, that chief officer at the source of executive power, who knows what persons have been appointed and what are their seals or signatures. He must also know their duties, and be authorized to certify to these, because the document, being usually offered as a hearsay statement, must appear to have been made under an official duty. Finally, the certifying officer must himself have such a seal as is presumed genuine, because otherwise the process of certifying would only have to be repeated anew. Such a seal, at common law, would practically be the seal of State only, for foreign officers at least, though for domestic officers it might be one of a lower grade. It will thus be seen that at common law, whenever a seal not itself presumed genuine is to be authenticated otherwise than by testimony on the stand, *two distinct rules are always involved* in practice, namely, the *admissibility of the hearsay certifying officer's statement*, and the *genuineness of his purporting certificate*. In other words, two questions must be answered: (1) *What higher officer is authorized to certify* to the authority of the lower office, the official incumbency of the person exercising it, and the genuineness of the document purporting to be executed by him: and (2) *Is this higher officer's purporting certificate to be presumed genuine?* The one requirement might be satisfied without the other,

15—Quoted from W., § 2162.

for example, (1) a judge of court might be a proper officer to certify to a clerk's authority to copy the records and to the genuineness of a copy purporting to be by the clerk; but (2) the judge's own purporting certificate might not be sufficiently authenticated by his seal if from a foreign State, though it might be from the domestic jurisdiction; and resort might further be required to the seal of State, which would be presumed genuine. Now it is the Authentication principle which answers the second question, and the Hearsay exception which answers the first question.

"The matter is further complicated by the circumstance that most statutes dealing with the subject provide in the same section for both sets of rules, *i. e.* they not only declare the higher officers authorized to certify to other official documents, but also declare how far up the process must be continued before reaching a seal which will be presumed genuine. For example, they may provide that a city tax-collector's certified copy may be authenticated by the mayor's certificate under city seal, and this in turn by the seal of the governor, or chancellor, or secretary of State under seal of State. Every such statute includes a declaration of the Authentication rule as well as of the rule of the Hearsay exception."[16]

16—The following English statute is an example of the few that keep the two principles distinct: 1845, St. 8 & 9 Vict. c. 113, § 1. "Whereas it is provided by many statutes . . . [that various official documents, corporation proceedings, certified copies, etc., shall be admissible when duly authenticated], and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents," it is enacted that whenever any certificate, official document, etc., is receivable in evidence, it shall be admitted if it "purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts . . . , without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

Compare the cases and statutes quoted *post*, Nos. 332-341, where the *Hearsay exception for Official Certificates* is dealt with.

TITLE II.

PREFERENTIAL RULES.

234 [1]NATURE OF THE RULES. "The nature of the *Preferential* rules is that they prefer one kind of evidence to another. This they may do in one of two ways: (1) They may require one kind of evidence to be brought in before any other can be resorted to, and may refuse provisionally to listen to the latter until the former is procured or is shown to be inaccessible; or (2) they may prefer one kind of evidence absolutely, *i. e.* they may require its production, and, so long as it is available, consider no other kind of evidence, even after the preferred kind has been supplied. With reference to the kinds of evidence thus preferred, these rules are of the following scope: (A) There is a rule of preference for the *inspection of the thing itself,* in place of any evidence, either circumstantial or testimonial, about the thing; this is the rule of Primariness, as sometimes termed (treated *post,* §§ 1177-1282), and concerns itself solely with *documents.* The preference here is solely of the conditional sort above-named, and not of the absolute sort. The questions that here arise are, in general, to what objects this rule of preference applies, under what conditions—the object ceasing to be available for production—the preference ceases, and to what exceptions the rule is subject. (B) There is, next, a preference as between various kinds of *testimonial evidence.* One kind of witness may, for various reasons, be required to be called in preference to another. Here the two kinds of preference, conditional and absolute, are both found. (1) The chief example of the former sort is the rule requiring an *attesting witness* to be called. Other examples of this kind of rule are sometimes found in requirements that the eye-witnesses to a crime must all be called, or that the owner of stolen goods must be called to prove their loss, or that the alleged writer of a document must be called to identify it. (2) Of the absolute preference of one witness above another, the chief example is the rule preferring a magistrate's *official report* of testimony delivered before him. The preference here, when held to be absolute, is so in the sense that this report is not allowed to be shown erroneous, *i. e.* the magistrate's report is preferred so as to stand against that of any other person whatever. Another example of such a rule is the preference given to the *enrolment of a statute* as certified to by the presiding officers of the Legislature, the Governor, and the Secretary of State; where this doctrine obtains, these persons' testimony is made to stand against that of any other persons."[2]

1—Quoted from W., § 1172.

2—For the "best evidence" principle, see *ante,* No. 163.

SUB-TITLE I.

PRODUCTION OF DOCUMENTARY ORIGINALS.

A: The Rule Itself.

DR. LEYFIELD'S CASE (1611).

10 Co. Rep. 92a.

Per Curiam: "It was resolved that the lessee for years in the case at bar ought to shew the letters patent made to the lessee for life. For it is a maxim in the law that . . . al-
235 though he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court. And the reason that deeds being so pleaded shall be shewed to the Court is that to every deed two things are requisite and necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, *sc.* if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others,—approve itself upon its shewing forth to the Court in two manners: 1. As to the composition of the words to be sufficient in law, and the Court shall judge that; 2. That it be not razed or interlined in material points or places; . . . 3. That it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. . . . And these are the reasons of the law that deeds pleaded in court shall be shewed forth to the Court. And therefore it appears that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the Court, upon the general issue to prove in evidence to a jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases will not appear to the Court, or peradventure the deed may be upon conditional limitation or with power of revocation, and by this way truth and justice and the true reason of the common law would be subverted. . . . Yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favor of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction."[3]

3—*Read* v. *Brookman*, 3 T. R. 151 (1789); a demurrer, to a plea excusing profert on the ground that it was "lost and destroyed by time and accident," was overruled; *Buller, J.:* "The rule laid down by Lord Coke [in Leyfield's Case] extends to all cases of extreme necessity; those which he mentions are only put as instances; and wherever a similar necessity exists, the same rule holds."

COMMONWEALTH v. MORRELL (1868.)

99 Mass. 542.

Indictment for robbery. At the trial, a detective officer testified that he and one Jones, his partner, arrested the defendants at Chicago, took possession of their baggage, and detached the tags from
236 their valises for the purpose of preserving them as evidence. The witness was proceeding to state what was written on the tags so detached by him, when the defendants' counsel objected, claiming that the tags must be produced or shown to be lost before the writing thereon could be given by the witness.

CHAPMAN, C. J.: "The general rule is most frequently applied to writings, where proof is offered of their contents. The writing itself must be produced. But there are many exceptions as to writings. An inscription on a banner or flag carried about by the leaders of a riot may be proved orally. The King v. Hunt, 3 B. & Ald. 566. Or a direction contained on a parcel. Burrell v. North, 2 Car. & K. 679. Or a notice to an indorser of a promissory note. Eagle Bank v. Chapin, 3 Pick. 180. In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag with the written direction upon it might have been more satisfactory to the jury than an oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters."[4]

GATHERCOLE v. MIALL (1846.)

15 M. & W. 319, 329.

Action for libel published in a newspaper called "The Nonconformist," Jan. 7, 1846. A person of the name of Brookes was called, who stated that he was the president of the Chatteris
237 Literary Institution, which consisted of eighty members; that early in January last a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscriber's room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it was

4—Compare the authorities cited in W., §§ 1181-1183.

lost or destroyed. The learned Judge, under these circumstances, held that secondary evidence of the contents of the paper was admissible. . . . Sir *Thomas Wilde,* Serjt., now moved for a new trial, on the ground of the improper reception of evidence, and of misdirection. "First, there was no sufficient evidence of the loss of the paper brought to the Chatteris Literary Institution, to make Brookes' evidence of its contents admissible. This was a room frequented only by subscribers of the Institution, limited in number; and it does not appear how many or how few were in the habit of visiting it about that time. Some inquiry should have been made amongst them, or at least from the proprietor of the rooms. It is not like the case of a public coffee-room, to which any number of strangers may resort."

Pollock, C. B.: "The evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much, according to the nature of the paper itself, the custody it is in, and indeed all the surrounding circumstances of the particular matter before the Court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would be likely to take care of. . . . What inquiry will do? I think, in cases of this sort, if, some time after its publication, a newspaper, which, except occasionally for the purpose of filing, is not very much considered a few days after its publication, is not found in the place where it ought to be, if it be anywhere, no search is necessary among members of the club, or persons who frequent the club-room: it may be taken to be lost, if it cannot be produced from the spot where it ought to be found." Alderson, B.: "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for. . . . If we were speaking of an envelope, in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said you ought to go to A. B. and see if A. B. has not got that which it is proved he took away. . . . As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had bona fide endeavoured to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper."[5]

5—Compare the authorities cited in W., §§ 1194-1195.

ATTORNEY-GENERAL v. LE MERCHANT (1773).

2 T. R. 201.

Information for the illegal importation of tea. In the course of the trial, the Attorney-General offered to read some letters concerning this tea, which had been sent by the defendant to Channon, a
238 witness for the crown, which letters were proved to have come to the defendant's hands under an order made by the Lord Chancellor for the delivery up to him of all papers and letters seized under a commission of bankrupt against Channon, among which were these letters. The solicitor of the excise had contrived to take copies of them whilst they were in the hands of the clerk of the commission; and notice having been given to the defendant to produce the original letters, and that being refused, the Attorney-General offered to read these copies. This was objected to by the counsel for the defendant, upon the ground principally, that a defendant in a criminal case was never bound to produce evidence against himself; that he was guilty of no crime in not producing them; and that the Attorney-General had no right to call upon him to produce them, or ask a single question concerning them; consequently no copies could be admitted in evidence. But Eyre, Baron, admitted the evidence, though he said he had some doubt about it. . . .

Smythe, L. C. B.: "First, it was objected, that copies of letters or papers in the hands of the adversary ought not to be read in criminal cases; that was one general objection. And the other, that supposing, for argument's sake, they ought to be admitted, yet in this particular instance the notice which was given was not sufficient. As to the first objection, that copies are not admissible in any criminal case, because that would be to oblige a man to produce evidence against himself; in answer to it, I do not recollect that they have produced any one case to show any difference at all as to the rule of evidence in criminal, and in civil cases; therefore the rule of evidence in both cases is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required, but if that original be destroyed, or if it be in the hands of the opposite party who will not produce it, then in case of a deed, a counter one, or sometimes a copy of the deed, or copy of the paper, is evidence to be admitted. . . . It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehavior in him in not producing them, and therefore in criminal cases a man who does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not founded

upon any misbehavior of the party, or considering him in fault; but the rule is this: the copies are admitted when the originals are in the adversary's hands for the same reason as when the originals are lost by accident; the reason is because the party has not the originals to produce. . . . Another objection has been made that this notice is not sufficient; the answer is, I know no difference between the rule of evidence in civil and criminal cases. Then, if there be no such difference, the rule which has always been followed and allowed in civil cases is that notice be given to the attorney or agent of the adverse party. Now in this case, without going minutely into the consideration, whether the notice was proved to the defendant himself, and was good, here is unquestionable notice proved to Sayer who is the agent and solicitor of Le Merchant, into whose hands it appears that these letters had actually been delivered; and then there is a notice likewise to Davy, who is the attorney for the defendant in this very cause, and no attempt was made on the part of the defendant to prove what was become of these letters, or that it was not in his power to produce them."[6]

DWYER v. COLLINS (1852).

7 Exch. 639.

Action by the indorsee against the acceptor of a bill of exchange; to which the defendant pleaded, *inter alia,* that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron,
239 the defendant proceeded to prove his plea; and for that purpose gave evidence of the gaming, and swore that the only bill he ever gave to the drawer of the bill which was declared on, was by way of payment of the debt then incurred. The defendant's counsel, being required to prove that the identical bill declared upon was that which was given on that occasion, called for the bill, which the plaintiff's counsel declined to produce. The plaintiff's attorney having admitted that the bill was in his possession and in court, the defendant's counsel called for its production; which being refused, he then offered to give secondary evidence of its contents. The plaintiff's counsel objected that there ought to have been a previous notice to produce; and the Lord Chief Baron, after consulting the judges, ruled in favor of the defendants.

PARKE, B.: "The next question is whether, the bill being admitted to be in court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a

6—Compare the authorities cited in W., §§ 1199-1201.

notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence,—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence), then the demand of production at the trial is sufficient. . . . If this [the former] be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document—a comparatively simple inquiry—, but the time necessary to procure evidence to explain or support it,—a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. . . . It would be some scandal to the administration of the law if the plaintiff's objection had prevailed."[7]

UNITED STATES v. DOEBLER (1832).

Baldw. 519, 524, 25 Fed. Cas. 883.

Indictment for forging a bank-note. After evidence of the forging of the note in question, one Empich was examined, who proved that at the Lancaster races, at the time testified by Rallston, the
240 defendant delivered him a 20 dollar note, stating that it was not good, and requested the witness to play it off at a faro table, which he did not do, but after some time returned it to the defendant. Mr. Gilpin, after stating that this note was not the subject of any indictment, but that the evidence in relation to it was offered to prove the scienter as to the notes charged in the indictment, asked the witness to describe the 20 dollar note, as to the bank, &c., it was on, which was objected to, on the ground that this was matter collateral to the indictment, of which notice ought to have been given to the defendant,

7—*Alderson*, B., in *Lawrence* v. *Clark*, 14 M. & W. 250, 253 (1845): "All these cases depend on their particular circumstances; and the question in each case is whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial"; *Pollock*, C. B.: "What is sufficient in one case may not be so in another: and much therefore must be left to the discretion of the presiding judge, subject of course to correction by the Court."

Compare the authorities cited in W., §§ 1202-1204.

and that it was not evidence of the scienter, because the delivery of the note to Empich was subsequent to the delivery of the note which was the subject matter of the indictment, and the question was elaborately argued.

BALDWIN, J.: " . . . As the intention and knowledge with which the act is done, constitute the crime, it may be made out by evidence of other acts of a similar kind with that charged in the indictment. This being the well settled and well known rule in such cases, the prisoner cannot be taken by surprise; when such evidence is offered, he must come prepared to meet not only the evidence which applies directly to the specific act charged, but all other acts which, according to the known rules of evidence, a prosecutor may adduce to prove the act charged. If the note he is charged with forging, passing, or delivering, is of the same kind with others which he has disposed of or retained in his possession, he has notice in effect that, if practicable to procure it, evidence will be given of their counterfeit character, and of his having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect; and either are sufficient. . . . Knowing that proof of all these facts is as competent to the prosecutor as the one specifically charged, no injustice is done him."[8]

Chief Baron GILBERT, *Evidence*, 7 (*ante* 1726): "Records, being the precedents of the demonstrations of justice, to which every man has a common right to have recourse, cannot be transferred
241 place to place to serve a private purpose; and therefore they have a common repository, from whence they ought not to be removed but by the authority of some other Court; and this is in the treasury of Westminster. And this piece of law is plainly agreeable to all manner of reason and justice; for if one man might demand a record to serve his own occasions, by the same reason any other person might demand it; but both could not possibly possess it at the same time in different places, and therefore it must be kept in one certain place in common for them both. Besides, these records, by being daily removed, would be in great danger of being lost. And consequently it is on all hands convenient that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence but by public authority from superior justice. The copies of records must be allowed in evidence, for . . . the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of; for to tie men up to the original that is fixed to a place, and cannot be had, is to totally discard their evidence, . . . for then the rules of law and right would be the authors of injury, which is the highest absurdity."[9]

8—Compare the authorities cited in W., § 1205.

9—*Ellenborough*, L. C. J., in *Hennell* v. *Lyon*, 1 B. & Ald. 182, 184 (1817): "The

DOE *dem.* PATTERSON v. WINN (1831).

5 Pet. 233, 241.

Ejectment to recover a tract of land of 7,300 acres, lying in that part of the county of Gwinnett, which was formerly a portion of Franklin county. On the trial at Milledgeville, at November
242 term 1829, the plaintiff offered in evidence the copy of a grant or patent from the state of Georgia to Basil Jones, for the land in question, duly certified from the original record or register of grants in the secretary of state's office, and attested under the great seal of the state. To the admissibility of this evidence, the defendants by their counsel objected, on the ground that the said exemplification could not be received until the original grant or patent was proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for, according to a rule of the court. This objection the Circuit Court sustained, and rejected the evidence.

STORY, J.: "We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the Great Seal is admissible in evidence, as being record proof of as high a nature as the original. . . . There was in former times a technical distinction existing on this subject which deserves notice. As evidence, such exemplification of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of letters patent, there, upon the principles of pleading, the original under the Great Seal was required to be produced, for a profert could not be made of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI, c. 4, and 13 Eliz. c. 6, were passed, by which patentees and all claiming under them were enabled to make title in pleading by showing forth an exemplification of the letters patent as if the original were pleaded and set forth. These statutes, being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law. A similar effect was given by the statute of 10 Anne, c. 18, to copies of deeds of bargain and sale, enrolled under the

admission of copies in evidence is founded upon a principle of great public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in courts, not of record, copies whereof are admitted, though not strictly of a public nature"; *Abbott*, J.: "It is a general principle that copies are receivable in such cases without the originals, from the great inconvenience which would result if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents might be wanted at different places at the same time."

Alderson, B., in *Mortimer* v. *McCallan*, 6 M. & W. 58, 67 (1840): "[If documents] are not removable, on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. . . . The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule."

Compare authorities cited in W., §§ 1214, 1215, 1218.

statute of Henry VIII, when offered by way of profert in pleading; and since that period a copy of the enrolment of a bargain and sale is held as good evidence as the original itself. Such, then, being the rule of evidence of the common law in regard to exemplifications under the Great Seal of public grants, the application of it to the case now at bar will be at once perceived, since by the laws of Georgia all public grants are required to be recorded in the proper State department."

JOHNSON, J., dissenting: "If it is the correct sense of the common law that the exemplification of a patent is as good evidence as the patent itself, I am yet to be made acquainted with the authority that sustains the doctrine. I am sure that Page's case (5 Coke), commonly cited as the leading case in its support, establishes no such principle. It relies expressly on the British statutes for the sufficiency of the exemplification of the patent and the right to use it in the profert. . . . Were it generally true as laid down, that at common law the copy of the grant was equal in dignity as evidence to the original, still, unless so recognized in Georgia, it is not the law of Georgia. Now, to say nothing of my own 'lucubrationes viginti annorum,' there is not a professional man in Georgia who does not know that such has never been the rule of judicial practice in that state. . . . I make no doubt that there are at this moment thousands of grants lying unclaimed in the land office, every one of which has been copied into the register. The truth is, the grant is a separate thing, from the true original; and the facsimile of it (if it may be so called in the register,) is nothing more than a copy; so that the paper here dignified with the epithet of an exemplification is nothing more than a copy of a copy, and therefore always considered in practice as evidence of an inferior order. The courts of that state have latterly relaxed in requiring evidence of loss; but even at this day, such evidence cannot be received in any of their courts, without an affidavit from the party presenting it, of his belief in the loss or destruction of the original."

COMMONWEALTH v. EMERY (1854).

2 Gray 80.

The defendant was tried on the charge of being a common seller of intoxicating liquors. The district attorney, in order to prove that the house was owned by the defendant, and that the business
243 carried on there was his, offered a paper purporting to be a registry copy of a deed of the premises to the defendant, certified by the register of deeds for this county. The defendant objected to the admission of the copy of the deed as evidence, for the reason that he had had no notice to produce the original deed; but Perkins, J., overruled the objection.

Shaw, C. J.: "Upon consideration, the court are of opinion that this copy of a deed ought not to have been admitted, without notice to the defendant to produce the original. The rule, as to the use of deeds as evidence, in this Commonwealth, is founded partly on the rules of the common law, but modified, to some extent, by the registry system established here by statute. The theory is this: . . . In all cases original deeds should be required if they can be had; but as this would be burdensome and expensive, if not impossible in many cases, some relaxation of this rule was necessary for practical purposes. . . . Our system of conveyancing, modified by the registry law, is that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties so as to be able to prove a chain of title by a series of original deeds. Every grantee, therefore, is the keeper of his own deed, and of his own deed only. . . . When, then, he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence; when in theory of law a superior is in his possession or power; it is only on proof of the loss of the original, in such case, that any secondary evidence can be received. . . . In cases, therefore, in which the original, in theory of law, is not in the custody or power of the party having occasion to use it, the certified office copy is *prima facie* evidence of the original and its execution, subject to be controlled by rebutting evidence. But as this arises from the consideration, that the original is not in the power of the party relying on it, the rule does not apply where such original is, in theory of law, in possession of the adverse party; because upon notice the adverse party is bound to produce it, or put himself in such position that any secondary evidence may be given."[1]

Statutes. *California:* C. C. P. 1872, § 1951, as amended March 24, 1874; a certified copy of a duly recorded instrument affecting realty "may also be read in evidence with the like effect as
244 the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy;" amended March 1, 1889, so as to read: "be read in evidence with the like effect as the original instrument without further proof."

Illinois: Rev. St. 1874, c. 30, § 35: "If it shall appear to the satisfaction of the Court that the original deed so acknowledged or proved and recorded, is lost, or not in the power of the party wishing to use it," a certified copy is admissible. Ib., § 36: "Whenever upon the trial of any cause at law or in equity in this State, any party to said cause, or his agent or attorney in his behalf, shall, orally in Court, or by affidavit to be filed in said cause, testify and

1—Compare the authorities cited in W., §§ 1224, 1225.

state under oath that the original" of any instrument affecting land, duly recorded, "is lost or not in the power of the party wishing to use it on the trial of said cause, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original," the record or recorder's certified copy is admissible."

New York: C. C. P. 1877, § 935: "A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the state, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance."

Ibid., § 947: "An exemplification of the record of a conveyance of real property situated without the state, and within the United States, which has been recorded in the state or territory, where the real property is situated, pursuant to the laws thereof, when certified under the hand and seal of the officer, having the custody of the record is, if the original cannot be produced, presumptive evidence of the conveyance, and of the due execution thereof."

REX v. WATSON (1817).

2 Stark 116.

High treason. It appeared that on the 26th of November a person of the name of Castle took a manuscript to Seale, a printer, in order that he might print 500 large copies for placards and 4,000
245 small ones, advertising a meeting at Spa Fields on the 2d of December, and that the prisoner Watson afterwards called upon him, Seale, and took away 25 of the large placards. Seale upon the trial produced one of the large ones, and another witness was afterward asked whether similar placards had not been posted upon the walls of the metropolis. It was objected for the prisoner, that no evidence of the contents could be received without notice to the prisoner to produce the original manuscript; that the original ought either to be produced, or proved to be destroyed, or in the possession of the prisoner; that notice must be proved to have been given to him to produce it before secondary evidence could be received; that all the printed placards were to be considered as copies, and not as originals; and that it by no means followed that all were alike because all were printed. And the case was assimilated to that of Nodin v. Murray, 3 Camp. 228, which was tried before Lord Ellenborough, where his Lordship held that a copy of a letter proved to have been taken by a letter-copying machine, and which was therefore necessarily a true copy, could not be received in evidence without notice to produce the original. It was also urged that notice ought to have been given to produce the 25 copies which had been taken away by the prisoner.

ELLENBOROUGH, L. C. J.: "An order having been given to print 500 copies, Watson fetched away 25; by this he adopted the printing as done in the execution of an order which he had given; and when he took away 25 out of a common impression, they must be supposed to agree in the contents." BAYLEY, J.: "The objection is, that without notice to produce the original any other evidence of the contents is but secondary evidence. It appears to me that that is not the case, for that every one of those worked off are originals, in the nature of duplicate originals; and it is clear that one duplicate may be given in evidence, without notice to produce the other. If the placard were offered in evidence in order to show the contents of the original manuscript, there would be great weight in the objection; but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must all be the same." ABBOTT, J.: "If this paper were offered in order to show what were the contents of the original manuscript, it might be contended that sufficient preparatory evidence had not been given; but in another point of view it appears to me that the evidence is admissible, in order to prove that Mr. Watson knew the contents of a placard posted in the streets, relating to a meeting in Spa Fields, on the 2d of December."[2]

NICKERSON v. SPINDELL (1895).

164 Mass. 25, 41 N. E. 105.

Action for expenses incurred and services rendered in superintending the building of a steamer at the request of the defendant Spindell, managing agent of the owners. The plaintiff's wife,
246 called as a witness for the plaintiff, testified that her husband had received numerous telegrams from Spindell to him, which had been destroyed. The plaintiff then offered secondary evidence of the contents of these telegrams. The defendants objected, on the ground that the originals of the telegraphic messages were the messages as delivered to the telegraph company. The judge ruled that, where the sender of a telegram takes the initiative, as between him and

2—*Ellenborough*, L. C. J., in *Philipson* v. *Chase*, 2 Camp. 110 (1809): "If there are two cotemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered."

Best, C. J., in *Munn* v. *Godbold*, 3 Bing. 292 (1825): "When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced"; but . . . "merely as secondary evidence of the part that was lost."

Compare the authorities cited in W., §§ 1234, 1237.

the person to whom it is sent the original is the message as delivered to that person, and that, on a proper foundation being laid, secondary evidence of the contents of the telegrams was admissible; and, having found that the absence of the telegrams as delivered to the plaintiff was accounted for, allowed the witness to testify as to their contents. Against the objection of the defendants and their exceptions thereto, she testified that the telegrams contained requests from Spindell to her husband to meet him at a certain place. There was evidence tending to show that the telegrams were sent by Spindell.

KNOWLTON, J.: "When the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it. Whether we should go further, and hold that the telegraphic company is so far the agent of the sender as to bind him by their errors in sending it, it is unnecessary in this case to decide. There is much authority in support of this last proposition, although the contrary has been held in England. There was no error in the admission of the testimony."[3]

DOE v. HARVEY (1832).

1 Moo. & Sc. 374.

TINDAL, C. J.: "This was an action of trespass for the mesne profits. Upon the trial it was proved that Harvey, the defendant, had occupied the premises in question from May, 1829, to May,
247 1830. The plaintiff offered in evidence a judgment in an action of ejectment brought for the same premises by the present plaintiff against one Payne. The only evidence that was given as to the origin or nature of Harvey's occupation was, that one Henry Payne, the son of the defendant in the ejectment, had put him into possession. But, as it appeared from the same witness that he had been put into possession under a written agreement, which agreement was not produced, the parol evidence of Henry Payne, as to the landlord under whom he held, or the terms under which he was let into possession, was deemed insufficient for that purpose. . . . If nothing had been in issue but the single fact whether Harvey held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. Authorities to this effect were cited in argument at the bar. But here, the question was, not merely whether Harvey held the premises, but whether he held them as tenant to Payne; and of this fact there was no other evidence admissible than the written agreement; which was not produced."

3—Compare the authorities cited in W., § 1236.

LAMB v. MOBERLY (1826).

3 T. B. Monr. 179.

MILLS, J.: "The plaintiff in the court below, sued the defendant, in an action of assumpsit, for so much money for a note made by a third person, and sold and delivered by the plaintiff to the
248 defendant. On the trial of the issue of non assumpsit, the plaintiff introduced the confessions of the defendant that he had bought such a note, and had promised to pay a certain sum therefor, at a period, or rather on a contingency which had happened, substantially agreeing with some of the counts in the declaration. The counsel for defendant moved the Court to exclude that evidence, until the plaintiff should produce the note itself as the best evidence. The Court sustained this motion. We cannot agree with the Court below . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before the acknowledgments of a sale of any other article could be given in evidence the article itself must be produced in court in order that the Court might see that it really existed, as that a note thus sold should be produced."[4]

TILTON v. BEECHER (1875).

Abbott's Rep. (N. Y.) I, 389.

Witness for plaintiff: "[Mr. Tilton had written the story of the whole affair for publication and wanted Mr. Beecher to hear it before publication,] and Mr. Tilton said to Mr. Beecher, 'I will read
249 to you one passage from this statement, and if you can stand that, you can stand any part of it,' and he read to him a passage from the statement, which was about as follows as nearly as I can recollect." Mr. *Evarts,* for defendant: "The statement will speak for itself." Mr. *Fullerton,* for plaintiff: "What did he read?" Mr. *Evarts:* "We want that paper and the part of it that was read, as it appeared in that paper, and it is not competent to recite out of a written paper by oral proposition what the written paper is the best evidence of." Mr. *Fullerton:* "I propose to show what communication was made by Mr. Tilton on that occasion to Mr. Beecher; I do not care whether it originated in his own mind, or whether it was read from a paper, printed or written; it makes no difference; what it was that he said

4—Compare the authorities cited in W., §§ 1215-1248.

to him is what I have a right to". Judge NEILSON: "I think the witness can state what was said to Mr. Beecher, although he stated matter that had been incorporated in writing."[5]

(B) EXCEPTIONS TO THE RULE.

COLE v. GIBSON (1750).

1 Ves. Sr. 503.

In 1733 on a treaty of marriage between *Philip Bennet* and Miss *Hallam,* then about twenty years old, articles were entered into, to which were made parties the intended husband and wife, the
250 defendant and Mr. *Ralph Allen.* The first clause therein was for securing an annuity of £100 to the defendant out of the wife's estate: but every other provision therein for benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by Mr. *Bennet* before the marriage to pay the defendant £1000, which bond was afterward delivered up to be canceled; but at what particular time did not appear. A recovery was afterward suffered to the uses of the articles. In 1736 a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death: but the present bill was now brought to set it aside. Evidence for the plaintiff to prove the contents of the bond, was objected to, as never done unless where the instrument itself cannot be had: whereas it appeared from the answer read, that the bond was delivered up to plaintiff, and must be in his custody. *For plaintiff.* This bill is not to be relieved against the bond; for then the objection would be good; but here it is made use of as collateral evidence, as being part of the transaction, and to prove that it was on account of the marriage, and on no other consideration.

HARDWICKE, L. C. J.: "The plaintiff has read, what is made evidence out of the answer, that the bond was executed, and that the defendant delivered it up to the plaintiff: which is evidence that it is in plaintiff's custody, and to prove the contents it must be produced. . . . A distinction is endeavored between a bill to set aside the bond or other instrument, and a case wherein it is made use of only by collateral evidence; but there is no such distinction in point of evidence,

5—*Ellenborough,* L. C. J., in *Smith* v. *Young,* 1 Camp. 439 (1808); proof of a demand, in an action of trover, was oral, the witness stating that he had both orally demanded and also in writing served notice: "I may do an act of this sort doubly. I may make a demand in words and a demand in writing; and both being perfect, either may be proved as evidence of the conversion. If the verbal demand had any reference to the writing, to be sure the writing must be produced; but if they were concurrent and independent, I do not see how adding the latter could supersede the former or vary the mode of proceeding."

Compare the authorities cited in W., §§ 1243, 1249, and Nos. 554-57, *post.*

the rule being the same whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach."

MASSEY v. FARMER'S NATIONAL BANK (1885).

113 Ill. 334, 338.

MULKEY, J.: "The action below was upon a promissory note purporting to have been executed by Henry C. Massey, Henderson E. Massey and George W. Laurie. . . . The note was given for
251 money borrowed from the bank by Henry C. Massey. The appellant filed a plea, verified by affidavit, denying the execution of the note, and the cause was tried upon that issue, alone. . . . The point which seems to be chiefly relied on, arises upon a motion to suppress part of the answer to the following interrogatory: 'You may state whether the note' (referring to the one sued on) 'was a renewal note.' Objection being made, unless the note was produced, the witness then, as we understand the record, produced it, and proceeded first to read the credits indorsed on it, the whole answer being as follows: 'Paid, July 25, 1879, $275 and interest on note to date. Paid August 5, 1879, $1782.75 and interest on note to date. That $1782.75 my father owed,—that is, *he gave me a deed to one hundred acres of land in 1866; told me to go to work on it, and improve it, and suit myself,*' (objection by defendant,) 'but had never given me a deed, and after he received notice from the bank in 1879, he goes to Jacksonville and deeds this one hundred acres of land away from me, with the exception of forty acres where the house and barn stand, and said to me and told me to give him a mortgage for $3000, and he would enable me to get a loan of $2000 on it, to pay upon this note. He did that. *I had to give him a mortgage for $3000,* while I never owed him a dollar in the world. He did that to fix the bank so they couldn't get anything off of me, and he was going to put his property out of his hands, to avoid this note.' . . [The general principle] has no application to the facts above stated. We fully recognize the rule that whenever the existence of a deed or other writing is directly involved in a judicial proceeding, whether as proof of the precise question in issue or of some subordinate matter that tends to establish the ultimate fact or facts upon which the case turns, such deed or other writing itself must be produced, or its absence accounted for, before secondary evidence of its contents is admissible. Yet while this rule is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writing referred to. To hold otherwise would certainly be productive of great inconvenience, and in some cases would defeat the ends of

justice. References to written instruments by a witness for the purpose stated are to be regarded as but mere inducement to the more material parts of his testimony. The present case well illustrates the principle in question. As remotely bearing upon the issue to be tried, the plaintiff sought to show the appellant had avowed a purpose not to pay the note—that he had said he was going to put his property out of his hands in order to defeat the claim. Now this, under the issue, is the important part of the answer to the question ['whether the note was a renewal note'], if indeed any of it can be so regarded. All, therefore, that was said about the deeding of the land, the giving of the mortgage, and getting the loan of $2,000, we regard as mere matter of inducement to the more important part of the testimony."[6]

SLATTERIE v. POOLEY (1840).

6 M. & W. 664.

Action on a covenant to indemnify the plaintiff against debts scheduled in a composition-deed and due to creditors not signing it; plea, that the debt in question was not contained in the schedule.
252 At the trial, the composition deed and schedule were produced in evidence for the plaintiff; but the latter, not being duly stamped, was rejected; whereupon the plaintiff's counsel tendered in evidence a verbal admission by the defendant that the debt mentioned in the declaration was the same with one entered in the schedule. This evidence was objected to, on the ground that the contents of a written instrument, which was itself inadmissible for want of a proper stamp, could not be proved by parol evidence of any kind; and the learned judge being of that opinion, the plaintiff was nonsuited.

PARKE, B.: "If such evidence were inadmissible, the difficulties thrown in the way of every trial would be nearly insuperable. The reason why such parol statements are admissible, . . . is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question." ABINGER, L. C. B., "concurred in what was said by Parke, B.; and stated that he had always considered it as clear law, that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not."[7]

6—Compare the authorities cited in W., §§ 1253, 1254.

7—*Pennefather,* C. J., in *Lawless* v. *Queale,* 8 Ir. L. R. 382, 385 (1845): "I cannot subscribe to what was said by Parke, B., in that case. . . . The doctrine there laid down is a most dangerous proposition. By it a man might be deprived of an estate £10,000 per annum, derived from his ancestors by regular family deeds

THE QUEEN'S CASE (1820).

2 B. & B. 286.

Bill for divorce on the ground of adultery and improper conduct; the House of Lords put the following questions to the Judges: "First, whether, in the courts below, a party on cross-examination
253 would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, *without having first shown* to the witness the letter, and having asked that witness whether the witness wrote that letter and his admitting that he wrote such letter? . . . Thirdly, whether, when a witness is cross-examined and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined, in the courts below, whether he did not in such letter make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein?" Abbott, C. J., for the Judges, answered the first question in the negative: "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness; if the witness admits that it is of his handwriting, the cross-examining counsel may at his proper season read that letter as evidence". The other question was answered thus: "The Judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter, but that the letter itself must be read, to manifest whether such statements are or are not contained in that letter. . . . [The Judges] found their opinion upon what in their judgment is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself and not by parol evidence."

and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

Maule, J., in *Boulter* v. *Peplow*, 9 C. B. 493, 501 (1850): "It [Slatterie *v.* Pooley] is certainly not very satisfactory in its reasons. . . . What the party himself says is not before the jury; but only the witness' representation of what he says."

Compare the authorities cited in W., § 1256.

HENRY BROUGHAM, *Speech on the Courts of Common Law, Hans. Parl. Deb., 2d ser., XVIII, 213, 219* (Feb. 7, 1828): "If I wish to put a witness' memory to the test, I am not allowed to examine as to
254 the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it, though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in the Queen's Case, after solemn argument, and, I humbly venture to think, upon a wrong ground, that the writing is the best evidence and ought to be produced, though it is plain that the object is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter, written by him, and which he believes to be lost? . . . I shall not easily forget a case in which a gentleman of large fortune appeared before an able arbitrator, now filling an eminent judicial place, on some dispute of his own, arising out of an election. It was my lot to cross-examine him. I had got a large number of letters in a pile under my hand, but concealed from him by a desk. He was very eager to be heard in his own cause. I put the question to him: 'Did you never say so and so?' His answer was distinct and ready,—'Never.' I repeated the question in various forms, and with more particularity, and he repeated his answers, till he had denied most pointedly all he had ever written on the matter in controversy. This passed before the rules in evidence laid down in the Queen's Case; consequently I could examine him without putting the letters into his hand. I then removed the desk, and said, 'Do you see what is now under my hand?' pointing to about fifty of his letters. 'I advise you to pause before you repeat your answer to the general question, whether or not all you have sworn is correct. He rejected my advice, and not without indignation. Now, those letters of his contained matter in direct contradiction to all he had sworn. I do not say that he perjured himself,—far from it. I do not believe that he intentionally swore what was false; he only forgot what he had written some time before. Nevertheless he had committed himself, and was in my client's power."[8]

STATUTE: *1854, St. 17 & 18* Vict. c 125, § 24: "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject-matter of the cause, without
255 such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contra-

8—*W. M. Best*, Evidence, § 478 (1849): "By requiring the document containing the supposed contradiction to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. . . . Yet, according to

dictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit."

Day, Common Law Procedure Acts, 4th ed., 277 (1874): "The effect is this: the witness in the first instance may be asked whether he has made such and such a statement in writing without its being shown to him. If he denies that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him) and to any parts of it relied upon as a contradiction."[9]

(C) RULES ABOUT VARIOUS KINDS OF SECONDARY EVIDENCE OF CONTENTS.

DOE dem. GILBERT v. ROSS (1840).

7 M. & W. 102.

Ejectment; to prove a deed of settlement, the original of which was in the hands of a third person, who refused to produce it, the plaintiff tendered a copy of the deed; but upon examination it
256 appeared that this had been made an attested copy, and was unstamped, and it was consequently rejected. It was then proposed to read, as secondary evidence of the contents of the deed, a short-hand writer's notes of the proceedings of the trial in the former action, when the settlement had been produced and proved by the then defendant Weetman. This evidence was objected to, but Lord Denman allowed it to be admitted, and the short-hand writer's notes were read. The ground of appeal was that the short-hand writer's notes were not receivable when it appeared that a copy of the settlement was in existence.

ABINGER, L. C. B.: "Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be ad-

the practice under the resolutions in Queen Caroline's Case, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands accompanied by the question whether he wrote it, thus giving him full warning of the danger he had to avoid and full opportunity of shaping his answers to meet it."

9—Compare the authorities cited in W., § 1263.

verse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another." ALDERSON, B.: "The objection [to secondary evidence] must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case; the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side at the trial may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all."[10]

CLEMENS v. CONRAD (1869).

19 Mich. 175.

Assumpsit. A witness, called by the defendants, was asked, on cross-examination, "were you indicted, in 1865, in Sandusky, for smuggling?" This question was objected to, but allowed by the
257 Circuit Judge.

COOLEY, C. J.: "The right to inquire of a witness, on cross-examination, whether he has not been indicted and convicted of a criminal offense, we regard as settled in this State by the case of *Wilbur* v. *Flood,* 16 *Mich.* 40. It is true that in that case the question was, whether the witness had been confined in State prison; not whether he had been convicted; but confinement in State prison presupposes a conviction by authority of law, and to justify the one inquiry and not the other would only be to uphold a technical rule, and at the same time point out an easy mode of evading it without in the least obviating the reasons on which it rests. We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary; while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent."[11]

10—Compare the authorities cited in W., § 1268.

11—*Ellenborough,* L. C. J., in *R.* v. *Castell Careinion,* 8 East 77, 79 (1806),

STATE v. LYNDE (1885).

77 Me. 561, 1 Atl. 687.

Indictment for keeping a liquor nuisance. The court admitted a copy of the record of the collector of internal revenue, showing that defendant had a license as retail liquor dealer. This copy was
258 made and certified by a clerk in the office of the collector, and the clerk was examined as a witness on the stand, and swore that the copy was correct and true. Defendant excepted.

PETERS, C. J.: "The original record of payments for licenses, kept in the office of the collector of internal revenue, would have been proper evidence; and a copy of the same, certified by the collector himself, would have been. A copy of the record authenticated merely by a clerk in the collector's office, an unofficial person, standing without other proof, would be neither sufficient nor admissible. But it was in this case supported by the testimony of the clerk as a witness, who swears that he personally examined the record and made a true copy. The copy, sustained by his oath, was admissible, if the mode of proof styled 'sworn copies' or 'examined copies' is allowable by the practice in this state. Examined copies are in England resorted to as the most usual mode of proving records. The mode . . . seems to have prevailed in many of the States, including Pennsylvania and New York. It was at an early date adopted in some of the Federal Courts. It is not an unknown mode of proof in New England. . . . Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or fraud is easily detectible. Probably the reason why such a mode of proof had not been much known, if known at all, in our practice, is that it is cheaper and easier to produce [certified] copies; and if a witness comes instead, it is more satisfactory to have [as here] the officer who controls the records bring them into court."[12]

on a similar question being raised: "It cannot seriously be argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor. This can only be known by the record." STATUTES: *England*, 1854, St. 17 and 18 Vict. c. 125, § 25: "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence," signed by the clerk or other custodian, shall suffice, "upon proof of the identity of the person." *California*, C. C. P. 1872, § 2051: "It may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." Compare the authorities in W., § 1270.

12—Compare the authorities cited in W., § 1273.

WINN v. PATTERSON (1835).

9 Pet. 663, 677.

Ejectment. STORY, J.: "The plaintiff, to maintain an issue on his part, gave in evidence a copy of a grant from the state of Georgia to Basil Jones, for seven thousand three hundred acres, including the lands in controversy, dated the 24th of May 1787, with a plat of survey thereto annexed. He then offered a copy of a power of attorney from Basil Jones to Thomas Smyth, Junior, purporting to be dated the 6th of August 1793, and to authorize Smyth, among other things, to sell and convey the tract of seven thousand three hundred acres, so granted, which power purported to be signed and sealed in the presence of 'Abram Jones, J. P., and Thomas Harwood, Jun.;' and the copy was certified to be a true copy from the records of Richmond county, Georgia, and recorded therein, on the 11th day of July 1795. And to account for the loss of the original power of attorney, of which the copy was offered, and of the use of due diligence and search to find the same, the plaintiff read the affidavit of William Patterson, the lessor of the plaintiff. . . . The plaintiff also read in evidence the deposition of William Robertson, who stated that he was deputy clerk of the court of Richmond county in 1794, and clerk in 1795, . . . that the record of the power of attorney from B. Jones to Thomas Smyth, Jun., made by himself while clerk of the court, is a copy of an original power of attorney, which he believes to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record; and that the copy of the said power of attorney transmitted with the deponent's depositions (the copy before the court), had been compared with the record of the original made by himself in Richmond county, and is a true copy. The remaining question then, is, whether the copy now produced was proper secondary proof, entitled by law to be admitted in evidence. The argument is, that it is a copy of a copy, and so not admissible; and that the original record might have been produced in evidence. We admit that the rule, that a copy of a copy is not evidence, is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being still in existence by law deemed as high evidence as the original, for then also it is a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original; or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it

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is the case of a second copy verified as a true copy of the original. Mr. Robertson expressly asserts that the record was a copy of the original power made by himself, and that the present copy is a true copy which has been compared by himself with the record. In effect, therefore, he swears that both are true copies of the original power. In point of evidence then, the case stands precisely in the same predicament as if the witness had made two copies at the same time of the original, and had then compared one of them with the original, and the other with the first copy, which he had found correct. . . . We are therefore of opinion, that there was no error in the court in admitting the copy in evidence under these circumstances."[13]

Chief Baron Gilbert, *Evidence*, 96 (*ante* 1726): "A copy of the deed must be proved by a witness that compared it with the original; for there is no proof of the truth of the copy, or that it hath any
259a relation to the deed. unless there be somebody to prove its comparison with the original."[14]

SUB-TITLE II.

RULES OF TESTIMONIAL PREFERENCE.

A: Preference for an Attesting Witness.

Professor James Bradley Thayer, *Preliminary Treatise on Evidence, 502* (1898): "[The rule] has a clear and very old origin. Such persons belonged to that very ancient class of transaction or busi-
260 ness witnesses, running far back into the old Germanic law, who were once the only sort of witnesses that could be compelled to come before a court. Their allowing themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to such a compulsory summons. Proof by witnesses could not be made by those who merely happened casually to know the fact. However exact and full the knowledge of any person might be, he could not, in the old Germanic procedure, be called in court as a witness, unless he had been called at the time of the event as a preappointed witness.

13—Chief Baron *Gilbert*, Evidence, 8 (*ante* 1726): "A copy of a copy is no evidence; for the rule demands the best evidence that the nature of the thing admits, and a copy of a copy cannot be the best evidence; for the farther off a thing lies from the first original truth, so much the weaker must the evidence be."

Foster, J., in *Cameron* v. *Peck*, 37 Conn. 763 (1871): "The rule that a copy of a copy is not evidence properly applies [1] to cases where the original is still in existence and capable of being compared with it, or [2] where it is the copy of a copy of a record, the record being still in existence, and being by law as high evidence as the original."

Compare the authorities cited in W., § 1275.

14—Compare the authorities cited in W., § 1278.

It was a part of such a system and in accordance with such a set of ideas that witnesses formally allowed their names to be written into deeds in large numbers. When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it when the execution of the deed was denied; and the same process that summoned the twelve, summoned also these witnesses. The phrase of the precept to the sheriff was *summone duodecim* (etc. etc.) *cum aliis*. The presence of these witnesses was at first as necessary as that of the jury. . . . After still another century, in 1562-3, process against all kinds of witnesses was allowed, requiring them to come in, not with the jury or as a part of the jury, but to testify before them in open court, and then the old procedure of summoning such [attesting] witnesses with the jury seems to have died out; [but they must still be summoned as witnesses.] . . . As late as the early part of the eighteenth century it was doubtful whether a deed could be proved at all, if the attesting witnesses came in and denied it. Half a century later, Lord Mansfield, while reluctantly yielding to what he stigmatized as a captious objection that you must produce the witness, declared that 'It is a technical rule that the subscribing witness must be produced; and it cannot be dispensed with unless it appeared that his attendance could not be produced.'"

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261 Common Law Procedure Commission (Jervis, Martin, Walton, Bramwell, Willes, Cockburn), *Second Report* (1853), 23: "We do not purpose to meddle with the preappointed evidence of execution required either by the Legislature or by persons creating powers; but we think it deserving of serious consideration whether this formal proof of the execution of written documents may not in other cases be dispensed with, where the execution is either admitted or capable of other proof. The principle on which the necessity for producing the attesting witness rests is that the witness is supposed to be conversant with all the circumstances under which the deed was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction; the instrument having been prepared, a clerk, a servant, or a neighbor is called in to attest it. Added to which, as parol testimony is not admitted to contradict or vary the terms of a written instrument, the occasions are few indeed where the evidence of the attesting witness goes further than to prove the execution of the writing. On the other hand, the necessity of calling the attesting witness, where the execution of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into, is often attended with difficulty and expense, and sometimes leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds, though their execution was not really in dispute and the

handwriting to all might have been proved by a single witness, and doubtless would have been admitted but for the difficulty which it was thought would by the existing rule be thrown in the way of the party alleging title. It also sometimes happens in the course of a cause that the adversary's case renders it necessary to give in evidence a document which it was not supposed would be required, or a document is produced by a witness on his subpoena which turns out, contrary to the expectations of the party requiring it, to be attested; the attesting witness is not at hand; yet the signature of the party might be easily proved, or the witness producing the instrument may have heard him admit the execution; nevertheless the document cannot be received, and the party requiring it loses his cause. When the genuineness of the document is not really in dispute, it is clear that the parties ought not to be limited to any particular witness to prove the execution. When the genuineness is in dispute, the party producing it will be sure to call the attesting witness, as the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that, except in cases where the evidence of attestation is requisite to the validity of the instrument, an attesting witness need not be called."

STATUTES: *England:* 1854, St. 17 & 18 Vict. c. 125, § 26: "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such in-
262 strument may be proved by admission, or otherwise, as if there had been no attesting witness thereto."

Illinois: Rev. St. 1874, c. 51, § 51: Whenever any instrument "not required by law to be attested by a subscribing witness" is offered in a civil cause, "and the same shall appear to have been so attested, and it shall become necessary to prove the execution of any such deed or other writing otherwise than as now provided by law, it shall not be necessary to prove the execution of the same by a subscribing witness to the exclusion of other evidence, but the execution of such instrument may be proved by secondary evidence without producing or accounting for the absence of the subscribing witness or witnesses."

Massachusetts: St. 1897, c. 386, Rev. L. 1902, c. 175, § 70: "The signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested."

New York, Laws 1883, c. 195, § 1: "Except in the case of written instruments to the validity of which a subscribing witness, or subscribing witnesses, is, or are necessary, whenever, upon the trial of any action, civil or criminal, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness,

but such instrument may be proved in the same manner as it might be proved if there was no subscribing witness thereto."[1]

TARRANT v. WARE (1862).

25 N. Y. 425.

DENIO, J.: "The only question which admits of argument arises out of the position that the publication of the instrument as the testatrix's will was not made in the presence of one of the subscribing
263 witnesses, and that the attestation of that witness was not made at the request of the testatrix. The two attesting witnesses were H. B. Newton and Mrs. Quimby. The former drew the will, and he testified before the surrogate that the testatrix declared it to be her will in the presence of Mrs. Quimby as well as of himself, and that she requested them both to sign it as witnesses. Mrs. Quimby, on the contrary, though she signed her name to a full attestation clause, testified before the surrogate that she was not requested by the testatrix to sign the will as a witness, and that there was no publication of the instrument as her last will and testament. Her account of the matter is, that being at the time on a visit at the house of Mr. Ware, she was called by him into the room where Mrs. Ware, the testatrix (who was her aunt), was lying in bed; that the will was then placed before the testatrix, who signed it, and that it was then signed by Newton, who directed her, the witness, to sign under his name, which she did. She testified that during this time nothing was said by any person in the room except what fell from Newton in requesting her to sign, and except that when the testatrix was affixing her signature, her husband, who was standing at the foot of the bed, desired her to hurry. She moreover declared that she did not know that the instrument was a will until after the death of Mrs. Ware. If the facts are as stated by her, the will was not duly executed, and it ought to have been refused probate. Prior to any adjudication upon the subject, it might have been argued with some plausibility that the nature and objects of the provisions declaring a certain number of subscribing witnesses necessary to a valid will required that the number specified should unite in testifying to an execution and attestation of the instrument in the manner required by the act; or at least that the will could not be established if a part or all of them should deny the existence of the facts requisite to show a proper execution. The witnesses were supposed to be persons selected by the testator to bear witness that he had actually executed the paper with a knowledge of its contents and in the form prescribed by law and that he was of suitable age and capacity and not under restraint; if the persons thus selected could not or would not affirm the existence of these facts, the intention of the law (it might be said) would not be answered; . . . [and] if

1—Compare the authorities cited in W., § 1290.

the testimony of the chosen witnesses, when unfavorable to the will, could be disregarded, a will may be set up and established by testimony not authorized by the statute and which the Legislature had not considered perfectly safe in ordinary cases. But, on the other hand, it was soon seen that the attesting witnesses might forget the facts to which they had once attested, and that it was not impossible that they might be tampered with by interested parties and thus be induced to deny on oath the facts which they had been selected to witness and to depose to. This view prevailed with the Courts. . . . Whether their [the witnesses'] denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported."[2]

DOE v. HINDSON (1765).

1 Day 41, 51.

Lord Camden: "The Legislature set up these witnesses as a guard, to protect the testator from fraud in that critical minute when he was about to execute his will. . . . There is a great difference between the method of *proving* a fact in a Court of justice and the *attestation* of that fact at the time it happens. . . . The new thing introduced by this statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon the old common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and, though that witness must be a subscriber, yet that is owing to the general common-law rule that, where a witness has subscribed an instrument, he must be always produced, because it is the best evidence. This we see in common experience; for after the first witness has been examined, the will is always read. . . . This [above distinction], I am afraid, has not always been attended to; but some persons have been apt to reason upon this point as if the statute had directed the will to be *proved* by three credible witnesses; forgetting the difference between the *subscription* and the *proof* of that subscription."[3]

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2—*Lumpkin*, J., in *Gillis* v. *Gillis*, 96 Ga. 1, 15, 23 S. E. 107 (1895): "[The attesting witnesses are,] unless accounted for, indispensably necessary witnesses; but the testimony, even as to the *factum* of the execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be."

Compare the authorities cited in W., § 1302.

3—*Eldon*, L. C., in *Bootle* v. *Blundell*, 19 Ves. 494, 500, 505, 509 (1815): "The rule of this Court [of chancery] requiring that to establish a will of real estate all the three witnesses shall be examined is not by any means, as it has been represented, a technical rule."

Compare the authorities cited in W., § 1304.

ADAM v. KERR (1798).

1 B. & P. 360.

Debt on a bond made in Jamaica. One of the attesting witnesses having been proved to be dead, and the other to be resident in Jamaica, the handwriting of the former only was established, and no evi-
265 dence was given of the handwriting of the obligor; verdict for the plaintiff, subject to the opinion of the Court.

BULLER, J.: "I am clear there is nothing in the first point. Where a witness is dead, the course is to prove his handwriting. In this case one of the attesting witnesses was dead, and the other was beyond the reach of the process of the Court; the best evidence, therefore, which could be obtained was given.[4] The handwriting of the obligor need not be proved: that of the attesting witness, when proved, is evidence of everything on the face of the paper; which imports to be sealed by the party."[5]

GELOTT v. GOODSPEED (1851).

8 Cush. 411.

Trespass to try title. DEWEY, J.: "The party here introduced evidence tending to show that both the witnesses, at the time of attesting the execution of the deed, resided in the State of Vermont, and,
266 as the report states, proved the fact to the satisfaction of the presiding judge, and that Charles Scott, one of them, still continued to

4—*Woods*, J., in *Dunbar* v. *Madden*, 13 N. H. 311, 314 (1842): "It is believed to be the well-established general rule of law on this subject, that proof of the handwriting of the witness may be given in all cases when from physical or legal causes it is not in the power of the party to produce the witness at the trial."

Compare the authorities cited in W., §§ 1310-1317.

5—*Nelson*, C. J., in *Losee* v. *Losee*, 2 John. 609 (1842): "Proof of the signature of a deceased subscribing witness is presumptive evidence of everything appearing upon the face of the instrument relative to its execution; as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. . . . The attestation comes in by way of substitute for his oath."

Bayley, B., in *Whitelocke* v. *Musgrove*, 1 Cr. & M. 520 (1833): "I always felt this difficulty, that that proof alone [of the subscribing witness' handwriting] does not connect the defendant with the note. . . . What is the effect which, with the greatest degree of latitude can be given to the attestation of the subscribing witness? It is that the facts which he has attested are true. Suppose an attestation of an instrument which describes the person executing it as A. B. of C. in the county of York. Then the utmost effect you can give to the attestation is to consider it as establishing that A. B. of C. in the county of York executed the instrument. But you must go a step further and show that the defendant *is* A. B. of C. in the county of York, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrove. There may be many persons of that name, and if you do not show that the defendant is the Francis Musgrove who executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. . . . Why? Because it is an essential part of the is-

reside there; and, as to the other witness, Charles Goss, it is stated there was no further evidence; whereupon the plaintiff, having been allowed to prove the handwriting of said Charles Goss, further offered to prove the handwriting of Harvey Stone, the grantor in the deed; but the court rejected this evidence, and ruled that the deed could not be read to the jury. . . .

"We assume, therefore, that the case was one properly requiring the admission of secondary evidence. Such being the case, the only further inquiry is, what amount of secondary evidence is required? Is it proof of the handwriting of all the subscribing witnesses, if there be more than one? If the witnesses were within the Commonwealth, proof of the execution by one of them would entitle the party to read his deed to the jury, and the like rule applies as to the handwriting where both are shown to be out of the jurisdiction of the court. In ordinary cases, where the mere formal execution is the subject of inquiry, it is quite sufficient to produce one of several subscribing witnesses; and if the secondary evidence is admissible, it is sufficient to prove the handwriting of one of the attesting witnesses, it being always necessary, if there be more than one attesting witness, that the absence of them all should be satisfactorily accounted for, in order to let in the secondary evidence."[6]

NEWSOM v. LUSTER (1851).

13 Ill. 175.

Trespass to try title. TRUMBULL, J.: "The next point in the case relates to the proof of the execution of the deed from Bogue to McCandless and Emerson. This deed was not acknowledged, but
267 was admitted in evidence upon proof of the handwriting of the grantor, the absence of the subscribing witness being first accounted for, and some evidence introduced tending to show that his handwriting could not be proved. The evidence sufficiently showed that the subscribing witness to the execution of the deed was not within the reach of the process of the Court; and in such case, this Court has expressly decided that it is unnecessary to produce the subscribing witness at the trial: Wiley v. Bean, 1 Gilm. 305.

"It is, however, objected that, in the absence of the subscribing witness, the next best evidence is proof of his handwriting, and that it was improper to admit the deed in evidence upon proof of the handwriting of the grantor alone. . . . I have no hesitation in holding that proof of the handwriting of the grantor to a deed furnishes altogether

sue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore, on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument."

Compare the authorities cited in W., § 1513.

6—Compare the authorities cited in W., § 1306.

more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness. When the attesting witness cannot be had, the law requires the next best evidence, which means the next best evidence of those facts to which the attesting witness, if present, would be called upon to testify; that is, not merely that he signed the paper as a witness, but that the party executed the instrument. It is difficult to account for the signature of a party to a writing which he did not execute; but it is easy to imagine how a forged instrument might be established against him, when it is only necessary to procure the name of a person as a subscribing witness to such an instrument, and then establish it by proof of the handwriting of the witness. As a general rule, therefore, whenever the subscribing witnesses to an instrument are beyond the jurisdiction of the court, its execution may be proved by proof of the handwriting of the grantor or obligor.

"This rule does not of course apply to instruments which the law requires to be attested by witnesses. In such cases evidence of the handwriting of both party and witness would be requisite."[7]

STATUTE: *California:* C. C. P. 1872, § 1308: In uncontested wills, "the testimony of one of the subscribing witnesses" suffices. Ib. § 1315: in contested wills, "all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county at the time appointed for proving the will, the Court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them."[8]

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(B) SUNDRY TESTIMONIAL PREFERENCES.

UNITED STATES v. GIBERT (1834).

2 Sumner 19, 81.

Indictment against the officers and crew of the ship Panda, for piracy committed on the brig Mexican. The brig Mexican belonged to Salem, and was owned by Joseph Peabody. It sailed from Salem for Rio Janeiro on the 29th August, 1832, under the command of Captain Butman; having on board a valuable cargo, and twenty thousand dollars in specie. On the 20th September, in 33° N. lat. and 34° 30′ W. Lon., she fell in with a suspicious-looking vessel, from

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7—Compare the authorities cited in W., § 1320.

8—This particular statute has been superseded by amendments; but it serves to illustrate the terms by which, in almost every jurisdiction, many of the preceding applications of the principle have been affected in statutes concerning wills.

which she made many efforts, but unsuccessfully, to escape. . . . Information of what had taken place was immediately disseminated throughout this and other countries, and reached the coast of Africa, where Captain Trotter, commanding the British brig of war Curlew, was then cruising. Circumstances led that gentleman to believe that the schooner Panda, then lying in the river Nazareth, was the vessel which had captured the Mexican. He immediately, therefore, proceeded to take measures against her. These measures resulted in the capture of the Panda, but the escape, for the time, of her crew. No ship's papers or log-book were found on board of her, although diligently sought for; and, owing to some accident, she shortly afterwards blew up, thereby killing several of the Curlew's men. Captain Trotter then sailed to other ports, still making efforts to discover the crew of the Panda, and at last succeeded in arresting the prisoners, and carried them into Portsmouth, England. By the British government, they were sent to this country for trial, the offence of which they were charged having been committed on board a vessel of the United States.

Story, J.: "The next and last specification under this head is that the Court declined to instruct the jury that the failure of the government to produce the witness, who (it was testified) saw the match applied for the purpose of blowing up the Panda, and removed it, afforded a legal presumption against the truth of the alleged attempt by the prisoner Ruiz to destroy the Panda. . . . The argument now is, that although Mr. Quentin, who was upon the stand, stated that he was on board at the same time with the witness, that he saw the smoke coming from the cabin, and the absent witness go down, and bring up the match, and many other circumstances to establish an intention to set the Panda on fire and blow her up; yet that his testimony was not the best evidence on this point, and ought to be rejected. . . It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact which leaves evidence of a higher and superior nature behind in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. . . . But the rule does not apply to several eye-witnesses testifying to the same facts or parts of the same facts, for the testimony is all in the same degree, and where there are several witnesses to the same facts, they may be proved by one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent."[9]

9—*Campbell*, J., in *Elliott* v. *Van Buren*, 33 Mich. 49, 52 (1875), repudiating any preference for a physician's testimony to an injured person's condition: "The term 'best evidence' is confined to cases where the law has divided testimony into primary and secondary; and there are no degrees of evidence, except where some document or other instrument exists the contents of which should be proved by an original

JEANS v. WHEEDON (1844).

2 Moo. & Rob. 486.

Case for a malicious prosecution. The defendant had made a charge against the plaintiff before a magistrate, the hearing of which was, in the first instance, adjourned, and on a subsequent occa-
270 sion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended on the first occasion and took down what the defendant said, but the defendant did not sign it, nor did the magistrate. *Bompas* Serjt. objected that parol evidence was inadmissible of what the defendant said on the first occasion, and that the writing must be produced.

CRESSWELL, J.: "I know from the depositions returned to me at the assizes, that, in practice when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other does not, the latter is as competent as the former to prove what he heard." Verdict for the plaintiff.

NOTE BY THE REPORTERS: "The fact of a conversation or transaction being reduced into writing, furnishes no general principle for excluding other evidence of the conversation or transaction than the writing. Such evidence is by no means necessarily secondary to the writing. Judges take notes of the evidence given on trials, yet the evidence may be proved from recollection, even on an indictment for perjury. . . . The exclusion must be founded either on the agreement of parties, or on the requirements of some particular law. When parties reduce into writing the terms of an agreement, or account of any other transaction, as between themselves such writing must be produced, and in the case of an agreement, cannot be contradicted, or even added to by parol evidence; for it is a reasonable presumption that, though other things were said or done besides those recorded in the writing, the parties concurred in treating those other things as not essential parts of the agreement or transaction. But this reasoning does not apply to third parties. There may well be occasions, either civil or criminal, in which others may have an interest in proving what really passed, and there is no reason why *they* should not be permitted to prove it,

rather than by other testimony which is open to the danger of inaccuracy. But where living witnesses are placed on the stand, one is in law on the same footing as another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable. There are some questions on which some witnesses cannot testify at all, for want of knowledge. No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts. But one who can testify under any circumstances upon the facts on which he is examined may do so as well where his superiors are to be found as where he knows as much as any other."

Compare the authorities cited in W., §§ 1286, 1339; and the "best evidence" phrase *ante*, No. 163. Compare No. 191, *ante*.

from the memory of witnesses, without producing the writing. Where matters are required to be reduced into writing by statute, either for the purpose of giving validity to the transaction, or for the purpose of evidence, the writing may be considered the primary evidence, and must be produced. But questions may, even in these cases, arise, as to the extent to which other evidence is to be excluded; in the determination of which, the necessity of the case in some instances, the purposes of the enactment in others, must be looked to. Thus, judicial records are not only primary, but from their nature conclusive, evidence of the decisions of courts of justice. The Statute of Frauds requires certain agreements, etc., to be in writing, to give them validity; and it may be laid down as a general rule, that in cases falling within that statute, the agreement cannot be added to, explained, or contradicted by parol. The statutes 1 & 2 Ph. & M. and 7 Geo. 4. c. 64, require the examinations of witnesses and prisoners to be reduced into writing, and parol evidence of what either of them said when under examination, cannot be received in the first instance on the criminal trial, preliminary to which the examination was taken. But even on such criminal trial, evidence is admissible by way of explanation, or to prove that the party made other statements besides those reduced into writing; otherwise, the safety of prisoners, and the credit of witnesses, would depend on the honesty and accuracy of the clerks who take the examinations; and instances (not occurring on such criminal trial) may perhaps arise, in which, what a witness said before a magistrate, might be given in evidence against him without even producing the written examination; at all events, it may be added to or explained, and that even by shewing other things said, pertinent to, and part of, the matters for which the examination was taken. . . . In the principal case it was not, perhaps, necessary that the statements, parol evidence of which was objected to (viz., statements made by the defendant on the first occasion of his going before the magistrate), should have been reduced to writing at all; but even if the entire examination of the witnesses, and the committal of a prisoner, take place at the same time, it would seem most inconvenient as well as unreasonable to make the written examination conclusive, as to all the preliminary statements of the witnesses on which it is founded. In practice, the witnesses are allowed to tell their stories in their own way, and what the magistrates or their clerks consider to be the effect, is written down and then read over (it is true) to the examinant; but it is scarcely to be expected that he should be very exact in observing inaccuracies."[10]

10—Compare the authorities cited in W.,§§ 1326-1329, 1349.

TITLE III.

ANALYTIC (OR, SCRUTINATIVE) RULES.[1]

THE HEARSAY RULE.

[2]NATURE OF THESE RULES. "The nature of the *Analytic* (or Scrutinative) rules is to subject a certain kind of evidence to tests calculated to exhibit and expose its possible weaknesses and to make clear to the tribunal the precise value that it deserves. There is in effect but one rule of this sort, the Hearsay rule. By this rule, two such tests or securities for trustworthiness are required to be applied to testimonial evidence,—the tests of cross-examination and confrontation; but the second is entirely subsidiary to the first, so that the essential purpose of this rule is that which is attained by bringing the witness to the stand and analyzing his assertions by the potent resolvent of cross-examination. The chief questions that arise in connection with this rule are whether the rule has in a given case been satisfied by adequate opportunity for cross-examination, whether certain classes of testimonial assertions are to be received exceptionally without undergoing these tests, and where the line is to be drawn between utterances to which the rule does and does not apply."

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[3]NATURE OF HEARSAY, AS AN EXTRA-JUDICIAL TESTIMONIAL ASSERTION. "When a witness A on the stand testifies, 'B told me that event X occurred,' his testimony may be regarded in two ways: (1) He may be regarded as asserting the event X upon his own credit, *i. e.* as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected, because he is not qualified by proper sources of knowledge to speak to it. This involves a general principle of Testimonial knowledge, already examined,[4] and does not involve the Hearsay rule proper.

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"(2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of B's statement as to event X. To this, A is clearly qualified to tes-

1—For a summary of the five Titles of Auxiliary Rules, see *ante*, No. 162.

2—Quoted from W., § 1172.

3—Quoted from W., § 1361.

4—*Ante*, Nos. 78-81.

tify, so that no objection can arise on that score. The only question, then, can be whether this assertion of B, reported by A, is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to prove event X by B's assertion; the utterance of B's assertion being itself proved by A's testimony to it. In other words, merely the making of B's assertion is properly proved by A; but the occurrence of event X is also sought to be proved, by this assertion of B, which was uttered out of court, but is offered testimonially for the same purpose as if it were being made presently by B on the stand.[5] It is these extra-judicial testimonial assertions which the Hearsay rule prohibits. The Hearsay rule points out that B's assertion, offered testimonially, is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. The Hearsay rule tells us that B's assertion (even assuming B to have been qualified, by knowledge and otherwise, as witness) cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter."

CRAIG dem. ANNESLEY v. EARL OF ANGLESEA (1743).

17 How. St. Tr. 1160.

The legitimacy of the plaintiff as heir was in issue; the declarations of Mrs. Piggot, a deceased intimate friend of his alleged mother, were offered. "This was objected to by defendant's counsel, who
273 insisted that hearsay was not evidence; . . . that Mrs. Piggot is dead, and where persons are dead, the law hath not provided for their testimony, nor will it substitute a mere declaration in the place of an oath; . . . that the admitting hearsay evidence in the present affair would introduce a dangerous precedent, in regard the other side could not have the benefit of cross-examining; in some cases, it is true, hearsay evidence is admitted from the necessity of the thing . . . that in civil cases there is not the same necessity, because a bill in equity may be filed to perpetuate the testimony of ancient witnesses, and then the evidence may be cross-examined; but Mrs. Piggot being dead, no declaration of hers can be evidence, because the defendant has no opportunity to cross-examine her. . . . The Court would not admit the hearsay of Mrs. Piggot's declaration to deponent to be made use of as evidence, on the principal reason that hearsay evidence ought not to be

5—Chief Justice *Appleton*, Evidence, 174 (1860): "In all cases of hearsay the effective witness is the individual, whether party or not, whose supposed statements the narrating witness relates. The individual testifying is merely the conduit or pipe through whose agency the impressions of some one else are conveyed to the Court. The real proof is the hearsay statement."

admitted, because of the adverse party's having no opportunity of cross-examining."[6]

COLEMAN v. SOUTHWICK (1812).

9 Johns. 45, 50.

Libel published in "The Albany Register." KENT, C. J.: "The next point is, that the testimony of Samuel North ought to have been received, when he offered to prove that he heard the defendant
274 ask one Henry Stanley, who resided in New York, whether he recollected the extract, as published in the Public Advertiser, appearing in the plaintiff's paper, to which Stanley replied, that he did. This point appears to me to be as untenable as the other. . . . The established doctrine is, that you must go, if you can, to the source of testimony, and not introduce a copy, when the original is to be had, nor undertake to prove what another person has been heard to say, when that person is a good witness, and can be produced. . . .Why not produce Stanley to testify what he told the defendant, instead of resorting to a bystander who heard what he said? . . . Hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.' . . . The plaintiff by means of this species of evidence would be taken by surprise and be precluded from the benefit of a cross-examination of Stanley, as to all those material points which have been suggested as necessary to throw full light on his information."

Sir MATTHEW HALE, *L. C. J., History of the Common Law, c. 12* (*ante* 1680): "The excellency [in English law] of this open course of evidence to the jury in presence of the judge, jury, parties, and
275 council, and even of the adverse witnesses, appears in these particulars: . . . 3dly, That by this course of personal and open examination, there is opportunity for all persons concerned, viz., the judge, or any of the jury, or parties, or their council or attornies, to propound occasional questions, which beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated."

6—For the history of the Hearsay rule, see W., § 1364.

JEREMY BENTHAM, *Rationale of Judicial Evidence, b. II, c. IX, and b. III, c. XX* (1827): "In the character of a security for the correctness and completeness of testimony, so obvious is the utility and
276 importance of the faculty and practice of interrogation that the mention of it in this view might well be deemed superfluous. . . . By interrogations thus pointed, such a security for completeness is afforded as can never be afforded by any general engagement which can be included in the terms of an oath or other formulary. . . . By interrogation, and not without, is the improbity of a deponent driven out of all its holds. . . . The best possible mode of extracting testimony—the mode which a considerate master of a family would employ when sitting in judgment on the conduct of a servant or a child—in a word, the mode by oral interrogation and counter-interrogation, is a production of English growth. Among those who in its native country are so cordial in their admiration of this mode of trial [by jury], there are not twenty perhaps who at this moment are aware that, in contradistinction to Roman jurisprudence, the mode of extracting evidence on this occasion is as peculiar to English procedure as the constitution of the Court. The peculiarity of the practice called in England 'cross-examination,' the complete absence of it in every system of procedure grounded upon the Roman (with the single exception of the partial and narrow use made of it in the case of confrontation), is a fact unnoticed till now in any book, but which will be as conclusively, as concisely ascertained at any time by the impossibility of finding a word to render it by in any other language. . . . No political institution was ever kept more completely hidden from general observation. All mouths are open in praise of trial by jury; and this is the mode of extraction employed on a trial by jury. It has been observed that somehow or other the ends of justice were more effectually accomplished in that sort of court of which the tribunal called a jury was one feature, and the use of this mode of extracting evidence another; but to which of them the effect was principally to be ascribed is a question that seems never to have presented itself. The feature which consists in the composition of the Court seems to have engrossed all the praise of it. 'Trial by jury! Ever blessed and sacred trial by jury! Juries for ever!' is the cry; not 'Trial by oral and cross-examined evidence!' It is, however, to this comparatively neglected feature that that most popular of all judicial institutions would be found to be indebted for the least questionable and most extensively efficient, if not the most important of its real merits."

DAVID PAUL BROWN, *The Forum, II, 456* (1856); this celebrated Pennsylvanian advocate is describing a case of supposed infanticide by
277 poison, administered by its mother, whose seducer had deserted her: "It was shown that a day or two before the death of her infant, the mother had sent for half-an-ounce of arsenic to a grocer's. That after the death the arsenic was taken to the grocer's, and was

weighed, and had lost twenty-four grains in its weight. This circumstance, together with the opinion of the chemist, presented a strong case. Neither was sufficient in itself, but together they were dangerous. Of course, the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus: 'When the arsenic was purchased, how did you weigh it?' 'I weighed it by shot.' 'How many shot?' 'Six.' 'Of what description?' 'No. 8.' 'When it was returned, did you weigh it in the same scales?' 'Yes.' 'Did you weigh it with the same shot?' 'I weighed it with shot of the same number—for I had no other number.' 'How much less did it weigh?' 'Twenty-four grains less.' It was plain that this testimony bore hard upon the prisoner—but at this stage of the case the court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers, and took from various uncut bags of No. 8, the requisite number of shot, subjected them to weight in the most accurate scales, and found that the some number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot—the grocers—the apothecary—the scales—were all brought before the Court. They clearly established the facts stated, and enabled us fairly to contend that there had been no portion of the arsenic used,—which argument, aided by the excellent character of the prisoner, proved entirely successful, and after a painful and prolonged trial, she was acquitted; so that her life may be said to have been saved by a shot."

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278 John C. Reed, *Conduct of a Lawsuit*, § *400* (1885): "When your evidence is but slight and that of the other side is very strong, you may be reckless in spurring his witnesses to make a complete statement. Your case is so bad that any change in it may be for the better. We add an entertaining and apt illustration. Some time ago the writer while waiting in court watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was sound and kind and free from all 'outs.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him to a blacksmith's shop to have him shod, when the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first, an honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well, and he had shod him about the time referred to in the plaintiff's testimony. 'Did you have any difficulty in shoeing him?' asked the defendant's counsel. 'Not the least. He stood perfectly quiet. Never had a horse stand quieter.' The other, a venerable-looking man, with a clear, blue eye, testified that he had owned the horse and that he was perfectly kind. 'Did you ever have any trouble

about getting him into a blacksmith's shop?' 'Well, sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him.' The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The jury found for the defendant. The next morning, as the writer was sitting in court waiting for a verdict, a man behind him, whom he recognized as the blacksmith, leaned forward and said, 'You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff didn't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I didn't tell him that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took him to a blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.' Of course the plaintiff's counsel should have been more searching in the examination, where he could not possibly have made his own case worse."[1]

PARNELL COMMISSION'S PROCEEDINGS (1888).

5th day, Times' Rep. pt. 14, pp. 194, 195.

This was virtually an action by Mr. Parnell and others, against the London *Times,* for defamation, in charging among other things that Mr. Parnell had approved the Phoenix Park assassination; this
279 charge was based on alleged letters of Mr. Parnell, plainly admitting complicity, sold to the *Times* by one Richard Pigott, an Irish editor, living in part by blackmail, who claimed to have procured them from other Irishmen. Pigott himself turned out to have forged them; but the case for their authenticity seemed sound, until Pigott was placed on the stand for the *Times* and came under the cross-examination of

1—"A certain ex-Governor had on one occasion a client who was indicted for maiming, the specific charge being that the defendant had bitten off the ear of the prosecutor. The case came on for trial and the outcome of it was not very promising for the defendant. While the defence was still being adduced, the defendant leaned over and whispered in the ear of his attorney, saying, 'Call Jack Deans; he was there; he saw the whole thing.' Thereupon in a short while Jack Deans was duly called and put upon the witness stand in behalf of the defendant. 'Now, Mr. Deans,' said the ex-Governor, after the preliminary questions, 'you say that you know the defendant and that you were present at the time of the alleged assault by him on the prosecutor. Tell us what you saw of that occurrence.' 'Well, I was coming 'long the road,' said the witness, 'and I seen 'em gitting up out of the dirt; but I didn't see the defendant hit the prosecutor, and I didn't see him kick him, and I didn't see him bite his ear off.' 'You were in plain view of the parties and you say you did not see any of these things?' asked the ex-Governor, with an expanding chest. 'Yes,' said the witness. Then the prosecuting attorney took a hand, and cross-examined. 'Now, Mr. Deans.' said he, 'you have told the Governor all that you *did not* see of this assault; please tell *me* what you *did* see of it.' 'Well,' said the witness, squirming in his chair and hesitating a long time before proceeding, 'it's so; I *didn't* see the defendant *bite off* the prosecutor's ear. But jest as I got abreast of him I seen him spit the ear out of his mouth.' That was enough for the prosecution and a great deal more than enough for the ex-Governor" (13 Green Bag 423).

Sir Charles Russell. The object of the ensuing part of the cross-examination was to bring out Pigott's shiftiness in first selling the letters as genuine to the *Times*, and then offering to the Parnell party for money to enable them to disprove the letters' genuineness. The letters had been first published in a series of articles in the *Times* entitled "Parnellism and Crime," beginning March 7, 1887, and bringing temporary obloquy to the Parnell party and causing the passing of the Coercion Act. Dr. Archibald Walsh, mentioned in the examination, was an intimate friend of Mr. Parnell. Pigott, in his prior examination, had claimed that he had handed the letters to the *Times* merely for the latter's protection, to substantiate the articles, and that the publication of the letters "came upon me by surprise;" the falsehoods exposed in the following answers were in a sense partly immaterial, but they served all the more to show the man's thoroughly false character: *Q.* "You were aware of the intended publication of that correspondence?" *A.* "No, I was not at all aware." *Q.* "What?" *A.* "Certainly not." . . . *Q.* "You have already said that you were aware, although you did not know they were to appear in the *Times*, that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?" *A.* "I was not aware till the publication actually commenced." *Q.* "Do you swear that?" *A.* "I do." *Q.* "No mistake about that?" *A.* "No." *Q.* "Is that your letter (produced)? Don't trouble to read it?" *A.* "Yes; I have no doubt about it." *Q.* "My Lords, that is from Anderton's Hotel, and is addressed by the witness to Dr. Walsh, Archbishop of Dublin. The date, my Lords, is March 4, 1887, three days before the first appearance of the first series of articles known as 'Parnellism and Crime.' (Reading.) 'Private and confidential. My Lord,—The importance of the matter about which I write will doubtless excuse this intrusion on your attention. Briefly, I wish to say that *I have been made aware of the details of certain proceedings that are in preparation* with the object of destroying the influence of the Parnellite party in Parliament.' (To witness.) What were these certain proceedings that were in preparation?" *A.* "I do not recollect." *Q.* "Turn to my Lords, Sir, and repeat that answer." *A.* "I do not recollect." *Q.* "Do you swear that, writing on the 4th of March and stating that you had been made aware of the details of certain proceedings that were in preparation with the object of destroying the influence of the Parnellite party in Parliament less than two years ago, you do not know what that referred to?" *A.* "I do not know really." *Q.* "May I suggest?" *A.* "Yes." . . . *Q.* "Did that passage refer to these letters, among other things?" *A.* "No, I rather fancy *it had reference to the forthcoming articles.*" *Q.* "I thought you told us you did not know anything about the forthcoming articles?" *A.* "Yes, I did. I find now that I am mistaken, but I must have heard something about them." *Q.* "Try and not make the same mistake again, if you please. (Reading.) 'I cannot enter more fully into details than to state that the proceedings referred to

consist in the publication of certain statements, purporting to prove the complicity of Mr. Parnell himself and some of his supporters with murders and outrages in Ireland, to be followed in all probability by the institution of criminal proceedings against these parties by the government.' Who told you that?" *A.* "I have no idea." *Q.* "Did that refer, among others, to the incriminatory letters?" *A.* "I do not recollect that it did." *Q.* "Do you swear it did not?" *A.* "I will not swear it did not." *Q.* "Do you think it did?" *A.* "No." *Q.* "Very well; *did you think that these letters, if genuine, would prove, or would not prove, Mr. Parnell's complicity with crime?*" *A.* "I thought they were very likely to prove it." *Q.* "Now, reminding you of that opinion, and the same with Mr. Egan, I ask you whether you did not intend to refer—I do not suggest solely, but among other things —to the letters as being the matter which would prove, or purport to prove complicity?" *A.* "Yes, I may have had that in mind." *Q.* "You can hardly doubt that you had that in your mind?" *A.* "I suppose I must have had." *Q.* (Reading.) 'Your Grace may be assured that I speak with full knowledge, and am in a position to prove beyond all doubt or question the truth of what I say.' Was that true?" *A.* "It could hardly have been true." *Q.* "Then you wrote that which was false?" *A.* "I did not suppose his Lordship would give any strength to what I said. I do not think it was warranted by what I knew." *Q.* "Did you make an untrue statement in order to add strength to what you had said?" *A.* "Yes." *Q.* "A designedly untrue statement, was it?" *A.* "Not designedly." *Q.* "Try and keep your voice up." *A.* "I say not designedly." *Q.* "Accidentally?" *A.* "Perhaps so." *Q.* *"Do you believe these letters to be genuine?"* *A.* "I do." *Q.* "And did at that time?" *A.* "Yes." *Q.* "(Reading.) 'And I may further assure your Grace that *I am also able to point out how the designs may be successfully combated and finally defeated.*' (To witness.) Now if these documents were genuine documents, and you believed them to be such, how were you able to assure his Grace that you were able to point out how the designs might be successfully combated and finally defeated?" *A.* "Well, as I say, I had not the letters actually in my mind at that time, so far as I can remember. I do not recollect that letter at all." *Q.* "You told me a moment ago without hesitation that you had both in your mind?" *A.* "But, as I say, it had completely faded out of my memory." *Q.* "That I can understand." *A.* "I have not the slightest idea of what I referred to." *Q.* "Assuming the letters to be genuine, what were the means by which you were able to assure his Grace you could point out how the designs might be successfully combated and finally defeated?" *A.* "I do not know." *Q.* "Oh, you must think, Mr. Pigott, please. It is not two years ago, you know. Mr. Pigott, had you qualms of conscience at this time, and were you afraid of the consequences of what you had done?" *A.* "Not at all." *Q.* "Then what did you mean?" *A.* "I cannot tell you at all."*Q.* "Try." *A.* "I cannot." *Q.* "Try." *A.* "I really cannot."

Q. "Try." *A.* "It is no use." *Q.* "Am I to take it, then, that the answer to my Lords is that you cannot give any explanation?" *A.* "I really cannot." . . . *Q.* "Now you knew these impending charges were serious?" *A.* "Yes." *Q.* "Did you believe them to be true?" *A.* "I cannot tell you whether I did or not, because, as I say, I do not recollect." . . . *Q.* "First of all, you knew then that you had procured and paid for a number of letters?" *A.* "Yes." *Q.* "Which, if genuine, you have already told me would gravely implicate the parties from whom they were supposed to come?" *A.* "Yes, gravely implicate." *Q.* "You regard that as a serious charge?" *A.* "Yes." *Q.* "Did you believe that charge to be true or false?" *A.* "I believed that to be true." . . . *Q.* "Now I will read you this passage:—'P. S. I need hardly add that *did I consider the parties really guilty of the things charged against them, I should not dream of suggesting* that your Grace should take part in an effort to shield them. I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be sufficient to secure conviction if submitted to an English jury.' What have you to say to that?" *A.* "I say nothing, except that I am sure I could not have had the letters in my mind when I said that, because I do not think the letters convey a sufficiently serious charge to warrant my writing that letter." *Q.* "But as far as you have yet told us the letters constituted the only part of the charge with which you had anything to do?" *A.* "Yes, that is why I say that I must have had something else in my mind which I cannot recollect. I must have had some other charges in my mind." *Q.* "Can you suggest anything that you had in your mind except the letters?" *A.* "No, I cannot." . . . [On the next day, when Pigott resumed his examination]: *Q.* "Then I may take it that since last night you have removed from your mind—I think your bosom was the expression you used—that this communication of yours [to the Archbishop] referred to some fearful charge, something not yet mentioned?" *A.* "No, I told you so last night, but I am sure that it is not so. I will tell you my reason." *Q.* "You need not trouble yourself." *A.* "I may say at once that *the statements I made to the Archbishop were entirely unfounded.*" . . . *Q.* "Then in the letters I have up to this time read—or some of them—you deliberately sat down and wrote lies?" *A.* "Well, they were exaggerations; I would not say they were lies." *Q.* "Was the exaggeration such as that it left no truth?" *A.* "I think very little."

PARNELL COMMISSION'S PROCEEDINGS.

72d Day, Times' Rep., pt. 20, pp. 145, 247.

280 [1]Same trial as the preceding; the Irish Land League was charged with collecting funds to be used for supporting crime and outrage and armed rebellion, and Mr. Parnell was under cross-examination as to the purpose for which he collected money during his tour in America; he admitted accepting money from all sources, including

1—This is intended to illustrate that too far and reacts against the cross-examiner.
type of cross-examination which is carried

those "physical force" adherents who favored dynamite-violence and the like, but claimed that he received it for the sole purpose of furthering the peaceable and lawful methods of the Land League; Sir Richard Webster, the Attorney-General, in cross-examining, brought up the following significant incident. *Q.* "Do you remember the celebrated occasion at Troy, when a gentleman came forward and offered you *'five dollars for bread and twenty dollars for lead'?"* *A.* "Yes." *Q.* "You did not think it necessary to refuse the twenty dollars for lead?" *A.* "I was very glad to get the money, but not for lead." *Q.* "In your presence, then, at Troy, a man offered five dollars for bread and twenty for lead?" *A.* "That was the expression used." *Q.* "You understood that to mean that some one in the audience was ready to subscribe five dollars for charity and twenty dollars for fighting purposes?" *A.* "Not a bit of it. I understood that he was ready to subscribe five dollars to our charitable fund and twenty dollars in support of the Land League movement." *Q.* "Then did you think it a fair description of your agitation to call it 'lead'?" *A.* "No, I did not think it was." *Q.* "Why did you think the gentleman meant the Land League by 'lead'?" *A.* "Because if he had not he would not have given the money to me." *Q.* "Do you represent that a public offer of twenty dollars for lead in support of your agitation and an acceptance of the sum on your side would be understood as a repudiation of physical force opinions?" *A.* "At the beginning of my meetings in America I *had declared that I would not receive one cent for arms* or for any unconstitutional or illegal movement. . . . Having made that declaration at the outset of my tour, and having said subsequently nothing inconsistent with that declaration, I consider that no man in his senses would have offered me twenty dollars believing that the money would be used for the very purposes which I had repudiated." . . . *Q.* "Now, do you not know that that speech about lead was repeatedly quoted in Ireland, and that the construction put upon it was that the subscription was for physical force matters?" *A.* "By your side it was quoted, I know." *Q.* "What do you mean by my side?" *A.* "The Tory party." . . . *Q.* "Did not Boyton, the Land League organizer, quote the speech as meaning what I have indicated?" *A.* "I do not know that he did." *Q.* "Do you not know it has been proved already in this case?" *A.* "I do not. The only use made of the speech in that sense was when Mr. O'Hanlon tried to break up our meeting in the Rotunda. He wrote a letter to a newspaper next day wanting to know what I had done with these twenty dollars." *Q.* "And suggesting that the money ought to have gone to the physical force party for the purchase of lead?" *A.* "Yes; *he thought that I was misappropriating it."*

(A) SATISFACTION OF THE RULE, BY CROSS-EXAMINATION AND CONFRONTATION.

BULLER, J., *Trials at Nisi Prius*, 240 (*ante* 1767): "If the witness be examined *de bene esse*, and, before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition
281 shall not be read, because the opposite party had not the power of cross-examination, and the rule of the common law is strict in this, that no evidence shall be admitted but what is or might have been under examination of both parties. . . . A deposition cannot be given in evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross-examine the witness, and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party. . . . From what has been said, it is evident that, as there can be no cross-examination, a voluntary affidavit is no evidence between strangers."

REX v. ERISWELL (1790).

3 T. R. 707.

Pauper settlement. The pauper, John Sharp, came into the parish of Icklingham All Saints in 1767, where he was employed as a day laborer to work on the navigation. In 1779 he was taken before
282 two of his majesty's justices of the peace for the said county, by the overseers of the poor of the parish of Icklingham All Saints, for the purpose of being examined as to the place of his last legal settlement; in consequence of which the examination was taken upon oath before those two justices, and signed by the pauper. No proceedings were had in consequence of this examination until the order of removal, which is the subject of this appeal, was applied for and made. The pauper, from the time of the examination being taken, continued to reside in Icklingham All Saints for about five years, endeavoring to gain his livelihood, and without becoming chargeable to that parish, when he became insane, and continued in a state of insanity to the time of his removal to Eriswell as aforesaid. On the part of the respondents this examination was offered in evidence, and objected to on the part of the appellants.

KENYON, L. C. J.: "Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness. . . . Without stating the cases which occur on this head, I will do little more than refer to the case of The King v. Paine, in Salk. 281, & 5 Mod. 163 [1696]. That

was not loosely decided, but was the opinion of this Court assisted by the Court of Common Pleas. In Salkeld it is expressly said that the rule cannot be extended further than the particular case of felony; and in the other book the Chief Justice declared that the depositions were not evidence; and a weighty reason is given, namely 'the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.' . . . [In this case the deposition]was *ex parte,* obtained at the instance of those overseers whose parish was to benefit by it, and behind the backs of the parish against whom it has now been used, without having an opportunity of knowing what was going on or attending to have the benefit of a cross-examination. I regard the question as of the last importance and as putting in danger the law of evidence in which every man in the kingdom is deeply concerned."[2]

EVANS v. ROTHSCHILD (1895).

54 Kan. 747, 39 Pac. 701.

ALLEN, J.: "This was an action of replevin, brought by the defendants in error as partners, under the firm name of E. Rothschild & Bros.,
against the sheriff of Washington county, to recover certain mer-
283 chandise. On his own application, William Morrison was made a party, and answered, claiming ownership of the property in controversy. On the 22d of October, 1890, the plaintiffs served a notice on the attorney for the sheriff that they would take depositions in Chicago on the 28th of October, 1890, between the hours of 8 o'clock a. m. and 6 o'clock p. m. They also, at the same time, served another notice that they would take depositions on the day stated in the other notice, in St. Joseph, Mo. The defendant appeared by attorney, and attended the taking of depositions at St. Joseph, but did not appear at Chicago. Before the commencement of the trial, the defendants duly excepted to the depositions taken at Chicago, on the ground that they had elected to appear and attend the taking of the depositions at St. Joseph, and that they could not be required to attend in two places, distant from each other, at the same time. The Court overruled the exceptions, and permitted both depositions to be read at the trial.

"Section 352 of the Code of Civil Procedure provides for the service of a notice of the time and place of taking depositions, as follows: 'The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday and the day of service.' Does this permit the service of two or more notices to take depositions at places widely separate from each other, on the same day, provided only the notice is served in sufficient time to give the party an opportunity to go to either place designated? We think the spirit, if not the letter, of the statute, clearly pro-

2—Compare the authorities cited in W., §§ 1373-1375.

hibits any such practice. Where testimony is taken by deposition, it is in one sense a part of the trial of the cause, and the only chance given to the opposing party to confront the witnesses whose depositions are taken under the notice is to attend before the officer who takes them. The only opportunity to apply the tests necessary to correct errors or detect falsehood in the statements drawn out on direct examination is that afforded by cross-examination at the same time. A party to an action has a right, if he deems it necessary, to be personally present when depositions are being taken affecting his interests. He is not required to employ a multitude of attorneys to protect his interests at different places on the same day, nor does the fact that he chooses to intrust his interests to the care of an attorney (other than the one who tries the case for him) at one place, require him or his principal counsel to attend on the same day at another place."[3]

WRIGHT v. DOE dem. TATHAM (1834).

1 A. & E. 3.

Ejectment; the plaintiff below claimed as heir-at-law of John Marsden deceased, who was admitted to have died seised, leaving the plaintiff below his heir-at-law, but Wright claimed under a will of Marsden.

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TINDAL, C. J.: "As to the second ground of exception, the facts are, that Mr. Tatham, the lessor of the plaintiff in this action, filed his bill in Chancery against Mr. Wright, the defendant in the present action, and three other persons. And, upon the answers of the defendants coming in, the Master of the Rolls directed an issue at law upon the question, whether the said John Marsden did devise his estates or not by the very identical will which is now in dispute. It was further proved that a trial of such issue, in which Mr. Wright and the other defendants in the chancery suit were the plaintiffs, and Mr. Tatham was the defendant, afterwards took place; and that, on the trial of that issue, Mr. Giles Bleasdale, one of the attesting witnesses to the will, was called and examined on the part of Mr. Wright, and was cross-examined on the part of Mr. Tatham. Now, if the former trial had taken place in a suit between Mr. Wright and Mr. Tatham, and those persons alone, no doubt could have been raised that, after the death of this witness, the evidence which he gave upon the former trial would have been admissible upon the second. For, in that case, it would have been evidence given in a suit between the very same parties upon the same subject-matter, at a trial on which Mr. Tatham had the right to object to the competency of the witness, to cross-examine him at the trial, and to contradict him by other testimony. Upon such a state of facts, therefore, it is unnecessary to cite cases to the point, that the evidence of this witness, given on the former occasion, would, after his death, be admissible at the second trial.

3—Compare the authorities cited in W., § 1379.

"But the only distinction between the case above supposed and the present is, that Mr. Wright was not the only party, but was joined with other plaintiffs in the former action; and that Mr. Tatham, instead of being the plaintiff in the present action, is only the lessor of the plaintiff. But we think neither of these circumstances will make any difference as to the admissibility of the evidence in question. For the result of the authorities is, that the lessor of the plaintiff is the real party in an ejectment, that the nominal plaintiff has no interest, and that, in an ejectment between Doe on the demise of J. S. against B., J. S. is bound by a verdict for the defendant. Neither can there be any real difference from the circumstance that, in the former action, the present defendant, Mr. Wright, was joined with other persons as plaintiffs; for Mr. Tatham, the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of Bleasdale, the same right of cross-examination and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had if Mr. Wright had been the sole plaintiff in that suit, or as he would have had now if Bleasdale had been alive and subpœnaed as a witness. It is manifest, therefore, that the verdict on the former trial, and the examination of witnesses on each side, did not take place in a suit between third parties or strangers, but virtually and substantially between the very same parties who are parties to the present suit, and upon the very same subject-matter of dispute."[4]

CONSTITUTION OF THE UNITED STATES (1787), *Amendment VI:* "In all criminal prosecutions, the accused shall enjoy the right . . .
285 to be confronted with the witnesses against him."

HOWSER v. COMMONWEALTH (1865).

51 Pa. 337.

WOODWARD, C. J.: "Confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. When the common law of England was transported to
286 these colonies, it gave a person charged with a capital crime no compulsory process to obtain witnesses and entitled him to no examination by himself or his counsel of witnesses brought against him. . . . To remedy this state of the law, our constitutions all declared—what statutes had then provided in England—that the accused should have an impartial trial by jury, should have process for witnesses and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of (*confronting*) the accused."[5]

4—Compare the authorities cited in W., §§ 1386-1388.

5—*Leonard*, J., in *State* v. *McO'Blenis*, 24 Mo. 416, 435 (1857): "The purpose of the People was not, we think to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law

UNITED STATES v. MACOMB (1851).

5 McLean 256.

DRUMMOND, J.: "The defendant was indicted under the 21st and 22d sections of the Post Office Act of March 3, 1825, 4 Statutes at Large, 107-9, for stealing from the mail a packet containing a land war-
287 rant, and fifty dollars in bank notes. It appeared that the offence was committed near Dixon, on the 1st of August, 1850. The packet was mailed at Freeport on the 30th of July, addressed to Dixon. On the day the offence was committed, the defendant was arrested at the latter place, and a few days afterwards, a preliminary examination took place there before an officer. The defendant was present with his counsel, at the examination, during which one Hurlbut, since deceased, who had enclosed the land warrant and bank notes, and directed and posted the letter, testified as a witness for the United States. Hurlbut was subjected—to use the language of the witnesses introduced here—to a long and tedious cross-examination by the counsel of the defendant. An objection was taken by the counsel of the defendant at the trial in this court because witnesses were permitted to state to the jury what Hurlbut had sworn to on the preliminary examination. . . . The objection resolves itself into the two following propositions: First: The declarations of a deceased witness made at a former trial between the same parties, upon the same subject-matter, can never be given in evidence in criminal cases. Secondly: If they can be, it is only when the persons who are called on to give the declarations of a deceased witness, can repeat the precise words of the witness, and it being admitted that that was not done here, the testimony ought to have been rejected.[6] . . .

"[As to the first point,] why should not the rule in civil and criminal proceedings be the same in this respect? The great object of all judicial investigation is to ascertain facts, and to do justice between the parties,—in criminal cases, to shield the innocent, and punish the guilty. In accomplishing this, however, Courts must act in conformity with some general rules founded in reason and experience. But after all our efforts we only make an approximation to this object. Many an innocent man has been and will be punished,—many a guilty one go free. If it be, on the whole, a sound rule to admit the declarations of a de-

of the land from future change by elevating them into constitutional law. . . . It was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the rule."

Bartley, C. J., in *Summons* v. *State*, 5 Oh. St. 341 (1856): "Evidence of the statements of a deceased witness on a former trial . . . would seem to be now confined to cases where opportunity for cross-examination had been afforded, and therefore to cases where the accused had been confronted by the deceased witness when the testimony was given on the former trial."

Compare the authorities cited in W., §§ 1397, 1398.

6—This second point is concerned with the principle already considered *ante*, No. 203.

ceased witness, made on a former trial, in a case involving property or reputation, it is equally so in cases involving life and liberty. The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes,—the presence of the accused, and the right of cross-examination. The admissibility of this species of evidence depends upon the necessity of the case, and upon a well-established exception to the rule which excludes hearsay,—if, indeed, we may not in one sense regard it as original testimony. We receive it because it comes up to one of the demands of the law; it is the best evidence which can be produced. Though the witness has been once confronted with the defendant, and, in his presence, been sworn and cross-examined, it may be admitted, it is more satisfactory to have him again produced before a jury at a second trial. But being dead, it is impossible, and we resort to the next best source of truth,—his sworn statements already made. I think the law of evidence, as now administered, is quite stringent enough in excluding testimony, and I confess I feel a strong disposition to admit it in all cases where it can be done without violating any principle, or controverting any settled rule of law. . . . In the instance we are now considering, we have the sanction of the oath itself, administered by competent authority, and the cross-examination of the witness,—the great test of truth,—by the party; and there is thus every reasonable safeguard thrown around the claims of the public on the one hand, and the rights of the accused on the other."

STATUTES. *United States, Rev. St.* 1878, § 861: "The mode of proof in trials of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided".

288 Ib. § 863: In civil cause in a district or circuit court a deposition may be taken "when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when he is ancient and infirm." Ib. § 865: "Unless it appears to the satisfaction of the Court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause". Ib. § 866: "In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; . . . . and the provisions of § 863, 864, and 865, shall not apply to any deposition to be taken under the authority of this section".[7]

7—*Cheves, J.*, in *Drayton* v. *Wells*, 1 N. & McC. 408 (1819): "The books enumerate four cases only in which the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was

BOGIE v. NOLAN (1888).

96 Mo. 85, 91, 9 S. W. 14.

Action on three promissory notes by M. A. Bogie against George N. Nolan, administrator of the estate of Mary Dowling. BRACE, J.: "In vacation, before the trial, the defendant took the deposition of the
289 plaintiff, and filed it in the cause, and the plaintiff, on the trial, when putting in his evidence in chief, offered to read his deposition, to which defendant objected, and the court sustained his objection, and refused to permit it to be then read. When the defendant came to put in his evidence, he offered to read the same deposition as statements and admissions of the plaintiff, to which plaintiff objected, 'the said Bogie being then present in court.' The court overruled the objection, and permitted the same to be read as statements and admissions of the said Bogie. . . . The declarations of a party to a suit, made in a deposition taken by his adversary, may be read in evidence against him on the trial in the same suit in which such deposition was taken, whether he be present or absent. He is none the less a party because his adversary has called him as a witness. The Legislature, in conferring upon a party the right to call upon his adversary to testify, and in providing means, by deposition, to procure the evidence of witnesses who might not be able to be in personal attendance upon the trial, did not intend to narrow the scope of inquiry, for the very truth of the matter in controversy, by abrogating that ancient, well-recognized, and hitherto unquestioned rule of evidence, that the declarations of a party to the suit may be given in evidence against him,—a rule that hitherto has had no respect for time or place, always presuming that a man's statements, as against himself, are truthful, whether made in court or out of court, on oath or in casual conversation, orally or in writing. . . . There can be no difference in the character of the evidence whether the declarations are made in the deposition of a party taken in his own case then on

the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence,—1st, Where the witness was dead; 2nd, Where he was insane; 3rd, Where he was beyond seas; and 4th, Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party."

Professor *Simon Greenleaf*, Evidence, § 168 (1842): "The same principle will lead us farther to conclude that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again, whether from physical or from legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed, it can make no difference in principle whether it be by the finger of death or by the finger of the law."

Green, J., in *Wells* v. *Ins. Co.*, 187 Pa. 166, 40 Atl. 802 (1898): "The cause of the subsequently accruing incompetency is not material. It may arise from absence, from sickness, from interest, from death, or from a newly-created statutory incompetency; but the principle controlling them all is that if, at the time the deposition or testimony was taken, the witness was competent, it may be given in evidence after the incompetency had arisen. Such is the sense of all the modern decisions, and we think the conclusion is reasonable and just."

Compare the authorities cited in W., §§ 1402-1413.

trial, his deposition taken in another case to which he was a party, or taken as a witness in a case in which he was not a party and had no direct interest. They are admissible in each case for the same reason, not as the deposition of a witness under the statute, but as the declaration of a party to the suit."[8]

(B) EXCEPTIONS TO THE RULE.

SUGDEN v. LORD ST. LEONARDS (1876).

L. R. 1 P. D. 154.

JESSEL, M. R.: "It might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead, in all cases where they were made
290 under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable justice, that a large number of exceptions have been made to the general rule. I will consider, first, what the exceptions are, and what is the principle which guides the Court in making exceptions. . . Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases."

1. DYING DECLARATION.

REX v. WOODCOCK (1789).

2 Leach Cr. L. 4th ed. 500.

Wife-murder. The deceased was found lying in a ditch, in a narrow lane, called Robinson's Lane, in the vicinity of Chelsea, in the county
291 of Middlesex. She had received eight wounds about the head, face, and neck, which seem to have been inflicted with the end of a blunt instrument; and was so exhausted by the loss of blood as to

8—Compare the authorities cited in W., § 1416.

be apparently dead. The body was taken to Chelsea Poor-house, put into a warm bed, and by medical assistance restored to life. In the course of eight hours, she recovered her senses to such a degree, that a magistrate was called, and he took her examination under oath; the accused, however, not being present. It appeared from the evidence of the surgeons, that she died in about eight-and-forty hours after the examination had been taken, and that it was impossible from the first moment that she could live long, but that although she retained her senses to the last moment, and repeated the circumstances of the ill usage she had received, she never expressed any apprehension, or seemed sensible of her approaching dissolution.

EYRE, C. B.: "The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two other species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament.[9] . . . [In the former case] the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice. But a difficulty also arises with respect to these declarations; for it has not appeared, and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. The several witnesses could give no satisfactory information as to the sentiments of her mind upon this subject. . . . My judgment is that inasmuch as she was mortally wounded and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations made under these circumstances ought to be considered by a jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death and must have considered herself as a dying woman."[10]

9—The judge here declared the examination inadmissible from the latter point of view, on the principle of No. 282, *ante*.

10—*R.* v. *Jenkins*, L. R. 1 Cr. C. R. 192

WILSON v. BOEREM (1818).

15 Johns. 286.

Assumpsit, on a promissory note, drawn by Thomas Shieffelin, in favor of the defendant, by whom it was endorsed to Josiah Brown, Jr., and by him to the plaintiff. The note, endorsements, demand of
292 payment, and notice, having been proved on the part of the plaintiff, the defendant produced witnesses to prove that the note was endorsed by Brown and the defendant, for the accommodation of Shieffelin, and delivered to the plaintiff by Brown, for the purpose of being discounted by him, but that he had never paid anything on account of the note, and had pledged it to one Simmons for his own debt. The defendant's counsel, in order further to make out the defence, offered to prove the dying declarations of Brown, in relation to the note.

THOMPSON, C. J.: "No case, either in the English courts or in our own, has fallen under my observation, where such evidence has been admitted in civil suit. Such testimony is inconsistent with two fundamental rules in the law of evidence. It is mere hearsay, not under oath, and no opportunity is given for cross-examination. . . . Whatever might have been the ground on which this kind of evidence was first admitted, in cases of homicide, we find it has long been an established rule in such cases, and, I may say, in such cases only."[11]

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2. STATEMENT OF FACTS AGAINST INTEREST.

MIDDLETON v. MELTON (1829).

10 B. & C. 317.

Action against a surety on a bond given by a collector of taxes. BAYLEY, J.: "The question in this case is, Whether a private book kept by a collector of taxes, containing entries wherein he ac-
293 knowledges the receipt of sums of money in his character of collector, can be given in evidence against a surety, the collector having been appointed to collect the taxes mentioned in the bond pursuant to

(1869); *Kelly*, C. B.: "The result of the cases is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die"; *Byles*, J.: "The authorities show that there must be no hope whatever"; and a declaration by one having "no hope at present" ot recovery was rejected. Compare the authorities cited in W., §§ 1439-1442.

11—*Kingman*, C. J., in *State* v. *Bohan*, 15 Kan. 418 (1875): "Mr. Redfield states that this evidence is not received upon any other ground than that ot necessity, in order to prevent murder going unpunished. . . . Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness of his crime, beyond the power of the Court by killing him, shall not thereby escape the consequences of his crime. . . . Necessity, then, being the only ground on which such testimony can be admitted, it remains to be seen whether that necessity exists so generally, or to so great an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption ot a rule admitting such testimony"; and

the provisions of an act of Parliament. In this case Squire was the collector, and his private book was found after his death, and given by his daughter to the defendant. There was evidence to show, therefore, that it was left in the defendant's possession, and he having refused to produce it at the trial after notice, secondary evidence of its contents was admissible. It was proved that it was the collector's usual habit to collect by his private book, and to mark the sums he received with ticks, and that those ticks denoted that those sums had been received by him. If the entries mentioned in the book were admissible evidence to show that he received those sums, they will be sufficient to entitle the plaintiff to retain the verdict for the full amount; and the question as to the admissibility of the receipts will not necessarily arise. . . . The question then is, Whether such an entry, made by an individual against his own interest, may be evidence of the fact of the receipt of the money against a third party? It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest. An entry in a book, whereby the party making it charges himself with the receipt of money on account of a third person, or acknowledges the payment of money due to himself, has been held to be evidence of the receipt or payment of such money. . . . These cases establish that where a person makes an entry charging himself with the receipt of a sum of money, that entry is evidence of the fact of the receipt of that money against a third person. The question as to the receipts then becomes immaterial. But if the entries in the book are admissible in evidence, because the tick marked against them denotes that the collector had received the money, the receipts signed by him must be evidence of the fact of such receipt of the money upon the same principle."

LITTLEDALE, J.: "Warren v. Greenville, 2 Str. 1129, Barry v. Bebbington, 4 T. R. 514, and Higham v. Ridgway, 10 East, 109, establish this general principle, that where a person has peculiar means of knowing a fact, and makes a declaration or written entry of the fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death."[12]

SMITH v. BLAKEY (1867).

L. R. 2 Q. B. 326.

Action for the amount of an advance made by the plaintiff to the defendant on a consignment of boots and shoes. In proving the transaction, the plaintiff offered a letter written to him in London by
294 one Barker, his confidential clerk, now deceased, who was in charge of the store in Liverpool; part of the letter was as follows:

in a trial for the murder of T. A., declarations were rejected of W. A., shot at the same time with T. A., but surviving him a few hours.

Compare the cases cited in W., §§ 1432-1434.

12—Compare the authorities cited in W., §§ 1456-1475.

"James Smith, Esq., London. April 5, 1864. Dear Sir,—I enclose four private letters, also two drafts of Cuming Brothers. . . Draft of John Blakey [the defendant] which he sent to-day, with three huge cases, to the office. I enclose his invoices for your perusal. He leaves shipment of his goods to your judgment. I have a sample pair of each description here, which we can send out by first ship, and keep the goods for the 'Lady Palmerston,' which vessel arrived yesterday from Glasgow, . . . Yours, &c., Geo. C. Barker."

BLACKBURN, J.: "The first question is, Was the letter of the 5th of April, 1864, written by Barker to the plaintiffs, admissible? . . . Of course, as long as Barker lived this letter would not have been evidence, and he must have been himself called as a witness; but Barker is dead, and it was sought to make the letter admissible, as coming within the class of cases in which statements, whereby a deceased person has charged himself or discharged another from the payment of money, have been admitted. And no doubt when entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement; as in Higham v. Ridgway (10 East, 109), where the entry of a man midwife that he had delivered the wife of a certain man of a son on a particular day, coupled with the charges which were marked as paid, was held admissible to prove the date of the birth of a person who had suffered a recovery, showing that he was not of age at the time. The present statement is contained in a letter which acknowledges the receipt of 'three huge cases,' and if this acknowledgment is receivable in eivdence as against interest, then the rest of the letter explanatory of the transaction under which the cases were received would also be evidence. But the authorities show, as was said in the Sussex Peerage Case, 11 Cl. & F. 85, that the declaration must be against pecuniary interest, or, what is much the same thing, against proprietary interest, as when a deceased occupier of land admitted that he held as tenant of another, thus cutting down his *prima facie* title in fee. In the present case all the admission by Barker that can be said to be against interest amounts to no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make him liable in the case of their being lost is an interest of too remote a nature to make the statement admissible in evidence."[1]

1—*Erle*, J., in *Papendick* v. *Bridgewater*, 5 E. & B. 180 (1855): "It is contended that there is a wide and universal principle that the declaration of a dead person, made against his interest, is admissible. No doubt many judges do use that language; but I think that the principle must be limited. . . . The argument in support of the evidence has almost gone the length of asserting that the declaration becomes admissible where any hope or fear might have prompted a contrary assertion; but it was admitted that the rule could not go so far; and in the case in the

3. STATEMENTS ABOUT FAMILY HISTORY (PEDIGREE.)

VOWLES v. YOUNG (1806).

13 Ves. 140.

The issue being one of heirship, on a bill to redeem, the judge at the trial below had rejected the testimony of Thomas Roberts that he had heard Samuel Noble, the husband of Mary Noble, say she was
295 illegitimate.

ERSKINE, L. C.: "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established, and subjects of property regulated; requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree therefore recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, establishing the descent from the only sources that can be had. . . . If the declaration of the husband is not to be received to prove the legitimacy or illegitimacy of his wife, as a distant relation might, which seems to be contended, the extent of that proposition must be considered. Suppose the question were whether she was the daughter of A. or B., his evidence might equally be rejected upon the question whether she descended from one stock or another; yet, as far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife; and the law, admitting probability upon such a subject, always receives reputation of descent. . . . Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed the relations of the family would not permit an inscription without founda-

House of Lords . . . it was said that the interest, to make the declaration admissible, must be either pecuniary or proprietary."

Dillon, J., in *Mahaska Co.* v. *Ingalls*, 16 Ia. 81 (1864): "From the unbroken current of English and the decided preponderance of American authority, we think the present state of the law is, that verbal declarations are receivable, when accompanied by the following prerequisites: 1st. The declarant must be dead. To this we believe the English cases make no exception. Mere absence from the jurisdiction will not answer; although by the course of decisions in some of the States, with reference to written entries, &c., absence might possibly be treated as equivalent to death. As, in the case at bar, the declarant was deceased, we need not decide whether death is, in all cases, an indispensable condition. We need only say, that probably the courts would not be inclined to relax the rule so as to dispense with this condition, unless it might be in the case of confirmed insanity. 2d. The next prerequisite is, that the declaration must have been against the interest of the declarant at the time, and that interest must be a pecuniary one. That it would have subjected the party to penal consequences is not sufficient, although this would add to the weight of the testimony. The conflict of the declaration with the pecuniary interest of the party, must be clear and undoubted, as this is the main ground upon which the admissibility of this species of evidence rests. 3d. The declaration must be of a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable."

Compare the authorities cited in W., §§ 1461-1476.

tion to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it.— I take this question with the qualification that has been stated, not whether the husband had heard the fact from any of his wife's relations, but whether he knew it; viz. whether he had such knowledge as is necessary to establish that kind of fact."[2]

REX v. ERITH (1807).

8 East 539.

Pauper settlement, the issue being to the town in which the pauper was domiciled. The respondents, in support of their case, examined the pauper, W. Harris; who stated that about twenty years ago, being then about fourteen years old, he remembered being at Erith with his father from the month of June to the Michaelmas following; that they lived in a barn, having no fixed residence, but travelling the country from place to place; that he remembered being at other places before this sojourning at Erith; and that his father, who was now dead, had told him that he (the pauper) was born a bastard at Erith, and had pointed to that place as they were passing; telling him that that was the place of his (the pauper's) birth.

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Ellenborough, L. C. J., (rejecting this declaration): "The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth; but in what place an undisputed birth, derived from known and acknowledged persons, has happened. The point thus stated turns on a single fact, involving no question but of locality, and therefore not falling within the principles of or governed by the rules applicable to cases of pedigree."[3]

2—*Eldon*, L. C., in *Whitelocke* v. *Baker*, 13 Ves. 514 (1807): "It was not the opinion of Lord Mansfield, or of any Judge, that tradition, generally, is evidence even of pedigree; the tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. . . . Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and Registry Books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

Brougham, L. C., in *Monkton* v. *Attorney-General*, 2 Russ. & M. 160 (1831): "If there be *lis mota*, or anything which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded. . . . The question then always will be, . . . Was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?"

Compare the authorities cited in W., § 1483.

3—*Earl*, J., in *Eisenlord* v. *Clum*, 126

SHIELDS v. BOUCHER (1847).

1 De G. & Sm. 40

In an issue as to the relationship of the mother of one of the plaintiffs, the Court below had refused to receive certain declarations of the deceased mother as to the place that she and her family, and her father and mother, came from, and the place where she was married.

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KNIGHT-BRUCE, V. C.: "For such a purpose is there a solid ground of distinction between time and place? There may be, but I do not distinctly perceive it. . . . I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like those that have been rejected in a case like the present. . . . Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? . . . . Nor are there, perhaps, any recollection or traditions of the old more readily communicated or more acceptable to an auditory of descendants than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy . . . and in the most striking manner with the reason [of the rule]."[4]

JOHNSON v. LAWSON (1824).

2 Bing. 86.

The question for the jury was, whether one Francis Lidgbird (whose claim the plaintiff supported) or Henry Wilding (whose claim the defendant supported) was heir-at-law to Henry Lidgbird, who died seized of certain lands in October, 1820, and was the son of John Lidgbird, formerly sheriff of Kent. In consequence of a separa-

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N. Y. 552, 27 N. E. 1024 (1891): "A case is not necessarily one of that kind [pedigree], because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree."

Bigelow, C. J., in *North Brookfield* v. *Warren*, 16 Gray 175 (1860); admitting evidential declarations where the main issue was as to a pauper's settlement: "Upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation."

Compare the authorities cited in W., § 1503.

4—Compare the authorities cited in W., §§ 1501-1502.

tion having taken place between John the sheriff and his wife, their son Henry was brought up, from about the age of nine months, with Miss Weller, afterwards Mrs. Hollinworth, till he went to college, and he spent his vacations at Mrs. Hollinworth's house: John Lidgbird, the sheriff, was on the point of marriage with Mrs. Hollinworth (which was prevented by his son Henry), and after the death of John, Henry lived with Mrs. Hollinworth for twenty-three or twenty-four years, and she was the only person in his confidence; this was proved by Mrs. Lucretia Pakenham, niece of Mrs. Hollinworth, who had died before the trial. On the part of the plaintiff it was proposed, among other evidence, to give evidence of declarations made by Mrs. Hollinworth, as to Francis Lidgbird being the heir of Henry, who died seized; but the learned judge refused to receive such evidence. It was then proved by Mrs. Elizabeth Withers, that a Mrs. King had been Henry Lidgbird's housekeeper for twenty-four years, and it was proposed to give evidence of declarations by Mrs. King, who was no longer living, as to Francis Lidgbird being the heir to Henry, but this was objected to by defendant's counsel: and Mr. Baron GRAHAM rejected it, saying "that it seemed to him to be carrying the principle of hearsay evidence too far; De Grey, C. J., having laid it down, that it must be confined to persons who are members of the family."

BURROUGH, J.: "This exception, from the general rule that hearsay shall not be admitted, must be construed strictly; and the natural limits of it are the declarations of members of the family. If we go beyond, where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? and if not, at what time after? We should have to try in every case the life and habits of the party who made the declaration, and on account of this uncertainty such evidence must be excluded. The argument for the defendant rests on here and there a loose expression from a judge, and on the circumstance that there is no case in which such evidence is reported to have been excluded; but before we can admit it, we must be referred to some case to warrant its admission. We have heard of no such case, and therefore the present rule must be discharged."[5]

5—*Robinson*, C. J., in *Doe* v. *Auldjo*, 5 U. C. Q. B. 175 (1848), holding admissible testimony from a member of the family that an old body-servant, now deceased, had returned from Africa and told them of the death there of his master, an explorer, the ancestor in question: "There is therefore no improbability in the servant's relation, which seems to have been credited at the time and ever since . . . and after fifty years parties are relieved from the necessity of attempting to account for him. . . . No better evidence would be required than the account brought back by his faithful servant to his family, and accredited by them and by the government which employed him."

Compare the authorities cited in W., §§ 1487-1488.

MONKTON v. ATTORNEY-GENERAL (1831).

2 Russ. & M. 147.

Issue as to the next of kin of Samuel Troutbeck; the main question was upon the Vice-Chancellor's rejection of a certain genealogical narrative and pedigree of the Troutbeck family in the handwriting
299 of one John Troutbeck, deceased, purporting that the writer's father and the testator were first cousins.

BROUGHAM, L. C.: "The principal point in dispute was the relationship of two individuals of the names of Samuel and George Troutbeck. John was clearly proved to have been related to one of those two, namely, to George: he was not proved—and that was as much in dispute as the relationship of Samuel and George—he was not proved to have been related to the family of Samuel; and this documentary account was objected to, as not falling within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence *dehors* the declarations, to connect them with the parties respecting whom the declarations are to be tendered. I entirely agree, that in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go to the length of holding, that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family. . . . It is not more true that things which are equal to the same thing are equal to one another than that persons related by blood to the same individual are more or less related to each other."[6]

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4. ATTESTING WITNESS.

300 ADAM v. KERR (1798).

1 B. & P. 360.

[*Quoted ante, No. 265.*]

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5. REGULAR ENTRIES.

a. By Parties to the Cause.

STATUTES: *England*, 7 James I, c. 12 (1609): *An Act to Avoid the Double Payment of Debts.* "Whereas divers men of trades, and handicraftsmen keeping shop-books, do demand debts of their
301 customers upon their shop-books long time after the same hath been due, and when as they have supposed the particulars and certainty

6—Compare the authorities cited in W., § 1491.

of the wares delivered to be forgotten, then either they themselves or their servants have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt; (2) and whereas divers of the said tradesmen and handicraftsmen, having received all the just debt due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payment; (3) Be it therefore enacted by the authority of this present parliament, that no tradesman or handicraftman keeping a shop-book as is aforesaid, his or their executors or administrators, shall after the feast of St. Michael the archangel, next coming, be allowed, admitted, or received to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done. II. Provided always, that this act, or anything therein contained, shall not extend to any intercourse of traffic, merchandising, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due or work done or to be done, between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandise, but that for such things only, they and every of them shall be in case as if this act had never been made; anything herein contained to the contrary thereof notwithstanding. III. This act to continue to the end of the first session of the next parliament and no longer."[7]

7—*Hardwicke*, L. C., in *Glynn* v. *Bank of England*, 2 Ves. Sr. 38 (1750): "The rule is that a man cannot make evidence for himself. . . . [As to] tradesmen and shop-books, . . . [there is] no instance, where entered in a man's own hand, that they have been admitted after any length of time as evidence. At the time of making the Act of Parliament of James I. there was an opinion growing up that after a certain length of time a man's own shop-books should be evidence for him after the year, to prevent which was that Act of Parliament made, as I have been informed, by Lord Raymond upon consulting him. It was to take away that opinion, that after the year that might be evidence."

Plymouth Colony Laws 196 (1682): "Whereas divers merchants, shopkeepers, tradesmen, and handicraftsmen, have traded, sold and trafficked their goods, wares, and merchandise to divers persons
302 in private, and their customers often sending for such things as they need by children and servants under age, &c., whereby such merchants, shopkeepers, and tradesmen have no opportunity to take bonds, bills, or witness of the delivery of their goods. Yet just it is that such dealers should be duly paid for their wares and merchandise. It is therefore enacted that all and every merchant, shopkeeper, dealer, &c., shall keep a book of their dealing and trading, fairly writing down therein both debt and credit, and the said merchants, their factors or servants, or any of them that shall deliver any such wares or merchandise, making oath that the said book of accounts is true both for debt and credit; such book of accounts shall be held sufficient in law for the recovery of any debt within four years after the delivery of any such goods; but if the defendant will take his oath that he had not those goods charged in the book or account, or that he hath paid for the same; then the case shall be tried and determined according to the best and strongest presumption the parties concerned shall produce."[8]

EASTMAN v. MOULTON (1825).

3 N. H. 156.

Assumpsit; in proving a set-off for cloth sold to the plaintiff the defendant offered his book of accounts, with his own oath to the correctness of the items. On his cross-examination, it appeared
303 that the goods were delivered not to the plaintiff himself, but to the latter's servants. The book was admitted against objection.

RICHARDSON, C. J.: "It has long been the settled practice in this State, to permit the account books of a party, supported by his supple-

8—*Swift*, C. J., *Treatise on Evidence*, 81 (Connecticut, 1810): "It is a general rule of law that no man shall be a witness in his own case; but to this there are sundry exceptions, in civil cases, on the ground of necessity. 1. The parties are admitted as witnesses in actions of book debt by force of statute (Statutes, Day's edition, 101). This provision of the statute is grounded on the necessity of the thing; for in many instances, it would be very difficult to obtain any other, or better proof; but as this action is very common, and as there is great danger in allowing a party to support a claim by his own oath, the law has provided every possible check and guard against false accounts, and has restrained the action within the narrowest limits possible. It is confined to such articles as are usually charged on book; and the book ought to be kept in a fair and regular manner, and the articles truly entered at the time of the delivery, or the performance of the service, so as to be consistent with and support the oath of the party; for the book is to be considered as the essential part of the evidence, and the oath of the party ts supplementary to it."

Devens, J., in *Pratt* v. *White*, 132 Mass. 477 (1882): "It has been sanctioned as an exception to the general rule of law, as it formerly existed, that a party should not be a witness in his own cause, and from supposed necessity in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses."

mentary oath, to go to the jury, as evidence of the delivery of articles sold, and of the performance of work and labor. But as this is in truth the admission of a party to be a witness in his own cause, the practice is confined to cases where it may be presumed there is no better evidence, and has many limitations.

"In the first place, it must appear that the charges are in the handwriting of the party who is sworn; because, if the charges are in the handwriting of a third person, such third person is presumed to know the facts, and may be a witness; so that there is no necessity of admitting the party to testify in his own cause. The book is, therefore, in such a case, rejected.

"The charges in the handwriting of the party must appear in such a state, that they may be presumed to have been his daily minutes of his transactions and business. For if it appear in any way, that many charges, purporting to be made at different dates, were in fact made at the same time, the book is not evidence. The charges must appear to be the original or first entries of the party, made at or near the time of the transactions to be proved; and if the contrary appear, the book cannot be admitted as evidence.

"There must be no fraudulent appearances upon the book, such as gross alterations. And where it appears by post marks, or otherwise, that the account has been transferred to another book, such other book must be produced.

"If it appear by the book itself, or by the examination of the party, that there is better evidence, the book cannot go to the jury as evidence. Thus, if an article be charged in the book as delivered by or to a third person, or if the party on his examination admit that to be the fact, the book is not evidence of the delivery of such article.

"The party, when called, is in the first instance permitted to state only, that the book produced is his book of original entries; that the charges are in his handwriting; that they were made at the times they purport to have been made, and at or near the time of the delivery of the articles, or of the performance of the services. He may, however, be cross-examined by the other party. . . . [In] the case now before us, as soon as it appeared that the cloth was delivered to a third person, the book became incompetent evidence to prove the delivery of that article; and the jury ought to have been so instructed."[9]

SMITH v. RENTZ (1892).

131 N. Y. 169.

Action for a balance due to the plaintiff's testator, who had acted as the banker and business agent of the defendant and had paid taxes and other bills for her. On the trial before a referee the plaintiff
304 offered in evidence the ledger kept by the testator containing the items of the alleged account. It was admitted against the objection of the defendant.

9—Compare the authorities cited in W., §§ 1540-1544.

ANDREWS, J.: "If the ledger was improperly admitted in evidence the judgment must be reversed. . . . The claim is also made that the books were competent as original evidence of the entries under the rule making books of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention. The rule which prevails in this State (adopted, it is said, from the law of Holland), that the books of a tradesman or other person engaged in business containing items of account, kept in the ordinary course of book-accounts, are admissible in favor of the person keeping them, against the party against whom the charges are made, after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions in this State, and has been maintained by the courts with general uniformity: Vosburgh v. Thayer (12 Johns. 461). It stands upon clear reason. The rule admitting account books of a party in his own favor, in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes or writing or vouchers in the hands of the party paying or advancing the money. Moreover, entries of cash transactions could be fabricated with much greater safety, and with less chance of the fraud being discovered, than entries of goods sold and delivered or the services rendered. It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent. Parties are now competent witnesses in their own behalf. A resort to books of account is thereby rendered unnecessary in the majority of cases. We think the ledger was erroneously admitted in evidence."[10]

10—*Lumpkin*, J., in *Ganahl* v. *Shore*, 24 Ga. 24 (1858): "In the nature of things no such principle can be maintained [as the inadmissibility of cash entries]. . . . The business of banking is confined almost entirely to money items; so of the books of factors and commission merchants; so of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops; the customer sends an order for a thousand dollars; it is forwarded and charged to the planter's account; true, the factor has the written order, but the cash advanced depends upon the evidence of his books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtaining of receipts, etc. . . . He that so affirms [the rejection of money items] is half a century behind the age in which he lives; and to get up

CONKLIN v STAMLER (1859).

