A TREATISE

ON THE

LAW OF IDENTIFICATION

A SEPARATE BRANCH OF THE LAW OF EVIDENCE.

IDENTITY OF PERSONS AND THINGS—ANIMATE AND INANIMATE —THE LIVING AND THE DEAD—THINGS REAL AND PERSONAL—IN CIVIL AND CRIMINAL PRACTICE—MISTAKEN IDENTITY, *CORPUS DELICTI*—*IDEM SONANS*—OPINION EVIDENCE.

BY

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PREFACE.

In presenting this treatise, the writer is not unmindful that we have valuable works by many able writers, and on many divisions or branches of the law of Evidence, not less than twenty authors having furnished us works on the various divisions. As they saw fit to divide it into about seventeen branches, too tedious to enumerate here, but not one devoted to the evidence of identification, a branch of the subject which is daily before the courts in its various phases, the writer has deemed it needful, and of sufficient importance to justify a treatise, and hence this work. The writer has endeavored to treat of the identity of persons and things, living and dead, animate and inanimate; things real and personal — in civil and criminal practice in England and America. The various means of identifying the living and the dead, the prisoner and the injured or killed: by circumstances; appearance; clothing; photographs; voice of the living; by opinion evidence; weapons and other articles, etc. Of things: view of premises by the jury; portable goods in court for inspection; compulsory physical examination for identity of the person or extent of injuries. Identity of real estate: by monuments and objects; courses and distances; metes and bounds; descriptions in deeds and wills. Personalty: in chattel mortgages, and where the subject of replevin, larceny or robbery. Ancient records and documents: judgment entries; liens; pedigree and heirship. Handwriting: subscribing witness; comparison; conflict. Including *corpus delicti: idem sonans*, and mistaken identity, etc.

It may be observed that the writer has omitted the subject of death by *poisoning* and *drowning*. The omission is intentional.

The question is referred to only to recognize its existence. It belongs to another science, and much has been said and written upon it, and writers and experts have so far disagreed, that if the writer had the ability, time and inclination, he would not have space in this work to reconcile a conflict so hopeless. These subjects, involving the questions of identity above referred to, have been noticed by the writers on the law of Evidence, but it will be seen that they have given to *identification* only a passing notice.

The writer has endeavored, with industry and access to the full and complete library of Congress, to collect all the leading cases and valuable material on this subject, to be found in the adjudged cases, both in England and America, not citing all the cases, of course, but sufficient to support each proposition; and in so doing, he was not content in giving a mere abstract principle of law. This might be sufficient for the practitioner who has daily access to a complete library; but is not satisfactory to those less favored. So it has been deemed better to illustrate principles by given cases which have been adjudged — sometimes giving a brief statement of the facts which involve the point, and often, for greater certainty, drawing upon the language of the court. And again, in this style, in the various conflicts in decisions, the reader has the reasoning on both sides. With these suggestions, this work, though imperfect it may be, is respectfully submitted to the consideration of a generous profession.

GEO. E. HARRIS.

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THE

LAW OF IDENTIFICATION.

CHAPTER I.

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Identification of persons and things.

§ 1. It is proposed in these pages to introduce the law and rules of identity of persons and things as a separate branch of the law of evidence. It has become a question of growing importance and one that is daily before the courts; perhaps the question of personal identification is now one of the greater importance, not only because the doctrine that the identity of name was evidence of identity of

person, has measurably exploded, except in the examination of titles to real estate; but because of the great number of important cases of mistaken identity, both in civil and criminal practice, and in cases involving the identity of the living and the dead. Parties to actions, the ancestor and the heirs to estates, questions of pedigree, marriages, births and deaths; questions of vendor and vendee, ancient records and documents, and parties thereto, and the degree of evidence necessary to establish them, and the doctrine of *idem sonans*. Next in importance is the identification of things, of property, real and personal; real estate as identified by the description in the instrument, deed, will, or other conveyance, whether it be described by name, number, monuments or metes and bounds, one or all, general or particular. Of personal property, as between claimants, in chattel mortgages, bills of sale, of stolen property, instruments causing violence or producing death, etc.

Means of identifying — persons by name — rule as to.

§ 2. The former rule, as above intimated, that the identity of name was evidence of the identity of the person, is not now enforced, except perhaps in the examination of records to trace a chain of title to real estate, and a few other exceptional cases, in which it raises a mere presumption. The rule in England seems to be, that as between parties to actions, the identity of name alone is sufficient to throw the *onus probandi* upon the defendant, to show that he is not the person spoken of.[1] Where the death of a plaintiff was suggested, and records of the court of the county where he had resided, showed that letters of administration were granted on the estate of a person of the same name, it was held sufficient to revive the action in the name of the administrator of his estate.[2] And it was held in England and also in Massachusetts, that where the name, the residence and the occupation, trade or profession of the party defendant to an action, were the same, the *onus* was thrown upon him to disprove the identity.[3] *

Personal identity by personal appearance.

§ 3. This branch of the subject, simple as it may seem, and free from difficulty in the estimation of those unaccustomed to reasoning

[1] Hamber v. Roberts, 7 C. B. 861; 18 L. J. Rep. (N. S.) C. P. 250 See § 183.
[2] Clark v. Pearson, 53 Ga. 496.
[3] Com. v. Costello, 120 Mass. 369; Russell v. Smyth, 9 M. & W. 818.

* Most of the matters in this introduction will be more fully considered hereafter.

on the subject, is, on the contrary, perhaps one of the most difficult questions with which courts and juries are called upon to deal. The change in the appearance of the person whose identity is in question, wrought by age, mode of life, hardships, toil and care, sometimes coupled with a skillful disguise. Again, the want of perception and discrimination in the identifying witnesses; these and numerous other causes have led to numerous cases of mistaken identity, both in ancient and modern times, and in all civilized countries, as we shall see, in both civil and criminal causes. Sometimes position and estates are acquired by fraud, and again, the innocent is punished, and not unfrequently the guilty escapes, from a mistake in the personal identity. These questions are fraught with their dangerous consequences, and difficult in their solution, and are of the greatest importance in the affairs of men. But where is the remedy? It lies alone in caution and prudence. Observation and sad experience admonish courts and juries to the use of the utmost care, caution and prudence.

Same — means of knowledge — proof to be made.

§ 4. Personal identity is not even to be presumed from appearance, whether it indicates youth or age. One indicted for profanation of the Sabbath, under a statute prohibiting labor on that day, by a person upwards of fourteen years of age. Though on the trial he appeared to be a full-grown man, it was not sufficient, because the proof did not show that he was of the age prescribed.[1] The size of a person most generally makes the first, and perhaps the most durable impression upon the observer, when applied to the person to be identified, whether excessive in size or diminutive, yet this may as a circumstance alone have but little if any weight, for many and obvious reasons.[2] One of the striking illustrations of the uncertainty of evidence of personal identity by appearance was the Tichborne case in England, which lasted one hundred and three days. A roving impostor (to take the adverse view) claimed to be Tichborne, and proved himself so to be, by eighty-five witnesses, comprising Tichborne's mother the family solicitor, one baronet, six magistrates, one general, three colonels, one major, two captains, thirty-two non-commissioned officers and privates, four clergymen, seven tenants, and seventeen servants. And nearly as many swore that he was another man.[3] And his case broke down on cross-examination.

[1] Stephenson v. State, 28 Ind. 272.
[2] Barbot's case, 18 State Trials, 1267; Rex v. Brook, 31 id. 1124.
[3] Tichborne case, see § 613, note.

Same — uncertainty of personal identity.

§ 5. An interesting case, which will appear more at length hereafter, occurred in New York and was tried in 1801. Thomas Hoag, *alias* Joseph Parker, was indicted for bigamy, and Parker was tried and acquitted. The question was solely one of identity. About twenty witnesses, well acquainted with Hoag, swore positively that the prisoner was Hoag, while nearly an equal number swore that it was not Hoag, but Parker.[1] It has been well said that permanency of individuality must be the law, in all questions as to the inferences of identity. Then we must assume that no two persons are exactly similar in every particular. Time leaves its marks on every individual, and the testimony of the most discriminating witness, after a lapse of time, can establish personal identity, at best, but imperfectly, and where a very striking resemblance is supposed to exist, it is often more probable that the witness is mistaken than that the resemblance really exists. A person may, by a skilful disguise, deceive for a time the most discriminating of identifying witnesses. Persons change by illness, accident, loss of voice, loss of teeth, affecting articulation. Indeed, in some cases personal identity has been established by the voice alone, but this must be unsatisfactory.[2]

Same — by circumstances — opinion evidence.

§ 6. At an early period in life two persons may be undistinguishable; by divergence they assume distinctive types, and the presumption that they will continue the same grows weaker, and cannot be extended to the question of identity further than to imply such continuance, subject to the changes necessarily wrought by the relentless hand of time. The identity of persons by their appearance and by closest examination and scrutiny seems to be far from satisfactory, certain or conclusive. Apart from this, as a means of knowledge, personal identity is most frequently established by circumstances and by opinion evidence; the latter of which is often admissible to prove identity, and this is an exception to the general rule which excludes the opinions of all witnesses except experts.[3] And very frequently in criminal cases, as we shall see, by circumstantial evidence which points to the accused as the perpetrator of the crime while a single

[1] People v. Hoag, 5 City H. Rec. 124. And see Ram on Facts, 442.

[2] Brown v. Com., 76 Pa. St. 319; Com. v. Scott, 123 Mass. 222.

[3] Kearney v. Farrell, 28 Conn. 317; Bennett v. Meehan, 83 Ind. 569; State v. Folwell, 14 Kan. 105; Currier v. R. R. Co., 34 N. H. 498; Barnes v. Ingalls, 39 Ala. 193; Brink v. Ins. Co., 49 Vt. 442.

circumstance may be weak, a combination of circumstances, all corroborating, may establish identity.

Same — opinion evidence — when admissible.

§ 7. Evidence of identity, when given in the most positive and direct manner, is often but the mere opinion of the witness, and hence he is required to give the facts upon which he based his statement, as the jury have a right to it to aid them in their determination of the matter in issue.[1] The opinion of a non-expert witness was held to be competent evidence, even as to the soundness of a person's mind, he having stated the facts upon which he based such opinion.[2] But in Connecticut, in a trial for burglary, the court admitted the opinion of witnesses on the question of identity, and then instructed the jury to act upon the weight or preponderance of testimony as to the identity. This was held to be error because it excluded from the jury the question of reasonable doubts.[3] It is now the rule in most of our States to admit the opinion of non-expert witnesses on all questions of identity, whether it be of persons or things; and as an exception to the general rule of evidence, is deemed worthy of a chapter in this work, to show where the exception applies.[4]

Circumstantial evidence — identity of accused.

§ 8. Where a homicide is committed in the presence of others, as it often occurs, there may be no question of the identity of either the deceased or the accused; but where a dead body is found, there are often three important questions — the identity of the deceased, was he murdered? and who did it? the latter involving the identity of the perpetrator of the crime; for the investigation, if the killing is recent, the first thing is to look for tracks, and for blood-stains, and for weapons or instruments of violence; if tracks are found, how many, their measurement, in what direction they were going or coming; if blood-stains, in what direction from the dead body; if weapons are found, did they belong to the deceased or to the accused?

[1] Whart. Cr. Ev., § 807; Jones v. White, 11 Humph. 268.

[2] State v. Newlin, 69 Ind. 108.

[3] State v. Morris, 47 Conn. 179.

[4] Cunningham v. Bank, 21 Wend. 557; Com. v. Dowdican, 114 Mass. 257; Hallahan v. R. R. Co., 102 N. Y. 194; Cooper v. State, 23 Tex. 339; Cottrill v. Myrick, 3 Fairfield (Me.), 322; People v. Rolfe, 61 Cal. 541; State v. Vittum, 9 N. H. 519; Holten v. Board, etc., 55 Ind. 194; Elliott v. Van Buren, 33 Mich. 49, Funston v. R. R. Co., 61 Iowa, 452; Colee v. State, 75 Ind. 511; Alexander v. Town of Mt. Sterling, 71 Ill. 366; Clifford v. Richardson, 18 Vt. 620; Cooper v. State, 53 Miss. 393; Curtis v. R. R. Co., 18 Wis. 327; Tate v. R. R. Co., 64 Mo. 149.

Any of these circumstances, though very slight, and wholly insufficient, except to arouse suspicion, will yet direct attention and limit the inquiry, and may lead to a combination of circumstances all pointing in one direction, and may be sufficiently strong to justify the arrest of the supposed perpetrator. Then if the tracks correspond; if there is any thing belonging to the accused found near the dead body; or any thing belonging to the deceased found in the possession of the accused, — these circumstances strengthen suspicion and render his guilt almost reasonably certain.

Tracks found near the scene of the crime — evidence.

§ 9. Where an assault was made, on a dark night, upon a man in his bed, the only question for the Supreme Court was the instructions to the jury and the identity of the accused; tracks were found near the scene, made in the dust by an old boot or shoe which had a hole in the bottom; counsel insisted that the shoe could not make such a track as described. On the next morning, after the jury retired and before verdict, one of the jurors amused himself with an old shoe, making tracks in the dust by way of experimenting; for this reason the conviction was set aside.[1] Where the deceased was sitting in his room at night he was shot through the window and killed; tracks were found on a flower-bed outside, under the window, which led to the discovery of the murderer.[2] The number of the tracks and the direction is sometimes of the greatest importance, when taken together with other surrounding circumstances.[3] In the case of Mrs. Arden and others who were convicted of the murder of her husband in England in 1551, it appeared that the crime was committed in the house and the body carried into an adjoining field and left. Snow having fallen, it was seen that there were tracks only from the house to the dead body; this limited the inquiry to the house, where new and conclusive indications of guilt were discovered.[4] Mr. Burrill gives a singular case of identification. Impressions were found in the soil near the scene of the crime, of the knee of a man who had worn pants of striped corduroy, and patched with same material, but the patch was not set on straight, and the ribs of the patch meeting the hollows of the garment into which it had been inserted, and this corresponded with prisoner's pants.[5]

[1] State v. Sanders, 68 Mo. 202.
[2] Linsday v. People, 63 N. Y. 145.
[3] Cicely v. State, 13 S. & M. (Miss.) 202, 219.
[4] London Legal Observer, 59.
[5] Burrill Cir. Ev. 269.

Clothing of deceased exhibited to the jury.

§ 10. Perhaps, as a means of identifying a person, living or dead, or for whatever purpose, the clothing worn is first to be observed. On a trial for murder in Indiana, the trial court permitted the clothing worn by the deceased at the time of the renconter which resulted in his death, to be exhibited to the jury, and this was held to be proper; they may shed some light upon the character of the wounds and the manner of their infliction; or, where the pockets are cut or turned inside out, it may show the motive.[1] And in Texas, where a murder was committed by shooting, the clothing worn by the deceased were put in evidence, and the shot holes exhibited to the jury, and it was not a valid objection that the clothes could not be sent up in the record of the evidence.[2] A similar ruling was held in the same State in a former case.[3] The garment worn by the deceased at the time of the shooting was exhibited to the jury to show the position of the slayer. This was admissible.[4] In still another case, the deceased was identified by his overcoat, coat, pants, vest, hat, etc. This was held correct.[5] And in Missouri, it was held proper to permit the jury to inspect blood-stains on clothing worn by the deceased at the time he was killed.[6]

Same — dress — identity of person — murder — rape.

§ 11. In Missouri, on a trial for murder, it was sought to show the presence of the accused at the time and place of the homicide by showing the identity of a shirt with blood-stains on it, which was found the next morning at the scene of the crime, identified with the shirt worn by the accused on the previous day, but the prosecution failed to fully identify the shirt as that of the accused.[6] In Massachusetts, a party was tried for rape; after the alleged act he was pursued; from the description given of him by the prosecutrix describing his dress, the information was obtained which led to his arrest. Persons who described the dress to those in pursuit, were held competent witnesses for the defendant, to show that the dress so described differed from that worn by him at the time they saw him on the day of the alleged crime.[7]

[1] Story v. State, 99 Ind. 413. And see McDonel v. State, 90 id. 320; Short v. State, 63 id. 376; Beavers v. State, 58 id. 530.

[2] Hart v. State, 15 Tex. App. 202.

[3] King v. State, 13 Tex. App. 280.

[4] Early v. State, 9 Tex. App. 476.

[5] State v. Stair, 87 Mo. 268.

[6] State v. Houser, 28 Mo. 233.

[7] Com. v. Reardon, 4 Gray, 420.

Personal identity by photographs — various purposes.

§ 12. Plans and diagrams were often received in evidence long before the invention of photographs, even in murder cases, when properly authenticated, and parol evidence of buildings, monuments, and all such objects, because they could not be brought into court to exhibit to the court and jury.[1] And in England, pictures and inscriptions were resorted to as evidence to prove pedigree, for want of better identification.[2] And more recently the pictures of the living and the dead have been used in the courts of this country as evidence, when the original could not be produced in court; but it is resorted to as secondary evidence, and must be brought within the rule admitting secondary evidence.[3] They have been used in cases of bigamy, to identify the first husband of the defendant.[4] Two photographs of a child were exhibited to show state of health before and after neglect and ill-treatment.[5] And in an action on a life insurance policy, to show the state of health of the insured and deceased a week before filing the application.[6] And in a murder case where the deceased was killed for the purpose of collecting his life insurance.[7] In all such cases it must be shown that the photograph is a good likeness of the original; but it was held in Alabama, that such proof might be made by the subject, if living, though he be a non-expert.[8] And they are now being used to test the genuineness of handwritings and signatures to documents for the purpose of identifying them,[9] and for the copying and identification of records.[10]

Personal identity by the voice — when admissible.

§ 13. Persons may be, and have been identified by the voice; as in Massachusetts on the trial of a party for burglary, two witnesses swore positively to the identity of the accused, by his voice alone, and he was convicted, and it was sustained, on writ of error.[11] But where, in New York, the prisoner was indicted for the murder of

[1] Shook v. Pate, 50 Ala. 91; Stuart v. Binsse, 10 Bosw. (N. Y.) 436; Wood v. Willard, 36 Vt. 82; Vilas v. Reynolds, 6 Wis. 214; Jones v. Tarleton, 9 M. & W. 675; Reg. v. Fursey, 6 Carr. & P. 84; Blair v. Pelham, 118 Mass. 420; Gavigan v. State, 55 Miss. 533.

[2] Camoys Peerage case, 6 Clark & F. 801 (1839).

[3] Ruloff v. People, 45 N. Y. 213.

[4] Reg. v. Tolson, 4 Fost. & Fin. 103 (1864).

[5] Cowley v. People, 83 N. Y. 464 (1881).

[6] Schaible v. Life Ins. Co., 9 Phila. Rep. 136.

[7] Udderzook v. Com., 76 Pa. St. 340. And see State v. Vincent, 24 Iowa, 570.

[8] Barnes v. Ingalls, 39 Ala. 193.

[9] Beavers v. State, 58 Ind. 530, 535; Matter of Foster's Will, 34 Mich. 21.

[10] Leathers v. Salvor Wrecking Co., 2 Wood C. C. 680.

[11] Com. v. Williams, 105 Mass. 63.

his wife, a witness said he heard cries from the house of the prisoner, he was permitted to testify as to the nature of the cries, whether for joy or grief; this was held to be error.[1] An Alabama case, not in the official reports, as it did not go to the court of last resort, but appeared in a law journal, presents a question of some interest on this branch of the subject.[2] While evidence of identity by merely hearing the voice, may not be the most reliable, it has been often received.

Same — rule in Texas — arson — and Massachusetts — attempt at arson.

§ 14. In a Texas case on an indictment for arson in the burning of a house and fences in the night-time, the owner hurried to the scene, and was shot at by the accused, he returned the fire, when he heard bitter oaths and vociferations emanating from the accused, whose voice he recognized and identified, having known him for thirteen years and lived within half a mile of him for many years. The court held that positive recognition of the defendant's voice, by one who was familiar with it, might suffice to identify the guilty party.[3] In a Massachusetts case the accused was indicted for an attempt at arson in burning a house belonging to one Farnham, whose wife testified that she heard the voice of the accused on the day before the attempt at night, had heard it but the one time, and again that night, and recognized it and could identify it. This was held competent.[4]

Dead bodies — identification thereof.

§ 15. The identity of the deceased, when the dead body is found, either mutilated or decomposed, in the water or on the land, often presents the most perplexing questions; and these arise in various forms. And the identity of the deceased is the first step to be taken toward the proof of the *corpus delicti*, which must be proved before any conviction can be had. The difficulty and uncertainty in making this proof, in many cases, and numerous cases of mistaken identity, seems to have induced the legislature of New York to enact a law on the subject, which statute has been construed by the court.[5] Where a dead body is found and identified, and this becomes an important question on the trial of the accused, the *onus* is then

[1] Messner v. People, 45 N. Y. 1.
[2] Southern Law Journal, vol. 1, page 395 (1880).
[3] Davis v. State, 15 Tex. App. 594.
[4] Com. v. Hayes, 138 Mass. 185 (1885).
[5] People v. Palmer, 109 N. Y. 110. And see New York Penal Code, § 181.

thrown upon him to show that the alleged deceased is still living, *i. e.*, to prove an *alibi* of the alleged deceased.[1] This question in this connection arose in an important case in Texas.[2] Where the dead body is decomposed beyond recognition, the identity must depend upon other circumstances than the features as once recognized.[3] If nothing but the body is found, it may often be identified by peculiar marks, with corroborating circumstances which lead to a satisfactory conclusion as to the identification.[4]

Same — body when burnt or drowned.

§ 16. In a Mississippi case, where the face of the deceased had been eaten by the hogs, the body was very readily identified by his clothing and other circumstances, and the only question was the identity of the accused.[5] In a North Carolina case, the body, it appeared, had been burnt, and nothing was found except a few bones, teeth and hair-pins, etc. These, with other circumstances, identified the remains, and also the accused as the perpetrator of the crime.[6] The greatest difficulty arises, perhaps, in identifying a dead body found in the water, whether it was drowned, or thrown into the water after death. The most scientific experts may fail to determine the real cause of the death.[7]

Same —identification of dead body by the teeth.

§ 17. We often complain of decayed teeth, and resort to the dentist. But it seems from observation and scientific tests, that after death, when the human remains have mingled with the dust, or been consumed by fire, the teeth remain, and may be identified, and the dentist may recognize and identify his work on the teeth, performed in the life-time of the subject.[8] And what is remarkable, this rule holds good in the case of artificial teeth; as it appeared in one case, eleven years after burial, the body was identified by the artificial teeth which had been fully described before exhumation.[9] In an English case, after the body had been buried twenty-three years, the wife of the deceased identified it by some peculiarity of the teeth,

[1] State v. Vincent, 24 Iowa, 570.
[2] Hamby v. State, 36 Tex. 523.
[3] Wharton & Stille Med. Jur., vol. 3, §§ 385, 391.
[4] Rex v. Clewes, 4 Carr. & P. 221. And see Webster's case, Bemis' Rep. 80, 84, 85, 87.
[5] McCann v. State, 13 S. & M. (Miss.) 472, 478.
[6] State v. Williams, 7 Jones L. (N. C.) 446. And see Webster's case, *supra*.
[7] Wharton Cr. Ev. (8th ed.), § 804, note.
[8] Webster's case, Bemis' Rep. 80, 84, 85, 87; State v. Williams, 7 Jones (N. C.), 446.
[9] Whart. Cr. Ev. (8th ed.), § 805, note; Rex v. Clewes, 4 Carr. & P. 221.

which remained sound during that long period.[1] A dead body in New York was identified, six months after death, by the testimony of a dentist, by a peculiarity of the teeth.[2] It appeared from the examination and statement of experts, in an English case involving the question of identity, that the age of a person may be ascertained quite accurately by a careful examination of the teeth.[3] As to the "wisdom teeth," COCKBURN, C. J., in the Tichborne case, is quoted as saying: "they are last to come and first to go."

Land — identified by deed — rule as to.

§ 18. Where real estate is conveyed by deed, the boundaries given therein identify the particular piece, parcel or tract intended to be conveyed. And it may be identified by name, by number, by known monuments or by metes and bounds, and where there are two descriptions in the deed, one of which is general, and the other particular, and the latter is incorrect, it may be rejected as surplusage, if enough remains to pass the title.[4] The description may as well be by monuments as by any other identification, and where there are two separate and distinct descriptions given in the deed of conveyance for greater certainty, one by monuments, such as stakes, trees, rocks or stones, and the other by courses and distances, and they are contradictory, conflicting or irreconcilable, the courses and distances must yield to the monuments.[5]

Realty — bounded on a pond — ditch cut on land.

§ 19. It was held in New York that where a land-owner, through whose land a stream ran, cut a ditch and changed the course of the stream, and subsequently sold to another the land through which the natural channel ran, and upon which the burden of the stream was cast, the vendee holds it according to its changed condition, with such burden on it.[6] In Massachusetts a deed described the land as bounded by a pond; it was found that the pond was a natural one, and raised more or less at different times by a dam existing at the date of the deed; being thus ambignous, parol evidence was admissible to prove an agreement as to the boundary of the pond.[7]

[1] Rex v. Clewes, 4 Carr. & P. 221.
[2] Linsday v. People, 63 N. Y. 143.
[3] Whart. & Stille Med. Jur., § 632.
[4] Mosley v. Massey, 8 East, 149; Rumbold v. Rumbold, 3 Ves. Jr. 65; Hull v. Fuller, 7 Vt. 100; Lyman v. Loomis, 5 N. H. 408; Jackson v. Moore, 6 Cow. 702; Bott v. Burnell, 11 Mass. 163; Smith v. Strong, 14 Pick. 128; Mason v. White, 11 Barb. 173.
[5] Washb. Real Prop. (5th ed.) 427; Frost v. Spaulding, 19 Pick. 445; Davis v. Rainsford, 17 Mass. 209.
[6] Roberts v. Roberts, 55 N. Y. 275.
[7] Waterman v. Johnson, 13 Pick. 261.

Same — bounded on river — not navigable — general rule.

§ 20. Where land is described as bounded by a river on one side, which river is not navigable, and the line ran to the bank thereof, and by and along said stream or bank, it extends to the middle or center of the stream, unless it is otherwise specially provided in the deed or description.[1] The rule of construction of all deeds of conveyance is to ascertain, if possible, the intent and meaning of the parties, and give it effect if it can be done without violating the recognized rule of law.[2] It is held that *what* the boundaries of land *are* is a question of *law*, but *where* the boundaries of the land *are* is a question of *fact* for the jury, and parol testimony is always admissible.[3]

When river the dividing line.

§ 21. Where a fresh-water river is made the dividing line between two riparian possessors, the middle or center of the stream is the lineal partition, *i. e.*, each one owns to the middle or center of the stream, in the absence of some terms expressing a different intent.[4] Not only is this true, but where the riparian owner possesses lands on both sides of such a stream, he owns the stream co-extensive with the boundaries of his land, and he may convey the stream without the soil, or the soil without the stream, by express grant. But if he sells the land on one side of such stream, his grantee will take to the center of the stream, in the absence of some expression indicating a contrary intention in the grant.[5] Where A. sold to B. one hundred and sixty acres, part of a large tract of land, with no further or better description than this, it was held that the grantee had the right to locate that quantity in any part of the tract he saw proper, upon the principle that a conveyance must pass an interest, if such effect can consistently and legally be given to it, and if uncertain and ambiguous, it must receive a construction most strongly against the grantor therein.[6]

Requisites — description — tax deed — construction.

§ 22. Where land was described in a deed, called for an old line "from A. down the bottom with Hill's line to a forked white oak,"

[1] Yates v. Judd, 18 Wis. 128; Comrs. v. Kempshall, 26 Wend. 404; Hatch v. Dwight, 17 Mass. 289; Morrison v. Keen, 3 Me. 474; Morgan v. Reading, 3 S. & M. (Miss.) 366; State v. Gilmanton, 9 N. H. 461; Arnold v. Elmore, 16 Wis. 536; Browne v. Kennedy, 5 Harr. & J. 195; People v. Platt, 17 Johns. 195.

[2] Peyton v. Ayres, 2 Md. Ch. Rep. 64; Hamner v. Smith, 22 Ala. 433.

[3] Abbott v. Abbott, 51 Me. 581.

[4] Muller v. Landa, 31 Tex. 265.

[5] Knight v. Wilder, 2 Cush. 199.

[6] Wofford v. McKinna, 23 Tex. 45.

and it was uncertain what bottom was meant, the question of identity was one of fact for the jury.[1] Where taxable land was described by saying "Cooper, James, 5 acres, section 24, T. 4, F. R. 1," and sold by such description for taxes, the deed was void for want of identity.[2] In the sale of land for taxes, the validity of the deed depends upon a compliance with the statute, and a defective description of land in the assessment cannot be cured by the tax deed.[3] A deed should be construed with reference to the state of the property in its then condition, as the parties are presumed to have so intended to refer.[4]

Personal property — necessity for identification.

§ 23. Having noticed a few of the points involved in the identification of real property, let us give a passing notice, in this brief introduction, to the necessity for, and the means of identifying personal property; this is sometimes almost as difficult as the question of personal identity. In chattel mortgages and deeds of trust or bills of sale, the property should be sufficiently described and identified as to make the record thereof a notice to third persons who may desire to deal with the grantor in relation thereto; that he may know what specific property was conveyed, this for the protection of the mortgagee, and if he neglects to look to it, he does so at his peril. His security, intended to be afforded by the conveyance, often depends upon the proper identification of the property, as much so as though it was real estate. But it is said that "where the description in a chattel mortgage is correct as far as it goes, but fails fully to point out and identify the property intended to be covered, a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument itself could be deemed reasonably to suggest."[5] This rule is general; it may protect the mortgagee, if it is sufficient to put intended purchasers upon their inquiry, for if they then fail to inquire, they are charged with such information as the inquiry would have elicited.

Description — mules — horses — oxen.

§ 24. Where the mortgage described the property as "one black mule about eight years old," it was held that these words were not so general and indefinite as to render it void, or to exclude it as evi-

[1] Baynard v. Eddings, 2 Strobh. (S. C.) 374.
[2] Raymond v. Longworth, 14 How. (U. S.) 76.
[3] Turney v. Yeoman, 16 Ohio, 24.
[4] Adams v. Frothingham, 3 Mass. 352.
[5] Yant v. Harvey, 55 Iowa, 421.

dence when properly recorded.[1] Where the mortgage attempted to convey a mare, and described her as having "four white legs," when in fact she had but one white foot to the pastern joint, and a little white on another foot, it was held insufficient to identify the mare.[2] In Michigan, a chattel mortgage described the property as all the cattle, etc., consisting of two yoke, aged six and seven years, color "red, white and blue." This was held sufficient, and that it was not necessary that each one should be "red, white and blue."[3] Where the mortgage described the property as a black mare mule, and the witness said a "mouse-colored mare mule," it was held that the variance was too slight to be fatal.[4]

Animals described — chattel mortgage — sufficiency.

§ 25. A chattel mortgage attempted to convey among other things "three four-year old horses" and described as being in the possession of the mortgagor. The court held it to be a general rule, that if the description of the property is sufficient when it, aided by inquiry which the instrument suggests, will identify the property.[5] Where the mortgage conveying cattle described them incorrectly as to their ages, and the evidence showed what cattle were intended to be conveyed, it was not void where the party claiming in opposition to the mortgage was not misled by the erroneous description, and could not have been, in the exercise of ordinary care.[6] A mortgagee brought suit to recover two mules, describing them as "two brown female mules." The answer set up that the only claim plaintiff had was founded on a mortgage conveying "two mule colts, one year old next spring," no other description given. It was held sufficient, and that any description which would enable third persons, aided by inquiries which the instrument indicates, to identify the property was sufficient.[7]

Animals and other personalty.

§ 26. Action was brought to recover possession of "one bay mare, one hind foot white, and white spot in face, branded 'G' 17 hands high, five years old, formerly the property of John Hamerberg." This was partially untrue, as the mare was branded "J" instead of "G" and 15¾ hands high, instead of "17," yet it was held

[1] Connally v. Spragins, 66 Ala. 258.
[2] Rowley v. Bartholemew, 37 Iowa, 374.
[3] Fordyce v. Neal, 40 Mich. 705.
[4] Tompkins v. Henderson & Co., 83 Ala. 391.
[5] Tolbert v. Horton, 33 Minn. 104.
[6] Harris v. Kennedy, 48 Wis. 500.
[7] Tindall v. Wasson, 74 Ind. 495; Smith v. McLean, 24 Iowa, 322.

valid, as it applied to the mare in so many particulars, and did not apply to any other animal. Where the chattel mortgage described the property as, "one bay mare, one cow, one chaise and harness, one sleigh, robes and harness, one saddle and bridle, all the farming tools and other personal property in and about the barn and premises at Herbert Hall; all the furniture, and all the articles of personal property in and about Herbert Hall so called," a family carriage belonging to the grantor and on the premises was held to pass by the mortgage, under the above description, as being sufficiently identified.[1] In Michigan, a mortgage conveying a bull, described him as, "one Durham bull known as the Gramalls bull, said bull is four years old, and weighs 2,400 pounds." COOLEY, Ch. J., was of opinion that the bull was sufficiently identified.[2]

Description — what to include — uncertainty.

§ 27. Where a stock of goods was mortgaged, and described as "the goods and chattels now in my store in Brunswick, a schedule of which is hereto annexed," and dated Dec. 29, 1868, defendant claimed under a prior mortgage of August 8, 1864. The above description, however, was in the defendant's mortgage, and was held sufficient to cover the goods.[3] Where the lease of a store building made the rent a lien on "any and all goods, wares and merchandise therein or thereafter to be put in, on or about the building," it was held not to include teams and wagons used by the lessee in delivering goods to customers, nor notes and accounts due him and kept in the building.[4] A mortgage upon a stated quantity of mixed logs in the drove was held void for uncertainty, as against the rights of third parties, if it does not furnish a *data* for separating them from the mass.[5]

Same — when valid — false description.

§ 28. Where the mortgaged property was described as "one four-horse iron-axle wagon," it was held insufficient as against subsequent purchasers or incumbrancers.[6] Where a mortgage conveyed "all the staves I have in Monterey, the same I had of Moses Fargo." He had no staves in Monterey, but had staves in Sandisfield township adjoining Monterey, which he "had" of Moses Fargo. Held suffi-

[1] Goulding v. Swett, 13 Gray, 517.
[2] Willey v. Snyder, 34 Mich. 60.
[3] Partridge v. White, 59 Me. 564.
[4] Van Patten v. Leonard, 55 Iowa, 520. And see Vawter v. Griffin, 40 Ind. 593.
[5] Richardson v. Lumber Co., 40 Mich. 203.
[6] Nicholson v. Karpe, 58 Miss. 34.

ciently identified.[1] A mortgage was held valid, conveying "all and singular the stock and chattels belonging to him, in and about the wheelwright shop occupied by him."[2] Where property is sufficiently described by the terms used in the instrument, a false mention of some particulars, as to the intention of the parties, will not defeat the mortgage; it may be rejected as surplusage.[3] And this is the rule we have seen laid down in the identification of real estate in case of two descriptions, one general, the other particular; if the latter be erroneous, it may be rejected, if enough remains of the former to uphold and validate the instrument, and pass the title; and there seems to be no valid reason why the same rule should not apply to personalty.

Stolen property — identity of — marks and brands.

§ 29. Having noticed briefly a few points relative to the identification of personal property when conveyed by chattel mortgage or deed of trust, which is controlled mainly by the instrument itself, we may, in this introductory chapter, take a hasty glance at the identity of personal property, where it is in dispute, as the subject of larceny, robbery or burglary. And first, as to larceny; in which case, as in all crimes and misdemeanors, the *corpus delicti* must be first proved, and herein, the owner, and the identity of the property alleged to have been stolen. When cattle are stolen, they may be identified in various ways, but in a cattle-raising country, often by marks or brands. In an indictment for stealing a "beef steer," the unrecorded marks were competent evidence in proof of identity and ownership.[4] And for stealing a "steer" which was identified by the brand, evidence showing the character and description of the brand was competent, though not recorded. In one case in Texas, under indictment for stealing a hog, the case was complicated by the necessity of identifying both prisoner and hog.[5]

Same — cattle, etc. — rule in Texas and North Carolina.

§ 30. An indictment charged the accused with stealing a cow, the property of one E. N. Wilson. But the proof showed that the cow was taken from the possession of one Fernandez, in charge of Wilson's ranch. This was held to be a fatal variance.[6] In another

[1] Pettis v. Kellogg, 7 Cush. 456.
[2] Harding v. Coburn, 12 Metc. 333.
[3] Bryan v. Faucett, 65 N. C. 650.
[4] Johnson v. State, 1 Tex. App. 333.
[5] Kelly v. State, 1 Tex. App. 628.
[6] Alexander v. State, 24 Tex. App. 126.

Texas case, for stealing a cow, the difficulty arose in the identification of the accused. When the owner missed the cow, he found the skin on premises occupied by several parties as tenants, and it remained in doubt who did the stealing, and there could be, of course, no conviction.[1] One Bishop was indicted in North Carolina for stealing a leather trunk, containing, among other things, a new fifty dollar bill, on a certain bank; about two months thereafter, the prisoner exchanged such a bill on the same bank to one Charles, cautioning him (Charles) not to use his name in relation to the bill. The prisoner being usually destitute of money he was convicted, upon this circumstance of the identity of the money.[2]

Money — cask — proof — production — identity.

§ 31. In an indictment for the larceny of paper money, the actual production of the money in court is often dispensed with, and necessarily so, because, in many cases, it may have passed through many hands, been deposited in banks or remitted elsewhere, and lost sight of, so as to render its identity impossible, while the circumstances of the theft point unerringly to the accused. As, for instance, the fact of the accused having and using larger sums of money, such as was lost, immediately, or soon after the larceny, whereas, before that time, he had been in adverse circumstances — destitute of money — hopelessly insolvent, and wrecked upon the reef of impecuniosity.[3] But these circumstances may not be sufficient, as circumstantial evidence, because they may not exclude every other hypothesis. As to the larceny of goods alleged to have been stolen, there may be mistake in their identity, as well as in the identity of persons. A respectable farmer in England was indicted for the larceny of a pair of sheets and a cask, proved to be the property of the prosecutor, by marks thereon; as to the cask, it was marked "P. C. 84," but they both had casks with the same mark, and there could be no conviction.[4]

Larceny — requisites — identity of owner and goods.

§ 32. In all indictments for larceny, it must be shown that the goods were lost, the name of the owner must be proved as laid in the indictment, then there remain two important questions — the identity of the goods and of the accused.[5] And so if a party is indicted for stealing a "black horse," he cannot be convicted if the evidence

[1] Curry v. State, 7 Tex. App. 267.
[2] State v. Bishop, 73 N. C. 44.
[3] Com. v. Montgomery, 11 Metc. 534; Burrill Circum. Ev. 658.
[4] 1 Wills Circum. Ev. 128.
[5] State v. Somerville, 21 Me. 14; Robinson v. State, 1 Kelly (Ga.), 563.

upon the trial clearly shows that it was "a horse of another color."[1] And where the indictment charged the defendant with stealing nineteen shillings in money, it was not supported by proof that he stole a sovereign in gold.[2] The variance between the allegation and the proof is fatal, wherever it fails to identify the property as laid in the indictment. And the goods or property must be shown to be those of the owner as it is alleged. He must have an absolute or special property in them.[3] Otherwise it is generally held that there can be no conviction.

Portable goods brought into court for identification.

§ 33. A junk dealer in Illinois was tried for receiving stolen goods, knowing them to be such; the articles were twelve "brass couplings," belonging to a railroad company, used for coupling engine hose. The court permitted them to be brought in and examined before the jury. He was convicted, but it was reversed, because the case as made, though *prima facie*, was not conclusive.[4] It is generally permitted in this country and in England to permit portable goods and property to be brought into court for identification, both in civil and criminal practice, where it is safe and convenient to do so — such as burglar's tools used in his trade; or weapons used by a murderer;[5] or children in cases of bastardy.[6] And where a party was sued for the detention of a dog, and after other witnesses had been called, plaintiff was permitted to *call the dog*.[7] Another dog came into court in an English case, in which it was alleged that the defendant kept a *vicious* and *mischievous*, biting dog; and he was permitted to bring the dog into court, that the jury might see that "he was gentle, he was kind," and in all things free from vice; this was held correct.[8]

Burglary — larceny by millers — adulteration.

§ 34. On the trial of an indictment for burglary in New York, among other property taken was a box of goods, which were recovered in the express office in Boston. The box and contents were produced in evidence and identified.[9] We find two cases of larceny by millers — one in England,[10] and the other in Massachusetts.[11]

[1] 2 Starkie Ev. 1531.
[2] 2 Archbold Pl. and Ev. 226.
[3] 2 Archbold Cr. Pl. and Ev. 342.
[4] Jupitz v. People, 34 Ill. 516.
[5] Com. v. Webster, 5 Cush. 295.
[6] State v. Britt, 78 N. C. 439; Risk v. State, 19 Ind. 152.
[7] Lewis v. Hartley, 7 Carr. & P. 405.
[8] Line v. Taylor, 3 Fost. & Fin. 731.
[9] Foster v. People, 63 N. Y. 619.
[10] Com. v. James, 1 Pick. 375.
[11] Rex v. Haynes, 4 Maule & S. 214.

In each case it was charged that the defendant retained part of the grist and adulterated the balance. In the English case the indictment was held to be bad for want of sufficient identification. In the latter case the identity was held sufficient. The matters referred to in this brief introductory chapter have received little more than a mere passing notice. Most of them will be referred to in their order, and be more fully considered hereafter.

CHAPTER II.

IDENTIFICATION OF PERSONS.

SEC.
35. Identified by the voice — rule in Texas — arson.
36. Same — rule in Massachusetts — attempt at arson.
37. Recognition by the voice — rule in Massachusetts and New York.
38. Recognition by the voice — identity.
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40. Dissimilarity of persons — proof of identity — assurance.
41. Personal identity — flash of a gun or pistol in the dark.
42. Same — a later English case — identity.
43. Same — experiments by professors — experts.
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52. Ancestor—identity of—claim to land.
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55. Bigamy — perjury — weight of evidence.
56. Name in deeds — presumption of identity.
57. Instruments of crime — personal identity.
58. Size of the person to be identified.
59. Personal appearance — peculiarities.
60. Instrument used by criminal — identity.
61. Impressions made by the teeth.
62. Bastardy — evidence of identity — rule in Maine.
63. Same — rule in Indiana.
64. Seduction — administering drugs.
65. Bastardy — criminal conversation.
66. Legitimacy—bastardy—rule in North Carolina.
67. Bastardy — identity — rule of evidence.
68. Bank check — false representation — risk.
69. Retailing and larceny — personal identity.
70. Circumstantial evidence of personal identity.
71. Larceny of a package of money — identity of the thief.
72. Fictitious appeal bond—indictment.
73. Rape—identity of accused—clothes.
74. Threat to take life — verdict.
75. Circumstantial evidence of identity.
76. Personal appearance — human identity — evidence.

Identified by the voice — rule in Texas — arson.

§ 35. In a case of arson in Texas it was held that positive recognition of the defendant's voice, by one who was familiar with it, might suffice to identify the guilty party. H. Smith testified that he was in his house about nine o'clock at night of February 19, 1883, when he discovered that a vacant house on his farm, about four hundred yards from his own residence, was on fire. He sent two negroes to extinguish the fire, but having failed, they returned. He then discovered that two sides of his field fence were on fire, and heard guns firing in the field. He took his gun and went to the field, passed the burning

house, when some one fired on him; he returned the fire, shooting three times; the other party fired five or six times. Smith saw no one, but heard the voice of Phil. Davis, saying: "Try it again, G—d d——n you." He had known defendant for thirteen years, and lived half a mile from him for many years, and knew his voice, to which he swore positively. Former difficulties between the parties were also in proof.[1]

Same — rule in Massachusetts.

§ 36. On the trial of a case for an attempt at arson, the defendant was identified by his voice, and by a witness who had heard him speak only once before the alleged crime. Mrs. Farnham testified that on February 6, 1884, a man drove into her yard in a sleigh, and asked, "Does Mr. Farnham live here," and she replied "yes, but he is not at home;" then he said, "well, he lives here, don't he," and drove away; that his voice was coarse, gruff, and very ugly; that on the night of the same day, about ten o'clock, a horse and buggy was driven up to the same house and turned round in the yard and stopped opposite an open shed, the buggy being twenty-nine feet from the door of the kitchen of the house when it stopped; she was attracted by the noise and called the attention of her husband and servant, one Bohan. One man remained in the buggy, and she went to the door and said twice, "who is there," and the man said, "what do you think it is," and she identified him from his voice, as the same man who came in the sleigh and spoke to her on that day. The servant testified that he saw a man come from the direction of the shed and get into the buggy and drive off. They then examined the shed and found in it a cartridge of Atlas powder, a fuse and a bottle of kerosene, and he was convicted.[2]

Recognition by the voice — rule in Massachusetts and New York.

§ 37. On a trial for burglary in Massachusetts in 1870, two witnesses testified to the identity of a burglar from his voice alone; that, at the time the crime was committed, they recognized one of the two burglars by his voice; that they had heard him talk but once before. The defendant's counsel asked the court to rule that this identification was insufficient; the judge refused this, and instructed the jury that the similarity in the voice was a circumstance to be considered with the other circumstances in the case. The prose-

[1] Davis v. State, 15 Tex. App. 594. [2] Com. v. Hayes, 138 Mass. 185.

cutor, Ball, and his wife testified that on the day before the night of the burglary, the defendant, whom they had never seen before, called at their house and talked some time with Ball; that he had a very interesting, manly, pleasant, smooth, gentle, handsome voice, like that of one born in this country, of foreign parents; "a York State voice;" that between eleven and twelve o'clock that night they were awakened by a noise in their bed-room; that a man at the side of the bed said: "Keep still, or you are a dead man; if you move, I'll take your heart's blood; now, Bill, work fast, take all the money; you at the window, if these folks move, shoot them;" the man then sprang from the room; that they could not see him, but identified him at once, by his voice, as the defendant, and there were two men engaged in the burglary. He was convicted, and the conviction was sustained.[1] In an action for slander, not made in direct terms, but by gestures, expressions and intonations of voice, it was held competent for the witnesses who heard the expressions, to state what they understood the defendant to mean by them, and to whom he intended to apply them.[2] Upon the trial of a prisoner for the murder of his wife, a witness for the State, who had heard cries from the house of the prisoner on the night preceding her death, testified to that fact; he was then asked and permitted to testify what these cries indicated — whether the person was crying from joy or grief. This was held by the Supreme Court to be error in the court below, and that the question called for the conjecture of the witness as to the cause of the cries which he had heard, and not for a description of them.[3]

Recognition by the voice — identity.

§ 38. An article by A. B. McEachin, of Tuscaloosa, Ala., 1880, appeared in the Southern Law Journal, vol. 1, p. 395, upon the voice as a means of identity, in which, among other things, he says: "We are all endowed with the faculty of distinguishing sounds, but some are gifted with much keener perceptions in acoustics than others, and therefore better qualified to identify articulate sounds; the blind man cultivates the sense of hearing to the highest possible perfection, and yet he will tell you that the familiar footfalls of the known ones are a more unerring guide to personal identity than the tones of the voice, which are ever liable to change.

[1] Com. v. Williams, 105 Mass. 63.
[2] Leonard v. Allen, 11 Cush. 241. Citing Goodrich v. Davis, 11 Metc. 484; Miller v. Butler, 6 Cush. 71.
[3] Messner v. People, 45 N. Y. 1.

Is it possible that he who is about to commit the foul crime of assassination upon his fellow man speaks in his natural tones when about his fearful work? or he who contemplates a midnight deed of violence or of wrong, uses his honest voice when about to accomplish his guilty purpose? I think not. Voices in distress express suffering, while exclamations of surprise, horror, fear, dread and the like convey to the listening ear the emotions that are moving within, and are abnormal and unnatural in tone. The case of *Harrison*, 12 State Trials, and *Brooks*, 31 id., are the only ones I have found in the old books, which turned upon the voice as a means of identifying criminals. The American adjudications in point are unsatisfactory, for the reason that personal identity is a question of fact, and the courts of last resort are rarely troubled with such disputations. * * * The trial of Chaney, who was charged with killing David N. Martin in Lauderdale county, this State, created great excitement. The peculiar report of Chaney's rifle was one of the most important links in the chain of evidence against him. He was sent to the penitentiary for life. The case is reported in 31 Ala., but the facts are neither narrated or reviewed. The case of Rutillus Rosser * * * turned almost entirely upon the voice. The parties lived near together, and Rosser was a frequent inmate of Phifer's house. Phifer was called to his door at night and shot down by an assassin in the darkness. Mrs. Phifer testified that she knew the voice of the accused well, and could not be mistaken about it, and that it was certainly his voice that called her husband to the door. Rosser proved an *alibi*, and the trial resulted in a hung jury. Rosser soon thereafter escaped from jail, and saved the courts further trouble on his account."

Identity of persons and things.

§ 39. Wigram lays down rules of interpretation as quoted by Mr. Greenleaf on Evidence, vol. 1, § 287, note, as follows: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to *identify* the person or thing intended by the testator, or to determine the quantity of interest he has given by his

will." And the same rule applies to contracts, where, from any cause, it becomes necessary to construe the contract in order to identify either the persons or things intended by the contract. As in case where a bill was drawn for £200, expressed in the body of the bill in words, but £245 in figures in the margin, it was held that the words in the body must be taken to be the true amount to be paid. Where it is sought to identify the subject-matter of a contract, and in seeking for all the surrounding circumstances to shed light upon matter of description, the object is to obtain from the words used in the instrument, in the light of circumstances, the intent and meaning of the parties, and it is held to be the rule, that if some of the circumstances do not correspond with a probable exposition, they will not prevent its adoption, if, from the whole description, the meaning and intent of the party can be collected, under the maxim, *falsa demonstratio non nocet.*[1] The rule is, that where there is a patent ambiguity in a written instrument, it cannot be explained by parol, but it may be so explained when there is a latent ambiguity.[2] Further distinctions are observed by the text-writers, but it is not my province, or in the purview of this work, to pursue this branch of the law, however interesting.

Dissimilarity of persons — proof of identity — assurance.

§ 40. As to all the inferences of identity, permanence of individuality must be the basis, and we must assume that no two human beings are precisely alike, each being having some perceptible difference. Time, that necessary element on all things, will make, and leave its mark on the features of individuals; but if we possessed them yesterday, we are presumed to possess them to-day, perhaps to-morrow. Possibly two adults may be so precisely alike as to not be distinguished by those most intimately acquainted with them, but in such cases the identity is, at best, but imperfectly substantiated, and it is more probable that the witnesses are mistaken than that such resemblance actually exists. One may, for a brief period, assume the similitude of another, but the deception must disappear like vapor, when put to the test of the rigid scrutiny of a searching cross-examination. Each individual will be found to possess certain distinctive features differing in some respects from all others. These, though modified by age, retain the general characteristics for a longer or shorter period, even under disguise. The outward appearance may be

[1] Sargent v. Adams, 3 Gray, 72.

[2] 1 Greenl. Ev., § 297, n.

changed by dress, or the manner of shaving, the wearing of the hair or beard; it may become long, it may be cut short, it may be dyed; but the leading characteristics remain; the true tests, the general appearance of the physiognomical structures — such as the mouth, nose, chin, cheek bones, eyes, etc., even the voice, may remain and possess some peculiarity, which will be recognized, such as speaking in a loud or low tone, quick or slow, loquacious or reticent, smooth or harsh, unless successfully disguised, or changed by illness, accident, loss of voice, or loss of teeth, which sometimes has its effect upon the articulation. In fact, in some cases persons have been identified by the voice alone.[1]

The change produced by time renders personal appearance the most difficult of identification. We separate with friends in youth, years glide by, we bear their image on the tablet of memory, meet again in old age, and there is a mutual surprise, to see the change wrought by the relentless hand of time. The hair once like the raven, if retained, is white, the cheeks furrowed, once round, the contracted brow, the missing teeth, the languid eye, the sunken jaws, perhaps from loss of teeth, the compressed lips, the pensive air, sloth of gait, inaction, and all these outward signs and marks of the bygone days. And yet there is an indescribable something by which you recognize him, from general characteristics, or family peculiarities or resemblances, and you may identify him with reasonable, but perhaps not absolute certainty. But if there are any distinctive marks about him, such as lameness, peculiar gait, carriage, manner, loss of a finger, scar on the face or hand, or artificial teeth, or blemish in the eye, these bring a corresponding increase of assurance, and he is identified with greater certainty. And then when he converses, you hear him narrate the incidents of your boyhood days, the reminiscences of youth, the schoolmates, the playgrounds, the teachers, the classes, the Sabbath-school, the church, the minister, the sermons, the playmates, the sports, the fishing, the hunting, the dogs and their names, the beaus and belles, who they married, where they lived, and how many children they had, and their names, the assurance is so full that you can identify him with almost absolute certainty. Thus, long absence and those changes, in the absence, without the distinctive peculiarities or rigid scrutiny, may bid defiance to recognition or identification. Then there are differences in the memory of witnesses,

[1] Com. v. Scott, 123 Mass. 222; King v. Donahue, 110 id. 155; Brown v. Com., 76 Pa. St. 319.

it may not be retentive — the image may fade, often the witness reaches a conclusion without assurance, and having done so, will stick to it with a tenacity that would do credit to the ancient Levites.*

Personal identity — flash of gun or pistol in the dark.

§ 41. Of the various means of identifying a person, one very perplexing and doubtful question has grown out of the subject in which professional men and experts disagree with witnesses, and the question is, perhaps, yet an open question, whether or not a person who fired a gun or pistol at another in the darkness of the night can be identified by means of the light produced by the flash of such gun or pistol? This question, says Mr. Taylor, was first referred to the class of physical science in France in 1809, and they answered it in the negative. A case tending to show that their decision was erroneous was subsequently reported by Foderé. A woman positively swore that she saw the face of a person who fired at another during the night, surrounded with a kind of glory, and that she was thereby enabled to identify the prisoner. This statement was confirmed by the deposition of the wounded party. Desgranges of Lyons performed many experiments on this subject, and he concluded that on a dark night, and away from every source of light, the person who fired the gun might be identified within a moderate distance. If the flash was very strong, the smoke very dense, and the distance great, the person firing the piece could not be identified. The question, he says, was raised in England, in the case of *Rex* v. *White*, at the Croydon Assizes in 1839. A gentleman was shot at while driving in a gig during a dark night; he was wounded in the elbow;

*Wharton & Stille in 3 Med. Jur., § 661, say: "We must remember, also, that while two persons (*i. e.*, twins) may be undistinguishable, except by near relatives, at an early period of life, they diverge as they grow older, and gradually assume distinctive types. We must, therefore, hold that the presumption of continuance, when invoked in questions of identity, cannot be extended further than to imply such a continuance of appearance as is subject to the usual modification of time." Then quoting Prof. Bowen (Princeton Rev., May, 1880 , p. 334): "The specific gravity of an elementary substance, the proportion in which substances are chemically united into compounds, the definite forms into which they crystallize, the modes of action of affinities, of reagents and many other similar instances of nature's work in this province, are precisely similar to each other; they do not vary even by a hair's breadth. Far otherwise is it in the world of living organism, where variety is the rule and uniformity is the exception; nay it is not even the exception, for not one such exception — that is the case of two indescribables — can be produced. So far as I know Leibnitz is the only philosopher of modern times who has noticed and duly emphasized this wonderful fact; for the statement of it is one of the fundamental axioms on which this whole system is founded * * * The illustration he employed while discussing the subject in the presence of Princess Caroline, as they were walking in a garden, was that no two leaves precisely alike could be found on any bush. Another gentleman who was present took up the challenge, but after search was obliged to confess that the statement of Leibnitz was probably correct." A better illustration, as it seems to me, might be taken from the human face. Here all the differences are crowded together, within a narrow compass, say within the limits of six by ten inches, and all the main features, brow, nose, eyes, mouth, cheeks and chin, are constructed essentially on the same general pattern. But what a marvelous wealth of difference underlies all this uniformity. Among the many millions of human faces that people this earth, no two can be found so nearly alike but that they are easily distinguished at a glance."

when he observed the flash of the gun, he saw that the piece was leveled toward him, and the light of the flash enabled him to recognize at once the features of the accused. On cross-examination he said he was quite sure he could see the prisoner, and that he was not mistaken as to his identity. The prisoner being skillfully defended, was acquitted.[1]

Same — a later English case — identity.

§ 42. The same author gives a later English case of *Rex* v. *Stepley*, decided in 1862. The prisoner shot at the prosecutor, a gate-keeper, on a dark evening in December, and the latter swore that he distinctly saw the prisoner by the flash of the gun, and could identify him by the light on his features. His evidence was corroborated by three other witnesses who saw him not far from the spot; and by one who saw him in the act of running away. He was convicted.[2]

Same — experiments by professors — experts.

§ 43. On the 14th day of May, 1833, at ten o'clock, P. M., says Mr. Beck, the Sieur Labbe, mayor of the commune of Foulanges, in the department of the Calvados, in passing on horse-back along the highway, with the widow Beaujéan, his servant, on foot, was fired at with a gun, from behind a ditch and through a hedge; he was wounded in the hand. It was an hour and forty-three minutes before the rising of the moon, and the night was dark, yet, both Labbe and his servant swore that they recognized the accused by the light of the discharge. One of the persons accused was arrested, tried, and condemned to death, but an appeal was taken to the Court Cassations. The advocate consulted M. Leferne Gineau, member of the Institute, and professor of experimental physics in the Imperial College of France, whether it was possible that the priming (amorse) in being inflamed could produce light sufficient to discover the face of the person firing. Gineau, with his son and Dufuis and Caussin, also professors, with several others, retired on the 8th of December at eight o'clock, P. M., into a dark room, and there Professor Gineau fired several primings, the spectators being stationed at different distances, in order to witness the effect. The light produced was strong, but fuliginous, and so rapidly extinguished that it was impossible to distinguish the individual firing. They then descended into the court-yard of the college, loaded the gun with powder, but the results

[1] Taylor Med. Jur. 403.

[2] Taylor Med. Jur. 404.

on discharging were the same. The condemned was acquitted and discharged.[1]

Memory of features — discrimination.

§ 44. Memory in children, says Mr. Wharton, is more tenacious than with adults, but less discriminating, seizing often on features peculiarly evanescent. With adults a good deal depends upon natural gifts of discrimination, a good deal upon the object we have in view in studying the face. Some more rarely forget a face they have once seen; and it used to be stated of General Scott, that he recollected the faces, though not the names, of soldiers of his command with whom his acquaintance was remote and slight. And there is no question that the power of distinguishing countenances may be excited by a particular crisis, matured by long practice. We recollect faces on which our attention has been concentrated in proportion to the vividness of the concentration. And police officers sometimes acquire the power of catching a glimpse in a moment that enables them to identify the person thus seen though afterward he may be skilfully disguised.[2]

Burglary — mistaken identity — corrected.

§ 45. Where a witness testifies directly and positively to a person as being the identical person whom such person, the witness, has seen upon some former occasion, and identifies him with the person whose identity is in dispute, he may be tested by presenting to him in court another person, as to whose similarity with the one in controversy he may be interrogated. Mr. Ames relates the case of a woman who prosecuted a man and had him tried for a burglary in which she claimed that her house and her person had been plundered. She testified positively to the prisoner as the perpetrator of the crime. But about the time the verdict of guilty was about to be rendered, the sheriff offered a suggestion to the effect that a man who had been tried only a day or two before that was very similar in appearance to the prisoner, when the convict was ordered into court, and the prosecutrix, upon seeing him, immediately declared that she had been mistaken in the man and that the latter was the offender. While this means of establishing the identity of the accused is proper and correct, there must be a direct presentation of such second person to the witness in the presence of the court and jury.[3]

[1] 1 Beck Med. Jur. 513.
[2] Whart. Cr. Ev. (8th ed.), § 806.
[3] Whart. Cr. Ev. (8th ed.), § 808.

Lost child — marks — identity — experts.

§ 46. Personal identity, as we have seen, depends to a greater or less degree upon personal appearance, which is not always reliable, and for greater certainty, resort is often had to marks on the person whose identity is in dispute; and even those are often unreliable, and lead to mistaken identity. In proof of this fact, cases are not wanting; in fact the books which give cases of mistaken identity are replete with instances where the most conclusive circumstances of identity have led to the greatest mistakes. A combination of coincidences, however conclusive they may seem upon the first impulse, may prove deceptive. Mr. Beck gives an instance of this kind—the case of a child which had been bled in the right arm when sixteen months old; when nearly four years old the child was lost, and two years thereafter the godmother, seeing two boys pass, was struck with the view of one of them; she called him to her, and was convinced that it was her godson. The identity was also considered to be proved by the discovery of a cicatrix from bleeding in the right arm, and a cicatrix from an abscess in the right knee, both of which were present in the lost child, and also in the one that was found. The latter, however, had upon its body marks of the small-pox, while no marks of the kind were on the body of the former. The child was claimed by a widow Lambrie, and many witnesses deposed that it was really her son. The court decided in her favor, chiefly on the ground that the lost child was not marked with the small-pox. The surgeons disagreed as to the cause of the cicatrix on the arm. Three declared that it had been made with a sharp instrument, others that it was not from bleeding, but from the opening of an abscess.[1] Here again we find surgeons as experts disagreeing, a thing not at all unusual, in fact it is a frequent occurrence. And when men of the same profession are called into court as experts, upon the same state of case, upon the same examination, and they disagree, we may well say that expert testimony, as a general rule, is of little value as evidence, if, indeed, it ever arises to the dignity of evidence, or deserves the name.

Comparison — identity of persons and things.

§ 47. In an English case involving the question of personal identity, PARKE, B., said: "In the identification of person, you compare in your mind the man you have seen with the man you see

[1] Beck Med. Jur. 655.

at the bar. The same rule belongs to every species of identification." ALDERSON, B., in the same case, said: "Generally wherever there is such a coincidence in admitted facts as makes it more reasonable to conclude that a certain subject-matter is one thing rather than another, that coincidence may be laid before the jury, to guide their judgment in deciding on the probability of the facts."[1]

Uncertainty in personal identity.

§ 48. A well-known gentleman of fashion very narrowly escaped conviction for a highway robbery, from his extraordinary resemblance to a notorious highwayman of the day. Mr. Beck gives this case in his Med. Jur. (7th ed.) 408. Sir Thomas Davenport, barrister, swore positively to the person of two men, whom he charged with robbing him and his lady in the open daylight, but a clear *alibi* was proven, and when the real robbers were arrested, he, on seeing them, at once changed his mind, and acknowledged he had been mistaken, and thus we see the uncertainty of personal identity.[2] The same author, on moral certainty, says: "Take the strongest case: a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged; still the jury only believe his guilt on two presumptions, either or both of which may be fallacious, viz., that the witnesses are neither deceived themselves nor deceiving them, and the freest and the fullest confessions of guilt have occasionally turned out untrue. Even if the jury were themselves the witnesses, there would still remain the question of identity of the person whom they saw do the deed, with the person brought before them accused of it; and identity of person is a subject on which many mistakes have been made. The wise and humane maxim of law that it is safer to err in acquitting than condemning, and that it is better that many guilty persons should escape than one innocent person suffer, are, however, often perverted to justify the acquittal of persons of whose guilt no reasonable doubt could exist.[3]

Bigamy — identity of the second wife.

§ 49. The identity of parties named in an indictment must be proved; upon an indictment for bigamy, it was proved, by a person who was present at the second marriage, that the woman married

[1] Fryer v. Gathercole, 13 Jur. 542.
[2] Best Prin. Ev. 504, § 517.
[3] Best Prin. Ev. 86.

was named Hannah Wilkinson, the name charged in the indictment, but there was no further proof that such was her name or that she had ever called herself by that name. PARKE, J., held the proof to be insufficient, and directed an acquittal. He subsequently added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself Hannah Wilkinson*, because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name; and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would have been invalid.[1] In chancery proceedings in England it is held that identity may be inferred from extrinsic evidence; as if the name, description and character of the party to the action agree with the name and description of the party answering, it is *prima facie* evidence of identity.[2]

Indictment — variance — divorce — confrontation.

§ 50. In England, to reverse an outlawry upon an indictment for a variance in the name of the defendant, between the record and the process, the diversity must be shown by the writ *identitate nominis*.[3] Mr. Bishop, in his Marriage and Divorce and Separation,[4] speaking of adultery and specific divorce and nullity suits, says: "Where a sexual commerce, or facts indicating it, are testified to, there must be evidence, from the same or other witnesses, of what the identity and diversity of the parties are; namely, that one of them was the defendant and the other was not the plaintiff; to aid this part of the proofs, the ecclesiastical courts sometimes resorted to what is termed a decree of confrontation; it was applied for on special grounds, and was in a certain form. The defendant was thereupon to be produced to a witness who had known her in both characters of wife and adulteress, or simultaneously, to two or more witnesses who could separately identify her in each character. * * * Other methods of proving the identity, generally less effective than the confrontation decree, will in particular cases suggest themselves. The presumption of identity from the identity of name is sometimes available.

[1] Roscoe Cr. Ev. (7th ed.) 327. Citing Rex v. Drake, 1 Lew. C. C. 25.

[2] Roscoe Cr. Ev. (7th ed.) 327. Citing Hennell v. Lyon, 1 B. & Ald. 182; Garvin v. Carroll, 10 Ir. L. R. 330.

[3] Hawkins' Pleas of the Crown, 654.

[4] Bishop Mar., Div. and Sep., § 1411.

Action to enforce specific performance — heirship.

§ 51. An action was brought to enforce specific performance by the administrator of Isbel, deceased, against the unknown heirs of William Dease on a contract between Isbel and Dease in 1838, whereby Isbel was to receive three hundred and seventy acres of the land to be granted under a certificate for one-third of a league of land issued to Dease. The land in controversy was located and caused to be located by Isbel under that agreement. The court appointed an attorney to represent the unknown heirs of Dease, and during the pendency of the suit, a number of persons, representing themselves to be the widow and children of William Dease, made themselves parties defendant. John H. and John W. Baker were on the land, but without title, and they were made defendants. The attorney for the unknown heirs, as well as those who claimed to be the widow and children of Dease, asserted rights against the Bakers, and all these set up the defense of stale claim against the plaintiff. There was judgment for the plaintiff and for the widow and children, and the entire tract was partitioned. The Bakers appealed, and presented two questions — that the evidence was not sufficient, and that the widow and children were not the heirs of Dease. The evidence tended to show that there were three persons whose names were William Dease or Deas, members of the same family, and who at times spelled their names differently. One of these, it was shown, never came to Texas, but the others did; of one of them there was no trace, while the other was identified as the husband and father of the defendants, by circumstances which seemed satisfactory.[1]

Ancestor — identity of — claim to land.

§ 52. In an action in the same State the plaintiffs claimed land as heirs of Solomon Keel, to whom the land was patented, and they proved heirship of one Dr. Solomon Keel, and that he had located the land, and had obtained a patent. The defendant proved the existence of another Solomon Keel, residing in Peter's Colony, under which the certificate was issued, with testimony that the certificate was issued to him, and that Dr. Keel did not reside in the colony. It was held to be error to refuse to submit to the jury the issue as to the identity of the person to whom the certificate was issued. The judgment was reversed and the cause remanded for this reason.[2]

[1] Baker v. McFarland, 77 Tex. 294.

[2] Greening v. Keel, 72 Tex. 207 (1888).

Same — claim to land — identity of name.

§ 53. And in still another Texas case, the name of the grantee in a grant of land was borne by two persons, both long since dead. Plaintiff claimed under one, and defendant under the other. It was held that testimony was admissible to show that one of the persons claimed the land, and exercised acts of ownership over it for a number of years, and that it afforded strong evidence that she was the person intended to be named in the grant.[1] But it is held in the same State, following the general rule, that the identity of name is ordinarily sufficient evidence of identity of the person in a chain of title. That in the absence of any other testimony, it is error to submit to the jury the question of such identification.[2]

Name — identity — person — remote transactions.

§ 54. In an early case in Texas, the court held as last above indicated, as to identity of name with the person in a chain of title and conveyance, for all purposes of the investigation of title, and that the identity of "Jane Carroll" with "Jane Tarbox" was sufficiently shown to establish the chain of title, in the absence of proof to the contrary; from the partial similarity of name, the possession of the original title papers, the recital in the deed of conveyance to "Jane Carroll," that the deed was made and executed to her in consideration of her approaching marriage with Lyman Tarbox, and the recital in a subsequent deed by "Jane M. Tarbox," that she is the wife of Lyman Tarbox, and as such joins in the conveyance.[3] But if the transaction be remote, the identity of name alone (as we have seen) is not sufficient evidence of identity of the person. In a Pennsylvania case in ejectment, upon the issue whether the plaintiff is related to the person last dying seized, declarations of the deceased person, proved to have been related to his family, was held to be competent evidence of identity, although they did not belong to his branch of it. And furthermore, it was held competent to give evidence that the witness had been informed by his mother that the person last seized was his uncle. And in the same case, it was held that a church record of births, deaths and burials is not competent to prove births, and that identity of name alone is not evidence of identity of person in remote transactions.[4]

[1] Hickman v. Gillum, 66 Tex. 314.

[2] Robertson v. Du Bose, 76 Tex. 1. And see Cox v. Cock, 59 Tex. 524; Chamblee v. Tarbox, 27 id. 144.

[3] Chamblee v. Tarbox, 27 Tex. 139, 144.

[4] Sitler v. Gehr, 105 Pa. St. 577. And see Northrop v. Hale, 76 Me. 306.

Bigamy — perjury — weight of evidence.

§ 55. In an indictment for perjury, in giving evidence in an examination before the mayor of Indianapolis, of one William Parker, for bigamy, in marrying the appellant, Sarah E. Hendricks, he having another wife living. She having sworn that Parker never was married to her, and that she never was with him in Johnson county, where the marriage was alleged to have occurred; in which trial there was a verdict of guilty. The allegation of perjury was supported by the testimony of a witness who swore that he was present at the marriage, and also by record. There was a verdict of guilty, and on appeal, FRAZER, J., said: "The jury was instructed that unless there was some extraneous fact in evidence to raise a doubt of the identity of the parties, the presumption was that they were the same parties. This, we think, was error. We think the question was one of fact, and not of law, and that it was, therefore, the province of the jury, and not of the court, to judge whether the marriage record was alone evidence strongly corroborating the witness as to the marriage of these identical persons. The names being the same, was a fact from which the jury, not the court, might draw an inference; it was some evidence, but whether sufficient or not, it was not for the court to say."[1]

Name in deeds — presumption of identity.

§ 56. Where the same name occurs in two deeds of conveyance raising the question of identity as to the grantor in a subsequent deed, and the grantee in a prior deed, being the same person, this was held in California to be a question for the jury, and not for the court, either as a question of law, or a preliminary question of fact to be decided before the admission of the deed in evidence, and the party must satisfy the jury when he produces the deed of the identity.[2] Where a former conviction is pleaded, it is a question for the jury to determine whether the party convicted was the same party who is under the indictment in the subsequent prosecution.[3] And it is held that there is no legal presumption that one bearing the name of the son of a deceased person is one of his heirs; but it is a question for the jury to decide, under all the circumstances; such as identity of name, residence of the claimant, and other members of the family, and the surrounding circumstances.[4]

[1] Hendricks v. State, 26 Ind. 494.
[2] Carleton v. Townsend, 28 Cal. 221.
[3] State v. Robinson, 39 Me. 154.
[4] Freeman v. Loftis, 6 Jones L. (N. C.) 528.

Instruments of crime — personal identity.

§ 57. One of the common means of identifying an individual with a crime which has been committed, is the instruments used in the perpetration thereof; as in the crime of murder, instruments found at or near the scene of the crime, as a pistol found near the body of the deceased, a stick or club, or a knife; or in cases of burglary, a chisel, false key, or other instruments used to effect an entrance, found in or about the house broken into, or any burglar's tools left in or about the house; and especially if there are indications of the same having been used in the perpetration of the crime. Then the important object is to take these indications as a clue to trace it to some particular individual as the owner or possessor of these instruments, or to identify it as either belonging to, or being in the possession of, some person suspected of the crime, or of some one having been in possession of such about the time of the commission of the crime. As where the instrument has been recently made, repaired, mended, borrowed or stolen; it may be identified by the maker, vender or owner, and this sheds a light upon the transaction, and often furnishes strong circumstances tending to identity, and to fix the liability upon some particular individual as the perpetrator of the crime. Or, if it merely creates or raises a suspicion, it limits inquiry to that particular direction, and may lead to the discovery of corresponding facts and circumstances, which lead to proof of a satisfactory identification of the actual offender. As where death was caused by a gun-shot, and the ball was extracted from the dead body, and all the guns in the neighborhood were examined, and one was found to carry a ball of the same weight and caliber; while this was not at all conclusive, yet it limited and directed inquiry. This, taken together with a former grudge, a quarrel, a lawsuit between the parties, ill feeling, bad and hot blood, and threats by the accused against the life of the deceased — these, with tracks of man or horse, corresponding with those of the accused, may form links in the chain of circumstantial evidence which lead to satisfactory identification. And yet, experience and observation admonish us, that great caution is necessary, in all such cases, to avoid mistaken identity, and that to vest mere circumstances with the force of truth, they must exclude every other hypothesis and generate full belief.

Size of the person to be identified.

§ 58. The circumstance of the size and stature of a person is one

which generally makes the first and most lasting impression upon the vision, when applied to the particular person to be identified; whether excessive or diminutive, *i. e.*, above or below the medium size of ordinary persons, above or below the height or weight. As in Barbot's case, where the principal circumstance tending to prove the identification of the prisoner was his diminutiveness of person.[1] As to the opportunities for observation, it may be, and often is, an immediate and instantaneous impression under circumstances of hurried motion or imperfect light, which would not admit of a close observation as to matters more minute, such as his peculiarities, if he can be seen at all with distinctness, where the outlines of the person give a sufficient idea of the stature.[2]

Personal appearance — peculiarities.

§ 59. While the above, when taken alone, is of little weight, it becomes important in connection with other facts and circumstances of identification. But the personal appearance with its peculiarities will furnish many important means for personal identity, many of which may be more readily imagined than described; we may mention the loss of a leg, an arm, a finger, an eye, front teeth, scar on the face or hand, the hair and beard, their color and length, peculiar features, voice, lameness, peculiar gait and any mutilation or defect which is visible. It was remarked in an important case, where the proof of the guilt depended upon circumstantial evidence, "it is obvious how perfectly slight and utterly inconclusive any one, or any two or three of these circumstances must have been, yet, *all being combined*, the result of the trial (a verdict of guilty) shows that the jury felt safe in acting upon them, as leaving no doubt.[3] Another means of identification is objects connected with the person of the accused, as a horse which the prisoner was riding at the time of the commission of the crime. In an English case, three Bow street officers were attacked in a post-chaise by two persons on horseback; one of the officers stated that he saw by the light produced by the flash of the pistol fired, that the horse of one of the robbers, who stationed himself at the head of the horses, was a dark-brown horse and of a very remarkable shape, having a square head and thick shoulders, and such that he could select him out of fifty horses; and that he had since seen him at the stable in Long-Acre.[4]

[1] Barbot's case, 18 State Trials, 1267.
[2] Rex v. Brook, 31 State Trials, 1137.
[3] Mendum v. Com., 6 Rand. 704, 713.
[4] Rex v. Haines, 3 P. & F. 144.

Instrument used by criminal — identity.

§ 60. There are many coincidences which may serve as a means of personal identification, after the commission of an offense or an alleged crime, to connect the prisoner with the transaction, and thus *identify* him as the perpetrator of the crime; we may mention the weapon or instrument used in the perpetration, impressions made at the scene of the crime by instruments found in the possession of the prisoner, as where marks were found upon the window of a house which corresponded with a chisel in the possession of the prisoner.[1] Impressions made at the scene of the crime by portions of the person of the criminal, or by articles of dress, clothing, shoes, etc., corresponding with those of the prisoner.[2]

Impressions made by the teeth.

§ 61. Mr. Burrill, in his Circumstantial Evidence, gives a case as related by *Mascardus*, in which impression made by the teeth furnished evidence of identification, "where an inclosed ground, set with fruits, was broken into by night, and several of them eaten; the rinds and fragments of some of which were found lying about. On examination of these, it appeared that the person who ate them had lost *two front teeth*, which caused suspicion to fall on a man in the neighborhood, who had lost a corresponding number; and he, on being taxed with the theft, confessed his guilt."[3] Another case is given thus: "In a late case of burglary at Albany, where a store was robbed of goods, a number of boards upon which goods were wound, were found near the canal; upon one of these boards was an indentation, as of a person who used his *teeth* in pulling it from between the goods, and showing that the robber had lost two teeth. This was the case with the individual who had been arrested, and was relied on as a corroborating circumstance against him.[4]

Bastardy — evidence of identity — rule in Maine.

§ 62. A different rule prevails in Maine, if we can say there is an established rule there, on the subject, from the rule we see in North Carolina. It was held in Maine, in 1839, that testimony of the resemblance of the child, in a bastardy case, to the alleged father, or the want of it, was not admissible, it not being a matter of fact, but merely of opinion. In a case presenting this question — and it seemed to be a case of first impression in that State — the court, in comment-

[1] Rex v. Bowman, Alison Princ. 314.
[2] Wills Cir. Ev. 100.
[3] Burrill Cir. Ev. 269.
[4] Burrill Cir. Ev. 269, note.

ing upon it, among other things, said: "It is said that the testimony offered should have been admitted, because the color of the child might have been such as to prove, conclusively, that the defendant was not the father of it. But it was not the color, or any peculiarity of conformation or form of features, as matters of facts, that were proposed to be proved, it was to prove the resemblance, which is matter of opinion; and witnesses, if they could have sight of the person, might be indefinitely multiplied, without affording any satisfactory ground of judgment for a jury. Witnesses, except in some art, trade or profession, requiring skill or science, are not called on for comparison and to testify to opinions arising from them. The facts being proved, the jury were better judges of the effect of similarity or dissimilarity in form of complexion.[1]

Same — rule in Indiana.

§ 63. On the trial of an Indiana case of bastardy, the State gave the bastard child in evidence, so the jury might compare it with the defendant, who was present; this went to the jury without objection, and the court instructed the jury that, if they discovered a resemblance between the child and the defendant, they might regard it as a circumstance tending to prove its paternity — tending to prove that the defendant was the father of it. The court said: "We doubt the right to introduce the child in evidence. We have seen no authority on the point. It would be an uncertain rule of evidence. It would involve the necessity of giving the alleged father in evidence. A child changes often and much in looks in the first three months of its existence. But, in this case, as the evidence went in without objection, the jury had a right to consider it."[2] This rule of evidence is not, by any means, to be regarded as safe and certain, and not well settled, owing, perhaps, to the fact that in this country those cases seldom occur.

Seduction — administering drugs.

§ 64. A defendant was indicted in Iowa, in 1878, for unlawfully having carnal knowledge of a female by administering to her a substance and by other means producing such stupor and imbecility of mind and weakness of body as to prevent effectual resistance. He was convicted and sentenced to the penitentiary for ten years. The evidence in substance was that she was sixteen years of age,

[1] Keniston v. Rowe, 16 Me. 39. [2] Risk v. State, 19 Ind. 152.

went in the evening, December 21, with her brother Fred to Linnville to meeting, returning in their sleigh. Defendant called to Fred, and they took a drink of liquor. Defendant got into the sleigh with them, they took another drink, and at her brother's request she tasted it. The sleigh broke down, her brother took charge of it, and she walked on with defendant. Knew nothing more until about midnight, when she awoke to find herself in defendant's saloon, in Scarsboro, sitting on a bench with her head on his shoulder, his arm around her, and her drawers unfastened. The door was locked, but he finally unlocked it; she knew by a smarting sensation that he had had intercourse with her; but was unconscious of it at the time. He took her into his house where his wife was. On the way to the house he said: "I am up to this kind of business." She made no complaint for sixteen weeks afterward. In due time she was a mother. The State offered on the trial to exhibit the child to the jury, and this was permitted, and the cause was reversed.[1]

But as to exhibiting a child to a jury on trial for bastardy, the courts are not agreed; but the weight of authority seems to be that it may be permitted. It has been frequently so held in North Carolina, and there seems to be no good reason why it should not be the general rule.

Bastardy — criminal conversation — damages — identity.

§ 65. In an action by the husband for damages for criminal conversation with the wife of the plaintiff, the wife was a witness in the case, for the plaintiff, and gave her evidence to the effect of her acts of intimacy with the defendant. The child alleged to be that of the defendant, and the result of such intimacy, was given in evidence and shown to the jury on the trial, to show the resemblance of its alleged father. The following instruction to the jury was held to be correctly given, to-wit: "If you believe that the child of plaintiff's wife, shown to you during the trial, resembles the defendant, and experience teaches you that there is any thing reliable in this appearance that would be safe for you to form an opinion on, you may consider it in corroboration of her testimony."[2] This was a peculiar case, not only in its inception, but in the nature of the evidence to sustain it. An action for criminal conversation seldom involves the question of the identity of a child, as is the case in a prosecution for bastardy, and even in that class of cases the courts are not agreed

[1] State v. Danforth, 48 Iowa, 43.

[2] Stumm v. Hummel, 39 Iowa, 479.

as to the rule, for we find in Maine it is held inadmissible in a case of bastardy to introduce the child in evidence, to show the jury a resemblance between the child and the alleged father. Because, the court said, the resemblance was matter of opinion, and could be given only by experts, and other witnesses are not called upon to make comparisons and give opinion.[1] The same rule was held substantially in Indiana. But it was rejected there apparently for want of precedent. The court said: "We doubt the right to introduce the child in evidence. We have seen no authority on the point. It would be an uncertain rule of evidence. It would involve the necessity of giving the father in evidence." But in that case, as it had gone to the jury without objection, the court did not disturb the verdict.[2] But in North Carolina the rule of practice is well settled that the child may be produced in evidence on the trial; in a number of cases commencing as early as 1844, and has been strictly adhered to in that State in quite a number of cases, and the court regards it as based upon the very best reason, and decline to change the ruling.[3]

Legitimacy — bastardy — rule in North Carolina.

§ 66. It was held in North Carolina, that the mother of a child, her husband, the alleged father, being dead, was a competent witness to prove the legitimacy of the child, and that where, on the trial of an action, the legitimacy of a child is involved, who is alleged to be of mixed blood, it is not improper to exhibit the child to the jury.[4] In the same State, it seems to be the settled practice in bastardy cases, to bring the child into court, that the jury may compare it with the alleged father; and where, on the trial of one of these cases, the mother was put upon the stand as a witness, having the child in her arms, the solicitor called the attention of the jury to the child's features, and afterward, in his address to the jury, commented upon its appearance, etc., all without objection by the defendant, it was held that the objection came too late after verdict. And it was not error for the judge to charge that the jury might take the appearance of the child into consideration and give it whatever weight they thought it entitled to.

Speaking of this, the court said: "It certainly has been the practice to admit such evidence on the trial of such cases, both in the

[1] Keniston v. Rowe, 16 Me. 39.
[2] Risk v. State, 19 Ind. 152.
[3] State v. Britt, 78 N. C. 439; State v. Bennett, 75 id. 305; State v. Woodruff, 67 id. 89; Warlick v. White, 76 id. 175.
[4] Warlick v. White, 76 N. C. 175.

County and Superior Courts, for more than forty years, without objection, and this court is not disposed to change a rule of evidence so long and so universally acquiesced in, and founded, as we think, in reason and common observation."[1]

Bastardy — identity · rule of evidence.

§ 67. It was held that, on the trial of a prosecution for bastardy, evidence that the prosecutrix had criminal intercourse with another man about the time when, in the course of nature, the child must have been begotten, and that such intercourse was habitual, was admissible; and, on such trial, evidence that the child resembles the man with whom such alleged intercourse was had is admissible.[2] This might bring the "other fellow" into court.

Bank check — false representation — risk.

§ 68. If the drawee of a check relies upon false representations as to identity, for which neither the drawer nor the drawee is responsible, he makes payment to a wrong person at his peril. Where the drawee attempts to justify payment to a person not bearing the name of the payee, upon his authorized indorsement of the payee's name, on the ground that he was the person to whom the drawer intended payment to be made, though described by a false name — all the facts in regard to such intention being unknown to the drawee at the time of payment — he cannot be allowed to prove a portion of the facts occurring at the time of drawing the check, and insist upon excluding other material facts occurring at the same time, when such facts have a tendency to disprove the existence of such intention.[3]

Retailing and larceny — personal identity.

§ 69. One Snow was indicted and tried in three cases as a common seller of intoxicating liquor. Two sales were proved, and a witness testified that he bought liquor at the same place, "of a man they called Snow," who was "pretty near like" the defendant, but whom he would not swear to be the defendant. This was held insufficient for the third sale.[4] And yet, in a more recent case in the same State, which was an indictment for larceny, it was held that on the trial of a criminal case, where the only question is that of the iden-

[1] State v. Woodruff, 67 N. C. 89. But see Outlaw v. Hurdle, 1 Jones L. 150; State v. Jacobs, 5 id. 259.

[2] State v. Britt, 78 N. C. 439. Citing State v. Patton, 5 Ired. 180; State v. Wilson, 10 id. 131; State v. Floyd, 13 id. 382; State v. Woodruff, 67 N. C. 89; Warlick v. White, 76 id. 175; State v. Bennett, 75 id. 305. But see Keniston v. Rowe, 16 Me. 38.

[3] Dodge v. Bank, 30 Ohio St. 1.

[4] Com. v. Snow, 14 Gray, 385.

tity of the defendant with the perpetrator, the jury may be warranted in finding him guilty, though no witness will swear positively to his identity.[1] As a legal proposition that is true, — persons are often identified by circumstances.

Circumstantial evidence of personal identity—rule in Massachusetts.

§ 70. On the trial of an indictment for robbery, the person robbed testified she was robbed of a ten dollar bill and three two dollar bills, but she could not say whether they were bank bills or not. When the defendant was arrested, three days thereafter, he had in his pocket two five dollar bills and two two dollar bills, one of which was a bank bill and the others not. The person robbed had testified that in the struggle with the robbers she bit the finger of one of them so as to cause a wound, and when arrested there was a wound upon the corresponding finger of the defendant's hand, and there was a stain on one of the bills, which, the government contended, was a blood-stain. Suppose it was a blood-stain; it is difficult to perceive how that could benefit the prosecution. If he were the robber, he had changed off her money, as that found in his possession was not the bills she described, nor did it correspond in amount.[2]

Larceny of a package of money — identity of the thief.

§ 71. One Whitman in Massachusetts was indicted for stealing a package of money in a most ingenious manner. The package was sent by a messenger boy in Boston to one Drew, a constable in Joy's building, to pay off an execution; the boy carried the money in an envelope, and with it a receipt, to be signed by Drew. On the trial, the boy was asked if there were any one in the office; he said "yes;" "who was it?" the boy answered, "that man," pointing to the defendant. Objection made and overruled. The witness then testified that he asked the man if he were G. G. Drew; that he said "no;" he asked when he would be in; he replied, "he will be in soon, right in;" that he asked him if he were going to stay till Drew came in; to which he replied "yes;" that he then laid down the package on the table, took out the receipt and asked him if he would sign it; that he signed it in pencil "G. G. Drew by Geo. Jones," and that he would not have left the package without the receipt. This was sufficient identification.[3]

[1] Com. v. Cunningham, 104 Mass. 545.
[2] Com. v. Tolliver, 119 Mass. 312.
[3] Com. v. Whitman, 121 Mass. 361.

Fictitious appeal bond — indictment.

§ 72. On an indictment for forging and uttering an appeal bond, the government offered evidence tending to show that the name of one of the sureties affixed to the bond was fictitious, by proving who the person really was who represented himself by the fictitious name, to the clerk of the court in which the bond was given, and that his statements as to his business, residence, occupation and ownership of property were all false. It was held that the evidence was competent, although the defendant admitted that the name was fictitious.[1]

Rape — identity of accused — clothes.

§ 73. On the trial of a party in Massachusetts for rape, after evidence given of a fresh pursuit of the accused, from the description of him as given by the prosecutrix, and by inquiries made by the pursuer, describing his dress, by which information was obtained which led to his arrest, the testimony of the person inquired of by the pursuer was admissible in evidence for the defendant, to show that the dress so described differed from that worn by him at that time. The court remarked: "One object of the testimony introduced by the government was to identify the person arrested with the person committing the offense. It sought to show identity by evidence of a fresh pursuit of the prisoner, from the description given by the prosecutrix, and of inquiries made by the pursuer for the person charged, by the description of the dress. The force of this evidence the prisoner sought to avoid by showing what inquiries were made, and then proving that the dress described by the person pursuing was different from that actually worn by him on that day." It was held that he had a right to do so, and the judgment of the court below, convicting him, was reversed.[2]

Threat to take life — verdict.

§ 74. Defendant was indicted for threatening to take the life of L. Curry, and sentenced to the penitentiary for three years. The verdict, as it appeared in the record, found the defendant "guity," and the conviction was, for this reason, reversed. Subsequently, a new record was brought up on *certiorari*, which had not the same defect, and the judgment was affirmed. The court said: "The language, it will be observed, with regard to the character of the verdict, that is, that they (the jury) shall find that the defendant is either 'guilty' or 'not guilty,' is imperative. Have the jury per-

[1] Com. v. Costello, 120 Mass. 359. [2] Com. v. Reardon, 4 Gray, 420.

formed this duty? Is the word 'guity' synonymous with or equivalent to the word 'guilty'— is it *idem sonans* with the word 'guilty?' Is there such a word as 'guity' belonging to, or having a definition in, the English language? We are compelled to answer each of these questions in the negative."[1]

Circumstantial evidence of identity.

§ 75. In an action of trespass for taking a piano forte which the plaintiff had bought from one L., defendant pleaded that it belonged to him, and had been feloniously stolen from him by L., and that he had retaken it. It was held that whatever would be evidence against L., if he were on trial for the felony, would be evidence in this action to prove the felony to have been committed by L., it being open that L. had committed the felony by hiring the piano forte, and selling it immediately. It was held that the defendant could not give evidence respecting optical instruments which were alleged to have been obtained by L. from another tradesman; but his identity became involved in the piano transaction, and depended upon circumstantial evidence. And it was held that, where a cartman took goods to the house of L., not knowing him, and asked for Mr. L., of a person whom he found in the house, and that person said "I am Mr. L.," this was *prima facie* evidence of the identity of Mr. L.[2]

Personal appearance — human identity — evidence.

§ 76. The personal appearance of a person may indicate youth or age, but it is not evidence of either. One Stephenson was indicted for profanation of the Sabbath by following his usual occupation on that day in violation of the statute — the statute imposing a penalty for its violation by persons of the age of fourteen years and upwards. In such case, the proof must be made that the accused is within the age prescribed by statute. He was present in court and was convicted, without any proof of his age except his personal appearance, and that was not put in evidence, nor did it go upon the record sent up on writ of error, nor could it be brought up by *certiorari*. The judge certified that he was in court and had the appearance of a full-grown man. This could not be received; it was not proved on the trial.[3] And in an indictment for selling liquor to a minor in violation of the statute, on the trial, the party to whom the liquor was

[1] Taylor v. State, 5 Tex. App. 569.
[2] Wilton v. Edwards, 6 Carr. & P. 677.
[3] Stephenson v. State, 28 Ind. 272.

sold, testified that he was eighteen years of age, about six feet high, and weighed about one hundred and seventy-five pounds. The question was whether the liquor dealer sold it to him in good faith; and was his appearance that of a person full twenty-one years of age? The liquor was sold to him upon his deceptive appearance. It was taken for granted that he was not a minor; as in the above case the court took it for granted that a full-grown man was upwards of fourteen years.[1]

[1] Ihinger v. State, 53 Ind. 251.

CHAPTER III.

NAME — IDEM SONANS.

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Names — words — idem sonans — verdicts.

§ 77. The doctrine of *idem sonans*, as applied to the names of persons, frequently presents very nice questions. Where the names sound alike, though entirely different names, and spelled differently, that is, to the sense of sight they differ, while to the sense of hearing they are the same, then they are held to be *idem sonans*. And the courts will not set aside proceedings on account of the misspelling of names, provided the variance is so trifling as not to mislead, or the name as spelled be *idem sonans;* as Wallace for Wallis; Lawrance for Lawrence; Benedítto for Benedetto; Renells for Reynolds; Magee for McGee. The following are a few of the names which have been held not to be *idem sonans:* Barham for Barnham;[1] Shutliff for Shirtliff;[2] Shakepear for Shakespeare;[3] Richard John for John Richard;[4] Lyons for Lynes;[5] Anstry for Anestry;[6] Tarbart for Tabart;[7] Crawley for Cromley;[8] M'Cann for M'Carn;[9] *Willison* Franklin for *Williston* Franklin.[10] And this rule applies as well to words as to names. When words are incorrectly spelled in the verdict of a jury, they will not vitiate the verdict if they are *idem sonans*, as mrder for murder; turn for term; too for two. But the verdict for damages was void when given for *impunitive* damages, or where a burglar was found guilty of *bergellery*, or where the defendant was found *guity* instead of *guilty;* because, in the three last examples there are no such words in the English language. Where words in the verdict are *idem sonans*, the courts hold that the variance is immaterial, and the verdict is good. But it will be void if words are used which are senseless, unintelligible or of doubtful import, because in such case the verdict does not find the defendant "guilty" or "not guilty."[11] And in all criminal cases where the jury agree upon a general verdict, it must be that the defendant is either "guilty" or "not guilty."

[1] Kirk v. Suttle, 6 Ala. (N. S.) 681.
[2] Gordon v. Austin, 4 Term Rep. 611.
[3] Rex v. Shakespeare, 10 East Rep. (Eng.) 83.
[4] 1 Chitty Pl. 314.
[5] Lynes v. State, 5 Porter (Ala.), 241.
[6] Bro. Var. (Eng.) 20.
[7] Bingham v. Dickie, 5 Taunt. 814.
[8] Arch. Cr. Pl. & Ev. 342.
[9] Rex v. Tannet, Russ. & Ry. 351.
[10] Bull v. Franklin, 2 Speer, 46.
[11] Shaw v. State, 2 Tex. App. 487; Haney v. State, id. 504; Dillon v. Rogers, 36 Tex. 152; Keeller v. State, 4 Tex. App. 527.

Misnomer — abbreviations — recognizance.

§ 78. "Bart" and "Bartholomew" are not the same names, and it will not be presumed, without averment, that the former is an abbreviation of the latter name. A bill of exchange sued on was payable to "Bart Whalon" at Edgar County Bank, and indorsed "B. Whalon." The special count alleged that the bill of exchange was drawn in favor of Bartholomew Whalon, and contained no allegation that "Bart Whalon" and "Bartholomew Whalon" were one and the same person.[1] An action was brought on a promissory note against one *Loring Pickering*. The declaration averred that the defendant made and executed the note sued upon. To support this declaration plaintiff introduced on the trial, and offered in evidence, a note signed by "*L. Pickering*." It was objected to for variance; but it was read, and no other evidence was offered by plaintiff to support his action. It was held not to be a substantial variance.[2] In a similar case, the principal named in the body of a recognizance was "Joseph Little;" it was executed in the name of "Joseph Lytle." It was held not to be error to admit such recognizance as evidence under the *scire facias* against "Joseph Lytle," reciting the execution of the recognizance by the latter name.[3] And so in describing a promissory note payable to "Conklon" as being payable to "Conklin," was held to be unimportant, that they were the same sound.[4]

Same — indictment for a nuisance.

§ 79. A party was sued by the name of Thomas Perkins, junior, for a nuisance under the statute against gaming. He pleaded in abatement, that his name was Thomas Hopkins Perkins. To this the county attorney demurred generally, and there was a judgment of *respondeat ouster*, and trial on the issue, and appeal. The court said: "It is said, on the part of the Commonwealth, that junior is no part of the name. This is true, but another objection to this indictment is, that the defendant is called Thomas, instead of Thomas Hopkins. In 5 D. & E. 195, a person was sued by the christian name of *James Richard* instead of *Richard James*, and it was held misnomer on account of the transposition. The indictment must give the defendant his christian name."[5]

[1] Curtis v. Marrs, 29 Ill. 508.
[2] Pickering v. Pulsifer, 4 Gilm. (Ill.) 79.
[3] Lytle v. People, 47 Ill. 422.
[4] Cutting v. Conklin, 28 Ill. 508.
[5] Com. v. Perkins, 1 Pick. 388 (1823).

Christian name — initial letter.

§ 80. Defendant was fined by a justice of the peace for neglecting to appear at a meeting of a militia company. At the trial the complainant produced the book of enrollment of the company, which contained the name of Charles Hall, but not the name of Charles Jones Hall, the true name of the respondent. Upon this the court laid down the rule thus: "The roll of White's company contained the name of Charles Hall, but not the name of Charles Jones Hall. Charles Jones is the respondent's christian name. It needs no argument to prove that Charles and Charles Jones are different names. The respondent, therefore, was not duly enrolled in the company of which the complainant claims to be clerk.[1] But it is now held in New York and other States that the middle letter is no part of the person's name, and where the plaintiff sued in an action of trespass *quare clausum fregit*, and declared in the name of *William Robinson*, and the deed under which he claimed title to the *locus in quo* was to William F. Robinson, this variance was held to be immaterial.[2] In an action of ejectment, there was an objection raised to a deed executed by Margaret Gittings; it was shown that her name in the body of the deed was written Margaret A. Gittings, and her signature to the deed was Margaret S. Gittings, her real name. This was held, by clear intendment, to be an immaterial variance.[3]

First name omitted — effect — abatement.

§ 81. One Martin being indicted for gaming in the name of William Martin, he pleaded in abatement that his name was John William Martin, and that he was so known and called, etc. The State's attorney demurred, which was overruled, and the cause went to the Supreme Court, where it was said: "It has been held, and we think correctly, that the middle name of an individual forms no part of his christian name. If this be correct, then the indictment cannot be sustained, as it only sets out the middle name and does not give the christian name at all. Difficulties and confusion frequently arise, growing out of the multiplicity of names given to individuals, and by which they are known; to obviate this, they should be named as they are generally called in society, and then if they plead in abatement, the plaintiff can reply the facts and maintain his action."[4]

[1] Com. v. Hall, 3 Pick. 262 (1825).
[2] Franklin v. Talmadge, 5 Johns. 84.
[3] Erskine v. Davis, 25 Ill. 251.
[4] State v. Martin, 10 Mo. 391. Citing Jones v. Macquillin, 5 Term Rep. 195.

Misnomer — abatement — addition — surname.

§ 82. An action was brought in England for words, against Benjamin Walden; he pleaded in abatement that his name was John, and by that name he was called and known, and that his surname was "Benjamin Walden." HOLT, C. J., said: "One may have a *nomen* and a *cognomen* that never was baptized, and thousands in fact have; also one may be baptized by the name of A. and be confirmed by the name of B., as Sir *Francis Gaudy* was, not that he thought the first name ceased; also he thought it would not be a sufficient answer to the defendant to say he was baptized by the name of A., without averring also, that he was ever called and known by that name. But supposing it had been a sufficient answer without more, yet saying he was baptized, etc., was nothing more than an inducement, which is waived by the traverse, so that the effect of the plea is that the defendant was never called by the name of A. B., and the chief justice said that the traverse was material and likewise the inducement."[1] Where a declaration alleged that a note was made by the defendant, by the name of "Samuel Headly," and the note offered in evidence was signed "Samuel Headly, Jr." it was held to be no variance; the "Jr." added to a person's name is no part of his name; it is a mere addition.[2]

Militia — execution — wrong name.

§ 83. An action of trespass was brought against a defendant in Vermont, in 1830, to recover a small quantity of clothing, which, on trial, it appeared was sold to Sanborn, one of the defendants, on a pretended execution, issued by Cornelius Stilphin, Jr., as captain of a militia company, on an amercement of the said Brainard for delinquency in military duty. Defendant pleaded the general issue with notice; and offered in evidence the execution against Brainard, signed by the said Stilphin, to which the plaintiff objected, because it did not appear that the amercement was made by Cornelius Stilphin, Jr., but by Cornelius Stilphin, captain, etc., and the same was excluded by the court. Defendant then offered to prove by parol that Cornelius Stilphin, captain of said company, was the same identical person who signed the execution by the name Cornelius Stilphin, Jr., but the court excluded it as incompetent.[3]

[1] Holman v. Walden, 1 Salk. 6.
[2] Headley v. Shaw, 39 Ill. 354.
[3] Brainard v. Stilphin, 6 Vt. 9.