8 Abb. Pr. 400.

The only proof made in the court below, was that the plaintiff had no clerk or book-keeper, and that persons dealing with him had settled with him by his books.

305 DALY, F. J.: "In Morrill *a.* Whitehead (4 E. D. Smith, 239), it was proved that the books produced were the account-books of the party; that he had no clerk, and that he kept fair and honest accounts; but as there was no proof that any one of the services entered in the book had been actually rendered, we reversed the judgment. This is the first case in this State that has gone, I think, that length, or in which it was distinctly determined that some of the articles or services charged in the account must be shown to have been actually delivered or rendered; though it has been frequently intimated that that proof was essential before the books could be received or used in evidence. (Vosburgh *a.* Thayer, 12 Johns., 461; Sickles *a.* Mather, 20 Wend., 76; Foster *a.* Coleman, 1 E. D. Smith, 86.) The decision in Morrill *a.* Whitehead is decisive in the present case, as the only proof before the justice here was that the plaintiff had no clerk, and that persons who had dealt with him and had settled by his books had found them to be correct.

"But even if this proof had been supplied, I am of opinion that it would not now be sufficient to authorize a judgment. The practice of allowing the party's books of accounts to be received as sufficient evidence of the existence of the debt, which was contrary to the English rule, came into use in this State and in New Jersey with the early Dutch colonists, in whose courts merchants and traders were always allowed to exhibit their books of accounts, where it was acknowledged or proved that there had been a dealing between the parties,—provided the books had been regularly kept, with the proper distinction of persons, things, year, month, and day. Full faith and credit were then given to them, especially where they were strengthened by the oath of the party, or where the creditor was dead. And the practice, long established in the Eastern States, of receiving such books as evidence, is presumed to have been introduced by the English colonists from Holland, who settled New England. In the Dutch colonial courts, the parties appeared before the court and made their own statement, and if they differed as to a fact which the Court thought material, either party might be put to his oath; so that the objection made to this species of evidence was, in these tribunals, of less force, as the party who made the entries could be interrogated in respect to the truth or correctness of each item. In New England, they very wisely retained

with it, he must forget the things that are behind, and press forward, for it will never stop or come back to him."

Compare the authorities cited in W., §§ 1539-1549.

the feature of the suppletory oath of the party substantiating the truth of the entries, in connection with the practice of allowing such books as evidence; and where the matter is not regulated by statute, which is the case in Maine and Rhode Island, long usage has established that the books of account must be supported by the oath of the party.

"In Case *a.* Porter (8 Johns., 211), the practice of allowing the entries of the parties made in the usual course of business to be received as evidence, was recognized as a usage established in the courts of this State. . . . In Vosburgh *a.* Thayer (12 Johns., 465), when the Court divided, PLATT, J., delivered a long opinion, declaring that it was repugnant to the common law. . . . But the other members of the Court, in an opinion *per curiam,* thought that the usage and necessity of admitting such proof had been too long sanctioned and felt in our courts, and that it was then too late to question its admissibility. But instead of simply recognizing the practice as it had prevailed in the Dutch tribunals, and declaring that the party should or could be examined under oath as to the truth or correctness of the entries made by him, they devised, as a test and safeguard, the special preliminary proof, which has since been required as a condition precedent to the admission of the books,—influenced, no doubt, by what was said by the whole court in the former case, and what was strongly insisted upon by Judge PLATT in his dissenting opinion, that they had no authority to require, and could not admit a party to be sworn as a witness. . . .

"But the important change recently made in the law of this State, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist when the rule above referred to was made, and there is now no occasion for resorting to the books, unless it may be to refresh the party's memory as to the items, or in cases where there is a failure of recollection. In the latter case, the books, if they contain the original entries of the transaction, would still, I apprehend, be evidence within the rule recognized in Merrill *a.* Ithaca & Oswego Railroad Company (16 Wend., 586)[11]; that is, if the party who made the entries had entirely forgotten the facts which he recorded, but can swear that he would not have entered them if he had not known them at the time to be true, and that he believes them to be correct. But I agree with Judge BRADY, that the books, except in the cases above put, can no longer be received as sufficient evidence of the sale and delivery of goods, or of the performance of services, by merely proving the preliminary facts which heretofore made them sufficient evidence; but that the party, if he had no other means of establishing the facts, must go upon the stand as a witness, resorting to his books only where it is necessary to refresh his memory as to the items, or where, from a failure of recollection, he is compelled to rely upon them alone, and can swear to what is required

11—This is the rule for a memorandum of recollection, *ante,* Nos. 89-92.

to warrant their introduction as evidence to be submitted to the tribunal that is to pass upon the facts."[12]

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STATUTES: *Georgia,* Code 1895, § 5182: "The books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions: 1. That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying; 2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries; 3. Upon proof (by his customers) that he usually kept correct books; 4. Upon inspection by the Court, to see if the books are free from any suspicion of fraud."

Illinois, Rev. St. 1874, c. 51, § 3: "Where in any civil action, suit, or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account-book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or disinterested person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account-book and entries shall be admitted as evidence in the cause."

Iowa, Code 1897, § 4622: "The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, . . . 2, when it [the entry] was made in a professional capacity, or in the ordinary course of professional conduct; 3, when it was made in the performance of a duty specially enjoined by law." Ib. § 4623: "Books of account, containing charges by one party against another, made in the ordinary course of business, are receivable in evidence only under the following circumstances. . . . First, the books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book or set of books; Second, it must be shown, by the party's oath or otherwise, that they are his books of original entries; Third, it must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof; Fourth, the charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

12—Compare the authorities cited in W., § 1560.

5. (*b*) *By Third Persons.*

PRICE v. EARL OF TORRINGTON (1703).

2 Ld. Raym. 873.

"In *indebitatus assumpsit* for beer sold and delivered to the defendant, upon *non assumpsit* pleaded, at the trial at Guildhall before HOLT, Chief Justice, the evidence against the defendant was, that the
307 usual way of the plaintiff's trading was, that the drayman came every night to the plaintiff's clerk, and gave account to him of all the beer that he had delivered that day; and an entry was made of it in a book, which the drayman and clerk subscribed; and that there was such an entry of ———— barrels of beer delivered to the defendant, &c., and that the drayman was dead, and the subscription was proved to be of his writing. And HOLT, Chief Justice, held this good evidence to charge the defendant. And a verdict was given against him, &c."

POOLE v. DICAS (1835).

1 Bing. N. C. 649.

In an action on a bill of exchange drawn by the defendant, accepted by Wheeler, and indorsed by the defendant to the plaintiff, a notary's clerk stated at the trial, that when the bill became due on Satur-
308 day, the 8th of June, 1833, it was left by the plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and Manning, one of his clerks, now dead, went out about seven in the evening to demand payment of the acceptor; in a short time Manning returned, and in the margin of the book containing the copy of the bill, wrote by the side of the copy of the bill, "no effects." This entry was produced at the trial, and proved to be in Manning's handwriting. *Kelly* and *Humfrey*, for the defendant, contended that an entry such as the present "is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it; and, secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place."[13]

13—*Hardwicke*, L. C., in *Lefebure* v. *Worden*, 2 Ves. Sr. 54 (1750): "It must be admitted that by the rules of evidence no entry in a man's own books by himself can be evidence for himself to prove his demand. So far [nevertheless] the Courts of justice have gone (and that was going a good way, and perhaps broke in upon the original strict rules of evidence), that where there was such evidence by a servant known in transacting the business, as in a goldsmith's shop by a cashier or bookkeeper, such entry, supported on the oath of that servant that he used to make entries from time to time and that he made them truly, has been read. Farther, where that

TINDAL, C. J.: "As to the first point, which is of considerable importance, we think the evidence in question was admissible; and we think it admissible on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred. If there were any doubt whether it were made at the time of the transaction, the case ought not to go down to trial again; but acording to my impression of the testimony in the cause, the entry *was* made at the time. . . . In the present case, it was the duty of the notary's clerk to present bills for payment on the evening of the day when the payment was demandable. After going out with the bill for the purpose of presentment, he returns and makes an entry in the margin of the book in which a copy of the bill had been made upon its being left at the notary's for the purpose of presentment. This was all in the ordinary course of business. The clerk had no interest to make a false entry; if he had any interest, it was rather to make a true entry: it is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred; and a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery."[14]

SMITH v. BLAKEY (1867).

L. R. 2 Q. B. 332.

The facts have been already given in No. 294, *ante*.

BLACKBURN, J.: "Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course
309 of business and in the discharge of a duty to Barker's principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. A strong instance of the distinction is the case of Chambers v. Bernasconi (1

servant, agent, or bookkeeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, [and] that it was the course of trade,—on proof that he was dead and that it was his handwriting, such entry has been read (which was Sir Biby Lake's Case). And that was going a great way; for there it might be objected that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind, the Court has gone so far."

14—*Swayne*, J., in *Fennerstein's Champagne*, 3 Wall. 149 (1865): "The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. . . . In all [the cases] he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath."

Compare the authorities cited in W., §§ 1522-1527.

C. M. & R. 347), in the Exchequer Chamber. The reason of the distinction is not at first sight very obvious; but I think all the cases show that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it. Thus in Price v. Earl of Torrington (1 Salk. 285; 2 Ld. Raym. 873), it was the duty of the drayman to deliver the beer and enter it in the book; in Poole v. Dicas (1 Bign. N. C. 649), it was the duty of the clerk to present the bill and make an entry of the dishonor; and in Doe v. Turford (3 B. & Ad. 890, 896-898), it was the duty of the person to serve the particular notice and make an indorsement of the service. In the last case PARKE, J., points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record. It at once follows that the present statement was not admissible, and ought not to have been received."[15]

KENNEDY v. DOYLE (1865).

10 All. 161.

The facts are stated in a prior part of the opinion, quoted *post,* No. 325.

310 GRAY, J.: "It becomes necessary, therefore, to determine whether his death has made his register competent evidence [as a book of regular entries]. The leading cases upon this subject are those in which Lord Holt held that entries, made in a tradesman's books by his servant or drayman in the usual course of his employment, were admissible in evidence after the death of the latter, upon proof of his handwriting. Pitman v. Maddox (2 Salk. 690; s. c. 1 Ld. Raym, 732; Holt, 298); Price v. Torrington (1 Salk. 285; s. c. 2 Ld. Raym. 873; Holt, 300). . . . Lord Chancellor Plunket repeatedly admitted the books of a Roman Catholic chapel in Dublin, made by Roman Catholic priests whose deaths and handwriting were proved, as evidence of marriages and baptisms, and on the last occasion, after argument, gave this reason for their admission: 'They are the entries of deceased persons, made in the exercise of their vocation contemporaneously with the events themselves, and without any interest or intention to mislead.' O'Connor v. Malone (6 Cl. & F. 576, 577); Malone v. L'Estrange (2 Irish Eq. R. 16). . . . In the United States, the law is well settled that an entry made by a person in the ordinary course

15—Compare the authorities cited in W., § 1524.

of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded. In a very early case the Supreme Court of Connecticut admitted the record of a baptism by a minister of a parish, who had since died, as evidence of the fact of baptism. Huntly v. Comstock (2 Root, 99). It has been repeatedly held in this Commonwealth that the book of a bank messenger or notary public, kept in the usual course of business, though not required by law, is competent evidence after his death. Welsh v. Barrett (15 Mass. 380); Porter v. Judson (1 Gray, 175). . . . In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation."[16]

FIELDER v. COLLIER (1853).[17]

13 Ga. 496, 499.

Action for a sum due on the sale of cotton for defendant. LUMPKIN, J.: "Plaintiffs offered in evidence the depositions of Edward Hogland and John Clancy, to prove the sale of the cotton, the
311 expenses incurred, &c. And counsel for the defendant objected, because the witnesses stated, 'that they derived their information relative to the matter about which they swore from the books, documents, accounts and vouchers of plaintiff.' As this constitutes, not only the principal point in the cause, but is really a question of some magnitude, it is proper to bestow upon it, a careful consideration. Edward Hogland was book-keeper, and John Clancy account sales clerk, of this large factorage and commission house in Liverpool. They both testify to the correctness of the account of sales and expenses upon defendant's lot of cotton. Appended to their answer they swear, 'that the expenses were reasonable, customary, necessary and just, at the time they were severally incurred; that from the business they have performed for the plaintiffs, and from their intimate knowledge of their business, de-

16—Compare the authorities cited in W., § 1523.

17—The principle of this case is to be compared with that of No. 92, *ante* (memoranda by book-entrant, based on reports of a salesman, etc., both being called to the stand to verify).

rived from long experience, they can state that they kept correct books; that the expenses charged were paid, and that they are such expenses as are necessarily incidental to the sale of cotton in Liverpool; that no sale can be effected without the payment of such expenses, and that the consignee is liable for, and must pay them.' Shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of the business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice, and convenience require it to be admitted. The weighers, wharfingers, and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. . . . To impose a different rule upon these establishments, whether at home or abroad, and to require them at all times, within the statutory period of limitations, to be prepared with original *aliunde* evidence to prove the terms of sale of all the property consigned to them, each item of expense, etc., would trammel commerce and amount to a denial of justice."[18]

6. SUNDRY DECLARATIONS BY DECEDENTS.

SCOGGIN v. DALRYMPLE (1859).

7 Jones L. 46.

In order to establish the boundary of a grant under which he claimed, the plaintiff introduced one Morris, who stated that he was the son of Peter Morris, a chain-carrier at the survey of the entry for the
312 grant; that his father, who was dead when the witness testified, had pointed out to him a corner as the third corner, and told him that there were other corners, which he (witness) could find in certain directions; that he made search and found marks, which he has since known, and that he pointed them out on the survey of the disputed land. The survey of the land was made partly by the information of Morris, and found to correspond mainly with his statement as to the first line and corner. The defendant's counsel objected to the declarations of Peter Morris, unless he showed the line or corner at the time; but the Court admitted the whole statement, and the defendant excepted.

MANLY, J.: "Traditionary evidence has long been received by the Courts of North Carolina in questions of private boundaries, as well as public. This has been recognized by the Judges as a departure from the

18—Compare the authorities cited in W., § 1530.

rules of the common law, but, nevertheless, it has been adhered to without deviation. It is now settled that hearsay from a deceased person is competent in questions of boundary between private estates. The necessity for such a departure from the common law principle grew out of the inartificial manner in which the lands of the State were originally surveyed and marked, making it necessary, in order to fix the position of the respective parcels to resort more frequently to tradition, and to give this kind of evidence greater efficiency by enlarging its limits. Whatever may have been the *reason,* this extended use of hearsay, according to the rule above laid down, is now firmly established.

"The precise point, and the only one presented in the bill of exceptions, is whether the declaration of a deceased person is admissible to establish a corner tree, which is not in view at the time of the declaration, but the position of which is described by the declarant, so that it is found by a witness. We can perceive no reason why such testimony is not admissible. The hearsay becomes definite by the aid of the witness, who following the directions given, finds the tree, and while it might be considered as of doubtful admissibility, disconnected from the evidence of the living witness, yet, aided by that, it seems to be clearly competent."[19]

CARVER v. JACKSON *dem.* ASTOR (1830).

4 Pet. 1, 80, 84.

STORY, J.: "The action is ejectment, brought upon several demises; and among others, upon the demise of John Jacob Astor. . . . Both parties claim under Mary Philipse, who, it is admitted, was
313 seised of the premises in fee, in January, 1758. Some of the counts in the declaration are founded upon demises made by the children of Mary Philipse, by her marriage with Roger Morris; and one of them is upon the demise of John Jacob Astor, who claims as a grantee of the children. . . . The next exceptions of the defendant grew out of the non-production of the lease recited in the deed of marriage settlement, and of the insufficiency of the evidence to estab-

19—*Field,* C. J., in *Morton* v. *Folger,* 15 Cal. 275 (1860): "[The authorities] show the general doctrine which will be found to prevail in the majority of the American States. By them it is clear that the declarations on a question of boundary of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of a general or public interest, or be one between the estates of private proprietors."

Richardson, C. J., in *Shepherd* v. *Thompson,* 4 N. H. 215 (1827), excluding declarations as to the boundary of the declarants' own land: "It must be presumed to have been their interest to extend the boundaries of the lot, and their declarations in favor of their interest were clearly not admissible."

Hubbard, J., in *Daggett* v. *Shaw,* 5 Metc. 226 (1842): "Declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested in thus pointing out their boundaries."

Compare the authorities cited in W., §§ 1563-1570.

lish either its original existence, or its subsequent loss. . . . We are of opinion, not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence; and superseded the necessity of introducing any other evidence to establish it. . . . It is laid down generally, that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed. Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not *per se* evidence of the existence of the lease; but if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one and possession has been long held under such release and is not otherwise to be accounted for, there the recital will of itself materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."[20]

STATUTE: *Massachusetts:* St. 1898, c. 535, Rev. L. 1902, c. 175, § 66; "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction
314 of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."[21]

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7. REPUTATION.

a. Landed Rights and Liabilities.

REGINA v. BEDFORDSHIRE (1855).

4 E. & B. 535.

On a presentment that a public common bridge was out of repair and that the inhabitants of the county ought to repair it, evidence of reputation was tendered that the lords of three manors in the
315 county ought by custom to repair certain different parts of the bridge, and not the inhabitants.

20—Compare the authorities cited in W., § 1573.

21—Compare the authorities cited in W., § 1576.

CAMPBELL, L. C. J.: "The question which we have to determine in this case is, Whether at the trial of an indictment for non-repair of a public bridge, with a plea that third persons are bound to repair the bridge, *ratione tenuræ,* evidence of reputation be admissible. The law of England lays down the rule that ,on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest. The term 'interest' here does not mean that which is 'interesting' from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence therefore ought not to be required; because in local matters, in which the community are interested, all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that, although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing.

"Let us now upon these principles examine whether the issue joined on the record raises a question on which evidence of reputation ought to be admitted. It does involve matter of private right, viz.: whether certain lands are burdened with the charge of repairing certain arches of this bridge; a matter of great importance to the owners of these lands. But does it not likewise relate to matters of *public and general interest* within the received legal meaning of these words? All the inhabitants of the county of Bedford who have any property liable to be assessed to the county rate have an interest in the question whether the bridge is to be repaired by the county, or whether the county is exempted from this burden, the obligation to repair it lying upon the owners of certain lands *ratione tenuræ.* The question therefore is almost

sure to be discussed in the neighborhood; and a true reputation upon the subject is likely to prevail."[1]

HARRIMAN v. BROWN (1837).

8 Leigh 707.

Writ of right for two hundred acres of land; the writ was brought by John Harriman against Matthew D. Brown. By the depositions of Lewis Jones, it appeared that in December 1795 his father moved
316 to the land of Shadrach Harriman on the Great Kanawha river, in what was then Kanawha county; that his father lived on this land about seven years, and whilst living on it, built a cabin and cleared some land; that Shadrach Harriman was then dead, and David Milburn, who married his widow and acted as guardian for Harriman's children, leased the land to the witness's father; that while his father lived on the land, Milburn shewed to his father particular trees as Harriman's corners, and it was then well understood in the country that those trees were Harriman's corners. The witness stated his belief that he knew the corners of Harriman's land well, especially the front or river corners. The lower front or river corner, he said, was a black walnut tree, which stood just below the mouth of Plantation creek, which walnut tree was then, by almost every person in the country who knew anything about the land surveys, called and believed to be Washington's upper front corner, it being marked with the initials of his name, viz. G. W. At the time of giving this deposition, the witness's father was dead. By the deposition of William Arbuckle it appeared that the witness, after stating that he always heard that Washington's upper corner was a black walnut with G. W. on it, and that Harriman's lower corner was Washington's upper corner, was asked by what means he ascertained that walnut to be Harriman's corner; and his answer was, that he was told by Reuben Slaughter that it was Washington's upper corner, and from the common report of the country he ascertained that Washington's upper corner was Harriman's lower corner.

1—*Seymour*, J., in *Robinson* v. *Dewhurst*, 15 C. C. A. 466, 68 Fed. 336 (1895): "The exception raises a question regarding that exception to the general rule excluding hearsay evidence which permits such evidence to be given, under certain limitations, in cases of ancient boundaries. The exception, as it originated in the English courts, was confined to such boundaries as were matters of public concern, and was part of a larger exception to the rule. On questions respecting the existence of manors; manorial customs; customs of mining in particular districts; a parochial modus; a boundary between counties, parishes, or manors; the limits of a town; a right of common; a prescriptive liability to repair bridges; the jurisdiction of certain courts,—matters in which the public is concerned, as having a community of interest, from residing in one neighborhood, or being entitled to the same privileges, or subject to the same liabilities,—common reputation and the declarations of deceased persons are received, if made, *ante litem motam*, by persons in a position to be properly cognizant of the facts."

TUCKER, P.: "In this case it became important to establish the identity of a black walnut, which the tenant contended was the beginning corner of Harriman's patent, under which the demandant claimed. His patent call is to adjoin the upper end of Washington's survey, at a large black walnut. Now the acknowledged upper boundary of Washington was about 565 poles, or considerably more than a mile and a half, below the black walnut contended for. And hence it became necessary to ascertain whether this black walnut was the tree referred to in the survey; for if so, it would control the call for Washington's line, upon the well established principle that natural or artificial boundaries, which are the objects of the senses, must control the call for ideal boundaries, or for lines which are often matters of conjecture and always liable to be mistaken, and particularly where (as was the case here) the upper line of Washington was a protracted line. See Baxter v. Evett's lessee, 7 Monroe 329, 333, 334. In order then to establish the fact that the black walnut was the reputed corner of Harriman, and that in making the survey it was by mistake supposed to be Washington's upper corner, the tenant introduced the depositions of Lewis Jones, Benjamin Jones and William Arbuckle. To these depositions the demandant objected, . . . that evidence of reputation as to boundary is inadmissible, and that for this reason also the testimony introduced was improper. Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For boundaries are artificial, arbitrary, and often perishable; and when a generation or two have passed away, they cannot be established by the testimony of eye-witnesses. In such cases, therefore, it becomes necessary to look to reputation, or depend upon hearsay evidence of the former existence and actual locality of an artificial boundary. . . . Because we have not manors, shall we therefore lose the benefit of the rule which considers boundary as matter of reputation, and permits hearsay evidence of its locality? If a like state of thing exists among us, if the principle will be found to apply in its utmost strictness, shall we reject the evidence because the case is not identical? By no means. What then is the avowed principle on which the distinction rests in the English courts? . . . 'Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they would discourse together about them, having all the same means of information.' (per *Lord* KENYON [in Morewood v. Wood, 14 East 329]. What language can be more appropriate to the case of land adventurers in our western country? That country was covered with entries and surveys between fifty and sixty years ago, and it was often many years after a survey was made, before the tracks taken up were settled by their owners. Thousands have never yet seen their lands. The impossibility, in innumerable instances, of proving marked corners by eye-witnesses is apparent. What is to supply that lost evidence? If reputation is admissible to establish the boundaries of a manor, because all the tenants of

the manor are interested therein, and are naturally conversant about the boundary, and may be presumed to discourse together about it, what shall we say in the case of our wild lands, which were covered with early adventurers, whose chief concern was to make themselves acquainted with the lines and corners of all around them? Every one who knows anything of the history of that country, must know the deep interest and familiar knowledge which the early settlers possessed in relation to the corners and boundaries and localities, not only of their own particular tract, but of almost every tract within range of their settlement. Every one knows that such subjects were not only the familiar topics of conversation, but that they were the all-absorbing topics. I will venture to conjecture that for one discussion in private conversation as to the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties. I take it, therefore, that every motive for the admission of hearsay testimony as to boundary in case of a manor applies with equal force to its admission in questions of boundary with us."[2]

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b. General History.

STEYNER v. DROITWICH (1696).

Skinner 623, 1 Salk. 281.

"Camden's Britannia was offered in evidence to prove a reputation ninety-two years ago that salt ought to be made only at the three pits of the Burgesses [of Droitwich] and that all others were excluded.
317 And it was said that the sayings of antient persons who are dead is always allowed, and this amounts to as much as the saying of an old man at least, and that Camden with a publick person, being historiographer Royal, etc., and that a gravestone had been allowed as evidence. *Sed non allocatur;* for if one part of Camden be allowed, another part ought to be, and if Camden, then another historian as well as him, and there would not be any certainty. . . . And the court said that an history may be evidence of the general history of the realm, but not of a particular custom; and therefore *secundum subjectam materiam* it may be good evidence or not."[3]

2—Compare the authorities cited in W., §§ 1586-1587.

3—L. C. J. *Jeffreys,* in *Lady Ivy's Trial,* 10 How. St. Tr. 555, 625 (1684), rejecting a history offered to show the date of Charles V's abdication and Philip and Mary becoming king and queen of Spain, over a century before: "Instead of records, the upshot is a little lousy history. . . . Is a printed history, written by I know not who, an evidence in a court of law?"

Story, J., in *Morris* v. *Lessees,* 7 Pet. 588 (1833): "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined . . . to cases where from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence."

Compare No. 636, *post,* and the authorities cited in W., §§ 1597-8.

c. Marriage.

BREADALBANE CASE (1867).

L. R. 1 H. L. Sc. 199.

The facts have been already given *ante* No. 192.

Lord CRANWORTH: "By the law of England, and, I presume, of all other Christian countries, where a man and woman have long
318 lived together as man and wife, and have been so treated by their friends and neighbours, there is a *prima facie* presumption that they really are and have been what they profess to be. If after their deaths a succession should open to their children, any one claiming a share in such succession as a child would establish a good *prima facie* case by showing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and, inasmuch as in England all marriages are solemnized in public and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children must much oftener than in England have to rely solely on the *prima facie* evidence afforded by the conduct of the parties towards one another and of their friends and neighbors towards them. This sort of evidence is spoken of in Scotland as *habite* and *repute*. Persons are sometimes said to be married persons by *habite* and *repute*. I agree, however, with the argument of the Appellant (speaking with deference to those who think otherwise), that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbors, in other words, *habite* and *repute*, may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite* and *repute* in any case make the marriage."[4]

4—*Lawrence*, J., in *Ringhouse* v. *Keener*, 49 Ill. 471 (1869), admitting testimony of friends that "his death was announced in the newspapers and he was spoken of by his acquaintances as dead": "In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice."

Compare the authorities cited in W., §§ 1602, 1605, and Nos. 192-197, *ante*.

d. Moral Character.[5]

BUCKLIN v. STATE (1851).

20 Oh. 23.

CALDWELL, J.: "The term 'character,' when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others; the term 'reputation' applies to the opinion which others may have formed and expressed of his character; so that, as has been remarked in some of the books, when treating on this subject, a man's character may really be good when his reputation is bad, and, on the other hand, his reputation may be good when his character is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction,—the term 'general character' being used in legal signification, as it is frequently used in common parlance, to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. When you ask a witness, then, in this sense of the term, what a man's general character is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him."

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PICKENS v. STATE (1884).

61 Miss. 566.

CAMPBELL, C. J.: "The testimony of one Garrett was a potent factor in producing the verdict of guilty. The accused sought to impeach Garrett, who was a witness for the State, by evidence that his general reputation for truth and veracity was bad, and in order to do this he produced a witness, Miller, and asked him if he knew the general reputation for truthfulness of Garrett in the community in which he lives? The witness replied, 'That's a right delicate question to answer,' and then counsel explained the question to mean, 'if he (witness) knew what Garrett's neighbors generally thought of him as a man of truth and veracity,' and insisted on an answer to the question thus explained. At this juncture the Court stated to the witness that 'general reputation meant what a majority of the people in Garrett's community, or the people with whom he was most conversant, say of his character for truth and veracity.' To this statement of the Court the accused excepted, and the witness, thus instructed by the Court, answered, 'I cannot say what a majority say of him in that respect.' Other witnesses produced by the accused immediately afterward severally replied that they did not know Garrett's general reputation for truth and veracity. One of them answered he could not say 'what a majority of the people think of him (Garrett). General reputation consists in what is generally thought of one by those among whom

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5—For other rules about Character, see Nos. 21, 33, 116, 120, *ante*, and No. 424. *post.*

he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of his habits and integrity'; 'common reputation among his neighbors and acquaintances'—are so many forms of expression by which an effort has been made to define wherein consists general reputation. . . . It was not necessary for him [the witness] to have heard a majority, or any given proportion, of that undefined and undefinable circle, designated as the 'neighborhood' or 'community,' *say* what they thought of G. . . . While a witness should be cautious on this subject, and not be encouraged to testify that he is acquainted with the general reputation of another unless he knows the generally prevalent sentiment of those most conversant with him, he is not to be repressed by telling him he must know what a majority *say* of him about whom he is called to testify. . . . He may have heard a sufficient number express themselves to be willing to say he knows the general concurrence in one view of a number great enough to be regarded as a fair index to the community. One may know the general reputation of Sargent S. Prentiss as a matchless orator, although he has heard a small proportion of those who felt the thrill of his unrivalled eloquence say what they thought of him."[6]

ATLANTIC & BIRMINGHAM R. CO. v. REYNOLDS (1903).
117 Ga. 47, 43 S. E. 456.

FISH, J.: "Reynolds sued the Waycross Air Line Railroad Company for damages alleged to have been sustained by him in consequence of injuries received by the falling of a telephone pole, forming a part
321 of a telephone line owned and operated by the defendant company, which pole he, in the course of his employment by the company as a lineman, had ascended for the purpose of repairing a broken telephone wire. One of the grounds of the motion for a new trial alleges that the court erred in 'sustaining the objections of plaintiff's counsel to defendant's witnesses C. J. Hendry, John Hayes, J. B. Quarterman, and Dan Hall, testifying that, while they did not know plaintiff's reputation where he lived in Waycross, yet they were well acquainted with him and knew his general reputation up and down the Waycross Air Line Railroad, where he worked, which was bad, and from that they would not believe him on oath.' We think this ground was well taken. . . . As the general reputation of a man is usually formed in the neighborhood where he spends most of his time, and most frequently comes in social and business contact with his fellow-men, it is usual to limit the inquiry as to a witness' general character to his general reputation in the neighborhood where he lives; that is, where he has his home. We do not think, however, there is any hard and fast rule which requires this to be done in every possible

6—Compare the authorities cited in W., §§ 1611-1614.

case. The very reason for so limiting the inquiry generally may be a good reason for allowing more latitude in an exceptional case. The reason for so limiting the inquiry generally, as already indicated, is that the place in which to ascertain a man's true reputation is the place where people generally have had the best opportunities of forming a correct estimate of his character. It is obvious that this may not, in every instance, be the neighborhood where a man's home is situated. . . . We apprehend that there may be cases in which a person has established no general reputation in the immediate neighborhood of his home, but has established such a reputation elsewhere. This may arise from the fact that his home is located in one place and his daily business or work is carried on in another, in which latter place he spends nearly all of his time, and hence is well known to people generally, while he rarely comes in social or business contact with people, outside of his family circle, in the neighborhood of his home."[7]

FOSTER v. BROOKS (1849).

6 Ga. 290.

NISBET, J., excluding reputation as evidence of insanity: "If reputation of insanity is competent, then reputation of sanity must be also. By this kind of evidence a fool may be proved a wise man, and a
322 philosopher a fool. Public opinion declared Copernicus a fool when he promulgated the planetary system, and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals. Hearsay evidence is excluded because a witness ought to be subjected to cross-examination, that being a test of truth. It ought to appear what were his powers of perception, his opportunities of observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth."[8]

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8. OFFICIAL STATEMENTS.

REX v. AICKLES (1785).

1 Leach Cr. L. 3d ed. 436.

Indictment for returning from transportation beyond seas within seven years after discharge from jail. It was held incumbent on the prosecutor to prove the precise day on which the prisoner was
323 *discharged;* and for this purpose Mr. *Newman,* clerk of the papers of the prison, produced a daily book, which he kept, containing entries of the names of all the debtors and criminals who are brought into the prison, and the times when they were discharged: but it appeared that those entries were not made from Mr. *Newman's* own knowledge of the

7—Compare the authorities cited in W., §§ 1615, 1616.

8—Compare the authorities cited in W., §§ 1620, 1621.

facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkey's indorsements on the back of warrants, which warrants were afterwards regularly filed. It was contended by the prisoner's counsel, Mr. *Garrow*, that these were not original entries of the facts; and therefore that the turnkey himself by whom *Aickles* was discharged, or the original minute from which the entry of his discharge had been made, should be produced, because they alone were the best evidence upon this subject, and it was in the prosecutor's power to produce them. It was compared to the production of a tradesman's ledger in order to prove the delivery of goods, instead of producing the original memorandum or day-book from which the ledger had been posted; and it was argued, that no credit could be given to entries made entirely from hearsay and information, and therefore they ought not to be received as evidence.

Per Curiam: "The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. . . . In the present case Mr. N. has no private interest whatsoever in this book to induce him to make factitious entries in it. He is a public officer recording a public transaction."[9]

STEWART v. ALLISON (1821).

6 S. & R. 327.

Smith Allison, the defendant in error, brought an action against James Stewart, on a promissory note made by Holbach & Saunders, in favor of Stewart, by whom it was indorsed. The pleas were
324 non assumpsit and payment. On the trial, the plaintiff, in order to prove notice to the indorser of non-payment by the makers of the note, gave in evidence a protest made by a notary-public, under his official seal, certifying that he had given such notice. The defendant then produced the notary himself, who, on being sworn, testified, that the protest was in the handwriting of his son, who was then on a voyage to the West Indies; that he (the notary) did not give the notice himself, that his son attended to this business for him, and that he had no knowledge of the notice having been given to the indorser of the non-pay-

9—*Wayne*, J., in *Gaines* v. *Relf*, 12 How. 472, 570 (1851): "Such writings [those which the law requires to be kept for the public benefit] are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses."

ment by the makers, except what his son told him, who said he had given the notice, and had written it in the protest, and this had been the practice of doing business among the notaries. The counsel for the defendant contended, that the protest, as explained by the witness, was not evidence of notice to the indorser of non-payment by the makers. The counsel for the plaintiff contended, that it was evidence of notice.

TILGHMAN, C. J.: "It was very possible, that the jury might give more credit to the official certificate, than to the oath of the notary; a notary may be tampered with, after giving his certificate; or the jury might think that the certificate and the parol evidence were not inconsistent. In my opinion then, the Court was right in telling the jury as they did that the plaintiff was not entitled to recover, unless notice of non-payment was given to the defendant; that the notarial certificate was legal evidence, on which, together with the parol evidence, the jury were to decide whether notice had been givn or not."

GIBSON, J., dissenting: "Now put the case of a witness who has in his direct examination sworn positively to a fact, but from whom, on being cross-examined, it comes out that he personally knows nothing about the matter, having obtained all his information from a person on whose veractiy he thinks he can depend. Ought not the Court to direct the jury that the whole of his evidence, taken with the explanation given, is incompetent and goes for nothing? . . . The assertion in a [notary's] protest of a fact founded on hearsay, which would be incompetent to be heard from a witness attending in the ordinary way, is not made competent and legal by the Act of Assembly. . . . The Legislature surely never intended to permit an officer to authenticate by his certificate a fact to which he would not, after being examined touching his means of knowledge, be permitted to swear. . . . I hold the notary competent to certify only what he personally knows to be true, and not what he may conjecture to be so from the relation of others. . . . The confidence supposed to be reposed in the truth and integrity of those officers by the Executive who appointed them is the ground on which the Legislature rested the substitution of their certificate for the ordinary judicial evidence of the facts asserted in it; and it therefore never could have intended to permit them to delegate this high personal trust to a stranger, acting without oath or even official responsibility."[10]

8a. Official Registers and Records.

KENNEDY v. DOYLE (1865).

10 All. 161.

GRAY, J.: "This action was brought against two sisters upon an agreement of both to pay money borrowed by them on their joint account from the plaintiff. One of them suggested her insolvency
325 and set up no other defence. The other pleaded infancy at the time of the agreement. . . . The parties being at issue upon the point

10—Compare the authorities cited in W., § 1635.

whether the defendant was of age when she made the agreement, the plaintiff, to prove that she was, offered a book, which was admitted to be the church record of baptisms in a Roman Catholic church in Lowell, regularly kept by McDermott, the priest of that church for a series of years, produced from the custody of O'Brien, the present priest, into whose hands it came upon the death of McDermott, and containing the following entry in McDermott's handwriting, and signed by him: '1837, December 17th. Baptized Joanna, born 12th, of Michael and Mary Doyle. Sponsors, Jeremiah Kennedy and Bridget Doyle.' There was also evidence that the defendant in this action was the Joanna Doyle named in this record. It does not appear to have been denied at the trial, and it was assumed at the argument, that the priest performed the rite of baptism and made the entry upon the record in the discharge of his ecclesiastical duty according to the rule and custom of his church. But there was no evidence that he was a sworn officer, or that the book was required by law to be kept; and upon this ground the defendant objected to its admission. The presiding judge, however, admitted it as competent evidence of the date of the baptism only.

"In England, a church record of baptisms, kept by a clergyman of the Established Church is admissible, even before his death, accompanied by evidence of the identity of the child, to prove the date of its baptism; but not the time of its birth, because the clergyman has no authority to make inquiry about the time of birth or any entry concerning it in the register: Draycott v. Talbott (3 Bro. P. C. (2d ed.) 564); May v. May (2 Stra. 1073); Wihen v. Law (3 Stark. R. 63), and other cases cited in Stark. Ev. (4th Eng. ed.) 299, note f.; Doe v. Barnes (1 M. & Rob. 389). In the Church of England, from the time of the Reformation, registers of baptisms, weddings, and burials were kept by order of the Crown as head of that church; and in the words applied by Lord Chief Baron Gilbert to the original order of Henry VIII. on this subject, 'when a book was appointed by public authority it must be a public evidence.' Gilb. Ev. (3d. ed.) 77. . . . The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law required to be kept, have considered all others as mere private memoranda, and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or other witnesses: Birt v. Barlow (1 Doug. 171); Newham v. Raithby (1 Phillim. R. 315); Ex parte Taylor (1 Jac. & Walk. 483; s. c. 3 Man. & Ry. 430 n.); Doe v. Bray (8 B. & C. 813; s. c. 3 Man. & Ry. 428); Whittuck v. Waters (4 C. & P. 375). Vice Chancellor Shadwell refused even to admit an entry in the register of the Roman Catholic chapel of the Sardinian ambassador in London as evidence of the baptism of the ambassador's son: D'Aglie v. Fryer (13 Law Journal, N. S. Ch. 398). 'The principle on which entries in a register are admitted,' said Mr. Justice Erle in a recent case, 'depends upon the public duty of the person who keeps the register to make such

entries in it, after satisfying himself of their truth.' Doe v. Andrews (15 Q. B. 759).

"Almost two centuries before the passage of the statute of Will. IV., the founders of the Massachusetts Colony, though not less attached than other Englishmen to their own forms of religious worship, had the wisdom to perceive that it was more important for the civil government to preserve exact records of the dates of births and deaths, than of religious ceremonies from which they might be imperfectly inferred; and that the importance of recording those facts did not depend on the particular creed or church government of the individual, but applied equally to the whole people. They accordingly left the baptism of the living and the burial of the dead to the churches; but by an ordinance of 1639 enacted 'that there be records kept of the days of every marriage, birth and death of every person within this jurisdiction;' and similar statutes have been ever since in force in Massachusetts. The record of a marriage by the justice of the peace or minister, or the town clerk's or registrar's record of births, marriages, and deaths, kept as required by these statutes, or a duly certified copy of either, is held competent evidence; 2 Dane Ab. 296; Milford v. Worcester (7 Mass. 56); Commonwealth v. Norcross (9 Mass. 492). . . . Similar decisions have been made in other States, generally upon the ground of the record having been kept in the performance of a duty imposed by law; and those cases, in the reports of which no statute is referred to, may yet have controlled by statute. . . .

"It is perfectly true that in this commonwealth the law makes no distinction between different sects of Christians, and the record of a Roman Catholic priest is of no less weight as evidence than that of a Congregational, or Protestant Episcopal, or any other minister. But our law not requiring any record of baptisms, the church book offered in evidence in this case, not having been kept under any requirement of law, was not a public record, and would not, had the priest who made the entries been still alive, have been admissible in evidence, unsupported by his testimony."[1]

Chief Baron GILBERT, *Evidence*, 24, 97 (*ante* 1726): "Where the deed needs enrolment, there the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds
326 by enrolment is also empowered to take care of the fairness and legality of such deeds. . . . But where a deed needs no enrolment, there, though it be enrolled, the *inspeximus* of such enrolment is no evidence; because since the officer has no authority to enrol them, such enrolment cannot make them public acts."

1—Compare the authorities cited in W., §§ 1642-1646.

THOMAS STARKIE, *Evidence*, 412 (1824): "It would be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged
327 them, without proof of the execution of the deeds; . . . and although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle that it is not probable it would now be acted upon."

EADY v. SHIVEY (1870).

40 Ga. 684, 686.

Ejectment. After offering the plaintiff's affidavits that the originals of their title-deeds were not in their possession and were believed after diligent search to be lost or destroyed, plaintiff's attorneys offered
328 in evidence copies of deeds to said lot, duly certified from the records, from Eady to Thomas Broddus, from Broddus to David Merriwether and others, a deed from them, the heirs of Broddus, to said Smith, and from Smith to said Cook. Defendant's counsel objected to these copies and they were rejected, upon the ground, (as was said in argument,) that there was no proof that such original deeds had ever existed.

MCCAY, J.: "We think the Court erred in rejecting the copy deeds. The affidavits conformed strictly to the forty-second rule of Court. It is true, there was nothing in the affidavits affirming, directly, the existence and genuineness of the originals. We are of the opinion that this was proven '*prima facie*,' by the certified copies from the record. . . . Why should not the existence of a proper record be evidence of the existence and contents of a lost original? To go to record, a deed must be probated, either executed or acknowledged before a magistrate, or proven by the affidavit of one of the witnesses. The very object of the record is to preserve a copy of the deed to be used if the original is lost or destroyed; and it would largely lessen the uses of a record if it were necessary before it could be used to prove the existence of the original by any other evidence. . . . Unless there be forgery or false swearing, nothing but a genuine existing deed can go upon the record properly, and the copy will show upon its face if the requirements of the statute have been complied with. We recognize fully the rule that the genuineness and existence of an original must be shown before the contents of it can be shown by secondary evidence. But in our judgment this is done by evidence that there is a duly executed record of what purported to be an original duly probated according to law."[2]

2—*Mills*, J., in *Womack* v. *Hughes*, Litt. Sel. C. 291, 294 (1821): "The Acts directing the mode of recording deeds do not direct that they shall thereafter be given in evidence in any court on the trial of an issue without any other proof than the *ex parte* authentication which entitles it to a place on its own record; nor is there any statutory provision which so directs, within the recollection of the Court. But the common-law principle relative to enrolled deeds has been uniformly applied by

STATUTES. *California,* C. C. P. 1872, § 1919: "A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record." Ib. § 1951 as
329 amended by St. 1889, no. 45: "Every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code" may be read "without further proof"; "also, the original record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof."

Georgia, Code 1895, § 3628: a "registered deed shall be admitted in evidence. . . . without further proof," unless the maker or heir or opponent makes affidavit that it is a forgery, whereon an issue of genuineness shall be tried.

Illinois, Rev. St. 1874, c. 30, § 20: For deeds, etc., without the State and within the United States or any Territory or dependency or the District of Columbia, an acknowledgment or proof may be made "in conformity with the laws of the State, Territory, dependency, or District where it is made"; and "if any clerk of a court of record within such State, Territory, dependency, or District shall under his hand and the seal of such court certify" to the conformity of the acknowledgment, or the conformity shall appear by the laws thereof, "such instrument, or a duly proved and certified copy of the record of such deed, mortgage, or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence as in other cases of such certified copies."

New York, C. C. P. 1877, § 935: A duly recorded conveyance is provable by the record or by a certified copy, "without further proof"; unless proof was taken on the oath of "an interested or incompetent witness."[3]

8b. Official Reports and Returns.

ELLICOTT v. PEARL (1836).

10 Pet. 412, 441.

Ejectment for a tract of 1000 acres of land originally granted to James Kincaid. STORY, J.: "The tenants, in order to prove the boun-
330 daries of the demandants' land, as laid down in the plat, and claimed by them; gave in evidence the original plats and certificates of survey of Kincaid's two thousand and one thousand acre tracts; and then examined M'Neal, a witness of the demandants, who was first

this Court to deeds recorded according to our statutes. It is not, however, every placing a deed upon record which makes it a recorded deed. The statutes usually point out the officer or Court before whom the deed is to be acknowledged, what the acknowledgment shall consist of, and how and to whom it shall be certified, and they are equally positive as to the time in which the different acts shall be done. Within these periods the recording officers have authority to record the instrument; afterwards, such authority ceases."

3—Compare the authorities cited in W., §§ 1648-1655, and Nos. 242-4, *ante.*

introduced to prove their boundary: who stated that the water courses, as found on the ground, did not correspond with those represented on the said plats: and after being examined by the demandants, for the purpose of proving that the marks on the trees, claimed by them as the corner and lines of their surveys, were as ancient as the said surveys, and also as to the position and otherwise of the lines and corners claimed by them, and represented on the plat made and used at the trial; stated, on the cross-examination of the tenant's counsel, that some of the lines, marked to suit the calls of the said surveys, appeared to be younger, and others, from their appearance, might be as old as the date of the said plats. The demandants, to counteract this evidence, and to sustain their claim, offered in evidence a survey, made out by M'Neal, in an action of ejectment formerly depending between the same parties for the same land, of which survey Pearl had due notice. The tenants objected to the reading of the explanatory report accompanying this survey, and the Court refused to allow so much thereof as stated the appearance as to age and otherwise of the lines and corners to go in evidence to the jury; and accordingly caused to be erased from the plat the words following, viz. 'ancient' (chops);—'John Forbes, Jun., states he cut the same letters and figures;'—'on the east side, the chops appear to have been marked with a larger axe, than the chops on the beginning tree;'—and then permitted the residue of the report and plat to go in evidence. This constitutes the third exception of the demandants.

"We are of opinion, that there was no error in this refusal of the Court. The evidence was inadmissible upon general principles. It was mere hearsay. The survey, made by a surveyor, being under oath [of office] is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees, and other objects on the ground, and to subjoin such remarks as may explain them. But in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties and subject to cross-examination. . . . It has never been supposed that if in such a survey the surveyor should go on to state collateral facts, or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons."[4]

JONES v. GUANO CO. (1894).

94 Ga. 14, 20 S. E. 265.

Action on a promissory note for the price of guano. To prove the quality, an analysis by the state chemist was offered. LUMPKIN, J.:

331 "Section 1553b of the Code declares that 'a copy of the official analysis of any fertilizer or chemical, under seal of the department of agriculture, shall be admissible as evidence in any of the courts

4—Compare the authorities cited in W., §§ 1665, 1672.

of this state, on the trial of any issue involving the merits of said fertilizer.' As it requires express legislation to render any copy of an analysis of a fertilizer admissible as original evidence, necessarily the terms of the law must be fully and exactly complied with, in order to obtain the benefit of its provisions. Therefore, the analysis must be an official one, or a copy of it taken from the records of the department of agriculture cannot be introduced. As we understand our system for the inspection and analysis of commercial fertilizers, samples are taken by the inspectors, and submitted for analysis to the state chemist, who makes reports to the commissioner of agriculture, which reports are recorded in the office of the latter. Analyses thus made are official.. We know of no law making official an analysis by the state chemist at the instance or request of a purchaser of fertilizers. Indeed, as we understand it, the state chemist is under no obligation to make an analysis for any private person at all. If he does so, it is simply a matter of courtesy; and although he may report an analysis thus made to the department of agriculture and it may be entered upon the records of that department, this will not give to that analysis an official character by virtue of which a copy of it will be rendered admissible as evidence in the courts."[5]

8c. Official Certificates.

OMICHUND v. BARKER (1744).

Willes 538, 549.

WILLES, L. C. J. (disapproving the latter part of the ruling in Alsop v. Bowtrell (Cro. Jac. 541), where a foreign clergyman's certificate was admitted to show not only his performance of the mar-
332 riage ceremony, but also the parties' subsequent cohabitation): "For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. Even the certificate of the King under his sign manual of a matter of fact (except in one old case in Chancery) has been always refused. . . . Besides, it is not the best evidence that the nature of the thing will admit; but the proper and usual evidence of a fact arising beyond sea is an affidavit or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place; which had been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission [for a deposition]."[6]

5—Compare the authorities cited in W., § 1664.

6—*Devens*, J., in *Com.* v. *Richardson*, 142 Mass. 74, 7 N. E. 26 (1886): "As to matters which the officer is not authorized by law to attest, his certificate is extra-official, can have no higher weight than that of a private citizen, and is therefore inadequate to make the proof required."

Compare the authorities cited in W., § 1674.

TOWNSLEY v. SUMRALL (1829).

2 Pet. 170, 178.

STORY, J.: "The original action was brought by the defendant in error against the plaintiff in error, as one of the firm of Thomas F. Townsley & Co., to recover the amount of a bill of exchange,
333 drawn, at Maysville in Kentucky, on the 27th of November, 1827, by one Richard S. Waters, on Messrs. Townsley & Co., at New Orleans, at 120 days after date for $2000, payable to Sumrall or order, which had been dishonored by the drawees. . . . The bill of exceptions stated, that the plaintiff offered in evidence the bill of exchange and the protest of the notary public at New Orleans, to which evidence the defendant objected, but the court admitted the testimony. . . . The first question that arises is upon the admissibility of the protest of the notary public at New Orleans, as proof of the dishonour of the bill. The protest is for non-payment for want of funds; and it does not appear that there had been any prior protest for non-acceptance. Bills of exchange payable at a given day after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity. The objection now made does not turn upon this point, but upon the point, that the present is not a foreign, but an inland bill of exchange; being drawn in Kentucky, and payable at New Orleans in Louisiana; and that a notarial protest is not in such cases evidence of a demand and refusal of payment. We do not think it necessary in this case to decide, whether a bill drawn in one state upon persons resident in another state, within the union, is to be deemed a foreign, or an inland bill of exchange. . . . It is admitted, that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonour of a bill without any auxiliary evidence. It has long been adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants; and being founded in public convenience, they ought, every where, to be allowed as evidence of the facts which they purport to state. The negotiability of such bills, and the facility as well as certainty of the proof of dishonour, would be materially affected by a different course; a foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonour, and be subjected to many chances of delay, and sometimes to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, therefore, being founded in public convenience, has been ratified by courts of law as a binding usage. But where parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And accordingly, even in cases of foreign bills, drawn upon, and protested in another country, if the protest has been made in the country where the

suit is brought; courts of justice sitting under the common law, require that the notary himself should be produced if within the reach of process, and his certificate is not *per se* evidence. This was so held by lord Ellenborough, in Chesmer vs. Noyes, 2 Campbell's R. 129. It is not disputed, that by the general custom of merchants in the United States, bills of exchange drawn in one state on another state, are, if dishonoured, protested by a notary; and the production of such protest is the customary document of the dishonour. It is a practice founded in general convenience, and has been adopted for the same reasons which apply to foreign bills in the strictest sense. The distance between some of these states, and the difficulty of obtaining other evidence, is far greater than between England and France, or between the continental nations of Europe, where the general rule prevails. We think upon this ground alone, the reason for admitting foreign protests would apply to cases like the present, and furnish a just analogy to govern it. . . . Wherever a protest is required to fix the title of the parties; or by the custom of merchants is used to establish a presentment or dishonour of a bill; it is competent evidence between the parties, who contract with reference to the presentment and dishonour of such bill."[7]

KIDD'S ADMINISTRATOR v. ALEXANDER'S ADMINISTRATOR (1823).

1 Rand. 456.

Action on a bond. The deposition of one John Scott, a transferee, was objected to on the ground of his interest. Before his deposition was taken, Israel and John Pleasants executed a release to Scott
334 under their seal, relinquishing all claim on the said Scott, on account of the transfer of the bond to them. The execution of this release, was certified by John Gill, notary public of the state of Maryland, in the form in which notarial acts are usually executed. . .

BROOKE, J.: "The Court not deciding whether, if proved, the release in the record would be effectual to bind the late house of Israel and John P. Pleasants, is of opinion, that the certificate of the notary public, John Gill, that John P. Pleasants, partner in the late house of Israel and John P. Pleasants, acknowledged it to be his act and deed, was inadmissible evidence to prove the execution of the said release. To effect that object, the deposition of the notary public, or some equivalent testimony ought to be before the court. In the absence of such proof, the court is of opinion, that John Scott, the assignee of the bond in question, was an incompetent witness, and his deposition and affidavit, also inadmissible testimony."

7—Compare the authorities cited in W., § 1675.

STATUTES: *California,* C. C. P. 1872, § 1948: "Every private writing, except last wills and testaments, may be acknowledged or proved and certified" like conveyances of realty, and the certificate is
335 evidence of execution.

Illinois, Rev. St. 1874, c. 30, § 35: An instrument affecting land, duly acknowledged or proved, "whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof."

Iowa, Code 1897, § 4621: "Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof."[8]

BULLER, J., *Trials at Nisi Prius,* 229 (*ante* 1767): "Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and
336 a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined. The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under its authority; therefore the chirograph of a fine is evidence of such fine, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record. So where the deed is inrolled, the indorsement of the inrolment is evidence without further proof of the deed, because the officer is intrusted to authenticate such a deed by inrolment; but if the officer of the court make out a copy, when he is not intrusted to that purpose, they ought to prove it examined, because being no part of his office, he is but a private man, and a private man's mere writing ought not to be credited without an oath. Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the Treasury, because it is no part of the necessary office of clerk, for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them. So if the deed inrolled be lost, and the clerk of the peace make out a copy of the inrolment, that is no evidence without proving it examined; because the clerk is intrusted to authenticate the deed itself by inrolment, and not to give out copies of the inrolment. The office copies of depositions are evidence in chancery, but not at common law without examination with the roll; for though that Court have, for their own convenience, impowered their officers to make out such copies as should be evidence; yet the particular rules of their courts are not taken notice of by the courts of common law, and therefore they are not evidence in those courts."

8—Compare the authorities cited in W., § 1676; and Nos. 328, 329, *ante.*

UNITED STATES v. PERCHEMAN (1833).

7 Pet. 51, 85.

MARSHALL, C. J.: "This is an appeal from a decree pronounced by the judge of the superior court for the district of East Florida, confirming the title of the appellee to two thousand acres of
337 land lying in that territory, which he claimed by virtue of a grant from the Spanish governor made in December 1815. . . . At the trial the counsel for the claimant offered in evidence a copy from the office of the keeper of public archives, of the original grant on which the claim is founded, to the receiving of which in evidence the attorney for the United States objected, alleging that the original grant itself should be procured, and its execution proved. This objection was overruled by the court, and the copy from the office of the keeper of the public archives, certified according to law, was admitted. The attorney for the United States excepted to this opinion. It appears, from the words of the grant, that the original was not in possession of the grantee. The decree which constitutes the title, appears to be addressed to the officer of the government whose duty it was to keep the originals and to issue a copy. . . . It appears too from the opinion of the judge, 'that by an express statute of the territory, copies are to be received in evidence.' . . . Whether these acts be or be not construed to authorize the admission of the copies offered in this cause; we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence."[9]

STATUTES: *England*, 1851, St. 14 & 15 Vict. c. 99, Lord Brougham's Act, § 14: "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production
338 from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice . . ., provided it be proved to be an examined copy or extract, or provided it purport to be signed or certified as a true copy or extract by the officer to whose custody the original is intrusted."

California, C. C. P. 1872, § 1893: A certified copy by "every public officer having custody of a public writing which a citizen has a right to inspect," is admissible "with like effect as the original writing." Ib., § 1901: A certified copy of a "written law or other public writing of any State or country," by "the officer having charge of the original," under the public seal of the State or country, is receivable." Ib., § 1918: "Other official documents may be proved as follows: 1, Acts of the Executive of the State, by the records of the State department of the

9—Compare the authorities cited in W., §§ 1677, 1680.

State; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. . . . 2, The proceedings of the Legislature of this State, or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk. . . . 3, The acts of the Executive, or the proceedings of the Legislature of a sister State, in the same manner; 4, The acts of the Executive, or the proceedings of the Legislature of a foreign country, . . . by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Executive of the United States; 5, Acts of a municipal corporation of this State, or of a board of department thereof, by a copy, certified by the legal keeper thereof. . . . 6, Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof; 7, Documents of any other class in a sister State, by the original, or by a copy certified by the legal keeper thereof, together with a certificate of the Secretary of State, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original; 8, Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody; 9, Documents in the departments of the United States government, by the certificates of the legal custodian thereof."

Iowa, Code 1897, § 4635: "Duly certified copies of all records and entries or papers belonging to any public office or by authority of law required to be filed therein," are admissible.

United States, Rev. St. 1878, § 905 (St. 1790, May 26): "The acts of the Legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto." Ib., § 906 (St. 1804, March 27): "All records and exemplifications of books which may be kept in any public office of any State or Territory or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, secretary of state, the chancellor or keeper of the great seal, of the State or Territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and

the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made."

Chief Baron GILBERT, *Evidence*, 11 (*ante* 1726): "The next thing is the copies of all other records [than statutes] and they are twofold: under seal, and not under seal. First, under seal; and
339 these are called by a particular name, Exemplifications, and are of better credence than any sworn copy; for the Courts of justice that put their seals to the copy are supposed more capable to examine and more critical and exact in their examinations than any other person is or can be; and besides there is more credit to be given to their seal than to the testimony of any private person. . . . Exemplifications are twofold: under the Broad Seal, or under the seal of the Court. . . . When a record is exemplified under the Great Seal, it must either be a record of the Court of Chancery, or be sent for by a *certiorari* into the Chancery (which is the centre of all Courts), and from thence the subjects receive a copy under the attestation of the Great Seal; for in the first distribution of the Courts, the Chancery held the Broad Seal, from whence the authority issued to all proceedings, and those proceedings cannot be copied under the Great Seal unless they come into the Court where that seal is lodged. . . . The second sort of copies under seal are the exemplifications under the seal of the Court, and these are of higher credit than a sworn copy. . . . Seals of public credit are the seals of the King and of the public Courts of justice, time out of mind. . . . But the seals of private Courts or of private persons are not full evidence by themselves without an oath concurring to their credibility. . . . The second sort of copies are those that are not under seal, and these are of two sorts, sworn copies, and office-copies. . . . A copy given out by the officer of the Court that is not trusted to the purpose . . . is not evidence without proving it actually examined."[10]

CHURCH v. HUBBART (1804).

2 Cr. 186, 238.

Action on policies of marine insurance; defence, that the vessels were seized by the Portuguese and condemned for illicit trade, within
340 the exceptions of liability in the policy. To prove this defence, certain laws and proceedings were offered, with the following certificates of copy: "I, William Jarvis, consul of the United States

10—*Mansfield*, L. C. J., in *Denn* v. *Fulford*, 2 Burr. 1177, 1179 (1761), admitting an examined copy of a Chancery bill, and interpreting the stamp law: "How does it appear that it is necessary that a copy of a proceeding in Chancery, given in evidence, must be an office-copy? . . . An office-copy is, in the same court and

of America, in this city of Lisbon, &c., do hereby certify to all whom it may or doth concern, that the law in the Portuguese language, hereunto annexed, dated from 18th March, 1605, is a true and literal copy from the original law of this realm of that date, prohibiting the entry of foreign vessels into the colonies of this kingdom, and as such, full faith and credit ought to be given it in courts of judicature or elsewhere. I further certify, that the foregoing is a just and true translation of the aforesaid law.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Lisbon, this 12th day of April, 1803.

(Signed) "WILLIAM JARVIS."

"Para, 27th June, 1801. D. Jono de Almeida de Mello de Castro, of the Council of State of the Prince Regent our Lord and his Minister and Secretary of State of the foreign affairs and war departments, &c. do hereby certify that the present is a faithful copy taken from the original deeds relative to the brig Aurora. In witness whereof I order this attestation to be passed and goes by me signed and sealed with the seal of my arms. Lisbon the 27th January, 1803.

(Signed) "D. JONO DE ALMEIDA DE MELLO DE CASTRO."

"I William Jarvis, Consul of the United States of America in this city of Lisbon, &c. do hereby certify unto all whom it may concern that the foregoing is a true and just translation of a copy from the proceedings against the brig Aurora, Nathaniel Shaler, master, at Para in the Brazils which is hereto annexed and attested by his Excellency Don Jono de Almeida de Mello de Castro, whose attestation is dated the 27th January, 1803.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, in Lisbon, this 16th day of April, one thousand eight hundred and three.

"WILLIAM JARVIS."

MARSHALL, C. J.: "To prove that the Aurora and her cargo were sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the Circuit Court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. The edicts of the crown are certified by the American consul at

in the same cause, equivalent to a record; but in another court or in another cause in the same court the copy must be proved."

Holroyd, J., in *Appleton* v. *Braybrook*, 6 M. Q S. 37 (1816): "The distinction is plain between that which proceeds from the officer in the course of his duty in the office, and that which he is not specially authorized by his office to do. . . . An exemplification is under the seal of the Court, which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose."

Lisbon to be copies from the original law of the realm, and this certificate is granted under his official seal. . . . In this case the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the original. To give to this certificate the force of testimony it will be necessary to shew that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are entrusted with high powers. This is very true, but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact. . . The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate. It is asked in what manner this oath should itself have been authenticated, and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

"The paper offered as a true copy from the original proceedings against the Aurora, is certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of state for foreign affairs, and the consul certifies the English copy which accompanies it to be a true translation of the Portuguese original. Foreign judgments are authenticated [either], 1, by an exemplification under the Great Seal, [or] *2*, by a copy proved to be a true copy, [or] 3, by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. . . . If it be true that the decrees of the colonies are transmitted to the seat of government and registered in the department of State, a certificate of that fact under the Great Seal, with a copy of the decree authenticated in the same manner, would be sufficient evidence of the verity of what was so certified, but the certificate offered to the Court is under the private seal of the person giving it, which cannot be known to this Court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury."[11]

11—Compare the authorities cited in W., § 1681.

STATUTES: *California*, C. C. P. 1872, § 1905: "A judicial record of this State or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk
341 or other person having the legal custody thereof. That of a sister State may be approved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form." Ib., § 1906: "A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country."

Illinois, Rev. St. 1874, c. 51, § 13: "The papers, entries, and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk."

United States, Constitution 1789, Art. IV, § 1: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Rev. St. 1878, § 905 (St. 1790; May 26): "The records and judicial proceedings of the Courts of any State or Territory, or of any such country [subject to the jurisdiction of the U. S.], shall be proved or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form."[1]

Chief Baron GILBERT, *Evidence*, 11 (*ante* 1726): "My Lord Chief Justice Parker allowed the printed statute to be evidence, in the case of the College of Physicians and Dr. West, of the truth of a
342 private act of Parliament touching the institution of the College of Physicians, because the printed statute-book is printed by the

1—Compare the authorities cited in W., § 1681.

In particular, as illustrating differences of local State practice in regard to requiring the *seal of Court* for a certified copy of a *domestic judgment*, compare the following: *Illinois:* 1895, Garden City S. Co. v. Miller, 157 id. 225, 41 N. E. 753 (Rev. St. c. 51, § 13, making judicial records provable by the clerk's certified

Queen's authority, and therefore, though it be not so good evidence as an exemplification under seal, yet it must be supposed as good an evidence of the truth of a copy as a copy compared with the rolls and sworn to by the testimony of any witness, which is allowed daily as a good proof of the copy of a record; for a copy printed by the public authority derives more credit from that authority than it would from the testimony of any living witness that had compared it."[2]

STATUTES: *California,* C. C. P. 1872, § 1900: "Books printed under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such
343 State or country, or proved to be commonly admitted in the tribunals of such State or country as evidence of the written law thereof," are receivable. Ib., § 1963: There is a presumption "that a printed and published book purporting to be printed or published by public authority was so printed or published."

Nebraska, Comp. St. 1899, § 5970: "Printed copies in volumes of statutes, code, or other written law, enacted by any other Territory, or State, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law" in the courts thereof, are admissible.[3]

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9. SCIENTIFIC BOOKS.

SPENCER COWPER'S TRIAL (1699).

13 How. St. Tr. 1163.

Murder; the deceased's body was found in the river, and the defense maintained that she had drowned herself. A medical expert was testifying to the symptoms of drowning as indicated by
344 the condition of the lungs. Dr. *Crell:* "My lord, I have little to say in this affair, the physicians that have been examined already having made it out, that persons who are drowned may have but little water in their bodies; but I have taken what pains I could, upon so short warning, and I will tell you the opinion of several eminent authors. My own opinion is, that a very small quantity of water, not exceeding three ounces, is sufficient to drown any body; and I

copy under Court seal, includes records out of the State, because such a copy was already admissible at common law for records within the State; the act of 1872, Rev. St. c. 51, § 13, simply repeats that rule for domestic records, and extends it to foreign records); *Massachusetts:* 1860, Chamberlin v. Ball, 15 Gray 352 (for a record of a court in the State, "it is not necessary that it should be an exemplified copy under the seal of the Court; . . . in Massachusetts it is sufficient if the copy is attested by the clerk; this rule of evidence is founded on immemorial usage").

2—*Marston,* J., in *Wilt* v. *Cutler,* 38 Mich. 196 (1878): "The distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government."

3—Compare the authorities cited in W., § 1684.

believe that the reason of the suffocation, or of any person's being stifled under water, is from the intercepting of the air, that the person cannot breathe, without which he cannot live. Now, my lord, I will give you the opinion of several ancient authors." Baron HATSELL: "Pray, doctor, tell us your own observations." Dr. *Crell:* "My lord, it must be reading, as well as a man's own experience, that will make any one a physician, for without the reading of books of that art, the art itself cannot be attained to. Besides, my lord, I conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men. Neither do I see why I should not quote from the fathers of my profession in this case as well as you gentlemen of the long robe quote Coke upon Littleton in others."[4]

ASHWORTH v. KITTREDGE (1853).

12 Cush. 194.

SHAW, C. J.: "In an action against a surgeon, for neglect, and want of competent skill, in the treatment of the plaintiff, by means of which the plaintiff lost his arm, the plaintiff put in his
345 evidence, to show what was his own condition, and the treatment by the defendant, and both parties offered evidence of the opinions of physicians and surgeons as experts. . . . The Court are of opinion, that it was not competent for the counsel for the plaintiff, against the objection of the other side, to read medical books to the jury. It was formerly practiced rather by general indulgence and tacit consent of the parties, than in pursuance of any rule of law; but it has been frequently decided that it is not admissible, and we now consider the law to this effect well settled, both upon principle and authority. Where books are thus offered, they are in effect used as evidence, and the substantial objection is, that they are statements wanting the sanction of an oath; and the statement thus proposed, is made by one not present, and not liable to cross-examination. If the same author were cross-examined, and called to state grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison of the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons

4—Theory of Evidence, c. II, pl. 104 (1739): "The almanack is a sufficient evidence to prove a day Sunday."

Pollock, C. B., in *Darby* v. *Ouseley,* 1 H. & N. 1, 8 (1856): "Standard authors may be referred to for such a purpose [to show the literary significance of parodies] or as showing the opinions of eminent men on particular subjects, but not to prove facts. . . . In this case the defendant's counsel proposed to read certain specific [church] canons, not as matters of speculative opinion, . . . but as matters of fact."

Compare the authorities cited in W., §§ 1698, 1699; and No. 636, *post.*

of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client, or to court or jury.

"Besides; medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning, in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas, a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience. If it be said, that no books should be read, except works of good and established authority, the difficulty at once arises as to the question, what constitutes 'good authority;' more especially whether it is a question of competency to be decided by the court, whether any particular book shall be received or rejected; or a question of weight of testimony, so that any book may be read, leaving its weight, force and effect to the jury. Either of the alternatives would be attended with obvious, if not insuperable objections."[5]

PINNEY v. CAHILL (1882).

48 Mich. 587, 12 N. W. 862.

GRAVES, C. J.: "The defendant hired the plaintiff's horse to drive from Milford to Holley and back and the animal became sick and died. The plaintiff claimed that this was caused by defendant's ill-
346 usage and neglect and he sued for damages. The jury found judgment against him and he brought this writ of error. . . . The plain-

5—*Lacombe*, J., in *Western Assurance Co.* v. *Mohlman Co.*, 28 C. C. A. 157, 83 Fed. 811 (1897), allowing a civil engineer, called as an expert in construction, to read excerpts from scientific books when giving his testimony: "The rule is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence; but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence. . . . Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for every one else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and

tiff produced a witness who swore that he was a veterinary surgeon of 25 years' standing, and his opinion as an expert being called for he swore that in his opinion the horse died from being overfed when too hot, which would produce colic. On cross-examination he said that colic was caused by over driving and feeding when the animal is too warm; that all works of good authority spoke of it and that the 'Modern Horse Doctor, by Dr. Dodd' was a work of that kind. The defendant then offered to show from this work of Dr. Dodd, where the author treats of colic, the passage following: 'In nine cases out of ten colic is the result of impaired digestive organs; the food runs into fermentation and evolves carbonic acid gas.' This evidence was offered to discredit this expert in connection with his cross-examination. The plaintiff objected to its introduction but the court admitted it. The rule is acknowledged in this state that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it and among others with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement on referring his learning to the books before mentioned and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it."[6]

10. COMMERCIAL REPORTS, ETC.

SISSON v. RAILROAD CO. (1866).

14 Mich. 489, 496.

Action of *assumpsit,* brought in the court below against the defendants as common carriers, upon a special contract for the transportation of a lot of beef cattle from Toledo to Buffalo, on their way to the
347 market at Albany or New York. . . . There was evidence also given, tending to show that the cattle were detained a long time on the way, by the fault of the defendants, and that the plaintiff suffered damage in consequence thereof, both by the depreciation of the quality of the

tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned."

Compare the authorities cited in W., §§ 1693, 1696.

6—Compare the authorities cited in W., § 1700.

cattle, and the fall of the market before they reached Albany. . . . The evidence consisted of the knowledge the witnesses had of the state of the market, as a matter of general notoriety, derived from newspapers (in which the state of the market is published daily), and telegraph reports, and from the statements of those engaged in the business.

COOLEY, J.: "Evidence of the state of the markets as derived from the market reports in the newspapers [should not have been excluded]. . . . The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."[7]

II. STATEMENTS OF A BODILY OR MENTAL CONDITION.

a. Pain and Suffering.

BACON v. CHARLTON (1851).

7 Cush. 581, 586.

Action on the case to recover damages for an injury sustained by the plaintiff, in being thrown from his carriage, while traveling through the town of Charlton, in consequence of an obstruction in the
348 highway. . . . The presiding judge ruled that groans or exclamations of pain, made by the plaintiff, at any time, were admissible in evidence, although they referred either by word or gesture to the locality of the pain; as if a man should put his hand upon his side and groan, or should say, "Oh, my head!" or utter similar complaints, being an expression of present pain or agony; but that any statement of his condition or feelings, made in answer to a question, or as a narrative, or with a view to communicate information, was not admissible. And a witness was accordingly allowed, against the defendant's objection, to testify that the plaintiff made exclamations of pain all the way

7—*Smith*, J., in *Fairley* v. *Smith*, 87 N. C. 367, 371 (1882), rejecting a cotton-quotation in a Charlotte newspaper for Boston prices: "The evidence received in the present case has none of those essential safeguards to ensure the accuracy of the published information as to the state of a distant market, to warrant its unqualified submission to the jury. It does not appear that business men acted upon this information, as truthful and correct, in their dealings with each other; nor from what source the information itself comes. . . . [It was thus improper to admit the evidence] without any proof, outside the paper, of its trustworthiness and recognition as such by business men dealing in cotton."

Compare the authorities cited in W., § 1702.

home from the place of the accident; that he made complaints of pain for three or four days after the accident, and stated the locality of the pains; and that he sometimes put his hand upon his hip and sometimes upon his left side.

BIGELOW, J.: "Where the bodily or mental feeling of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. . . . Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady. . . . These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable."[8]

BARBER v. MERRIAM (1865).

11 All. 322.

Action of tort for personal injury. At the trial there was evidence that the female plaintiff, for the first two weeks of her illness, was attended by Dr. Holden, and afterwards by Dr. Weld. . . . Dr.
349 Guild, who succeeded Dr. Weld in attendance on the female plaintiff, was called as a witness, and was allowed to repeat to the jury the statements of the plaintiff herself, made since the suit was brought, for the purpose of receiving medical advice, as to the character and seat of her injuries and sensations, against the objection of the defendants.

8—*Aveson* v. *Kinnaird*, 6 East 195 (1805); evidence was offered of declarations on a sickbed by the plaintiff's wife that she was not well on the previous Tuesday, when she went to be insured; *Ellenborough*, L. C. J.: "A witness has been received to relate that which has always been received from patients to explain—her own account of the cause of her being in bed at an unseasonable hour with the appearance of being ill. . . . What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received upon such inquiries, and must be resorted to from the very nature of the thing. . . . The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in Skinner which I have alluded to."

Swayne, J., in *Insurance Co.* v. *Mosley*, 8 Wall, 397 (1869): "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony. . . . As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. . . . Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded."

G. Putnam, Jr., for the defendant: ". . . The statements of the female plaintiff to Dr. Guild ought not to have been admitted. They would clearly have been incompetent, if made to anybody except a medical attendant. Bacon v. Charlton (7 Cush. 581, 586). It has frequently been stated by text-writers and judges that such statements, if made by a patient to a physician, may be given in evidence; but no adjudication of that point has been found."

BIGELOW, C. J.: "In Bacon v. Charlton (7 Cush. 581, 586) it was held that a party to an action might give in evidence his own complaints, exclamations, and expressions, such as usually and naturally accompany and indicate bodily pain or injury; but that all statements of facts and narrations of prior occurrences by him, although connected with and relating to his malady or injury, are incompetent and ought to be excluded. It was intimated in that case that a different rule might be applicable to statements made by a patient to a medical man; and, on consideration, we entertain no doubt that there is a well-founded distinction between these two kinds or species of evidence. . . . Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. . . . To the argument against their competency founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth. . . . It is suggested, in behalf of the defendant, that the statements in the present case were made by the plaintiff after the commencement of this action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man and for the purpose of receiving medical advice, they were competent and admissible."[9]

9—*Endicott, J.*, in *Roosa* v. *Loan Co.*, 132 Mass. 439 (1882): "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both these cases [physician and ordinary witness] these declarations are admitted from necessity because in this way only can the bodily condition of the party . . . be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury . . . which may be proved by other evidence."

Compare the authorities cited in W., § 1722.

ROCHE v. RAILROAD CO. (1887).

105 N. Y. 294, 11 N. E. 630.

PECKHAM, J.: "The only question in this case arises upon the admission of the testimony of a third party that the plaintiff, some days after the happening of the accident which caused her injury,
350 complained that she was suffering pain in her injured arm. The witness did not testify that on these occasions the plaintiff screamed or groaned, or gave other manifestations of a seemingly involuntary nature and indicative of bodily suffering, but he proved simple statements or declarations made by plaintiff, that she was at the time of making them suffering with pain in her arm. The plaintiff was herself sworn and proved the injury and the pain. The condition of the arm the night of the accident was also proved; that it was very much swollen and black all around it, and subsequently red and inflamed, and continued swollen and inflamed more or less for a long time. The defendant challenges the evidence of complaints of pain thus made, on the ground that it was incompetent, and the argument made was that the evidence as to the injury and its extent could not be thus corroborated by mere hearsay.

"Prior to the time when parties were allowed to be witnesses, the rule in this class of cases permitted evidence of this nature. Caldwell v. Murphy, 11 N. Y. 416; Werely v. Persons, 28 N. Y. 344. These cases show that the evidence was not confined to the time of the injury, or to mere exclamations of pain. The admissibility of the evidence was put, in the opinion of Judge DENIO, in 11 N. Y., *supra,* upon the necessity of the case, as being the only means by which the condition of the sufferer as to enduring pain could, in many instances, be proved. . . . After the adoption of the amendment to the Code, permitting parties to be witnesses, the question under discussion was somewhat mooted in Reed v. Railroad, 45 N. Y. 574, by ALLEN, J., in the course of his opinion, although the precise point was not before the court. . . . The case of Hagenlocher v. Brooklyn R. R., 99 N. Y. 136, 1 N. E. Rep. 536, decides that, even since the Code, evidence of exclamations indicative of pain made by the party injured is admissible. The case does not confine proof of these exclamations to the time of the injury. The question was asked of the plaintiff's mother: 'How long after injury was your daughter confined in the bed?' Answer. She was for about four weeks. Question. What expressions did she make, or what manifestations, showing that she suffered pain?' This shows there was no confinement of the evidence to the time of the injury. The evidence given, however, was of screams when the plaintiff's foot was touched, and of her exclamations of pain when even the sheet was permitted to touch the foot. The evidence was permitted on the ground that it was of a nature which substantially corroborated the plaintiff as to her condition.

"Having thus admitted evidence of this kind since the adoption of the Code amendment permitting parties to be witnesses, the question is whether there is such a clear distinction between it and evidence of simple declarations of a party that he was then suffering pain, but giving no other indications thereof, as to call for the adoption of a different rule. It seems to us that there is. Evidence of exclamations, groans, and screams is now permitted, more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way. It characterizes and explains such condition. Thus, in the very last case cited, it was shown that the foot was very much swollen, and so sore than the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that, when so light an article as a sheet touched the foot, the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural, and original corroborative evidence of the plaintiff as to his then physical condition. Its weight and propriety are not, therefore, now sustained upon the old idea of the necessity of the case.

"But evidence of simple declarations of a party, made some time after the injury, and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased. As is said by Judge ALLEN, in Reed v. Railroad, *supra*, the necessity for giving such declarations in evidence, where the party is living and can be sworn, no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. . . . For these reasons, the evidence of Mr. McElroy, as to the plaintiff's declarations of existing pain, when they were walking in the street together, long after the accident, should not have been received."[10]

10—*Canty*, J., diss., in *Williams* v. *R. Co.*, 68 Minn. 55, 70 N. W. 860 (1897): "So narrow and strict a rule is not practicable. The expression of suffering may be one-half groans and exclamations and one-half words or nine-tenths of the former and one-tenth of the latter, or *vice versa*. How can the law say how much of the utterance shall consist of words, and how much of groans, sighs, and exclamations, or that it may not all consist of words? Again, how can the law say what degree of anguish the words shall be uttered? One person complains cheerfully, and even laughs and jokes, when he is suffering intense agony, while another complains most dolefully about the slightest afflictions. For these reasons, I cannot agree with the majority or with the New York cases, which attempt to make a distinction between words describing present existing suffering and other exclamations indicating such suffering."

Compare the authorities cited in W., § 1719.

11b. *Intent and Design.*

MUTUAL LIFE INSURANCE CO. v. HILLMON (1892).

145 U. S. 285, 12 Sup. 909.

Action on a life insurance policy. John W. Hillmon, the insured, who had lived in Wichita, was alleged to have been accidentally killed in southern Kansas, at Crooked Creek, in a deserted region
351 whither he had gone prospecting for a ranch site in company with one Brown. The defence contended that John W. Hillmon was not dead; that the body found was that of one Walters, and that Hillmon had insured his life with the fraudulent intention of pretending death in order to collect the insurance money.

GRAY, J.: "This [important] question is of the admissibility of the letters written by Walters on the first days of March, 1879, which were offered in evidence by the defendants, and excluded by the court.[11] In order to determine the competency of these letters, it is important to consider the state of the case when they were offered to be read. The matter chiefly contested at the trial was the death of John W. Hillmon, the insured; and that depended upon the question whether the body found at Crooked Creek on the night of March 18, 1879, was his body, or the body of one Walters. Much conflicting evidence has been introduced as to the identity of the body. The plaintiff had also introduced evidence that Hillmon and one Brown left Wichita in Kansas on or about March 5, 1879, and travelled together through southern Kansas in search of a site for a cattle ranch, and that on the night of March 18, while they were in camp at Crooked Creek, Hillmon was accidentally killed, and that his body was taken thence and buried. The defendants had introduced evidence, without objection, that Walters left his home and his betrothed in Iowa in March, 1878, and was afterwards in Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the last letters received from his were one received by his betrothed on March 3 and postmarked at Wichita, March 2, and one received by his sister about March 4 or 5, and dated at Wichita a day or two before; and that he had not been heard from since. The evidence that Walters was at Wichita on or before March 5, and had not been heard from since, together with the evidence to identify as his the body found at Crooked Creek on March 18, tended to show that he went from Wichita to

11—One of these letters was as follows, as repeated by a witness from memory: "Wichita, Kansas, March 4th or 5th or 3d or 4th—I don't know—1879. Dear Sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all. I am truly your brother, Fred. Adolph Walters."

Crooked Creek between those dates. Evidence that just before March 5 he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon.

"Letters from him to his family and to his betrothed were the natural, if not the only attainable evidence of his intention. . . . A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. . . . The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."[12]

IIc. *Statements by a Testator.*

DOE *dem.* SHALLCROSS v. PALMER (1851).
16 Q. B. 747.

Ejectment. The plaintiff's lessor claimed as devisee of Francis Brookes, who was heir-at-law of his brother William Brookes. The defendant claimed in right of his wife Appollina, as devisee of
352 William Brookes. The will appeared to have been drawn originally so as to give the property in fee to Francis, and to have been changed in William's handwriting so as to give it to Francis for life

12—*Field,* C. J., in *Com.* v. *Trefethen,* 157 Mass. 185, 31 N. E. 961 (1892): "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred. . . . Although evidence of the conscious voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law, not as hearsay, but as original evidence; and when the person making the declarations is dead, such evidence is often not only the best, but the only evidence of what was in his mind at the time. . . . It is not necessary in the present case to determine what limitations in practice, if any, must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead; . . . and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial."

Start, C. J., in *State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63 (1895); evidence of the murdered person's statements as to having an engagement to meet the defendant was admitted as a "verbal act": "It was not admissible, in my opinion, on the ground that it tended to 'characterize her subsequent acts and her departure on the fatal ride soon after she made the statement,'—that is, that it was a part of the *res gestae,*—for the reason that her statement neither accompanied nor characterized any act relevant to the issue. But it was relevant to the issue to show that

with remainder to Appollina. The question was whether the alterations had been made before or after the execution of the will.

CAMPBELL, L. C. J.: "The evidence relied upon consisted of declarations by the testator, frequently made, before and nearly down to the time when the will was executed, that he intended to make provision by his will for Appollina Biddulph (the now defendant, Mrs. Palmer), coupled with the fact that without this alteration the will, which disposes of the whole of his property, real and personal, makes no provision for her. . . . It may be convenient, first, to consider the question, whether, if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared, and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford? As to the admissibility, they all seem to rest on the same principle; and, if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded; as a logical inference might be fairly drawn from it respecting the priority of two events, that is to say, the making of the alteration and the execution of the will; and I am not aware of any principle, rule of law, decided case, or *dictum* against the admissibility of such evidence."[13]

SUGDEN v. LORD ST. LEONARDS (1876).

L. R. 1 P. D. 154.

COCKBURN, L. C. J.: "This is an appeal against a decree of the President of the Probate Division, granting probate of a paper purporting to be the substance of the will of the late Lord St. Leon-
353 ards. The will was last seen on the 20th of August, 1873; the death of the testator took place on the 29th of January, 1875. The will

she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him. To sustain it on the ground that the statement of the deceased was a part of the *res gestae*, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases."

Compare the authorities cited in W., §§ 1725, 1726; and Nos. 30, 48, *ante*.

13—Compare the authorities cited in W., §§ 112, 1735; and Nos. 30, 48, *ante*.

was kept in a small box placed on the floor of a room called the saloon, on the ground floor of the testator's house. Upon his death it was looked for in that box by the solicitor employed by the executors, and it could not be found. Several questions arise from this state of facts. In the first place, was the will destroyed by the testator *animo revocandi* or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory, so far as it goes, but not altogether complete, ought probate to be granted, so far as the evidence which we have before us shows what were the contents? . . . The last time the will was seen was by Miss Sugden, on the 20th of August, 1873. Lord St. Leonards was taken ill in September, 1873, and was confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room; when he again rejoined the family down stairs, she replaced the box in the saloon, that he might not miss it, and it remained there until his last illness commenced, in March, 1874. It was then again taken possession of by Miss Sugden, and kept by her until Lord St. Leonards' death; therefore it could only have been got at by him between Christmas, 1873, and March, 1874. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will, in other words, referred to the will itself as still subsisting, and this again adds to the vast improbability of his having destroyed the will. . . . Declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree. . . . I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?"[14]

14—The following reasoning was used by Hannen, J., at the trial below: "Believing, as I do, the testator made these statements [alluding to the existence of the will] showing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it at any time when he had the opportunity of

JESSEL, M. R.: "[The reasons[15] for the exceptions to the Hearsay rule] all exist in the case of a testator declaring the contents of his will. . . . Having regard to the reasons and principles which have induced the Courts of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. . . . We have a witness peculiarly likely to know what the contents of the will were. Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that there has been no question raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. . . . The case is singular in that respect, and I should think it is very likely to remain singular, as regards subsequent cases; therefore there is no danger in admitting this evidence in this particular case, and I see no reason why we should refuse to do justice now because other persons, not credible witnesses, may be induced in other cases to attempt to substantiate fictitious wills."

JAMES, L. J.: "In this case it is conceded that every one of those declarations was admissible and was properly admitted for some purpose in the cause, and thereby those declarations of the testator have become legitimately known to me. I believe them to have been made by him, and I believe them to be true, and, having those declarations before me and so believing them, it would be a judicial lie if I were to pretend that I did not act upon them in coming to the conclusion that the evidence of the witness as to the actual contents of the will is true."

MELLISH, L. J.: "The difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive. . . . A declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen again, for you then establish an exception which more or less throws a doubt on the law."[16]

getting access to it. . . . I come to the conclusion that his declarations down to the latest period of his life show that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it."

15—See these reasons quoted *ante*, No. 290, from the foregoing part of this opinion.

16—Lord *Blackburn*, in *Woodward* v. *Goulstone*, L. R. 11 App. Cas. 469 (1886): "I wish to guard myself, as the Lord

BOYLAN v. MEEKER (1860).

28 N. J. L. 276.

Ejectment; issue as to the validity of a will. WHELPLEY, J.: "If the due and formal execution of a will can be proved by the testimony of witnesses present when it was executed, the will in question
354 was so proved. Four witnesses of respectability and character swear they were present, and saw it executed. Their evidence is so minute in its details as to cut off all possibility of mistake. They either saw what they testify or they are perjured. . . . Upon the trial, the plaintiff set up against the will: 1. Incapacity. 2. Forgery of the will. 3. Fraud practiced on Meeker by inducing him to sign a paper without knowing it was a will. These defences do not support one another. The evidence of incapacity does not tend to show that the instrument produced was a forgery or a fraud. . . . The verdict must be supported, if at all, because the will was either forged or a fraud upon Meeker, effected by substituting one paper for another.

"It is manifest, from the state of the case and the course of the argument in this court upon this rule, that the plaintiffs relied upon the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will, and that therefore he had never knowingly executed the paper. Upon the issue as to his sanity when he executed the paper, his conduct and declarations, both before and after that time tending to show his want of capacity at the time, were competent evidence for the plaintiffs. All the authorities support that position. But the case clearly shows that these declarations were offered, received, and pressed upon the jury as the proper foundation of a verdict against the will, on the broad ground, that even if the testator had testamentary capacity, yet that he never executed the paper as a will because these declarations showed his utter ignorance of any such paper, and were, if true, inconsistent with the idea of its execution by him. The admissibility of this evidence on the issue of fraud and forgery has been argued on two grounds, first, that they were exterior manifestations of an inward condition of mind, that is to say, ignorance of the existence of the will. It is argued . . . that sanity and ignorance are both states of mind, that exterior manifestations must be relied upon to prove both. If this were so, there might be some force in the argument. But . . . the exterior manifestations of insanity are involuntary, those of knowledge purely voluntary. . . . The devisor may to secure his own peace and comfort during life . . . conceal the nature of his testamentary dispositions and make statements calculated and intended to deceive those

Chancellor did, against being supposed, except so far as it is necessary for the present case, to be either affirming or disaffirming the decision which was come to in Sugden v. Lord St. Leonards, or the propositions of law there laid down. I wish to leave them just in the same way as before, as far as I am concerned."

with whom he is conversing. He has neither the sanctity of an oath or the strong bond of self-interest to secure his adherence to the truth."[17]

RUSLING v. RUSLING (1883).

36 N. J. Eq. 603, 607.

DIXON, J.: "The appellants, a son and the widow of Gershom Rusling, deceased, impeach the validity of his will, executed with due formality on January 4th, 1875. . . . Two grounds of validity are
355 alleged by the caveators: first, want of testamentary capacity in the testator; second, undue influence by the proponents. It is not necessary to state in this opinion, with any degree of detail, the evidence offered to show the testator's mental incapacity at the time of executing this will, January 4th, 1875. It is enough to say that in our judgment it establishes nothing more than an occasional forgetfulness of the names and faces of persons with whom he did not come into frequent contact. . . . For the proof of undue influence, the caveators mainly rely upon declarations of the testator, made some time before and some time after the execution of the will, respecting the conduct towards him of the favored legatees. These declarations are not admissible as evidence of the facts which they were offered to prove.

"When undue influence is set up in impeachment of a will, the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which of his free will he would not have assented. This involves two things: first, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise, the state of mind at one time is competent evidenec of its state at other times not too remote, because mental conditions have some degree of permanency. Hence in an inquiry respecting the testator's state of mind, before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony."[18]

17—Compare the authorities cited in W., § 1736.

18—*Colt*, J., in *Shailer* v. *Bumstead*, 99 Mass. 122 (1868): "When used for such

MOONEY v. OLSEN (1879).

22 Kan. 69, 78.

Action brought by Olsen against Mooney and another to set aside the will of Lydia Foster, who died July 8, 1876. Trial by a jury, at the March term, 1877, of the district court, and verdict against
356 the will. The defendants below filed their motion for a new trial, which was overruled.

BREWER, J.: "Action to set aside a will. Trial by a jury, and verdict against the will. The first matter which we shall notice is the alleged error in the admission of testimony. The will was challenged on the ground of undue influence, as well as on the ground that the decedent, at the time of its execution, was not of sound mind and memory. It appeared that the decedent was taken sick July 3d, and died on the 8th; that Dennis Mooney and Mrs. Mary McCarthy, the principal devisees and legatees under the will, were in attendance upon her during most of this time, and that the will was written the day before her death. Over objection, the court permitted testimony of the conduct of these devisees, not merely at the time of making the will, but also while present at the home of the decedent during the sickness, and immediately after her death; also of the statements of the decedent made prior to her sickness, (some a long time prior,) showing estrangement from and ill feeling towards Dennis Mooney; also of letters from him to her tending to show the same state of facts; also of an engagement of marriage, expected to be consummated on the tenth of July, to one who was present during most of the sickness, and was not mentioned in the will. . . .

"The question of undue influence is one of peculiar character. It does not arise until after the death of the one who alone fully knows the influences which have produced the instrument. It does not touch the outward act, the form of the instrument, the signature, the acknowledgment; it enters the shadowy land of the mind in search of its condition and processes. Was the mind strong, or weak? clear of comprehension, or only feeble grasping the facts suggested? Was the will resolute and firm, or enfeebled by disease and bodily weakness? What prompted the making of the will? Was is the thought of the testatrix, or the suggestion of interested parties? What influences were brought to bear to secure its execution, or the disposition of any specific property? These are inquiries always difficult of solution, often made more so by the fact that the parties most competent to give information are

purpose, they are mere hearsay, which by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve"; they are thus inadmissible so far as they form "a declaration or narrative to show the fact of fraud or undue influence at a previous period."

Compare the authorities cited in W., § 1738, notes 1, 2, 3.

the ones most interested to withhold it. To fully inform the jury, they should know the condition of the testatrix's mind at the time of the execution, the circumstances attending the execution, the relations and affections of the testatrix, and such other matters as tend to show what disposition if in health and strength, and uninfluenced, she would probably have made of her property. This opens a broad field of inquiry, and gives to such a contest over a will a wider scope of investigation than exists in ordinary litigation. 'Put Yourself in His Place,' is the title of a recent popular novel, and is appropriate to indicate the scope of such an inquiry. . . .

"It is sometimes broadly stated that the declarations of a testator, whether prior or subsequent to the execution of the will, are inadmissible for the purpose of impeaching it. In a certain sense this is doubtless true. As a mere matter of impeaching the will, they are hearsay and inadmissible. They are not like statements of an ancestor in derogation of title or elimination of estate, which, being declarations against interest, are admissible against the heir, for there is no adverse interest in a devisor against the will or the devisee. They are more like declarations of a grantor, after grant, in limitation of his grant, and are strictly hearsay. Thus, if a testator, after executing a will, should say that the will was forced from him, or that it was executed against his will, and through undue influence, such statement, of itself, would be hearsay and inadmissible. . . .

"But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence. . . . Therefore where, as in a case like this, the circumstances attending the execution raise a doubt as to the mental strength of the testatrix, evidence that the disposition of the property runs along the line of her established friendships and previously-expressed intentions tends strongly against the idea of any undue influence; while evidence that it is contrary to such friendships and intentions makes in favor of improper influences. The testimony of her declarations shows a state of mind unfriendly to one of the principal devisees, and his letters to her indicate a mutual understanding of this estrangement and ill-will. Such an estrangement is out of harmony with the recognition in the will."[19]

19—Compare the authorities cited in W., § 1738, note 4.

WATERMAN v. WHITNEY (1854).

11 N. Y. 157.

Probate of a will, contested on the grounds both of mental unsoundness and of undue influence. After several witnesses had been called and examined on the part of the defendants, to prove the mental
357 capacity of the testator, all of whom had testified to facts tending to show that the mind and the memory of testator, who had been a man of vigorous intellect, were impaired at and previous to the time of the execution of the will, and that he had not mental capacity to make a will, the defendants called one Emory as a witness, by whom they offered to prove that the testator, after the execution of the will, had stated to the witness how he had disposed of his property in his will, which was in a manner entirely different from the actual disposition of it by the will in question. This evidence was objected to; the court sustained the objection, and the defendants' counsel excepted.

SELDEN, J.: "The mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. It is abundantly settled that upon either of these questions, the declarations of the testator, made at or before the time of the execution of the will, are competent evidence. The only doubt which exists on the subject is whether declarations made subsequent thereto may also be received. . . . The insanity or imbecility of the testator subsequent to making the will may be proved, in connection with other evidence, with a view to its reflex influence upon the question of his condition at the time of executing the will. . . . Here the offer was to prove declarations of the testator, stating that contents of the will to be entirely different from what they were in fact; and these declarations were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of the will. If evidence of the mental condition of the testator after the execution of the will is admissible in any case, as to his capacity when the will was executed (and the competency of such proof seems to be sustained by many authorities and contradicted by none); then it is clear that the testimony offered here should have been admitted. . . . There is no conflict between the doctrine here advanced in regard to the admissibility of the species of evidence in question, and the rule before adverted to, which excludes it when the issue is as to the revocation of a will. The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition. To receive evidence of subsequent declarations in the former case, would be attended with all the dangers which could grow out of changes of purpose, or of external motives operating upon an intelli-

gent mind. No such dangers would attend the evidence upon inquiries in relation to the sanity or capacity of the testator."[20]

12. SPONTANEOUS EXCLAMATIONS.

THOMPSON v. TREVANION (1693).

Skinner 402.

Action for assault and battery upon the wife of the plaintiff, *Lord* HOLT "allowed that what the wife said immediate upon the hurt received and before that she had time to devise or contrive anything for
358 her own advantage, might be given in evidence."[21]

INSURANCE COMPANY v. MOSLEY (1869).

8 Wall. 397.

SWAYNE, J.: "This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley against
359 loss of life, or personal injury by an accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in assumpsit. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff recovered. During the trial a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall down stairs in the night, or from natural causes. The defendant in error was called as a witness in her own behalf, and testified, 'that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; . . . she noticed that his voice trembled; he complained of his head, and appeared to be faint and in

20—Compare the authorities cited in W., §§ 228, 229, 1740; and No. 38, *ante*.

21—*Aveson* v. *Kinnaird*, 6 East 193 (1805); *Counsel:* "Declarations by the wife upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer." *Ellenborough*, L. C. J.: "It is not so clear that her declarations made at the time would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence; though not if it were a collateral declaration of some matter which happened at another time"; citing Thompson v. Trevanion.

R. v. *Foster*, 6 C. & P. 325 (1834); manslaughter by driving a cabriolet over a person; a statement made by the deceased, to one who did not see the accident but immediately afterward heard the deceased groan and went up and asked what was the matter, was admitted; *Park*, J.: "It was the best possible testimony that under the circumstances can be adduced to show what it was that had knocked the deceased down"; citing Aveson v. Kinnaird.

great pain.' To the admission of all that part of the testimony which relates to the declarations of the assured, about his falling down stairs, and the injuries he received by the fall, the counsel of the defendants objected. The court overruled the objection, and the defendants excepted. William H. Mosley, son of the assured, testified, in behalf of the plaintiff 'that he slept in the lower part of the building occupied by his father; that about 12 o'clock of the night before mentioned *he saw his father lying with his head on the counter,* and asked him what was the matter; *he replied that he had fallen down the back stairs and hurt himself very badly.*' The defendants objected to both the question and answer.

This statement presents the questions. . . . They are, whether the court erred in admitting the declarations of the assured, as to his bodily injuries and pains, and whether it was error to admit such declarations to prove that he had fallen down the stairs. It is to be remarked that the declarations of the former class all related to present existing facts at the time they were made. Those of the latter class were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife upon his reaching it. . . . It is not easy to distinguish [the case of Com. v. Pike, 3 Cush. 181] and that of The King v. Foster, in principle, from the case before us, as regards the point under consideration. In Aveson v. Kinnaird, it was said by Lord Ellenborough that the declarations were admitted in the case in Skinner, because they were a part of the *res gestæ*. To bring such declarations within the principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is, by no means, of universal application. . . . Here the principal fact is the bodily injury. The *res gestæ* are statements of the cause made by the assured almost contemporaneously with its occurrence and those relating to the consequences made while the latter subsisted and were in progress. . . . Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. . . . In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned."[1]

1—*Lacombe,* J., in *U. S.* v. *King,* 34 Fed. R. 314 (1888), charging the jury: "There is a principle in the law of evidence which is known as *'res gestae';* that is, the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have. . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth, forced out against his will or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say.

Bleckley, C. J., in *Travelers' Ins. Co.* v. *Sheppard,* 85 Ga. 751, 776, 12 S. E. 18 (1890): "There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech

(C) THE HEARSAY RULE NOT APPLICABLE.[2]

MILNE & SEVILLE v. LEISLER (1862).

7 H. & N. 786.

TROVER for 3000 pieces of calico, shirtings, &c. Pleas (inter alia), Not guilty, and that the goods were not the plaintiffs'. Issues thereon.

360 The plaintiffs, Messrs. Milne and Seville, were cotton spinners at Oldham, and the defendant was a shipping merchant carrying on business at Manchester. According to the statement of the plaintiff's witnesses, on the 16th May, 1861, Francis Atkin, who carried on business at Manchester under the name of Atkin and Company, went to the warehouse of the plaintiffs at Manchester to purchase some "shirtings." The plaintiff's salesman remarked that he was a stranger, whereupon Atkin said, "I am not buying for myself. I will give you the house, if you prefer it, that I am buying for, and references respecting myself."

or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declarations must be the utterance of human nature, of the *genus homo*, rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be sufficient sanction for the speech of man as such,—man, distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy."

Shelby, in *Jack* v. *Mutual R. F. Life Ass'n*, 51 C. C. A. 36, 113 Fed. 49 (1902), admitting statements made by an insured after being poisoned and just before his death: "While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time, they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the *res gestae* would extend over a day, or a week, or a month."

Compare the authorities cited in W., § 1750.

2—Professor *James Bradley Thayer*, in XV Amer. Law. Rev. 5, 81 (1881): "If it be true, as it seems to be, that the phrase, [*res gestae*] first came into use in evidence near the end of the last century, one would like to know what started the use of it just then. That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its 'convenient obscurity.' . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term *res gesta*,— . . . which was a foreign term, a litle vague in its application, and yet in some applications of it precise,—they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one —some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."

Atkin subsequently wrote the following order, having previously given the names of the three persons mentioned in it as referees. The words in italics were afterwards inserted by the plaintiff Seville:—"Order from F. Atkin and Company, 15, New Cannon Street [for Grant, Murdoch and Company, Liverpool], to Messrs. Milne, Seville and Company, 2000 pieces [describing them by trade marks], 2000 other [describing them], and 3000 [describing them], gold. To be completed in 4 to 6 weeks. F. Atkin and Company, 2 per cent. 14 days, or ½ per cent. 30 days. F. Burton, of James Burton and Son; James Leach and Company; Lord, of E. L. Gault, 29, Booth St. [*J. C. Bond, of J. H. Littledale, Liverpool*]." Atkin wanted to have the goods immediately, but the salesman refused until he had consulted his principals. On the following day, the plaintiff, Seville, was informed by the salesman of what had taken place between him and Atkin; whereupon Seville made personal inquiries of the above-named referees, and according to his evidence the result was that he "determined not to trust Atkin with the goods." A message was then sent to Atkin to meet the plaintiffs on the exchange in the afternoon. The salesman first met Atkin there, and told him that Seville required to have the name of the person for whom he was buying the goods. Atkin said he would give him the name, and handed to him an envelope with "Grant, Murdoch and Co.," written upon it. The plaintiff, Seville, then came, and the salesman gave him the envelope and introduced Atkin to him. Seville then said aloud, "Grant, Murdoch and Company; are those the parties?" Atkin replied "Yes." Seville then observed, "This firm are strangers to me, and before I can trust them with the goods I must have some reference, and know something about them." Atkin said he could give a respectable reference, and he gave the name "J. C. Bond, of J. H. Littledale and Company." Seville then wrote the name in pencil on the envelope, and said he would write to Liverpool and make the necessary inquiries, and if the answer was satisfactory the goods would be delivered. Atkin pressed to have some of the goods delivered immediately, to enable him to get them from the bleachers before the Whitsuntide holidays, and he said that he would send the money before the 28th of that month, and that the references would be all right. Seville thereupon consented to let Atkin have a portion of the goods; and, on his return to the warehouse, Seville inserted in the above order the words in italics. 2500 pieces of the shirtings were delivered to Atkin the same evening, and 500 the next morning. An invoice was sent with them headed "Grant, Murdoch and Company, per F. Atkin."

In the course of Seville's examination, the plaintiff's counsel proposed to give in evidence a letter which Seville said he wrote on the 17th after his return to the warehouse, to Messrs. Francis and Corner, the plaintiffs' brokers in Liverpool. The defendant's counsel objected that the letter was not admissible in evidence, but Wilde, B., overruled the objection and received it. The letter was as follows:—

"Manchester, 17th May, 1561.

"Gentlemen,

"We wish you to call at J. H. Littledale and Company's, and see J. C. Bond, and inquire as to the trustworthiness of Messrs. Grant, Murdoch and Company, of your town; and also of F. Atkin and Company, of this city, who is making a rather large purchase of goods for the above party, and who refers us to Mr. Bond. Write by return directed to the Mill. "Yours, &c.,

"Messrs. Francis and Co." "J. Seville."

It subsequently appeared that Grant, Murdoch and Company had no knowledge whatever of the transaction, and that Atkin sent the goods to the defendant, who had previously undertaken to consign them to Singapore on Atkin's account, and had advanced him 857*l.* upon them. Atkins was afterwards declared bankrupt.

The case on the part of the defendant was that he had bona fide advanced the money to Atkin, who had purchased the goods on his own account: that Atkin had given the name of Grant, Murdoch and Company as the shippers of the goods.

Martin, B., left it to the jury to say whether they believed the witnesses on the part of the plaintiffs or the defendant. If the plaintiffs intended to sell the goods to Grant, Murdoch and Company, they were entitled to recover, because Grant, Murdoch and Company never did in fact buy them, so that there was no contract or sale at all. If, on the other hand Atkin bought the goods on his own account, and they were sold by the plaintiffs to him, though the sale might have been avoided on the ground of fraud, yet as the plaintiffs had not elected to do so, Atkin, or any person to whom he sold or pledged the goods, would have a valid title to them, and the defendant would be entitled to the verdict. The learned Judge read the letter of the 17th of May, and observed that if it was a genuine letter written at the time stated, it seemed to establish the plaintiff's case. The jury having found a verdict for the plaintiffs.

Edward James, in last Michelmas Term, obtained a rule nisi for a new trial, on the ground of the improper reception in evidence of the letter of the 17th of May.

Edward James and *Aspland,* in support of the rule:—"First, the letter was not admissible in evidence. The plaintiffs were bound to prove that the goods were sold on the credit of Grant, Murdoch and Company. Now, if the reasoning on the other side be correct, the plaintiffs might prove that fact by the production of their books in which they had debited Grant, Murdoch and Company with the amount of the goods; for the entry would be an act done at the time of the sale and would show an impression on the mind of the plaintiffs that the goods were purchased for Grant, Murdoch and Company. But their books would clearly not be admissible for that purpose. (Wilde, B.: "Suppose a witness said, 'I saw one of the plaintiffs when he was leaving the exchange, and he

told me that they had just sold 2000*l.* worth of goods to Grant, Murdoch and Company, would that be admissible?") It would be no more admissible than if the plaintiffs had publicly proclaimed upon the exchange that they had sold certain goods to a certain person. (POLLOCK, C .B.: "Suppose the plaintiffs had gone immediately after the sale to their warehouse, and ordered the removal of the goods to another part of it, with the view of being delivered to Grant, Murdoch and Company, would not evidence of that fact be admissible?") As against the plaintiffs any declaration made or act done at the time of the sale would be evidence, but they cannot by their conduct, make evidence in their favour. (WILDE, B.: "Suppose one of the plaintiffs had said, 'I know we sold the goods to Grant, Murdoch and Company, because at the time of the sale I told our warehouseman to mark the goods for them.'") That would not be evidence for the plaintiffs. This letter was no part of the res gestæ."

POLLOCK, C. B.: "If a man on leaving his counting-house said to his servant 'I have just sold so and so,' that would not be evidence of the sale. Here, however, . . . this letter, being part of the transaction of a reference made in pursuance of the direction of the party purchasing, was admissible". WILDE, B.: "It seems to me that the case is the same as if the plaintiff, Seville, had himself made the inquiry, and that it makes no difference whether he directed another person to inquire or himself wrote to Bond. Then would the fact that the plaintiff, Seville, wrote to Bond, and received a certain character, be admissible? I think it would, as part of the res gestæ. I do not think its admissibility could be supported on the ground suggested by the plaintiff's counsel, viz., that it was something which the plaintiffs did when they had no interest to deceive. . . . If the evidence were admissible on that ground, everything a man said on the day when he made a bargain, and still more, everything he did, would be admissible. It seems to me that would be very dangerous ground. . . . The real ground is that this was an inquiry made by the direction of the plaintiff in pursuance of an authority from Atkin [the defendant's agent], and therefore was part of the *res gestæ*."[3]

W. D. EVANS, *Notes to Pothier on Obligations*, II, 242 (1806): "Speech is a mode of action; . . . and I conceive that the distinction between the cases in which the immediate action of speech fur-
361 nishes a material indication with respect to the object of the inquiry, and those in which it is a mere act of narration, will in most cases

3—Mr. *Gaston* (afterwards Judge), in *Cherry* v. *Slade*, 2 Hawks 400, 404 (1823), arguing *pro querente* against declarations of residence: "It is sometimes said that there is an exception when words are the *res gestae* or part of the *res gestae*. But this seems not to be accurate. The words are then received, not as evidence of the *truth* of what was declared, but because the speaking of the words *is the fact*, or part of the fact, to be investigated. There may be a controversy whether A. B. at a certain time spoke certain words, and those who heard him are of course receiveu to prove the fact. The words spoken concurrently with an act done are often a part of the act, and give it a precise and peculiar character, and therefore must be testified,—not to show that the words spoken are true, but to show that they

furnish the proper principle. . . . Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best determined by the expressions accompanying them. Wherever, therefore, the demeanor of a person at a given time becomes the object of inquiry, his expressions, as constituting a part of that demeanor, and as indicating his present intent and disposition, cannot properly be rejected in evidence as irrelevant. . . . This proposition [that a declaration accompanied by an act is admissible] is only correct where the expressions are demonstrative of the nature of the act itself."

JEREMY BENTHAM, *Principles of Morals and Legislation* (1780), *c. XVIII, par. XXXV, note:* "What is meant by payment is always an act of investitive power, as above explained,—an expression of an act
362 of the will, and not a physical act; it is an act exercised with relation indeed *to* the thing said to be paid, but not in a physical sense exercised *upon* it. A man who owes you ten pounds takes up a handful of silver to that amount and lays it down at a table on which you are sitting. If then, by words or gestures or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money and do with it as you please, he is said to have paid you. But if the case was that he laid it down, not for that purpose but for some other—for instance, to count and examine it, meaning to take it up again himself or leave it for somebody else—he has *not* paid you. Yet the physical acts exercised upon the pieces of money in question are in both cases the same. Till he does express a will to that purport, . . . [there is no payment]."

WEBB v. RICHARDSON (1869).

42 Vt. 465, 472.

Trespass *q. c. f.*, the issue being as to the title to a certain lot 64, except the north 20 acres.

PECK, J.: "The Court properly admitted proof of the declara-
363 tions of Reuben Hawkins, made while working on lot sixty-four to the effect that he called it his 'possession lot,' and that he was claiming and getting it by possession. But the Court was in error in excluding 'evidence to show that at other times, prior to 1822, the said Hawkins said the same things when not on lot sixty-four, but at his house and in sight of it, and pointing it out.' To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts

were in fact spoken. For example: Did A commit an assault on B? What he said when he laid his hands on B will show whether it was an angry or friendly act. Did the agent of defendant make a certain representation in the course of a bargain? If so, that representation was an ingredient in the bargain."

Compare the authorities cited in W., § 1770.

of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy, necessary to constitute a continuous possession, depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterward be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken. This principle is tersely stated in the civil law, thus: a man may retain possession by intention alone, yet this is not sufficient for the acquisition of possession. . . . If the admissibility of such declarations is put the ground of declarations constituting part of the *res gestæ,* they are admissible, as the *res gestæ* is not confined to a particular act of occupancy done upon the premises, but is the continual possession, which includes the successive acts of occupancy. Since a party who has once commenced a possession of land, by actual entry and acts of occupancy upon it, may continue to possess it during intervals when not upon it, he may claim it during such intervals as well as when actually upon the land doing acts of possession; and the fact of his making such claim is provable by evidence of his declarations made at the time, in the same manner and to the same effect as if made while on the land, doing an act of possession. Such declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof."[4]

TILTON v. BEECHER (1875).

Abbott's Rep. (N. Y.) I, 800.

Action for criminal conversation. With reference to the plaintiff's having made inconsistent statements or admissions of the falsity of his claim, by stifling the matter when first publicly in-
364 vestigated, it was desired to show the true significance of his conduct in handing to his agent, Mr. Moulton, a statement to be given by the agent to the investigating committee, appointed by the church to which the parties belonged. Mr. *Fullerton,* for the plaintiff, to the witness, Mr. Moulton: "What did he [the plaintiff] say in regard to it at

4—*Manning,* J., in *Cooper* v. *State,* 63 Ala. 80 (1879): "What a person says that is explanatory of an equivocal or ambiguous act which he is then doing or situation which he is then occupying—as that of a person in possession of property—may be proved as *res gestae,* a part of the thing then going on, to elucidate and define the character of such equivocal act or situation. Words so connected with and illustrative of it are considered as appertaining to the act or situation, and, like expression on the human face, as indicating character,—the character of the act or situation which they are related to and are blended with. This is the central idea of the doctrine respecting what is called *res gestae.*"

Compare the authorities cited in W., §§ 1778, 1779.

the time he gave it to you? [Objected to.] . . . If I hand your Honor a certain paper, with a request to do a certain thing with it, for a certain purpose, is not that direction evidence?" Mr. *Beach,* for the plaintiff: "Let me put an illustration to your Honor. . . . Suppose Mr. Evarts comes to me and delivers a blow in my face, and at the instant of delivering that blow he accuses me of having injured him in some form; he gives the motives and the purpose with which he delivers that act; can that act be proved against Mr. Evarts, without permitting him to give the declaration accompanying the act?" Mr. *Evarts,* for the defendant: "That is a spoken act. That is not hearsay. It is a part of the blow; it is a spoken act. Some confusion, no doubt arises in lawyers' discussions about hearsay evidence that comes by word of mouth in connection with that act; but your Honor is familiar with the distinction that our learned friend has given. . . . Now if he [Mr. Tilton] gave instructions to take that paper and lay it before the council, or carry it to Mr. Beecher, that is a part of the act of delivering it to him. But this question is large enough to draw out, and so I suppose is intended to draw out, a larger line of hearsay evidence, to wit, conversations between Mr. Moulton and Mr. Tilton, with which Mr. Beecher cannot be affected"; Judge NEILSON: "That distinction must be observed."[5]

FABRIGAS v. MOSTYN (1773).

20 How. St. Tr. 137.

Action for false imprisonment by the Governor of Minorca; defence, that the plaintiff excited sedition and riot. The reasonableness of the governor's apprehension of riot came into issue; the aid-de-camp
365 to the governor testified that a native magistrate came to him to report that "Fabrigas said he would come with a mob . . . and they would see better days tomorrow". Mr. *Peckham,* for the defence: "You need not mention what the mustastaph told you; that is not regular". Mr. J. GOULD: "I should be glad to know how the Governor can be apprized of any danger unless it is by one or other of his officers informing him there is likely to be such and such a thing happen?" Mr. *Peckham:*

5—*Coltman,* J., in *Wright* v. *Tatham,* 7 A. & E. 361 (1837): "Where an act done is evidence *per se,* a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is in its own nature irrelevant to the issue and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible."

Hosmer, C. J., in *Enos* v. *Tuttle,* 3 Conn. 230 (1820), referring to declarations as to the purpose of giving a note: "[They were] well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction."

Holmes, C. J., in *Com.* v. *Chance,* 174 Mass. 245, 250, 54 N. E. 551 (1899); murder of R.; the fact that one Mrs. O'B. during a quarrel with her husband took two bullets from a closet and said, "The third one killed R.," was excluded: "The act of taking out the bullets needed no explanation; it is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved."

Compare the authorities cited in W., §§ 1773, 1775.

"Hearsay is no evidence . . ." Mr. J. GOULD: "We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the Governor". Mr. *Lee*, for the defence: "It is no evidence of the fact; if you mean it only as a report, we do not object."

PARNELL COMMISSION'S PROCEEDINGS (1888).

11th, 13th, 17th, 18th days, Times' Rep. p. 103, 179.

The Irish Land League and its leaders being charged with a conspiracy to encourage outrage and agrarian violence, and the general state of the country as to disquiet and apprehension being a part of the
366 issue, it was conceded that the fact of repeated complaints being made to the police and to employers by tenants and others was provable; in this process, testimony was proposed of employers as to reports made to them by herdsmen and others of injuries to cattle, etc., the reports being offered in verbal detail; to this Sir Charles *Russell* objected, for Mr. Parnell, as hearsay; the *Attorney-General*, in reply: "I would respectfully submit that my learned friend has forgotten the rule that the *res gestæ* may be proved, and if in the course of the proof of the facts it is shown that servants have made inquiries with regard to them and reported the result, those reports form part of the *res gestæ* for the purpose of ascertaining under what circumstances the occurrences took place." Sir C. *Russell:* "As regards the *res gestæ*, what is the *res?* That certain cattle were injured. How can it be part of the *res gestæ* that a man who was present, and saw the injury, afterwards made a statement to a third person of what he had seen? To say that this is part of the *res gestæ* is an entire misapprehension of the rule." . . . *President* HANNEN: "The *fact* that a particular report had been made by a person in discharge of his duty was admissible in evidence, not that the *contents* of that report should be taken as evidence of the facts to which it related. If the matter rested there, without there being any other evidence of the facts except that contained in the report, that could not be regarded as evidence of the facts by the Court. . . . There is a broad distinction between a thing being merely admissible in evidence and its being taken as proof of the facts alleged."[6]

6—*Doster*, C. J., in *State Bank* v. *Hutchinson*, 62 Kan. 9, 61 Pac. 443 (1900); action on a homestead mortgage; defence, duress of the wife by threats to prosecute the husband, communicated by the latter to the former: "A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. Counsel for plaintiff in error also contend against the admissibility of this testimony, upon the ground that it was hearsay in character. . . . Neither of these contentions is sound. There were three substantive litigated questions in the case—First, were threats made? And, if so, secondly, were they communicated to Mrs. Hutchinson? And, if so, thirdly, did they produce the claimed effect? As to the second of these as well as the first, the meritorious question was, had a verbal act been done? That is, had a communication been made? That act, if done, was not incidental or collateral in nature. It was one of the three principal litigated matters in the case, and, being such, the performance of the act was provable by the testimony of any one who, if competent, was a witness to it. The question was not whether

STATE v. FOX (1856).

25 N. J. L. 566, 602.

Murder. A witness for the prosecution testified to meeting the accused on the day of the murder, and proceeded to fix the time and place.

367 "It was between twenty and twenty-five minutes past ten o'clock when I reached home; I cannot fix the time by any other way than what my sister said; my sister remarked that I had been very quick, and that made me look at the clock." The counsel for the defendant here objected to the reception of the conversation of the said witness with her said sister as evidence in this cause, and moved the Court to overrule the same. The counsel for the State objected, and the Court thereupon admitted the said conversation in evidence, and refused to overrule the same. To the question, "When was your attention first called to the fact of meeting the man referred to by you," the witnessed answered: "My attention was first called to the matter by being sent for to Brunswick by Mr. Jenkins. I first saw it in the papers; I think it was the 'New York Daily Times;' I think this was the following Tuesday. I heard of it from a neighbor before I left Brunswick, but I did not know that I knew about the affair. . . . What I saw in the 'Times' called my attention to the fact of having been to Brunswick that day, and meeting that man, and I mentioned it." *Question:* "What particular feature in the affair did the neighbor call your attention to before you left New Brunswick?" *Answer:* "She said, perhaps the man I met on Thursday morning might have had something to do with it." The counsel for the defendant here objected to the reception, as evidence in this cause, of the said conversation of the said witness with the said neighbor, and the remark of the said neighbor to the said witness, and moved to overrule the same. To which the counsel for the State objected. The Court thereupon admitted the said conversation and remark in evidence.

GREEN, C. J.: "The evidence was not offered or admitted to prove the truth of the facts stated to the witness, but merely to show what it was that called the attention of the witness to a fact stated by her or that fixed the fact in her recollection. Whether the statement of the third person was true or false was perfectly immaterial. The fact that the communication was made, and not its truth or falsity, was the only material

Hutchinson's communication to his wife was truthful, but it was whether the communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay. . . . It is a general rule in the law of evidence that, when the inducing cause of the action of a person is the subject of inquiry, the information upon which he acted may be stated, although it consists of the speech of third persons. A familiar illustration of this rule is afforded in cases of defense against assaults. It is always admissible in such case to show the making of threats by those who overheard them, and their communication to the defendant, upon the strength of which he armed himself, and resisted the assault of his antagonist."

Compare the authorities cited in W., § 1789.

point. The conversations were not hearsay, within the proper meaning of the term."[7]

(D) HEARSAY RULE AS APPLIED TO COURT OFFICERS.

ALLEN v. ROSTAIN (1824).

11 S. & R. 362, 374.

Issue as to a partnership. The general reputation of the defendants as partners was declared admissible by the trial Court; though no testimony to that effect was in fact introduced. On appeal, the ruling
368 was held erroneous.

TILGHMAN, C. J.: "But the defendants' counsel contend, that there probably was an injury sustained in this instance, because, the jury having heard the Court's opinion, that general reputation was evidence, might have been influenced by their own knowledge of a general reputation in Pittsburgh, that the defendants were engaged in a general partnership. But we must not suppose that the jury acted illegally. They were sworn to determine according to the evidence; that is, the evidence as given upon oath, in open court. Although it was once held that a juror might determine upon facts within his own knowledge, not proved by his oath,[8] yet that opinion has long been reprobated, in consequence of the confusion and injustice that would result from it. The parties have a right to hear the evidence, that they may have an opportunity of cross-examining the witness, and contradicting him, if necessary, by other evidence."[9]

ANDERSON'S TRIAL (1680).

7 How. St. Tr. 811, 874.

Conviction for saying mass as a priest. The defendant, Marshal,having been asked after verdict whether he had anything to say, protested that the testimony to his confession of being a priest was insufficient. To
369 this the Court replied, by the RECORDER: "As for the first part, it is plain, to the satisfaction of everybody, that there hath been two suffi-

7—Compare the authorities cited in W., § 1791.

8—*Vaughan,* C. J. in *Bushel's Case,* 6 How. St. Tr. 999, 1010, Vaughan 135 (1670): "It is true, if the jury were to have no other evidence for the fact but what is deposed in court the judge might know their evidence. . . . But the evidence which the jury have of the fact is much other than that, for, 1, Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger; 2, They may have evidence from their own personal knowledge, by which they may be assured and sometimes are that what is deposed in court is absolutely false; . . . 3, The jury may know the witnesess to be stigmatized and infamous."

9—*Cal.* P. C. 1872, § 1120: "If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness

cient witnesses, upon whose testimony you are convicted; . . . And now, because I will put it out of all doubt, it is not the business nor the duty of the Court to give any evidence of any fact that they know of their own knowledge, unless they will be sworn for the purpose; for, though they do not know it in their own private consciences to be true, yet they are obliged to conceal their own knowledge, unless they will be sworn as witnesses. But now you are convicted, I must take the liberty to tell you, that at your last trial you did own yourself to be a priest. And I must put you in mind further of something which you may very well remember; when I detained you after your acquittal, and recommitted you when Sir G. Wakeman was discharged, I did then tell you, you have owned yourselves to be priests, I was bound to take notice of that confession of yours, and therefore obliged to detain you; such a token as that is may perhaps bring it to your memory."[10]

TILTON v. BEECHER (1875).

Abbott's Rep. (N. Y.) II, 902.

Criminal conversation. At an early stage of the controversy, before litigation, Mr. Benjamin F. Tracy had been called into consultation, as a friend, between the two parties; in the plaintiff's case on the trial,
370 some testimony had reflected on Mr. Tracy's share in the negotiations; and in his opening address for the defendant, Mr. Tracy at a certain point in his speech said: "My name has been dragged into this trial by the plaintiff and his counsel and his main witness, in a manner that leads me to make you a personal statement of my relations to this scandal"; and was proceeding to do so, when the following colloquy ensued: Mr. *Beach:* "Mr. Tracy, do you propose to be a witness to what you are about to state?" Mr. *Tracy:* "If necessary I do, sir." Mr. *Beach:* "I submit to your Honor, that the gentleman has no right to make a long written personal statement in his opening to the jury, which he does not propose to verify as a witness. It is not the office of an opening." *Judge* NELSON: "I presume that the counsel proposes to prove what he states in his opening. . . . At the same time he would be at liberty to prove it otherwise." Mr. *Porter:* "We propose to prove it, sir, as we choose, and by what evidence we will. The counsel cannot call upon us to specify the particular witness by which we propose to prove it; nor can he interrogate the counsel who is engaged in the opening of this case as to whether he is the party by whom the proof is to be made. That will depend upon subsequent developments in the case." Mr. *Beach:* "My point, sir, cannot be evaded or changed. I have made no

and examined in the presence of the parties."

Compare the authorities cited in W., § 1800, and Nos. 408, 637, *post.*

10—Compare the authorities cited in W., § 1805.

For the question whether the judge who testifies is thereby *disqualified to sit,* see *post,* No. 407. For the question of taking *judicial notice* from the bench, see *post,* No. 634.

objection to the counsel stating any fact which they propose to prove in this case, whether that fact, when proved, will go to his exculpation from the grave imputation which has been cast upon him in the course of this trial or not; if it is announced as a fact that he expects to prove upon the trial, I have no more to say. . . . What I do say is, sir, that when this gentleman, thus situated in this case, departs from the ordinary course of an opening and commences a part of his address with the preface that he will now make a personal explanation to this jury, that it is not in sense or in purpose a statement of facts which he expects to prove, it is the assumption of a right separate from the character of counsel to make a personal explanation and appeal to the jury, which, I submit to your Honor, is improper. That is all I object to, sir; and if this counsel, or any other counsel, will avow that Mr. Tracy or this defence intends to prove the facts or the circumstances which he now proposes to state, of course my voice is silenced, sir." Judge *Neilson:* "If it is a personal explanation, not to be followed up by proof—perhaps not in its nature susceptible of proof—then it should be omitted. I think we agree about that; the rule is very clear. . . ." Mr. *Porter:* "I evidently misunderstood my friend, from his last explanation. I unhesitatingly avow that the facts which Gen. Tracy proposes to present are facts which we do propose to prove." Mr. *Tracy:* "I shall endeavor, gentlemen, to state no fact in what I am about to say which will not be made plain to you by evidence which we shall introduce, or which will not be made sufficiently plain to you without further evidence, by the comments I may make upon the facts already in evidence."[11]

PEOPLE v. WELLS (1893).

100 Cal. 459, 34 Pac. 1078.

McFarland, J.: "The information charges the defendant, Wells, jointly with Ollie Hutchings, alias Grace Gilbert, with the crime of forgery. Wells was tried separately, was convicted, and appeals from
371 the judgment and from an order denying a new trial. . . . Upon cross-examination of appellant the prosecuting attorney asked him these questions: 'Where did you formerly reside? Do you know the Highland National Bank of Newberg, New York? Were you married to your present wife when you came here with her? Did you not admit in a letter to Mr. M. C. Belknap that in November, 1893, you forged your father-in-law's name to a note in New York?' To these questions counsel for appellant objected as incompetent, immaterial, irrelevant, and not in cross-examination; declared that they were unfair to appellant; and asked the court to instruct the district attorney not to ask any more such questions. The record merely shows that after discussion the objections were sustained. The first three of these questions are important mainly as leading up to the last one, the asking of which was utterly inexcusable

11—Compare the authorities cited in W., § 1807, and No. 409, *post.*

and reprehensible. . . . It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury; and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: 'As, "Well we know"; or "We could, an if we would"; or "If we list to speak"; or "There be, an if there might:"' This was an entirely unfair way to try the case; and the mischief was not averted because the Court properly sustained the objection (though we think it should have warned counsel against the course which he was taking) and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases, questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when Courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows and every judge and lawyer knows to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."[12]

12—Compare the authorities cited in W., § 1808.

TITLE IV.