Misnomer — defective orthography.

§ 84. The doctrine of *idem sonans* having been so often passed upon and illustrated that the rule seems to be settled that when it occurs that the sound of a name, *idem sonans*, whether of a party to an action or of a third party, is not in any way affected by bad or defective orthography, such error is immaterial; and two names being alike in the original derivation, and having become promiscuous in their use, though differing in their sound, will not, by the use of either, be considered a fatal variance. But it has been held that the doctrine is not to be rigidly enforced by the courts. As held in Illinois, the courts at the present day will not be confined to the rigid rules of *idem sonans*, but will inquire whether the variance is material.[1] And so it has been held in some of our Western States, in the use of the names of foreigners; the courts hesitate to decide there is a material variance when it occurs in misspelling the name, or an incorrect pronunciation of a man's proper name, where valuable and important rights are involved and at issue. And so, where, in a deed of conveyance of real estate and acknowledgment thereof, the party, in making out his chain of title, gave in evidence one deed to *Mitchell Allen*, and a deed thereof from *Michael Allaine*, and insisted that the names represented the same person. This was held to be no variance. They were French names, and the difference in spelling *Mitchell* and *Michael* would result from giving the name the English or French pronunciation; and the names of *Allen* and *Allaine* were *idem sonans*. And what was remarkable, in the same chain of title, there was a deed to *Otaine Allaine* and a deed from *Antoine Allaine* claimed to be to and from the same person; and this was held not to be a fatal variance. These names were also French, and it was presumed that there was proof in the court below that *Antoine* took by a misnomer and conveyed the property by his own proper name.[2]

Bond — names — sureties — rule in Illinois.

§ 85. In Illinois, in a chancery suit, the plaintiff's bill was dismissed and he prayed an appeal from the order dismissing it, and obtained the order of appeal, provided he would file the requisite bond, with one Henry Service as his surety. When he filed his appeal bond his surety signed his proper name, *J. H. Servoss*, as the surety. The court said: "The appeal bond should have been executed by the

[1] Belton v. Fisher, 44 Ill. 32. [2] Chiniquy v. Cath. Bish. Chicago, 41 Ill. 148.

person named as security, in the order granting the appeal. Here the name signed as security is altogether different from that mentioned in the order granting the appeal."[1] This case seems to have gone to the very verge of the law, if not beyond it.

Names — not idem sonans — "Henry" and "Harry."

§ 86. It was held in Illinois, that *Henry* and *Harry* are distinct names, and in a proceeding by *scire facias*, if it is assumed that one of these names is a corruption of the other, proper averments should be used, or the judgment, if by default, will be erroneous, and for this reason reversed. The court laid down the rule thus: "It is objected that Henry Freelove, and not Harry Freelove, was called and defaulted. While the name of Henry is sometimes corrupted into Harry, yet they are separate and distinct names. We cannot, therefore, hold that they are the same, unless it were shown by averments and proof. Had the *scire facias* averred that Harry Freelove and Henry Freelove were one and the same person, and the averment had been sustained by proof, or its truth admitted by the defendant, the judgment would be sustained.[2] And it was also held that a recognizance for the appearance of a person by the name of William H. Graves is not forfeited by an indictment against Harrison Graves, and his non-appearance. If the facts of the case warranted, there should have been an averment in the *scire facias*, that Harrison Graves was the person who entered into the recognizance by the name of William H. Graves.[3]

Misspelled name — firm name — strictness.

§ 87. One Butler was duly summoned to court as defendant on the docket, to answer the complaint. He searched the docket in company with his counsel, and found no case on the docket against him as *Butler;* but, as appeared on the docket, it was against one *Bulter*, and he failed to appear, and there was judgment and execution. He brought it up on *certiorari*, but could find no relief; but it was said that, if there was a misnomer, he should have pleaded in abatement.[4] In the case of abbreviations, it was held that "Com." and "Co." were well-understood abbreviations of the word "company," when used as a part of the name of a commercial firm. An assignee brought an action on a promissory note made payable to

[1] Shinkell v. Letcher, 40 Ill. 48.
[2] Garrison v. People, 21 Ill. 535. Citing Graves v. People, 11 id. 542.
[3] Graves v. People, 11 Ill. 542.
[4] Hermann v. Butler, 59 Ill. 225.

"Sturges & Com.;" the allegation in the declaration set out that it was indorsed by "Sturges & Com." When plaintiff produced the promissory note to read it in evidence on the trial, it was indorsed by "Sturges & Co." This was held to be no material variance.[1]

Names — idem sonans — larceny.

§ 88. A party in Massachusetts was indicted for larceny from one John M. Mealy, and he, as a witness, testified that his name was spelled "Malay" or "Maley," but never called "Mealy." The court left it to the jury to say whether the name proved was *idem sonans* with the one in the indictment, and he was convicted. The Supreme Court held that the question of misnomer was rightly left to the jury.[2] A party in Texas was indicted for stealing a red bull yearling, which was neither marked nor branded, from one "Hix Nowells;" the witness, Nowells, testified that his name, properly spelled, was "Hicks Nowells," and where it had been spelled in the indictment "Hix Nowells," the court held that "Hix Nowells" and "Hicks Nowells" were *idem sonans*, and that the court did not err in its charge to the jury in disregarding the difference in the orthography of the name, and in omitting to submit to the jury for their determination whether or not the name as spelled in the indictment was the same as that proved on the trial, that there was no room for doubt upon the question, and the court might well assume that the names were identical. If there had been any doubt as to whether the names were *idem sonans*, it would have been proper, and perhaps essential, to have submitted the question to the jury.[3]

Same — bigamy — name of wife.

§ 89. Defendant Jenning was indicted in Massachusetts for bigamy, charging that he was lawfully married to one Augusta Gigger, and that afterward he did unlawfully marry one Hattie Johnson, he being then and there the lawful husband of the said Augusta Gigger, who was still living at the time of said second marriage by defendant. He was convicted and the conviction affirmed. The court said: "The question of misnomer was rightly submitted to the jury, who were well warranted in finding that the name of the first wife, as spelled in the indictment and in the record of her marriage, "Gigger," the initial letter had the soft sound, which it conversely (though not universally) has before "i," and that the

[1] Keith v. Sturges, 51 Ill. 142.
[2] Com. v. Donovan, 13 Allen, 571.
[3] Spoonemore v. State, 25 Tex. App. 258. Citing Henry v. State, 7 id. 388.

double letter had the usual hard sound, and that the name which the only witness, other than the defendant, pronounced in the same way, and testified was spelled either "Jigger" or "Jigr," was usually so pronounced."[1]

Names — spelling — sound alike — idem sonans.

§ 90. In a very late case in the Massachusetts court, the defendant was indicted for adultery, and this court admitted evidence to show that a woman described in the indictment as Albino Jefferds, the person with whom the offense was alleged to have been committed, had pleaded "not guilty" to a complaint against Albino Jeffards. It was held that this evidence was properly admitted on the question of identity, whether or not she was correctly described in the indictment.[2] In another recent case in the same State, on the trial of an indictment for polygamy, it appeared that the name of the defendant's first wife was spelled "Celeste" in the indictment. The first wife testified that her first name was "Celestia." She pronounced it "Celeste" in two syllables, with the accent on the last. There was no other evidence as to the pronunciation and sound of "Celeste." It was held that the question of misnomer was properly submitted by the court to the jury, for their determination.[3] *

Suit on checks — identity of bank.

§ 91. There were three checks drawn by Culver in favor of Marks. The first in the following form, to-wit: "LAFAYETTE, Ind., *Nov.* 1, 1869. The First National Bank pay to J. F. Marks one thousand dollars. (Signed) M. C. CULVER." The other two in same form, except they were payable to J. F. Marks *or bearer*. These checks were each dated at Lafayette, Ind., and drawn on the "First National Bank," the name of no other place or bank appearing on the checks, and the evidence showed that there was a National bank at Lafayette. The presumption was held to be that the checks were drawn upon the First National Bank of Lafayette. On this point the court said: "A question is made as to the checks. "It is contended that, as the

[1] Com. v. Jennings, 121 Mass. 47.
[2] Com. v. Brigham, 147 Mass. 414.
[3] Com. v. Warren, 143 Mass. 568.

* In Com. v. Warren, *supra*, the court said: "The province of the court and jury in cases like the present is governed by the following rule: If two names, spelt differently, necessarily sound alike, the court may, as matter of law, pronounce them to be *idem sonans;* but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury. The Queen v. Davis, 4 New Sess. Cas. 611; 5 Cox C. C. 237; 2 Den. C. C. 233. In that case the judge ruled as matter of law that "Darius" and "Tryus" were *idem sonans*. The conviction was quashed, COLERIDGE, J., saying: 'If the question had been left to the jury, there can be no doubt that a Dorsetshire jury would have found that Darius and Tryus were the same name.'" And see the case of Com. v. Jennings, 121 Mass. 47.

complaint alleges that the checks were drawn on the 'First National Bank of Lafayette, Indiana,' and there was no proof of such fact except that the checks were drawn on the 'First National Bank,' that the proof made by the introduction of the checks does not correspond with the averments of the complaint. The checks were copied and made part of the respective paragraphs of the complaint which declared upon them, and shows affirmatively, in each paragraph of the complaint, the name of the bank upon which they were drawn. They were each dated at Lafayette, Indiana, and the name of no other place or bank appeared upon the checks, and the evidence showed there was a 'First National Bank' at Lafayette, and the fair presumption is, in the absence of any thing appearing to the contrary, that it relates to, and that they were drawn on that bank."[1]

Promissory note — to cashier of bank — rule in Indiana.

§ 92. A promissory note payable to the cashier of a bank is in effect payable to the bank, and an action may be brought on it in the name of the bank, or a successor to the cashier named, without an assignment by the latter, who need not be a party. The court said: "It was shown that Boyd, to whom, as cashier, the mortgage was made, had succeeded Patton in the office. It is the case of a trustee of an express trust, who may sue in his own name, without joining the *cestui que trust.* Patton, having ceased to be the trustee, had no interest in, or relation to, the paper, which made him a necessary party. Paper made payable, or indorsed, to the cashier of a bank is, in effect, payable to the bank itself, and in this case the suit might appropriately have been brought in the name of the bank, though not improperly brought in the name of the cashier.[2] And so the action by the cashier was sustained.

Note in bank — indorsement — identity of bank and cashier.

§ 93. In a very recent case in Michigan, plaintiff recovered a judgment on the following instrument, to-wit., $1,235.00. Six months after date, for value received, I promise to pay to the First National Bank of Boise City, Idaho, in favor of E. Pinkham or order the sum of twelve hundred and thirty-five dollars, with interest at eight per cent per annum. Chicago, Dec. 11, 1885. HARVY COCKELL."

On the back of this, was indorsed:—"E. Pinkham." "Pay to the

[1] Culver v. Marks, 122 Ind. 555. Citing Walker v. Woollen, 54 id. 164; Roach v. Hill, id. 245; Dutch v. Boyd, 81 id. 146.

[2] Dutch v. Boyd, 81 Ind. 147. And see Nave v. Hadley, 74 id. 155.

order of Citizens' Exchange Bank (Hart, Mich.), for collection for account of First National Bank of Idaho. JOHN HUNTOON, *Cashier*."

A line had been drawn through all the words between "Pinkham" and "First National Bank," etc. This was introduced in evidence on the trial. The judgment was reversed, because the court was of opinion that, "If, as seems to be suggested, plaintiff's title must be traced through this indorsement from the bank which owned it, there is a double difficulty in the case: That there was no evidence that the First National Bank of Boise City, Idaho, is identical with the First National Bank of Idaho. Neither is there any proof that Huntoon was the cashier of either of them.[1]

Note — where payable — silent — presumption.

§ 94. Where, in Indiana, in a recent case, a suit was brought to recover a debt, upon a promissory note, executed by the defendant, it was held that it would be presumed, until the contrary was made to appear by evidence given in the case, that such promissory note was made and executed in the State of Indiana; and that where, in a suit brought upon such promissory note, it specifies some particular bank at which it is made payable, but does not specify the State in which such bank is located, it will be presumed, until the contrary is made to appear, that such bank is located in that State.[2] But these presumptions like other presumptions may be rebutted or overcome by other and countervailing evidence. The same rule was held in another case by the same court, and about the same time, under circumstances very similar to those given above.[3]

Idem sonans — verdict — indictment.

§ 95. The rule of *idem sonans* applies as well to ordinary words as to proper names; and so, on the trial of a recent case in Louisiana, for assault and battery with intent to murder, the jury returned a verdict, finding "the accused guilty with assault by *sutinge* with intent to murder." It was held that the verdict was sufficient to reasonably convey the idea intended, the word "sutinge" being intended for "shooting" under the rule of *idem sonans*.[4] A party in Texas was indicted for the murder of one "Whitman" or "Whiteman." The indictment in one part spelled the name of the deceased "Whitman" and in other parts "Whiteman." The defense moved

[1] Pinkham v. Cockell, 77 Mich. 265 (1889).
[2] Walker v. Woollen, 54 Ind. 164.
[3] Roach v. Hill, 54 Ind. 245.
[4] State v. Wilson, 40 La. Ann. 751.

to quash and in arrest of judgment, because of uncertainty resulting from the discrepancy between the names "Whitman" and "Whiteman." But it was held that the allegations of the indictment precluded any uncertainty, and that the names were *idem sonans*, and the same. The court said: "The following among many others found in the books are held to be *idem sonans:* Blankenship and Blackinship, McInnis and McGinnis, Edminson and Edmundson, Deadema and Diadema, and Conley and Connolly. In *Gresham* v. *Walker*, 10 Ala. 370, it was said: The law does not take notice of orthography; therefore, if the name is misspelled, no harm to the prosecution can come from this, provided the name as written in the indictment is *idem sonans*, as the books express it, with the true name. It is sometimes a nice matter to determine when the names are of the same sound; and the courts do not in this matter hold the rule of identity with a strict hand.[1]

Same — indictment — assault and battery.

§ 96. One Ward was indicted for an assault and battery on Henry *Chambles;* the assaulted party testified that his name was Henry *Chambless*, and that in spelling it he doubled the letter "s" at the end, and witness pronounced his name as it was usually called, showing that both syllables were emphasized about equally. It was held that the variance between the averment of the indictment and the proof as to the name of the person assaulted was immaterial where the names may be sounded alike without doing any violence to the power of letters found in the variant orthography, as in the name of *Chambless* and *Chambles*.[2]

Corporation — name of railroad — rule as to.

§ 97. In actions by or against corporations, upon the question of identity by name, like those by or against individuals, the defendant or plaintiff should be described by the correct name; and where the name of the corporation consists of several words, the transposition or alteration, or even the omission of some of them, may perhaps not be sufficiently important or material to make a fatal variance if it be still left clear what particular corporation is intended by the statement made in the declaration, in the attempt to describe it. So, where Chadsey brought suit on a promissory note, payable to James

[1] Henry v. State, 7 Tex. App. 388. Citing Archb. Cr. Pr. & Pl. 80; Ward v. State, 28 Ala. 53.

[2] Ward v. State, 28 Ala. 53. Citing 2 Russell Crimes, 715; Ahitbol v. Beniditto, 2 Taunt. 401; Gresham v Walker, 10 Ala. 370.

G. McCreary, treasurer of the Rock Island and Alton Railroad Company, it was a mere description of the person.[1] *

Name of indorser — witness — defendant.

§ 98. A defendant, being an indorser on a bill of exchange, sent a person to the plaintiff and indorsee, to inquire of him as to the solvency of B., a prior indorser; the person who was sent to the house to inquire, went to the plaintiff's residence, and on the street door being opened, a person in a dressing gown, whom he had never seen before or afterward, asked him what his business was. It was held that this was not evidence of the identity of the plaintiff, to let in the evidence of the conversation had with the man in the dressing gown.[2]

Suit was brought against one "S." It was shown in evidence that a witness went to the tavern and asked a waiter if S. was there, and a person came out, and he inquired of him who he was, when he answered that his name was S. This witness had never seen him before and never saw him at any time thereafter. On this statement it was held that it was some proof that this person was S., and that the conversation between the witness and such person was then admissible in evidence to go to the jury.[3]

Same — identity of name — person.

§ 99. It is held in England that it is not necessary to make strict proof of the identity of the defendant in an action with the person of the same name, concerning whom a witness gave evidence. The similarity of the name will be sufficient to throw the burden of proof on the defendant to show that he is not the person spoken of.[4] The identity of the name, as we have seen, is to be taken as *prima facie* evidence of the identity of the person. It raises a presumption,

[1] Chadsey v. McCreery, 27 Ill. 253.
[2] Corfield v. Parsons, 1 C. & M. 730.
[3] Reynolds v. Staines, 2 C. & K. 745.
[4] Hamber v. Roberts, 7 C. B. 861; 18 L. J. C. P. 250.

* In Chadsey v. McCreary, *supra*, BREESE, J., said: "This suit was brought by a corporation, and, consequently, no question of a misnomer of a corporation can arise. The note is made payable to the appellee, who is described to be the treasurer of the Rock Island and Alton Railroad Company. It is mere description of the person, and, if erroneous, cannot vitiate. The fact appears to be, that the true name of the railroad company is Alton and Rock Island. The transposition can be of no manner of consequence in this suit. There can be no doubt what road was meant, of which the appellee was the treasurer. In 1 Kyd, 237, it is said, as the name of a corporation frequently consists of several words, the transposition, interpolation, omission or alteration of some of them may make no essential difference of their sense. It is held in a devise to a corporation, if the words, though the name be entirely mistaken, show that the testator could only mean a particular corporation, it is sufficient; as for instance, a devise to the inhabitants of the South Parish may be enjoyed by the inhabitants of the First Parish, the "First Parish" being the legal name. 3 Pick. 237. There is no evidence preserved in the record except the note; so we cannot know but that it was abundantly proved what corporation was understood and meant by the description in the note. That the Alton and Rock Island Railroad Company are liable to issue stock on the payment of this note there can be no doubt." And see Peake v. Wabash R. R. Co., 18 Ill. 88; Jowett v. Charnock, 6 M. & S. 45.

which will stand until it is rebutted or overthrown by countervailing evidence. And where a carman carried goods to the house of L. but did not know him — he inquired for Mr. L. of a person in the house, and that person said "I am Mr. L." — this was held to be *prima facie* evidence that the person to whom the carman spoke was Mr. L.[1]

Identity — plaintiff's name — "Lubuke" and "Lubukee."

§ 100. In an action of ejectment in Illinois, the plaintiff sought to support his claim of title by a decree rendered on a proceeding under the "Burnt Record Act" against the same defendants. A question arose as to the identity of plaintiff in the two suits, there being a difference in the spelling of the surnames. In the ejectment suit, throughout the whole proceedings the plaintiff's name was spelled "*Lubukee*," while in the proceedings in the other case, with one exception, it was written "*Lubuke*." In entitling the copy of the decree in that case, as the same was set out in the record in the ejectment suit, the name was spelled "Lubuke." In the two suits, the names of the defendants, the christian name of plaintiff, the court in which the suits were brought, the appeal in both cases in the Supreme Court, and the appeals therein, all corresponded with literal accuracy. There was no evidence, aside from the diversity in spelling the names, that Lubuke and Lubukee were different persons, or that there was ever but one proceeding brought against the same defendants under the "Burnt Record Act," involving the title to the land in controversy; and in an application for a continuance in the ejectment suit, in the trial court, the defendants expressly stated that the plaintiff in that suit was the plaintiff in the former suit. It was held that, in the absence of countervailing evidence, the facts sufficiently established the identity of the plaintiff in the two suits.[2]

Introduction by name — fraud.

§ 101. On the trial of the right of property in a stock of goods, between a judgment creditor and a claimant by purchase from the judgment debtor, under a bill of sale dated prior to the rendition of the judgment, it was held competent for plaintiff to prove that, after the rendition of the judgment, the defendant in execution went into the office of an attorney, accompanied by a person who was unknown to the attorney, but who was introduced to him as bearing the name

[1] Wilton v. Edwards, 6 C. & P. 677. [2] Heacock v. Lubukee, 108 Ill. 641 (1884).

of the claimant, and who requested him to write a transfer of the stock of goods from the defendant to the said unknown person. The facts tended to show that the bill of sale was fraudulently antedated, and the jury might infer the identity of the person from the identity of the name.[1] This seems to carry the rule about as far as it can go with safety.

Land certificates — deeds — names.

§ 102. In a Kentucky case decided in 1820, it appeared that two certificates for lands, under the act disposing of the vacant lands of the Commonwealth, granted in the same name, it was held, would be taken as having been granted to the same person, unless the contrary is shown. That the adjudications of the County Court, granting certificates to settlers, were conclusive only for certain purposes, for if two certificates be granted to the same person, an adversary may show it, and the last certificate will be void.[2] And a rule similar to the above was held in Illinois in 1864. "Covenants of warranty," said the court, "passed with the seizin of the land from Lubbe to Flagg, and from him to James Brown. The James Brown to whom Flagg conveyed will be presumed to be the person who, by that name, executed the conveyance to Lubbe."[3] This was the early rule, and has been followed in later cases where the facts and circumstances were similar.

Deed to land — married woman.

§ 103. It is held that ordinarily, in a chain of conveyance, similarity of name is sufficient evidence for the identification of a vendor with the purchaser in a preceding deed, and in that case the coincidence of the given name of a married woman with that of a single woman, to whom, in consideration of marriage, land had been conveyed, was held sufficient, in connection with possession of the original title papers, and with recitals in the deeds, to establish a claim of title dependent for its continuity upon the question whether the married woman and the single woman are one and the same person, there being no evidence to the contrary. And though recitals in deeds are ordinarily admissible in evidence only against parties and privies, yet, when the recital is of a matter of pedigree, which

[1] Moog v. Benedicks & Co., 49 Ala. 512.

[2] Cates v. Loftus, 3 A. K. Marsh. (Ky.) 203.

[3] Brown v. Metz, 33 Ill. 339. Citing 2 Phil. Ev. 508; Sewell v. Evans, 4 Adol. & Ell. (N. S.) 626; Simpson v. Dismore, 9 M. & W. 47.

includes the facts of *births*, *marriages* and deaths, it is evidence even against a stranger to the deed.[1]

Verdict — incorrect orthography — effect.

§ 104. It has been correctly stated that, as a rule, bad spelling will not vitiate a verdict where it has the requisites of being certain and intelligible. In that case the verdict was: "We the jury find the defendant *gilty* as charged in the indictment and assess his punishment at confinement in the penitentiary for a *turm* of *too* years." This verdict, though not a good specimen on the question of orthography, was held to have the two essentials of certainty and intelligibility, and to be one which could not be misunderstood. And so in Krebb's case this court held that the verdict, "We the jury find the defendant guilty and sets his punishment *deth*," however obnoxious in spelling and style, was, notwithstanding, an intelligible verdict in a murder case. Indeed, it may now be stated as a general rule, that neither bad spelling nor ungrammatical expressions by the jury will vitiate the verdict when the sense is clear.[2] Another rule is that verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided, unless from necessity originating in doubt of their import or immateriality of the issue found, or their manifest tendency to work injustice.

Same — defective orthography — when not fatal.

§ 105. An action of trespass was brought in Texas, and the jury returned a verdict for the plaintiff for the sum of $50 against the defendant for actual damages, and $100 as *impunitive* damages. This was reversed, the court saying: "The verdict was unintelligible. Our English word 'impunity,' which applies to something which may be done without penalty or punishment, comes from the Latin word *impunis*, which is a derivation from the word *poena*, with the prefix *in*, and means without punishment or penalty. We have no such word in our language as 'impunitive.' It cannot then be a proper finding, for the jury to say: We the jury find for the plaintiff $100 as 'impunitive damages."[3] A bad specimen of orthography, however, will not vitiate the verdict of the jury, when no doubt can be entertained as to the words intended, or as to their meaning; but it is not the province of the jury to coin words.[4] In the same State, the jury who tried and convicted a prisoner returned

[1] Chamblee v. Tarbox, 27 Tex. 139.
[2] Koontz v. State, 41 Tex. 570.
[3] Dillon v. Rogers, 36 Tex. 152.
[4] McMillan v. State, 7 Tex. App. 100.

a verdict finding the accused *guilty* as charged in the indictment, to which no objection was taken until assigned for error in the motion for a new trial. It was held that the verdict was sufficiently intelligible not to be misunderstood.[1]

Name in actions — rule in England — identity.

§ 106. It was held in England, in 1849, that parties were not entitled to put in evidence, as part of their case, documents handed to a witness, on cross-examination by the opposite party, to depose to their nature, and that, under like circumstances, counsel was not entitled to see letters which were handed to a witness to depose to handwriting. It was held to be *prima facie* proof of identity, if a name were written up in an auction-room, and the auctioneer is addressed by the bystanders by that name. WILDE, C. J., said: "As to the inventory and the lease, I think those documents are in the defendants' possession, and that the opposite party has no right to them. As to the letters, my own opinion is, that, if the handwriting, or any of the contents of any paper shown to a witness, be deposed to, the opposite counsel is entitled to see it, otherwise he, perhaps, would not be able to shape his line of conduct. He would not be so entitled if the witness merely deposed to the nature of the paper, or to its having been produced on a given occasion, or any similar thing. As the contrary, however, has been ruled, I will abide by that ruling. To fix one of the defendants — Robinson, the auctioneer — the fact is put in evidence, that in the room in which the plaintiff's goods were sold, the name of Robinson was written up, and that the by-standers addressed the person who was selling as Robinson. BOVILL objected, that the evidence was insufficient to establish identity. WILDE, C. J., overruled the objection. It had been held that, if a man's name appear over a door, and a person within answers to the name, it is *prima facie* evidence that he is the man so named."[2]

An action in England, in 1842, was upon a judgment for costs in a divorce suit in Scotland, amounting to £93 5s. 8d, claimed to be due to plaintiffs under a decretal order of the Scotch Sessions, against William Gray Smith or Smyth. The copy of the record was filed, but the question of defendant's identity arose. PARKE, B., following Lord ABINGER, C. B., said: "I am of the same opinion. There appears to me to be ample evidence of identity. The defendant in the present

[1] Curry v. State, 7 Tex. App. 91.

[2] Collier v. Nokes, 2 Carr. & Kir. 1012.

action bore the same christian and surname with the defendant in the Scotch suit; both had resided in Dumphries; and there was a correspondence in their ages and professions."[1]

Report of death — identity of plaintiff — rule in Kentucky.

§ 107. In a Kentucky case, in 1805, an execution was quashed because the plaintiff was supposed to be dead. The question was, what proof was required of the death of a party to a suit who is alleged to have died in a remote part of the world. The proof made before the general court as to the death of the plaintiff was a report that a certain Smith Nicholas, of the family of the late George Nicholas, deceased, had died at the Island of Madagascar, and the court say it strongly appeared, and was not absolutely denied, that the Smith Nicholas of the State of Tennessee is the same Smith Nicholas who some time since sailed from the port of Baltimore to some part of the East Indies, and, by common report, died on his return, at the Island of Madagascar, previous to issuing the execution which was quashed. "The first question," said the court, "which presents itself is, was this proof sufficient to quash the execution? If the plaintiff were of the family of the late George Nicholas, proof of a mere report, or a common report, was not the best evidence which the nature of the case admitted of, and which was in the party's power to have procured; because, by procuring the testimony of his relations in Baltimore, nay, even in this country, the fact might have been rendered more certain than it was by mere report, and upon this ground the court erred in quashing the execution. But it is not shown that the plaintiff is of that family; and the report, even if that were more certain, of the death of that Smith Nicholas, unless it were also made to appear that he was plaintiff in this suit, ought not to have produced the quashal of the execution. This proceeding not affecting the merits, and calculated only to produce delay, presumptions ought not to be made to support it." The judgment of the court below was reversed with costs, and order to proceed with the execution.[2]

Identity of plaintiff by name.

§ 108. Where the records of an inferior court of a certain county when sitting for ordinary purposes, shows that administration was granted on the estate of "Jonathan Pearson, late of said county, de-

[1] Russell v. Smyth, 9 M. & W. 810, 818.

[2] Nicholas v. Lansdale, Litt. Sel. Cas. (Ky.) 21.

ceased," and it appears in proof that Jonathan Pearson, who is the party plaintiff in the action on trial, was a resident of such county a few years prior to the grant of administration, it was held that there was *prima facie* evidence of the identity of the deceased person with the plaintiff; and the force of such evidence is strengthened when it is not answered by the plaintiff or by those who use his name for the assertion of their claim.[1]

Parties to actions — identity of — general rule.

§ 109. The general rule on the subject of the identity of parties to actions seems now to be that, if there be several persons in the same locality, at the same time, of the same name, in the same business or profession, and any fact appears which raises a doubt as to the identity of the person, the mere identity of name is insufficient to establish the identity of person.[2] But it has been held to be sufficient presumptive evidence of identity, and the name being shown, it then devolves upon him who denies the identity to rebut or overcome the presumption by proof to the contrary, unless, however, such proof grows out of the facts in the case.[3] But, where the transactions are remote, it has been held that mere identity of name is not sufficient as presumptive evidence of identity.[4] In England where the name was written up in an auction-room at the time of the sale, and the party was addressed by that name, it was held to be sufficient proof of his identity.[5] But it was held in England, and also in Massachusetts, that where the name, the residence and the occupation, trade or profession of a party defendant to an action were the same, the *onus* was on him to disprove identity.[6] And this seems now to be the general rule in England on this subject,[7] and has been followed by our courts.[8]

Same — grantor — initials — deceased plaintiff.

§ 110. If the subsequent grantor of lands be of the same name as the prior holder and grantor, he will be presumed to be the

[1] Clark v. Pearson, 53 Ga. 496.

[2] Gitt v. Watson, 18 Mo. 274; Hamber v. Roberts, 7 M., G. & S. 860; Goodell v. Hibbard, 32 Mich. 48; People v. Rolfe, 61 Cal. 541; State v. Moore, 61 Mo. 276; Hamsher v. Kline, 57 Pa. St. 403.

[3] Simpson v. Dismore, 9 M. & W. 47; Hoyt v. Davis, 30 Mo. App. 309.

[4] Sitler v. Gehr, 105 Pa. St. 577.

[5] Collier v. Nokes, 2 C. & K. 1012.

[6] Com. v. Costello, 120 Mass. 369; Russell v. Smyth, 9 M. & W. 818; Roden v. Ryde, 3 G. & D. 604; Greenshields v. Crawford, 9 M. & W. 314; Page v. Mann, 1 Mood. & Malk. 79; Sewell v. Evans, 4 Adol. & Ellis (N. S.), 626; Murieta v. Wolfhagen, 2 C. & K. 744.

[7] Russell v. Tunno, Pinckney & Co., 11 Rich. (S. C.) 303; Atchison v. M'Culloch, 5 Watts (Pa.), 13; Grindle v. Stone, 78 Me. 176; Douglas v. Dakin, 46 Cal. 49.

[8] Bell v. Brewster, 44 Ohio St. 690; Wilbur v. Clark, 22 Mo. 503.

same person, in the absence of any proof to the contrary.[1] And parties to a succession of deeds which make up a chain of title are held presumptively to be the same persons.[2] But when the family name and initials are the same, as a legal proposition it should not be assumed that there is identity of person.[3] The objection to the identity of a person cannot be raised for the first time in the supreme or appellate court — the objection must be raised in the trial court and let that court have the opportunity of passing upon the question, because that court may sustain the objection and obviate the appeal, so far as that point is concerned.[4] It was held in Michigan, in an action by Isaac N. Gage, upon a guaranty of collection, by one Reed, of several promissory notes executed by one Cole, to be competent to admit in evidence the proceedings and judgment against Cole, to enforce the collection of the promissory notes; although the name of the plaintiff in those proceedings was Newton Gage, where it is shown that the plaintiff's name was Isaac Newton Gage, and that he is the same person named as Newton Gage in the judgment against Cole.[5] The court will not generally presume the identity of person, as it is a fact for the jury. In Georgia, where the records of a court showed that letters of administration had been granted on the estate of an intestate, and it appeared from the evidence that such person, who was plaintiff in an action on trial, was a resident of the county a few years prior to the grant of such letters of administration, it was held to be *prima facie* evidence of identity of the deceased person with the plaintiff in the action on trial.[6] *

[1] Jackson v. King, 5 Cow. 237; Brown v. Metz, 33 Ill. 339.

[2] Chamblee v. Tarbox, 27 Tex. 139; Cross v. Martin, 46 Vt. 14; Heacock v. Lubukee, 108 Ill. 641; Cates v. Loftus, 3 A. K. Marsh. (Ky.) 204.

[3] Jones v. Turnour, 4 C. & P. 204; Houk v. Barthold, 73 Ind. 22; Reed v. Gage, 33 Mich. 179; Bennett v. Libhart, 27 Mich. 489.

[4] Houk v. Barthold, 73 Ind. 22.

[5] Reed v. Gage, 33 Mich. 179.

[6] Clark v. Pearson, 53 Ga. 496.

* In Mooers v. Bunker, 29 N. H. 421, the action was brought in assumpsit for money had and received. The specification claimed one-fifth part of $265, received by the defendant for timber taken from the lands — the Paul Eaton lot, so called, and sold by one John Ray. The former owner of the lands died in 1830, leaving a son, Henry, and four other children and their legal representatives. The defendant put in evidence a quit-claim deed executed by Henry Eaton, and dated in 1844. There were other children and grandchildren of Paul Eaton, the former owner of the land, and the father of Henry. Mrs. Mooers was a daughter of Paul Eaton, and died before her father. She left four children and it was not known that either of them had died. These were the plaintiffs, and their identity became the important question in the case. BELL, J., said: "The first thing to be proved is that the plaintiff is seized of the share he claims of the real estate. If his name was John Smith or John Jones or any of the common or frequently occurring names, it would be at once apparent that to prove a John Smith to be entitled is but one step to show the plaintiff's title, the next is to prove that he is the same person. In the nature of things, the same question may arise in every case. It is not often a matter of controversy whether the identity of the plaintiff is established; because, the doubt, if any arises, can generally be readily removed. But if a question be made, a jury is not at liberty to presume that even a person of so peculiar a name as Timothy Mooers is the same person as the man of the same name who is shown to be entitled to a particular estate. In a case of some interest at this time, the Berkeley Peerage case, 4 Campb. 401, a failure to establish the identity of the plaintiff's ancestor, and the son of the deceased peer of the same name, was the deficiency in the claim of the claimant's title. Beyond the identity of name, no evidence could be produced that the persons were the same."

Name — person — presumption.

§ 111. Much has been said in the books to the effect that the identity of name is *prima facie* evidence of the identity of person, and when the name is shown, the presumption is raised of the identity of the person; but as a rule, its correctness may well be doubted. And it was thought that the name would not raise such a presumption, if the party resided in Wales, and his name was Jones. But it is held that the mere identity of name is not sufficient evidence of the identity of the person, in cases where it is shown by direct testimony, or even by inference, that there are more than one person in the place or circle of society, who bear the same name.[1] But the inference will be the stronger where the circumstances render it improbable that there are two persons of the same name in the same place, at the same time.[2] Identity, however, will be presumed from the name and other facts and circumstances indicating or pointing to the party as the identical person in question.[3] These facts and circumstances are so varied that it would, perhaps, be unsafe to undertake to lay down any general rule by which the courts can afford to indulge the presumption.

Malicious mischief — boys identified in court.

§ 112. Several young boys, fourteen or fifteen years of age, frequented the house of the prosecutor almost daily, abusing him with insults, calling him tory, and finally broke into his store with great violence — they had feigned names and it was difficult to learn who they were. On the trial, after proving these facts, the district attorney proceeded to identify them by having them called to the bar, and interrogating the prosecutor as to their respective names, when counsel objected, and observed that their defense would rest mainly,

[1] Ellsworth v. Moore, 5 Iowa, 486; McMinn v. Whelan, 27 Cal. 300; Jones v. Jones, 9 M. & W. 75; Morrissey v. Ferry Co., 47 Mo. 521; Reed v. Gage, 33 Mich. 179; Mooers v. Bunker, 29 N. H. 420; Moss v. Anderson, 7 Mo. 337; Bennett v. Libhart, 27 Mich. 489; Kinney v. Flynn, 2 R. I. 319.

[2] Murieta v. Wolfhagen, 2 C. & K. 744; Kelly v. Valney, 5 Pa. L. J. Rep. 300; Sewell v. Evans, 4 Adol. & Ell. (N. S.) 626; Greenshields v. Crawford, 9 M. & W. 314; Jackson v. Cody, 9 Cow. 140; Heacock v. Lubukee, 108 Ill. 641; Cates v. Loftus, 3 A. K. Marsh. (Ky.) 202; Gitt v. Watson, 18 Mo. 274; Douglas v. Dakin, 46 Cal. 49; Burford v. McCue, 53 Pa. St. 427; Grindle v. Stone, 78 Me. 178; Balbec v. Donaldson, 2 Grant (Pa.), 459; Bogue v. Bigelow, 29 Vt. 179; State v. McGuire, 87 Mo. 642; Jackson v. Goes, 13 Johns. 518; Graves v. Colwell, 90 Ill. 615; Hatcher v. Rocheleau, 18 N. Y. 86; Brown v. Metz, 33 Ill. 339.

[3] Com. v. Costello, 120 Mass. 358; Jones v. Parker, 20 N. H. 31; Brown v. Metz, 33 Ill. 339; Farmers' Bank v. King, 57 Pa. St. 202; State v. Bartlett, 55 Me. 200; Brotherline v. Hammond, 69 Pa. St. 128; Hunt v. Stewart, 7 Ala. (N. S.) 525; Dennis v. Brewster, 7 Gray, 351; Bennett v. Libhart, 27 Mich. 489.

upon the identity of the defendants, and complained of unfairness, etc., and that they should be identified without calling. The court replied that "it was the duty of the defendants to be present *at the bar* of the court, and in all criminal proceedings were always supposed to be, and no trial could take place without such presence, but by consent. If, therefore, the counsel for the defense object to calling them to the bar, for the purpose of proving them the same persons concerned in the riot, the court would be obliged to forfeit their recognizance and so bring them up; and was proceeding to do so when counsel for the defense consented that they might be called and identified, which was done.[1]

Proof of identity —letters — ancient documents.

§ 113. In an action to quiet titles to lands in Ohio, decided in 1887, it was held, substantially, that a resemblance between the handwriting upon one paper and that upon another tends to prove that both were written by the same person, and that, therefore, where the identity of a person is in issue, it is competent to introduce letters or receipts claimed to be in his handwriting, for the purpose of comparison with other writings, admitted or clearly proven to have been written by him, and such comparison may be made. An opinion expressed by experts as to handwriting — it was held not necessary to the admission of the paper claimed to be in the handwriting of a person whose identity is involved, that they should be clearly proven to have been written by him. Any uncertainty as to this will affect the weight, but not the competency of the evidence. That a letter purporting to have been written more than thirty years ago belongs to that class of instruments known as ancient documents; and, where produced from the family papers of the person to whom it had been addressed, is presumed to have been written by the person by whom it purports to have been written; and, the writer and the person addressed being dead, is admissible in evidence without further proof of its authenticity. And so a pay-roll of a military company in the war of 1812, on which is what purports to be the signature of a soldier to a receipt for pay due him, produced from the archives of the government in the War Department at Washington City.[2]

[1] Poople v. Mount, 1 Wheeler Cr. Cas. 411.

[2] Bell v. Brewster, 44 Ohio St. 690.

Soldier — name — land patent — family records.

§ 114. In an action of ejectment in New York, in 1818, brought by the heirs of Moses Miner, the plaintiff claimed under a patent issued to Moses *Minner*, a soldier of the *New York* line during the revolutionary war; it was held that the patent was *prima facie* evidence of the service of the soldier mentioned in it, and as it did not appear that there was any man in the army by the name of *Minner* the variance must be considered a mere misspelling of the name, which could not affect the identity of the person, and did not make it a distinct name, and besides the defendants claimed under a soldier named Moses *Minor*, who there was strong evidence to show was the same as the person under whom the lessors claimed. Hearsay is admissible as evidence to prove the death of a person. The register of marriages and births, to prove pedigree or heirship.[1]

Name — presumption — proof of signature.

§ 115. In an action on a judgment debt of a corporation, against Henry N. Stone of Boston, a shareholder therein, the certificate of organization was signed by Henry N. Stone of Boston. It was held that the defendant was the same person who signed the certificate of organization is *prima facie* shown by the identity of name, in the absence of any evidence of another person of that name in Boston. And this seems now to be the general rule as to identity of parties to actions.[2] To prove the signature of a person, it is not sufficient to prove that the signature is the same with that of a person bearing the same name; but it is necessary to produce evidence that it was written by the same person.[3]

Proof of identity, either of the plaintiff or defendant, with one named in a contract, etc., is never necessary in the first instance. Producing the contract bearing the same name with the party in the suit is *prima facie* sufficient, and throws the *onus* upon the other party to produce evidence against the identity.[4] Where a bond signed by several obligors came collaterally in question, one

[1] Jackson v. Boneham, 15 Johns. 226.

[2] Grindle v. Stone, 78 Me. 176. And see Murieta v. Wolfhagen, 2 C. & K. 744; Sewell v. Evans, 4 Adol. & El. (N. S.) 626; Greenshields v. Crawford, 9 M. & W. 314; Russell v. Tenno, Pinckney & Co., 11 Rich. (S. C.) 303; Bell v. Brewster, 44 Ohio St. 690; Atchison v. M'Culloch, 5 Watts, 13; Fletcher v. Conly, 2 Gr. (Iowa) 88; Moss v. Anderson, 7 Mo. 337; Wilbur v. Clark, 22 id. 503; Douglas v. Dakin, 46 Cal. 49; Hamber v. Roberts, 7 C. B. 861; Wilton v. Edwards, 6 C. & P. 677; Russell v. Smyth, 9 M. & W. 810; Reynolds v. Staines, 2 C. & K. 745; Roden v. Ryde, 3 G. & D. 604.

[3] Nelson v. Whittall, 1 B. & Ald. 19; Kinney v. Flynn, 2 Durfee, 319; Jackson v. Christman, 4 Wend. 278; Whitelocke v. Musgrove, 1 C. & M. 511.

[4] Jackson v. King, 5 Cow. 237.

obligor and one witness were of the same name, and the judge at the trial admitted the bond in evidence upon the proof of the handwriting of the other witness, shown to be dead, and without accounting for the absence of the other witness, it was held that the judge erred; that, in the absence of proof, he was not authorized to say, from the identity of name, that the obligor and the witness were the same person.[1]

Name — proof — deed — presumption — identity.

§ 116. Oral evidence is generally competent to show that the plaintiff is the same person as the defendant's principal. This was held in an early case in Alabama.[2] One of the modes of proving identity has been held to be by a concurrence of several characteristics.[3] And even *ex parte* affidavits have been held admissible in evidence to prove the identity of a person, so far as it respects his marriage or pedigree.[4] So far as the name is proof of the identity of the person, the suggestion of death of a plaintiff, in the record of the case, in order to make his devisees parties plaintiff to the action, was held *prima facie* evidence of his death, for all the purposes of the trial of the case. In that case the action was brought to recover possession of real estate in the State of Illinois, and involving the title thereto. Plaintiff Stebbins claimed under a sale on execution in a judgment recovered by the United States against one Duncan. Duncan's title was derived from one Dunbar to one Prout in January, 1818, and recorded in October, 1838. Defendants claimed under a deed from Dunbar to one Frank, dated in 1818, and recorded in 1870. The suit was commenced by one Morris, who died pending the action. His death was suggested on the record, and, at the trial, proof of the probate of his will was offered as proof of his death. The first question was on the sufficiency of the proof of that fact. The original deed from Dunbar to Prout was witnessed by Smallwood of Washington, D. C. Smallwood being dead, the genuineness of his signature was proven by depositions. The next question was as to the sufficiency of that as complete proof of the identity of Dunbar. It was held that the execution of a deed being proved according to law, slight proof of the identity of the

[1] Jackson v. Christman, 4 Wend. 278.
[2] Chandler v. Shehan, 7 Ala. 251.
[3] Mullery v. Hamilton, 71 Ga. 720.
[4] Winder v. Little, 1 Yeates (Pa.), 152.

grantor is sufficient — that in tracing titles, identity of name is *prima facie* proof of identity of persons.[1]*

Identity of name — when sufficient to identify the person.

§ 117. In California the identity of name is held to be presumptive evidence of the identity of person; and where William J. Douglas was plaintiff in an action for rent, and the defendant set up a judgment obtained in another court against William J. Douglas, without any averment of identity, it was held that the identity of the parties was to be presumed from the identity of name.[2] In an action by a messenger of the court of bankruptcy against J. S., it appeared from the proceedings under the *fiat*, which was put in, that the name of the petitioning creditor was "James Roberts," but it was objected, on the part of the defendant, that there were no particulars of demand annexed to the writ of trial, and further, that, in the absence of some evidence of identity with the person so named, there was nothing to go to the jury. It was ruled otherwise, and the jury returned a verdict for the amount claimed, and this was affirmed.[3] And so it was held in Maine in 1886 — in an action on a judgment debt of a corporation against Henry N. Stone of Boston, a shareholder therein, the certificate of organization having been signed by Henry N. Stone of Boston — that the fact that defendant was the same person who signed the certificate of organization was *prima facie* shown by the identity of name, in the absence of any evidence of

[1] Stebbins v. Duncan, 108 U. S. 32.
[2] Douglas v. Dakin, 46 Cal. 49.
[3] Hamber v. Roberts, 7 M., G. & S. 861.

*In Stebbins v. Duncan, 108 U. S. 32, Justice WOODS said: "It was further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor in the deed, that is to say, that the John J. Dunbar, by whom the deed purported to be executed, was the same John J. Dunbar named in the patent for the lands in controversy. In any case slight proof of identity is sufficient. Nelson v. Whittall, 1 B. & Ald. 19; Warren v. Anderson, 8 Scott, 384; 1 Selwyn N. P. 538; n. 7, 18th ed. But the proof of identity in this case was ample. In tracing titles, identity of names is *prima facie* evidence of identity of persons. Brown v. Metz, 33 Ill. 339; Cates v. Loftus, 3 A. K. Marsh. 202; Gitt v. Watson, 18 Mo. 274; Baibec v. Donaldson, 2 Grant (Pa.), 459; Bogue v. Bigelow, 29 Vt. 179; Chambiee v. Tarbox, 27 Tex. 139. See, also, Sewell v. Evans, 4 Adol. & El. (N. S.) 626; Roden v. Ryde, id. 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthias county, Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia, where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed. But besides the identity of names, there was other evidence showing the identity of persons. The patent and the deed bore date the same day, and the patent was recited *in hoc verbo* in the deed. These circumstances tend strongly to show that the party by whom the deed was executed must have had possession of the patent. The deed recites that the patent was delivered to the grantor, John J. Dunbar, and the affidavit of John J. Dunbar, sworn to and subscribed on January 7, 1818, before Smallwood, a justice of the peace, and one of the subscribing witnesses to the deed, whose signature to the jurat is shown to be genuine, to the effect that he was the same John J. Dunbar to whom the patent was issued, was indorsed upon the deed. After a lapse of sixty-one years, this evidence is not only admissible to prove the identity of the grantee in the patent with the grantor in the deed, but, uncontradicted, is conclusive."

And so we see that while identity of name is not always evidence of identity of person, yet it is always so treated in tracing titles: and in all cases slight proof of identity is sufficient, *prima facie*, and, when it is not contradicted, it is conclusive.

another person of the same name residing in the city of Boston.[1] In an action of ejectment in Missouri, decided in 1842, it was held not to be necessary to call the subscribing witnesses to the deed to prove the identity of the grantor, or to account for their absence, nor was their presence necessary by the rule that the best evidence should be produced. That the proof of the identity of the grantor in a deed, by a person who is not a subscribing witness, was not inferior, as evidence, to the proof of the fact by one who has testified that he attested it as a witness.[2]

Junior — middle letter — name — immaterial variance.

§ 118. In the title of an act incorporating the Wabash Railroad Company, the act described the corporation as "the Wabash Valley Railroad Company," and where the company in bringing suit was described as the Wabash Railroad Company, it was held to be no variance.[3] It was held in New York that the addition of "junior" to a name is mere matter of description, and forms no part of the name; neither is the middle letter, between the christian and surname, any part of the name, for the law knew of only one christian name; and where it appeared that a middle letter was inserted in a name upon a ballot by mistake, it might be rejected. An action was brought in the nature of a *quo warranto* against Cook, to test his right to hold the office of State treasurer of New York. The question was, whether the ballots cast for Benjamin C. Welch, Jr., and those cast for Benjamin Welch, without the addition of the "Jr.," were intended, by those who voted them, for Benjamin Welch, Jr., and it was held as above indicated.[4] The addition of "junior," being no part of a man's name, it was held in Kentucky that a person to whom a promissory note was assigned, with the addition of junior, might assign it to another party, omitting the "junior," and his assignee could maintain an action on it against the maker of the note — that it was a question of identity, as to who was the real owner of the note, and that question could not be raised on demurrer.[5] In a proceeding in New Hampshire, to the record of a proceeding to lay out a public highway, an objection was made, because in the information one of the *termini* was stated to be "near the blacksmith shop of William *B.* White," and in the record as being "near the blacksmith shop of William *D.* White," the court allowed an

[1] Grindle v. Stone, 78 Me. 176.
[2] Moss v. Anderson, 7 Mo. 337.
[3] Peake v. Railroad Co., 18 Ill. 88.
[4] People v. Cook, 14 Barb. 259.
[5] Johnson v. Ellison, 4 T. B. Mon. (Ky.) 526.

amendment, and this was sustained on appeal.[1] One Grant was indicted in Maine for larceny, in which indictment it was charged that the property so stolen was the property of one Eusebius Emerson of Addison, and the proof showed that there were in the town of Addison two men of the name of Eusebius Emerson, a father and son, and that the property belonged to the son, who had usually signed his name with the addition of "junior" thereto. It was held that the "junior" was no part of the man's name, and that the ownership of the property, as alleged in the indictment, was sufficiently proved.[2]

Identity of name — goods delivered to a swindler.