PRECAUTIONARY (OR, PROPHYLACTIC) RULES.

[1]General Nature of these Rules. "Among the different sorts of rules of Auxiliary Probative Policy, this class is marked out by the special feature that they operate by applying to the evidence, in advance of its admission, some expedient calculated to supply an antidote or prophylactic for the supposed weakness or danger inherent in the evidence. The several rules of this sort thus are united by this common feature, in contrast with the four other classes of auxiliary rules.

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"These Precautionary (or, Prophylactic) Rules operate in one or both of two slightly different ways. The expedient which they apply serves either to *eliminate* the supposed danger by counteracting its influence in advance, or to furnish a means by which it can be *discovered* and other measures can be taken to counteract it at the trial. The Oath operates in the first way only, by setting against the witness' motives to falsify his fear of divine punishment and thus nullifying in advance the influence of the former. The Perjury-Penalty operates in the same way, merely substituting the fear of temporal punishment for the fear of divine punishment. The Publicity rule operates in both of the above ways, first, by subjecting the witness to the fear of the later consequences of public opinion and of a present exposure by interested bystanders, and, next, by providing the means of counteracting his possible falsities through the presence of those who can contradict him. The Sequestration of Witnesses operates partly in the first way, by preventing collusion, but chiefly in the second way, by furnishing a means of exposing that collusion if it has already taken place. The Notice of Evidence to the Opponent operates only in the second way, by furnishing the opponent, in advance of the trial, with knowledge of the proposed evidence, and by thus enabling him to prepare to expose false evidence; though perhaps there is also involved an effect of the first sort, in subjectively deterring the opponent from offering that which he knows can be shown false."

1—Quoted from W., § 1813.

SUB-TITLE I.

OATH.

LADY LISLE'S TRIAL (1685).

11 How. St. Tr. 325.

JEFFRIES, C. J., threatening a refractory witness: "Now mark what I say to you, friend . . . Thou hast a precious immortal soul, and there is nothing in the world equal to it in value. . . . Consider that the
373 Great God of Heaven and Earth, before whose tribunal thou and we and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance of thee for every falsehood thou tellest. I charge thee, therefore, as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretense whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth."[2]

OMICHUND v. BARKER[3] (1744).

Willes 538, 1 Atk. 45, 1 Wils. 84.

Several persons resident in the East Indies and professing the Gentoo religion, having been examined on oath administered according to the ceremonies of their religion under a commission sent there
374 from the Court of Chancery, it became a question whether those depositions could be read in evidence here; and the Lord Chancellor, conceiving it to be a question of considerable importance, desired the assistance of Lee, Lord Chief Justice, B. R., Willes, Lord Chief Justice, C. B., and the Lord Chief Baron Parker, who after hearing the case argued were unanimously of the opinion that the depositions ought to be read.

2—*Ashburn*, J., in *Clinton* v. *State*, 33 Oh. St. 33 (1877): "The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that he will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insures the utterance of truth."

3—A case of which Burke said in 1794 (Works, Little & Brown's ed., XI, 77): "one of the cases the most solemnly argued that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on the bench, both bench and bar being then supplied with men of the first form."

WILLES, C. J.: "As to the general question, Lord Coke has resolved it in the negative, Co. Lit. 6 b,—that an infidel cannot be a witness; and it is plain by this word 'infidel' he meant Jews as well as heathens, that is, all who did not believe the Christian religion. . . . Having now, I think, sufficiently shown that Lord Coke's rule is without foundation either in Scripture, reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country. And on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them.[4] . . .

"In order to obtain justice the plaintiff in this cause laid his case properly before the Court of Chancery, and prayed a commission to Calcutta; and the Court of Chancery, I think very rightly and with great justice, ordered a commission to go, and that the words 'on the Holy Evangelists' should be omitted, and the word 'solemnly' inserted in their room; and likewise very prudently directed that the commissioners should certify upon the return of the commission in what manner the oath was administered to the witnesses examined on the commission; and what religion they were of. The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in England, which fully answers the objection (if there was anything in it) that the form of the oath cannot be altered; and they certified that after the oath was read and interpreted to them, they touched the Bramin's hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the Gentoo religion, and in the same manner in which oaths are usually administered to persons who profess the Gentoo religion on their examination as witnesses in the Courts of justice erected by virtue of his Majesty's letters-patent at Calcutta; and they further certified that the witnesses so examined were all of the Gentoo religion. This certificate, I think, fully answers the objection that it does not appear that the witnesses believe a God, or that he will punish them if they swear falsely; which, as I have already said, I admit to be requisites absolutely necessary to qualify a person to take an oath. . . . Lord Stairs in his Institutes of the Laws of Scotland, p. 692, confirms this, where he says, 'It is the duty of Judges in taking the oaths of witnesses to do it in those forms that will most touch the conscience of the swearers according to their persuasion and custom; and though Quakers and

4—In another of the reports, his words are: "Though I am of opinion that infidels who believe a God and future rewards and punishments in the other world may be witnesses, yet I am as clearly of opinion that if they do not believe a God or future rewards and punishments, they ought not to be admitted as witnesses."

fanatics deviating from the common sentiments of mankind refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath.' . . . The form of oaths varies in countries according to different laws and constitutions, but the substance is the same in all. . . . It would be absurd for him to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath."

HARDWICKE, L. C. (approving a passage from Bishop Sanderson): "'*Juramentum,* saith he, *est affirmatio religioso.* All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood.' . . . The next thing . . . is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."[5]

JOSEPH CHITTY, *Criminal Law, 4th Amer. ed., I, 616* (1841): "The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand, and, **375** when that is done, to say to him, 'The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, So help you God!'; upon which the witness kisses the book."[6]

5—*Alderson,* B., in *Miller* v. *Salomons,* 7 Exch. 535, 558, 615 (1852): "Omichund v. Barker has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like." *Pollock,* C. B.: "It appears to me to have decided merely this,—that the common law of England agrees with the law of nations, that the form of an oath is to be accommodated to the religious persuasion which the swearer entertains." *Martin,* B.: "The doctrine laid down [in Omichund v. Barker] was that the essence of another oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood."

Walworth, J., in *People* v. *Matteson,* 2 Cow. 433 (1824): "I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or in other words, does the witness believe in the existence of a God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or in the world to come"?

Pearson, J., in *Shaw* v. *Moore,* 4 Jones L. 26 (1856): "There is no ground for making a distinction between the fear of punishment by the Supreme Being in this world and the fear of punishment in the world to come. Both are based upon the sense of religion. . . . The efficacy of the fear of punishment in either case depends upon the degree of belief as to the certainty of that punishment, so that there can be upon reason no ground for making a distinction. The rule of law which requires a religious sanction is satisfied in either case."

Compare the authorities cited in W., §§ 1817, 1818.

6—The usual form of words in civil cases differed slightly: "The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth; So help you God!"

BRADDON'S TRIAL (1684).

9 How. St. Tr. 1127, 1148.

Attorney General: "What age are you of?" *Witness:* "I am thirteen, my lord." *A. G.:* "Do you know what an oath is?" *W.:* "No." *L. C. J.* JEFFERIES: "Suppose you should tell a lie; do
376 you know who is the father of liars?" *W.:* "Yes." *L. C. J.:* "Who is it?" *W.:* "The devil." *L. C. J.:* "And if you should tell a lie, do you know what will become of you?" *W.:* "Yes." *L. C. J.:* "If you should call God to witness to a lie, what would become of you then?" *W.:* "I should go to hell-fire." *L. C. J.:* "That is a terrible thing;" and the child was admitted.[7]

STATUTES: *California,* Const. 1879, Art. I, § 4: "No person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief."

377 *Illinois,* Const. 1870, Art II, § 3: "No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations." Rev. St. 1874, c. 101, § 3: An oath may lawfully be administered "in the following form, to-wit: The person swearing shall, with his hand uplifted, swear by the everliving God, and shall not be compelled to lay the hand on or kiss the gospels." Ib., § 4: When "such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely, and truly declare and affirm."

7—*Campbell,* C. J., in *Hughes* v. *R. Co.,* 65 Mich. 10, 31 N. W. 605 (1887): "A child cannot testify unless capable of appreciating the obligation of his oath, if he takes an oath, or his affirmation if that is substituted. . . . He must be able to comprehend it; . . . disposed to tell the truth under some sense of obligation. . . . We are compelled to apply the law as we find it, until changed by legislation. But we are greatly impressed with the practical imperfection of the present rules. In France, and probably elsewhere, the Courts refuse to administer an oath to children of tender years, and allow them to be examined without anything more than suitable cautions, leaving their statements on direct and cross-examination to be taken for what they are worth. This seems to be a sensible proceeding, and is probably quite as efficacious as our present system and less likely to abuse. . . . It would be better, we think, to put their testimony on the more rational ground that it is calculated to be of some value, and capable under a proper examination of being reasonably well weighed for what it is worth."

England: 1885, St. 48 & 49 Vict. c. 69, § 4: on a charge of carnally knowing a girl under the age of consent, where the girl concerned "or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath," the child's testimony may be received without oath, if the Court believes that it "is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

Compare the authorities cited in W., § 1821; and the case of *R.* v. *Brasier, ante,* No. 61 (infant's capacity as a witness).

Massachusetts, Rev. L. 1902, c. 175, § 18: "Every person who declares that he has conscientious scruples against taking any oath shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the Court or magistrate on inquiry is satisfied of the truth of such declaration." Ib., § 19: "Every person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there are any such. Every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God may be received to affect his credibility as a witness."

United States, Federal Equity Rules, No. 91: "Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him."[8]

SUB-TITLE II.

PERJURY—PENALTY.

THOMAS STARKIE, *Evidence, 91* (1824). "The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course
378 of a regular proceeding, by an authorized person. For if the oath were extrajudicial, the witness could not be punished for committing perjury under that oath, and therefore one of the securities for truth which the law has provided would be wanting."[9]

SUB-TITLE III.

PUBLICITY.

Sir JOHN HAWLES, *Solicitor-General*, commenting on CORNISH'S TRIAL, in *11 How. St. Tr. 460* (about 1690): "The reason that all mat-
379 ters of law are, or ought to be, transacted publicly is that any person, unconcerned as well as concerned, may as *amicus curiæ* inform the Court better, if he thinks they are in error, that justice may

8—Compare the authorities cited in W., § 1828.

9—*Willes*, C. J., in *Omichund* v. *Barker*, Willes 538, 553 (1744): "When the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if [they do] they cannot be indicted for perjury because the fact was committed in another country. Those therefore who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses. And so there is an end of this objection."

be done; and the reason that all trials are public is that any person may inform in point of fact, though not subpoenaed, that truth may be discovered, in civil as well as in criminal cases. There is an invitation, to all persons who can inform the court concerning the matter to be tried, to come into the court, and they shall be heard."[10]

Sir WILLIAM BLACKSTONE, *Commentaries, III, 373* (1768): "This open examination of the witnesses, *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."

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SUB-TITLE IV.

SEPARATION OF WITNESSES.

THE HISTORY OF SUSANNA: "[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly to be tried;] and the elders said: 'As we walked in the garden [of Joachim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . [But Daniel,] standing in the midst of them, said . . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel.' . . .

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10—Lord *Eldon,* in Twiss' Life of Eldon, 1, 300 (1797): "I prosecuted a ship at Bristol to condemnation for having on board smuggled goods to a great amount. George Rous, who was a good-natured friendly man, but violent in court, and particularly as counsel for smugglers, raved in this case and swore that I had contrived to have these goods put on board in order to condemn the ship, whilst the captain had gone ashore to see a wife whom he tenderly loved and his children whom he was extremely fond of, at the end of a very long voyage in which he had been absent from them. This was all coinage. But it was put a stop to by a sailor in court starting up and exclaiming, 'Well, that's a good one! That's a good fetch! Why, my mistress and her children were aboard ship with our captain during the whole of the voyage!'"

Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them.' So when they were put asunder one from another, he called one of them, and said unto him:[2] 'Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well; thou hast lied against thine own head.' . . . So he put him aside, and commanded to bring the other, and said unto him,[3] . . . 'Now therefore tell me, under what tree didst thou take them companying together?" who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well; thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."[11]

LAUGHLIN v. STATE (1849).

18 Oh. 99, 102.

The plaintiff in error was indicted for rape, and for an assault with intent to commit a rape, and convicted and sentenced upon the latter charge. . . . Before the examination of the witnesses had been
382 commenced, the counsel for the defendant requested that the witnesses for the State should be examined out of the hearing of each other; and that they should be ordered to withdraw from the court

11—*McClellan*, C. J., in *Louisville & N. R. Co.* v. *York*, 128 Ala. 305, 30 So. 676 (1902): "The purpose to be subserved in putting witnesses under the rule is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses; and it is legitimate argument against the veracity or fairness of a witness to say that his testimony has been developed along the lines of his inclination in the case by the opportunities he has had, from hearing the other witnesses, to refute them or to amplify his own statements to meet the exigencies of the trial."

Hanley, J., in *Golden* v. *State*, 19 Ark. 590, 598 (1858): "The course in such case is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined."

California: P. C. 1872, § 867, a committing magistrate "may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined"; ib. § 868: he "must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody"; C. C. P. 1872, § 2043: "If either party requires it, the judge may exclude from the court-room any witness of the adverse party"; amended by the Commissioners in 1901, by adding: "but a party to the action or proceeding cannot be so excluded, and if a corporation is a party thereto, it is entitled to the presence of one of its officers, to be designated by its attorney."

Compare the authorities cited in W., §§ 1839, 1841.

room, and the order was made as requested. Notwithstanding this order, Robert Johnson, the father of the girl, whose name was not on the subpœna as a witness, but who was sworn with the other witnesses before they retired, and who remained in court, seated by the counsel for the State, and heard the testimony of his daughter and the other witnesses who were examined, was offered as a witness on the part of the State. The counsel for the defendant objected to his being examined, he having, contrary to the order of the court, remained within the bar. When inquired of by the Court why he disobeyed the order in remaining within the bar, he stated that he heard the order of the Court, but did not understand the meaning of it. The Court overruled the objection, and Johnson was examined as a witness.

Caldwell, J.: "The most important question arising in the case, and the only one that the counsel for the accused have relied on in argument, arises on the admission of Robert Johnson, the father of the girl, as a witness.

"This is a question of no little delicacy. It relates exclusively to the fairness of proceeding on the trial. Much may be said on both sides of the case, and on part of the accused in this case, many considerations meriting a careful examination have been presented. On the one side, where the order of the Court has been made for the witnesses to retire, and be examined out of the hearing of each other, if a witness remains in violation of the order, it furnishes strong ground of suspicion that the witness is not fairly disposed in the cause, and that he wishes to avail himself of the testimony of the other witnesses, in order to make his statements as potent as possible, by making them correspond with theirs. Where, too, a party in interest in the cause, after the order has been made, should procure his witnesses to be present in violation of such order, it is equally suspicious that he intends a similar degree of wrong and unfairness. On the other hand, when we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify,—these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause. We do not find that any rule has been established, in this country, that would justify this court, as a court of errors, in deciding that it was error in an inferior court to admit a witnesses who had violated the order, and heard the other witnesses testify."[12]

12—Compare the authorities cited in W., § 1842.

SUB-TITLE V.

DISCOVERY OR NOTICE OF EVIDENCE TO THE OPPONENT BEFORE TRIAL.

Sir James Stephen, *History of the Criminal Law, I, 225, 398* (1883): "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in
383 which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warrant, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into Court to be tried. This is set in a strong light by the provisions of [1709, St. 7 Anne, c. 21, § 14, quoted *infra,* allowing a list of witnesses in treason]. . . . This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the State trials held under the Stuarts, it did not occur to the Legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favor that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offences should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder. . . . [The prisoner] was not allowed as a matter of right, but only as an occasional exceptional favor, . . . to see his [own] witnesses or put their evidence in order. When he came into Court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him."

Statutes: *Michigan,* Comp. L. 1897, § 11883: The foreman shall return to court or deliver to the prosecuting attorney "a list of all the witnesses sworn before the grand jury," when an indictment is
384 found. Ib., § 11893: The indictment, "with the names of the complainant and all the witnesses indorsed on the back thereof," is to be filed. Ib., § 11934: The prosecuting attorney, on filing an information, shall "indorse thereon the names of all the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the Court may by rule or otherwise prescribe, he shall also

endorse thereon the names of such other witnesses as shall then be known to him."

United States, St. 1790, April 30, § 29, Rev. St. 1878, § 1033: A list "of the witnesses to be produced on the trial for proving the indictment, stating the place of abode," is to be delivered "at least three entire days" before trial, for treason, and "at least two entire days" before, for other capital offenses.[13]

Sir James Wigram, *V. C., Discovery,* §§ *31, 32, 148* (1836): "Proposition I: It is the right, as a general rule, of a plaintiff in equity to examine the defendant as to all matters of fact which, being
385 well pleaded in the bill, are material to the proof of the plaintiff's case and which the defendant does not by his form of pleading admit. Proposition II: Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defense. With this (if a) qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which or the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence. . . . If it were now for the first time to be determined whether in the investigation of disputed facts truth would be best elicited by allowing each of the contending parties to know before the trial in what manner and by what evidence his adversary proposed to establish his own case, arguments of some weight might *a priori* be adduced in support of the affirmative of this important question. Experience, however, has shown —or, at least, Courts of justice in this country act upon the principle —that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend. And accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case and meeting that of his adversary without

13—*Douglass,* J., in *Gardner* v. *People,* 4 Ill. 83, 89 (1841): "The list of witnesses which is required to be furnished to the prisoner prior to the arraignment is to be composed of the witness endorsed on the indictment by the foreman of the grand jury. . . . The question is now presented whether the prosecuting attorney is to be confined to the list of witnesses endorsed on the back of the indictment. . . . If such a construction were placed upon this statute as would exclude all witnesses whose names were not endorsed on the indictment, many offenders would go unpunished, not on account of their own innocence, nor of the negligence of the State's attorney, but by a defect in the law itself, or a narrow and illiberal construction of it not sanctioned by reason or justice. We think, therefore, that the prosecution is not confined to the list of witnesses endorsed on the indictment and furnished previous to arraignment; but that the Circuit Court, in the exercise of a sound discretion, and having a strict and impartial regard to the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require."

Compare the authorities cited in W., §§ 1850-1855.

knowing beforehand by what evidence the case of his adversary is to be supported or his own opposed."

COMBE v. LONDON (1840).

4 Y. & C. 139, 155.

ABINGER, L. C. B.: "A party has a right to file a bill of discovery for the purpose of obtaining such facts as may tend to prove his case;
386 and if those facts are either in possession of the other party, or, if they consist of documents in possession of the other party, in which he either has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery, in order to aid him in law or in equity, to exhibit those documents in evidence, or compel a statement of those facts. But does it not rest there? Has he a right, as against the defendant, to discover the defendant's case? Does any case go the length of that? Sometimes the cases trench very much on those limits? but if you take the question as a matter of principle, has a man a right, or is it consistent with common justice that he should file a bill to discover the defendant's case? The ground on which he files his bill, is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant, 'Tell me what your title is—tell me what your case it—tell me how you mean to prove it—tell me the evidence you have to support it—disclose the documents you mean to make use of in support of it—tell me all these things, that I may find a flaw in your title.' Surely that is not the principle of a bill of discovery. And if you look at the cases, you will find, however they may occasionally trench on the line of distinction—you will find that is the great line of distinction."

COMMON LAW PRACTICE COMMISSIONERS, *Second Report, 35* (1853): "As to facts within the knowledge of an adverse party, the Courts of
387 law possess no power of compelling discovery; except, indeed, that by the recent change [of 1851] in the law each party may be called as a witness [on the trial] by his opponent; but it is obvious that this course will only be resorted to in the most desperate emergency. It cannot reasonably be expected that a party ignorant of what his adversary may be prepared to swear, shall put so adverse and interested a witness into the box, without having had any opportunity of previous interrogation. For the purpose of discovery, previous to the trial, whether of facts or of documents, the party desiring is has now no alternative but to resort to a court of equity. We have no hesitation in saying that this is altogether wrong. We assert as an indisputable proposition, that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction. . . . This opportunity for examination prior to the trial will be useful, not only for the purpose of discovering facts exclusively in the knowledge of the oppo-

site party, but as the means of sparing the trouble and expense of producing evidence of facts which he may be prepared to admit; while, on the other hand, it will tend to make more clearly manifest the matters which are alone in contest between the parties. In some cases, such a preliminary discovery may even altogether obviate the necessity of any trial, by compelling the one party or the other to admit facts decisive of the case upon the merits, so as to show that proceeding to trial would be a mere abuse of the forms of justice. A power of preliminary discovery would likewise tend to expose the motives of groundless actions brought for vexation, and of unfounded defences set up and persisted in for delay. It would, moreover, have a most wholesome effect in preventing false pleas from being put on the record; for as soon as the examination of the party had made manifest the falsehood of the plea, a judge might be applied to to disallow the pleading at the expense of the party pleading it. If the very existence of such a power had not the effect of preventing the necessity of its exercise, it would at least aid the Court in extirpating frivolous and improper litigation. We propose that either party in a cause shall be at liberty to deliver to the opposite party, provided such party would be liable to be called as a witness, or his attorney, written questions on the subjects on which discovery is sought; and to require such party, within a time to be fixed, to answer the questions in writing upon oath, sworn and filed in the same manner and under the same sanction, in case of falsehood, as an affidavit; and that the party omitting to answer within the prescribed time shall be subject to the consequences of a contempt of the court. But we by no means propose to confine the power of interrogating such adverse party to the written questions above referred to. We think that in many cases an opportunity should be afforded for oral examination. At the same time, care must be taken that the power of personal examination be not abused by being made a means of vexation and oppression, when used against weak or timid persons. We propose, therefore, not to leave it at the option of a party to demand an oral examination, but to give the court, or a judge, discretion, on the application of either party, in case of an insufficient answer to the written questions before referred to, or in any other case in which it may be made to appear essential to justice, to direct an oral examination of the other party before either a judge or a master of the court."[1]

STATUTES: *Illinois,* Rev. St. 1874, c. 51, § 6: "Any party to any civil action, suit or proceeding, may compel any adverse party or person for whose benefit such action, suit, or proceeding is brought, instituted, prosecuted, or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required,

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1—*Pound,* C., in *Ulrich* v. *McConaughey,* 63 Nebr. 10, 88 N. W. 150 (1901): "The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view, and have done away with most of those features which gave rise to that reproach."

in the same manner, and subject to the same rules, as other witnesses."

Massachusetts, Rev. L. 1902, c. 173, §§ 35, 57-63 (quoted *post,* No. 396).

New York, C. C. P. 1877, § 870: "The deposition of a party to an action pending in a court of record, or of a person who expects to be a party . . . may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial."

MR. JUSTICE DALY. *"Preparation for Trial," The Brief,* II, 299 (1900): "In preparing for the trial of your action, it may be necessary to take the deposition of the adverse party with the expectation of having to use it as evidence. The Code contemplates the use of the deposition upon the trial, and the examination is not allowed for the mere purpose of enabling the applicant to prepare for trial. The examination is in every case of very great benefit to the party applying for it, and for that reason is almost invariably resisted with vigor, the conflict giving rise to a vast amount of litigation, producing decisions not always easy to reconcile and not always adhered to. In my experience no remedy has been more warmly contested, and it is hardly possible to-day to make an application for it without a fatiguing study of a vast number of cases. The reason for this is due to the resistance naturally to be expected to an assumed inquisitorial investigation, which may disclose the case of an adversary and discover its weakness, and to the disposition of the Courts to limit the privilege of examination for fear of abuse. The remedy first made its appearance in our practice with the Code of Procedure in the middle of the century now drawing to a close. The language of the old Code 'No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed; nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter,' led the Courts at first to consider the examination as a mere substitute for the former bill of discovery and thus, logically, in administering the remedy, to hold that parties availing themselves of it were bound to conform as near as might be to the rules and practice governing bills of discovery. Under the present Code, in which the examination of a party before trial, at the instance of his adversary, the examination of a witness *de bene esse* and the taking of depositions for the perpetuation of testimony in anticipated litigations are all grouped in one article, it is held that the proceeding is purely statutory, to be governed by the provisions of the Code, and not to be controlled by the former practice. This clearing away of former restrictions did not, however, tend to diminish litigation upon the subject, and there is yet much to perplex the practitioner in the very fine distinctions which have been favored by the courts. The tendency of the courts is not yet toward liberality, in permitting examinations of parties at the instance of their adversaries, and a very wide discretion is exercised in determining whether the facts

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set forth in the appellant's affidavit show that the testimony is material and necessary. A perusal of the statute might reasonably lead to the conclusion that the Legislature intended to afford a very broad and general remedy; but a review of the great array of decisions upon the article would lead to the conviction that the Courts, in the conscientious discharge of duty, have made a deal of work and trouble for themselves which might have been avoided, without special injury, by a less conservative construction, by permitting the examination except where it is obviously intended to annoy and harass and by confining the examination strictly to the issues, or limiting it to particular matters as the statute expressly permits. . . . It is interesting to note that the Court of last resort in this State has expressed its fear of latitude leading to abuse with respect to one branch of the subject only, namely, that which relates to the examinations *before action brought* of a person who is expected to be made a party to it. . . . If the examination is allowed by the Court it need not be limited to the affirmative cause of action or defense of the party desiring the examination, but may be a general examination, the same as if it were had at the trial. . . . [The examination has been refused] where there is no proof that the facts are not as well known to the party seeking the examination as to the adversary whom he wishes to examine; where it is not shown that an examination of the adversary could not be had at the trial and it does not appear that an examination before trial is necessary or important; where it is made to appear that the examination is sought merely for the purpose of annoyance or delay; where the information sought can be obtained from records or documents; where it cannot be ascertained on what issue the party desires the examination or where a defendant sought to examine a plaintiff before service of a complaint in order to frame an answer; where it is not alleged that the facts exist which are sought to be proved by the examination; and, generally, where the Court is not satisfied that the examination of the adversary is either material or necessary. The instances under this head are too numerous to cite; and it may be suggested that each case will be judged upon its own facts and that the practitioner, in groping his way through the maze of adjudications on this division of the subject, will find common sense a not untrustworthy guide."[1]

RE STRACHAN.

L. R. [*1895*] *1 Ch. 439, 445.*

In the month of April, 1894, a petition for an inquiry as to the sanity of Horace Ward Strachan, an alleged lunatic, was presented by his brother James Arthur Strachan. Affidavits were filed in support
390 of the petition, and an order for an inquiry was made; but on the 13th of June, 1894, before the inquisition was concluded, the alleged lunatic died, and thereupon the proceedings in Lunacy came to an end.

1—Compare the authorities cited in W., § 1856.

In February and March, 1894, the alleged lunatic had made two wills in favour of Mrs. Elizabeth Sanford, neither of which contained any appointment of executors. After his death, the validity of these wills was disputed by his brother J. A. Strachan on the ground of insanity, undue influence, and defective execution; and, in July, 1894, J. A. Strachan brought an action in the Probate Division for the administration of his deceased brother's estate, upon the footing that he had died intestate. In this action, to which Mrs. Sanford was made Defendant, he sought to have it declared that these two wills had been made by his brother when insane, and were induced by her undue influence acting upon his brother in his then condition. Mrs. Sanford counter-claimed to have it declared that the two wills were valid, and that probate thereof might be granted. Notice of trial was given on the 27th of October, and on the 17th of November the Plaintiff (J. A. Strachan) made an affidavit of documents, in which he claimed privilege for certain documents in his possession, including drafts or copies of his petition in Lunacy, and of the affidavits filed by him in the lunacy in support of the petition. An application by Mrs. Sanford in the Probate action for the production of these documents by the Plaintiff was refused by Sir Francis Jeune on the 19th of November, 1894. . . . The 4th paragraph of the petition was as follows: "Your petitioner is desirous of inspecting and taking copies of and extracts from the petition affidavits and other proceedings in the matter of the supposed lunatic in order that she may ascertain what allegations of mental incapacity are intended to be made at the trial of the said Probate action, and that she may have an opportunity of rebutting them."

LINDLEY, L. J.: "In the present case, if inspection is allowed, Mrs. Sanford will see her adversary's hand, which she cannot do without the assistance of the Court; whilst, if inspection is refused, the Court will not confer on her opponent any advantage, which he has not already got. Mrs. Sanford has no right to this advantage, and I see no reason why she should have it. Her own petition shews that she does not want to see the documents in order to support her own case. She wants to see how her opponent hopes to prove his case, and what she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes. In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before the trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues, and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous. It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse."[2]

2—1887, *Post* v. *R Co.*, 144 Mass. 341, 348, 11 N. E. 540: "It is clear that Courts do not compel discovery from persons who sustain no other relation to the contem-

HENRY BROUGHAM, *Speech on the Courts of Common Law* (Feb. 7, 1828; Hans. Parl. Deb., 2d ser., §VIII, 188): "Whatever brings the parties to their senses as soon as possible, especially by giving each a clear view of his chance of success or failure, and, above all things, making him well acquainted with his adversary's case at the earliest possible moment, will always be for the interests of justice, of the parties themselves, and indeed, of all but the practitioners. It is the practitioners generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to. The seeming interest of two parties disposed to be litigious, in many cases appears to be different from the interests of justice, although their real interest, if strictly examined, will not unfrequently be found to be the same. Now, justice is embarrassed by the disingenuousness of conflicting parties; justice wants the cases of both to be fully and early stated; but both parties take care to inform each other as little as possible, and as late as possible, of their respective merits. One tells as much of his case as he thinks good for the furtherance of his claim, and the frustration of the enemy's—so does the other, only as much of his answer as may help him, without aiding his adversary; and the judge is oftentimes left to guess at the truth in the trick and conflict of the two. The interest of the Court of Justice being to make both parties come out with the whole of their case as early as possible, the law should never lend itself to their concealments. This remark extends to the proof as well as the statement of the case; an intimation of what the evidence is may often stop a cause at once. In Scotland, the law in this respect is better than ours, for no man can produce a written instrument on trial without having previously shown it to his adversary. For want of this salutary rule I have often seen the most useless litigation protracted for the sole benefit of practitioners. I was myself lately engaged in a cause, the circumstances of which will give the House an idea of the mischief. I was instructed not to show a certain receipt to the opposite party, as my client, the defendant, meant to nonsuit his adversary in great style, as he would call it. Well, the plaintiff, (an executor), stated his case, and called his witnesses to prove the debt. I did not take the trouble to cross-examine, which would have been quite unnecessary. Equally so was it to address the jury. I acknowledged the truth of all that had been sworn on the other side, but added that it was all useless, as I happened to have a receipt for the money, which had been paid to the testator. This, of course, put an end to the case. The sum sought to be recovered did not exceed twenty pounds, and the expenses could not have been less than a hundred."

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plated litigation, or to the subject of the suit, than that of witness; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendants."

BOLTON v. LIVERPOOL (1833).

1 Myl. & K. 88, 91.

THE plaintiffs, who were merchants and copartners in Liverpool, were defendants in an action, brought by the corporation, for the recovery of certain dues levied by the corporation upon the traders of that
392 town. The bill was filed for the purpose of obtaining a discovery from the corporation in aid of the plaintiff's defence to the action at law. The bill among other things charged that divers cases had been lately submitted to counsel, for their opinion, touching the right of the corporation to receive the tolls and duties, and from which, if produced, it would appear that the corporation had no such right, and that all such cases were then in the possession or power of the defendants; and it further charged that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings, relating to the matters contained in the bill; and by which, if produced, the truth of those matters would appear.

The defendants admitted that they had then, in their possession, certain grants, deeds, documents, and papers, relating to the matters aforesaid, and that they had in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents and papers. But the defendants said that many of such grants, deeds, and documents were the title deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had in the said schedule particularized and distinguished which of the said grants, deeds, and documents were the title deeds and documents evidencing the title of the corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents, and papers.

BROUGHAM, L. C.: "I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. . . . The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence.

How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. . . . He rests on the right which he has in common with all mankind to be exempt from dues and customs; and he says, 'Prove me liable if you can'. The corporation have certain documents which they say prove this liability. He cannot call for these documents merely because they may upon inspection be found not to prove his liability, and so help him and hurt his adversary whose title they are."

Wm. Tidd, *Practice, 9th ed., I, 586,* (1828): "Oyer of deeds, etc., is demandable by the defendant or by the plaintiff. If the plaintiff in his declaration neccessarily make a *profert in curia* of any deed, writ-
393 ing, letters of administration, or the like, the defendant may pray oyer of the deed, etc., and must have a copy delivered to him, if demanded, paying for the same at the rate of fourpence per sheet. And a defendant who prays oyer of a deed is entitled to a copy of the attestation and names of the witnesses, as well as of every other part of the deed. So likewise, if the defendant in his plea makes a necessary *profert in curia* of any deed, etc., the plaintiff may pray oyer, and shall have a copy at the like rate. And the party of whom oyer is demanded is bound to carry the deed to the adverse party. . . . Formerly all demands of oyer were made in court, where the deed is by intendment of law when it is pleaded with a *profert in curia;* and therefore, when oyer is craved, it is supposed to be of the Court, and not of the party; and the words *ei legitur in hæc verba,* etc., are the act of the Court. In practice, however, oyer is now usually demanded and granted by the attorneys."

GROENVELT v. BURRELL (1698).

1 Ld. Raym. 252.

The plaintiff was refused an inspection and copy of the records of the college of physicians, in an action against one of them for false
394 imprisonment, *Per Curiam:* "This record may be pleaded without a *profert in curia,* and therefore no oyer can be prayed for it, and therefore the defendants shall not be bound to give a copy, for it would be in effect to discover their evidence. And the plaintiff has no right in this record, therefore this case differs from the case of the public books of a corporation, for there the party has an interest. In the same manner, where there is a dispute between a lord and a copyholder, the copyholder shall see the rolls, because he has an interest in them."

Common Law Practice Commissioners, *Third Report, 45* (1831): "By law, no profert is required to be made and consequently no oyer can be demanded of any instrument, except private deeds, letters
395 testamentary, and letters of administration. If there are other cases, they are unfrequent and obscure. The following are consequently

excluded: records and public writings of whatever description, private writings under seal but not falling within the legal definition of deeds (for example, a sealed will or a sealed award), and private writings not under seal of whatever description; and even of private deeds a numerous class is excepted, viz., such as take effect either by livery of seisin or by operation of the statute of uses. . . . The whole of this practice appears to be too strict, too intricate, too prolix, and in some parts of it obscure and unsettled. It is strongly calculated to give rise to technical difficulty and formal objection, and tends in some other respects also to produce unnecessary delay and expense. The truth is that the law of profert and oyer was originally devised in reference to a state of things that no longer exists; being altogether founded on that method, now for so many ages obsolete, of oral pleading between litigants actually confronting each other in open court. . . . The present practice of profert and oyer, though in its present form chargeable with many defects, is in its principle of the highest importance. It is manifestly essential to the interests of justice that a party against whom his own written instrument or the instrument of another person is pleaded should have the means of inspection, and, if necessary, of procuring a copy before he is called upon to answer. He may wish to ascertain its genuineness, and, if genuine, whether it has sustained any material alteration since it was executed. He may wish to know the names of the subscribing witnesses and to ascertain from them what testimony they are prepared to give as to the circumstances under which it was executed. He may propose to found his defence upon some parts of the instrument which his adversary has not chosen to set forth and which may either show its invalidity in point of law or provide him with an answer in point of fact. . . . We can see no good reason why, in every case in which profert would be required of a bond or other deed, it should not also be made of any other instrument of whatever description, which is either alleged to be or which may be presumed to be in writing. Such an alteration of the law would prevent the delay, expense, and uncertainty which attends an application to the Court or a judge, and place the whole practice on this subject on a more simple and uniform as well as a more equitable footing."

STATUTES. *England*, 1851, St. 14 & 15 Vict. c. 99, § 6: Upon action pending, any judge may on application by either party "compel the op-
396 posing party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same or procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity". 1854, St. 17 & 18 Vict. c. 125,

§ 50: "Upon the application of either party to any cause or other civil proceeding in any of the superior courts upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, it shall be lawful for the court or judge to order" that the opponent answer as to such custody and as to the objection if any to production; and then "the Court or judge may make such further order thereon as shall be just."

Illinois, Rev. St. 1874, c. 51, § 9: Courts are empowered "in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue". Ib. c. 110, § 20: "It shall not be necessary in any pleading to make profert of the instrument alleged; but in any action or defence upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have oyer thereof and proceed thereon in the same manner as if profert had been properly made according to the common law."

Kansas, Gen. St. 1897, c. 95, § 380: Either party may demand of the opponent "an inspection and copy, or permission to take a copy, of a book or paper or document in his possession or under his control containing evidence relating to the merits of the action or defense therein"; the demand to be written and to specify particulars; on refusal within four days, the Court may on motion and notice order such inspection or copy, and on failure to comply with the order, may exclude the document or direct it to be presumed to be as alleged". Ib. § 381: Either party, if required, shall deliver to the other "a copy of any deed instrument or other writing whereon his action or defense is founded or which he intends to offer in evidence at the trial; on refusal, the party's original shall be excluded at the trial."

Massachusetts, Rev. L. 1902, c. 173, § 6: "Written instruments" shall be declared on, except insurance policies, by setting out a copy or the part relied on, or the legal effect; "if the whole contract is not set out, a copy of the original, as the Court may require, shall be filed upon motion of the defendant," and the copy may be made a part of the record as if oyer had been granted; "no profert or excuse therefor need be inserted in a declaration". Ib. § 35: "No party shall be required [in his pleading] to state evidence, or to disclose the means by which he intends to prove his cause". Ib. §§ 57-63: Interrogatories may be filed, after entry of action or answer, and before a trial on the merits, "for the discovery of facts and documents material to the support or defence of the action," to be answered on oath by the adverse party; documents containing "matters not pertinent to the subject of the action" may be protected from inspection; no party shall be obliged "to disclose his title to any property the title whereof is not material to the trial of the action in the course of which he is interrogated, or to dis-

close the names of the witnesses by whom or the manner in which he proposes to prove his own case."

New York, C. C. P. 1877, § 803: "A court of record, other than a justice's court in a city, has power to compel a party to an action pending therein to produce and discover, or to give to the other party an inspection and copy or permission to take a copy of a book document or other paper in his possession or under his control relating to the merits of the action or of the defence therein." Ib. §§ 804-809, 1914: Proceedings regulated; "the general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled," where not otherwise prescribed in this act; upon refusal to comply, a Court may dismiss a complaint or strike out an answer, etc., or bar a particular claim or defence, or, for refusal to allow inspection and copy, exclude the document or punish for contempt or both. 1895, Supreme Court Rules, Nos. 14-17: Applications for production under C. C. P. § 804, *supra,* may be made as follows: 1, by the plaintiff, for documents "which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant"; 2, by the defendant, for documents "which may be necessary to enable the defendant to answer any pleading of the plaintiff"; 3, by either party, on a showing that the document "is material to the decision of the action or special proceeding or some motion or application therein, or is competent evidence in the case or an inspection thereof is necessary to enable the party to prepare for trial."

United States, St. 1789, c. 20, § 15, Rev. St. 1878, c. 12, § 724: In trials at law, the U. S. courts may on motion 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"; on failure to produce, judgment of nonsuit or default may be given.[1]

REYNOLDS v. BURGESS SULPHITE FIBRE CO. (1902).

71 N. H. 332, 51 Atl. 1075.

Action by Elizabeth Reynolds, administratrix, against the Burgess Sulphite Fibre Company. . . . Bill in equity. The bill alleges that the plaintiff has commenced an action at law against the defendants
397 to recover damages for negligently causing the death of the plaintiff's intestate by furnishing him for use in his employment improper, unsuitable, and dangerous machinery; that on April 9, 1899, while the intestate was in the employ of the defendants, he was killed by falling against the governor of an engine; that the engine gave indications, by an unusual noise, that it was in a defective condition,

1—Compare the authorities cited in W., §§ 1858, 1859.

and, shortly afterward the strap on its connecting rod broke, and caused the connecting rod to break through the outer casing with a loud crash, and thereby caused the intestate's fatal fall; that the broken pieces of the strap are in the defendants' possession; that, to properly prepare the plaintiff's action at law for trial, it is necessary that these pieces should be examined by the plaintiff's attorneys, and also by competent persons, with a view of testifying; and that the defendants, though requested, have refused to permit such examination. The prayer is for a discovery of the pieces of the broken strap, and for an inspection of the same by the plaintiff's attorneys and such other persons as she may desire. The defendants filed a demurrer, which was sustained pro forma, subject to the plaintiff's exception.

CHASE, J.: "Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law,—points that are hereinafter considered,—it is certain that the defendants, through their officers and agents, might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made; in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves? (1) Two reasons are suggested: One—positive, and, if well founded, substantial—that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this way; and the other—negative, and not applying to the merits of the question—that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it, and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books for inspection. The rights of the defendants arising from the ownership of the strap are no more sacred than would be their rights arising from the ownership of a plan of the strap, if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitableness or unsuitableness for the office it was to perform than any possible description or plan of it could afford, and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan. . . . (2) The defendants' second objection is because the discovery and inspection are sought for

the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right—if she have one—without having the opportunity. . . . (3) The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and, in view of the authorities, cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort, because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. . . . If the absence of authorities is entitled to any weight, it is, under the circumstances, very slight. Cases for personal torts arising from the action of the defendant,—wilful torts, so to speak,—in which the defendant could make discovery without incriminating himself, must, from the nature of the case, be very rare. It is possible that there have been none excepting Macaulay v. Shackell, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 & 18 Vict. c. 125), by which, among other things, it was provided that either party to a civil action in the superior courts 'shall be at liberty to apply to the court or judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.' . . . In passing, it may be remarked that if the act and the reason of its enactment do not show that its author understood that courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of

bill of discovery in aid of actions at law for negligence since that time. . . . If Macaulay v. Shackell and Wilmot v. Maccabe are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable."[1]

1—Compare the authorities cited in W., § 1862; and No. 461, *post*.

TITLE V.

SIMPLIFICATIVE RULES.

General Nature of these Rules; Undue Confusion of Issues, and Unfair Prejudice, as Grounds for Exclusion.[1] "The peculiar mark of the ensuing group of rules is that in their operation they set aside or exclude, either conditionally or absolutely, certain kinds of evidence (otherwise admissible so far as Relevancy is concerned) which are found to have an improper effect by obstructing or confusing rather than aiding or facilitating the process of ascertaining the truth. They may be termed *Simplificative* rules, with reference to their mode of operation, in contrast to the other rules of Auxiliary Probative Policy. These Simplificative rules treat the danger or inconvenience of the evidence as ineradicable by such methods as those of the foregoing rules, and therefore resort to the extreme measure of eliminating entirely the evidence supposed to be tainted with the objectionable disadvantage.

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"As to the qualities or elements that constitute the objectionable features and furnish the grounds for exclusion, they lie in some indirect and disadvantageous probative effects found in experience to be produced by the use of certain kinds of evidence. These disadvantageous effects may be broadly summarized under two heads, namely, Undue Confusion and Unfair Prejudice. (a) If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal —*i. e.* the jurors—, by diverting their attention from the real issue and fixing it upon a trivial or minor matter, or by making the controversy so intricate that the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable. (b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.

"The foregoing motives, as might be expected, do not always operate distinctly and precisely in the shape of rules deduced directly and solely from one or the other motive. These broad considerations of policy may be plainly enough seen in the utterances of the judges, and an appreciation of them is indispensable to an understanding of the rules.

Yet the resultant concrete rules may be due in part to the one and in part to the other motive, or one of these motives may, though dominant, be attended by subordinate motives of some other kind."[1]

SUB-TITLE I.

ORDER OF INTRODUCING EVIDENCE.

RUCKER v. EDDINGS (1841).

7 Mo. 115, 118.

Scott, J.: "The law has entrusted Courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertence by the introduction of testimony out of its order. This discretion is to be
399 exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed. Where mere formal proof has been omitted, Courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the Court may at its discretion permit either party to examine him again, even as to new matter, at any time during the trial. So, where by an accidental omission plaintiff's attorney does not call and examine a witness who was present in Court, and a non-suit is moved for after he has rested his case, the Court will permit the witness to be examined in furtherance of justice. This Court is sensible of the disadvantages under which it labors in revising the discretion of the circuit Courts in matters of this kind, and a strong case must be presented for its interference before it can be induced to disturb the judgment of inferior Courts by revising the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence. It must be manifest to any one conversant with the trial of causes that the Court before which a trial is had, from having an opportunity of seeing the conduct of parties, of witnessing the difference in the experience of the opposite counsel, and many incidents which cannot be set out in a bill of exceptions and which influence the exercise of its discretion (and properly too), has superior means for a wise and judicious exercise of this power than is possessed by this Court, which is confined entirely to the facts spread upon the record."[2]

1—Quoted from W., § 1863.

2—*Waite*, J., in *Hathaway* v. *Hemingway*, 20 Conn. 191, 195 (1850): "The rule upon this subject is a familiar one. When, by the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his case. He cannot, as said by Lord Ellenborough, go

ROGERS v. BRENT (1849).

10 Ill. 573, 587.

CATON, J.: "This was an action of ejectment, and upon the trial in the circuit court the plaintiff below introduced a patent from the United States, for the premises in question, to Jesse Bowman as assignee
400 of Samuel M. Bowman, dated on the first of May, 1843, which was followed by a deed from Jesse Bowman to Brent, dated December 1st, 1846. The plaintiff then proved the possession of the defendant, and closed his case.

"The defendant then offered to prove by the register's certificate, that the land in controversy was entered at the land office by Samuel M. Bowman on the 19th of May, 1840, and that he assigned his certificate of purchase to Jesse Bowman on the 5th of April, 1843. He also offered the record of a judgment in the Lee circuit court, against Samuel M. Bowman, which was entered on the 12th day of September, 1842, upon which an execution was issued on the 28th of the same month, by virtue of which the sheriff levied on the premises in question, and advertised and sold them according to law to Southwick, who obtained a sheriff's deed on the 17th of December, 1844. As each portion of this evidence was offered it was objected to, and ruled out by the court, and an exception taken. A verdict and judgment were entered for the plaintiff. . . .

"Having shown in what way it was competent for Rogers to prove that he did not, in the language of the issue, 'unlawfully withhold the possession,' it only remains to be seen whether the evidence which he offered, and which was excluded by the Court, tended to prove such a case. . . . The question is, not whether it was sufficient of itself to make out the defence, but would it aid to make out the case? Would it tend to prove the defence? Most cases have to be proved by a succession of distinct facts, neither of which standing alone would amount to anything, while all taken together form a connected chain and establish the issue; and from necessity a party must be allowed to present his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on

into half his case and reserve the remainder. The same rule applies to the defence. After the plaintiff has closed his testimony, the defendant must then bring forward all the evidence upon which he relies to met the claim on the part of the plaintiff. He cannot introduce a part and reserve the residue for some future occasion. After he has rested, neither party can as a matter of right introduce any farther testimony which may properly be considered testimony in chief. . . . But this rule is not in all cases an inflexible one. There is and of necessity must be a discretionary power, vested in the Court before which a trial is had, to relax the operation of the rule, when great injustice will be done by a strict adherence to it."

Compare the authorities cited in W., § 1867.

and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice and prove detrimental to the rights of parties. It may be that Rogers was bound to connect himself with Southwick's title before he could insist that the patent was void because obtained in fraud of such title; but he must first prove such title to exist before he could connect himself with it; and this he was not allowed to do. If he was bound to connect himself with Bowman's creditors, to avail himself of the fraud practiced upon them, he must first show that there were such creditors; and the judgment which proved this was ruled out by the Court. It is the right of the party, when he offers evidence in its proper order which proves or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is that it will be followed by such other proof as is necessary for its proper connection, and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the Court is being trifled with, it may be proper to call upon counsel to state the connection which they expect to give the proposed evidence; but this should ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party. It may sometimes happen that evidence is offered so out of its proper place as to authorize the Court to exclude it for want of a proper foundation; as, in this case, had the sheriff's deed been offered without the previous proceedings, it might have been properly excluded till the proper foundation for it was shown. No such objection, however, existed in this case. The party commenced at the foundation of his case, and offered to establish the first necessary fact; and, when that was ruled out, he still persisted in offering to prove subsequent parts of his case dependent upon those previously offered and rejected, till his repeated offers had almost the appearance of wrestling with the opinion of the Court. He proceeded as far as duty or propriety required."[3]

3—*Christiancy*, J., in *Campau* v. *Dewey*, 9 Mich. 381, 422 (1861): "On the direct examination, it is true, if the relevancy of a proposed inquiry does not appear, the Court have a right to call on the counsel to state the object of the proposed testimony and the manner in which it is to be made relevant; and the Court may in the exercise of its discretion requires a particular statement of the substance of the evidence in connection with which the proposed inquiry is to be rendered pertinent, and, if refused, may reject the evidence. . . . But on a cross-examination the rule as to relevancy is not so strict; and it would be a very unsafe rule which should allow the Court to reject evidence, which may in any manner be rendered material, because the party proposing it has not volunteered to precede it with a statement of its precise object and of the other facts in connection with which it is to be rendered material. The Court may doubtless, in its discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and reject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required; for, in many cases, to state the precise object of a cross-examination would be to defeat it."

PARNELL COMMISSION'S PROCEEDINGS (1888).

33d day, Times' Rep. pt. 9, p. 104.

The Irish Land League and its leaders being charged with complicity in crime, the doings and admissions of various known criminals were offered, with the purpose of connecting with them the
401 League leaders; Sir *Richard Webster,* Attorney-General, having asked a witness what one Carey said about Egan, one of the leaders, Sir Charles Russell objected; Sir *R. Webster:* "I think, if your lordships trust me for a moment, you will see that it is in the interests of justice that this man should make his statement. I will undertake to connect it with Egan"; Sir *C. Russell:* "I do not think that is a reason"; President HANNEN: "Well, if the Attorney-General does not fulfil his pledge, I shall strike out what is said"; Sir *C. Russell:* "We have had so many of these pledges which have been broken"; Sir *R. Webster:* "I beg your pardon; no pledges that I have given have been broken"; Sir *C. Russell:* "Well, left unfulfilled"; Sir *R. Webster:* "Or left unfulfilled"; President HANNEN: "Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out."[4]

LORD LOVAT'S TRIAL (1746).

18 How. St. Tr. 658.

HARDWICKE, L. C.: "My lords, the rule for the examination of witnesses in this Court, in either House of Parliament, and everywhere else, is that . . . all questions that are asked, whether touching
402 the matter of fact to be tried or the credibility of the witness, are to be asked at the proper time. The party who produces a witness has a right to go through the examination first, and then the other side cross-examines him; and after that is over, the judge asks him such questions as he thinks proper; unless, as I said before, there be any objections to the questions, or any doubtful matter arises that wants immediately to be cleared up. The same method is to be observed here; and the reason of it, my lords, is that unless your lordships observe this method, you will be in perpetual confusion."

MOODY v. ROWELL (1835).

17 Pick. 490, 499.

Assumpsit on a promissory note for the sum of $2,750, dated November 1, 1828, payable to John Blaisdell, junior, since deceased, or his order, in five years, with interest, and purporting to be signed
403 by the defendant and indorsed by the payee. The defence rested on the ground, that the signatures of the defendant and of the payee

4—Compare the authorities cited in W., § 1871.

were forged. Henry H. Brown, who was called as a witness for the defendant, was examined as to the handwriting of the payee. On his cross-examination, the plaintiff examined him as to the handwriting of the defendant. The judge did not permit the plaintiff to cross-examine the witness as to the defendant's signature, he not having been questioned on that subject by the defendant. . . .

SHAW, C. J.: "Where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole case. . . . It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple, and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter or to matter already examined to in chief."[5]

PHILADELPHIA & TRENTON R. CO. v. STIMPSON (1840).

14 Pet. 448, 461.

At the April session of the Circuit Court, James Stimpson instituted an action against the plaintiffs in error, for the recovery of dam-
ages, for the violation of a patent granted to him by the United
404 States, on the 26th day of September, 1835, for "a new and useful improvement in the mode of turning short curves on railroads." The case was tried on the 16th day of February, 1839; and a verdict was rendered for the plaintiff, for the sum of four thousand two hundred and fifty dollars. On the trial of the cause, the defendants tendered a bill of exceptions to the decision of the Court, on their admitting the patent to the plaintiff in evidence; and to other rulings of the Court in the course of the trial. . . . The third exception was to the refusal of the Court to allow the defendants to introduce proof of the conversations between the patentee and the counsel of the Baltimore and Ohio Railroad Company, while an arrangement of a suit against the Company was made, as to the character and effects of the arrangements. . . .

5—*Campbell, J.*, in *Chandler* v. *Allison*, 10 Mich. 477 (1862): "The only object of this process [of cross-examination] is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would represent them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were (as he always may be) requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper on cross-examination. . . . A party cannot glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed. . . . No one can be compelled to make his adversary's witness his own to explain or fill up a transaction he has partially explained already."

STORY, J.: "The next exception is to the refusal of the Court to allow certain questions to be put by the defendants to John H. B. Latrobe, a witness introduced by the defendants to maintain the issue on their part. Latrobe, on his examination, stated, 'I know Mr. Stimpson by sight and character. He granted to the Baltimore and Ohio Railroad Company the privilege of using the curved ways on their railroad, and all the lateral roads connected therewith. I fix the date of the contract in the early part of October, 1834, because I have then a receipt of Mr. Stimpson's counsel, for two thousand five hundred dollars. Mr. Stimpson laid his claim against the Baltimore Company for an infringement of his patent, in 1832. It was referred to me by the Company, and I advised them.' The counsel for the defendants then offered to prove by the same witness, the declarations of the plaintiff and his agent, to the witness, that the settlement made with the Baltimore and Ohio Railroad Company with the plaintiff, was not an admission by the said company of the plaintiff's right in the alleged invention, but a mere compromise of a pending suit, disconnected with a grant, in writing, made by the plaintiff to the said company. . . .

"Now, (as has been already intimated,) it is incumbent upon those who insist upon the right to put particular questions to a witness, to establish that right beyond any reasonable doubt, for the very purpose stated by them; and they are not afterwards at liberty to desert that purpose, and to show the pertinency or relevancy of the evidence for any other purpose, not then suggested to the Court. It was not pretended at the argument, that the evidence so offered was good evidence in chief, in behalf of the defendants upon the issue in the cause. It was *res inter alios acta,* and had no tendency to disprove the defendant's title to the invention, or to support any title set up by the defendants; for no privity was shown between the defendants and the Baltimore Company. As evidence in chief, therefore, it was irrelevant and inadmissible. . . .

"But it is now said that the evidence was in fact offered for the purpose of rebutting or explaining certain statements made by one Ross Winans, a witness called by the defendants, in his answers upon his cross-examination by the plaintiff's counsel. Now this purpose is not necessarily, or even naturally, suggested by the purpose avowed in the record. Upon his cross-examination Winans stated: 'I understood there were arrangements made with the Baltimore Company. I heard the company paid five thousand dollars.' Now, certainly these statements, if objected to by the defendants, would have been inadmissible on two distinct grounds. 1. First, as mere hearsay; 2. And, secondly . . . upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress

of the cause.[6] The question then is presented, whether a party can, by his own omission to take an objection to the admission of improper evidence brought out on a cross-examination, found a right to introduce testimony in chief to rebut it or explain it.[7] If upon the cross-examination, Winans' answer had been such as was unfavourable to the plaintiff, upon the collateral matters thus asked, which were not founded in the issue, he would have been bound by it, and not permitted to introduce evidence to contradict it. There is great difficulty in saying that the defendants ought to be in a more favoured predicament, and to acquire rights founded upon the like evidence to which they did not choose to make any objection, although otherwise it could not have been in the cause. But waiving this consideration, the grounds on which we think the refusal of the Court was right, are: first, that it was not distinctly propounded to the Court, that the evidence was offered to rebut or explain Winans' testimony;[8] and, secondly, that in the form in which it was put, it proposed to separate the written contract of compromise from the conversations and negotiations which led to it, and to introduce the latter without the former, although it might turn out that the written paper might most materially affect or control the presumptions deducible from those conversations, and negotiations."[9]

NEW YORK IRON MINE v. NEGAUNEE BANK (1878).

39 Mich. 644, 659.

Cooley, J.: "The plaintiff in error is sued as a maker of three promissory notes and endorser of a fourth, all of which are copied in the margin.[10] By reference to these notes it will be seen that the name
405 of plaintiff in error is subscribed or endorsed by W. L. Wetmore, and the contest has been made over his authority to make use of the name of plaintiff in error as he has done. The New York Mine is a corporation, having its place of operations at Ishpeming in this State. It was organized some fourteen years ago, with Samuel J. Tilden and William L. Wetmore as corporators. Mr. Tilden has had the principal interest from the first, and has always acted as president and treasurer, keeping his office in New York city. Mr. Wetmore

6—*Walker*, C. J., in *Stafford* v. *Fargo*, 35 Ill. 481, 486 (1864): "[The opponent] has only the right to cross-examine upon the facts to which he [the witness] testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in cross-examination."

Compare Nos. 403 and 405.

7—On this point, compare the authorities cited in W., § 15.

8—On this point, compare No. 13, *ante*.

9—On this point, compare Nos. 552, ff., *post*.

10—These notes were signed or endorsed "New York Iron Mine, by W. L. Wetmore."

has always until this controversy arose acted as general agent with his office at Ishpeming. The board of direction has been made up of these gentlemen with some nominal holders of stock in New York city as associates. . . . The firm of Wetmore & Bro. named in the three notes purporting to be made by the New York Mine, was composed of William L. and F. P. Wetmore, and there was evidence that the New York Mine had had business transactions with that firm to the amount in all of $125,000. . . . It was not claimed on the trial that there had ever been any corporate action expressly empowering Wetmore as general agent to make promissory notes, nor did it appear that he had ever executed any in its name except a few. . . . It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. . . .

"Some of the proceedings on the trial require attention, and especially the rule of cross-examination laid down by the circuit judge when Wetmore was on the stand as a witness for the plaintiff. Wetmore was manifestly a willing witness, and made such showing as was in his power in support of the authority which as general agent he had assumed to exercise. But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced, for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff, and the circuit judge, remarking that the witness had given no testimony in reference to the notes, nor had any testimony been introduced by any other party in reference to them, nor had the notes been put in evidence, sustained the objection.

"The question of the proper range of cross-examination has been discussed in this State until it would seem that further discussion must be entirely needless. . . . [After quoting Mr. J. Campbell's words as set forth *ante,* No. 403, note 1], one might suppose, after reading this language, that it was written in anticipation of the proceedings in this very case. . . . Here the matter in issue was confined to the single point of Wetmore's authority to make and endorse the paper sued upon. . . . The questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense. The witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole; and when questions were asked calculated to sup-

ply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought it for his interest to call out. It would be difficult to present a more striking illustration of the error in the rule in People v. Horton[11] than is afforded by this case. For here was the principal actor in the transaction under investigation brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact—though it was peculiarly within his own knowledge—, and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction but a principal part, and made to tell, not the whole truth according to the obligation of his oath, but a small fraction only,—a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true, the defense was at liberty to call the witness subsequently; but this is no answer; the defense was not compellable to give credit to the plaintiff's witness as its own for the purposes of an explanation of facts constituting the plaintiff's case and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in People v. Horton was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue. What has been said on this point has in substance been said many times before. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of."[12]

SUB-TITLE II.

SUNDRY RULES TO AVOID CONFUSION OF ISSUES, UNDUE WEIGHT, ETC.[13]

FRASER v. JENNISON (1879).

42 Mich. 206, 224, 3 N. W. 882.

COOLEY, J.: "This case involves the validity of the will of the late Alexander D. Fraser, of Detroit, one of the oldest and best known members of the Michigan bar. The will bears date May 17, 1877.
406 . . . By their pleading the contestants set up the follow defenses: first, they deny the due execution of the supposed will; second, they

11—4 Mich. 67, 82; following the rule in *Phila. & T. R. Co.* v. *Stimpson.*

12—Compare the authorities cited in W., § 1890.

13—For other rules under this principle see *ante*, Nos. 21-27, 33-36, 51-54.

aver that at the time of the supposed execution the decedent was of unsound mind, and incapable of making a valid will; third, they allege that the will was the result of insane delusions in the decedent. . . . Dr. Henry Hurd was called, who testified that he . . . was familiar with mental diseases, their causes and symptoms. . . . Four other witnesses were called who, as medical experts, testified to the same effect with Dr. Hurd. This made five in all. A sixth was called, but the Court declined to hear more. . . .

"The Court was quite justified in declining to permit Dr. Johnson to be called as an expert by the contestants after five other experts had been called and examined on their behalf. If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence; and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the Court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth in all litigation in which expert evidence is important may prevail almost of course. But one familiar with such litigation cannot but know that, for the purposes of justice, the examination of two conscientious and intelligent experts on a side is better than to call more; and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony, of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things; and it can only be avoided by confining the use of expert evidence within reasonable bounds."[1]

MAITLAND v. ZANGA (1896).

14 Wash. 92, 44 Pac. 117.

DUNBAR, J.: "This is an action for damages, founded on an agreement to convey land; at least we construe the contract to be an agreement to convey. The contract was executed on August 5, 1858. On No-
407 vember 26, 1889,—something more than four years after the execution of the contract—the respondent, by warranty deed, conveyed said lands to one Roswell Skeel, a third party and bona fide purchaser, which deed was duly recorded. The answer alleges affirmatively that the contract was a gift to take effect at respondent's death, alleges fraudulent representations, ignorance of defendant, etc. . . . During the progress of the trial the presiding judge, at the request of the respondent, and over the objections of the appellant, took the witness stand,

1—Compare the authorities cited in W., § 1908.

and testified concerning testimony offered by the appellant in some prior case involving the matter in dispute. This is assigned by the appellant as error, and, while the authorities are somewhat conflicting on this proposition, we think the weight of authority and the better reasoning are opposed to the admission of such testimony. Respondent contends that because it is a well established rule that jurors may testify in a case, there is no reason why the judge should not be allowed to do so. But it seems to us that there are many reasons why the judge should not be allowed to testify that would not weigh in the case of a juror. If the defendant is entitled to the testimony of the judge, the plaintiff is equally entitled to his testimony, and it might eventuate, if this practice were to be tolerated, that the judge, upon a motion for nonsuit, would be compelled to pass upon the weight of his own testimony; and, considering the inclination of the human mind to attach more importance to his own statements than to those of others, it is easy to see that the rights of the litigants might be prejudiced in such a case. Again, while upon the witness stand he would have a right to all the protection that any other witness has under the law. He could refuse to answer questions which, in his judgment, might tend to criminate him. He might decline to answer questions the admissibility of which it would be necessary for the court to determine, and which would bring him as a witness in conflict with himself as a court. Again, it would to a certain extent lead to the embarassment of the jury, who are subordinate officers of the court, and under its directions, to have to weigh the testimony of the judge in the same scales with the testimony of other witnesses in the case whose testimony was opposed to that of the judge. And in many ways it seems to us that this practice would lead to embarrassment, and would have a tendency to lower the standard of courts, and bring them into contempt. There is no necessity for this practice, for, under the liberal provisions of our laws, if a party desires to avail himself of the testimony of the judge, another judge may be called in to preside at the trial of the cause."[2]

HOWSER v. COMMONWEALTH (1865).

51 Pa. 332, 337.

WOODWARD, C. J.: "Polly Paul, an elderly maiden lady, who was reputed to possess money, and Cassy Munday, a young girl who lived with her, were both cruelly murdered on the evening of the 7th
408 June, 1865, in Summerhill township, Cambria county. The plaintiffs in error were defendants below in an indictment which charged only the murder of Miss Paul, and after a full and careful trial were both convicted of murder in the first degree. . . .

"The first and ninth errors complain of the admission of John Buck and George W. Kerby, two of the jurors in the box, as witnesses on

2—Compare the authorities cited in W., § 1909, and No. 369, *ante.*

the part of the Commonwealth. In respect to the first of these witnesses, it might be sufficient to say that the objection was not made until after he was sworn as a witness, when it was too late to object to his competency, and in respect of both it might be said that they were called to incidental and comparatively immaterial points, that did not touch the *corpus delicti*. But, waiving these answers, let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. . . . The learned counsel argue that the practice violates the constitutional rights of the accused, who are entitled to a speedy and public trial by an *impartial* jury, and to be confronted with the witnesses. Our law takes the utmost care to secure to the accused, in capital cases, an impartial jury —it almost allows prisoners to select their own triers. They may examine jurors as to their knowledge of circumstances, their expressions, opinions or prejudices, and challenge as many as they can show cause for, and may challenge twenty without showing cause, and then if any juror happens to have knowledge of any pertinent fact, he is bound to disclose it in time for the accused to cross-examine him, and to explain or contradict his testimony. If this be not a fulfilling of the constitutional injunction in behalf of *impartial* juries, it would be difficult to invent a plan that would fulfil it and at the same time be consistent with the demands of public justice. But counsel imagine that the constitutional right to *confront* witnesses would be abridged in the instances of witnesses taken from the jury-box, because their truth and veracity could not be attacked without damage to the attacking party. As to material witnesses, those, we mean, upon whose testimony the event is essentially dependent, we think they ought not to be admitted into the jury-box, and we believe the general practice is to exclude them where the fact is discovered in time; but we do not think the constitutional provision alluded to, nor any rule of law, is violated by the examination of a juror as a witness. The *a priori* presumption is that he is a man of truth and veracity or he would not have been summoned as a juror; and confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. . . . He, like all other witnesses, must 'confront' the accused, that is, be examined in the presence of the accused, and be subject to cross-examination; but he is not disqualified to be a witness."[3]

ROSS v. DEMOSS (1867).

45 Ill. 447, 449.

LAWRENCE, J.: "This is a suit in equity, brought by Alexander Demoss, in the Livingston Circuit Court, against Riley Ross, Margaret Wood, Daniel J. Wood, and Benjamin W. Gray, to have a mort-
409 gage satisfied, and the lands reconveyed to complainant. It appears that defendant in error, in April, 1858, executed a mortgage with

3—Compare the authorities cited in W., § 1910, and No. 368, *ante*.

a power of sale, to secure to William Ross $68, on forty acres of land. That subsequently, in September of the same year, to secure the further sum of $300, defendant in error executed a mortgage on another tract of land, containing seventy-five acres, to William Ross, with power of sale. . . . It is alleged in the bill, that the sale by Ross was not intended to be a foreclosure of these mortgages, but that it was at the time agreed that defendant in error should have further time to pay and redeem the lands; and that all of the money for which the mortgages were given had been fully paid.

"On the trial below, the evidence was conflicting, but it seems to preponderate in favor of the decree. The weight of the evidence of Garner is somewhat impaired from the fact, that he was proved to have been one of the attorneys in the case, and had a conditional fee, dependent on the result of the suit. It is of doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the case; and an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism if not suspicion; but where the half of a valuable farm depends upon his evidence, he places himself in an unprofessional position, and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."[4]

SUB-TITLE III.

OPINION RULE.

1. *The General Principle.*[5]

THOMAS STARKIE, *Evidence, 173* (1824): "A witness examined as to facts ought to state those only of which he has had personal knowledge. . . . It has been said that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his knowledge of the fact. . . . As far as regards mere belief or persuasion, which does not rest upon a sufficient and legal foundation, this position is correct, as where a man believes a fact to be true merely because he has heard it said to be so."[6]

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4—Compare the authorities cited in W., § 1911, and No. 370, *ante*.

5—These first extracts are intended to represent the various principles, past or prevailing, sound or unsound, upon which the Opinion Rule has been made to rest by different authorities.

6—*Mansfield*, L. C. J., in *Folkes* v. *Chadd*, 3 Dougl. 158 (1872) (it was objected that the evidence of Mr. Smeaton, an eminent engineer, as to the cause of a harbor's filling up, "was matter of opinion, which could be no foundation for the verdict of a jury, which was to be built entirely on facts, not opinions"): "The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the backwater. That is matter of opinion; the whole case is a question of opinion, from

Sir George Cornewall Lewis, *Influence of Authority in Matters of Opinion, 1* (1849): "It is true that even the simplest sensations in-
411 volve some judgment; when a witness reports that he saw an object of a certain shape and size, or at a certain distance, he describes something more than a mere impression of his sense of sight, and his statement implies a theory and explanation of the bare phenomenon. When, however, the judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a *fact*. . . . The essential idea of *opinion* seems to be that it is a matter about which doubt can reasonably exist, as to which two persons can without absurdity think differently. The existence of an object before the eyes of two persons would not be a matter of opinion, nor would it be a matter of opinion that twice two are four. But when testimony is divided, or uncertain, the existence of a fact may become doubtful, and, therefore, a matter of opinion."

Dr. Richard Whately, *Elements of Rhetoric, pt. I, c. II,* § 4 (1828): "[As to matter of fact and matter of opinion,] decidedly it is *not* meant,
412 at least by those who use language with any precision, that there is any greater certainty, or more general and ready agreement, in the one case than in the other; *e. g.*, that one of Alexander's friends did or did not administer poison to him, every one would allow to be a question of fact, though it may be involved in inextricable doubt; while the question, what sort of an act that was, supposing it to have taken place, all would allow to be a question of opinion, though probably all would agree in their opinion thereupon."[7]

facts agreed upon. Nobody can swear that it *was* the cause. . . . It is a matter of judgment, what has hurt the harbor. . . . A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed,—the situation of banks, the course of tides and of the winds, and the shifting of sands. . . . I cannot believe that where the question is whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbor is also a matter of science. . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence."

O'Neall, J., in *Seibles* v. *Blackhead,* 1 McMull, 57 (1840): "It is true that the mere opinion of witnesses who have not the aid of science to guide them would not have any weight in such a case, and would be generally inadmissible unless sustained by facts showing the opinion to be true. . . . I find that the witnesses generally said they thought the slave to be unsound, and if they had stopped there such testimony ought to have been rejected; but they go on to fortify their opinions with facts showing some foundation for them, and hence they were admissible and were to be compared with the facts by the jury."

7—*Campbell,* J., in *Kelley* v. *Richardson,* 69 Mich. 436, 37 N. W. 514 (1888): "These cases are so common that few persons ever think that what are rightly called facts are at the same time no more nor less than conclusions. Thus, impressions of cold or heat, light and darkness, size, shape, distance, speed, and many personal qualities, physical and mental, are constantly acted on as facts, although not uniformly judged by all observers, for the simple reason that the facts cannot be otherwise communicated."

FENWICK v. BELL (1845).

1 C. & K. 313.

Case for running foul of plaintiff's ship, whereby she was damaged, and thereby prevented from completing her cargo. Plea, not guilty.

413 The plaintiff's witnesses proved that the ships of the plaintiff and defendant were respectively tacking up the river Thames on a particular day; and that, at the time they got into Gravesend-reach, the plaintiff's ship was on the larboard tack, and that the ship of the defendant was on the same tack, following in her wake. It appeared further, that, just as the plaintiff's ship had completed her tack and was putting about, and whilst she was in that position which is technically called "in irons,"—that is, having no steerage-way upon her,—she was run into by the defendant's ship. The master and crew of the plaintiff's ship stated in evidence, that they had done every thing in their power to prevent the collision; and they stated further, that, had the defendant's ship been put about sooner, as she ought to have been, the collision would not have taken place.

The master of the Trinity-house of Newcastle was then called, and the learned counsel for plaintiff proposed to ask him, whether, according to the best of his judgment,—having heard the evidence, and admitting the facts as proved by the plaintiff to be true,—he was of opinion that a collision between the two ships could have been avoided by proper care on the part of the defendant's servants.

Dundas, for the defendant, objected, that this question could not be put, inasmuch as it was the very question which the jury were to try.

Coltman, J., however, overruled the objection, and allowed the question to be put, on the ground that it was a question having reference to a matter of science and opinion.[8]

8—Messrs. *Carrington* and *Kirwan,* note in 1 C. & K. 313: "It seems to be a mistake to say that, in putting such a question to the witness as was put in the above case of *Fenwick* v. *Bell* [whether a collision could have been avoided by proper care] you submit to his decision a point which the jury alone can try. On the contrary, it is submitted that the object of putting the question is not at all to decide upon the fact itself, but to prove an entirely new fact, namely, the opinion of a person of competent skill as to what might or might not have been done by the parties under a given state of circumstances. The jury are of course to decide upon the value of this opinion, as well as upon the value of the evidence on which it is founded; and thus it is plain that in the end the whole matter is submitted to their consideration, and that the only effect of the opinion will be to assist them in judging of a question of which the witness may reasonably be supposed, on account of his professional knowledge, to have been more competent to judge than themselves."

Danforth, J., in *Snow* v. *R. Co.,* 65 Me. 231 (1875): "The reason for its exclusion given by counsel, that it would instruct the jury as to the amount of the verdict to be rendered, would seem to be a very good reason for its admission. Instruction is what the jury want. They would not be bound by it any more than by other testimony, but it would be more or less valuable in enabling them to come to a correct conclusion."

BROWN v. COMMONWEALTH (1878).

14 Bush 398, 405.

HINES, J.: "Appellant, charged with willful murder, was tried, convicted of voluntary manslaughter, and sentenced to the penitentiary for sixteen years, and from that judgment he appeals. The substance
414 of the proof is, that appellant tendered money and demanded a drink at the bar of one Jacob, and that Jacob and his bar-tender, Snyder, both refused to let appellant have any liquor, Snyder assigning as a reason that the father of appellant had so requested. Some harsh language passed between the parties, when appellant drew a pistol and snapped it at Jacob, and on its failing to fire, appellant, with a declaration to the effect that he would get a pistol that would kill, went a short distance to his dwelling and in a few minutes returned with another pistol, which he presented and snapped at Jacob. At this point Snyder called to an officer to arrest appellant, and without further provocation he turned and shot Snyder, from the effects of which he died within a few days. The principal defense was insanity. . . .

"Some seventy witnesses were examined in the case, and the larger number of them, experts and non-experts, were permitted to express their opinions as to the sanity of the appellant, and of the testimony of the non-experts, excepted to by counsel for appellant, is the following: . . .

"D. P. Guin said: 'Have known the accused since a boy, but have not been with him much; had but little to do with him. From observation of his conduct and acts, I had no reason to believe him insane, and never heard anything of it. My attention was not called to it. He had many peculiarities.' J. J. Brown said: 'Am not related to the accused; have known him since 1849; had business with him and frequent chats. From habits, conduct and chats I never thought him insane; have seen peculiarities in members of his family, but never had any question as to his sanity. I am not an expert nor a doctor. My attention was never called to the accused's insanity.' R. H. Monow said: 'Have known the accused all his life, and have always thought him sane. I am no doctor, nor was my attention ever called to his insanity.' . . . Judia Long: 'I have known the accused and his family for thirty-five years. From his manner, habits, and my personal knowledge of him I think him as sane as any one.' . . . Many other witnesses were examined who testified substantially as the above, but we deem it unnecessary to give their statements, as these are sufficient to dispose of the objection made by counsel. The question is, When, if at all, will non-experts be permitted to state in evidence an opinion as to sanity?

"This court, in Hunt's Heirs v. Hunt, 3 B. Mon. 577, expressed the opinion that such evidence was incompetent unless the witness stated the facts upon which the opinion was based, but did not undertake to say what facts would be necessary to render the expression of an opinion competent. . . . Exactly what is meant by the expression in some cases,

when such evidence has been admitted, that 'the witnesses must detail the facts upon which the opinion is based,' we do not find explained. If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the Court antecedent to its introduction, and that to promulgate a general rule as to the amount and quality of the evidence that should satisfy the Court in every case would be impossible. . . . It is not intended that the admissibility of the evidence shall be made to depend upon the ability of the witness to state specific facts from which the jury may, independent of the opinion of the witness, draw a conclusion of sanity or insanity; for it is the competency of the opinion of the witness that is the subject of inquiry. The ability of the witness to detail certain facts of the mind may add very greatly to the weight of the opinion given in evidence; but they will not of necessity affect the question of competency."[9]

TAYLOR v. MONROE (1875).

43 Conn. 36, 44.

Trespass on the case for an injury from a defect in a highway of the defendant town. . . . This highway passed down a steep hill about thirty rods in length, twenty-five feet from the foot of which and
415 forming part of the highway was a bridge twelve feet in length, and of the same width, elevated four feet above a stream which crossed the highway. At the northerly end of the bridge the highway was so raised above the adjoining ground as to endanger the public travel, and on the 10th of August, 1871, there was not a good and sufficient railing or fence on the easterly side thereof, and the highway was then and there out of repair, all of which was in consequence of the negligence of the town of Monroe.

Upon the hearing the defendants claimed, and offered evidence to prove, that the highway was not so raised as to endanger travel; that no railing was required to make the same safe for public travel; that the highway was an ancient one and was constructed and maintained in conformity to the experience of skilled road-builders. The defendants placed upon the witness-stand two witnesses who were professional road-builders of twenty-five years experience in the business, and each of whom had seen and examined and described the road and bridge and railing and their surroundings at the place where the injury happened; and then the defendants' counsel asked each of them the following questions:

1. "What is you opinion, based upon the facts you have testified to, as to whether this causeway, at any point north of the railing, is so raised above the adjoining ground as to require a railing in order to render public travel reasonably safe?"

9—Compare the authorities cited in W., § 1922.

2. "What is your opinion as a skilled workman in the construction of roads, as to whether or not the road from the bridge to the foot of the hill, supposing it to be as it was at the time of the accident, was reasonably safe and convenient for public travel?"

3. "Is or not the elevation of the embankment and the slope of the bank, and the depth of the ditch or gutter such, north of the end of the pole, that if an ordinary vehicle were driven off the bank in the ordinary mode of driving, it would overturn the vehicle or cause any accident?"

To each of these questions the plaintiff objected and the court excluded the same. . . .

Loomis, J.: "The next question is, whether the opinions of the 'two professional road-builders of twenty-five years experience in the business,' who 'had seen and examined and described the road and bridge and railing and their surroundings at the place where the injury happened, ought to have been received in answer to the four special interrogatories mentioned in the record. If these witnesses were experts and the subject matter was proper for their opinion, it must be conceded that the evidence ought to have been received in answer to at least three of the questions stated. . . . The rule as to experts is, that 'in cases involving questions of science and skill, or relating to some art or trade, experts are permitted to give opinions; the principle embraces all questions except those, the knowledge of which is presumed to be common to all men. So the business which has a particular class devoted to its pursuit, is an art or trade within the rule.' Rochester & Syracuse R. R. Co. v. Budlong, 10 Howard's Pr. Rep., 289. Though the rule as stated is well settled, yet there is often a practical difficulty in applying it to the facts and circumstances of the particular case, especially where the general subject matter, as in this case, is open to the observation of many persons. If this case falls pretty near the line, we think it is clearly on that side of the line that permits expert testimony. . . . The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the questions at issue. In the case at bar the plaintiff claims that 'persons who use roads, and not those that build them, are the proper experts.' The similar objection suggested in the case just cited would have a better foundation than it has here, because persons who use roads do not necessarily have their attention called to points of safety or danger in the construction of the road; and moreover the users of a road do not constitute any recognized class devoted to any business, trade, art or profession, connected with such use, which could give any value to their opinions. The road-builders must of necessity adapt their work to the purposes for which it is intended, to-wit, the safety and convenience of public travel, and in so doing they must keep in mind all the elements that

enter into the question of safety and convenience, and thereby they acquire a peculiar knowledge and experience that gives special value to their opinions upon the subject."

STATE v. PIKE (1870).

49 N. H. 423.

Doe, J.: "Opinions, like other testimony, are competent in the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea
416 of the force, meaning, and inherent evidence of the things described. Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay or on evidence from which the jury can form an opinion as well as the witness. A rule that opinions are or are not evidence must necessarily be in conflict with the rule which admits the best evidence. A constant observer of the trial of cases, examining the testimony for the purpose of ascertaining how many opinions are received and how many rejected, will find ten of the former as often as he finds one of the latter; and if he is very critical, he will find the ratio much greater than that. Opinions are constantly given. A case can hardly be tried without them. Their number is so vast and their use so habitual that they are not noticed as opinions distinguished from other evidence. . . . The cases of identity of persons and things and of handwriting having been named in the English books as illustrations of the competency of opinions, those cases were supposed to be peculiar exceptions to the general rule, whereas they are mere instances of the application of the general rule which admits the best evidence. This general, natural, fundamental, comprehensive, and chief rule of evidence was gradually ignored, and special and artificial rules were substituted; or, if there was not an absolute substitution, there was such a removal of emphasis from the general rule to the special rule that the former lost the overshadowing influence and control which belong to it. . . . When the fact that some opinions are not the best evidence had been magnified and turned into the so-called general rule of law that opinions are not evidence, and the rule admitting the best evidence was supplanted by it, it was thought necessary to find a special precedent for every opinion before it could be admitted. The judgments of Westminster Hall were searched to find a decision that an opinion as to the value of property was competent, and to find another decision that an opinion as to sanity was competent. No such decisions could be found. None had ever been made; because such opinions had always been received as unquestionably competent. The reason of the failure to find the decisions was not understood here. The failure was taken as conclusive proof that in England the opinions were not admitted. When an American mistake of this magnitude is discovered, it is fit to be corrected at

once. To return to the true principle is not to change the law, but to cease violating the law; or, putting it in a milder form, to allow that which is the law *de facto* to yield to that which is the law *de jure*."[1]

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2. *Applications of the Rule to Specific Topics of Testimony.*

HARDY v. MERRILL (1875).

56 N. H. 216, 241.

Appeal, by William H. Hardy against Isaac D. Merrill, from the decree of the judge of probate approving and allowing, in solemn form, the will of Joseph Hardy, deceased. Said will was dated July 26,
417 1870. . . . The issues were in common form. In the first, the executed alleged that the said Joseph Hardy was of sound mind; and in the second, he alleged that said will was not obtained by undue influence: upon both of which allegations issue was taken by the appellant. . . . Solomon Hardy, a brother of the testator, was called as a witness by the appellant, and the following questions among others, were put to him. 1. "Being a brother of Joseph Hardy, from your observation of his appearance and conduct at the time you saw him at your house in June, 1869, state whether or not, in your opinion, he was, at the time, of sound and disposing mind and memory." 2. "Being a brother of the testator, from what you had observed as to his conversa-

1—*Owen*, J., in *Railroad Co.* v. *Schulz*, 43 Oh. St. 270, 283, 1 N. E. 324 (1885): "It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steamboats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury."

Endicott, J., in *Com.* v. *Sturtivant*, 117 Mass. 122 (1875): "[The condition is that] the subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time."

Peck, J., in *Bates* v. *Sharon*, 45 Vt. 481 (1873): "[Opinion is admitted] where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who has had the benefit of personal observation."

Gibson, J., in *Cornell* v. *Green*, 10 S. & R. 16 (1823): "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusion; and wherever the facts *can* be stated, it is not to be departed from. But every man must judge of external objects according to the impression they make on his senses; and after all, when we come to speak of the most simple fact which we have witnessed, we are necessarily guided by our impressions. There are cases where a single impression is made by induction from a number of others, as, where we judge whether a man is actuated by passion, we are determined by the expression of his countenance, the tone of his voice, his gestures, and a variety of other matters; yet a witness speaking of such a subject of inquiry would be permitted directly to say whether the man was angry or not. . . . I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impression from these facts become evidence."

tion, conduct, and general deportment as to all subjects, up to July 26, 1870, have you any opinion as to his sanity at that date, and, if so, what is it?" The referees excluded these questions, and the appellant excepted. . . .

FOSTER, C. J.: "It would be merely a repetition of the historical part of Judge DOE'S opinion, in State v. Pike, 49 N. H. 421-423, if I were to relate how, after the eminent jurists, who presided in our courts the years 1811 and 1833, had all passed off the stage, the 'Massachusetts exception' gradually worked into favor in New Hampshire, it having been erroneously declared by the Massachusetts courts to be an expression of the English common law. . . . A tolerably careful investigation authorizes me to repeat the language of Judge DOE, that 'in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any court any objection, question, or doubt in regard to it.' State v. Pike, 49 N. H. 408, 409. I presume, however, it will not be denied that in the ecclesiastical courts, where questions of testamentary capacity are generally tried, such opinions have always been received. . . . The practice in the courts of the common law has been universal and unwavering in the same direction; and 'the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised.' State v. Pike, 49 N. H. 409. . . .

"Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. . . .

"Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones

of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions,—because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances,—because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description,—the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'He seemed to be frightened'; 'he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was pleased'; 'he was angry.' . . . All evidence is opinion merely, unless you choose to call it fact and knowledge as discovered by and manifested to the observation of the witness. . . . And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions. . . . Suppose, the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased, and had an opportunity to see whether he appeared to be well or sick: suppose the lawyer is asked, 'Did you observe any indications of his being well or sick?' and the answer to be, 'I observed no indication of his being sick; he appeared as well as usual, as well as I ever saw him'; suppose the farmer is asked, 'Did you notice anything unusual in his appearance or conduct?' and the answer is, 'No, I did not'; suppose the blacksmith is asked, 'In your opinion was he well or sick?' and the answer is, 'In my opinion he was perfectly well; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain'; what legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word 'opinion,' in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony 'opinion' does not make it 'opinion'; and calling it something else does not make it something else. . . .

"Now let us imagine a scene that might very probably be exhibited in any court where the Massachusetts rule prevails. One witness says: 'He did not appear as usual; he did not appear natural.' 'Very well,' says a learned barrister, 'very well, Mr. Witness. You may say that,—that is quite regular,—that is your opinion. Now tell us in what respect he did not appear "as usual" or "natural."' 'Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk.' 'Very well, Mr. Witness, you acquit yourself like a sensible man. Now

tell the jury whether in your opinion he was then of sound mind.' 'I object,' thunders the learned barrister on the other side. 'I object,' thunders the opposing junior. 'Counsel know better; it is an insult and an outrage to put such a question.' . . . The witness is confounded. The jury are confounded. Everybody is confounded,—except those who understand that 'incoherence of thought' and 'delirium,' vulgarly called 'wandering,' is not a state of mental unsoundness, is not mental disease: and that 'as usual' or 'natural' is not a condition of mental health. Whether it is such condition or not is a question then solemnly debated. . . . At the close of the scene which I have described, not a man of the laity goes out of the room without being disgusted with this exhibition of the law as a system of arbitrary rules, that ignoring all legal ideas decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator 'appeared perfectly natural,' and forbids the adverse party to offer the testimony of another witness that 'he didn't appear to be in his right mind'? . . . The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the Court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law and calculated to bring it into contempt."[1]

1—The following cases illustrate the peculiar application of the rule to this topic in Massachusetts, in New York, and in Georgia:

Nash v. *Hunt,* 116 Mass. 237, 251 (1874); *Wells,* J.: "Objection is made to the testimony of the witness Beal, who had conversations with the testator, and who was allowed to state that at the last interview before the date of the will, he 'observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition.' We do not understand this to be the giving of an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness. So far as his mental condition was manifested by the witness by that interview, in conversation, looks or demeanor, he could properly state, as a matter of observation, whether it was in the usual or natural manner of the testator or otherwise."

Paine v. *Aldrich,* 133 N. Y. 544, 547, 30 N. E. 725 (1892); the following question was held improper: "Taking into consideration these facts that you have stated here in your testimony to-day, which you learned from your contact with Mr. Paine and from his conversations with you, what impression did he give you as to whether or not he was rational or irrational?" while this one was pronounced unexceptionable: "From the conversations you had with him and from his actions, his acts in your presence, were those conversations or those acts those of a rational or an irrational man?"

Maynard, J.: "The trial court applied the correct rule in regard to this class of evidence. The witness was a layman and could not properly give an opinion as to the mental capacity of the grantor, or as to whether he was rational or irrational, even when such opinion might be based upon specific acts and conversations, and his personal observations. He could state the acts and conversations of which he had personal knowledge, and then be permitted to say whether, in his judgment, such acts and conversations were rational or irrational, or were those of a rational or irrational person. This is the extent to which any of the cases have gone."

Welch v. *Stipe,* 95 Ga. 762, 22 S. E. 670 (1895); the test is: "Before the opinion of a non-expert witness can be considered it must appear not only that the wit-

KEMPSEY v. McGINNIS (1870).

21 Mich. 123, 139.

This case was brought into the circuit court for the county of Kalamazoo, by the appeal of Mary Kempsey from the judgment of the probate court of that county, allowing the will of Thomas Patterson.
418 The issue formed in the circuit court was tried by a jury, who rendered a verdict for the proponents. The questions for review in this court arise upon the rulings of the circuit judge on the admission and rejection of evidence as to the testamentary capacity of the testator. Dr. William Mottram was called by the appellant and contestant, and after testifying to facts within his personal observation, as to the condition of the testator, stated that he heard Dr. Abbott testify, and recollected the description he gave of Patterson, and that he heard Eckard testify, except a part of the cross-examination. He was then asked:

1. *Question:* "Assuming the testimony of the witness as true in reference to the condition of Patterson during the days they mentioned, what, in your opinion, was his capacity to make a will, or as to his being of sound and disposing mind?" This question was objected to by the appellees as incompetent and irrelevant. The Court sustained the objection. To which ruling and decision the counsel for appellant duly excepted.

2. *Question:* "Assuming the testimony of Eckard in regard to the condition of Patterson during the latter part of Thursday and Thursday night, and Friday and Friday night, including his conversation and what he did, to be true; and assuming the testimony of Dr. Abbott in regard to his symptoms from Friday morning to the time you went there, to be true, including your own observation on Saturday, what is your opinion as to Patterson being of sound disposing mind and memory on Friday morning, so as to be able to transact business continuously and understandingly from nine until eleven o'clock?" This question was objected to by the counsel for appellees on the ground of irrelevancy and incompetency, and it was argued that the answer to the question would take the question at issue from the jury, and that an expert cannot be allowed to give an opinion upon facts that were not under his own observation. The Court sustained the objection. To which ruling the counsel for the appellant duly excepted.

3. *Question:* "Assuming that the deceased, Thomas Patterson, was a man sixty-three years of age, of thin chest, and weak physical frame, and stooping; that he was attacked the 12th of December, 1865, with

ness has the opportunity of learning the facts upon which the opinion is predicated, but it must appear that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture; and, in addition to this, it must appear that the witness, in the expression of the opinion, speaks with reference to the facts upon which it is predicated. . . . But where [as here] she neither states the facts coming under her observation nor states that the opinion expressed is the result of such observation, there is no possible theory upon which it can be received in evidence."

Compare the authorities cited in W., § 1938.

pleuro-pneumonia; that on the afternoon of Thursday, the 14th of December, he was in great pain and suffering, breath short, and through that night the pain and suffering and short breathing continued, with much thirst, with his mind wandering and flighty, running from one subject to another, his face pale and yellowish, purple under his eyes, that he was sleepless, and yet in a drowsy condition throughout the night, muttering and talking to himself, insisting that his horses were sick, when in truth, they were not sick; that on Friday morning he suffered and complained of pain, short breath, and much thirst, taking no notice of a person whom he himself had called in; that he was on the same morning, at about nine o'clock, found by a physician who examined him, a very sick man, in great pain, short breathing, not much expectoration, only about a gill during the day, and that of a brownish color; skin neither hot nor cold; that his condition remained so during that day; that on Saturday morning he was worse; that on examination of him by you on Saturday afternoon, his lungs were found in the second stage of that disease, with little or no expectoration then, and no pain, but complained of having suffered great pain, breath short, voice bronchial, and lying in a state of stupor, except when aroused by a question put to him, and then immediately subsiding into stupor again, with skin cool, feet and hands cold, ankles and wrists clammy, and face and extremities somewhat livid, and that he died about eleven o'clock that night,"*" what is your opinion as to Patterson being of sound disposing mind and memory on Friday morning, so as to be able to transact business from nine to eleven o'clock?" The question was objected to by the appellees on the following grounds: 1st. The question assumes facts of which there is no proof. 2d. It asks the opinion of the witness upon the principal question to be found by the jury—that is, the soundness of the mind of the testator. The objection was sustained by the Court upon the second ground.[1] To which ruling the appellant duly excepted.

Dr. Foster Pratt was sworn for appellant, and testified that he had heard nearly all the testimony given by Eckard, Drs. Mottram and Abbott. The same hypothetical question to the "*" with the following addition: "In your opinion, was Patterson, on the morning of the 15th, the day before his death, and during the forenoon of that day, capable of planning and executing such a paper as is here offered as his will," was then put to the witness. This question was objected to by the appellees on the ground that it calls for the opinion of the witness on a fact to be found by the jury. Objection sustained by the Court. To which ruling the appellant duly excepted. The same hypothetical question to the "*" with the following addition: "In your opinion, was Patterson, at and during the time above noted, in a physical and mental condition to transact any business requiring an exercise of the judgment, the reasoning faculties, and a consecutive continuation of thought," was then put to the witness. This question was objected to by the appellees

1—The ruling on appeal as to the first of these objectlions (the hypothetical form of the question) is set out *post,* No. 431.

on the same ground as the last. The Court sustained the objection, and the appellant duly excepted.

Christiancy, J.: "To what extent and in what manner the mind of the testator was affected by the disease, or what was his mental condition, was a question of fact, upon which it was competent for the professional witnesses to express their opinions. But what degree of mental capacity is necessary to enable a testator to make a valid will, to what extent and with what degree of perfection he must understand the will and the persons and property affected by it, or to what extent his mind must be impaired to render him incapable, is a question of law exclusively for the court, and with which the witnesses have nothing to do. And it is a question of law of no little difficulty, which calls for the highest skill of competent jurists, and upon which the ablest Courts are not entirely agreed. . . . And if—as common experience has shown, and as courts have often remarked—opinions of professional witnesses upon such questions have become of little practical value upon trials, from the almost universal conflict between those called upon the different sides—and this upon questions pertaining to their own peculiar profession—such opinions must be rendered utterly useless, and become a source of error and confusion, if the professional witness is allowed to fix his own legal standard of testamentary capacity, thus mixing up in the minds of the jury his conclusions upon matters of law of which he is ignorant, with his conclusions from facts pertaining to his profession, which he claims to understand, while his professional brother, testifying on the other side, equally competent, comes to directly opposite conclusions from the same facts. Besides, if each witness is allowed to fix his own legal standard of testamentary capacity, no two of them would be likely to fix upon the same, and there may be an apparent agreement while they differ in fact, and an apparent conflict when there is a real coincidence in opinion, and the jury have no means of knowing the real meaning of the witnesses or judging of the value of their testimony.

"It may be urged in reply to this, that the confusion arising from allowing the witnesses to answer questions involving their opinion of the legal capacity of a party to make a will, may be cleared up by a cross-examination, ascertaining what, in his opinion, constitutes such capacity, and that any error in this respect may be corrected by the court in his charge, or otherwise. But it seems to be much wiser, wherever it is practicable, to exclude the improper question, and avoid the confusion altogether, than to admit it first, and then undertake to get rid of its effects, an experiment which is never wholly successful. . . . It would have been much fairer, more in accordance with principle, and much less in the nature of leading questions to have put the questions in such a manner as to call only for an opinion of what the real state of the testator's mind was, how much intelligence he possessed, how far he was capable of understanding the nature and situation of his property, his relation to others, and the reasons for giving or withholding his bounty as to any of them, etc., than to ask them whether he had a dis-

posing mind and memory, or whether he was capable of making a will. The course I have suggested as the true one, was adopted by the propounders in their examination of professional witnesses, and by the contestants also, in some of their questions which were not objected to by the proponents of the will. . . . These questions were, whether from the conversation they had with him, and from what he then saw of him, he was capable of understanding a document of any considerable length if it had been read to him; also, what capacity the testator had, and whether, in the opinion of the witness, the testator was at the time, capable of holding a conversation like the one testified to by another witness. . . .

"Two questions, however, are put by the contestants to Dr. Pratt, upon the assumption of the same facts, and overruled by the court, which I think did not properly fall within the objection I have been discussing. 1st. 'Was the testator, in your opinion, at the time, etc., capable of planning and executing such a paper as is here offered as his will?' and, 2d, 'Was he in a mental and physical condition to transact any business requiring an exercise of the judgment, the reasoning faculties, and a consecutive continuation of thought?' The first of these questions was, I think, admissible under the decision of this court, in Beaubien v. Cicotte, 12 Mich., 505, and I concur entirely with my brother Campbell in that case, that it is proper to put such questions to the witness as call for his opinion upon the capacity of the party to understand the very act, or kind of act, in dispute. I am unable to see the soundness of the principle in which five of the judges concurred in the Parish will case, that the question in every case is, 'had the testator, as *compos mentis,* capacity to make *a* will, not had he the capacity to make the will produced.' Men do not make wills in the abstract, but some particular will; and the question should, I think, always relate to the capacity to understand and make the will in controversy. Some wills are short, plain, and easy to be understood; others are long and exceedingly complicated in their provisions. If the testator sufficiently understands the short and simple will which he *has made,* it should not be set aside because he had not the capacity to understand the long and complicated one which he *did not make.*

"But both the questions above mentioned put to Dr. Pratt, when fairly construed, call, I think, only for the witness's opinion as to the degree of intelligence actually possessed by the testator, without any opinion of his on the legal question of testamentary capacity; and this either party had a right to show, whether it should be greater or less than the law requires to constitute testamentary capacity in reference to the will in question. The rejection of these questions was, therefore, in my opinion, erroneous."[1]

1—Compare the authorities cited in W., § 1958.

YOST v. CONROY (1883).

92 Ind. 464.

ELLIOTT, J.: "There is much confusion and some conflict in our cases upon the subject of proving benefits and damages to land affected by the construction of ditches, turnpikes and ways, and this case
419 requires an examination of that subject. In cases of confusion and conflict, the better way is to search for principle and adopt that view which stands most firmly on sound principle.

"It is an elementary doctrine, that witnesses who are acquainted with the value of property may express an opinion as to the value. Thus far all is plain and free from doubt. Opinions of witnesses as to the amount of benefits or damages sustained by a party are not competent. It may well be held that these cases declare the general rule correctly, since to hold otherwise would put the witnesses in the place of the jurors, and commit to them the decision of the amount of recovery. A contrary doctrine would also violate the rule that witnesses can not express an opinion upon the precise point which the issues present for the decision of the jury.

"There is not, however, the slightest conflict between the two propositions stated. It is one thing to prove the value of property, and quite another to prove what damages have been sustained by a party, or how much benefit has accrued to a litigant. . . . Many things enter into the estimate of benefits and damages besides the value of the land taken, and the value of the residue with and without the improvement, so that in expressing an opinion as to the value a witness does not give an opinion as to the amount of the benefit or damages; he does no more than furnish evidence upon one of the elements of the estimate. It is impossible to conceive that juries or courts can justly estimate benefits and damages without the aid of opinions of values from competent witnesses, unless, indeed, it be assumed that courts and juries have knowledge of the values of all kinds of property. If this assumption were just, then, no doubt, all that would be needed would be an accurate description of the property; but every one knows that in the very great majority of cases neither courts nor juries possess such knowledge as would enable them, unaided by opinions, to affix just values to property. . . .

"The question which here directly faces us is this: Is it competent to prove the value of land before a ditch is constructed, and what its value will be after the construction of the ditch? It can not be doubted that such evidence tends to assist in determining the question of damages and benefits, nor is there reason for supposing that it is not material. The situation of the land and the location and capacity of the ditch may be described with perfect accuracy, and yet a jury be utterly unable to form a just estimate of the amount of benefits or damages. Of what assistance to a jury composed of clergymen, merchants, and bankers would be a description of the minutest accuracy, without some estimate of values by competent witnesses? Possibly, it

would enable such a jury to form a crude conjecture; it could do but little more. . . . There seems to be, elsewhere than in Indiana, very little diversity of judicial opinion upon the proposition that a witness may state his opinion of the value of land with and without the proposed highway or ditch. The only question is whether he may not give his opinion in broad, general terms as to the extent of the injury or benefit. . . . It is a general rule that a witness can not be allowed to express an opinion upon the exact question which the jury are required to decide. . . . The cases holding that general opinions as to the amount of damages suffered by a plaintiff are not competent, are based upon this general principle. We can see no reason why the general rule should not apply to a case where the question is whether the ditch or highway will be one of public utility. The question is one upon which no especial learning or experience is required, and in such cases opinions are not, as a general rule, allowed to go to the jury."[2]

PENN MUTUAL LIFE INSURANCE CO. v. MECHANICS' SAVINGS BANK & TRUST CO. (1896).

19 C. C. A. 286, 72 Fed. 413, 428.

This action was on a policy of insurance for $10,000 issued December 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt, on his own life. Schardt died April 17, 1892, during the currency of the policy. The questions and answers in the application which are material to the controversy here were as follows:

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"6. Have you your life insured in this or any other company? (If so, give the name of each company, and the kind and amount of each policy) A. Yes; $10,000 in Northwestern, 20 pay life; $5000 in Aetna; $1,000 in New York Mutual Life, renewable term." After these answers this statement was signed by the applicant: "I hereby warrant and agree, that I am temperate in my habits, now in good health, and ordinarily enjoy good health, and that in the statements and answers in this application no circumstance or information has been withheld touching my past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted." . . . It was conceded that at the date of the application Schardt had a policy for $5,000 in the New York Life Insurance Company, which he failed to mention. Schardt's salary as teller was $1,500, and he had but a small amount of property. When he died in April, 1893, he had $80,000 of insurance on his life, nearly all of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted at the time of his application for this policy to little less than $100,000, and at his death exceeded that sum. He did not disclose the fact of his crime to the defendant at the time of his application, or at any other time. Defendant called insurance experts to testify in regard to the materiality

2.—Compare the authorities cited in W., § 1943.

of the facts in respect to which it was claimed that Schardt had been guilty of misrepresentation or concealment. The Court permitted the experts to say, whether, in their opinions, the facts misstated or concealed were material, but refused to allow them to say whether, by the usage of all insurance companies, such facts were regarded as material to the risk.

TAFT, J.: "At the trial the defendant introduced witnesses who had been long engaged in the insurance business, and was permitted by the court to ask them whether the facts concerning which it was either admitted or claimed that Schardt had made untrue statements, and the fact of his embezzlements which he did not disclose, were material to the risk; but the court declined to permit an answer to the question whether, by the usage and practice of all insurance companies, such acts were regarded as material. This latter ruling of the court was excepted to by the defendant company. The question of evidence thus presented has been before the courts of England and America in many different phases, and the decisions present a bewildering conflict of authority. . . . It is in accord with the better reason to exclude opinions of insurance experts upon the point whether an undisclosed fact was material to an insurance risk. If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of everyday life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. . . . Certainly, there is the same ground for excluding the individual opinions of insurance men [in life insurance] upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not experts upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind. . . .

"The better authorities, however, seem to sustain the rule that the insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or in rejecting risks, when made aware of the fact claimed to be material. The distinction between this and the rule just discussed may seem at first a close one, but on consideration it appears to be sound. It may be asked why, if one insurance man of long experience cannot give his individual opinion that a fact is or is not material to a risk, should it be competent for him to state the opinions of a great many insurance men on the same question? A fact is material to an insurance risk when it naturally and substantially increases the probability of that event upon which the policy is to become payable. Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the same time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. . . . But care must be taken that the witness shall not substitute his own opinion, or that of his own company only, neither of which is relevant, for the usage of companies generally. The modern practice of life insurance companies seems to be, not to vary the premium, except for age, and either to accept risks of the same age, or reject them altogether. If so, there would seem to be no means of judging the materiality of any other fact than that of age, from the usage or practice of insurance companies, except by their acceptance or rejection of the risk; and the question should be limited, in such cases, therefore, to whether insurance companies generally, if made aware of the undisclosed fact, would reject the risk. The question which the court refused to permit was whether the misrepresented or concealed fact would be regarded among insurance companies generally as material. This was rightly rejected. The proper form in which the question might have been put to a duly-qualified witness was: 'Are you able to say, from your knowledge of the practice and usage among life insurance companies generally, that information of this fact would have enhanced the premium to be charged, or would have led to a rejection of the risk.'"[3]

3—Compare the authorities cited in W., § 1947.

FENWICK v. BELL (1845).

421 *1 C. & K. 313.*

[Quoted *ante*, No. 413.][4]

EARL OF THANET'S TRIAL (1799).

27 How. St. Tr. 927.

Charge that the defendant obstructed the officers and aided O'Connor, a prisoner, to escape during his trial; Richard Brinsley Sheridan on the stand for the defence. Mr. *Law* (afterwards L. C. J.
422 Ellenborough) cross-examining for the prosecution: "My question is whether, from what you saw of the conduct of Lord Thanet and Mr. Fergusson, they did not mean to favour the escape of O'Connor?" "I will say that I saw nothing that could be auxiliary to that escape." "I ask you again whether you believe [as above]?" "I have no doubt that they *wished* he might escape; but from anything I saw them *do*, I have no right to conclude that they did." "I will have an answer. I ask you again [as above]?" "If the learned gentleman thinks he can entrap me, he will find himself mistaken". Mr. *Erskine*, for the defence: "It is hardly a legal question". L. C. J. KENYON: "I think it is not an illegal question."

FISKE v. GOWING (1881).

61 N. H. 431.

Debt. The plaintiff recovered judgment against Milan Harris, A. R. Harris, and S. G. Griffin, who were stockholders in the M. Harris Woollen Co., a corporation of which the defendant was treasurer;
423 the execution issued thereon was placed in the hands of the sheriff for collection, who exhibited it to the defendant at his office in Boston, and at the time gave to him a proper and sufficient written request for a certificate of the number of shares, &c., of the judgment debtors in the corporation; and the defendant did not then, or ever, furnish such certificate. The defence was, that after giving the written request the sheriff waived or withdrew it. Both the sheriff (produced as a witness by the plaintiff) and the defendant testified fully in respect to all the conversation, facts, and circumstances which took place during their interview. Subject to the plaintiff's exception, the court allowed the following question to be put to the defendant, and his answer to be taken: "Did you, or not, understand from what Mr. Holt [the sheriff] said, and from his conduct, that he waived or withdrew his request for a certificate?" Ans. "I fully so understood it; that was the reason I took no steps towards giving a certificate." . . .

SMITH, J.: "The precise question raised in this case was decided in Eaton v. Rice, 8 N. H. 378, where it was held that a witness may state generally what he understood a contract between two persons to

4—Compare the authorities cited in W., § 1951.

have been from their conversation, although he may not be able to state the language used in making the agreement. It rarely happens that two persons are able to give precisely the same account of a conversation. Their narration will differ more or less according to their intelligence, their interest in the subject-matter, their opportunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult and sometimes impossible for a witness to describe. It was a vital question whether the defendant understood or had a right to understand, from what was said and done, that the request for a certificate was waived or withdrawn. He might have received his understanding in part from the conduct of the officer, and in part from what was said between them and from the way it was said. To confine the witness to a mere narration of the language used, if he were able to recall it, might give the jury an imperfect and erroneous idea of the actual understanding of the parties."[5]

ALEXANDER DAVISON'S TRIAL (1808).

31 How. St. Tr. 186.

The accused, a commissary-general in the army, was charged with fraud in the public accounts; Lord *Moira* sworn: "Had your lordship [as general-in-command] an opportunity of observing his [the accused's] public conduct?" "His conduct was clear and punctual, answering every expectation I had formed, strictly delicate in refusing emoluments which he might well have claimed." "From your lordship's general knowledge of his conduct, is he a person whom your lordship would think capable of committing a fraud?" "Certainly not." After an interruption on another point: L. C. J. ELLENBOROUGH: "The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offence charged in the indictment." Sir *Andrew Hammond* sworn; L. C. J. ELLENBOROUGH: "From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud?" "I should have thought him the last man in the world that would have attempted anything of the kind, or even to have been a cause of it." Mr. *James Davidson* sworn: "From all that you have observed of him [Mr. D.] and all that you have known and heard of him, what is your opinion of his general character?" "You say 'known and heard'; all that I have *known* of him is that he has been an honest man, an honest dealer

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5—Compare the authorities cited in W. §§ 1963, 1969. Compare also the principle of Completeness, *ante*, Nos. 202-204.

with me as a merchant." "From what you have *heard* in the world at large, what is your opinion of him?" "There are a variety of reports concerning Mr. Davison; those I know only as the world knows; but as to his dealings with me, I always found him an honorable and honest man."

R. v. ROWTON (1865).

Leigh & C. 520, 532, 539, 10 Cox Cr. 25.

Indecent assault upon a boy; the witness for the prosecution was asked, "What is the defendant's general character for decency and morality of conduct?", and answered: "I know nothing of the
425 neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion and the opinion of my brothers who were also pupils of his is that his character is that of a man capable of the grossest indecency and the most flagrant immorality." This evidence was objected to.

Cockburn, C. J. (for eleven of the thirteen judges): ". . . When we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. . . . I am strongly of opinion that that answer was not admissible. As, when a witness is called to speak to the character of the accused, he cannot say, 'I know nothing of his general character, but I have had an opportunity of forming an opinion as to his disposition, and I consider him incapable of committing this offence;' so here, when the witness declared that he knew nothing of the general character of the accused, but that in his opinion the prisoner's disposition was such as to make it likely that he would commit the offence in question, applying the same principle, the answer was inadmissible."

Erle, C. J. (dissenting): "Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man; which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. . . . I think that each source of evidence is admissible. You may give in evidence the general rumor prevalent in the prisoner's neighborhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumor. I never saw a witness examined to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say: 'This man has been in my employ for twenty years; I have had experience of his conduct; but I never heard a human being express an opinion of him in my life; for my own part, I have always regarded

him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Chief Justice has laid down would exclude this evidence, and that is the point where I differ from him. To my mind, personal experience gives cogency to the evidence; whereas such a statement as 'I have heard some persons speak well of him,' or 'I have heard general report in favor of the prisoner,' has a very slight effect in comparison."

Willes, J. (dissenting): "I apprehend that the man's disposition is the principal matter to be inquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition. . . . The judgment of the particular witness is superior in quality and value to mere rumor. Numerous cases may be put in which a man may have no general character—in the sense of any reputation or rumor about him—at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character [reputation] without having acquired it, which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to its parents and teachers, and the character of a man of business to those with whom he deals. . . . According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a court of law? . . . The evidence in this particular case was of a very peculiar character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within reach of his influence—persons who would not be likely to communicate his conduct to the neighborhood or to one another."

Chief Justice Swift, (*Conn.*) *Evidence, 143* (1810): "A witness called to impeach or support the general character of another [witness] is not to speak of his private opinion or of particular facts in
426 his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances. The only proper questions to be put to him are, whether he knows the general character of the witness intended to be impeached, in point of truth, among his neighbors? and what that character is, whether good or bad? The witness may be inquired of as to the means and opportunity he has of

knowing the character of the witness impeached,—as, how long he has known him, how near he lives to him, and whether his character has been a subject of general conversation; but his testimony must be founded on the common repute and understanding of his acquaintance as to his truth, and not as to honesty or punctuality. In England, [citing 4 Esp. 162,] the first question is, whether the witness impeaching has the means of knowing the general character of the other witness? and from such knowledge of his general character, whether he would believe him on oath?"[1]

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427 Algernon Sidney's Trial, *9 How. St. Tr. 851, 864* (1683); Mr *Sheppard* sworn. *Att'y-Gen.:* "Pray, will you look upon these writings [shewing the libel]. Are you acquainted with Colonel Sidney's hand?" *Sheppard:* "Yes, my lord." *Att'y-Gen.:* "Is that his handwriting?" *Sheppard:* "Yes, sir; I believe so. I believe all these sheets to be his hand." *Att'y-Gen.:* "How come you to be acquainted with his hand?" *Sheppard:* "I have seen him write the indorsement upon several bills of exchange." Col. *Sidney:* "My lord, I desire you would please to consider this, that similitude of hands can be no evidence." L. C. J. Jeffries: "Reserve yourself until anon, and make all the advantageous remarks you can." . . . *Sidney:* "Now, my lord, I am not to give an account of these papers; I do not think they are before you, for there is nothing but the similitude of hands offered for proof. The similitude of hands is nothing; we know that bonds will be counterfeited, so that no man shall know his own hand."

1—*Story,* J., in *Gass* v. *Stinson, 2* Sumner 610 (1837): "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."

Caton, C. J., in *Eason* v. *Chapman, 21* Ill. 35 (1858), (after pointing out that persons may have a bad name for truthfulness, and yet "from their daily walk and conversation in other respects, none would doubt their truthfulness when solemnly called to testify in a court of justice"): "Yet it would be impossible to detail all the minutiæ of the circumstances which would inspire that confidence so as to impart their full and just impression to the jury. . . . Hence witnesses, who must be always impressed with these indescribable circumstances if they exist, have always been allowed to express the opinion whether they would or not believe the impeached witness under oath."

Per Curiam, in *Hillis* v. *Wylie, 26* Oh. St. 576 (1875): "To say that the reputation of the witness is 'bad' gives but imperfect information; 'bad' is a relative term, and the inquiry at once arises in the mind, 'How bad is it?' Is his reputation so bad that he ought not to be believed under oath? The mode of inquiry [thus] allowed is only a means of ascertaining what the reputation of the witness for truth really is. The object of the testimony is not to introduce as evidence the opinion of the impeaching witness as to the truthfulness of the witness against whom he testifies, but to enable the jury to ascertain the true character of his reputation for truth as the impeaching witness understands it, and thereby enable them to determine the extent to which it ought to discredit the witness. The question would be the same in effect if the witness were asked if the reputation of the witness in question were such as to go to his discredit when under oath."

Compare the authorities cited in W., §§ 1983, 1985.

Compare also the rules as to the Kind of Character (*ante,* Nos. 115-117), the mode of proof of Particular Instances of Misconduct (*ante,* Nos. 120-126), and the nature of Reputation (*ante,* Nos. 319-321).

HALES' TRIAL, *17 How. St. Tr. 273* (1729); forgery of a promissory note. *Counsel:* "Mr. Lincoln, those receipts which you produced, did Mr. Kinnersley actually write them?" Mr. *Lincoln:* "I saw
428 him write them all." *Counsel:* "Shew them to the jury." REYNOLDS, J.: "Gentlemen of the jury, in that book you will find some receipts wrote by Mr. Kinnersley, which Mr. Lincoln swears are his hand."

DUNCAN, J., in COM. v. SMITH, *6 S. & R. 571* (1819): "Comparison of handwriting is when other witnesses prove a paper to be the handwriting of a party, and the witness is desired to take the
429 two papers in his hand, compare them, and say whether they are or are not the same writing. There the witness collects all his knowledge from comparison only; he knows nothing of himself, he has not seen the party write, nor held any correspondence with him."[2]

DOE *dem.* MUDD v. SUCKERMORE (1836).

5 A. & E. 703.

Ejectment for messuages, &c., in Suffolk. On the trial before VAUGHAN, J., at the Suffolk Spring assizes, 1835, a verdict was found for the defendant. In Easter term, 1835, *Storks,* Serjt., obtained
430 a rule for a new trial on the ground of an improper rejection of evidence. On this day, cause was shown by *Kelly* and *Gunning;* and *Storks,* Serjt., and *Byles,* were heard in support of the rule. The Court took time to consider; and in Trinity term, 1837 (June 8th), their Lordships, differing in opinion, delivered judgment seriatim. . . .

COLERIDGE, J.: "This was a motion for a new trial, on the ground that evidence had been improperly rejected by my brother VAUGHAN under the following circumstances. The question in the cause was the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, Stribling, was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions, made by him in proceedings relating to the same will in another court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard, were shown to him: and he said he believed they were all of his handwriting. At the time he gave his evidence, another witness was in court, and, the cause lasting to the second day, was called. He had never seen Stribling write, nor had any other means of acquiring a knowledge of the char-

2—Compare here the other rules as to the qualifications of an ordinary witness to handwriting, *ante,* Nos. 83, 84.

The foregoing extracts illustrate the contrast between the ancient and the modern meanings of "comparison of hands" (W., §§ 1991-1994).

acter of his handwriting, but from an examination of the signatures so produced: this he had made on the first day, and, from this, he stated that he thought he had acquired a knowledge of the character of his handwriting; and he was asked whether he believed the attestation to the will to be the handwriting of Stribling. This was objected to, and, on argument, determined to be inadmissible; in my opinion, after much consideration, the evidence was properly rejected.

"The rule as to proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus. Either the witness has seen the party write on some former occasions, or he has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. . . .

"Upon these grounds directly, I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. . . . Assuming that no dispute exists as to the genuineness of the standard or the fairness with which it has been selected, [still] such a comparison leads to no inference as to the general character of the handwriting. . . .

"If the points which I have just supposed to be conceded [genuineness of specimens and fairness of selection] be brought into question, other and most serious objections arise to this mode of proof. If the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard,—an issue, too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages that the former standard is not produced, and that the opposing party can avail

himself of no counter-proof. . . . If the fairness with which the standard has been selected is disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice has been given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into. It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury, and that we have no provisions for limiting the standard of comparison or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted.

"Now, in the present case, it must be conceded that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures selected by one party, and had acquired an impression of some general character pervading the whole: he had heard it proved that those were written by the witness Stribling; and, from these materials he was to speak. It is asked, how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be? With respect to the assumption, there will be a fitter place to point out the distinction; but I answer, here, that the two cases differ in that which is essential, in the undesignedness of the one, the fact that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose in some future unknown cause; and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance that the witness has the materials for ascertaining the general character of the handwriting, which is the knowledge to be acquired. . . . Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard is itself disputed? Is the counter-evidence to be received at once as to this point; and the opinion of the jury to be taken on the preliminary and collateral issue, before the evidence is heard as to the principal document? Or is that to be gone into after the *prima facie* proof on the collateral issue, and to be received, subject to being entirely displaced by the answer on the other side? Or, lastly, is the judge to decide this question of fact? I believe it impossible to answer these questions without either introducing a most inconvenient novelty in our procedure at *Nisi Prius,* or involving the jury in a complication of issues from which it is too much to expect that they should escape safely."

WILLIAMS, J.: "The question (important as it is, being connected

with principles and practice regulating the admissibility of evidence) seems mainly to be reduced to this point, whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. . . . And the objection is twofold; first, that it was acquired merely by the comparison of writing; and next, that, at all events, it was not acquired by either of the legitimate and recognised modes, already referred to, having seen the party write, or corresponded with him.

"As to the first, . . . it seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting, in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof. What is to be said, where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant, and (in proportion to the length of time) faint image in the mind with the writing in question? . . .

"I come now to consider, whether the witness in this case had any legitimate means of knowledge to authorize the question, the answer to which was rejected. It has been said that the specimens selected may have been garbled and fallacious, 'calculated to serve the purpose of the party producing them, and, therefore, not exhibiting a fair specimen of the general character of the handwriting.' . . . I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one-half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then some proof that they were of the witness's handwriting? And, if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters, written, the one ten, the other five, years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has, in some manner, authenticated them to be his. Why might the witness have been asked the proposed questions in this instance? Because the witness had sworn that the papers were of his handwriting. In each case, it is from the perusal of papers (and papers only) that the knowledge is acquired. In each case there is some proof that the papers to be perused, in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and inquiry arise. . . . Anything, I presume, from which the identity of the writer is established, may suffice. If then, from such proof, whence a reasonable inference

may arise that the letter or signature is by such or such person, an opinion of his handwriting may be given, the question recurs, whether there be not *some* foundation for opinion, where the party has upon his oath declared that the papers perused by the witness were written by himself. That no person has, hitherto, been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write, or received writing from him), may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, has it ever arisen before? If not, we are called upon, as in the various and ever varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject, to this fresh question. . . ."

PATTESON, J. ". . . All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname. . . . Or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. . . . A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party,

which perhaps may be considered as the same process in effect, expressed in other words. The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

"Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord KENYON in Stranger v. Searle, 1 Esp. 14; and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and, if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party. The other mode of satisfying the witness, viz. by the information of third persons, is equally open to objection, as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair.

"The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally require to be proved; and so it is obvious that the same process, as is now attempted, might be repeated ad infinitum, and lead to no conclusion. But if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes which I consider to be the only legitimate modes, those witnesses must, from the nature of their evidence, be much more competent to form an opinion as to the handwriting in question in the cause, than the witness whose evidence is proposed to be introduced by such a process."[3]

DOE *dem.* PERRY v. NEWTON (1836).

1 Nev. & P. 1.

Ejectment for land in Cumberland. At the trial before COLERIDGE, J., at the last assizes at Carlisle, it appeared that this action was brought by the heir at law of one Brockbank against the defend-
431 ants, who claimed as devisees under the will of the same individual. In February last the testator died, as was supposed intestate.

3—Compare the authorities cited in W., § 2016.

Some weeks afterwards, in removing the bed in which he had died, a document was found, which the defendants alleged to be his will. The question at the trial, was, as to the genuineness of this document. It was dated in 1833, and was witnessed by three persons, all of whom were dead at the time of the discovery of the will; and it was not known by whom it had been written. Evidence was given, on the part of the defendants, of belief in the handwriting of the testator and attesting witnesses. On cross-examination the same persons proved that various letters produced to them by the plaintiff's counsel, and purporting to be letters written and signed by the testator and two of the persons attesting the will, were respectively in their handwriting. On the part of the plaintiff witnesses were afterwards called, who negatived, according to their belief, the alleged handwriting of the testator and attesting witnesses; and it was then proposed to give in evidence the before-mentioned letters, proved to have been undoubtedly written by the testator and witnesses respectively, in order that the jury might compare the handwriting contained in those letters with the signatures to the will, and thus detect an alleged dissimilarity between such letters and signatures. This evidence was rejected by the learned judge. A verdict was found for the defendants.

Alexander now moved for a rule *nisi* for a new trial, on the ground that this proof had been improperly rejected. "The general rule of evidence on this subject is stated to be, that handwriting cannot be proved by a comparison of the paper in dispute with any other papers, although acknowledged to be genuine. The generality of the proposition was, however, limited by Griffith v. Williams.[1] In that case the Court of Exchequer held, that the rule does not apply where the writing acknowledged to be genuine is already in evidence in the cause, and that in such case the jury may compare the two documents. Nor was this the earliest decision upon the point; for in Allesbrook v. Roach,[2] not noticed in the last-cited case, *Lord* Kenyon allowed the signature of the defendant to several bills of exchange to be compared by the jury with his alleged signature to the bill on which that action was brought. The bills there allowed to be made the subject of comparison were no more connected with the matter in dispute than the letters proposed to be given in evidence in the present action. . . . The question therefore will be, the propriety of such a limitation. Two reasons have been assigned in its support: first, that the jury may be wholly illiterate, and unable therefore to institute the comparison; the second, that the party interested has it in his power to select, and probably will select, out of a number of documents, such only as suit his purpose, and will keep back the rest. The first reason, however applicable at former times, will scarcely have any weight at the present day. The second would apply with equal stringency to cases of ancient documents, which are undoubtedly proveable by a comparison of handwriting, and yet in such cases the interested party possesses

1—1 C. & J. 47. 2—1 Esp. 351.

the same power of producing or keeping back any specimens he may deem favourable or otherwise to his view of the case. Such a course of proceeding is open to inquiry and observation, and affords a test, rather for the value, than for the admissibility, of this description of evidence. It is difficult to see on what solid grounds the distinction can rest between the admissibility of documents already in evidence in the cause, and those offered for the purpose of comparison. Both are avowedly in the handwriting of the party; and the question being the genuineness of the alleged writing, they afford an equal criterion."

Lord DENMAN, C. J.: "I think that we ought not to raise any doubt on this subject. Griffith v. Williams was supposed to go a long way when it established the right, on the part of a jury, to take other papers, already in evidence, and compare them with the questionable one, for the purpose of coming to a conclusion, from the comparison, whether that questionable one was genuine. The real ground, on which that case stands, is, that comparison in such a case is unavoidable. When two documents are placed before a jury, one of which is in question, and the other is clearly known to be the handwriting of the party, no human power can prevent the jury from forming some opinion whether those two were written by the same person; and consequently when such is the case, and the mind of the jury must be so employed, it is better for the Court to enter into the consideration, and to direct any observations that may occur as to the value of such evidence. I own I do not find it easy to reconcile what I have now said with what passed before *Lord* KENYON in the case of Allesbrook v. Roach. What was done in that case is not consistent with the uniform practice of Westminster Hall. . . . It is, in my opinion, infinitely safer and better to abide by the rule which has existed up to the present time, that evidence of handwriting by comparison is inadmissible, except in cases where it is unavoidable. Considering the consequences that might arise in criminal cases, that a party might be convicted on such a mere conjecture and surmise as the appearance handwriting would present, we cannot, I think, be too cautious in extending the rule." . . .

COLERIDGE, J.: "I am of the same opinion. I only wish to say a word in respect to that instance on which Mr. *Alexander* relied with respect to ancient handwriting. . . . I have always understood that to be an excepted case; but that exception has been founded on the same principle which justifies it in others. The exception is of *necessity;* the handwriting cannot be proved in any other way. Doubtless it is less open than modern writing would be to the objection that the selection may be an unfair one.

"I will add another reason why I think the evidence was properly rejected,—that many irrelevant issues would be thereby raised. It is all very well if the jury are to look only at the documents that are otherwise in evidence in the cause. Whether those documents are or are not in the handwriting of the party, must be proved in the

course of the case. If the rule is extended to documents that have nothing to do with the matter in dispute, on every one of those an issue is raised quite irrelevant to the main point; with this additional objection to be made to it, that the other party cannot know what documents are going to be produced, and does not come prepared to answer inferences arising from their production. This seems an additional reason why the rule should be narrowed." . .

Lord DENMAN, C. J.: "My brother COLERIDGE's observation is a striking one. Each letter produced might raise a separate issue."[4]

UNIVERSITY OF ILLINOIS v. SPALDING (1900).

71 N. H. 163, 51, Atl. 731.

Action against Solomon Spalding, as surety on a bond given by Charles W. Spalding. Verdict for the defendant. The defense was that after the bond was signed, and before it was delivered to
432 the plaintiffs, the name of one surety was erased and another written over it, and that the appearance of the signatures was such that ordinary care would have disclosed the erasure and substitution to the plaintiffs before acceptance of the bond. An enlarged photographic copy presented faint lines of the writing alleged to have been erased. The plaintiffs claimed that the erasure was of a part of the defendant's name accidentally written by him upon the line below his full signature, while the defendant denied that the words erased were in his handwriting. For the purpose of comparison the defendant introduced in evidence his signatures written upon stock certificates, and sworn to be genuine by him and by the treasurer of the corporation. The plaintiffs excepted to this evidence on the ground that the signatures were neither admitted to be genuine, nor found in papers otherwise in the case, and, further, that they appeared to have been written at a date subsequent to the execution of the bond. . . .

REMICK, J.: "The exception next considered presents the question whether signatures of the defendant on papers otherwise irrelevant, and not admitted to be genuine, were admissible for the mere purpose of comparison with the signature in dispute. By the general rule of the common law, comparison by juxtaposition was limited to the writing in issue and writings in the case for other purposes. The introduction of writings, otherwise irrelevant, for the mere purpose of comparison, was permitted only when the writing in issue was so ancient as not to admit of proof based on knowledge derived from seeing the party write, or its equivalent. . . . While the law remains in the conflicting and inconclusive shape disclosed by the foregoing review of the authorities, confusion and controversy are inevitable. Consistency and efficiency alike require a definite rule, authoritatively declared. In this view, we have re-examined the question, both from the point of reason and authority.