§ 119. A peculiar case of fraud, by assuming the name of another, occurred in Massachusetts and was decided in 1883. An action of tort was brought for the conversion by the carrier of a quantity of cigars. The facts, as they appear in the opinion of the court, are, that in June, 1881, a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff, asking for a price list of cigars, and giving his address as "A. Swannick, P. O. Box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter, ordering a quantity of cigars. The plaintiff forwarded the cigars by the defendant, who was a common carrier, and at the same time sent a letter to the swindler, addressed "A. Swannick, Esq., P. O. Box 1595, Saratoga Springs, N. Y.," notifying him that he had so forwarded the goods. There was at the time in Saratoga Springs a reputable dealer in groceries, liquors and cigars, named Arthur Swannick, who had his shop at the corner of Ash street and Franklin street, and who issued his cards and held out his name on his signs and otherwise as "A. Swannick." He was in good credit, and was so reported in the books of E. Russell & Co., a well-known mercantile agency, of whom the plaintiff made inquiries before sending the goods. The plaintiff supposed that the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods by defendant, the packages being directed to A. Swannick, Saratoga Springs, N. Y. The defendant carried the packages safely to Saratoga Springs. On July 1, the defendant, by its agent, carried a package of cigars directed to A. Swannick to the said Arthur

[1] State v. Weare, 38 N. H. 314.
[2] State v. Grant, 22 Me. 171. And see People v. Collins, 7 Johns. 549.

Swannick; he refused to receive it on the ground that he had not ordered the cigars; afterward the defendant carried the cigars to the shop No. 16 Congress street, and delivered them to the person appearing to be the occupant of the shop, and took receipts signed "A. Swannick." It was held that the carrier was not liable.[1]

Same — goods delivered — same name.

§ 120. An action of tort was brought in Massachusetts, and decided in 1872, against a common carrier. It appeared that on October 17, 1870, John F. Gorman, a stranger to the plaintiff, representing himself to be John H. Young of Providence in Rhode Island, purchased liquors of plaintiff at Boston, on a credit of thirty days. They were marked by his order, "John H. Young, Providence, R. I.," were delivered to defendants to be carried to Providence, were so carried, and were received there and stored in defendants' freight-house, on October 19. In the bill of lading the defendants promised to deliver the goods at Providence to John H. Young or order; and the plaintiff sent the bill of lading to "John H. Young of Providence, R. I." But the letter containing it remained in the post-office at Providence, until re-mailed to plaintiff, on November 23. On October 29, Gorman called at the freight-house in Providence, asked for the liquors as the property of John H. Young, and paid the freight; and the liquors were delivered to him upon his receipt, which he signed "John F. Gorman." Gorman was known to the clerk who delivered the liquors. No person named John H. Young resided or did business at Providence, and no person authorized the purchase of the goods by Gorman in that name. After the delivery to Gorman, plaintiffs demanded the liquors from the defendants. CHAPMAN, C. J., said: "The plaintiff sold the gin and whisky, which are the subject of this action, to a person calling himself John H. Young of Providence, and delivered them to the defendants, to be carried to the same person in Providence by the same name. As he was the only person in Providence who bore that name, there was no other individual to whom the defendants could deliver the property. A delivery to him would be a performance of the contract. The fact that he was known to the delivery clerk as John F. Gorman made it necessary for him to conceal from the clerk the

[1] Samuel v. Cheney, 135 Mass. 278. Citing Cundy v. Lindsay, 3 App. Cas. 459; Dunbar v. R. Co., 110 Mass. 26; M'Kean v. M'Ivor, L. R., 6 Exch. 36; Heugh v. R. Co., L. R., 5 id. 51; Clough v. R. Co., L. R., 7 id. 26.

fictitious name, and to pretend that he was acting as agent for John H. Young. He was thus enabled to obtain the property, but by means of this deceit, the property reached the person to whom the plaintiff sold and consigned it. Thus the contract of the defendants was performed in its spirit and letter, and the plaintiff has no cause of action against them."[1]

Identity of stranger by name merely.

§ 121. An action having been brought on a note, the execution of the note was not denied, it was even admitted. But the defendant pleaded and relied upon the statute of limitations, and the plaintiff called a witness who testified that, acting as his attorney, he had addressed a letter through the post-office to the defendant, with whom the witness was not personally acquainted, on the subject of the claim sued on, and that he received a reply, and that soon thereafter a person called at the office of the witness and introduced himself as the defendant, and, in conversation respecting the claim, made such promises as would take the case out of the statute of limitations. The defendant's name being an unusual one, and no attempt having been made to show a false personation, this was held to be sufficient *prima facie* proof of identity to be allowed to go to the jury.[2] This *prima facie* case was not made upon the mere fact of the name, but the previous correspondence respecting the claim had brought the defendant to the office of the witness, where the conversation ensued and the promise was made. These circumstances left the identity reasonably certain. But the general rule is, that where the name is identical, that, of itself, is *prima facie* evidence of the identity of the person, and this will throw the *onus probandi* upon the party whose identity is in doubt or dispute.[3] But this presumption, like other presumptions, may be rebutted or overcome by countervailing evidence.[4] Mr. Bishop says: "In reason, the identity of a person charged with an offense requires fully as much care as the *corpus delicti*. The cases are numerous wherein witnesses have been mistaken on this point, or if there is to be perjury, it is upon this that it is more likely to appear. And there is no more excuse for punishing a defendant, when another has committed a crime, than when no one has. The rule, therefore, should be, that, the special facts and circumstances being brought into view, the judge should caution the

[1] Dunbar v. Railroad Co., 110 Mass. 26.
[2] Kelly v. Valney, 2 Am. L. Reg. 499.
[3] Gitt v. Watson, 18 Mo. 274.
[4] Sitler v. Gehr, 105 Pa. St. 577.

jury as to any part of the case at which they are liable to be misled, whether the *corpus delicti*, the identity, or any other, and they should convict when, and only when, taking all into consideration, they affirmatively believe from the evidence, beyond a reasonable doubt, that the defendant is guilty as charged.[1]*

Same name — father and son — rule.

§ 122. We have seen that where there are two persons of the same name, as father and son, the elder is presumed to be the person named, in the absence of any addition to the name; but this is a mere presumption, and may be explained or rebutted, if not true.[2] It was held in Pennsylvania to be error to submit to the jury, without other proof, the question whether R. P. O'Neil, who executed a deed, was Rev. Patrick O'Neil, the former owner of the land.[3] And where a deed was made to one of two persons of the same name, the one the father and the other the son, both residing together on the premises described in the deed, it was held to be error to exclude from the jury, by instructions, the character and circumstances of the occupancy, as bearing upon the question whether the deed was made to the father or the son.[4]

Where, in England, a promissory note was payable to the order of J. H., and it was indorsed by J. H. to the plaintiff, and there appeared to be two persons of the same name, father and son, and

[1] Bishop Crim. Proc. (3d ed.), § 160.
[2] Bennett v. Libhart, 27 Mich. 489; Bate v. Burr, 4 Harr. (Del.) 130.
[3] Burford v. McCue, 53 Pa. St. 427. And see McMinn v. Whelan, 27 Cal. 300.
[4] Graves v. Colwell, 90 Ill. 613; State v. Vittum, 9 N. H. 521; Lepiot v. Browne, 1 Salk. 7.

*Mr. Taylor, in his valuable work on the Law of Evidence, on the subject of identity, at § 1657, gives us the following remarks: "It may, however, here be observed that the description in the declaration cannot properly be said to prove the identity of the defendant. The question is, who was served with the writ, and who has pleaded to the action? and it is obvious that no description which the plaintiff chooses to introduce into his statement of his own case can in strictness answer this question or affect the defendant's interest. This remark is made because in the case of Greenshields v. Crawford, 9 M. & W. 314, the court appears to have acted upon a similar mistake. The decision in Smith v. Henderson, 9 M. & W. 818, was right, not because the defendant was described by the plaintiff's declaration as a pilot, but because the accident was proved to have been caused by a pilot named Henderson, and a person answering that name and description was *present in court*, and might fairly be presumed to be the same Mr. Henderson who had pleaded to the action. In another case in which a witness, called to prove the defendant's handwriting, had corresponded with the person bearing his name, who dated his letters at Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient. Harrington v Fry, Ry. & M. 90, per BEST, C. J. And in Warren v. Sir J. C. Anderson, Bart., 8 Scott, 384, where the only proof of defendant's signature to a bill was given by a clerk of Messrs. Coutts, who stated that two years before the trial he saw a person whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name, that he had since seen checks, similarly signed, pass through the banking-house, and that he thought the handwriting was the same on the bill, the court held that the evidence, weak as it confessedly was, might be submitted to the consideration of the jury." It is not upon the weakness or the strength of the evidence that the court will submit it to the consideration of the jury, but upon its competency and relevancy. If the court should exclude competent testimony from the jury because of its weakness, the judge would first have to pass upon the weight of it, and thus invade the province of the jury.

there was no evidence to show to which of the two the note was given, but it appeared that the indorsement was in the handwriting of J. H., the son, it was held that, although the presumption would be *prima facie* that J. H., the father, was meant, the son's indorsement rebutted that presumption.[1]

Weight of evidence as to identity — indictment.

§ 123. Where the identity of the defendant on the trial of an indictment becomes a question, the burden of proof is on the prosecution to identify the defendant with the perpetrator of the crime. So, in an indictment for burglary, decided in Connecticut, in 1879, a question of identity of the accused was made by the defense, and evidence was introduced on both sides upon this point. The judge charged the jury that it was for them to decide on which side of the question of identity was the weight of evidence. This was held to be error as stated. The court said: "If the court intended by this to say that the accused should be convicted if the bare preponderance of proof on the question was with the State, and the jury so understood it, it was clearly erroneous. But it is obvious that the court did not so intend, and that the jury did not so understand it. Indeed they could not so understand it without imputing to the court the most glaring inconsistency. The question of identity was a vital one. If the State were not right in its claim the accused could not be convicted. The jury were told in another part of the charge, that in order to convict the accused, the State must prove, beyond a reasonable doubt, that he committed the burglary."[2] This seems extremely doubtful.

Name — presumption of identity — burglary.

§ 124. In another case of burglary, decided in Missouri in 1882, it was held on the question of identity that identity of names with an *alias* added was sufficient to raise a presumption of identity of persons. But the conviction was reversed because of two offenses — burglary and larceny — being embraced in one count.[3] But it is a mere presumption open to rebuttal, and it alone is insufficient to prove identity, as we have seen, where the name is common in the community where the defendant resides. In an indictment in North Carolina, in 1883, for a conspiracy to commit a rape upon a certain

[1] Stebbing v. Spicer, 8 M., G. & S. 827; 8 C. B. 827.
[2] State v. Morris, 47 Conn. 179.
[3] State v. Kelsoe, 76 Mo. 505.

female, it was held that, although the name of the person upon whom an offense is charged to have been committed, be to the jurors unknown, yet the proof must identify the party injured as completely as if his real name appeared in the indictment.[1] The inference of identity strengthens with circumstances which indicate the probability of two persons at the same time, of the same name, residing at the same place; names. with other circumstances, raise a presumption of identity.

Forgery — opinion evidence — signature.

§ 125. One Hopkins, having been indicted for forgery in Vermont, in 1877, for forging the name of Charles H. Green, on a bill of exchange for $541.10, payable to said Green, on the Fire Association of Philadelphia. On the trial the State introduced a witness who testified, from his knowledge of Green's handwriting, that he was of opinion that the signature in question was a forgery. On cross-examination, a signature which had been used in the trial, and was acknowledged to be genuine, was shown to the witness, and he was asked to point out the difference between that signature and the one in question. This testimony was excluded because the witness was not an expert; but this was held to be error. The court said: "The weight to be given to the opinion of a witness who bases his opinion upon familiarity with handwriting depends largely upon the extent of his familiarity; and for the purpose of testing that and his ability to distinguish between a signature, that which is claimed to be forged and one that has been used upon the trial and acknowledged to be genuine, it is the right of the party accused of committing the forgery to inquire of the witness what difference there is between the two signatures."[2]

Inference or conclusion — opinion.

§ 126. The rule is laid down, in substance, that "opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. Eminently is this the case with regard to noises and smells; the questions of identification, where a witness is allowed to speak as to his opinion or belief, and to the question whether a party believed himself at the time to be in great

[1] State v. Trice, 88 N. C. 627.

[2] State v. Hopkins, 50 Vt. 316.

danger of death."[1] But not as to his inference and conclusion. So, in Texas in a trial for adultery, the court below permitted a witness, over defendant's objection, after he had narrated circumstances in which he discovered the defendants, to state that he suspected therefrom that they had been copulating. It was held to be error to admit the witness' suspicions and his inferences.[2] To admit the opinion of a witness as evidence in a proper case is one of the recognized exceptions to the general rule, but it will not be extended to mere conclusion, suspicion or inference.

Liability assumed by a stranger.

§ 127. In an action against the proprietors of a stage, brought in New York in 1854, for injuries to a wagon owned by the plaintiff, caused by the negligence of the defendant's driver. The action was against Lent and Mulford. The return of the justice certified that at the close of the testimony, "the plaintiff rested and discontinued against the defendant Mulford, and the defendant moved for a nonsuit, which motion was denied, when the case was submitted." But judgment was rendered against both defendants, and defendants appealed. The court said, assuming that the plaintiff sufficiently proved that his wagon was injured by a person who was driving the stage, the only evidence that either of these defendants was responsible was that of the plaintiff's son, who testified that two gentlemen called upon his father and conversed on the subject, and one of them answered to the name of "Lent," and that the latter wished the wagon sent to his place to be repaired, and both were satisfied that it was their stage by which the injury was caused. This by no means identified the defendants as owners of the stage. The witness was not acquainted with the defendants, and they could not be charged because some person assumed to admit the liability.[3]

Courts will not presume identity.

§ 128. The courts will not presume identity of a party or person, and it was held in Iowa that the court, while it knew judicially the judges of the different judicial districts of the State, and would presume, in the absence of any showing to the contrary, that the courts of the districts are held by such judges, it cannot know that the attorney J. D. Thompson and the Hon. J. D. Thompson, judge of the thirteenth judicial district, are one and the same person. The name

[1] Whart. Cr. Ev., § 459, and cases cited.

[2] McKnight v. State, 6 Tex. App. 158.

[3] Fanning v. Lent, 3 E. D. Smith, 206.

alone of a person is not sufficient to identify the person.[1] And this rule was held in Michigan in a recent case.[2] And in an important case in Pennsylvania, involving the title to real estate, it was held error to submit to the jury, without other proof, the question whether "R. P. O. Neil," who executed a deed, was Rev. Patrick O'Neil, the owner of the land.[3]

Names — rule in election cases — candidates.

§ 129. Every name should be fully and properly given and expressed, but errors in spelling, as we have seen, will not defeat the purpose; if the sound is the same, it is within the rule of *idem sonans;* thus, in election cases where the name is written on a ballot, if it be so written as to leave no reasonable doubt as to the intention, it should be counted, but if a ballot contain two names for the same office, it is bad as to both, but it is not to be rejected as to candidates for other offices on the same ballot. And where there was a doubt as to the individual intended to be voted for, on account of the misspelling of the surname or the addition of different or erroneous christian names, facts and circumstances of public notoriety *dehors* the ballot, connected with the election and the different candidates, are competent evidence to ascertain for whom the voter intended to cast the ballot.[4]

Same — election — rule in several States.

§ 130. In a Michigan case one Michael Finnegan was the relator in *quo warranto.* It was held that where ballots were cast for Michael *Finnegan*, the relator, by the name of Michael *Finegan*, the rule of *idem sonans* applied, and that they should all have been counted for the relator.[5] In an Illinois contested election case in 1888, it was shown that there were but three candidates for county treasurer — John B. Kreitz, the democratic nominee, Charles F. A. Behrensmeyer, the republican nominee, and B. L. Dickerman, the prohibition nominee, and that Kreitz had a brother named John M. Kreitz, who was not a candidate, and that John B. Kreitz was ordinarily known and called John Kreitz, while John M. Kreitz was ordinarily known and called Matt Kreitz. It was held that some tickets bearing the name of John M. Kreitz for county treasurer were properly counted for John B. Kreitz.[6]

[1] Ellsworth v. Moore, 5 Iowa, 486.
[2] Bennett v. Libhart, 27 Mich. 489.
[3] Burford v. McCue, 53 Pa. St. 427. And see McMinn v. Whelan, 27 Cal. 300.
[4] Carpenter v. Ely, 4 Wis. 420.
[5] People v. Mayworm, 5 Mich. 146.
[6] Kreitz v. Behrensmeyer, 125 Ill. 146.

In Missouri in 1888, there were but two candidates for an office, their names being so unlike that there could be no danger of mistake, and the election was confined to one county, which was largely German. It was held that the court might well find that the ballots cast for "J. D. Hubba," "J. D. Huba," "Huber," and "J. D. Hub," and "D. Huber" were all intended and should be counted for the candidate "J. D. Hubbard."[1]

Same — contest for office — rule.

§ 131. In an early New York case, in a contest for the office of county clerk, the case was tried by a jury, and it was held that the ballots cast for H. F. Yates should be counted for Henry F. Yates, if the jury believed they were intended for him.[2]

In Wisconsin in 1855, there was a contest for the office of district attorney of Rock county. Carpenter, the relator, claimed the office; Ely had the certificate and had qualified under the law. The jury found specially that there was given at said election, not including the vote in dispute in Magnolia, or the votes given in the town of Turtle: "For George B. Ely, 1,098; George B. Ela, 8; Ely Ely, 1; Ely, 3; Mathew H. Carpenter, 1,081; D. M. Carpenter, 4; M. D. Carpenter, 2; M. F. Carpenter, 1; Carpenter, 1; S. J. Todd, 676. The relator claimed that all the votes cast for Carpenter, with the different initials, were intended for him, and Ely, the respondent, claimed that the eight votes cast for George B. Ela, being *idem sonans* with his name, should be counted for him, as they were so intended, and the decision of the jury was affirmed.[3]

In a contested election case in Michigan.

§ 132. It was held that evidence of the intention of persons voting at an election was not admissible; that such intention was to be determined by the ballot itself; thus it was not competent to show by parol evidence that a ballot cast for H. J. Higgins was intended for Henry F. Higgins.[4]

Application of the rule — idem sonans.

§ 133. In the application of the doctrine of *idem sonans*, the rule is that if the words may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the words are *idem sonans* and the variance is immaterial.[5] In the en-

[1] Gumm v. Hubbard, 97 Mo. 311.
[2] People v. Ferguson, 8 Cow. 102.
[3] Carpenter v. Ely, 4 Wis. 420.
People v. Higgins, 3 Mich. 233
Ward v. State, 28 Ala. 53.

terning of judgments on the court dockets and judgment-rolls, and the names in the indexes, certainty is required, and identity, to avoid injury and great injustice to persons having occasion to examine or being interested in judgments and their liens on property, and especially should great care be taken to enter the names of judgment debtors correctly, while it may not, in all cases, be fatal to misspell the name, if it is so spelled as to bring it within the rule of *idem sonans*.[1] In Texas it was held that in a murder trial, where the jury found the defendant guilty of murder in the "fist" degree, it was insufficient and should be set aside as void. In these cases the rule of *idem sonans* did not apply — though it is held to apply as well in trials for murder as in other cases.[2] And though the spelling be bad and the grammar incorrect, yet, if the words used are *idem somans*, the verdict will be valid. The question has been before the court in Texas quite frequently, and this rule has been generally applied.[3] As for instance, where the jury found the prisoner "gilty" instead of "guilty" and fixed his penalty at a "turm" instead of "term "of years, or "deth" instead of "death."[4] As to names, the law, it is said, does not recognize a middle name as any part of the name of a person, regarding every person as having two names, and where there is a middle name or letter and it is omitted, or if a mistake occur in it, the courts will not regard it, but will treat such middle name as a surplusage.[5]

Name in indictment — variance — when immaterial.

§ 134. In a Texas case for larceny the indictment charged that Amaranti Musquez, Marcial Tigirina and Ignation Waldonado did steal, etc., from the possession of Manual Barragon, six head of work oxen of the value of $105, the property of the said Manual Barragon, etc.

The indictment first charges the name of the defendant to be

[1] Walker v. State, 13 Tex. App. 618.

[2] Haney v. State, 2 Tex. App. 504; Williams v. State, 5 id. 226; State v. Smith, 33 La. Ann. 1414; Huffman v. Com., 6 Rand. (Va.) 685; Taylor v. State, 5 Tex. App. 569; Walker v. State, 13 id. 618.

[3] McMillan v. State, 7 Tex. App. 100; Koontz v. State, 41 Tex. 570; Taylor v. State, 5 Tex. App. 569; Walker v. State, 13 id. 618.

[4] Krebs v. State, 3 Tex. App. 348; Koontz v. State, 41 Tex. 570.

[5] State v. Martin, 10 Mo. 391; Miller v. People, 39 Ill 457; Edmundson v. State, 17 Ala. (N. S.) 179; Isaacs v. Wiley, 12 Vt. 674; Keene v. Meade, 3 Pet. 7; State v. Manning, 14 Tex. 402; Franklin v. Talmadge, 5 Johns. 84; Wood v. Fletcher, 3 N. H. 61; Erskine v. Davis, 25 Ill. 251; Speer v. Craig, 22 id. 432; King v. Hutchins, 8 Fost. 561; Bletch v. Johnson, 40 Ill. 116; Allen v. Taylor, 26 Vt. 599; Dilts v. Kinney, 3 Green (N. J.), 130.

"Arnaranti," and second to be "Aramanti," the first being correct, it was held that the latter might be rejected as surplusage.[1] The court of Wisconsin had announced the same doctrine in an indictment for the murder of one Sylvester Giddings, in 1863. The defendant was convicted of manslaughter, and the case went up to the Supreme Court on exception taken by the defendant on the trial and after verdict.[2]*

Murder — name of deceased — idem sonans — rule.

135. In an Alabama case a slave was indicted for the murder of Louis Boudet (or Boredet), as the court decided, on inspection, it might be; it was held that where the indictment alleged the name of the deceased to be Louis *Boudet* or *Boredet*, while his real name was *Burdet*, and sometimes pronounced as if it were spelled *Bouredet*, and the Circuit Court thereupon charged the jury, "that if the real name were the same in sound as if written *Boudet* or *Boredet*, or so near the same that the difference would be but slight, or scarcely perceptible, and he would have been readily known by his name being pronounced as if written *Boudet* or *Boredet*, then the variance would not avail the defendant." The Supreme Court said: "The ruling of the court in reference to the name of the deceased was substantially correct. We understand the Circuit Court to have said, in substance, that if the variance in the name be so slight as scarcely to be perceptible, and the deceased would have

[1] Musquez v. State, 41 Tex. 226 (1874). [2] State v. Lincoln, 17 Wis. 579.

*In the case of State v. Lincoln, 17 Wis. 579, *supra*, the court said: "This indictment was for murder, and in it the name of the deceased is spelled in three different ways. In one place he is called "Sylvester Glddings," in another "Sylvester Gidings" and in another "Sylvester Gidines." It was urged that the judgment should be arrested for this reason. But we are inclined to think that, with the three forms of spelling, the names are to be regarded as *idem sonans*, within the rule upon that question. But there was proof introduced to the effect that the name of the deceased was Jack Glddings and not Sylvester, and upon this the prisoner asked the court to instruct the jury "that they must find, from the evidence, that the name of the person killed was Sylvester Giddings as charged in the indictment, or that he was generally known by that name, and if they fail to find these facts, they must acquit the defendant," and also "that if the jury find, from the evidence, that the name of the person killed was Festus Giddings or Jack Glddings, and that he was generally known by either of these names and not by the name of Sylvester Giddings, they must find the defendant not guilty." These instructions the court refused fully to give, but did instruct "that the name of the deceased must be proved as laid in the indictment, or the variance will be fatal; but that if they found, from the evidence, that the deceased was known by several different christian names, and that he was described by one of these names in the indictment, and there was proof of the name as laid, it was sufficient, though there was also proof of the other name by which he was also known." We think this instruction, considered with reference to the proof before the jury, erroneous. There was no witness for the prosecution who had testified either that the name of the deceased was Sylvester Giddings, or that he was generally known by that name. Hall, the first witness, testified that the deceased worked for him three years, that he was generally known by the name of Jack Glddings, but that he had seen him write his name several times, and he "thought" he wrote it "Sylvester Giddings." Crawford, also a witness for the prosecution, testified that he knew "Jack Glddings" and never knew him by any other name. Rockway, for the prosecution, testified that the deceased was generally known by the name of Jack Giddings, but that eleven or twelve years before, he had received an order from the deceased, which he *thought* was signed "Sylvester Giddings." Others swore his real name was "Festus." — (Judgment reversed.)

been readily known by the name thus called, then such variance was immaterial. In the case of *Ahitbol* v. *Beniditto*, the court ruled *Benedetto* was *idem sonans* with *Beniditto*.[1]

Larceny — assault — name of injured person.

§ 136. The same court, in a case of assault, held that a variance between the averment in the indictment and the proof, as to the name of the person assaulted, was immaterial, where the names may be sounded alike without doing violence to the letters found in the variant orthography, as in the names *Chambless* and *Chambles*.[2] When the name of the owner of stolen goods was written in an indictment as "Fraude" while the proper spelling of it was "Frende," and expert evidence showed a wide difference in the sound and in pronouncing the two words, the question of variance or no variance in the names should be submitted to the jury, with proper instructions explanatory of the rules of *idem sonans*. When this question arises, it is said, the practice should be analogous to the practice in case of plea of misnomer by the prisoner — the fact should be submitted to the jury, and it is competent to show that the names are entirely dissimilar in sound, or that the prisoner is as well known by the name used in the indictment as by any other.[3]

Larceny — name of owner — jeopardy — rule in Texas.

§ 137. One Parchman was indicted in Texas and convicted for stealing a gelding, the property of one H. Franks, to which he pleaded guilty; a jury were impaneled, and the testimony of the State's witness, H. Frank, went to the jury, when it was discovered, from his testimony, that his name was H. Frank, and the animal stolen was charged in the indictment to be the property of H. Franks; a *nolle prosequi* was ordered over the objection of the defendant's counsel. The grand jury found a new bill of indictment on the same day, charging him with the theft of the gelding from H. Frank. He was convicted on the second indictment. He filed his plea of jeopardy and supported it by the former record, under the Constitution. The court said: "We believe, after a careful examination of the authorities, that if the court had no jurisdiction of the cause; or

[1] Aaron v. State, 37 Ala. 106. Citing Ahitbol v. Beniditto, 2 Taunt. 401; Ward v. State, 28 Ala. 60; Doe, *ex dem.*, v. Miller, 1 B. & Ald. 699.

[2] Ward v. State, 28 Ala. 60; Gresham v. Walker, 10 id. 370; 2 Russell Crimes, 715; Ahitbol v. Beniditto, 2 Taunt. 401.

[3] Weitzel v. State, 28 Tex. App. 523.

if the indictment were so defective that no valid judgment could be rendered upon it; or if, by any regular necessity, the jury were discharged without a verdict, which might happen from the sickness or death of the judge of the court, or the inability of the jury to agree upon a verdict after sufficient deliberation and effort; or if the term of the court as fixed by law come to an end before the trial is finished, or the jury be discharged with the consent of the defendant, expressed or implied; or if, after verdict against the accused, it has been set aside on his motion for a new trial, or in arrest of judgment,— the accused may, in all such cases, again be put on trial for the same facts charged against him, and the proceedings had will constitute no protection. But, when the legal bar has once attached, the government cannot avoid it by varying the form of the indictment. If the first indictment were such that the accused could have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second."[1]

Retailing — name of the vendee.

§ 138. In Indiana one Cleaveland was charged by information with selling intoxicating liquor to one George "Geessler" and it appeared on the trial that the name of the vendee was George "Geissler." The defendant asked, and the court refused to charge the jury as follows: "If the information charge that the defendant sold the whisky to one George 'Geessler,' and the proof is that it was sold to George 'Geissler,' whose last name is spelled 'Geissler,' and pronounced 'Giseler,' then the proof does not support the charge, and unless the prosecution has proven that the vendee is known as well by one name as the other, the defendant must be acquitted." But the court charged as follows: "'Geissler' and 'Geessler' are near enough alike to make no difference in this case. The question is, did the defendant sell the liquor to the prosecuting witness?" this was held to be correct.[2] It was held in Missouri, and perhaps very properly, that the rule that from identity of name, identity of person may be presumed, cannot be extended so far as to sustain the inference that the same name appearing as plaintiff and defendant in an action represents one and the same person. But an order of

[1] Parchman v. State, 2 Tex. App. 228, 237.

[2] Cleaveland v. State, 20 Ind. 444; Stewart v. State, 4 Blackf. 171; Moore v. Anderson, 8 Ind. 19; James v. State, 7 Blackf. 325.

publication intended to notify Benjamin F. Strimple is valid if directed to "Frank Strimple," that being the christian and surname by which he is usually known.[1] But it was held that, in an action against a non-resident, the order of publication against the defendant gave his name as Q. R. Noland instead of Quinces R. Noland, and there was no personal appearance under the order of publication, the court acquired no jurisdiction.[2] Names are *idem sonans* when the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has, by corruption or abbreviation, made them identical in pronunciation. "Wheler" and "Whelen" are not *idem sonans*,[3] nor are "Miller" and "Millen."[4]

Growing importance of idem sonans rule.

§ 139. There is a rule of growing importance by which courts, for many years, have evinced, by their decisions, a disposition to recede from the fading adherence to common-law technicalities, and hold rather to substance than mere form. Modern decisions conform to the rule that a variance, to be material, must be such as to mislead the opposite party to his prejudice, and hence the doctrine of *idem sonans* has been much enlarged by modern decisions, to conform to the above salutary rule.[5] The law does not treat every slight variance, if trivial, such as the omission of a letter in the name, as fatal. The variance should be a substantial and material one to be fatal.[6]

[1] Wilson v. Benedict, 90 Mo. 208; Steinmann v. Strimple, 29 Mo. App. 478.
[2] Skelton v. Sackett, 91 Mo. 377.
[3] Whelen v. Weaver, 93 Mo. 430.
[4] Chamberlain v. Blodgett, 96 Mo. 482.
[5] Trimble v. State, 4 Blackf. 435, 437.
[6] Stevens v. Stebbins, 3 Scam. 25.

CHAPTER IV.

IDENTITY OF PRISONER.

SEC.
140. Identity of prisoner — second conviction — robbery.
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Identity of prisoner — second conviction — robbery.

§ 140. In an English case decided in 1858, the prisoners having been indicted for robbery at Leeds, the jury found a verdict of guilty; and the indictment also charging that Levy (one of the prisoners) had been previously convicted of felony, the court proceeded to try that charge. It appeared that a person named William Levy had been summarily convicted at Leeds, under the provisions of the statute 18 and 19 Vict., chap. 126, and that no witness could be produced who was present when that person was convicted. H. West (Alfred Austin with him), for the prosecution, proposed to prove the identity of the prisoner with the person so convicted, by putting in the conviction before the magistrates of the borough of Leeds under the statute, and by calling the governor of the Leeds Borough Gaol, who produced a warrant of commitment signed by the same magistrates, and otherwise agreeing in every particular with the conviction, under which he stated that he received the prisoner, who had just been convicted, into his custody, and that he underwent his sentence in pursuance of the terms of the warrant. BYLES, J., said: "That is evidence on which the jury may fairly convict the prisoner of having committed this robbery, after having been previously convicted of felony."[1]

[1] Reg. v. Levy, 8 Cox, 72.

Same — housebreaking.

§ 141. A case similar to the above had been tried for housebreaking in 1840. The indictment, besides the ordinary count for housebreaking, charged that the prisoner had been previously convicted of felony at the Newbury Borough Sessions in October. To prove the previous conviction, a certificate of Mr. Vines, the clerk of the peace of the borough, was put in, certifying that the prisoner had been convicted of stealing cotton print, and had been sentenced to imprisonment for four months. To prove the identity of the prisoner Mr. Hackett, the governor of Reading Gaol, was called; he said: "The prisoner was in my custody before the Newbury Borough Sessions, in October, 1837; I sent him to Newbury at that time; I was not at the trial, but I received him back with an order from the Newbury Sessions; and he remained in my custody four months under that sentence." He was transported for life.[2]

Assassination — tracks — gunshot.

§ 142. In a Texas case in 1880, one Bouldin was indicted and convicted for the alleged murder of one Jerry Lyons on September 10, 1879, by shooting with a gun. The deceased was a laborer on a railroad track, and while at work was shot from a thicket near the track. The gun was heard by two or three other men working near by, but they saw no one in the direction of the report. The defendant was a negro, who lived about a mile and a half from the place of the assassination. Seven or eight months previous, he had, as he stated, caught the deceased in adulterous intercourse with his wife, and consulted his former owner about his right to kill him; but being advised not to do so, he said he would acquiesce and quit his wife. The deceased was killed with a single small ball, and the accused had been seen that morning hunting with a small rifle. Men in search of the assassin found tracks in and near the thicket where the shot was fired, and horse-tracks leading in the direction of defendant's house. They called at his house and he came out without his shoes. They arrested him and let him put on his shoes, and took him where they found the tracks, one of which was in a pile of ashes, and was the impress of the left shoe, slightly run down. They found the shoe to fit the tracks. He said the gun that he had been hunting with was not his, but was at his house. They got it and found it had been recently discharged. These were the facts for the State.

[1] Reg. v. Crofts, 9 C. & P. 219.

He proved a good character, and an *alibi*, if the witnesses deposed truthfully. The new trial was granted.[1]*

Footprints — identity — rule in California.

§ 143. A case decided in California, in 1886, was that of McCurdy for the murder of one Dreher, in 1884. The defendant was found guilty, but the cause was not reversed on the grounds of newly-discovered evidence, yet other important questions were considered and decided. On the trial of the case, to prove the identity of the accused, evidence of the measurement of certain footprints, claimed to be those of the defendant, was admitted. They were found in the vicinity of the place of the homicide, and corresponded with the footprints of the defendant. The measurements were made respectively about five days and two weeks after the date of the homicide. This was held to be proper.

At the trial of this case, and after the closing of the testimony, and the argument of counsel and instructions by the court, the jurors, at their own request, inspected certain articles of apparel referred to in the evidence, and worn by the defendant and the prosecuting witness on the day of the alleged homicide. There being no objection made by either party to the action, it was presumed that such inspection was by the consent of all the parties, and was not

[1] Bouldin v. State, 8 Tex. App. 332.

* In this case (Bouldin v. State, *supra*) WHITE, P. J., said: "The sixth division of the charge of the court to the jury is almost, if not literally, a copy of the charge of the court with regard to the relative weight, character and effect of circumstantial and positive proof, when compared together, which was delivered by the same presiding judge to the jury in the case of Monroe Harrison v. The State, decided at the present term, *ante*, p. 183. In that case the charge was dissected and its inherent defects and errors were fully pointed out, both in so far as it was upon the weight of evidence and in so far as it was incorrect as an attempted annunciation of the principles of law applicable to those two branches or classes of evidence. It is only necessary, on this branch of the case, to refer for its disposition to the opinion of Judge CLARK in Harrison's case. It was error for the court to permit the jury to take with them into their room, when they retired to consider of their findings, the rifle gun and balls which had been exhibited and testified about by the witnesses." As was said by the Supreme Court in the case of Smith v. The State, 42 Tex. 444: "If by this means they (the jury) or either of them did obtain a personal knowledge of a material fact in the cause before finding their verdict, and it was considered by them in finding their verdict, then they acted upon a fact known to themselves, not developed publicly on the trial as to how they understood it, concerning which defendant has had no opportunity to cross-examine them as witnesses, and upon which, being unknown, the defendant or his counsel have not been heard, and of which the judge trying the cause had no information, either on the trial, in giving his charges, or on the motion for a new trial." We are further of opinion that the court erred, as shown by the third bill of exceptions, in not permitting defendant to prove, if he could, his willingness to try his shoe in the footprints found upon the ground, and supposed to have been made by the assassin, and also that he requested the parties having him under arrest to measure his horse's foot, and apply the measure to the horse-tracks supposed to have been made by the animal ridden by the assassin to and from the place of killing. The evidence being wholly circumstantial, every fact and circumstance calculated to illuminate the transaction should have been permitted to go to and be weighed by the jury. There is no telling what effect the fact that defendant was willing to subject himself and horse to tests of actual measurement with the physical facts appearing from the tracks left upon the ground would have had upon the jury passing upon a case wholly of circumstantial evidence. If it were much or little, defendant was nevertheless entitled to have the jury to know by the evidence, that when he was first brought to face the tracks of the murderer he did not shun the contact or comparison with them, but, on the contrary, was anxious and insisted that the best tests that could have been made should then and there be made by those investigating the matter and holding him in custody as the perpetrator of the deed."

error. The court said: "The testimony as to the guilt of defendant was conflicting to the last degree. Accepting the statements of Fred Dreher, a brother of deceased, as true, there can be no reasonable doubt of the guilt of the defendant. If, on the other hand, the testimony of the defendant is to be credited, a well-grounded apprehension is raised that Fred Dreher himself, and not the defendant, was the guilty party. The situation of the parties, the surrounding circumstances, the incentives to the crime, and all the probabilities, were questions peculiarly within the province of the jury to determine. There being evidence sufficient to support the verdict, we are not at liberty, under the well-established rules of this court, to interfere with such verdict upon the ground that it is contrary to the evidence."[1] As a matter of evidence to prove identity, the measurement of footprints two weeks after the time of the alleged homicide, is somewhat remote, and carries the rule about as far as the rule of evidence on the subject will permit.

Tracks in the mud — identification.

§ 144. A singular proceeding occurred in a criminal court in Tennessee in 1875. The prisoner, Stokes, was indicted for the murder of Mrs. Housen, tried and convicted of murder in the second degree, and sentenced to the penitentiary for twenty years. The deceased was taken from her house at night and hung to what the witnesses termed a "hog-pole." The track of a bare foot was found in the mud, near the place where she was hung, and the inference, from all the surrounding circumstances, was, that the person who made the track was one of the parties engaged in the murder. Upon the trial of the cause, the prosecution, for the State, brought in a pan of mud and placed it immediately in front of the jury, and then asked the witness if the mud in the pan was about as soft as the mud in the branch where he saw the track. Witness said it was. (To all of which defendant objected, and the same was overruled.) The attorney-general then called upon the defendant to put his foot in the mud. Upon objection, the court told the defendant he could put his foot in the mud if he wanted to, but he would not force him to do so. Subsequently another witness was asked if he saw the pan of mud setting there before the jury. He said he did. And he was asked if he saw any track in it. He said he saw none. (To all of which the defendant objected.) Here the attorney-general again

[1] People v. McCurdy, 68 Cal. 576.

called upon the defendant to put his foot in the mud. Because of this action of the attorney-general, and the assent of the court thereto, the cause was reversed. The court said: "In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. It is no sufficient answer that the judge afterward told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud and the request of the attorney-general was improper and should not have been permitted by the court. We greatly deprecate the practice into which some circuit judges have fallen, in permitting incompetent and illegal testimony to be placed before the jury, and afterward, at the close of the case, withdrawing it and telling the jury not to be influenced thereby."[1]

Tracks — jurors examining them.

§ 145. A singular and important case was decided by the Supreme Court of Missouri in 1878. It was an indictment against Sanders for assault with intent to kill one Burgoon, who lived about three miles from Carthage in Jasper county, and was in his bed asleep between ten and eleven o'clock at night. That the assault was cowardly and with murderous intent was not questioned. The only question was as to the identity of the prisoner with the perpetrator of the crime. The night was dark, and the evidence was mainly circumstantial and strongly pointed to defendant; testimony also equally strong and conflicting, but not implicating others, was given, making altogether a case peculiarly proper for the jury. And the question before the Supreme Court was the admissibility of evidence, and the misbehavior of the jury. The court said: "The evidence in regard to the criminal intercourse between Mrs. Burgoon and the defendant — the quarrels between the husband and wife, and the lawsuit between Burgoon and defendant, all growing out of this illegal intimacy, in our opinion, was proper for the consideration of the jury, and submitted to them under proper instructions. * * * The principal objection to the judgment in this case is based on an affidavit in regard to the conduct of the jury. This affidavit was made by one Snyder, who was not a juryman. He states that, on the morning

[1] Stokes v. State, 5 Baxt. (Tenn.) 619.

after the jury retired, he saw several persons, whom he afterward ascertained to be jurors, experimenting with an old shoe, which had a hole freshly cut through the sole, to see whether a track made by it would be similar to the track testified to as being in the lane running west from Burgoon's house; that one of the jurors stepped up to him and said: "We have been trying tracks, look here," pointing to tracks made in the dust with an old shoe; "we have been making tracks with an old shoe," pointing to a shoe then in the possession of the juror; that the affiant remarked to the juror (not at the time knowing he was a juror) that the shoe shown him was not like the sole of the boot referred to in the evidence; to which the juror replied: "It would make a track any how;" referring, as affiant supposed, to the boot spoken of by the witnesses on the trial. An affidavit of the juryman Leathers, who was referred to in the above affidavit by the by-stander, was then read, which is as follows: He was one of the jurymen in the trial of Sanders; that L. P. Cunningham, in his argument after the close of the evidence, told the jury to just try worn-out boots, and see for themselves whether they make imprints in dust or sand, as it is claimed by the prosecution that boots worn out, like boots referred to in evidence, would do, and told the jury they had a right to make the experiment for themselves, to satisfy their own minds on the point. The affiant then made the experiment and was seen and reported by Mr. Snyder. An affidavit by another juryman named Jessup is found in the record, which states, "that during the trial of the above cause, W. F. Leathers, one of the jurors, told him he had taken an old shoe and cut a hole in the outer sole and tried it in the dust, and they might talk to him as much as they pleased about a boot, worn as the one testified to by the witnesses, not showing the size and shape of the place worn-out, but he knew better; that he had tested that himself as aforesaid, and he knew it would show the marks of the place worn out. What was done with the affidavit was not stated. It is well settled that jurors are not allowed to impeach their own verdict. Disregarding the affidavit of the juror Jessup, which is clearly inadmissible, we have still before us the fact that a portion of the jurors experimented, with a view to ascertain a fact testified to on the trial, and to test the credibility of the witnesses who testified in regard to that fact. That such experiments by a portion of the jury, or by all the jury, without leave of the court, are improper, is incontrovertible. In

some States the jury are allowed by the court, even in criminal cases, but under charge of the sheriff, to view the ground where the offense is charged to have been committed, for the purpose of determining for themselves, as to the credibility of the witnesses who were examined in the case. It is not necessary to determine in this case whether our courts have any such power. There has been, undoubtedly, some relaxation of the rules prevailing anciently in regard to juries, but I have not found any case where the jury, after the cause was submitted to them, was allowed to receive evidence which could have any bearing on the case.[1]

Inspection of clothing of the deceased.

§ 146. The jury may, under the statutes of many of our States, view the premises, but this could not be done or permitted at common law, except by the consent of the parties. In the trial of an indictment for murder in Indiana, decided by the Supreme Court in 1884, the trial court permitted the clothing worn by the deceased at the time of the renconter which resulted in his death, to be exhibited to the jury. This was held to be proper, because marks upon clothing may afford evidence of the character of the wounds as well as the manner in which they were inflicted, and where the pockets were cut or turned wrong side out, it may furnish proof of motive prompting the killing. The court said: "There was evidence showing that the appellant was shot in the right hand, and the legitimate inference from this might well have been that his were the fingers that made the bloody marks upon the pockets of the deceased. It would have been an unjustifiable usurpation for the court to deny the triers of the facts the right to make legitimate inferences from the clothing placed before them for their inspection."[2]

Same — clothing and rug identified.

§ 147. In Texas, on a trial for murder in 1883, alleged to have been committed by shooting, it was held to be proper to allow the

[1] State v. Sanders, 68 Mo. 202. That jurors are not allowed to impeach their own verdict, the court cites State v. Coupenhaver, 39 Mo. 430, and cases there cited; State v. Alexander, 66 id. 148. Sometimes under charge of the sheriff, they may view the ground where the offense is alleged to have been committed. State v. Knapp, 45 N. H. 148.

[2] Story v. State, 99 Ind. 413. Citing Best Prin. Ev. (Am. ed.) 198, authorities in note; Burrill Cir. Ev. 261, 686; Whart. Cr. Ev. (9th ed.), §§ 312, 767; McDonel v. State, 90 Ind. 320; Short v. State, 63 id. 376; Beavers v. State, 58 id. 530.

prosecution, over objection by the defense, to put in evidence the clothing worn by the deceased at the time he was shot, and to exhibit the shot-holes in the clothes. It was not a valid objection to this proof that the clothes could not be "sent up in the record." The court said: "As shown by the seventh bill of exceptions, the State was permitted to produce and identify before the jury the clothing worn and the buggy rug used by the deceased at the time he was shot — which were perforated by bullet-holes. Objection was made, and sustained as far as it was proposed to offer the articles of clothing and rug as evidence in themselves, but was overruled in other respects, and the witness was permitted to identify the articles; to state that they were the clothing and rug worn and used by the deceased on the day and at the time of the shooting." This was held to be proper.[1]

Same — coat and pants — rule in Texas.

§ 148. In the trial of King for the murder of Dr. Harrington in Texas, decided in 1882, it was held that, when the position of the slayer became a material inquiry in the case, it was not error to admit in evidence the garments proved to have been worn by the deceased at the time of the shooting, if they tended to show the position of the slayer. And where the defendant objects to such evidence, his bill of exceptions should show wherein it was improper and inadmissible. On this point, the court simply remarked that "upon the trial of this case, the State, over the defendant's objections, was permitted to introduce and exhibit to the jury a coat and pair of pants which were proved to have been on the person of the deceased at the time he was shot. Testimony of this character is oftentimes pertinent, material and admissible.[2]

Same — case of assassination — rule in Texas.

§ 149. In an earlier Texas case (in 1880), which depended upon circumstantial evidence, it was held to be competent for the prosecution to show by evidence that the deceased had considerable money prior to his removal to Texas, where he was assassinated, though such evidence was remote. That whether for the purpose of identifying the deceased, or for other purposes tending to prove the case, the clothing found on the body of the deceased was competent evidence

[1] Hart v. State, 15 Tex. App. 202. [2] King v. State, 13 Tex. App. 280.

to be introduced by the State on the trial. Early was indicted and convicted for the murder of one Winters, on Feb. 24, 1873. The prosecution introduced in evidence certain clothing, consisting of an overcoat, coat, pants, vest, hat, etc. The court said: "The objection to this evidence was that the clothes were not proper instruments of evidence and could not be made a part of the record and submitted for inspection on appeal. * * * We are not specially advised by the record whether this evidence was introduced for the purpose of identifying the deceased or not; but whether for this purpose, or for any other purpose tending to prove the case, we are of opinion that the State was entitled to it."[1]

Acts — weapon — motives — surroundings.

§ 150. It was held to be competent, on the trial of an indictment for murder, for the State to put in evidence acts of the accused, antecedent to the act of killing, which, either in themselves or in connection with other circumstances, tend to prove motive or preparation. Where a prisoner was charged with homicide it was competent to prove all the circumstances connected with the body, and the state of the body of the deceased when it was found, the tracing of stains, marks, or impressions, the finding of instruments of violence on the spot or elsewhere, and all visible *vestigia* as part of the transaction. And after the witness had described such articles and they appeared to have been connected with the deceased, or used in the commission of the crime or secretion of the body, it is competent to exhibit such articles for identification. Hubby was indicted and convicted for the murder of Gardner on May 27, 1879, and sentenced to death. Among other things, the court said: "It does not appear, by positive testimony, that the clothing found was the clothing of the deceased; but that is a natural if not a necessary inference, when viewed in connection with the fact that the body, when found, was almost entirely denuded. The form in which the clothing was when found — carefully bundled up, and concealed some distance from the body — is not without some significant bearing; but if immaterial, no possible prejudice could have resulted to appellant. A rope or some similar instrument evidently constituted an important factor in an attempt at concealment of the dead body.

[1] Early v. State, 9 Tex. App. 476. Citing Hubby v. State, 8 id. 597, and cases there cited; 1 Stark. Ev. 66.

The evidence establishes most convincingly that, after the assassination had been accomplished, the person of the deceased was stripped of its clothing, a rope or similar appliance was fixed about the neck, and the body thus dragged for six miles across the prairies, studded with musquite bushes, chaparral, and prickly-pear thickets, and finally concealed in a thicket on Little Pond creek. When found, the neck of the body, as stated by a witness, "was cut in deep all around, as if done by a rope around it." Certainly the finding of a rope in the house of appellant, after his arrest, which, from the marks and indications upon it, had evidently been used for some similar purpose, was a fact competent to go to the jury; and the fact that the witness produced the rope and described it to the jury does not render the proceeding erroneous, especially as no ground of objection was shown or urged before the court. The exhibition of the articles in the condition in which they were found was more satisfactory, in connection with the other circumstances, than any description that could have been given by the witnesses, even had the articles been actually offered in evidence. As said by Starkie: "Upon the trial of a prisoner on a charge of homicide or burglary, all circumstances connected with the state of the body found or house pillaged — the traces by stains, marks or impressions, the finding of instruments of violence, or property, either on the spot or elsewhere; in short, all visible *vestigia*, as part of the transaction, are admitted in evidence for the purpose of connecting the prisoner with the act. Such facts and circumstances have not improperly been termed inanimate witnesses."[1]

Same — blood-stains — rule in Missouri.

§ 151. On the trial of a party for murder in Missouri in 1885, it was held that it was not error, but proper, to admit in evidence and permit the jury to inspect clothing worn by the accused on and soon after the day of the commission of the crime and having thereon blood-stains. And the fact that such clothing could not be filed with the bill of exceptions was no reason for excluding them, the descriptive evidence being sufficient to enable the court to pass upon the competency of the evidence. Stair was indicted for killing Sewell, and jointly with him one Nannettie for aiding and abetting; they

[1] Hubby v. State, 8 Tex. App. 597. Citing 1 Stark. Ev. 66; People v. Gonzalez, 35 N. Y. 49; Gardiner v. People, 6 Park. Cr. 155; Wynne v. State, 56 Ga. 113; Campbell v. State, 23 Ala. 44; Com. v. Pope, 103 Mass. 440; 1 Whart. Ev. 346; Whart. Hom., § 647.

were both convicted and sentenced to be hanged. The evidence was wholly circumstantial; Sewell was advanced in years, and he and his son were camping near Nevada—had with them two wagons, four horses, some plows, bedding, dishes, etc. Defendants were, for the time, living in Nevada, and Sewell called to see them; and they visited the camp, and were there on the night of August 5, 1885, and again at home that night. During that night or early next morning they drove the wagons and teams by their house, got some articles, and drove out of Nevada, a few miles, and camped that day. The bodies of the deceased persons were found near their camp in the brush, covered up with old sacks and leaves, where they had been dragged. A knife was found in Stair's pocket with blood on it. They were arrested while in possession of the wagons and teams and other articles belonging to the deceased. The conviction was reversed only as to Nannettie Stair.[1]

Recognizance — identity of prisoner — of witness.

§ 152. A *scire facias* was issued against one *Conrad* Carpenter, and others, his sureties on a forfeited recognizance. The recognizance was conditioned for the appearance of *Coonrod* Carpenter, and signed *Conrad* Carpenter. Process was issued, but not served on Carpenter. It was held (1) that, if considered as a misnomer of the christian name of Carpenter, the error was waived by his failing to plead the misnomer in abatement; (2) that by signing the recognizance he admitted that he was the person therein named *Coonrod* Carpenter.[2]

It was held in Massachusetts that on the trial of a criminal cause, where the only question was the identity of the prisoner with the guilty party, the jury might be justified in a verdict of guilty, though no witness will swear positively to the identity of the accused.[3] The rule we have been considering applies as well to witnesses as to the parties to the action. In a recent case in Missouri it was held that the identity of the name of a witness with that contained in the record of a conviction of an offense creates a *prima facie* presumption of the identity of the person. Defendant was tried for burglary and larceny in St. Louis, but acquitted as to the larceny and convicted of the burglary and sentenced to the peniten-

[1] State v. Stair, 87 Mo. 268.
[2] Carpenter v. State, 8 Mo. 291.
[3] Com. v. Cunningham, 104 Mass. 545. And see Com. v. Byce, 8 Gray, 461; Smith v. Whitman, 6 Allen, 562.

tiary. On the trial the defendant testified in his own behalf, and the State in rebuttal and for impeachment offered the record of a conviction of Michael McGuire in 1873, for grand larceny, and a sentence of two years in the penitentiary; it was objected that the defendant was not otherwise identified as the person convicted; this was overruled, and such ruling held to be correct.[1]

Indictment — variance — name.

§ 153. Where a party was indicted and charged with an assault on one "Silas Melville" with intent to kill, and the proof showed the assault to have been made on one "Silas Melvin," it was held to be a fatal variance, and that the court should have instructed the jury to acquit.[2] A peculiar case occurred in Texas, decided in 1886. It appeared that a complaint and information impleaded "Clements Turner." The evidence named, and the verdict and judgment condemned "Turner Clements." The record failed to identify the party accused as "Clements Turner" as the party convicted; and the Supreme Court on error held that the variance was fatal.[3]

Weapons — how to be identified.

§ 154. In a recent case in Alabama, Finch was indicted jointly with South for the killing of one Lindsay. They were jointly tried; Finch was convicted of manslaughter, and as to South the jury disagreed. The deceased was killed by cutting with a knife, and it was held to be competent to show that the defendant had borrowed a knife from the witness, Sanford, a short time before the difficulty, as an act of preparation for an expected difficulty, and that to identify the knife it was proper and relevant to describe the knife.[4] Where, in an indictment for murder by shooting, as shown by the confession of the defendant and by the dying declarations of the deceased, what the range of the gun used in shooting, and the size of the buckshot was, with which it was loaded, it was admissible to show, by the evidence of a party, after the murder, that he found a buckshot of the same size in a tree within said range.[5] In Virginia, in 1877, one Dean was indicted for the murder of one Furgate. There were two trials in which the jury failed to agree, and on the third trial the de-

[1] State v. McGuire, 87 Mo. 642. And see State v. Moore, 61 id. 276; Gitt v. Watson, 18 id. 274; Flournoy v. Warden, 17 id. 435.

[2] State v. Curran, 18 Mo. 320.

[3] Clements v. State, 21 Tex. App. 258 (1886).

[4] Finch v. State, 81 Ala. 41, 49 (1886).

[5] Mose v. State, 36 Ala. 211.

fendant was found guilty of murder in the first degree. Deceased was shot in the back by an unseen assassin, while plowing in his field on a Monday morning, June 25, 1877, two or three hundred yards from his house. His wife was in the garden, heard the gun fire and heard the cries of her husband, and saw his horse running through the field. She hurried to his assistance, and inquired what was the matter; he replied, "I am shot; some one has shot me from the brush;" these were his last words. There had been two indictments for perjury found against Dean, upon the testimony of the deceased, and hence his enmity. It was held competent to prove the examination of the guns in the neighborhood to ascertain whether any of them would carry a ball the same size of the one found in the body of Furgate, the murdered man.[1] In an indictment for murder in Indiana it was held that, in an indictment for homicide by shooting, the kind of gun used in the act of killing, and the shot used need not be specified; nor need the wound be described; and that an indictment containing one good paragraph should not be quashed.[2]

Weapons identified by comparison — anarchists.

§ 155. Perhaps one of the most important cases on record of the identification of weapons by a comparison thereof was the case of the anarchists in Illinois, decided by the Supreme Court of that State in 1887. A condensed statement of the case is given by Mr. Kerr in his Law of Homicide, § 458, p. 504, as follows: "Where the charge against the defendant is the making of the weapon or instrument with which the killing was done, in furtherance of a conspiracy of which he was a member, it is proper to introduce in evidence other weapons or instruments made by him of the same kind, in order that the jury may compare them with the one with which the killing was done, and so be aided in determining whether the defendant was the maker. Thus, in the anarchists' case, the policeman, for whose murder the defendants were indicted, was killed by the explosion of a bomb thrown in the midst of the police force. On the trial the court allowed to be given in evidence, bombs and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, placed there by certain of the conspirators. As specimens of the kind of weapons which Lingg,

[1] Dean v. Com., 32 Gratt. (Va.) 912. [2] Dukes v. State, 11 Ind. 557.

the one of the conspirators who had charge of their manufacture, and his associates, were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the description of the bomb that killed the policeman, with a view of determining whether Lingg, as was charged, was the maker of the latter or not."[1] And where it is shown, on a trial for manslaughter, that injuries which resulted in death could have been inflicted with weapons of a certain kind, it was held competent to show that the defendant had in his possession such instruments before the killing.[2] It was held in a trial for murder in Georgia that a witness may answer whether an instrument which he has heard described, but has never before seen, answers the description given, or is the same instrument, and if he makes an improbable statement, it may be made the subject of comment before the jury in argument.[3]

On the trial of an indictment for murder it was improper to permit a witness to experiment with the weapon or instrument with which the homicide was alleged to have been committed, for the purpose of determining the manner of its working. And so in Nebraska, the Supreme Court held that the sheriff could not be permitted to discharge a pistol used by the prisoner, to see whether it would go off half-cocked, as the prisoner claimed, and to furnish evidence thereby to sustain the theory of the prisoner that the killing was accidental, the revolver having, as he claimed, gone off half-cocked. The court said: "In the first place, the judge had no authority to require the sheriff to make the experiment, and in the second place, the possibility of a discharge at half-cock could have been shown just as well with the chambers of the revolver empty as by an actual discharge.[4] In a late Virginia case, the prisoner and the deceased had been living together as man and wife, and for some time he had staid almost nightly at the house of the deceased. She became jealous of his attentions to another woman, and a quarrel ensued. He struck her and threatened to kill her. On the night of the homicide, he had not returned home up to bedtime. She looked out of the house and saw two persons standing in an alley near by. She said: "Yonder stands two persons at the corner of the lot; it looks like Harry Thomas and his sweetheart, I think; I am going to see if it

[1] Spies v. People, 122 Ill. 1 (1887).
[2] Finch v. State, 81 Ala. 41.
[3] Cobb v. State, 27 Ga. 648.
[4] Polin v. State, 14 Neb. 540.

is them, and am coming back right away to the house. She went toward the couple, who separated and moved off in different directions. Deceased and defendant were heard talking in angry tones in the alley. He did not return to her house that night. He went to work as usual the next morning. A stick which he left at the house where he staid that night showed stains apparently of blood. Deceased never returned to her house after leaving it as above stated. The next morning she was found dead a short distance down the alley, with her throat cut and a contusion on the side of her head as though she had been struck. The jury found the prisoner guilty and recommended that he be imprisoned for life. He was identified by his stick and the blood on it. The court said: "That silent but never perjured witness, his stick, with its finger prints of blood, was left at the house where he spent the night. There he sat, a culprit who could not sleep, because conscience was awake and drove sleep away."[1]

Clothing — burning — bloody.

§ 156. A case of great atrocity was decided by the Supreme Court of Georgia in 1885. The accused was indicted and found guilty of the murder of his wife in the Superior Court of Upson county. The evidence showed that the accused and the deceased were at home the night previous to the homicide; that they had a quarrel; the next morning the accused was seen leaving the house by jumping from the window; very soon thereafter the smell of clothes burning; several parties went to the house, burst open the doors, and discovered the deceased lying in the fire badly burned, her head smashed in, skull broken and her throat cut. She was dead. A pair of pants were found lying close by, bloody, and they were identified as those worn by the accused the night before; an ax and knife were also found which had blood on them; they belonged to the accused. The confessions of the accused were proved to the effect that he went up behind his wife, struck her on the head with an ax and cut her throat with a knife. His shirt and drawers were also bloody. Of course he was convicted and the judgment affirmed.[2]

[1] Thomas v. State, 67 Ga. 460.

[2] Drake v. State, 75 Ga. 413.

CHAPTER V.

PHOTOGRAPHS.

SEC.
157. Photograph — premises — when admissible in evidence.
158. Same — evidence — action against highway.
159. Photographs of two dead men — murder.
160. Widow — identity — photograph of dead husband.
161. Photograph in case of bigamy — identity.
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167. Photograph evidence — murder for life insurance.
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170. Photograph of handwriting — plea of *non est factum*.
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178. Land grant — signature — photograph copy.

Photograph — premises — when admissible in evidence.

§ 157. Where an action was brought to recover damages of defendant for injuries inflicted upon plaintiff's possession, etc., a photograph of plaintiff's premises, as affected by defendant's use and occupation of the same, is competent evidence as an aid to the jury in applying the evidence and showing the condition of the premises at the time it was taken. The court said: "The photographic view of the cellar was an appropriate aid to the jury in applying the evidence, as it was taken in the month of November, and showed the condition of the premises at that time."[1]

A telegraph company in England was indicted for obstructing a highway. That the public is *prima facie* entitled to the use of every portion of an ordinary highway lying between the fences inclosing it is matter of law, though what is a permanent obstruction placed on a highway, rendering it less commodious than before, and so amounting to a public nuisance, is a question of fact for the jury. Photographs are allowed to be used on the trial of an indict-

[1] Cozzens v. Higgins, 3 Keyes, 206.

ment for an obstruction to a highway to show the nature of the *locus in quo*.[1]

Same — evidence — action against highway.

§ 158. In an action against a town to recover for injuries caused by a defect in the highway, which the town was bound to keep in repair, a photograph of the place is admissible in evidence, if verified by proof that it is a true representation, to assist the jury in understanding the case; and whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and his decision thereon is not subject to exception. The court disposed of this question thus: "A plan or picture, whether made by the hands of man or by photograph, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. * * * Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding, and not open to exception."[2]

Photographs of two dead men — murder.

§ 159. Upon a criminal trial photograph likenesses, taken after the death of the person, when it is material to identify the dead body, may be exhibited to witnesses acquainted with such persons in life, as aids in the identification. One Ruloff was convicted for the murder of Merrick, at Binghamton, New York, on August 17, 1870. Deceased was a clerk in a store; he and another clerk (Burrows) slept in the store, awoke about two o'clock, and saw three men disguised near their bed; they had fixed their packages of goods ready for removal. The clerks arose; Burrows engaged one; deceased went to assist him, when one of the others shot him in the head, and he died instantly. The burglars made their escape. A day or two later, the bodies of two dead men were taken from the Chenango river in the immediate vicinity, whom the evidence tended to show were two of the burglars. About this time Ruloff was found skulking in the neighborhood and was arrested as and for the other burglar and the murderer of Merrick. Further evidence identified the drowned men as individuals intimately connected with Ruloff, the

[1] Reg. v. Tel. Co., 3 Fost. & F. 73.

[2] Blair v. Pelham, 118 Mass. 420. Citing Marcy v. Barnes, 16 Gray, 161; Hollenbeck v. Rowley, 8 Allen, 473; Cozzens v. Higgins, 1 Abb. Ct. App. Dec. 451; Udderzook v. Com., 76 Pa. St. 340; Ruloff v. People, 45 N. Y. 213; Church v. Milwaukee, 31 Wis. 512; Com. v. Coe, 115 Mass. 481; Walker v. Curtis, 116 id. 98.

prisoner. Photographic likenesses of the dead men were taken, and were submitted to their relatives and acquaintances, who were permitted to give their opinion, as witnesses, as to their identity. In Ruloff's chests in New York were found burglar's tools, and they were given in evidence. He was convicted, and the judgment was affirmed. As to the photographs as a means of identifying the dead men, the court said: "Objection is also taken to the admission of the photographic likenesses of the two persons found drowned. Evidence was given of the manner in, and the disadvantageous circumstances under which they were taken; and the evidence was that they were not artistic pictures, nor in all respects the most perfect likenesses that could be taken. This was fully explained by the artist, and the reasons why they were not more perfect, stated. They were submitted to the witnesses, not as themselves alone sufficient to enable them to identify the persons with entire certainty, but as aids, with the other evidence, to enable the jury to pass upon the question of identity. They were the best portraits that could be had and all that could be taken. The persons were identified by other circumstances — the clothes they wore and the articles found upon their persons, and their general description; and the photographs were competent, although slight, evidence in addition to the other and more reliable testimony. We are of opinion that it was not error, under the circumstances, to admit them as evidence for what they were worth. By themselves they would have been of little value, but they were of some value as corroborating the other evidence identifying the dead bodies."[1]

Widow — identity — photograph of dead husband.

§ 160. The court will take judicial notice of the art of photography, the mechanical and chemical processes employed, the scientific principles on which they are based, and their results. A photograph shown by the widow to be a good likeness of her husband, and an indorsement thereon, in his handwriting, of his name, date and place of its execution, are admissible in evidence to show the identity of the husband and a murdered man, when offered in connection with the testimony of the photographer that it was the likeness of a man of the same name as the husband, taken at the place and about the time indorsed on it, and the further testimony of a witness, who saw deceased shortly before and after his death.

[1] Ruloff v. People, 45 N. Y. 213.

One Luke having been murdered in Alabama by disguised men on July 12, 1870, his widow brought suit, under the act of legislature of December 28, 1868, against the county of Calhoun, to recover the statutory penalty of $5,000. She never resided in the United States, but was a subject of Great Britain and resided in Canada, which country her husband left and went to Alabama a few months before his death. To show that the dead man was her husband, she offered in evidence the photograph, as above stated, of her deceased husband. It was further shown by the witness Smith, the deputy sheriff, from whom Luke, the deceased, was taken by the persons in disguise, and who saw the body after his death, that it was a good likeness of the murdered man. The photograph was held to have been properly admitted in evidence. The widow recovered, as the sequel showed, a judgment for the penalty of $5,000. The county appealed, and pending the appeal, the legislature repealed the law, and she recovered nothing by her suit.[1]

Photograph — in case of bigamy — identity.

§ 161. It was held in England, in 1864, that, on an indictment for bigamy, a photographic likeness of the first husband might be allowed to be shown to the witness present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate. Mary Tolson was indicted for that on September 1, 1860, she feloniously intermarried with one Harris, her first husband being then alive. The certified extract from the register of the marriage register book of a regiment, showing a marriage, in 1855, between one E. W. Tolson and a person of the same name as the prisoner, was produced and put in. WILLES, J. — "Evidence of identity will be necessary." A witness present at the marriage was called and proved the identity of the prisoner, and then, in order to prove the identity of the first husband with the person mentioned in the certificate, it was proposed to show the witness a photograph taken from the prisoner, who had said it was that of her first husband, and to ask the witness if it represented the man whom he had seen married: this was permitted, and the witness said there was a resemblance, and she believed the man was the same. A sergeant in the same regiment was called, who said that he knew the man named E. W. Tolson in that regiment, who was stationed at Canterbury in 1858, and went to India that year, where he saw him in

[1] Luke v. Calhoun County, 52 Ala. 115.

1863. Being shown the photograph, he said that was the man, and there was no other man of the same name in the regiment. This was admitted as proof of the first marriage. The second marriage was proved by the second husband, the prosecutor, who was cross-examined as to his credibility, and it was he who spoke of the prisoner's declaration that the photograph was that of her first husband. WILLES, J. — (to the jury) "The photograph was admissible because it is only a visible representation of that image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and therefore is, really, only another species of the evidence which persons give of identity, when they speak merely from memory. You must be satisfied of the identity of the prisoner on the occasions, both of the first and second marriage, of which there is no evidence but that of the prosecutor, whom you are not bound to believe."[1] The jury returned a verdict of "not guilty."

Use of photograph in case of bigamy.

§ 162. In the days of Mr. Roscoe's writing he refers to the fact that photographic likenesses may often be used for the purpose of identification, that it was constantly done in actions for divorce, and that it had then been allowed even in a criminal trial. Where a woman was tried for bigamy, a photograph of her first husband was allowed by WILLES, J., to be shown to witnesses present at the first marriage, in order to prove his identity with the person mentioned in the certificate of marriage. Now they are used in many cases in civil and criminal causes, and not confined to personal identity.[2]

Same — proof of good likeness — expert.

§ 163. Photographic copies of persons and things are used only for the purpose of identifying the original, and a photographer is admissible as a witness to prove the character of the execution of the photograph. And although none but experts as witnesses may testify as to the execution of the photograph, it was held in Alabama, in 1863, that to enable a person to determine whether the picture resembled the original, required no special skill in, or knowledge of, the photographic art; and that on that question, a person for whom a picture had been taken, although possessing no special skill or knowledge of the art, may testify that the picture was a good likeness.[3]

[1] Reg. v. Tolson, 4 Fost. & F. 103 (1864).

[2] Roscoe Ev. at n. p. 125. Citing Reg. v. Tolson, 4 Fost. & F. 103.

[3] Barnes v. Ingalls, 39 Ala. 193.

Same — state of health — life insurance.

§ 164. An important case was decided in Philadelphia, in 1873. It was an action upon a policy of life insurance upon the life of Enricka Random for $5,000. The defense was, fraudulent representations in the application. She died suddenly, ten days after the application was made, and the weight of evidence was that she died of abscess of the right lung, as shown by the post-mortem examination. Plaintiff produced a photograph of the deceased, which was proved to be a correct and truthful representation of her a week before her death. The photograph was then shown to the jury, over the objection of the defendant. The court said: "But we think that the photograph thus proved and verified by witnesses who saw the original at a period approximating so near the date of her contract of insurance, was competent to go to the jury as evidence of her apparent bodily condition at that time."[1]

Pictures and inscriptions — evidence of pedigree.

§ 165. The rule of law as to the admissibility of photographs in evidence seems to be, that it is only where the original cannot be produced that they can be received, under the rule admitting secondary evidence; then the photographic copy, when properly proven, is of great value, *i. e.*, of persons dead or who cannot be produced in court; it may then be used to identify the person it purports to represent, but the picture must, in all cases, be duly authenticated. In the *Camoy Peerage Case*, one of several co-heirs to a barony in abeyance which had been created by a writ of summons and sitting in Parliament, was attainted of high treason. His son and heir was restored in blood only, by act of Parliament, expressly excepting honor and hereditaments. It was held to be competent to the crown to terminate the abeyance of the barony in favor of the heir of the attainted co-heir, or of the heir of any other co-heirs, and that the right to terminate the abeyance in favor of any of the other co-heirs was not affected by the attainder, and that all pedigrees produced from the custody of a person whose ancestor was connected by marriage with the family described in the pedigree, are admissible as evidence to show the state of family; and an inscription on an old portrait of one of the family, produced from the same custody, was admissible for the same purpose. In the course

[1] Schaible v. L. Ins. Co., 9 Phila. 136, 138.

of the investigation, the committee said that as there was a person who could give a better account of the history and custody of the documents presented, he ought to be called. The same witness was about giving in an inscription on a picture which he saw at *Raynham* Hall. It was the picture of a youth, placed in a fixed panel over the fireplace in the billiard-room; and the inscription was "Lewknor, brother to Mary, the first wife of *Horatio* Lord *Townsend*," objection was made but it was overruled and this statement was received in evidence.[1]

Two photographs of child — rule in New York.

§ 166. The New York court held that photographic pictures, when sworn to be correct resemblances of the person or thing, are competent as evidence. One Cowley was indicted under the statute of 1876 — to prevent and punish wrongs to children — charged with having neglected to give a child "Victor," in the custody and charge of the said defendant, proper food, clothing, etc., causing and permitting the health of the child "Victor" to be impaired and injured, and failing to give him proper medical attendance when he was ill, etc. The prosecution offered in evidence two pictures of the child — one taken before he went into the custody of the defendant, and the other taken two weeks after he went out of such custody — to show the difference in appearance; both proved to be correct pictures, except that the latter, as the doctor said, owing to its position, did not show the emaciation of the child to be as great as it really was. Upon the competency of this evidence, they were held to be admissible. The court said: "We know not of a rule applicable to all cases, ever having been declared, that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized countries rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence that fugitives from justice are arrested on the identification given by them. "The Rogues' Gallery" is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are the signs of

[1] Camoy Peerage case, 6 Clark & Fin. 801 (1839).

the things taken. A portrait or miniature taken by a skilled artist, and proved to be an accurate likeness, would be received on a question of identity or the appearance of a person not producible in court. Photograph pictures do not differ in kind of proof from the picture of a painter. They are the product of natural laws and a scientific process."[1]

Photograph evidence — murder for life insurance.

§ 167. The courts now judicially recognize photographs as a proper means of evidence to prove identity of persons, things, objects, and premises, in all proper cases, and when they are shown to be good likenesses, and correct resemblances. And they may be given in evidence to prove identity. On the trial of one Udderzook in Pennsylvania for the murder of "Goss *alias* Wilson," a photograph of Goss, testified to be like the mutilated body found, was evidence to be submitted to the jury, that the body was that of Goss. The prisoner and the deceased were brothers-in-law, having married sisters, Prior to February 2, 1872, Goss had obtained insurance on his life in several companies to a large amount, for the benefit of his wife. About February, 1872, he occupied a shop about three miles from Baltimore, and resided in the city, and was engaged in gilding picture frames. On February 2, 1872, the shop was destroyed by fire, and among the ruins was found the remains of a human body, alleged to be the body of Goss. The prisoner made the preliminary proofs as to identity, etc., to obtain the money for the wife of Goss. Payment was refused, the companies denying that it was the body of Goss, and she brought suit and recovered a verdict. While a motion was pending for a new trial, other facts developed, which led to the arrest of Udderzook. On the 9th of July, 1873, a dead body was found concealed in the woods near "Bear's Woods" in Pennsylvania, which by means as above stated, and by letters and proof of handwriting, showed it to be the body of Goss, and to connect the prisoner with the terrible tragedy.[2] Since the discovery of the art of photography it has been called into requisition in the court for various purposes where the question of identity has been involved, and the courts take judicial cognizance of it as a means of aiding the

[1] Cowley v. People, 83 N. Y. 464 (1881).

[2] Udderzook v. Com., 76 Pa. St. 340.

jury, not only to identify persons, but objects, things, scenery, places, premises and handwriting etc.*

Dead body — photographs — clothing — wound.

§ 168. The same authors, at § 673, vol. 3, give the following curious English case of identity by photographs: "In 1868, in all probability an escaped lunatic, named Heasman, was found in a cupboard of a house in Hackney, England, dead. Great publicity had been given to the circumstance attending the discovery of his body, and the result was that a crowd of persons, most of them bringing photographs, visited the dead-house to see if the features corresponded

* In Udderzook v. Commonwealth, 76 Pa. St. 340, which was an indictment for murder, AGNEW, C. J., said: "All the bills of exception, except one, relate to the question of identity, the most being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore, on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of the photograph, the chief being to the admission of it to identify Wilson as Goss, the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature, painted from life and proved to resemble the person, may be used to identify him cannot be doubted, though, like all other evidence of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. It is true the photographs we see are not the original likeness; their lines are not traced by the hand of an artist, nor can the artist be called to testify that he faithfully lined the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science. In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen the man known as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retinae through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses."

In Wharton & Stille's Med. Jur., vol. 3, § 670, we find the following: "During the mayoralty of the Hon. John M. Scott, in 1842-43, rough pen and pencil sketches were made of the countenances of the prisoners, the remembrance of whom it was thought desirable to perpetuate. Of these there now remain on file, etc., sketches of twelve individuals; this may be considered as the first approach toward the formation of the Rogues Gallery; these have been found useful in a number of instances. During the administration of Mayor Gilpin from 1875 to 1880 daguerreotypes and ambrotypes of noted men in police annals were made the nucleus of a gallery, though kept in a trunk under lock and key most of the time. They were seldom exhibited to others than officers of the detective department of police. With the present administration the gallery of photographs commenced, and has been carried forward to its present condition, numbering now (April 24, 1860) two hundred and sixty-six portraits. It has been thought desirable in furtherance of police ends, to add, as far as possible, the portraits of men, notorious in other cities, but who occasionally visit us professionally. Exchanges have been made to some little extent with New York, Albany, Pittsburg, etc., and pictures received have been hung up in our gallery. As regards the *pictures* of men known to the police as rogues of a high grade, very few of these, as yet, are known to exist in any portion of the land. Generally, these men will *not*, under any consideration, sit for their portraits. When in custody, and are therefore secure, the question is often asked, how do you get the consent of these men and women to sit and have their likenesses taken to be hung up for general exhibition? The answer is, sometimes by threats of thirty days' imprisonment as the alternative of refusal; at others, and in most cases, the parties have been arrested for the commission of some crime, and, having years of imprisonment before them, are reckless and regardless of consequences, so far as their pictures are concerned, and yield readily to the demand therefor. The greater portion of the pictures in our gallery are the pictures taken under these circumstances, and, therefore, for any practical purpose are by the writer deemed almost useless — especially so with regard to the younger portion of them. They alter so materially in person, etc., as often to be hardly recognized after years of imprisonment. The one great idea, it was said, "in establishing the Rogues Gallery, should be to enlarge the acquaintance of detective officers with individuals with whom they have to do, and thus to give the officers greater facilities in the performance of official duty."

with those of missing friends. Among the visitors was Dr. Ellis, medical superintendent of St. Luke's Hospital, who recognized the body, showed that the clothing were those of a patient in St. Luke's, and declared that the name of the deceased was Heasman — the name of a patient who had recently escaped from the establishment. The name on the stockings worn by deceased corresponded with this statement. On the following day the brother of the deceased confirmed the physician's view. But strong evidence was produced to the effect that the corpse was that of another person. An engineer, who had lost a friend, produced a photograph very like the deceased; and another, Mrs. Mary Ann Banks, positively swore that the body was that of her husband, Mr. Ebenezer Charles Banks, a commercial traveler. She adhered to this statement upon oath in the coroner's court, her two sisters partially supported her, and she had one strong circumstance in favor of her statement: Before she had seen the body, she described a particular wound upon the little finger, which wound appeared to have been found, but, notwithstanding this strong proof, the great preponderance of evidence was that the body was that of Heasman."*

Photographic view of premises — when admissible.

§ 169. The rejection of a photographic view of premises, the boundaries of which are in dispute, and upon which a trespass is al-

* To the above is a note, from which an extract may be in place. "The interest felt in the case an interest out of all proportion to the importance of the facts, reveals a curious doubt which is always latent in the public mind, and which has, we suspect, as much justification as popular instincts usually have, a doubt whether appearances *is* conclusive, or even strong evidence of identity. The doubt is probably based upon tradition, which deals much in stories of mistaken identity, but we are inclined to believe it much more solid than either policemen or artists would be willing to allow. A large proportion of ordinary persons, it may be even a majority, but certainly a very large proportion, are very untrustworthy witnesses to identify when dependent on appearances alone. They are, either from nature or habit, incapable of appreciating form, and form alone is the unerring proof of personal identity. The difficulties in the way of identification, more especially of the dead, are to them insuperable. In the first place, people are much more similar than we always remember. Without excepting or disputing the extraordinary idea which exists in so many countries, and is the basis of so many fables, that every man has a "double" somewhere, an individual absolutely identical in appearance with himself, it is quite certain the most extraordinary likenesses do exist among persons wholly disconnected in blood; that there are faces and forms in the world which are rather types than individualities, people so like one another that only the most intimate friends and connections can detect the difference. The likeness of Madam Lamotte to Marie Antoinette is a well-known historic instance, and there are few persons who have not, in the course of their own experience, met with something of the same kind. The writer has twice. In one case he was on board a ship in which were two persons, who neither were, nor by possibility could be, connected by birth or any circumstance whatever, except indeed caste; oddly enough they were unaware of a likeness which was the talk of the ship, dressed in the same style, but from inexplicable repulsion — we are stating mere facts — disliked and avoided each other. The writer, in a six weeks' voyage, and with a tolerably intimate acquaintance with one of the two, never succeeded in distinguishing them by sight; and of the remaining passengers, certainly one half, say thirty educated persons, were in the same predicament. In the second instance, the evidence is far less perfect, but sufficient for the argument we are now advocating. The writer stopped short in Bond street utterly puzzled by the apparition of one of his closest connections, not two yards off, clearly it was he, yet he could, from circumstances, by no possibility be there; still it was he, and the writer advanced to address him, when a momentary smile broke the spell; leaving, however, this impression: "I would have sworn to Blank in any court of justice; his double must be walking about Bond street." And hence the uncertainty of all human testimony on questions of personal identity.

leged to have been committed by placing rocks and rubbish thereon furnishes no ground of exception, if the same is offered simply as a "chalk representation," without being verified by the oath of the photographer, although the evidence of other persons is offered to show its correctness. The rejection of the photograph was held to be no ground for exception, as it was not verified.[1] Where an action was brought against a city for damages alleged to have resulted from a change made by the city in the grade of a street, after the grade had been established by the city, a photograph of plaintiff's premises, which he testified was as perfect as could be taken, was admitted in evidence to show the location and surroundings of the premises and improvements, and aid the jury in determining how far they were affected by the change made in the grade of the street. It was held to be properly admitted, a *view* of the premises by the jury being impracticable.[2] The same rule we find held in a New York case, where an action was brought to recover damages for injuries to the plaintiff's premises. The photograph of the premises went in evidence to the jury to aid them in understanding the case.[3] The same rule was held in Massachusetts in 1875, in an action against a town for damage for injuries resulting from a defect in the highway, which the town was bound to keep in repair. The plaintiff had the road photographed and introduced it in evidence; and that was no error.[4] This is the practice in England, where it was held to be proper. In an indictment against a telegraph company for obstructing a public highway, which, it was held, amounted to a public nuisance, the photograph of the highway, with its obstructions, was properly admitted in evidence.[5] No good reason is perceived why it should not be the practice in these cases as well as in the proof of the identity of persons in cases of homicide, to identify the accused or the deceased, or both, or in cases where it is necessary to identify handwriting, which is now the practice, in plea of *non est factum*, or in cases of forgery, and other cases.*

[1] Hollenbeck v. Rowley, 8 Allen, 473.
[2] Church v. Milwaukee, 31 Wis. 512.
[3] Cozzens v. Higgins, 3 Keyes, 206.
[4] Blair v. Pelham, 118 Mass. 420.
[5] Reg. v. Tel. Co., 3 Fost. & F. 73.

*In Archer v. R. Co., 106 N. Y. 598 (1887), the action was brought against the defendant to recover damages for an injury to plaintiff while a passenger on the train. A photograph was introduced, showing the location where the accident occurred. It was held to be competent evidence. The plaintiff, being on the witness stand, was asked to look at the photograph and see if that described fairly the locality. Objection was made and overruled, and he answered in the affirmative. The court said: "The proposition now submitted by the appellant to show error, '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,' being general, is unavailing." Citing Cowley's case, 83 N. Y. 464, 476;

Photograph of handwriting — plea of non est factum.

§ 170. An action was brought in Texas against an administrator, in which there was a plea of *non est factum* interposed against the establishment of the claim, and this presented a question of identity of handwriting, and the photographic copy was held inadmissible in evidence. The mere fact that a witness whose deposition is offered to establish a plea of *non est factum* is a resident of another State, and the instrument to which the plea applies is on file in a Texas court, will not authorize the introduction of evidence of his opinion of the handwriting, based on a photographic copy of the instrument attached to the interrogatories.[1]

Photographic copies — papers withdrawn — identity.

§ 171. Where an action was brought for the infringement of a copyright of a play, the deposition of the defendant had been taken and filed; annexed to it, as exhibits, were the printed program of a performance at a theater in San Francisco, and certain slips cut from newspapers published at that place. The plaintiff applied for leave to withdraw these exhibits from the files, and annex them to a commission, which was about to be issued in the cause, for the examination of witnesses in San Francisco. The court ordered the originals of printed exhibits, on file as parts of the deposition, to be taken from the files for the purpose of being annexed to a commission, on condition the photographic *fac simile* thereof should first be made and placed on file in lieu of the originals, under the direction of the clerk.[2]

In 1874 Lord COLERIDGE, the chief justice of the Court of Common Pleas of England, in answer to an application to withdraw documents to be sent out to Bombay, to have identified the handwriting of some of them, said: "That difficulty might be got over by taking photographic copies of them, as is by no means uncommon in the present

[1] Eborn v. Zimpelman, 47 Tex. 503. [2] Daly v. Maguire, 6 Blatchf. 137.

People v. Buddensleck, 103 N. Y. 487. In Buddensleck's case, *supra*, he was indicted for manslaughter, for that he erected a building in the city of New York, of insufficient material, and by reason of which culpable negligence, the same fell and killed Louis Walters, etc. A photograph of the premises was used in evidence on the trial, and it was held that the photograph was properly received in evidence for the prosecution, citing Cozzens v. Higgins, 33 How. Pr. 439; Cowley v. People, 83 N. Y. 464; Durst v. Masters, 1 Pro. Div. 373, 378.

In Alberti v. R. R. Co., 118 N. Y. 77 (1889), the action was to recover damages for personal injuries received while a passenger on a sleeping car. On the trial the plaintiff's counsel offered in evidence a photograph of the plaintiff, showing the manner in which his limbs were contracted; this was permitted by the court, under objections of the defendant; before it was done, however, one of the doctors testified that the photograph was taken in his presence and that it correctly represented the contraction of the limbs. The only materiality of this evidence was to show the manner in which the limbs were contracted. It was held that the testimony of the physician made it competent evidence as a map or diagram. Citing Archer v. R. R. Co., 106 N. Y. 589, 603; Wilcox v. Wilcox, 46 Hun, 32, 38; Ruloff v. People, 45 N. Y. 213, 224; Hynes v. McDermott, 82 Id. 50.

day."[1] Thus we see photography in use. The rule of law requires the best evidence. This required the production of the original papers, in all cases admitting documentary evidence as the best evidence of its genuineness. But now the photograph of the original is recognized judicially when proved to be correct; and the reason of the rule having ceased, the rule itself has ceased, and much difficulty is obviated.

Photograph of deceased person — of handwriting.

§ 172. In an Indiana case decided by the Supreme Court in 1877, a photograph of the deceased was introduced, to which exceptions were taken. The court said: "The court below allowed a certain photograph, and evidence touching it, to go to the jury, for the purpose of identifying the deceased; evidence touching a spot on the coat of the prisoner, supposed to be a blood spot, and the test of a physician in reference to the same spot; evidence of the dodging, trembling and confusion, when met by witness before and at the time of the arrest; evidence of a witness as to his having seen a man in Ripley county, some time before the commission of the crime, who resembled the prisoner; evidence touching a satchel and its contents, found near the church where the dead body was found, as belonging to the deceased; the admission of all of which the prisoner's counsel thinks was erroneous; but with careful attention, we can see no error in these rulings."[2] In a Michigan case in 1876, involving the will of one Alfred Foster, deceased, it was held that while it might not be error to permit photograph copies of a will which was in controversy to be given to the jury, with such precautions as to secure their identity and correctness, yet their use can never be compulsory, and their rejection cannot be urged as error. It would seem to be error to reject any competent evidence, when it is shown to be material. But in this case, as it appears from the opinion of the court that it was a photograph of the handwriting of the testator, and was offered to be used in comparison with a signature shown to be genuine, it was refused under the old English rule which would not permit the comparison of handwriting by the jury on account of their illiteracy.

Photograph of handwriting — rule in Texas.

§ 173. In an important case in Texas, decided in 1877, the action

[1] Stephens, *Re*, 8 Moak Eng. Rep. 482.
[2] Beavers v. State, 58 Ind. 530, 535.
[3] Matter of Foster's Will, 34 Mich. 21.

was brought to recover money on two instruments, one for borrowed money, $900, and one for money placed in the hands of the obligor for investment, $6,500. An attempt was made to prove the handwriting by photograph. It was there held that photographic copies of instruments sued on can only be used as secondary evidence; like letter-press copies, which may or may not be *fac similes* of the originals, it is a question of fact, whether a photographic copy of a writing, when offered in evidence, is a mathematically exact reproduction of the original writing. And that the mere fact that a witness whose deposition is offered to establish a plea of *non est factum*, is a resident of another State, and the instrument to which the plea applies is on file in a Texas court, will not authorize the introduction in evidence of his opinion of the handwriting, based on a photographic copy of the instrument which was attached to the interrogatories of the witness.[1] In this case the Supreme Court said: "In support of the admissibility of such evidence, it is contended that the court will take judicial notice that the photographic process secures a mathematically exact reproduction of the original, and that, therefore, evidence as to the handwriting of such a copy is as satisfactory as though it referred to the original. But certainly the exactness of a photographic copy of a writing depends on the instrument and materials used. Like a letter-press copy, it is a copy, and may be more or less imperfect. However superior to other copies, it is certainly a question of fact whether any particular photographic copy is exact or not, for photographers do not always produce exact *fac similes*."

Same — rule as to proof of.

§ 174. In Udderzook's case in Pennsylvania, a different rule seems to have been held, to the effect that the photographic likeness was admissible in a murder case to prove the identity of the deceased, without producing the artist to show that it was taken correctly.[2] It does not, however, seem to be well settled, whether or not the court is charged with judicial notice or knowledge of the science in such cases, or whether it is necessary to prove the photograph to be correct and an exact copy, in order to its admissibility. Lord COLERIDGE said: "It comes to this, whether the court would take judicial cognizance of photographs, as an established means of producing a correct likeness. This the court could not refuse to do. Its common

[1] Eborn v. Zimpelman, 47 Tex. 503. [2] Udderzook v. Com., 76 Pa. St. 352.

use, the length of time the process has been known, the scientific principles on which it is based, all combine to make any other decision impossible."[1]*

Test of genuine handwriting — forgery.

§ 175. The art of photography is now comparatively new, yet is being used in the courts, for various purposes, as evidence, views, landscapes, likenesses of persons and things, or copying papers, and detecting counterfeits and proof of handwriting, and for other purposes. Mr. Wharton gives the following from the Albany Law Journal: "A novel application of the art of photography was made in a case on trial before Mr. Justice DYKMAN in the Supreme Court Circuit of New York city, on Friday, June 2, 1876. The question at issue was, whether the certification of a check, purporting to have been made by the teller of the bank on which it was drawn, was genuine or a forgery. The teller swore that it was not his certificate, and several experts pronounced the signature a forgery; while other experts, called by the holder of the check, were equally positive that the signature was genuine. Thereupon the court-room was darkened, and "Professor Combs," with the aid of a calcium light magic lantern, threw an image from a photograph negative of the check, upon the wall, to show that the writing was free and flowing, and not the labored and retouched signature, which is the usual accompaniment of forgeries, and which some of the experts insisted

[1] *Re* Stephens, 8 Moak's Eng. Rep. 482. See L. R., 9 C. P. 187.

*In Leathers v. Salvor Wrecking Co., 2 Woods C. C. 680, the libel was filed in the Court of Admiralty, to recover damages for wrecking and dismantling the steamboat *Natchez* which was sunk in the Yazoo river. BRADLEY, J., said: "If the steamer *Natchez* was impressed into the service of the Confederate States government and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libelant by that government the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit. It is evident that the government of the United States acted on the supposition that it was the owner of, and entitled to the control of, the wreck. The authority given to the wreckers, and the contract made with them, are evidence of this. The latter got only one-half of the net proceeds of the property. The balance was retained by the government. Without stopping to inquire whether thus acting under the authority of the government of the United States would or would not be a full defense for the wreckers, and for the respondents in this suit, it is clear, from the evidence, that the libelant's transactions with the Confederate States government bear out the hypothesis that he obtained therefrom the full value of the steamboat, and that whatever was left of her hull and machinery belonged to that government, and, by consequence, became the property of the United States. The libelant, however, testifies, and no doubt sincerely, that the amount received by him from the Confederate government, was received as compensation for the services of the steamboat. But a long period of time has elapsed since the events occurred; and an examination of the documents themselves is conclusive that the said amount was the valuation of the vessel itself, and was so understood by the libelant at the time, and received by him as such. * * * It is objected by counsel for the libelant, that the documentary evidence in question is not properly authenticated. We think it sufficiently authenticated to make it competent. The original papers are on file in the war department. * * * Photographic copies are the best evidence the case admits of. The wonderful art by which they were produced gives us, as we may say, duplicate originals; and in the case of public records or documents properly deposited in the public archives of the country, and which the public interest requires should be there kept and preserved, no better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and the authentication of their genuineness in the usual way, by proof of handwriting."

appeared in this case. This exhibit seemed to have the desired effect, as the jury found that the certificate was genuine.[1]

Same — alleged alteration of check.

§ 176. Another case is stated, not altogether unlike the above, to have been tried in the Superior Court of New York city in 1876, in the case of *Funcke* v. *The New York Mutual Life Insurance Company*. It appears that a question arose, and the main question in the case, as to whether or not a check had been raised from $100 (one hundred dollars) to $1,500 (fifteen hundred dollars). The alteration had been confessed by a notorious forger, who had been employed to make it, but who was then under sentence for another offense. Photographs were exhibited showing decided traces of the original writing; especially of the word "one" under the newly-written word "fifteen." It was objected that these traces of the original writing, which were not visible on the check itself, were also invisible on some of the photographs. It has been suggested to us by President Morton, that this was probably due to a too long exposure of the negatives not showing the traces. The ink, which had been obliterated by the use of dilute sulphuric acid, hypochloride of soda (laboraquis solution) had left only a very faint trace of oxide of iron, which, by reason of its yellow color, would have a special absorbing power for the actinic or photographic rays; but yet even in this regard the difference between this remnant of the ink and the white paper was very slight, and if the exposure was at all too long, even the yellow traces reflected light enough to render the negative opaque. It was, therefore, necessary that *just time enough* should be given to allow the white paper to produce its effect, when slightly yellow parts would be distinguishable by their inferior action.[2]

Same — another use — examining bread.

§ 177. Another important use of the art of photography, showing its practical utility in matters in litigation, was demonstrated in an action brought by the Rumford Chemical Works against one Hecker, for infringement of a patent. Beyond what appears in the official report of the case, Mr. Wharton acknowledges the receipt from a scientist, of the following, illustrating a further use of photographs in the production of evidence, to-wit: "In the case of *Rumford Chemical Works* v. *Hecker*, 11 Blatchf. 552, the question was raised

[1] Whart. Cr. Ev. (8th ed.), § 545, note; [2] Whart. Cr. Ev. (8th ed.), § 544, note, from 13 Alb. L. J. 407.

as to the relative porosity of bread made with yeast in the usual manner and that prepared with the baking powder of the complainants. Evidence was introduced by defendants as follows: 'President Henry Morton of the Stevens Institute of Technology, Hoboken, N. J., who organized the photographic observations of the eclipse of 7th of August, 1869, under the Nautical Almanac Office, and otherwise an expert in photography, was produced and deposed to having prepared sections of both varieties of bread of exactly equal thickness, and to having made microscopic or highly enlarged photographs of the same, under the same conditions, and these were filed in court as exhibits.[8*]

Land grant — signature — photograph copy.

§ 178. A grant of land in California purporting to have been made to one Jose de la Rosa, dated December 4, 1845, and purporting to be signed by Pio Pico, as acting governor, and countersigned by Jose Maria Covarrubias, secretary, was adjudged to be false and forged. The court said: "We have ourselves been able to compare these signatures by means of photographic copies, and fully concur from evidence *subjecta fidelibus*, that the seal and the signature of Pico on this instrument are forgeries; and we are more confirmed in this opinion by the testimony of Pico himself found in the record. In a brief affidavit, made on the 9th day of June, 1853, he swore, without hesitation, that the document bearing date December 4, 1845, was signed by him. But in the deposition in this cause, on 27th day of February, 1857, while this issue was pending, he appears to testify with very great caution. He seems to have drawn out a certain formula of words, on which it is clear that a conviction of perjury could not be sustained, whether his testimony was true or false. The

[8] Whart. Cr. Ev. (8th ed.), § 544, note.

* Mr. Wills in his work on Circumstantial Evidence, at page 118, says: "A case of capital conviction occurred a few years ago, where the prisoner had given his portrait to a youth, which enabled the police, after watching a month in London, to recognize and apprehend him; and photographic likenesses now frequently lead to the identification of offenders. It is well known that shepherds readily identify their sheep, however intermingled with others; and offenders are not unfrequently recognized by their voice, circumstances frequently contribute to identification, by confirming suspicion and limiting the range of inquiry to a class of persons; as where crimes have been committed by left-handed persons; or where, notwithstanding simulated appearances of external violence and infraction, the offenders must have been domestics; as in the case mentioned on a former page, of two persons convicted of murder, one created an alarm from within the house; but upon whom nevertheless suspicion fell, from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than inmates. On the trial of a gentleman's valet for the murder of his master, it appeared that there were marks on the back door of the house, as if it had been broken into, but the force had been applied from within, and the only way by which this door could be approached from the back was over a wall, covered with dust which lay undisturbed; and over some tiling, so old and perished that it would not have borne the weight of a man; so that the appearances of burglarious entry must have been contrived by a domestic, and other facts conclusively fixed the prisoner as the murderer."

answer is in these words, and three times repeated in the very same words, *I cannot now remember*, in regard to the original document mentioned in the interrogatory, but the signature, as appears in the traced copy, *appears to be my signature*, and I *believe* it was placed there by me at the time the document bears date."[1]

[1] Luco v. United States, 23 How. 515. And see the noted Howland Will case, 4 Am. Law Rev. 625.

CHAPTER VI.

OPINION EVIDENCE.

SEC.

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Rule as to experts — exceptions — opinions of witnesses.

§ 179. While it is true, as a general rule, that no witness is permitted to give an opinion unless he is shown to be an expert, yet, there are many exceptions to this rule, which are now as well un-

derstood, appreciated and recognized as the rule itself, chief among which are matters in evidence tending to prove identification. Many other matters in the law of evidence fall within the exception, as we shall see, a few of which have been enumerated by the law writers on this subject, and which are not, perhaps, directly connected with the purpose of this treatise, yet, so interwoven with it that it has been deemed proper, in order to draw the distinction, which is held to exist between expert evidence, proper, and that of opinion evidence by non-experts, to give a few instances in which the non-expert witness may express an opinion, and this will be done at the hazard of a censure for digression. There are, as we shall see, many matters in which a witness cannot state the facts, and inform the jury without expressing an opinion. And hence the convenience and the necessity of many of these exceptions to that general rule. Then the great difficulty of distinguishing between (in many cases) the statement of a fact and the expression of an opinion. And, as we shall also see, it is difficult, if not impossible, to lay down any general rule for the application of the various exceptions which arise, that it seems proper, at this point, as if in parenthesis, to introduce, or rather to inject here, a few of those well-known exceptions.

Instances of exceptions — formerly limited.

§ 180. Some of the exceptions above referred to were very properly stated by Mr. Greenleaf, at the time he wrote, when he said: "Non-experts may give their opinions on questions of *identity*, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, value, conduct, and bearing, whether friendly or hostile, and the like." This, true as far as it then went, at that time, did not more than approximate the various matters which come within the recognized exceptions at the present day. We may now add, not concisely, but an incomplete list of other matters in which witnesses, though not experts, may give their opinions. But it must be observed in these cases (as in the case of an expert, except where he testified upon given facts) that the opinion must be given in connection with, or based upon, facts stated by the witness. The court and jury have a right to know the reason for the opinion, that they may know what weight to give it. And it is no less true in the case of the expert whose testimony decides nothing, but merely furnishes additional facts for the consideration of the jury. And often his testimony needs support, when too feeble and decrepid to stand alone.

In a case of nuisance, it requires not the skill and science of an expert to give an opinion of the effect upon the air of the poisonous effluvia which arises from a pig-sty or a privy. A non-expert may testify as to the identity (in a case of murder) of the accused and the deceased; as to the identity of a pamphlet, in case of slander; as to dangers of fire insurance; as to dangers in a railroad car; as to benefit to result from the construction of a ditch; as to comparison of footprints; as to the agility and power of fish to resist the ascent of a stream; as to the health of a slave; as was held.

Same — additional instances — opinion.