4—Compare the authorities cited in W., § 2008.

"It may be safely stated as a fundamental proposition that, on the question whether a given signature is in the handwriting of a particular person, comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature with an exemplar of the person's handwriting, existing in the mind, and derived from direct acquaintance, however little, with the party's handwriting. The objections upon which the common-law rule of exclusion is founded are threefold: (1) Ignorance of jurors, and their inability to make intelligent comparison; (2) danger of unfairness and fraud in the selection of specimens, with no sufficient opportunity for the opposing party to investigate and expose; (3) collateral issues to the genuineness of specimens presented.

"(1) The first objection, however justified by the state of English society when it was originally announced, has no weight at the present time in a jurisdiction where intelligence and education are general, and needs no further comment. (2) Since the right to produce specimens under a rule allowing a comparison is equally open to both parties, and the specimens are all subject to examination and cross-examination, the opportunity for advantage from unfair selections is too slight to furnish reason for closing the door against this important avenue of investigation. (3) The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury—is, when applied to specimens neither admitted by the parties nor found by the Court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to assert in whether they belong to the same class or not; but, when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury. . . . The true rule is that, when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but, before any

such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. This involves, indeed, a marked departure from the common law. It does away with the common-law limitation of comparison to standards otherwise in the case, and hence with its exceptions, and the controversy and confusion which have grown out of them. . . . In some States, as already shown, legislation has been deemed essential to bring about such changes; but in others, as we have also shown, the same result has been accomplished by judicial action. As the common-law rule was based primarily upon the assumed incapacity of jurors to make intelligent comparison, such judicial action would seem warranted under the power to adapt the common law to new conditions. The value of comparison as a method of proof being now generally conceded, juries being no longer too ignorant to derive benefit from that source, and the danger of spurious specimens and the objections to collateral issues being fully met by requiring the genuineness of the standard to be determined as a preliminary fact by the trial judge, there remains, it would seem, no satisfactory reason for the old limitations and exceptions. And it is fair to assume that, had no statute been enacted, the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced. Such a tendency was indicated by the discussion and decision in [Doe d.] Mudd v. Suckermore, which was so soon followed by the act of Parliament referred to. In any event, the essential principle of the common law is preserved, and the dangers and objections against which it was aimed met, by requiring the genuineness of the standard to be found by the Court as a preliminary fact, upon clear and positive testimony."

STATUTES: *England,* 1854, Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall
433 be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

California, C. C. P. 1872, § 1944: "Evidence respecting the handwriting may also be given by a comparison made by the witness or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge."

New York, Laws 1880, c. 36, § 1; Laws 1888, c. 555: "Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

§ 2 (amendment of 1888) same for the first eighteen words; then "handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the Court and jury in like manner."

History of the Law in the 1800s.[1] "(A) *Classes of Witnesses.* What we have as the 1800s came in (the time when reasons and principles for the rules of evidence began much to be thought about) is (1) the acceptance of witnesses who had seen the person write; (2) the acceptance of witnesses who had received writings subsequently treated by him as genuine or who had had the custody of ancient documents of the same person's; (3) the permission, for such persons, equally of merely examining the disputed writing and of bringing into court the specimens they knew and juxtaposing them; (4) the exclusion of any other mode of testimony under the condemnatory phrase 'comparison of hands.' The other kinds of witnesses that were thus excluded would be (*a*) an *ordinary witness who knew nothing about the handwriting* but merely juxtaposed specimens and compared; (*b*) the same testimony by one skilled in handwriting generally.

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"(*a*) Now the former was of course barred absolutely by the Opinion rule, well expounded in this connection in the following passage:

1770, Yates, J., in Brookbard v. Woodley, Peake N. P. 21, note: 'Where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else, and any two people may think differently.'

"(*b*) The other kind of testimony thus excluded was that of *experts speaking from juxtaposition.* This it was now strenuously sought to introduce. It is no matter of surprise that the judges instinctively hesitated; for the idea of expertism in handwriting was then a novel one. But the significant circumstance is that those who tried to use this kind of testimony were obliged to strive to remove from it the stigma of being 'comparison of hands.' They failed for a long time to introduce the new kind of testimony, and the Legislature had finally to step in with its aid. But the result of the discussion was that the stigmatized 'comparison of hands' now obtained definitely a narrow meaning; it covered the testimony of all witnesses whose knowledge was acquired solely *by examination of specimens for the purpose of the trial;* it no longer applied to witnesses who had gained a knowledge by seeing the person write or by receiving correspondence or the like. . . .

"(B) *Submission of Specimens to the Jury.* There is, of course, a sole remaining way of attempting to prove the genuineness of handwriting, *viz.,* without asking the opinion of any witness, to *lay before the jury some specimens* of the writing of the person in question.

1—Quoted from W., § 1993.

In the early practice before 1800 there was no objection to the jury's examination purely as such. The witness who had seen the person write (or later, had received papers, or possessed old documents learned to be genuine) might bring the writing in, if he had it, and the jury would incidentally look at it. Thus the stigma of 'comparison of hands' was not applicable to the fact of the jury's examination as such; the struggle was against the use of a certain kind of witness, not against what he did if admitted. There were towards the end of the 1700s only two kinds of witnesses—those who had seen the person write, and those who had held correspondence or possessed ancient documents —and it seems entirely clear that not only could these witnesses bring in and compare the specimens they had, but the specimens could be laid before the jury for their inspection. But now the controversy (above mentioned) over expert testimony by juxtaposition was in full array; the new and narrow sense of the stigmatized 'comparison of hands' naturally associated itself with any and every process of 'comparison' or manual juxtaposition; and doubts about the propriety of the time-honored inspection by the jury thus arose. It is possible that the old practice of handing to the jury all specimens brought in by witnesses who had seen the person write persisted for some time into the 1800s. But the Court of Exchequer, in 1830, and the King's Bench, in 1836, after canvassing the whole subject from the point of view of policy, put a limitation upon the practice—confining it to documents already in the case—, which remained the law, until the Common Law Procedure Act of 1854 speedily reverted to the early tradition, and substituted its more satisfactory rule.

"If the foregoing exposition has been clear, we may understand (1) that the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of 'comparison of hands' has changed; (3) that the mere process of juxtaposition *coram judicio,* whether for witness or for jury, was historically orthodox and unquestionable; and (4) that the opposite fates at common law of juxtaposition by experts and juxtaposition by jury—exclusion for the former, but limited sanction for the latter —were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life."

HOAG v. WRIGHT (1903).

174 N. Y. 36, 66 N. E. 579.

PER CURIAM: "The plaintiff is the son and sole surviving descendant of the defendants' testatrix, Hester Hoag, who died on the 15th of February, 1895, in the eighty-first year of her age. The
435 action is upon two promissory notes—one for $2,000, dated October 16, 1890, payable to the order of the plaintiff; and the other for $4,000, dated November 13, 1894, payable to the plaintiff—without

words of negotiability. The complaint is in the usual form, and by their answer the defendants denied the making and delivery of both notes, and alleged that, if made or delivered, they were without consideration. . . .

"Experts were called by both parties to give their opinions as to the genuineness of the signatures to the notes after comparing them with the indorsement of the decedent upon certain checks read in evidence as standards of comparison. Upon the cross-examination of an expert named Reed, called by the plaintiff, it appeared that during his testimony upon a previous trial of this action he had been shown two papers so folded as to disclose only what purported to be the signature of the decedent upon each. He testified, in substance, that upon the other trial, after comparing these signatures with the standards in evidence, he had pronounced them genuine, and had sworn that all were written by the same hand. Each of the papers, when unfolded, was a total blank, and the signatures were obviously spurious. The witness was thus compelled to admit that he had been mistaken in his opinion as an expert, upon the previous trial, in relation to the signature of the decedent, and had testified that the spurious signatures were genuine. After this witness had left the stand, another expert was called by the plaintiff, who, also testifying by comparison, stated that the signature to the notes were genuine. Upon cross-examination an effort was made by the defendants' counsel to show that he had made the same mistake upon the previous trial as Mr. Reed. For this purpose he was shown the two papers, folded so as to expose only the spurious signatures, and was asked if he remembered that these signatures had been shown him on the former trial. The counsel for the plaintiff objected to 'showing the witness any papers which are not in evidence.' The Court thereupon said: 'The objection is sustained. I think it is incompetent. On reflection, I will strike it out.' . . .

"The evidence stricken out in this case was not only competent and material, but was of decided value, and might have turned the scale toward the defendants upon an issue so closely contested. It tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion. . . . Owing to the dangerous nature of expert evidence, and the necessity of testing it in the most thorough manner in order to prevent injustice, we are disposed to go farther, and to hold that, where a witness makes a mistake in his effort to distinguish spurious from genuine signatures, and he does not acknowledge his error, it may be shown by other testimony. The test sought to be applied in this case was one of the most practical and conclusive that can be employed to determine whether the witness is really an expert or not. It bears not only upon his competency to express an opinion, but upon the

value of his opinion when expressed. . . . The good sense of the trial judge will confine it within proper bounds, and prevent an unnecessary consumption of time. It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty, or property upon an opinion that is worth nothing. The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave that we feel compelled to depart from our own precedents to some extent, and to establish further safeguards for the protection of the public. As to the hostility of witnesses to a party may be shown as an independent fact, although it protracts the trial by introducing a new issue, so, as we think, the incompetency of a professed expert may be shown in the same way and for the same reason; that is, because it demonstrates that testimony, otherwise persuasive, cannot be relied upon."[1]

3. HYPOTHETICAL QUESTIONS.

KEMPSEY v. McGINNISS (1870).

21 Mich. 123, 141.

The testimony offered in this case has been set forth *ante,* No. 418.

CHRISTIANCY, J.: "No controversy arises upon the questions touching mental capacity put to any one of the witnesses testifying
436 from their personal observation alone. But the contestants offered in evidence the opinions of several professional witnesses who had not seen the testator during his illness; and upon the proper mode of conducting such an examination some of the main questions in the case arise. We consider it too well settled to require the citation of authorities, that, upon questions of this kind, the opinions of men skilled in that particular science, in other words, physicians, are admissible in evidence, though not founded upon their own personal observation of the facts of the particular case.

"But in the case of such professional witnesses, as well as in that of unprofessional witnesses—who are allowed to give their opinions only from personal observation—the facts upon which the opinion is founded must be stated, and the jury must be left to determine whether the facts stated, as well as the opinions based upon them, are true or false. And it is obvious that when such opinions are given without personal knowledge or observation, such opinions must be based either upon facts observed and stated by other witnesses who knew them, or upon a state of facts assumed for the purpose as a hypothetical case, which the jury may find from the evidence. But as the jury are to pass upon the credibility of all witnesses and the weight of the evidence, and to determine all matters of fact involved in the case, no witness can have the right to usurp the power of the jury, or to deter-

1—Compare the authorities cited in W., § 2015.

mine any of these questions for them, nor even to give an opinion upon the weight or credibility of any of the testimony. No question, therefore, can be put to the witness which calls upon or allows him to decide upon the truth or falsehood of any evidence in the case. If, therefore, there be any conflict between the witnesses as to the facts upon which a professional opinion is sought, it is manifest the professional witness cannot, though he has heard the testimony, be asked to base his opinion upon that testimony, upon the hypothesis of its truth; because, to reach his conclusion, he must necessarily pass upon the credibility of the witnesses and the weight of the evidence. In the case of any such conflict, therefore, the only proper mode of interrogating the professional witness, is by stating and enumerating in the question itself, the facts to be assumed. And when his opinion is asked upon a case (such as the physical or mental effects of a disease upon a certain person, under certain circumstances and exhibiting certain symptoms), as stated by other witnesses, when there is no conflict, he is to assume, without undertaking to decide, the truth of their statements, and to base his opinion *only* upon the facts thus assumed, leaving the jury to determine whether such assumed acts are true or false.

"Now, it is manifest that this is but giving an opinion upon a hypothetical case, as much as if the facts testified to by the other witnesses had been expressly and hypothetically assumed and enumerated in the question itself. And it would seem, from the nature of the case, to be impracticable to frame any proper question for eliciting an opinion, which is not in the nature of a hypothetical case, being based upon an assumed state of facts which the jury may, or may not, find to be true. And as a collection of state of facts assumed, whether few or many, constitute in the aggregate the basis on which the opinion is asked, if it does not appear that the opinion would be the same with any of those facts omitted, it necessarily follows that if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury.

"From these considerations it necessarily follows that the jury should know just what facts are assumed and enter into the collection or state of facts upon which the witnesses opinions are based. otherwise they cannot know whether they ought to treat the opinions as evidence at all, since they can form no opinion whether such assumed facts, or the opinions based upon them, are true or false. . . . If one or more witnesses have stated, in the presence and hearing of the professional witness, the facts observed (such as the symptoms of the person in question, and has various physical and mental manifestations), and the witness is asked his opinion upon the hypothesis that *all* the facts stated by the witness or witnesses named are true, the jury, having heard all the evidence alluded to, know that facts are assumed by the witness in giving his opinion. But if the witness be asked his opinion of a case assuming the testimony of certain specified

witnesses to be true, and it appears that he did not hear the whole of their testimony, and it does not definitely appear what facts stated by them he has heard, and what he did not hear, the jury cannot know upon what state of facts he forms his opinion, nor whether the facts he has assumed are true, nor whether his opinion would have been the same if he had heard the whole; . . . and his opinion cannot, therefore, safely be received in evidence. This disposes of two questions put to Dr. Mottram, the rejection of which was excepted to by the contestant; both of which were based upon the assumed truth of the testimony of Eckard and Dr. Abbott. It appears from the statement of Dr. Mottram himself that he did not hear the whole of Eckard's testimony, and it does not appear what particular facts stated by him he did, and what he did not hear."[2]

BELLEFONTAINE & INDIANA R. CO. v. BAILEY (1860).

11 Oh. St. 333, 337.

Brinkerhoff, J.: "Peter Bailey brought this action against the Bellefontaine and Indiana Railroad Company, before a justice of the peace of Darke county, to recover damages for the killing of
437 his two horses, through the carelessness and negligence of the employees of the railroad company in running their locomotive and

2—*M'Naghten's Case,* 10 Cl. & F. 207 (1843). Question for the Judges: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, etc.?" *Maule,* J.: "In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry."

Dean, J., in *Lake* v. *People,* 1 Park. Cr. C. 557 (1854): "A question in physical science will afford an illustration. A motion which is the result of a combination of different forces invariably changes its direction if but one of the moving powers is withdrawn. Take away half of them, it would be reversed in its course. Experts might be called to prove any given motion; they might also be asked what would be the effect of certain combined forces; but in either case it is manifest that to have the opinion correct, *all* of the motive powers must be given. . . . To allow [medical testimony to be given on merely such part of the evidence as they heard] would be as dangerous a principle as to permit a juror to sit during a part of the trial and then unite with the rest in rendering a verdict."

Morris, C., in *Burns* v. *Barenfield,* 84 Ind. 48 (1882); a medical witness was asked what he thought of a certain kind of treatment, after examining a case: "The answer of the witness was not based upon facts stated by him. What he knew about the case might and doubtless did embrace much more than he had stated to the jury; how much or what he knew about the case was in a great measure unknown to the Court and the jury. It is the clear right and duty of the jury to judge of the truth of the facts upon which the opinion of the expert is based. If his opinion is based upon what he may suppose he knows about the case—upon facts, it may be, although irrelevant and unknown to the jury—it would be impossible for them to pass upon the truth of the facts upon which the opinion may be based, or to apply the opinion of the expert to the facts. . . . The expert's memory might be deficient in recollecting all the facts testified to; he might have a different understanding of or place a different construction upon the language used by the witness or witnesses upon whose testimony he based his opinion from what the jury would have or place if they were informed upon what facts testified to the opinion was based."

Compare the authorities cited in W., §§ 676, 681.

cars. . . . The company answered simply denying the negligence charged. . . . On the trial of the case in the common pleas, it appeared from a bill of exceptions embodied in the record, that the defendant, to maintain the issue joined on its part, called to the stand, as a witness, Aloah Skilton, who testified that he was acting as locomotive engineer on the train which killed the horses for which the action was brought, at the time of said killing, and saw said horses in the act of coming upon the railroad track; that he was acquainted with the business of running railroad engines and trains, and had been engaged in the business for the last five years. The defendants' counsel then asked said witness his opinion as to the possibility of avoiding the injury to the said horses, in view of the distance between the train and the plaintiff's horses when the latter came upon the railroad track? To which question the plaintiff objected; which objection the Court sustained, and refused to allow the question to be answered; to which decision of the Court the defendant excepted. . . .

"It is objected, in the second place, that the question put to the witness does not suppose or assume a state of facts on which his opinion was to be based. Undoubtedly, if the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he might give; but no such assumption, it seems to us, is necessary when the witness is, or is properly presumed to be, himself personally acquainted with the material facts of the case. The witness here was himself the engineer of the locomotive, by which the injury was done; he saw the horses when they came upon the track; we think it is fairly presumable that he knew something of the distance between the engine and the horses when they came upon the track; the velocity and weight of the train; the character of the grade; the means of checking the velocity of the train; and the time and distance which would be required to check the progress of, or stop the train. If an expert may give his opinion on facts testified to by others, we see no reason why he may not do so on facts presumably within his own personal knowledge; and if his knowledge of any material fact be wanting or defective, the parties have ample opportunity to show it by cross examination, and by testimony *aliunde*. A physician or surgeon called on to give an opinion as to the state of health, or the cause of the death of any person, and having no personal knowledge of the person's symptoms, must of necessity testify hypothetically from assumed or supposed symptoms; but surely the attending physician or surgeon of the patient, having himself the best opportunity of personally knowing his symptoms and condition, is not, in the first instance presumed to be under any such necessity. The question before us is, in principle, it seems to us, the same; and we think the Common Pleas erred in refusing to allow the question to be answered."[3]

3—Compare the authorities cited in W., § 675.

FIRST NATIONAL BANK v. WIREBACH'S EXECUTORS (1884).

106 Pa. 38, 44.

Assumpsit, by the First National Bank of Easton, Pa., against Uranus Wirebach, executor of Jacob C. Wirebach, deceased, upon a promissory note indorsed by the decedent. Plea, non-assumpsit.

438 Wirebach died in May, 1877, and upon the nonpayment of the note at maturity suit was brought by the bank against his executor. The defendant set up that both before and at the time of the execution of the note Wirebach was of unsound mind, the result of several strokes of paralysis, and was incapable of contracting.

To sustain this defence the defendant offered the notes of testimony of Dr. E. C. Mann, a medical expert examined at a former trial of the cause. This was objected to by the plaintiff, on the grounds: that the testimony was based on "a hypothetical state of facts different from that now proved;" that "the hypothetical question contained statements of matters upon which no testimony whatever has been offered by the defendant at this trial:" Objections overruled and testimony admitted. Exception. First assignment of error.

CLARK, J.: "At the trial of this cause, the testimony of Dr. E. C. Mann, a medical expert examined at a former trial, on behalf of the defendants, was admitted; the plaintiffs objected to the reading of the notes upon several grounds,—that the testimony is based upon a hypothetical state of facts, different from that now proved; that the hypothetical question, in answer to which the witness then testified, is based upon facts, of which no evidence whatever is now given, and, that the plaintiff has a right to cross-examine the witness, upon the basis of the testimony now adduced. We cannot say, from an examination of the testimony taken at the last trial, that the hypothesis assumed is not fairly consistent with the facts sought to be established, and alleged to be proved, by the defendants. The form of the interrogatory was such as disclosed clearly what specific facts were assumed, and upon which, the opinion of the expert was given; that opinion, therefore, could have no weight with the jurors in their deliberations, unless they found the facts assumed in the hypothesis, to have been established by the proofs. Each side had the right to an opinion from the witness, upon any hypothesis reasonably consistent with the evidence; and whether the facts were fairly and fully stated in this instance, for the opinion of the witness, was a question for discussion to the jury. The opinion of an expert can be of no value, when the facts of which the opinion is predicated, are not established; whether they are so established is for the subsequent consideration of the jury."[4]

4—Compare the authorities cited in W., § 682.

PART III.

RULES OF EXTRINSIC POLICY.

439 GENERAL NATURE OF THESE RULES.[1] "The rules admissibility of evidence, as already pointed out,[2] fall into three general groups: first, those which determine the probative value, or Relevancy, of circumstantial and testimonial evidence,—that is, the fundamental quality without which no evidential data are to be allowed to be considered by the jury; secondly, those Auxiliary Rules of Probative Policy which impose artificially some additional conditions of admissibility, but are directed solely to improving the quality of proof and strengthening the probabilities of ascertaining the truth as the result of the investigation; and thirdly, the present group,—those rules which rest on no purpose of improving the search after truth, but on the desire to consider the requirements of extrinsic policy.

"These rules forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering. The rules of this last class thus differ from those of the second class in that their effect is to obstruct, not to facilitate, the search for truth, and that this effect is consciously accepted as less harmful, on the whole, than the extrinsic disadvantages which would ensue to other interests of society if no such limitations existed. It ought to follow that no limitation upon the present ground ought to be recognized unless it is clearly demanded by some important extrinsic policy, and that every presumption should be made against such a demand.

"The most natural grouping of these rules of Extrinsic Policy is that which regards them according as they are *absolute* or *conditional*. The former class of prohibitions are applied by the Court like other rules of evidence; the latter are not applied unless on demand of the person supposed to be affected in his interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest. The latter class of rules—the rules of Privilege—have features in common, which sharply distinguish them from the former. The former class is small in number; indeed, it can hardly be said that there are any definite and well-established rules of exclusion of that type; they have usually been discountenanced in judicial opinion. The rules of the latter class, on the contrary, are numerous and well established, and affect in a marked degree the daily course of proof in litigation."

1—Quoted from W., § 2175. 2—*Ante*, No. 6.

TITLE I.

RULES OF ABSOLUTE EXCLUSION.

COMMONWEALTH v. DANA (1841).

2 Metc. 329.

This was an indictment, containing six counts, on the second and fourth sections of *c.* 132 of the revised statutes. The first count alleged that the defendant, on the 4th of January, 1841, at Boston, unlaw-
440 fully had in his possession, with intent to offer for sale, and to sell and aid and assist in selling, negotiating and disposing of five hundred certain lottery tickets, and five hundred shares, to wit, halves and quarter tickets and shares, &c. in a certain lottery called School Fund Lottery, for the benefit of public schools in the State of Rhode Island. The officer who served the search warrant produced at the trial sundry articles by him taken under the writ, at the service of the same, and in the office of the defendant; some of which articles were the property of J. Phalen & Co. but containing lottery tickets in the School Fund Lottery of the State of Rhode Island, and all in the care and keeping of the defendant. The counsel for the defendant objected to the admission of these articles so taken by the officer and shown to the jury in court, on the ground that he had exceeded his authority under the search warrant, and moved that the same be excluded. But the judge refused to exclude any thing from the jury, which was done or taken by the officer in execution of the warrant. To which the defendant's counsel excepted.

Wilde, J.: "In support of the issue joined in the case, the attorney for the Commonwealth offered in evidence the copy of a search warrant issued from the police court to the admission of which the defendant's counsel objected, on the ground that the same had been issued improvidently, and was void in law. The warrant was issued on the complaint of one Jonathan F. Pulsifer, under oath, in which he alleged that he had good reason to believe, and did believe, that lottery tickets, and materials for a lottery, unlawfully made, for the purpose of drawing a lottery, were concealed in the office of the defendant, and sundry other places. By the Rev. Sts. *c.* 142, § 2, any magistrate is authorized to issue warrants 'to search for and seize lottery tickets, or materials for a lottery, unlawfully made, provided or procured, for the purpose of drawing a lottery,' when he shall be satisfied that there is reasonable cause, upon complaint made on oath, that the complainant believes that lottery tickets or materials for a lottery are concealed in any particular house or place. If this be a valid law, the objection of

the defendant's counsel fails; but they contend that it is void, being contrary to civil liberty, natural justice, and the Bill of Rights. . . . The law, authorizing search warrants in such cases, is in no respect inconsistent with the Declaration of Rights. We are also of the opinion, that the warrant in this case is in conformity with all the requisitions of the statute and the Declaration of Rights. . . .

"There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice how they were obtained,—whether lawfully or unlawfully,—nor would they form a collateral issue to determine that question."[3]

3—*Scholfield*, J., in *Stevison* v. *Earnest*, 80 Ill. 513, 518 (1875): "It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If it could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?"

Compare the authorities cited in W., §§ 2183, 2373.

TITLE II.

RULES OF CONDITIONAL EXCLUSION (PRIVILEGE).

SUB-TITLE I:

THE TESTIMONIAL DUTY IN GENERAL.

COUNTESS OF SHREWSBURY'S TRIAL (1612).

2 How. St. Tr. 769.

The occasion of examining Lady Shrewsbury before the Privy Council, was her conduct in respect to the marriage of lady Stuart.

441 This latter lady was first-cousin to James I.; for she was the daughter of Charles earl of Lenox, the younger brother of James's father lord Darnley. Her mother was Elizabeth daughter of sir William Cavendish. The countess of Shrewsbury was aunt to lady Arabella, being sister to her mother. A marriage took place between lady Arabella and sir William Seymour, who at the Restoration recovered the dukedom of Somerset for his family. Being a marriage with one so nearly related in blood to the King, and without his consent, it was deemed an offence against the royal prerogative, on which account lady Arabella and her husband were imprisoned; the former in a private house at Lambeth, the latter in the Tower. But both escaped from their confinement with a view to retire abroad; and the countess of Shrewsbury was taken into custody as privy and accessary to the escape of lady Arabella. On being examined by the privy council, the countess refused to discover what she knew of the affair of the Marriage and Escape, or to subscribe her examination; and for this refusal she was brought before a select council. The Charge was in two points: 1. That the said countess of Shrewsbury, by commandment of the King, being called to the council table, before the lords of the council at White-hall, and there being required by the lords to declare her knowledge touching the said points, and to discover what she knew concerning them, for the safety of the King, and quiet of the realm; she answered, that she would not make any particular answer; and being again asked by the King's command by the council at Lambeth, and being charged again to answer to the point, she refused for two causes: 1. For that she had made a rash vow that she would not declare any thing in particular touching the said points; and for that (as she said) it was better to obey God than man; 2. She stood upon her privilege of nobility, *scil.* to answer only when she was called

judicially before her peers; for that such privilege was allowed (as she said) to William earl of Pembroke, and to the lord Lumley.

Sir Francis Bacon, Attorney-General, arguing: "You must know that all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the King's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."

"The lord Chancellor began, and the archbishop, and all the other lords began with the first, and adjudged it a great and high contempt, and the lord Chancellor said, that that was against the law of England, with which all the lords agreed. It was resolved by the justices and master of the rolls, that the denying to be examined was a high and great contempt in law, against the King, his crown and dignity; and that if it should be permitted, it would be an occasion of many high and dangerous designs against the King and the realm, which cannot be discovered: and upon hope of impunity it will be an encouragement to offenders, as Fleming justice said, to enterprize dangerous attempts. And the Master of the Rolls said, that it was not any privilege of nobility, to refuse to be examined in this case, no more than of any subject."[1]

STATUTES. *England,* 1562-3, St. 5 Eliz. c. 9, § 12: "If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose
442 concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default" shall

1—JEREMY BENTHAM, *Draft for a Judicial Establishment,* (Works, Bowring's ed. IV, 320; 1827): "What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,—they and everybody. What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny-worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

Tilghman, C. J., in *Baird* v. *Cochran,* 4 S. & R. 397, 400 (1818): "From the nature of society, it would seem that every man is bound to declare the truth when called upon in a court of justice. . . . The general welfare will be best promoted by considering the disclosure of truth as a debt which every man owes his neighbor, which he is bound to pay when called on, and which in his turn he is entitled to receive."

forfeit £10 and give further recompense for the harm suffered by the party aggrieved.

1695-6, St. 7 & 8 W. III, c. 3, X 7: Persons indicted for treason and misprision "shall have the like processe of the court where they shall bee tryed, to compell their witnesses to appeare fer them att any such tryal or tryals as is usually granted to compell witnesses to appear against them."

United States, Constitution 1787, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[2]

AMEY v. LONG (1808).

9 East 473, 479.

This was an action on the case, in which the declaration stated that the plaintiff, in Michaelmas term 47 Geo. 3. in the Court of K. B. impleaded one K. Smith in a plea of trespass on the case to the
443 plaintiff's damage of 500*l*; and such proceedings were thereupon had, that afterwards, on the 2d of December, 1806, at the sittings of *Nisi Prius* at Westminster, &c. before Lord Ellenborough C. J. a certain issue joined in the said plea between the plaintiff and K. S. in due manner was tried, &c.: and that before the trial of the said issue, viz. on the 28th of November, 1806, the plaintiff prosecuted out of the said court his Majesty's writ of subpœna, directed to —Railton, W. F. Hope, C. Long (the defendant), and A. Grace; by which writ the king commanded them that they should appear in their proper persons respectively before the said Edward Lord E. &c. in his Majesty's said court at Westminster Hall, in the county of Middlesex, on Tuesday, then next, viz. on the 2d of December 1806, &c.: And that they the said C. Long and A. Grace, or one of them, should produce and shew forth at the time and place aforesaid, a certain warrant granted to them or one of them by the Sheriff of Surry, upon a certain writ of non omittas testatum fieri facias issued out and under the seal of the said Court, &c. on or about the 13th of May then last, between the plaintiff and S. Glover, defendant, and the paper writing or instructions which accompanied the same warrant; and then and there to testify and shew all and singular those things which they knew, or the said warrant, papers, &c. might import, of and concerning the said action between the plaintiff and K. Smith, &c.: which said writ the plaintiff afterwards, and before the trial of the said issue, viz. on the 1st of December 1806, at Westminster, &c. caused to be made known and shewn to the defendant, and a copy thereof to be left with him, and then and there paid him 1s., being a reasonable sum for his costs and charges in attending as a witness, according to the tenor of the said writ of sub-

2—For the history of the testimonial duty and of the statutes granting process for witnesses, see W., §§ 2189, 2193.

pœna. And although the defendant, in part obedience of the said writ of subpœna, did afterwards on the 2d December 1806, at W. &c. appear as a witness on the trial of the said issue; and although the defendant could and might, in obedience to the said subpœna, have produced and shown forth at the time and place aforesaid on the said trial of the said issue the said warrant so mentioned and referred to in the said writ of subpœna, as aforesaid, and thereby so required to be produced and shewn forth as aforesaid; and although the production and shewing forth of the said warrant was material evidence for the plaintiff on the said trial, and would have enabled the plaintiff to have obtained a verdict on the said issue against the said K. S. at W. &c. whereof the defendant there had notice; yet the defendant not regarding his duty in that behalf, but wrongfully and unjustly intending to injure the plaintiff, and to deprive her of the benefit of the same evidence on the trial of the said issue, and thereby to prevent her from obtaining a verdict against the said K. S. thereon, and put her to expence, &c. did not nor would at the time and place aforesaid, on the said trial of the said issue, produce or shew forth the said warrant, or the said paper writing or instructions so mentioned and referred to in the said writ of subpœna as aforesaid; although the defendant was then and there solemnly called upon by the said Court for that purpose, and had no lawful or reasonable excuse or impediment to the contrary; but then and there wholly neglected and refused so to do; and by reason thereof the plaintiff was nonsuited in the said action; and such proceedings were thereupon had in the said action, that afterwards, in Hil., 47 Geo. 3. the said K. S. recovered against the plaintiff 52l. 10s. for his costs and charges about his defence in that behalf, as by the record, &c. more fully appears. By reason of which said several premises the plaintiff was not only obliged to pay and did pay to the said K. S. the said sum of 52l. 10s. but was hindered and delayed in the recovery of her damages in the plea aforesaid, and was obliged to lay out 200l. more in and about the prosecution of the said action, &c. There was another count in substance the same. To which the defendant pleaded not guilty; and the plaintiff obtained a verdict.

A motion was made to arrest the judgment on two grounds: 1st, that it was not sufficiently alleged in the declaration that the defendant had it in his power to produce the warrant which the writ of subpœna duces tecum required him and another person to whom it was directed, or one of them, to produce at the trial; 2dly, That that which is commonly called a writ of subpœna duces tecum is not of compulsory obligation in the law. Mr. *Gibbs,* Attorney-General, and Mr. *Garrow,* arguing against the issuing of such process: "The writ of subpœna *duces tecum* only lay to public officers for the production of the public documents in their custody, in which all persons had or might have an interest, and could not properly be extended to private persons". Messrs. *Park, Marryat,* and *Pell* (arguing for the process): "This writ is of essential importance to the due administration of justice, oftentimes as

much as the common writ of subpœna to compel the attendance of witnesses; for where a matter depends upon written evidence in the possession of another than the party in the cause who is interested in its production, it would be nugatory to enforce his personal attendance without the document by which the truth of the fact in issue can alone be proved. . . . As the obligation of a witness to answer by parol does not depend upon his own judgment, but on that of the Court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound at all events to bring with him the papers which he has been subpœnaed to produce; and when it is in Court, he may then state any legal or reasonable excuse for withholding it, of which the Court will judge. In this respect there can be no distinction between parol and written evidence. Proof of either kind, if within the knowledge or possession of the witness, ought to be produced if legal; and of its legality the Court and not the witness must judge."

Lawrence, J., said "this was one of the greatest questions he had ever heard agitated in Westminster Hall,—one which most deeply affected the administration of justice both civil and criminal. He could not reconcile it to his mind to suppose that the innocence of a person accused might depend on the production of a certain document in the possession of another, who had no interest in withholding it, and yet that there should be no process in the country which could compel him to produce it in evidence."

Ellenborough, L. C. J.: "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instruments might happen to be, afforded. . . . There are circumstances in respect of which the production of an instrument required in the terms of a subpœna, would not be enforced by the authority of the Court,—which is a proposition too clear to be doubted. And to be sure, though it will always be prudent and proper for a witness served with such a subpœna to be prepared to produce the specified papers and instruments at the trial, if it be at all likely that the judge will deem such productions fit to be there insisted upon; yet it is in every instance a question for the consideration of the judge Nisi Prius whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment."

Joseph Chitty, *Practice of the Law*, III, 829 (1835): "In general it is advisable to issue and serve, not only a subpœna *to give evidence*, but also *to produce all documents* in the witness's power, by a
444 *subpœna duces tecum*, and, when practicable, the date and particulars of each deed or document should be stated, so as to preclude the possibility of excuse, that the particular document had escaped recollection; and afterwards the writ may conclude, 'and all other deeds, documents, instruments, writings, and papers whatsoever, in your custody or power, that may afford any evidence or information touching the matters in difference in the said cause,' and further, it may be useful *to require the witness* in terms *'diligently to search for and examine and enquire after all such deeds, documents, instruments, papers and writings;'* so that the same may be produced and given in evidence to the jurors at the time and place of trial. This would prevent a not unfrequent excuse, that the witness was not aware that it was his duty *to search*, which after having been served with so explicit a subpœna, he could not urge. . . .

"The best course on all occasions would be to issue a subpœna duces tecum in the *fullest form*, and as in the antecedent note; and the names of *four witnesses* are still allowed to be included in one writ. . . . Whether a witness be favourable or not, it is always most prudent to subpœna him, or endeavor to do so, as soon as the *issue has been joined*, or at least, on the part of a defendant, as soon as notice of a trial has been given; *first*, because such service will prevent the witness from getting out of the way, and avoiding service; *secondly*, because it will protect the witness from arrest on civil process, and preclude all excuses, excepting dangerous illness, for non attendance; and, *thirdly*, because if such bona fide endeavour to serve be ineffectual, the judge, upon an affidavit of such early but unsuccessful endeavours and of the materiality of the witness, would probably postpone the trial on the application of the defendant, which he would refuse if the endeavours were too long delayed. At all events, a witness would have good ground to complain, if he were not served a reasonable time before the trial, and perhaps even if his disobedience might be excused. In a *Town cause* a bona fide endeavour to serve the witness ought to be made *at least four days before the trial;* and a notice in London served at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, is much too short. In a *Country cause*, the witness, if out of the assize town, must at all events be served *before the commission day*, and also before the day of attendance named in the writ; and if the service be afterwards, although before the actual day of trial, and in consequence the witness do not attend, the Court will not grant an attachment. At the same time every prudent witness should exert himself and endeavor to attend, however short the notice.

"The safest course is always to serve a copy of the subpœna, and

at the same time to produce and show the original to the witness in the presence of *two* persons, who will afterwards join in an affidavit that the original was produced; for if the witness, in answer to an application for an attachment, should swear that the *original* subpœna was not shown to him, the rule nisi for the attachment might be discharged with costs, and this although it be admitted that the witness did not demand inspection of the original."

BRADDON'S TRIAL (1684).

9 How. St. 1127, 1167.

Mr. *Thompson:* "Call Mr. Fielder, and Mrs. Mewx, and Mr. Lewes." Lewes appeared. *Crier:* "Lay your hand on the book." *Lewes:* "My lord, I desire my charges may be paid, before I swear." *L.C.J.*
445 JEFFFRIES: "Pr'ythee, what have I to do with thy charges? I won't make bargains between thee. If you have any evidence to give, and will give it, do; if not let it alone." *Lewes:* "My lord, I shall not give any evidence till I have my charges." *L. C. J.:* "Braddon, If you will have your witnesses swear, you must pay them their charges. Mr. *Braddon:* "My lord, I am ready to pay it, I never refused it; but what shall I give him?" *L. C. J.:* "Nay, I am not to make bargains between you, agree as you can." Mr. *Thompson:* "My lord, we are willing to do what is reasonable. You, Lewes, what do you demand?" *Lewes:* "He can't give me less than 6*s.* a day?" *L. C. J.:* "Why, where dost thou live?" *Lewes:* "At Marlborough." *L. C. J.:* "Why, canst thou earn 6*s.* a day by thy own labour at Marlborough?" *Lewes:* "My lord, I am at 40*s.* or 3*l.* a week charge with my family and servants." *L. C. J.:* "What trade art thou?" *Lewes:* "A stapler." *L. C. J.:* "And does your trade stand still while you are in town?" *Lewes:* "Yes, to be sure it can't go well on." *L. C. J.:* "Well, I say that for you, you value your labor high enough, I know not what your evidence may be; but, Mr. Braddon, you must pay your witness, if you will have him." Mr. *Braddon:* "I will, my lord, very readily. What will you have? I have paid you something already." *Lewes:* "Give me 20*s.* more then. You can't give me less." Then Mr. Braddon paid him 20*s.*, and he was sworn.[3]

WEST v. STATE (1853).

1 Wis. 210, 230.

The plaintiff in error was indicted at the April term of the circuit court for the county of Fond du Lac, for the seduction of Eliza Pierce.
Before the trial commenced, the defendant, by his counsel, moved
446 the court for an attachment against one Ashel Brooks, on whom a subpœna, as a witness in behalf of the defendant had been regularly

3—STATUTES: *United States,* Rev. St. 1878, § 870: No witness subpoenaed to depose under a *dedimus potestatem* "shall be deemed guilty of contempt for disobeying . . . unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpoena."

Compare the authorities cited in W., §§ 2201, 2202.

served, and who had been in attendance as such witness, in obedience to said subpœna, during that term, but had left and gone home the day before the application was made. No fees had been paid or tendered the witness, and it appeared that his testimony was material to the defense. The motion was denied by the Court, on the ground that no fees had been paid or tendered to the witness by the defendant. To which decision of the Court, the defendant excepted.

SMITH, J.: "It is alleged for error, that before the trial commenced, the defendant, by his counsel, moved the Court for an attachment against one Ashel Brooks, who, it appeared, had been duly subpœnaed to attend as a witness on behalf of the defendant, and who had been in attendance, but had left and gone home the day before the trial; which said motion was overruled by the Court, on the ground that no fees had been paid or tendered to the witness. . . .

"It was, anciently, the commonly received practice, in the common law courts, that no counsel should be allowed the defendant upon his trial upon the general issue, in any capital crime, unless some point of law arose, proper to be debated. Several reasons are given for this rule; perhaps the best, if not the most facetious, that could be devised, is that given by Sir Edward Coke, which is, 'because the evidence to convict the prisoner should be so manifest as it could not be contradicted.' So, also, the doctrine was held, that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be allowed to exculpate himself by the testimony of any witnesses . . . At length the enormous injustice of the rule became so oppressive to the consciences of the courts that the practice of examining witnesses for the prisoner, without oath, gradually grew up. But the iniquity of this practice was as obvious as that of the old rule. The witnesses for the crown testified under oath, and however solemnly or truly, or reasonably they might testify, the evidence produced by the prisoner, wanted the same sanction of an oath, and lost its just weight in the estimation of the jury. At different times afterwards, the rule was so modified by acts of parliament, as to admit the examination of witnesses on oath, in behalf of the defendant, in particular cases, until at length, it was declared by statute (1 Ann. St. 2 c. 9), 'that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.' . . . And in conformity with the full equity of the rule, the Constitution of the United States, and of this state, declares 'that in all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel for assistance in his defense, and to have compulsory process to compel the attendance of witnesses in his behalf.' . . . The right to compulsory process, secured by the provisions of the Constitution, above referred to, cannot be taken away by legislative enactment, and ought not to be hampered by judicial construction. The Legislature, so far from attempting to restrict this right, have expressly recognized it, and provided ample means for its full enjoyment. Section 8 of chapter 146

of the Wisconsin Revised Statutes, page 724, is in the following words: 'It shall not be necessary to pay or tender any fees to any witness who is subpœnaed in any criminal prosecution, but every such witness shall be bound to attend, and be punishable for nonattendance, in the same manner as if the fees allowed by law had been paid him.' By no rule of construction, can this section be restricted to witnesses subpœnaed on behalf of the state. It is evidently enacted in aid of the constitutional guaranty above mentioned, and includes, as well the witnesses for the defendant, as those for the State.

"But, it is urged, that this section of the statute, if held to refer to witnesses summoned on behalf of the defendant, is repugnant to that provision of the Constitution, which provide that 'the property of no person shall be taken for public use, without just compensation therefor.' The time and labor of attendance of the witness are said to be as much property, within the meaning of the Constitution, as are chattels or land. . . . But, in no just sense, can the requisition upon the citizen of his attendance upon the Courts to testify as a witness, be considered as the taking of private property for public use, within the meaning of the Constitution. The object of that provision in the fundamental law, was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country; such as the performance of militia duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service, or render aid to his government, without other compensation than that of his participation in the general good, and his enjoyment of the general security and advantage which result from common acquiescence in such obligations on the part of all the citizens alike, and which is essential to the existence and safety of society. . . . We hold, therefore, that a witness is bound to obey the process of subpœna in a criminal prosecution, as well on the part of the defendant as on that of the State, without payment or tender of fees.

"But it does not follow that the refusal by the Court, to grant an attachment against the witness for non-attendance, is error. The award of the attachment rests in the sound discretion of the Court, to whom application was made, and whose process is disobeyed. It is somewhat like a motion for continuance, or new trial, and other like matters addressed to the discretion of the Court, the refusal of which is not necessarily error, and only becomes so when that discretion is clearly abused, to the manifest injury of the party, or to the perversion of justice. No such abuse, nor indeed any abuse of discretion, appears in this case. It is true, the defendant in his affidavit, alleges that the witness was material. But he does not apply for a continuance on account of his absence; he does not state that he can-

not prove the same facts by other witnesses, or that he cannot safely proceed to trial without his testimony; nor does any fact appear, that in the least evinces an improper exercise of the discretion of the court. All that does appear is, that the court assigned an erroneous reason for its judgment, which may, for aught that is apparent upon the record, have been correct."[4]

PEOPLE v. DAVIS (1836).

15 Wand. 602, 608.

The defendant was brought up on an attachment for disobedience to a subpœna served upon him to attend as a witness for the plaintiff in a cause of Kelley v. De Forrest, noticed for trial at the
447 Warren circuit, on the first Tuesday of June last. The defendant was duly subpœnaed on the 26th May, (13 days before the circuit,) at the city of New-York, where he resided. Ten dollars were given to him to pay his expenses. He did not attend. Being brought into court, interrogatories were filed, to which he answered. . . . The substance of the answers is that he is entirely insolvent, and had, when subpœnaed, delivered up all his property without reserve, into the hands of his assignees under the insolvent law, except what was exempt from execution; that he had a wife and three children for whom he provided, and that two of his children were at the time when the subpœna was served, and up to the time of the circuit, so sick as as to render it improper for him to leave them; that his family were wholly dependent on his daily labor for their daily support, and that they must have suffered, if left, for the common necessaries of life; that his wife was unable to attend the children alone during nights, and he could not procure her any assistance; that the ten dollars which he received as witness' fees would not, as he believes, have defrayed his expenses of travel by the public conveyances; that he advised with his friend, and leaving the fees with him, procured him to write to the plaintiff's attorney, stating his excuse. . . .

COWEN, J.: "It was the duty of the witness to obey the subpœna; and he is guilty of a contempt in disregarding it, and must be punished unless he has furnished us with a legal excuse. Both insolvency and poverty in the witness are sworn to by himself and Mr. Lamb, who was one of his assignees. But it is scarcely necessary to observe that these form no excuse in the abstract. If received at all it must be in connection with the situation of the family, or as showing the utter inability of the defendant to defray his expenses. In rendering these excuses of sickness and extreme poverty, while we are not disposed to deny the validity of either if clearly made out in a proper degree, we cannot allow the witness to judge for himself. Were we to stop and be content with his telling us in this general way, 'some

4—Compare the authorities cited in W., §§ 2191, 2192.

of my family were so sick that, with want of assistance and considering our poverty, I deemed it improper to leave home,' we should surrender our own judgment. . . . The process of subpœna demands great and extraordinary efforts on the part of the witness to obey. It commands him expressly to lay aside his business and excuses; and, while it lays him under severe obligations, it clears away obstructions in the path of obedience; the witness was always privileged from arrest on civil process in going, staying, and returning. It is not denied that serious sickness in his family, such as would prevent a prudent father or husband from leaving home on his own important business, would save him from the imputation of a contempt and, perhaps from an action. But such a cause ought clearly to be shown to the Court. . . . Above all, where the summons allows him full time, he should struggle to get ready, as he would to go abroad on his own pressing business. If inevitably disappointed, after exhausting every reasonable expedient, he ought certainly to be excused from the payment of a penalty which presupposes some degree of neglect, at least. Witnesses are the summary instruments of investigation in all our common-law courts. It is not until a positive disability is apparent that their domestic examination will be received as a substitute for their actual presence. The important right of oral examination and cross-examination is at stake; and every good citizen, if he could be supposed to regard nothing beyond his own rights, should struggle for the front rank in the order of obedience. The least we can say of the case before us is, that it presents an unpleasant contrast to all this; great diligence, from first to last, in devising colorable excuses, without lifting a finger in preparation to go forward. The defendant must be fined, and the fine ought, at least, to be so large as to indemnify the plaintiff Kelly against the expenses of the last circuit, with the costs of this proceeding."[5]

New York Commissioners (David D. Field and others) of Practice and Pleading, *First Report, 250* (1848): "Can there be a doubt that, under our present system, the rights of witnesses are gross-
448 ly disregarded? Why should the law permit a person to be taken from Suffolk to Niagara against his will, and at great sacrifice, because two persons in Niagara have a legal dispute? The loss to the witness may be more than the whole subject of litigation. Does not the law in this case inflict a greater wrong that it may redress a less? We think it does; and we propose to prevent it hereafter, by declaring that no person shall be taken hereafter out of his own county for another person's civil action. . . . There should seem, moreover, to be no good reason to require the personal attendance of a witness at so great a sacrifice. No doubt, his appearance upon the stand, where the testimony may be taken from his lips, is preferable to a written

5—Compare the authorities cited in W., § 2204.

deposition, taken at a distance. But that is not the only question. The point is this, whether the increased advantage to the parties of having the judge and jury see the witness, is more than a counterpoise to the increased injury to the witness from being brought so far, and at so great a loss. We think the question can be answered in only one way. In his own county let him be called to the stand. If it be wanted in another, let it be taken in his own, and transmitted thither. Should there be a really urgent occasion for the personal attendance of the witness, there can be little doubt that the party may be able to induce him to attend, by compensating him for his expenses and time. So it is now, where a witness is wanted from another State; the party makes an arrangement with him to come in many cases where his attendance is important. If a witness in Jersey City be wanted for a trial in New York, he can generally be induced to attend, though he cannot be compelled to do so. So it will happen, we doubt not, if our plan be adopted."

STATUTES: *California,* P. C. 1872, § 1330: "No person is obliged to attend" out of the county of residence or of service of subpœna,
449 unless a subpœna is indorsed by the trial judge's order, or a judge of the Supreme or Superior Court, on affidavit of the party "stating that he believes" the evidence to be material and attendance necessary.

United States, Rev. St. 1878, § 870: No witness is compellable to attend for a *dedimus* deposition "out of the county where he resides, nor more than 40 miles from the place of his residence." Ib., § 876: In civil cases, a subpœna shall not run more than 100 miles from the place of the court, if the witness lives out of the district of the court.[6]

SUB-TITLE II.

PRIVILEGED TOPICS.

DOE *dem.* EGREMONT v. DATE (1842).

3 Q. B. 609, 621.

Ejectment for lands in Somersetshire. The lessor of the plaintiff, George, Earl of Egremont, claimed under the demise of Charles,
450 late Earl of Egremont, who died in 1763, leaving his will dated 30th July, 1761. By the will, lands were devised to George O'Brien, late Earl of Egremont, for life, with limitations over in remainder, under which remainder the lessor of the plaintiff was now entitled as tenant in tail. . . . In order to show that the lands in question were part of the lands devised, and had been the property of the devisor, it was proposed to prove that they had been held by the tenant

6—Compare the authorities cited in W., § 2207.

for life, the late George O'Brien, Earl of Egremont, as landlord. The evidence opened in support of this was a rent book, belonging to the late tenant for life, and now in the hands of his executor, Colonel Wyndham, in which was an entry of the receipt of rent for his property, by the steward of the tenant for life, in 1800. A subpœna *duces tecum,* to produce the book, was served on Colonel Wyndham: and (by consent of the parties) Mr. Murray, Colonel Wyndham's attorney, appeared for him, with it. . . . He then objected to produce the rent book, on the ground that it was a document relating to the title of Colonel Wyndham; but the learned judge overruled the objection; and the book was produced. Verdict for the plaintiff.

Sir *W. W. Follett, Erle, Crowder,* and *Montague Smith* showed cause: "First, even if the witness was not compellable to produce the book, that is no ground for a new trial on the application of one of the parties. The book being, in itself, legitimate evidence, what right has the party against whom it is produced to make the objection? The only person injured, if any, is the owner of the book: but he is not the party making the application." *Lord* Denman, C. J.: "Surely injustice is done to the defendant if that is admitted in evidence against him which ought not to have been admitted. It seems very difficult to say that such a situation is not to be reviewed."

Kelly, Bere and *Butt,* contra. . . . "Even where the judge directs the witness to produce the evidence, if the witness still refuse, all that the judge can do is to punish him for contempt; and yet, if the judge improperly refuse to order the evidence to be produced, it is admitted that this is a ground for a new trial." Patteson, J.: "Taking that to be so, it shows only that a party to the suit has a right to complain that the judge has not exercised on his behalf the power which ought to have been exercised; but, where a judge refuses to protect a witness from giving the evidence, that is not a decision against either party in the cause." . . .

Lord Denman, C. J.: "With respect to the preliminary point, I may perhaps have expressed myself too strongly during the argument, considering the case of Marston v. Downes, 1 A. & E. 31, which was not present to my mind at the moment. I must own, however, that I am not altogether satisfied with the principle of that decision. Perhaps I might be inclined to put the argument thus. A party to a suit has a right to insist that no evidence shall be produced against him, except such as can be given legally. Now, if a witness be compelled by a judge at *Nisi Prius* to produce a title-deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced, is affected by that which ought not to have been laid before the jury. . . . These observations, however, are only thrown out for the purpose of indicating a doubt upon a question of considerable importance, which seems to me to have arisen quite unnecessarily in this case. For I have not the least doubt that the witness was compellable to produce the book in question." . . .

Coleridge, J.: ". . . I must say that I entertain great doubt whether we could have reviewed the decision of the learned judge. There is a very broad distinction between cases where the privilege has been allowed, and those where it has been disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party whose privilege has been disallowed has no *locus standi in banc.* I recollect a case on the western circuit, in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice Park, who was perfectly familiar with the course of practice at *Nisi Prius,* would not for a moment allow me to appear in that character. He said, 'I must be left to take care of the witness, and I alone; I shall not hear counsel on his behalf.' If counsel cannot be heard for a witness at *Nisi Prius,* certainly he cannot be heard for that witness in *banc.* And, if the witness cannot call upon us to review the decision, can the party to the cause do so? Legitimate evidence has been produced against him: he is not prejudiced by that, and can have no ground of complaint."[7]

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1. Sundry Privileged Topics.

WALKER'S TRIAL (1794).

23 How. St. Tr. 1098.

Mr. *Erskine,* cross-examining Thomas Dunn: "Who gave you the [glass of] shrub the next day?" *Witness:* "Suppose a gentleman was so friendly as to give me a glass of shrub, is that anything?"
451 *Counsel:* "I am not finding fault with it; who was it?" *Witness:* "I do not know whether that is to be answered or not. . . . I do not suppose that is any material matter." Mr. *Justice* Heath: "You have nothing to do whether it is material or no; answer the question."[8]

7—*Porter,* J., in *Great Western Turnpike Co.* v. *Loomis,* 32 N. Y. 127, 138 (1865): "Strictly speaking, there is no case in which a witness is at liberty to object to a *question.* That is the office of the party or of the Court. The right of the witness is to decline an *answer,* if the Court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge."

Compare the authorities cited in W., § 2196.

8—*Gamble,* J., in *Ex parte McKee,* 18 Mo. 599, 601 (1853): "The opinion of the witness that the question is irrelevant is entitled to no consideration. If a merely frivolous or impertinent question were asked of a witness, the officer taking the deposition might not feel himself called upon to compel an answer; but it would only be in a very plain case of impertinence that he would undertake to decide that the witness should be allowed to avoid answering. The Court in which the cause is pending will at the trial reject irrelevant evidence, and it would greatly detract from the value of our statutes which authorize the taking of depositions, if the question of relevancy was to be raised before and decided by every justice of

DOE *dem.* EGREMONT v. DATE (1842).

3 Q. B. 609, 617.

The facts and the testimony offered in this case, as well as the objection made, have been set forth *ante,* No. 450.

452 DENMAN, L. C. J. (compelling the witness to produce the book): "[The executor] possessed it in the character of executor of the late tenant for life; when produced, it proved the fact of payment of rent to his testator. Why was the witness not to prove that fact, either by his personal knowledge, if the party calling him chose to question him, or by any paper which he might possess? Such a paper was not a title-deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title-deeds. The production of the paper was a mode of proving a fact; that this fact might be injurious to some interest of his own furnishes no reason for his not producing the book. I consider him strictly as a witness; . . . he is indeed an interested witness, but he does not therefore possess the privilege, which a party to the cause would have, of refusing to give evidence."[9]

DOBSON v. GRAHAM (1889).

49 Fed. R. 17 (C. C., E. D. Pa.)

Bill to enjoin infringement of patent by John Dobson against Richard Graham. Plaintiff called defendant's workmen to show infringement, and asked them to state wherein the defendant's machine
453 differed from complainant's. This they refused to do under advice of counsel. Plaintiff moves for an inspection of defendant's machinery, and to compel the witnesses to answer interrogatories. Motions denied.

BUTLER, J.: "These motions must be dismissed for the reasons stated at an earlier period in the case. As then said, the plaintiff filed his bill charging infringement of his rights without having any positive knowledge upon the subject. He seems to have relied upon the chance of obtaining evidence to support the charge from the defendant and his workmen. Such a case is not entitled to special favor of a court of equity. The defendant's business is conducted in private, for the purpose of securing to himself (as he asserts) the use of his peculiar machinery and methods of manufacture. These secrets of his business, if they cover nothing unlawful, are his property and as well

the peace or other officer who takes a single deposition in the cause, when he cannot know the aspect which the case will probably assume at the trial. To allow the witness himself to pass upon the question of relevancy and refuse to answer such questions as he thought irrelevant, would be to deprive the party of the testimony of every unwilling witness."

Compare the authorities cited in W., § 2210.

9—Compare the authorities cited in W., § 2211.

entitled to protection as the rights secured by the plaintiff's patent. His workmen are bound by express contract not to divulge them. In the absence of such contract equity would imply an obligation of equal force. If it were shown that these secrets are used as a cloak to cover an invasion of the plaintiff's rights, or if there was reliable evidence tending to show it, and justifying a belief that they are sound, the motions would be sustained. But there is no such evidence before us. It appears that the defendant employs certain workmen who were formerly employed by the plaintiff; that these workmen are familiar with the plaintiff's patented machinery, and that they aided in constructing the defendant's. This is substantially all. These workmen have been permitted to answer questions directed towards a comparison of the defendant's machinery with the plaintiff's except where the answer would tend to describe wherein the former differed from the latter, and thus to describe the peculiarities of the defendant's machinery. The Court cannot properly compel them to go further, nor, in this state of facts, compel the defendant to submit his machinery to inspection."[10]

FREE v. BUCKINGHAM (1879).

59 N. H. 219, 225.

The bill alleged a deed fraudulently made by the defendant Buckingham, as attorney of the plaintiffs, to the defendant Young, and contained a prayer that the deed be set aside, and for other relief.
454 . . . Upon cross-examination of Mr. Free, one of the plaintiffs, the defendants' counsel asked him, "Are you a Spiritualist?" The question being objected to, the defendants' counsel claimed the right to make inquiries of this kind, "as affecting the credit of the witness." The witness answered several other questions of a similar character. The defendants' counsel finally inquired of the witness whether the spirit of Daniel Webster was present aiding him in the trial of the cause, and whether he had received and availed himself of information from departed spirits, disclosing the character and the method of the defence. The referee, being of the opinion that the examination on this point had proceeded far enough, rejected the last named questions, and others of a similar character, and the defendants excepted. . . .

FOSTER, J.: "There was no error of law in the referee's refusal to allow the plaintiff, Mr. Free, to be asked, on cross-examination, whether the spirit of Daniel Webster was present aiding him in the trial,, and whether he had been assisted by departed spirits in obtaining information of the defence. Nor would it have been error of law to allow those questions to be put. It was a question of fact how far the proposed inquiry could usefully go for the purpose of discovering the

10—Compare the authorities cited in W., § 2212.

credit of the witness. His testimony or other evidence might have been of such a character that light would be thrown upon it by a disclosure of his spiritualistic faith or practice; and his testimony and the case might have been such that there was no occasion to call for any disclosure on that subject.

"It is not claimed that the peculiarity of Free's religious belief affected his capacity as a witness, but only his credibility. Upon cross-examination, a witness may be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosyncracies (if they affect his capacity), may all be relevant. But it is not customary in modern practice to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, contrary to the spirit of our institutions. A man is competent to testify who believes in the existence of God and that divine punishment, either in this life or the life to come, will be the consequence of perjury. No judicial tribunal is bound to inquire, nor ordinarily will inquire whether a witness be a Protestant or Romanist, Trinitarian or Unitarian, a Shaker, Mormon, Jew, or Gentile, a Spiritualist or a Materialist."[11]

STATE v. HILMANTEL (1868).

23 Wis. 422, 425.

At the annual election for county officers of Milwaukee county, in November, 1866, Hilmantel received a majority of the votes cast for the office of clerk of the board of supervisors of said county;
455 and, having received the certificate of election, he entered upon the duties of the office. The complainant was the opposing candidate for said office at that election, and brought this action to try Hilmantel's title, alleging that a portion of the votes cast for the latter, greater in number than his majority, were received in violation of the provisions of the registry act, chap. 445, Laws of 1864. . . . The verdict being in favor of the defendant, the complainant moved in this court for a new trial, on the ground of alleged errors in the rulings of the circuit court on questions of evidence. . . .

DIXON, C. J.: "The exception taken to the ruling of the Court excluding the question put to the witness Newbauer, involves a point of very considerable importance. It is, whether a person generally qualified under the constitution and laws to be a voter, but disqualified by reason of his non-compliance with requirements of the registry act, to vote at a particular election, and who was notwithstanding permitted to vote at such election, can be compelled, against his will, to

11—Compare the authorities cited in W., § 2214.

disclose in a court of justice the name of the person for whom he voted. At the request of the defendant's counsel, the Court instructed the witness that he might decline to answer the question if he saw fit. He declined, and the plaintiff excepted to the decision of the Court. Does the privilege of the secret ballot, conceding it to exist, extend to a person who voted illegally? In answering this question, it is plain that no distinction can be made between different individuals or classes of individuals who vote in actual violation of the law. We cannot discriminate between such as have some or most of the requisite legal qualifications to entitle them to vote and those who have none. If one person who votes illegally may claim the privilege, then all may do so. Can a person who under no circumstances would have been entitled to vote, but who nevertheless did vote, claim the privilege? Can such an one, who procures his vote to be received by fraud or force, or through the mistake, inadvertence or corruption of the inspectors, claim the privilege? In reason and justice we say not; and if he cannot, then any other person who votes, having no legal right, cannot, even though the giving and receiving of the vote involves no moral guilt or intentional violation of the law on the part of either the voter or inspectors. The turning point of the inquiry is, whether the privilege is confined to persons voting lawfully. We think that it is. It is said to spring from the policy of the statute, which authorizes *legal voters,* but no others, to vote by ballot. It would seem to be a most obvious perversion of this policy, were the privilege extended to persons not within the statute, but who acted in direct opposition to it. Thus we think that the peculiar right or immunity of the lawful voter, growing out of the policy of the law with regard to such persons, cannot be claimed by one who is not a lawful voter."[12]

COOK'S TRIAL (1696).

13 How. St. Tr. 334.

A juror was asked by the defendant whether the juror had said that he believed Cook to be guilty. *Att. Gen.:* "My lord, he must not ask the jury that question, whether they have declared before, **456** that they will find him guilty; that is to make them guilty of a misdemeanor." Serj. *Darnall:* "Is it any misdemeanor for me to say, I think or believe such a man is guilty?" . . . I think any man, my lord, that comes to serve upon the jury, may be asked any question that does not make him guilty of any offence or crime, or liable to any punishment: Now if any of these gentlemen that are returned upon this pannel, before the summons have declared their opinion that the prisoner is guilty, or ought to suffer; with submission, the prisoner may ask such a question, whether he have said so, yea or no?"

12—Compare the authorities cited in W., § 2215.

Just. POWELL: "He cannot upon a Voyer Dire be asked any such question."

Just. ROKEBY: "It is not denied to be a material objection, but it must be made out by proof."

L. C. J. TREBY: "You put it too large, brother Darnall; you may ask upon a Voyer Dire, whether he have any interest in the cause; nor shall we deny you liberty to ask whether he be fitly qualified, according to law, by having a freehold of sufficient value. But that you can ask a juror or a witness every question that will not make him criminous,—that is too large. Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny; but they have not been obliged to answer; for though their answer in the affirmative will not make them criminal or subject them to a punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty, his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace himself. . . . The like has been observed in other cases of odious and infamous matters which were not crimes indictable."

COMMON LAW PRACTICE COMMISSION, *Jervis* (later C. J.), *Cockburn* (later C. J.), *Martin* (later B.), *Walton, Bramwell* (later B.), and *Willes* (later J.), Second Report, 22 (1853): "With re-
457 gard to questions which do not tend to expose the witness to prosecution or punishment, but which tend to degrade his character by imputing to him misconduct not amounting to legal criminality or the having been convicted of a crime the punishment of which has been undergone, the law of England (according to the better authorities) in like manner protects the witness from answering, unless the misconduct imputed has reference to the cause itself. Should this rule be maintained? On the one hand, the witness may have been recently convicted of perjury or some other form of the *crimen falsi;* he may have become infamous by his offences against the law or against society; he may have, to his own knowledge, acquired a bad repute for habitual mendacity; and it may be highly important that the jury who are to weigh his testimony should be made aware of the drawbacks which thus attach to it. On the other hand, it cannot be denied that it would be an extreme grievance to a witness to be obliged to disclose past transactions of life which may have been long forgotten, and to expose his character afresh to evil report and obloquy when by subsequent conduct he may have recovered the good opinion of the world. As the law now stands, the question may be put, but the witness is not bound to answer; but if he does answer and denies the imputation, his denial is conclusive and cannot be controverted. It has been proposed to take away the privilege of the witness and to

compel him to answer. We cannot bring outselves entirely to concur in this view. We have already pointed out the effect which the dread of an inquiry of this nature may have in deterring a witness from appearing in court. To this may be added that, while under the present system the refusal to answer has practically the effect of an admission, the consequence of compelling the witness to answer would not improbably be to induce him to give an absolute denial, which would not be open to contradiction. On the balance, then, of these opposing considerations, we recommend that the existing law should be maintained, except that where the question relates to the conviction of the witness of perjury or any other form of *crimen falsi* and the witness either denies the fact or refuses to answer, the conviction should be allowed to be proved."[1]

LORD MELVILLE'S TRIAL (1806).

Hans. Parl. Deb., 1st Ser., VI, 170, 222, 234, 243, 249.

Questions put to the Judges: "1. Whether according to law a witness can be required to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself,
458 but the answering which may establish or tend to establish that he owes a debt recoverable by civil suit? 2. Whether according to law a witness can be required to answer a question relevant to the issue, the answering of which would not expose him to a criminal prosecution, but might expose him to a civil suit at the instance of His Majesty for the recovery of profits derived by him from the use or application of public money contrary to law?"

Erskine, L. C., in giving his answer, said that "he had been for seven-and-twenty years engaged in the duties of a laborious profession, and while he was so employed, he had the opportunity of a more extensive experience in the courts than any other individual of his time. It is true that in the profession there had been, and there now were, men of much more learning and ability than he would even pretend to; but success in life often depended more upon accident, and certain physical advantages, than upon the most brilliant talents and profound erudition. It was very singular that, during these twenty-seven years, he had not for a single day been prevented in his attendance on the courts by any indisposition, or corporeal infirmity. Within much the greater part of this period, he has been honoured by a gown of precedency, and in consequence of this privilege, had not only been engaged in every important cause, but had conducted causes of this description during that period in the court of King's Bench. . . . Although his experience was equal not only to any individual judge on the bench, but

1—Compare the authorities cited in W., § 2216. Compare also the rules for *scope of cross-examination to character* (*ante*, Nos. 120-126), and for *privilege against self-crimination* (*post*, Nos. 473-480).

to all the judges, with their collective practice; yet, he never knew a single objection to have been taken to an interrogatory proposed, because the reply to it would render the witness responsible in a civil suit. It was true, that in Mr. Peake's book, which had been frequently cited on the present occasion, there was a note by which it should appear that an objection of this kind had been taken by the late Chief Justice Kenyon; but, notwithstanding his high opinion of the minute accuracy and great learning of that reporter, he thought he had, in this instance, been guilty of a mistake, on two grounds: 1st, because he [Erskine] himself had been counsel in the cause and had no recollection of the circumstances: 2dly, because, if that note were correct, Lord Kenyon must have been guilty of an obvious contradiction of his own principles and sentiments, as they appeared even on the face of the same report. . . . Notwithstanding some difference of opinion among high authorities, among persons for whom he had the greatest veneration, yet he could not help thinking that the law itself was unembarrassed from these contradictions. He considered it so far precise, clear, and perspicuous, that it was necessary no new law should be promulgated, otherwise than in the form of a declaratory law, by which it should be announced what had been the law, what was the law, and what ought to be the law, and what shall be the law of the land as to this important particular."[2]

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2. *Privilege of the Party-Opponent in Civil Cases.*

Sir WILLIAM BLACKSTONE, *Commentaries, III, 382* (1768): "The principal defects [of the common-law trial system] seem to be, 1, The want of a complete discovery by oath of the parties. This each of
459 them is now entitled to have by going through the expense and circuity of a court in equity. . . . It seems the height of judicial absurdity

2—To the questions above quoted the answer was "Yes," by eight judges, Sutton, B., Graham, B., Chambre, J., Le Blanc, J., Heath, J., Macdonald, C. B., Ellenborough, C. J. of K. B., Erskine, L. C., with Lord Eldon; and "No," by five judges, Grose, J., Lawrence, J., Rooke, J., Thompson, B., and Mansfield, C. J. of C. P.; the opinions of this majority seem to have been treated as carrying conclusive weight; their tenor was, in general, that the privilege extended only to "such questions as would expose him to a criminal prosecution or to a penalty or forfeiture." Parliament then passed a statute as follows: 1806, St. 46 Geo. III, c. 37: "Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of His Majesty or of some other person or persons, Be it therefore declared, That a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit either at the instance of His Majesty or of any other person or persons."

Compare the authorities cited in W., § 2223.

that in the same cause between the same parties in the examination of the same facts a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence if attempted on a trial at bar, but when sitting the next day as a court of equity should be obliged to hear such examination read and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted or else universally rejected. . . . A second defect [in the common-law mode of trial] is of a nature somewhat similar to the first, the want of a compulsive power for the production of books and papers belonging to the parties. . . . In mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered as really understood at the time, though subsequent events may tempt him to give it a different color. And as this evidence may be finally obtained and produced on a trial at law by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the Courts of law is liable to the same observations as were made on the preceding article."

STOREY v. LORD LENNOX (1836).

1 Keen 341, 350.

Lord LANGDALE, M. R.: "From the mode of proceeding at common law, a man with the full knowledge of facts which would show the truth and justice of the case may, by concealing these facts within his own breast and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied or in resisting a demand which he knows to be just. This conduct is by courts of equity considered to be against conscience; and they accordingly enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief by filing a proper bill for the purpose; and by the general rule the defendant to a proper bill for discovery is bound to make a complete disclosure of everything he knows or believes in relation to the matter in question.[3] . . . According to the general rule which has always prevailed in this court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff."[4]

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3—The ensuing sentence is quoted from the same judge's opinion in *Flight* v. *Robinson*, 8 Beav. 22, 23 (1844).

4—For the statutes which abolished the privilege at common law and adopted the chancery rule making the opponent compellable, see *ante*, Nos. 388, 396.

Compare the authorities cited in W., §§ 2218, 2219.

KYNASTON v. EAST INDIA CO. (1819).

3 Swanst. 248.

Bill to recover tithes payable from the defendant's premises. Denial that the premises were within the plaintiff's parish. Decree for the plaintiff, and reference to a master to ascertain the value of
461 the premises. On the sixth of February 1819, the plaintiff having moved, before the Vice-Chancellor, that Joseph Sills and William Smith might be at liberty to inspect the several warehouses and premises, mentioned in the pleadings, in the occupation of the defendants, situate in Gravel Lane, Petticoat Lane, Harrow Alley, Cutler's Street, and Parker's Gardens, respectively, preparatory to their being examined as witnesses on the part of the plaintiff; the Vice-Chancellor ordered a reference to the Master to inquire and state to the Court, whether an inspection of the several warehouses and premises, mentioned in the pleadings to be in the occupation of the defendants in Gravel Lane, Petticoat Lane, Harrow Alley, Cutler's Street, and Parker's Gardens, respectively, by the said Joseph Sills and William Smith, preparatory to their being examined as witnesses, upon interrogatories carried into the Master's office by the plaintiff, in pursuance of the decree, was necessary for the Master to form his conclusion upon the matters referred to him. From this order the defendants appealed to the Lord Chancellor. Pending the appeal, by his report, dated the 24th day of March 1819, the Master certified that he was of opinion, that an inspection of the several warehouses and premises, mentioned in the order of reference, by the said Joseph Sills and Robert Smith, preparatory to their being examined as witnesses, upon the interrogatories exhibited by the plaintiff before him for the examination of witnesses, in respect of the matters referred to him by the decree, was necessary for him to form a satisfactory conclusion upon the matters so referred to him. On the 7th of April 1819, the Vice-Chancellor [*Sir* JOHN LEACH] confirmed the Master's report, and ordered that the defendants should permit Joseph Sills and Robert Smith to inspect the several warehouses and premises in the occupation of the defendants, in Gravel Lane, Petticoat Lane, Harrow Alley, Cutler's Street, and Parker's Gardens, respectively, preparatory to their being examined as witnesses upon interrogatories carried into the Master's office by the plaintiff. From this order also the defendants appealed to the Lord Chancellor.

The Solicitor General [*Sir* SAMUEL SHEPHERD], Sir *Arthur Piggott* and Mr. *Wyatt*, in support of the appeal: "The order for inspection is unprecedented, unauthorized by practice or principle. The Court has no jurisdiction to compel the owners of houses to open them for the admission of adverse witnesses, undertaking to furnish evidence against them on the question of their value. Parties may be themselves examined on interrogatories; but their freehold is protected from the entry of strangers. The order can be supported only on the principle that

the Court is competent to compel the East India Company to open their doors; every house subject to the same claim of tithe must be subject to the same inspection. If the parties acted on such an order, and the East India Company brought an action for trespass, how could the defendants protect themselves by an order of this Court? What precedent is there of such a defence? The instances in which the legislature has, for the purpose of revenue, compelled inspection of houses, afford no proof of a like power in this Court. If the proprietor of a mine, in working underground, has worked into the mine of his neighbour, and taken ore not belonging to him, inspection may be ordered; but the Court then acts at the instance of the owner of the mine invaded and of the ore taken. A tithe-owner is undoubtedly entitled to enter on the land subject to tithe for the purpose of seeing the tithe set out, and carrying it away, but the analogy of that right cannot authorize the plaintiff in deputing strangers to enter and inspect the defendants' freehold. On the principle of this order every tithe-owner may file a bill, not according to the established practice for discovery, but for inspection."

Messrs. *Wetherell* and *Palmer*, for the plaintiff: "The principle is that wherever, in respect of the property of one individual, a right accrues to another which cannot be measured without inspection of the subject of property, the Court is competent to compel the proprietor to permit that inspection, as indispensable to the purposes of justice."

L. C. Eldon: "Though novel in circumstances, this case is not novel in principle. The purpose of inspection is to inform the conscience of the Court, and witnesses appointed by it are entitled to be considered as its officers. . . . The question is, whether in such a case the Court must not have the means of ascertaining by the inspection of witnesses the nature of the premises, in order to ascertain their value; and whether the law meant to leave it thus, that the defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value, but on the other hand the plaintiff was to be in such circumstances that he could examine no witnesses who knew with precision the value of the premises. . . . It is admitted that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case where, on the suggestion that a machine used by the defendant was an infringement of a patent, the Court ordered the defendant to allow an entry into his premises for the purpose of ascertaining by inspection whether the machine was an infringement. . . . If without this proceeding the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is that, on principle, it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom orders is made."[5]

5—Compare the authorities cited in W., § 2221, and No. 397, *ante*.

UNION PACIFIC R. CO. v. BOTSFORD (1890).

141 U. S. 250, 11 Sup. 1000.

The original action was by Clara L. Botsford against the Union Pacific Railway Company, for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger,
462 by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the Court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner; the defendant at the time informing the Court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The Court overruled said motion, and refused to make said order, upon the sole ground that this Court had no legal right or power to make and enforce such order." To this ruling and action of the Court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

GRAY, J.:. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy, or of the identity of a party; or, on an appeal of maihem, the issue of maihem or no maihem; and, in an action of tresspass for maihem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum*

vulneris, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, 'it is not thought necessary to summon a jury to decide it,' because 'the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof,' and, therefore, 'the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.' The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Com. 331-333. The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction; and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. The writ *de ventre inspiciendo,* to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother. The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Com. 456; Bac. Ab. Bastard, A. . . . But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people.

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history."

WANEK v. WINONA (1899).

78 Minn. 98, 80 N. W. 851.

MITCHELL, J.: "This action was brought to recover damages for personal injuries caused by the alleged negligence of the city in allowing a public sidewalk to become and remain out of repair, and in an unsafe condition for public travel. The only question which we find it necessary to consider is whether the trial Court erred in denying the application of the defendant to require the plaintiff to

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submit himself to a physical examination by two or more competent and disinterested physicians, to be named by the court in order to ascertain the nature and extent of his injuries. The alleged injuries were sustained October 19, 1898. The plaintiff's notice of his claim for damages was served on the city November 14, 1898. This action was commenced December 9 of the same year, and defendant's application for a physical examination was made May 1, 1899, the first day of the term at which the action was tried. The complaint alleged that the injuries would be permanent, and the existence or nonexistence of at least some of the injuries could only be ascertained by a physical examination of plaintiff's person. The trial court denied the application upon the grounds, as shown by his memorandum: First, that he had no power in any case to order a party to submit to a physical examination of his person; and, second, even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

"We are very clearly of the opinion that the Court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person, . . . and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so. We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called 'medical experts.' To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examina-

tion of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment."[1]

3. *Privilege of Husband and Wife.*[2]

Sir Edward Coke, *Commentary upon Littleton, 6 b* (1629): "He that loseth *liberam legem* becometh infamous and can be no witness; or if the witness be an infidell, or of non-sane memory, or not
464 of discretion, or a partie interested, or the like. But oftentimes a man may be challenged to be of a jury that cannot be challenged to be a witnesse, and therefore, though the witnesse be of the neerest alliance or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding or discretion, or a partie in interest, though it be proved true, shall not exclude the witnesse to be sworne. . . . Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *qua sunt duæ animæ in carne una;* and it might be a cause of implacable discord and dissention between the husband and wife, and a meane of great inconvenience; but in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villain."

KNOWLES v. PEOPLE (1867).

15 Mich. 408, 413.

Campbell, J.: "Defendant was convicted in the circuit court for the county of Lenawee of a charge of larceny, in stealing cattle. . . .
465 Defendant having introduced testimony tending to prove that he was at home at the time when the larceny was said to have been committed, and there being evidence tending to show that his wife was home at the same time, the Court refused to instruct the jury that they had no right to consider the omission of defendant to call her as a witness, nor allow the omission to prejudice him in their deliberation, and, on the contrary, instructed them that such neglect might be taken into consideration against him. There is no doubt that a jury may regard with suspicion a failure of a party to produce testimony which is in his power, and which would throw light upon matters left without other proper evidence. But this rule has never been applied to those cases where the law, on grounds of public policy, has established privileges against being compelled to produce it. It is well

1—Compare the authorities cited in W., § 2220.

2—For the *disqualification to testify in each other's favor*, see *ante*, Nos. 74-76. For the privilege as to *marital communications*, see *post*, Nos. 509, 510.

settled that where a man avails himself of his privilege, to decline answering questions, no unfavorable inference can be allowed to be drawn from his silence, and in Carne v. Litchfield, 2 Mich. 340, the refusal of the circuit court to prevent counsel from commenting on such a claim of privilege, was held to be sufficient ground for reversing a judgment.

"Our statute, in changing the common law rule concerning the testimonial incapacities of husband and wife, has not made them competent witnesses for or against each other without restriction, but has prohibited either from testifying without the consent of the other, and from divulging mutual confidences without mutual consent. It is very manifest that the rule which prevents a wife from being compelled to testify against her husband is based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection, and that this is regarded as more important to the public welfare than that the exigencies of lawsuits should authorize domestic peace to be disregarded, for the sake of ferreting out some fact not within the knowledge of strangers. If the omission to call a wife upon the stand is to be treated as warranting the conclusion that her testimony would be adverse, then the privilege is entirely destroyed, and she will have to be called at all events. The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect to the better feelings of humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of a public examination, of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts. The law, in permitting husbands and wives to testify on behalf of each other, can not have contemplated that any moral coercion should enable others to force them into the witness box. Lord Mansfield, in Blatch v. Archer, Cowp. 63, admitting the general rule that an omission to produce accessible evidence is suspicious, declared that it would have been very improper, without necessity, to call a son in a case where his father was interested, and held that the principle did not apply to such a state of things. Yet a son was always competent for any party. But the relation of husband and wife has always been held as one which should not be exposed to any needless influences which might interfere with the most unreserved confidence and security."

COMMISSIONERS OF COMMON LAW PROCEDURE, *Second Report, 13* (1853): "A more difficult question [than that of admitting them in each other's favor] arises when we proceed to consider whether
466 it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would no doubt be of rare occurrence; when it did, it would in the greater number of instances be where husband and wife have separated and are on bad terms with one another. In such cases the mischief apprehended from

the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together on the usual terms; here the identity of interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances and when the fact to be proved is certain in its character and clearly within the knowledge of the witness. . . . But if there be such a fact in the knowledge of one of two married persons, so material to the cause of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it becomes matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances, we believe, would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence. . . . The conclusion to which the foregoing observations leads us is that husband and wife should be competent and compellable to give evidence for and against one another on matters of fact as to which either could now be examined as a party in the cause."[3]

REX v. CLIVIGER (1788).

2 T. R. 263.

Two justices removed by an order, James Whitehead, otherwise Shepherd, and Margery, his wife, from the township of Anlezark to Cliviger, both of the county of Lancaster; and, on appeal to the
467 sessions, that order was confirmed, subject to the opinion of the Court on the following case. As to so much of the order as respected the settlement of Margery, therein named to be the wife of James Whitehead, the respondents proved the marriage of the paupers, James and Margery, on the 16th September 1786, and then closed their case. The appellants insisted, that James Whitehead, the pauper, had a former wife, Ellen, living at the time of his marriage with Margery, and called James Whitehead to prove it; who swore that he never was married to the said Ellen. The appellants then offered to call the said Ellen, stating her to be the lawful wife of said James Whitehead, to contradict what he, her supposed husband, had sworn; and to swear that she

3—For the *statutes* which have modified or abolished the privilege, see *post*, Appendix. For the *history* of the privilege, see W., § 2227.

was his lawful wife; but the sessions, under the circumstances, refused to receive her evidence. The appellants then went into evidence of cohabitation between the said Ellen and James for a period of three or four years; of declarations and acts of James acknowledging the said Ellen to be his wife, and amongst others, an indenture of apprenticeship, dated 24th August 1785, was proved, by which the said James and the said Ellen, therein described to be his wife, bound out apprentice one Thomas Williams, the son of the said Ellen, by one Joseph Williams, formerly her husband, but then deceased. The question referred to the Court is, Whether the said Ellen was a competent witness under these circumstances or not?

S. Heywood and *Topping*, in support of the order of sessions: "The real question before the Court is, Whether a wife is a competent witness, even in the case of third persons, to prove her husband guilty of bigamy? Besides the objection of her being interested in the *question* which was put to her, inasmuch as she was called to prove, that a person whom she called her husband was liable to her debts, and for her maintenance; there is another objection to her testimony arising from the policy of the law, which will not permit husband and wife to give evidence tending to the crimination of each other. Here the evidence of the wife went to charge her husband with bigamy. . . . The argument which may be urged on the other side, that the husband could not be affected by this evidence, inasmuch as it could not be made use of on any other occasion, cannot have any weight; for if it tends in any degree to prejudice him, that is sufficient. It would certainly have raised impressions against him, and indeed it would have been the duty of the justices to have committed him after having heard it. They may possibly be some cases where a wife may give evidence on behalf of third persons, which may obliquely affect her husband, but certainly none where it tends to impute any crime on him."

Bearcroft, Cockell, Serj. and *Johnson, contra:* "In the case of an indictment for bigamy, the first wife's evidence is not admissible, because it goes to charge her husband directly. But here nothing that the woman could say could affect her husband; no prosecution could be grounded on her testimony; neither was there any benefit to herself."

Ashhurst, J.: "There is no doubt but that husband and wife may prove their own marriage on a question of settlement. But this case rests on particular circumstances. A marriage in fact has been proved with one woman; the question was, Whether she was the pauper's lawful wife? Then another woman was called to prove that she had been before married to him, and was in truth his lawful wife. That creates the doubt, Whether it was competent to the wife to prove that her husband had been twice married? Under these circumstances, I am of opinion that she was not a competent witness to that purpose. . . . I lay all consideration of interest out of the case. . . . But the ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend

to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime, but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime and cause the husband to be apprehended."

REX v. ALL SAINTS (1817).

6 M. & S. 195, 199.

Upon appeal the sessions confirmed an order for the removal of Esther Newman, otherwise Esther Willis, from the parish of Cheltenham, in the county of Gloucester, to the parish of All Saints,
468 in the city of Worcester, subject to the opinion of this Court on the following case: The appellants having produced the pauper, the counsel for the respondents began their case by calling a witness, named Ann Willis, for the purpose of proving that she had been married in Ireland to one George Willis. The counsel for the appellants objected to the competency of this witness, declaring themselves prepared with evidence of the subsequent marriage of the same George Willis to Esther the pauper; but the Court determined to admit the witness.

Scarlett and *Campbell,* in support of the order of sessions, argued that Ann Willis was a competent witness to prove her marriage with George Willis. "In order to maintain this position it was not necessary to dispute the rule that husband and wife cannot be witnesses for each other, nor against each other, provided the rule were limited to cases where the interest of husband and wife is the matter in controversy, as where either of them is partly to the record. But suppose an issue between A. and B., and A. calls a witness, who proves certain facts, and also calls the wife of that witness, with a view of confirming his evidence; if the wife, instead of confirming, should contradict her husband, this testimony, according to the argument below at the sessions, must be rejected, otherwise it may tend to shew her husband guilty of perjury. But would it not be a strange anomaly in the law, if the competency of a *feme covert* to be a witness should depend upon whether her evidence would or would not agree with the evidence of her husband, his interest not being in litigation? It seems, indeed, as if some such doctrine had led to the decision of Rex *v.* Cliviger."

Jervis, Taunton, and *Twiss, contra,* argued that Rex *v.* Cliviger was decisive of this question; "for although in that case the husband was one of the parties included in the order of removal, and had been

called as a witness, and denied his former marriage, in which respect it differs from the present case, yet having been decided upon the principle that the law does not permit husband and wife to give evidence that may even tend to criminate each other, that decision entirely disposes of the present case."

Lord Ellenborough, C. J.: "With the best attention I have been able to give this case, I cannot discover any incompetence of the first wife to give evidence touching the fact of her marriage. . . . She affirmed that he was her husband. How does this criminate him? Does it contradict anything which he had sworn to before, so as to involve him in the crime of perjury. Not at all. Does it even relate to a matter on which he had given previous evidence? By no means. . . . The objection rests only on the language of the King *v.* Cliviger, that it may tend to criminate him, for it is not an immediate tendency inasmuch as what she stated could not be used in evidence against him. . . . If we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which connected with other facts may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds."

Bayley, J.: "There was no objection arising out of the policy of the law because by possibility her evidence might be the means of furnishing information and might lead to inquiry and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife. . . . I am not sure that the import of the expression 'tendency to criminate' was very accurately defined in that case [of R. *v.* Cliviger]. It was probably not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. . . . Nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him; but such a collateral consequence is not a sufficient objection."[1]

CALDWELL v. STUART (1832).

2 Bail. 574.

Action of trover for the recovery of certain slaves, which the plaintiff claimed by parol gift from the defendant's testator, who was her step-father. The only witness to prove the gift was Mrs. Stuart,
469 the widow of the testator, and she was objected to, as incompetent by reason of her relation to the testator. The presiding judge

1—*Roane,* J., in *Baring* v. *Reeder,* 1 Hem. & M. 154, 168 (1806): "I take the rule on this subject to be that, in civil actions, where the husband is no party, the wife may be called as a witness even to facts which if proved in another action to

overruled the objection; and the plaintiff obtained a verdict, which the defendant now moved to set aside, on the ground that the testimony of the widow ought to have been excluded.

Johnson, J.: "We are very clearly of opinion that Mrs. Stuart was properly admitted as a witness. The rule, which excludes the wife from giving evidence for, or against the husband, is founded, in some degree, upon the legal identity of the husband and wife. . . . Domestic quiet and harmony of families have suggested the propriety of excluding it where it would be volunteered. . . . Neither the rule, nor any of the reasons upon which it proceeds, have any the most remote application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as the case may be, and not the husband's. There is no danger of matrimonial discord; nor is there any violation of confidence."[2]

SOULE'S CASE (1828).

5 Mc. 407, 408.

The husband was indicted for an aggravated assault and battery upon the wife; and upon the trial, before Preble, J. at the last term in this county, he admitted the wife as a competent witness for the
470 State; but saved the point for the consideration of all the Judges.

Mellen, C. J.: "In this case the only question is whether the wife of the defendant was properly admitted as a witness against him on the trial, to prove the assault and battery upon her, charged in the indictment. It is well known that, as a general principle, husband and wife are not legal witnesses against each other. . . . From the general rule some exceptions have been established, founded on the necessity of the case. For instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound, and torture her at times and in places when and where no witnesses could be present nor assistance be obtained. Reasons of policy do not certainly extend so far as in such cases to disqualify her from being a witness against him. . . . So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace, and

which her husband is a party, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife in such a case is entirely impotent as it relates to the husband, producing him no loss, and consequently exciting in him no displeasure, will not violate the reason of that policy which, in respect to the harmony to be desired in the marriage state, has given rise to the rule in question."

Compare the authorities cited in W., §§ 2234-2236.

2—Compare the authorities cited in W., § 2237.

introduce discord, animosity, and confusion in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic, and perhaps intoxicated husband, who has done all in his power to render the wife unhappy and destroy all mutual affection."[3]

4. *Privilege Against Self-Crimination.*

TRIAL OF WILLIAM PENN AND WILLIAM MEAD (1670).

6 How. St. Tr. 951, 957.

Indictment for disturbing the peace by street-preaching. *Witness:* "My lord, I saw a great number of people, and Mr. Penn, I suppose, was
471 speaking; I saw him make a motion with his hands, and heard some noise, but could not understand what he said. But for Capt. Mead, I did not see him there." *Rec.:* "What say you, Mr. Mead, were you there?" *Mead:* "It is a maxim in your own law, *'Nemo tenetur accusare seipsum,'* which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself'."[4]

STATUTES. *United States,* Constitution 1787, Amendment V.: "No person . . . shall be compelled in any criminal case to be a witness
472 against himself".[5]

Sir J. F. STEPHEN, *History of the Criminal Law, I,* 342, 441, 535, 542, 565 (1883): "In the old Ecclesiastical Courts and in the Star Chamber [the *ex officio* oath] was understood to be and was used
473 as an oath to speak the truth on the matters objected against the defendant—an oath, in short, to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim *'nemo tenetur prodere seipsum'* was agreeable to the law of God, and

3—Compare the authorities cited in W., § 2239.

4—For the history of the privilege, see W., § 2250.

5—*Blatchford,* J., in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892); "It is contended on the part of the appellee that . . . the constitutions of those States [of Virginia, Massachusetts, and New Hampshire] give to the witness a broader privilege and exemption than is granted by the Constitution of the United States, in that their language is that the witness shall not be compelled to accuse himself, or furnish evidence against himself, or give evidence against himself; and it is contended that the terms of the Constitution of the United States, and of the constitutions of Georgia, California, and New York are more restricted. But we are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language."

For other constitutional and statutory provisions, see W., § 2252, and the statutes quoted *post,* Appendix.

part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad law, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which they have offered protection has come to be commonly admitted. . . . [But by the institution of our privilege against self-crimination] the result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial. . . . This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice; and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. During the discussions which took place on the Indian Code of Criminal Procedure in 1872, some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study. The Procureur de la République and Juge d'Instruction, their power of holding inquiries, drawing up *proces-verbaux*, examining suspected persons secretly, and without informing them even of the accusation or evidence against them, taking depositions behind their backs, and keeping them in solitary confinement till (whatever soft words may be used about it) every effort has been made to extort a confession from them, are contrasted in the strongest way with everything with which we are familiar, and which I have described, in detail, in the preceding chapters. To keep a man in solitary confinement and question him till he is driven into a confession is not the less torture because the process is protracted instead of being acute. . . . The following account of the matter is given by M. Hélie: 'The magistrate who puts questions to the accused and asks explanations from him has the right to interrogate him for the purpose of extracting his excuse or his confession of guilt. He should, without harassing or confusing him, but at the same time while requiring a disclosure, encourage his freedom of utterance. He should, in short, with the most complete impartiality, seek solely to get at the truth. The interrogatory must be neither an argument nor a combat;

that is by means of the issue. The main object is to ascertain the theory of the defence, and thus to determine the details of the issue and the points therein which are to be established.' He adds, that though the interrogatory is not essential, yet the President can interrogate the accused either before or after the witnesses are heard, the former being the common course. . . . Whatever may be the law on the subject, the fact unquestionably is that the interrogation of the accused by the President is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial. Moreover, all the reports of French trials which I have seen, and I have read very many, suggest that the views taken by M. Hélie as to the proper object of the interrogatory, and the proper method of carrying it on, are not shared by the great majority of French Presidents of Cours d'Assises. The accused is cross-examined with the utmost severity, and with continual rebuke, sarcasms, and exhortations, which no counsel in an English court would be permitted by any judge who knew and did his duty to address to any witness. This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure (except parts of the law as to the functions of the jury). It cannot but make the judge a party—and what is more, a party adverse to the prisoner; and it appears to me, apart from this, to place him in a position essentially undignified and inconsistent with his other functions. . . . This comparison of French and English criminal procedure naturally suggests the question, Which of the two is the best? To a person accustomed to the English system and to English ways of thinking and feeling there can be no comparison at all between them. However well fitted it may be for France, the French system would be utterly intolerable in England. . . . The whole temper and spirit of the French and the English differs so widely, that it would be rash for an Englishman to speak of trials in France as they actually are. We can think of the system only as it would work if transplanted into England. It may well be that it not only looks, but is, a very different thing in France. . . . The best way of comparing the working of the two systems is by comparing trials which have taken place under them. For this purpose I have given at the end of this work detailed accounts of seven celebrated trials, four English and three French, which afford strong illustrations of the results of the two systems. It seems to me that a comparison between them shows a superiority of the English system even more remarkably than any general observations which may be made on the subject. In every one of the English cases the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases,—notwithstanding which, far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which any one can represent as cruel or undignified."

a. Scope of the Privilege.

PAXTON v. DOUGLAS (1809).

16 Ves. Jr. 239, 242, 19 id. 225.

The plaintiffs filed the bill as creditors of Peter Douglas, deceased, on behalf of themselves and all the other creditors, &c., an exception was taken to the Master's Certificate, that he had allowed in-
474 terrogatories for the examination of Charles Christie; claiming as a bond creditor of Douglas. The interrogatories, as allowed by the Master, inquired, 1st, generally as to the consideration for the bond for 2600l.; whether money, goods, &c.: 2dly, whether Christie was not before and at the date of the bond entitled to four-sixteenths parts of the ship Belvidere, in the service of the East India Company; and was not the commander of the said ship; whether Douglas did not contract for the purpose of such shares for 2400l.: whether that was a fair price: whether it was paid; as to the circumstances of payment, &c.: 3d, whether Douglas, or his nephew James Peter Fearon, at the same time made some and what proposal or offer to purchase from him the command of the said ship, for any and what sum; and how such sum was to be paid and secured: 4th, whether he treated, or made, or concluded, any and what bargain with Douglas or Fearon, for the sale of the command to Fearon for the sum of 2600*l.* or any other and what sum: 5th, whether, and when he (Christie,) resigned the command: and was not Fearon, and when, and by whose recommendation or procurement, appointed to the command: 6th, whether he had, or not, proved the bond under a Commission of Bankruptcy against Fearon; and if not, why?

Christie objected to answer these interrogatories; on the ground that his answer might criminate himself; and subject him to a forfeiture under the East India Company's Bye-Laws; declaring, that no owner or part-owner of any ship, or any commander, or other person, shall directly or indirectly sell, or take any gratuity or consideration, nor shall any person or persons buy, pay, or give, any gratuity or consideration, for the command of any ship or ships, to be freighted to the Company; and in case any such contract, payment, or gift, shall be made, the commander, or intended commander, concerned therein, shall from henceforth be incapable of being employed, or of serving the Company in any capacity whatsoever. . . .

Mr. *Richards* and Mr. *Rouple*, for the Report, insisted that. . . . some of the interrogatories, the first, for instance, going to the consideration, generally, could not be objected to.

Eldon, L. C.: "If a series of questions are put, all meant to establish the same criminality, you cannot pick out a particular question and say, if that alone had been put, it might have been answered. . . He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly

appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him."[1]

AARON BURR'S TRIAL (1807).

Robertson's Rep. I, 208, 244.

Treason; a cipher letter was placed before the witness, who had been secretary to the defendant, and he was asked by Mr. *McRea,* for the prosecution: "Do you understand the contents of that paper?"

475 Mr. *Williams,* for the defendant: "He objects to answer. He says that, though that question may be an innocent one, yet the counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to criminate him. If a man know of treasonable matter, and do not disclose it, he is guilty of misprision of treason. . . . The knowledge of the treason, again comprehends two ideas,—that he must have [1] seen and understood [2] the treasonable matter. To one of these points Mr. W. is called upon to depose; if this be established, who knows but the other elements of the crime may be gradually unfolded so as to implicate him?"

MARSHALL, C. J., sanctioning the witness' refusal: "According to their [the prosecution's] statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within

1—V. C. *Leach,* in *Green* v. *Weaver,* 1 Sim. 404, 430 (1827): "[L. C. Eldon, in *Parton* v. *Douglas,*] went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity is that every statement of fact in every bill ought to be 'incidentally leading' to the same conclusion, ultimately, as the prayer of the bill does lead to; for the fact is either conducive to the general result or it is unimportant and irrelevant. But I take Lord Eldon to have meant (and which perhaps is not very fully explained in the report, and which satisfied my mind a good deal) not that every fact which may lead to the effect of subjecting a defendant to a penalty, is objectionable; but where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity on the footing of penalty, that, as a Court of equity does not relieve on penalty, it will not give any incidental discovery."

his bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."[2]

WARD v. STATE (1829).

2 Mo. 120, 122.

McGirk, C. J.: "The case appears by the record to be, that at the late term of the Circuit Court for the county of St. Louis, the grand jury for said county caused a subpœna to be issued for said Ward,
476 to appear before them and testify generally, without saying in what particular matter or cause he was to testify. Ward accordingly appeared, and was sworn to give evidence to the grand jury. He went before the grand jury to testify. The first question asked by the foreman of the grand jury was this: 'Do you know of any person or persons having bet at a faro table in this county, within the last twelve months?' To which the witness answered, 'I do.' The foreman then desired the witness to tell what person or persons have so bet, other than himself, and not naming himself. The witness declined answering, saying that he could not answer without implicating himself. Ward was then directed by the Court to answer the requirements of the grand jury, but not to name himself as a better; which he refused, alleging that to answer thus would implicate himself. Whereupon the Court committed him to prison, till he should consent to give the evidence required, and till the further order of the Court. A writ of error is sued on, a supersedeas asked for. . . . Was the witness right in refusing to answer the question on the ground that the answer would implicate himself? The record shows that the game of faro is played with cards, by one person as banker against any number of persons, each person playing for himself, without any aid from the others, against the banker; and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is 'Tell who bet at the game of faro, not naming yourself.' The answer of the witness is (supposing him to be A) that 'if I tell that B, C, and D played, it will be either full or partial evidence that I played.' This is the whole argument of the case,—an argument which I think is totally untenable in law and reason. . . . The question is, 'Who did you see betting at faro except yourself?' It is be-

2—Compare the authorities cited in W., § 2260.

lieved that a direct answer in the negative to this would be, 'I saw no one bet at faro.' This answer, I think, all will allow, does not accuse him. But suppose his answer must be, that he saw B bet at faro, can it not be true that though B bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime, prove in law or reason that he who saw the crime committed was a participator? . . . But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact, whether he bet; and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should in their turn give evidence against him? I have looked into the cases cited at the bar, and I am unable to perceive any principle, in any of them, which ought to vary the foregoing opinion."[3]

BOYD v. UNITED STATES (1885).

116 U. S. 616, 6 Sup. 437, 524.

Information for evasion of customs dues by fraudulent invoicing. On the order of the trial Court, the invoice was compelled to be produced by the defendant for inspection in court, under St. June
477 22, 1874, § 5, Rev. St. 1878, § 724 (*ante* No. 396), requiring production on motion, and taking the facts to be confessed as alleged, in case of failure to produce. This order was held unconstitutional, under the Fifth and also the Fourth Amendments; the present case was held to be in effect a criminal proceeding. WAITE, C. J., and MILLER, J., dissented, solely to the extent of holding that Court's order was not for a search nor a seizure and therefore not within the prohibition of the Fourth Amendment. The opinion of BRADLEY, J., for the majority, gave the following exposition of reasons: "The principal question, however, remains to be considered. It is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. . . . In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the

3—Compare the authorities cited in W., § 2262.

subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the secretary's warrant Wilkes's house was searched, and the papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1000 against Wood, one of the party who made the search, and £4000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick v. Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies

as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time. . . .

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods, it within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the 5th section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they have been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred. . . .

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within

the clear intent and meaning of those terms. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. . . . "

Miller, J., and Waite, C. J.: "I concur in the judgment of the court, reversing that of the Circuit Court, and in so much of the opinion of this court as holds the 5th section of the act of 1874 void as applicable to the present case. I am of the opinion that this is a criminal case within the meaning of the clause of the Fifth Amendment to the Constitution of the United States which declares that no person 'shall be compelled in any criminal case to be a witness against himself.' And I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a subpœna *duces tecum*, and though the penalty for the witness's failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear.

"But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure authorized by the statute. No order can be made by the Court under it which requires or permits anything more than service of notice on a party in suit. . . . Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in the presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. . . . While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is

only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing. This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted. I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute."

STATE v. FLYNN (1858).

36 N. H. 64.

The respondent was indicted for keeping for sale a large quantity —to-wit, ten gallons—of intoxicating liquor, not being an agent for the sale of such liquor, and the liquor not being domestic wine, &c.,
478 contrary to the statute, &c. Upon the general issue the State introduced evidence tending to show that A. P. Colby, an assistant marshall of the city of Manchester, acting under a warrant issued by the police court of said city, which was not produced or offered as evidence, went with assistants to the place occupied by the respondent, on Elm street, in Manchester, and there made search for spirituous liquors. The respondent's counsel then objected to the admission of any evidence of the facts ascertained upon such search, upon the ground that the statute for the suppression of intemperance, so far as it purports to authorize a search for spirituous liquors, particularly the fourth section of the statute, is repugnant to the Constitution of the United States and of this State, and any evidence obtained under such unconstitutional enactment is inadmissible, because it is in the nature of admissions made by the respondent under duress, and the respondent is thus compelled to furnish evidence against himself; but the Court admitted the evidence. The jury having found a verdict against the respondent, his counsel move for a new trial, by reason of said decision.

Ball, J.: "The objection made in this case does not go so far as to insist that all evidence obtained under a search-warrant is incompetent. . . . Its ground is, rather, that information obtained by means of a search-warrant, in a case not authorized by the Constitution, is not competent to be given in evidence, because it has been obtained by compulsion from the defendant himself, in violation of that clause of the Constitution which provides that no person shall be compelled to furnish evidence against himself. . . . It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admis-

sions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of a party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. . . . It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his."[4]

UNITED STATES v. CROSS (1892).

20 D. C. 365, 382.

Cox, J.: "The defendant was indicted for murdering his wife on the first day of October, 1889. . . . Exception No. 42 was to the admission of the record in the Marshal's office as to the height of the de-
479 fendant. It seems that he was called into a room in the Marshal's office, and his measurement taken, and that was done after he was convicted at the first trial. . . . It appeared that Mr. Carroll was the clerk, and testified that there is a book kept in the office of the Marshal in which all the measurements of convicted persons are kept, and a description of the convicted persons written down and furnished the Department of Justice. They are required to keep that book and the practice was for somebody to take the measurement and call it out to him, and he reduced it to writing. He identified the book produced as the one used, and then gave the measurement of the defendant. That was objected to on several grounds. . . There is still a further objection made to it and that is, that it is an effort to compel the defendant to give evidence against himself. It must be remembered that when this measurement was taken, the defendant was *convicted,* and, therefore, it was not taken with the view to a trial or for use upon a trial. There does not seem to be any reason why it could not be used after it had been taken under the circumstances stated. It could not be contended that the knowledge of the size or height of a man acquired in any other way, for instance by a tailor, could not be used when at the time it was not taken for the purpose of being used as testimony, and it seems to us that a record taken as this was, for a lawful purpose and under the rules of the office, might be made use of afterwards. It does not seem to us that it is compelling the defendant to give evidence against himself, although some cases that have been cited to us go very far in that direction. There was one case holding that it was error for the prosecuting officer

4—Compare the authorities cited in W., § 2264; and No. 440, *ante.*

to compel the prisoner in court to put his foot into a vessel filled with mud in order to measure it and identify it. That is well enough. It was held in another case that where the officer compelled the defendant to put his foot in certain tracks that were discovered, in order to identify him, that was wrong, as it was compelling him to give evidence against himself, and evidence of that kind so secured, could not be used. We think that is going very far; it is rather too fine. What would be the consequence if such evidence should be entirely excluded? You could not compel a person after his arrest to empty his pockets and disclose a weapon, when the most vital evidence on the part of the Government, in a homicide case, is the possession of the deadly weapon. Could you not compel him to open his pocket-book and exhibit papers that might be conclusive in the case of a forgery, or anything of that sort? We think that officers having a prisoner in custody have a right to acquire information about him, even by force, and that, for example, when his photograph is taken or his measurement taken, it is simply the act of the officers and is not compelling him to give evidence against himself."[5]

COUNSELMAN v. HITCHCOCK (1892).

142 U. S. 547, 564, 586, 12 Sup. 195.

Counselman, being a witness before the grand jury in attendance upon a District Court of the United States, refused to answer questions re-
480 lating to his dealings with certain railroad corporations, on the ground that an answer might tend to criminate him. The grand jury was investigating alleged violations by these corporations of the provisions of the Interstate Commerce Act. Having been committed for contempt, and refused his discharge upon a writ of *habeas corpus,* Counselman appealed to the Supreme Court. The statutes upon which the right to compel answers rested were as follows: U. S. Rev. St. 1878, § 860, re-enacting St. Feb. 25, 1868, c. 13: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture," except for perjury committed in discovering or testifying as aforesaid; St. 1887, Feb. 1, c. 104, § 9, 24 Stat. 379: In any action against a common carrier for damage under this statute, the privilege is not to excuse from testimony; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding;" Ib. § 12 (similar, for investigations by the Interstate Commerce Commission); St. 1891, Feb. 10, c. 128, amending St. 1887, Feb. 1, c. 104, § 12: Upon investigations by the Interstate Commerce Commission, where the aid of the Circuit Court is re-

5—Compare the authorities cited in W., § 2265.

quired to obtain testimony, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding".

BLATCHFORD, J. (for the Court): "It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. . . . It remains to consider whether § 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. . . . Any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any Court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. The consititutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.[1] . . . Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

1—*Smith*, J., in *State* v. *Nowell*, 58 N. H. 314 (1878): "The legal protection of the witness against prosecution for crime disclosed by him is in law equivalent to his legal innocence of the crime disclosed. . . . The witness, regarded in law as innocent, if prosecuted for a crime which he has been compelled by statute to disclose, will stand as well as other innocent persons; and it was not the design of the

STATE v. QUARLES (1853).

13 Ark. 307.

SCOTT, J.: "The defendant, having been indicted, under the 8th Section of the Gaming Act, for betting money on a game of chance called Pocre, interposed the plea of not guilty, in which the State joined,
481 which was submitted to a jury. The prosecuting attorney then, with leave of the court, entered a *nolle prosequi* as to one F. L. Neal, against whom a like prosecution was pending; and having had him sworn as a witness on behalf of the State, and informing him that the *nolle prosequi* as to him had been entered, and that no indictment, for any similar offence, would be thereafter preferred against him on a charge of its having been committed prior to that day, asked him the following question, to-wit: 'Have you seen the defendant, Hamilton G. Quarles, bet money with any person or persons at a certain game of chance played with cards, called Pocre, in the county of Union, State aforesaid, within twelve months next before the 16th day of April, A. D. 1851?' This question, the witness refused to answer, 'for fear that he would thereby incriminate himself,' as he alleged; and the Court refusing to compel him to do so, as moved on the part of the State, the point of law was saved by bill of exceptions. No further evidence having been offered, the jury found for the defendant, and the State appealed. . . . On the part of the State, it is insisted that the witness ought to have been compelled to answer the question, because, under the law, as altered by our statute, it was not possible that the answer could have had any tendency to criminate him, and as it related to matter that was relevant and material to the issue, it was not his privilege to refuse, because of any tendency of the answer to degrade his character. On the other side, it is contended that our statute has not materially changed the common law rule on this subject; and, moreover, that it is beyond the competent power of the Legislature to enact a law under which a witness could be compelled to answer a question which he might think would incriminate himself. The provision of the statute in question, is in the following words, to-wit: 'In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence.' . . . It is necessary, then, that we shall discover, if we can, the true nature of this constitutional privilege of the witness, before we construe these regulations of the Legislature, which concern it. . . .

common-law maxim, affirmed by the Bill of Rights, that he should stand any better. . . . He could plead and show that he had disclosed the same offence upon a lawful accusation against his principal, and thus make a perfect answer in bar or abatement of the prosecution against himself."

"The privilege in question, in its greatest scope, as allowed by the common law—and no one, be he witness or accused, can pretend to claim it beyond its scope at the common law—never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed; but only an exemption from the necessity of himself producing the evidence to establish his own crime. . . . So long as it might be lawful to produce in evidence against an accused party whatever he might before have voluntarily said as a witness on a prosecution against another, there were no means by which the privilege could be made available short of a claim by the witness to be silent; and as that was the rule of the common law, this was the common-law mode of making the privilege available. And that silence was but a mode of making the privilege available, and was not of the essence of the privilege itself, is conclusively proven by all that current of enlightened authority, to which we yield our fullest assent, which hold that the privilege has ceased when the crime has been pardoned, when the witness has been tried and acquitted, or is adjudged guilty, or when the prosecution, to which he was exposed, has been barred by lapse of time. . . . When this rule of the common law should have been so changed by legislative enactment, as to make unnecessary any appeal whatever on the part of the witness to his constitutional guarantee—as by regulations securing to him otherwise and effectually all that was guaranteed by the Bill of Rights—he could have no greater reason to complain than he would have had had the law remained unchanged, and under its operation he had never had any occasion to take shelter under the guarantee. And in such case, there would be no more ground upon which to suppose a want of competent power in the Legislature to make such regulations than there would be in case that body were to repeal the statute of gaming, and by this means deprive the gambler of his constitutional privilege to be accused and tried for a criminal offence, which has no longer existence. In either case, all that could be said would be, as to the gambler, that Courts could not indulge him in the luxury of a constitutional accusation and trial, wherein he could display his skill in breaking through the meshes of the law, for the reason that he had committed no offence then known to the law. And as to the witness, that he could not be indulged with the arm of the law to prevent his being ravished of matters tending to a crimination of himself, for the reason that nothing that could be wormed out of him could possibly have that effect. In a word, in neither case, there being no invasion of right or privilege, could there be any place for vindication; and there being no encroachment upon any right retained by the citizen, and no pretence of any transgression of any of the higher powers delegated to the Legislature, such acts would be clearly without the pale of prohibition and within the scope of authority. . . .

"But the Legislature has so changed the common-law rule, by the enactment in question, in the substitution of a rule that the testimony, required to be given by the act, shall never be used against the witness for the purpose of procuring his conviction for the crime or misdemeanor to which it relates, that it is no longer necessary for him to claim his privilege as to such testimony, in order to prevent its being afterwards used against him. And the only question that can possibly arise under the present state of the law, as applicable to the case now before us, is as to whether our statutory regulations afford sufficient protection to the witness, responsive to this new rule and to his constitutional guarantee against compulsory self-accusation. . . . In any case where more than ordinary precautions may be thought expedient or necessary, the powers of the Circuit Court are ample for the complete preservation of every item of evidence that might be produced. There can then be no ground for apprehension for the safety of the witness from this source. Nor can there be any greater cause for apprehension from any supposed possibility or probability that the true privilege of the witness may be invaded under the operation of the new rule, by the practical effect of his evidence, either direct or indirect, in opening up to the State, avenues of light leading to evidences of other crimes or misdemeanors, upon which prosecutions might be afterwards founded against the witnesses, that might otherwise remain closed and unsuggested. Because, when the course of examination would lead to any inquiry as to any matter materially connected with any crime or other misdemeanor than that which was the subject of direct inquiry before the court,—as, when such matter might be indispensable for the elucidation of some material matter already produced in evidence by the witness and directly involved in the issue—the witness could claim his privilege as to such matter as fully as if he had been inquired of in chief touching such other crime or misdemeanor. . . . And when the effect of the witness' testimony would not substantially amount to the furnishing of an item in a consecutive series of proofs tending to his conviction for another crime or misdemeanor, it would be so remote, contingent, and intangible, as scarcely to be of capacity to be considered of as legitimately resulting from his testimony in legal contemplation, in any sense to invade his true privilege. At any rate, we can safely say, it would not *prima facie* be so. And the argument to maintain the contrary, can only be supported by assuming that the privilege is absolute and unqualified, which is not only legally untrue as to it, but untrue as to every other right and privilege of the citizen, because they are all but component elements, not of natural liberty, but of civil liberty. And the error of the hypothesis will abundantly appear in the absurdities evolved in carrying out, to its inevitable result, any given right or privilege of the citizen when so based. If, for instance, it were broadly admitted that the privilege in question was so based, and hence would be invaded whenever the incidental effect of the testimony of the witness might in any degree be suggestive of sources of light that, when pursued, might lead to evidences upon which prosecutions might aft-

erwards be founded against the witness for other crimes or misdemeanors: and also, (as contended for on the other side,) that the witness is to be the sole judge of the occasion for the exercise of his privilege, it would be difficult to drive the machinery of government forward in its ordinary course. A Court, for instance, might then lawfully refuse to try a cause, lest its investigation, by the instrumentality of the jury and witnesses, might be suggestive of inquiries that might ultimately lead to evidence upon which a criminal prosecution might be afterwards founded against the presiding judge. And for a like reason, the Executive might feel lawfully authorized to withhold his ordinary communications from the Legislature; and even that body might lawfully decline to perform its ordinary duties upon the same ground—especially if the true privilege not only authorizes the citizen to withhold criminating matter, but also any matter that might have a tendency to degrade—because, the very remedies for the future would often be suggestive of the errors of the past, and these might not all be of an excusable cast. But to all objections of this class, it is a conclusive answer to say that, if, beyond reasonable foresight, any such cases should arise under the operation of our statute rule, as would seem to be clearly within its equity, although not embraced within its strict letter, all such special and unlooked-for cases would be as fully within its provisions, as if embraced by its terms, and witnesses in such extreme cases would doubtless obtain full protection from the Courts."

BROWN v. WALKER (1896).

161 U. S. 591, 16 Sup. 644.

Appeal from *Brown* v. *Walker,* 70 Fed. 46 (1895), against a ruling of Buffington, J., holding to be effectual the following statute, which had been passed in consequence of the decision in *Counselman* v.
482 *Hitchcock, supra,* No. 480: St. 1893, Feb. 11, c. 83, 27 Stat. 443: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'an act to regulate commerce,' approved Feb. 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, that no person

so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." The petitioner had been subpœnaed as a witness before the grand jury, at a term of the District Court for the Western District of Pennsylvania, to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company, for an alleged violation of the Interstate Commerce Act. Brown, the appellant, appeared for examination, in response to the subpœna, and was sworn. After testifying that he was auditor of the railway company, and that it was his duty to audit the accounts of the various officers of the company, as well as the accounts of the freight department of such company during the years 1894 and 1895, he was asked the question: "Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August and September, 1894, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?" To this question he answered: "That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself." The grand jury reported these questions and answers to the Court, and prayed for such order as to the Court might seem meet and proper. Upon the presentation of this report, Brown was ordered to appear and show cause why he should not answer the said questions or be adjudged in contempt; and upon the hearing of the rule to show cause, it was found that his excuses were insufficient, and he was directed to appear and answer the questions, which he declined to do. Whereupon he was adjudged to be in contempt and ordered to pay a fine of five dollars, and to be taken into custody until he should have answered the questions. The testimony was held to be compellable, and the ruling below affirmed, by a majority of the Court, FULLER, C. J., HARLAN, BREWER, PECKHAM, and BROWN, JJ.; dissenting opinions being filed by FIELD, J., and by SHIRAS, J., for GRAY and WHITE, JJ., also. The following extracts exhibit the various reasonings accepted:

SHIRAS, J., dissenting: "All that can be said is that the witness is not protected by the provision in question from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. . . . Nor is it a matter of perfect assurance that a person who has compulsorily testified, before the commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become in-

sane, and papers and records may be destroyed by accident or design. . . . Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the State courts. The same act or transaction which may be a violation of the interstate commerce act may also be an offense against a State law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute; but a full disclosure of all the attendant facts (and, if he testify at all, he must answer fully) might disclose that the witness had been guilty of embezzling the moneys intrusted to him for that purpose, or it might have been disclosed that he had made false entries in the books of the State corporation in whose employ he was acting. These acts would be crimes against the State, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts, or, at least, clues thereto, which led to his prosecution."

FIELD, J., dissenting: "It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But we do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, 'it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that, in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect. . . . It is true, as counsel observes, that both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal self-respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others. What can be more abhorent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented, and of which the world was ignorant?' The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. . . . The counsel for the appellant justly observes that 'the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom.'"

BROWN, J., for the majority: "If the object of the provision be to

secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible,—in other words, if his testimony operate as a complete pardon for the offense to which it relates,—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. . . . It can only be said, in general, that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose,—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. . . . The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered; but that gives him no claim to indemnity against the State, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing. . . . [After arguing that Congress has power to enact such a statutory amnesty to apply in State courts, and that the statute in question was intended as a general one:] But, even granting that there were still a bare possibility that, by disclosure, he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in Queen v. Boyes,[1] in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate. . . . The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is

1—1 B. & S. 311, 325 (1861).

not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that, if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other. . . . The danger of extending the principle announced in Counselman v. Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."[2]

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b. Claim and Waiver of the Privilege.

BEMBRIDGE'S TRIAL (1783).

22 How. St. Tr. 143.

Mr. *Bearcroft,* arguing for the defence: "It is true he was examined in a mode of inquiry in which it was not improper, perhaps, to examine him; but it cannot be doubted that the persons who did examine
483 him saw that the questions that they put upon that occasion tended to criminate the person under that examination. What does your lordship do in that situation? What does every judge do, even down to the lowest justice of the peace, even to committee-men upon elections, whenever a question of that sort is asked of a witness? 'Stop; understand that you are at your own discretion whether you will answer that question or not; you need not accuse yourself.' The law of England is that no man is bound to accuse himself; and the man who administers that law best always takes care to give that caution."[3]

2—Compare the authorities cited in W., §§ 2281, 2282.

3—1809, L. C. *Eldon,* in *Lloyd* v. *Passingham,* 16 Ves. Jr. 59, 64: "The practice formerly was that the judge told the witness he was not bound to answer the question;" 1809, L. C. *Eldon* in *Paxton* v. *Douglas,* 16 Ves. Jr. 239, 242: "Now, it appears to be understood that he may waive the objection and proceed if he thinks proper; and in general it is left to his own discretion"; 1854, *Parke,* B., in *Att'y-Gen'l* v. *Radloff,* 10 Exch. 84, 88: "I think that a witness ought to make the objection himself"; 1876, *Mayo* v. *Mayo,* 119 Mass. 290, 292: "It is within the discretion of the Court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness." Compare the authorities cited in W., § 2269.

CLOYES v. THAYER (1842).

3 Hill N. Y. 564, 566.

Action on a promissory note bearing date November 27th, 1835, payable to bearer, made by the defendants and transferred to the plaintiff by Isaac Hovey, the payee. The defendants pleaded the gen-
484 eral issue, and gave notice, in general terms, that they would prove the note to have been given to Hovey upon a usurious consideration. . . . The defendants' counsel called Isaac Hovey as a witness, and asked him if he was the original holder of the note. The witness declined answering the question, for fear, as he said, that his reply might form a link in the chain of evidence to convict him of a criminal offence. The circuit judge required the witness to answer the question and to testify in relation to the receipt by him of the alleged usury; giving as the reason for his decision that it was not an offence to take usury when the note in question was executed. The plaintiff's counsel excepted. The jury rendered a verdict in favor of the defendants; and the plaintiff now moved for a new trial on a bill of exceptions.

NELSON, C. J.: "The court erred in compelling the payee of the note to answer questions tending to criminate himself. It was expressly held in Burns v. Kempshall (24 Wend. 360), that the answer in a like case might tend to subject him either to a penalty or to an indictment for a misdemeanor.

"But the error is not available to the plaintiff. The privilege belongs exclusively to the witness, who may take advantage of it or not at his pleasure. The party to the suit cannot object. He has no right to insist upon the privilege and require the court to exclude the evidence on that ground. The witness may waive it and testify, in spite of any objection coming from the party or his counsel. If ordered to testify in a case where he is privileged, it is a matter exclusively between the Court and the witness. The latter may stand out and be committed for contempt, or he may submit; but the party has no right to interfere or complain of the error. It would be otherwise if the Court allowed the privilege in a case where the witness had not brought himself within the rule, as the [cross-examining] party would then be improperly deprived of his testimony."[4]

REGINA v. GARBETT (1847).

2 C. & K. 474, 492, 2 Cox Cr. 448, 1 Den. Cr. C. 276.

Forgery. The first count of the indictment charged the prisoner with forging a bill of exchange for £50, with intent to defraud William Booth.
. . . In the course of the trial, *S. Martin*, for the prosecution, pro-
485 posed to give in evidence the examination of the prisoner on the trial of the civil action of Blagden v. Booth, at the Kingston Spring

4—Compare the authorities cited in W., § 2270; and the opinion in *Doe* v. *Date*, *ante*, No. 450.

Assizes, 1847. . . . On that trial, the prisoner was called as a witness for the defendant; and, in his examination in chief, he had said: "This is my signature to the bill as drawer. The bill is made payable to my order. The acceptance was on it when I handed it to Mr. Phillips (the second endorser)." His cross-examination was as follows, as was proved by Mr. Corfield, the short-hand writer, by his short-hand notes:—

The stamp was never out of my possession till it was handed to Mr. Phillips.

Had you Mr. Booth's authority to accept it?—I had not.

Where did you get the stamp?—I purchased it at a shop in London, and from that time the stamp has never been out of my possession. I never received a penny for it.

Never mind what you received for it,—when was the "William Booth" put upon it?—Between the Friday and the Sunday.

What Friday and Sunday?—I believe it was between the last Friday and the last Sunday in November.

After the 21st?—Certainly after the 21st.

After the 21st of November, 46?—Certainly.

Did you communicate with Mr. Booth on the subject?—Not in any way.

Have you never done so?—Yes, I believe last Saturday week I saw Mr. Booth.

Lord DENMAN.—Was that the first time?—The first time, my Lord.

Mr. *Chambers*.—Why! did he not write you a letter?—Never, I never heard of his writing me a letter until I came into this Court by accident.

Until you came by accident,—what do you mean?—I came into Court in pursuance of a subpœna served three hours ago.

Who served you three hours ago?—A gentleman.

Where were you three hours ago?—At my office in King William Street, in the City.

Who is the man,—do you know him?—I do not, but I believe he is a clerk to Mr. Stuart.

Where is your office do you say?—My place of business is in King William Street.

What are you?—An attorney and solicitor.

Did you know what you came here to prove?—I did not until I came into the box.

Do you know what you are attempting to prove?—I do.

Do you mean to say it is a forgery?—It is not his handwriting.

Not in his handwriting. Who accepted it then?—I am in the hands of the Court.

Lord DENMAN.—It must be answered.

The Witness.—I state, my Lord, that I filled the bill up at Mr. Phillips's request in his own drawing-room, and handed it to him, and have never received a penny for it.

Mr. *Chambers*.—I ask you who did that? (pointing to the bill.)—Not Mr. Booth.

Did Mr. Phillips?—No.

Who was present when the bill was filled up?—Mr. Phillips alone.

Were there only you two present?—Mr. Booth was not present when "William Booth" was written. William Booth had been written before I filled it up in Mr. Phillips's drawing-room.

Who was present when "William Booth" was written?—I won't say—only myself.

Was any one else?—I cannot say.

I ask you to tell me whether any other person was present when "William Booth" was written besides yourself?—I believe a clerk.

What clerk?—That I decline to say.

Mr. *Chambers*.—My Lord, I press the question.

Lord DENMAN. (To the witness).—That other person or you must have written it?—Precisely so.

You knew that when you uttered it?—When I handed it to Mr. Phillips I did know it and Mr. Phillips knew it too.

By Mr. *Chambers.*—Who was the other person? I ask the question, and I submit, my Lord, it is a proper question.

Lord DENMAN.—It must be answered.

Montagu Chambers, for the prisoner, objected to those parts of the cross-examination being given in evidence which followed the prisoner's declining to answer, and applying to the Court for protection, and the decision of *Lord* DENMAN, C. J., that he must answer the question.

Montagu Chambers, for the prisoner: "I submit that the prisoner, when he was a witness on the trial of the case in Blagden v. Booth, was not bound to answer the question then put, which he demurred to answering, and was illegally compelled to answer; and that, therefore, the answers he gave to those questions could not be legally given in evidence against him; and that, although he did so answer, the statements he made were not receivable in evidence against him on the subsequent trial for forgery: first because his answers were given upon oath; secondly, because he was not cautioned by the learned judge before whom he was examined; and, thirdly, that, when he did appeal to the Court he was told he must answer."

Willes, for the prosecution: "When a witness, in giving his evidence, even inadvertently states a part of a transaction, and it is essential to truth and justice that he should answer the whole, he must do so. Here the witness knew what he came to prove; he does not take advantage of his privilege, but makes certain statements to the advantage of one party, and then wishes to say no more, and insist on his privilege, which he cannot be allowed to do, as the plaintiff has a right to the whole truth."

ROLFE, B.: "If the witness says, on his oath, that he believes the answer will criminate him, can you compel him to give the answer after that?" WILDE, C. J.: "I have known judges over and over again tell the witness he must answer." PARKE, B.: "It must appear to the judge that the answer really has some tendency to criminate the witness." *S. Martin:* "I submit that the judge has a discretion."

"The case was afterwards considered by the judges, when a majority of their Lordships held the conviction wrong, being of opinion, that, if a witness claims the protection of the Court on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him. Their Lordships did not decide (as the case did not call for it) whether the mere declaration of a witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where sufficient other circumstances did not appear in the case to induce the judges to believe that the answer would tend to criminate the witness.

Their Lordships, also held, that it made no difference in the right of the witness to protection that he had before answered in part;—their Lordships being of opinion that he was entitled to claim the privilege at any stage of the inquiry, and that no answer forced from him by the presiding judge (after such a claim) could be afterwards given in evidence against him."

BURR'S TRIAL (1807).

Robertson's Rep. I, 243.