§ 181. It has also been held that a non-expert witness may give his opinion as to a defect in a street-crossing; of a teamster as to the value of horses, harness and wagon; in a case of damages for personal injuries, as to the physical condition, before and after the injury; in assault and battery, as to pain, suffering and loss of health; as to the sanity or insanity of an accused party; as to the value of services rendered and commodities sold and delivered; as to the age of a person, from his personal appearance; whether a two-horse wagon could turn in a given space; as to color of liquor; as to the sufficiency of a dam on a stream; as to whether a photograph was a good likeness; in a case of murder, as to blood spots on a stone; as to sanity, in a will case; as to the value of a gun; as to the value of a dog. These are but a few of the known exceptions, and which will be considered in detail, as we proceed. A further enumeration, which might be made, if further space was allowed for this digression, might induce the belief that the exceptions had become the rule. But great care should be ever taken to instruct the jury as to the effect of either expert or opinion evidence; either of these are mere opinions, based or founded upon facts, and the jury have a right to know the facts, for, generally, if the non-expert is not acquainted with the facts, he is not entitled to express an opinion. But, as to the effect, the jury are not bound by the opinion; they may not have confidence in it; when they have both the opinion and the facts, they may form a different opinion, and act upon it, and they are not precluded by it, from acting upon their own judgment as to the facts and circumstances. They have the right to weigh the opinion as other evidence, and disregard it if it have no weight.

Identity — non-experts — opinions as evidence.

§ 182. To prove identity non-experts may often give their opinions

as evidence, this being one of the exceptions to the rule prohibiting it. So where the plaintiff brought action on the case for a nuisance, for keeping a privy and pig-sty so near plaintiff's residence as to be a nuisance, it was held that witnesses who had examined the premises, and was acquainted with them by personal observance, and with the effect upon the air in such cases, might properly testify, in connection with the facts, to their opinions, founded on the facts, that the effluvia from the privy or sty must necessarily render the plaintiff's house uncomfortable as a place of abode.[1]*

Identity of persons and things.

§ 183. "To identify a person or thing is to show that he, or it, is the person or thing in question. Thus, in an inquest or trial for murder, the first thing is to identify the deceased; *i. e.*, prove who he was. So in investigating the title of land, the purchaser, in the absence of a stipulation to the contrary, is entitled to proof of the identity of the land described in the title deeds, with that which he has contracted to purchase."[2] "In cases of larceny, trover, replevin, the things must be identified. So, too, the identity of the articles taken or injured must be proved in all indictments, where the taking of property is the gist of the offense, and in actions of tort for damages, to specific damages, or property. Many other cases occur in which identity must be proved in regard either to persons or things. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after long absence, and the like."[3]

Proof of identity — rule of evidence.

§ 184. The identity of persons or things is a fact, to be proved like

[1] Kearney v. Farrell, 28 Conn. 317.
[2] Rapalje & L. Law Dict. 623.
[3] Bouvier Law Dict., *title* Identity.

* In Bennett v. Meehan, 83 Ind. 569, ELLIOTT J., said: "There is another class of cases in which a non-expert witness, familiar with the facts, may state his opinion to the jury." Wharton thus expresses the rule: "So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which cannot be specifically described." 1 Whart. Ev., § 512. The rule is stated in not very different terms by Stephens in Stephens' Ev. 103: "Many cases illustrate this rule. Thus, a witness may state his opinion of a culvert; City of Indianapolis v. Huffer, 30 Ind. 235; Lund v. Tyngsborough, 9 Cush. 36; that a horse is gentle; Sydleman v. Beckwith, 43 Conn. 9; that a certain substance is 'hard pan;' Currier v. Boston, etc., Ry. Co., 34 N. H. 498; that a highway is in good repair, or that it is out of repair; Alexander v. Town of Mt. Sterling, 71 Ill. 366; Clinton v. Howard, 42 Conn. 294; that a certain liquid was whisky; Commonwealth v. Dowdican, 114 Mass. 257; that a train was running at a special rate of speed; State v. Folwell, 14 Kans. 105; Commonwealth v. Malone, 114 Mass. 295; that the weather was cold enough to freeze potatoes; Curtis v. Chicago, 18 Wis. 312. In Porter v. Pequonnoc, etc., Co., 17 Conn. 249, a non-expert witness, acquainted with the facts, was permitted to give an opinion as to the sufficiency of a dam, the court saying: 'It was a question of common sense, as well as of science.' Other cases illustrating the general doctrine are collected by the author first cited, as well as by Mr. Best in his work on Evidence. Best Ev. 657. And to these we may add, Barnes v. Ingalls, 39 Ala. 193; Morse v. State, 6 Conn. 9; McKonkey v. Gaylord, 1 Jones L. 94; Cunningham v. Hudson River Bank, 21 Wend. 557."

other facts before a jury, and may be proved by any of the various means known to the law of evidence, whether in a general or special way, and whether by expert testimony, by comparison, or by circumstantial evidence; and often where the more rigid rules of the law of evidence are relaxed, more flexible, more liberal, when the issue presents a question of disputed or doubtful identity. These cases, indeed, often form an exception to the general and well-recognized rules of evidence. The necessity for a relaxation of these rules grows out of the extreme difficulty which arises in making the proof, and especially is this true in criminal practice; take, for instance, a case of homicide; the first step, of course, is to prove the *corpus delicti* and the venue; the next, and no less important, step is the identity of both the deceased and the accused; and unless the identification is clear and beyond a reasonable doubt, the prosecution must fail. And this often presents difficult, serious and grave consideration. And the numerous reported cases of mistaken identity admonish the courts and juries to weigh circumstances tending to establish identity, with abundant caution. For mere circumstances to be vested with the force of truth or conclusiveness, they must exclude every other hypothesis, and generate full belief. It is then, and only then, that they inspire full confidence.

Non-experts — opinion — publication — insurance.

§ 185. To make proof of the publication of a libelous pamphlet in an action to recover damages, a witness testified that she received from the defendant in the action, a copy of a pamphlet, of which she read some portions, and loaned it to several persons successively, who returned it to her, and though there were no marks by which he could identity it, she *believed* that the one produced was the same pamphlet, but could not testify positively that it was. This was held to be sufficient evidence of publication to go to the jury.[1] In an action to recover a loss on a policy of fire insurance, the tenant of the premises insured, who had charge of all the business thereon, and knew all of its details and processes, was produced as a witness, and asked if the business he was carrying on at the time of the fire, was any more hazardous to the insurance than the manufacture of toys. The court of Vermont held that the answer to this question was admissible in evidence.[2]

[1] Fryer v. Gathercole, 4 Exch. 262; 13 Jur. 542.

[2] Brink v. Ins. Co., 49 Vt. 442.

Same — same — railroad accident — damages.

§ 186. In a recent case in New York, where the action was brought against a railroad company to recover damages for an injury to plaintiff's arm on defendant's car, by the alleged negligence of the company, a witness was introduced by the plaintiff, who, after describing the position of the plaintiff's elbow upon the window sill of the car, added: "I should judge that it could not project out of the window by the position that he held it in the car;" also that "it could not be out of the car." Upon exceptions to this evidence, the court held that the testimony was competent; that it was not merely an opinion, but a statement of facts, without a positive allegation as to its accuracy; but, even if regarded as an opinion, as it was being based upon personal knowledge of the facts, it was competent. Another witness, who said he heard a rattling noise on the outside of the car, was asked and permitted to answer, under the objections and exceptions of the defendant, "Did you discover any confusion among the passengers by the noise on the outside of the car?" And this was held competent as a part of the *res gestæ*.[1] These are some of the exceptions to the general rule, which excludes the opinion of non-expert witnesses from the consideration of the jury. But whether such opinion be competent or incompetent must depend generally, and perhaps always, upon the nature of the facts upon which the witness bases his opinion.

Same — same — ditch — effect of — clothing described.

§ 187. On the trial of a proceeding to establish a ditch, the cause was appealed to the Circuit Court and on the trial it was held proper to allow a witness, who had stated in detail the number of acres of land in the vicinity of the ditch, and who had given its size and location, to testify as to how many acres of land would be benefited by its construction. It was also held proper for this witness to state what effect, if any, the drainage of the wet land would have upon the health of the community.[2] Upon the trial in Massachusetts, of an indictment for the crime against nature, the court permitted a witness who saw the clothes of the defendant at the time in question, to testify to spots and stains on them, without producing the clothes, or showing any reason for not producing, and also to testify that he examined the boots of the defendant, and footprints near the place

[1] Hallahan v. Railroad Co., 102 N. Y. 194.

[2] Bennett v. Meehan, 83 Ind. 566.

where the crime was committed, and *thought* that the boots would fit the footprints and were of the same size.[1] It is in very many cases not necessary that a witness should be an expert to render him competent as a witness to testify his opinion to the jury. In the above case, this question was fairly presented, as to the identity of the clothes, the boot and the footprints; and on this point the court remarked that "whenever evidence of the condition of clothes or other articles of personalty is competent and material, their condition may be described by witnesses, without producing them in court themselves. The correspondence between boots and footprints is a matter requiring no peculiar knowledge to judge of, and as to which any person who has seen both may testify." The general rule is well recognized and admitted to be, that witnesses are not permitted to testify their opinion to the jury, unless they are experts. But there is an exception to this rule, which seems to be as well settled now as the rule itself. There are many subjects upon which an opinion must be derived from a series of circumstances and instances coming under the observation of the witnesses, which they could never detail to the jury.[2] This is the true reason of the exception to the general rule, and it was well said: "It is because witnesses have a knowledge of the thing about which they speak, and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable, in their nature, of being explained to others, that they may state what they know in the best way they can. This best way is by giving, in the form of an opinion, that which cannot be put in the form of explanation or narrative."[3]

Trespass — breach — opinion of witnesses.

§ 188. An action of trespass was brought against a defendant in Maine for breaking plaintiff's close, and treading down his grass and destroying a dam. It was held that an opinion of a person accustomed to witness the agility and power of certain fish, in overcoming obstructions in the ascent of rivers, and who have acquired, from observation, superior knowledge upon that subject, are admissible in evidence to show that a stream in its natural state would or would not be ascendible by such fish.[4] Another breach in the same State was that of a marriage contract. And in an action to recover damages for a breach of promise of marriage, the opinion of

[1] Com. v. Pope, 103 Mass. 440.
[2] M'Kee v. Nelson, 4 Cow. 355.
[3] Cooper v. State, 23 Tex. 339.
[4] Cottrill v. Myrick, 3 Fairf. (Me.) 222.

witnesses not possessing any peculiar professional skill, that the plaintiff was once in a state of pregnancy, was held to be inadmissible. Evidence also to the effect that it was once reputed that she was pregnant at one time, and attempted to effect an abortion, was held to be inadmissible. And the plaintiff recovered a verdict against the defendant for $1,200, which was affirmed.[1] An action was brought for damages for slanderous words spoken, charging the plaintiff with fornication and adultery. The evidence tending to show that the words spoken were true, or that there were reports in circulation, of particular instances of impropriety of the plaintiff's conduct, will not be admitted, it was held to show that the defendant believed that what he said was true.[2]

Personal identity — opinion of witnesses — name — identity.

§ 189. In a recent California case, one Frank Rolfe was convicted for robbery of several hundred dollars in gold and silver coin. On the trial of the case, a certified copy of a former conviction for another offense in another county was admitted in evidence. It was insisted that there was not sufficient evidence to show that the defendant Frank H. Rolfe was the same party who was convicted under the name of "Frank Rollins" in the other county. The court said: "Identity of person is presumed from identity of name; there were other circumstances in the case which tended to establish the fact that Frank H. Rolfe was the same person convicted in the other county under the name of "Frank H. Rollins;" otherwise of course this would have been insufficient.[3] In a New Hampshire case in 1838, the defendant was indicted for adultery with one L. W. at, etc., without further designation. There were two persons, father and son, of the same name, in the same town, and the latter used the addition of "junior" to his name, and was thereby known and distinguished from his father. It was held that the accused had the right to understand that the offense was charged to have been committed with the father, and evidence of adultery with "L. W. Jr." could not be admitted under such indictment.[4]

Mr. Wharton in his Evidence says: "Human identity is an inference drawn from a series of facts, some of them veiled, it may be, by disguise, and all of them more or less varied by circumstances."[5]

[1] Boies v. McAllister, 3 Fairf. (Me.) 308.
[2] Bodwell v. Swan, 3 Pick. 376.
[3] People v. Rolfe, 61 Cal. 541.
[4] State v. Vittum, 9 N. H. 519.
[5] Whart. Cr. Ev., § 13, also § 803, n. 6.

While this may be true, it is a fact, to be proved like other facts, and may depend upon circumstantial evidence. But then he says: "After all, we have to go back to opinion. A witness says: 'The person in question is A.' This is opinion. A jury infers from marks of identity or dissimilarity, that identity is proved or disproved. This again is opinion; but it is opinion more primary and more reliable than that of witnesses speaking from impressions produced upon themselves. And recollecting how easily opinions as to identity are affected by prejudice, we must conclude, when we rest on the opinion of witnesses as our authority, that the two great constituents of reliability are: 1. Familiarity with the person in controversy; and 2. Freedom from personal or party prejudice."[1]

Non-expert — disease of slaves.

§ 190. In an action for a breach of covenant in the warranty of a slave in Tennessee, it was held that the opinion of a witness as to the condition of the slave, founded upon observation and knowledge, was admissible in evidence. But the witness must first state the facts upon which his opinion is founded, and then he may testify that opinion. In speaking of this the court said: "It seems to me that there was error in rejecting those parts of Washington Hitchcock's deposition, wherein, speaking of the slave Clarissa, he says: She was at the time I first saw her, and now is, almost, if not quite, an idiot,' also the words, 'and seems not to understand what is said to her,' and also, 'she seems to have no care of herself or sense of protection.'"[2] Another case in the same State was covenant on the soundness of a slave. It was there held that the opinion of the physician who attended the deceased slave, as to the character and duration of the disease, were competent evidence; and that the statements of the slave, made to the physician and others during his illness as to the symptoms and effects of the disease, were competent evidence.[3]

Same — injuries — rule in Kansas.

§ 191. But in Kansas, where an action was brought, to recover for damages resulting from a fall caused by an alleged defective street crossing, plaintiff had a judgment for $4,000. The Supreme Court reversed it. He was injured at the crossing, which had formerly extended over the gutter, making the surface of the sidewalk and cross-

[1] Whart. Cr. Ev., § 807.
[2] Norton v. Moore, 3 Head (Tenn.), 480.
[3] Jones v. White, 11 Humph. 268.

ing; but an abutting lot-owner had cut off the planks composing the crossing, to put in stone, and left it uncovered. The city authorities knew the condition of it for weeks prior to the accident. The court permitted the plaintiff to introduce in evidence that the street crossing was unsafe and dangerous. No attempt was made to show that these witnesses were experts. They had, however, seen the street crossing where the accident occurred. The court, in so deciding, said: "As a general rule, the opinions of witnesses are not competent evidence, although such opinions are derived from the witnesses' personal observation, and are sought to be given in evidence in connection with the facts on which they are based. To this rule there are some exceptions. In matters relating to skill and science, such persons as have had sufficient experience, or who are possessed of sufficient knowledge, as experts, may give their opinions, whether they personally know the facts or not. There are also some exceptions seemingly founded upon convenience or necessity, and relating to such matters as involve magnitudes or quantities or proportions of time. * * * The present case, however, does not come within either of the exceptions, but comes within the general rule; and, therefore, it was error for the court to admit the evidence. Whether the crossing was safe or unsafe depended upon very many circumstances.[1]

Same — rule in New Hampshire and Indiana.

§ 192. As a general rule of course, as we have seen, the opinion of witnesses is not to be received in evidence, merely because they may have had some opinion, with no greater opportunity of observation than others, unless they relate to matters of skill and science. But it was held that the opinion of an experienced teamster respecting the value of horses, harness and wagons, which are familiar to him, is admissible, it not being a matter of skill or science.[2] It was held in New York that, in the assessment of damages for the breach of a covenant, the opinion of witnesses as to the probable amount of damages are not admissible. That witnesses must give *facts* and not *opinions*, except in matters relating to science, when the opinions of experts may be received. That on questions of insanity, in cases of *crim. con.*, and in actions for breach of promise of marriage, the opinions of witnesses will be received, although in the first case the

[1] City of Parsons v. Lindsay, 26 Kans. 426.

[2] Robertson v. Starke, 15 N. H. 109.

exception should be limited to the opinions of professional men.[1] In an action against a railroad company for damages for personal injury, a witness was asked, "What was his physical condition as to health up to the time of the injury?" Ans. "Well, his appearance looked like he might be a stout man; I always supposed he was, from his appearance; of course I am not a doctor; he had a healthy look." "What was his condition as to health and physical condition on yesterday?" Ans. "Why, he looked very much worn down, to what he did the last time I saw him." This was properly received, and confirmed as correct.[2]

Same — murder — assault and battery.

§ 193. An action was brought in Indiana for damages for assault and battery. Plaintiff had judgment for $500, which was affirmed. The court was of opinion that, in a suit for personal injuries, on account of assault and battery, alleging suffering and a permanent impairment of health as the result, testimony by the plaintiff as to the wounds, pain and suffering, loss of sleep, and poor health afterward, is not matter of *opinion*, but a statement of facts, and is admissible.[3] In an indictment for murder in Indiana, the court charged the jury thus: "The opinions of medical experts are to be considered by you in connection with the other evidence in the case, but you are not bound to act upon them to the exclusion of the other evidence. Taking into considerations these opinions, and giving them due weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises." This was held to be correct.[4]

Same — damages — values — rule in Indiana.

§ 194. In the same State, and where this question has been very frequently before the court, and much discussed, it was held, in an

[2] Norman v. Wells, 17 Wend. 137.

[3] Carthage Turnpike v. Andrews, 102 Ind. 138. Citing House v. Ford, 4 Blackf. 293; Indianapolis v. Huffer, 30 Ind. 235; Benson v. McFadden, 50 id. 431; Holten v. Board, etc., 55 id. 194; Coffman v. Reeves, 62 id. 334; State v. Newlin, 69 id. 108; Mills v. Winter, 94 id. 329; Johnson v. Thompson, 72 id. 167; Yost v. Conroy, 92 id. 464; R. R. Co. v. Hale, 93 id. 79; Goodwin v. State, 96 id. 550; Hamm v. Romine, 98 id. 77; Wilkinson v. Moseley 30 Ala. 562; Blackman v. Johnson, 35 id. 252; R. R. Co. v. McLendon, 63 id. 266; R. R. Co. v. George, 19 Ill. 510; Willis v. Quimby, 11 Fost. (N. H.) 488; Elliott v. Van Buren, 33 Mich. 49; Culver v. Dwight, 6 Gray, 444; Irish v. Smith, 8 Serg. & R. 573; Parker v. Boston, etc., Co., 109 Mass. 449; Best Prin. Ev. 494; Com. v. Sturtivant, 117 Mass. 122; Evans v. People, 12 Mich. 27; Abbott Trial Ev. 599, 600.

[4] Hamm v. Romine, 98 Ind. 77.

[5] Goodwin v. State, 96 Ind. 551.

action against a railroad company for killing a horse, that where it is a question whether a railroad could properly be fenced at a certain place, it is not competent to take the opinion of witnesses upon the question, but the jury must be left to decide that question upon the facts proved.[1] And that the opinion of a witness as to the public utility of a ditch, sought to be established by law, was not proper evidence; so, also, as to the damages which it will cause to the lands of a party; but the opinion of one acquainted with the property, as to the value of the property with and without the ditch, was competent.[2] This would seem to be one of those nice distinctions, without a conceivable difference, except in the fact that the rule excludes one opinion (as to amount of damages) and receives two opinions as to values; one with the ditch and the other without it. And all this to pacify a mere inconvenient precedent. The same court again held, that where the value of property is an issue in a cause, any witness acquainted with such property may testify as to the value thereof, stating also the facts upon which such an opinion is based.[3] Here we find the difficulty, if not the impossibility, of distinguishing between facts and opinions, in some cases.

Same — general rule in given cases.

§ 195. Where an action was brought upon an account for service rendered, where there had been mutual dealing between the parties, it was held proper to permit a witness who was familiar with the facts, to testify as to the relative value of the services and the commodities, which went to make up the mutual account between the parties. And then the value of such testimony may be tested by cross-examination, so that the jury may properly estimate the weight to which such opinion is entitled as evidence.[4] Mr. Greenleaf says: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, value, conduct, and bearing, whether friendly or hostile, and the like.[5] An action was brought in Indiana against principal and surety upon the bond of Newlin as guardian of an insane person. It was held that the opinions of non-expert witnesses, as to a person's unsoundness of mind, are competent to be admitted in evidence, they having stated the facts upon which they have based such opinions, to the jury.[6]

[1] R. R. Co. v. Hale, 93 Ind. 79.
[2] Yost v. Conroy, 92 Ind. 464.
[3] Holton v. Com'rs, etc., 55 Ind. 194.
[4] Johnson v. Thompson, 72 Ind. 167.
[5] 1 Greenl. Ev., § 440.
[6] State v. Newlin, 69 Ind. 108.

Same — railroad — damages — infancy

§ 196. Where an action was brought on a promissory note, it was held that a witness who had testified to the personal appearance of the defendant, who had pleaded infancy, at the time the contract was made, on which suit was brought, may be permitted to give his opinion as to the age of such person.[1] A brakeman on a railroad train was required as a part of his duty, in the night-time, to couple to his train certain cars upon a side track. A "cattle chute" was situated near the side track. He was struck by the "cattle chute" and seriously injured. It was held that when witnesses for the plaintiff had testified that such "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant (railroad company) that persons had frequently ridden past it, holding to the side of the car, was proper and should have been received.[2] Where, in an action for damages, it appeared that defendant's railroad locomotive ran into the plaintiff's wagon, two witnesses for plaintiff were asked in substance, "whether a two-horse wagon could be turned down there near the crossing." It was said to be difficult if not impossible to lay down any rule, applicable to all cases, as to what is or what is not, expert testimony; but whether a two-horse wagon can be turned in a certain road, or opening, is a question of fact, to which a witness may testify, though he is not shown to be an expert.[3]

Same — rule in Massachusetts and Connecticut.

§ 197. In an indictment for unlawfully retailing spirituous liquors it was held proper to ask a witness for the State as to what he had seen at the premises; and when he had answered that, in response to calls for whisky, defendant poured something out of a jug, he could be further asked as to the color of that something, and that his answer was admissible, when he said it was "reddish."[4] Plaintiff sued for damages to his property on a water-course, by the breaking of defendant's dam, above him, which was carried away by a freshet. Plaintiff introduced a witness having no peculiar skill in the mode of constructing dams, who testified that he had been acquainted with the stream in question for many years; that the water passing where the dam was, was very rapid in time of a freshet; that the dam was built very high — higher than any dam he had ever known — keeping

[1] Benson v. McFadden, 50 Ind. 431.
[2] Allen v. R. R. Co., 57 Iowa, 623.
[3] Funston v. R. R. Co., 61 Iowa 452.
[4] Com. v. Owens, 114 Mass. 252.

back a large and deep pond of water; and that, in his *opinion*, under such circumstances, a dam as defendant's dam was could not stand. It was held (1) that the facts thus stated were unexceptionable evidence; and (2) that the *opinion* of the witness, in connection with such facts, was admissible.[1]

Same — rule as to water-power — photography.

§ 198. In another mill case it was held that a witness, not an expert, may testify, if he knows the fact, that back-water made by defendant diminishes the power of plaintiff's water-wheel.[2] It was held in New Hampshire that, in questions relating to distances, and the dimensions and qualities of things, a witness cannot testify, without an implied expression of *opinion*, and that no objection can be sustained on that account.[3] As to the opinion of non-expert witnesses, it was held in Alabama, that though experts only may be competent as witnesses to testify whether or not a photograph is well executed; yet, to enable a person to determine whether the picture resembles the original, requires no special skill in, or knowledge of, the photographic art; and on that question, a person for whom such picture has been taken, although possessing no special skill or knowledge of the art of photography, is competent to testify that the picture so taken was a good likeness.[4]

Opinion — murder — blood spots.

§ 199. In an indictment in New Hampshire for murder, on the trial, a witness for the prosecution having testified that the morning after the murder he saw, near the house of the prisoner, where the murder was committed, and in a path between it and the house of the prisoner's father, to which he went, he saw spatters and spots upon a stone, and after the witness had stated that he could testify as a matter of fact what the spots were, he was asked so to state. This was objected to as irrelevant, and that the witness was not an expert, and not competent to express an *opinion*. The objection was overruled; the court stated, however, that his opinion was not requested, and he would only be allowed to answer, as a fact, what the substance was. The witness answered that it was blood. It was held that the admission of the evidence was not error — that the witness, though not an expert, was competent to testify to a fact.[5]

[1] Porter v. Mfg. Co., 17 Conn. 249.
[2] Williamson v. Yingling, 80 Ind. 379.
[3] Hackett v. R. R. Co., 35 N. H. 390.
[4] Barnes v. Ingalls, 39 Ala. 193.
[5] Greenfield v. People, 85 N. Y. 75. Citing Com. v. Sturtivant, 117 Mass. 122, 132; People v. Eastwood, 14 N. Y. 563, Linsday v People, 63 id. 143.

Same — sanity of testator — rule in Massachusetts.

§ 200. An appeal was taken from the allowance and probate of two instruments, purporting to be a will and a codicil. It was held that, on the issue as to whether the testator was of sound and disposing mind, the evidence of a witness who had had an interview with the testator three weeks before the date of the will, that he observed no incoherence of thought in the testator, nor any thing unusual or singular in respect to his mental condition, was held to be competent.[1] In a similar proceeding in the same State, it was held that, upon the issue of the sanity of a testator, persons acquainted with him, although neither witnesses to the will or medical experts, may testify whether they noticed any change in his intelligence or any want of coherence in his remarks.[2]*

Non-expert — rule in Indiana.

§ 201. In Indiana a party was indicted for incest, and the plea of insanity was interposed. It was held that in criminal cases a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of the defendant, and it must also appear that he has some knowledge of the acts and conduct of the defendant, to entitle his opinion to be received in evidence. The court should decide whether such knowledge has been shown, and such facts stated, as will entitle the witness to express an opinion, but what weight the opinion shall have is a question of fact to be settled by the jury.[3]

Same — sidewalk — rule in Illinois.

§ 202. In Illinois an action in damages was brought against a town for injuries. The question whether a sidewalk made of rough plank, laid on stringers, was properly constructed or not, was held not to be a question for an expert altogether, only to be put to, and answered by one who has the reputation for skill in such work and in the handling of tools, and quality and adaptation of materials; that

[1] Nash v. Hunt, 116 Mass. 238 (1874).
[2] Barker v. Comins, 110 Mass. 477.
[3] Colee v. State, 75 Ind. 511.

* In Barker v. Comins, 110 Mass. 477, GRAY, J., said: "The questions to the witnesses produced at the trial were rightly admitted. They did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter, not of opinion, but of fact, as to which any witness who has had opportunity to observe may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred."

a man of common sense and ordinary observation and experience can pronounce as satisfactorily upon such a question as the most accomplished mechanic, and that it was error in the court below to exclude such evidence from the consideration of the jury.[1]

Same — rule in New Hampshire and Connecticut.

§ 203. Where, in New Hampshire, the plaintiff contracted to do certain grading for defendant's railroad, it was held that what *hard pan* was, and whether any was found in excavating, were not questions relating to matters of science, art or skill, and that it was not necessary that a witness should be shown to be qualified as an expert before he can be thus interrogated.[2] But in Connecticut it was held that the mere opinion of a witness respecting the *age* of a person from his personal appearance, where such opinion was unaccompanied by any facts upon which he bases such an opinion, was inadmissible in evidence.[3] And this seems to be the general rule, and founded in sound reason.

Non-expert witness — rule in Vermont.

§ 204. In Vermont an appeal was taken from an order to remove paupers, and one question was, whether the paupers, at the date of the order, had a legal settlement in Troy; and this depended upon whether he (Thomas) gained a settlement there by seven years' continuous residence. The question was put to the witness, Craig, "from your opportunities of knowing, as you have stated them, do you think it possible for Thomas to have lived in Troy that year and you not have known it?" To which the witness answered: "I should not think it was." This was held to have been properly received.[4] In an earlier case in the same State, on this subject, BOYCE, J., said: "This rule, however, has its exceptions, some of which are as familiar and as well settled as the rule itself. Where all the pertinent facts can be sufficiently detailed and described, and where the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But cases occur where the affirmative of these propositions cannot be assumed. The facts are sometimes incapable of being presented with all their proper force and significance to any but the observer himself, as in case of insanity, to which may be

[1] Alexander v. Town of Mt. Sterling, 71 Ill. 366.
[2] Currier v. R. R. Co., 34 N. H. 498
[3] Morse v. State, 6 Conn. 9.
[4] Cavendish v. Town of Troy, 41 Vt. 99 (1868).

added that of a settled affection or dislike toward a particular person. Under these circumstances, the opinion of witnesses must be received.[1]

Same — rule on the subject.

§ 205. The rule is, that any witness, not an expert, who knows the facts personally, may give an opinion in a matter regarding skill, stating also the facts upon which he bases that opinion. As said by Mr. Wharton in his Law of Evidence (§ 512): "So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which cannot be specifically described."[2] And as to experts themselves, Mr. Greenleaf says: "Where scientific men are called as witnesses, they cannot give their opinion as to the general merits of the cause, but only their opinion upon the facts proved." And Mr. Starkie in his Law of Evidence, in a concise form, says: "The general distinction is, that the jury must judge of the facts for themselves. But that wherever the question depends on the exercise of peculiar skill or knowledge, that may be made available, it is not a decision by the witness on facts, to the exclusion of the jury; but the establishment of a new fact, relation or connection which would otherwise remain unproved."

Opinion — as to the value of a gun.

§ 206. One Cooper was indicted in Mississippi for stealing a gun, of the value of $15, which was grand larceny. If the value of the gun were less than $10 it would have been petit larceny, and so the question of value was important. Several witnesses having seen the gun, testified to its value. This was the only ground upon which a new trial was asked. It was held that the opinion of any ordinary witness was competent. Simrall, Ch. J., said: "Where there is a difference in the quality of the same kind of articles, there will be more or less difference of opinion as to value. Absolute certainty is not attainable. The judgment is reliable according to the degree of information and knowledge which the person has."[3]

Same — as to the value of a dog.

§ 207. The following dog case was decided in New York in 1840. Flager brought suit against Brill for trespass for killing a dog. It was held that the opinions of witnesses, as to the value of a dog, for

[1] Clifford v. Richardson, 18 Vt. 620 (1846).

[2] Barnes v. Ingalls, 39 Ala. 193; Cunningham v. Bank, 21 Wend. 557.

[3] Cooper v. State, 53 Miss. 393.

whose destruction an action was brought, are admissible in evidence. NELSON, Ch. J., said: "The opinions allowed as to the value of a well-broken *setter* dog, I am inclined to think, were barely competent, and the answer of the witnesses depended in a measure upon their skill and judgment in respect to the animals. The questions were put to persons supposed to be acquainted with the peculiar qualities of *setter* dogs, and who had some knowledge of their value in the market. The case is analogous to those in which the opinions of persons are always permitted, of the value of domestic animals, such as cattle, sheep, etc., in which they are in the habit of dealing. They are supposed to be better acquainted with the general market value of such animals than the generality of mankind. A common standard is thus fixed that may assist in arriving at the value in the particular instance, which will be value according to the quality, condition, etc., of the article in question.[1] The proof in the case was slight as to the breed and quality of the plaintiff; but it was enough, I think, to authorize the general inquiry. The court and jury always make the proper application. They have obviously done so in this case; for though the value of a well-broken *setter* was put at from $100 to $200, the jury found for plaintiff only $25."

Opinion of temperature — heat — cold.

§ 208. In an action brought against a railroad company to recover for the loss of potatoes which froze while in the possession of defendant, as a common carrier, it was held competent to permit witnesses to give their opinions of the state of the weather on the day the potatoes were shipped, and whether it was sufficiently cold to freeze potatoes while in the cars; or as to the state of the weather during the time they were in store at Chicago, and whether it was sufficiently cold to freeze them in the store-room.[2] A similar question arose in an action for a breach of warranty, on the sale of a lot of hams; and it was there held that a witness may testify, in general terms, as to the temperature of the place of the storage of goods (such as hams) liable to be injured by heat, and the jury may find, from such evidence, whether the goods were properly stored and cared for, although no means were used by the witness or others to ascertain the exact temperature.[3]

[1] Brill v. Flager, 23 Wend. 354.
[2] Curtis v. R. R. Co., 18 Wis. 312. And see Leopold v. Van Kirk, 29 id. 548.
[3] Leopold v. Van Kirk, 29 Wis. 548. And see Curtis v. R. R. Co., 18 id. 312.

Same — instances — caution.

§ 209. Any witness may state, if he has the proper knowledge of the fact, whether a party is solvent or insolvent, and yet the most that can be said of such testimony is, that it is a mere matter of opinion.[1] And he may also testify as to the speed at which an engine was running at any particular time, when that question becomes a material one. This, too, is necessarily an opinion, as in the case of handwriting, or of footprints.[2] In all these questions of opinion evidence, whether the witness be an expert or not, when he gives an opinion, there is nothing conclusive in that. Upon cross-examination, the facts, if any there be, upon which the witness bases his opinion may be brought out, and the jury is entitled to them; and upon these facts the jury may form a different opinion. Any man of reason and observation knows how unreliable the opinion of man is, and how varied upon a given state of facts. Hence, the opinions of witnesses do not bind the jury; but, at most, they can only furnish an additional fact for the consideration of the jury. Especially is this true in questions of sanity or insanity, when one man sets himself up as the judge of the mental capacity of his fellow man. The uncertainties and dangers admonish us to receive opinion evidence with abundant caution.

Opinion — value of real property.

§ 210. As to the opinion of a witness upon the value of real estate, it has never been regarded as a matter of science or skill, or as involving either, nor does it require an expert to give an opinion. If not in all matters, certainly in this matter, common sense serves a better purpose than science. Without depreciating the latter, it seems safe to give preference to the former. A non-expert witness may give his opinion on the subject, if he has the knowledge of the value thereof. It has been so held in most of our States. It was so held in New York.[3] And often so held in Massachusetts,[4] and by the

[1] Blanchard v. Mann, 1 Allen, 433.

[2] Young v. State, 68 Ala. 569; State v. Moelchen, 53 Iowa, 310; State v. Reitz, 83 N. C. 634.

[3] Jarvis v. Furman, 25 Hun, 391; Thorn v. Sutherland, id. 435.

[4] Brown v. R. R. Co., 5 Gray, 35; Shaw v. City of Charlestown, 2 id. 107; Hosmer v. Warner, 15 id. 46; Rand v. Inhabitants, etc., 6 Allen, 38; Wetherbee v. Bennett, 2 id. 428; Bristol County Bank v. Keavy, 128 Mass. 298; Walker v. Boston, 8 Cush. 279; Wyman v. R. R. Co., 13 Metc. 327; Sexton v. North Bridgewater, 116 Mass. 200; Hawkins v. City, etc., 119 id. 94; Dwight v. Comrs., 11 Cush. 203; Shattuck v. R. R. Co., 6 Allen, 116; Dickenson v. Inhabitants, 13 Gray, 546; Russell v. R. R. Co., 4 id. 607; Whitman v. R. R. Co., 7 Allen, 316.

court of Pennsylvania.[1] In Ohio,[2] also in Iowa,[3] and very frequently in Indiana,[4] and in Missouri,[5] in Maine,[6] in Illinois,[7] in Texas,[8] in Wisconsin,[9] and Michigan,[10] and in fact it may be considered not an exception, but a rule.

Opinions of witnesses — covenant — trespass.

§ 211. In an action of covenant in New York, the question was, ought the opinions of witnesses to have been received as to the amount of damages? The proposition being to take the abstract opinion of the witnesses on an examination in chief, subject only to cross-examination, COWEN, J., said: "The amount of indemnity, where it is not capable of being reached by computation, is always a question for the jury. If there be any rule without exception it is this; and I have been unable to find any instance where the opinions of witnesses have been received.[11] In an action of trespass in England, for cutting a bank which had been erected to prevent overflow, the question of opinion evidence was presented, and on a motion for new trial, Lord MANSFIELD, C. J., said: "A confusion now arises from a misapplication of the 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 the banks, the course of the tides, and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbors, the causes of their destruction, and how remedied; in matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the *Trinity House*, I cannot believe that where the ques-

[1] Brown v. Corey, 43 Pa. St. 495; Hanover Water Co. v. Ashland Co., 84 id. 279.

[2] Atlantic, etc., Ry. Co. v. Campbell, 4 Ohio St. 583; Cleveland, etc., Ry. Co. v. Ball, 5 id. 568.

[3] Dalzell v. City of Davenport, 12 Iowa, 440; Henry v. R. R. Co., 2 id. 289; Sater v. P. R. Co., 1 id. 386.

[4] Evansville, etc., Ry. Co. v. Cochran, 10 Ind. 560; Frankfort, etc., Ry. Co. v. Windsor, 51 id. 238; Holten v. Comrs., etc., 55 id. 194; Ferguson v. Stafford, 33 id. 162.

[5] Tate v. R. R. Co., 64 Mo. 149.

[6] Snow v. Boston, etc., 65 Me. 230; Warren v. Wheeler, 21 id. 484.

[7] Green v. Chicago, 97 Ill. 374; Lafayette, etc., Ry. Co. v. Winslow, 66 id. 219; Cooper v. Randall, 59 id. 317; Laswell v. Robbins, 39 id. 210; French v. Snyder, 30 id. 344.

[8] Houston, etc., Ry. Co. v. Knapp, 51 Tex. 592.

[9] Erd v. R. R. Co., 41 Wis. 65.

[10] Pettibone v. Smith, 37 Mich. 579; Page v. Wells, id. 415.

[11] Norman v. Wells, 17 Wend. 137.

tion is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion; and for false evidence on such questions, a man may be indicted for perjury. Many nice questions may arise as to forgery, and as to impressions of seals; whether the impression was made from the seal itself or from an impression in wax. In such case I cannot say that the opinion of seal makers is not to be taken.[1]*

Witness — opinion — of the horse.

§ 212. A witness who testifies from personal knowledge of the facts upon which his opinion is founded (the disposition of a horse being in question) was asked: "From your knowledge of the horse, was he, in your opinion, a safe and kind horse?" This was held to be proper; but it was held that to render the opinion of common witnesses admissible it is indispensable that they be founded on their

[1] Folkes v. Chadd, 3 Doug. 157.

* To the case of Folkes v. Chadd, 3 Doug. 157, we find appended the following note, to-wit: "This may be regarded as the principal case on the admissibility of opinion. It has been followed and confirmed by a variety of similar decisions. In Thornton v. Royal Exchange Assurance Company, 1 Peake N. P. C. 25, Lord KENYON admitted the evidence of a ship-builder on a question of sea-worthiness, though he had not been present at the survey. And in a subsequent case, his lordship received the evidence of underwriters in explanation of the terms of a policy. Chaurand v. Angerstein, 1 Peake N. P. C. 43. See, also, Berthon v. Loughman, 2 Stark. N. P. C. 258. But see Durrell v. Bederley, Holt N. P. C. 286. So, a person versed in the laws of a foreign country may give evidence as to what in his opinion would, according to the law of that country, be the effect of certain facts. Chaurand v. Angerstein, 1 Peake N. P. C. 44. In prosecutions for murder, medical men are allowed to state their opinions, whether the wounds described by the witnesses were likely to have occasioned death. In Rex v. Wright, who was tried for murder, the defense being insanity, the twelve judges were unanimous in opinion that a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz.: whether, from other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. Rex v. Wright, Russ. & Ry. Cr. Cas. R. 456; 2 Russ. Crimes, 623 (2d ed.) The Scotch law is the same as our own on this subject. Professional men, when examined on the subject of their art or science, are of necessity allowed to state their opinions, and to speak to the best of their skill and judgment. In homicide, the *corpus delicti* is in many cases established by no other evidence. Burnett on the Criminal Law of Scotland, 458. In the principal case Lord MANSFIELD said: "Handwriting is proved every day by opinion." In Revett v. Braham, B. R. H. 32 G. 3, 4 T. R. 497, two clerks from the post-office, accustomed to inspect franks, and to detect forgeries, were allowed to give evidence of their opinion as to the genuineness of the handwriting to a will, and similar evidence was admitted in Rex v. Cator, by HOTHAM, B., 4 Esp. N. P. C. 145, and in Birch v. Crewe, by ABBOTT, J., cited 5 B. & Ald. 332. The authority of these decisions, nowever, has been much shaken by the case of Cary v. Pitt, Peake Ev., Appendix, 84 (4th ed.), in which Lord KENYON rejected such evidence, and by the case of Gurney v. Langlands, B. R. H. 2 G. 4, 5 B. & A. 330, in which the judges expressed great doubts as to the admissibility of such evidence, and observed that, at all events, it was entitled to no weight, and was much too loose to be the foundation of a judicial decision either by judges or jury."

own personal observation and not on the testimony of others, or any hypothetical statement of facts, as is permitted in the case of an expert, and he should be able to state such facts as will satisfy the jury, at least presumptively, that his opinion is well founded.[1] In an action for damages for a nuisance in placing a pile of stones by the side of the highway, and causing plaintiff's horse to take fright and run away, the following question and answer thereto were held admissible: "What objects usually make horses shy, according to your experience?" Answer. "I think any new object on the road?" And also, "At what place has your horse gone near to moving trains of cars?" and "How was your horse affected by the road roller?" and "How extensively is it known in the neighborhood that the horse has run away?" These being permitted was no ground for a new trial.[2]

Same — same — rule in Iowa.

§ 213. An action was brought against the city of Ottumwa to recover damages for an injury from being thrown from a wagon on the street. Mrs. McGuire, a witness, when asked to state in her own way how the accident occurred, said: "There was some one standing on those steps near the door sprinkling the street with a hose, and the water flew over the horses and around them, and they got frightened and jumped." Objection was here made "to what the witness said about the horses becoming frightened, because it is incompetent, being an opinion of the witness." The objection was sustained. But the court, ROTHROCK, J., delivering the opinion, said: "We think these rulings of the court were erroneous. It is true that the dividing line between what is a fact and what is an opinion is not and cannot be very clearly defined, but it surely is competent for a witness to state whether the horses were frightened by the stream of water thrown upon or around them, or by the escape of steam from an engine, or by being set upon by a dog, or the like; the observation of the witness as to the cause and effect is a fact, which he may state to the jury." * * * A witness may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come; the correspondence between boots and footprints; and it is competent for a witness, not an expert, to testify to the condition of health of a person, whether ill or disabled, sick with a fever, or destitute. A

[1] Sydleman v. Beckwith, 43 Conn. 9. [2] Clinton v. Howard, 42 Conn. 295.

witness may give his judgment whether a person was intoxicated at a given time."[1]

Opinion as to capacity of a sewer.

§ 214. An action was brought against the city of Indianapolis to recover damages resulting from an overflow of plaintiff's lot and dwelling-house. The defendant assigned for error, that the court below allowed witnesses, not experts, to give their opinions as to the capacity of the sewer in question. FRAZER, J., said: "The rule is that any witness, not an expert, who knows the facts personally, may give an opinion in a matter not requiring skill, stating also the facts upon which he bases that opinion. But in this case it can scarcely be called an opinion which the witnesses gave, but a fact. They had seen the sewer would not pass the water in time of flood. It did not require an expert, with such a fact within his knowledge, to say that the sewer was too small.[2]

Same — sickness — soundness of a slave.

§ 215. In Alabama an action was brought to recover damages for the loss of a hired slave. Objection was made to the testimony of non-expert witnesses giving opinion as to the physicial condition of the slave, and it was held that a witness, not a physician or midwife, may testify to the physical condition of a slave, and may state that said slave "was sick," "had fever," or "was pregnant."[3] Another case in the same State was an action for breach of warranty of the soundness of a slave, sold by defendant at $1,000. On the trial plaintiff offered to prove by one Dennis, that he (the witness) was one of the appraisers of the estate of Henry Jones, deceased, and that the boy Henry, here in controversy, was then appraised as being unsound, at $600, being about one-half of what he (the witness) would have then said the boy was worth, if he had been represented to be sound. On objection, this evidence was excluded. This was held to be error, and that a witness may testify to the fact that a slave was in bad health and incapacitated for doing hard work.[4]

Opinion — breach of marriage contract.

§ 216. In an action in New York to recover damages for a breach of promise of marriage, it was proposed to prove by witnesses

[1] Yahn v. City of Ottumwa, 60 Iowa, 429. Citing State v. Shinborn, 46 N. H. 497; Com. v. Pope, 103 Mass. 440; Barker v. Coleman, 35 Ala. 221; Wilkinson v. Moseley, 30 id. 562; People v. Eastwood, 14 N. Y. 562; State v. Huxford, 47 Iowa, 16.

[2] Indianapolis v. Huffer, 30 Ind. 235.

[3] Wilkinson v. Moseley, 30 Ala. 562.

[4] Barker v. Coleman, 35 Ala. 221.

whether or not the plaintiff was tenderly attached to the defendant. The witnesses gave their opinions, founded upon an attentive observation of the parties during the courtship, that the plaintiff was sincerely attached to the defendant. The judges permitted the opinions of the witnesses to go to the jury as evidence. On appeal, the Supreme Court said: "It is true as a general rule, that witnesses are not allowed to give their opinions to the jury; but there are exceptions, and we think this is one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot express. The opinions of witnesses on the subject must be derived from a series of instances, under their observation, which yet they never would detail to a jury.[1] The reason given in the above opinion has been said to be the true reason why the opinions of witnesses may be given to the jury, upon questions not involving skill or science. "It is because witnesses have a knowledge of the thing about which they speak, and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable, in their very nature, of being explained to others, that they may state what they know in the best way they can. This best way is by giving, in the form of an opinion, that which cannot be put in the form of explanation or narrative."[2]

Same — larceny — wagon tracks.

§ 217. In a case of larceny in Kansas, the defendant was indicted, convicted and sentenced for stealing a black horse, worth $75. Among other testimony, one Avery, a witness for the State, testified that in his opinion the defendant Folwell's wagon made the tracks that were followed. Defendant moved to strike out this testimony, but the motion was refused. The court said: "It is very evident that the testimony could have had but little or no weight with the jury; still it may possibly have had enough to make it necessary to examine the question raised. It is true, as a general rule, that witnesses are not allowed to give their opinions to the jury, but there are exceptions. In many cases they are the best evidence of which the nature of the case will admit; cases where nothing more exact than an opinion can be obtained. Duration, distance, dimensions, velocity, etc., are often to be proved only by the opinions of the witnesses, depending, as they do, on many minute circumstances, which cannot fully be detailed by witnesses."[3]

[1] M'Kee v. Nelson, 4 Cow. 355.
[2] Cooper v. State, 23 Tex. 339, per BELL, J.
[3] State v. Folwell, 14 Kans. 105.

Same — murder — rule in Massachusetts.

§ 218. On the trial of an indictment in Massachusetts for murder, the testimony of persons not experts was held to be admissible, that hairs on a club appeared to the naked eye to be human hairs, resembling the hairs of the deceased, and the defendant offered evidence, that five months after the alleged homicide, there were hairs on wood piles in the yard where it occurred; and that the yard had remained substantially in the same condition during that period; held to be inadmissible. CHAPMAN, J., said: "The objection to this evidence rests upon the general principle, that witnesses who are not experts cannot testify to their opinions, but are limited to statements of fact, and it is contended that this testimony is merely an expression of opinion. But there is a large class of facts in regard to which judgment or opinion is all that can be expressed. Such testimony is admissible in respect to the value of property, and damages done to it. *Vandine* v. *Burpee*, 13 Metc. 288; *Walker* v. *Boston*, 8 Cush. 279; *Dwight* v. *Com'rs*, *etc.*, 11 Cush. 201; *Swan* v. *County of Middlesex*, 101 Mass. 173. Also whether a horse eats well, travels well, and appears to be free from disease. *Spear* v. *Richardson*, 34 N. H. 428. And in *Hackett* v. *Boston*, *etc.*, *Ry. Co.*, 35 N. H. 390, the court say that, in most cases where a witness is examined as to distances, dimensions, weight or any quality of the matter in question, he cannot testify except by the use of language which necessarily implies an opinion. Many facts that we know through our senses are of this character."[2]

Same — rule in Tennessee.

§ 219. The general rule that opinions of witnesses are not competent testimony is subject to the well-settled exception making them admissible as such in questions involving personal identity. The impression of the witness must be based upon his knowledge of the person sought to be identified, and while it is not necessary that it should be formed at the time he saw such person, yet when formed it must be the result of the recollection of the person seen, connected with the seeing, and not after-acquired information from others. Woodward was indicted with another for murder and as accessory. Two persons were near enough to see the person who did the killing, and to see him run from the place, but owing to the darkness of the night, they could not distinguish or identify him,

[2] Com. v. Dorsey, 103 Mass. 412 (1869).

but in the flight he met one Tanner, who was permitted to give to the jury his impression as to the identity of the defendant, Woodward, as the man who ran by him from the scene of the homicide In the identification of the accused, Tanner's testimony was material. It was insisted that it was error to permit it to go to the jury. It was held to be correct, the Supreme Court holding as above indicated.[1]

Opinion testimony — rule in several States.

§ 220. Upon the trial of an indictment for burglary in Connecticut, the State was allowed to introduce an almanac for the purpose of showing at what time the sun set on the day the crime was alleged to have been committed. A question was made by the defense as to the identity of the prisoner with the person who committed the crime, and evidence was introduced on both sides on this point. The judge, in his charge to the jury, instructed them that it was for them to decide on which side of the question of identity was the weight of evidence. This was held to be error — that as the question was a vital one in the case, this part of the charge was erroneous; the jury were to be satisfied of his identity beyond a reasonable doubt.[2] A party was indicted in North Carolina for arson, the burning of a barn. It was held that it was not necessary that a witness should be an expert to testify as to the identity of tracks; but where the witness gives reasons for believing the tracks described to be those of the accused, the whole of his testimony should go to the jury, for them to say whether the grounds of his opinion are satisfactory. ASHE, J., said: "His testimony in such case can amount to nothing more than his opinion as to the correspondence. Though the opinions of witnesses are in general not evidence, yet on certain subjects, some classes of witnesses — experts — may express their opinions, and on certain other subjects, any competent witness may express his opinion or belief. It is competent for a witness to express his opinion as to the handwriting of a party, or as to the identity of a person. 1 Greenl. Ev., 440. And if it be competent for him to give his opinion as to the identity of a person, we can see no reason why he may not give it as to the identity of his footprints. Such evidence, of course, would have more or less weight with the jury, according as the witness had had the means and opportunity of forming an acquaintance with the tracks of the defendant. In one case the witness who was permitted to testify that in his opinion the tracks referred

[1] Woodward v. State, 4 Baxt. (Tenn.) 322.

[2] State v. Morris, 47 Conn. 179.

to were those of the defendant, as the grounds of his belief stated that the defendant had lived with him three or four weeks, and worn an old pair of boots of his, and had twisted them so that witness could not wear them. The track was peculiar; the left foot was the largest; the upper leather ran over the sole leather, and made a sort of "mashey track." The bare opinion of the witness as to the identity of the track should have little weight with the jury, but when this witness gives his reason for entertaining the opinion, the whole of the testimony should be allowed to go to the jury, for them to say whether the grounds of the opinion are reasonable and satisfactory."[1]

Same — collision — vessels — distance.

§ 221. The owner of the ship *Rhode Island* brought an action for damages against the steamboat *Senator* resulting from a collision between the vessels. After the principal witness had testified concerning the position of the vessels and the character of the night, he was asked whether a vessel on such a night and in such a place could be seen at a considerable distance from a vessel approaching the shore, and, if so, how far? It was held that this question should have been allowed. Murray, Ch. J., said: "It is undoubtedly true that the jury must make up their minds from the facts, and to that end the speculative opinions of witnesses are carefully excluded. But it is difficult, in such a case as the present, to say how the darkness of the night could have been so brought home to the knowledge and comprehension of the jury, as to enable them to determine whether the *Senator* was in fault, unless by some such question as the one proposed. The character of the night had been described, and the better to understand whether objects could be easily distinguished, it was asked whether a vessel, on such a night, and in such a place, could be seen at a considerable distance from a vessel approaching the shore, and if so, how far? The question was direct, and the answer would have been sufficiently certain. The witness must have stated that the vessel could have been seen within some named distance, from which the jury might have drawn the inference of fault."[2]

Same — rule in Massachusetts and New York.

§ 222. In the trial of an indictment in Massachusetts for burglary, in breaking and entering a dwelling-house, two witnesses testified

[1] State v. Reitz, 83 N. C. 634.

[2] Innis v. The Senator, 4 Cal. 5.

that, at the time of the burglary, they identified the burglar by his voice, with the defendant, when they had only once heard him talk. Defendant requested the judge to rule that the identification was insufficient; this he refused, and instructed the jury, that the similarity in the voice was a circumstance to be considered with the other circumstances in the case, but advised them not to convict on this circumstance alone. This was sustained.[1] In a New York case, SUTHERLAND, J., said: "On questions of science, or skill, or trade, persons of skill in those particular departments are allowed to give their opinions in evidence, but the rule is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question of knowledge and judgment. Thus: a physician in many cases cannot so explain to a jury the cause of a death or other serious injury to an individual as to make the jury distinctly perceive the connection between the cause and the effect. He may, therefore, express an opinion that the wound given, or the poison administered, produced the death of the deceased; but in such a case the physician must state the facts on which his opinion is founded."[2]

Weight of opinion evidence — rule.

§ 223. We have seen that the opinion of a witness, whether he be an expert or not, is not conclusive of any thing; that it decides nothing, and the jury is not bound by it, nor can the court charge the jury as to the weight of it. In an action brought to recover $2,000 by an attorney for professional services, which case came up to the Supreme Court of the United States, FIELD, J., said: "The only question presented for our consideration is, whether the opinions of the attorneys as to the value of professional services rendered were to control the judgment of the jury, so as to preclude them from the exercise of their 'own judgment or ideas' upon the value of such services. That the court intended to instruct the jury to that effect, we think is clear. After informing them that, in determining the value of the services, they might consider their nature, the time they occupied, and the benefit derived from them; also, that the plaintiffs were entitled to a reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence — it proceeded to call special

[1] Com. v. Williams, 105 Mass. 63 (1870).

[2] Jefferson Ins. Co. v. Cotheal, 7 Wend. 73.

attention to the testimony of the attorneys, and told the jury that if they accorded *these* witnesses with truthfulness, their testimony should have weight, and the fact as to what is reasonable compensation should be 'determined from the evidence offered,' and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition as follows: 'You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas of the value of the services.' This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that in the words 'evidence offered,' and 'evidence that has been offered before you,' reference was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: That while the jury might consider the nature of the services and the time expended in their performance, their value — that is, what was reasonable compensation for them — was to be determined exclusively from the testimony of the professional witnesses." This was held to be error.[1]

Same — rule in Kansas.

§ 224. A similar case was decided in Kansas in 1866, for fees claimed by Stinson & Hurd. It was there said: "Certain lawyers having testified as to the value of the legal services rendered by the plaintiffs, the court instructed the jury that 'such witnesses are supposed to be better qualified to put a value upon such services than the jury, none of whom may have any personal knowledge of the nature of the business in which they have been performed. *Such testimony is the guide of the jury*, in finding the amount justly due, and in this case you must take the testimony of these witnesses and be governed by it in finding the value of the services rendered by Stinson & Hurd.'" This was held to be error.[2]

Opinion — value of personalty — damages.

§ 225. In Massachusetts it was held, in an action of trover for goods attached by the sheriff, that the jury properly exercised their own judgment and applied their own knowledge and experience in regard to the general subject of inquiry in the case; that the jury were not bound by the opinion of the witness; that they might have taken the facts testified by him, as to the cost, quality and condition

[1] Head v. Hargrave, 105 U. S 45. 211; Patterson v. Boston, 20 Pick. 159; Citing Anthony v. Stinson, 4 Kans. Murdock v. Sumner, 22 id. 156.

[2] Anthony v. Stinson, 4 Kans. 211.

of the goods and come to a different opinion as to their value.[1] The same rule was held in Illinois, that the jury were not bound by the opinions of witnesses as to the value of property taken for public improvements, in the exercise of the right of eminent domain. That while it is proper, on the examination of witnesses as to the value of the condemned property, to call out the various theories upon which their opinions are based, in order to arrive at their correctness, the jury must finally determine the question of value according to their own judgment of what seems to be just and right, from all the evidence before them.[2] Another Illinois case was an appeal from the Circuit Court from an assessment of damages for the right of way across a farm of one Caldwell. It was held that, in estimating the damages to the farm, where there was a conflict of evidence as to the amount of real damages to the farm, the jury were justified in giving greater weight to the testimony of farmers than that of persons of other pursuits. WALKER, J., said: "We are asked to reverse their judgment because it is alleged that the verdict of the jury is against the weight of evidence. The witnesses estimated the damages from nothing to $1,200. Those fixing it at the highest estimate were farmers, and those fixing it at the lowest amount were persons engaged in other pursuits. None of the witnesses who were farmers estimated the damage to this farm at even as low a sum as that fixed by the jury. There were four farmers who estimated the damage at more than the jury gave, and they stand wholly unimpeached. From their occupation they had a better opportunity of estimating the injury and inconvenience occasioned to this farmer by the construction of the road, than mechanics or persons engaged in other pursuits. And in such a conflict the jury were justified in giving the preference to their testimony, and having done so, we do not feel authorized or even inclined to find fault with the conclusion at which they have arrived."[3]

Human identity — opinion of witness.

§ 226. As we have seen, the opinions of witnesses may be received in questions involving personal identity, because that, like handwriting, is at best but a matter of opinion, and that is all that should be required of any witness upon a question of identity. And for this reason the exception to the general rule prevails to a greater

[1] Murdock v. Sumner, 22 Pick. 156.
[2] Green v. Chicago, 97 Ill. 370. Citing Hyde Park v. Dunham, 85 id. 569.
[3] Jacksonville Ry. Co. v. Caldwell, 21 Ill. 75.

extent than in any other class of cases. On the trial of an indictment in Tennessee, the opinion of a witness was received as to the identity of the accused, and it was held that it was not necessary that it should be formed at the time the person sought to be identified was seen by the witness. But when formed it must be the result of the recollection of the person seen, and of the facts connected with seeing, but not from information derived from others.[1] The same rule prevails in California, where it was permitted in a case of robbery.[2] Mr. Wharton, speaking of the uncertainty of human identity, says: "It is an inference drawn from a series of facts, some of them veiled, it may be, in disguise, and all of them more or less varied by circumstances.[3] The exception to the general rule as above noticed has been adopted by many of our courts, not only as to the identity of persons, but as to things very generally.[4]

Opinion as to insanity — intoxication.

§ 227. In New Hampshire it is held that the opinion of a witness, who is not an expert, as to the sanity of a respondent, is incompetent, although found from observation of the respondent's appearance and conduct. Any witness may testify that a person was or was not intoxicated, or under the influence of intoxicating liquors, and it was held that whether or not there is such disease as *dipsomania*, and whether a respondent had that disease, and whether acts done by him were produced from such disease, were questions of fact for th e jury[5] *Dipsomania* is not now regarded as a distinct form of insanity. It is said to be one of the occasional consequences of an indulgence in alcoholic drink, and is the periodical occurrence of a violent thirst for intoxicating liquor — a thirst which is not satisfied until the patient drinks one, two or three days continuously. The desire then subsides and he may remain sober for weeks, until another attack comes on. The rule of course varies with different persons, and perhaps from different causes. Some will continue for a week or longer before it produce nausea, emesis, and disgust; and some go longer between attacks. The medical authors are not fully agreed in their description, or at least in their expression as to the

[1] Woodward v. State, 4 Baxt. (Tenn.) 322.

[2] People v. Rolfe, 61 Cal. 541.

[3] Whart. Cr. Ev., § 13. See also § 803, n. 6.

[4] Bennett v. Meehan, 83 Ind. 569; Com. v. Malone, 114 Mass. 295; Clinton v. Howard, 42 Conn. 294; Sydleman v. Beckwith, 43 id. 9; State v. Folwell, 14 Kans. 105; Barnes v. Ingalls, 39 Ala. 193; Brink v. Ins. Co., 49 Vt. 442; Hallahan v. R. R. Co., 102 N. Y. 194; Cooper v. State, 23 Tex. 339.

[5] State v. Pike, 49 N. H. 399.

disease. Some denominate it "an ungovernable thirst for drink," others say it is simply "a bad habit of self-indulgence" or "periodical paroxysm for drink," which is about the same thing. The general rule of evidence excluding the opinion of witnesses, has its exceptions, which are about as well recognized and settled as the rule itself, and expert testimony is not the only exception, but non-professional witnesses may often give their opinion, especially in questions of identity.

In Missouri in 1882, on the trial of an indictment for larceny, in stealing goods from a store, a witness was permitted to testify as to his opinion, based on his personal knowledge, as to the identity of the goods found on the accused, though he could not swear positively.[1] Were it not so, it would be often difficult to identify goods. Indeed it is all that should be expected of a witness.

Intoxication — witnesses' opinion as to — murder.

§ 228. As to the opinion of witnesses upon the question of intoxication, in a New York case decided in 1856. One Eastward was indicted jointly with LaRock for the murder of Brereton. There was a severance and Eastwood was put on trial and convicted. The defendant had interfered with Brereton on the road while driving cattle. One witness said: "They appeared to be intoxicated." Another said: "I should think Eastwood had been drinking at the time, but I did not see him stagger." It was held to be competent to ask a witness who saw and observed him on the occasion referred to, whether, in his judgment, he was then under the influence of intoxicating liquor; that the question does not call for an answer in violation of the general rule which excludes the opinions of witnesses; that a prisoner charged with murder was intoxicated at the time of the commission of the crime, may be material to explain his conduct at and prior to that time; and also, in reference to the design with which the act had been perpetrated. The court said: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not probably describe the conduct of the man, so that from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better deter-

[1] State v. Babb, 76 Mo. 501. Citing State v. Kelly, 73 id. 608; State v. Williams, 54 id. 170.

mined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue."[1] And where a party was followed by a crowd and killed, it was held proper to interrogate a witness who observed their operations, whether he observed or discovered any difference in their purpose among those composing the crowd; this to ascertain whether or not some were principal actors, and others accessories. An accessory being one who stands by and aids, abets or assists in the perpetration of a crime, or who, not being present, has advised and encouraged the perpetration of it. The advice or encouragement may be by words, acts, signs or motions.[2]

Same — when opinion admissible.

§ 229. The Missouri Supreme Court in 1873, in a civil action, held that opinions of witnesses were admissible, where the subject of injury is so indefinite and general in its nature as not to be susceptible of direct proof, or if the witness has had the means of personal observation, and the facts and circumstances upon which he bases his conclusion are incapable of being detailed so intelligently as to enable any one except the observer himself to form an intelligent conclusion from them. The action was brought to recover a balance of $1,959.40, for stone sold and delivered to defendant at the water-works on Compton Hill in St. Louis, in which there was a verdict for the plaintiff. On the trial, the court permitted several witnesses, against the objection of defendant, to give their estimate of the average depth or thickness of the broken stone used in the said work. The court held that such ruling of the court below was correct.[3] In a former case in the same State, in an action for grading for a railroad, the court held that a witness can only be allowed to detail facts, and not mere opinions, when such opinions are not based upon facts. But in estimating the cost of work, etc., he must give the facts, and may then be allowed to state what his estimate is, upon the facts detailed.[4] In Texas it was held to be competent to prove the number of stock of a certain brand running in a range by the opinion of stock-men accustomed to ride in quest of other stock through the same range, if it be the best evidence within reach of the party offering it, though the witnesses may have had no interest in nor charge of the stock in question.[5] In Michigan it was held

[1] People v. Eastwood, 14 N. Y. 562.
[2] Brennan v. People, 15 Ill. 511.
[3] Eyerman v. Sheehan, 52 Mo. 221.
[4] Fitzgerald v. Hayward, 50 Mo. 517.
[5] Albright v. Corley, 40 Tex. 105.

in an action of trespass that merely seeing the mortar of a wall disintegrated and destroyed by water would not alone justify an expression of opinion whence the water came; but if there were other facts indicating that the water came from a particular direction, or must have been applied in a particular way, it would be competent, along with the evidence of the indications themselves, to admit opinions upon them.[2] The opinions must be based upon facts, and those facts must have come under the observation of the witness.

Murder — shooting — opinion.

§ 230. In a trial for murder in Texas, one Cooper was indicted and convicted for the killing of Forston in 1855. One of the witnesses (Slater), who was not a professional man, so far as disclosed by the record, stated to the jury as follows: "I think the man who shot, must have been on a level with Forston, and I do not believe that a man on the ground could have shot Forston as he was shot." Dr. Oakes, a physician, who assisted in the examination of the body of the deceased, testified: "I think the man who shot must have been on horse-back, or some other elevation." Two other physicians, Dr. Phillips and Dr. Cage, gave the same testimony. The court reversed the case and remanded it for a new trial, saying, among other things: "We are of opinion that the court below erred in permitting the witnesses to state their opinion or belief to the jury, and we cannot perceive that the matter about which the opinions of the witnesses were given was a matter of science or of skill, which made it proper to receive the opinions of medical men in reference to it, any more than the opinion of the witness Slater, who is not shown to be a professional man.[3] In the opinion of the court, reference is made to a New York case,[5] in which SUTHERLAND, J., said: "On questions of science, or skill, or trade, persons of skill in those particular departments are allowed to give their opinions in evidence; but the rule is confined to cases in which, from the very nature of the subject, facts, disconnected from such opinions, cannot be so presented to a jury, as to enable them to pass upon the question with the requisite knowledge and judgment. Thus, a physician, in many cases, cannot so explain to a jury the cause of the death, or other serious injury of an individual, as to make the jury distinctly perceive the connection between the cause and the effect. He may, therefore,

[1] Underwood v. Waldron, 33 Mich. 232.

[2] Cooper v. State, 23 Tex. 331, 336. But see McCann v. State, 13 S. & M. (Miss.) 471.

[3] Jefferson Ins. Co. v. Cotheal, 7 Wend. 73.

express an opinion that the wound given, or the poison administered, produced the death of the deceased; but, in such case, the physician must state the facts on which his opinion is founded.[1] It would seem that the rule laid down in this Texas case may be doubtful. In a case depending upon circumstantial evidence, what may tend to elucidate the transaction should be admitted.*

[1] McCann v. State, 13 S. & M. (Miss.) 471, in which the precise question was presented, that we have seen in the Texas case above, and the testimony was held to be competent.

*In Com. v. Sturtivant, 117 Mass. 132, ENDICOTT, J., said: "There was evidence tending to show that there were three persons, Simon Sturtivant, Thomas Sturtivant and Mary Buckley, killed at the same time, by the same weapon. The government had the right to lay before the jury the whole of the transaction of which the murder of Simon Sturtivant was a part. For this purpose the testimony of the physician, as to the autopsy of Mary Buckley, was competent. * * * The exception to the rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances of facts, and the condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is a mere opinion which is thus given by witnesses, but a conclusion of facts to which his judgment, observation, and common knowledge has led him in regard to the subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general. Every person is entitled to express an opinion on a question of identity as applied to persons, things inanimate or handwriting, and may give his judgment in regard to the size, color, or weight of objects, and may estimate time and distance. He may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to proceed. State v. Shinborn, 46 N. H. 497. The correspondence between boots and footprints is a matter requiring no peculiar knowledge, and to which any person can testify. Com. v. Pope, 103 Mass. 440.

So a person not an expert may give his opinion whether certain hairs are human hairs. Com. v. Dorsey, 103 Mass. 412. And a witness may state what he understands by certain "expressions, gestures and intonations," and to whom they were applied, otherwise the jury could not fully understand their meaning. Leonard v. Allen, 11 Cush. 241. In this connection may be noted a large class of cases, where, from certain appearances, more or less difficult to describe in words, witnesses have been permitted to state their conclusions in relation to indications of disease or health, and the condition or quality of animals or persons. As when a witness testifies that a horse's foot appeared to be diseased, he states a matter of fact, open to the observation of common men. Willis v. Quimby, 31 N. H. 485. And it is proper for a witness to give his opinion that a horse appeared to be sulky and not frightened at the time of an accident. Whittier v. Franklin, 46 id. 23. Or he may testify as to the qualities and appearance of a horse. State v. Avery, 44 id. 392. In Currier v Boston & Maine Railroad, 34 id. 498, it is said that the question whether there was hard pan in an excavation does not ask for an opinion, but seeks for facts within the knowledge of the witness, and which knowledge may be obtained by common observation. It is competent for a witness to testify to the condition of health of a person, and that he is ill or disabled, or has a fever, or is destitute and in need of relief. Parker v. Boston & Hingham Steamboat Co., 109 Mass. 449; Wilkinson v. Moseley, 30 Ala. 562; Barker v. Coleman, 35 id. 221; Autauga County v. Davis, 32 id. 703. And one may testify that another acted as if she felt very sad. Culver v. Dwight, 6 Gray, 444. So those who have observed the relations and conduct of two persons to each other may testify whether, in their opinion, one was attached to the other. And in McKee v. Nelson, 4 Cow. 355, the court say: "The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury." See Trelawney v. Colman, 2 Stark. 191. A witness may also give his judgment whether a person was intoxicated at a given time. People v. Eastwood, 14 N. Y. 562. Or whether he noticed any change in the intelligence or understanding, or any want of coherence in the remarks of another. Barker v. Comins, 110 Mass. 477; Nash v. Hunt, 116 id. 237.

In Steamboat Clipper v. Logan, 18 Ohio, 375, it was held that a person who had been a cap-

Opinion — circumstantial evidence — identity.

§ 231. In a case decided in Alabama in 1853, it was held that, in a trial for murder, a witness may state his "opinion as to the time of the day" when an occurrence took place; and also as to the length of time which may have elapsed between the happening of two events. Campbell was indicted for the murder of Martha Garrett, and was convicted and sentenced to the penitentiary for life; the trial lasting two weeks. On Sunday, December 3, 1850, the deceased left her mother's house (she was aged twelve years, her mother was a widow), to attend Sabbath-school in the court-house. On the next morning her dead body was found in a dry branch with her throat cut, and many bruises on her body, her Bible, hymn-book and handkerchief lying within about eight inches of her body. She left the Sabbath-school and started home at eleven o'clock, stopping three or four minutes at Mrs. Martin's house. The body was found about nine hundred yards from the court-house. The evidence tending to connect the prisoner with the murder was circumstantial, and consisted also of confessions of guilt made by him to Edward Stiff. The evening before, the accused had conversed with one West about the purchase of a watch, and that West should bring the watch to him the next morning (Sunday); West failed to bring it, and he spoke to several persons of his intention to go to Mrs. Covington's for it, where West lived, about a mile from the village of Centre, near the residence of deceased. When the Sabbath-school adjourned, the accused was at Allen's tavern, near enough to see the adjournment, he borrowed a horse from Street and left the town at eleven o'clock; went to Mrs. Covington's; remained about five minutes. Horse's tracks were found, diverging from the Centre road to Mrs. Covington's, and extending in the direction of the place where the body was found, and the evidence tended to show that these were the tracks of the horse which the accused rode; and that a water pool, between Mrs. Covington's and where the body was found, was discolored with blood the day after the murder, and that the heel of the defendant's boot corresponded in size with tracks made near the

tain and engineer of a steamboat, having examined a boat after injury by collision, may state his opinion as to the direction from which the boat was struck at the time of the collision. There was no evidence that the witness had any special knowledge in regard to collisions, through observation or experiment; and the court does not rest the decision on the ground that the witness was an expert; but says there is "no objection to calling these men experts, if the name will render their testimony more unexceptionable; but it is not true as a legal proposition that no one but an expert can give an opinion to a jury. From the necessity of the case, testimony must occasionally be a compound of fact and opinion." And the court say they can give no better illustration of their meaning than by the use of the language in McKee v. Nelson, a portion of which is quoted above.

edge of the pool. There was much conflicting testimony, and many exceptions taken, but the conviction was affirmed.[1]*

[1] Campbell v. State, 23 Ala. 44.

*In Campbell v. State, *supra*, CHILTON, C. J., said: "Joseph C. Street was allowed to give '*his opinion*' as to the time of day the prisoner left Centre; the witness stated that he had no time piece. This evidence was admissible. Every person of ordinary perception and observation must be regarded as capable of giving an opinion upon a matter of this nature — a matter upon which every man's knowledge and experience are supposed to qualify him to approximate a correct conclusion. We apprehend no case can be found asserting a different doctrine. Indeed we know of no case where the point was ever called in question, and yet it is one involved in almost every trial. The same principle covers the objection to the witness' testifying as to the length of time the prisoner was absent from Centre, the witness having seen him when he left and when he returned. The shoes of the horse which the prisoner rode were taken from his fore feet, the horse having no shoes on his hind feet, and were applied to the track leading from Centre to Mrs. Covington's, in the direction of where the body of the deceased was found; and a witness who saw them thus applied was allowed to depose that "they seemed to fit in every particular." The prisoner's counsel contends, that, before this could be made legal evidence, it must be shown that the shoes fitted the horse's foot. This was a circumstance, doubtless, about which he might well have cross-examined the witness, to ascertain whether the shoes fitted the indentation made hy the horse's hoof, or by the shoe in the earth. In the absence of proof to the contrary,we must presume that, in fitting the shoes to the track, they were applied to the tracks which the shoes made; and in this view the proof was not only legal, but consti tuted a circumstance which became of importance in pointing out the rider as the guilty agent. Asa Allen, the proprietor of the tavern from which the prisoner started in Centre, was allowed to testify that the prisoner "occasionally visited his house, hut not as often as others." This was objected to as irrelevant. * * * It seems to be well settled that, if no presumption is to he drawn from the circumstances offered in evidence, it ought not properly to have any weight upon the minds of the jury, and the court should exclude it.— 1 Phil. Ev. (3d ed.) 460. Circumstances may he minute, and, considered separately, of very little importance, shedding hut a dim ray of light upon the transaction sought to be elucidated; yet, when grouped together and considered in the aggregate, they may constitute a chain of evidence which draws the mind to a very satisfactory conclusion. An illustration of this is furnished by the case of Mendum v. Com., 6 Rand. 704. The defendant was indicted for murder, committed by stabbing with a dirk. It appeared that a dirk without a cap had been found secreted near the place of the murder; and the cap of the dirk, engraved J. H., was handed to a witness, by a negro, a mile and a half from the place, but how the negro came by it no one could tell. The handle was engraved with the letters J. H.; and it appeared that some sixteen or seventeen years before, a witness purchased a dirk, with this engraving from James Hickman, the half-hrother of the prisoner; that Hickman had since died, and the prisoner had admitted that a dirk was the only part of Hickman's property he had received. The witness who heard him make this admission saw a dirk in his hands, with J. H. engraved on the handle, but could no further identify it with the one now produced. The dirk found secreted was, from its general appearance, identified as the one produced on trial, and the cap produced by the negro apparently fitted the handle. The prisoner had, before the murder, lent a dirk, not identified on the trial, which was returned to him before the murder was committed. There was no proof that the prisoner had ever heen at or near the place of the murder. These circumstances were allowed to go to the jury, as evidence that the dirk found belonged to the prisoner, and they were told that if they had uo douht of its being his property, then the prisoner's dirk so found made one circumstance to be weighed with others. The annotators upon Phillips (Cowen & Hill 3d ed., vol. 4, p. 598,'n. 307), in commenting on this case, say: "Now, it is obvious how perfectly slight, and utterly inconclusive, any one, or any two or three, of these circumstances must have been; yet all heing combined, the result of the trial (a verdict of guilty) shows that the jury felt safe in acting upon them, as having no doubt." So, also, the conduct of the prisoner, his situation and locality, the opportunities he had of knowing when the deceased left the school, and whether his being found in that position at the particular time was or not an unusual occurrence with him, are all circumstances very weak in themselves, yet not so wholly foreign from the main inquiry as to justify their rejection. Every thing calculated to elucidate the transaction is admissible, since the conclusion depends upon the number of links, which alone are weak, hut, taken together, are strong and able to conclude. McCann v. The State, 13 Smedes & Marsh. 471."

CHAPTER VII.

MURDER — IDENTIFICATION.

SEC.

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Identity of deceased — prisoner — corpus delicti.

§ 232. In the trial of an indictment for murder, the first step is to prove the *corpus delicti*, without which there can be no conviction.[1] But it is not necessary in all cases that any witness has actually seen the deceased after death, because in some cases and in some circumstances it may be impossible, as in one case in Massachusetts,[2] and another case in North Carolina.[3] The *corpus delicti* in these cases was established beyond all doubt, by circumstantial evidence. But in many cases of assassination where the dead body is found, the identification of it presents a most difficult question for the court and jury, one of which we now propose to examine. The *corpus delicti* being established so far as to identify the deceased, the next step is to identify the accused as the perpetrator of the crime. This, as a rule, in such cases, must be done by circumstantial evidence, and may be done in many ways, as each case has its own peculiar circumstances, and often involves the identity of other things, such as tracks, weapons, clothing, blood-stains and other evidences. It must be remembered that identification of both persons and things is generally established either by circumstantial or opinion evidence, and while the former rule admitted the opinion of none but experts, the exception to that rule, especially in questions of identity, is now as well recognized as the rule itself, as we have just seen, and non-expert testimony is received on questions of identity, but the witness is required to give the facts upon which he bases his opinion.[4] It will be observed that the writer has omitted the cases of death by poisoning and drowning — at least they are not discussed; they are intricate subjects, and belong to another science.

Personal identity — prisoner — dimensions.

§ 233. In the trial of Barbot in England for the murder of Mills,[5] the principal circumstance relied upon for the identification of the prisoner was the diminutiveness of his person, by a party who had seen him in a canoe, in prison and in court. The matter of the size

[1] People v. Palmer, 109 N. Y. 110; Pitts v. State, 43 Miss. 472; Taylor v. State, 3 Tex. App. 169; State v. Williams. 7 Jones (N. C.), 446.

[2] Webster's case, Bemis Rep. 80, 84, 85, 87.

[3] State v. Williams, 7 Jones (N. C.), 446.

[4] State v. Vittum, 9 N. H. 519; People v. Rolfe, 61 Cal. 541; Goodwin v. State, 96 Ind. 551; Com. v. Owens, 114 Mass. 252; People v. Eastwood, 14 N. Y. 562; Linsday v. People, 63 id. 143; Greenfield v. People, 85 id. 75; Colee v. State, 75 Ind. 511; Cooper v. State, 53 Miss. 393; Young v. State, 68 Ala. 569; Com. v. Pope, 103 Mass. 440; State v. Shinborn, 46 N. H. 497; Com. v. Dorsey, 103 Mass. 412; Cooper v. State, 23 Tex. 339.

[5] Rex v. Barbot, 18 State Trials, 1267–1276.

of a person is what generally makes the first and most durable impression (except perhaps the clothing) which, more or less, attracts attention and impresses the mind. When the senses are directed toward a particular person, and especially where the person is unusually large or small, or if he is above or below the medium height, that fact will attract the attention and impress the memory; the impression is instantaneous and lasting. It must always be visible where there is even light enough to observe the outlines of the person. There are then upon closer observation many peculiarities in the person's appearance; it may be lameness, peculiar gait, carrying the head to one side, peculiar hair, as to color and style of wearing it; color and expression of the eyes, the want of an eye, or front tooth, scars on the face, any deformity, or any other physical defect or mutilation. In *Brook's* case,[1] one of the main circumstances relied upon for the identification of the prisoner by the witness was his size, and this was seen only by a light produced by striking something like a sword on a stone, which produced a flash very near the face of the prisoner.

Same — identity in the night-time.

§ 234. One Howe was indicted in New York for murder. The prisoner was observed, by persons who saw him a short time before the homicide, carrying something under his overcoat, like a stick, and seemed to act in a very strange manner. A man about his size passed one of the witnesses about midnight, going toward the house of the deceased, on horse-back; and about one hour and a half later, a man came riding in great haste going for the doctor; soon thereafter, upon going to defendant's stable, one of his horses was found to be wet and smoking, as if he had been lately ridden, and upon search being made, a short rifle was found concealed in the prisoner's house.[2]

Murder — identity — bones and shoes.

§ 235. One Clewes was indicted in England, for the murder of Hemmings on June 25, 1806, by striking on the head with a "blood-stick." It was a peculiar case. It appeared that great enmity existed between Mr. Parker, the rector, and his parishioners, and that the prisoner had used expressions of enmity toward Mr. Parker, and said he would give £50 to have him shot. Mr. Parker was

[1] Rex v. Brook, 31 State Trials, 1124. [2] People v. How, 2 Wheel. Cr. Cas. 417.

shot by Hemmings, (deceased) who was detected in the act; and it was important to prove that the persons who had employed him to murder Mr. Parker, fearing discovery, had themselves murdered Hemmings, whose bones, on December 28, 1829, were found buried in a barn, which had been occupied in 1806 by the prisoner. The finding of the bones was proved, and the wife of Hemmings identified a carpenter's rule, the remains of a pair of shoes, which were found at the place where the bones were discovered, and she also identified the skull of the deceased by something remarkable about the teeth. Evidence was also given of various declarations of the prisoner, showing that he entertained malice against Mr. Parker. Evidence was then received, that the prisoner and others employed Hemmings to kill Mr. Parker, and that he being delegated, said LITTLEDALE, J., "the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt. Now, to ascertain whether or not this was so, in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker." And strange enough he was acquitted, but it was for want of proof that he did actually participate.[1]

Murder — identity of deceased — New York statute.

§ 236. The Penal Code of New York seems to have established a new rule of evidence in murder cases. This Code (§ 181) prohibits the conviction "of any one of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing as alleged, are each established as independent facts, the former by direct proof and the latter by proof beyond a reasonable doubt." The court, in construing this extraordinary statute, held that it did not require direct proof of the identity of the victim, but only of the death. That identity was not included in the *corpus delicti*, but is left open to indirect circumstantial evidence. An important case tried under this statute was an indictment of Palmer for the murder of Peter Bernard, in which he was found guilty of murder in the second degree. There being no direct proof, the circumstances, briefly given, may illustrate the difficulty under this very singular statute. It was sought to establish the identity of deceased by circumstances, among others, that articles were found on or near the body which resembled articles shown to have been the property, and in the possession of Bernard before his disappearance. One witness testified that he made for Bernard a boot taken from the foot of the

[1] Rex v. Clewes, 4 Carr. & P. 221.

dead body. A satchel was found near the body, in which was an almanac on which the name of "Bernard" was written. A witness identified it as Bernard's; testified that he had seen him write, and thought the name was in his handwriting. Keys found on the body fitted the lock of the satchel. Various articles of clothing found on the body were also identified as belonging to Bernard. The body was decomposed and in a state beyond recognition. This is merely the evidence produced to identify the deceased. In delivering the opinion of the court, FINCH, J., comments thus: "The question is a very grave one; not merely to the prisoner, whose liberty may depend upon the issue, but to the people, and the administration of public justice, for if the law be as the General Term has declared it, a murderer may always escape, if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible; or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow that the tenderness of the Penal Code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body, and has put a premium upon, and offered a reward for that species of atrocity." The learned judge, after quoting this Code, continues: "In the first clause of this provision the endeavor to state and describe one fact has involved the statement of another, changing a simple into a compound fact, and making it possible to apply the requirement of direct proof to the two facts — of death and of identity, rather than to the one fact — of the death alone. That some one is dead is directly proved whenever a dead body is found. Its *identity*, as that of the person alleged to have been killed, is a further fact, to be next established in the process of investigation. If it be the meaning of the Penal Code that both of these facts — identity as well as death—are to be proved by direct evidence, it establishes a new rule which never before prevailed, and of which no previous trace can anywhere be found. It has always been the rule since the time of Lord HALE, that the *corpus delicti* should be proved by direct, or at least, by certain and unequivocal evidence. But it never was the doctrine of the common law, that when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule."[1]

[1] People v. Palmer, 109 N. Y. 110.

Murder — administering poison.

§ 237. In a trial for murder in New York the clothes identified as those worn by the accused on the evening before the homicide, were held properly submitted to the jury for their inspection and identification.[1] A party was indicted in New York for administering poison with intent to kill, and it was held to be sustained by proof that the prisoner procured the poison and placed it where it would be taken by the person intended to be murdered; the poison being identified, and proof of previous malice on the part of the prisoner toward the person injured, which was admissible.[2] A bold attempt at poisoning was made in England by one Mrs. Dale. She was indicted for having attempted to poison one William Lawson, with intent to murder him, etc. The prisoner and her husband lodged at the house of the prosecutor. On February 20, 1852, a few days before the alleged offense, a quarrel arose between the prosecutor and the prisoner's husband, and the latter was committed to prison for want of surety to keep the peace. The prosecutor, on the same day, gave them a week's notice to quit. On February 25, the prisoner went to the chemist's shop and asked for a penny's worth of salts of lemon to clean bonnets. The shopman said: "What you want is salts of sorrel;" she said "yes;" he sold it to her and said it was not a thing to be played with, and should be kept out of the children's way. The next day the prosecutor and his wife had some tea for dinner, and finding something wrong in the taste, called out to a lodger who had previously used the tea-pot. At the same time the prisoner came in and threw the tea away out of the cups and cleaned them with hot water. The prosecutor said: "There must be poison somewhere." The prisoner said, "It may be in the sugar;" taking up the sugar, said, "its in here." The basin was taken to the chemist's, where it was found to contain salts of sorrel. The sugar and all weighed two ounces. Evidence was adduced to show the character of the poison. It appeared that in one instance an ounce had failed to destroy life; in another, half an ounce had proved fatal in a debilitated subject. It would produce sickness and nausea. She said to the policeman, that the prosecutor drove her to it, and that she had no friend in the world. Being told that she must be taken to the druggist's to see where she got the poison, she said, "I bought it at Kendrick's," and in answer to questions, said, "I put it in the sugar basin while the old woman

[1] People v. Gonzalez, 35 N. Y. 49.

[2] La Beau v. People, 34 N. Y. 222.

was sitting by the fire." WIGHTMAN, J., said, in summing up the case: "There are two questions in this case, involving others. The first is, whether the prisoner did attempt to administer the poison; if she did, the next is, whether she made the attempt with the intent to murder. If you are not satisfied on either of these points, you will acquit the prisoner. With respect to the first point, did she attempt to administer the poison?" (The learned judge then went over, and summed up the evidence in the case.) "With reference to the statements to the police officer, his lordship observed, that, according to the strict line of duty, it was improper in the constable to put the question to the prisoner; but his conduct did not amount to a cross-questioning; she told him she put it in the sugar. If she put it there, intending that it should be taken, that is an attempt to administer it. Then was it with intent to murder? The means used were not sufficient, for it required a large quantity of the ingredient to take away life, but the prisoner might not have known what quantity was requisite for that purpose. On the other hand, she may have known, and knowing, may have intended simply to annoy the prosecutor in revenge for the treatment of her husband." The jury acquitted the prisoner, though the policeman did testify against her.[1]

Identity by occupation — killed the barber.

§ 238. On the trial of an indictment for murder it is always indispensable to a conviction to prove the identity of the person killed; it is equally as important as it is to prove the *corpus delicti*.[2] Identity is a question of fact for the jury, and like other facts, it may be established, and often is, by circumstantial evidence.[3] And it must be shown that the deceased was the person named in the indictment.[4] This, in an indictment for murder, is equally as important as to identify the prisoner himself. One Shepherd was indicted, tried and convicted for the murder of one Wesley Johnson, and sentenced to the penitentiary for fourteen years. The point relied upon for the reversal of the judgment was, that it was not proved that the Johnson killed by the prisoner was the Wesley Johnson mentioned in the indictment. That the party killed must be the person named in the indictment is a clear principle in the criminal law. The identity of the deceased must be clearly established. But in

[1] Reg. v. Dale, 6 Cox C. C. 14.
[2] Bish. Cr. Pro. (3d ed.), § 1060.
[3] Webster's case, 5 Cush. (Mass.) 295.
[4] Davis v. People, 19 Ill. 74.

that case it was held that it had been established, and the court expressed it briefly, thus: "That identity was established in this case is clearly shown, as all the witnesses speak of the Johnson killed as "Johnson, the barber," and there was but one such at the place of the killing, whose name was charged in the indictment to have been Wesley Johnson. A man can be identified by his christian name or by his occupation, and this victim was identified by his occupation. The prisoner's counsel, in instructions asked of the court in his behalf, refers to the person killed as Wesley Johnson, in fact, there is no question as to his identity."[1]

Same — when the evidence does not identify.

§ 239. A similar question to that noticed in the preceding section arose in Illinois in 1857, in which the identity of the deceased was held to be indispensable in all cases of murder. That the name of the person killed must be proved as laid in the indictment, and it is so, even in cases of a mere assault, assault and battery, the name of the injured party must be alleged, and proved as alleged; and also in case of larceny of goods or personal property, the name of the owner must not only be alleged, but it must be proved. The reason of this rule must be apparent to every reader. One Davis was indicted in Illinois for the murder of "Seth Taylor," and upon the question of identity it was said: "This judgment must be reversed, because the evidence does not show that the person struck and killed was Seth Taylor, as alleged in the indictment. In no part of the evidence, which is spread upon the records, is he thus indicated. He is referred to by all the witnesses as "Taylor" — whether the Seth Taylor named in the indictment, or not, the court may presume, but cannot say with certainty. It is not so proved. It is essential in all criminal prosecution, that the name of the party injured, or, as in this case, killed, should be proved as laid. There is no conflict of authority on this point.[2]

Murder — blood-stains on a shirt — identity.

§ 240. One Houser was tried and convicted for the murder of one Farris in Missouri. He was convicted upon circumstantial evidence of identity. It was sought to show the presence of the defendant at the time and place of the alleged murder, showing the identity of a shirt with blood-stains on it, which was found at the place of the alleged homicide and on the next morning after the killing, identi-

[1] Shepherd v. People, 72 Ill. 480. [2] Davis v. People, 19 Ill. 74.

fied with the shirt worn by the accused on the previous day; the fact testified to by the person, a relation of the accused, at whose house the homicide was committed, that she gave the shirt up to the brother of the accused, on his demand, was held to be evidence tending to show the real opinion of the witness as to the question of identity and ownership of the shirt — she having stated that when she gave the shirt to the brother she told him that she did not believe it belonged to the accused. Upon this circumstance the court announced the rule thus: "This witness was competent to identify the shirt, and it became material to ascertain what her opinion was on that subject. She said her opinion was that the shirt did not belong to the defendant, although in her opinion it resembled the defendant's shirt more than those of her brother, and although one of the sleeves was torn and in that respect corresponded with the defendant's, whose shirt sleeve had, according to other testimony, been torn in a scuffle at Laster's on the day of the homicide. Although the witness expressed the opinion that the shirt was not the defendant's, the fact that she testified to was that she gave the shirt to the defendant's brother, who applied to her for it as the defendant's shirt. The testimony is admitted to be competent to account for the non-production of the shirt by the State. We think it was always competent to show the real opinion of the witness on the question of identity. That belief it was the province of the jury to ascertain, not only from the w tness' words but from her acts."[1]

Slave indicted — identity of pass.

§ 241. The prisoner, a slave, was convicted for murder in North Carolina in 1829. Upon the trial it was proved that the body of the deceased was found on the morning of November 27, 1828, on the side of the road. There were appearances of a fierce conflict between two men for a distance of thirty-five yards. The mere circumstance it seems of a lost paper convicted him, for about twelve paces (yards) from where the body lay, the following paper was found: "Permit Arthur to pass and repass till Monday morning next, November 23, 1828. HENRY SHEPHERD." Arthur was the accused. Shepherd testified that he signed the paper by direction of the prisoner's master, and delivered it to a son of the prisoner to carry to his father. This paper was admitted in evidence over the prisoner's objection. But the court stated to the jury, at the

[1] State v. Houser, 28 Mo. 233.

time the paper was read, that if they should believe that the prisoner actually received that permit when it was written, they would give to that circumstance such weight as they thought proper; but if they should think that the prisoner never received it, then they should exclude from their consideration all the evidence relative to it. Upon this single circumstance, in proof of identity, he was convicted, and that conviction affirmed. And so little consideration was given to this important branch of the case, that the court merely gave it this passing remark: "The permit, I think, was properly received in evidence, and the law properly laid down by the judge."[1]

Murder — by one of two or more persons.

§ 242. When a crime is proved against two or more persons and it is not certain which is the guilty party, or against one by testimony sufficiently contradictory or otherwise shown to be mistaken or incredible, the prosecution must fail, and the same rule will apply, which applies to the persons or things, the subject of the offense One Campbell was indicted in Illinois for murder, and it was there held, as above stated, that although it might be positively proved that one of two or more persons committed a crime, yet if it be uncertain which it was, all must be acquitted. This is doubtless true as a general rule, but it certainly finds its exception in cases where a conspiracy has been shown.[2] In the trials of an indictment in Georgia it was held that where several persons were indicted for an assault with intent to murder, where it appeared that there was a considerable crowd present besides the defendants, at the time the offense was committed, evidence from a witness to the effect that he heard some one cry, "kill him," "kill him," was inadmissible, and the judgment of the court below was reversed. But it will be seen that the general rule of evidence, in many respects, finds exceptions when it is sought to prove identity.[3]

Of accused — murder — larceny.

§ 243. On a trial for murder in New York, the prosecution sought to establish that one Cortright was seen at a certain time and place by one of the witnesses. The witness said that he passed a man at a certain time and place; and against the prisoner's objection, was allowed to state that he "had an impression who it was; and don't know for certain, only I thought it was, I thought it was William

[1] State v. Arthur, 2 Dev. (N. C.) 217.
[2] Campbell v. People, 16 Ill. 17.
[3] Harris v. State, 53 Ga. 640.

Cortright, I don't know whether it was him or not, it was my impression it was." It was held that the court erred in receiving the evidence.[1]

A party in Kentucky was indicted for stealing certain municipal bonds of the city of Cincinnati, and convicted. Upon the question of the identity of the accused, it was held that the court erred in rejecting the testimony of a witness who knew the accused at the time the bonds, with the larceny of which he was charged, were alleged to have been purchased from him in the city of Cincinnati; that he saw there a person so much resembling the accused, that he twice approached the person with the intention of speaking to him, believing him to be the accused.[2]

Same — robbery — evidence.

§ 244. A case decided in Virginia in 1850, was a joint indictment for robbery of gold and silver coin from the residence of the prosecutor. *Hopper*, *Stiers* and *Lemons* were indicted; the two former were on trial. The prosecution introduced Peter Watkins as a witness, who appeared reluctant, and on examination in chief the counsel put the questions to him as follows: "State whether or not you examined the horse-tracks toward Crogan's? state whether or not you had any difficulty in following the tracks?" Prisoners' counsel objected, but the court overruled the objection, and allowed him to answer, and the answer was adverse to the prisoners and they excepted, and he identified the two prisoners in court as *Hopper* and *Stiers*, having seen them on two previous occasions only; that he believed them to be, to the best of his knowledge, two of the persons engaged in the robbery, and the court admitted the evidence. They were convicted, and upon writ of error, the court refused them a new trial.[3]

Of child murdered — rule in England.

§ 245. A woman was indicted in England for the murder of her child about sixteen months of age. It was held that, although it was necessary in a case of murder that there should be evidence that the body found was the body of the murdered person, the circumstances may be sufficient evidence of identity. Admissions by the prisoner, elicited by questions of a police officer, with an admonition to tell all she knew, etc., were held to be inadmissible. But a subsequent state-

[1] People v. Williams, 29 Hun, 520.
[2] White v. Com., 80 Ky. 480.
[3] Hopper v. Com., 6 Gratt. 684.

ment by the prisoner to another police officer is not *necessarily* so far under the same influence as to exclude it. One Baxter, a policeman, had said to the prisoner, "you had better tell all you know about it, it will save trouble;" she then made statements, which it was proposed to prove on the part of the prosecution; it was held inadmissible.[1] In order to establish identity, evidence that the witness gave testimony in a prosecution against the prisoner for another murder, and that he recognized him as the person from whom he purchased coin the morning after the murder, was properly admitted without producing the record of the prosecution.[2] In an action to recover damages of a railroad company for personal injuries resulting from negligence, it was held proper to permit an exhibition of the wounded limb to the surgeon in the presence of the jury and in that case the plaintiff recovered a judgment for $900, which, on appeal, was affirmed.[3] Beavers was convicted for the murder of Sewell and appealed. On the subject of the proofs the court said: "The court allowed a certain photograph, and evidence touching it, to go to the jury, for the purpose of identifying the deceased; evidence touching the spot on the coat of the prisoner, supposed to be a blood spot, and the test of physicians in reference to the same spot; evidence as to the dodging and trembling and confusion of the prisoner, when met by the witness, before and at the time of the arrest; evidence of a witness as to his having seen a man in Ripley county some time before the commission of the homicide, who resembled the prisoner; evidence touching a satchel and its contents, found near the church where the dead body was found, as belonging to the deceased. The admission of all of which the prisoner's counsel thinks was erroneous. But with careful attention, we can see no error in these rulings."[4]

Identity — murder — head of murdered man.

§ 246. In the trial of an indictment for murder, where the *death* of the person alleged to have been killed has been *prima facie* established by the identification of the dead body as that of such person, the *onus* is then on the prisoner to show, if he can, that such person is still living; this is an *alibi* of the alleged deceased person, to establish which, the same weight of evidence is required as would be to establish an *alibi* of the prisoner. One Vincent was indicted in Iowa for the murder of Clarence Showers, and convicted of manslaughter. The evidence was circumstantial and extremely compli-

[1] Reg. v. Cheverton, 2 Fost. & F. 833.
[2] Brown v. Com., 76 Pa. St. 319.
[3] Mulhado v. R. Co., 30 N. Y. 370.
[4] Beavers v. State, 58 Ind. 530, 535.

cated. The court, speaking of this, said: "We can scarcely refer to a case that has fallen within our knowledge, which presents such numerous, varied and complicated, and at the same time, concordant circumstances, upon which became necessary to determine the guilt or innocence of an accused, as the record before us discloses. The identity of the prisoner and the deceased; their presence together in the neighborhood where the dead body was found, at the time the crime was committed; dates of facts and circumstances necessarily developed, indicating the guilt or innocence of the prisoner; all of them were mainly and most of them wholly established by circumstantial evidence. The defense is based on an alleged *alibi* of the prisoner, and also that the body of the murdered man was not in fact that of Clarence Showers, who, it is claimed by the prisoner, was in life long after the date of the crime." The best identification of the deceased was his head, which had been separated from the body, and was partially decayed. The court, reasoning upon the testimony of identification, said: "It may be probable that the evidence of these witnesses on the question of identity, they having known deceased in life, or having before them a picture, admitted to be correct, or in any other way made familiar with the features of the deceased, would be of greater weight than that of those who have not made the human body a study.[1] The judgment of the court below was affirmed.

Webster's trial — identity of the deceased.

§ 247. The celebrated Webster case, decided in Massachusetts in 1849, involved several questions of identity, which seem to deserve a brief notice at this point. Professor John W. Webster was indicted for the murder of Dr. George Parkman of Boston, on November 23, 1849. The evidence was almost wholly circumstantial. Webster was a professor of chemistry in the Medical College in Boston. The indictment contained four counts, the last of which was relied upon, and may be here given as follows: "That the said John W. Webster, at Boston aforesaid, in the county aforesaid, in a certain building known as the Medical College there situate, on the twenty-third day of November last past, in and upon the said George Parkman, feloniously, willfully and of his malice aforethought, did make an assault, and him the said George Parkman, in some way and manner, and by some means, instruments, and weapons to the jurors unknown,

[1] State v. Vincent, 24 Iowa, 570.

did then and there feloniously, willfully and of his malice aforethought, deprive of life. So that he, the said George Parkman, then and there died; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said John Webster, him the said George Parkman, in the manner and by the means aforesaid, to them the said jurors unknown, then and there, feloniously, willfully and of his malice aforethought, did kill and murder," etc., etc. It was shown substantially, that Parkman was peculiar in manners, and well known in Boston; left his home on November 23, 1849, in good health and spirits, and never returned; he was traced to different points in several streets, until about two o'clock, P. M., when he was seen to enter the Medical College, but did not return home. Search was made on the next day and continued until the 30th, when certain parts of the human body were discovered in and about defendant's labratory in the Medical College; and many fragments of bones and blocks of mineral teeth, embedded in slag cinder, together with small quantities of gold, which had been melted, were found in the assay furnace of the labratory. These led to the arrest of Webster. The part of the human body so found resembled in every respect the corresponding proportions of the body of Dr. Parkman, and there were no duplicate parts, and not the remains of a dissected body. The artificial teeth found were made for Parkman by a dentist in Boston in 1846, and by him refitted about two weeks before his disappearance. Defendant was indebted to Parkman on certain notes, and was being pressed for payment. Defendant had said that on November 23, about nine o'clock, A. M., he left word at Dr. Parkman's house for him to call at the college at half-past one o'clock and he would pay him; and that he had an interview with him about that hour at the college. That defendant had no means to make the payment; but the notes were afterward found in his possession. Gould, a witness for the prosecution, testified that he knew the prisoner by sight, but had no personal acquaintance with him, never saw him write, but had seen his handwriting and was familiar with his signature; had seen his signature to diplomas which witness had filled out. Witness had paid particular attention to penmanship for fifty years, and had given instructions in it; "I have published on the subject." Three anonymous letters were produced, addressed to the city marshal of Boston, which had been dropped in the post-office at Boston and East Cambridge, between the time of the disappearance and the arrest, in which various suggestions were thrown

out, calculated to divert attention from the college, and it was proposed to ask the witness in whose handwriting they were; objection was made, but overruled, and witness said he thought they were in the handwriting of defendant. There was much evidence on the part of the defendant to prove good character, etc. Several witnesses testified that they saw Dr. Parkman at various places in Boston in the afternoon of November 23, between two and five o'clock. The prosecution then proposed to show that there was at the time in Boston a man bearing a strong resemblance to Dr. Parkman, in his form, gait and manner—so strong that he was approached and spoken to as Dr. Parkman, by persons well acquainted with the latter. But the court rejected this as too remote, and remarked that "perhaps there might be no objection to the introduction of the very person supposed to be Dr. Parkman." These were the main points in this very remarkable case, involving the question of identity.[1] The case in full has been given to the public in pamphlet form.