MARSHALL, C. J.: "It is alleged that he [the witness] is and from the nature of things must be the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any ques-
486 tion, if he will say upon his oath that his answer to that question might criminate himself. . . . [But] there is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed; it is this: When a question is propounded, it belongs to the Court to consider and decide whether *any* direct answer to it *can* implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be; the Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be, and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims."

STATE v. THADEN (1890).

43 Minn. 253, 255, 45 N. W. 447.

MITCHELL, J.: "The defendant was jointly indicted with two others (Partello and Tall) for forgery in the second degree, by putting off as true upon one Christianson a false and forged promissory note
487 purporting to have been executed by one Linstad. He demanded and was granted a separate trial, and the state called, as a witness in

its behalf, Linstad, the person whose name was alleged to have been forged. The first error assigned is the ruling of the trial Court in compelling this witness to answer certain questions, he having previously declined to do so, claiming that the same might tend to criminate himself. While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. . . . The problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the Court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the Court must be able to see from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. . . . The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in Reg. v. Boyes.[5] . . . To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial. . . .

"Applying this rule to the case at bar, it is very clear that no error was committed in compelling the witness Linstad to answer the questions. The sole object of the evidence sought to be elicited from him was to prove that his signature to the note was forged, and not genuine. For the purpose of proving this, counsel for the state exhibited the note to him, and asked if the name affixed was his signature. This the witness declined to answer, on the ground that it might criminate himself, and the Court held that he need not answer the question. Counsel then, with the evident purpose of proving the same fact indirectly, asked the following questions: 'Have you ever seen this note before?'

5—1 B. & S. 311, 321 (1861).

The witness replied, 'I refuse to answer that question, because it may criminate myself;' or, as subsequently expressed, 'it might have a tendency to criminate myself.' The Court having ruled that he must answer, the witness replied, 'Yes.' Counsel then asked him, 'When?' to which the witness interposed a claim of privilege in the same form as before, and, the Court having again ruled that he must answer, he replied, fixing the time he had first seen the note at a date subsequent to the date of the alleged uttering by the defendant.

"Whether the rulings of the court were consistent in sustaining the witness' claim of privilege as to the first question, and overruling it as to the other two, it immaterial. There was not a thing, either in the circumstances of the case as then presented to the court, or in the nature of the questions, to suggest any reasonable apprehension of danger to the witness from being compelled to answer. The very nature of the offence charged against defendant negatived the idea of the witness being a party to it, and there was nothing in the character of the evidence sought to be elicited from him that would reasonably suggest any real or appreciable danger that it would or could tend to inculpate him in any other offence. The answers themselves, when given, show that they had no such effect."[6]

PEOPLE v. TYLER (1869).

36 Cal. 522, 530.

The facts and the statute involved in this case are stated *ante,* in No. 72.

488 SAWYER, C. J.: "At the trial the defendant did not avail himself of the right conferred by this Act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the Court to require the District Attorney to refrain from urging such inference, but the Court declined to interfere, and intimated that the law justified the counsel in the course pursued. Counsel thereupon continued to urge before the jury that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted. At the close of the argument of the case to the jury, the defendant's counsel asked the Court to give to the jury the following instruction: 'The jury should not draw any inference to the prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable

6—Compare the authorities cited in W., § 2271.

to him.' The Court refused to give the instruction, and defendant excepted. The action of the Court in the premises is claimed to be erroneous. . . .

"Now, if, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself. Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the Act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question."

STATE v. CLEAVES (1871).

59 Me. 298, 300.

Appleton, C. J.: "The defendant, a married woman, was indicted for being a common seller of intoxicating liquors. The presiding justice instructed the jury 'that the fact that the defendant did not go
489 upon the stand to testify was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence.' To this instruction exceptions were seasonably taken. The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence. The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and

every reason for its utterance. Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offence incurred. But the defendant, having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? . . . The silence of the accused, the omission to explain or contradict, when the evidence tends to establish guilt, is a fact—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye. It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."

STATUTES: *Maine,* Pub. St. 1883, c. 134, § 19: "In all criminal trials the accused shall, at his own request, but not otherwise, be a competent
490 witness. . . . The fact that he does not testify in his own behalf shall not be taken as evidence of his guilt."[7]

COMMONWEALTH v. WEBSTER (1850).

5 Cush. 295, 316.

The facts in this case are stated *ante,* in No. 17. SHAW, C. J.: "A few other general remarks occur to me upon this subject, which I will
491 submit to your consideration. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive

7—Compare the authorities cited in W., § 2272, and the statutes quoted, *post,* Appendix.

evidence. But when a pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution."[8]

FOSTER v. PEOPLE (1869).

18 Mich. 266, 274.

CAMPBELL, J.: "The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse, and some other articles. Foster was
492 tried separately, and the other defendant, McCoy, was used by the People, as a witness against him. McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt, in receiving the horse in Detroit, and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination, he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what that defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defence. The Court overruled this objection, and then the witness declined to answer. The record does not show on what ground the witness declined. The Court refused to direct him to answer. . . . The question, therefore, narrows itself to an inquiry whether, after undertaking voluntarily to explain the transactions connected with the larceny and the disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, he can then refuse to answer further, and be protected against further disclosures relating to the same transaction.

"The cases which apply to ordinary witnesses—who do not stand properly on the same footing with accomplices—do not in any way sanction such a stretch of privilege. Where he has not actually admitted criminating facts, the witness may unquestionable stop short at any point and determine that he will go no further in that direction. . . . But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one

8—Compare the authorities cited in W., § 2273, and No. 148, *ante*.

of them may have such a tendency to aid in reaching the result, that an answer concerning it may supply means of conviction, by aiding the other proofs which it indicates, or supplements, on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offense is waived. The law does not endeavor to preserve any vain privileges, and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. . . . And the further consideration is also recognized, that a witness has no right, under pretense of a claim of privilege, to prejudice a party by a one-sided or garbled narrative. . . .

"When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them, if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent, while under a joint indictment; and, if not indicted, they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can, in any case, allow to them any privilege whatever, whether they have gone so far already, as to any matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matter under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges. . . . The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defence, as alluded to in his affidavit for continuance."[1]

1—Compare the following phrasings: 1820, *Ex parte Cossens,* Buck Bkcy. Cas. 531, 540; bankrupt's examination; L. C. *Eldon:* "If a man has gone on answering questions that had a tendency to criminate himself, he may stay, in answering those questions, wherever he pleases; you cannot carry him further than he chooses voluntarily to go himself"; 1824, *Dixon* v. *Vale,* 1 C. & P. 278; *Best,* C. J., said that if a witness, after caution, chooses to answer, "he is bound to answer all questions relative to that transaction"; 1872, *Connors* v. *People,* 50 N. Y. 240; *Church,* C. J., permitting answers as to former arrests, as affecting credibility: "The prohibition in the Constitution is against *compelling* an accused person to become a witness against himself. If he consents to become a witness in the case, voluntarily and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges and

STATE v. WENTWORTH (1875).

65 Me. 234, 243.

Complaint to the municipal court of Biddeford, for selling one pint of intoxicating liquors to Charles T. Goodwin. . . . The defendant being called as a witness in his own behalf, was interrogated by the
493 government counsel concerning sales of intoxicating liquors made by himself personally. His counsel objected to the inquiries for the reasons (among others) urged against the inquiries made of Goodwin, and claimed that he was not obliged by law to answer concerning sales made by himself prior to the sale charged in the complaint; that the waiver of his privilege to give no evidence tending to criminate himself applied only to the charge under consideration and set forth in the complaint. The presiding judge remarked that the full court had decided otherwise and ruled that the defendant must answer any question put to him by the county attorney in regard to any sales of intoxicating liquors in that store by himself to any person within thirty days. To these rulings the defendant excepted. . . .

APPLETON, C. J.: "The objection is taken that the counsel for the state, in his inquiries of the defendant after at his own request he was a witness, transcended the limits of legitimate cross-examination. The defendant was charged with having sold intoxicating liquors to one Charles T. Goodwin, on a day certain. It is immaterial, so far as regards his criminal liability, whether the sale was by him or his authorized agent. He was not obliged to testify. He does testify 'upon his own request.' He goes on the stand and denies the sale or the authority to sell. He exonerates himself. He denies the commission of the offence charged. He is subject to cross-examination as the necessary result of his assuming the position of a witness. What are the limits which the law imposes on this cross-examination? It will hardly be contended that he can go on the stand and by a simple denial escape all discreditive or criminative cross-interrogation. . . . If he discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."[2]

subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary, he has no reason to complain."

2—Compare the authorities cited in W., § 2276, and the rule for cross-examining only to matters dealt with on the direct examination (*ante*, Nos. 403-405).

SUB-TITLE III:
PRIVILEGED COMMUNICATIONS.

1. In General.

DUCHESS OF KINGSTON'S CASE (1776).

20 How. St. Tr. 586.

Bigamy; trial by the House of Lords. To prove the first and disputed marriage, the question was asked of Lord Barrington, an old friend of the accused: "Did you ever hear from the lady at the bar that
494 she was married to Mr. Hervey?" Lord *Barrington:* "If anything has been confided to my honor, or confidentially told me, I do hold, with humble submission to your lordships, that as a man of honor, as a man regardful of the laws of society, I cannot reveal it." Then the Duchess released Lord Barrington from every obligation of honor; and the Solicitor-General, not to be outdone, declared that he would ask no more questions. But several lords insisted on their right to continue the questioning. *Lord* CAMDEN: "I hope that your lordships, sitting in judgment on criminal cases—the highest and most important that may affect the lives, liberties, and properties of your lordships—that you shall not think it befitting the dignity of this high Court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties. My lords, the laws of this land—I speak it boldly in this grave assembly—are to receive another answer from those who are called to depose at your bar, than to be told that in point of honor and of conscience they do not think that they acquit themselves like persons of that description when they declare what they know." . . . *Duke of* RICHMOND: "I do not look on a witness at the bar to be the witness of the counsel or of the prisoner, but the witness of the House". Lord Barrington still refusing, the Lords adjourned to discuss the point of law, and it was announced to him that "it is the judgment of this House that you are bound by law to answer all such questions as shall be put to you."[3]

DUBLIN ELECTION CASE (1869).

1 O'M. & H. 270, 271,

"Mr. Sanger, the telegraph-officer, when called as a witness to produce the telegrams, said, 'My lord, before I produce these telegrams, I must object to their production. We have always looked upon a
495 telegram as sacred, and we think that this decision of your lordship will shake the confidence of the public in the telegraph.' Mr. Justice KEOGH said that the opinion of the telegraph company as to this could make no difference. The telegrams were produced. . . . Mr. Justice KEOGH in his judgment said further as to this: 'Telegrams are nothing but electric letters, written by the candidates or their agents to electors. If such letters were in the pockets of the electors, or if copies of

3—Compare the authorities cited in W., § 2286.

them were in desks of the candidates, the petitioners of course would have a right to insist upon their production; and there is no reason why, because they are transmitted along a wire instead of being written on paper with pen and ink, they should have any greater protection.' "[4]

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2. Attorney and Client.

ANDERSON v. BANK (1876).

L. R. 2 Ch. D. 644, 649.

JESSEL, M. R.: "The object and meaning of the rule is this: That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely nec-
496 essary that a man, in order to prosecute his rights or defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."[5]

STATUTES. *California,* C. C. P. 1872, § 1881: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as
497 a witness in the following cases: . . . 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment"; amended by the Commissioners in 1901 by

4—*Cooley,* J., Constitutional Limitations, 6th ed., p. 371, note (1890): "The telegraph is used as a means of correspondence, and as a valuable and in many cases an indispensable substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfils an important public function; and the propriety of his preserving inviolable secrecy in regard to communications is so obvious that it is common to provide statutory penalties for disclosure. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the Courts compelling him to do so?"

Compare the authorities cited in W., § 2287.

5—For the history of this privilege, see W., § 2290.

adding: "nor can an attorney's secretary, stenographer, or clerk, be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity; but no communication is privileged under this subdivision when the same was made with the intention that it should be communicated to any person having an interest adverse to the client, or when the same was made in furtherance of a crime or fraud then being perpetrated or in contemplation". Ib. § 1882, added by amendment of the Commissioners in 1901: "Consent to the giving of such testimony as is mentioned in section 1881 is conclusively implied in the following cases: 1. When the person who made any communication mentioned in that section testifies, without objection on his part, as to such communication or any part thereof, the person to whom such communication was made may be examined fully, in the same action or proceeding, as to such communication; 2, When a person employes an attorney to prepare his will, the attorney may, in any proceeding for the probate or revocation of probate of such will, testify, as to the contents of such will if lost or destroyed, and as to all information and instructions received by him from the testator, in the course of the preparation or execution of such will, and relating thereto."[6]

CRAIG *dem.* ANNESLEY v. ANGLESEA (1743).

17 How. St. Tr. 1139, 1225, 1229.

The preliminary facts of this case are stated *ante,* in No. 145. It was proposed to show that the defendant, by supporting the criminal prose-
498 cution for murder against the plaintiff, had tried to put the plaintiff out of the way, and had expressed such plans in an interview with Mr. Giffard, a solicitor. This solicitor had often been employed by the defendant, but for six months had had no affairs of his in hand, and did not expect to be employed again; on May 1 the plaintiff had killed a person,—by accident, as he claimed; on May 2, the defendant, hearing of it, sent for Mr. Giffard, and told him to go and conduct the prosecution, not disclosing the defendant's name, and incidentally made certain remarks, now offered in evidence, Mr. *Harward,* of counsel for the plaintiff, spoke as follows: "My lord, the conversation Mr. Giffard had with lord Anglesea was to this purpose; Mr. Giffard is an attorney

6—Compare the following statute of *Iowa:* Code, 1897, § 4608: "No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred"; amended by St. 1900, 28th Gen. Ass. c. 125, § 1, by inserting the word "such" before "person." Compare also the statutes cited in W., § 2292.

of reputation in England, and as such has been twenty years or thereabouts employed by this noble earl in his business, as he had occasion for him. When my unfortunate client was to be trial at the Old Bailey, that was the time lord Anglesea had greatest occasion for this Mr. Giffard; and it will appear to your lordship that lord Anglesea disclosed his intentions to him in this manner: 'I am advised that it is not prudent for me to appear publicly in the prosecution, but I would give 10,000*l.* to have him hanged. Mr. Jans my agent shall always attend you. I am in great distress; I am worried by my wife in Ireland; Mr. Charles Annesley is at law with me for part of my estate, and' says he, 'If I cannot hang James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right, if he will remit me into France 3,000*l.* a year; I will learn French before I go.'"

Mr. *Daly,* of counsel for the defendant, objects to Mr. Giffard's being examined, since as an attorney he was to keep the secrets of his client, and if he is a gentleman of character, he will not, and as an attorney he ought not to disclose them.

Mr. *Recorder* (arguing for the defendant): "My lord, formerly persons appeared in court themselves; but as business multiplied and became more intricate and titles more perplexed, both the distance of places and the multiplicity of business made it absolutely necessary that there should be a set of people who should stand in the place of suitors, and these persons are called attornies. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and attorney to be so great that it would be destructive to all business if attornies were to disclose the business of their clients. In many cases men hold their estates without titles; in others, by such titles, that if their deeds could be got out of their hands, they must lose their fortunes. When persons become purchasers for valuable considerations, and get a deed that makes against them, they are not obliged to disclose whether they have that deed. Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs. The reason why attornies are not to be examined to anything relating to their clients or their affairs is because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it."

Mr. Prime Sergeant *Malone* (for the defendant): "The mutual confi-

dence between client and attorney require the preservation of secrecy; and as the client cannot be supposed to be qualified to distinguish what is, or is not necessary to his cause, if he should be mistaken, and entrust his attorney with what the attorney should be of opinion was unnecessary, yet surely his attorney ought not to reveal it. As clients are not versed in law affairs, they must be informed by their attorney, for which purpose they must tell them their whole case, and this necessity creates a confidence between them. . . . There seems to be no difference whether the conversation relates to the principal cause in which the attorney is concerned, or to a collateral action, in which he is not; it is in either case grounded on the confidence that arises from the attorney's being employed, and therefore ought not to be disclosed."

Mr. Serjeant *Tisdall* (arguing for the plaintiff): "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client."

Mr. *Harward* (arguing for the plaintiff): "I take the distinction to be, that where an attorney comes to the knowledge of a thing that is *malum in se,* against the common rules of morality and honesty, though from his client, and necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public."

Bowes, L. C. B.: "Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that everything said by a client to his attorney falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other; and of this the Court may judge, from the particulars of the conversation. Nor do I see any propriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. . . . But where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney."

Mounteney, B.: "Mr. Recorder hath very properly mentioned the foundation . . . that an increase of legal business, and the inabilities of parties to transact that business themselves, made it necessary for

them to employ (and as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them; that this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instructions for the carrying on those causes which they found themselves under a necessity of intrusting to their care. If this original principle be kept constantly in view, I think it cannot be difficult to determine either the present question or any other which may arise upon this head; for upon this principle, whatever either is, or by the party concerned can naturally be supposed, necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained,—that the attorney shall inviolably keep secret. On the other hand, whatever is not, nor can possibly by any man living be supposed to be, necessary for that purpose, that the attorney is at liberty, and in many cases—as particularly, I think, in the present case—the attorney ought to disclose. . . . For God's sake then let us consider, what will be the consequence of the doctrine now laid down [by the defendant] and so earnestly contended for, that such a declaration made by any person to his attorney, ought not by that attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offence; he is desirous and determined, at all events, to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration, because he was retained as an attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove this, in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both. . . . The declaration now offered to be proved is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known."

Dawson, B.: "Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed. I will suppose an unknowing man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to the suit; he looks them over, and finds not half of them to be relative thereto. I apprehend the attorney is not compellable to disclose the contents of

any one of those deeds; neither do I think it necessary to him: and I think, the Court must, in this case be satisfied, first, that what came to this man's knowledge was not necessary to his client's affairs; and in the next place, that the client could not think it necessary. . . . The motive for carrying on the prosecution against the plaintiff is said to be, because he has a right to the estate the defendant was in possession of. Can any man think that this was necessary to tell the attorney, or that the defendant could have thought it so? What was necessary, or what a man might have thought necessary, ought not to be disclosed. But if the defendant in this case had gone anything further, he has trusted him, not as an attorney, but as an acquaintance."[1]

GREENOUGH v. GASKELL (1833).

1 Myl. & K. 98, 103.

Bill to require the surrender and cancellation of a note improperly obtained by the defendant from one Darwell. The defendant, by his answer, wholly denied that the note in question had been exe-
499 cuted by the plaintiffs at his instance or entreaty, but he admitted that he had been aware of the situation and circumstances of Darwell at the time of the transaction impeached by the bill; and, in answer to the charge to that effect, he also admitted that he had in his possession divers books, &c., containing entries and memorandums, and also divers papers and letters, relative to the matters in the bill mentioned; and he set forth a list of them in a schedule. But he stated that such entries and memorandums were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for Darwell; for whom he had been professionally engaged for a number of years.

Brougham, L. C.: "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers). But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case. . . . It does not appear that the protection is qualified by any reference to

1—Compare the authorities cited in W., §§ 2298, 2310.

proceedings pending or in contemplation. . . . If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications;—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued. If the protection were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defense against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications the protection would be insufficient if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry."[2]

HATTON v. ROBINSON (1833).

14 Pick. 416, 422.

Trespass for taking two mares, a chaise and chaise harness. The defendant pleaded the general issue, and filed a brief statement alleging that he attached them as the property of David Winch. At
500 the trial, before WILDE, J., it appeared, that the plaintiff claimed the property under a bill of sale from Winch. The defendant to prove the bill of sale fradulent, offered in evidence the deposition of Samuel Ames, Esq., a counsellor at law in Providence. The plaintiff objected to the admission of the deposition, on the ground that Mr. Ames was employed in the transaction testified to by him, as the attorney of Winch and the plaintiff, and that all he knew in relation to it, was communicated to him in that capacity. The only evidence that Mr. Ames was so employed, was the deposition in question. Mr. Ames, in his deposition, testified that on April 6, 1831, Winch desired him to draw a conveyance of certain property attached to the Fenner tavern stand in Providence, to the plaintiff, to whom he had contracted to sell it; that he accordingly drew the conveyance; that his impression was, that a small portion of the consideration was to be paid very soon, but that the residue, amounting to the sum of $400 or $500, was secured to Winch by the plaintiff's negotiable note indorsed by one Wesson, which note also the deponent drew. The deponent further testified, that on April 30, 1831, Winch again called upon him, and informed him, that he was about to leave Providence with the purpose of residing in the State of New York; that he owed old debts in Massachusetts to a much larger amount than the value of his property; that he also owed a

2—Compare the authorities cited in W., §§ 2294, 2295.

considerable sum in Providence, for which he was recently indebted; that his intention was, to convert what salable property he had, particularly a pair of horses and a carriage or carriages, into money, as soon as he could obtain a fair price for them, and with the proceeds to pay his Providence creditors; and that in the meantime his Massachusetts creditors pressed him, and as soon as he left Rhode Island for New York, would undoubtedly attach and sacrifice his horses and carriage or carriages. The deponent further testified, that he understood Winch, that he had left them with the plaintiff for sale, with the intention from the proceeds from the sale, to give preference to, and pay his Providence creditors, and that he wished to cover them, as far as possible, from attachment by his Massachusetts creditors; that, on the whole, as Winch had come from Massachusetts poor, and the credits he had obtained in Providence had been the means of his acquiring what little property he had, the deponent thought his preference of his Providence creditors would not be unfair, and accordingly informed him, that he was willing to draw a mortgage deed from him of the horses, carriage or carriages, to any person he might select; that Winch said, that he had perfect confidence in the plaintiff, and that the deponent accordingly drew such a mortgage deed. . . .

Merrick and *Bottom* for the plaintiff: ". . . Where counsel are consulted as to what will be the legal effect and consequences of any particular instrument of conveyance, they are as much guarding the rights of their clients and protecting their property, as when litigation is actually in progress; and communications made by clients, in both cases, are entitled to the same privileges. The current of the decisions, and all the elementary treatises, put the rule strictly on the ground of professional consultation. They do not limit it to consultations on questions in actual or immediately contemplated litigation. It is the character of the communication which is to be considered." . . .

Newton, Lincoln and *Child* for the defendant: ". . . It is a forced construction of this deposition to infer from it, that any application was made by Winch for legal advice in the defence of any suit. None was then pending, and it was only among the events which were possible, that any suits would be instituted. Winch certainly could not have asked legal advice, whether his creditors could commence suits. It was not his purpose to defend, if they were commenced. The conveyance of property would not affect, in any manner, the right of any creditor to recover judgment for his debt, although it might defeat the collection of it. It does not appear, that Winch asked legal advice of Mr. Ames, on any subject, or that the latter gave any legal advice; and the burden of proof is on the plaintiff, to show that Mr. Ames acted in a professional capacity. The business could have been done as well by any other person as by an attorney at law." . . .

Shaw, C. J.: "The only question for the Court in the present case, is, whether the deposition of Mr. Ames was properly admitted in evidence; and this depends upon the further question, whether the matters

testified to by him, were to be considered as within the rule of privileged communications. . . . There are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney, does not render the communications attending it, privileged; and they may be testified to by him, as by any other agent. . . . We cannot perceive that the communications were made to [the attorney, Mr. Ames,] by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum,* the only purpose seems to have been to satisfy Mr. Ames' mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him, that whatever might be the legal character of the act, it was not intended with moral turpitude. It did satisfy him, that he was not to be engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none given. We are therefore necessarily brought to the conclusion, that either these disclosures were made without any particular motive, or if there was a purpose, connected with the proposed draft, it was to satisfy Mr. Ames's mind, upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibited from disclosing."[3]

BARNES v HARRIS (1851).

7 Cush. 576.

Action of assumpsit on an account annexed to the writ. At the trial in the court of common pleas, before HOAR, J., the defendant called Stephen Holman, as a witness, and proposed to inquire of him
501 as to a conversation between him and the plaintiff, which took place in the office of Milton Whitney, Esq., an attorney of this court, before the commencement of the suit. The witness having stated, that at the time of the conversation, he was a student at law in Whitney's office; that the plaintiff called there for professional advice; that he did not know but the plaintiff supposed him to be Mr. Whitney; and that the conversation was relative to the plaintiff's claims against the defendant, as to which the plaintiff consulted the witness; the judge ruled, that it was not competent for the witness to testify as to any statements then made to him by the plaintiff, for the purpose of obtain-

3—Compare the authorities cited in W., § 2297.

ing professional advice. Whitney was not present at the conversation; he was not the attorney of the plaintiff in this suit; and it did not appear that the plaintiff had ever before consulted him. The jury found a verdict for the plaintiff, and the defendant alleged exceptions. . . .

METCALF, J.: "The testimony of the witness was excluded, probably, either on the ground that he was a student in an attorney's office, and therefore the communication made to him by the plaintiff was privileged, as if made to the attorney himself, or on the ground that the plaintiff supposed that the witness was an attorney at law. But, in our judgment, the testimony ought not to have been excluded on any ground. . . . *Lord* BROUGHAM says, (1 Mytne & Keen, 103,) the rule is established out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources.' Such being the reason of the rule which protects communications made to attorneys and counsel, the Court should apply the rule to those cases only which fall within that reason. And it is truly said, in Harrison on Ev. 36, that as the rule operates to the exclusion of evidence, the Courts have always felt inclined to construe it strictly and narrow its effect. We believe the rule is correctly stated in Foster v. Hall, 12 Pick. 93; viz. that it 'is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks.' The witness, in this case, was not of the legal profession, and though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose. Many students at law are never either the one or the other. Some of the members of this court never were. If the plaintiff's communication was made to the witness in his capacity as a student in Mr. Whitney's office, it is not privileged; Andrews v. Solomon (Peters C. C. 356); nor if it was made on the supposition that the witness was Mr. Whitney or some other attorney at law (Fountain v. Young, 6 Esp. R. 113)."[4]

THOMPSON v. KILBORNE (1856).

28 Vt. 750, 757.

Covenant for the alleged breach by the defendant of his contract under seal, dated May 8th, 1844, agreeing, among other things, to furnish for the use of the plaintiff, for a hop-yard, for the period
502 of nine years thereafter, five acres of the defendant's land. . . . The only exception reserved by the plaintiff, upon that branch of the

4—Compare the authorities cited in W., §§ 2300, 2301.

case which related to the alleged refusal of the defendant to permit the plaintiff to occupy the yard after the fall of 1847, was in reference to the admissibility of a part of the deposition of Elbridge D. Johnson, formerly of Derby, but now residing in Peoria, Illinois, offered by the defendant, which the plaintiff claimed related to a communication made by him to the said Johnson, as his counsel; the part of the deposition objected to, and that part in reference to the deponent's understanding of the relation in which he stood to the plaintiff, being as follows: "The said Thompson came to me at my office and had considerable chat about his contract with the said Kilborne. Whether the conversation was professional, or semi-professional, or neither, I am at a loss to determine, but I will state the circumstances, and leave the matter to be determined by higher authority. Thompson introduced the conversation by inquiring about his contract with Kilborne for carrying on the hop-yard. I am unable to state its exact purport, but am able to state the substance. He inquired if he could not make use of something which had occurred between him and Kilborne to avoid the effect of his contract to carry on the yard. I am unable to state whether it was something Kilborne had said or done in the matter, and am unable to say what reply I gave him, but he then said he should not carry on the yard again, and he thought the matter he stated would protect him in so doing, and he inquired of me if I did not think so. The said Thompson intended to draw from me a legal opinion, I have no doubt, and that he did not expect or intend to pay anything for it, I have as little doubt; that I stated to him what was the law applicable to the case stated, is probable, but that I did not expect to receive any compensation for counsel, or intend to charge anything, is quite certain. I should state, perhaps, that Mr. Thompson was, when I knew him, a man somewhat given to legal reflections, and was supposed to have a slight taste for litigation, and was seldom without a controversy on hand, or one in prospect; and we were for many years neighbors and on friendly terms, and I dare say we have had some hundred just such legal conversations as the one above detailed, about his numerous controversies, which were all equally fruitless of fees, except when he got into a suit, when he usually employed me as counsel, and paid me, not what I charged for my services, but what we agreed upon whenever we got through with the not over agreeable process of a settlement of our accounts. It is possible, also, that the freedom with which I was accustomed to converse with him on legal subjects, and without charge, may have led him into the habit of getting his law for nothing from me, at this and other times; at all events, it is quite as much my fault as his that I am not able to decide whether the conversation in question was a privileged communication or not. I am unable to say whether he understood our conversation as a consultation, or just a chat to fortify a determination he had already taken about the business. I may say that a different locality has taught me a much more sensible practice in such matters, and further deponent saith not." The court

allowed the deposition to the point above designated to be read to the jury, to which the plaintiff excepted. . . .

REDFIELD, CH. J.: "The first question made in the present case is, whether the plaintiff's communication to Johnson was under the confidence of the relation of counsel and client. It seems to us not to be of that character. There was no retainer, and nothing to show that the plaintiff sought the advice with any view to regulate his future conduct, in regard to a pending or expected litigation. And, had any retainer been charged, there is every reason to believe the plaintiff could justly have resisted the claim upon the facts stated by Johnson. And, had Johnson, the next hour, received an application for counsel, and retainer, upon the other side, no one can question his being at full liberty to engage. This anomalous relation testified to in the deposition, and which seems so much to puzzle Johnson, and which he so justly deprecates, certainly grows out of a too common facility, upon the part of the profession, in this State, to undervalue their professional and official character, as sworn officers of the highest judicial tribunal in the State. The practice of giving advice, upon legal subjects, without study and examination, and without corresponding pay, and a distinct retainer, is certainly a vicious one. The practice of the profession of giving street advice misleads the general opinion in regard to the value and dependence upon such advice. It would no doubt be better for the profession, and their clients both, if all professional advice, in regard to the prosecution and defense of claims, were given in writing, as it is in many places, and both parties are thereby put under the proper responsibility in regard to it, the one to pay for it and the other to make it hold good, or to show, at least, that it was not notoriously bad. But, at all events, we cannot regard a conversation of this loose and indefinite character as entitled to the protection of professional confidence."[5]

COVENEY v. TANNAHILL (1841).

1 Hill N. Y. 33, 35.

Motion by the defendants, Edwards & McKibben, to set aside a report of referees made in favor of the plaintiff. The defendants were partners under the name of John Tannahill & Co., and, in this
503 action of assumpsit, the plaintiff gave in evidence an account stated in writing on the 3d September, 1839, with an acknowledgment at the end, signed John Tannahill & Co., in the handwriting of Tannahill, by which the balance was admitted to be due the plaintiff of $734.36. The defendants . . . called Seth E. Sill as a witness, who acted as counsel for the plaintiff on the hearing, and put to him the following questions: 1. Whether he was present when the account stated was signed; 2. If so, when and where it was signed, and who was present; 3. When he first saw the said account stated, and whether

5—Compare the authorities cited in W., § 2303.

the acknowledgment of a settlement and balance due was endorsed on the account when he first saw it. To which questions the witness replied, that all his knowledge of the writing had been obtained by him as counsel in this cause, and that he could not answer the questions without violating the confidence reposed in him by his client as counsel in the cause. The referees decided that the witness should not answer the questions put to him. . . .

BRONSON, J.: "Confidential communications between attorney and client, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege. The mode in which the information is communicated—whether by an oral statement of facts, or by delivering a written instrument—cannot be important. The principal is the same in whatever way the information passes. The policy of the law allows a man to make the best defence in his power. Whatever may be his delinquency, he is permitted to confer freely with his counsel, and to place in his hands any paper touching the matter in question, without the peril of having his confidence betrayed under the forms of law. The attorney may be called to prove the existence of a paper, and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents. But he cannot be compelled to produce or disclose the contents of a paper which has been deposited with him by his client. . . .

"This privilege of the client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference, in principle, between *communications made* by the client, and *acts done* by him in the presence of the attorney. It may be, and undoubtedly is, sound policy to close the attorney's mouth in relation to the former, while in many cases it would be grossly immoral to do so in relation to the latter. . . . I will not undertake to say how far the distinction between the communications and the acts of the client may extend; but there can be no good reason for excluding the attorney when he has witnessed a transaction in the way of business between his client and a third person; as the adjustment of an account, the execution of a deed, the payment of a sum of money, the giving up of securities, or the like. It is not necessary that a man should have an attorney to witness his dealings with third persons; and if one is called in, I can see no reason why he, like any other person who was present, should not be sworn to prove what was done.

"In the case at bar, I feel no difficulty in saying, that Mr. Sill should have been required to answer the first two questions which were put to him. . . . The substance of the first two questions put to the witness is—'Was you present when the account stated was signed; when and where was it done, and who was present?' . . . The meaning of the answer is, that if the witness was present and saw the paper signed, &c. he was so present as counsel for the plaintiff. The case then comes to this: The plaintiff, in adjusting an account with a third person, and procuring a written acknowledgment of a balance due, calls in a coun-

sellor at law to witness the transaction; and the question is, whether the attorney shall be permitted to speak without the leave of his client? Upon that question I cannot entertain a doubt. What was done and said between plaintiff and Tannahill in the way of business, cannot be turned into a confidential communication between attorney and client, merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to the attorney, and he might have been required to answer, not only when and where the account was signed, but as to everything that was done and said between the plaintiff and Tannahill on that occasion, so far as the matter would be pertinent if proved by any other witness. If any communications passed between the attorney and client apart from Tannahill, these may be privileged; but nothing else. . . .

"The third question proposed to the witness was, in substance, 'When did you first see the account stated, and was the evidence of a settlement endorsed on the account when you first saw it?' Although the question does not necessarily imply so much, it was understood on the hearing as intended to draw from the witness an admission that he had seen the paper in the hands of his client, or received it from him, in a different state or condition from that in which it appeared on the trial. If such was the aim of the defendants in putting the question, I think the referees were right in not allowing it to be answered. We have already seen, that the attorney cannot be compelled either to produce or to disclose the contents of a paper which he has received from his client. . . . The principle is, that all confidential communications between attorney and client, whether written or oral, are alike privileged. If the plaintiff, at any particular time, delivered or exhibited the account to his attorney without the evidence of a settlement endorsed upon it, it was the same thing, in substance, as though he had at that time told him verbally that he had an account in that plight; and the one form of communication is, I think, as much privileged as the other."[6]

MITCHELL'S CASE (1861).

12 Abb. Pr. 249.

Appeal from an order of commitment for contempt. Mr. Mitchell was an attorney and counsellor-at-law, and was, as such, retained by, and acting for, one McKechnie, who was the defendant in an action brought
504 by J. H. McCunn and J. Moncrief, in the Court of Common Pleas for the city and county of New York, to recover from McKechnie the possession of a certain lot of land in that city. Upon the trial of that

6—*Ellenborough*, L. C. J., in *Robson* v. *Kemp*, 5 Esp. 52, 55 (1803): "The act [of destroying a power of attorney] cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is as privileged as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been derived from his situation as an attorney."

L. C. *Brougham*, in *Greenough* v. *Gas-*

action before his honor Judge Brady, one Bettz was examined as a witness for the defendant, and upon examination testified that he, Bettz, claimed the title to the land, that the defendant McKechnie was his tenant, and that he, Bettz, was defending the action as landlord of the defendant; and being asked whether he had in his possession any old deeds, leases, or assignments relating to the land, he answered that he had received from his grantors a certain old lease and other papers, which he had kept in his possession until a few days before the trial, when he had delivered them to John W. Mitchell, his attorney, and the attorney of the defendant in the action; and being asked to produce the said old lease and other papers, he answered that he was unable to do so, because they were in Mr. Mitchell's possession. Mr. Mitchell was then in court, acting as the attorney and counsel of the defendant on the trial. He was thereupon called as a witness by the plaintiffs, and on his examination, being asked: "Have you in your possession any old leases or deeds relating to this property, placed there by Mr. Bettz?" replied, that he had some papers of Mr. Bettz's, but that he did not know what they were; and on being requested by the Court to examine the papers and see, he declined to do so, objecting on the grounds that he was privileged from testifying as to such matters, they having come to his knowledge from his client, that he had not been subpœnaed, and that he had had no notice to produce the papers. During a brief suspension of the proceedings pending this examination, Mr. Mitchell delivered the bundle of papers to Mr. Bettz, with a suggestion that he carry them to the office of his counsel. After the proceedings were resumed, this fact appearing upon the continued examination of Mr. Mitchell, the plaintiffs applied for an attachment for contempt against him; but it was finally arranged that the application should be suspended, and the case adjourned, upon a stipulation that Mr. Mitchell should appear on the adjourned day with the papers in the same. On the same day Mr. Mitchell was served by the plaintiffs with *subpœna duces tecum*, requiring him to produce the papers on the adjourned day. After the adjournment, the parties appeared on the 27th of May, and Mr. Mitchell, being called to the stand and asked if he had brought with him the bundle of papers in question, replied that he had. Being requested to look at them, and inform the Court whether they had related to the lands in suit, he refused to do so. The Court thereupon ordered the witness to be committed for ten days to the county jail, for contempt of court. From this order the present appeal was taken.

DALY, F. J.: "Before the important change in the law requiring a party to an action to be examined as a witness at the instance of the adverse party, the general principle was recognized, that no one in a

kell, 1 Myl. & K. 98, 104 (1833): "[The privilege does not exist] where there could not be said, in any correctness of speech, to be a communication at all,—as where, for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being attorney, but of which fact any other man if there would have been equally cognizant."

Compare the authorities cited in W., §§ 2306-2309.

court of law could be compelled to give evidence against himself. . . . The principle of exemption was applied in its broadest extent to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to an action was not bound to give evidence, he could not be required to produce papers to be used against him as evidence; and if a paper had been deposited by him with his attorney, the attorney's possession was deemed the possession of the party, and the attorney could not be required to produce it, nor even any other person having the temporary possession of it in right of the party. If a document was in the possession of the party to an action at law, or in the possession of his attorney, all that could be done was to give him notice to produce it; and if he failed to do so, the other party was at liberty to give secondary evidence of its contents; or if the production of the document itself was essential, and he would not produce it, the court would, if he was a defendant, strike out his answer, or if a plaintiff, nonsuit him—a practice introduced into courts of law from the Court of Chancery. But the attorney might be called, and was bound to answer whether or not he had the paper in his possession, that the other party might be enabled to give secondary evidence of its contents, which he could not do until he had first shown that he was unable to produce it; and though the attorney could not be required to disclose the contents of the paper, his examination might be carried at least so far as to show, with reasonable certainty, that the document in his possession was the one respecting which the other party proposed to give evidence. . . . The rule was also well established, that neither a party nor his legal adviser would be compelled in a court of justice to disclose the confidential communication which had passed between them in respect to the matter upon which the party had sought professional advice. The principle which appears to have been recognized as far back as the days of Elizabeth (Cary's R., 127, 88, 89), was not confined to courts of law, but was equally acted upon by the Court of Chancery, where the aid of that court was sought to compel a discovery of evidence. On an application for a discovery, a court of equity would neither compel nor permit a solicitor to disclose what his client had communicated to him in professional confidence, nor compel the production of letters which had passed between them, or through intermediate agents upon the business, containing or asking legal advice or opinions, nor cases prepared at the instance at the client for the opinion of counsel. . . .

"Such was the state of the law before the enactment of the provision compelling parties to action to be examined as witnesses at the instance of an adverse party. The provision has brought about a very material change; but before proceeding to inquire into the effect of the enactment upon the question of privilege, it is very plain, that by the law, as it stood before this change was made, the conduct of Mr. Mitchell amounted to a contempt. His refusing to produce papers acknowledged to be in his possession, for the reason that it would be a

breach of his privilege as attorney for the defendant, was assuming the right of determining for himself the question of privilege, which was not his province, but that of the Court; and his disobedience of the order of the judge to produce them, was a very plain case of contempt, upon the authority of the cases that have been cited. It was a contempt to wilfully deprive the court of the means of determining whether the principle of protection extended to the papers in his possession or not, and it would not be the less a case of contempt, even assuming that, upon what was stated to the court, a case of privilege was shown; for though a judge should decide erroneously upon the question of privilege, the order he makes is nevertheless to be obeyed. If it were otherwise, it would always be in the power of a witness to withhold evidence whenever he thought fit to consider himself privileged.

"But Mr. Mitchell was mistaken, since the enactment above referred to, in supposing that he had any privilege at all. The exemption of the attorney was never regarded as his personal privilege, but as existing purely for the protection of his client. . . He was, in this respect, in the language of Chief Baron Gilbert, 'considered as one and the same person with his client' (Gilbert on Evidence, 138); and if, by a change in the law, a party to an action has no longer any privilege, it follows as a matter of course, that his attorney can have none. The provision in question declares, that 'a party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be *compelled to testify in the same manner,* and subject to the same rules of examination, as any other witness.' This sweeps away the rule of the common law, that parties to actions should not be compelled to give evidence against themselves; and every privilege, either of the party or of his attorney, that was founded upon it, is gone. I suppose that the protection that was extended to the confidential communications between attorney and client remains unaffected, as the reason upon which that rule was founded is as applicable now as it was before; but with this exception, a party to an action, or his attorney, are no longer privileged to withhold testimony. A party to an action may be compelled, by a *subpœna duces tecum,* to produce papers and documents, upon the trial, to be read in evidence. . . .When the Code, therefore, declares that a party to an action may be compelled to testify in the same manner, and subject to the same rules of examination, as other witnesses, it is obvious that the meaning is, that whatever may be required of other witnesses may be required of him. If they must produce books and papers, so must he; and if he has placed them in the possession of his attorney, agent, or any other person, the one who has them in actual custody may be compelled to bring them before the court, to be used as evidence. . . . The general rule of courts of equity, that wherever the client may be called upon to produce papers, the attorney, if they are in his possession, may be required to produce them, is the proper rule, now that parties to actions are made witnesses.

"There may possibly be cases in which the deposit of a document with

an attorney for advice and counsel, may bring it within the rule of protection; though I can conceive of none, if the client would himself be bound, if he had it in his possession, to produce it as a witness. In this case, however, there could be no pretence that the papers in question were left by the witness Bettz with Mitchell for professional advice and counsel, as Mitchell declared that he could not tell what they were without examining them; nor, when first interrogated respecting them, whether he had them in his possession or not, without looking into a bundle of papers which he had with him in court. He was, therefore, either ignorant of their nature and contents, or else he stated what was untrue. We are bound to presume the former; and if he did not therefore know what they were, the fact that they were left with him in professional confidence would not protect them. . . . Mr. Mitchell did not declare that the papers had been left with him by Bettz for professional advice or assistance, but he put his objection on the ground that to produce them would be a breach of his privilege as attorney for the defendant. They were not placed in his hands by the defendant, but by the witness Bettz; and if any privilege could exist, it must have been as the attorney of Bettz, who, as the owner of the land, was defending the suit against his tenant; but he had no privilege either as the legal adviser of Bettz, or as the attorney of the defendant. Either of them could have been examined as witnesses, and required, if they had the papers in their possession, to produce them; and he could have no privilege where they had none.

"Upon both grounds, therefore, it was a case of contempt: first, because it was right of the judge to determine whether there was any privilege or not, and the duty of the witness to be governed by his decision; and secondly, because he had no privilege entitling him to withhold the papers in his possession from being given in evidence."[7]

SKINNER v. GREAT NORTHERN R. CO. (1874).

L. R. 9 Exch. 298.

505 Rule to vary an order for inspection, made at Chambers by Keating, J., in an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendants' negligence, whilst he was traveling as a passenger on their line. The document of which inspection was ordered comprised, amongst others, two reports, dated respectively the 15th of December, 1873, and the 4th of February, 1874, made to the defendants by Mr. Jackson, their medical officer, after examining the plaintiff. The examinations to which the reports referred were held, and the reports were made, before any action had been commenced or any communication made by the plaintiff's attorney, but after a claim for compensation had been made by the plaintiff and in consequence of that claim. The

7—Compare the authorities cited in W., § 2307.

rule was to vary the order by excluding these reports. *Pritchard* shewed cause: "The decisions in the Courts of Queen's Bench and the Common Pleas, with respect to this class of documents, are not altogether consistent; in this Court there is no reported decision."

Bramwell, B.: "The distinction is this; where an accident happens, and the officials of the company in the course of their ordinary duty, whether before or after action brought, make a report to the company that report is subject to inspection; but where a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, inspection of that report is not granted; that practice has been constantly followed in this Court. . . . We have to choose between the decision of the Queen's Bench and that of the Common Pleas, and we follow the latter, which is in conformity with the practice of this Court. The rule must be made absolute."[8]

COLEMAN'S WILL (1888).

111 N. Y. 220, 226, 19 N. E. 71.

Ruger, C. J.: "The probate of the will of William Coleman, deceased, was contested before the surrogate by his widow and several of his children and grandchildren, upon the ground that he was
506 not of sound mind and memory at the time of its execution, and its execution was procured through undue influence, fraud and intimidation exercised over him by Robert S. Coleman. The will was admitted to probate, and the decree was affirmed upon appeal by the General Term. . . . The most material question in the case arises over the exception taken by the contestants to the admission of the evidence of the witnesses Hughes and Northrup, as to conversations had by them, respectively, with the testator at the time of receiving instructions in reference to a draft of the will offered for probate, and another drawn about two years previously by the same attorneys. The testimony given by these witnesses was undoubtedly very material and important in its bearing upon the issue tried, and if erroneously admitted would lead to a reversal of the judgment appealed from. The evidence showed that the witnesses were a firm of lawyers, residing at Sandy Hill, and were employed by the testator in their professional capacity to draw such wills, and that the conversations testified to, were had with them for the purpose of enabling them to execute the instructions of the testator. That these interviews were had in pursuance of and under the sanction of a professional employment, and that communications made by a client under such circumstances to his attorneys, were clearly within the protection of the statute, we have no doubt. The prohibition of the statute, therefore, applies to these communications, and they were inadmissible as evidence unless brought within the provisions of section 836, authorizing their disclosure. By that section the pledge of se-

8—Compare the authorities cited in W., §§ 2317-2319.

crecy imposed by the statute is to be observed, unless its provisions 'are expressly waived' by the client. There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt the witnesses, in the particular instance, from the prohibition imposed by the statute. An examination of the will itself, as well as the evidence of all of the witnesses present on the occasion of the execution, concur in establishing the fact that the testator requested both Hughes and Northrup to sign the attestation clause of his first as well as of his second will, as witnesses thereto. That request implies not only information as to the necessity of such signatures to the validity of the instrument executed, but also knowledge of the obligations which they assumed in respect to the proof thereof after his death. He must have been aware that his object in making a will might prove to be ineffectual unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. . . . It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relations of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not."[o]

LAYMAN'S WILL (1889).

40 Minn. 371, 42 N. W. 286.

From a judgment of the probate court of Hennepin county, admitting an instrument to probate as the last will of Martin Layman, deceased, the contestant, Lizzie Haley, a grand-daughter of the testator, appealed.

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COLLINS, J.: "But two questions are presented for our consideration upon this appeal: *First.* Did the trial court err in admitting certain testimony of the witness Laing, objected to by the contestant on the ground that it was incompetent and inadmissible, by reason of Gen. St. 1878, *c.* 73, § 10? . . . The principal question in this case seems to have been as to the sanity of the deceased when he executed the instrument offered for probate, and alleged by the proponents to be his last will and testament. The witness Laing was an attorney at law, and had prepared the will in question. He had also served the decedent in other matters as his legal adviser. In this way he had acquired some knowledge of the mental condition of the deceased, and was more or less qualified to express an opinion as to his sanity. . . . The witness

o—Compare the authorities cited in W., §§ 2314-2315.

stated his professional connection with the testator for quite a period of time before his death, including the day upon which the will was drafted and signed, and also testified that he had many conversations with him, always upon legal business. He was then permitted, the contestant objecting, to narrate the details of the business which was transacted, what the deceased counselled the witness about, what he said, and what advice and counsel he was given by the attorney. The full particulars of one or two interviews, in no manner connected with the making of the will, were related to the jury.

"These communications between the decedent and his attorney were privileged at common law as well as by statute, the object of the rule being the protection of the client and his estate. And while many text-writers assert emphatically that the seal of secrecy remains forever, unless removed by the party himself, there is an abundance of authority for saying that, upon the decease of the only person who could, in his life-time, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its objects, and thus bring it into direct conflict with the reason upon which it is founded. The object of the rule, so far as it relates to this class of communication, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting. The testimony called for was quite necessary in order to determine the weight which ought to be given the witness' opinion as to the mental condition of the testator, and his disclosures in no way reflected upon the character or reputation of the deceased. The testimony when given served to protect the estate, and tended to aid in a proper disposition of it. The issue in the case was as to the mental soundness of a person under whom each litigant claimed, and, whatever the result, the interest and the estate of the deceased were not prejudicially affected. It is not an action in which the success of an adverse third party must prove detrimental to the property. Neither of these litigants can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and important evidence of the character above described upon the only question involved in the dispute, namely, the sanity of the deceased."[10]

10—*Turner*, V. C., in *Russell* v. *Jackson*, 9 Hare 387, 393 (1851): "In the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it. . . . That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin, and in such a case as the present. In the one case the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interests. In the other case the question is to which of two parties claiming under the client the property in equity belongs, and it would seem to be a mere arbitrary rule to hold that it belongs to one of them, rather than to the other."

Compare the authorities cited in W., § 2329.

3. Husband and Wife.[11]

MERCER v. STATE (1898).

40 Fla. 216, 24 So. 144.

TAYLOR, C.: "The plaintiffs in error were on the 10th day of June, 1897, indicted, jointly with one Westley Bush, in the circuit court of Jackson county, for willfully driving an ox upon a railroad track.
509 . . . Upon the cross-examination of J. E. Brock, one of the State's witnesses, a letter written by him to his wife was exhibited to him by the attorneys for the defendants; and he was asked if he had written such letter, to which he replied, in substance, that he had written the letter, but that the following words, 'that I never saw the boys that night that the ox was put upon the road,' then contained in it, were not put into the letter by him, and were not in it when he sent it to his wife. . . . With this identification of the letter, and by consent of the State attorney as to the time and order of its introduction, it was offered in evidence on behalf of the defendants in rebuttal of the evidence of the witness who wrote the letter; but its admission in evidence was objected to, both by the State and by the witness whose letter it purported to be, upon the ground that, being a letter from the witness to his wife, it was a confidential communication, as between husband and wife, and therefore privileged. This objection was sustained. . . . In neither of these cases decided here, nor in any other State having similar enabling statutes, have we been able to find any declaration that the removal from husband and wife of their incompetency as witnesses because of interest in the cause has the effect of empowering either of them, when they become witnesses, to give illegal or incompetent testimony, by detailing or exposing those transactions or communications that have passed between them in the sacred confidence and trust that should exist between husband and wife, or that the removal of the incompetency of husband and wife as witnesses on the ground of interest removes the inhibition of the law against the exposure in evidence of confidential communications between them. Such confidential communications between husband and wife have always been regarded as privileged. . . . Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. The reason of the old rule for rendering interested witnesses incompetent to testify

11—For the *history* of this privilege, see W., § 2333. For the *statutes* declaring the privilege, see *post*, in the Appendix.

at all in any case to which they were parties was because their interest was supposed to be such a strong incentive to perjury, and, where husband and wife was interested in a cause, both of them were excluded as incompetent witnesses for any purpose, because of their unity of interest; they, in the eye of the law, being regarded as one person, and whenever either was interested both were considered to be equally interested; and the incentive to perjury from such interest was considered to be as strongly operative upon the one as upon the other. But the reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society.

"The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage, and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. And the same rule prevails in full force after the marital relation has been dissolved by death or divorce. Where the incompetency as witnesses of husband and wife on the ground of interest has been removed by statute, as is the case here, either of them may testify, for or against the other, to any fact, the knowledge of which was acquired by them independently of their marriage relation, in any manner not involving the confidence growing out of the marriage relation. . . . The letter from the husband to the wife here excluded, however, was not sought to be introduced directly through the wife as a witness to whom it had been written, but, in some manner not disclosed by the record, had found its way to the possession of the attorneys for the defendants, and its offer in evidence was from their immediate custody. There is a considerable array of authorities to the effect that when confidential communications between husband and wife, or between attorney and client, get out of the possession and control of the parties to the confidence, and that of their agents and attorneys, and find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, then such communications lose the protected privilege of the law, and become competent and admissible evidence. We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the general rule, is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself, and protects it from exposure in evidence, where-

soever or in whosesoever hands it may be. . . . We think the letter offered in evidence here from the witness Brock to his wife was inherently a confidential communication, and that it was privileged from exposure in evidence, in and of itself, regardless of the custody from which it was produced at the trial, and that its admission in evidence was properly refused."[12]

CLEMENTS v. MARSTON (1872).

52 N. H. 31, 38.

Assumpsit, by Charles W. Clements against Weare Marston, on an account annexed for boarding the defendant, labor, &c., between April 1 and July 17, 1869. The defendant died since the commence-
510 ment of the suit, and his administrator did not elect to testify. Against the defendant's objection, the wife of the plaintiff was admitted, and sworn as a witness for the plaintiff, generally in the cause, and her testimony related to matters within the knowledge of the deceased, and concerning which he might have testified. The wife was permitted to testify to conversations of the deceased with and in the presence of her husband; also, that she kept the plaintiff's money at the time the account in the declaration accrued, and as to the amount of that money, and how it was expended, and that the same was expended at the time the deceased is said to have boarded with the plaintiff, as stated below.

Hatch and *Page* for the defendant: "The admission of the wife as a witness was an error. If she was a competent witness, she must have been made so by Gen. Stats., ch. 209, secs. 20-22. . . . The testimony given by the wife in this case belongs to that class which is expressly declared incompetent by the statute. (1) Gen. State., ch. 209, sec. 21, provide that sec. 20 'shall not be so construed as to render competent their testimony as to any statement, conversation, letter, or other communication made by either of them to the other, *or to any other person;*' and sec. 22, by the words 'in any case,' cannot enlarge the limitation before made in sec. 21. The wife was here permitted to testify to 'conversations of the deceased with and in the presence of her husband,' which fall within the exact letter of the statute proviso. And, moreover, such conversations and communications were matters of marital confidence; that is, they were conversations which she heard and secrets which she obtained through her peculiar relation as the wife of the plaintiff, and were not admissible."

Wiggin and *Leavitt,* for the plaintiff: "I. The wife was a competent witness. She was neither a party to the record nor a party in interest. No disqualification can be suggested, except that she was the plaintiff's wife; and the legislature has seen fit to enact—whether wisely or unwisely is not for us to discuss or the court to determine—that that

12—Compare the authorities cited in W., § 2339.

relationship shall neither disqualify nor exempt from testifying. . . . II. The subjects upon which the plaintiff's wife was examined were not within the exception named in the statute. We claim that it was the intention of the legislature to take away entirely both the disqualification and the exemption existing at common law, depending upon the *existence* and continuance of the marriage relation, and based upon 'identity of trust,' and the 'fear of sowing dissension between husband and wife, and occasioning perjury,' and to *allow* and *require* each to testify to facts within their *knowledge* not confided to them by the other. Confidential communications between husband and wife are protected from disclosure after the marriage relation has ended by divorce or death, and whatever would be protected from disclosure after the marriage relation had ceased, is equally protected from disclosure while the relation continues, and nothing more. . . . As to her testimony that she kept her husband's money at this time, and how it was expended, she was acting as her husband's agent, and could properly testify to her acts as such, aside from the statute."

SARGENT, J.: "At common law, a party to a cause could not testify, on the ground that he was interested. Any person not a party, if interested in the result of the suit, was excluded as a witness on the ground of interest. Wives were excluded,—1st, on the ground of interest, they being interested wherever their husbands were; and 2d, upon the ground of public policy, that it was not expedient to place husband and wife in a position that might lead to dissensions and strife between them, or that might encourage perjury. Hence, wives were not allowed to testify for or against their husbands when they were parties to civil proceedings, and, for the same reason, both were excluded when either was a party in a criminal case. . . . The law of 1857, ch. 1952, provided that no person should be excused or excluded as a witness by reason of interest as a party or otherwise. This was held not to include the wife of the party. . . . The disqualification of interest was alone removed by that statute. But that was not the only ground upon which the wife of a party had been excluded at common law. The other ground—that based on public policy—was untouched, and remained in its full force. . . .

"But one step prepared the way for another, and each legislature went a step beyond its predecessor, until, in 1866, in chapter 4268 of the acts of that year, which is embraced in General Statutes, chapter 209, section 20, the disqualification of interest is not only removed, but it is provided that in certain classes of cases the husband and wife are made competent witnesses for or against each other. An additional section was added in 1867,—section 22, of the same chapter,—providing that, 'the wife may testify for the husband, or the husband for the wife, in any case where it appears to the Court that their examination as witnesses upon the points to which their testimony is offered would not lead to such violation of confidence' (meaning marital confidence). This section was amended by chapter 20, laws of 1870, so that the wife may

testify for or against her husband, or the husband for or against his wife, in every case where it appears to the court that their examination as witnesses would not lead to such violation of (marital) confidence. . . . Thus it appears that the present policy of our legislation on this subject is to make the husband and wife competent witnesses for or against each other, just as though they were strangers, in no way connected, except in the single case where the Court can see that such testimony would lead to a violation of marital confidence.

"Applying that principle, and there would seem to be no good reason why the wife should not have testified in the case before us. They are to be allowed or compelled to testify for and against each other, with this single exception; and this violation of marital confidence must be something confided by one to the other simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances. In this case the wife acted as the husband's agent and kept his money and knew how it was expended; but all the communications made to her were made to her as such agent, just as he would have made the same communications to any other agent doing the same business. There was no confidential communication between them as husband and wife, but simply the ordinary communications between principal and agent; and the communications would be no more confidential than those between other principal and agent. . . . Allowing the wife to testify for or against her husband, in any case where a stranger would have been a competent witness, seems to be the rule now; and, in that view of the case, nothing should be excluded except something that is strictly confidential, and not only so but communicated in strict marital confidence.[13]

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4. *Jurors.*[14]

PHILLIPS v. MARBLEHEAD (1889).

148 Mass. 326, 19 N. E. 547.

Petition to the Superior Court for a jury to assess the damages caused by the taking by the respondent of land of the petitioner, in July, 1886, for the laying out of Atlantic Avenue in Marblehead.
511 The respondent called as a witness one Martin, a member of the board of selectmen of Marblehead in 1886, who testified as an expert as to the value of the petitioners' land. Upon cross-examination he testified that the petitioners had in his judgment sustained damage to the amount of three hundred dollars, and no more. The petitioners then offered in evidence, solely for the purpose of contradicting the witness Martin, the record of the board of selectmen of Marblehead made July 27, 1886, showing the laying out of Atlantic Avenue, and

13—Compare the authorities cited in W., § 2336.

14—For the use of jurors' affidavits to *impeach a verdict*, see the Parol Evidence Rule, *post*, Nos. 569-575.

the amount of damage therefor, signed by Martin together with the other members of the board. The record contained the statement that the petitioner had sustained damage by the taking of their land to the amount of five hundred and fifty-three dollars, and that that sum was awarded the petitioners. The judge ruled that the record was not admissible in evidence for the purpose named, and the petitioners excepted.

FIELD, J.: "While the deliberations of legislative bodies are usually public, the deliberations of judicial or quasi judicial bodies are private, and there are reasons of public policy why they should not be made public, particularly when the purpose to be served is comparatively unimportant. Grand and petit jurors are not permitted to testify to opinions concerning the case expressed in their consultations with one another, and arbitrators are not permitted to testify to the grounds on which they reached the conclusions declared in the award. For the purpose of contradicting a witness, we think that evidence ought not to be received of the deliberations of selectmen acting in a quasi judicial capacity, and that the certificate of the doings of the board of selectmen was rightly excluded."

EARL OF SHAFTESBURY'S TRIAL (1681).

8 How. St. Tr. 759, 771.

Sir F. Withins moved, after the charge to the grand jury, that the evidence be heard in court; and L. C. J. PEMBERTON declared that he would grant the motion. The jury then desired to have a copy
512 of their oath,[15] which was given them, and they withdrew. On returning shortly, the following colloquy ensued:

Foreman: "My lord Chief Justice, it is the opinion of the jury that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do if it be done in court".

L. C. J. PEMBERTON: "Look ye, gentlemen of the jury, it may very probably be, that some late usage has brought you into error, that it is your right, but it is not your right in truth. . . . What you say con-

15—The form of oath administered to grand jurors was as follows:

"The foreman, by himself, lays his hand on the book, and the marshal administers to him the following oath: 'My lord, or sir (as the foreman's name may be), you, as the foreman of this grand inquest for the body of the county of A, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the king's counsel, your fellows', and your own, you shall keep secret; You shall present no one for envy, hatred, or malice; but you shall present all things truly as they come to your knowledge, according to the best of your understanding: So help you God.' The rest of the grand jury, by three at a time, in order, are sworn in the following manner: 'The same oath which your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your part: So help you God.' "

cerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say".

Foreman: "My lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in anything it is contrary to the sense of what the jury apprehend First, they apprehend that the very words of the oath do bind them, it says, 'That they shall keep the counsel's, and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand anything of law".

Mr. Papillon [a juror]: "If it be the ancient custom of the kingdom to examine in private, then there is something maybe very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is no intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been. Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty."

L. C. J. Pemberton: "The king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it."

Foreman: "My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right, but if the Court overrule, we must submit to it."

COMMONWEALTH v. MEAD (1858).

12 Gray 167.

Indictment for the manslaughter of Jeremiah A. Agin. At the trial in the municipal court of Boston, before Nash, J., the defendant admitted the killing, but contended that it was in self defence.

513 John Perham, Jr., testified that he saw the defendant shoot Agin, and that Agin was, at the time, between one and three feet from the

defendant. To contradict Perham, the defendant called several of the grand jurors who found this indictment, and proposed to show by them that Perham testified differently before the grand jury as to the distance between the defendant and Agin when the pistol was fired. But the judge excluded this evidence, on the ground that it was against public policy and the established practice, to allow grand jurors to be called to detail the testimony of witnesses, given on a partial and *ex parte* examination, and in the grand jury room, for the purpose of impeaching the witnesses at the trial of the indictment. The defendant was found guilty, and alleged exceptions.

Bigelow, J.: ". . . The only other question arising in this case is, whether the testimony of the grand jurors is admissible to prove that one of the witnesses in behalf of the prosecution testified differently on his examination before them from the testimony given by him before the jury trials. As to the competency of such evidence the authorities are not uniform. The weight of them is in favor of its admissibility. On principle it seems to us to be competent. The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. . . . But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula.* After the indictment is found and presented, and the accused is held to answer and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defence, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist. The case at bar furnishes a good illustration of the truth of this remark. No possible injury to the interests or rights of the government that we can see could happen by a disclosure of the testimony given by the witness before the grand jury. . . . On the other hand, it is clear that the rights of the accused might be greatly affected and his peril much increased, if he can be shut out from showing the fact that an important witness against him is un-

worthy of credit, or that his testimony before the jury of trials is to be taken with great caution and doubt, because on a previous occasion, when called to testify on oath, he had given a different account of the same transaction from that which he has stated in his evidence at the trial."[1]

STATUTES. *California,* P. C. 1872, § 926: "Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said or in what manner he or any other grand
514 juror may have voted on a matter before them; but, may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor."

Iowa, Code 1897, § 5267: "Every member of the grand jury must keep secret the proceedings of that body and the testimony given before it, except as provided in the next section, nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against a person not in custody or under bail, otherwise than by presenting the same in court or issuing or executing process thereon, until such person has been arrested." Ib. § 5268 (disclosure of a witness' testimony may be made to ascertain its consistency or to prove perjury). Ib. § 5269: "No grand juror shall be questioned for anything he may say or any vote he may give in the grand-jury room relative to a matter legally pending before it," except for perjury.[2]

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5. *Government and Informer; Official Documents; State Secrets.*

HARDY'S TRIAL (1794).

24 How. St. Tr. 8.

The witness had reported the existence and doings of secret political societies: "I did not do it of myself, but by advice: a gentleman recommended me by all means to make a report. It was not to
515 a magistrate." Mr. *Erskine:* "Then to whom was it?" Objection was made. "I submit he must state the name of the person to whom he communicated it; then have I not a right to subpœna that

1—Compare the authorities cited in W., § 2363.

2—Compare the authorities cited in W., § 2360.

person? I will then ask [this witness], When did you tell it him? At what place? Who were present? Then I ask that person, Is is true? . . . And if he were to say, I never saw his face [the witness'] till I saw him in court, would not that shake the credit of the witness with any man of understanding? I apprehend it would." Mr. *Attorney-General* (opposing): "What is the principle upon which the Court says, You shall never ask where he got that information? . . . A court of justice does not sit to catch the little whispers or the huzzas of popularity; it proceeds upon great principles of general justice. It says that individuals must suffer inconveniences rather than great public mischief should be incurred; and it say that if men's names are to be mentioned who interpose in situations of this kind, the consequence must be that great crimes will be passed over without any information being offered about them, or without persons taking that part which is always a disagreeable part to take but which at the same time it is necessary should be taken for the interest of the public. . . . Nobody will deny but that it is a hard case; but it has become a settled rule, because private mischief gives way to public convenience."

EYRE, L. C. J.: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not unnecessarily disclosed. . . . [As to (1) the person reported to,] I cannot satisfy myself that there is any substantial distinction between the case of this man's going to a justice of the peace or going to a magistrate superior to a justice of the peace, or to some other person who communicated with a justice of the peace. . . . [As to (2) the person above, advising a report,] I am of opinion the principle extends to that question, because the disclosing who the friend was that advised him to go to a magistrate is a thing which puts that friend in a situation into which he ought not to be put, and into which it is inconvenient to general justice that he should be put. . . . My apprehension is that, among those questions which are not permitted to be asked, are all those questions which tend to the discovery of the channels by whom the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make a disclosure than it is to whom he made the disclosure in consequence of that advice, [or] than it is to ask any other question respecting the channel of communication or all that was done under it."

BULLER, J.: "My lord chief justice and my lord chief baron both say the principle is that the discovery is necessary for the purpose of obtaining public justice; and if you call for the name of informer in

such cases, no man will make a discovery, and public justice will be defeated. Upon that ground, therefore, it is that the informer for the purpose of a public prosecution shall not be disclosed."[3]

DELANEY v. PHILADELPHIA (1794).

1 Yeates 403.

Issue was joined in this cause to ascertain the distance of the northern boundary of Dock street, from the south side of Walnut street, on the east side of Second street. For the appellant it was
516 moved that a subpœna with a clause of *duces tecum*, should issue to the surveyor general, to bring with him certain original papers from his office. SMITH, J., suggested his doubts, whether the Court could with propriety issue a subpœna with such a clause to the surveyor general, or any other public officer, having the custody of papers, of which certified copies were evidence.

PER CURIAM: "We ought not to issue a subpœna with such a clause, in the present instance; otherwise the surveyor general or other public officer, might be obliged to take any original public papers from his office to the furthest counties in the state, and the same papers might be demanded in different counties at the same time."

Whereupon the counsel mutually agreed to go together, to the office of the surveyor general, and examine the original papers. Mr. Broadhead, the surveyor general, would not permit his clerk to make out copies for the counsel, alleging that it was after office hours on Saturday afternoon, although his clerk offered to do the service, on the parties agreeing to make him compensation. The Court directed a subpœna to issue to the surveyor general, to appear instanter; he appeared accordingly, and attempted to excuse himself, by observing that he could not see sufficiently to make out the copies, and had no clerk who could perform the service; but on being threatened with an attachment by the Court, he produced the original papers.[4]

3—*Gray*, C. J., in *Worthington* v. *Scribner*, 109 Mass. 487, 488 (1872): "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the Government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government."

Compare the authorities cited in W., § 2374.

4—Compare the authorities cited in W., § 2373.

AARON BURR'S TRIAL (1807).

Robertson's Rep., I, 121, 127, 136, 181, 255; II, 536.

Treason. The accused moved for a *subpœna duces tecum* to the President of the United States to attend and bring certain correspondence with General Wilkinson, material to aid the defence. The
517 counsel for the prosecution did not deny that the President was "as amenable to that process as any other citizen," but claimed that "if his public functions disable him from obeying the process, that would be a satisfactory excuse *pro hac vice*," and that the papers here asked for were state secrets and irrelevant. Mr. *Botts*, arguing for the accused: "I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of State secrecy. It never can conduce to public utility, though it may furnish pretexts to men in power to shelter themselves and their friends and agents from the just animadversion of the law,—to direct their malignant plots to the destruction of other men while they are themselves secure from punishment. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, every thing that is done in a public way by their public functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability; and with the exception of what relates to negotiations with foreign nations, or what is called the diplomatic department, there ought to be nothing suppressed or concealed. . . . I will again predict that, if a secret is inquisitorial tribunal be established by your decision now, . . . if you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression. If these things be established, to go down to posterity as precedents, the inevitable consequences will be that, whenever any man in the United States becomes an object of the vengeance or jealousy of those in power, he may easily be ruined. A wicked executive power will have nothing to do to effect his destruction but to foment divisions in this country, to encourage and excite accusations by its officers, to deny the use of all public documents that may tend to the justification of the accused, or to render the attainment of exculpatory evidence dependent on the arbitrary whim of its prosecuting officers, and he will be condemned to sink without the smallest effectual resistance."

Marshall, C. J. (granting the motion): "The exceptions [to the accused's right to process] furnished by the law of evidence, with one reservation, so far as they are personal, are of those [persons] only whose testimony could not be received. The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony,

it is said to be incompatible with his dignity to appear under the process of the Court. Of the many points of difference which exist between the First Magistrate in England and the First Magistrate in the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the Court will only mention two. (1) It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the President, as well as every other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. (2) By the constitution of Great Britain the crown is hereditary, and the monarch can never be a subject. By that of the United States, the President is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every one. In this respect, the First Magistrate of the Union may more properly be likened to the first magistrate of a State,—at any rate, under the former Confederation; and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum*. If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this Court. If upon any principle the President could be construed to stand exempt from the general provisions of the Constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be sworn on the return of the subpœna, and would rather constitute a reason for not obeying the process of the Court than a reason against its being issued. In point of fact, it cannot be doubted that the people of England have the same interest in the service of the executive government—that is, of the cabinet counsel—that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting; yet it has never been alleged that a subpœna might not be directed to them. It cannot be denied that to issue a subpœna to a person filling the exalted station of the Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpœna may issue to the President, the accused is entitled to it of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpœnas is to be looked for in

the conduct of a Court after those subpœnas have issued,—not in any circumstance which is to precede their being issued. . . . [As to the argument that reasons of state might forbid the disclosure,] there is certainly nothing before the Court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety; . . . if it does contain any matter which it would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will of course be suppressed. . . . Everything of this kind, however, will have its due consideration on the return of the subpœna. . . . I admit, in such a case, much reliance must be placed on the declaration of the President; . . . perhaps the Court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The President may himself state the particular reasons which may have induced him to withhold a paper, and the Court would unquestionably allow their full force to those reasons."

To this subpœna, President JEFFERSON responded, without attendance, by a letter to the prosecuting counsel, in which he offered to be examined at Washington by deposition, but explained his non-attendance at Court as follows: "As to our personal attendance at Richmond, I am persuaded the Court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case; as it would, should we receive a similar one to attend the trials of Blennerhasset and others [co-conspirators] in Mississippi Territory, those instituted at St. Louis and other places on the western waters; or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the Constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority." The President though forwarding the desired letter, added the following: "With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that for the advantageous conduct of their affairs some of these proceedings at least should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication."[5]

5—*Stanbery*, Attorney-General, arguing, in *Mississippi* v. *Johnson*, 4 Wall. 475, 483 (1866): "If the Court [in Burr's Trial] in saying that the President was amenable to *subpoena*, was right, the Court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the Court hesitated, and not a step further was taken

COOLEY, C. J., *Torts, 2d ed., *376* (1888): "If we take the case of legislative officers, their rightful exemption from liability is very plain.

518 Let it be supposed that an individual has a just claim against the State which the legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. . . . If we take next the case of executive officers, the rule will be found to be the same. The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive in these particulars exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent. Taking next the case of the judicial department, the same rule still applies. For mere neglect in judicial

towards enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at *Nisi Prius*, suddenly, on a motion of this kind, had held that the President of the United States was liable to the *subpoena* of any Court as President."

Zabriskie, C., in *Thompson* v. *R. Co.*, 22 N. J. Eq. 111, 113 (1871): "The subpoena was [in this case] directed to the Governor by his individual name, and not as Governor. Every person, whatever his office or dignity, is bound to appear and testify in courts of law when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of the government may be, and in many cases are, a sufficient excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse, and whether the official engagements are sufficient must be determined from the circumstances of each case. . . . There is no reason why the Governor should not be called upon to testify as to the time when the engrossed bill was delivered to him. . . . But I will make no order on him for that purpose. . . . Such order ought not to be made against the Executive of the State, because it might bring the Executive in conflict with the Judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the Court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an order; and in his case, the Court would hardly entertain proceedings to compel him by adjudging him in contempt. . . . If the Governor, without sufficient or lawful reasons, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal."

Compare the authorities cited in W., §§ 2369, 2370.

duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. . . . For all duties the time, manner and extent of the performance of which are left to the wisdom, integrity and judgment of the officer himself, it is conceded that, as a general rule, the only liability of the officer is to the criminal law, in case he shall wrongfully and maliciously neglect to perform his duties, or shall perform them improperly. Duties of this nature are usually spoken of as duties in the exercise of discretionary and judicial powers, and it is deemed a conclusive answer to any private action for an injury resulting from neglect or unfaithful performance to say that where a matter is trusted to the discretion or judgment of an officer, the very nature of the authority is inconsistent with responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and then make its exercise a wrong."

BEATSON v. SKENE (1860).

5 H. & N. 838, 853.

Libel. The plaintiff, Skene, was a general of cavalry. At the close of the Crimean war he was superseded in command, and resigned. An investigation into the state of the corps was made by General
519 Shirley, whose secretary and commissioner the defendant Beatson was. The defendant reported to his superior that the plaintiff had stirred up mutiny in the corps, and afterwards so testified as a witness before a military court of inquiry held to investigate General Shirley's alleged libel on the plaintiff. For this testimony the plaintiff's suit for libel was brought; and he sought production, in his proof, of the military court's minutes of the defendant's testimony, and of the plaintiff's own letters to the Secretary of War.

Bovill and *Garth* showed cause: "First, the learned Judge was correct in refusing to compel the production of the letters and minutes of the Court of Inquiry, the Secretary of State for War having objected to produce them, on the ground that their production would be prejudicial to the public service. It is clear that evidence may be excluded, where the disclosure would be prejudicial to public interests." . . .

Edwin James and *Gray*, in support of the rule: "First, the learned Judge ought to have compelled the production of the letters and minutes of the Court of Inquiry, which the Secretary for War was subpœnaed to produce. The letters were not confidential communications, but were written by the plaintiff in explanation of his conduct, and for the purpose of showing the motives by which he was actuated. There

is no authority that under such circumstances the Secretary for War was entitled to withhold them. The case is totally different from that of a confidential report made by a military officer to the Secretary for War, which it is conceded would be privileged."

Pollock, C. B.: "We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. As an instance, we would put the case of a British minister at a foreign Court writing in that capacity a letter to the Secretary of State for Foreign Affairs in this country, containing matter injurious to the reputation of a foreigner or a British subject; can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined?

"It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community."[6]

6—*Field*, J., in *Hennessy* v. *Wright*, L. R. 21 Q. B. D. 509, 512 (1888): "There are two aspects of this question. First, the publication of a State document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a court of justice at the instance of any suitor who thought proper to say '*fiat justitia ruat coelum*,' an order for discovery might involve the country in a war. Secondly, the publication of a State paper may be injurious to servants of the Crown as

6. *Physician and Patient.*

DUCHESS OF KINGSTON'S TRIAL (1776).

20 How. St. Tr. 573.

Bigamy. Mr. Hawkins, a physician, who had attended the accused and her alleged husband, was asked: "Do you know from the parties
520 of any marriage between them?" Ans.: "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honor."

MANSFIELD, L. C. J.: "If all your lordships will acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege, where it is a material question in a civil or criminal cause to know whether parties were married or whether a child was born, to say that his introduction to the parties was in the course of his profession and in that way he came to the knowledge of it. . . . If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."[7]

COMMISSIONERS ON THE REVISION OF THE STATUTES OF NEW YORK, *III, 737* (1836): "The ground on which communications to counsel
521 are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance."

individuals; there would be an end of all freedom in their official communications if they knew that any suitor, that as in this case any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice."

Compare the authorities cited in W., § 2375.

7—Compare the authorities cited in W., § 2380.

STATUTES. *California:* C. C. P. 1872, § 1881, par. 4: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in
522 attending the patient which was necessary to enable him to prescribe or act for the patient"; amended by the Commission of 1901 by adding: "but this subdivision does not apply in an action between a physician or surgeon and his patient in which the treatment of the patient by the physician or surgeon is in issue; and provided that in an action brought under sections 376 and 377 [for death by wrongful act] a physician or surgeon is competent to testify as to the cause of the death of the deceased."

New York: C. C. P. 1877, § 834: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity." Ib., § 836, including amendments added by St. 1897-1899; the preceding section not to apply if "expressly waived upon the trial or examination" by the patient; moreover, except for "confidential communications and such facts as would tend to disgrace the memory of the patient," express waiver by the personal representative of the deceased suffices, or, in testamentary controversies, by the executor, surviving husband, widow, heir, or next of kin.

Oregon: Annot. C. 1892, § 712, par. 4 (like Cal. C. C. P. § 1881, unamended). Ib., § 713: "If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon, on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section."[8]

GARTSIDE v. INSURANCE CO. (1882).

76 Mo. 446.

NORTON, J.: "This suit was instituted in the circuit court of the city of St. Louis, on a policy of insurance to recover a death loss. On the trial judgment was rendered for defendant, which, on plain-
523 tiff's appeal to the St. Louis court of appeals, was reversed, and from the judgment of reversal defendant prosecutes an appeal to this court.

"The only question presented on said appeal for our determination is, whether a physician, who is called to visit a patient, when introduced as a witness, can be required or allowed to disclose any information acquired by him from such patient either orally, by signs or by observation of the patient after he has submitted himself for examination, which information was necessary to enable him to prescribe for such patient. An affirmative answer reverses, and a nega-

8—Compare the authorities cited in W., § 2380.

tive answer affirms the judgment, and the solution of the question is dependent upon a construction of the fifth subdivision of section 4017, Revised Statutes, which declares that the following persons shall be incompetent to testify, viz: . . . 'A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.'

"It is contended upon the one hand that the above statute was only designed and intended to forbid the disclosure of such information as a physician while attending a patient acquires orally from the patient. It is contended, on the other hand, that the statute forbids, not only information acquired through the ear by oral communication, but also all information acquired through the eye by observation or examination of the patient after he has submitted himself to the care of the physician for examination and treatment. In settling this contention, and in determining the proper construction to be placed on said section 4017, we feel authorized to look at the adjudications in other states having similar statutes. . . .

"While it is true that the phraseology of our statute is different in the above respect from the New York statute, it is also true that the object intended to be accomplished by both is the same, and the meaning of both is the same when construed with reference to the object intended to be brought about, viz: casting 'the veil of privilege' or secrecy over information acquired by a physician while professionally engaged in the sick chamber, and necessary to enable him to prescribe. Information acquired by a physician from inspection, examination or observation of the person of the patient, after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient. The construction contended for by defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient, would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis; and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of the physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz: his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the legislature and virtually to overthrow it.

"It follows from what has been said that the circuit court erred in permitting Drs. Gregory and Bauduy, two physicians, to give in evidence the information acquired by them while attending Gartside, their patient, professionally, although such information was acquired not from what the patient said but from observation and examination."[9]

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7. *Priest and Penitent.*

REGINA v. HAY (1860).
2 F. & F. 4.

William Hay, aged twenty-two, pitman, was charged with robbing Daniel Kennedy of a silver watch, at Jarrow, on the 25th December. . . . Inspector Rogers, by whom the prisoner was apprehended,
524 stated that from information he received he went to the house of the Rev. John Kelly, a Roman Catholic priest, from whom he received a watch, which the prosecutor identified as his property, and who was now called.

The crier of the Court was about to administer the oath to him, when he objected to the form of the oath.

HILL, J.: "What is the objection?"

Rev. Mr. *Kelly:* "Not that I shall tell the truth, and nothing but the truth; but, as a minister of the Catholic Church, I object to the part that states that I shall tell the *whole* truth."

HILL, J.: "The meaning of the oath is this: it is the whole truth touching the trial which you are asked; which you, legitimately according to law, can be asked. If anything is asked of you in the witness-box which the law says ought not to be asked—for instance, if you are asked a question the answer of which might criminate yourself—you would be entitled to say, 'I object to answer that question, because the answer might criminate myself,' and the law would sustain the objection. You can therefore have no objection as a loyal subject, and in duty to the laws of the country, to answer the whole truth touching the case which may be lawfully asked. Therefore you must be *sworn*."

The witness took the oath in the usual form, and gave the following evidence:—"I have been twelve years Catholic priest at the Felling. On Christmas-day I received the watch produced."

Headlam then asked, "From whom did you receive that watch?"

Witness: "I received it in connection with the confessional."

HILL, J.: "You are not asked at present to disclose anything stated to you in the confessional; you are asked a simple fact—from whom did you receive that watch which you gave to the policeman."

Witness: "The reply to that question would implicate the person who gave me the watch, therefore I cannot answer it. If I answered

9—Compare the authorities cited in W., § 2384.

it, my suspension for life would be a necessary consequence. I should be violating the laws of the Church, as well as the natural laws."

HILL, J.: "I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer, 'From whom did you receive that watch?' On the ground I have stated to you, you are not asked to disclose anything that a penitent may have said to you in the confessional. That you are not asked to disclose; but you are asked to disclose from whom you received stolen property on the 25th of December last. Do you answer it, or do you not?"

Witness: "I really cannot, my lord."

HILL, J.: "Then I adjudge you to be guilty of contempt of Court, and order you to be committed to gaol. [To the officer of the Court] —Take him into custody."

The witness was accordingly removed in custody.

STATUTES. *New York:* C. C. P. 1877, § 833: "A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character in the course
525 of discipline enjoined by the rules or practice of the religious body to which he belongs."[10]

10—Compare the authorities cited in W., §§ 2394, 2395.

PART IV.

PAROL EVIDENCE RULE.
(CONSTITUTION OF LEGAL ACTS.)

GENERAL NATURE AND SCOPE OF THE RULE.[11] "I. At the outset certain discriminations must be kept in mind: (1) First and foremost, *the rule is in no sense a rule of evidence*, but a rule of substantive
526 law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all, the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to 'prove' it or give 'evidence' of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; a ruling (for example) that on a plea of self-defence, in an action of battery, no evidence of the plaintiff's insulting words is to be received, would become the legitimate progeny of the law of evidence. . . . Let us dismiss, then, once for all, any notion that the parol-evidence rule, in any of its aspects, is concerned with any precautions or limitations based on probative value, or indeed with any regulation of evidence in the legitimate sense of that word. This will be the first step to a clear understanding of the working of the rule.

"(2) Next, *the matter excluded* by the rule is *not inherently or even most commonly anything that can be properly termed 'parol.'* That word (in spite of its numerous other derived applications) signifies and implies essentially the idea 'oral,' *i. e.* matter of speech, as contrasted with matter of writing. Now, so far as the phrase 'parol-evidence rule' conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or acted other than in writing, or is now offering to testify orally—, that impression is radically incorrect. When the prohibition of the rule is applicable, what is excluded may equally be written as oral,—may be letters and telegrams as well as conversations; and where the prohibition is applicable on the facts to certain written material, nevertheless for the very same transaction certain oral material may not be prohibited. So that the term 'parol' not only affords no necessary clue to the material excluded, but is even

11—Quoted from W., §§ 2400, 2401.

positively misleading. It must be understood to be employed in a purely unnatural and conventional sense.

"(3) There is *no one and undivided parol-evidence rule.* There are at least four distinct principles or bodies of doctrine. They concern a common subject—legal acts—, but their content and details are separate and distinct. The case lies very much as if we possessed one term 'action' for all the various forms of remedial procedure. It is true enough that they all may be looked upon as mere species of the general notion of a remedy, but it would be by all conceived impossible to discuss the details of mandamus, certiorari, injunction, capias, replevin, bill in chancery, action on the case, scire facias, subpœna, and the rest with no better word-materials than the one word 'action.' Yet this is not far from the impossible task which has been attempted with the term 'parol-evidence rule.' There is no one generalization for that rule,—at least none which has any practical consequence. The four general groups of doctrine which go to make up the whole have a separate set of rules; the chief problem in their application is to ascertain which kind of rule in involved in the case in hand, and to keep one from being mistaken for another.

"(4) *The parol-evidence rule is not the only rule which concerns the use of written things.* There are several other rules, with which it has nothing to do, that also have something to say about writings,—the chief of which are the rule about Producing Documentary Originals and the rule about Authenticating Documents. These are rules of evidence in the genuine sense, and the term 'parol' is often naturally employed (especially with the former) in discussing them. But they are of no kith or kin with the Parol-Evidence rule proper, as here involved, *i. e.* the rule of substantive law. Their difference from the present rule is plain enough; but the false nomenclature of the latter has sometimes caused a relation between them to be suspected.

"(5) Finally, it needs to be insisted, in opposition to the popular and natural view which tends to thrust itself forward at trials, that *a writing has no efficacy per se,* but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. Granting that there is a writing before us: Has it been brought home to anybody as his act? Was it meant to supersede other materials? Was it essential to the transaction? What external objects does it apply to? These are questions which cannot be answered without looking away from the writing to other data; and until they are answered the efficacy of the writing is merely hypothetical. There is no magic in the writing itself. It hangs in mid-air, incapable of self-

support, until some foundation of other facts has been built for it. So far as the parol-evidence rule is concerned with writings at all, it concerns these questions of the relation between the writing and other data, and it points out what other data are essential and available for the proper use of the writing. It conduces to a sound understanding of the rule if we dispel wholly that natural notion which falsely attributes to a writing some mystic independence and automatism.

"In short, then, (1) the parol-evidence rule is not a rule of evidence; (2) nor is it a rule for things parol; (3) nor is it a single rule; (4) nor is it all of the rules that concern either parol or writing; (5) nor does it involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.

"II. What, then, *is* the Parol-Evidence rule? It concerns the *constitution of legal acts.* This requires a brief notice of the nature of legal acts.

"Only a small part of conduct is legal conduct, *i. e.* conduct having legal effectiveness. The nature and effect of such conduct as will be given legal effect is therefore a question of general consequences in all departments of the law. Leaving aside the field of crimes (which deals with the relation between State and individual) and of torts (which deals with irrecusable or involuntary civil relations) we are here concerned with voluntary relations, *i. e.* those relations which may be created, transferred, or extinguished by will of the parties. The conduct which is allowed to have such effect is a *legal act.*[1]

"For the purpose of specific varieties of legal acts—sale, contract, release, and so on—, there are specific requirements, varying according to the subject. But there are also certain fundamental elements, common to all, and capable of being generalized. These elements present problems which run through all the varieties of legal acts, and must therefore be analyzed and discussed in union. Their principles, when applied to specific kinds of acts, usually give substantially similar results; and, when they do not, it is merely because special circumstances call for local variances. What has to be done, therefore, is to compare under one head the principles common to all legal acts, and to take account of the specific variations for specific kinds of acts. This is what the 'parol evidence' rule does in our law.

"These principles fall into four groups, marking the four possible elements of every legal act: (A), The Enaction, or Creation, of the act; (B), its Integration, or embodiment in a single memorial, when desired; (C), its Solemnization, or fulfilment of the prescribed forms, if any; and (D), the Interpretation, or application of the act to the

1—"There is a very important class of acts in which the legal result follows because that result was itself contemplated and desired as one of the consequences of the act. From the fact that legal results are in contemplation in this class of acts, the Germans call them *Rechtsgeschafte,* Frenchmen call them *actes juridiques.* English lawyers have not yet agreed upon any name for them. The terms 'juristic acts' and 'acts in the law' have been suggested" (Markby, Elements of Law, 3d ed., § 235).

external objects affected by it. Of these four, the first and the fourth are necessarily involved in every legal act; the second and the third may or not become practically important, but are always possible elements.

"A. The Enaction, or Creation, of an act is concerned with the question *whether any legal act at all,* or a *legal act of the alleged tenor,* has been consummated; or, if consummated, whether the circumstances attending its creation authorize its *avoidance* or *annulment.* Under the first head arise the questions whether a writing is anything more than a preparatory draft, whether it has been completed by delivery, whether its tenor is to be judged by its actual words or the intended words, and the like. Under the second head arise the questions whether it can be avoided because of mistake, fraud, or duress, affecting the motive leading to its enaction.

"B. The Integration of the act consists in embodying it in a *single utterance* or *memorial,*—commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors; and, in the latter case, either wholly or partially. Thus the question in its usual form is whether a particular document is the one deemed by law to be the sole memorial of the act, or how far a particular document was intended by the parties to cover certain subjects of transaction between them and therefore to deprive of legal effect all their other utterances.

"C. The Solemnization of the act concerns the forms which are required by law to attend it in order to give it legal effect. This always becomes a question of some particular subject in the law, because there is no universal formality required in common for all acts. Thus the formalities of attestation, seal, registration, and the like are essential for some but not for other acts. Writing is naturally the most important and most common instance of a required formality. The resort to writing may sometimes be an instance of Integration and sometimes of Solemnization, but either may exist without the other.

"D. The Interpretation of an act is the application of it to external objects, in the process of defining and enforcing the right or obligation affected by its terms. The words of a legal act are merely the symbols by which the actor indicates the external objects which the act is expected to effect—a lot of land or a barrel of sugar or John Doe the legatee. The connection between these words and their possible objects must be judicially established before the terms of the act can be given the effects expected by the parties. In this process of Interpretation, the main questions concern the standard of meaning to be adopted and the data which may be used in determining that meaning.

"For these four elements in the act, the principles are independent of each other,—so independent, indeed, that they sometimes appear to be contradictory; and the chief inherent difficulty in their application arises from the necessity of distinguishing which element and which principle is really involved."

A. CREATION OF LEGAL ACTS.

1. *Subject; Delivery.*

EARLE v. RICE (1872).

111 Mass. 17.

Bill in equity against William W. Rice, Thomas L. Nelson, Thomas Earle, Philip Henry Earle, Ellen Chase Earle, and Thomas H. Earle, the last four being minor children of the plaintiff and the defend-
527 ant Thomas Earle, praying that a paper signed by the plaintiff and Thomas Earle might be delivered up to be cancelled, and that Rice and Nelson might deliver to the plaintiff the proceeds of the sale of certain real estate of hers in their hands. . . . At the hearing, before GRAY, J., it appeared that in February, 1869, the plaintiff then being married to Thomas Earle, and having several children by him, was seised in fee in her own right of land in Worcester, which had been devised to her by her father; and that she and her husband, being desirous of selling this land, signed a memorandum, dated February 23, 1869, which, after reciting the ownership of the land and the desire of the parties to sell it, continued thus: "It is understood and agreed that said real estate shall be advertised and sold, some time during the month of March next,—said parties joining the conveyance thereof; and the proceeds thereof, after paying the expenses of said sale, and discharging any incumbrances thereon, shall be placed in the hands of Edward Earle and William W. Rice, in trust. . . . And it is understood that a deed of trust shall be prepared in proper form to carry out the understanding and intention above summarily expressed, with such proper details and provisions as shall be necessary to make the same effectual."

William W. Rice testified that Thomas Earle asked him to draw this memorandum; that he replied that he did not believe such an agreement would be legally binding between him and his wife; that Thomas Earle then said "I do not suppose the writing will be binding between us, but I want it made, and I will sign it, and she can sign it if she will; we shall then be morally bound by it, the friends of both can see what I am willing to do, and if either party refuse to be bound, it will be known who is to blame"; that the witness drew the paper and Thomas Earle signed it; and that the witness told the plaintiff what Thomas Earle said. The plaintiff testified that Rice brought her the paper, and told her very plainly that it would not be legally binding, and that her husband knew it was not legally binding, but considered it as morally binding, and as showing that he was willing to do what was right in the matter; that she showed it to her counsel, and told him that her husband was aware that it was not legally binding; that her counsel told her that she was not legally bound by it, but would of course feel morally bound to carry out its provisions, and that it was right for her to sign it; and that she signed it. The

administrator and the guardian *ad litem* objected to the admission of this testimony. . . .

GRAY, J.: " . . . . As to the memorandum of February 23, 1869, the evidence is full and conclusive that it was signed by the husband with the understanding that it would not be legally binding, or anything more than a moral or honorary obligation, upon either party; and by the wife, after being informed that such was the husband's understanding of its effect, and after being advised by her counsel that it would not legally bind her. In short both parties signed it with the understanding that they were not bound thereby, except so far as they might feel themselves morally obliged to carry out the intention therein expressed. Evidence of this character, though not competent to control the interpretation of the contract, is clearly admissible to show that the contract should be set aside, or treated as of no effect, in equity. . . . It follows that the wife has done nothing to affect her rights in the land devised to her by her father, or to confer any rights therein upon her husband and children; and that the proceeds of the sale of the land, in the hands of the trustees, belong to her as fully as the land did before the sale."[1]

THOROUGHGOOD'S CASE (1601).

9 Co. Rep. 137.

"If A makes a writing to B and seals it, and delivers it to B as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed, for
528 the law respects the delivery to the party himself, and rejects the words which will make the express delivery to the party upon the matter no delivery. . . . And therewith agrees the report of 19 H. 8. 8. *a.* and takes the difference when it is so delivered to the party himself, and when to a stranger, as it was there agreed. A writing may take effect by actual delivery to the party himself without any words: And as a writing may take effect by actual delivery without words, so it may take effect by words without actual delivery: As if a writing is sealed, and it lies in a window, or upon a table, and the obligor saith to the obligee, see there's the writing, take it as my deed and he takes it accordingly, it is a good delivery in law."[2]

XENOS v. WICKHAM (1866).

L. R. 2 H. L. 296.

The Appellants are shipowners, carrying on business under the name of the Greek and Oriental Steam Navigation Company, and as such were the owners of the ship Leonidas. The Respondent
529 is the chairman and representative of the Victoria Fire and Marine Insurance Company. The declaration alleged, in the usual

1—Compare the authorities cited in W., § 2406.

2—Compare the authorities cited in W., § 2408.

form, that the Plaintiffs caused their vessel to be insured by this company for a space of twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at £1000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. . . . It appeared that on the 25th of April, 1861, the Plaintiffs employed Mr. Lascaridi, an insurance broker, to effect for them a policy on the ship Leonidas for £2000, at £8 8*s.* per cent., from the 25th of April to the 25th of October. . . . In accordance with the usual practice, Lascaridi prepared for the Respondent's company a slip embodying the terms of the proposed insurance, and got it initialed by Mr. E. J. Sprague, a clerk of the company, for the sum of £2000. This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the Plaintiffs sent to Lascaridi a letter, dated 29th of April, 1861, desiring him to "cancel Leonidas insurance, and insure the same for all the year and for all seas at £10 10*s.* per cent." On the 30th of April Lascaridi called at the Respondent's office, and stated that he did not wish the policy already mentioned to proceed, but desired to effect another. The slip for the insurance for £2000 for six months was then destroyed, and another slip was prepared by him, and initialed by the Respondent's clerk, "E. J. S.," on the Leonidas for £1000 for twelve months, from the 25th of April, 1861, on "hull, stores, and machinery, valued at £13,000." On the 1st of May Lascaridi sent to the Plaintiffs an account debiting them with the sum of £338, as payable by them in respect of insurances on the Leonidas, and drew on them, as of that date, for that sum at three months. They accepted the bill, and when they did so Lascaridi told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterwards a policy in the usual form of the company was filled up from the slip, and was dated the 1st of May, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums, and when insurances are effected (as this was) for cash, or on cash account, all premiums for insurances effected during each month are payable on the 8th of the succeeding month. Just before the expiration of this credit a debit note is sent to the broker, with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On the 8th of June a debit note was sent from the Respondent's office to that of Lascaridi. On its being presented, Lascaridi's clerk said that no premium was due, and, upon a second messenger being sent with the policy, which was expressed to be duly "signed, sealed, and delivered," and the debit note, the clerk repeated the statement and said that the policy ought not to have gone forward. In the course of the day one of the clerks of Lascaridi called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was there-

upon indorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against Lascaridi for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of the 2nd of September, 1861, Lascaridi's clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the Baltic, there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day, intelligence, by telegram, had been received at Lloyd's, stating that the Leonidas was stranded on the Nervo, but this intelligence was not known to the Respondent till three o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the Appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from Lascaridi any part of the premium, or any credit for the same. The Lord Chief Justice, on these facts, directed a verdict for the Defendant, but reserved leave to the Plaintiffs to move to enter a verdict for them if the Court should be of opinion that the policy was binding on the company, and had been cancelled without authority.

Sir *George Honyman,* Q. C., and Mr. *Watkin Williams,* for the Appellants: "The judgment in the Court below was, that there never was a complete and binding contract between these parties. That proposition cannot be sustained. The policy was treated, except by Lord Chief Baron POLLOCK, as a common law deed, and it was supposed to require actual delivery to make it effectual. Formal delivery to the Appellants, or even to a particular person on their behalf, is not essential for its validity."

Mr. *Bovill,* Q.C., and Mr. *Archibald,* for the defendant: "There was no policy here under the hands and seals of the company at the time of the loss. . . . A memorandum of cancellation was made on the policy, and though the policy was left with the broker, it was left not as a delivery of it, as a policy, to him, as the broker for the assured, but merely to enable him to get a return of the stamp duty. As to the delivery of a deed, it is said in the Touchstone: 'The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed.' Here it was only proposed to be delivered, and on that proposal it was repudiated. In truth, it never was delivered, and has never been in the possession of the Appellants as a deed accepted by them."

The following question was put to the Judges: "Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance

Company was, when the ship Leonidas was lost, liable as insurer to the Plaintiffs on the policy, or alleged policy, in the pleadings mentioned? It is to be assumed that the ship Leonidas was totally lost on the 1st of September, 1861."

Mr. Justice Blackburn: . . . "I should wish to call your Lordship's attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

"The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the Defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not. If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be 'always' the practice, and the statements there as to what was done in this particular case, shew that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger. . . .

"Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed. I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. . . . I cannot perceive how it can be said that the delivery of the policy to the clerks of the Defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the Defendant to the use of the assured. . . . No authority, I think, has been cited

which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law."

Judgment reversed; and judgment given for the Plaintiff.

HUDSON v. REVETT (1829).

5 Bing. 368.

This was an issue directed by the Court of Common Pleas, to try whether certain deeds of lease and release, and an accompanying deed of trust, were the deeds of the defendant, and if so, whether they
530 had been obtained by fraud, covin, or misrepresentation.

The lease and release bore date the 25th and 26th of November, 1825, respectively; the deed of trust the latter day; and the object of the deeds was to effect a conveyance of Revett's property to Hudson, in trust, to raise money by sale of it for the payment of Revett's debts, with a trust, as to any residue, in favor of Revett. At the trial, before Holroyd, J., at Suffolk Summer assizes, Mr. Brown, the attorney who prepared the deeds, and was also a party to the deed of trust, stated, that on Monday the 28th November, 1825, the defendant being then a prisoner in the King's Bench prison, he, Brown, on the part of the plaintiff and other creditors, and acting, as he conceived, for all parties, went, accompanied by Columbine, the attesting witness, to the defendant in the prison, for the purpose of procuring the execution of the deeds. That they corresponded exactly with drafts which had before been assented to and signed by the defendant; that blanks were left for the amounts of the debts of various creditors, which were then filled up, with the exception of the blank for the debt of one Mills, a creditor; that Mills, who was present, claimed 16,000*l.* odd; but that the defendand showed an account, reducing Mills's debt to 14,858*l.* 8*s.* 8*d.*, and said he had vouchers by which he could confirm the account. The account was admitted, subject to the production of these vouchers; and it was agreed that the blank for Mills's debt should be filled up when they were produced. The defendant and Mills then executed the deed, leaving the blank to be filled up as above mentioned. This statement was confirmed by the attesting witness, the only other person present. The next day Brown and Mills attended the defendant again; but Columbine was not present. The defendant produced the vouchers in question; the balance was struck; Brown filled up the blanks with the sum of 14,858*l.* 8*s.* 8*d.*, and then went away, taking with him the deeds for the purpose of procuring their execution by other parties. The instrument at that time had a deed-stamp, (not ad valorem,) and no new stamp was added. The defendant left the prison shortly afterwards, and the deeds were executed in his presence by his wife, (who also

joined in a fine to enure to the uses of the trust-deed,) under his sanction, when he was at liberty.

No evidence was offered on the part of the defendant; but the following passage in Bull. N. P. p. 267, was relied on: "If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered—as if a bond were made to C. with a blank left after for his Christian name and for his addition, which is afterwards filled up." Holroyd, J., told the jury it did not appear in the passage cited that the alteration was made in the presence of the party, but that, if in such a case there was that which amounted to a redelivery, and showed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a redelivery, and the deed would be his in its altered state. The jury found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin or misrepresentation. *Wilde,* Serjt., moved for a new trial on the ground that the deed was void, having been altered in a material particular after its execution, without any redelivery. A rule nisi having been granted,

Storks and *Russell,* Serjts., showed cause: . . . "It was settled between the parties that the deed should be executed, subject to the blanks being filled up, when the amount of debt should have been ascertained and agreed upon. They were filled up, therefore, according to the intention of the parties, and there was no alteration of the deed, but a completion of it, according to the intentions of the parties. Under these circumstances it may be contended, first, that the deed remained the deed of the parties (without redelivery) notwithstanding the insertion. . . . A deed may be in the nature of an escrow only, from circumstances and the nature of the transaction, without the formal and apt words spoken of in Shepherd's Touchstone, 50 and 60; therefore, where a deed is to be executed by several parties, and if any of them refuse, the deed will be inoperative, a party who executes first must be taken to execute and deliver it as his deed conditionally in case the others also execute: so if the insertion of a sum be necessary to give the instrument effect, a party who executes before such sum has been ascertained must be understood as executing conditionally, and to give the deed effect upon such sum being ascertained and inserted: until insertion, it is therefore an escrow; upon insertion, and not till then, it becomes the deed of the party who executed, by relation to the time of the execution. The concurrence of the agent of the obligors was of equal force with the concurrence of the obligors themselves. And this will apply to the objection of the insertion of the sum not having been made in the presence of Revett (if that were so) because Brown was authorized to make the insertion. . . . The deed in question therefore is good, and the deed of Revett, without any re-execution or redelivery. But if not good without a redelivery, it would be clearly so if such redelivery, or

what was tantamount to it, took place. . . . Then, has there been a second delivery in this case? Goodright dem. Carter v. Straphan establishes this point, viz., that circumstances alone may be equivalent to a redelivery. Lord MANSFIELD, after citing two cases from the year-books, which confirm the proposition, that it is not necessary for a deed to be re-executed or reattested, but redelivered only, says, 'Now, delivery is an act in pais only. The question, then, is, Whether the law has laid down any precise form in which delivery must be made, or whether circumstances may not be equivalent to it without actual delivery? . . . No manual tradition or handing over of the deed to the grantees is necessary."

Wilde: . . . "The deed was perfect when it was first executed, and, therefor, re-excution, which implies that the deed is previously imperfect, could not have any operation. It was signed, sealed, and delivered: the estate had passed out of the relessor, and had vested in the relessee, and the attestation was such as to show the deed to be a perfect instrument. According to Perkins, s. 154 (a passage cited by Lord MANSFIELD), 'If the first delivery take any effect, the second delivery is void.' As to the instrument's operating as an escrow till the blanks were filled up, Com. Dig. Fait. (A. 3), Shep. Touch. 58, and 4 Cruise, 36, are express authorities to show, that if a deed be delivered as an escrow, it must be so delivered in terms, and the fact must be noticed in the attestation. . . . Secondly, the rule of law is clear and undisputed, that any alteration of a deed in a material point by insertions, erasures, or otherwise, will avoid the deed, even though the alteration may have been innocently or laudably intended."

BEST, C. J.: "This was an issue which the Court thought it right to direct, for the purpose of ascertaining whether these deeds had been properly executed, or were obtained by fraud. The jury have found that all the deeds were properly executed, and they have negatived the fraud. An application has been since made to grant a new trial on several grounds. . . . The third objection is, that the trust deed was a complete deed at the time the witness attested its execution in the King's Bench prison, and that the learned Judge ought not to have left it to the jury to presume another delivery; that if it was a perfectly executed deed, the alterations made subsequently to its execution, though with the assent of all the parties render that deed a nullity; and that if the trust deed be a nullity, all the other deeds are useless, because they refer to this, and cannot stand as a complete conveyance without it.

"I am disposed to agree, though it is not necessary to decide that point, that if the trust deed is to fall, all the deeds will fall. But I am of opinion that all the deeds must stand. . . . This brings us, therefore, to the great questions in this case. They have been divided into two. It has been first insisted that there was no perfect execution of the deed until the sum of 14,858*l.* was written in it; and if there was not a perfect execution of the deed up to that time, then it was competent for my brother HOLROYD to refer it to the jury, to consider whether they

would not presume an execution of the deed after all the sums were written in, and it was rendered a perfect deed. I am of opinion that this is a correct view of the case.

". . . That brings us to the question, Was there any perfect delivery of this deed antecedent to the period when these sums were written in? If one looks at the deed, and particularly at that part of the deed which my learned brother has referred us to, it is quite impossible that the deed could be considered as having any operation till these sums were actually written in, because, what was the object of the deed? The object of all the deed was to convey the estates to trustees, that those estates might be sold, and that the proceeds of those estates might be applied to pay certain creditors' debts, which were to be ascertained. In the preparation of the draft of this deed, blanks were left for the insertion of sums when those sums should be ascertained. When these parties met in the King's Bench prison, can it be said that that was a perfect execution of the deeds, when the sums that were due to these creditors remained unascertained? The operative part of the deed refers to the payment of particular sums, which, as then, were unascertained. It is quite clear, if nothing had passed at this time, that the deed could not be an operative deed until those sums were introduced, because the great object of the deed was the payment of those sums. I think, therefore, taking it in this point of view, that this was not to be considered as an execution of the deed,—that this was not a complete deed,—and that therefore the case falls within the authority of the case in Cowper, and not within the law which is extracted from Perkins.

"This deed, as I have stated, undoubtedly was not to be considered as complete until the sums were introduced. But it has been said, if it was delivered to the party, it could not be delivered as an escrow, unless so delivered, in terms. Perhaps, technically speaking, this is so; because a deed delivered to a party is not an escrow: a deed delivered to a stranger is an escrow till something is done: but though it is delivered to a party, there are cases, and in the same page, to which my learned brother referred, to show that it is not a perfect and complete deed; Com. Dig. tit. Faits (A 3): 'So if it be at once delivered as his deed, it is sufficient, though he afterwards explained his intent otherwise, as if an obligation be made to A. and delivered to A. himself as an escrow, to be his deed on the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant.' The authorities referred to in the text, in support of this position, are at least conflicting; but in the next division (A 4) it appears that this position about delivery as an escrow is merely a technical subtilty; for the learned writer says, 'If it be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition is performed, though the party happens to have it before the condition is performed.' . . .

"Let us see how that doctrine applies to the present case. The par-

ties meet; something is to be done before a complete deed can be made; the sums are to be ascertained which the different creditors are to be paid. They cannot be ascertained that day; it is ascertained at a subsequent day, and they are written in. Take it, if you please, that this is a delivery of the deed as a deed; it is not a delivery of the deed in the language of Lord Coke, upon condition; that is, upon condition that something is to be done, which at that time was not done? That something is afterwards done: then, and not till then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have ben decided on the operation of deeds, we may say that this deed was not a complete deed, executed so as to have effect in the hands of these parties until the sums were written in.

"I shall not, after what I have said, travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do not decide this case on that ground. I decide it on this, that it either was no deed at all, until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in, which were to give it all its effect. . . . On these grounds I am of opinion that the rule should be discharged."

PRICE v. HUDSON (1888).

125 Ill. 284, 287, 17 N. E. 817.

SHOPE, J.: "This was an action of ejectment, by John N. Price, against Phœbe Hudson and William D. Hudson, to recover the north-
east quarter of the north-west quarter of section 3, township 3
531 north, range 9, east, in Richland county. The general issue was filed, and a trial by jury resulted in a verdict of not guilty. A motion for new trial interposed by plaintiff was overruled, and judgment entered on the verdict, from which the plaintiff below prosecutes this appeal. The record shows that the tract of land in controversy was patented by the government of the United States to the defendant William D. Hudson, prior to the year 1863; that in that year said William D., and his wife and co-defendant, Phœbe Hudson, were occupying the tract of land, and the dwelling house thereon, as a homestead, and have ever since continued to so occupy it. It appears that said William, being about to enlist in the army of the United States, in the year 1863 made and acknowledged a deed for said land, in the usual form, in which his wife was grantee; that he took the deed and placed it in

a trunk in their dwelling house, telling his wife that if he got killed in the army she should take the deed and have it recorded. The grantor was not killed in the war, but returned in 1865, and still survives. The plaintiff claims title through said deed of 1863, from said William D. to Phœbe Hudson.

" . . . The first question presented is, did the title pass to Phœbe Hudson by the deed from her husband? Waiving the question as to the right of the husband to thus convey the homestead, to render the deed operative as a conveyance an unconditional delivery was requisite; or if the delivery was conditional, or to take effect upon the happening of some event in the future, it must appear that the condition has been performed, or that the event has happened. It is not essential, however, to a delivery, that the deed should pass from the hand of the grantor to the grantee. Any disposition made of the deed by the grantor, with the intention thereby to make delivery of it, so that it shall become presently effective as a conveyance of a title, will, if accepted by the grantee, constitute a sufficient delivery. The intention to deliver on the one hand, and of acceptance on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations, of the parties, constituting parts of the *res gestæ*, which manifest such intention; and in like manner the presumption of a delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises. It is not competent to control the effect of the deed by parol evidence when it has once taken effect by delivery, but it is always competent to show that the deed, although in the grantee's hands, has never, in fact, been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the non-delivery of the deed. In this case the deed was placed in the trunk by the grantor, to be taken by the grantee only in the event of the death of the grantor while in the army. He testifies: 'I made this deed, so that if I got killed she would get the land, and my brothers and sisters would not heir it. I never intended she should have a title of the land unless I got killed in the army.' The deed never was placed upon record, and remained in the trunk, where it had been deposited by the grantor, for substantially twenty years, without being taken by the grantee. The testimony shows that the grantor never saw the deed after 1863, when he placed it in the trunk, and the grantee took no manual possession of it until in 1883, about the time the mechanic's lien proceedings were instituted, when she, for the first time, took the deed from the trunk for the purpose of obtaining advice as to its effect, and upon being advised that it was, under the circumstances, ineffectual to convey title, destroyed it. She at no time asserted any claim under the deed, or attempted to do so. Both testify, and are substantially uncontradicted, they did not understand that the deed was ever delivered, or intended to be delivered, or that the title in the land was vested in Mrs. Hudson. An application of the prin-

ciples before announced will fully justify the finding that the deed was in fact not delivered."[3]

BURKE v. DULANEY (1894).

153 U. S. 228, 234, 14 Sup. 816.

This action was brought by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for forty-three hundred and eight dollars and eighty cents, dated Salt
532 Lake City, Utah, August 10, 1883, and payable one year after date, for value received, at the bank of Wells, Fargo & Co. in that city, with interest at the rate of six per cent per annum from date until paid.

The defendant, Burke, denied his liability upon the note, and at the trial below was sworn as a witness on his own behalf. In support of his defence, as set forth in the answer filed by him, he stated the circumstances under which the note was given. He said: "Mr. Dulaney bought this group of mines—the Live Yankee and the Mary Ellen. He came to the Walker House in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property. He says, I will carry an interest for you, and you can take it if you want it, and if not, you can give it back to me after you see the property." To this testimony the plaintiff objected, and the defendant admitting that the agreement referred to by him was oral, the objection was sustained. To this ruling he excepted. Being asked what he did after giving the note in suit, he answered: "I gave the note. I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho Territory, to Cœur d' Alêne mines, and as I was ready to give him a deed at any time he would send me my note. That is all." Objection being made by the plaintiffs to this testimony, the defendant offered to prove "that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burk, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of his note. All this evidence was excluded by the Court upon motion of the plaintiffs to which ruling the defendant excepted. The defendant having stated that the conversation with the testator above referred to, and which was executed by the Court, took place prior to the execution of the note, he offered to prove that at the time the note was made, the same

3—Compare the authorities cited in W., § 2408.

agreement was made orally between him and the testator. This testimony was also excluded, and he excepted. . . .

HARLAN, J.: "The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this Court, especially in cases in which it was sought to deprive *bona fide* holders of or parties to negotiable securities of the rights to which they were entitled according to the legal import of the terms of such instruments. . . . The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the Court, did not in any sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not —except in a named contingency—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling to the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, *prima facie,* indeed, should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing *as the promissory note of the maker,* payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. . . .

"For the reasons stated, and without considering the case in other aspects, we are of opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforcible according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them,

tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them."[4]

PYM v. CAMPBELL (1856).

6 E. & B. 370.

Action on a contract to purchase shares in an invention. The contract was dated Jan. 17, 1854, named the respective shares and prices, and was signed by Campbell, Pym, Mackenzie, and Pritchard.

533 The defendants gave evidence that, in the course of the negotiations with the plaintiff, they had got so far as to agree on the price at which the invention should be purchased if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers appointed by the defendants, when, if they approved, the machine should be bought. At the appointed time the defendants and two engineers of the names of Fergusson and Abernethie attended; but the plaintiff did not come; and the engineers went away. Shortly after they were gone the plaintiff arrived. Fergusson was found, and expressed a favorable opinion; but Abernethie could not then be found. It was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should be then drawn up and signed, which, if Abernethie approved of the invention, should be the agreement, but, if Abernethie did not approve, should not be one. Abernethie did not approve of the invention when he saw it; and the defendants contended that there was no bargain. The Lord Chief Justice told the jury that, if they were satisfied that, before the paper was signed, it was agreed amongst them all that it should not operate as an agreement until Abernethie approved of the invention, they should find for defendant on the pleas denying the agreement. Verdict for the defendants.

Erle, J.: "I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi,* the terms contained in it are conclusive, and cannot be varied by parol evidence. But in the present case the defence begins one step earlier; the parties met and expressly stated to each other that, though for convenience they would then sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was

4—Compare the authorities cited in W., § 2409.

signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

CROMPTON, J.: "I also think that the point in this case was properly left to the jury. If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition, because the agreement on the face of the writing would have been absolute, and could not be varied. But the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernethie approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed, that is a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them, except that where there is a writing it is the record of the contract. The decision in Davis v. Jones, 17 Com. B. 625, is, I think, sound law, and proceeds on a just distinction; the parties may not vary a written agreement; but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible."

STANLEY v. WHITE (1896).

160 Ill. 605, 43 N. E. 729

BAKER, J.: "This was a bill for partition, filed by Stanley R. White, against John Stanley and others, in the circuit court of Iroquois county.

534 The cause was heard upon the original and amended bills of Stanley R. White, the answers thereto, and the cross-bills of Jane S. Talliaferro, Mark A. Stanley and Dicie A. Warren, and the answers and replications thereto. The testimony was taken before the master in chancery, and upon the filing of his report the court found all the allegations in complainant's bills and in the cross-bills to be true, and that partition and division ought to be made as prayed in complainant's bills, and rendered a decree accordingly. From that decree defendant, John Stanley, prosecutes this appeal. He objects to that part of the decree awarding partition of the north-east quarter of the southwest quarter of section 33, township 27, north, range 12, west of the second principal meridian. His contention is, that Jane Talliaferro, Mark Stanley and Dicie Warren have no rights in said land, and are not

entitled to the one-sixth interest each therein ordered by said decree to be set off to them. He claims that their interests therein they had conveyed to him by a good and sufficient deed prior to the institution of this suit, and he asks that the decree, as to that part of it awarding to said Jane Talliaferro, Mark Stanley and Dicie Warren a one-sixth interest each in said land, be reversed.

"The evidence shows that appellant and Jane Talliaferro, Dicie Warren, Mark Stanley and Joseph Stanley, children, and Stanley R. White, grandchild, of Micajah Stanley, who died intestate, are his sole surviving heirs. Among other lands of which he died seized was the land above described. After his father's decease, appellant desired to obtain a conveyance to himself of the interests of the heirs in said land. To that end he had prepared for him the deed here in controversy, which bears the date of March 15, 1889, and was signed by Mark A. Stanley and Jennie E., his wife, Jane S. Talliaferro, widow, and Dicie A. Warren and George E., her husband, all of whom admit that they signed the deed with a full knowledge of its contents. Mark A. and Jennie E. Stanley and Jane S. Talliaferro duly acknowledged the deed on July 25, 1889, and it was acknowledged by Dicie A. and George E. Warren on November 1, 1892. The evidence shows that all of the grantors did not sign the deed at the same time, but that some signed at one time and others at other times, and that after the several signings the deed was each time returned either to appellant or to his mother, who was acting for him. The deed has remained under his control ever since the day it bears date. The grantors do not contend there was any fraud, duress or undue influence used to induce them to sign the deed. Their only claim is, that it was the understanding between them and appellant, at the time the deed was executed, that it was not to be operative unless signed by all the heirs of Micajah Stanley.

"The question to be decided is, was there, or was there not, a delivery of this deed by the grantors to appellant? The answer depends upon the answer to the further question, what was the intention of the parties at the time the transaction took place? If the parties intended that a present title should pass, then plainly there was a delivery. If, after appellees had signed and acknowledged the deed, they had merely handed it to appellant for the purpose, solely, of having him get the signatures of the other heirs thereto, that would not have constituted a delivery, but would have been a mere manual transfer of possession, and would not have passed the title. If, however, the deed being ready for delivery, they had given it to him intending at the time to pass a present title, but with the mutual verbal understanding that the deed should subsequently become inoperative and void if the other heirs should refuse to sign it when requested so to do, then there would have been a delivery and the title would have passed, and the grantors could not thereafter set up the non-performance of the

condition in order to defeat the deed, but would be concluded by its terms. (Stevenson v. Crapnell, 114 Ill. 19; McCann v. Atherton, 106 id. 31; Weber v. Christen, 121 id. 91.) The latter hypothesis presents the facts shown by the record in this case. The deed, absolute on its face, was properly signed and acknowledged. The grantors were acquainted with its contents, and they deposited it with the grantee, and under his control it has remained ever since. The weight of the evidence shows that when the grantors gave him the deed they thought they were divesting themselves of the title, and intended so to do. Their only concern seems to have been that all the other heirs should do as they were doing, hence the condition was added that if the other heirs refused to sign the deed it should become void. That was the condition, and not that the deed was *not to take effect* unless signed by the other heirs. . . .

"Appellees rely upon Roundtree v. Smith, 152 Ill. 493, . . . as sustaining their contention that there was here no delivery. The Roundtree case differs from the case at bar in this: that there the deeds were given by the grantor to the grantee with the mutual understanding that they were *not to take effect* until the return by the grantee of certain securities to the grantor, and that the deeds were to remain subject to the latter's control until the securities should be offered and accepted. The securities, however, were not given. We said there, as here, that the intention must govern, and held that there was no delivery because the deeds were not given to the grantee with the intention of then passing the title; that the grantor had never parted with the control over them, and she consequently had a right to demand them back at any time before the transaction was completed. . . . We are of the opinion that appellant is entitled to the estate in the land in controversy which the deed here in question purports to convey to him."[1]

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2. *Intent and Mistake.*

BRETT v. RIGDON (1568).

Plowd. 340, 343.

"The making of a testament consists of three parts, as do all other human acts which are done with discretion [*i. e.* sound mind], viz., inception, progression, and consummation. . . . But there is one same
535 thing annexed to each of these parts, and that is the intent of the party, for every one who does any act with discretion has an intent in the inception of it, . . . and in the progression and consummation of it the same intent also subsists; so that one same intent runs through all the parts and continues in the doing of them".

1—Compare the authorities cited in W., § 2410; and the doctrine of No. 562, *post.*

JOHN AUSTIN, *Jurisprudence,* Campbell's ed., Sect. XVIII, XIX, §§ 601-617 (about 1832): "In order that we may settle the import of the term 'intention,' it is necessary to settle the import of the term
536 'will.' For, although an intention is not a volition, they are inseparably connected. . . . These expressions, and others of the same import, merely signify this: Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements. . . . For example: If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end. . . . Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled volitions. And as these are the only volitions, so are the bodily movements, by which they are immediately followed, the only acts or actions properly so called. . . . Most of the names which seem to be names of acts, are names of acts coupled with certain of their consequences. For example: If I kill you with a gun or pistol, I shoot you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an act, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it at your head or body and pull the trigger. These I will.. The contact of the flint and steel, the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are consequences of the act which I will. I will not those consequences, although I may intend them. But in common language the words 'will' and 'intend' are often confounded. . . . To desire the act is to will it. To expect any of its consequences is to intend those consequences. The act itself is intended as well as willed. For every volition is accompanied by an expectation or belief, that the bodily movement will immediately follow the wish. And hence (no doubt) the frequent confusion of will and intention. Feeling that will implies intention, numerous writers upon jurisprudence (and Mr. Bentham amongst the number), employ, 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply 'will'."

THOMAS ERSKINE HOLLAND, *Jurisprudence,* 3d ed., 99 (1886): "It was laid down by Savigny that, in order to the production of a juristic
537 act, the will and its expression must be in correspondence. This view is in accordance with the *prima facie* interpretation of most of the relevant passages in the Roman lawyers, and is still predominant

in Germany, but certainly cannot be accepted as universally true. An investigation into the correspondence between the inner will and its outward manifestations is in most cases impossible, and where possible is in many cases undesirable. . . . Is it the case that a contract is not entered into unless the will of the parties are really at one? Must there be, as Savigny puts it, 'a union of several wills to a single, whole, and undivided will?' Or should we not rather say that here, more even than elsewhere, the law looks, not at the will itself, but at the will as voluntarily manifested? When the law enforces contracts, it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise. If, for instance, one of the parties to a contract enters into it, and induces the other party to enter it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless. Not only will the dishonest contractor be unable to set up his original dishonest intent as an excuse for non-performance, but should he, from any change of circumstances, become desirous of enforcing the agreement against the other party, the latter will never be heard to establish, even were he in a position to do so by irrefragable proof, that at the time when the agreement was made the parties to it were not really of one mind. . . . The language of systems of positive law upon the point is generally ambiguous, nor is this to be wondered at. The question is practically a new one. The process of giving effect to the free acts of the parties to a contract, rather than to the fact that certain rigidly defined formalities have been complied with, has lasted so long that legal speculation has only recently begun to analyse the free act itself into two factors of an inner will and an outward expression, and to assign to one or to the other a dominant place in the theory of contract. Just as the Romans used, without analysing them, the terms *'velle,' 'concensus,' 'sententia,'* so the modern Codes, though some appear to look rather to the inner will, others rather to its outward expression, as a rule employ language which is capable of being interpreted in either direction. The same may be said of the English cases. In these one constantly meets with such phrases as 'between him and them there was no *concensus* of mind,' 'with him they never intended to deal'; but one also meets with much that supports the view of the question which we venture to hope may ultimately commend itself to the Courts as being at once the most logical and the most favourable to the interests of commerce. . . . In other words:[3] the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' *i. e.* a judge or jury, would put upon such acts. This luminous principle at once sweeps away the ingenious speculations of several generations of moralists, while it renders needless long lists of subtle distinctions which have been drawn from decided cases."

POLLOCK, C. B., in CORNISH v. ABINGTON, *4 H. & N.*, 549, *555* (1859): "The word 'wilfully,' in the rule as laid down in Pickard v. Sears, means nothing more than 'voluntarily.' Lord Wensley-
538 dale, perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

FOSTER v. MACKINNON (1869).

L. R. 4 C. P. 704.

Action by indorsee against indorser on a bill of exchange for 3000*l.* drawn on the 6th of November, 1867; by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed suc-
539 cessively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud. The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances:—Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested; and the defendant had some time previously, at Callow's request, signed a guarantee for 3000*l.*, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back

of the bill immediately after that of Cooper. Callow only shewed the defendant the back of the paper: it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fradulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict. The jury returned a verdict for the defendant.

Byles, J.: "This was an action by the plaintiff as indorsee of a bill of exchange for 3000*l.*, against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud. . . . A rule nisi was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing-up, and secondly, on the ground that the verdict was against the evidence.

"As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act. It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which the name is appended.

"The authorities appear to us to support this view of the law. In Thoroughgood's Case (2 Co. Rep. 9*b*), it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to Thoroughgood's Case, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor. . . . The position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does

not bind him, is supported by many authorities. . . . Accordingly, it has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: Swan *v.* North British Australasian Land Company (2 H. & C. 175).

"These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferrees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hand of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined. But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper.

"To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons—first, that he never in fact signed the writing declared on—and, secondly, that he never intended to sign any such contract. In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument. . . .

"For these reasons, we think the direction of the Lord Chief Justice was right. With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry. The rule, therefore, will be made absolute for a new trial."

TRAMBLY v. RICARD (1881).

130 Mass. 259.

COLT, J.: "The first count in the plaintiff's declaration is for tres pass to real estate, and removing the plaintiff's furniture. The second is for the conversion of the same furniture. The defendants, in
540 justification of their acts, rely upon an alleged breach of the plaintiff's written agreement, which stated that he borrowed the furniture of them, and by which he agreed to hold the furniture as their property, paying them a weekly sum for the use of the same, with the privilege of buying it at a price named. To this contract, the plaintiff, being unable to read or write, affixed his mark. He contended at the trial that it was obtained from him by fraud, and offered to prove that, before he affixed his mark, the defendants orally agreed to sell the furniture to him at a price named, part of which was to be paid down, and the balance in instalments; that nothing was said at any time about borrowing or paying rent for it; and that, immediately after agreeing on the terms, the defendants requested him to sign the written contract, which he did, supposing the same to contain the terms and stipulations of the oral agreement. The plaintiff testified that the written agreement was not read or explained to him, and that he did not request that it should be. He admitted that the defendants made no verbal or written representations of its contents. The judge excluded the evidence; and the only question here is whether the jury would be justified in finding from it that the written agreement was fraudulently obtained.

"In the absence of fraud or imposition, it is presumed that the terms of a written contract were known and assented to by the parties who signed it; that they either read it, or were informed of its contents, or were willing to assent to its terms without reading it. This presumption is not defeated by showing that the contract signed was different from that which one or the other supposed he was signing. It is not permitted to show that another contract was the real contract, because the parties have chosen to put their agreement in writing, as the better way to preserve its terms, and parol evidence cannot be admitted to vary it. But this familiar rule does not exclude evidence which tends to show that the written contract was by some fraud or imposition never in fact freely and intelligently signed by the party sought to be charged. It may always be shown that he was not possessed of the

requisite capacity, or that his signature was obtained by fraud. . . . A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is a fraud in one who with knowledge of the fact attempts to enforce it. . . . We are of opinion, that the evidence offered should have been submitted to the jury, with proper instruction."[1]

ESSEX v. DAY (1885).

52 Conn. 483.

Suit for the correction of certain bonds issued by the plaintiffs, which were in terms payable at the end of twenty years from their date, but which were intended to be issued with a provision that the
541 town might at its option pay them in ten years from date; brought to the Superior Court in Middlesex County. The following facts were found by a committee: On the 25th day of September, 1869, the town of Essex subscribed for four hundred and eighty shares of the capital stock of the Connecticut Valley Railroad Company, and on the 27th day of April, 1870, directed the issue of town bonds to the amount of $48,000 to pay for the stock. . . .

At a special meeting held on the 27th day of April, 1870, a committee had made the following report: "That the town issue coupon bonds of the denomination of one thousand dollars each, numbered from one to forty-eight consecutively, to be payable at the option of the town in ten years from date, and due in twenty, denominated ten-twenty bonds, bearing interest six per cent per annum; the interest payable semi-annually; . . ." The town passed the resolution recommended and the selectmen at once entered upon their duties under it. They did not intend to have the bonds printed as they were printed, as below stated, but did intend that they should be printed so as to be payable at the option of the town in ten years from their date.

The printing of the bonds was procured by James C. Walkley, the president of the railroad company, who attended to that duty for Essex and other towns. He did it for Essex at the request of C. O. Spencer, agent of the town, who gave him a written memorandum which Mr. Walkley gave to the Kellogg & Bulkeley Printing Company, and which called for ten-twenty bonds only. The printing company

1—Compare the authorities cited in W., § 2415, and the following statement of the rule: *Black* v. *R. Co.*, 111 Ill. 351, 358 (1884): "When a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound."

2—Compare the authorities cited in W., § 2416.

consulted with Mr. Walkley as to the general form of the bonds, and showed him blank forms of bonds; but the bonds were printed twenty-year bonds by mistake in the printing. The bonds as printed were returned to the agents of the town, and "competent authority" appointed by the selectmen signed them and they were then left with the town treasurer to be sold. There were in all forty-eight bonds of $1,000 each. Of these bonds the four in question in this case were sold about January 1st, 1870, to F. A. Tiffany, then a citizen of the town of Essex. Each bond had attached interest coupons payable every six months through the twenty years from date. . . . At the time the town treasurer signed the bonds he signed them supposing they were payable at the option of the town in ten years from their date. He signed them all without reading any of them. The bonds were left with the town treasurer for delivery to purchasers. . . .

At the time Tiffany bought the bonds the then town treasurer, Edward W. Redfield, told him that the bonds were ten-twenty bonds, and at the option of the town could be called in and paid at the expiration of ten years from their date, and that such was the vote of the town in authorizing the issue of the bonds. But Tiffany did not care whether the bonds were redeemable in five, ten or twenty years, and would have bought them as readily in the one case as in either of the others. Tiffany sold these bonds in the autumn of 1878 to Daniel S. Swan. Before Swan bought them he called upon the then town treasurer in relation to the bonds, and to know what the action of the town would be, and the treasurer told him what the vote of the town was in authorizing the issue of the bonds, and that the town would call them in at the expiration of ten years from their date, and pay them up; and that the town had already called them in, but by mistake they had been called a year too soon. Swan sold these bonds to the defendant April 20th, 1880, at a premium of not over two per cent. The defendant at the time of his purchase had full knowledge of the vote of the town in relation to the issue of the bonds, and that the town had called them for payment. . . . On the 25th of February, 1880, the town gave notice by publication in various newspapers that the bonds would be paid at the office of the treasurer on the 1st of April, 1880, and that interest upon them would cease at that time. None of the agents of the town appear to have had any knowledge that there had been a mistake in the issue of the bonds until the town was informed, after February 25th, 1880, by the Chelsea Savings Bank, a holder of some of them, that the bonds on their face were twenty year bonds and not redeemable before. . . . Upon these facts the court (SANFORD, J.,) rendered judgment for the plaintiffs and for a correction of the bonds by inserting in them an option on the part of the plaintiffs to pay them at the expiration of ten years from their date. The defendant appealed.

LOOMIS, J.: "It is not necessary for us to consider in this case whether the bonds issued by the town are to be regarded as negotiable

and therefore protected in the hands of a *bona fide* holder against the correction which the plaintiffs seek to procure. We may assume for the purposes of this case, that, in the absence of notice on the part of the defendant of the error claimed by the plaintiffs to have intervened in the printing of the bonds, the correction could not be made.

"Starting with this assumption, the questions which present themselves for consideration are the following:—1. Have the plaintiffs, through their agents, been guilty of such negligence, either in the original execution and issuing of the bonds, or in the seeking of a correction of the error when discovered, as precludes them from the equitable relief which they seek? 2. Did the first purchaser of the bonds, and afterwards the purchaser from him, and finally the defendant at the time of his purchase, have such knowledge of the error in the bonds, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek? 3. Was the error one of such a character that it can be corrected by a court of equity? . . .

"1. And first—have the plaintiffs been guilty of a fatal negligence? . . . We think therefore that the negligence of the plaintiffs in the execution and issuing of the bonds, was not of such a character as to preclude all equitable relief against the present defendant. . . .

"2. Did the first purchaser of the bonds in question, and afterwards the purchaser from him, and finally the defendant at the time of his purchase, have such knowledge of the mistake, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek? . . . We think the only reasonable view of the matter is, that the defendant knew, or had such information that the law would impute to him knowledge, that the bonds were by mistake issued as twenty year bonds instead of ten-twenty ones.

"3. Was the mistake one of such a character that it can be corrected by a court of equity? It is claimed by the counsel for the defendant that the mistake, in such a case, must be mutual, and the cause of the agreement, and numerous authorities are cited in support of the proposition. This rule, within the limits of its proper application, is founded in reason. If a contract is corrected by a court of chancery to make it conform to the intention of one of the parties, it is of course forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party.

"But this case is not that of that character nor governed by that rule. A grantor by mistake embraces in his deed a parcel of land that neither party intended to have conveyed. The grantee sees his mistake, but does not call the attention of the grantor to it, and afterwards claims the parcel thus accidentally conveyed. Or a person offers a reward of $100 for the detection and arrest of a burglar, but by mistake and without his notice it is printed $1,000. A man who knows

of the mistake arrests the burglar and claims the $1,000. In each of these cases the error is not mutual, but wholly on the one side. What is there on the other? Not mistake, but fraud. That fraud can never stand for a moment in a court of equity. But suppose the case to be one where, instead of actual fraud, there is merely such knowledge, actual or imputed by the law, as makes it inequitable for the purchaser to retain his advantage. The Court will deal as summarily with that inequitable position of the party, as in the other case with his fraud. . . .

"It is however claimed, on the part of the defendant, that the mistake must have been one that induced the contract on the part of the purchaser; that is to say, that the purchaser must have taken the bonds for the very reason that they were twenty year bonds and not ten-twenty ones. But it is obvious that the hardship attending the correction of a contract is all the greater where the other party accepted the contract for the reason that he supposed himself to be acquiring what the correction of it deprives him of. But supposing the purchasers of the bonds in question had taken them in entire indifference as to whether they were twenty year or ten-twenty bonds, and that the defendant was now endeavoring to assert rights under them to which he had before been indifferent, would there be no remedy in equity? Can it be claimed for a moment that equity, which deals with substance and not mere form, which applies reason and not mere arbitrary rules, would see no substantial difference between the case of a party who, when he accepted the contract, was indifferent with regard to a known mistake and so remained, and one who, at first indifferent, was now trying to take an unjust advantage of the mistake?

"We conclude, therefore, that there was nothing in the nature of the mistake, or in the relation of the parties to it, that should lead a court of equity to refuse the relief sought."

PARK BROTHERS & CO. v. BLODGETT & CLAPP CO. (1894).
64 Conn. 28, 29 Atl. 133.

TORRANCE, J.: "This is an action brought to recover damages for the breach of a written contract, dated December 14th, 1888. The contract is set out in full in the amended complaint. It is in
542 the form of a written proposal addressed by the plaintiff to the defendant, and is accepted by the defendant in writing upon the face of the contract. Such parts of the contract as appear to be material are here given: 'We propose to supply you with fifteen net tons of tool steel, of good and suitable quality, to be furnished prior to January 1st, 1890, at' prices set forth in the contract for the qualities of steel named therein. 'Deliveries to be made f. o. b. Pittsburg, and New York freight allowed to Hartford. To be specified for as your wants may

require.' The contract was made at Hartford, by the plaintiff through its agent A. H. Church, and by the defendant through its agent J. B. Clapp. After filing a demurrer and an answer which may now be laid out of the case, the defendant filed an 'answer with demand for reformation of contract,' in the first paragraph of which it admitted the execution of said written contract. . . . The present appeal is based upon what occurred during the trial with reference to the reformation of the contract. Upon that hearing the agent of the defendant was a witness, on behalf of the defendant, and was asked to state 'what conversation occurred between him and A. H. Church in making the contract of December 14th, 1888, at and before the execution thereof and relevant thereto.' The plaintiff 'objected to the reception of any parol testimony on the ground that the same was inadmissible to vary or contradict the terms of a written instrument, or to show any other or different contract than that specified in the instrument, or to show anything relevant to the defendant's prayer for its reformation.' The Court overruled the objection and admitted the testimony, and upon such testimony found and adjudged as hereinbefore stated.

"The case thus presents a single question—whether the evidence objected to was admissible under the circumstances; and this depends upon the further question, which will be first considered, whether the mistake was one which, under the circumstances disclosed by the record, a court of equity will correct. The finding of the Court below is as follows:—'The actual agreement between the defendant and the plaintiff was that the plaintiff should supply the defendant, prior to January 1st, 1890, with such an amount of tool steel, not exceeding fifteen tons, at the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. But by the mutual mistake of said Church and said Clapp, acting for the plaintiff and defendant respectively, concerning the legal construction of the written contract of December 14th, 1888, that contract failed to express the actual agreement of the parties; and that said Church and said Clapp both intended to have the said written contract express the actual agreement made by them, and at the time of its execution believed that it did.' No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the ground of mistake.

"The plaintiff claims that the mistake in question is one of law and is of such a nature that it cannot be corrected in a court of equity. That a court of equity under certain circumstances may reform a written instrument founded on a mistake of fact is not disputed; but the plaintiff strenuously insists that it cannot, or will not, reform an instrument founded upon a mistake like the one here in question which is alleged to be a mistake of law. The distinction between mistakes of law and mistakes of fact is certainly

recognized in the text books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. . . . Under certain circumstances a court of equity will, and under others, it will not reform a writing founded on a mistake of facts; under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is whether it is such a mistake as a court of equity will correct; and this perhaps can only or at least can best be determined by seeing whether it falls within any of the well recognized classes of cases in which such relief is furnished. . . .

"The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by reason of a mutual mistake, made, as we must assume, innocently and without any such negligence on the part of the defendant as would debar him from the aid of a court of equity; the rights of no third parties have intervened; the instrument if corrected will place both parties just where they intended to place themselves in their relations to each other; and if not corrected it gives the plaintiff an inequitable advantage over the defendant. It is said that if by mistake words are inserted in a written contract which the parties did not intend to insert, or omitted which they did not intend to omit, this is a mistake of fact which a court of equity will correct in a proper case. Sibert v. McAvoy, (15 Ill. 106). If then the oral agreement in the case at bar had been for the sale and purchase of five tons of steel, and in reducing the contract to writing the parties had by an unnoticed mistake inserted 'fifteen tons' instead of 'five tons,' this would have been mistake of fact entitling the defendant to the aid of a court of equity. In the case at bar the parties actually agreed upon what may, for brevity, be called a conditional purchase and sale, and upon that only. In reducing the contract to writing they, by an innocent mistake, omitted words which would have expressed the true agreement and used words which express an agreement differing materially from the only one they made. There is perhaps a distinction between the supposed case and the actual case, but it is quite shadowy. They differ not at all in their unjust consequences. In both, by an innocent mistake mutually entertained, the vendor obtains an unconscionable advantage over the vendee, a result which was not intended by either. There exists no good substantial reason as it seems to us why relief should be given in the one case and refused in the other, other things being equal. It is hardly necessary to say that in cases like the one at bar, courts of equity ought to move with great caution. Before an instrument is reformed under such circumstances, the proof of the mistake and that it really gives an unjust ad-

vantage to one party over the other, ought to be of the most convincing character. . . .

"Upon principle, then, we think a court of equity may correct a mistake of law in a case like the one at bar, and we also think the very great weight of modern authority is in favor of that conclusion. The case clearly falls within that class of cases where there is an antecedent agreement, and in reducing it to writing, the instrument executed, by reason of the common mistake of the parties as to the legal effect of the words used, fails as to one or more material points, to express their actual agreement. . . . If this is so, then clearly he was entitled to the parol evidence which the plaintiff objected to; for in no other way ordinarily can the mistake be shown."

GARRARD v. FRANKEL (1862).

30 Beav. 445.

The plaintiff, Mr. Garrard, was the owner of the house No. 211 Oxford Street, for a long term of years; it had been let to John Parnell at £230 per annum, which was shown to be its real value. In July, 543 1860, this house was to be let, and on the 30th of July, 1860, the defendant, Mrs. Frankel, who was then a stranger to the plaintiff, wrote to him asking for the particulars relating to this house and the terms on which the premises were to be let. On the 1st of August, 1860, the plaintiff wrote to the defendant to the effect that the lowest price required was £240 rent, clear of all taxes, the tenant repaying the insurance, and that the fixtures might be purchased or not, at the tenant's option, and that, if not purchased, they would be removed. The defendant said that she had never received this letter, but the Court thought otherwise. On the 6th of August Mrs. Frankel called at the office of Messrs. Garrard & James respecting the house. The plaintiff was absent, having gone to Paris on the 1st of August, where he remained until the 11th; but she then saw Mr. James his partner. Mr. James, in answer to her further inquiries, informed her that Mr. Garrard would not let the premises for less than £240, nor otherwise than on a lease for seven, fourteen or twenty-one years, similar to that granted to the former tenant. She expressed herself satisfied, and said that the plaintiff's immediate determination was necessary, that she held No. 1 Great Portland Street at a rent of £160 per annum and that the lease was about to expire. She also said that she rented another house in Oxford Street at £145 per annum, and she referred Mr. James to Mr. Peter Robinson, and Mr. Turrill her landlord. On the 9th of August, 1860, the defendant, Mrs. Frankel, wrote to the firm as follows: "Gentlemen—I shall feel extremely obliged if you can give me

an answer respecting the house and shop in Oxford Street tomorrow; as I must give a decisive answer on Saturday next respecting the other house that I am in treaty for." On the 14th of August, 1860, Mrs. Frankel called on Mr. Garrard, who had returned from Paris on the previous Saturday; he informed her that he was not altogether satisfied of her responsibility, and that he was not disposed to let the house to her, unless she was prepared to pay a premium of £125 as a further guarantee for her responsibility, in which case he would reduce the rent from £240 to £230. The defendant, after consulting her friends, agreed to pay a premium, and the inquiries proceeded. The plaintiff, on the 17th of August, then wrote the following letter: "Madam—If you will favor me with a call on Monday between twelve and one, we shall no doubt be able to settle finally about the house in Oxford Street. I can then show you the form of lease granted to the late tenant, and yours would be similar to it. My clerk called on Mr. Turrill yesterday, but he was unwell, his daughter said he would write." On the 20th of August, 1860, Mrs. Frankel called on Mr. Garrard, who showed her the draft of the lease to the former tenant; she then agreed to take a lease in the same form, and they signed the following memorandum which was written within the fold of the draft: "The within-named Stephen Garrard, as landlord, agrees to let, and the within-named Elizabeth Jane Frankel, as tenant, agrees to take, the premises within described for twenty-one years from Michaelmas next, at the rent of £230 clear of all taxes, and in all respects on the terms of the within lease. . . ."

Mr. Garrard afterwards inserted certain words in the draft lease, stating the amount of the premium to be paid, and he inadvertently filled in the blank for the amount of rent to be paid with the figures £130 instead of £230. The lease and counterpart were engrossed with this error, and on the 27th August, 1860, they were executed without its being discovered. Mr. Garrard did not discover the mistake until just before Christmas Day, 1860, on which day the first payment of rent under the lease became due. He, however, wrote to Mrs. Frankel, asking for £57, 10s. for the quarter's rent, being at the rate of £230 per annum. In answer to this, Mrs. Frankel, on the 11th January, 1861, wrote, insisting that the rent payable under the lease was only £32, 10s. or after the rate of £130 per annum. This led to further correspondence, and ultimately, on the 26th day of February, 1861, the plaintiff instituted this suit, praying that the lease of the 27th of August, 1860, might be rectified, by substituting the rent of £230 instead of the rent of £130, and that the lease might be produced for that purpose, or otherwise, that the lease might be delivered up and cancelled, the plaintiff offering to execute a new lease at the rent of £230 to Mrs. Frankel at his own expense.

The bill also prayed an injunction restraining her from parting with or incumbering the lease, or doing any act to the Plaintiff's preju-

dice. It appeared, however, that on the 21st of September, 1860, Mrs. Frankel had assigned the lease, by way of mortgage, to Messrs. Block & Son, to secure a sum of £150 which she had borrowed of them, and such further sums as, on an account current, should be due to them from her, not exceeding £300. On the 22d of February 1861, Dr. Brunn, who had previously lent Mrs. Frankel £105, paid Messrs. Block & Son £251, 2s. 6d. due to them from her. They thereupon reassigned the lease to her, but, at her request, they handed the lease and mortgage to Dr. Brunn. The bill was therefore amended, and he was made a party to the suit.

Mr. *Selwyn* and Mr. *Bevir,* for the plaintiff, argued that a mistake had been clearly proved, and that the plaintiff was entitled to have the lease reformed so as to make it in accordance with the real contract between the parties, and, secondly, that Dr. Brunn, who had no more than an equitable interest, had no right as against the Plaintiff, whose equitable rights were prior in point of time. Mr. *Follett* and Mr. *Kingdon,* for Mrs. Frankel, argued that there had been no error or mistake; that if there had been, it was merely on the part of the Plaintiff, and that it was now clearly settled that a document could only be reformed where the mistake was mutual. Mr. *Bruce,* for Dr. Brunn, argued that he was a purchaser for valuable consideration without notice, and though the legal estate was not vested in him, still he stood in the position of Messrs. Block, who had advanced their money and obtained the legal estate, which was now held as trustee for the assignee of their mortgage. That the difficulty had not been occasioned by the Plaintiff's own neglect, which he could not set up as against innocent parties. . . .

The Master of the Rolls (Sir John Romilly): "In this case the bill is filed to rectify a mistake, consisting in the insertion in the lease of a house in Oxford Street, granted by the Plaintiff to the Defendant, of the figures of '130' instead of '230,' as the amount of the annual rent to be paid. The object of the bill is to substitute *'two'* for *'one'* in this part of the lease.

"The first question is one of fact, whether the mistake was really made, and if so, by whom and under what circumstances. That the mistake was really made by the Plaintiff, is, I think, indisputably proved. . . .

"The next question is also one of fact, it is this:—Did the Defendant know that this statement of £130 per annum was a mistake? It was certainly not a mistake committed by her, and thereupon it is argued that there must be an end of the case, for that, to enable this Court to interfere to rectify a mistake, the mistake must be mutual. But though, as a general rule, this is correct, it does not apply to every case. The Court will, I apprehend, interfere in cases of mistake, where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it. I am therefore of opinion

that this question arises:—Did the Defendant *bona fide* believe that the contract she had entered into was one to take a lease of the premises in question, determinable at her option, at seven, fourteen, or twenty-one years, at £130 per annum rent? . . . . I am of opinion that the Defendant must have perceived the discrepancy between the amount of rent which had been previously stated by the Plaintiff, which was the same amount as was specified in the agreement signed by her, written within the fold of the draft lease, and the amount contained within the body of it. . . .

"On this state of facts the question of law arises, how a case so circumstanced has to be dealt with. . . . I am disposed to believe that the Defendant, when she signed it, knew that the lease within contained the figures £130, although she knew that the agreement in the fold was different. My belief is that if they had both been £230, she would equally have signed the agreement, and would also have executed the lease; but I do not think that I am entitled to found any decree on such a belief. I doubt therefore whether I can compel Defendant to be bound by a lease inconsistent with a portion of the agreement which she signed, and which, in one view which might be taken of it, might govern the other portion. I am quite clear that I cannot compel the Plaintiff to be bound by the terms of the lease as it stands, or permit the Defendant to derive any advantage from this mistake, and, in that respect, the Plaintiff is in my opinion entitled to relief.

"I think the proper course to be taken is the following: I shall give the Defendant the option of retaining or rejecting the lease, but if she retains it I shall decree the lease to be reformed by substituting the rent of £230 for £130 per annum. If, however, the Defendant wishes to give up the lease and agreement altogether, I shall permit her so to do, but in that case I shall direct her to pay for the use and occupation of the house, during the time she had possession of it, at the rate of £230 per annum, which was the rent paid by the last tenant, and which I consider to be proved to be the value of it. . . .

"The next question which arises in this suit is to consider what ought to be done with respect to Dr. Brunn and his claim as mortgagee of the Defendant's lease. That stands in this way:—After the lease had been executed it was assigned by the Defendant to secure a sum of £300 and interest to Messrs. Block, who were wholly ignorant of any mistake. When the mistake was discovered and the contest in this suit arose, the Plaintiff applied to Messrs. Block to assign the legal estate to him, and he offered to pay them what was due on their mortgage. Messrs. Block, under the advice of their solicitor, and in my opinion very properly, declined to give any advantage to either side; they undertook not to assign the lease to anyone except the Defendant or the Plaintiff, but that if the Defendant, to whom they had advanced the money, was prepared to repay them, they would reassign the lease to her first; but if not, they would, upon repayment

of the amount due, assign the lease to the Plaintiff. The Defendant induced Dr. Brunn to advance the money to Messrs. Block, and they thereupon reassigned the lease to the Defendant, who gave such security thereon as she could to Dr. Brunn, who had, by that time, notice of the whole transaction, this Court having also interposed by injunction to prevent any fresh dealing with the lease, so as to create new obligations upon it. In this state of things I think that Dr. Brunn stands exactly in the position of Messrs. Block, with the exception that he has not got the legal estate. As regards the Messrs. Block, I am clearly of opinion that they were purchasers for value, without notice, to the extent of the amount which they advanced, and, in my opinion, in equity Dr. Brunn stands in their place. I am of opinion, therefore, that the Plaintiff must pay Dr. Brunn the amount due on Messrs. Blocks' mortgage transferred to him, though not directly, from them; and that if the Plaintiff do not repay it, Dr. Brunn must have a charge for this amount on the house, as against the Plaintiff and his interest therein. I think the same observations also apply to a sum of £105 which Dr. Brunn advanced to the Defendant on the security of the lease before he had any knowledge or any reason to suppose that there was any error in the body of the lease itself; and I also think that Dr. Brunn must be allowed to add his costs of this suit to his security, and that the whole must be a charge on the house and premises in the hands of the Plaintiff if the lease be given up, or upon his interest therein if the lease be reformed. But I am of opinion that, upon payment of this, the Plaintiff is entitled to have inserted in the decree an order against the Defendant to repay the total amount so paid by him to Dr. Brunn; in addition to which, if the Defendant elects to keep the house with the lease as altered by the introduction of the increased rent, her interest therein will, whatever be its value, be primarily liable for the repayment of such sum."[1]

BARKER v. STERNE (1854).

9 Exch. 684.

At the trial, before POLLOCK, C. B., at the London Sittings, it appeared that Messrs. Seegers, who were commission agents in London, were in the habit of receiving consignments of goods from
544 one Matthes, a merchant residing at Redevitz, in Bavaria. On these occasions it was usual for Matthes to send to Messrs. Seegers a blank form of a bill of exchange, with his signature as drawer, and they filled it up and got it accepted by the purchaser of the goods. In accordance with that course of dealing, Matthes, at Redevitz, signed, as drawer, a blank form of the bill in question, and sent it to Messrs.

1—Compare the authorities cited in W., §§ 2417, 2418.

Seegers in a letter advising them of a consignment of goods, and Messrs. Seegers in London filled up the blanks by inserting the date, amount, &c., as stated in the declaration; and, having got the bill accepted by the defendant, applied it to their own purposes, when it was *bona fide* endorsed to the plaintiffs for value. It was submitted, on behalf of the defendant, that, as Messrs. Seegers had only a limited authority to fill up the blank form, in order to obtain payment of the goods consigned to them, this was in effect a bill drawn in London, and therefore required a stamp. The learned Judge overruled the objection, and a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter a verdict for him. . . .

Pollock, C. B.: "This was a motion for a new trial, in a case tried before me at Guildhall. It was an action on a bill of exchange, drawn abroad in blank, and filled up in London. Mr. *Chambers* moved for a new trial, on the ground that, the blank form of the bill having been improperly filled up contrary to the direction and intention of the drawer, it was not binding as against him, and that it only became a bill in London, and consequently required a stamp. We are of opinion, on the authority of Snaith v. Mingay, that this is not an inland bill, and therefore no stamp is necessary. It seems to us that the mode in which Mr. *Chambers* presented the objection must fail, for in reality, *quoad* mankind at large, the authority of a person who holds such a piece of paper with the name of a drawer or an acceptor upon it, must be judged of from the paper itself. If a person in this country puts his name to a blank form of bill, either as drawer or acceptor, it may be filled up with any amount the stamp will bear, and he cannot shelter himself from liability by any private instructions contained in a separate document, of which the rest of the world must necessarily be ignorant. There is a case (Younge v. Grote, 4 Bing. 253) where a customer of a banker, on leaving home, gave to his wife several blank forms of checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one of them so carelessly, that a clerk to whom she delivered it was enabled to alter the amount to a larger sum, in such a way that the bankers could not discover the alteration, and they paid it: it was held that the loss must fall on the drawer, as it was caused by his negligence. Now, whether the better ground for supporting that decision is, that the drawer is responsible for his negligence, which has enabled a fraud to be practised, or whether it be considered that, when a person issues a document of that kind, the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions, it is unnecessary to inquire. I should prefer putting it on the latter ground. For these reasons we think that, in this case, there ought to be no rule."[2]

2—Compare the authorities cited in W., § 2419.

BAXENDALE v. BENNETT (1878).
L. R. 3 Q. B. D. 525.

Action commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for 50*l.* drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the
545 holder, and her interest. At the trial before LOPES, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3rd of June, 1872, and was the *bona fide* holder of it, without notice of fraud, and for a valuable consideration. One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of Young v. Grote (4 Bing. 253), and Ingham v. Primrose (7 C. B. (N. S.) 82), that the defendant was liable, and directed judgment to be entered for the plaintiff for 50*l.* and costs. . . .

BRAMWELL, L. J.: "I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here?

Let us examine the facts. The defendant drew a bill (or what would be a bill had it had the drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of Young v. Grote and Ingham v. Primrose go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. . . ."

Brett, L. J.: "In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. . . . It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. . . . In this case it is true that the defendant after writing his name across

the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up. Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? . . . He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act. . . . In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment."

BAGGALLAY, L. J., concurred that the judgment ought to be entered for the defendant.

HUBBARD v. GREELEY (1892).

84 Me. 340, 24 Atl. 799.

Action by Joshua G. Hubbard against Everard H. Greeley and others. Judgment for plaintiff.

WALTON, J.: "Whether the grantee named in a deed de-
546 livered as an escrow, who has wrongfully obtained it and put it on record, can convey a good title to a *bona fide* purchaser, is a question in relation to which the authorities are in conflict. In Blight v. Schenck, 10 Pa. St. 285, the Court held, in a full and well-reasoned opinion, that the title of a *bona fide* purchaser could not be defeated by proof that one of the deeds through which he claimed title was a wrongfully obtained and a wrongfully recorded escrow. The Court rested its decision on the fact that the custodian of an escrow is the agent of the grantor as well as the grantee, and, if one of two innocent persons must suffer by the wrongful act of the agent, he who employs an unfaithful agent, and puts it in his power to do the act, must bear the loss; that the agent has the power to deliver the deed, and, if he delivers it contrary to his instructions, he will be answerable to his principal; and it is therefore reasonable that the latter, and not the innocent purchaser, should bear the loss. In Everts v. Agnes, 4 Wis. 343, the contrary was held. But in the latter case the Court appears to have acted in ignorance of the decision in the former case, and in ignorance of the equitable doctrine upon

which it rests, although the former decision was made six years before the latter. This, as it seems to us, was an unfortunate oversight; for the former decision is supported by reasoning so strong, and, as it seems to us, so satisfactory, we cannot resist the conviction that if the attention of the Court had been called to it, and the principles on which it rests, a different conclusion would have been reached; and the subsequent decisions, which have followed the lead of that, would have no existence.

"But be this as it may, the authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that, if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then, the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that in all cases where such deliveries are made the deeds take effect immediately and according to their terms, divested of all oral conditions. And it is equally well settled that, if the delivery is to one who is acting at the time as an agent or attorney of the grantee, the effect is the same. . . .

"The principal contention in the present case is whether one of the deeds through which the defendants have derived their title was legally delivered. The deed is from George E. Seavey and Nathaniel H. Clark to Thomas Boyd and Robert W. Boyd. It is dated January 26, 1878, was acknowledged the same day, and recorded July 15, 1878. The plaintiff claims that this deed was delivered as an escrow, and, although acknowledged and recorded, never became operative. Upon the proofs in the case, we do not think such an attack upon the defendants' title is permissible. The proof is that the deed was made and accepted in part payment of a debt owing from the grantors to the grantees, and that it was in fact delivered to one G. C. Bartlette, an attorney at law, who had been employed by the grantees to collect the debt; that Bartlette afterwards sent the deed by mail to the grantees, and that they caused it to be recorded; and that, at the time of the defendant's purchase, the deed had been on record for more than eight years, its validity apparently uncontested and unchallenged.

And it is admitted that the defendants are innocent purchasers for value, and, at the time of their purchase, had no notice of the condition of the title other than that disclosed by the record. Under these circumstances, and for the reasons already given, we think the plaintiff is estopped to deny that the deed was legally delivered. We rest our decision upon the ground that the deed was, in fact, delivered to the grantees' attorney as such, and that such a delivery is equivalent to a delivery to the grantee himself; and that, when such a delivery is made, it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the nonperformance of which the deed never became operative. It seems to us that to hold otherwise would render all deeds of little value as evidence of title."[3]

GUARDHOUSE v. BLACKBURN (1866).

L. R. 1 P. & D. 109.

The plaintiffs were residuary legatees under a will of Mrs. Hannah Jameson, who died on August 23, 1863, leaving a will dated May 30, 1851, and a codicil dated April 13, 1852. The defendants were
547 the executors. The will charged the testatrix' three estates with legacies to the amount of $1,300.

The plaintiffs admitted the due execution of the will and codicil, and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper pro-

3—Compare the following statements: *Parker*, C. J., in *Somes* v. *Brewer*, 2 *Pick.* 184, 191 (1824): "Between the grantor and the grantee in such cases, the technical difference between 'void' and 'voidable' is wholly immaterial. Whatever may be avoided may in good sense, to this purpose, be called void. . . . But in regard to the consequences to third persons the distinction is highly important, because nothing can be founded upon a deed which is absolutely void; whereas from those which are only voidable fair titles may flow."

Bennett, J., in *Smith* v. *South Royalton Bank*, 32 Vt. 341: "The deed not having been delivered, it was a nullity and void, or, more properly speaking, never existed; . . . there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a void and a voidable instrument: . . . let the principle be as it may in regard to commercial paper, no question can be made as to a void deed."

Compare the authorities cited in W., § 2420, and No. 551, *post*.

pounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate," in lieu of "and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of £500, and the estate of Stainton of the payment of legacies to the amount of £800, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased. William Carrick said in examination: He took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1,300; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Sir J. P. Wilde: "The plaintiffs have cited the defendants to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words 'therein and' ought to be expunged from the codicil before probate is granted thereof. The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will. The ground upon which the Court is asked to expunge them is, that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proven to be the fact (if the evidence is admissible, and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions. . . . I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the Ecclesiastical Courts on this head. Under that law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded

the equal attention of the court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former. . . . But the words of the Wills Act, 'No will shall be valid' unless executed in a certain manner, obviously exclude the probate of unexecuted instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. . . .

"But then comes the question, if the Court cannot now, as it could before the statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. . . . The truth is, that the rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect. Nor indeed are these rules pressed in the courts either of law or equity beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see Pym v. Campbell, 6 E. & B. 370. Or if (going further still) some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see the case of Wake v. Harrop, 6 H. & N. 768. . . . Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs, to what extent is it still open to the court since the statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? . . . After much consideration the following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did not know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been

purposely practised on the testator in obtaining his execution thereof. Fifthly, that, subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as he knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. . . .

"It remains to say a few words on the fifth [proposition]. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the statute would thus perish at the hands of the court. . . . In the present case, the codicil was proved to have been read over to the testator before the execution thereof; she duly executed the same; and the Court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form."[1]

3. *Voidable Acts.*

STATE v. CASS (1889).

52 N. J. L. 77.

Certiorari upon a judgment for the plaintiff Catherine Cass, in an action against S. Cummings to recover $125, the price paid to him for a horse, sold on fraudulent representations as to his speed.

548 Mr. Cass, in the presence of his wife, the plaintiff, stated to the defendant that they desired a horse that could make the distance between Rockland and Orange Valley, between seven and eight miles, in one hour or one and a half hours, and stated that if the horse could not do that they didn't want to buy him; to which the defendant replied that the horse could easily do that. There was evidence that the horse was not able to travel seven or eight miles in one hour or in one hour and a half, and was not fit for the purpose for which he had been bought. It appeared on the cross-examination of the plaintiff that at the time of the sale a written warranty of the horse had been given in the following form: "Newark, April 6th, 1887. To one

1—Compare the authorities cited in W., § 2421.

gray horse Charley, which I warrant to be sound and kind with the exception of straining of muscle of left hind leg." The counsel for defendant thereupon moved that all evidence as to representations made by the defendant, other than those contained in the written warranty, be stricken out, on the ground that the agreement of the parties having been reduced to writing, such writing could not be varied or enlarged by parol evidence. The Court denied the motion, and allowed an exception.

Reed, J.: "[The parol evidence rule] is not infringed by the admission of parol testimony which is not intended as a substitution for or an addition to a written contract, but which goes to show that the instrument is void or voidable, and that it never had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter of the contract. Nor is the admission of parol evidence for the purpose of avoiding a written contract on the ground of fraud, confined to such testimony as goes to show that a party was lured to make a contract other than that intended, as by the substitution of one contract for another by trickery, or by misreading a contract to an illiterate person. Parol testimony may be admitted to show that the execution of a written contract was brought about by a fraudulent representation. . . . The elements essential to constitute such fraudulent representation will be considered later, and it is now necessary only to remark that such evidence as will lay a foundation for an action of deceit or a ground for the recission of the contract, is always receivable, although it consists of oral representations. This point was strenuously denied in the arguments submitted by the counsel for the defendant. His contention was, that fraud in the execution of the instrument could be shown, but that oral representations going to a failure of consideration only could not. The seeming strength of his contention lay in the likeness between the written and the oral facts in the present case, both concerning the quality of the animal sold. The written warranty applied to the soundness and kindness of the horse, and the oral testimony to the speed of the animal. The danger of permitting parol declarations to be proved, which were so nearly related to the subject-matter of the written warranty, was strongly pressed as an evil which the rule of evidence already stated seemed especially designed to prevent. But the distinction between such representations as add to the contract and such as avoid the contract, because of their fraudulent character, is too firmly established in our jurisprudence to be now shaken. As an additional warranty, that is, an addition to the contract, the present representations were clearly inadmissible. So soon, however, as they displayed such features as went to show that through them the contract had been fraudulently induced, and so was unenforceable for that reason, at the election of the defrauded party, the rule excluding parol testimony to enlarge a written contract became

inoperative. It is of course obvious, that the fact that there was a written warranty in respect to the soundness and kindness of the animal would be a forcible argument that no other representations as to quality were made. The existence of the written warranty would be useful in determining the probability of the truth of the counter statements of the parties as to the existence or non-existence of the parol declaration. But when the fraudulent affirmations are once proven to exist, the written contract becomes unimportant. This seems to be an elementary principle of the law of evidence. The right to prove fraud, in whatever shape it may exist, to avoid written contracts, has been so uniformly recognized that it can hardly be said to have been the subject of serious judicial discussion. . . . I conclude, therefore, that if the evidence established fraudulent conduct on the part of the defendant, the testimony was properly admitted."

NEWTON v. TOLLES (1889).

66 N. H. 136, 19 Atl. 1092.

Bill in equity, filed October 20, 1886, for the recission of a contract for the purchase of a farm and other property, and for the return of money paid as a part of the purchase-money. Facts found by
549 the Court. The defendant, Sophia A. Tolles, employed R., a real estate agent in Nashua, to sell her farm. In May, 1886, Newton, seeking to buy a farm, applied to R., who informed him of the Tolles farm, told him it contained two hundred acres, took him to see it, and there pointed out to him such of the corners and boundaries as he knew; but he did not know, or undertake to point out, all of them. Afterwards R., as agent of Tolles, and Newton executed an agreement by which Tolles agreed to sell, and Newton to buy, the "Tolles farm" for $5,400, to be paid, $200 on the execution of the agreement, $1,000 on the delivery, on or before June 1, 1886, of a bond for a deed, $1,000 on or before July 10, 1886, and $3,200 on the delivery, on or before October 20, 1886, of a good and sufficient deed. "Said Newton to have all the stock, tools, hay, grain, etc." On the margin of the agreement, "Farm contains about 200 acres" was written. Newton paid $200 May 15. Tolles executed and delivered to Newton a bond, conditioned to convey to him "a certain lot or parcel of land situated in Nashua," and particularly described by metes and bounds, meaning and intending to convey all the homestead farm, containing about two hundred acres, as by deed of heirs of Horace C. Tolles to me, and other land and right in said homestead farm," upon Newton's payment of $1,000 on the delivery of the bond, $1,000 on or before

1—Compare the authorities cited in W., § 2423; and also the doctrine of No. 560, *post.*

. . .

July 10, 1886, and $3,200 on the delivery, on or before October 20, 1886, of a good and sufficient deed. . . .

Prior to 1879 the Tolles farm comprised about two hundred and three acres, of which the defendant and her husband owned a part in common, and each a part in severalty. In that year the heirs of Horace C., then deceased, conveyed a parcel of about twenty-five acres to Xenophon Tolles, and all their interest in the rest of the farm to the defendant. In January, 1886, the defendant sold about eighteen acres to C., who sold to Roby. A parcel of about twenty-five acres, called the "Salmon Brook meadow," was half a mile distant from and had no connection with the rest of the farm except in its use as a part of it. These parcels were not shown to Newton by R., and are not covered by the particular description given in the bond. Newton, at the time of the bargain, did not understand that they were included in his purchase; but he understood he was buying the Tolles farm, and that it contained two hundred acres. The defendant did not intend to convey, nor understand that she agreed to convey, the three parcels, or any one of them; but she understood and believed that the farm as described in the bond contained about two hundred acres. It in fact contains only one hundred and thirty-five acres.

In June, 1886, Newton discovered that Tolles owned the Salmon Brook meadow ,and learned of its connection with the farm. He thereupon claimed possession of it, and that it was included in the bargain, but his claim was denied. He refused to pay the installment due July 10, and August 21 Tolles brought a suit at law to recover it, which is the second of the above named actions. About the first of August, Newton found, by a survey, that the farm as described in the bond contains only one hundred and thirty-five acres. October 20, 1886, Tolles tendered to Newton a warranty deed of the premises of which he is in possession, and demanded payment of the balance of the purchase-money. Newton refused to accept the deed, and on the same day filed his bill, in which he offers to restore the real and personal property to the defendant, give up and cancel the bond, and to account for the rents and profits while he has been in possession. . . .

Carpenter, J.: "There was a mutual mistake in the quantity of land. The defendant understood she was selling, and the plaintiff that he was buying, a farm of two hundred acres. It in fact contains only one hundred and thirty-five acres. The defendant, believing that the farm contained two hundred acres, informed the plaintiff that it did contain that number. The plaintiff relied on her statement. Under the influence of the error common to both parties the transaction was consummated. The mistake was one of fact, in a material point affecting the value of the property. Its prejudicial consequences to the plaintiff are the same as if the defendant's statement had been designedly fraudulent. . . . A material mistake in the quantity does not, in its effect upon the equitable rights of the parties,

differ from a like mistake in the character, situation, or title of the bargained property. It is equivalent to a mistake in the existence of a material part of the subject of the contract. The case is as if, before the contract was executed and without the knowledge of either party, a parcel containing sixty-five acres of the two hundred contracted for had sunk in the sea. The error is as injurious to the plaintiff as if two hundred acres were comprised in the stated boundaries and the defendant had no title to a parcel of sixty-five acres, or as if she had title to only one hundred and thirty-five two-hundredths of the whole in common with a stranger. The defendant could not sustain a bill to compel a specific performance of the contract by the plaintiff, because it would be inequitable. The party against whom a contract, made under a mutual mistake of material facts, will not be specifically enforced, is in general entitled to rescind. If there are exceptions to the rule, this case does not fall within them. It is inequitable that the defendant, by reason of her negligent and erroneous, though not fraudulent, representation, should make a profit of the sum at which the parties valued sixty-five acres of land, and that the plaintiff without fault on his part should lose that sum. Equity will prevent such a result by rescinding the contract or decreeing a specific performance with compensation in behalf of the injured party, at his election, and by refusing specific performance on the application of the other party."

FAIRBANKS v. SNOW (1887).

145 Mass. 153, 13 N. E. 596.

HOLMES, J.: "This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The de-
550 fendant alleges that her signature was obtained by duress and threats upon the part of her husband. The judge below found for the plaintiff, on the ground, it would rather seem, that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to prove. But as this may not be quite clear, we proceed to consider the only exception taken by the defendant. The judge refused to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

"No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. Barry v.

Equitable Life Assurance Society (59 N. Y. 587, 591). But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. . . . This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus volui:* D. 4. 2. 21, § 5 (see 1 Windscheid, Pandekten, § 80).

"Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud; and is, that, whether it springs from a fear or belief, the party has been subjected to an improper motive for action. But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. . . . The authorities with regard to duress, however, are not quite so clear. It is said in Thoroughgood's case, 2 Rep. 9, that 'if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged 45 E. 3. 6.' . . . But in Y. B. 43 E. III. 6, pl. 15, which we suppose to be the case referred to, it was alleged that the defendant was imprisoned by the procurement of the plaintiff. And we know of no distinct adjudication of binding authority that mere threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. . . . On the case as it presented to us, we are of opinion that the ruling requested was wrong upon principle and authority."

NATURE OF VOIDABLE ACTS; MOTIVE, AS THE GROUND OF VOIDABILITY.[1] "The *voidness* of an act (or, more correctly, of conduct which has never become a legal act) is seen to be a quality
551 *purely relative, i. e.* an instrument may be void, as against the grantee or payee, yet valid as against the indorsee or the grantee's grantee. It may even be valid as against one of two grantees, though void as against the other, or valid for one clause and void for the next,—consequences thoroughly accepted in the modern judicial rulings. The conception, so often met with, that voidness, when concealed for one person, necessarily involves voidness in the absolute sense, *i. e.* for every other person,[2] is therefore unfounded and unpractical, since the test of reasonable consequences will differ for different persons affected by the conduct.

1—Quoted from W., §§ 2413, 2423.

2—As seen in the quotations in the note to No. 546, *ante*.

"As a part of the same erroneous conception, the *relative quality* of an act, as valid for one person while invalid for another, has been associated exclusively with the term *voidable*. But this is the confounding of two separate ideas in the same term. A voidable act is one which *may be annulled at the actor's option*, but is valid till annulled; while a void act is of itself null, and *requires no further act exercising an option*,—the practical differences being, first, that the voidable act remains valid if the option is never exercised, and, secondly, that its invalidity must be pleaded affirmatively. Now the relative quality—*i. e.* of affecting one person though not another—is concededly true of voidable acts. But that it is not their inherent mark may be perceived from two circumstances; on the one hand, that a voidable act may continue to be voidable in the hands of a third person, so far as he is a transferee with notice (*i. e.* the voidability, like the voidness, may absolutely affect the act under certain circumstances), and, on the other hand, that some acts ordinarily voidable are by modern doctrine (*e. g.* the contracts of a lunatic) valid for even the immediate promisee, if he did not and could not know of the avoiding circumstance.

"The result is, then, that the distinction between relative and absolute validity must be separated from the idea of voidness and voidableness. The only place for the former contrast is between acts permitted and acts prohibited by public policy.

"The inquiry, therefore, is, What is the distinction between these elements, the lack of which leaves the act void, and those other elements which merely make the act voidable? These other elements are all reducible finally to a single consideration, namely, that of *motive*,—*i. e.* the relation between the actor's state of mind and some fact external to himself and his act. This consideration of Motive falls under three general heads:

"1. When the fact creating the motive is somewhere mentioned in the *terms of the act*, it is commonly spoken of as a *Condition*. Conditions may be established by *express stipulation* in the act, or by *implication* of law. Of the latter sort may be, for example, in contracts, a warranty of a horse's pedigree; in deeds, a description of land as containing specified buildings; in wills, a recital (incorrectly) of the death of an elder son as the reason for devising to a younger one.

"2. When the fact creating the motive is *not* mentioned *in the terms of the act*, the recognized grounds of avoidance are of two general sorts, *Error* and *Compulsion*. (*a*) *Error* may exist either by the inducement of the second party, or without it. (1) Error *induced by the second party* may involve a fact misrepresented *fraudulently* or *innocently*. In both cases, the fact must have been material as a motive to induce the act; but the right to avoid is much narrower in scope in the latter case than in the former. In both

cases, however, the avoidance is due to a fact external to the legal act itself, and this marks the distinction between void and voidable acts. (2) Error *not induced by the second party* will involve either mutual or individual mistake. Where the mistake is *mutual*—for example, where the parties agree to buy and sell a specified lot of land, supposing it to contain forty acres, and in fact it contains thirty-four acres only, but the price is made proportionate to forty acres, and the terms of the deed do not mention the area—, the question is whether this mistaken mutual motive will authorize either the total avoidance of the act, or at least its judicial reformation on equitable lines. This is one of the chief sources of controversy in the so-called doctrine of mutual mistake; and it has been already noticed that this is entirely distinct in its problem from the doctrines of mutual mistakes as to the actual contents of a document signed. So, too, a mutual erroneous assumption as to the legal effect of words intentionally used belongs under the present head. The practical problem here is a difficult one, and the rules are by no means uniform in acceptance; but in nature it is a problem common to all legal acts, whether oral or written. Where the mistake is *individual* only —for example, in the above case, if one party alone entertained the mistake as to area—, it is generally conceded that the act cannot be avoided. (*b*) *Compulsion,* or duress, so far as it means a coercion to choose between the signing of a document and the suffering of some harm, whether corporal or otherwise, signifies that the act has been consummated because of the motive of fear of that harm. Since motive alone is thus involved, it follows that compulsion, like fraud, merely makes the act voidable. In fact, then, compulsion is always of this nature, and there is no clear distinction of principle between 'equitable' and 'legal' duress so-called. The only conceivable case in which duress could go to deny the very existence of the act is that of the physical seizure of the person's hand, and a forcible movement of his pen, by another person, for there the first person's volition is lacking.

"3. A peculiar variety of the foregoing doctrine is found in the avoidability of acts of *infants* and *lunatics.* Here a rule of thumb is adopted, by which the person's age or disease of itself serves virtually to raise a fixed presumption of fraud or compulsion, and thus to create the option to avoid, regardless of any inquiry whether there was in the individual case deceit or duress. The general probability of it is regarded as sufficient. At the same time there has always been a tendency, in one or another court, to break from the fixed rule, and to treat such person's contracts, especially after performance on one side, as voidable only when in fact there was in the particular case fraud or duress. It may be added that the earlier doctrine that a lunatic's contracts are void, not merely voidable, is referable to the natural opportunity for doubting whether his mental

condition, as respects legal acts, is that of total absence of real volition or merely of an unintelligent apprehension of the proper motives of his conduct; for, if the former be the case, it is logical to treat his act as void.—The voidness of a *married woman's* acts at common law was a pure anomaly; either it had no reason at all (as modern legislation practically pronounces), or it was based on an apprehension of imposition, in which view the rule of voidability should have been applied. The invalidity of acts *ultra vires* of a *corporation* does not involve the present principle, but rather that of prohibited acts; for the law's prohibitions of such acts by corporations are of the same nature as its prohibition of gambling or bribing contracts by natural persons."

B. INTEGRATION OF LEGAL ACTS, (VARYING THE TERMS OF A VALID DOCUMENT).

General Theory of the Rule against Varying the Terms of a Writing.[1] "When parties negotiate at a distance, by letters and telegrams,—first an offer, then a declination, then a re-

552 vision of the offer, then a halt upon an important term, afterwards an offer of its concession in return for the concession of some prior term now to be changed, and finally an acceptance of this concession, and thus an end of the negotiations,—where are terms of this contract to be found? Obviously, in this congeries of letters and telegrams, as mutually modifying and complementing each other. The whole of the contract is not in any one document. Nor, on the other hand, does the whole of any document (probably) represent a part of the contract, because some of its terms have been impaired and replaced by other documents in the series. Nor can it be said that there is a series of legal acts, each one independent, successively modifying the preceding ones; for each letter and telegram is merely tentative and preparatory, and there exists no legal act until the final assent is given. That assent, when it comes, adopts and vivifies the entire mass, which until then was legally inchoate only. The process is not unlike the fall of cards in the play of a trick at whist; the total effect cannot be determined till the last card has fallen, and no one card exhibits in itself the effect of the trick; yet, when all are played, the second card may prove to be the decisive factor and may remain unimpaired by any later play.

"On the other hand, if instead of leaving the net effect of the negotiations to be gleaned from the mass of writings, a single document is finally drawn up to replace them and to embody their net

1—Quoted from W., § 2425.

effect, and is signed or otherwise adopted by the parties, this document will now alone represent the terms of the act. Instead of leaving the wheat mingled with the chaff, the wheat has been definitely selected and set apart in a single mass. The wheat existed there, no less before than now, but it has now been placed in a single receptacle by itself.

"This process of embodying the terms of a legal act in a single memorial may be termed the Integration of the act, *i. e.* its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, have no longer any legal effect; they are replaced by a single embodiment of the act. In other words: *When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*

"This principle, perfectly well settled in our law, has several aspects which it is necessary here to notice:

"(1) In the first place, it is *not a rule of evidence,* because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact. It is a rule of substantive law, because it deals with the question where and in what sources and materials are to be found the terms of a legal act. This understanding of the rule is plain enough in the modern judicial utterances, in spite of the frequent loose employment of the word 'evidence'—a faulty habit but easily enough succumbed to, when applying the rule at trials.[2]

2—*Knight* v. *Barber,* 16 M. & W. 66 (1846); the plaintiff and the defendant had made an oral agreement for the sale of shares; on the same afternoon the defendant signed a memorandum, which was then handed to the plaintiff, reciting the sale, the price, etc.; it was held that this memorandum should have borne a stamp. *Parke,* B.: "With respect to the first point made by Mr. Baines [for the plaintiff], that there was a distinct parol contract between these parties before the memorandum was signed, if that memorandum was afterwards made and signed by the defendant, and was intended to contain the terms of the contract and to be acted upon by the plaintiff, it became, when it was so acted upon, the real contract between the parties. The parol agreement goes for nothing, if it was intended that it should be reduced into writing and this is afterwards done."

Van Fleet, C., in *Van Syckel* v. *Dalrymple,* 32 N. J. Eq. 233 (1880): "What was said during the negotiation of the contract or at the time of its execution must be excluded, on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned."

Sir *J. P. Wilde,* J., in *Guardhouse* v. *Blackburn, supra,* No. 547: "It is one thing to admit evidence, and another to give effect to it. If a statute require that a thing should be in writing and signed, in order to its validity, it precludes the court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known."

"(2) In the next place, this rule has no necessary relation to any rule of law *requiring* acts to be done with a *particular formality* such as *writing*. On the one hand, a contract may be entirely in written form, prescribed by law, and yet the terms may be scattered through many writings and not integrated in a single document; for example, a will of personalty under the statute of Charles II (against frauds and perjuries) had to be in writing, and yet the ecclesiastical Courts constantly dealt with valid wills which were made up from numerous separate writings of all sorts. On the other hand, even where no form of writing is prescribed, the rule of integration applies if the parties have in fact embodied their act in a single memorial."[3]

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1. Private Acts.

LILLY'S PRACTICAL REGISTER, *48* (1719), *as quoted in Viner's Abridgment, "Contract," G. 18:* "If an agreement made by parol to
553 do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for the non-performance of this agreement, it must be brought upon *the agreement reduced into writing,* and not upon the parol agreement; for both cannot stand together, because *it appears to be but one agreement,* and that shall be taken which is the latter and reduced to the greater certainty by writing; for *vox emissa volat litera scripta manet.*"[4]

WEBB v. PLUMMER (1819).

2. B. & Ald. 746, 750.

Assumpsit. The declaration stated, that the plaintiff being possessed of a farm, was in respect of it entitled to foldage; and that in
554 consideration that the plaintiff would relinquish and give up the possession of the farm, and would permit him to have the benefit of such foldage, the defendant undertook to make due and customary allowances, as between in-coming and out-going tenants, for and in respect of the said foldage. At the trial at the last Sussex

3—*Pollock,* C. B., in *Eden* v. *Blake,* 13 M. & W. 614, 618 (1845): "Whatever be the value of the goods sold, whether it be such as calls for a memorandum in writing, under the statute of frauds or not, if there has been a memorandum in writing, it cannot be altered by extrinsic evidence."

4—The Pennsylvania rule is *sui generis: Paxton,* J., in *Phillips* v. *Meily,* 106 Pa. 536, 543 (1884): "The English rule that parol evidence is inadmissible to vary the terms of a written instrument does not exist in this State; . . . the cases in this State in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: 1st, where there was fraud, accident, or mistake in the creation of the instrument itself; and 2d, where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed."

assizes before PARK, J., the only question was as to the foldage, in respect to which a certain sum was claimed by the plaintiff, who was the out-going tenant of a Southdown farm, from the defendant, the incoming tenant. It was admitted, that by the custom of the country such an allowance was usually made; but the defendant contended, that under the special provisions of the plaintiff's lease, the custom of the country was excluded. The following were the clauses relied on: "And also that the said Henry Webb shall not, during the term, carry, or cause or suffer to be carried from off the premises, any hay, straw, corn in the straw, haulm, sheaf, or fodder, muck, dung, compost, or sullage, that shall grow, arise, or be made in or upon the said demised premises; but yearly and every year, in a good husband-like manner, fodder out, lay, spread, spend, and use the same, in or upon some proper part thereof, upon pain of forfeiting three pounds for each load so carried away from the said demised premises; and also shall and will, at all times during the said term, penn or fold his flock of sheep, which he shall keep upon said demised premises, upon such parts where the same have been usually folded, upon the penalty of three pounds a time for each and every time that the same shall be folded off from the demised premises, or on any other part thereof, than where the same have been usually folded as aforesaid; and also shall and will, in the last year of the said term, at the usual time for moving the dung out of the closes, carry all the dung and manure arising on the premises in the preceding year to such part or parts of the said fallowed lands or grattens as shall be appointed by the lessor, his heirs or assigns or the next succeeding tenant or tenants, and there cast the same into a mixen or mixens, he and they paying for fallowing such land and carrying out the dung, but nothing for the dung itself, and also grass in the ground, and for thrashing out the corn, as is customary between a tenant coming in and a tenant going out of a farm." The learned judge directed the jury to find a verdict for the plaintiff, with liberty to move to enter a verdict for the defendant.

BAYLEY, J.: "I am of opinion that the plaintiff is not entitled to recover the compensation in question. Where there is a written agreement between the parties, it is naturally to be expected, that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown; and it is founded upon this principle, that justice requires that a party should quit upon the same terms as he entered. If, therefore, the party, when he entered upon the farm, paid for a way-going crop, or for foldage, manure, fallowing, or tillage, then if the lease be wholly silent as to the terms upon which he is to quit, the custom of the country may be

introduced, and he may be entitled to receive for a way-going crop, foldage, &c. . . . Here, too, there is a specific contract to fold the flock upon the premises, under a penalty. My judgment, however, is founded particularly on the last stipulation in the lease, by which the tenant is prohibited from carrying off the manure, and by which the incoming tenant is directed to make certain payments to him; and if a lease speaks distinctly of the allowances to be made upon quitting, it seems to me to exclude all others which are not named."

Holroyd, J.: "I am of the same opinion. . . . Even supposing that there was no covenant to fold in this lease, still, inasmuch as it provides for the payments which the incoming tenant is to make, it seems to me that its language is equivalent to this, that the incoming tenant shall pay for such things as are specified, and no more. For the rule *expressio unius est exclusio alterius* applies. Then as the parties have provided for all the payments that were to be made, and as they have not mentioned foldage, it follows that the plaintiff is not entitled to any compensation for it, and that the verdict must be entered for the defendant."

BROWN v. BYRNE (1854).

3 E. & B. 703.

Action for a freight bill of £145, 9*s*, 10*d*. The plaintiff was a shipowner in Liverpool. The defendant was a merchant there, carrying on business under the firm of A. E. Byrne & Co. On the
555 5th October, 1853, Messrs. J. B. Byrne & Co., of New Orleans, shipped on board the ship Courier, a vessel belonging to the plaintiff, 110 bales of cotton, for which the master signed a bill of lading, of which the following is a copy: "Shipped in good order and well conditioned, by J. B. Byrne & Co., on board the ship called the Courier, whereof Gemmill is master, now lying at the port of New Orleans, and bound for Liverpool, to say, one hundred and ten bales cotton, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the aforesaid port of Liverpool (the dangers of the sea only excepted) unto order or to assigns, he or they paying freight for the said goods five-eighths of a penny sterling per pound, with 5 per cent primage, and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished the others to stand void. Dated in New Orleans, the 5th day of October, 1853. John Gemmill." This bill of lading was forwarded to the defendant, indorsed to him.

The defendant offered to pay £143 13*s*. 7*d*. on account of this freight; but he refused to pay the balance, £1 16*s*. 3*d*., on the ground that, by custom of Liverpool, as described in the opinion, he was entitled to a deduction of three months' discount from the freight.

Blackburn, for the defendant: "Perhaps it is not possible to reconcile all the cases on this matter, or to lay down accurately the limits to the admissibility of custom. But the cases agree in laying down limits which certainly include this case. It may be convenient first to answer a question, put from Bench, as to whether there is a distinction between written and verbal contracts. There is a difference; but in this respect there is none. When the parties have agreed that a particular writing shall be the record of their contract, they cannot by other evidence show that their intention was something different from what they have expressed in that record. When there is no record of the contract, the intention is to be gathered, not only from their words, but from everything else. But, if the parties met for the first and last time, and made a contract entirely by words, these words would, if proved, have precisely the same construction as if they had been written down. It is quite true that evidence is also admissible to interpret words; but that is on a different ground. If a contract were made in France between Frenchmen, and were sued on here, an interpreter would be sworn to prove the meaning of the French words. But evidence of French lawyers would also be admissible, to show what incidents the French law annexed to such a contract; for such incidents are tacitly incorporated. But the parties may, by express words or by implication, agree to exclude the incident which the general law would annex if they were silent; and it is exactly the same where the incident is annexed by custom or local law. . . . In the present case, if the wording of the bill of lading had been 'he or they paying freight for the said goods five-eighths of a penny per pound, cash without deduction,' the tenor of the instrument would have expressly excluded the custom; but there are no such words. Then the question is, not whether the custom if admitted will vary, or be inconsistent with, the contract as it would stand without the custom, but whether it is impliedly excluded by the tenor of the instrument. The other mode of enunciating the proposition has been used by high authorities, but evidently is inaccurate. No one ever did or ever will seek to annex an incident by proof of a custom, except for the express purpose of varying the contract from what it would be if the custom were not proved."

Coleridge, J.: "This was a special case extremely well argued before my brothers Wightman, Erle, Crompton, and myself, at the sittings after last term, by Mr. Mellish and Mr. Blackburn. And the question for decision is shortly this: Whether, in an action by a shipowner against the indorsee of a bill of lading, to whom goods have been delivered at Liverpool, and who has accepted them, the bill of lading making them deliverable, he 'paying freight for them five-eighths of a penny sterling per pound, with £5 per cent primage, and average accustomed,' the latter may lawfully claim to retain from £138 11*s.* 3*d.*, the amount of the freight at the rate specified, £1 16*s.* 3*d.*,

on the ground that, by the custom of Liverpool, he is entitled to a deduction of three months' discount from the freight. It is admitted that the custom exists in fact, in regard of shipments from New Orleans, and some other ports in the Southern States of the American Union, to Liverpool; but it is objected to as bad in law, because it is inconsistent with the written document, the bill of lading. Five-eighths of a penny on the weight of the cargo is, it is said, equal to £138 11*s.* 3*d.*: the bill must be read as if that sum were specified in it; and this custom, if allowed, will change it to £136 15*s.*

"The principles on which this case is to be decided are perfectly clear; the difficulty lies in the application of them to the facts. . . . In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less.[1] . . . Here the contract is, to pay freight on delivery at a certain rate per pound: is it inconsistent with this to allege that, by the custom, the shipowner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment: the custom does not set this aside; indeed, it adopts it, as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the shipowner undertakes to allow three months' discount on freight paid after that rate; the latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed, or if, from the language of it, the intention of the parties could have been collected, that the freight at the specified rate should be paid, free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above."

1—*Grove*, J., in *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482, 488 (1873): "In one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effect of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary."

BRETTO v. LEVINE (1892).

50 Minn. 168, 52 N. W. 525.

DICKINSON, J.: "The defendants were formerly the owners of certain real estate situate in the town of Tower, including a store building standing thereon, in which was a quantity of shelving put up for use therein. They also had within the building certain other property which is the subject of this action, consisting of hanging lamps, stove, tables, show cases, chairs, counters, safe, and other personal property. On the 11th day of February, at the city of Duluth, they agreed orally upon a sale of the real estate to the plaintiff, and, as the plaintiff claims, of all the personal property also, for the price of $4,300. Pursuant to that agreement a deed of conveyance of the real estate was made and delivered the following day, in which the consideration expressed was as above stated, and which was paid. In this deed, following the description of the premises conveyed, is the clause: 'This grant includes all the shelving in the building situate on said premises.' The issue in this case is as to whether the sale included the personal property referred to, other than the shelving, and the principal question of law is whether the effect of the deed was to render incompetent the oral proof which was received at the trial, to the effect that by the agreement of the parties this personal property was included in the sale. If such was the agreement, the title passed. The payment of the price saved the transaction from the operation of the statute of frauds.

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"Although the agreement, assuming that it included the personal property, as well as the real estate, was entire in its nature, it related to subjects so different that different modes of carrying it into execution were appropriate, if not necessary. As to the personal property, all that was necessary to transfer the title was the agreement of sale and the payment of the price. The real estate could only be legally conveyed by deed. That was the ordinary and legally proper purpose of such an instrument. If the deed had not contained the clause above recited, there would be not much reason to support a claim that the deed of the real estate was intended by the parties to embrace, and become the exclusive evidence of, all which they might have agreed upon or intended to accomplish, so as to exclude oral evidence of a sale of the personal property as well as of the real estate. Such an instrument would not be legally presumed to have been intended to have a wider or different effect than that which, and which alone, such instruments are commonly and properly executed to accomplish,—that is, to convey real property, and to express such conditions or covenants concerning the same as might be agreed upon. An instrument of such a nature would not be presumed to have been intended also to accomplish the very different purpose of evidencing all transactions or agreements of the parties relating to a subject dis-

tinct from that to which the deed in terms and appropriately relates. . . .

"But we do not think that the clause concerning the shelving in the building gave to this deed any other effect in this particular than it would have had if this clause had been omitted. If such a clause had been inserted with respect to one or more articles of personal property, as chairs, of such a nature that there could be no doubt as to whether they constituted a part of the realty so as to pass under a deed conveying the real property, the result would probably be different. But the most satisfactory conclusion, as to the reason for introducing this clause in the deed, is that it was because of some uncertainty or doubt as to whether the shelving was properly a part of the realty, or only personal property, and to prevent any controversy or question concerning that matter. By the technical language of the deed, the shelving was *included as a part of the real property*, 'this grant' being declared to include it. From this it is not to be conclusively presumed that the deed was not intended merely as a conveyance of what was deemed to be, or to belong to, the real estate, but also to be the repository of all that the parties had agreed upon or done, so as to exclude parol evidence of a sale of personal property as a part of the same transaction."

POTTER v. EASTON (1901).

82 Minn. 247, 84 N. W. 1011.

START, C. J.: "On February 12, 1897, the defendants executed to the plaintiff three promissory notes, for $500 each, due in one, two, and three years, respectively, with interest. There was written on
557 the face of each note these words: 'Secured by mortgage on one bay pacing stallion known as Lebbeas I, 2:13¼.' As a part of the same transaction they executed to the plaintiff a chattel mortgage to secure the payment of the notes upon 'One mahogany bay stallion, known as Lebbeas I (2:13¼ pacing).' They also signed and delivered to the plaintiff a writing in these words: 'This is to certify that we have bought the bay stallion known as Lebbeas I (pacing 2:13¼), and given in payment three promissory notes, of $500 each, payable yearly, with interest at 6 per cent. per annum, payable Rochester; and we further agree to apply one-third net of said Lebbeas I's earnings after September 1, 1897, to liquidate said notes.' This is an action upon the notes, to recover an alleged balance of $1,239.20. The answer alleged that the notes were given for the purchase price of the stallion sold by plaintiff to defendants, and that the plaintiff warranted the horse to be sound, but that in fact he was unsound,—had a ringbone and was broken in wind,—and that by reason of such breach of the warranty the defendants had sustained damages in a sum exceeding the amount due on the notes. The reply admitted that

the notes were given for the purchase price of the horse, but denied that the plaintiff 'made any warranty whatever regarding the horse called "Lebbeas I."' On the trial the notes, mortgage, and certificate were offered in evidence by the plaintiff. The defendants gave oral evidence tending to prove that the plaintiff warranted the horse, and that there was a breach thereof, and resulting damages. The evidence was received over the objections and exceptions of the plaintiff, which were to the effect that the contract of sale was in writing, and such oral evidence was incompetent. The plaintiff had a verdict for $150 only, and he appealed from the judgment entered upon the verdict. The correctness of the trial court's ruling upon the admissibility of the oral evidence to prove the warranty is the only question presented by the record for our decision.

"The plaintiff contends that the certificate is a complete contract, purporting to state the terms of the purchase of the horse; hence evidence of an oral warranty of the soundness of the horse was incompetent. If the premises of this proposition are correct, the conclusion is necessarily so; for, if the horse was sold with an oral warranty as to his soundness, the warranty was one of the terms of the contract, and not a separate or collateral one. Therefore, if the certificate here in question is complete in itself, and couched in such language as imports a legal contract for the sale of the horse, parol evidence is not admissible to add to the written terms of the contract; for, if such be the correct construction of the writing, it will be conclusively presumed that it contains all of the terms and stipulations of the parties in the transaction. But if the writing is manifestly incomplete, and it appears upon its face that the parties did not intend it to be a complete statement of the whole contract between them, parol evidence is competent to prove the existence of any separate agreement as to any matter on which the writing is silent which is not inconsistent with its terms.

"These rules are elementary, but, in their application to particular cases, care is required in distinguishing the cases so as to determine within which rule the particular case falls. In considering whether or not a particular writing is an incomplete contract, within the rule stated, the controlling question is whether it appears upon the face of the writing that the parties intended it to be the exclusive evidence of their agreement. While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed. So construing the certificate or writing here in question, and particularly in connection with the notes and the chattel mortgage, which are a part of the same transaction, it is reasonably clear from the face of the certificate

that it was not intended as a contract for the sale of the horse, but that it was intended simply for the purpose of further securing the payment of the notes by a lien on the earnings of the horse. Therefore it is not a complete sale contract on its face, and evidence of the oral warranty was correctly received by the trial court. The writing cannot be read as a present agreement of sale, or as a recital of the terms of a past sale. It contains no stipulations to sell or buy. The seller does not execute it, but the purchasers do; and they recite therein the fact of a past sale, without attempting to state any of its terms, as a consideration for the promise to apply a part of the earnings of the horse to the payment of the notes. If the substance of this certificate had been written into the chattel mortgage, as it might well have been, could it be reasonably claimed, by any fair or permissible construction of the mortgage, that it embodied a complete contract for the sale of the horse? Clearly not. Now, whether we read the certificate as a part of the mortgage or in connection with it, as a part of the same transaction, it must receive the same construction; and it is clear that it is not a complete contract for the sale of the horse, and, further, that the parties did not intend it to be."[1]

RAMSDELL v. CLARK (1897).

20 Mont. 103, 49 Pac. 591.

This action was upon a lease entered into between the respondent (plaintiff below) and appellant (defendant below), on October 20, 1887. Under the terms of the lease, defendant was to take
558 possession of a certain mine, situated in Silver Bow county, and to work and mine the same in "a good workmanlike, and substantial manner, and to the best advantage," for one year, unless he negotiated a sale of the said property within that period. He was to "reduce and smelt the ore therefrom, and concentrate the same," at his own expense, and sell the products, and, after deducting all expenses, he was to pay one-half the net proceeds to the plaintiff. Defendant took possession of the mine on the day of the execution of the lease, but worked the same for a period of six months only. Plaintiff instituted an action against defendant in the district court of Silver Bow county on January 30, 1892. The complaint alleged three breaches of the covenants contained in the lease. As the first breach it averred that

1—Compare the following: *Depue*, J., in *Naumberg* v. *Young*, 44 N. J. L. 331 (1892): "In what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? . . . The only safe criterion of the completeness of a written contract as the full expression of the terms of the parties' agreement is the contract itself. . . . If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something has been left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible."

defendant had worked the mine for six months, but had failed to pay over to plaintiff one-half of the net proceeds realized from the ores extracted. As a second breach it alleged that defendant had failed to work the mine in a good, workmanlike, and substantial manner during said six months, to the damage of plaintiff in a certain sum. The third breach set forth was that the defendant had failed to work the mine at all after the expiration of said six months, to the damage of plaintiff in a certain sum. The defendant answered the complaint, denying certain of the allegations therein. He also averred that the terms of the lease had been modified as to accounting in respect to concentrates. As a defense to the first breach, it was alleged that an accounting had been had with plaintiff under the lease, as modified on July 10, 1888, and that he (plaintiff) had been paid, and had accepted, in full settlement of his claims, what was found to be due him. A replication was interposed, which, among other denials, set forth that there had never been an accounting, and that the plaintiff had never been paid, and had never accepted, any sum in full settlement for what was due him by reason of the first breach of the lease. The case was tried to a jury. Upon the trial the defendant introduced in evidence the following receipt: "Dec. 6, '94. G. H. M. Office of W. A. Clark, Butte, Montana, 7-10, 1888. Received of Ramsdell Parrott lease, at the hands of W. A. Clark, five hundred and sixty and 79-100 dollars, payment in full for balance of royalty on ore and supplies. $560.79. [Signed] Joseph Ramsdell." The jury returned a verdict in favor of defendant. A motion was made for a new trial, which was granted. The appeal is from the order granting the motion for a new trial. . . .

Buck, J.: "Even keeping in mind the distinction between a receipt regarded as a mere acknowledgment, and as possessing a contractual feature, still the rule of law is not absolutely clear when it is to be applied to the language of each particular receipt. . . . The mere expression contained in a receipt 'in full payment' does not necessarily render the paper a contract in the nature of a release or waiver. Whether a receipt possesses any contractual feature or not must often be determined from its entire language, and also, at times, from the language in connection with the circumstances under which it was given. If A, to whom B is indebted in the undisputed sum of $200, is paid by the latter $100, and signs a receipt for the sum of $200, or, mentioning the sum paid, acknowledges payment in full of the debt, nevertheless A, in an action against B for the unpaid balance, without showing any fraud, mistake, or other excuse for having signed the receipt, can contradict it by extrinsic evidence, and show that only $100 was paid. It would only be evidence of B's having paid the debt just as an oral admission proved against A would be. If, however, B has been indebted to A on an account the amount of which has been in dispute between them, a receipt by A definitely specifying the entire account, and acknowledging a sum received as payment in

full of the same, would possess a contractual feature; and, in order to contradict or vary the terms of it by extrinsic evidence in so far as it would be a contract, A would be required to observe the rules of law applicable to contracts, and could not treat it in evidence against him as if it were of no greater weight than a mere oral admission on his part.

"Let us apply these principles to the receipt given by the plaintiff, and relied upon by the defendant, in the case before us. As to the circumstances under which it was given, Wethey, a witness for defendant, testified that there had been a dispute between plaintiff and defendant as to one or two items of the account due under the terms of the Ramsdell-Parrott lease, and that the last settlement had between them was subsequent to the expiration of the six months during which the defendant had worked the mine. The receipt specifies the lease, and recites that a certain sum has been received by plaintiff as 'payment in full for the balance of royalty on ore and supplies.' The literal terms of the paper stand admitted, and Wethey's testimony as to it is uncontradicted. It is not suggested that the plaintiff did not actually receive the sum of money specified therein. After the admission in evidence of this testimony and the receipt, the defendant had established a prima facie defense as to the first cause of action. The burden was then upon the plaintiff to destroy the effect of this receipt. He failed to do so. . . . At the close of the trial, so far as the evidence was concerned, the defendant was entitled to a peremptory instruction that the jury should find in his favor as to the first cause of action."[2]

BAUM v. LYNN (1895).

72 Miss. 932, 18 So. 428.

Bill for accounting by Mary Grace Devine Lynn against the executrix of John A. Klein and others. From a decree for plaintiff, defendant, Ellen Baum, executrix of J. F. Baum, appeals.

559 Cooper, C. J.: "In May, 1873, John A. Klein was appointed guardian to the appellee by the chancery court of Warren county, and gave bond as guardian in the penalty of $2,000, with George M. Klein and J. F. Baum, appellant's testator, as sureties. . . . The prayer is that the executrix of the guardian be required to render his final ac-

2—*Cowen*, J., in *M'Crea* v. *Purmort*, 16 Wend. 460, 473 (1836): "A release cannot be contradicted or explained by parol because it extinguishes a pre-existing right. But no receipt can have the effect of destroying *per se* any subsisting right; it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not extinguish the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment; but it *is* the extinguisher itself."

Compare the authorities cited in W., § 2432.

count as guardian. . . . Decrees were made against George M. Klein and Ellen Baum, executrix of J. F. Baum, for $2,000. . . .

"The objection most strenuously urged to the decree rests upon the following facts, proved or offered to be proved by appellant: The guardian had loaned a part of his ward's money to Mrs. Mary Irving. In June, 1884, the guardian being then dead, and his estate hopelessly insolvent, the appellee, who then resided in the state of Texas, came to this state to look after the estate. On the 16th of June, Mrs. Irving made to her conveyance in the following language: 'This indenture, made and entered into this day, the 16th of June, 1884, by and between Mary Irving, of the city of Vicksburg, county of Warren, and state of Mississippi, party of the first part, and Mary Grace Lynn, of the state of Texas, party of the second part, witnesseth: That whereas, John A. Klein, late of said city of Vicksburg, did, on or about the 14th day of February, 1874, loan the said Mary Irving certain moneys then in his hands as guardian of the said Mary Grace Lynn, then Mary Grace Devine, and whereas, the said Mary Irving now desires to settle in full any balance that may be due by her: Now, therefore, for and in consideration of the premises, and the consideration of the full acquittal, discharge and release of the said Mary Irving from any and all liability to the said John A. Klein as guardian, or the said Mary Grace Lynn for and on account of said loans, and the further consideration of ten dollars in hand paid, the receipt of which is hereby acknowledged, the said party of the first part does hereby convey and warrant to the party of the second part, her heirs and assigns, in fee simple, the following described real estate in the said city of Vicksburg,'—describing the property, and concluding with the usual habendum. The appellant took the deposition of Mr. Irving, who was the husband of the grantor, she being now dead, and that of George M. Klein, and of Mr. Smith, the attorney who prepared the conveyance, all of whom testified that the conveyance was made by Mrs. Irving, and accepted by Mrs. Lynn, in full satisfaction and settlement not only of the debt due by Mrs. Irving to Klein as guardian, but also in discharge and settlement of liability on the part of the guardian to his ward, which liability Mrs. Lynn agreed to discharge and release as a part of the consideration for the conveyance. The complainant moved to suppress these depositions, and objected to them when offered in evidence, upon the ground that it was incompetent to vary by parol proof the written contract of the parties as shown by the deed. . . .

"In Gully v. Grubbs, 1 J. J. Marsh, 387, Judge Robertson in an admirable and concise manner states the true principle upon which is based the rule of permitting oral evidence to be introduced to show the true consideration of a deed in opposition to that recited, as well as the limitation of the rule. . . . Judge Robertson illustrates his own views by noting the difference between the mere statement of a fact

(*e. g.* the admission of the receipt of the purchase price) and the vesting, creating, or extinguishing a right (*e. g.* by the execution of a release), in the following language: 'A party is estopped by his deed. He is not to be permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations; and, by analogy, the acknowledgment in a deed is not conclusive of the fact. This is but a fact, and testing it by the rationality of the rule we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by proof, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying *per se* any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguishment itself.' The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the conveyance was a mere recited consideration for the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests."[3]

3—Compare the authorities cited in W., § 2433.

CHAPIN v. DOBSON (1879).

78 N. Y. 74.

This action was brought upon the following agreement between the parties: "Philadelphia, July 9, 1868. We agree to furnish John Dobson with the following machinery, on terms stated: Sixteen
560 48-inch and 7 60-inch first Breaker Feeders, at three hundred dollars each, delivered at depot at Pawtucket, R. I., to be sent by steamer from Boston to Philadelphia, and allowance of three dollars to be made on each machine for freight. Man's time and expenses from Philadelphia to be charged extra for applying the machines. Terms cash on delivery, 5 per cent commission to be allowed on each machine, 5 60-inch and 4 48-inch to be delivered as soon as possible, the balance in thirty days thereafter. Harwood & Quincy, Agents for Chapin & Downes. I agree to the above. John Dobson." Plaintiffs delivered a portion of the machines, for which they claimed to recover the purchase-price, with damages for the refusal on the part of defendant to receive the residue. Defendant's answer alleged among other things, in substance, that at the time of the execution of said instrument, and in consideration that defendant would execute the same, plaintiffs agreed and guaranteed that the machines would work well and to the satisfaction of defendant, and in case of their failure so to do, that plaintiffs would take them back, and defendant should not be required to pay for them; that the machines delivered did not work well or to the satisfaction of the defendant, and were useless to him; in consequence whereof defendant detached them from his machinery, notified plaintiffs to remove them, and refused to accept the residue. Upon the trial defendant offered evidence proving a parol guaranty to the effect that the machines should be so made that they would do the defendant's work well and satisfactorily, or in case of failure that they should be taken back, and not be paid for. This evidence was objected to on the ground that, in substance, the agreement was embodied in the writing, which could not be varied by oral evidence. The objections were overruled, and plaintiffs duly excepted.

Danforth, J.: "The general rule requires the rejection of parol evidence when offered to cut down or take away obligations entered into between parties and by them put in writing. . . . It does not apply, therefore, where the original contract was verbal and entire and a part only reduced to writing. Nor has it any application to collateral undertakings. And these facts are always open to inquiry, and may be proved by parol. . . . The plaintiffs introduced in evidence a written instrument dated July 9, 1868. There is nothing upon its face to show that it was intended to express the whole contract between the parties. The referee finds that it does not contain

it, and that the plaintiffs at the same time guaranteed to the defendant that the machines mentioned therein should be so made that they would do the defendant's work satisfactorily or they should not be paid for, and the defendant thereupon signed the writing in consideration of said guaranty. He also finds that the matters in writing and the above guaranty constituted the contract or agreement between the parties. . . . The written contract related to machines thereafter to be manufactured by the plaintiffs, fixed the price at which they were to be furnished, the number, the place, and manner of delivery, the time and manner of payment. Nothing else was provided for. These terms are to remain as written. Some of them impose obligations upon the plaintiffs, and others on the defendants. The parol agreement was on the part of the plaintiffs. By it they guaranteed 'that the machines should be so made that they would do the defendant's work satisfactorily.' The writing specified machines described as 'First Breaker Feeders,' of certain dimensions. How they should work, and whether well or ill, is not stated. If it had called for a machine to satisfy a required purpose, of which the plaintiffs had notice, and which they had undertaken to supply, they would have been bound as a condition of the contract to supply an article reasonably fit for the purpose, and a warranty would have been implied that it was so. . . . The guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machine is implied, the guaranty is in harmony with it, and adds nothing; if it is not implied, the paper contains no declaration that the machines shall be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no term of the writing, nor varies it. The written contract and the guaranty do not relate to the same subject matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or the specifications of the patent; and whether they did or not conform thereto would be the only inquiry. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid, and to be performed, and the consequences of a breach of the guaranty are a recoupment or abatement of damages in favor of the defendant."[1]

1—Compare the authorities cited in W., § 2434; and also the doctrine of No. 548, *ante*.

BARBRE v. GOODALE (1896).

28 Or. 465, 43 Pac. 378.

Action to recover upon two separate causes. The first was upon a written agreement which purports upon its face to be the agreement of one G. W. Handsaker, of the first part, and J. C. Goodale,
561 of the second part. By its terms, in brief, the first party agrees to cut, haul, bank and deliver to the second party 2,000,000 feet of fir logs, and, if certain conditions of the lumber market continued to prevail, an additional 500,000 feet, at a certain point upon the McKenzie river, in Lane county, at the rate of $3 per 1,000, to be paid by the second party as follows: One dollar per thousand when the logs were cut and banked, and $1 per thousand when scaled and rolled in the river, and such balance as should be found due between the parties within 31 days thereafter. The last clause is as follows: "It is further understood and agreed, and is part of the consideration of this agreement, that the second party reserves out of and deducts from the balance that may be due the first party, after making said first two payments, any sum or sums that may then be due or to become due to the second party from J. I. Barbre, or for which he is responsible, to pay J. I. Barbre not to exceed $1,700, the obligations of which are now created." The contract purports to be under seal. The plaintiff having cut, hauled, and banked 1,442,000 feet of logs, and cut in the timber 382,000 feet more, and while proceeding with the performance of the contract, the defendant, on March 1, 1892, notified and directed him to discontinue the work, as he would not pay for or take any more of such logs. Whereupon the plaintiff commenced this action to recover under the contract for such logs as he had cut and banked, and also for such as he had cut in the timber. The complaint proceeded upon the theory that G. W. Handsaker was Barbre's agent in the execution of said contract, and that it was signed and executed in his name, instead of Barbre's, by consent of defendant, and hence that Barbre is entitled to sue upon the agreement solely and in his own name. The second cause of action was based upon the sale and delivery by plaintiff to defendant of 987,000 feet of other logs at $3.25 per 1,000, upon which a balance of $472.34 is claimed. . . .

At the trial, plaintiff, while a witness in his own behalf, was asked and permitted to answer, over the objection of the defendant, the following questions: "Question. How did that clause about the $1,700, which allows Goodale to deduct from last payment amount due him from Barbre, not to exceed $1,700, come to be in the contract? Answer. I had been logging for Goodale, and he had paid me about $1,700 on logs which were claimed by the O. & C. R. R. Co., and it sued, or threatened to sue, him to recover the value of the logs. If he had to

pay the railroad company for the logs, this had to be deducted out of the contract price of those logs. Q. State what the conversation was, at the time of your entering into the contract, as to who the true parties to the contract should be. A. Mr. Goodale and I had a conversation about making the contract to get out some logs. I wanted to get out some logs for him,—about 2,000,000 feet. I had the teams and everything necessary to carry on logging. Mr. Goodale said that he would let me have a contract to get out 2,000,000, but did not want to have the contract made in my name; that the railroad company had sued, and he was afraid that if the contract was in my name the company would make trouble; and he said, 'Why not make it in the name of George?' (meaning G. W. Handsaker). I told him that I did not want to bother George. Goodale said it would not be any trouble to him; that I could go on and carry on the contract just the same. I said I could see George about it, and I did speak to George about it, and he said, so long as he would not be bothered in any way, he would assist me in the matter; and it was agreed between Mr. Goodale, Mr. Handsaker and myself that the contract should be drawn up and signed by G. W. Handsaker, and that I should carry it out, and that it should be my contract, and not the contract of G. W. Handsaker, and that Mr. Handsaker should not be bound by the contract. Under this agreement the contract was drawn up and signed by Mr. Handsaker and Goodale, and I did the work that was done under it." This, with other testimony of the same nature, all elicited over defendant's objection, form the basis of the principal grounds of error relied upon for the reversal of the judgment below.

WOLVERTON, J.: "The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question, among American authorities—the one affirming, and the other denying; but the case is one of first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit, so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show

that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive, or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presumption thus created is a disputable one, and that the intention of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing.—The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible.

"Now, looking to the contract which is the basis of the cause of action under consideration, we find that it was executed in manner and form as requested by the defendant, and to subserve a special purpose peculiar to his own interest, with the express avowal that it should be treated as the contract of plaintiff, although executed in the name of Handsaker, the agent. It is further disclosed that both the defendant and the plaintiff afterwards so treated it; the plaintiff proceeding under it, and in obedience with the terms and conditions thereof, in cutting, hauling and banking the logs preparatory to delivery, and the defendant by making payments to him from time to time, sometimes directly, and sometimes through Handsaker, the agent. This is ratification, and constitutes a very significant feature of the inquiry. Aside from this, the contract discloses upon its face that a part of the consideration for these logs moved directly from defendant to plaintiff. Under these attendant circumstances, and others which might be alluded to, we think the Court committed no error in admitting the testimony to show who were the real parties to the contract, as well as to explain how the clause touching the $1,700 came to be placed therein."[1]

1—Compare the authorities cited in W., § 2438.

FOSTER v. JOLLY (1835).

1 C. M. & R. 703.

Assumpsit by the payee against the maker of a promissory note for 12*l.*, payable fourteen days after date. Plea, the general issue.

562 At the trial before GURNEY, B., at the last assizes for the county of Lancaster, it appeared that Samuel Milnes, the brother-in-law of the defendant, being agent for a co-operative society, and having ordered goods for the society from a person named Walker, which had not been paid for, the plaintiff, as the attorney of Walker, sued Milnes for the amount. Milnes then gave the names of certain members of the society, who were also sued for the debt and a verdict obtained. Milnes also gave a cognovit, and, judgment being entered up, he was taken on a *ca. sa.*, and while in prison, the defendant gave the note in question for the amount of the demand against Milnes. The defendant now proposed to show, that the note was given under an agreement that it should not be enforced, in case Walker should obtain a verdict in the action against the members of the co-operative society. On the part of the plaintiff, it was objected that parol evidence of the agreement was inadmissible to vary the terms of the written instrument, and also that the agreement was that the note should not be put in suit, only in case Walker obtained the fruits of his verdict. The learned Judge, however, admitted the evidence, giving the plaintiff leave to move to enter a verdict for 12*l.*, if the Court should be of opinion that the evidence was inadmissible. . . .

Lord ABINGER, C. B.: "At the commencement of the argument, I felt some doubt, whether this might not be regarded as a question of consideration; but the reasoning of Mr. Wightman has placed it in another light, and I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration, or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defence attempted to be established was in direct contradiction of the terms of the note. The maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you upon a contingency,' that is at variance with his own written contract."[2]

THOMPSON v. CLUBLEY (1836).

1 M. & W. 212.

Assumpsit, by the endorsee against the acceptor of a bill of exchange for 200l. drawn by one H. R., payable to his own order, and by him endorsed to the plaintiff. Plea, that the bill of ex-

563 change was wholly made by H. R., at the request and for and

2—Compare the authorities cited in W., § 2444; and the doctrine of Nos. 533, 534, *ante*.

by way of accommodation of and for the plaintiff, and was accepted by the defendant, at the request of H. R., for and by way of like accommodation of and for the plaintiff; and that at the time of making and accepting the said bill of exchange, it was expressly agreed by and between the said parties, that if the said bill of exchange should happen to be outstanding at the time when it became due, it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or H. R., upon or in respect of it; concluding with a verification. Replication, that before and at the time of the commencement of suit, the plaintiff was, and still is, the holder of the said bill of exchange for good and sufficient consideration, in respect of his being the holder thereof: without this, that the bill was either made or accepted by way of accommodation of or for the plaintiff, or that it was agreed by or between the parties, in manner and form as the defendant has above in the same plea in that behalf alleged; concluding to the country.

The case came on for trial at the sittings after Easter term, before Lord ABINGER, C. B., when the defendant, in support of his plea, called H. R., who stated that in the spring of 1833 he had occasion to raise money, and having applied to an attorney to assist him, it was arranged between him and the plaintiff that the witness should give him the bill on which the present action was brought, but which should be taken up by the plaintiff, and that witness should receive bills of like value from the plaintiff, for which witness was to provide; and that the defendant had not received any value for his acceptance. It was objected on the part of the plaintiff, that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to show that the acceptor was not to pay it, but that the plaintiff, who was the endorsee, was to take it up, and not to sue the acceptor; the effect of which was to make an entirely different contract. Foster v. Jolly, 1 C., M. & R. 709, was relied upon as in point; but the objection was overruled. . . .

PER CURIAM: "This defence was clearly admissible, inasmuch as it showed that the acceptance was in truth for the accommodation of the plaintiff, and that all the parties put their names to the bill without consideration. With regard to the evidence being inconsistent with the terms of the instrument, we are of opinion that the agreement as to payment was collateral, and not part of the original contract. It was a collateral agreement, that the plaintiff would not enforce the contract upon the bill."[3]

GOSS v. LORD NUGENT (1833).

5 B. & Ad. 58.

DENMAN, C. J.: "By an agreement in writing, the plaintiff con-

3—Compare the authorities cited in W., §§ 2444, 2445.

tracted to sell the defendant several lots of land for the sum of £450,
and to make a good title to them; and £80 was paid to him as a de-
564 posit. It was afterwards discovered, that, as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot; and the plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but now refuses to pay the remainder of the purchase-money, and he relies on the objection to the title. By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. But the Statute of Frauds has made certain regulations as to contracts for the sale of lands. We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But, in the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement. . . . The contract . . . is not wholly a contract in writing."[4]

ASHLEY v. ASHLEY (1855).

4 Gray 197.

Shaw, C. J.: "This is an action brought to recover damages for a disturbance of the plaintiff's easement, in stopping a water course
through land of the defendant, by which the plaintiff's land
565 was rendered wet and unproductive, and by which a right of way in other land of the defendant was rendered miry and impassable.

4—Compare the authorities cited in W., § 2441.

. . . It appeared that the plaintiff's lot had been set off to his mother, as dower, that the plaintiff took a share in the reversion by descent, and had acquired the rights of the other heirs by purchase. . . . The plaintiff, in order to establish the right of way, alleged in his declaration, to have been disturbed by the stopping of the drain or watercourse, relied on a parol reservation made by his mother, at the time of selling the land, under a license of court, as administratrix of her husband, for the payment of debts; and offered to show that when the deed was made by the administratrix to the defendant, there being no way reserved, the defendant assured her or her agent that she should have a right of way for the use of her lot, now held by the plaintiff, as if it were reserved. The judge had ruled that, by force and effect of the deed given by the administratrix to the defendant, he had the land free from any servitude in favor of the upper lot, or any right to a watercourse over that of the defandant; and that, if such servitude existed at all, it had arisen since that time, by adverse use and enjoyment for the term of twenty years. Upon this point, the evidence offered by the plaintiff was, that when the agent of the administratrix delivered to the defendant the deed, he stated that it reserved no right of way to her own lot, and that the defendant then said she might pass over the land as much as she pleased, as much as if the right of way was in the deed. Here the question was whether the right of way could be established by twenty years' adverse, continued and uninterrupted enjoyment. The judge, against the objection of the defendant, held that this evidence was competent, not because a right of way can be created by a parol grant, but to show that the plaintiff commenced the actual use of the way under a claim of right. The Court are of opinion that this was correct, for the purpose and to the extent, to which it was limited."[5]

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2. *Judicial Acts.*

a. *Record of a Judgment.*

Sir F. Pollock and *Mr.* F. W. Maitland, *History of the English Law, II, 666* (1895): "The distinction that we still draw between 'courts of record' and courts that are 'not of record' takes us back to very
566 early times when the King asserts that his own word as to all that has taken place in his presence is incontestible. This privilege he communicates to his own special court; its testimony as to all that is done before it is conclusive. If any question arises as to what happened on a previous occasion the justices decide this by recording or bearing record (*recordantur, portant recordum*). Other courts, as we have lately seen, may and, upon occasion, must bear record; but their records

5—Compare the authorities cited in W., § 2446.

are not irrefragable; the assertions made by the representative doomsmen of the shire-moot may be contested by a witness who is ready to fight. We easily slip into saying that a court whose record is incontrovertible is a court which has record (*habet recordum*) or is a court of record, while a court whose record may be disputed has no record (*non habet recordum*) and is no court of record. In England only the King's court—in course of time it becomes several courts—is a court of record for all purposes, though some of the lower courts 'have record' of some particulars, and sheriffs and coroners 'have record' of certain transactions, such as confessions of felony. In the old days, when as yet there were no plea rolls, the justices when they bore record relied upon their memories. From Normandy we obtain some elaborate rules as to the manner in which record is to be borne or made; for example a record of the Exchequer is made by seven men, and, if six of them agree, the voice of the seventh may be neglected. In England at a yet early time the proceedings of the royal court were committed to writing. Thenceforward the appeal to its record tended to become a reference to a roll, but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices; and as duplicate and triplicate rolls were kept there was always a chance of disagreement among them. A line is drawn between 'matter of record' and 'matter in pays' or matter which lies in the cognizance of the country and can therefore be established by a verdict of jurors."[6]

SAYLES v. BRIGGS (1842).

4 Metc. 421, 423.

Trespass upon the case for malicious prosecution. The declaration contained three counts, charging three distinct prosecutions of the plaintiff by the defendant. . . . To support the third count, the
567 plaintiff gave in evidence a complaint to a magistrate, signed and sworn to by the defendant, charging the plaintiff with forging a record of a magistrate; but he did not give in evidence any warrant issued on said complaint, nor prove that he was arrested and held to answer to the complaint, except by parol testimony. The plaintiff was arraigned

6—*Coke upon Littleton*, 260 (1628): "*Recordum* is a memorial or remembrance in rolles of parchment of the proceedings and acts of a Court of justice. . . . And the rolles, being the records or memorialls of the judges of Courts of record, import in them such incontrollable credit and veritie as they admit no averment, plea, or proofs to the contrarie; . . . and the reason hereof is apparent, for otherwise [as our old authors say, and that truly] there should never be any end of controversies, which should be inconvenient."

L. C. J. *Mansfield*, in *Jones* v. *Randall*, Cowp. 17 (1774): "The minutes of the judgment are the solemn judgment itself."

Nisbet, J., in *Bryant* v. *Owen*, 1 Ga. 355, 367 (1846): "The record is tried by inspection; and if the judgment does not there appear, the conclusion is that none has been rendered."

before a justice of the peace, who made the following record, and no other, of the proceedings before him: "Berkshire ss. At a justice's court holden before me, at house of Franklin Bartlett, in Adams, on Wednesday, 13th day of February 1839, at one of the clock in the afternoon, Commonwealth vs. Franklin O. Sayles, on the complaint of Peter Briggs, Esq., for forgery. After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered by me the said justice, that the said Franklin O. be discharged." The plaintiff offered parol testimony of the said justice and others, that he was arraigned on all the aforesaid complaints, and pleaded to the same, and that a hearing thereon was had before said justice, who discharged the plaintiff. The defendant objected to the admission of this testimony. But, as it appeared that no record had been made, by said justice, of the proceedings had before him, except that above set forth; and as it further appeared that said justice was no longer a justice of the peace under the commission held by him at the time of the trial and hearing of said cases before him, and that he had declined to qualify himself as a justice under a new commission which he had since received, and had also declined to make any further record in relation to said proceedings; the judge, before whom the trial was had, ruled that it was competent for the plaintiff to introduce parol evidence, if not contradictory to said record, to prove the issuing of the warrant on the third complaint, and also that the plaintiff was arraigned on all said complaints, and pleaded to the same, and that, upon a hearing before said justice, he was, by said justice, discharged therefrom. The proposed evidence was thereupon admitted, and a general verdict was returned for the plaintiff, which is to be set aside, and a new trial granted, if said ruling was erroneous.

HUBBARD, J.: "A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment, and the design is, not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests; and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction. They are received as the truth itself, and no averment can be made against them nor can they be varied by parol. . . .

"But records, like other documents, are exposed to casualties, and, like them, may also be misplaced or lost; or owing to the accidents which continually occur, the record may not, in a given instance, have been extended from the minutes of the proceedings. And the cases are abundant to show that a lost record, like a lost deed, may be proved by parol; and that the minutes may be introduced, where the record has not been drawn out *in extenso,* as containing the elements of the

record, and, in truth, for the time being, the record itself. . . . But in the present case, no facts or circumstances were introduced tending to prove either the loss of records, or the existence of any other record than the one produced; nor any minutes, from which another record might be completed. On the other hand, it appears that no record, other than the one in evidence, was ever made, and that no minutes were taken, at the time of the alleged trial, from which such further record could be made. It is impracticable, therefore, to support the introduction of this testimony on the ground that the record or a part of it was lost.

"Again, it is argued that this testimony should be received from necessity, as there is no way by which the plaintiff can obtain redress, and that this is the best evidence which now exists. But in my judgment it will be productive of far less mischief for an individual to suffer from the neglect or misfortune of an officer in not making a judicial record than to establish a precedent that the record itself or a part of it may be proved by parol,—that it may speak one language to-day and another to-morrow, depending on the different witnesses who are called or on their changing recollections. And without prescribing a rule for a case where a magistrate might by the act of God be deprived of the opportuunity of making even any minutes of proceedings before him from which a record could be made (if such a case should ever occur), we are of opinion that the want of a judicial record cannot be supplied by parol evidence; and that the rules which apply to the admission of testimony to prove the contents of a lost record, or to the introduction of minutes by which the record may be extended, have no real bearing on a case like the present, where no such loss ever took place and no such minutes ever were made. A party who is to be affected by the record will in the exercise of ordinary care see that it is correctly made up; and if the officer should neglect or refuse to perform his duty, he can be compelled by mandamus to make a true record.

"There is, then, no record of an acquittal on the charge contained in the second count, nor of the issuing of a warrant, or of an acquittal, on the third count; and, for the reasons given, the want of such a record cannot be supplied by parol proof."

PRUDEN v. ALDEN (1839).

23 Pick. 184, 187.

Writ of right, in which the demandants claimed title as heirs of their father, Peleg Gulliver, who died seised of the demanded premises, in September 1806. The tenant claimed under a deed dated in November 1807, from Salome Gulliver, who was the widow of Peleg, and administratrix of his estate. This deed recited, that "a

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license was obtained by an order of the Court of Common Pleas, begun and held at Plymouth, on the second Tuesday of August 1807, to make sale of the real estate of said deceased, so far as should be necessary to satisfy the just debts by him owing at the time of his death, and for incidental charges." . . . It appeared, that it was the practice of the judge of probate, of the county of Plymouth, from 1807 to 1810, to consult one of the judges of the Court of Common Pleas, at the sittings of that court, in regard to the application for licenses, and after obtaining his assent thereto, to hand the applications and the directions of the court respecting them, to the clerk at the close of the terms, to be certified; that the clerk, at that time, had become careless and inattentive to his official duties, and a large portion of the records was made up unskilfully by his wife; that the docket for the August term 1807 was not to be found; that the present clerk, having found the papers in his office to be irregularly and confusedly filed, arranged them in order from the year 1800 to the time of his appointment; that on the files there are seven minutes for licenses for the sale of real estate at the August term 1807, and as many records of licenses granted for that purpose, but that no record is to be found of any license granted to Salome Gulliver for that purpose, and no minutes or application on the files, from which such a record might be made up. . . . The demanded premises were sold to the tenant, at the time and place mentioned in the notices posted up by Delano, the sum named in the deed being the highest bid made therefor. If, upon these facts, the Court should be of opinion, that the jury would be authorized to find, that there was a legal license granted to sell the estate, the demandants were to become nonsuit; otherwise, the tenant was to be defaulted.

Shaw, C. J.: "It being very clear, that the administratrix could make no valid sale, without a license, the title of the tenant depends upon proof of such license. It is contended on the part of the demandants, that there is no legal proof of such a license having been granted. We think it may be admitted, as contended for by the demandants, that a license by the Court of Common Pleas must be proved by its records. But the Court are to take notice how the records of their own and of other courts are in fact made and kept. The clerk intrusted with the duty of keeping records, must of necessity take down the doings of the court, in short and brief notes; this he usually does in a minute book called the docket, from which a full, extended and intelligible record is afterwards to be made up. But until they can be made up, these short notes must stand as the record; and if, in the mean time, through the death or sickness of the clerk, or other casualty, they are lost, it must be deemed a loss of the records, and secondary proof may be offered of their contents. . . . In the present case, the license relied upon is supposed to have been granted at the August term, 1807, and is so recited in the deed to the tenant; and it is proved,

that the docket of that term is missing. The recital in the deed, corroborated by many other circumstances, together with more than thirty years' undisturbed possession by the tenant under a deed which could only be good by force of such license, appears to the Court to be sufficient proof of the existence and loss of the record, to let in secondary evidence. And from the evidence thus offered, the Court are satisfied, that such license was in fact granted, and some minute of it entered by the clerk, which would have been sufficient to warrant him in making up an extended record, according to the usual course of business in his office."[7]

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b. Verdict of a Jury.

ROBBINS v. WINDOVER (1802).

2 Tyl. 11, 13.

Motion for new trial, stating that some of the Jurors of the Jury who tried the cause, after the cause was submitted to them, witnessed or related to others of the panel certain matters and things in
569 relation to the issue not witnessed or related on the trial of the cause in Court. . . . *Chauncey Langdon,* for defendant, offered to read the affidavit of one of the Jurors. To the reading of this affidavit an objection was taken. . . .

TYLER, J.: "Upon the point in question, the Court are decidedly of opinion, that the affidavit cannot be admitted to be read. The common law requires that the twelve jurors shall unite in a verdict. Whoever considers the variety and intricacy of causes they have to determine, the difficulty of bringing twelve persons of different habits and modes of thinking, and of unequal abilities, fortuitously elected, to concur in opinion, will perceive the wisdom of the Legislature in directing that their deliberations should be secret; for it was to be expected, that in bringing about a union of sentiment in the panel, the subject under consideration would be presented in various lights; that futile objections would be met with inconclusive arguments, theory opposed to practice, and legal science to common sense; that the reputations of witnesses would be scanned, the character of parties too often adverted to, and the whole investigation illustrated by relations of what each juror had heard or known in cases supposed similar; that the warmth of debate would excite an obstinacy of opinion, and a reluctant and tardy assent to the verdict, perhaps drawn from some one, which, on after reflection, might leave in the juror's mind a doubt of its rectitude. It would be of dangerous tendency to admit jurors by affidavit to detail these deliberations of the jury room, to testify to subjects not perfectly comprehended at the time, or but imperfectly recol-

7—Compare the authorities cited in W., § 2450.

lected. From a natural commiseration for the losing party, or a desire to apologize for the discharge of an ungrateful duty, after the juror had been discharged from office, he would be too apt to intimate, that if some part of the testimony had been adverted to, or something not in evidence omitted, his opinion would have been otherwise, whilst others of the panel, with different impressions or different recollections, might testify favourably for the prevailing party. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated."[8]

HAAK v. BREIDENBACH (1817).

3 S. & R. 204.

Breidenbach, the plaintiff below, brought this action upon an arbitration bond entered into by the defendant, on the 4th August 1786, to abide the award of arbitrators for damages alleged to have
570 been done prior to that time, by the defendant, to the bark mill and spring of the testator, by damming up a streamlet of water on the defendant's land. The defendant pleaded no award; and recovery in a former action in the Common Pleas of Dauphin county (in which Lebanon county was then included), for the same cause of action. The plaintiff replied, and set out the award for the payment of 120 pounds; and assigned for breach, the non-payment thereof. To the second plea, he replied no such recovery. In support of the plea of a former recovery, the defendant gave in evidence the record of a recovery, in an action on the case against him brought to November Term 1788, by the testator in the court above mentioned, in which the declaration was for damming up a stream of water on the defendant's land, on the 10th August 1785, by which the testator's bark mill and spring were overflowed and injured, whereby he lost the profits and advantages thereof, from the 10th August 1785, to the 3d November 1788, when that suit was instituted. The plaintiff then offered the deposition of Stacy Potts, one of the jurors who tried the cause, to show, that on that trial, the plaintiff waived all claim for damages from the 10th August 1785, to the 4th August 1786; that the jury was directed by the court, on account of the arbitration, not to include that period of time in estimating the damages, and that they therefore only included the damages sustained subsequently to the 4th August 1786. This evidence was objected to by the defendant, but admitted by the court, and a bill of exceptions taken. . . .

TILGHMAN, C. J.: "The question in this case in the court below, was whether the plaintiff had recovered damages in a former action for a nuisance continued from 10th August 1785, to 4th August 1786. In order to prove that he had, the defendant gave in evidence the rec-

8—Compare the authorities cited in W., § 2349.

ord of a recovery in a former action, in which a *continuando* was laid, including the time in dispute. On the other hand, the plaintiff offered and the court admitted parol evidence to show that on the trial of the former action the plaintiff gave up part of the time laid in the *continuando,* viz., from 10th August 1785, to 4th August 1786, and received damages only for a time prior to 10th August 1785. The error assigned is in the admission of the parol evidence. In trespass with a *continuando,* the plaintiff may waive the *continuando,* and prove a trespass at any time before the suit brought, or he may give evidence which goes to only part of the time laid in the *continuando.* . . . If the plaintiff did not in truth recover in the former action for the time between 10th August 1785, and 4th August 1786, he will suffer wrong unless he recovers in this action. And if he might, on the former trial, confine himself to part of the time laid in the *continuando,* I see not why he may not now be permitted to show that he did not confine himself, because this evidence does not contradict the record. Inasmuch, then, as the justice of this case could not be obtained but by admission of the parol evidence, I am of opinion that it was properly admitted and that the judgment should be affirmed."[9]

VAISE v. DELAVAL (1785).

1 T. R. 11.

Motion by *Law* for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won.

571 *Lord* MANSFIELD, C. J.: "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is very high misdemeanor. But in every such case the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means."[10]

WRIGHT v. TELEGRAPH CO. (1866).

20 Ia. 195, 210.

Suit to recover damages for the injury sustained by him on account of the casualties aforesaid. The cause was tried to a jury and resulted in a verdict of three hundred and forty-five dollars and

572 sixty-six cents for plaintiff. The defendant moved for a new trial, based mainly upon alleged erroneous giving and refusing in-

9—Compare the authorities cited in W., §§ 2351, 2349, n. 5.

10—*Mansfield,* C. J., in *Owen* v. *Warburton,* 1 B. & P. N. R. 326, 329 (1807): "The affidavit of a juryman [to a jury's misconduct] cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were

structions, misconduct of the jury, and newly discovered evidence. In support of the alleged misconduct of the jury, the defendant filed the affidavits of four of the jurors who tried the cause. Each affidavit stated, in substance, that, in order to arrive at the plaintiff's damages, it was agreed that each juror should mark down such sum as he thought proper to allow; that the aggregate should be divided by twelve, and the quotient should be the verdict; which agreement was carried out by each juror, and the quotient thus obtained was returned to the court as the verdict of the jury. The plaintiff then moved to strike the affidavits of the jurors from the files, because they could not be read as evidence in support of the motion for a new trial. This motion to strike was sustained and the motion for a new trial overruled. The defendant excepted and appeals.

Cole, J.: "The first question presented by the transcript, and argued by counsel, is, whether affidavits of jurors may be read in support of a motion for a new trial, based upon the alleged misconduct of the jury, in the manner of arriving at the verdict. . . .

"While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance which, under the circumstances, justifies us in laying down the following as the true rule: That affidavits of jurors may be received for the purpose of avoiding the verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast. That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it. While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberation, conversations, debates, and judgments of the jurors themselves; and the effect or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to

to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him."

be concluded thereon by his solemn assent to and rendition of the verdict (*veredictum*—a true declaration). To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . . While it is certainly illegal and reprehensible in a juror, to resort to lot or the like to determine a verdict, which ought always to be the result of a deliberate judgment, yet such resort might not evince more turpitude tending to the discredit of his statement than would be evinced by a person not of the jury, in the espionage indicated by *Lord* MANSFIELD and necessary to gain a knowledge of the facts to enable him to make the affidavit. At all events the superior opportunities of knowledge and less liability to mistake, which the juror has over the spy, would entitle his statement to the most credit. And if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a Court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to credit. Nor does the consideration of the affidavits of jurors, for the purposes stated, contravene sound public policy. It is true, however, that public policy does require that when a juror has discharged his duty and rendered a verdict, such verdict should remain undisturbed and unaffected by any subsequent change of opinion upon any fact or pretext whatever; and, therefore, a juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a Court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate discharge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful.

"We are, therefore, of the opinion that the District Court erred in striking from the files and refusing to consider the affidavits of the four jurors, that the verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict, pursuant to a previous agreement to accept it as such. These affidavits, uncontradicted, are sufficient to sustain the motion to set aside the verdict and grant a new trial."[1]

REX v. WOODFALL (1770).

5 Burr. 2661, 2667.

Lord MANSFIELD, C. J.: "This comes before the court upon two rules: the first (obtained by the defendant) 'To stay the entering up judgment on the verdict in this cause'; the second (obtained by the attorney general,) 'That the verdict may be entered according to the legal import of the finding of the jury.' The last rule must, from the nature of it, be first discussed; because the ground of argument upon the other cannot be settled, till this is disposed of. . . . The prosecution is an information against the defendant, for printing and publishing a libel, in the Public Advertiser, signed 'Junius'; the tenor of which is set out, with proper averments as to the meaning of the libel, the subject-matter, and the persons, concerning which and of whom it speaks; with innuendoes filling up all the blanks, and the usual epithets. . . . There was no doubt but that the evidence, if credited, amounted to proof of printing and publishing by the defendant. . . . I directed the jury . . . that where an act in itself indifferent, if done with a particular intent becomes criminal; there the intent must be proved and found: but where the act is in itself unlawful, (as in this case), the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent. The jury staid out a great while, many hours. At last they came to my house; (the objection of its being out of the county being cured by consent). In answer to the usual question put by the officer, the foreman gave their verdict in these words—'Guilty of the printing and publishing, only.' Nothing more passed. The officer has entered up the verdict literally; without so much as adding the usual words of reference, to connect the verdict with the matter to which it related. Upon this, the two rules I have stated were moved for. Upon that obtained by the Attorney General, the affidavit of a juror was offered by the counsel for the defendant. But we were all of opinion, that it can not be received. . . . Where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors

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1—Compare the authorities cited in W., § 2354.

or bystanders may be received, upon a motion for a new trial or to rectify a mistake in the minutes; but an affidavit of a juror never can be read as to what he then thought or intended. . . . No argument can be urged for omitting the word 'only' which does not prove that it can have no effect though inserted; and therefore it is a question of law upon the face of the verdict. . . . The question is whether any meaning can be put upon the word 'only,' as it stands upon the record, which will affect the verdict. . . . It is impossible to say with certainty what the jury really did mean. Probably they had different meanings. If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by the verdict. . . . If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favor of a *venire de novo*."[2]

CAPEN v. STOUGHTON (1860).

16 Gray 364.

Petition entered at April term 1858 of the court of common pleas in Norfolk, setting forth that in November 1856 a town way was laid out over the land of the petitioners in Stoughton, and damages
574 assessed therefor, by which the petitioners were aggrieved, and the county commissioners, upon their application and after due notice, issued a warrant for a reassessment of the damages by a jury; that a jury was empanelled and the case tried before them; that blank forms of verdict for the petitioners and for the respondents were handed to them by the sheriff; that the jury agreed upon and filled out a verdict for the petitioners, but through mistake omitted to sign it, and signed a verdict for the respondents; that both verdicts were sealed up in one envelope and returned into the court of common pleas; that the petitioners received information from some of the jurors that the verdict returned was in their favor, and so told their counsel, and he, relying on this information, without inspecting the verdict, moved the court at December term 1857 to accept it, and it was accepted and ordered to be certified to the county commissioners. The prayer of the petition was that this judgment should be vacated, the case brought forward on the docket, and leave given the petitioners to sue out a writ of review. SANGER, J., ruled that, assuming all the facts stated in the petition to be true, the petitioners were not legally entitled to the relief prayed for, and the court had no discretionary power to grant it; and dismissed the petition. The petitioners alleged exceptions, which were argued in January 1859, and sustained, and the case remitted. . . .

2—Compare No. 631, *post*.

A hearing was had in the court of common pleas at April term 1859, at which AIKEN, J., against the objection of the respondents, allowed three of the persons who had composed the sheriff's jury to testify that, after agreeing on a verdict for the petitioners and filling up a blank form accordingly, the jury by mistake signed the form of verdict for the respondents; and ordered the former case to be brought forward on the docket, and the acceptance of the verdict to be vacated as prayed for. The respondents alleged exceptions to the admission of the testimony of the jurors.

BIGELOW, C. J.: "We think this case differs essentially from those cited by the counsel for the respondents, in which it has been held, that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct of the jury, or of some one or more of the panel. It has been settled upon sound considerations of public policy that mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the jury room, cannot be shown by the evidence of the jurors themselves, as the ground of disturbing a verdict, duly rendered. . . . But in the present case the mistake which is proved by the testimony of the jurors is of a different character. It is not one connected with the consultations of the jury, or the mode in which the verdicts were arrived at or made up. No fact or circumstance is offered to be proved, which occurred prior to the determination of the case by the jury and their final agreement on the verdict which was to be rendered by them. But the evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased, and they had actually agreed on their verdict. The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived. . . . No considerations of public policy require that the uncontradicted testimony of jurors to establish an error of this nature should be excluded. Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove dangerous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake, of a merely formal and clerical character, which the Court ought to interfere to correct, in order to prevent the rights of parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case."[3]

3—Compare the authorities cited in W., §§ 2355, 2356.

LOW'S CASE (1827).

4 Me. 439.

An indictment was found at the last April term in this county, against this defendant, for the alleged forgery of a deed. At the last September term, being brought in to plead to the indictment,
575 he filed a motion in writing under oath, in these words:—"And now the said John Low comes into court, and alleges that he ought not to be holden to answer to this indictment, because he says that the said indictment was not found by any twelve of the grand jury; but simply by a majority of the number who constituted the grand jury panel, at the court at which said bill purports to be found. And he now moves the court for liberty to prove these facts by the testimony of James Gray, foreman of the grand jury who returned said bill into court; and by Col. Thomas W. Shannon, Joseph Frost, Esq., John S. Foss and Miles Ford, who were grand jurors on the panel aforesaid, and who are now here present in court; and that said bill was so returned under a mistaken idea that it was only necessary that a majority of the panel should agree to a bill of indictment." The affidavits of the grand jurors named in the motion being taken *de bene esse,* they all testified that their impression was, that it was sufficient if a majority of the grand jury concurred in the finding of a bill, though the number composing the majority was less than twelve. The foreman and two others stated that in the present case the number of grand jurors so concurring was less than twelve. One of the others testified that such was his impression, but that he did not feel certain of the fact; and the other said that he did not know whether there were or were not twelve who concurred in finding the bill. The motion was then ordered to stand over for argument at this term. . . .

WESTON, J.: ". . . The concurrence of twelve grand jurors is necessary to find a bill. The party accused cannot be legally held to answer, upon the finding of a less number. And this privilege is secured to the citizen, in crimes capital or infamous, by the provisions of the constitution. These positions are not denied; but it is insisted that, when an indictment is once verified by the attestation of the foreman of the grand jury that it is a true bill, and as such been presented to the Court, and ordered to be put on file, it then becomes a matter of record; and furnishes conclusive and incontrovertible evidence, that it was found by the requisite number. I am satisfied that an indictment, thus sanctioned, is to be regarded as a record, and that it has all the legal verity which belongs to that species of evidence; and I admit that according to our practice, it proves the fact that twelve or more agreed to the bill. I think the certificate of the foreman must be necessarily understood as implying this, and as constituting the proper evidence of the fact; it not here appearing in the caption that it was found by twelve men, according to the usage in England. But

while I recognize the absolute certainty, which a regular judicial record carries with it, and the policy upon which it is founded, I am also of opinion that there is, and always has been, and from the necessity of the case must be, a power in the Court to vacate, or to cause to be amended, a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers. I entertain no doubt that the Court may exercise this power at any time, according to their discretion; but unquestionably while a criminal prosecution, or a civil suit, is yet in progress, and has not finally terminated. . . . The return of the sheriff, upon mesne or final process, has the character of a record; and as such is incontrovertible; and yet it is no uncommon practice for the Court, in their discretion, to permit him to amend it. And upon the suggestion of the clerk that an error has crept into the record, through the inadvertency either of himself or his substitutes, the court, being satisfied of the truth of the suggestion, do not hesitate to order its amendment.

"It is well known that in our practice, when the grand jury come into court, upon being inquired of whether they have agreed in any bills, and the foreman answering in the affirmative, he is directed to hand them in; whereupon they pass from his hands, through the intervention of an officer to the clerk. They are not read over, nor is the substance of them stated, or the persons named against whom they are found. It is taken for granted that the foreman returns only such as the requisite number have concurred in; but no inquiry is made of his fellows, nor is it made known to them at the time what bills are passed over to the Court. Let it be supposed that after they have been received, and ordered to be filed, and the grand jury discharged, it should happen to be suggested to them that, among the number, is one charging a certain citizen with a certain crime. If therefore every juror, except the foreman, should present himself and offer his affidavit that he never agreed to such a bill, is there no power in the Court to receive such testimony, and if assured of its truth to give relief? Or if the foreman, after the grand jury has been dismissed, discovering his mistake, should suggest to the Court, and offer to support his statement by oath, and by the corroborating testimony of every member of the grand jury, that the Attorney General had drawn two bills against a party accused, one for murder and one for manslaughter, and had left them with the jury, that they might make use of one or the other, as they might find the facts; that a competent number of them had agreed in the bill for manslaughter; but that he had since discovered that he had inadvertently signed and presented as true the bill for murder, to which they had not agreed; is the judicial power so defective, that this error must remain without correction? If so the life of a citizen may be brought into jeopardy, in violation of both his legal and constitutional rights, under the pretence of a necessary adherence to the letter of a technical rule.

"It may be said that to permit an inquiry of this sort, would open the door to great abuses; that it would afford opportunity to tamper with the jury; and that it would lessen the respect due to the forms and solemnities of judicial proceedings. These are considerations, which address themselves strongly to the attention of the Court; and cannot fail to have a deep influence, in the exercise of their discretion. It could only be in a very clear case; where it could be made to appear manifestly and beyond every reasonable doubt, that an indictment, apparently legal and formal, had not in fact the sanctions which the law and the constitution require, that the Court would sustain a motion to quash or dismiss it, upon a suggestion of this kind."[4]

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3. *Corporate Acts.*

UNITED STATES BANK v. DANDRIDGE (1827).

12 Wheat. 65.

STORY, J.: "This is a writ of error to the circuit court for the district of Virginia. The original action was debt on a bond, purporting to be signed by Dandridge, as principal, and Carter B. Page, Wil-
576 son Allen, James Brown, Jr., Thomas Taylor, Harry Heth and Andrew Stevenson, as his sureties, and was brought jointly against all the parties. The condition of the bond, after reciting that Dandridge had been appointed cashier of the office of discount and deposit of the Bank of the United States, at Richmond, Virginia, was, that if he should well and truly, and faithfully discharge the duties and trust reposed in him as cashier of the said office, then the obligation to be void, otherwise to remain in full force and virtue. The declaration set forth the condition, and assigned various breaches. Dandridge made no defence; and the suit was abated, as to Heth, by his death. The other defendants severed in their pleas. It is not thought necessary to state the pleadings at large; it is sufficient to state, that Stevenson and Allen pleaded, among other pleas *non est factum* generally, and also special pleas of *non est factum,* on which issues were joined; and that all the defendants, in various forms, pleaded, that the instrument was not the deed of Stevenson; and further pleaded, that the bond had never been approved, according to the provisions of the 30th article of the rules and regulations of the bank. Issues were also taken on these pleas; and the cause came on for trial upon all the issues of fact. At the trial, evidence was offered for the purpose of establishing the due execution of the bond by the defendants, and particularly by Stevenson and Allen, and its approval by the plaintiffs. The evidence was objected to, on behalf of the defendants, as not sufficient to be left to the jury, to infer a delivery of the bond, and

4—Compare the authorities cited in W., § 2364.

the acceptance and approval thereof by the directors of the bank, according to the provisions of their charter; and the objection was sustained, the Court being of opinion, that although the scroll affixed by Allen to his name, is, in Virginia, equivalent to a seal of wax, and although proof of the handwriting of Stevenson, and the bond being in possession of the plaintiffs, and put in suit by them, and the introduction of Dandridge into the office of cashier, and his continuing to act in that office, would, in general, be *prima facie* evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted; yet it was not evidence of that fact, or of the obligation of the bond, in this case; because, under the Act of Congress, incorporating the Bank of the United States, the bond ought to be *satisfactory* to the board of directors, before the cashier can legally enter on the duties of his office, and consequently, before his sureties can be responsible for his non-performance of those duties; and that the evidence in this case did not prove such acceptance and approbation of the bond, as is required by law for its completion. . . . The court excluded the whole, and every part of the said evidence from the jury, being of opinion, that the board of directors keep a record of their proceedings, which record, or a copy of it, showing the assent of the directors to this bond, was necessary to show that such assent was given; and if such assent had not been entered on the record of the proceedings of the said directors, the bond was ineffectual, and no claim in favor of the plaintiffs could be founded thereon, against the defendants in these issues. . . . It is admitted, in the opinion of the Circuit Court, that the evidence offered would in common cases, between private persons, have been *prima facie* evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted. But it is supposed, that a different rule prevails in cases of corporations: that their acts must be established by positive record of proofs; and that no presumptions can be made, in their favor, of corporate assent or adoption, from other circumstances, though in respect to individuals, the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons; and from the supposed incapacity of the former to do any act, not evidenced by writing, and if done, to prove it, except by writing. . . .

"In ancient times, it was held, that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and had to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a

vast variety of cases, in modern times, and cannot now, as a general proposition, be supported. Mr. Justice BAYLEY, in Harper v. Charlesworth, 4 B. & C. 575, said, 'A corporation can only grant by deed; yet there are many things which a corporation has power to do, otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature.' And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal. But whatever may be the implied powers of aggregate corporations, by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself. . . . We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced. . . . If a person acts notoriously as cashier of a bank, and is recognised by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. . . .

"But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. . . . In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. . . . The corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. . . . Assuming, then, that the directors of the parent bank were, as a board, to approve of the bond, so far as it respects the sureties, in what manner is that approval to be evidenced? Without question, the directors keep a record of their proceedings as a board; and it appears by the rules and regulations of the parent bank, read at the bar, that the cashier is bound 'to attend all meetings of the board, and to keep a fair and regular record of its proceedings.' If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case (we repeat it), the whole argument has proceeded upon

the ground, as conceded, that no such record exists of the approval of the present bond. The charter of the bank does not, in terms, require that such an approval shall be by writing, or entered of record. It does not, in terms, require that the proceedings of the directors shall generally be recorded, much less, that all of them shall be recorded. It seems to have left these matters to the general discretion of the corporation, and of the directors; and though it obviously contemplates, that there will be books kept by the corporation, which will disclose the general state of affairs, it is not a just inference, that it meant that every official act of the directors should be recorded, of what ever nature it might be. . . . Upon what ground it can be maintained, that the approval of the bond by the directors must be in writing? It is not required by the terms of the charter, or the by-laws. In each of them, the language points to the fact of approval, and not to the evidence by which it is to be established, if controverted. It is nowhere said, the approval shall be in writing, or of record. The argument at the bar, upon the necessity of its being in writing, must, therefore, depend for its support, upon the ground, that it is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities, which ought not to be departed from. Upon the best consideration we can give the subject, we do not think that the argument can be maintained, under any of these aspects."

MARSHALL, CH. J. (dissenting.): "I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the circuit court of Virginia gave general surprise to the profession, and was generally condemned. . . . The plaintiff is a corporation aggregate; a being created by law; itself impersonal, though composed of many individuals. These individuals change at will: and even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation, and after they cease to be so, for everything they do, whether in the name of the corporation or otherwise. The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature. Can such a being speak, or act, otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will; the voice which utters it, must be the aggregate voice. Human organs belong only to in-

dividuals; the words they utter are the words of individuals. These individuals must speak collectively, to speak corporately, and must use a collective voice; they have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing. A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing. . . . It is stated in the old books (Bro. Corp. 49), that a corporation may have a ploughman, butler, cook, &c., without retaining them by deed; and in the same book (p. 50), Wood says, 'small things need not be in writing, as to light a candle, make a fire, and turn cattle off the land.' Fairfax said, 'A corporation cannot have a servant but by deed; small things are admissible, on account of custom, and the trouble of a deed in such cases, not by strict law.' Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed, or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. . . . According to the decisions of the Courts of England, then, and of this Court, a corporation, unless it be in matters to which the maxim *de minimis non curat lex* applies, can act or speak, and, of course, contract, only by writing. . . .

"It may be said, that although certain things ought to appear in writing, it is not necessary that all the transactions of a bank should so appear; and the assent of the directors to the bonds given by their cashiers, need not appear. Such grave acts or omissions as may justify the suing out a *scire facias,* to vacate the charter, ought to be evidenced by their records; but such unimportant acts as taking bonds from their officers, need not appear; these may be inferred. I do not concur in this proposition. . . . The counsel for the plaintiffs has sought to escape the almost insuperable difficulties which must attend any attempt to maintain the proposition that a corporation aggregate can act without writing, by insisting that the directors are not the corporation, but are to be considered merely as individuals who are its agents. If this proposition can be successfully maintained, it becomes a talisman, by whose magic power the whole fabric which the law has erected respecting corporations, is at once dissolved. In examining it, we encountered a difficulty in the commencement. Agents are constituted for special purposes, and the extent of their power is prescribed, in writing, by the corporate body itself. The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the cor-

poration. But do they act as individuals, or in a corporate character? If they act as a corporate body, then the whole law applies to them as to other corporate bodies. If they act as individuals, then we have a corporation which never acts in its corporate character, except in the instances of electing its directors, or instructing them. . . . The president and directors form, by the charter, a select body, in which the general powers of the corporation are placed. This body is, I think, the acting corporation. . . . The board must keep a record of its proceedings. Were the by-laws silent on the subject, this would be, as I think, rendered indispensable, by the fact, that it is the act of a corporation aggregate. If there must be a record of their proceedings, and even were this necessity not absolute, if the by-laws show that there is one, it follows, that this record, not the oral testimony of the members, or of bystanders, must prove their acts. . . . This record, or an authentic copy of it, must, according to the rules of evidence, be produced, that it may prove itself. May its existence be presumed in this case? The corporation, which claims this presumption, keeps the record, and is now in possession of it, if it exists. No rule of evidence, is more familiar to the profession, than that a paper cannot be presumed, under such circumstances.

"I have stated the view which was taken by the circuit court of this case. I have only to add, that the law is now settled otherwise, perhaps, to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it."[5]

C. FORMALITIES OF LEGAL ACTS.

STATUTES REQUIRING WRITING AS AN ESSENTIAL OF A LEGAL ACT.

1535, St. 27 H. VIII, c. 16: "No manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another.
577 . . . by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record."

5—Compare the following:

State v. *Main*, 69 Conn. 123, 37 Atl. 80 (1897); Information for a violation of the statute relating to "peach yellows," brought to the Superior Court in New London County and tried to the jury before *Shumway*, J.; verdict and judgment of guilty. . . . *Baldwin*, J.: "The defendant requested instructions to the effect that before the commissioner of peach yellows or his deputy 'could legally order trees destroyed, regulations in relation to so ordering trees destroyed must have been adopted or approved by the State Board of Agriculture, and the State having failed to prove any such regulations, the defendant should be acquitted.' They were properly refused, because the State had offered evidence tending to show that such regulations had been previously adopted. This evidence was a copy from the records of the board, duly certified by its secretary, under its seal, purporting to set forth the doings of the board at a meeting held several months before the date of the order served

1540, St. 32 H. VIII, c. 1, § 1: Gives liberty to devise all lands "as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life."

1678, St. 29 Car. II, c. 3, § 1: "All leases, estates, interests of freehold, or terms of years, or any uncertain interests of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, *made* or created by livery and seisin only, or by *parol, and not put in writing and signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect. . . ."

Ib. § 3: "No leases, estates, or interests . . . [in land] shall . . . be assigned, granted, or surrendered, unless it be *by deed or note in writing, signed* by the party so assigning."

Ib. § 4: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, *unless the agreement* upon which such action shall be brought, *or some memorandum or note thereof, shall be in writing, and signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Ib. § 5: "All devises and bequests of any lands or tenements . . . shall be *in writing, and signed* by the party so devising the same, or by some other person in his presence and by his express directions, and shall be *attested and subscribed in the presence* of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

Ib. § 7: "All declarations of creations of trusts or confidences of any lands, tenements, or hereditaments, shall be *manifested and proved by some writing signed* by the party . . . , *or else* they shall be *utterly void* and of none effect."

Ib. § 9: "All grants and assignments of any trust or confidence shall likewise be *in writing signed* by the party granting or assigning . . . *or else* shall likewise be *utterly void* and of none effect."

upon the defendant. He sought to meet this document by oral testimony from the secretary that the statement in the minutes of the meeting that certain regulations were adopted, had been interlined pending this prosecution, and was no part or the original record. This testimony was properly rejected by the court. It was offered to impeach the record of a public board, and such a record cannot thus be collaterally attacked."

Compare the authorities cited in W., § 2451.

Ib. § 17: "*No contract* for the sale of any goods . . . *shall be allowed to be good,* except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that *some note or memorandum in writing of the said bargain be made and signed* by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Ib. § 19: "No nuncupative will shall be good . . . that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will, or to that effect."

Ib. § 20: "After six months passed from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will."

LEROUX v. BROWN (1852).

12 C. B. 801, 823.

Assumpsit. . . . It appeared that an oral agreement had been entered into at Calais, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ
578 the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighbourhood, for transmission to the defendant here,—the employment to commence at a future day, and to continue for one year certain. Evidence was given on the part of the plaintiff to show, that, by the law of France, such an agreement is capable of being enforced, although not in writing. For the defendant, it was insisted, that, notwithstanding the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law; and, being a contract not to be performed within a year, the statue of frauds, 29 Car. 2, c. 3, s. 4, required it to be in writing. Under the direction of the learned judge, a verdict was entered for the plaintiff on the first issue,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him on that issue, if the court should be of the opinion that the contract could not be enforced here.

Jervis, C. J.: "I am of the opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principles which ought to govern our decision. My Brother *Allen* admits, that, if the 4th section of the Statute of Frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by

Mr. Honyman,—who has argued this case in a manner for which the Court is much indebted to him,—that, if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the *solemnities* of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the Statute of Frauds, and contrasting them with those of the 1st, 3d, and 17th sections, this conclusion seems to me to be inevitable. The words of s. 4 are, 'no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.' The statute, in this part of it, does not say, that, unless those requisites are complied with, *the contract shall be void,* but merely that *no action shall be brought upon it* and, as was put with great force by Mr. Honyman, the alternative, 'unless the agreement, *or* some memorandum or note thereof, shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice."

OTHER FORMALITIES THAN WRITING.[1] "It remains here only to note, for the sake of completeness, the remaining formalities receiving the sanction of modern law. These formalities, so far as required, take their place, with the writing of some of the sections of the statute of frauds, as an inherent element of form in the validity of the transaction. Like all other requirements of form, they are arbitrary, in the sense that the act may be sufficient in its terms (for example, to constitute a contract or a release), and may be fully proved by the evidence, and yet remains legally ineffective. Nevertheless, they are not arbitrary, to the extent that they rest on a conscious policy of avoiding certain general dangers or abuses, and that they enforce a rigid rule merely for the sake of this policy.

579

"(1) A *signature* is required by the statute of frauds, for all of the transactions in which writing is required; and obviously the signature is a formal requirement over and above that of writing

1—Quoted from W., § 2456.

alone. A signature, however, was not required at common law for a deed.

"(2) A *seal* was essential at common law for the chief sorts of documents. The origin of significance of the seal, in its relation to the use of writings, has already been noticed. What the form of a seal should be was long a subject of elaborate discussion.

"(3) The *attestation* of a document was originally not a formality to the validity of the document, but merely a precaution desirable for securing testimony to the transaction; the noting of the names of the witnesses on the document was thus only a memorandum for future usefulness. But the Statute of Frauds introduced, for wills, the act of attestation as a formality. This formality includes two things, first the presence of the witnesses at the act of signature by the testator, and, secondly, the signature of the document by the witnesses. The two together thus constitute an intrinsic element in the validity of the document.[2] It may be noted that whatever questions are thus raised—for example, whether the document must bear a written recital of the witnesses' presence, or whether, if their signatures are borne, the fact of presence may be otherwise established—do not involve the principle of Integration, but only the principle of Formality.

"(4) The *registration* of a document may be made an essential formality of its validity, apart from and additionally to its service as a constructive notice of the document's validity. But this quality is seldom attributed to it unless by express statutory declaration. Under the modern (or Torrens) system of registration of title, no doubt this is the actual result. It may be noted that by this modern system the document of title would seem also to furnish one of the rare instances of a compulsory integration.

"(5) A *stamp* has by some legislation been made formally necessary to the validity of a document, the policy of such laws being to compel indirectly the payment of a tax."

D. INTERPRETATION OF LEGAL ACTS.

General Nature of Interpretation; Standard and Sources of Interpretation.[3] "The process of Interpretation is a part of the procedure of *realizing a person's act in the external world.* It
580 is, in a sense, the completion of the act; for without it the utterance, whether written or oral, must remain vain words. If a person were to be contented with proclaiming his contracts at the top of a mountain, or nailing his deeds to the front gate, he would

2—Compare Nos. 179, 264, *ante*, for a distinction between the formality of attestation and the requirement of the attesting witness' testimony.

3—Quoted from W., §§ 2458, 2459.

not need to be concerned with the process of interpretation. But deeds and contracts and wills, if they are not to remain empty manifestoes, must be enforced. They must be applied to external objects. Somewhere possession must be yielded or goods delivered or money transferred; and in order that the law may enforce these changes in external objects, the relation between the terms of the legal act and certain specific external objects must be determined, as an indispensable part of the process. In short, the interpretation of the terms of a legal act is an essential part of the act considered as capable of legal realization and enforcement.[4] The only difference is that the actor alone creates the terms of his act, while the interpretation of it, being a part of the enforcement, comes into the hands of the law.

"The process of interpretation, then, though it is commonly simple and often unobserved, is always present, being inherently indispensable. The method of it consists in *ascertaining the actor's associations or connections between the terms of the act and the various possible objects of the external world.* Those terms may be dramatic or verbal. The lantern of Paul Revere, and the twenty-one guns of a warship's salute, are as much the subject of interpretation as the words of a will. In all cases, the process is that of applying the symbol or word to external objects. Since men cannot go out and instantaneously transform, with the *presto* of a magician, the existing to the desired state of things, they must embody their will in marks which will serve to point out the effects desired, and then wait for the law, or for some one's voluntary obedience to it, to effect the realization of the effects thus pointed out in advance. The process of interpretation may be compared to a wireless telegraph station. A vessel approaches the coast and perceives the station-pole standing straight above the cliffs. Until the current can be intercepted, it is but a useless rod of steel; it sends no message and accomplishes no purpose. It may have any one of various attunements; and it will tell nothing until a similar attunement be established by the vessel. To ascertain that attunement, the particular country where it is fixed must be known, and then the official records of its methods and signals must be consulted. Not until then can the station's message be made actual to the vessel.

"Such is the process of interpretation. The analogy of the telegraph-station illustrates the important distinction between the two great divisions of the process. The first question must always be, What is the *standard* of interpretation? The second question is, In what *sources* is the tenor of that standard to be ascertained? Sometimes one or the other of these questions may interpose no difficulty; but both must always be settled.

4—*Answer of the Judges* to the House of Lords, 22 How. St. Tr. 301 (1789): "Your lordships ask us, 'whether the sense of the letter be matter of law or matter of fact?' We find a difficulty in separating the sense of the letter from the letter. The paper without the sense is not a letter."

"(1) The *standard* of interpretation, as involved in legal acts, is the personality whose utterances are to be interpreted. There are practically four different available standards. First, there is the standard of the normal users of the language of the forum, the *community at large,* represented by the ordinary meaning of words. Next, there is the standard of a *special class of persons* within the community,—the followers of a particular trade or occupation, the members of a particular religious sect, the aliens of a particular tongue, the natives of a particular dialect, who use certain words in a sense common to the entire class, but different from that of the community at large. Thirdly, there is the standard of the *specific parties* coöperating in a *bilateral act,* who may use words in a sense common to themselves and unknown to any others. Finally, there is the standard of an *individual actor,* who may use words in a sense wholly peculiar to himself; and here the question will naturally arise whether he may insist on his individual standard in the interpretation of the words of a contract, or even of a uniliteral act such as a will. The first inquiry in interpretation, then, is to determine which of these standards is the proper one for the particular act to be interpreted; and for this purpose certain working rules have to be formulated.

"(2) The *sources* for ascertaining the tenor of the standard form the second object of inquiry. Since interpretation consists in ascertaining the associations between the specific terms used and certain external objects, and since these associations must be somehow knowable in order to proceed, the question is where they are to be looked for. So far as the standard of interpretation is solely the normal one of the community, the inquiry is a simple one; the usage of the community (as represented in dictionaries and elsewhere) is the source of information. But that standard (as will be seen) is rarely the exclusive one. The mutual standard of parties to a bilateral act, and for wills the individual standard of the testator, is constantly conceded to control; and it then becomes necessary to search among the prior and subsequent utterances of the party or parties to ascertain their usage, or fixed associations with the terms employed. In resorting to these data, the question then arises whether there is any prohibitive rule of law which limits the scope of search and forbids the use of certain data. These rules, if any, form the second part of the law of interpretation.

"Before proceeding, however, to these two parts of the subject in order, it is necessary to fix upon a terminology and to avoid misunderstanding in the use of words. When we seek to ascertain the standard and sources of interpretation and thereby discover the actor's association of words with external objects, what is the term, in one word, which describes the object of search? Is it the person's 'meaning'? Or is it his 'intention'? Over this difference of phraseology has persisted an endless controversy, which, like that of the two knights

and the shield at the cross-roads, is after all resolvable mainly into a difference of words only.

"*'Intention' and 'Meaning,' distinguished.* The distinction between 'intention' and 'meaning' is vital. The distinction is independent of any question over the relative propriety of these names; for there exist two things, which must be kept apart, yet never can be unless different terms are used. The words 'will' and 'sense' may be taken as sufficiently indicative of these two things and free from the ambiguity of the other terms.

"Will and Sense, then, are distinct. Interpretation as a legal process is concerned with the Sense of the word used, and not with the Will to use that particular word. The contrast is between that Will, volition, or intent to utter, as the subjective element of an act, making a person responsible for a particular utterance as his, and that Sense or meaning which involves the fixed association between the uttered word and some external object. It has already been seen that by the general canon of legal acts, the person's actual will or intent to utter a given word can seldom be considered for legal purposes. If he has exercised a volition to utter something, then he is responsible for such utterances as in external appearance the utterance he intended,—whether or not he actually intended it. On the other hand, the sense of his word as thus uttered—his fixed association between that symbol and some external object—may usually be given full effect, if it can be ascertained. The rules for the two things may be different. The law has thus constantly to emphasize the contrast between the prohibitive rule applicable to the execution of an act,[1] and the present permissive rule applicable to its interpretation. Judges are desirous, when investigating the sense of the words as uttered by the person, of emphasizing that they do not violate the rule against inquiring whether he actually intended to utter those words. Hence the reiteration of the contrast between 'intention' and 'meaning':

1789, *Kenyon,* L. C. J., in *Hay* v. *Coventry,* 3 T. R. 83, 86: "We must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used."

1833, *Parke,* J., in *Doe* v. *Gwillim,* 5 B. & Ad. 122, 129: "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he used."

1833, *Denman,* L. C. J., in *Rickman* v. *Carstairs,* 5 B. & Ad. 663: "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used."

"The common terminology of these judicial explanations is unfortunate, because 'meaning' has a suggestion of the state of the person's mind as fixed on certain objects, and 'intention' bears the same suggestion. The constant exclusion of the state of the person's mind in

1—*Ante,* Nos. 534-544.

one aspect and its consideration in another aspect are thus apparently contradictory and irreconcilable. But the terms 'will,' or 'volition,' and 'sense,' serve to avoid this ambiguity. They emphasize the distinction that the will to utter a specific word is one thing, and the fixed association of that word is another thing. Thus the Execution of the act and its Interpretation as executed are kept distinct.

"The analogy of other symbols than words will best illustrate how common and fundamental is this difference in other affairs, and how instinctively it is appreciated and applied. Suppose a foreign vessel to be coasting the shore and entering various harbors where the Government maintains a uniform system of harbor-buoys in various colors and shapes, indicating respectively channels, sandbars, sunken rocks, and safe anchorages; here the significance of each kind of buoy is known to be the same in every harbor under Government control. But suppose the vessel to enter a harbor or inlet under the control of an individual or a city having a peculiar and different code of usage for the buoys; here it is immaterial whether a red buoy under the Government system signifies a channel or a sandbar; the vital question for the vessel now is what a red buoy signifies under the code of the local authority, and all other systems of meaning are thrown aside as useless. This illustrates that though, in interpreting a person's (for example, a testator's) words, we are concerned with *his* individual meaning, as distinguished from the customary sense of words, still we are not dealing with his state of mind as to volition, but with the associations affixed by him to an expressed symbol as indicating to others an external object. That is to say, the local harbor authorities may have 'intended' to put a green buoy instead of a red buoy, or to have put the red buoy at another spot; they may have made a 'mistake,' just as the testator may have intended to use other words; but in both cases the state of mind as to volition, or mistake, is a wholly different thing from the fixed association, according to that individual's standard, between the expressed symbol and some external object. To illustrate another aspect of the subject, suppose a game of chess to be played by B with his guest A. If the two are of the same nation, their standards of interpretation—for example, as to the shape of each chessman, the allowable moves, and the effect of a move—will be the same. But some nations differ from others in one or more of these respects; so that if, for example, B's national rules allowed a rook to threaten diagonally on the board, A as guest would accept and accommodate himself, as best he might, to this standard of operation. But, though this much might be conceded to B as host, in the adoption of his standards for giving meaning to his acts of moving the chessmen, yet it would remain true that his private intent or volition, as distinguished from the significance of his acts of moving, would be immaterial; so that, for example, his intent to have touched and moved a different piece, or to have placed the piece

on a different square, would not be taken into consideration. So, again, if A and B engage in a shooting match, with two targets of 100 yards' and 500 yards' distance, it may be that, after the shooting, A and B will discover that they have not agreed which prize is to be associated with which target, or whether the victory at the 500-yard target is to count for more than the victory at the 100-yard target, and they may have to repeat the match after coming to a common understanding. But in no case would A think of claiming that B, who has hit the 100-yard bull's-eye, could not win because he was really aiming at the 500-yard target and hit the other only by mistake; nor could A have a second trial, on missing the 500-yard target, because by mistake he shot at the 100-yard target.

"A person, then, who wills to utter words is like a man placing a buoy, or moving a chessman, or shooting a target. His will or intent or volition as to the terms of the peculiar utterance is one thing; his sense of meaning attached to the terms actually uttered is a different thing. Whatever may be the rules for the former element of his act, the rules for the latter element are independent of them."

I. STANDARD OF INTERPRETATION.

581 Brook, J., in Throckmorton v. Tracy, *Plowd. 160* (1554); (after hearing Saunders lay down three rules for deeds, of which the third was: "The words shall be construed according to the intent of the parties, and not otherwise"): "The party ought to direct his meaning according to the law, and not the law according to his meaning; for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence. For if a man was assured that whatever words he made use of, his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was his meaning."

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582 Jeremy Bentham, *Rationale of Judicial Evidence, b. IX, pt. VI, c. IV* (1827; Bowring's ed., vol. VII, p. 556, note): "The refusal to put upon the words used by a man in penning a deed or a will the meaning which it is all the while acknowledged he put upon them himself, is an enormity, an act of barefaced injustice, unknown everywhere but in English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery. Lawyers putting upon it their sense? Yes, *their* own sense. But which of all possible senses is *their* own sense? They are as far from agreeing with one another, or each with

himself, as with the body of the people. In evident reason and common justice, no one will ought to be taken as a rule for any other; no more than the evidence in one cause is a rule for the evidence to different facts in another cause."

ATTORNEY-GENERAL v. SHORE (1833-43). (LADY HEWLEY'S CHARITIES.)

11 Sim. 592, 615.

Lady Hewley, a Presbyterian, in 1704, deeded to charities for the assistance of "poor and godly preachers of Christ's holy gospel," etc. The trustees having become Unitarians at a later period, a bill
583 was filed to remove them and order the trust's administration for the benefit of persons described in the deed. For this purpose, evidence of the theological tenets of the sect to which she belonged, and of the usages of that sect, was admitted, by a majority of the judges.

TINDAL, C. J.: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real

mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar, idiomatic meaning, in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. . . . But I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed."[1]

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584 LINDLEY, L. J., in RE JODRELL, *L. R. 44 Ch. D. 590, 609, 614* (1890): "I do not propose to deal with decided cases at all. It may be that there were expressions in the documents then before the Court which made the Judges come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms—whether in deeds, wills, or mercantile documents. They may be valuable guides; but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed before. Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you. . . ."

BOWEN, L. J.: "It seems to me that the only weight one can give to such language [as the so-called rule against disturbing a clear meaning] is to treat it not so much as a canon of construction as a counsel of caution to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a

1—Lord *Chelmsford*, in *Beacon L. & F. Ass. Co.*, 1 Moore P. C. n. s. 73, 98 (1862): "In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain."

distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because, forsooth, the language has not been framed according to some measure or standard of correct expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it. As soon as you once arrive at your journey's end you have no more to do than to give effect to the true construction as you see it."

TILTON v. AMERICAN BIBLE SOCIETY (1880).

60 N. H. 377.

Bill in equity, by the executor of the will of Joseph Tilton, for the interpretation of the third item of the will. Facts found by the court. The third item is, "I give and bequeath to the Bible So-
585 ciety, Foreign Mission Society, the Home Mission Society, and the Tract Society, five hundred dollars each." There are no societies known by those names. From 1851 until his death in 1864, the testator and his wife were members of the Congregational church and society at Littleton, and were regular attendants at the services and meetings of the church and society. Subject to the plaintiff's exception, it was proved that during that time, at such meetings, annual contributions were taken for the New Hampshire Bible Society, the American Board of Commissioners for Foreign Missions, the New Hampshire Home Missionary Society, and the American Tract Society (who are defendants claiming the legacies); that when such contributions were taken, they were called collections for the New Hampshire Bible Society, Foreign Missions, the New Hampshire Missionary Society, and the American Tract Society; and that during the same period a similar custom of contribution for the same societies prevailed in the other Congregational churches and societies of this state, the donees being usually designated as the Bible Society, Foreign Missions, Home Missions, and the Tract Society. There was no evidence that the testator had knowledge of the usage in other towns than Littleton, except his connection with the Littleton church and society. Franklin Tilton was a member of the Congregational church and society at Littleton from July, 1858, until his death, was a regular attendant at their meetings, and took part therein, during a part of the time was superintendent of the Sabbath-school, and was familiar with the usages of the church and society. The residuary legatees contend

that the bequests of the third item are void for uncertainty. Upon these facts the Court found that the societies for whom the annual contributions were taken were the societies which the testator intended to make legatees in the third item of his will.

Doe, C. J.: "The question is not whether a plea of misnomer of a party is sustained by proof, nor whether there is a variance between the evidence and the name of a third person set forth in pleading. The question is not by what name any Bible society was known to others, but which one of several Bible societies was intended by the testator. . . . Evidence showing what name was given to a Bible society in its character, what name it used or recognized as its own, and by what name or names it was known to others, tends to prove a name by which the legatee might have been known to the testator, and a name which he might have used in his will to express his intention. But the society intended by him, and identified by competent evidence, is the legatee, by whatever name described in the will, and notwithstanding any other name or names by which it may have been invariably or usually known to others. . . . A person known to a testator as A. B., and to all others as C. D., may take a legacy given to A. B."[1]

MYERS v. SARL (1860).

3 E. & E. 306.

Action for a sum due on a building contract. By the contract it was provided that "no alteration or additions shall be admitted unless directed by the architects of" the defendants "in writing
586 under his hand; and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" the plaintiff "to recover payment for such addition or alteration." It was contended before the arbitrator, on behalf of the defendants, that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the clause in the contract above set out, and also on the ground that no sufficient weekly accounts of such work were delivered by the plaintiff within the meaning of that clause. With respect to the latter objection it appeared in evidence that certain accounts of the extra work were delivered by the plaintiff as and for weekly accounts within the meaning of the contract; and it was contended on his behalf that the term "weekly account," as used in the contract, was a term of art well known in the building trade and to all builders and architects, and that parol testimony was admissible to prove its meaning.

1—Compare the authorities cited in W., § 2463.

The admissibility of such evidence was objected to on the part of the defendants. The arbitrator held that the words used were a term of art, and that such evidence was admissible: and he accordingly received the same.

HILL, J.: "The question turns upon the meaning to be given, in the contract, to the words 'a weekly account of the work done thereunder.' Mr. Lush says that the plain, ordinary meaning of these words is a 'weekly account of all the work done thereunder.' The usage of the trade is proved to be that they mean 'a weekly account of the day work done thereunder.' We have to determine whether evidence of that usage was rightly received. Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary, and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain, ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed is ambiguous or unambiguous; but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning."

BLACKBURN, J.: "I am of the same opinion. I agree with my brother Hill that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *prima facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning, which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . I take it to be the true rule of law upon the subject that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the instrument relates, that meaning is *prima facie* to be attributed to it; unless upon the construction of the whole contract enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds."[1]

1—*Coleridge*, J., in *Brown* v. *Byrne*, 3 E. & B. 703 (1854): "Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence [of a local usage] be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning *are* used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet

VIOLETTE v. RICE (1899).

173 Mass. 82, 53 N. E. 144.

HOLMES, J.: "This is a bill in equity to reach and apply property which is alleged to have been conveyed in fraud of the plaintiff, claiming damages for a breach of contract to employ the plaintiff in
587 the part of 'Bertha Gessler' in a play called 'Excelsior Junior.' The contract was in writing, and engaged the plaintiff in general terms 'to render services at any theaters,' etc.; the plaintiff agreeing 'to conform to and abide by the rules and regulations adopted by said Edward E. Rice for the government of said companies.' . . . At the hearing evidence was taken *de bene* that at the time of signing the contract it was agreed that the general word 'services' meant services in the particular part named. This evidence ultimately was rejected, and the only question is whether it should have been admitted.

"We are of opinion that the evidence could not be received. . . . The engagement to render services expressed a general employment, which could not be limited to a single part without contradiction; for to give evidence requiring words to receive an abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed. . . . When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal speaker, situated as the party using the language was situated; 'but to admit evidence to show the sense in which the words were used by particular individuals is contrary to sound principle.' Drummond v. Attorney General, 2 H. L. Cas. 837, 863. . . . The case of Keller v. Webb, 125 Mass. 88, goes a good way, but was not intended, we think, to qualify the principle, settled by the earlier and later Massachusetts cases, some of which we have cited. In that case evidence of conversation was admitted to show that 'casks' in a written contract, meant casks of a certain weight. It was assumed that the contract meant casks of some certain weight, but did not state what, and thus that the evidence supplemented, without altering, the written words. A similar explanation applies to Stoops v. Smith, 100 Mass. 63."[2]

the cases are familiar in which 'a thousand' has been held to mean 'twelve hundred,' 'a week' 'a week only during the theatrical season,' 'a day' 'a working day.' "

2—*Holmes*, J., in *Goode* v. *Riley*, 153 Mass. 585, 28 N. E. 228 (1891): "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would open too great risks, if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church. An artificial construction cannot be given to plain words by express agreement."

Compare the authorities cited in W., § 2463.

WALLS v. BAILEY (1872).

49 N. Y. 463, 473.

This action was instituted to recover a balance alleged to be due to the plaintiffs for plastering the defendant's house. The work in question was done under a written contract, of which the following is a copy:

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"BUFFALO, N. Y., *January* 18, 1869.

"We hereby agree to do the plastering work of house now being built by George Bailey, on Main street, at the prices named below, viz.:

"For one coat work, twenty-five cents per square yard.

"For two coat work with hard finish, thirty-three cents per square yard.

"The prices to include all labor and cost of material, we paying said Bailey the invoice price for all laths purchased and supplied by him. All work to be done with the 'International Lime Company's' lime; the laths to be securely nailed before plastering, and all work to be done in a good, workmanlike manner, and to the satisfaction of said Bailey.

"Plastering with hydraulic cement, forty-five cents per square yard, to be done in a good, workmanlike manner, and to the satisfaction of said Bailey. WALLS & LECK."

The plaintiffs claimed that in determining the number of square yards for which they are entitled to pay, under the agreement, the openings, including doors and windows, are to be measured as plastering. That in rooms plastered with two or three coat work, the part of the work behind the cornice and base-board is to be measured as though actually plastered with two or three coats, though the same was only plastered with one coat. This claim was based on the assumption that at the time the agreement was made it was the custom of plasterers in the city of Buffalo to measure and charge for openings; and for wall not plastered, where the same was covered by a cornice or base-board. The Court allowed proof of such custom to be given on the trial under defendant's objections. Defendant was called as a witness in his own behalf, and his counsel asked him this question: "When you made the contract had you any knowledge of any custom in Buffalo of measuring openings in measuring plastering?" This was objected to and the Court excluded the testimony. The Court charged that the contract was to be construed with reference to the custom of the place where made, that such custom must be reasonable and public, general and uniform, to which defendant excepted. The jury found a verdict for the full amount claimed by the plaintiffs.

FOLGER, J.: "The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering

work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows and doors? . . . Evidence of usage is received, as is any other parol evidence, when a written contract is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons, as to particular subjects, to give effect to language in a contract as it was understood by those who made use of it. The jury, in the case before us, have found the existence of the usage contended for by the plaintiffs, and upon evidence which well sustains the finding. The same evidence shows that the usage was uniform, continuous and well settled. Nor was it one which was in opposition to well settled principles of law, or which was unreasonable. . . .

"These views dispose of the points made by the appellant in this court, save the one that the trial court erred in overruling the question put to the defendant when on the stand as a witness in his own behalf, to wit: 'When you made that contract, had you any knowledge of any custom in Buffalo of measuring openings in measuring plastering?' . . . It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with, an existing usage? Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract wherever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstance from which it may be inferred or presumed that they had reference to it. . . . The jury may presume, from all the circumstances of the case, that knowledge or notice existed. . . . It seems then, to come to this: Is the presumption, which the jury may thus make conclusive, or may not that presumption be repelled by express negatory proof of ignorance? When the defendant

proposed, by the question which was rejected, to offer evidence tending to show his ignorance of the existence of the usage, he claimed no more than to exercise the right of attempting, by direct evidence, to repel the presumption of his knowledge, which might without that proof, or perhaps in opposition to it, be made from the facts of the case. . . . In this view it was proper for the defendant to put and answer the question rejected."[3]

STOOPS v. SMITH (1868).

100 Mass. 63.

The defendant having agreed to pay the plaintiff "for inserting business card in 200 copies of his advertising chart," the defendant, refusing to pay, offered to show that the chart, as understood
589 between them, meant a chart of cloth, to be posted up in two hundred public places near Worcester, and that no chart had been so made and posted.

WELLS, J.: "The writing, upon which this action is brought, contains a promise on the part of the defendant only. It recites, imperfectly and in general terms, the agreement to be performed on the part of the plaintiff, as the consideration upon which the promise of the defendant is made. At the trial, the defendant offered evidence to show the whole arrangement between the parties; particularly the representations of the plaintiff as to the material of which the chart was to be made, and the manner in which it would be published; and contended that he was not bound to pay, because the plaintiff had failed so to make and publish the chart. The Court excluded the evidence, and ruled that no evidence of extrinsic facts was admissible for any purpose.

"The alleged representations related to that which was then in the future, and were, in one aspect, of a promissory nature. The principle of law is clear and well settled, that the obligation of a written contract cannot be abridged or modified by or made conditional upon another preceding or contemporaneous parol agreement, not referred to in the writing itself. But it is equally well settled that, for the purpose of applying the terms of the written contract to the subject matter, and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is admissible, and has a legitimate office. For this purpose, all the facts and circumstances of the transaction out of which the contract arose, including the situation and relations of the parties, may be shown. The subject matter of the contract may be identified by proof of what was before the parties, by sample or otherwise, at the time of the negotiation. The terms of the negotiation itself, and statements therein made, may

3—Compare the authorities cited in W., § 2464.

be resorted to for this purpose. . . . The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used, and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purpose of explanation and definition because they purport to carry the force of obligation. The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars 'for inserting business card,' etc. In applying this stipulation, if the defendant had a business card distinctively known and recognized as such, there would be no difficulty in giving effect to the contract. But the identification of that card would involve the whole principle of admitting parol evidence for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared; and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract. The same considerations render the evidence offered by the defendant competent for similar purposes. The term 'his advertising chart' requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was to be an 'advertising chart.' "[4]

4—Compare the authorities cited in W., § 2465.

RICKERSON v. HARTFORD FIRE INS CO. (1896).

149 N. Y. 307, 43 N. E. 856.

This action was founded upon a policy of fire insurance issued to P. Sammet and J. Alexander by the Hartford Fire Insurance Company, payable to the Washington Life Insurance Company, as mort-
590 gagee and as its interest might appear, upon premises known as number 160 Mott street in the city of New York. . . . On the first of May, 1890, Sammet and Alexander transferred the property to the plaintiff by a conveyance which described the premises by metes and bounds, and also as "known and distinguished as number one hundred and sixty Mott street," being the same description that there was in the mortgage. At the same time, both policies were transferred to the plaintiff, and the change of interest was duly noted and indorsed thereon by the insurance companies. . . . The trial Court found that, at the date of insurance, "there were two buildings on the lot known as No. 160 Mott street, New York city, viz., a three-story brick building, fronting on the street, twenty-five feet wide by forty-six feet deep, with an extension, and a five-story brick building twenty-four feet wide and thirty-nine feet deep." On the 13th of December, 1890, a fire occurred that injured the three-story building to the amount of a few hundred dollars, but which injured the five-story building to the amount of several thousand dollars. The insurance companies repaired the damage to the former only, and refused to pay any part of the damage to the latter. The complaint was dismissed for the reason that the policy did not cover the rear building, and that the defendant had fulfilled its contract by repairing the damages to the front building. . . .

VANN, J.: "We have a policy which, if it had been read before the fire by a person standing upon the premises and familiar with the buildings and the way they were occupied, would leave him in doubt whether the property insured embraced all the buildings or only a part. For this ambiguity the company is responsible, because it prepared and executed the contract, and the language used is wholly its own. While it is the duty of the Court to so construe the policy as, if possible, to give effect to every word used, if the sense in which they were used is uncertain and the meaning is ambiguous, that meaning should be given which is most favorable to the insured. . . . The trial Court, however, resolved the doubt in favor of the insurer, as it found that the company 'intended to insure and did insure only the three-story brick building situate on the front of the lot No. 160 Mott street in the city of New York,' and that it 'did not intend to insure and did not insure the five-story brick building situate on the rear of the lot No. 160 Mott street, New York city.' . . . In finding the fact, it is reasonable to presume that he was influenced by the testimony of the manager

of the defendant in relation to that subject. He was asked: 'When your company issued this policy on which this action is brought, which building did you intend to insure?' This was objected to as 'incompetent, irrelevant and immaterial, and as calling for a conclusion;' but the objection was overruled and the plaintiff excepted. The witness answered, in substance, that he intended to insure the front building only. He was then asked: 'Did you intend to insure more than one building?' and subject to the same objection, ruling and exception, he answered, 'No.' The witness was thus permitted to testify to the secret operation of his own mind, although it had not been communicated to the other party to the contract. He wrote the policy and countersigned it, and in doing so stood for the company. When the Court allowed him to state his intention in issuing the policy, it virtually permitted one party to a written agreement to state what he meant by it, against the objection of the other. The writing, itself, was the best evidence of the intent and meaning of the company. As its meaning was ambiguous, evidence was properly received to place the court in the position of the parties and enable it to appreciate the force of the words they used in reducing the contract to writing. It then became the duty of the Court, sitting without a jury, to decide what the parties, thus situated, meant by the language employed. But one party to a written contract cannot state how he understood it when he signed it, nor testify as to its meaning or as to his intent. That would be a violation of the rule that the writing is the best evidence and would tend to destroy the effect of the promise. What the parties intended should have been gathered from the contract, read in the light of the circumstances surrounding them when they used the doubtful words. Parol evidence was not admissible to show what either party secretly intended, as that would add to or take from the writing which is presumed to express the intention of both."[5]

5—*Blackburn*, J., in *Grant* v. *Grant*, L. R. 5 C. P. 727, 729 (1870), quoting a passage from his own treatise on Sales: "The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used. But the language used in a contract is the language used to another in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry."

Blackburn, J., in *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607 (1871): "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke*. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by

II. SOURCES OF INTERPRETATION.

Sir JAMES WIGRAM, V. C., *Extrinsic Evidence in Aid of the Interpretation of Wills,* Proposition V (1831): "For the purpose of
591 determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."[6]

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a. Exception for Declarations of Intention.

MILLER v. TRAVERS (1832).

8 Bing. 244.

Bill to establish the will of Sir John Edward Riggs Miller, Bart.

TINDAL, C. J.: "The testator by his will, duly executed, devised
592 'all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick,' to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare. The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Compare the theory as stated by Mr. Justice *Holmes,* in "The Theory of Legal Interpretation," 12 Harv. L. Rev. 417: "Each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances and therefore cannot complain if his words are taken in that sense."

Compare the authorities cited in W., §§ 2466, 2467, and the doctrine of No. 538, *ante.*

6—*Sugden,* L. C., in *Attorney-General* v. *Drummond,* 1 Dr. & W. 356 (1842), interpreting a deed containing the words "Christian" and "Protestant dissenter": "The Court is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed or will (it matters not whether it was one or the other) was executed. . . . The Court therefore has not merely a right, but it is its duty to inquire into the surrounding circumstances, before it can approach the construction of the instrument itself."

Professor *James Bradley Thayer,* Preliminary Treatise on Evidence, 445 (1898): "It had become possible for

"The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to show what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: 'All my freehold and real estates whatsoever situate in the counties of Clare, Limerick and in the city of Limerick;' that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words 'counties of Clare' and substitute the words 'county of' in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. The plaintiff contends that he has a right to prove that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick.

"But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent from a defective or mistaken description; it is making the will speak upon the face of the will. It is not simply removing a difficulty arising upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted. Now, the first objection to the introduction of such evidence is that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the

Wigram to lay it solidly down, over seventy years ago, that, with the exception of direct statements of intention, no extrinsic fact, relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence, could be shut out."

words used in the will, and that words which he has not used cannot be added.

"But it is an objection no less strong that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed. And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty which arises from applying the description contained in the will either to the thing devised or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself."[7]

THE LORD CHEYNEY'S CASE (1591).

5 Co. Rep. 68a.

Devise to his son H. and the heirs of his body, and then to T. C. and the heirs male of his body, on condition "that he or they or any of them" shall not alienate. Proof by witnesses that it was "the
593 intent and meaning of the testators" to include under "he or they" his son H., as well as T. C., was excluded; "he should not be received to such averment out of the will." "But if a man has two sons, both baptized by the name of John, and conceiving that the elder,

7—Compare the authorities cited in W., § 2471.

who had been long absent, is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living,—in this case the younger son may in pleading or in evidence allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he at the time of the will named his son John the younger, and the writer left out the addition of the younger."

Sir Francis Bacon, *Maxims, rule XXV, circa* 1597 (Works, Spedding's ed., 1861, vol. XIV, p. 273): "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas*
594 *latens. Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity. [1] *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averment, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I. D. *et* I. S. *hoeredibus,* and do not limit to whether of their heirs; it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. [2] But if it be *ambiguitas latens,* then otherwise it is. As I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S. and North S. this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass. [3] Another sort of *ambiguitas latens* is correlative unto this: for this ambiguity spoken of before is, when one name and appellation doth denominate divers things; and the second is, when the same thing is called by divers names. As if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christie in Universitate Oxford;* this shall be holpen by averment, because there appears no ambiguity in the words: for the variance is matter in fact. But the averment shall not be of the intention, because it does not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words; but so it is not in variance; and therefore the averment must be a matter that doth induce a certainty, and not of intention; as to say that the precinct of 'Oxford' and of 'the University of Oxford' is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford."

DOE *dem.* GEORGE GORD v. NEEDS (1836).

2 M. & W. 129.

Ejectment for a house and garden, claimed by the plaintiff under the will of John Spark, which gave various property to "John Gord," to "John Gord the son of George Gord," to George Gord the
595 son of George Gord," and then proceeded: "Also I give and bequeath unto Ann Needs, until the decease of George Needs and Jane Needs, the lower house and garden; and after their decease to *George Gord, the son of Gord,* and his assigns. Also I give and bequeath unto George Gord, the son of John Gord, the sum of ten pounds, and to Jane and Elizabeth, the two daughters of the said John Gord, the sum of five pounds each. Also I give and bequeath unto Mary Gord, the daughter of George Gord, the sum of five pounds, and to George Gord the son of the said George Gord, the sum of ten pounds, and to John Gord, one other son of the said George Gord, the sum of twenty pounds." The lessor of the plaintiff, who was the George Gord, the son of George Gord, mentioned in the will, claimed the premises in question under the devise to "George Gord, the son of Gord," and offered evidence of declarations by the testator, showing that he, the lessor of the plaintiff, was the intended devisee in remainder of the "lower house and garden." It was contended for the defendant that this evidence was not admissible, but the learned judge overruled the objection.

Park, B.: "The only point therefore remaining to be considered is whether evidence was properly admitted of the devisor's declarations to show what person he meant to designate by the description of 'George Gord, the son of Gord.' And we are of opinion that such evidence was properly admitted.

"If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens,* within the meaning of Lord Bacon's rule (Maxims, 25), which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here, on the face of the devise, no such doubt arises. There is no blank before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind. The devisor has clearly selected a particular individual as the devisee.

"Let us then consider, what would have been the case, if there had been no mention in the will of any other George Gord, the son of a Gord; on that supposition there is no doubt, upon the authorities, but

that evidence of the devisor's intention as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will two persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a latent ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'it shall be holden by averment, whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in Altham's Case, 8 Rep. 155 a; 'If A. levies a fine to William his son, and A. has two sons named William, the averment that it was his intent to levy the fine to the younger is good, and stands well with the words of the fine.' Another case is put in Counden v. Clarke, Hob. 32, which is in point,—'if one devise to his son John, where he has two sons of that name:' and the same rule was acted upon in the recent case of Doe v. Morgan, 1 C. & M. 235. The characteristic of all these cases is, that the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will."[1]

MILLER v. TRAVERS (1832).

8 Bing. 244.

The facts are stated *ante,* No. 592.

TINDAL, C. J.: "The cases to which this construction (*ambiguitas verborum latens verificatione suppletur*) applies will be found
596 to range themselves into two separate classes. . . . The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended

1—Compare the authorities cited in W., §§ 2472, 2473.

to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

DOE *dem.* SIMON HISCOCKS v. JOHN HISCOCKS (1839).
5 M. & W. 363.

ABINGER, L. C. B.: "This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grand-
597 father of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death to his grandson, Henry Hiscocks, in tail male, and making, as to certain other estates, an exactly similar provision in favor of his son John for life; then, after his death, the testator devises those estates to 'my grandson, John Hiscocks, eldest son of the said John Hiscocks.' It is on this devise that the question wholly turns. In fact, John Hiscocks, the father, had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son. The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the County of Devon, 1838, and that learned judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a non-suit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident

that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

"But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

"Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

"It appears to us that, in all other cases parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the de-

fendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of Doe v. Huthwaite, 3 B. & Ald. 632, Bradshaw v. Bradshaw, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly. But we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will."

WILLARD v. DARRAH (1902).

168 Mo. 660, 68 S. W. 1023.

Devise to "my well-beloved nephews J. and W. W." The testator had two grandnephews so named and also two grandsons so named, the latter being his intimates and the former being personally
598 unknown to him. Evidence of his repeated declarations that he had bought this land for them and that he had instructed the scrivener in their favor was admitted.

BRACE, P. J.: "The devise is 'to my well-beloved nephews John and William Willard'; and it is found from the indirect parol evidence that there are two sets of brothers, each named John and William Willard,—the plaintiff and his brother, 'well-beloved' grandsons of the testator, and two grandnephews, not 'well-beloved' of him, and having no legal or moral claim on his bounty. As to each of these sets of brothers the description contained in the will is partly correct and partly incorrect. It is correct as to the Christian and surnames of each set. It is correct as to neither in the superadded description of relationship to the testator, as the word 'nephew' simpliciter, cannot be held to include grandnephews, and the inapplicability in this case is re-enforced by the word 'beloved' prefixed thereto. So that the description in the will, when it comes to be applied to those only who can possibly have been intended, is just as equivocal in point of fact as if these additional words of description had been omitted, as in the first case supposed. The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers, but it is morally and legally certain that it was intended to apply to one or the other, thus bringing the case within the rule established by the second class of cases, in which direct or extrinsic parol evidence, including expressions of intention, is admissible. Such evidence was therefore admissible in this case, in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the will to the objects of the

testator's bounty, to prevent the fourth clause of the will from perishing, and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the will, but to let in light by which that intention, rendered obscure by outside circumstances, may be more clearly discerned, and the will of the testator, in its entire scope, effectuated according to his true intent and meaning."[1]

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b. Exception for "Falsa Demonstratio."

WISEMAN v. GREEN (1900).
127 N. C. 288, 37 S. E. 272.

FURCHES, J.: "This is an action for possession of a small piece of land lying on Toe river, in Mitchell county, on which there is an old grist and saw mill, said to contain two acres. . . . The land in
599 controversy at one time belonged to Alexander Wiseman, and both plaintiff and defendant claim title under him. In 1871 the sheriff of Mitchell county, having an execution in his hands against Alexander Wiseman, undertook to lay off his homestead, and to sell the excess under said execution. Among other lands sold by the sheriff as such excess, he sold two acres of land lying on the Toe river, 'on which is situated one saw and grist mill, known as "A. Wiseman's Mill";' and the deed contains the following calls: 'Beginning on the southeast bank of Toe river, two rods below the mill house, and runs west, north, east and south, to the beginning, so as to include the mill and site and two acres of land, it being and including the land sold as the excess of the homestead of A. Wiseman.' It appears from the survey and the evidence in the case that the land contained in the calls of this deed does not include the saw mill, nor the grist mill, nor the mill site. But, if the first call 'west' is reversed, and read 'east' instead of 'west,' the description in the deed, 'beginning on the southeast bank of the Toe river, two rods below the mill house,' will include both the saw and grist mill and mill site. The plaintiff claims that the word 'west' should have been written 'east,' and was written 'west' by mistake,—was an inadvertence, a slip of the pen,—and should be corrected. The defendant contends that there is no mistake, inadvertence, or slip of the pen about it, and that there is nothing to correct; that, instead of its being a correction, it would be a change of the deed, which the Court has no right to make. . . . But it seems to be well settled that the Court has the right to construe a deed, and, in proper cases, to correct an inadvertence,—a 'slip of the pen,'—when it plainly appears from the deed itself. . . The sheriff's deed under which the plaintiff claims 'in-

1—Compare the authorities cited in W., § 2474.

cludes the saw and grist mill and mill site,' and the deed must be run so as to include them. The mill is what is considered in law a permanent object, a natural boundary or location, and is the most certain part of the description contained in the deed, and controls the other calls therein. The beginning corner is certain; no mistake about that,—two rods below the millhouse, on the southeast bank of the river. To begin at that point and run 'west,' as the deed calls, and then with the other calls in the deed, you entirely miss the mill house and the mill site. But to commence at this known beginning corner, thence 'east,' and then with the other calls in the deed, you include both mill house and the mill site. It seems to us that common sense, justice, law, and the precedents of this Court sustain the ruling of the Court, and the finding of the jury that 'west' was a mistake, and should have been written 'east.' This being so, the Court does not change the deed, but only puts a legal construction upon it, which creates no new rights, nor does it affect the rights of others."[2]

WINKLEY v. KAIME (1855).

32 N. H. 268.

EASTMAN, J.: "The demandant declares for forty acres of land, more or less, of lot No. 97, in the 2d division in Barnstead. The case was turned into an agreed one at the trial, and we take the
600 evidence as finding the facts. The first step in the demandant's title is a devise from Benjamin Winkley to the demandant, of 'thirty-six acres, more or less, in lot 37 in the 2d division in Barnstead, being same I purchased of John Peavey.' It is apparent that here is a radical difference between the description of the premises demanded and those contained in the devise; the land demanded being a part of lot No. 97, and that bequeathed being a part of lot No. 37. The plaintiff contends that there is a latent ambiguity in the devise, and that the testator intended to bequeath to him the land in lot 97, as set forth in his declaration, and not 37. To prove this, parol evidence was introduced on the trial, tending to show that the lands occupied by Peavey

2—*Caton*, C. J., in *Myers*, v. *Ladd*, 26 Ill. 415, 417 (1861): "If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that the horses were in the pasture or on the road. The description of the horses being sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate, and describe it as my dwelling house in which I now reside, situate in the city of Ottawa, I shall not avoid the deed by showing that my residence was outside the city limits. So if a deed describe lands by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is, that where there are two descriptions in a deed, the one, as it were, superadded to the other, and one description being complete and sufficient in itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone."

were a part of 97 in the 2d division, and that there is no such lot as 37 in the 2d division in that town.

"There is nothing ambiguous in the terms of this devise, but the evidence shows that, as it stands, it cannot take effect, for there is no such lot as No. 37 in the 2d division. The ambiguity is latent; shown so to be by the evidence; and if that stands well with the words of the will, it will be competent, as showing the meaning and intention of the testator. Without going into any extended examination of the question of latent ambiguity at the present time, it is sufficient for the present case to say that it appears to come very properly under the rule of *falsa demontratio non nocet*; the principle being, that if there is a sufficient description of the land devised, or of the person of the devisee intended by the testator, independent of the erroneous description, the will will take effect. . . . By rejecting the words and figures, 'in lot 37,' in this devise, it will stand thus, 'thirty-six acres, more or less, in 2d division in Barnstead, being same I purchased of John Peavey.' What the testator purchased of Peavey is shown to be in the 2d division; is bounded, and answers in all respects to the description in the devise, except the number of the lot. The extrinsic evidence thus manifestly shows what must have been the intention of the testator, and, both upon the doctrine of the authorities and the justice of the case, we think the devise should be made to take effect."

KURTZ v. HIBNER (1870).

55 Ill. 514.

Bill for petition by John Hibner and others, children and heirs of John Hibner, deceased, against Charles, Elizabeth and James Kurtz, the latter claiming under a will of John Hibner. The Circuit
601 Court refused to hear parol evidence, to explain the language of the will. The relevant provisions of the will were the following: "Third—I give and bequeath to my daughter, Elizabeth Kurtz, all that tract or parcel of land situate in the town of Joliet, Will County, Illinois, and described as follows: The west half of the southwest quarter of section 32, township 35, range 10, containing eighty acres, more or less, together with all the appurtenances thereunto belonging, or in anywise appertaining." "Seventh—I give and bequeath to my grandson, James Kurtz, all that part or parcel of land described as the south half of the east half of the south quarter section 31, in township 35, range 10, containing forty acres, more or less."

Appellants offered to prove that the testator, at the time of his death owned only one eighty-acre tract, in township thirty-five, which was the one described in the bill; that a mistake was made in drafting the will, by the insertion of the words "section thirty-two," instead of "section thirty-three;" that Charles and Elizabeth Kurtz had been in

the actual possession of the tract for a number of years, and upon the repeated promise of the testator in his lifetime, that he would give the same to Elizabeth, had made lasting and valuable improvements, at their own expense, on the land—had fenced it, and erected thereon a dwelling-house, barn and corn cribs, dug wells and set out fruit-trees. Appellants also offered to prove that James Kurtz, at the time of the death of the testator, was in the actual possession of the forty-acre tract, as the tenant of the deceased, and that the draughtsman of the will, by mistake, inserted the word "one," after the words "section thirty," instead of "two," so as to bequeath to James land in section thirty-one instead of section thirty-two. This evidence was rejected by the Court, on the hearing.

THORNTON, J.: "It has been strongly urged by counsel for appellants, that this evidence should have been received, for the purpose of ascertaining the intention of the testator. The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible, to alter, detract from, or add to, the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received, to enable the court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the Court. . . . The thing devised is certain and specific. Section, township, and range are given. The evidence offered, as to the mistake in the section, would have made a new and different will. . . . The case of Riggs v. Myers, 20 Mo. 239, is also cited by counsel for appellants. That case is very different from the one under consideration. The testator, in that case, made a full disposition of all his estate, and then described certain lands, locating them in a township in which he owned no lands. The land intended to be devised, was, however, identified, by reference to 'the big spring' upon it. In the case before the Court there is no disposition, either specifically or generally, of the lands in the bill mentioned. We think, therefore, there was no error."

NOTES UPON KURTZ v. HIBNER.

10 American Law Register, New Series, 93 (1871).

ISAAC F. REDFIELD, C. J. (of Vermont), editor of the Register: "We regret the necessity of dissenting, so entirely as we must, from the argument and conclusions of the learned judge in the fore-
602 going opinion. . . . The Court say, indeed, that the evidence was offered by the appellants for the purpose of showing that the will was by mistake drawn differently from what the testator intended.

That precise point was immaterial, and the evidence was not, strictly speaking, admissible for that purpose. That would be to add a new term to the will by making it read, in terms, as the testator would have had it made, if he had recollected the numbers of the sections in which his lands lay, which can never be done. . . . But nothing is more common, or we might say universal, than to receive oral proof to show, that language was used in a peculiar sense, or that one term was used for another, or that an essential term, to make the definition perfect, was wholly omitted, or erroneously stated. . . . One rule upon the subject is so thoroughly established as to have become a maxim in the law, *falsa demonstratio non nocet.* The practical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show, with reasonable certainty, what was intended. . . . In the principal case, there could be no question of the admission of oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was at the time he made the will. No reasonable man could question this upon the decided cases. This being done, it appears the testator had no such land as that described, in the particular sections named. This rendered it clear, absolutely certain, we may say, that the sections named were erroneous and could have no possible operation, and must be rejected. The devise then was the same as if the sections had not been named at all, or had been named, leaving the numbers blank. We are then compelled to fall back upon the remaining portion of the description, 'eighty acres of land in range ten, in township thirty-five,' and 'forty acres of land in range ten, in township thirty-five;' and, upon inquiry, we find precisely such pieces of land in 'range ten, in township thirty-five,' belonging to the testator. This renders the devise as certain as it is possible to make it. . . . We trust we have not failed to express our views in regard to the foregoing case with all that moderation and respect which is due to the decision of so learned and able a court, and which we most sincerely feel. But that the decision is fatally and flagrantly erroneous there can be no more question or doubt than of the axioms of geometry or the propositions in the most exact sciences."

John D. Caton, J. (of Illinois), *ib. p. 353:* "I have perused with some care and much interest the reports of the case of Kurtz v. Hibner et al., ante, p. 93, and the editorial note appended, in which the learned editor feels compelled to dissent from the conclusions of the court, as announced in the opinion of Mr. Justice Thornton. The principle involved is of the highest importance, and is worthy of the most careful consideration of the profession. From the best consideration which I have been able to give the subject, I am constrained to the conclusion that the decision of the Court is right, and that the editor has fallen into an error. The great learning and deservedly

high reputation of the editor who wrote that note, and the profound respect I have ever entertained for him as an eminent jurist, whose labors have done much to advance the science of the law, have caused me to hesitate long before allowing myself to disagree with him.

"The fundamental error of the editor, in my apprehension, consists in his assuming that necessarily the testator designed to devise land to which he had a present existing title. To maintain this assumption we must find that the Court, as a matter of law, must declare that it was impossible for the testator to intend to devise property to which he had not a present title, when there is no expression in the will intimating such a purpose. I have met with no case, and certainly none that has been cited in the editorial note, in which such a doctrine is intimated. While in the particular case we may admit that this is most probably true, we must also admit that it is not necessarily so, and the Court had no warrant for saying, as matter of law, or as a necessary legal conclusion, that such was the case; and hence it had no right to act upon such a conclusion. We may suppose a thousand cases in which the testator would devise a particular piece of land to which he at the time had no title. It is sufficient to suggest the case of an honest mistake as to the ownership, or of a contemplated purchase. At any rate, he had a right to do so, and so it has no doubt been done by ten thousand before him through misapprehension or even caprice. The devise in this will is of 'the west half of the south-west quarter, section 32, township 35, range 10, containing 80 acres, more or less.' Here then we have the range, the township, the section, the quarter section, and the half-quarter section set down, and *nothing more*. The description is complete and definite, but we find nowhere a single word of additional description. We find no attempt to duplicate the description as 'my' land, or 'in the possession of A. B.,' or 'on which is the Big Spring,' or 'my land on the Bluff', nor any other single word on which the Court may seize to enable it, with the aid of parol proof, to say that *thirty-two* was a false description, and so reject it, and still determine from the words of the will that section thirty-three was in truth meant. Strike the word 'thirty-two' from this description and the whole is left entirely unintelligible, for there is nothing else in the will to supply its place.

"I entirely agree with the learned editor, in his definition of the maxim *falsa demonstratio non nocet*. He says, 'The practical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, PROVIDED *enough remains to show, with reasonable certainty, what was intended.*' I have emphasized the latter part of this definition because I think it an important, nay, an indispensable part of it, and which, in its application to the principal case, was quite overlooked in the note. If we reject the false description, which is in the number of the section, and so leave that a blank as the editor in fact does, leaving only a specified eighty-acre

tract in an unspecified section in a given township, we have a description which applies alike to no less than 36 different lots, so far as the description goes, and nothing 'remains in the will to show with reasonable certainty' which of the 36 tracts was intended. . . .

"If in this case the word *my* had been used instead of *the* in connection with, or rather in duplication of the description, then indeed there would have been something *in the will* to construe, and by the aid of parol proof the Court might ascertain what the testator meant when he used it—then there would have been an additional description by which the Court might have determined the subject of the devise, after having eliminated *thirty-two*. I repeat, without some sort of additional description in the will, the Court had no right to destroy the description, which is clear, precise, and single, and insert an additional description of its own, and then go on and construe it. It is impossible to say that there is a false description where there is but one description which, as in this case, is plain and perfect, without an additional reference or word by which the Court might be enabled to determine what land was in the mind of the testator when he wrote or dictated the description proposed to be eliminated from the will. The central idea on which this doctrine of *falsa*, &c., turns is, that there must be two descriptions of some sort, which facts *aliunde*, if need be, show are inconsistent with each other, and enable the Court to say satisfactorily which is the true and which is the false description, when it will discard the false and give effect to the true, as if the false description had never been written. . . . The legal acumen for which the editor, with whom I feel compelled though reluctantly to disagree, is so justly celebrated, will, I am satisfied, upon more mature reflection, convince him that he has for once, at least, fallen into an error; and his well-known candor, I am sure, must make him anxious, that if such be the case, it should be pointed out in a courteous and proper way."[1]

1—Compare the authorities cited in W., § 2477.

BOOK II.

BY WHOM EVIDENCE MUST BE PRESENTED.
(BURDEN OF PROOF, AND PRESUMPTIONS).[1]

I. KINDS OF BURDEN AND PRESUMPTION.

[2]BURDEN OF PROOF; (1) FIRST MEANING; RISK OF NON-PERSUASION OF THE JURY. "Since the parties have the risk and burden of producing evidence left upon themselves, how is it to be apportioned between them? In short, *which party has the 'burden of proof'?*

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"In every attempt to explain the principles of the law as to burden of proof and presumption, two things at least present themselves for consideration,—the general process, logical and legal, involved in determining the parties by whom evidence is to be produced, and the significance and usage of various terms employed and the incidental problems of each part of the process. The difficulties of such an attempt, almost insuperable, exist not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered. At the outset, then, it will be more satisfactory to analyze the logical and legal situation considered in itself and independently of the various usages and terms that chiefly cause the confusion.

"(1) *Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds

1—A chief difficulty in the study of this subject is to learn to detect the different processes to which the terms "burden of proof" and "presumption" are applied so ambiguously in the opinions of the Courts. Hence, in the materials here collected, the cases placed immediately after the introductory explanations of terms are intended to be used as studies in the different forms of judicial expression—the obscure and misleading as well as the precise ones; then follow (under II) illustrations of specific presumptions in common use.

2—Quoted from W., §§ 2485, 2486.

in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. This does not mean that B is absolutely safe though he does nothing for he cannot tell how much it will require to persuade M; a very little argument from A might suffice; or, if M is of a rashly speculative tendency, the mere mention of the proposition by A might without more affect M's action; so that it may be safer in any case for B to say what he can on his side of the question; and thus in fact he, as well as A, has more or less risk, in the sense that there are always chances of A's persuading M, no matter how trifling his evidence and argument. But nevertheless the risk is really upon A, in the sense that if M, after all said and done, remains in doubt, and therefore fails to pass to the point of action, it is A that loses and B that succeeds; because it is A who wishes the action taken and needed as a prerequisite to accomplish the persuasion of M. The risk of non-persuasion, therefore, *i. e.* the risk of M's non-action because of doubt, may properly be said to be upon A. This is the situation common to all cases of attempted persuasion, whether in the market, the home, or the forum. So far as mere logic is concerned, it is perhaps questionable whether there is much importance in the doctrine of burden of proof as affecting persons in controversy. The removal of the burden is not in itself a matter of logical necessity. It is the desire to have action taken that is important.[3] In the affairs of life there is a penalty for not sustaining the burden of proof,—*i. e.* not persuading M beyond the doubting point,—namely, that M will not take the desired action, to which his persuasion is a prerequisite.

"Thus, in practical affairs generally, the burden of proof (in the sense of risk of non-persuasion) signifies that upon a person desiring action from M will fall the penalty of M's non-action unless M can be persuaded beyond the doubting-point as to the truth of the propositions prerequisite to his action. What, then, is the difference, if any, between this risk of non-persuasion in affairs at large and the same risk in litigation? In litigation, the penalty is of course different; the action which is desired of M is the verdict of the jury, the decree, order, or finding of the judge, or some other appropriate action of the tribunal. But so also the action differs in other affairs, according as M is an investor with money to lend, or an employer with a position to fill, or a friend with a favor to grant. Is there no other

3—"In Logic, then, when we speak of the burden of proof, we are not speaking of some merely artificial law, with artificial penalties attached to it. . . . No penalty follows the misplacement of the burden of proof, except the natural consequence that the assertion remains untested, and the audience therefore (if inquiring) unconvinced. . . . There is no 'obligation' on any one to prove an assertion,—other than any wish he may feel to set an inquiring mind at rest or to avoid the imputation of empty boasting. It is a natural law alone with which we are here concerned,—the law that an unsupported assertion may, for all that appears, be either true or false." (Professor Alfred Sidgwick, Fallacies, 163.)

and more radical difference? The radical difference in litigation, as distinguished from practical affairs at large, is as to the *mode of determining the propositions of persuasion which are a prerequisite* to M's action. In affairs at large, these are determined solely by M's notion of the proper grounds for his action,—depending thus on the circumstances of the situation as judged by M. In litigation, these prerequisites are determined, first and broadly, by the *substantive law,* which fixes the groups of data that enter into legal relations and constitute rights and duties, and, secondly more and more in detail, by the *laws of pleading and procedure,* which further group and subdivide these larger groups of data, and assign one or another sub-group to this or that party as prerequisites of the tribunal's action in his favor. Thus, if A were endeavoring to persuade M to assist him with money because M's brother B had cruelly assaulted and beaten A, M might conceivably exact of A that the latter first prove to him—*i. e.* persuade him—not merely that B had beaten A, but further that B had not done this in self-defence or by A's consent or in ejecting A from B's premises or otherwise for some reason, legally justifiable or not. In a legal tribunal, on the other hand, the substantive law will define and limit, in the first place, the reasons to be regarded as justifiable, and will thus narrow the total of facts that can in any event be involved; and, in the second place, the law of pleading will further subdivide and apportion these facts. It will inform A that he need persuade the tribunal of two facts only, namely, that A was beaten and it was B who beat him; and that, upon persuading the tribunal of these facts, its action will be taken in his favor, and A's risk of the tribunal's non-action will thereupon cease. It will inform B that at this point the risk of non-action will turn upon him, in the sense that he needs the tribunal's action in order to relieve himself from the consequences of its previous action, and that this action (by way of reversing its provisional action in A's favor) will depend upon his persuading the tribunal as to certain specified facts by way of excuse or justification. Perhaps the same law of pleading may further apportion to A a third set of facts to be the subject of a replication, in case B succeeds in obtaining action in his favor on his plea.

"But the groupings defined by the substantive law and the further subdivision by the law of pleading do not necessarily end the process of apportionment by law. Even within a single pleading there are instances in which the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent. In criminal cases, for example, though there is no affirmative pleading for the defence, it is put upon the defendant, in some jurisdictions, to prove the excuse of self-defence; in many jurisdictions in which payment need not be affirmatively pleaded to a contract-claim, the burden of proving payment is nevertheless put upon the debtor; and so in many other instances. The difference of effect between an apportionment under this method and an apportionment

by requiring a pleading is merely that, in the latter method, all questions of burden of proof might conceivably be disposed of before trial or the entering into evidence; while by the other method the apportionment is not made until the trial proper has begun. The other method is less simple in the handling; but it has come into more vogue under the loose modes of pleading current in modern times in many jurisdictions.

"*Test for this Burden; Negative and Affirmative Allegations; Facts peculiarly within a Party's Knowledge.* The characteristic, then, of the burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations, then, is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the *party having the affirmative allegation.* But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non-performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential.

"The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. Thus, in most actions of tort there are many possible justifying circumstances,—self-defence, leave and license, *volenti non fit injuria,* and the like; but it would be both contrary to experience and unfair to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ('false words,' in the old nomenclature), it might have

been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. Thus, no one principle will serve in torts as a guiding rule for the various cases. In criminal cases, the innovation, in some jurisdictions, of putting upon the accused the burden of proving his insanity has apparently also been based on an experience in the abuses of the contrary practice. In claims based on written instruments, experience has led in most jurisdictions to a statutory provision, requiring the execution by the defendant to be specially traversed or else taken for admitted,—a step which stops short of changing the burden of proof, but well illustrates the considerations affecting its incidence. The controversy whether a plaintiff in tort should be required to prove his own carefulness, or the defendant should be required to prove the plaintiff's carelessness, has depended in part on experience as to a plaintiff being commonly careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available.

"This last consideration has often been advanced as a special test for solving a limited class of cases, *i. e.* the burden of proving a fact is said to be put on the *party who presumably has peculiar knowledge* enabling him to prove its falsity if it is false. But this consideration furnishes no working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as one to be kept in mind in apportioning the burden of proof in a specific case.

"There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given case. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific cases, resting for their ultimate reasons upon broad and undefined reasons of experience and fairness."

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[1]Burden of Proof; (2) Second Meaning; Duty of Producing Evidence to the Judge. "So far as concerns the principles explained above, the matter may have come before any kind of tribunal.
605 The inquiry peculiarly concerns the procedure in legal controversies; but the settlement of it is not affected by the nature of the tribunal. The tribunal might be a judge, or a jury, or both, so

1—Quoted from W., § 2487-2490.

far as regards apportioning the risk of non-persuasion. Nothing has been said, or need be, about a distinction between judge and jury. But we come now to a peculiar set of rules which have their source in the bipartite constitution of the common-law tribunal. Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits. The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not go to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them. It operates somewhat as follows:

"(*a*) The party having the risk of non-persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence; and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of non-persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non-persuasion, is a distinct one, for it is a *duty towards the judge,* and the judge rules against the party if it is not satisfied; there is as yet no opportunity to get to the jury and ask if they are persuaded. The judge, then, requires that at least enough evidence be put in to be worth considering by the jury.

"(*b*) Suppose, then, that the proponent has satisfied this duty towards the judge, and that the judge has ruled that sufficient evidence has been introduced. The duty has then ended. Up to that point the proponent was liable to a ruling of law from the judge which would put an end to his case. After passing this point he is now *before the jury,* bearing his risk of non-persuasion. There is now no duty on either party, with reference to any rule of law in the hands of the judge, to produce evidence. Either party may introduce it, and doubt-

less both parties will do so; but there is nothing that requires either to do so under penalty of a ruling of law against him. The proponent, however, still has his burden of proof in the sense of the risk of non-persuasion of the jury; *i. e.* should the jury be in doubt after hearing the evidence of the proponent, either with or without evidence from the opponent, the proponent fails to obtain their verdict upon that issue, and the opponent remains successful. In this second stage of the trial, with the evidence before the jury, the only burden operating is that which concerns the jury,—the risk of non-persuasion; and not that which concerns the judge,—the duty of producing evidence.

"(*c*) Suppose, however, that the proponent is able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim,—evidence such that the jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, *i. e.* unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason,—a verdict which would later have to be set aside as against evidence. The matter is thus *in the hands of the judge again,* as having the supervisory control of the proof; and now he may, as applying a rule of law, *require the opponent to produce evidence,* under penalty of losing the case by direction of the judge. Thus, a duty of producing evidence, under this penalty for default, has now arisen for the opponent. It arises for the same reasons, is measured by the same tests, and has the same consequences as the duty of production which was formerly upon the proponent. There are, however, two ways in which it may be invoked by the judge, differing widely in terms and in appearance, but essentially the same in principle. (*c'*) In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data differing in every new trial and not to be tested by any set formulas. The judge's ruling will be based on a survey of this mass of evidence as a whole; and it will direct the jury on that issue to render a verdict on that *mass of evidence* for the proponent. The propriety of this has sometimes been doubted by Courts who do not believe the process to be precisely analogous to that of directing a nonsuit for the proponent or of enforcing a presumption, as shortly to be explained; but the better authority gives ample recognition to this process. (*c"*) Another mode under which this process is carried out employs the aid of a fixed rule of law, *i. e.* a *presumption,* applicable to *inferences from specific evidence to specific facts forming part of the issue,* rather than to the general mass of evidence bearing on the proposition in issue. If it is a part of the proponent's case, for example, to prove that a person is deceased, and he has offered evidence that the person has been absent, unheard from,

for seven years or more, and there is no other evidence on the subject, then the proponent may ask that the jury be directed, if they believe this fact of absence, to take as true the proposition that the person is deceased; if that, moreover, were the only proposition at issue, then the direction would be to find a verdict for the proponent if this fact of absence were believed. The result is the same as in the preceding form of the process (*c'*), *i. e.* the opponent loses as a matter of law, in default of evidence to the contrary; in other words, the presumption creates for the opponent a duty of producing evidence, in default of which he loses as a matter of legal ruling, the matter not being open for the jury, and the risk of non-persuasion, which applies only to the jury's deliberations, having ceased to affect the proponent. This particular form of the process, however (*c"*), happens to have become known as a 'presumption.' The term 'presumption' has been the subject of much confused usage. The particular ambiguity which we need here to guard against is the confusion between the inference itself—*i. e.* the propriety of making the inference from the evidence to the *factum probandum*,[2]—and the effect of the inference in the hands of the judge. So far as 'presumption' means anything for the present purpose, it signifies a ruling as to the duty of producing evidence.

"(*d*) Keeping in mind, then, that a presumption signifies a ruling of law, and that to this extent the matter is in the judge's hands and not the jury's, what is the effect upon the legal situation of the opponent if he does respond to this duty and *comes forward with other evidence* against the fact presumed? When he has thus fulfilled his duty under the ruling of law, he puts himself out of the hands of the judge and his ruling, and finds himself back again in the hands of the jury. He is precisely where the proponent was in the first place when he fulfilled the duty, then his, of producing evidence and succeeded in getting from the judge to the jury. The case is now open again as to that specific issue, *i. e.* free from any liability to a ruling of law against either side, and is before the jury, where the original proponent (as ever, when the issue is open to the jury) has the burden of proof in the sense of the risk of non-persuasion of the jury. The important thing is that there is now *no longer in force any ruling of law by the judge* requiring the jury to find according to the presumption. 'All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. . . . The main point to observe is that the rule of presumption has vanished;' because its function was as a legal rule to settle the matter only pro-

2—This is one of the earlier uses of "presumption"; it is in effect an equivalent of "inference." Such are Coke's "presumptions, whereof there be three sorts, viz., violent, probable, and light or temerary" (Co. Litt. 6, *b*). This is what is usually meant by "presumption of fact."

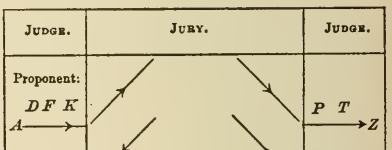
visionally, and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied.[3]

"(*e*) Are there any further stages in this possible shifting of the duty of producing evidence? It is conceivable that the proponent may be able to invoke other presumptions, though this is not common. But may not the opponent go further than produce evidence sufficient to remove the presumption? May he not only get the issue opened before the jury again, but also go further and raise what may be termed a *counter-presumption* in his favor, so that the proponent will find himself in his original position at the opening of the trial, namely, subject to the duty of producing sufficient evidence to go the jury, under penalty, in case of default, of suffering a ruling against him by the judge as a matter of law? This result is possible in principle, and there are instances of it, though rare. For example, a plaintiff, in an action for the burning of his property by the defendant railway-company's negligence, created a presumption of negligence by showing the setting of the fire by sparks from the defendant's locomotive; the duty of producing evidence was thus put upon the defendant, who not only removed it by producing evidence sufficient to go to the jury, but by showing the proper construction, equipment, and inspection of the locomotive was held to have raised a presumption that it had not been negligent and thus to be entitled to a ruling by the judge against the plaintiff, taking the case from the jury.[4]

"The important practical distinction between these two senses of 'burden of proof' is this: This *risk of non-persuasion* operates when

3—The following passage from Professor Austin Abbott's article, in the University Law Review, II, 59, will serve to illustrate the general situation involved in this duty of producing evidence: "To use a homely illustration, a civil jury trial may be compared to a game of shuffle-board. The first and nearest to the playery is the field of mere scintillas; if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way or disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities."

4—"The various possible stages in the foregoing process may be illustrated by a diagram; the particular usefulness of the graphic method being that it shows in small compass the relation of the stages and the vital distinction between the judge's and the jury's situation for the two kinds of burdens:



Let A = the starting-point of the proponent having the risk of non-persuasion on a given issue;

A' = the starting-point of the opponent on the issue;

Z = the point of complete persuasion or proof for the proponent;

Z' = the corresponding point for the opponent. The proponent then finds, as

the case has come *into the hands of the jury,* while the *duty of producing evidence* implies a liability to a *ruling by the judge* disposing of the issue without leaving the question open to the jury's deliberations.

"*Tests for ascertaining this Burden.* The term 'burden of proof' is used commonly as applying equally to the two preceding kinds of situations, and often is applied in both senses in the same judicial opinion. Apart, therefore, from the difficulty of some of the problems of law germane to each situation, peculiar confusion is added by the unfortunate ambiguity of the terms of discussion. There is at this day a fairly widespread acceptance and understanding, in judicial utterances, of the distinction between the two things themselves, the risk of non-persuasion of the jury, and the duty of going forward with evidence sufficient to satisfy the ruling of the judge. The law which regulates respectively this risk and this duty is in most respects either generally settled or is the subject of local differences of decision whose lines of dispute are not difficult to discern. The main source of difficulty lies in the interchangeable use of the term 'burden of proof,' which forces the judges from time to time to distinguish, explain, repudiate former judicial utterances employing analogous language but dealing with distinct situations; and thus there is an appearance (and to some extent, a reality) of confusion in the precedents on the subject.

"As to the tests for determining this second burden of proof, it has already been pointed out that (*a*) for the one burden (the risk of non-persuasion of the jury) the substantive law and the pleadings, primarily, serve to do this, and, subsidiarily, a rule of practice, within

soon as he begins his production of evidence, that at any point between *A* and *K* he is subject to a ruling of the judge defeating him for lack of sufficient evidence. After reaching *K*, and obtaining a judicial ruling in his favor as to sufficiency of evidence, he is now free from his duty of producing evidence to the judge, and has only his risk of non-persuasion of the jury. But he may be able to reach with his evidence the point *P*, and invoke again the control of the judge, thus shifting to the opponent the duty of producing evidence. This may be done either by some general rule of presumption that is applicable, or by a specific ruling of the judge upon the mass of evidence adduced. If the duty is thus created for the opponent, he starts from point *A'* to sustain it. Until he has by some evidence reached point *K'* he is liable to a judicial ruling defeating him on that issue. If he can reach point *K'*, the duty and liability of satisfying the judge disappears, and he is in the field of the jury again. Here, however, the risk of non-persuasion of the jury is still, as before, upon the proponent for that issue; but neither party has any duty to satisfy the judge. Further, however, the opponent may succeed in reaching point *P'*, at which the judge, either by a general rule of counter presumption or by a specific ruling on the mass of evidence will order a verdict for the opponent, unless the proponent comes forward with more evidence. Thus the proponent again has the liability to produce some evidence, and must again attain point *K*, in order to come into the field of the jury once more. The process, however, seldom reaches these advanced stages. If the parties cease all production of evidence while the case is between points *K* and *P* or *K'* and *P'*, *i. e.* when the risk of non-persuasion of the jury comes to be the only and final stage, there are rules for the jury's guidance, namely, the rules for preponderance of evidence and reasonable doubt." (Quoted from W., § 2487.)

the stage of a single pleading, may further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases. (*b*) For the other burden (the duty of going forward with evidence to satisfy the judge) there is always, at the outset, such a duty for the party having the first burden, or risk of non-persuasion, until by some rule of law (either by a specific ruling of the judge upon the particular evidence, or by the aid of an appropriate presumption, or by matter judicially noticed) this line is passed. Then comes the stage in which there is no such duty of law for either party (although, if the proponent has invoked some presumption, this stage is immediately passed over). Then, either by a ruling on the general mass of evidence, or by the aid of some applicable presumption, the duty of law arises anew for the opponent. Finally, it may supposably, by similar modes, be later re-created for the proponent. There is therefore no one test, of any real significance, for determining the incidence of this duty; at the outset the test is furnished by ascertaining who has the burden of proof, in the sense of the risk of non-persuasion of the jury, under the pleadings or other rules declaring what *facta probanda* are the ultimate facts of each party's case; a little later, the test is whether the proponent has by a ruling of the judge (based on the sufficiency of the evidence, or a presumption, or a fact judicially noticed) fulfilled this duty; later on, it will be whether the proponent, by a ruling of the judge upon a presumption or the evidence as a whole, has created a duty for the proponent; and still later, whether, for the purposes of the judge's ruling, the proponent has satisfied this duty. It has been suggested that 'the test ought in strict accuracy to be expressed thus, namely: which party would be successful if no evidence at all, or no more evidence (as the case may be), were given? But it is obvious that this is not a test, in any sense of being a useful mode for ascertaining the unknown from the known; it is simply defining and re-stating in other words the effect of this duty of producing evidence; it says 'the burden of proof, in this sense, means that the party liable to it will lose as a matter of judicial ruling if no evidence or no more evidence is given by him'; and this does not solve the main problem of determining in a given case which is the party thus liable to these consequences.

"*Shifting the Burden of Proof.* (*a*) The *first burden* above described—the risk of non-persuasion of the jury—*never shifts,* since no fixed rule of law can be said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes beforehand the issuable facts respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the

other's, or possibly his and possibly the other's. The other party and himself will of course have their turns in proving their respective *facta probanda* (though under a strict system of pleading these turns of proof will be more clearly fixed before trial, and may occur at different stages and not the same stage of the cause); and the putting-in of evidence may therefore 'shift' in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not 'shift' in any real sense; for each may once for all ascertain beforehand from rules of law the *facta probanda* apportioned to him, and this apportionment will always remain as thus fixed, to whatever stage the cause may progress.

"(*b*) The *second kind of burden*, however—the duty of producing evidence to satisfy the judge,—*does have* this characteristic referred to as a '*shifting*.' It is the same kind of a duty for both parties, but it may rest (within the same stage of pleading and upon the same issue and during one burden of the first sort) at one time upon one party and at another time upon the other. Moreover, neither party can ascertain absolutely beforehand at what time it will come upon him or cease to be upon him or by what evidence it will be removed or created,—except so far as a presumption has by a rule of law been laid down as determining the effect attached to certain facts. Moreover, in a distinctive sense, this kind of burden 'shifts' and the other does not, in that during the unchanged prevalence of the first kind of burden for one party, the second kind may be shared in turn by one and the other, though the first—the risk of non-persuasion of the jury, should the case be left in their hands—has not come to an end.

"*Legal Effect of a Presumption.* The whole situation is complicated, quite apart from any ambiguity of terms, by the operation of presumptions upon specific fragments of the issue under a single pleading, in combination with the established practice of leaving to the jury for a general verdict the whole of the issues under a pleading. For example, suppose that the whole of the plaintiff's case and the whole proposition as to which he has the burden of proof in the first sense and the whole of the issue under the pleadings is that A is dead without heirs; suppose that the plaintiff has offered testimony that A has been for seven years absent from home and unheard from, and that there is also testimony in contradiction of these facts from the defendant and also testimony from both sides as to the existence of heirs. Here it is obvious that the case is not in the hands of the judge to order a verdict for the plaintiff, first, because the death of the plaintiff, assuming the presumption from absence to determine this, is not the only proposition essential to the plaintiff's case, and, secondly, because he cannot pass upon the truth of the plaintiff's contradicted testimony as to absence and therefore it cannot then be known whether the fact exists on which the presumption operates; and thus the case is still in appearance in the hands of the jury. Nevertheless, the matter is still in the hands of the judge (in theory

of law, at least) as much as it ever was; that is to say, the presumption or rule of law still operates that the fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of any explanatory facts to the contrary from the defendant. This rule of law is still applied, notwithstanding the additional elements in the case; for the judge will instruct the jury that if they find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then by a rule of law they are to take for true the fact of death and are to reckon upon it accordingly in making up their verdict upon the whole issue. The situation here is even simpler than it is in perhaps the majority of issues in litigation; so that the theoretical tends to be lost sight of, in that the issue does go to the jury and the case of the opponent of the presumption is apparently not brought to an end by a ruling of the judge. Nevertheless, in theory this legal effect is merely postponed, and will have due place if the jury understands the instructions and does its duty."

TITLE I.

GENERAL PRINCIPLES FOR THE TWO KINDS OF BURDEN OF PROOF.

BARRY v. BUTLIN (1838).

2 Moore P. C. 480.

Pendock Barry, of Tollerton Hall, in the County of Nottingham, the testator respecting the validity of whose will the present appeal arose, died on the 13th of March, 1833, at the age of seventy-
606 six years, a widower, leaving behind him the appellant, his son and heir, and only next of kin. On the 24th of September, 1827, the deceased executed his will in duplicate, at the house of Percy, his attorney, in the presence of two witnesses, whereby he appointed the respondent, James Butlin, sole executor and residuary legatee, and amongst other legacies bequeathed to Percy £3,000, to Butlin £2,000, and to Whitehead, his butler, £3,000. The validity of this will was disputed by the appellant, on the ground that the execution was procured by the fraud and conspiracy of Percy, Butlin, and Whitehead, at a time when the deceased was of unsound mind, and wholly incapable of making or executing a will, or of doing any act requiring thought, judgment, and reflection. The respondent propounded the above will for probate in the Prerogative Court of Canterbury, and an appeal was taken from the decree in its favor.

PARKE, B.: "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides. These rules are two; the first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. . .

"If [in the authority cited by the appellant] it is intended to be stated as a rule of law, that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof

is thereupon required from the party propounding the will,—we feel bound to say that we assume the doctrine to be incorrect. The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the *onus* is imposed on the party propounding the will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family, and a legacy of £50 to his confidential attorney, who prepared the will: would this fact throw the burden of proof of actual cognizance by the testator, of the contents of the will, on the party propounding it, so that if such proof were not supplied, the will would be pronounced against? The answer is obvious, it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances. . . . We think, therefore, on the whole, that the evidence of the *factum,* coupled with the strong probabilities of the case, is [in this case] sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favor, especially when made by those of weak capacity."

HINGESTON v. KELLY (1849).

18 L. J. Exch. 360.

Action for work and labor, tried before Denman, L. C. J. The plaintiff was an attorney, and with the assent of the defendant acted for the defendant as an election agent in a contest for the bor-
607 ough of Lyme Regis, which the defendant was a candidate to represent in parliament. It also appeared from the evidence of the plaintiff's witnesses, that the plaintiff had voted for the defendant at the election, although a paid agent is not permitted by law to vote. The defendant produced evidence to show that it was agreed that the plaintiff's services were to be given gratuitously. His Lordship in summing up told the jury, that the plaintiff, having proved the services rendered, was *prima facie* entitled to be paid, and that they should find for the plaintiff, unless the defendant had distinctly proved to their satisfaction that the contract was that the services were to

be gratuitous, in which case they ought to find for the defendant. The jury found for the plaintiff.

PARKE, B.: "The great difficulty in my mind is whether, looking to Lord Denman's summing up, the jury understood that the burthen of proof still lay on the plaintiff. The burthen of proof was never altered. The plaintiff being a professional man, and performing professional services, was *prima facie* entitled to remuneration. His voting, indeed, was an act which amounted to a statement by himself that he was not to be paid. Still, if the case had rested there, the jury, notwithstanding the voting, might have believed that the contract was that the plaintiff was to be paid. Then came the evidence for the defendant to show that the agreement was that the plaintiff should not be paid. After this was given, the question for the jury still remained, whether on the whole evidence the plaintiff had made out his title to remuneration. I think, if I had been a juryman, that on the facts of this case I should have found my verdict against the party, whether the plaintiff or the defendant, on whom I was told by the judge that the burthen of proof lay."

ABRATH v. NORTH EASTERN R. CO. (1883).

L. R. 11 Q. B. D. 440.

Malicious prosecution. On the 10th of September, 1880, a collision occurred at Ferry Hill station, on the defendant's railway, and one M. McMann alleged that he had thereby sustained injuries.
608 McMann was attended by the plaintiff, G. A. Abrath, a doctor of medicine and surgery, and McMann brought an action against the defendants to recover damages. The action by McMann stood for trial at the Northumberland Summer Assizes, 1881, but it was settled by the defendants paying to the plaintiff McMann, 725*l.* damages, and 330*l.* costs. Afterwards, upon information given to the railway company, counsel advised that there was a good case for prosecuting a charge of conspiracy against McMann and Dr. Abrath, his medical adviser. Two eminent medical men were of opinion that the case of the alleged injuries to McMann was an imposture. Thereupon the defendants caused an information to be laid before justices, against the plaintiff, Dr. Abrath, on a charge of conspiracy to cheat and defraud the defendants. He was committed for trial and was tried in January, 1882, and acquitted, the foreman of the jury adding that it was the unanimous wish of the jury that he should leave the Court without a stain upon his character. He thereupon commenced the present action.

CAVE, J., in summing up to the jury, told them that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and then proceeded as follows: "With regard to this question, you must bear in mind that it lies on the plaintiff to prove that

the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point." A new trial was granted, by the Queen's Bench Division, on the ground that the general rule should be followed, which was that the onus rested on the person affirming; and that there had been a misdirection by CAVE, J., in telling the jury that the onus lay upon the plaintiff to prove that the defendants had not taken reasonable care to inform themselves of the true state of the case, and had not honestly believed the case which they laid before the magistrate. From this order a further appeal was taken by the defendant, and allowed; the original ruling of CAVE, J., being affirmed.

BOWEN, L. J.: "This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that it, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff. I think that the whole of the fallacy of the argument addressed to us, lies in a misconception of what the learned judge really did say at the trial, and in a misconception of the sense in which the term 'burden of proof' was used by him. Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom

the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof.

"There is another point which must be cleared in order to make plain what I am about to say. As causes are tried, the term 'onus of proof' may be used in more ways than one. Sometimes when a cause is tried the jury is left to find generally for either the plaintiff or the defendant, and it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests, and when and at what period it shifts. Issues again may be left to the jury upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law which have to be explained to the jury. . . . Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms 'negative' and 'affirmative' are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained."

POWERS v. RUSSELL (1832).

13 Pick. 69.

Bill to redeem a mortgage.

SHAW, C. J.: "It is conceded that in 1822, Nathan Powers, the brother of the plaintiff, having received a conveyance of the
609 same estate from Peter Russell the defendant, who was then his wife's father, on the same day duly executed and delivered to the

defendant a mortgage deed, conditioned to perform a bond then entered into, to support and maintain the defendant in the manner therein more particularly specified, during his life. The claim of the plaintiff is, that the same Nathan Powers, who has since deceased, immediately after making the deed above mentioned, executed another mortgage deed to the plaintiff, in virtue of which he claims a right to redeem. The execution and delivery of this last mortgage are denied by the defendant, and the points raised and considered have turned wholly upon this question. It is very clear, that to enable the plaintiff to maintain his bill to redeem, he must prove affirmatively, that he stands in the character of a grantee of the premises from the original mortgagor, and that in regard to this point the burden of proof is upon the plaintiff. . . .

"It may be useful to say a word upon the subject of the burden of proof. It was stated here, that the plaintiff had made out a *prima facie* case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, purposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact.

"To illustrate this;—*prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side, tending to negative such fact of delivery; this latter is met by other evidence, and so on through a long inquiry. The burden of proof has not shifted, though the weight of evidence may have shifted frequently; but it rests on the party who originally took it. But if the adverse party offers proof, not directly to negative the fact of delivery, but to show that the deed was delivered as an *escrow*, this admits the truth of the former proposition, and proposes to obviate the effect of it, by showing another fact, namely, that it was delivered as an escrow. Here the burden of proof is on the latter.

"Applying these rules to the present case, it is manifest that the burden of proof was upon the plaintiff through the whole inquiry. The question was, whether the instrument was ever delivered by Nathan Powers to Chester Powers as his deed. This question is to be examined, as if the original deed had been first produced."

CARVER v. CARVER (1884).

610 *97 Ind. 497, 510.*

[The facts and the opinion on the present point are included in the quotation *post,* No. 647.]

REX v. ALMON (1771).

5 Burr. 2868.

Criminal libel. To charge the defendant as the publisher, evidence was offered of a purchase of the libel, imprinted with the defendant's name and bought in his shop. MANSFIELD, L. C. J.: "This
611 being *prima facie* evidence of a publication by the master himself, it stands good till answered by him; and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. . . . [It] must stand *till* contradicted or explained or exculpated by some other evidence, and if not contradicted, explained or exculpated, would be in point of evidence sufficient or tantamount to conclusive. . . . If it be sufficient in point of law, and the juryman believes it [*i. e.* the fact of purchase], he is bound in conscience to give his verdict according to it." *Mr. Justice* ASTON "laid down the same maxim as being fully and clearly established, 'that *prima facie* evidence (if believed) is binding *till* contrary evidence be produced'."[1]

1—Compare the following:

R. v. O'Doherty, 6 State Tr. n. s. 831, 873 (1848): *Pennefather* B., charging the jury, in a prosecution for publishing an article with seditious intent: "The publishing them is certainly *prima facie* evidence against him, as being the registered proprietor [of the newspaper]" A *juror:* "There is difference of opinion among the jurors; some hold that, from your lordship stating there being *prima facie* evidence of the prisoner's guilt, we should at once go to find him guilty; others receiving the phase thus, that your lordship did not mean to convey that it was sufficient [to require that finding]" *Pennefather,* B.: "I did not mean, gentlemen, to direct you or tell you that in point of law, because he was the publisher and proprietor of the paper, he therefore necessarily knew the contents. I did not mean to convey that. But I told you that it was evidence that he did know the contents, and that you were to form your judgment upon the whole of the case, reading the documents and the evidence."

Walker, J., in *Cogdell* v. *R. Co.,* 132 N. C. 852, 44 S. E. 618 (1903): "The Court was requested to charge that there was a presumption that the deceased had exercised care, which the Court refused to give, but charged the jury that there was an inference that due care was exercised. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

ALABAMA GREAT SOUTHERN R. CO. v. TAYLOR (1901).
129 Ala. 238, 29 So. 673.

Action by Mary E. Taylor against the Alabama Great Southern Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed. The complainant contained two counts; the first read:
612 "The plaintiff claims of the defendant seventy-five dollars damages, which damages were caused by fire from the engine operated by defendant, whereby said sum of seventy-five dollars damages were caused by said defendant to said plaintiff by reason of said fire, whereby said plaintiff's corncrib or building was wholly destroyed,—all caused by the negligence of defendant,—and by reason of said fire said plaintiff was damaged to the amount of said sum of seventy-five dollars; wherefore plaintiff brings this action." The defendant introduced as witnesses the engineer and fireman who were on the engine that was drawing the passenger train which passed the plaintiff's corncrib on the morning in question, and the master mechanic on the defendant's road, and the inspector of engines at the defendant's shops in Birmingham. All of these witnesses testified that the engine was equipped with the latest approved and improved spark arresters, devices, and appliances to prevent the escape of sparks from the said engine; that they had examined the engine in question the day the plaintiff's corncrib was burned, and they found the engine in perfect condition in every respect; that it was better equipped, so far as proper devices and appliances for preventing the escape of sparks was concerned, than engines were generally upon well-regulated roads. The defendant excepted to the Court's giving, at the request of the plaintiff, the following written charge: (1) "If the jury believe from the evidence that the corncrib described in the complaint was destroyed by fire emitted from a locomotive of the defendant, then the jury must find for the plaintiff, unless they believe from the evidence that the plaintiff, after discovering the fire, by due diligence could have put out the fire and saved the property from destruction." The defendant requested the Court to give to the jury the following written charges, and separately excepted to the Court's refusal to give each of them as asked: . . . (10) "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the engine in question at the time of the accident was supplied with the most approved appliances and devices for the prevention of fires, in use by well-regulated railroad companies in this country, and that such appliances were well managed and handled by the servants in charge thereof at the time, and that there was no negligence upon the part of the defendant by which said fire was communicated to the building in contest here, at or near the said building, then it is your duty to find for the defendant."

SHARPE, J.: ". . . Apparently, in giving and refusing instructions to

the jury, the trial Court proceeded on the theory that the fact, if established, that defendant's engine communicated fire to the plaintiff's building was sufficient to fix upon the defendant the charge of negligence conclusively. Such a conception is, in view of the evidence, at variance with principles declared by this Court. In actions of this kind the communication of fire to the property of another by an engine of a defendant railroad company is, when nothing appears to the contrary, presumed to have been the result of negligence on the part of the defendant. The presumption so arising is not a conclusive one, so as to preclude the defendant to rebut it; nor does it take the place of actual evidence of negligence further than to cast upon the defendant the burden of showing by evidence that at the time of the occurrence it was in the exercise of ordinary care in respect to the construction, equipment, and management of the engine. When, by proof, it has so repelled the presumption, the burden shifts to the plaintiff, who must go forward anew with actual evidence to disprove that of the defendant, either directly or inferentially, by showing that a carefully constructed, equipped and managed engine would not have set fire to the property. When there is no evidence of negligence other than that supplied by the presumption referred to, and the presumption has been, to its full extent, repelled by undiscredited evidence, the jury should find for the defendant, if they believe the evidence, and the Court should so charge, if requested in writing to do so. . . . These considerations force the conclusion that there was error in giving the charge requested by the plaintiff, and also in the refusal to give charge 10 requested by the defendant."

MENOMONIE RIVER SASH & DOOR CO. v. MILWAUKEE & NORTHERN R. CO. (1895).

91 Wis. 447, 65 N. W. 176.

This action was brought to recover damages against the defendant for the negligent destruction by fire from one of its locomotives at Marinette, Wis., on the 30th of September, 1891, of the lumber
613 of the Menomonie River Sash & Door Company, in its lumber yard adjoining the track of the defendant at that place, of the value of about $7,000. . . . The jury found a special verdict, in substance: . . . (4) The fire in question was set by the defendant's switch engine. (5) Said engine was properly constructed and equipped, to prevent the escape of sparks and cinders. (6) Said engine was not in good condition when it passed the place where the fire started. (7) As to whether said engine was properly managed when it passed the place where the fire started, the answer was, "Don't know." (8) To the eighth question, "Was there any want of ordinary care on the part of the defendant which caused the fire which burned the lumber?" the

jury answered in the affirmative; (9) and to the ninth question, in substance, in what such want of care consisted, the jury answered, "Careless inspection of netting in engine No. 2." . . . The plaintiffs moved for judgment on the verdict, and the defendant moved on the judge's minutes, pleadings, etc., among other things, to set aside the sixth, eighth, and ninth answers and findings of the verdict, as against the undisputed evidence in the case, and for judgment on the special verdict thus corrected and the undisputed evidence, on the ground that such evidence showed that the defendant was entitled to judgment. The Court denied the plaintiffs' motion and entered an order setting aside the answers or findings in the special verdict to the sixth, seventh, eighth, and ninth questions, as being contrary to the uncontradicted evidence in the case, and that the defendant have judgment upon the uncontradicted evidence, dismissing the plaintiffs' complaint. Judgment was entered in favor of the defendant, pursuant to this order, from which the plaintiffs appealed. . . .

PINNEY, J.: "The evidence produced on the part of the plaintiff was sufficient to go to the jury, to show that the fire in question was set by the defendant's switch engine, presumably by sparks or cinders thrown and escaping from it; but it does not follow from this fact that the defendant is liable for the consequences that ensued. In order to charge it with the loss of the plaintiffs' lumber the fire must have been caused by the defendant's negligence. It is a well-understood fact—so much so that Courts may properly take notice of it as a matter of common knowledge—that no means or device that human ingenuity has as yet been able to produce will wholly prevent the emission or throwing of sparks or cinders from railway locomotives. . . . The presumption, therefore, of negligence, or the want of proper equipment, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but, of the two, rather weak and unsatisfactory. It is indulged in merely for the purpose of putting the company to proof, and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular. Hence evidence showing that the engines passing over a road were properly constructed and equipped, and were subjected to the vigilant and careful inspection of a competent and skillful person as often as once in two days, and found to be in proper order, would seem to satisfy the requirements of the rule. The effect of such proof, with proof of proper management, is to overcome any inference of negligence on the part of the defendant arising from the mere fact that sparks and cinders did escape and communicate fire, to the plaintiffs' injury. In the present case the precise manner in which the fire occurred was not observed by any one, but is wholly a matter of inference; and it is important to note that the case differs, in this respect, materially from the case of Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co., 84 Wis.

171, 53 N. W. 850, and Stacy v. Railway Co., 85 Wis. 225, 54 N. W. 779, where the evidence indicated that the fire in question was caused, not by sparks or cinders thrown from the engine, but from coal and cinders dropped on the track under circumstances tending to show that the engine was not properly constructed and in good condition, or negligence in the management of it, and thus furnishing affirmative proof of negligence which would require the submission of the case to the jury, to determine whether the evidence introduced by the company to overcome the presumption mentioned was, in all material respects, worthy of credit. . . . We think that, the evidence produced by the defendant in relation to the condition of the engine, its management, and the inspection of it remaining wholly uncontradicted, the case falls within the rule on which this Court acted in Spaulding v. Railway Co., 33 Wis. 591, in a case quite in point, and that the Circuit Court properly held that such evidence should not be submitted to the jury. The weight and effect of such evidence, and the amount and character of proof necessary to overcome it, are questions for the Court; but, in case of a conflict of testimony, the jury may determine what facts are proved. We do not understand that there is any conflict of evidence in relation to the facts upon which the defendant relies to rebut the inference of negligence arising from the mere fact that the fire was communicated from sparks and cinders escaping from the defendant's engine. The question was therefore wholly a question of law for the Court whether the proof was sufficient for the purpose indicated. . . . It appears to us that the evidence, much of which has been set forth, was amply sufficient, within the rule, to rebut all inference of negligence on the part of the defendant, and that the burden of establishing such negligence on its part as would justify a verdict in their favor remaining on the plaintiffs, and no such evidence having been produced, judgment was properly given for the defendant."

EWING v. GOODE (1897).

78 Fed. 442.

TAFT, J.: "In this case the petition of Nellie Ewing, the plaintiff, alleges that she employed the defendant, Goode, a surgeon and oculist, to cure her of a certain malady of her eye, for a reward to be
614 paid therefor; that defendant entered upon such employment, but did not use proper care and skill in the operating on the eye of plaintiff, and did not bestow proper attention and treatment upon the eye after the operation, causing her to suffer great pain, and to lose the right eye entirely, and to impair the sight of her left eye. The answer of the defendant denies unskillfulness or lack of attention on his part and any injury to the plaintiff caused thereby. . . . Before the plaintiff can recover, she must show by affirmative evidence—

first, that defendant was unskilled or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. . . . The preliminary question for the Court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that defendant was unskillful or negligent, and that his want of skill or care caused injury. In the Courts of this and other States the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however, overwhelming the evidence to the contrary, the Court must submit the issue thus made to the jury, with the power to set aside the verdict, if found against the weight of the evidence. In the Federal Courts this is not the rule. According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the Court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant. Hence our inquiry is: Does the case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant, or injury caused thereby? . . . The condition of the plaintiff cannot but awaken the sympathy of every one, but I must hold that there is no evidence before the Court legally sufficient to support a verdict in her favor. I should deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being true, it becomes my duty to direct a verdict for the defendant."[1]

BARABASZ v. KABAT (1900).

91 Md. 53, 46 Atl. 337.

PEARCE, J.: "This is an action brought by the appellees against the appellant to recover damages for an alleged assault and battery made upon the female plaintiff by one Joseph Molis while in the dis-
615 charge of his duties and in the course of his employment as the servant or agent of the appellant. At the close of the plaintiff's testimony the defendant offered eight prayers, by each of which, in varying form, the Court was asked to withdraw the case from the consideration of

1—Compare the following: *Brett*, J., in *Bridges* v. *R. Co.* L. R. 7 H. L. 213 (1874): "It is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so."

the jury. All these prayers were rejected by the Court, and their rejection constitutes the first exception. After the rejection of these prayers, the defendant proceeded with his case, and introduced a number of witnesses to sustain his defense. At the close of the whole case, prayers were offered by both parties, and were passed upon by the Court, but are not embraced in the record; it appearing therefrom that the defendant waived all objection to the ruling on all these prayers and on questions of evidence. . . .

"The appellees contend that though there may have been error in the Court's ruling in refusing to take the case from the jury at the conclusion of the plaintiff's evidence, such error was waived by the defendant in proceeding with his own case, and cannot be reviewed on this appeal. Prior to the act of 1894, c. 516 (section 87a, art. 75, of the Code), this question could not have arisen in Baltimore city, because, before the passage of that act, if the defendant at the close of the plaintiff's testimony submitted a prayer to take the case from the jury, and such prayer was refused, the defendant could not, under the rules of the courts of Baltimore city, offer testimony in defense, and the case went to the jury on the plaintiff's testimony, just as, prior to the act of 1867, c. 388 (Code, art. 75, § 8), if a party demurred to the declaration or to a plea at any stage of the case, and his demurrer was overruled, the other party was entitled to judgment on the demurrer, unless by leave of Court the demurrer was withdrawn and plea was filed in due course according to the stage of the case. This was so, because when the party elected, by his demurrer, to rest his case upon an issue at law, he thereby waived the right to have an issue of fact (or, to speak more accurately, acknowledge there was no issue of fact), so long as the issue of law tendered by him was not, by leave of court, withdrawn. This reason of the common law would seem to be equally applicable and controlling in the case of a prayer offered at the close of plaintiff's testimony to take the case from the jury. By offering such prayer the defendant admitted all the facts established by the plaintiff's testimony, and rested his defense upon an issue of law, viz. the sufficiency of those facts to warrant a recovery.

"But Parliament in England and American Legislatures are constantly modifying the rigor of the common law, and our own legislature, by the act of 1867, gave to the party demurring to a declaration or plea the right to plead over without withdrawing his demurrer, and expressly provided in such case that 'upon appeal or writ of error the question of law arising upon the demurrer should be decided and determined as fully to every intent as if the party demurring had not pleaded over.' This privilege was a wise and salutary one, since without it only partial relief would have been afforded against the evil intended to be remedied. Without it, the demurrant would have lost absolutely the right to have decided the issues of law, upon which he might be correct, and the only benefit he would have secured would be the chance of establishing his defense upon the issue of fact to be raised

by plea. In other words, he would purchase the doubtful result of an issue of fact by the abandonment of the uncertain result of an issue of law. But under the operation of the act of 1867 he enjoys the benefit of a defense both at law and on the facts. Thus, equal and exact justice is done to both parties, and the cost and delay of litigation are greatly reduced. The practice of offering prayers to take a case from the jury is said to be equivalent to a demurrer to evidence, and when a defendant, at the close of the plaintiff's testimony, submits such a prayer, it is in effect a motion for a nonsuit, which is the practice prevailing in some states to-day. The only difference in the effect of a demurrer to evidence and a motion for nonsuit upon plaintiff's testimony, as stated by Mr. *Justice* GRAY in Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 39, 11 Sup. Ct. 478,[2] being that the judgment on the former is a final determination of the rights of the parties, whereas the judgment on the latter is in favor of plaintiff, the case must be submitted to the jury; and, if in favor of defendant, it is no bar to a new action. The act of 1894 enacted that where the defendant offers such a prayer at the close of the plaintiff's evidence, and it is rejected, 'the defendant shall not be precluded from offering evidence of defense, but any defendant in any such action may offer evidence of defense as fully and to the same extent as though such prayer had not been offered.' It does not, however, provide, as the act of 1867 did in reference to its subject-matter, that 'upon appeal or writ of error the question of law arising upon such rejected prayer shall be decided and determined as fully to every intent as if no evidence in defense had been offered.' We think there was a sound reason for not so providing, because the defendant's evidence, being in

2—*Gray*, J., in *Central Transportation Co.* v. *Pullman's Palace Car Co.* (1890), cited *supra:* "[Under a State statute allowing a court to enter a non-suit without the plaintiff's consent, and granting the plaintiff a writ of error therefor,] the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. . . . The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, 'rather a matter of form than of substance except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal.' . . . It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the Court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon. But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error."

by his own deliberate election, should be available as well for the plaintiff as for the defendant, since it not unfrequently happens that the defendant, in so electing, supplies the deficiency of plaintiff's testimony; and if the defendant is still of opinion that upon the whole testimony, which he has himself invoked, there is no legally sufficient evidence to warrant a recovery, he may renew his prayer to take the case from the jury, and so is not deprived of his right to have determined upon the whole case, at that stage to which his election has brought the case, the question of law raised by the renewed prayer to take the case from the jury. If, on the other hand, he is of opinion that he can no longer sucessfully rely upon such prayer, by reason of any additional evidence brought into the case, we can perceive no reason why he should be permitted to resort again to a position which would operate to exclude his own testimony making for the plaintiff.

"The question here raised has never been presented in this Court, but, for the reasons we have given, we think the contention of the appellees is logical and correct. It would certainly produce a failure of justice if a verdict of a jury, rendered upon the evidence of both parties, and upon instructions at the close of the case, to the granting or refusing of which there was no exception, should be set aside upon an alleged erroneous ruling upon the plaintiff's evidence only; and it would be trifling with the purposes for which courts of justice are created to require the review of an error which, if declared, would not justify a reversal."

JOLIET, AURORA & NORTHERN R. CO. v. VELIE (1892).
140 Ill. 59, 29 N. E. 706.

MAGRUDER, C. J.: "This is an action on the case begun on April 23, 1888, by the appellee against the appellant company in the Circuit Court of Kane County to recover damages for a personal injury, which resulted in the amputation of one of the appellee's legs and the mangling of the other, in tearing his ribs from the breast bone, in inflicting internal injuries and in completing shattering his nervous system. The plea was not guilty. The first trial resulted in a verdict in favor of the plaintiff for $15,000.00. A new trial was granted. The second trial has resulted in verdict and judgment in favor of the plaintiff for $14,000.00. This judgment has been affirmed by the Appellate Court, and the judgment of the latter Court is brought here for review by appeal. . . . After the plaintiff below had introduced his evidence and rested, the defendant—the appellant here—moved to exclude the plaintiff's evidence. This motion was overruled, and exception was taken. The action of the trial Court in thus overruling the motion of the defendant to exclude all of the plaintiff's evidence, so made at the close of the plaintiff's evidence, and not afterwards, is the

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only error now insisted upon by appellant's counsel, except the claim that the damages are excessive which will be noticed hereafter.

"A motion to exclude the evidence operates as a demurrer to the evidence. Where the defendant demurs to the plaintiff's evidence, he must be held to admit not only all that the plaintiff's testimony proves, but all that it tends to prove. The demurrer not only admits the truth of the testimony demurred to, but all the conclusions of fact which a jury may fairly draw therefrom. The testimony is to be taken most strongly against the party demurring, and whatever inferences a jury would be entitled to draw the court ought to draw. The object of the demurrer is to refer to the Court the law arising from facts. . . . Hence, if there is evidence tending to prove the issues in favor of the plaintiff, the judgment must be in his favor, or, what amounts to the same thing under the more recent practice, the motion to exclude must be overruled. If, therefore, the record in this case was in such shape as to present for our consideration the question of law whether the evidence, that had been introduced by the plaintiff below when he rested his case, was or was not sufficient to justify a recovery, or establish a cause of action, we would be obliged to examine such evidence in order to determine the question thus presented.

"But we do not think that the appellant is in a position to urge before this Court, that the trial Court erred in refusing to sustain its motion to exclude the evidence of the plaintiff below. When the motion was overruled the defendant below did not stand by the motion; on the contrary, it proceeded to introduce testimony to contradict the proofs of the plaintiff; and, after the introduction of its own testimony, it did not renew its motion to exclude, nor did it ask the court to instruct the jury to find for the defendant, but allowed the case to go to the jury under instructions framed upon the theory that there was such a conflict in the evidence as to justify the jury in passing upon it. Where a defendant, whose motion to exclude plaintiff's evidence, made as soon as plaintiff rests, is overruled, fails to stand by such motion, or to renew it when all the testimony is in, or to request that the jury be instructed to find for the defendant, but introduces testimony of his own to contradict the case made by the plaintiff, and requests that the jury be instructed to pass upon the issues involved and to determine them according to the preponderance of the evidence, he thereby waives his right to object to the action of the Court in overruling his motion, and is estopped from assigning such action as error in a court of review.

"This conclusion necessarily follows from the observations already made upon the nature of such a motion, which operates as a demurrer to the evidence. When a defendant demurs to a declaration and his demurrer is overruled, he has two courses before him. He can either stand by his demurrer and suffer judgment to go against him, trusting to the upper Court to sustain his position, or he can plead to the declaration and go to trial. If he does the latter, he loses any rights which he might have had under his demurrer if he had stood by it. We

see no reason why the same rule should not apply in the case of a motion by the defendant to exclude the plaintiff's evidence, when such motion is made as soon as the plaintiff rests his case. A motion of this kind is a substitute for the old practice of filing a demurrer to the evidence, which set out all the facts admitted, and was expressed in the formal language of the ordinary demurrer. The plaintiff then joined in the demurrer, or refused to join therein, according to the ruling of the court. Inasmuch as the demurrer admits all the facts stated in it to be true, and admits also all the inferences which can be properly drawn from the facts, and merely claims that the testimony is not sufficient in law to enable the plaintiff to maintain his action, the defendant necessarily withdraws his admissions when he neglects to stand by his demurrer after it is overruled, and proceeds to introduce witnesses to contradict the very evidence which he has just admitted to be true. The action of the Court in ruling upon the demurrer to the evidence is based upon defendant's admission that the facts established by the evidence are true. When the defendant no longer admits such facts to be true but tries to prove that they are false, he ought to be held to have waived any error based upon the admissions thus withdrawn. . . . When the testimony of the defendant is introduced, the case made by the plaintiff may have been strengthened, and its defects, if any existed, may have been cured. Very often the cross-examination of the defendant's witnesses brings out facts favorable to the plaintiff's cause of action which the latter could not otherwise obtain. When all the evidence is in on both sides, an entirely different case may be presented from that which existed when the plaintiff rested. Even though a motion to exclude plaintiff's evidence made at the close of his case may have been improperly overruled, yet the evidence on both sides when considered all together may show so clearly, that the cause depends upon the effect or weight of testimony, as not only to justify but to require the jury to pass upon it. Would it be right for this Court to reverse a judgment for error in overruling such a motion, if it could plainly see that the case was one for the jury in view of all the testimony presented by both sides, and that it was properly submitted to the jury under instructions applicable to a controverted state of facts? We think not.

"If the defendant in this case felt confidence in the position, that the evidence introduced by the plaintiff established no cause of action, it should have stood by its motion. . . . What matters it that it would have been wrong to submit the case to the jury upon the plaintiff's evidence alone, if it was right to submit it upon the plaintiff's evidence and the defendant's evidence together? . . . They [defendant's counsel] nowhere claim, or ask us to hold, that the case was not properly submitted to the jury upon all the evidence presented on both sides. Their sole contention is, that the plaintiff *when he rested* had not made a case, and that the trial court erred in not sustaining the motion *then* made to exclude plaintiff's evidence without reference to the bearing, or effect

on the issues, of the evidence subsequently introduced; and that, for this alleged error alone, we must reverse the cause irrespective of anything that occurred after such motion was overruled, and no matter upon what theory or upon what kind of instructions the case was finally submitted. We are unable to concur in this view."[3]

COMMONWEALTH v. WEBSTER (1850).

5 Cush. 295, 320.

The facts of this case have been stated *ante,* in No. 17.

SHAW, C. J., charging the jury: "Another rule is, that the circumstances taken together should be of a conclusive nature and
617 tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. . . . The evidence . . . in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

"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."

3—*Gray* J., in *Columbia &c. R. R. Co.* v. *Hawthorne,* 144 U. S. 202, 12 Sup. 591 (1892): "The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error."

BUEL v. STATE (1899).

104 Wis. 132, 80 N. W. 78.

MARSHALL, J., commenting on the phrase "reasonable doubt": "Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse rather than to
618 enlighten the jury. It is said that scholastic attempts to explain the meaning of such words, which are more easily understood than explained, are liable to lead such men as commonly make up our juries to think that the ordinary processes of reasoning, by which they are accustomed to come to conclusions in the ordinary affairs of life, are not suitable to the jury room in a criminal case, but that some other process of reasoning is to be adopted which they are to gather from the language of the trial judge, and that they are thereby really weakened in their ability to come to a just conclusion; that it would be better to leave them to exercise their own intelligence in regard to language so plain that it is not easy to make it plainer by explanation. Mr. Justice NEWMAN said, in Hoffman v. State:[4] 'It needs be a skillful definer who will make the meaning of the term ("beyond a reasonable doubt") more clear by the multiplication of words,' while the writer expressed the view, in Emery v. State,[5] that the due administration of justice in many cases requires a careful explanation of the term to be given to the jury, and that without it justice is liable at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by courts, discredited. In State v. Sauer,[6] MITCHELL, J., expressed the opinion that 'most attempts at explaining the meaning of a "reasonable doubt" are made by the use of expressions that themselves need explanation more than the term sought to be explained by them, and that the better way is to omit such attempts, but that if such attempts be indulged in it would be better to adopt those definitions that have received general approval by Courts.' In People v. Stubenvoll,[7] CHAMPLIN, J., speaking for all the members of the court, said: 'We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt.' In Judge Thompson's work on Trials,[8] it is said that 'all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by men in the jury box.' Many more instances might be given where judges of appellate courts and text writ-

4—97 Wis. 576, 73 N. W. 52.
5—101 Wis. 27, 78 N. W. 145.
6—38 Minn. 438 N. W. 355.
7—62 Mich. 329, 28 N. W. 883.
8—II, § 2469.

ers have discouraged all attempts at explanation of what is a reasonable doubt, from the standpoint of a juror. Nevertheless the fact remains that trial judges, at least in important criminal trials, generally take great pains to explain the term so that the commonest understanding can grasp its meaning. The practice in that regard has grown up from frequent observations of the necessity of it. It is considered here that it is proper in all cases to make a careful explanation of the term, and that where the prosecution relies wholly on circumstantial evidence it is the better practice to do so, taking the utmost care, however, to use only expressions that have been approved particularly by this Court."[9]

ELLIS v. BUZZELL (1872).

60 Me. 209, 213.

BARROWS, J.: "The plaintiff claims to recover damages of the defendant, because, he says, the defendant falsely charged him with the commission of the crime of adultery. The defendant says the
619 plaintiff ought not to recover damages, because the accusation was not false, but true, and he testified that he saw the plaintiff in the act of adultery with a certain woman. The plaintiff denies this in his testimony, and produces the deposition of the woman, who denies it also. Hereupon he requests the judge to instruct the jury that the defendant in order to maintain the defense must prove the act of adultery upon him beyond a reasonable doubt, the same as if he was on trial for the commission of a crime. The judge refused so to instruct, and, on the contrary, instructed the jury that if the defendant had made out the truth of the charge against the plaintiff by a preponderance of testimony, it was sufficient to entitle him to a verdict; and that proof of the truth of the statements made by the defendant would be a complete justification for uttering them. . . .

"The burden, however, of proving that what he has said is true, rests rightfully enough upon the defendant, not only because he holds the affirmative according to the pleadings, but because of the presumption of innocence. This presumption, as well as whatever testimony the plaintiff may offer to repel the charge, the defendant must be prepared to overcome by evidence. But when he has done this by that measure and quantity of evidence which is ordinarily held sufficient to entitle a party upon whom the burden of proof rests, to a verdict in his favor

9—Compare the following: 1901, Lenert *v.* State, — Tex. Cr. —, 63 S. W. 563: "The jury sent word to the Court . . . that they desired an additional charge upon the meaning of 'reasonable doubt.' . . . Thereupon the Court told the jury verbally 'that the two words "reasonable doubt" were words of common use, and the jury could understand them as easily as the Court, and the Court had a reasonable doubt as to whether or not he could under the law charge them as to their meaning.' We see no error in this action of the trial Court calculated to injure the rights of the appellants."

in a civil case, shall he be required to go further, and in order to save himself from being mulcted in damages for the benefit of the plaintiff, free the minds of the jury from every reasonable doubt of the plaintiff's guilt, as the State must in the trial of a criminal prosecution?

"We see no good reason for thus confounding the distinction which is made by the best text-writers on evidence, between civil and criminal cases with regard to the degree of assurance which must be given to the jury as the basis of a verdict. . . . It is true, that this distinction has heretofore been carried into civil cases and applied to suits in which it incidentally became necessary to determine, in order to settle the issue which the parties were litigating, whether one of the parties had committed an offense against the criminal law. Hence have arisen in these actions for defamation among others, a series of decisions which, if juries had acted according to their tenor, would have been productive not unfrequently of very unjust results. Practically we do not consider the form of expression used in the instructions to juries in cases of this description as very likely to change the result. We do not believe, if the jury in the present case found themselves inclined to believe upon the whole evidence that the plaintiff was verily guilty, as the defendant had said, that they would have proceeded to assess damages in his favor, because he might have started a reasonable doubt in their minds whether he ought to be convicted of the crime and sent to the State prison, upon that evidence, even had they been so instructed. The practical effect of such an instruction would probably have been to eliminate the doubt from the minds of the jury, not to change the result at which they arrived. But we think it best to recognize what has been justly said to be 'well understood, that a jury will not require so strong proof to maintain a civil action as to convict of a crime;' and to draw the line between the cases where full proof beyond a reasonable doubt shall be required and those where a less degree of assurance may serve as the basis of a verdict, where the juror instinctively places it,—making it to depend rather upon the results which are to follow the decision, than upon a philosophical analysis of the character of the issue. . . . A greater degree of caution in coming to a conclusion should be practiced to guard life or liberty against the consequences of a mistake always painful, and possibly irreparable, than is necessary in civil cases, where, as above remarked, the issue must be settled in accordance with one view or the other, and the verdict is followed with positive results to one party or the other, but not of so serious a nature."[10]

10—Compare the authorities cited in W., § 2498.

TITLE II.

PRESUMPTIONS IN SPECIFIC ISSUES.

SUTTON v. SADLER (1857).

3 C. B. N. S. 87.

Ejectment; the issue was as to the competency of William Walter Sutton to make a will. The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee,
620 and insisted that he was entitled to begin, which was conceded. A will was then produced; and, after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, the defendant's counsel called witnesses to prove the testator's competency. Evidence was then given on the part of the plaintiff, to impeach the competency of the testator; and it was sought to be shown that he had been incompetent *a nativitate,* and also that, if ever capable of making a will, he had from habitual and incessant drunkenness rendered himself incapable. The learned Baron, in leaving the case to the jury, told them that the heir-at-law was entitled to recover unless a will was proved; but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. The jury returned a verdict for the defendant. *Grove,* Q. C., obtained a rule *nisi* for a new trial, on the grounds of misdirection.

Cresswell, J.: "This was an ejectment tried before Bramwell, B., at the last Chester Assizes. The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted upon the right to begin, which was granted. His counsel then produced a will, and, after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, called witnesses to prove the competency of the testator. The plaintiff then gave evidence to impeach his competency, and endeavored to show that he had been incompetent *a nativitate.* The learned judge in summing up, told the jury that the heir-at-law was entitled to recover unless a will was proved; but that, when a will was produced, and the execution of it proved, 'the law presumed sanity, and therefore the burthen of proof was shifted;' and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt,

they ought to find for the defendant. A verdict having been found for the defendant, a rule *nisi* for a new trial was granted in Easter Term, it being alleged that the learned judge misdirected the jury.

"Some very valuable observations on this subject are to be found in the judgment of Lord BROUGHAM in Waring v. Waring, 6 Moore's P. C. 355: 'The burthen of proof,' says his Lordship, 'often shifts about in the progress of the cause, accordingly as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on the one or the other party the necessity of protecting himself from the consequences of such inferences. Nor can anything be less profitable as a guide to our ultimate judgment, than the assertion, which all parties are so ready to put forward severally, that, in the question under consideration, the proof is on the other side. Thus, no doubt, he who propounds a latter will undertakes to satisfy the court of probate that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the *factum* is regular, will suffice: and they who impeach the instrument must produce their proofs, should the party actor (the party propounding) choose to rest satisfied with his *prima facie* case after an issue tendered against him. In this case, the proof has shifted to the impugner; but his case may easily shift it back again.' The result must be the same where the party propounding does not rely on a *prima facie* case, but gives the whole of his proofs in the first instance. The onus remains on him throughout: and the court or jury who have to decide the question in dispute must decide upon the whole of the evidence so given: and if it does not satisfy them that the will is valid, they ought to pronounce against it. If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will: and, if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will: and in each case the presumption in favor of competency would prevail. But that is not a mere presumption of law: and, when the whole matter is before the jury on evidence given on both sides, they ought not to affirm that a document is the will of a competent testator, unless they believe that it really is so. The result is, that the rule for a new trial must be made absolute."[1]

1—Compare the following expositions: *Thomas*, J., in *Crowninshield* v. *Crowninshield*, 2 Gray 524 (1854); "On the whole matter, we are of opinion, that where a will is offered for probate, the burden of proof, in this Commonwealth, is on the executor or other person seeking such probate, to show that the testator was, at the time of its exception, of sound mind; that if the general presumption of sanity, applicable to other contracts, is to be applied to wills, it does not change the burden of proof; that the burden of proof does not shift in the progress of the trial, the issue throughout being one and the same; and that if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the

DAVIS v. UNITED STATES (1895).

160 U. S. 469, 16 Sup. 353.

HARLAN, J.: "Dennis Davis was indicted for the crime of having, on the 18th day of September, 1894, at the Creek Nation, in the Indian Territory, within the Western District of Arkansas, feloniously, wilfully, and of his malice aforethought, killed and murdered one Sol Blackwell. He was found guilty of the charge in the indictment. A motion for a new trial having been overruled, and the court having adjudged that the accused was guilty of the crime of murder, as charged, he was sentenced to suffer the penalty of death by hanging. At the trial below the government introduced evidence which, if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged. But there was evidence tending to show that at the time of the killing the accused, by reason of unsoundness or weakness of mind, was not criminally responsible for his acts. . . . The issue, therefore, was as to the responsibility of the accused for the killing alleged and clearly proved. In its elaborate charge the Court instructed the jury as to the rules by which they were to be guided in determining whether the accused took the life of the deceased feloniously, wilfully, and with malice aforethought. . . . These extracts from the charge of the Court present this important question: If it appears that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, can the jury properly return a verdict of guilty of the offence charged if upon the whole evidence from whatever side it comes they have a reasonable doubt whether at the time of killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of the act he was committing? If this question be answered in the negative the judgment must be reversed; for the Court below instructed the jury that the defence of insanity could not avail the accused unless it appeared affirmatively, to the reasonable satisfaction of the jury, that he was not criminally responsible for his acts. The fact of killing being clearly proved, the legal presumption, based upon the common experience of mankind, that every man is sane, was sufficient, the court in effect said, to authorize a verdict of guilty, although the jury might entertain a reasonable doubt upon the evidence, whether the accused, by reason of his mental condition, was criminally responsible for the killing in question. In other words, if the evidence was *in equilibrio* as to the accused being sane, that is,

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statute a person capable of making the will, and the will cannot be proved."

Whitfield, J., in *Sheehan*, v. *Kearney*, — Miss. —, 21 So. 46 (1896): "Now, when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity, and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof, properly understood."

Compare the authorities cited in W., § 2500.

capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there were an entire absence of proof that he was insane.

"This exposition of criminal law is not without support by adjudications in England and in this country. . . . There are other cases to the same general effect, some of them holding that the presumption of sanity will prevail, and that the jury may properly convict, unless the defence of insanity is established beyond a reasonable doubt; others, that it is the duty of the jury to convict, unless it appears by a preponderance of evidence that the accused was insane when the killing occurred.

"We are unable to assent to the doctrine that in a prosecution for murder, the defence being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. . . . 'As a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.' 4 Bl. Com. 21. All this is implied in the accepted definition of murder. . . . Upon whom then must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is not unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defence by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

"This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most

cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. . . . But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged."[2]

SCHMISSEUR v. BEATRIE (1893).

147 Ill. 210, 35 N. E. 525.

MAGRUDER, J.: "This is a bill filed on July 16, 1892, in the Circuit Court of St. Clair County by Elizabeth Schmisseur and Mary Wuest and their husbands against August Beatrie and Elizabeth Beatrie for the partition of certain lands. The defendants, who are minors, answered by their guardian *ad litem*. Upon hearing had, the decree of the court below was in favor of the defendants upon the material issues involved, and this appeal is prosecuted from said decree by the complainants. Mary Beatrie, the wife of Nicholas Beatrie, died testate on September 27, 1890, owning certain lands in said county, and provided in her will, after giving her husband the sole and exclusive use and control of her property real and personal during his life, that after his death all her property, both real and personal, should descend to her 'lawful heirs according to the laws of descent.' On March 25, 1892, Nicholas Beatrie, her husband, died testate as to the major portion of his estate, but intestate as to some of his real estate. Said Nicholas and Mary left two daughters, the appellants Elizabeth Schmisseur and Mary Wuest. They had had a son, Nicholas Beatrie Jr. who died before either of them, to wit: in the year, 1880, leaving two children, the appellees August Beatrie and Elizabeth Beatrie. The question in the case is, whether or not the appellees are the legitimate children of Nicholas Beatrie Jr. deceased. If they are his legitimate children, then the decree correctly finds that, as the grand-children of Mrs. Mary Beatrie, deceased, they are each entitled to an undivided one sixth part of the real estate of which she died seized, and that, as the grand-children of Nicholas Beatrie Sr., they are each entitled to an undivided one sixth part of the real estate owned by him at his death and as to which he died intestate.

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"The case turns upon the validity or invalidity of the marriage of Nicholas Beatrie Jr., the father of appellees, with Margaret Hube, their mother. It is conclusively proven, that said Nicholas Beatrie Jr.

2—Compare the authorities cited in W., § 2501.

and Margaret Hube of St. Clair County were married by a justice of the peace of said county on November 14, 1876, under a marriage license duly issued on that day by the county clerk of that county. It is claimed, however, by the appellants, that at this time Nicholas Beatrie Jr. had a wife by a former marriage, who was then still living and undivorced. A second marriage is void where either of the parties to it has a husband or wife by a former marriage, who has never been divorced and is still living. It is proven that, on November 12, 1872, said Nicholas Beatrie Jr. was married to Barbara Anstedt of said county by a Catholic priest in said county in pursuance of a marriage license duly issued by the county clerk of said county on November 8, 1872. He and Barbara had one child which died in infancy. They lived together as man and wife for about one year and a half, or two years, in said county, and then separated and never lived together again. She was living at the time of the marriage with Margaret Hube and did not die until 1885, five years after the death of Nicholas Beatrie Jr. One witness swears, that she married one John Meyer after she separated from said Nicholas, and before the latter's second marriage in November, 1876.

"When a marriage license has been solemnized according to the forms of law every presumption will be indulged in favor of its validity. The presumption is one in favor of innocence, as it will be presumed that a man will not commit the crime of bigamy by marrying a second time while his first wife is living. Absence for seven years without being heard from creates the presumption of death. But the presumption in favor of the validity of marriage is so strong, that a former husband or wife will be presumed to be dead after an absence of less than seven years. The ordinary presumption in favor of the continuance of human life is made to give way to the presumption in favor of the innocence of a second marriage. In the present case, however, no presumption as to the death of Barbara Beatrie can be indulged in favor of the validity of the marriage with Margaret Hube, because the proof shows affirmatively that said Barbara was alive when said marriage took place, and for nine years thereafter.

"It is claimed, however, in behalf of the appellees, that Nicholas Beatrie Jr. will be presumed to have been divorced from his first wife before he married the second time. We have said that the courts 'will often presume a previous divorce in order to sustain the second marriage.' (Cartwright v. McGown, 121 Ill. 388.) . . . The two marriages of Nicholas Beatrie Jr., and the existence of the first wife at the time of the second marriage, being established by proof, the presumption would arise in favor of a divorce from the first wife in order to sustain the second marriage. In view of this presumption the burden of proof rested upon the appellants, as the objecting parties, to show that there had been no divorce. The law is so positive in requiring a party, who assert the illegality of a marriage, to take the burden of proving it,

that such a requirement is enforced even though it involves the proving of a negative.

"In order to show that there had been no divorce, the complainants below introduced the bill and other proceedings in a divorce suit begun by Nicholas Beatrie Jr. against Barbara Beatrie. The bill in that suit was filed on November 14, 1876, in the Circuit Court of St. Clair County. It alleged that said Nicholas was married to said Barbara on November 12, 1872; that he lived with her until October, 1873; that on October 1, 1873, she wilfully deserted and absented herself from him without any reasonable cause and continued such desertion for more than two years; that she had committed adultery with one Meyer, and was living with him as his wife, etc. Summons was served on said Barbara on December 11, 1876. No decree of divorce was ever entered in said cause. The record shows that, at the January term, 1877, the cause was continued, and at the April term, 1877, the court ordered that it 'be dismissed at complainant's costs and execution is awarded therefor.' It will be noted, that the bill for divorce was filed on the same day on which the second marriage took place. It contains an admission by Nicholas Beatrie Jr., that, on that day, he was still the lawful husband of his first wife, and had not been divorced from her. . . . In Cartwright v. McGown, *supra,* it appeared that the first marriage took place in Kentucky in 1841, and the second in Illinois in 1843 while the first wife was living and undivorced; and it was held that, as the divorce obtained by the first wife was not granted until 1846, the facts did not justify the Court in presuming that the husband had procured a divorce from his first wife.

"It is said, however, that although Nicholas Beatrie Jr. may not have obtained a divorce from his first wife Barbara, yet the law will indulge the presumption that she obtained a divorce from him before November 14, 1876, in order to sustain the validity of the second marriage entered into on that day. . . . But, in the case at bar, the complainants below not only introduced in evidence the bill of divorce above mentioned and the proceedings showing its dismissal without a decree, but they also proved that Nicholas Beatrie Jr. and his first wife had lived in St. Clair County and been residents thereof during all their lives, and that, from an examination of the records of the Circuit Court of that county from March, 1872, to September, 1881, no entries appeared in any suit of Nicholas Beatrie Jr. against Barbara Beatrie, or of Barbara Beatrie against Nicholas Beatrie Jr., except those already specified. . . . The evidence introduced to show that there had been no divorce was sufficient to so far overcome the presumption in favor of a divorce obtained by the first wife, as to shift back upon the defendants the burden of showing, that there had been a divorce. . . . Besides proof of the first marriage, and of the existence of the first wife at the time of the second marriage, and of the admission of the husband that he had not been divorced from his first wife when he married the second one, it was shown, that no divorce

had been obtained by either the husband, or his first wife, in the Circuit Court of the county where both of them had always resided, and where divorce proceedings, if there had been any, would be most naturally looked for. This testimony threw the burden on the defendants below to go farther, and prove that a divorce had been obtained if such was the fact. A decree of divorce is a matter of record, and, if such a record is in existence, it can be produced.

"For the reasons here stated, we think, that the case ought to be reversed and sent back, in order that the appellees may have the opportunity of proving that there was a divorce between Nicholas Beatrie Jr. and his first wife, if such proof can be furnished."[3]

GULF, COLORADO & SANTA FE R. CO. v. SHIEDER (1895).

88 Tex. 152, 30 S. W. 902.

DENMAN, J.: "This suit was brought by T. D. Shieder against the Gulf, Colorado & Santa Fe Railway Company to recover damages for injuries inflicted upon the plaintiff's wife in a collision between
623 one of the trains of defendant and the buggy in which Mrs. Shieder was riding at the intersection of a public street with the railroad in the town of Ballinger on the 17th day of April, 1892. . . . The Court below charged the jury that the burden of proof was upon defendant railroad to establish contributory negligence on the part of Mrs. Shieder. This charge is assigned as error. There is much conflict of authority upon the question as whether the burden of proof, upon the issue of contributory negligence, rests upon plaintiff or defendant. The confusion resulting is intensified by the fact that few, if any, jurisdictions can be found in which the decisions of the courts of last resort can be entirely reconciled upon this important question. A careful examination of the cases leads us to the conclusion that much of the apparent conflict in the decisions of any particular State is due to the fact that the Courts, in deciding individual causes, have sometimes relied upon the authority of decisions of Courts holding a different view of the law as to burden of proof; such differences not appearing on the face of the opinions, but lurking in the principle upon which they are based. The two classes of decisions, and the reasons by which they are respectively supported, are essentially antagonistic. They start from different premises, and logically arrive at different results, and therefor the citation of one to support the other generally leads to confusion. Mr. Beach, who undertakes to defend the rule imposing the burden on the plaintiff, asserts that it is supported by 'the decided weight of authority,' and declares it to be the doctrine in Massachusetts, Maine, Mississippi, Louisiana, North Carolina, Michi-

3—Compare the authorities cited in W., § 2506.

gan, Oregon, Illinois, Connecticut, Iowa, Indiana, and probably New York, but candidly admits that the contrary is the settled rule in England, the supreme court of the United States, Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont, and Colorado, and is the opinion of the text writers. . . .

"The rule seems to be well settled that it is not necessary for the plaintiff in his petition to negative, either by facts stated or by express averment, the existence of contributory negligence on his part. . . . We have been able to find no case where such pleading has been required, except in a few of those states where the burden of proof is upon plaintiff to show that he was not guilty of contributory negligence. Since these States have changed the well-established and logical rule of evidence at common law, consistency would seem to require a corresponding change in the rule of pleading; but it seems that only a few of them have so ruled. . . . We are of the opinion that the great weight of authority, as well as the reason of the law, is in favor of the rule which imposes the burden of proof upon defendant to establish plaintiff's contributory negligence, and it may be considered the settled law in this State. . . . It is not necessary for us to determine here in what class of cases a special plea of contributory negligence is required, but it seems generally to be admissible in many jurisdictions under the general denial, even where the burden of proof is on defendant.

"To the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence there appear to be, in the very nature of things, two well-defined exceptions: *First,* Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a *prima facie* defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the Court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's cars while on the track under circumstances which in law would make him a trespasser *prima facie,* then the law would raise a presumption of contributory negligence against him, for which his petition would be bad on demurrer; and it would be necessary for him to plead some fact or circumstance rebutting such presumption,—such as that he was, after going upon the track, stricken down by some providential cause,—in order to save his petition, and on the trial the burden would be upon him to establish

such cause. *Second*, When the undisputed evidence adduced on the trial establishes *prima facie* as a matter of law contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case may find him free from negligence; otherwise the Court may instruct a verdict for defendant, there being no issue of fact for the jury."[4]

SCOTT v. LONDON & ST. KATHARINE DOCKS CO. (1865).

3 H. & C. 596.

The declaration stated that the defendants were possessed of a warehouse and of a certain crane or machine for lowering goods therefrom, and at the time of the grievances committed by them as
624 hereinafter mentioned, they, by their servants in that behalf, were lowering by the said crane or machine from the said warehouse certain bags of sugar on to the ground and stone pavement in the docks of the said Company, and on and along which the plaintiff was then lawfully passing; and the defendants, by their servants, so negligently, carelessly and improperly lowered the said bags of sugar and conducted themselves in that behalf, that the same came and fell upon and against the plaintiff: Whereby the plaintiff was greatly wounded, bruised, hurt and permanently injured, &c. Plea, not guilty, and issue thereon. At the trial before MARTIN, B., at the London Sittings after Trinity Term, 1864, the plaintiff deposed as follows: "I am an officer of the Customs. I am an auxiliary examiner. I superintend weighing goods. On the 19th of January I had performed duty at the East Quay of the London Docks. I was directed to go from the East Quay to the Spirit Quay by Mr. Lilly, the surveyor. I went to the Spirit Quay in order to do duty. I proceeded on my way. . . . In passing from one doorway to the other I was felled to the ground by six bags of sugar falling upon me. (He then described the injuries he received.) No one but myself was at the place. I had no warning. There was no fence or barrier. No one called out. I heard the rattling of a chain." At the conclusion of the plaintiff's examination in chief the learned Judge expressed his opinion that, even assuming that the bags of sugar were being dealt with by the servants of the defendants in the course of their employment, and that the plaintiff was lawfully passing through the Docks, there was not sufficient evidence of negligence on the part of the defendants to entitle him to leave the case to the jury; and his londship then directed the jury to find a verdict for the defendants.

Field (*Murphy* with him) argued for the defendants: "There was

4—Compare the authorities cited in W., § 2507.

no evidence of negligence which ought to have been submitted to the jury. . . . A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, will not justify a Judge in leaving the case to the jury: Toomey v. The London, Brighton and South Coast Railway Company, 3 C. B. N. S. 146, 150. That doctrine was acted upon in Hammack v. White, 11 C. B. N. S. 588. There Erle, J., in the course of the argument said: 'I do not assent to the doctrine that mere proof of the accident throws upon the defendants the burthen of showing the real cause of the injury. All the cases where the happenings of an accident has been held to be *prima facie* evidence of negligence have been cases of contract.' [BLACKBURN, J.: 'The question depends on the nature and character of the accident. If a ship goes down in the sea that is equally as consistent with care as with negligence; but if a ship goes down in a dock, is not the fact of the accident *prima facie* evidence of negligence.'] There was no evidence of want of reasonable care. The fact of lowering the bags is quite as consistent with care as with the absence of it." . . . [BLACKBURN, J.: "There is an old pleading rule, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. Applying that here, is not the fact of the accident sufficient evidence to call upon the defendants to prove that there was no negligence?"]

The Solicitor-General (*T Jones* with him), for the plaintiff: "It is conceded that where the evidence is as equally consistent with due care as with negligence, there is no case for the jury. It is also conceded that it is not enough to show a mere scintilla of evidence. No rule can be laid down that the mere fact of an accident is evidence of negligence; for each case must depend on its own circumstances. . . . The true test is, whether the case is more consistent with negligence than care. Looking at the simple fact that the bags of sugar fell violently upon the plaintiff, this case is more consistent with negligence than care."

ERLE, C. J.: "The majority of the Court have come to the following conclusions: There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. We all assent to the principles laid down in the cases cited for the defendants; but the judgment turns on the construction to be put on the Judge's notes. As my brother Mellor and myself read them we cannot find that reasonable evidence of negligence which has been apparent to the rest of the Court."[5]

5—Compare the authorities cited in W., § 2508.

STATE v. BRADY (1902).
— *Ia.* —, *91 N. W. 801.*

WEAVER, J.: "The evidence for the state tended to show that on the night of September 29, 1900, the barn of one Stuart, situated several miles east of the city of Des Moines, was unlawfully broken and
625 entered, and certain harness stolen therefrom; that on said night defendant was seen upon the public highway in that neighborhood; that about ten days thereafter the stolen property, or some of it, was found in his possession; and that he made some statements or admissions serving to strengthen the suspicion of his guilt. The defendant denied his guilt, and offered considerable evidence tending to prove an alibi, and explained his possession of the harness by the statement that he bought it of a person who brought it to his residence in Des Moines on the morning after the alleged crime, which statement was also corroborated by several witnesses. Among the instructions given by the Court to the jury are the following: . . . '(8) So, too, the possession of property that has been recently stolen from a building by means of breaking and entering said building is sufficient to raise a presumption of guilt of the person in whose possession said property is found; that is, it creates the presumption that he is the party that broke and entered said building, and took therefrom the said property, unless the attending circumstances or evidence explains said possession, and shows that the same may have been otherwise honestly acquired. . . .'

"As to the effect to be given in prosecutions for burglary to proof of possession of goods stolen in connection with the breaking and entering, the authorities are not entirely in harmony. There are decisions which hold without qualification that the fact of possession of property recently stolen, under such circumstances has no tendency to prove the possessor's guilt of the burglary. And, on the other hand, there seem to be cases which hold that such fact alone creates a sufficient presumption of guilt to justify conviction of the accused. The rule, however, which is recognized by the great weight of authority, and most commends itself to our sense of reason and justice, adopts neither of the extremes mentioned, and may be stated as follows: There is no presumption of guilt of burglary attaching to the mere possession of the stolen goods by the accused, but such fact, if the alleged crime be of recent occurrence, has a tendency to prove his guilt, and, if there be other proved circumstances tending to connect him with the commission of the offense, the fact of possession, thus aided, will sustain a conviction. . . . Under the rule thus established, the instruction in the present case that the possession of the goods by the appellant 'creates the presumption that he is the party who broke and entered the building' was error.

"The use of the terms 'presumption of guilt' and *'prima facie* evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned, but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. In a civil proceeding, when a plaintiff makes a *prima facie* case, the burden is shifted, and, in the absence of any countershowing, he is entitled to recover as a matter of law. This rule is understood by the average intelligent layman as well as by those learned in the law; and when, in a criminal case, an instruction is given that the showing of a specific fact is *prima facie* evidence of guilt, jurors may very naturally conclude that the establishment of such fact has the effect to cast upon defendant the burden of proving his innocence of the charge against him. . . . 'Presumptions' of guilt and *'prima facie'* cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with which he is charged."[6]

DAVIE v. BRIGGS (1878).

97 U. S. 628, 633.

HARLAN, J.: "The appellants, as the heirs-at-law of Allen Jones Davie, deceased, assert an interest in the proceeds of a sale which took place in June, 1853, of a tract of land in Guilford County, North
626 Carolina, known many years ago as the McCulloch gold-mine. Whether the defence, so far as it rests upon the Statute of Limitations of North Carolina, can be sustained, [against a suit begun in July, 1874,] depends upon the evidence as to the time when Allen Jones Davie died. The learned counsel for appellants insist that, consistently with the legal presumption of death after the expiration of seven years, without

6—Compare the following phrasings: *R.* v. *Cockin*, 2 Lew Cr. C. 235 (1836): Sacks stolen in February were found in the defendant's possession some twenty days after; *Coleridge*, J.: "If I was now to lose my watch, and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it. But if a month hence it were to be found in your possession, the presumption of your having stolen it would be greatly weakened; because stolen property usually passes through many hands."

R. v. *Langmead*, Leigh & C. 427 (1864): *Blackburn*, J.: "I should have said that recent possession was evidence either of stealing or receiving according to circumstances. . . . When it has been shown that property has been stolen and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances."

Compare the authorities cited in W. § 2513; and the doctrine of No. 32, *ante*.

Allen Jones Davie being heard from by his family and neighbors, the date of such death should not be fixed earlier than the year 1858. In that view,—excluding from the computation of time the war and reconstruction period between Sept. 1, 1861, and Jan. 1, 1870, as required by the statutes of North Carolina (Johnson v. Winslow, 63 N. C. 552), —the suit, it is contended, would not be barred by limitation.

"The general rule undoubtedly is, that 'a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.' Stephen, Law of Evid., c. 14, art. 99; 1 Greenl. Evid., sect. 41; 1 Taylor, Evid., sect. 157, and authorities cited by each author. But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death in fact occurred within the seven years. If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the Court or jury may infer that life ceased before the expiration of the seven years. Mr. Taylor, in the first volume of his Treatise on the Law of Evidence (sect. 157), says, that 'although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life.' These views are in harmony with the settled law of the English courts. . . .

"We therefore follow the established law when we inquire whether, according to the evidence, Allen Jones Davie died at an earlier date than at the end or expiration of the seven years when the legal presumption of his death arose. It seems to us that, upon the showing made by the complainants themselves, the conclusion is inevitable that he died some time during the year 1851. . . . In view of this evidence, we cannot accept as absolutely controlling the legal presumption which, in regard to Allen J. Davie's death, arose at the expiration of seven years from the time when he was last heard from. We cannot determine the rights of the parties upon the hypothesis that his death occurred in the year 1858, when the appellants themselves and their chief witnesses not only unite in declaring their belief that he died in 1851, but state facts which fully justify that belief. Concluding then, as we must, that he died in the year 1851, it seems clear that the claim set up in the bill to an interest in the proceeds of the sale of June, 1853, is barred by the limitation of three years prescribed by the North Carolina statute."

BOOK III.

TO WHOM EVIDENCE MUST BE PRESENTED.
(LAW AND FACT; JUDGE AND JURY).

BARTLETT v SMITH (1843).
11 M. & W. 483.

Assumpsit by the endorsee against the drawer of a bill of exchange. The declaration stated, that the defendants, on, &c., made their certain bill of exchange in writing, and directed the same to Mr. John
627 E. Butcher, Dublin, and thereby required the said J. E. Butcher to pay to the order of the defendants, in London, the sum of £17. It then alleged the endorsement of the bill to the plaintiffs. The defendant, by his pleas, denied the drawing and endorsement. At the trial before the Undersheriff of Middlesex, the bill, when produced, appeared to be drawn in Dublin, payable in London, and was stamped as a foreign bill. On the plaintiff's counsel proposing to read it in evidence, the defendant's counsel objected, on the ground that, although the bill purported to be drawn in Dublin, it was in fact drawn in London, and being therefore an inland bill, required a higher stamp; and proposed to give evidence of that fact. The Undersheriff however said, that as the bill was not objectionable on the face of it, he should allow the case to proceed; on which the defendant's counsel addressed the jury, and afterwards adduced evidence to show that at the time the bill bore date, the drawer was in London: whereupon the Undersheriff left it to the jury to say whether the bill was drawn in London or Dublin, but reserved leave to the defendants to move to enter a nonsuit if this Court should think he ought to have received the evidence in the first instance, and to have decided upon it. . . .

Lord ABINGER, C. B.: "I am of opinion that this rule must be made absolute for a new trial, but no to enter a nonsuit. All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence, and decide upon it without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the judge, and adjudicated on by him alone. So, in the present case, evidence offered to impeach the admissibility of the bill, on the ground that it was improperly stamped, should have been received by the judge, and determined by him before the bill was allowed to be read to the jury. When the objection was made that the bill bore a wrong stamp, the Undersheriff ought to have received the evidence to impeach it, before he allowed the bill to be read; and it

was for him to say whether the evidence adduced for the purpose was such as to satisfy him or not. The evidence tendered was for the purpose of showing that the bill ought not to be read at all; and if the Undersheriff rejected it in the first instance, he ought not to have received it afterwards and submitted it to the jury. There ought, therefore, to be a new trial."

PARKE, B.: "I am of the same opinion. All preliminary matters of this kind are to be determined by the judge, not by the jury. I well recollect the case of Major Campbell, who was indicted for murder in Ireland; and on a dying declaration being tendered in evidence, the judge left it to the jury to say whether the deceased knew, when he made it, that he was at the point of death. The question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who returned for answer that the course taken was not the right one, and that the judge ought to have decided the question himself."[1]

COMMONWEALTH v. ROBINSON (1888).

146 Mass. 571, 16 N. E. 452.

The facts of this case have been already stated in No. 48.

C. ALLEN, J.: " . . . In seeking a new trial on account of the admission of this testimony, the argument of the prisoner's counsel, briefly stated, is as follows: Preliminary evidence must be given to show that the acts offered to be proved were done in pursuance and as a part of some plan or scheme to accomplish the particular result; it is the exclusive province of the Court to determine if such evidence is sufficient; the decision of the Court, admitting the evidence, is subject to revision in the present case, the testimony upon which that decision was founded having been reported for the purpose; it is not enough that there was some evidence, but the preliminary evidence must amount to proof; the ruling of the Court did not expressly affirm the necessity of such proof, that is, as we understand the argument, the necessity of such amount or degree of proof; and finally. this Court, upon a revision of the preliminary evidence reported, should now hold that it was not sufficient to warrant the introduction of evidence to show that the prisoner poisoned her sister, Mrs. Freeman. The last three of these propositions are the only ones which need any further attention.

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"A consideration of the nature of the question which is presented

1—Compare the following phrasing: *Bartlett* v. *Hoyt*, 33 N. H. 151, 165 (1856): "Whether a witness is interested upon this or that given state of facts is a question of law for the Court; whether the facts exist as claimed by one party or the other is a question of fact, which, when presented in the form of the preliminary inquiry as to the competency of witness, may be determined by the Court, or, in the exercise of their discretion, by the jury."

Compare the authorities cited in W., § 2550.

to the Court, when it is called upon to decide upon a preliminary question of fact, in order to determine whether offered evidence shall be received, will show that its determination reaches no further than merely to decide whether the evidence may or may not go to the jury. The decision upon this particular question of the admissibility of the evidence is ordinarily conclusive, unless the judge sees fit to reserve or report the question for future revision. But where, in a case like the present, the admissibility of testimony depends upon the determination of some prior fact by the Court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt.

"Ordinarily, questions of fact are exclusively for the jury, and questions of law for the Court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the Court in the due and orderly course of the trial must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. . . . In all such cases, the Court, in deciding to admit the offered testimony, does no more than to hold that enough has been shown to make it proper to submit the testimony to the jury, leaving its weight and credit for their determination. The decision of the judge does not relieve the party offering the testimony from the necessity of establishing every material fact to the satisfaction of the jury. In this view of the law, it was not necessary that the Court should find that the preliminary evidence amounted to full proof, beyond a reasonable doubt, that the prisoner poisoned her sister in pursuance of a general plan or scheme, in which the poisoning of Mr. Freeman was a later step."

BRIDGES v. NORTH LONDON R. CO. (1874).

L. R. 7 H. L. 213.

Action for damages for negligence in causing the death of the plaintiff's husband. Plea, not guilty. The cause was heard before Mr. Justice BLACKBURN at the Middlesex Sittings after Michael-
629 mas Term, 1869. Mr. Bridges, who resided at Highbury, had been a season ticket-holder on this railway for some time, going daily between that place and Broad Street, the City terminus of the rail-

way. He was fifty-two years of age, and very near sighted. On the 20th of January, 1869, he left Broad Street at 6:40 P. M. He was in the last passenger carriage of the train, the very last carriage being the guard's compartment. The train arrived at Highbury at a few minutes before 7 o'clock. The tunnel was filled with steam, the night being damp. The station at Highbury appeared, from the statement in the case prepared for the Exchequer Chamber, to be thus formed: Approaching the station from London there is a tunnel about 150 feet in length; there is a slope, on which was lying a heap of hard rubbish, and then a platform, which is, in fact, a continuation of the station platform, but is narrower, and is within the tunnel. After getting through the tunnel there is the proper station platform. The station is lighted. There is a lamp at the station end of the tunnel, but none within the tunnel itself. On this occasion the train only partially came up to the station platform, the last two carriages being within the tunnel. The last but one stopped opposite the narrow end of the platform; the last, in which Mr. Bridges was riding, was opposite the heap of hard rubbish. A passenger (afterwards called as a witness at the trial), who was in the last carriage but one, heard the name of the station called out in the usual way and got out; he alighted on the narrow platform; "after he got out he heard the warning, 'Keep your seats,' after which the train moved on to the station. The witness hearing a groan, proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body. He was lying about ten feet from the end of the slope, and farther within the tunnel." His leg was broken, and he had received mortal internal injuries from the fall.

Mr. Justice BLACKBURN was of opinion that there was no evidence of negligence on the part of the defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the plaintiff, the jury assessing the damages at £1200. The nonsuit was then entered, but leave was reserved to move to enter the verdict for the plaintiff for the damages thus contingently assessed. A rule was accordingly moved for, and, after argument in the Court of Queen's Bench, was refused. On appeal to the Exchequer Chamber the facts were stated in a case, power being reserved to the judges to draw inferences of fact. The case was heard, and the judgment of the Court below was affirmed by four judges to three. This appeal was then brought. The judges were summoned, and Lord Chief Baron KELLY, Mr. Baron MARTIN, Mr. Justice KEATING, Mr. Justice BRETT, Mr Justice DENMAN, and Mr. Baron POLLOCK attended.

Lord CAIRNS, who presided in the absence of the Lord Chancellor, proposed that the following question should be put to the judges: Whether in the facts stated in the special case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negli-

gence on the part of the respondents which ought to have been left to the jury? The Lord Chief Baron requested time for the judges to answer the question.

Mr. Baron POLLOCK: "My answer to your Lordships' question is in the affirmative. [After having stated the facts of the case,] . . . The general rule which prescribes the duty of the judge presiding at Nisi Prius, when the question is raised whether, at the close of the plaintiff's case, there is evidence which ought to be left to a jury, is laid down in the judgment of the Court of Exchequer Chamber in Ryder v. Wombwell, Law Rep. 4 Ex. 32, 38, where the question being whether articles supplied by the plaintiff to the defendant, who was an infant, were 'necessaries,' the Court said: 'The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant.' This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration.

"I commence, therefore, by considering what was the duty of the defendants towards their passengers upon the occasion in question, the non-observance of which would constitute negligence. . . . [Here the learned judge examined the facts and the possible inferences in detail, and continued:]

"The plaintiff no doubt is bound to make out her case, and cannot by a bare suggestion challenge its rebuttal, and if what I have stated was all mere speculation, it ought not to have gone to the jury. But if it was an inference which could be fairly drawn from the facts proved in the same manner as things unseen or unproved—which in the eye of the law are the same—are constantly inferred and found as facts by a jury, then the evidence should have been submitted to the jury, together with any which the defendants chose to adduce, and which might have exculpated or further inculpated them according

as their witnesses knew more of the occurrence, and confirmed or displaced the evidence for the plaintiff."[1]

STATE v. MOSES (1830).

2 Dev. 452, 458.

Indictment for murder by shooting. The counsel for the prisoner placed his defence upon the total want of credibility in the witnesses for the prosecution. It was argued, first, that the testimony of the
630 principal witness was not credible from its absurdity, for how could a man in a dark night, at the distance of ten steps, see another pull the trigger of a gun. . . . His honor, in his charge to the jury, informed then that the credit they would give to the testimony was a matter exclusively with them, and proceeded to suggest such circumstances as, in his opinion, might be considered by them as tending to shake or support the credit of the witness for the State, and leaving it also to them to give such weight to any other circumstances, which they might remember and the Judge should omit, as they thought proper. In speaking of the first objection, the Judge said, that a man might see by the flash of a gun, even in the night and probably the darker the night the more distinctly; and if they believed from the testimony, that was the case in the present instance, and that seeing a man in the attitude of shooting, with his hand upon the trigger, and even by the flash of the gun, was substantially seeing him pull the trigger; and that if this was the fact in the particular case, then the contradiction relied upon in the testimony of the witness did not exist. . . . The jury returned a verdict of guilty, upon which, the counsel for the prisoner obtained a rule for a new trial, for misdirection. . . .

RUFFIN, J.: "The Act of 1796, (Rev. c. 452,) 'to direct the conduct of Judges in charges to the petit jury,' restrains the judge from giving an opinion whether a fact is fully or sufficiently proved. At the same time, it imposes another duty; which is, to state, in a full and explicit manner, the facts given in evidence, and declare and explain the law arising thereon. . . . An unfair and partial exhibition of the testimony can alone be complained of; and the apprehension of that seems to have induced the passage of the law under consideration. It is not for us to say, whether that apprehension was well or ill founded; or whether the administration of the law would not be more certain, its tribunals more revered, and the suitors better satisfied, if the Judge were required to submit his view upon the whole case, and after the able and ingenious, but interested and partial arguments of Counsel, to follow with his own calm, discreet, sensible and impartial summary of the case, including both law and fact. Such elucidations from

1—Compare the doctrine of No. 2, *ante;* and the authorities cited in W., § 2552.

an upright, learned and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so but really reconcilable, would be of infinite utility to a conscientious jury in arriving at just conclusions—not by force of the Judge's opinion, but of the reasons on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the Judge, it is not to be questioned, that success would, oftener than it does, depend on the justice of the case, rather than the ability or adroitness of the advocate.

"But such is certainly neither the duty nor within the competency of our Judges. I have already mentioned that it would be difficult for a Judge, surrounded by all the circumstances, to determine exactly what is his duty in this respect, in law and his own conscience. With still less certainty can a revising court lay down any rules *a priori,* or even apply them, after they are prescribed to cases as they arise. So much of the meaning of words depends upon their context, and of words spoken, upon the tone, emphasis, temper, and manner of the speaker, that it is utterly impossible that the whole can be transferred to paper, so as to enable an appellate tribunal to pass in general upon cases, without imminent hazard of doing injustice to the parties, and casting unmerited reproach upon the intentions of the Judge, and the understanding of the jury. If I were to lay down a rule as growing out of this Act of Assembly, I would say, that it was in general this: That the weight of the evidence is for the jury; they hold the scales for that. But the nature, relevancy and tendency of the evidence, it is competent for the Judge and his duty to explain. He is not only to recapitulate the testimony, but to show what it tends to prove, and he may recapitulate it in such order and connexion, as to give it the effect of proving the fact sought for, if in itself it be sufficient for that purpose. Whether it be sufficient, it is the province of the jury to determine, and by this statute it is their exclusive province; and the Judge cannot give his opinion in aid of theirs, that it is, or is not sufficient. . . .

"To apply these observations to the case before us: It is objected here, that the Court below assumed the power of expressing an opinion upon the facts, or expressed such forced inferences from the testimony, as might bias the minds of the jury. The facts to which those parts of the charge apply, where the credit due to several witnesses. The main fact in dispute, on which the issue was joined, was the guilt or innocence of the prisoner. This depended upon the subordinate facts of the veracity or falsehood of the tales of the witnesses. Now this last fact—of credibility, or the want of it—rested again upon other facts which tended to sap or sustain it. . . . In charging the jury, the judge is not obliged to confine himself to delivering the abstract rule, that a witness does impair his credit by refusing to give full evidence; but may, and ought also to call the attention of the jury to the specific misbehavior before their own eyes, a fact in evidence to him and them.

Again, if the credit of one witness is assailed upon the ground that he is contradicted by two others, is the Court barely to inform the jury, that if such contradiction exist, it may impair the credit of the first witness, but that they have the right in law to reconcile the testimony, and then act on it? Or may he not mention to them the circumstances, and show how they are contradictory, or how reconcilable, leaving it to the jury, to say, whether in truth, the two tales do, or do not stand together, according to the parts of the transaction to which they relate, or to the meaning of the witnesses? Such a course as this last, seems to me to be right, useful and lawful. . . .

"In like manner, the other exceptions are readily disposed of, without my going through them in detail. The whole are regarded as mere suggestions by the Judge to the jury, of the construction of which the words of the witnesses are susceptible, or the inferences which could be deduced from admitted or hypothetical facts; in each case leaving it to the jury to say, what was the true construction, or the true inference. I think this is the legitimate province of a Judge, within the statute under consideration. If I err, the charge of the Judge is an empty pageant, and ceremonial mockery, which may serve for the amusement of the crowd, but instead of aiding the jury, by rescuing the case from the false glosses of powerful advocates, and the misconception of the evidence, as applicable to the legal controversy, will but confound the jury, and still further obscure the truth."[2]

COMMONWEALTH v. PORTER (1846).

10 Metc. 263.

SHAW, C. J.: "This case comes before the Court upon a bill of exceptions, and the question is, whether, in a criminal prosecution against the defendant for an alleged violation of the license
631 laws, his counsel have a right to address the jury upon the questions of law embraced in the issue. The effect of the argument for the defendant, when analyzed, appears to be this; that in criminal prosecutions, it is within the legitimate right and proper duty of juries, to adjudicate and decide on questions of law as well as questions of fact; and that although the judge may instruct and direct them upon a question of law, and they fully comprehend and understand those directions, in their application to the facts of the case, yet that they are invested by law with a legitimate power and authority, if their judgments do not coincide with that of the judge, to disregard it, and decide in conformity with their own views of the law. If this were a correct view of the law, it would undoubtedly follow, as a necessary consequence, that in such appeal from the Court to the jury, the counsel on both sides would have a right to argue the questions of law to the

2—Compare the following: Vicksburg R. Co. v. Putnam, 118 U. S. 545, 7 Sup. 1 (1886); Thayer, Preliminary Treatise on Evidence, 188.

jury. But if this proposition is not correct, it does not follow, we think, as a necessary consequence, that the counsel cannot address the jury upon the law, under the direction of the court. They are, in our view, separate and distinct questions, to be separately considered.

"We consider it a well-settled principle and rule, lying at the foundation of jury trial, admitted and recognized ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law. And the obligations of each are of a like nature, being that of a high legal and moral obligation to the performance of an important duty, enforced and sanctioned by an oath. . . .

"The whole doctrine of bills of exception, now in such general and familiar use, both in civil and criminal proceedings, is founded upon the same great and leading idea. It presupposes that it is within the authority, and that it is the duty of the judge to instruct and direct the jury authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply, in the issue to be tried; and he may also be required so to instruct upon any pertinent question of law within the issue, upon which either party may request him to instruct. The doctrine also assumes that the jury understand and follow such instruction in matter of law. This results from the consideration, that if such instruction be either given or refused, it is the duty of the judge to state it in a bill of exceptions, so that it may be placed on the record; and if the verdict is against the party who took the exception, and it appears, upon a revision of the point of law, that the decision is incorrect, either in giving or refusing such instruction, the verdict is set aside, as a matter of course. To this conclusion the law could come, only on the assumption that it was the right and duty of the court to instruct the jury in matter of law, that the jury understood it, and, as a matter of duty, were bound to follow it; so that, if the instruction was wrong, the law assumes, as a necessary legal consequence, that the verdict was wrong, and sets it aside. The law could only assume this, upon the strength of the well known and reasonable presumption, that all persons, in the absence of proof to the contrary, do that which it is their duty to do. It is presumed that the jury followed the instruction of the Court in matter of law, because it was their duty so to do, and therefore, if the instruction was wrong,

the verdict is wrong. But if the jury could rightly exercise their own judgment, and decide contrary to the direction of the Court, as they unquestionably may do, in regard to questions of fact, no such presumption would follow; it would be left entirely in doubt, whether the jury had been misled or influenced by the incorrect direction in matter of law, and therefore this would alone be no sufficient ground for setting aside the verdict. But entirely otherwise it is in regard to a matter of fact, in respect to which it is within the proper authority, and is the duty of the jury to exercise their judgment authoritatively and definitely. And should a judge express or intimate any opinion upon a question of fact, however incorrect it might be afterwards found to be, upon a revision by a higher Court, it would not necessarily afford a ground for a new trial; for, it not being the duty of the jury to follow it, there would be no presumption that they had followed it, and therefore it would not, of itself, show conclusively that the verdict was wrong. . . .

"[Furthermore, looking at the essential purposes of a Constitution, and the fundamental rights and principles there guaranteed in solid permanence,] it appears to us that the principle contended for would be adverse to all these objects. If a jury has a legitimate authority to decide upon all questions of law arising in the cases before them, and that contrary to the instruction of the judge, in cases where such direction of the judge may be supposed adverse to the views of the law relied on by the accused or his counsel, they would have the same power to decide any question of law, against the opinion and instruction of the judge, when such opinion is in favor of the accused, and find him guilty, where the judge should direct the jury that those facts which the evidence conduces to prove, if proved to their satisfaction, would not warrant a conviction. A case may be supposed, at least for the purpose of illustration, where a high popular excitement should arise and become general, in which large bodies of persons might come to be actuated by feelings of honest but mistaken indignation against some supposed wrong and earnest in the pursuit of the supposed interests of philanthropy; or perhaps numbers may be influenced by more base, interested, and vindictive passions. Under these circumstances, a grand jury, having, as the case supposes, a legitimate and rightful authority to decide on questions of law, contrary to the instructions and charge of the judge, might return an indictment; a traverse jury, in their turn, might convict upon it, though the court before whom it is tried should give them such directions, in point of law, that if they understood and followed them they must acquit the accused. But the case supposes that the law may be rightfully interpreted by a jury which may shift at every trial. What then becomes of the security which every citizen is entitled to, by a steady and uniform, as well as impartial interpretation of the laws and administration of justice, by judges as free, impartial and independent as the lot of humanity will admit? . . .

"On the whole subject, the views of the Court may be summarily expressed in the following propositions:—

"That in all criminal cases, it is competent for the jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the Court, in the form of a special verdict.

"But it is optional with the jury thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit.

"In thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and they may thus incidentally pass on questions of law.

"In forming and returning such general verdict, it is within the legitimate authority and power of the jury to decide definitely upon all questions of fact involved in the issue, according to their judgment, upon the force and effect of the competent evidence laid before them; and if in the progress of the trial, or in the summing up and charge to the jury, the Court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the jury to revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct and warranted by the evidence.

"But it is the duty of the Court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions, pertinent to the issue, upon which either party may request the direction of the court, upon matters of law. And it is the duty of the jury to receive the law from the Court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the Court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide all questions of fact according to the evidence."[1]

HUTCHISON v. BOWKER (1839).

5 M. & W. 535, 541.

Assumpsit for the non-delivery of barley. Plea, non assumpsit. At the trial before Lord ABINGER, C. B., it appeared that the action was brought by the plaintiffs, who were corn merchants and factors
632 at Kirkaldy, in Fifeshire, to recover from the defendants, who were corn merchants at Lynn, damages for the non-performance of a

1—Compare the authorities cited in W., § 2559; and No. 573 *ante*, and No. 639, *post*.

For proof of *foreign law*, compare No. 639, *post*.

contract to supply 400 quarters of barley. To prove the contract, the following letters were given in evidence:

"Lynn, 21st Nov., 1838.

"Messrs. Rt. Hutchison & Co., Kirkaldy.

"Gentlemen:

"In reply to your favor of 17th inst., we beg to offer you a cargo of about 400 qrs. of good barley, weighing 52lbs. per bl., at 34*s.* per qr. on board. . . . Your most obedient servants,

"A. & J. Bowker."

To this letter the plaintiffs returned the following answer:

Kirkaldy, 24th Nov., 1838.

"Messrs. A. & J. Bowker, Lynn.

"Gentlemen:

"We have your favor of 21st current, offering 400qrs. good barley, 52lbs. per bl., at 34*s.* per qr. f. o. b., payment in full by banker's bill at two months, on receipt of bill of lading and invoice: of such offer we accept, expecting you will give us fine barley and full weight. . . .

"We remain, gentlemen,

"Your most obedient servants,

"Robt. Hutchison & Co."

The defendant declined to ship "fine barley." Evidence was given at the trial to show that the phrases "good" barley and "fine" barley were terms well known in the trade, and that fine barley was the heavier. The jury at first found a verdict for the plaintiffs generally, stating their opinion to be, that "the difference was in weight, and that barley would be fine and good at 52lbs. per bushel." The learned Judge asked them to reconsider the verdict, and answer this question, whether there was a distinction in the corn trade between "good" and "fine"? And they then found that there was a difference between good and fine, but that the parties did not understand each other; and they returned a verdict for the plaintiffs, damages 30*l.* Cresswell having on a former day obtained a rule to show cause why this verdict should not be set aside, and a nonsuit entered,

Sir F. Pollock (*W. H. Watson* with him) now showed cause. ". . . The words have either a general or a technical meaning. It was found that the word 'fine' had a technical meaning, and the obscurity is removed by the verdict. The jury thought that on this contract there could be no misunderstanding amongst merchants. It was a question to be left to the jury, what was the meaning of the word 'fine' in the contract. [Parke, B.: "You may ask the jury the meaning of the word 'fine' in a mercantile sense, but you cannot go further. The Court is to say what is the meaning of the contract, and

whether there has been an acceptance of it."] . . . It is admitted that when the words of a contract are clear and unambiguous, it is for the Court to put a construction upon it; but where the words are either unintelligible, or have both a popular and a technical meaning, it is for the jury to say whether the words were used in a technical or ordinary sense."

Lord ABINGER, C. B.: "It appears to me that the question as to the interpretation of this contract is a question entirely for the Court, and not for the jury. That they should ever be the judges on such a matter was founded on this, that there might be technical words used in a contract, which the jury might understand, and the Court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the Court, that the jury are to have the interpretation of the contract, and not the Court. . . . In this case, if they had said they were satisfied that there was no difference in the words, I should then have directed them to find for the plaintiffs; but they told me they were of opinion that there was a difference in the words, but they did not think the contract should be interpreted with reference to that distinction, as the parties did not understand each other. I think that they had no right to assume that. . . . The meaning, therefore, being left ambiguous. I am of opinion that this rule ought to be made absolute."

PARKE, B.: "I am of the same opinion. . . . The law I take to be this,—that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word 'fine,' in the corn market; and the jury having found what it was, the question, whether there was a complete acceptance by the written documents is a question for the judge."[2]

COMMONWEALTH v. ANTHES (1855).

5 Gray 185.

Indictment on St. 1855, c. 215, § 17, for being a common seller of spirituous and intoxicating liquors. Trial and conviction in the Court of Common Pleas of October term 1855, before Sanger, J., who
633 signed the following bill of exceptions: "During the trial the defendant's counsel moved the court to instruct the jury:—1st That

2—Compare the following phrasings: *Gassett* v. *Glazier*, 165 Mass. 473, 43 N. E. 193 (1896): "Where a contract is to be gathered from talk between the parties, and especially from talk on more than one occasion, the question what the contract was, if controverted, must usually be tried by the jury as a question of fact." *Rankin* v. *Fidelity Ins. T. & S. D. Co.*, 189 U. S. 242, 23 Sup. 553 (1903):

the law is unconstitutional and void. 2d. That the jury have a right to judge of the constitutionality of the law. 3d. That if the jury do so judge, and have a reasonable doubt whether the law be constitutional or not, they must acquit the prisoner.

"The court declined so to instruct the jury, but did instruct them that the law is constitutional, and that under the provisions of chapter 152 of the statutes of 1855, entitled an act concerning the duties and rights of jurors, although the jury might judge of the meaning of a law, they had not the right to judge of its constitutionality." The decision was made at Boston on the 27th of August, 1857.

SHAW, C. J.: ". . . I desire however to refer to one subject, that of libel, which in some quarters seems to have been regarded as settling the question, that in all criminal cases juries may rightfully adjudicate upon the law, as well as the fact; but it seems to me so manifestly to lead to the opposite conclusion, and to involve a discussion of the true principle on which jury trial is placed by the common law, that, at the risk of appearing tedious, I wish to state it fully enough to make it intelligible.

"This controversy arose in England during a period shortly preceding the American Revolution, respecting the relative powers of courts and juries, in cases of public prosecutions for libel. It arose in times of great party violence and heat, connected itself intimately with the great political contests of the time, and was conducted in the courts of justice, in parliament, and in the country, with a warmth of passion not favorable to the satisfactory determination of legal principles. But it appears to me that, whether we consider the point upon which the controversy turned, the principles assumed and admitted on all sides as the basis of the argument, or the provisions of the Act of Parliament, commonly known as Mr. Fox's bill, by which it was terminated, they do not impugn the great principle of the common law, that to questions of fact the jurors respond, to questions of law the judges.

"Criminal prosecutions for libel might, by the common law, be by indictment or information; but in point of fact they were most usually state prosecutions, commenced by information filed by the attorney or solicitor general, *ex officio,* and most frequently for political offences, and therefore were often contested with great bitterness, the political parties actively taking sides, in favor of the crown or of the accused respectively. The controverted question arose in this way: By the theory of the law, language, the meaning, effect, and interpretation of all language, is of legal construction, and must be settled as matter of law by courts. This rule applied to statutes, proclamations, treaties, and other acts of state, and also to private contracts of all sorts; and this, in

"Although [the question of] the construction of written instruments is one for the Court, [yet] where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury."

Compare the authorities cited in W., § 2556.

theory, was considered as applicable to publications charged to be libellous. But it is obvious that the same language may have a different meaning, according to the thing referred to, from existing facts or external circumstances, not apparent in the written or printed publication itself. To meet this view, the rules of pleading strictly required that the indictment or information should set out the matter charged to be libellous, *in hæc verba*. If the words should be charged to have any peculiar meaning beyond their ordinary sense, by reason of any fact, then such fact is to be distinctly averred, with time and place, so that it may be put in issue and tried. If it was relied on that such words were written or spoken in connection with such fact or circumstance, it must be stated, in terms, that they were written or spoken 'of and concerning' such facts, ordinarily styled the *colloquium*, adding in all suitable places innuendoes, pointing the meaning of the words to the particular persons or things to which it is intended to charge that they did apply.

"Now the theory of those judges who held that the jury were only to find the fact of publication, and the truth of the averments, *colloquia*, and innuendoes, was this; that when the words of the alleged libel are exactly copied, and all the circumstances and incidents which can affect their meaning are stated on the record, inasmuch as the construction and interpretation of language, when thus explained, is for the Court, the question of the legal character of such libel, whether seditious or obscene, whether it illegally slanders the living, or blackens the memory of any one deceased, would be placed on the record, and therefore, as a question of law, would be open after verdict, on a motion in arrest of judgment. Whatever might be the verdict, if the publication thus spread on the record, with its averments, is not libellous, the court must so declare it. Those who took this side of the question insisted, that if the publication was *per se* libellous, it was unlawful, and the innocent intent and purpose of the publisher afforded no excuse, and if libellous and illegal, the malicious intent was an inference of law. Those reasoners therefore maintained that a criminal prosecution for libel was peculiar, and distinguishable from all others in this, that, by the form of proceeding, the whole matter was spread upon the record; that, when the fact of publication and the truth of the averments and innuendoes were established, the whole question of guilty or not, as in case of a special verdict, was a question of law; and they therefore held that it was right to instruct the jury that, if they found these facts true, they ought to return a verdict of guilty, without passing their judgment upon the question of malicious intent or guilty purpose. These views, it was maintained, were supported by a series of respectable authorities, nearly or quite uniform, from the English Revolution to the time of this controversy.

"On the contrary, it was maintained by the popular party, that such a view of the law of libel tended to discourage and repress all free and manly discussion of public affairs, and destroy the just freedom of the press; that whether a publication was libellous or not, depended upon

the justifiable motive, or mischievous intent, with which it was written; that if it was fairly intended to expose and correct the abuses of bad government, or wickedly to weaken and impair the acts of good government, that these were questions of fact, depending on many facts of a public nature, which could not be brought upon the record; and that therefore the question whether it was unlawful, malicious, and wicked, false in fact, and not written with good motives and for justifiable ends, might even depend on the purpose and character of the whole publication, of which the parts selected as libellous are usually extracts only; that these are all facts bearing upon the general question of guilt, and therefore like other facts, on which the guilt of a party accused of crime depends, were to be found by the jury. Some respectable authorities could be adduced to show that such had, at times, been the course of eminent judges in instructing the jury.

"The great struggle on this subject took place in the case of The King v. Dean of St. Asaph, reported most fully in 3 T. R. 428, note. The case was tried before Buller, J., who charged, in summing up, that there were two facts for the consideration of the jury, namely, the fact of the publication, and the truth of the innuendoes. It came before the full court, and was argued in a masterly manner for the defendant by Mr. Erskine, in one of his celebrated speeches. The opinion of the Court was given by Lord Mansfield, who again affirmed the correctness of the ruling, and upon the same grounds, and he cited many authorities to show that this had long been the established practice. Lord Kenyon, a few years later, directed the jury in the same terms, in The King v. Withers, 3 T. R. 428.

"Thus stood the law, as declared and administered in the highest courts of Great Britain, until this remarkable controversy was terminated by an Act of Parliament, St. 32 G. 3, c. 60, which settled the law for that government. After reciting that doubts had arisen, it declared and enacted that on every such trial, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment or information, and shall not be required or directed by the Court or judge to find the defendant guilty, merely on proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information; that on every such trial, the Court or judge shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases; that nothing in the Act shall be construed to prevent the jury from finding a special verdict, at their discretion, as in other criminal cases; and in case the jury shall find the defendant guilty, it shall be lawful for him to move in arrest of judgment, on such ground and in such manner as he might have done before the passing of the act.

"It will be borne in mind that the leading adjudications above cited were made, and this act of parliament was passed, after the separation of the United States from Great Britain, so that they have no authority

here as positive law; and they are referred to only as historical evidence, showing what the ancient common law of England was when it became the common law of Massachusetts and the other colonies of English origin. It appears to me that the manner in which this controversy was conducted, and the ancient authorities which it brought to light, have a significant and direct application in support of the proposition I am endeavoring to maintain. Both parties acted on the assumption that, by the common law, the juries answer to questions of fact, and judges to those of law, and when all the facts appears on the record, it is for the Court only to decide and pronounce the law.

"Whether, therefore, we consider the rules of the common law, or the constitution and law of this Commonwealth, we are of opinion that it is the proper province and duty of the Court to expound and declare the law, and that it is the proper province and duty of the jury to inquire into the facts by such competent evidence as may be laid before them, according to the rules of law for the investigation of truth, which may be declared to them by the Court, and find, and ultimately decide, on the facts. It may be added that it is the more necessary to adhere to this rule, in the administration of American law, because in these States the government is conducted according to written constitutions, in which the powers even of the Legislature are limited and defined; and it is therefore within the province, and it is made the duty of the judicial department, on proper occasions, to decide, not only what is the true interpretation and legal effect of a legislative enactment, but also whether an act, passed with all the forms of legislation, is within the just limits of legislative power, and therefore whether it is constitutional and valid."[1]

1—Compare the authorities cited in W., § 2557.

BOOK IV.

OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED.

TITLE I.

JUDICIAL NOTICE.

YEAR-BOOK, *7 H. IV, 41, pl. 5* (1406): In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case: "Sir, let us put the case that one man
634 kills another in your presence, you observing it, and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death; you ought to respite the judgment against him, for you are knowing to the contrary, and should make further report to the King, to give him pardon. No more should you give judgment in this case, before causing those to appear by whose hands the King was paid." GASCOIGNE, C. J.: "Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so."

In SIR JOHN FENWICK'S TRIAL, before the House of Commons, 13 How. St. Tr. 663, 667 (1696), Mr. Hawles, Solicitor-General, on Mr. Newport having cited the above story of Gascoigne, replied: "It is said, though a judge do think in his conscience a person guilty, yet he ought not to make use of that private knowledge; and a case was quoted out of Henry IV. But I think that judge might have behaved himself something better than he did; and sure I am, now he would be blamed. I do not say that a judge upon his private knowledge ought to judge; he ought not. But if a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate, and go to the bar and give evidence of his knowledge; and so the judge in Henry IV's time ought to have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business."

FOX v. STATE (1851).

9 Ga. 373.

At the July Term, 1850, of Bibb Superior Court, John Fox was placed on his trial for larceny from the house. The defendant moved for a continuance for the absence of a witness, William Robards,
635 who resided in Decatur County. On the showing for a continuance, it appeared that the witness had been recognized at the last term of the Court to appear and testify in the cause for the defendant. The defendant stated that he expected to prove by the witness, Robards, that he (witness) heard one Simpson, upon whose testimony the defendant understood the State would mainly rely for conviction, say "that if hard swearing would send the defendant to the penitentiary, that he should go." . . . Robards was confined in jail at the time of the conversation, charged with stealing a horse and buggy. . . . The motion to continue was overruled by the Court, and the trial ordered to progress. The Jury returned a verdict of guilty. Whereupon, counsel for defendant moved the Court for a new trial, on the ground that the Court erred in refusing to grant the continuance. The Court overruled the motion for a new trial, and remarked "that in overruling the defendant's showing for a continuance, he did not place much confidence in the truth of the defendant's statements—knowing, as he had, for many years, the witness, Simpson, whose testimony was sought to be assailed, and having no special reason to confide in the integrity of Fox, he thought if a witness intended to act out the corruption ascribed to Simpson, he would not be likely to declare his intentions in advance in the presence of others, and the facts disclosed on the trial left his preconceived opinions of the integrity of Fox unchanged." Counsel for the defendant excepted.

Nisbet, J.: "The new trial ought to have been granted, because there was error in not allowing the continuance. . . . All proper diligence was used to have the witness at the trial. It is clear that the showing for a continuance was complete.

"Why, then, was it not granted? It appears from the record before me, that the presiding Judge gave as reasons for refusing the new trial, that he did not place much confidence in the truth of the defendant's statements. . . . They are not only not sufficient, but develop a ground of action in such cases not warranted by the law. . . . There was, as we have seen, no legal objection to the showing for a continuance. Can the Court, when the showing is sufficient, refuse it on account of his personal knowledge of the character of the party making it, and of the witness whose testimony that party is seeking to assail—a knowledge not drawn from evidence before the Court, but from his private sources of information? He, beyond all controversy, cannot. He has no discretion to act upon such knowledge. The discretion allowed in applications for a continuance must be within the

law, and must spring out of, and be bounded by what transpires in the case. It cannot be justified upon what the Court, as a man, may or may not know. Justice is administered according to general rules; rules which, if applicable in a single case, must be applicable in all like cases, no matter who are the parties, or what their character. If the Court may dispense with them because of his personal knowledge of the character of the parties before him in one case, he may in all cases. And this would be equivalent to dispensing with them altogether."[1]

ATTORNEY-GENERAL v. CAST-PLATE GLASS CO. (1792).
1 Anstr. 39.

On this information a verdict was found against the defendants, who now moved to set it aside, and obtain a new trial, on the ground of misdirection of the Judge. The case turned upon the interpretation of the statute 27 Geo. III. c. 28, whereby it is enacted:
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. . . Section 10. "And be it further enacted by the authority aforesaid, that all and every maker or makers of cast-plate glass, shall break into small pieces, to the satisfaction of the officer of excise under whose survey such maker or makers shall be, immediately upon being requested so to do by such officer, all cast-plate and all cullett which shall not be *squared into plates.*" . . . The five plates in question were made by the defendants, with oval tops, and as this was the shape in which they were intended for sale, they refused to square them, as the officer desired, by making them rectangular; and accordingly this information was filed against them, for the penalties in the tenth section. The Attorney General, at the trial, produced books explaining the process and terms of art in the manufacture; and the defendants offered evidence to prove, that the technical meaning of the word *squaring* glass, is the cutting it into the shape in which it is intended for the market, whatever that shape may be; and on this evidence being refused, and a verdict directed and found against the defendants, the present motion was made for a new trial. . . .

Eyre, C. B.: "In explaining an Act of Parliament, it is impossible to contend, that evidence should be admitted; for that would be to make it a question of fact, in place of a question of law. The Judge is to direct the jury as to the point of law, and in doing so, must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer a Judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *Nisi Prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds

1—Compare the authorities cited in W., § 2569.

on which the Judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

"I have no doubt in saying, that the legislature used the word 'square,' not in the strict, but in the common acceptation, confining it to rectangular, but not to equilateral figures."

REX v. ROSSER (1836).

7 C. & P. 648.

The prisoner was indicted for stealing in the dwelling of Charles May a watch and seals, stated in the indictment to be of the value of 7*l*. A witness for the prosecution having sworn that the prop-
637 erty, in his opinion, was worth that sum, the jury, after the summing up, inquired if they were at liberty to put a value on the property themselves.

VAUGHAN, J.: "If you see any reason to doubt the evidence on the subject, you are at liberty to do so. Any knowledge you may have on the subject you may use. Some of you may perhaps be in the trade."

PARKE, B.: "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn."[2]

DOYLE v. BRADFORD (1878).

90 Ill. 416.

SCOTT, J.: "This action was brought to recover of defendant a penalty imposed for the violation of a village ordinance regulating the sale of intoxicating liquors. On the trial, both before the jus-
638 tice of the peace and in the circuit court, defendant was found guilty, and judgment rendered against him for $50, and to reverse the judgment of the latter Court he brings the case to this court on appeal. Unless the village is organized under the general incorporation act of 1872, it is conceded it had no authority to pass the ordinance that imposed the penalty sought to be recovered, and as the record contains no express averment to that effect, it is said this Court can not take judicial notice of its organization under the general law.

"The statute makes it the duty of all Courts in this State to take

2—Compare the authorities cited in W., § 2570; and the following phrasing: *Manning* v. *R. Co.*, 166 Mass. 230, 44 N. E. 135 (1896): Injury by the fall of a trolley; to the objection that there was no evidence of negligence, it was said "the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen, unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands,—and to infer from those general propositions of experience that there was negligence in the particular case."

judicial notice of the existence of villages and cities organized under the general law, and of the change of the organization of any town or city from its original organization to its organization under that act. In Brush v. Lemma, 77 Ill. 496, it was declared that before this Court could take judicial notice of the change of any city or town from its original organization to its organization under the general law, it must in some way appear in the record that the city or its authorities are acting under such new organization, and when that fact is once made to appear, the Court, without proof that all the requirements of the statute have been complied with, will take judicial notice of its organization under this statute. It is apprehended it can make no difference how that fact is made to appear. All matters generally known will be deemed to be within the knowledge of Courts,—such as the names of counties in the State, and whether they are acting under township organization or not. In the case cited there was a special, public law, of which the Court was bound to take judicial notice, under which the city was originally organized. The single fact, an election had been held and two persons were contesting the right to the office of mayor, was not regarded as such action as would indicate the inhabitants were acting under the general incorporation law. Such an election for such an office could, with equal propriety, have been held under the special law under which the city may have been acting, and hence that circumstance alone was not thought to be sufficient to 'excite inquiry' or to 'arouse judicial notice, the city, as a matter of fact, had changed its organization from under the special to the general law.'

"But that is not the case here. There was a special law under which the 'town of Bedford' could be and no doubt was organized, but there was no law other than the act of 1872 under which it could be organized as a village. It could only be a village under the general incorporation act. Evidence is found in the record it has assumed to act as a village incorporation in the passage of ordinances and the bringing of suits in its corporate name, and it appears the offense of which defendant was convicted was committed within the corporate limits of the 'village of Bradford.' This is certainly evidence of the existence of the village of Bradford, and as it is known there is no such village under any special law of the State, it must be under the general law; and, as was said in Brush v. Lemma, without proof that all the requirements of the statute have been complied with, judicial notice will be taken of the change of its organization under the general law."[3]

3—Baron *Parke,* in *Frost's Trial,* Gurney's Rep. 168 (1840), to counsel: "For the future, it would save time if, when you founded an objection upon an Act of Parliament, you had the Act here; for, though we are supposed to keep the statutes in our heads, we do not."

HOOPER v. MOORE (1857).

5 Jones Law 130.

The plaintiff declared for the detention of the slaves Fanny and her children, and alleged title, as administrator with the will annexed of Alexander Moore, under the provisions of that will. The
639 testator lived and died in Halifax county, in the State of Virginia. . . . The defendant claimed the slaves as the administrator of Alexander Moore, Jun'r., and offered evidence to show that . . . the said testator placed in the possession of his grand-daughter and her husband, Alexander Moore, Jun'r., the slave Fanny in question, who is the mother of the other slaves sued for; that Alexander Moore, Jun'r., held the slaves in question for ten years, during which time, he lived in the State of Virginia, and brought them thence to the county of Caswell, where he remained in possession of them until his death in 1852. In order to show the law of Virginia controlling this transaction, the deposition of Woodson Hughes, Esquire, a gentleman of the legal profession in that State, was produced, who deposed that according to the law of Virginia, no inference of a gift could be drawn from the possession of the slaves, under the circumstances of this case. The defendant's counsel insisted: . . . That no statute of Virginia had been offered in evidence, altering the common law; that by the common law a gift was presumed, and that it was the duty of the Court to expound the statute and give the defendant the benefit of the presumption, notwithstanding the deposition of Mr. Hughes, and prayed the Court so to instruct the jury. The Court . . . declined giving the instructions prayed for, but gave in charge the law of Virginia as proved by the deposition of Mr. Hughes, and left it to the jury to decide the question, whether it was a gift or a loan, free from any presumption either way. Defendant again excepted. . . .

Pearson, J.: "What is the law of another State, or of a foreign country, is as much a 'question of law,' as what is the law of our own State. There is this difference, however: the Court is presumed to know judicially the public laws of our State, while in respect to private laws, and the laws of other States and foreign countries, this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved *as facts;* for otherwise, the Court cannot know or take notice of them. This is familiar learning. In order to give effect to this presumption of a knowledge, on the part of the Court, of the public laws of our State, it is provided that the persons who are entrusted with the administration of justice as a Court, shall be men learned in the law. . . . When an issue of fact involves a question of law, the jury are not entrusted to decide it; but it is the duty of the Court to give to the jury instruction in regard to the law, and it is the duty of the jury to be governed by such instructions. In this way, as much accuracy, and as great a degree of fixedness, in respect to

questions of law, is secured, as the nature of the subject admits of.

"Such being the case in respect to questions arising about our own laws, it would seem as a matter of course to be likewise so in respect to questions arising about the laws of other States, or of foreign countries, whenever, in the administration of justice, our Courts are called upon to deal with them. The assertions of a contrary opinion is met at once by these considerations, which, as it seems to us, cannot be answered: i. e., if juries are incompetent to decide questions in regard to our own laws, and the Court is required to give them instructions in respect thereto, are they any more competent to decide questions in regard to the laws of other States, or foreign countries? and do not they stand equally in need of instructions in respect to them? If such questions are to be decided by the juries, their decisions cannot be reviewed by the Supreme Court, and where is the security either for accuracy or fixedness? A jury is not a permanent tribunal, and no memorial is kept of its action, except the general conclusion—a *verdict;* which is binding only between the parties to the particular case.

"But it is said our Courts are not presumed to know the laws of other States, or of foreign countries. Admit it; still can it be questioned that the Court is more competent to ascertain and understand such laws, than the jury? or that the jury stand as much in need of instruction in respect thereto, as in respect to our own laws?

"Again, it is said the existence of such laws must be alleged and proved as *facts.* Admit it. But how are they to be proved? To the court, or to the jury? Surely to the court, because they are 'questions of law.' We are aware that an impression prevails to some extent, that the proof is to be made to the jury. This originated from the expression 'to be proved as facts,' and many loose *dicta* are to be met with, scattered through the books, in which these words have been inadvertently added to, so as to make the expression 'to be proven as facts to *the jury.*' . . . If the law be written, and its existence is properly authenticated, the Court, availing itself of the aid of the judicial decisions of the country, puts a construction on it, and explains its meaning and legal effect, and the jury have nothing to do with it, save to follow the instructions of the Court, as if it was our own law. If the law is unwritten, and its existence is presumed or admitted, then the jury have nothing to do with it. For example, if it be presumed, or admitted, that the common law prevails in the State of Virginia, and has not been altered by statute in respect to the particular question, our Court decides what the common law is. . . .

"But if the existence of an unwritten law of another State, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the *credibility of the witnesses,* and it is the province of the Court to inform the jury as to the construction, meaning, and legal effect of the law, supposing its existence to be proven; and to this end, the Court

should avail itself of the judicial decisions of the State or country. . . .

"In our case, the Judge below erred in refusing to decide that, according to the common law, a gift was presumed, as is settled by repeated decisions, and in leaving it an open question of fact for the jury upon the deposition of Mr. Hughes."[4]

McCOY v. THE WORLD'S COLUMBIAN EXPOSITION (1900).
186 Ill. 356, 57 N. E. 1043.

CARTWRIGHT, J.: "Appellant subscribed for one thousand shares of the capital stock of appellee. The shares were $10 each, and at the time of subscription two per cent, or $200, was paid to meet
640 preliminary expenses. Afterward, three calls, of eighteen, twenty and twenty per cent, respectively, of the capital stock were made, which appellant refused to pay. Appellee brought this suit to recover the amount of said calls, and at the trial the Court directed a verdict for $7,500, being the amount of the calls, with five per cent interest from the time when they became due. A verdict was returned accordingly and judgment was entered thereon. . . .

"The subscription contained the condition that the exposition should be located in Chicago, and it is said that there was no proof of the performance of that condition. The Constitution of the State was amended to authorize the corporate authorities of the city of Chicago to issue bonds in the aid of the exposition to be held in the city of Chicago, and the fact that it was located and held there appears from public Acts of Congress. From numerous such acts it became a historical fact of such public notoriety that the Courts will take judicial notice of it."[5]

KILPATRICK v. COMMONWEALTH (1858).
31 Pa. 198.

STRONG, J.: "This record presents several questions of the gravest importance. . . . The principal questions relate to the constitution of the court in which the indictment was tried, and to the instruc-
641 tion which was given the jury. . . . The record exhibits that, at the court of Oyer and Terminer for the city and county of Philadelphia, John Kilpatrick, the defendant, was indicted, tried, convicted of murder in the first degree, and sentenced. The first assignment of error is that 'it appears by the record that the case was tried by the Hon. James R. Ludlow and Joseph Allison, neither of whom was the President of the Court of Common Pleas; and therefor the said judges

4—Compare the authorities cited in W., §§ 2572, 2573.

5—Compare the authorities cited in W., § 2575.

had no constitutional right to hold said court and try the said case; and that the entire proceedings are void and *coram non judice.'*

"Upon the argument in this court a doubt was suggested, whether this question is raised by the record. The doubt was not without reason. Personally we know that Judges Ludlow and Allison are asociate justices of the Court of Common Pleas, learned in the law, and that neither of them is the president of that court. Yet can we judicially take notice of the fact, that neither of them is the president of that court, when the defendant did not deny it by plea, and when the record does not show it; but, on the contrary, avers that the trial took place at a court of Oyer and Terminer? Doubtless, there are many things of public interest, things which ought generally to be known, of which courts will take notice without proof. But whether a Superior Court is bound to know who are the judges of subordinate courts, and what is the nature of their commissions, is by no means clearly settled. In the English courts it has been held, that such facts a Court cannot be presumed to know. . . . In the American courts the question is still an open one, though it has not often arisen. . . . Notwithstanding the doubts, however, which have elsewhere entertained in similar cases, we are disposed to take judicial notice of the facts that, at the time of the trial in the court below, Judge Thompson was President Judge of the Court of Common Pleas of Philadelphia county, and that Judges Ludlow and Allison, though justices learned in the law, were only associates. The rule is, that Courts will take notice of what ought to be generally known within the limits of their jurisdiction. There seems to us, to be as much reason for our having knowledge of who are in fact the judges of our constitutional courts, as for our having judicial knowledge of the heads of departments, sheriffs, &c.; knowledge of whom is always presumed."[6]

6—Compare the authorities cited in W., § 2578.

TITLE II.

JUDICIAL ADMISSIONS.[1]

LANGLEY v. EARL OF OXFORD (1836).

1 M. & W. 508.

Debt on bond, in the penalty of 1300*l.* The defendant craved oyer of the bond and also of the condition, which being set out, stated it to be for payment of the sum of 650*l.*, with interest for the same,
642 after the rate of 5*l. for each hundred pounds by the year.* The defendant then pleaded that the words respecting the interest had been inserted in the condition of the bond after it had been executed. To which the plaintiff replied, taking issue thereon. At the trial before *Lord* ABINGER, C. B., at the Middlesex Sittings, the plaintiff produced the bond, the execution of which was attested by a subscribing witness; but he was not called. Evidence, however, was given of a search for him, but without success, which the learned Judge held to be sufficient to excuse his not being produced. The handwriting of the attesting witness was not proved, but the plaintiff put in an order of Mr. *Baron* GURNEY, dated the 10th of February, 1835, by which it was ordered, with the consent of both parties, that the venue should be

1—Compare the following passages:

Gilbert, Evidence, 103 (1726): "The consent of the parties concerned must be sufficient and concluding evidence of the truth of such fact, for they [the jury] are only to try the truth of such facts wherein the parties differ."

Com. v. *Desmond,* 5 Gray 80, 82 (1855); *Thomas,* J., referring to the prosecuting attorney's admission trial that a witness was an accomplice; "Admissions made in the course of judicial proceedings are substitutes for, and dispense with, the actual proof of facts."

Paige v. *Willet,* 38 N. Y. 28, 31 (1868): "A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission."

New York, L. & W. R. Co.'s Petition, 98 N. Y. 447, 453 (1885); stipulation as to commissioners of valuation; *Earl,* J.: "Parties by their stipulations . . . may stipulate away statutory, and even constitutional rights; . . . all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct or the control of their rights, in the trial of a cause or the conduct of a litigation, are enforced by the Courts. . . . So it is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the Courts."

Dunning v. *M. C. R. Co.,* 91 Me. 81, 39 Atl. 352 (1897); *Savage,* J.: "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts,—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight."

Compare the authorities cited in W., §§ 2588, 2589.

changed from Carmarthenshire to Middlesex, the defendant thereby undertaking to admit on the trial of the cause, in case the subscribing witness should not be found, that the attestation was in his handwriting. The cause had been before tried in Middlesex after the above order was made, the only issue then being on the plea of *non est factum;* the words in the condition of the bond respecting the payment of interest, not having been set out on oyer. The plaintiff on that trial recovered a verdict, which the Court set aside, and ordered a new trial on payment of costs, giving the defendant leave to set out on oyer the words respecting the interest; and the defendant accordingly did so, and pleaded the special plea now on the record. The defendant contended on the second trial, that the order of Mr. *Baron* GURNEY did not apply to this trial, and that it was therefore incumbent on the plaintiff to prove the handwriting of the attesting witness. The Lord Chief Baron, however, admitted the bond in evidence without further proof, but gave the defendant leave to move to enter a nonsuit, on the above ground. . . . .

Sir *W. W. Follett* now moved to enter a nonsuit, on the ground that the admission contained in the judge's order, made previously to the first trial, was not evidence on this trial, as the pleadings were different. He admitted, that if the pleadings had remained the same, the admission might have been evidence on the second trial. But he contended, that the oyer having been amended, and a new plea pleaded, it made it altogether a new record. . . .

PER CURIAM: " . . . The admission is to be used on the trial of the cause, whenever the trial takes place; no matter whether it be the first or the second trial."[2]

PRESTWOOD v. WATSON (1896).

111 Ala. 604, 20 So. 600.

Ejectment by E. Watson, as administrator of the estate of R. E. Jordan, deceased, against J. E. Prestwood and A. J. Fletcher, to recover certain lands, specifically described in the complaint.
643 There was a judgment for plaintiff, and defendants appeal. Reversed. . . . On the trial of the cause it was admitted and agreed by and between the attorneys for the plaintiff and the defendants that this case was tried in the same court, at a former term of the court, upon an agreed written statement of facts; that said written agreed statement of facts upon which the case was formerly tried, and the bill of exceptions upon which the case was appealed, were lost or mislaid. . . . The plaintiff offered to introduce in evidence a copy of the agreed statement of facts used on the former trial, which was taken from the report of the case as found in 79 Ala. 417. It was shown by the tes-

2—Compare the authorities cited in W., § 2594.

timony of John Gamble that the foregoing agreement was not signed by the parties or their attorneys, and was made only for that trial, and that several years ago (four or five years) the counsel of defendants notified plaintiff and his counsel that defendants would not abide said agreement in any subsequent trial. The defendants objected to the introduction of said statement of facts upon the following grounds: (1) Said agreed statement of facts was never signed by the parties, or by their attorneys. (2) Said agreed statement of facts was not shown to be made in open court, or indorsed or entered on the minutes or record of the court. (3) Said agreed statement of facts was not admissible, nor could the same be alleged or suggested by the plaintiff, against the defendants in this cause, because the same was not signed by the party to be bound thereby. The Court overruled each of the foregoing grounds of objections, allowed said agreed statement of facts to be introduced as evidence, and to this ruling the defendants duly excepted. . . .

BRICKELL, C. J.: "A former trial of this case was had in the court below, on a statement of facts reduced to writing, and by the parties admitted to be true, in open court. . . . The primary question to be considered is whether, on a subsequent trial, this statement of facts was admissible, and its operation and effect as evidence; for, if it was admissible, and binding and conclusive on the parties, a consideration of many of the exceptions reserved is unnecessary. Agreements of this character, intelligently and deliberately made,—whether made by the parties in person, or by their attorneys or solicitors of record,—are encouraged and favored. Their purpose, generally, is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant. . . . Such agreements are sometimes made to avoid continuances, or for some specific purpose, and, by their terms, are limited to the particular occasion or purpose, and, of course, lose all force when the occasion has passed, or the purpose has been accomplished. But if by their terms they are not limited, and are unqualified admissions of facts, the limitation is not implied, and they are receivable on any subsequent trial between the parties. . . . That the agreement was not signed by the parties or by the counsel was not of importance. Their signatures were not necessary to impart to it validity. Private agreements between parties or their attorneys, relating to the proceedings in a pending case,—agreements not made in the presence of the Court,—the rules of practice require, shall be in writing, and signed by the party to be bound thereby. The rule has never been supposed to have any application to agreements or admissions made in the presence of the Court. Upon such agreements or admissions, made verbally, every Court is necessitated to act daily. The refusal to recog-

nize and act upon them would delay the transaction of business, and entail upon counsel and parties much unnecessary labor. The purpose of the rule is to relieve such admissions or agreements from the infirmative considerations attaching to mere oral admissions of facts imputed to the one party or the other, and to avoid the unseemly wrangles, disputes, and contradictions which would ensue if they rested only in memory. Where the agreement or admission is made in the presence of the Court, it is without the purpose or reason, if not without the letter, of the rule. And when made in open court, and reduced to writing, intended to be used, and used, as an instrument of evidence, and is without limitation as to time or occasion, it cannot be withdrawn or retracted at the mere will of either party. The presence of witnesses to prove the facts stated is waived. If the witnesses had been produced and testified, and they died, or became insane, or removed without the jurisdiction of the court, on a subsequent trial evidence of their testimony would be admissible. The admission of the facts dispensing with evidence, if it could be disregarded by either party on any subsequent trial, in the event of inability to produce witnesses to establish them, would often convert such admissions into instruments of fraud and injury. When they are made deliberately and intelligently, in the presence of the Court, and reduced to writing, they are of the best species of evidence; and parties cannot be permitted to retract them, as they are not permitted at pleasure to retract admissions of fact made in any form. If they are made improvidently and by mistake, and the improvidence and mistake be clearly shown, the Court has a discretion to relieve from their consequences,—a discretion which should be exercised sparingly and cautiously.

"There was no application by either party for relief from the agreement, and neither party should have been bound to give evidence in controversy of the facts therein stated. The loss of the writing rendered admissible secondary evidence of its contents. The best evidence would have been a certified copy of the transcript in this court on the former trial. Unless by consent, the statement found in the published report of the case was not admissible."[3]

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644 STATUTES. *California,* C. C. P. 1872, § 595, as amended by St. 1880: "The Court may require a moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered, or overruled as improper, the trial must not be postponed."

3—Compare the rule for the *authority of an attorney as agent* in making admissions out of court (*ante,* No. 138, note); and the authorities cited in W., §§ 1063, 2594.

Illinois, Rev. St. 1845, Rev. St. 1874, c. 110, §§ 43, 44: In asking a continuance "on account of the absence of testimony," the party's or his agent's affidavit stating the facts expected to be proved thereby, etc., must be offered; "if the other party will admit the affidavit in evidence, the cause shall not be continued"; Ib., § 45, Laws 1867, p. 157: "When the affidavit is concerning the evidence of a witness, the party admitting such affidavit shall be held to admit only that if the absent witness were present he would testify as alleged in the affidavit, and such admission shall have no greater force or effect than if such absent witness were present and testified as alleged in the affidavit, leaving it to the party admitting such affidavit to controvert the statements contained therein, or to impeach said witness, the same as if such witness were present and examined in open court"; Ib. c. 38, § 428 *a,* St. 1885, June 26, p. 73: On such affidavits in a criminal case, neither party shall be "required to admit the absolute truth of the matter set up in the affidavit for continuance, but only that such absent witness, if present, would testify as alleged in the affidavit; and if it is so admitted, no continuance shall be granted, but the case shall go to trial, and the party admitting the evidence shall be permitted to controvert the statements contained in such affidavit by other evidence, or to impeach such absent witness the same as if he had testified in person; provided that the Court may in its discretion require the opposite party to admit the truth absolutely of any such affidavit when, from the nature of the case, he may be of opinion that the ends of justice require it."

ADKINS v. COMMONWEALTH (1896).

98 Ky. 539, 33 S. W. 948.

GRACE, J.: "This is an appeal by Joseph Adkins and Jesse Fields from a judgment of the Knox circuit court sentencing each of them to confinement in the state penitentiary for life, for the murder
645 of Josiah Combs. The killing occurred in Hazard, the county seat of Perry county, on the 23d day of September, 1894; same being Sunday and about 7 o'clock in the morning. Indictment against these defendants was duly found by the grand jury of Perry county on the 13th day of December, 1894. And on the same day, a motion of the Commonwealth for the removal of the cause to another county, was made, accompanied by the written statement of the Commonwealth's attorney, in due form, that the state of lawlessness was such in Perry county that a fair trial of the accused on said charge could not be had in that county. . . . Upon this state of the record, the Court made an order removing the cause to the county of Knox for trial, and to this order defendants excepted. . . . The Knox circuit court began on the second Monday in April, 1895. This cause seems to have been set for the fourth day of the term. The Commonwealth announced 'Ready.' The defendants

were not ready, and, being required, they filed an affidavit setting out the absence of some 25 witnesses by whom they could prove important and material facts, chiefly relating to an alibi in behalf of both parties; showing that in March, before, they had procured a subpœna for the witnesses, and placed same in the hands of the sheriff of Breathitt county, where said witnesses resided; counsel for defendants saying to the Court that they did not desire a continuance of the cause for the term, provided they could obtain the attendance of these witnesses at a later day of the court. Thereupon the Court set said cause for hearing on the tenth day of the term. . . . On the calling of the cause on the tenth day of the term, the attorney for the Commonwealth again announced 'Ready,' and the defendants, 'Not ready,' and, being required by the Court again to show cause, they filed another affidavit, reciting the absence of some 27 witnesses, the materiality of whose evidence in their defense was duly set forth, together with the facts developed in their efforts to procure their attendance since the former calling of the cause, as recited herein. And defendants again asked a continuance. Upon an examination of this last affidavit, the Commonwealth's attorney agreed that the same might be read upon the trial of the cause as the testimony of the absent witnesses; the counsel for accused insisting, if compelled to try on this affidavit, that the State should admit absolutely, as true, the facts stated in this affidavit. This the Court overruled. Exceptions were duly taken, and the Court overruled the motion for a continuance. . . . It is proper to add that, of the witnesses for the defense from Breathitt county who were relied upon by them to prove an alibi, 10 finally appeared, and testified to a state of facts which, if true, showed it was impossible that either of the accused (Adkins or Fields) could have been in Hazard, Perry county, Sunday morning, September 23, 1894, when the shooting and killing of Combs occurred; this testimony showing the accused to have then been in Breathitt county, 30 miles away from Hazard, at the hour of the shooting of Combs. And finally it appears, under the affidavit which the accused did file, and the statements of which the Commonwealth consented, to prevent a continuance, might be read as evidence, that the statements of 13 other witnesses were read on this same matter of an alibi; that these statements were given with great detail and circumstance of time and place, and showing conclusively, if true, that the accused could not have been in Hazard, Perry county, at the time of the killing of Josiah Combs.

"Counsel for the defendants contend earnestly that in all this proceeding their clients have, by this combination of circumstances, . . . not been allowed a reasonable opportunity to prepare their defense in a case of such grave magnitude to them. . . . Counsel question the constitutionality of the act of 1886 in reference to the trial of criminal cases, whereby this proceeding is made possible under the Code. Counsel say that this question has often been presented to this Court, but

not decided; and they insist in this case that it is due to their clients, as well as to the trial courts of the state, and to the profession, that it should be determined.

"The provision upon which counsel rely is found in the eleventh section of the Bill of Rights, adopted as a part of the present Constitution of Kentucky, and is as follows: 'In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.' These are substantially the same provisions on this subject as contained in the old Constitution of Kentucky. Under our Criminal Code, adopted soon after that Constitution went into operation, it was provided (section 188): 'That when an indictment is called for trial, or at any time previous thereto, the Court upon sufficient cause shown by either party may direct the trial to be postponed to any time in the same term, or to another term.' And by section 189: 'That the provisions of the Code of Practice in civil actions in regard to the postponement of the trial of actions, shall apply to the postponement of [criminal] prosecutions on application of defendant, except that, when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the Commonwealth admit upon the trial that the facts are true.' These provisions found in the Code of 1854 became the rule of practice in the trial courts, and, from time to time, it was, either by implication or directly approved by the Court. . . . And such continued to be the law and rule of practice in criminal cases up to May, 1886. During all these years it became manifest that the rule requiring the State to admit as absolutely true whatever the accused might, by his ex parte affidavit, say he could prove by an absent witness, materially impaired the execution of the criminal law; that by its operation it was placed in the power of an unscrupulous criminal, aided by expert and ingenious counsel, to long and indefinitely delay the trial of his cause, or else to compel the State to admit facts, for the purpose of a trial, which often, in effect, were equivalent to a verdict of acquittal. In this way, and by the operation of this provision, the criminal law was brought into disrepute, and by many held in contempt, and the Court and officers of the law censured for the long delay, and final failure, of justice. To remedy this crying evil, the Legislature, in 1886, amended the provisions of the Code of 1854 in reference to the terms on which the State might procure a trial of criminal causes, and provided that the State might demand a trial, at any term of the Court after the one at which the indictment was found, by admitting, not that the facts claimed by the accused that he could prove by any absent witness were true, but by admitting that, if such witness was present and testifying, he would state the facts as claimed

by the accused in his affidavit; this latter amendment, however, still containing a provision that the Court might, in its discretion, where the ends of justice seemed to require it, compel the attorney for the Commonwealth to admit the truth of the statements contained in the affidavit of the accused. This amendment of 1886 also contained further clauses authorizing the State to contradict the statements of the affidavit by other testimony, and to impeach the absent witnesses by whom it was claimed such testimony would be given. This law has been the rule of practice in the circuit courts of the State since its enactment. It is conceded that its provisions are widely different, and make a material modification of the Code of 1854 on this subject. It may be also observed of this new provision that, in practice, it has been found a great improvement upon the old law, in that it enables the State, in a reasonable time to force a trial of its indictments, notwithstanding the continued and persistent efforts of the accused to delay and continue. We call to mind no provision of the Criminal Code that has been found so valuable, and of such material aid to accomplish a speedy trial, as that contained in this amendment. . . .

"Yet the question remains whether this amendment of 1886 is constitutional. Of the provisions of Bill of Rights, § 11, before quoted, as applicable to this case, we have two clauses,—one affirming the right of a person accused of crime to meet the witness face to face (of course, this means the witness that may be called by the State against him). The other provision is that the accused shall have the right to 'the compulsory process of the State for obtaining witnesses in his favor.' The one provision is equally as authoritative, as clear, and its meaning as obvious, as the other. No effort has ever been made by the Legislature to impair in any degree the efficiency of the first clause quoted, 'That accused shall have the right to meet the witnesses [called against him] face to face.' We apprehend that no such effort would be tolerated by the Courts. And yet this section 11 of the Bill of Rights by no means contains the whole law applicable to the Criminal Code of the State. . . . The provision of section 11 of the Constitution, under consideration, is but a part of the whole. It is but a provision in behalf of one accused of crime to have the process of the State to compel the attendance of his witnesses. And yet the question is presented whether this provision shall override and suborn every other duty of the State to the citizen. Whether, after the compliance with this provision of the Constitution, in awarding to the accused the compulsory process of the State, wherein and whereby is given reasonable time and opportunity for the execution of the same, and yet, after all this has been done, and the actual attendance of every possible witness failed to be obtained, what shall then be done? Shall the accused be discharged without trial, and, of course, without punishment, or shall the Legislature make some other and further provision applicable to that state of case? It did undertake to make such further provision,

by the Code of 1854, in allowing the State a trial upon admitting as true the facts stated by accused that he could prove by absent witnesses. This provision, having, on a fair trial, been found highly detrimental, if not subversive of the whole Criminal Code, was by the amendment of 1886, under consideration, abandoned, and a different mode adopted by the legislative will. This consists, as we have seen, in only requiring the State to admit that the absent witnesses, if present, would testify as claimed in the affidavit. On the face of the acts in question, neither of them, either in letter or spirit, violates the provisions of the Constitution. They are but an expression of the legislative will as to what shall be the rule of procedure by the Courts on a state of case where the accused, having had awarded him this compulsory process of the state to obtain the attendance of his witnesses, and having been allowed a reasonable time and opportunity to enforce this writ, yet, on the calling of his case for trial, finds himself without the actual presence of all the witnesses whom he desires. . . . In adopting this construction, the prisoner is deprived of no right guaranteed to him by the Constitution. And the State is also, by this amendment of 1886, enabled to obtain a trial within a reasonable time, and thus give to all her citizens the benefit of the laws enacted for their security and protection.

"Reviewing this case in the light of this interpretation, and upon the facts disclosed by the record, we feel constrained to say that the accused have not, in the trial of this case, had awarded them the compulsory process of the law, with reasonable time and opportunity to obtain the benefit of same. And for this reason the judgment of conviction, as to both appellants, Adkins and Fields, is reversed, and the cause remanded to the Knox circuit court for further proceedings therein not inconsistent with the principles of this opinion."[4]

Statutes. *England,* Rules of Practice, Hilary Term, 4 Wm. IV (10 Bing. 456), No. 20: "Either party, after plea pleaded, and a reasonable time before trial, may give notice . . . of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified," the offering party may move that the opponent show cause, and "the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or presiding officer, shall be paid by the party so required, whatever may be the result of the cause"; provided that the judge "may give time for inquiry or examination of the documents intended to be offered in evidence, and give such

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4—Compare the authorities cited in W., § 2595.

directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit"; and no costs of proving a document shall be allowed "to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have neglected or refused to make such admission" or the judge have indorsed the application as not reasonable to be granted.

California, C. C. P. 1872, § 447, as amended by St. 1874: "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified"; Ib. § 448: "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant"; Ib. § 449, as amended by St. 1880: "But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is upon demand refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case."

Illinois, Rev. St. 1874, c. 110, § 34, Rev. St. 1845, p. 415, § 14: "No person shall be permitted to deny, on trial, the execution or assignment of an instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit, and if plaintiff shall file his affidavit denying the execution or assignment of such instrument; provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."

New York, C. C. P. 1877, § 735: "The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party a paper material to the action, and request a written admission of its genuineness. If the admission is not given, within four days after the request, and the paper is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial and paid by the party refusing the admission; unless it appears, to the satisfaction of the Court, that there was a good reason for the refusal."[5]

5—Compare the authorities cited in W., § 2596; and the rule for documents *produced by a party claiming under them* (*ante,* No. 218).

CARVER v. CARVER (1884).

97 Ind. 497, 510.[6]

ZOLLARS, J.: "Action by appellee in relation to real estate; verdict in her favor, and over a motion for a new trial and other motions, judgment upon the verdict that she is the owner, and entitled
647 to the possession, of the undivided one-third of the real estate, and for $125 against appellant William Carver for the detention thereof. . . . This brings us to the question of the sufficiency of the paragraphs of the complainant, as against any of the defendants. . . . The second paragraph is quite lengthy, tedious, and uncertain in detail. The substance of it is as follows: In 1853, appellee's father gave to her lands in Rush county, subject to a small encumbrance, and conveyed it to a trustee, to be held by him until her husband should pay off the encumbrance, when the trustee should convey it to her. In 1854, the trustee, with her consent, sold the land for enough to pay off the encumbrance and $2,500 additional. In the same year, her husband, Ira Carver, and appellant William Carver, purchased land in Henry county, and paid for the same with appellee's $2,500. With her consent, the money was thus applied as an investment for her. The land in Henry county having been sold, appellee's husband, acting as her agent, for her use and benefit, purchased the land in controversy, and paid for the same with the proceeds of the Henry county land. By mistake, the deed for this land was not made to appellee, but to her husband. In 1857, her husband was of weak mind and financially embarrassed. Appellant William Carver, with knowledge of the husband's condition, mentally and financially, and that appellee's money paid for the land, and with the intent to cheat and defraud her out of the land, confederated with the husband, and a justice of the peace, to get her to sign a deed to him, William Carver. To accomplish this, they and each of them, and especially William Carver, represented to her that her husband was overwhelmingly in debt, and that his creditors were about to arrest and imprison him; that he, William Carver, was security for her husband for a large amount; that if she would execute to him a mortgage upon the land to secure him, he would save her husband from arrest and imprisonment, and save the land for her and her children, and that in no other way could this be done. Believing and relying upon these representations, all of which were false, and known to the parties to be false, she signed what they told her was a mortgage. She never made any deed to William Carver, and the deed under which he claims to hold the land is as to her a forgery. During all this time she was the wife of Ira Carver, and continued to be and to live with him as such until 1875, when he died. She had no knowledge of the deed until 1870. . . .

6—The part of the opinion in this case dealing with the *burden of proof* is to be considered in connection with Nos. 606-610, *ante*.

"It is conceded by appellants in argument, that Ira Carver, husband of appellee, was the owner of the land described in the second paragraph of the complaint and in the judgment, prior to the 20th day of November, 1857, at which time he made a deed for the same to appellant William Carver. Their whole claim rests upon the deed from him. It is really conceded, too, and shown by the evidence, that appellee, as the widow of Ira Carver, who died in 1875, if she did not join in that deed, is the owner of and entitled to the possession of the undivided one-third of the said real estate, except, perhaps, what may have been sold by Carver. It is contended, however, that she did join in that deed. Whether she did or not, is the main question of fact in the cause.

"Prior to the trial, appellants served a notice on appellee, that upon the trial they would introduce in evidence the said deed, which bears the names of appellee and her husband as grantors. Upon the service of this notice, appellee filed her affidavit denying the execution of the deed. Proof of execution having been made, which, to the trial Court, was sufficient to entitle the deed to be read in evidence, it was so read. The third instruction to the jury was as follows: 'The defendants have read in evidence a deed purporting to be executed by Ira Carver and plaintiff, Esther J. Carver, conveying said real estate to the defendant William Carver. The burden of proving that the plaintiff . . . executed said deed is upon the defendants, and if the defendants have not proved by a preponderance of all the evidence in the cause that said plaintiff did sign her name to said deed, the plaintiff is entitled to a verdict in her favor, no matter how innocent the defendants may have been in their purchase. If, however, you find that Esther J. Carver did sign her name to said deed then your verdict must be for the defendants, whether the deed bears the true date of its execution or not; and this must be your verdict, though the plaintiff, when she signed said deed, believed it to be a mortgage. You will then see that an important point in controversy is as to whether the plaintiff signed said deed, and this you will determine, as well as all other facts submitted to you, from a careful consideration of all the testimony and circumstances in evidence, for you are the exclusive judges of the evidence and the credibility of the witnesses, and determine from the evidence what it proves and what it does not prove.' Several objections are urged against this instruction. As related to the deed the argument is, first, that after appellants had made such a case as entitled the deed to be read in evidence, the burden of proof was shifted to appellee to prove the non-execution of the deed; second that as the execution of the deed seems to have been acknowledged before an officer authorized to take acknowledgments, appellee can not, in this action, dispute the execution. These two objections are so related that we consider them together.

1. "The rule is well settled that in the absence of statutes upon

the subject, the grantee, offering a deed in evidence, must prove its execution, whether it has been acknowledged and recorded or not; especially is this so if its execution is put in issue by a plea of *non est factum*. The statutes of this State, like those of many of the other States, have made material innovations upon this rule. The code of 1852, in force when this cause was tried, provided that where a writing, purporting to have been executed by one of the parties, is the foundation of, or is referred to in any pleading, it may be read in evidence on the trial of the cause against such party without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath. . . . Section 304, 2 R. S. 1876, p. 158, provided as follows: 'If either party at any time before trial allow the other an inspection of any writing, material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read, without proof of its genuineness, or execution, unless denied by affidavit before the commencement of the trial.' A failure to deny the execution by a pleading under oath has been held to be so far an admission of the genuineness of the instrument as to preclude its being controverted by proof. This rule would, perhaps, apply to a case like this where the denial is by affidavit. The reason of this ruling, as stated in the earliest decision upon the subject under these statutes, is that the party relying upon the instrument has a right to be forewarned of any contemplated attack upon it. . . . These statutes clearly include deeds, and recognize the rule as we have stated it to be, in the absence of statutes. Their purpose is not to shift the burden of proof, but simply to relieve the party relying upon a written instrument of the burden of making proof of its execution, unless the execution be denied under oath. . . . The affidavit, or plea of *non est factum*, throws back upon the other party the burden of proving the execution of the instrument, and thus the parties occupy the position they would have occupied were there no statutes upon the subject.

"After making a *prima facie* case in favor of the execution of the writing, it may be read in evidence. The party making such proof may rely upon it, and in the absence of countervailing evidence, it will be sufficient to make his case. This, however, does not shift the burden of the issue to the party denying the execution. In the case of Fay v. Burditt, 81 Ind. 433 (42 Am. R. 142), it was questioned, whether in any case, it is proper to say that the burden of an affirmative issue shifts in the course of a trial from one party to the other. We think, upon further consideration, that there is no hazard in saying that it does not as to any single proposition, such as to whether or not a written instrument was in fact executed by the party denying the execution. When the execution of an instrument is thus denied, the question is, did the party thus denying in fact execute it? The party

relying upon it has the affirmative of that issue. The burden is upon him to establish that affirmative, and that burden will remain upon him until he establishes it to the satisfaction of the jury, not by a *prima facie* case alone, but by such proof as will withstand and overthrow all of the evidence to the contrary. There must be more than an equipoise of the testimony; there must be a preponderance in favor of the execution. If, upon the making of a *prima facie* case, the burden shifts to the other side, then it would follow that when the *prima facie* case is overthrown by weightier testimony, the burden shifts back again. To say that the burden thus shifts, is to say that it is constantly shifting from the stronger to the weaker side, as the testimony may make one side or the other stronger. Of course, when a *prima facie* case is made out in a case like this, the burden is upon the other side to meet it, or suffer defeat. . . . This imposition of the burden to meet a *prima facie* case, or to show matter in avoidance, is not the shifting of the burden of proof as to the fact in issue. Appellants made their defence under the general denial, as they had a right to do under the statute. By introducing in evidence the deed from Williams to Ira Carver, appellee's husband, and the deed which purports to have been executed by appellee and her husband, they made their defence, as against appellee's claim, dependent upon the validity of the latter deed. The defence thus took the shape of an affirmative defence, a defence of confession and avoidance; a confession of title in appellee as the widow of Ira Carver, and of avoidance, by the deed from her and husband to appellant William Carver. By the notice and affidavit in relation to this latter deed, the burden of proving its execution was clearly thrown upon appellants, and was not shifted from them by their making out a *prima facie* case.

2. "The deed purporting to have been executed by appellee and her husband, apparently, was properly acknowledged and recorded. We cannot hold, however, that the certificate of acknowledgment is conclusive upon appellee. . . . We think, however, that under our statutes since 1852, a certificate of acknowledgment in proper form makes a *prima facie* case in favor of the execution of the instrument, not only as to innocent third parties, but as to the parties to the instrument also. The statutes require that deeds shall be acknowledged. To entitle a deed to be recorded it must be acknowledged. . . . A record of a deed without such acknowledgment is not competent evidence against any one. An acknowledgment is not essential to the validity of a deed, as between the parties to it, but it is apparent upon an examination of the statutes that, as to all parties, it is a very important matter. It is essential to the record of a deed, and thus becomes the basis of notice by record. The deed may be recorded; the record becomes notice to the world, and may be used as evidence, without the production of the deed or proof of its execution, because the acknowledgment is evidence of the execution. . . . It is provided, how-

ever, that neither the certificate of acknowledgment of a deed, nor the record, nor the transcript of the record thereof, shall be conclusive, but may be rebutted, and the force and effect thereof, contested by any one affected thereby. 1 R. S. 1876, p, 368, section 32; section 2954, R. S. 1881. The reasonable construction of these several sections of the statute is, we think, that the certificate of acknowledgment is *prima facie* evidence of the execution of the deed, and that in all cases where the record is competent evidence, the deed is also competent, without further proof of its execution.

"This, however, does not throw the burden of proof upon the party denying the execution. In this case appellants produced the deed, asserting its genuineness. That was denied by appellee. Appellants had the affirmative of the issue, and were bound to establish it by a preponderance of testimony or suffer defeat. The certificate of acknowledgment operated as evidence in support of the genuineness of the deed, and made a *prima facie* case for appellants, very much as the presumption of sanity operates as evidence in behalf of the State in criminal prosecutions. The burden was upon appellee to meet and overthrow the *prima facie* case, but the burden was not upon her to prove the non-execution of the deed. The Court below did not err, therefore, in charging the jury that the burden was upon appellants to prove by a preponderance of the testimony that appellee executed the deed."

APPENDIX I.

TYPICAL STATUTES AFFECTING THE QUALIFICATIONS OF WITNESSES[1]

ENGLAND.

1814, St. 54 Geo. III, c. 170 (rated inhabitants of parish, etc., are to be competent in certain cases).

1833, St. 3 & 4 Wm. IV, c. 42 (removes the disqualification by reason of a verdict being usable for or against the witness).

1840, St. 3 & 4 Vict. c. 26 (similar to St. 1814).

1843, St. 6 & 7 Vict. c. 85, Lord Denman's Act: "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony, Now therefore be it enacted, That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence," provided that this shall not render competent "any party to any suit," "or the husband or wife of such person."

1846, St. 9 & 10 Vict. c. 95: In suits in the county courts, "the parties thereto, their wives and all other persons" may be examined.

1851, St. 14 & 15 Vict. c. 99, § 1 (St. 6 & 7 Vict. repealed as to the proviso about parties); § 2 (parties, and persons on whose behalf a suit is brought or defended, are to be competent and compellable); § 3 (a person charged with an offence indictable or punishable with summary conviction, is not to be affected by statute; neither husband nor wife is to be "competent or compellable to give evidence for or against" the other in criminal proceedings); § 4 (an action for breach of promise of marriage or in consequence of adultery is not to be affected).

1—The rules of the common law respecting the qualifications of witnesses were highly restrictive. In the progress of thought, these restrictions came in many instances to be recognized as illiberal and unnecessary; and legislation has in several important respects abolished them either wholly or in part. The statutes affecting these changes have often embodied in the same enactment the change of diverse rules. It is convenient to place here, for reference, under the different topics, certain typical statutes affecting the qualifications of witnesses as to organic and emotional capacity, *i. e. insanity, infancy, infamy, interst,* and *marital relationship*. The statutes which affect other rules of testimonial evidence, notably the privileged topics of testimony, are not here included so far as they are grammatically separable.

1853, St. 16 & 17 Vict. c. 83, § 1: "Husbands and wives of the parties" shall be competent and compellable to testify "on behalf of either or any of the parties." § 2: But nothing shall render husband or wife competent or compellable to testify for or against the other "in any criminal proceeding or in any proceeding instituted in consequence of adultery." § 3: Neither shall be "compellable to disclose any communication made to" him or her by the other "during the marriage."

1859, St. 22 & 23 Vict. c. 61, § 6 (on a wife's petition for divorce founded on adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to the cruelty or desertion).

1869, St. 32 & 33 Vict. c. 68: "Whereas the discovery of truth in courts of justice has been signally promoted by the removal of the restrictions on the admissibility of witnesses and it is expedient to amend the law of evidence with the object of still further promoting such discovery." § 2 (parties to an action for breach of marriage promise are competent). § 3 (parties to any proceeding in consequence of adultery, and their husbands and wives, are to be competent; but no answer as to a witness' own adultery is to be compellable, unless the witness has already testified in disproof thereof).

1877, St. 40 & 41 Vict. c. 14 (on an indictment or proceeding to try or enforce a civil right only, the defendant, and the defendant's wife or husband, are to be competent and compellable).

1885, St. 48-9 Vict. c. 69, § 4: In prosecutions for rape under age, where the girl in question, "or any other child of tender years" does not in the Court's opinion understand the nature of an oath, the child's evidence may be given without oath, if in the Court's opinion the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth"; with a proviso requiring corroboration.

1889, St. 52-3 Vict. 44, § 8 (similar).

1898, St. 61 & 62 Vict. c. 36, § 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings"; the accused thus testifying, "shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is then charged."

UNITED STATES FEDERAL CONGRESS.

Revised Statutes, 1878, § 858: "In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;

provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. In all other respects, the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."

Ib. § 1078: "No witness shall be excluded in any suit in the Court of Claims on account of color."

Ib. § 1079: "No claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section [*i. e.*, when taken and offered by the government attorney]"; repealed by St. 1883, *infra.*

Ib. § 1977: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens."

Ib. § 2140: "Indians shall be competent witnesses" in all cases concerning illegal sale of liquor to Indians.

Ib. § 5392: Every person guilty of perjury or subornation of perjury shall "be incapable of giving testimony" until judgment is reversed.

St. 1903, Feb. 5, c. 487, § 7, 32 Stat. L. 798: The Bankruptcy Act, 1898, § 21, subd. *a*, amended so as to permit the Court "to require any designated person, including the bankrupt and his wife," to appear for examination "concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act; provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

St. 1874, June 22, c. 391, § 8: "No officer, or other person entitled to or claiming compensation under any provision of this act [against evading customs laws] shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof," and the defendant may testify.

St. 1878, March 16, c. 37: "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the

person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

St. 1883, March 3, c. 116, § 6: In cases in the Court of Claims, no person is to be excluded "because he or she is a party to or interested in the same."

St. 1887, March 3, c. 359, § 8 (similar; adding "any plaintiff or party in interest may be examined as a witness on the part of the government"; § 1079 of Rev. St. 1878, repealed).

St. 1887, March 3 c. 397, § 1: "In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution, without the consent of the husband or wife, as the case may be. And such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law."

CALIFORNIA.[1]

Code of Civil Procedure, 1872, § 1879: "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section 1847."

Ib. § 1880: "The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons on behalf of whom an action or proceeding is prosecuted, against an executor or administrator upon a claim

1—All the Code Commissioners' amendments of 1901 were held *unconstitutional and void* (on formal grounds affecting the Commissioners' authority), in *Lewis* v. *Dunne*, 134 Cal. 291, 66 Pac. 478; but they have been inserted here, because they may later be validly enacted.

or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." The foregoing sub-sect. 3 was replaced in 1901 by the following Commissioners' amendment: "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such party or interested person derives his interest or title, by assignment or otherwise, or the husband or wife of any such party or person, must not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, or in behalf of his or her husband or wife, against the executor, administrator, or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his title or interest from, through, or under a deceased or incompetent person by assignment or otherwise, as to any matter of fact occurring during the lifetime of such deceased person, or occurring while such incompetent person was competent."

Ib. § 1881: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"; the amendments to § 1881, added by the Commissioners in 1901, concern the respective privileges involved.

Penal Code, 1872, § 675 (imprisonment suspending or extinguishing civil rights does not create incompetency as witness in criminal case).

Ib. §§ 1099, 1100 (joint indictment of two or more; the Court may order discharge of one, to be witness for the prosecution, before the defence is gone into, and must order the discharge of one, to be witness for a co-defendant, before close of evidence, if there is not sufficient evidence to put him on his defence).

Ib. § 1102: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

Ib. § 1322: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties."

Ib. § 1323: If the accused "offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about

which he was examined in chief;" "his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

COLORADO.

Annotated Statutes, 1891, § 185 (insolvent assignments; the debtor's wife may be compelled to testify).

§ 1168: "An accessory during the fact shall be a competent witness," unless otherwise disqualified.

§ 1170: "The party or parties injured shall in all cases be competent witnesses, unless he, she, or they shall be rendered incompetent by reason of his, her, or their infamy or other legal incompetency other than that of interest. The credibility of all such witnesses shall be left to the jury as in other cases."

§ 1171: "Hereafter in all criminal cases tried in any Court of this State, the accused, if he so desire, shall be sworn as a witness in the case, and the jury shall give his testimony such weight as they think it deserves; but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence."

§ 1172: "Approvers shall not be allowed to give testimony."

§ 1173: "The solemn affirmation of witnesses shall be deemed sufficient."

§ 2780 (on preliminary examination the accused may make a statement, under oath or otherwise, "after all witnesses have been heard.")

§ 3382: A married woman becoming special partner in a limited firm "shall be a competent witness for or against her husband, the same as though a *femme sole*" in all proceedings arising out of partnership.

§ 4785: "No person making a claim against the estate of any testator or intestate shall be permitted to prove the same by his or her own oath," except as in § 4782, for uncontested claims.

§ 4816: "That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section [now § 4822] when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending; and also, except in the following cases, namely: *First:* In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person; *Second:* When in such action, suit or proceeding, any agent of any

deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transaction; *Third:* When in any such action, suit, or proceeding, any such party suing or defending as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversion or transaction with the opposite party or parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction; *Fourth:* When in any such action, suit, or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation; *Fifth:* When in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or parties in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency."

§ 4818: "That in any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of section one of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation."

§ 4819 (an assignment or release "made for the purpose of allowing such person to testify" does not make him competent under §§ 4816, 4817).

§ 4820 (the statute is not to affect the law in regard to the settlement of estates of deceased persons, etc., or to the acknowledgment or proof of deeds, or to the attestation of instruments required to be attested).

§ 4822: "All persons, without exception, other than those specified in the next three sections, and in the second, third, fourth, seventh, and eighth sections of chapter one hundred and four of the general laws, may be witnesses. Neither parties nor other persons who have an interest in the event or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters

of religious belief; although in every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any other fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other person cognizant of such conviction, as impeaching testimony or by any other competent testimony."

§ 4823: "The following persons shall not be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly."

§ 4824: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person shall not be examined as a witness in the following cases: 1. A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

§ 4825: "If a person offer himself as a witness, that is to be deemed a consent to the examination; also the offer of a wife, husband, attorney, clergyman, physician, or surgeon, as a witness, shall be deemed a consent to the examination within the meaning of the first four subdivisions of the last section."

St. 1893, p. 127, § 3 (in a prosecution for a failure to support, the wife is competent against the husband without his consent).

CONNECTICUT.

General Statutes, 1887, § 1094: "In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence."

§ 1097: "A wife shall be a competent witness against her husband

in any action brought against him for necessaries furnished her while living apart from him."

§ 1098: "No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise, or of his disbelief in the existence of a Supreme Being, or of his conviction of crime; but such interest or conviction may be shown for the purpose of affecting his credit."

§ 1099: Any party to a civil action may compel any adverse party or "any person for whose immediate and adverse benefit" the action was begun, etc., to testify; but not compel both discovery and testimony from the same party.

§ 1623: "Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify, upon such trial, and if such person has a husband or wife, he or she shall be a competent witness, but may elect or refuse to testify for or against the accused, except that a wife when she has received personal violence from her husband, may, upon his trial therefor, be compelled to testify in the same manner as any other witness. The neglect, or refusal, of an accused party to testify shall not be commented upon to the Court or jury."

GEORGIA.

Code 1895, § 5198 (1): "Communications between husband and wife" are excluded.

Ib. § 5268: "Religious belief goes only to the credit."

Ib. § 5269: "No person offered as a witness shall be excluded by reason of incapacity, for crime or interest, or from being a party, from giving evidence, either in person or by deposition [in any court or proceeding] . . . ; but every person so offered shall be competent, and compellable to give evidence on behalf of either or any of the parties to the said suit, action, or other proceeding, except as follows: 1. Where any suit is instituted or defended by a person insane at the time of the trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person. 2. Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested. 3. Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the

corporation. 4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if, as a party to the cause, he would for any cause be incompetent. 5. No agent or attorney-at-law of the surviving or sane party, at the time of the transaction testified about, shall be allowed to testify in favor of a surviving or sane party, under circumstances where the principal, a party to the cause, could not testify; nor can a surviving party or agent testify in his own favor or in favor of a surviving or sane party, as to transactions or communications with a deceased or insane agent, under circumstances where such witness would be incompetent if deceased agent had been principal. 6. In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent, may be examined in reference to such facts testified to by said witness"; amended by Acts 1900, p. 57, Van Epps' Suppl. § 6200, by adding: "whether such transactions or communications were had by such insane or deceased person with the party testifying or with any other person."

Acts 1897, p. 53, Van Epps' Suppl. § 6222: "When suit is instituted against joint defendants, one of whom is the representative of an insane or deceased person, the sane or living party defendant shall not be admitted to testify as to any transaction or communication with the insane or deceased party, when his evidence would tend to relieve or modify the liability of the party offered as a witness and tend to make the estate of said insane or deceased party primarily liable for the debt or default."

Code 1895, § 5270: "There shall be no other exceptions allowed under the foregoing paragraphs."

Ib. § 5272: "Nothing contained in section 5269 shall apply to any action, suit, or proceeding in any Court, instituted in consequence of adultery, or to any action for breach of promise of marriage."

Ib. § 5273: "Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses."

Ib. § 5274: "Drunkenness, which dethrones reason and memory, incapacitates during its continuance."

Ib. § 5275: "No physical defects in any of the senses incapacitates a witness. An interpreter may explain his evidence."

Ib. § 5276: "The Court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity, or drunkenness, or childhood."

Criminal Code, 1895, §§ 1010, 1011: "In all criminal trials the prisoner shall have the right to make to the Court and jury such statement in the case as he may deem proper in his defence. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the cause"; but in so making a statement, he is not compellable "to answer any questions on cross-examination, should he think proper to decline an answer"; "no person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, is competent or compellable to give evidence for or against himself."

Ib. § 1011 (4): "Husband and wife shall not be competent or compellable to give evidence in criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offence committed, or attempted to have been committed, upon her person. She is also a competent witness to testify for or against her husband, in cases of abandonment of his child, as provided for in § 114 of this Code."

Ib. § 104 (the wife is to be a "competent witness," when the husband is tried for maltreatment of wife).

Ib. § 910 (the accused's statement before a magistrate regulated).

ILLINOIS.

Revised Statutes, 1874, c. 17, § 6 (in bastardy trials, "the mother and defendant" are competent).

Ib. c. 38, § 35: When a witness is released by Court order from liability to prosecution, and compelled to testify, "the defendant shall also at his own request be deemed a competent witness"; but no inference shall be drawn, as in ib. § 426.

Ib. c. 38, § 426: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect."

Ib. c. 38, § 491, *St. 1893, June 17:* The wife is to be competent in any case against the husband under the statute punishing abandonment of family, "as to any and all matters relevant thereto, including the fact of such marriage and the parentage of such children."

St. 1901, May 11, § 3: In prosecutions for abandonment of wife or child, "such husband or wife shall be a competent witness to testify in any case brought against the one or the other under this act, and to any and all matters relevant thereto, including the facts of such marriage and the parentage of such child or children."

Rev. St. 1874, c. 51, § 1: "No person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence."

Ib. § 2: "No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:— *First.* In any such event, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee, or devisee shall have attained his or her majority. *Second.* When, in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or part in interest, such opposite party or party in interest may testify concerning the same conversation or transaction. *Third.* Where, in any such action, suit, or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction. *Fourth.* Where, in any such action, suit, or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission

by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation. *Fifth.* Where, in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency."

Ib. § 4: "In any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or party adversely interested in the event thereof, shall, by virtue of section 1 of this Act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit, or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any conversation or transaction between himself and such agent, except where the conditions are such, that under the provisions of sections 2 and 3 of this Act, he would have been permitted to testify, if the deceased person had been a principal and not an agent"; amended by St. 1899, April 24, by inserting after "such agent," the words, "unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only."

Ib. § 5: "No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties

may, under the provisions of this act. Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife."

Ib. § 6 (quoted *ante*, No. 388

Ib. § 7: "In any civil action, suit, or proceeding, no person who would, if a party thereto, be incompetent to testify therein, under the provisions of sections 2 or 3, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify."

Ib. § 8 (nothing in this Act is to affect the law as to the settlement of the estates of deceased persons, incapables, etc., or the proof of conveyances for record, or the attestation of instruments required to be attested).

IOWA.

Constitution, 1857, Art. I, § 4: "Any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law."

Code, 1897, § 4601: "Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared."

Ib. § 4602: "Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility."

Ib. § 4603: "No person offered as a witness in any action or proceeding in any Court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter."

Ib. § 4604: "No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor,

administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined in his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence."

Ib. § 4606: "Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; but they may in all civil and criminal cases be witnesses for each other"; amended by *St. 1898, 27th Gen. Ass.*, c. 108, § 1, by inserting after "affections of the other," the words "or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment."

Ib. § 4607: "Neither husband nor wife can be examined in any case as to any communication made to the one by the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted."

Ib. § 5484: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the State; and should a defendant not elect to become a witness, this fact shall not leave any weight against him on the trial, nor shall the attorney or attorneys for the State, during the trial, refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial."

Ib. § 5485: A defendant taking the stand "shall be subject to cross-examination as an ordinary witness, but the State shall be strictly confined therein to the matters testified to in the examination in chief."

MASSACHUSETTS.

Revised Laws, 1902, c. 175, § 20: "No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: *First*, neither husband nor wife shall be allowed to testify as to private conversations with each other; *Second*, neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other; *Third*, in the trial of all indictments, complaints, and other proceedings against

persons charged with the commission of crimes or offences, a person so charged shall at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him."

Ib. § 21: "The conviction of a witness of crime may be shown to affect his credibility."

MICHIGAN.

Compiled Laws, 1897, c. 282, § 99: "No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, or for any interest of such person in the matter, suit, or proceeding in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereafter provided."

Ib. § 100: "On the trial of any issue joined, or in any matter, suit, or proceeding, in any court, or before any officer or person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit is prosecuted or defended, may be witnesses therein, in their own behalf or otherwise, in the same manner as otherwise, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as provided by law for other witnesses. No person shall be disqualified in any criminal case or proceeding, by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not raise any presumption against him, nor shall the Court permit any reference or comment be made to or upon such neglect."

Ib. § 101: "That when a suit or proceeding is prosecuted or defended by the heirs, assignees, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be ad-

mitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner and not within the knowledge of any one of the surviving partners. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation, shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person; provided, that whenever the words, 'the opposite party,' occur in this section, it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy"; amended by St. 1901, No. 239, by inserting after "surviving partners," the following: "No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died shall be a competent witness, in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives."

Ib. § 102: "A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support within the meaning of Act No. 136 of the Session Laws of 1883, and except in cases where the husband or wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claims or interest of the other of said married persons who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action, or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any

communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery the husband and wife shall not be competent to testify."

Acts 1887, No. 82: "Whenever a child under the age of ten years is produced as a witness the Court shall by an examination, made by itself, publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the Court or jury, if there be a jury, it may appear to deserve."

Acts 1897, No. 212: "A husband may testify for or against his wife without her consent, and a wife may testify for or against her husband without his consent, in all criminal prosecutions for bigamy; provided, however, that nothing herein contained shall be so construed as to permit a husband or wife to testify against the other without the consent of both concerning any communications made by one to the other during the marriage."

Compiled Laws, § 8652, Howell's ed.: In divorce proceedings, either party may elect to testify, but "such testimony shall not be received in support or in defence of a charge of adultery."

MINNESOTA.

General Statutes, 1894, §§ 642, 1191 (inhabitants in a city or county, not to be disqualified as such).

§ 2007 (Indians to be competent in prosecution for unlawful sale, etc., of liquor to Indian).

§ 2561 (in actions by husband against savings bank for wife's money, wife may be examined as if unmarried).

§ 5658: "All persons, except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the Court."

§ 5659: "A party to the record of any civil action or proceeding,

or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony."

§ 5660: "It shall not be competent for any party to an action, or interested in the even thereof, to give evidence therein of and concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties"; amended by St. 1895, c. 27, by adding: "provided that where the testimony of the party or person since deceased or insane shall have been taken, prior to death or disability, either in form of a deposition or by court stenographer in court, and can be had and read as the testimony of such witness, wherein such party or person shall have testified concerning any conversation with the opposite party or person or concerning admissions made to such party, upon a trial of the issues after the death or disability of such party or person as contemplated in this section, the opposite party may testify fully in reference to conversations and admissions to which the aforesaid deposition or evidence shall relate."

§ 5661: "The following persons are not competent to testify in any action or proceeding: *First,* those who are of unsound mind or intoxicated at the time of their production for examination; *Second,* children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly."

§ 5662: "There are particular relations in which it is the policy of the law to encourage confidence, and preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: *First.* A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to proceedings supplementary to execution"; amended by St. 1903, c. 227, omitting the last clause, and substituting "nor to an action or proceeding for abandonment and neglect of the wife or children by the husband."

§ 6841: "A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any case or proceeding,

civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination upon which he must answer any proper queston relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question."

§ 2216: "Whenever in any action in any court the defendant shall plead or answer the defence of usury, either party to the action may be a witness on his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except, also, actions in which the opposite party claims as assignee and the original assignor is deceased."

§ 7324 (a co-indictee may be discharged by the Court, to be a witness for the State, at any time before defendant has gone into his defence).

§ 7325 (a co-indictee must be discharged, before the evidence is closed, to be a witness for the co-defendant, if the Court is of opinion that there is not sufficient evidence to put him on his defence).

MISSOURI.

Revised Statutes, 1899, § 2638: The accused's failure to testify "shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the Court or jury before whom the trial takes place."

§ 2635: "No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution."

§ 2636: "When two or more persons shall be jointly indicted or prosecuted, the Court may, at any time before the defendants have gone into their defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant shall also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving his testimony for a co-defendant."

§ 2637: "No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting the credibility of such witness; provided that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the de-

fendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case; provided that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife."

§ 4652: "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defence is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator; provided, further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no farther."

§ 4654: "Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses."

§ 4655 (the foregoing sections not to affect the law of attestation of instruments required to be attested).

§ 4656: "No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: *First,* in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; *second,* in actions against carriers, so far as relates to the loss of the property and the amount

and value thereof; *third,* in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or proceeding is based upon, grows out of, or is connected with any matter of business or business transaction where the transaction or business was had with or was conducted by such married man as the agent of his wife; provided that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists or subsequently, to testify to any admission or conversation of her husband, whether made to herself or to third parties"

§ 4659: "The following persons shall be incompetent to testify: *First,* a person of unsound mind at the time of his production for examination; *second,* a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

§ 4680: "Any person who has been convicted of a crime is notwithstanding a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

NEW YORK.

Constitution, 1895, Art. XIII, § 4: "Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor."

Code of Civil Procedure, 1877, § 828: "Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, opposed, prosecuted, or defended."

Ib. § 829: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest,

against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the proceeding or interested in the result thereof."

Ib. § 831: "A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. A husband or wife shall not be compelled, or, without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff."

Ib. § 832: "A person, who has been convicted of a crime or misdemeanor, is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not included by that inquiry."

Ib. § 850: "The Court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge."

Penal Code, 1881, § 714 (substantially the same as § 832, C. C. P.).

Ib. § 715: "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during marriage."

Code of Criminal Procedure, 1881, § 10: "No person can be compelled in a criminal action to be a witness against himself."

Ib. § 392 (in criminal cases, the testimony of a child apparently under 12 not understanding an oath may be received if it is "of sufficient intelligence."

Ib. § 393: "The defendant in all [criminal] cases may testify as

a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

Laws 1876, c. 182, § 1: "All persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the indictment."

Laws 1892, c. 689, § 115 (a wife may testify in an action by a husband against a savings bank to recover money deposited by the wife as hers).

OHIO.

Annotated Revised Statutes, 1898, § 5240: "All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

§ 5241: "The following persons shall not testify in certain respects: . . . 3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist. 4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. 5. A person who, if a party, would be restricted in his evidence under § 5242, shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing."

§ 5242: "A party shall not testify where the adverse party is a guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person, except—1. To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died. 2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject. 3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations. 4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversation or admissions. 5. In an action or proceeding by or against a partner or joint con-

tractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued. 6. If the claim or defence is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county; whereupon the book shall be competent evidence, and such book may be admitted in evidence, in any case, without regard to the parties, upon like proof by any competent witness. 7. If a party, after testifying orally, die, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters. 8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied."

§ 5697 (parties in divorce and alimony cases are to be competent like any other witnesses).

§ 7284: "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions; but such interest, conviction, or relationship may be shown for the purpose of affecting his or her credibility. But husband or wife shall not testify concerning any communication made by one to the other, or act done by either in the presence of each other during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or unless in case of personal injury by either the husband and [or?] wife to the other, or in case of neglect or cruelty of either to their minor children under ten years of age. And the rule shall be the same if the marital relation has ceased to exist; provided, that the presence or whereabouts of the husband or wife shall not be construed to be an act under this section."

§ 7285: "On the trial of all indictments, complaints, and other proceedings, against a person charged with the commission of an offence, the person so charged shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or any comment be made upon, such neglect or refusal."

PENNSYLVANIA.

Digest of Laws, 1896 (Pepper & Lewis): *"Witnesses"* § 1: "Except upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with a criminal offence triable in the Court of Oyer and Terminer ought to be committed for trial, and except also upon a hearing under *habeas corpus* for the purpose of determining whether bail ought to be taken upon a commitment for murder in the first degree, or for the purpose of determining in any case how much bail ought to be required, or for the purpose of determining in any case whether a person committed for trial ought to be further held, and except, also, upon hearings before a grand jury, in none of which cases shall evidence for the defendant be heard, and except, also, as provided in § 2 of this Act, all persons shall be fully competent witnesses in any criminal proceeding before any tribunal."

Ib. § 2: "In such criminal proceedings, a person who has been convicted in a court of this Commonwealth of perjury, which term is hereby declared to include subornation of perjury, shall not be a competent witness for any purpose, although his sentence may have been fully complied with, unless the judgment or conviction be judicially set aside or reserved [reversed?], or unless the proceeding be one to punish or prevent injury or violence attempted, done, or threatened to his person or property, in which cases he shall be competent to testify."

Ib. § 3: "Nor shall husband and wife be competent or permitted to testify against each other, or in support of a criminal charge of adultery alleged to have been committed by or with the other, except that, in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done, or threatened upon the other, each shall be a competent witness against the other, and except, also, that either shall be competent merely to prove the fact of marriage in support of a criminal charge of adultery alleged to have been committed by or with the other."

Ib. § 4: "Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial."

Ib. § 8: "In any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, no liability merely for costs nor the right to compensation possessed by an executor, administrator, or other trustee, nor any interest merely in the question on trial, nor any other interest or policy of law, except as is provided in § 5 [11] of this Act, shall make any person incompetent as a witness."

Ib. § 9 (provisions of § 2, *supra*, applied to civil proceedings).

Ib. § 10 (provisions of § 4, *supra*, applied to civil proceedings).

Ib. § 11: "Nor shall husband or wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpœna or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either party may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage."

Ib. § 12: "In any proceedings brought by either under the provisions of section three [*aliubi*] to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one to the other, unless this privilege be waived upon the trial."

Ib. § 14: "Nor, when any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy; unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors, or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into Court the costs accrued at the time of his disclaimer, or gives security therefor as the Court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses."

Ib. § 15: "But no person who is incompetent under clauses (*a*), (*b*), (*c*), and (*d*) [§§ 9, 10, 11, 13, *supra*] of this section shall become competent by the general language of clause (*e*) [§ 14, *supra*]."

Ib. § 16: "Any person, who is incompetent under clause (*e*) [§ 14, *supra*] of section five by reason of interest, may, nevertheless, be called to testify against his interest, and in that event he shall become a fully competent witness for either party; and such person shall also become fully competent for either party by a release or extinguish-

ment in good faith of his interest, upon which good faith the trial judge shall decide as a preliminary question."

Ib. § 18: "Hereafter, in any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed, either by his own act or by the act of the law, to a party on a record who represents his interest in the subject in controversy, nevertheless, any surviving or remaining party to such thing or contract or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party or the adjudication of his lunacy; if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such surviving or remaining party or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person."

Ib. § 21: "In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of any thing or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony; but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not these matters were touched upon in such cross-examination."

Ib. § 22: "Except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to criminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by Court or counsel during the trial."

"Desertion," § 3 (action for maintenance against a deserting husband; the wife to be competent for Commonwealth, and the husband to be competent).

St. 1899, April 11, Pub. L. 41 (preamble stating a purpose to remove existing disadvantages of the wife).

Ib. § 1: "In any civil action brought against the husband to recover necessaries furnished to the wife, if the husband makes defence at the trial upon the ground that the wife had left him without justification or excuse before the necessaries were furnished, or upon any other ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the plaintiff."

Ib. § 2: "In any criminal proceeding brought against the husband, if he makes defence at the trial upon any ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the Commonwealth."

St. 1903, No. 32: In prosecutions for a husband's failure to support, "the wife shall be a competent witness."

WISCONSIN.

Statutes, 1898, § 4068: "No person shall be disqualified in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness. Any party to the record in any civil action or proceeding, or any person for whose immediate benefit any such action or proceeding is prosecuted or defended, or the president, secretary, or other principal officer or general managing agent of any corporation which is such a party or for whose benefit the action or proceeding is prosecuted or defended, may be examined upon the trial of any such action or proceeding as if under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify; but the party calling for such examination shall not be concluded thereby, and may rebut the evidence given thereon by counter or impeaching testimony."

§ 4069: "No party, and no person from him, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person or with a person then insane in any civil action or proceeding in which the opposite party derives his title or sustains his liability, to the cause of action from, through, or under such deceased person or such insane person, or in which such

insane person is a party prosecuting or defending by guardian, unless such opposite party shall first be examined or examine some other witness in his behalf to such transaction or communication between the deceased or insane and such party or person, or unless the testimony of such deceased person given in his lifetime or of such insane person be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates"; amended by St. 1901, c. 181, by adding after the word "party," in the first line, the words "in his own behalf or interest."

§ 4070: "No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through, or under whom such adverse party derives his interest or title, when such agent is dead or insane or otherwise legally incompetent as a witness, unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates."

§ 4071: "In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto."

§ 4072: "A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other. In an action for criminal conversation the plaintiff's wife is a competent witness for the defendant as to any matter in controversy except as aforesaid."

§ 4073: "A person who has been convicted of a criminal offence is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer."

§ 4085: "The Court before whom an infant or person apparently of weak intellect shall be produced as a witness may examine such person to ascertain his capacity and whether he understands the nature and obligations of an oath."

LIST OF CASES QUOTED.

LIST OF STATUTES QUOTED.

ENGLAND.

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Constitution 1879.

Penal Code 1872.

Code of Civil Procedure 1872.

COLORADO.

Annotated Statutes 1891.

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