Homicide—identity of the deceased.

§ 248. Where the witnesses in a murder case saw the deceased on the day of the alleged murder they may testify to the identity of the dead body, as that of a person who was seen by them on the same day, and who stated that a horse of a certain description had escaped from him, and, on being informed that the defendant was in possession of a horse answering to that description, said that the defendant was the person he desired to see, and thereupon went in search of the defendant. The deceased was found next day, shot in three places and his throat cut, and defendant had left, on the horse, which he claimed to have won. The jury found him guilty of murder in the first degree and assessed the death penalty, but this was reversed.[2]*

[1] Com. v. Webster, 5 Cush. (Mass.) 295. And see Bemis' Rep. 80, 84, 85, 87.

[2] Hamby v. State, 36 Tex. 523.

* In Hamby v. State, *supra*, holding as above stated, the court briefly said: "The indictment in this case is certainly inartificially drawn, wherein it attempts to describe the wound of which the deceased died; but it in effect charges the defendant with having shot the deceased in the head, breast and side, giving him one mortal wound, of which mortal wound he then and there instantly died. Though this expression is a peculiar one, and might be held subject to criticism yet it is believed that if either of the wounds described were proven mortal, the indictment would thereby be sustained; and it was not, therefore, bad on exception or demurrer. The force of the objection made to the testimony of Jackson and Mrs. Methlin is not perceived. The deceased appears to have been a total stranger in the community, and we think the testimony of those two witnesses was properly admitted, to identify the person with whom they conversed, with the deceased. Their testimony was also admissible to show that there was some business or other relation between the defendant and the deceased. And the testimony of Mrs. Methlin was also material, as showing that the deceased, just before his death, was in search of the de-

Decomposition of bodies — preservation.

§ 249. One of the circumstances sometimes relied upon to identify the body of a deceased person as one alleged to have been murdered, is the length of time which has elapsed, as corresponding with the time the person has been missing. But this is supposed not to be reliable. Of course, from decomposition it may be known whether or not the death has been very recent. The rapidity of the process of decomposition depends upon so many different circumstances that it is uncertain. At a late period of decomposition, the examination of the body may not serve as a test to be relied upon with any great degree of certainty. The age of the person, existence of wounds, last illness, constitution of the person, exposure to air or water before interment or before discovery, the temperature of the weather, as hot or cold, the latitude, the purity or impurity of atmosphere, and many other conditions are to be considered. Wharton and Stille in their Medical Jurisprudence, vol. 3, § 686, say: "The *air* at its ordinary temperature favors the progress of putrefaction. In bodies which are exposed for a long time to all the changes of weather, it is estimated that all the soft parts are completely destroyed in less than six years, and most of the bones in twelve, as they become light, brittle and honeycombed in their appearance. (§ 687) *Water*, being a natural constituent of the human body, is also one of the elements necessary for the progress of

fendant. This testimony is not objectionable on the ground of being hearsay evidence, and the court did not, therefore, err in admitting it to the jury. But we think the court did err in overruling defendant's motion for a new trial. The conviction was had almost wholly on circumstantial evidence, and that failed to establish any evidence of express malice, and yet the jury found the defendant guilty of murder in the first degree, and assessed the death penalty. The main circumstances proven on the trial, upon which this verdict was found, are substantially as follows: On the day the homicide is supposed to have been committed, the deceased and defendant were at Jackson's store, in Sherman, apparently quite friendly. They left the store and rode together. Not long after, defendant went to Methlin's house and penned a horse there, which answered the description of the one the deceased rode from Sherman, and said he had bought it. He got the horse and left for Ward's, his brother-in-law. He looked as though he had been drinking. Soon after defendant left Methlin's, deceased came, and appeared to have been drunk. He said he wanted to see defendant, who had his horse. The deceased left Methlin's for Ward's, a little before sundown, and was last seen by Methlin near Ward's field. When defendant left Methlin's he went to Ward's; got there about two o'clock, was drunk and said he had killed a man in Sherman that day; was at the house two or three times during the afternoon. He had the horse described as the one belonging to the deceased, and also a gold watch supposed to be the deceased's, which he said he had won. About sundown he got upon the horse he claimed to have won, and rode off. He was soon after seen riding south on a gallop, in the direction in which the body of deceased was found, and deceased running after him, hallooing to defendant to stop. In about an hour, defendant returned to Ward's house; he acted very strange and restless. At one o'clock in the morning he left on horse-back. He told Ward that a man would be found dead near there. On the next day the body of deceased was found; he had been shot in the back, head and side, and his throat cut. These are the material facts proven to connect defendant with deceased, and with this terrible tragedy." This was held insufficient to warrant a verdict of murder in the first degree. The court thought it failed to establish express malice.

decomposition. If, however, the body is sunk in water, putrefaction does not advance so rapidly as in the air, and often the changes which take place are different from those of ordinary decomposition. The soft parts of the body may become converted into a substance called chevreul, *adipocere*. It is solid, white, and fusible," etc. Having neither space, time, or inclination to pursue this subject in detail, as we find it laid down in the valuable works on medical jurisprudence, we may refer to the Egyptian mummies. It is said that Dr. Walter Lewis, who was engaged for many months in the years 1849 and 1850, in inspecting the vaults of the churches of London, for the board of health, states, among many other interesting facts, which are not here in place, the following, relative to the time for decomposition in vaults: "The complete decomposition of a corpse, and its resolution into its ultimate elements, is by no means accomplished in a period of ten years; nor is that description accurate which represents that at the end of that period nothing but a few brittle bones are left in the else vacant shroud; on the contrary, so extremely slow is the process, under the circumstances, that I have but rarely seen the remains in a leaden coffin, of any age, in the condition described. In a few wooden coffins, the remains are found exactly in this state in a period of from two to five years. This period depends upon the quality of the wood, and the free access of the air to the coffin. But in leaden coffins, fifty, sixty, eighty and even a hundred years are required to accomplish this. I have opened a coffin in which the corpse had been placed for nearly a century, and the ammoniacal gas formed dense white fumes when brought into contact with hydrochloric acid gas, and was so powerful, that the head could not remain near it for more than a few seconds at a time. The putrefaction is, therefore, very much retarded by the corpse being placed in a leaden coffin."[1]*

[1] Wharton & Stille Med. Jur., vol. 3, § 691.

* The same authors at § 685, note, say: "There is upon the summit of the Great St. Bernard, a sort of morgue (*dead-house*), in which have been deposited, from time immemorial, the bodies of these unfortunate persons who have perished upon this mountain by cold, or the fall of avalanches. The study of the circumstances of locality and of temperature in which this establishment is placed may, to a certain degree, indicate the most favorable condition for the long preservation of bodies. Thus are shown to travelers bodies which they assert have been sufficiently preserved to be recognizable after the lapse of two or three years. A physician, whose position as former Prosecutor of the Faculty of Medicine in Paris rendered him curious to visit this part of the hospital in all its details, verified, with his own eyes, all that travelers have written, and has transmitted to us the following observations: "The hospital at St. Bernard is, as is well known, the most elevated habitation of Europe, being seven thousand two hundred feet above the level of the sea. The temperature of this part of the globe is always very low, rarely above zero, even during summer. This extensive establishment is built upon the borders of a lake, at the bottom

Murder — alibi — opinion — circumstances — teeth.

§ 250. It is generally held in trials for murder, where the death of the person is established *prima facie* by the identity of a dead body as that of the person alleged to have been murdered, that the burden is then changed, and it devolves upon the accused to show that such person is still living. This defense is an *alibi* of the alleged deceased person, and requires the same weight of evidence that is necessary to establish the *alibi* of the accused.[1] But it seems to have been held at one time in New York, that a witness could not be allowed to express his opinion that the dead body was that of the murdered man or person.[2] But the rule of evidence now seems to be, that opinion evidence is always received on questions of identity. It will be often very difficult, if not impossible, to prove identity without admitting the witness' opinion as to identity. Linsday was indicted for the murder of one Colvin, in New York, and his case finally decided by the Court of Appeals in 1875, in which identity became an important question. A dead body was found in Seneca river, June 22, 1874; the skull was fractured; Dr. Kimball, who saw the body soon after it was discovered, testified as to whether the bone was freshly fractured, or whether the fracture was old. He testified that it was not recent, and gave his opinion from the appearance of the edges of the fractured bone and its color. Colvin

[1] State v. Vincent, 24 Iowa, 570. [2] People v. Wilson, 3 Park. Cr. 199.

of a gorge in the mountain; the principal mass of the building represents a long parallelogram, placed in the direction of the gorge, so that its two principal faces, pierced with numerous windows, are sheltered from the wind by the rocks; whilst the two extremities, on the contrary, are exposed to all the violence of those which blow from one side of the gorge to the other. About fifty steps beyond the principal building, and a little out of the right line with it is the morgue, a sort of square chamber, the walls of which are three or four feet thick, constructed of good stone, and the arched roof, which is very solid. Two windows, about four feet square, are pierced in the direction of the breadth of the valley, directly facing each other, so that a perpetual current of cold air traverses the interior of the chamber. There is, further, but a single table in the morgue, upon which they place the bodies when first introduced; after a while they are arranged around the wall in an upright attitude. At the time of my passage of the Great St. Bernard (31st August, 1837) there were several of those mummified bodies along the wall of the chamber, but a great number were entirely divested of flesh, and lay scattered about the earthy floor of the room. They informed me that decomposition only took place when the bodies fell by accident to the ground, which was owing to the humidity occasioned by the snows, which occasionaliy entered with the current of air through the windows of the morgue."

Dr. Harlan says: "Early in September, 1833, I had an opportunity of inspecting the contents of the morgue of St. Bernard. Among the group of bodies of every age and sex, we were particularly struck with two figures, one, that of a man, whose countenance was horribly contorted by the act of desiccation: — each limb and every muscle of the body had assumed the expression of a wretch in purgatory. The other was that of a mother holding her infant to her bosom, the latter with an imploring expression, looking up to the face of the mother, whom it appeared to have survived some time, as is generally the case when mother and child are frozen together — a great power of forming animal heat exists in children." (History of Embalming, etc., by J. N. Grannal. Translated from the French by R. Harlan, M. D., Philadelphia; Judah Dodson, 1840.)

had been missing about six months when the body was found. To identify the body found as that of Colvin, witnesses were allowed to testify, under objection and exceptions, as to a similarity and color of the hair and beard of the body, and of Colvin; and as to the measure of the body and the stature of Colvin, showing a correspondence. A dentist who had extracted some teeth for Colvin and who noticed some peculiar indentation in the others was permitted to testify that the teeth extracted were missing from the jaw of the body found, and that the remaining teeth had the same peculiarities he had specified. Vader, jointly indicted with Linsday, was permitted to testify, and proved the killing by Linsday with an axe. He was convicted and the judgment affirmed, there being no error in the above rulings.[1]

Teeth as a means of identity — age.

§ 251. It is stated in Wharton & Stille Med. Jur., § 632: "A singular case of disputed identity, in which there was between two persons such a similarity of name, time, place, age, occupation, and circumstances, as for a long time utterly to perplex the investigation, occurred in London. The body of a woman supposed to have been murdered was missing, and another woman was arrested upon suspicion of having secretly made way with her and sold her remains for dissection. Both direct and circumstantial evidence brought the crime home to her. The day after the alleged murder, an old woman, of the description of the supposed deceased, was found, with a fractured thigh, lying exhausted in the street. She gave her name as Caroline Walsh, and said that she was from Ireland. She died, and was buried at the London Hospital. The name of the missing woman was also Caroline Walsh, and she was also Irish. The prisoner, Elizabeth Ross, when arrested, insisted that this was the female whom she was accused of having murdered. Various points of difference were established by the evidence of a large number of witnesses, but the chief distinction was, that, while it was stated that the missing woman had very perfect incisor teeth (a remarkable circumstance for her age, which was eighty-four), the other one, who died at the hospital, had no front teeth, and the alveolar cavities corresponding to them had been obliterated for a considerable time. Moreover, the non-identity was further confirmed by the granddaughters of the missing woman, who swore that the exhumed

[1] Linsday v. People, 63 N. Y. 143.

body of Caroline Walsh was not that of their grandmother. Teeth may determine age. The first, second and third molars are cut respectively in the seventh, fourteenth, and twenty-first year. At nine years of age there will generally be twelve permanent teeth, viz.: Eight incisors and four molars. At thirteen years there will be twenty-eight teeth, viz.: Eight incisors, four canines, four bicuspids and four molars. In examining one thousand and forty-six children of known ages Mr. Saunders found that out of seven hundred and eight of nine years of age three hundred and eighty-nine had the full development of teeth for their age. But on the principle urged by him that where the teeth of one side are fully developed, those of the other side should also be reckoned, five hundred and thirty came up to the standard; of the remainder, none would have varied more than a year from the standard — and these always by deficiency. Again, of the three hundred and thirty-eight children of thirteen years, no less than two hundred and ninety-four might, from their teeth, have been pronounced with confidence to have been of that age. Of the remaining forty-four, thirty-six would have been judged to have been in their thirteenth year, and eight at or about the completion of their twelfth year. The wisdom teeth, it is said by COCKBURN, C. J., in the Tichborne case, are "the last to come and the first to go." But the last part of this assertion is by no means universally true. And the teeth as a rule harden with age. For further knowledge on this subject, the reader is referred to works on dentistry.*

*It is far more difficult to identify the dead than the living, where resort is had only to the features; and as time elapses it becomes still more difficult, and even though the death be sudden, there is a change, at once, of countenance, of expression, from that seen in the living and the setting in of a different appearance; and gradually all the former expression fades away, beyond recognition, and defies all identity; and finally, the only means of identity may perhaps be the teeth; as to these, in many cases resort has been had, where the face has lost its shape and expression; and yet, the teeth, their peculiar shape, size, the number that are missing, etc., is not conclusive, though it may be received in evidence as a link in the chain of circumstantial evidence to identify the deceased; and is one of the means to which resort may properly be had. The dentist may recognize his work in filling teeth, or in supplying artificial teeth, as in the noted Webster trial in Boston, for the murder of Dr. Parkman; not as expert testimony, but as proof of a fact. But this is by no means conclusive or satisfactory. In State v. Vincent, 24 Iowa, which was an indictment for the alleged murder of one Claiborn Showers, as to the facts, BECK, J., said: "At the time the remains of the murdered man were found, the head had been severed from the body, and was by a physician preserved in alcohol. It was exhibited to the court and jury at the trial. Many of the witnesses for the State identified the head as that of Claiborn Showers. The greater portion of them recognized it by the features alone; others, in addition, discovered peculiar marks upon the teeth, which seemed to increase their confidence in the identity. The prisoner proposed to prove by two witnesses, who were physicians and surgeons, and whose knowledge and attainments in their profession made them familiar with the natural changes through which a human body must necessarily pass after death, that on account of these natural and inevitable changes, it was not possible for any one

Of dead body or its remains — how identified

§ 252. Where the dead body, or what remains of it, is discovered, the first step in the process of investigation is, to make due proof of the *corpus delicti;* to do this, the first step is identification of the deceased, as being the body of the person alleged to have been killed. And where the body is discovered soon after the crime has been committed, and the features are retained, and the face has not been disfigured and the features destroyed by the violence which caused the death, or, otherwise, by accident or decomposition, the identification is often made by direct proof, without resort to uncertain circumstantial evidence, but to positive proof by those who knew the deceased while living. But where the features are by any means destroyed or disfigured beyond recognition, then resort must be had to circumstances, such as natural marks on the body of the corpse, by articles found on or near the person, or by the clothing. And in cases where the features have been beaten in by blows, and recognition rendered impossible, circumstances must furnish the means of identification. Or as in McCann's case in Mississippi, where the face of the deceased had been eaten by hogs, he was readily identified by circumstances beyond the reach of controversy, and the only question was the identification of the accused.[1] Where nothing but the body is found, there may be, and often is, a satisfactory identification furnished by marks of a peculiar character, objects appearing near it, with other corroborating circumstances, as in Clewes case in England,[2] where deceased was recognized after twenty years, by his peculiar teeth, a carpenter's rule and a pair of shoes, all of which were identified. But in all examinations of skeletons for identification, the matter of age and sex should receive the first attention, being a matter of first importance, for these alone may at once determine the whole question in favor of the accused, and obviate the necessity of further examination.

Dead body burnt — proof of corpus delicti.

§ 253. A curious and interesting case, though revolting in the details of its enormity, was tried on an indictment in North Carolina

[1] McCann v. State, 13 S. & M. (Miss.) 472–478.

[2] Rex v. Clewes, 4 Carr. & P. 221. And see Webster's case, Bemis' Rep. 80, 84, 85, 87.

to identify the head. The court refused to permit this to go to the jury." On appeal to the Supreme Court this ruling of the court below was sustained. But if such changes do take place after death, it is difficult to conceive of any good reason why such testimony should not have been received from experts, to go to the jury for what it was worth.

in 1860, involving the identity of the alleged deceased. One Williams was indicted for the murder of Peggy Isly. It appeared that William Isly married the mother of deceased, and resided half a mile from defendant. Evidence tended to show that defendant had, for a year or two, criminal intercourse with deceased. She left the house of her step-father about 10 o'clock, on a Thursday night in December, 1859, and carried a calico frock, two petticoats and a piece of cloth, and was never again seen. Defendant was one of the special court of Rockingham, and held a session on that day, and he left the village of Wentworth for home after night, about seven or eight o'clock. Several days thereafter, the neighbors collected to make search. On Sunday, December 11, they examined about Troublesome creek, which flows through defendant's land. About six hundred yards from his house, in a private place near the creek, they discovered where a log heap had been burnt; some logs were still burning; fragments of bone were among the ashes and were shown to the defendant, but he denied knowing any thing about them. Most of the bones were found in the center of the log heap. He was informed that another search would be made; they went next day and found the burnt place had been dug up by defendant's direction. There was a hollow beach tree near this place, and on the 12th it was on fire. On January 23, 1860, the coroner went to that creek, to make further search, and to hold an inquest. Defendant said the burnt place was intended for a plant-bed, and had been enlarged, and in doing so the beach tree had burnt down. A black substance was found in the tree, which the witnesses called bones. They dragged the creek and found bones, three hair pins, three common pins, a button and a hook and eye, a black substance and fire coals, similar to those in the log pile; these were preserved for the coroner and produced. Four physicians and one dentist were examined, and they proved or recognized part of a human skull, and part of the cheek bone of a human being. The dentist identified human teeth among the bones exhibited. The defendant said he "had no doubt of the death of Peggy Isly, and that the bones found in the creek were hers; that her step-father or some of his boys had knocked her in the head and thrown her body in the log pile, and he did not blame Isly for trying to get his head out of the halter by putting others in." The articles found were such as deceased usually wore. It was shown not to be the time to burn plant-beds. He was courting another girl or woman at the time, and who had talked

to him about the deceased. All this testimony was admitted, he was found guilty, and this was affirmed. The rule which seems at one time to have prevailed in England, "that upon charges of homicide, the accused shall not be convicted unless the death be distinctly proved *either by direct evidence of the fact or by inspection of the body*, was held not to be of universal application, but when the identity of the body is completely destroyed by fire or other means, the *corpus delicti*, as well as other parts of the case, may be proved by presumptive or circumstantial evidence.[1]

Same — strictness in proof of corpus delicti.

§ 254. As regards the English rule above referred to by the North Carolina court, as to the strictness required in the proof of the *corpus delicti*, referring to the language of Sir Matthew Hale on the subject, Mr. Best, in his Principles of Evidence, says: "In most of cases the proof of the crime is separable from that of the criminal; thus the finding of a dead body, or a house in ashes, may indicate a probable crime, but do not necessarily afford any clue to the perpetrator. And here again, a distinction must be drawn, relative to the effect of presumptive evidence. The *corpus delicti* is made up of two things: first, certain facts forming its basis; and secondly, the existence of criminal agency, as the cause of them Now it is with respect to the former of these that the general principles of Lord STOWELL and Sir Matthew Hale especially apply, and it is the established rule that the facts which form the basis of the *corpus delicti* ought to be proved, either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind."[2] And Bentham, after indorsing the above idea as to presumptive evidence, says: "Were it not so, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other known chemical menstrua, or to sink it in an unfathomable part of the sea."

Dead body found in the water — death by drowning.

§ 255. Perhaps the writer of this work would do as well to give this branch of this subject only a passing notice; it may be said to belong to a different science. It opens up a broad and difficult field, one upon which experts frequently disagree, as they do in many other matters, until the unprofessional are left in darkness and doubt;

[1] State v. Williams, 7 Jones (N. C.), 446. And see Webster's case, Bemis' Rep. 80, 84, 85, 87.

[2] Best Prin. of Ev. 321.

doubting whether their *testimony* arises to the dignity or deserves the name of *evidence*. Many of the writers on medical jurisprudence have undertaken to lay down a rule or test by which to determine whether a dead body found in the water had actually been drowned, or whether the person was first killed and the body then thrown into the water; most of these tests are confessedly unreliable, since they depend upon so many contingencies. Candor compelled Dr. Casper to treat it as uncertain, and the tests unreliable. He says: "The question which first arises is, whether death was actually produced by drowning, or whether the body was thrown into the water subsequently to death. This latter often happens in cases of young infants. It may also be possible that suicide has been committed by some other means even when the body is found in the water, as the party may have inflicted some mortal wound upon himself at the water's edge, or while standing in the water. In these cases an examination of the body will show that death was produced by some other means. Injuries found upon the dead body can seldom be relied on as showing violent treatment by another person; these injuries may have been produced by the party himself in an attempt at suicide, and drowning been afterward resorted to, or they may have been produced by striking against some object in the act of drowning, or they may have been caused by the body after death coming in contact with floating ice, stays of bridges, a ship's rudder, or other colliding objects. Where the process of decomposition is considerably advanced, it will be very difficult to distinguish between the appearances which result from decomposition and suggillations produced by violence done to the living body; and here even experienced physicians may be deceived. In this as in all other cases, some light may be thrown upon the question by the circumstances attending the particular case; as, for instance, where the body is naked and the season a proper one for bathing, the probability will be accidental drowning; and so where the deceased was a person whose business was on the water. On the other hand, traces of blood upon the shore, torn clothing, articles of clothing belonging to another person may indicate probable murder. Whether the water is deep or shallow, a dirty pond or fresh pool, may serve to throw light upon the question; although it may sometimes happen that a drunken, feeble or epileptic person may be drowned in shallow water, or in a ditch or fetid pond."*

*Mr. Wharton in his Criminal Evidence (8th ed.) note to § 804 on identity of a dead body, gives the charge of the court to the jury as to the remains of one Weston, the murdered man, as reported in Lowenstein's trial, p. 332. Judge LEARNED thus sums up the evidence of identity of the

Body exhumed three times — identified by the teeth.

§ 256. A singular case is given by Dr. Casper of identification by the teeth, after the body has been exhumed the third time. Schall was suspected of the robbery and murder of Ebermann, who had disappeared. At the first exhumation of the body claimed to be that of Ebermann, a woman, a stranger in the neighborhood, swore that the body was that of her husband, who had recently disappeared, an allegation which was chargeable either to delusion on her part or to complicity with Schall. Five months afterward the body was again exhumed, for the purpose of determining whether it exhibited certain tattoo marks similar to those proved to have been on the person of Ebermann; but decomposition had so far progressed as to make this method of identification impossible. Two years and a half after the first burial, the head (which had been cut off in the murder) was for the third time exhumed; the ground being that Ebermann's mistress claimed that his teeth were so peculiar that she could at once identify them. The skull was submitted to Casper for examination. One question to be determined was whether the fatal shot had pierced from behind the left ear into the head. This question, from the shattered or decayed condition of the bones, could not be definitely answered. The teeth, however, remained

remains: "The question for you is, was that body John D. Weston's body? The facts are, first, that it was the body of a one-armed man; the same arm was gone in both cases. Another fact to which the physicians testify is the peculiar flexibility of the finger. There is some discrepancy as to whether it was the same finger in the body as with Weston, I think. The third peculiarity was the separation of the teeth, they were further apart than usual; that peculiarity is said to have existed in both. As to the size and mode of wearing a moustache, the man is said to be, I think, of such a size as to correspond with John D. Weston. Then you have the further fact about the coat, pantaloons and vest, and I think the shoes and hat, and the alpaca coat; they are all identified by John D. Weston's wife. You will remember if I am wrong in the details. She testified to the shortening of the pantaloons and to mending the coat; there is also a pair of eye-glasses which I think she identified. At any rate she says she fastened a similar pair to his suspenders." In Goldsborough's case, one Huntly was murdered in 1839, and the body found in 1841, by an open drain. The chief point of identification relied on was a peculiar tooth which Huntly had on one side of his head. Only one-half of the bones of the body were found, and none of the clothing was discovered. The skull was fractured and filled with dirt, and no flesh remained. As to the tooth Mr. Warren says (in Blackwood, 1845, p. 106): "When first discovered it would appear that there was a very prominent tooth on the left side of the lower jaw, which arrested the attention of all who saw it; but soon afterward, owing to the inconceivable carelessness and stupidity of those intrusted with it, and who permitted every idle visitor to have free access to it, the tooth in question, alas, was lost. I confess I have seldom experienced such a rising of indignation as when this remarkable deficiency of evidence was thus accounted for." He, "the judge," left it fairly to the jury, to judge whether sufficient had been done to satisfy them beyond all *reasonable* doubt that the bones produced were those of Huntly, but accompanied by a strong expression of his own opinion that the evidence was of an unsatisfactory nature. Unless they were satisfied on *that* head there was an end of the case; for the very first step failed proving that Huntly was dead. If, however, on the whole of the facts, they should be satisfied in the affirmative, then come the other two great questions in the case, had Huntly been murdered? and by the defendant at the bar?" There was a prompt verdict of *acquittal*.

unaffected by decay. These were recognized by the mistress of Ebermann at the first glance. To Casper was put the question whether the teeth met the description previously given by the brother of the deceased. He answered that there was a similarity, but not such as would justify, on this ground alone, a positive identification. The result of the third exhumation was to produce evidence consistent with the hypothesis of Schall's guilt, and, so far as concerns the testimony of deceased's mistress, positively confirmatory of that hypothesis, by the teeth alone.[1]

Artificial teeth — identity after eleven years.

§ 257. Another case is given to the effect that the body was identified eleven years after burial. A widow, Mrs. V., died in 1848, of pain in the stomach and vomiting, which lasted four days; foul play was suspected, but no examination was made for eleven years. Suspicion rested upon her husband and his second wife. The coffin was opened in 1859. It exhibited a human skeleton, and the first point was to identify this with Mrs. V. Relatives testified that she had four artificial teeth connected by a gold band. There was much testimony as to other means of identity, all of which was unsatisfactory; but in taking the skull out of the sand, four artificial teeth connected by a gold band, fell out, and these the witness at once positively identified as belonging to the deceased. Two firm back teeth remained on the upper jaw, and in the under jaw eight teeth remained firm and unaffected by time or decay.[2]

Murder — identity of deceased by name.

§ 258. One Penrod was indicted for killing "Robert Kain." On the trial the witnesses called the deceased "Kain," without giving any christian name. The variance was held fatal, and the conviction was reversed. The court remarked: "The indictment under which the defendant was convicted charged him with murdering Robert Kain. There is no evidence in the record that the party killed was named "Robert Kain." He is called by the witnesses "Kain" only, without giving any christian name. This is indistinguishable from *Davis* v. *People*, 19 Ill. 74, where it was held that such variance between the averment in the indictment and the evidence is fatal.

[1] Whart. Cr. Ev., § 805, n. Citing 5th ed. Casper's Gericht Med. (Liman's ed. Berlin, 1871. Bd. ii, s. 120.)

[2] Whart. Cr. Ev. (8th ed.), § 805, n. And see Clewes' case, 4 Carr. & P. 221, which depended mainly, for its identification, upon the peculiarity of the teeth twenty-one years after burial. See, also, Webster's case in Massachusetts, as given in Bemis' Rep. 80, 84, 85, 87.

In *Shepherd* v. *People*, 72 Ill. 480, cited by the attorney-general, there was evidence describing the deceased and his vocation — that of barber — which unmistakably identified his name with that averred in the indictment. There is no such proof here."[1] It would seem difficult to reconcile this with the two cases referred to. In the one case the witness said "Kain" but did not say "Robert Kain." In Shepherd's case the witness gave no name at all, but called the deceased "the barber," and that was held to be satisfactory. It cannot be presumed that the jury knew, or that the court judicially knew that there was but one barber in the town.

Same — initials — rule in Georgia.

§ 259. In an early case in Georgia, one Mitchum was indicted for the murder of "William R. Morris," and the proof showed that it was "W. R. Morris" who was killed. As to proof of identity of the deceased the court left it to the jury to determine the question, and this was held to be correct, though the verdict of guilty was reversed and the cause remanded for a new trial upon another ground altogether. Upon this point the court, NISBET, J., delivering the opinion, merely remarked, that "the jury had the right to consider the question of identity, not alone in the light of all the attendant circumstances. They were satisfied with the identity, as is evidenced by their verdict, and we will not disturb it on this account." This may have been right, but the Illinois cases above do not seem to fully harmonize with it. While it is true that the question of identity is one of fact, it must be proved like other facts to warrant a verdict of guilty, and especially in a trial for murder.[2]

Same — murder — rule in Texas.

§ 260. In Texas in 1880, one Hunter was tried on an indictment charging him with the murder of one "William Redus." There was evidence to show that the true surname of the deceased was "Reder," but that he was known and often called "Redus." The court charged that if the jury so found the fact, it was immaterial whether Redus was the true name or not, and this was held to be correct. The counsel for the defense asked and the court refused to charge the jury as follows: "That the defendant is indicted and placed upon trial for killing William Redus, and if the jury find, from the evidence, that the deceased's name was William Reder,

[1] Penrod v. People, 89 Ill. 150. [2] Mitchum v. State, 11 Ga. 615.

and not William Redus, then there is a variance between the name charged in the indictment and the proof, and the jury will, in this event, find the defendant not guilty." This was properly declined. The court said: "Whilst it is considered that the special charge asked and refused enunciates a correct principle of law, yet, the court having given substantially the same principle, it was not incumbent on him (the court) to repeat it at the request of the defendant."[1]

Same — assault and battery — rule in Texas.

§ 261. In another Texas case in 1849,[2] one Cotton was indicted for assault and battery. The name of the injured party occurred three times in the indictment. 1. Francis Hubble. 2. Francis Hubles. 3. Francis Hubbles. The proof showed the true name to be Francis Hubble. It was held that an indictment was sufficient in respect to the description of the person injured, if it be certain to a common intent — if it be sufficiently explicit to inform the prisoner who are his accusers. If the name of the person injured be correctly stated where it occurs the first time in the indictment, subsequent statements of it, in which there is an apparent variation, may be rejected as surplusage. If a party be known by one name as well as another, he may be described by either. As where the property stolen was laid in the indictment as the property of Steven Harris, and it appeared that the name of the owner was Harrison, but he was sometimes called Harris, the variance was held to be immaterial.[3] And so in this case the judgment was affirmed.

Murder — blood spots on boards identified.

§ 262. Linsday and Vader were jointly indicted for the murder of Calvin, and Linsday was put on trial separately. A body, identified as that of the alleged murdered man, was discovered in the Seneca river on June 22, 1874, with skull fractured. The evidence tended to identify certain boards taken from the prisoner's sleigh, with spots caused by the flow of blood from the body of the dead man, that had remained there since the night the body was alleged to have been removed; and there was no evidence that they had been tampered with subsequently, or were in any different condition, except that hogs had been dressed upon them. Expert evidence

[1] Hunter v. State, 8 Tex. App. 75.
[2] Cotton v. State, 4 Tex. 260.
[3] State v. France, 1 Overton, 434; Com. v. Hunt, 4 Pick. 252; 1 Chitty Cr. L. 216, 217.

was received as to certain experiments determining that some of the spots on the boards were the blood of hogs, and some human blood. This was held to be properly admitted in evidence; and the fact that the boards had long been out of the prisoner's possession and used by others, while it affected the question of identity of the boards and the spots, did not render them inadmissible in evidence.[1]

Same — tracks and a mask found.

§ 263. One Murphy was convicted for the murder of Matilda Hugus, by gun or pistol shot, on April 19, 1874, as the evidence tended to show, by some one standing outside of the house, in which deceased and a brother-in-law of prisoner resided, and near the window where they were sitting when the shot was fired. The shot went through a pane of glass and into the brain of deceased, from which she died instantly. The imprint of footsteps was found on the night of the murder on a flower-bed near and under the window through which the shot was fired, and evidence was given that it corresponded in size with a boot found in the prisoner's house on the following day. The witness who measured the footprints, in reply to a question as to what were the measurements taken by him, commenced his answer by stating "I measured from the outside of the flower-bed where the man stood," and then an objection being made, he said, "from where the footprints were up to the window where the shot went in, was five feet three and a half inches; inside, two feet and eleven inches. I had a man sit in a chair and measured from the floor to the top of his head." After the murder and on the same evening a mask was found under the window where the shot was fired. During a conversation with the witness Pinkerton, Schute asked the prisoner where that mask came from? and he answered, "the children got it from the ragamuffins;" then added, "that mask had a black nose, and was torn down the face." The conviction was affirmed.[2]

Identity of window — skeleton — murder trials.

§ 264. On a trial for murder in Massachusetts, a witness testified that he saw the prisoner, about the time the murder was alleged to have been committed, jump out of the window of a church, and that he pointed out the window to an officer soon thereafter. It was held competent for the prosecution to show by the officer, in order

[1] Linsday v. People, 63 N. Y. 145. [2] Murphy v. People, 63 N. Y. 590.

to more clearly identify the window to which the witness had referred.[1] McCulloch was indicted in Indiana for the murder of one Morgan. The evidence showed that a skeleton was found, of the sex and size of the person alleged to have been murdered. This was held sufficient evidence of the *corpus delicti* to justify the admission of circumstantial evidence to identify the skeleton of the party alleged to have been killed, and also to show the manner in which he came to his death. A witness at the trial testified that in several conversations the prisoner had spoken of having killed a man by the name of Morgan, the name of the man alleged in the indictment to have been murdered, but in one conversation he stated that he was innocent of the crime; but it did not appear affirmatively that the declaration of innocence was in the same conversation in which he made the confession of guilt. It was held that it could not be assumed that the assertion of his innocence was necessarily made in the same conversation in which he had said that he had killed Morgan.[2] If it had been in the same conversation, the defendant would have been entitled to the benefit of it. When one side brings out a part of a conversation, the other side may, if they desire, bring out the whole of it, that it may be fully understood. The law does not intend that a fragment or a garbled extract of a conversation shall go to the jury.

Anarchists' trial — dynamite bombs — comparison — identity.

§ 265. On the trial of the celebrated case of the anarchists in Chicago for the murder of the policeman with dynamite, after the proof of the manufacture and use of bombs, it became necessary, and the court admitted in evidence similar bombs, manufactured by the same man, to identify the means and weapons used by them to destroy human life. The policeman for whose murder Spies and others were tried was killed by a bomb thrown and exploded in the midst of the police force. The court, on the trial of the prisoners, allowed the prosecution to produce and give in evidence bombs and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, placed there by certain of the conspirators, as specimens of the kind of weapons which Lingg, the one of the conspirators who had charge of their manufacture, and his associates were preparing; not only as showing the identity of the means and

[1] Com. v. Piper, 120 Mass. 185. [2] McCulloch v. State, 48 Ind. 109.

weapons prepared, manufactured and used by them, but also as showing the malice and evil heart indicated by the use of such vile, dangerous and destructives means, appliances and weapons.

The introduction of these bombs, cans, etc., manufactured by Lingg, one of the conspirators, was held by the Supreme Court not to be improper to go to the jury to aid them in their determination. The jury had the right to see them and to compare their structure with the description given by the witnesses of the bomb with which they killed the deceased policeman, with a view of determining whether the defendant Lingg, as was charged, was the manufacturer of the latter bombs or not. The fact that some of these bombs and cans, like some of those which had been shown to certain of the conspirators during the time of their drill, were found buried near one of the places designated for their meeting, where certain of the armed men were to assemble on the night of the attack on the police, was held to be a circumstance, proper to be considered by the jury in their determination of the nature and character of the conspiracy, and its connection with the events of the night of the murder.[1]*

Dress — a circumstance of human identity.

§ 266. Mr. Burrill in his work on Circumstantial Evidence, speak-

[1] Spies v. People, 122 Ill. 1.

*Mr. Burrill, in his Circumstantial Evidence at p. 635, says: "The two leading descriptions of persons which most frequently become the subjects of identification, in the course of judicial inquiry into crime, are, first, the person of the subject of the crime; and, secondly, the author of the crime: 1. Identification of the person of the subject of the crime. This is one of the earlist processes which becomes necessary in the cases of homicide, and forms an essential part of the proof of the *corpus delicti*. 2. Identification of the person of the criminal. The circumstances which go to identify an accused party as connected with a crime charged, are of two principal kinds; first, those of a remote or more minute character, the inferences from which are approximations to identification, and which chiefly serve to narrow the range of persons within which the particular criminal agent is to be sought; their principal use being to introduce and aid by proof of more proximate circumstances; and secondly, circumstances which more directly connect the accused individual with the transaction, and which in their effect often amount to direct identification. 1. The direction and appearance of wounds upon the body of a murdered person, especially such as have been inflicted by firearms, often serve to indicate the distance at which the murderer stood, and the position which he occupied while inflicting them, and thus have an effect to confirm an hypothesis based upon other facts and inferences." Referring to the case of McCann v. State, 13 S. & M. (Miss.) 472 (decided in 1850), as an apt illustration of this view. In that case McCann murdered one Andrew Toland. No known enmity had existed between the deceased and the accused; various circumstances pointed, more or less directly, to the accused. He was an intimate friend of a son of the deceased. They were together in the most intimate relations on the day before the murder occurred at night on the highway. The deceased and the accused traveled on the same road about dark, and just before the murder — the prisoner riding a large, tall horse, and the deceased riding a small horse. The shot took effect in the back of the neck, and ranged downward, showing that the murderer occupied a position above that of the deceased. This, though alone insufficient, served, with other circumstances, to identify the accused as the perpetrator of the crime

ing of dress as a means of human identity, says: "Dress is usually one of the first circumstances observed in the appearance of a person, and where it is in any degree peculiar, furnishes important means of identification. * * * It is the exterior clothing, however, including the hat, which ordinarily makes the first and most lasting impression upon the sense of sight. * * * But in one respect the circumstance of dress is less reliable than any other observed appearance, it being frequently assumed for the very purpose of disguise."[1] The sad comment is, that dress is sometimes more observed and noticed than the person who wears it, and often more easily identified, because more observed; and hence less reliable as a means of human identity. In this connection Mr. Ram gives, what we will, for the sake of society, charitably call an imaginary interview, thus: "'May I ask her appearance sir,' said Tressilian? "'Oh! sir," replied Master Goldthread,' I promise you she was in gentlewoman's attire — a very quaint and pleasing dress that might have served the queen herself; for she had a forepart, with body and sleeves of ginger-colored satin, lined with Murrey taffeta, and laid down and guarded with two broad laces of gold and silver. And her hat, sir, was truly the best fashioned thing that I have seen, being of tawny taffeta, embroidered with scorpions of Venice gold, and having a border garnished with gold fringe. Touching her skirts, they were in the old pass-devout fashion.' 'I did not ask you of her attire, sir,' said Tressilian, 'but of her complexion — the color of her hair, her features.' 'Touching her complexion,' answered the mercer, 'I am not so special certain; but I marked that her fan had an ivory handle, curiously inlaid, and then again as to the color of her hair, I can warrant, be its hue what it might, that she wore above it a net of green silk-parcel twisted with gold.' 'A most mercer-like memory,' said Lamborne; 'the gentleman asked him of the lady's beauty, and he talks of her fine clothes.'" In such a case, and with such a witness as the mercer, a slight change in attire would destroy every means of recognition, and render him an unreliable sort of witness to prove the identity of the person.

Murder — pistol — examined by jurors.

§ 267. On the trial of an indictment for murder in Georgia, it was held that a pistol, although it had been fired off after the encounter was over, might go to the jury for their examination and

[1] Burrill Cir. Ev. 639.

inspection, and its condition, as found at the close of the fight, may be described by witnesses who saw it then and before it was altered by firing; but no experiment by firing, or otherwise, if made without defendant's consent, and after the homicide, should be permitted to go to the jury in evidence, as it was said it might result in the manufacture of testimony against the accused after the cessation of hostilities. And it was held that the witness might testify about the appearance of the pistol and cartridges immediately after the fight, so as to identify the same, its condition, whether it had been snapped or not, and facts generally concerning the pistol immediately after the fight which resulted in the homicide.[1]

Same — opinion evidence — rule in Texas.

§ 268. Cooper was indicted and convicted for the murder of Fortson in Texas; they had been fire-hunting for deer in the night, were neighbors and friends and often hunted together; deceased had killed one deer and wounded another, and they were returning home alone, on horseback, prisoner carrying the deer and deceased carrying the lamp, about twenty yards in the rear (as related by prisoner), when deceased was shot and killed. Prisoner gave the first information, by awakening Dr. Phillips and Mr. Henry, and stating to them, substantially as above; and that when he heard the gun fired, deceased exclaimed "Cooper, I am shot." That he fell and the lamp was extinguished, and he died almost instantly. The wound was in the back, and his coat was burned or crisped, where the load entered the body. Several witnesses stated, as their *opinion*, that the gun must have been very near him — from *two* to *twelve* feet; other witnesses gave *opinions* as to his position on horseback, and the range of the balls; others again from the density of the forest and the impossibility of the murderer having escaped, unobserved, and as to the manner in which the deed was done. The conviction was reversed because the court admitted non-experts to give *opinions* in evidence. BELL, J., said: "I may feel a strong conviction, not, however, amounting to certainty, that a man who stands before me in a court-room to-day is the same man whom I knew ten years ago, in a distant part of the world; I cannot explain to others the grounds of my strong belief, yet this belief amounts to a species of knowledge. If called as a witness, I may express my *opinion* that the man before me is the same man whom I knew in another place. My *opinion*

[1] Wynne v. State, 56 Ga. 113.

is entitled to some weight, because it is the statement of a fact, about which, to be sure, I cannot speak with absolute certainty; but yet with so much certainty as, perhaps, to satisfy the minds of others that the thing stated is a fact.[1]

Killing with a dirk — identity of weapon.

§ 269. An important question arose in a murder trial in Virginia in 1827. It depended upon the identification of the dirk, by witnesses who had seen it, or one like it, in the possession of the accused, and they could only speak from the general appearance of the weapon. It had not been seen in his possession for a considerable length of time prior to the homicide. It was found about one hundred yards from the dead body of *Moseby*, the deceased, and had no blood on it. This circumstance was weak, and the corroborating circumstances were remote in point of both time and place. The court was divided, but a majority refused a writ of error.[2]

Murder — circumstances — suspicion — insufficiency.

§ 270. Objects are often found at or near the scene of a crime which are not the instruments of it; but which yet become of great importance in the identification of the perpetrator, either in raising or confirming a suspicion against some person as the supposed offender; but these should generally be connected with other circumstances; yet a very strong circumstance arises in the fact of finding on the person of the accused, articles belonging to the deceased, which are satisfactorily identified — such as his purse, pocket-book, watch, jewelry, etc. Equally strong is the circumstance, perhaps, of finding at or near the scene of a murder, articles of apparel belonging to the accused, such as a pair of gloves, a handkerchief, or a hat; these, when there is a satisfactory identification of them, will at least call for a satisfactory explanation. But these, while they are sufficiently strong to raise a suspicion, point to some individual and narrow the range of inquiry, they are by no means conclusive, since cases of mistake have become so frequent. Experience and observation have taught us many valuable lessons, in the application of circumstantial evidence, to avoid mistaken identity. In the case above given, articles of the deceased found in the possession of the accused may not be the same but similar, or he may have borrowed or purchased them from the deceased, and not be able to show it. Or in the case of articles belonging to the accused, found at or near the

[1] Cooper v. State, 23 Tex. 331. [2] Mendum v. Com., 6 Rand. (Va.) 704.

scene of a murder, they may have been stolen, or sold, or loaned to the real murderer or even to the accused. Suppose a man be found dead with a dirk in his side, which he borrowed from a friend and committed suicide, and that friend was the last person seen in company with him; it is called a murder, and the circumstances point directly to the owner of the dirk, and no explanation of his can create a reasonable doubt of his guilt in the minds of the jury.

Same — circumstances may mislead — caution.

§ 271. Circumstances may often have no value except to raise suspicion, which should be confirmed by other facts or circumstances. A murderer may take the property of the deceased and dispose of it to an innocent person, who may never be able to account for his possession thereof; the property being identified, that, of itself, to the unthinking, may be a satisfactory identification of the perpetrator. Again, an assassin or robber may inflict a mortal wound upon his victim, and leave him unconscious and in a dying condition on the highway, with a bloody knife by his side; a stranger arrives on the scene, and like the "good Samaritan" attempts to lift him from the ground; in so doing his clothes are blood-stained, and he is found in the act by others; the witnesses who saw them thought they were struggling together; the innocent man is arrested, blood is on his clothes, the knife is by the side of the corpse, they were seen struggling together. The circumstances point directly to him and none other. The innocent man is liable, yea, almost certain, in the absence of the intervention of some extraordinary circumstance, to be convicted and executed, and his death is the result of his charity, benevolence and humanity in the performance of an act of mercy. Hence the great necessity of caution in the application of circumstantial evidence in questions of identification.

Again, an innocent man walking on the highway is overtaken by a man on horseback, who had stolen the horse he was riding, and fearing pursuit by the owner of the horse, induced the footman to ride; the offer is thankfully accepted; the thief says, "ride on about a mile, tie the horse and walk on, I will ride when I come up, we will ride and tie." The offer was accepted, the pursuers came, found the innocent man on the horse, and the explanation was of no avail. The guilty man left the road and escaped, and the innocent must suffer.*

* As to the detection of blood on weapons as a means of identification in cases of murder, Mr. Taylor, in his Med. Jur. (8th Am. ed.) p. 300, says: "A knife, dagger or sword may have

Murder for interest in an estate.

§ 272. A singular case is given of the trial of the Knapps for the murder of Joseph White, for his estate, under these brief circumstances: White was childless and was known to have executed a will; his legal representatives were, Mrs. Beckford, his housekeeper, the only child of a deceased sister, and four nephews and nieces, children of a deceased brother. To Stephen White, one of the latter, he gave the larger portion, and to Mrs. Beckford a smaller portion. A daughter of Mrs. Beckford married Joseph J. Knapp, Jr., who, with his brother Francis, were young shipmasters, as also a son of Joseph. Shortly after the murder, the father received a letter, obscurely intimating that the writer was possessed of a secret connected with the murder, and for the preservation of which he demanded a "loan" of $350. Being unable to comprehend it, he handed it to his son, who returned it, saying he might hand it to the vigilance committee appointed on the subject, which he did, and this led to the arrest of Charles Grant, who had been an associate of R. Crowninshield, Jr., and George Crowninshield, and had spent part of the winter at Danvers under the name of Carr, and had been their guest, concealed in their father's house. On April 2 he saw from the window Frank Knapp and young Allen ride up to the house; George walked away with Frank and Richard with Allen; and on their return, George told Richard that Frank wished them to undertake to kill Mr. White, and that J. J. Knapp, Jr., would pay a thousand dollars for the job.

been used for inflicting a wound, and may have no stains of blood upon it, or only a slight yellowish film or dried serum. It may in fact have been wiped by drawing it through the wound or clothing. In other cases the weapon may have well-marked stains upon it, and when these are recent, and on a clean or polished surface, they may be easily recognized; but when of old standing, or on a rusty piece of metal, it is a matter of some difficulty to distinguish them from stains produced by rust or other causes. If the stain is large and dry, a portion may be scraped off and placed in a watch glass with some distilled water — the solution filtered to separate any oxide of iron, and then tested. If the water by simple maceration does not acquire a red or red-brown color, the stain is *not* probably due to blood. If it acquire a red color the solution may be tested," etc. The same author, at page 296, in speaking of stains of blood on linen and other stuffs, their age or date, says: "Supposing the stuff to be white, or nearly colorless, the spot of blood, if *recent*, is of a bright red color; but by exposure it sooner or later becomes of a reddish-brown, or of a deep red color. This change of color to a reddish-brown, I have found to take place in warm weather in less than twenty-four hours. After a period of five or six days, it is scarcely possible to determine, from the appearance, the date of the stain, even conjecturally. In a large stain of blood on linen, no change took place in a period of five years; it had a reddish-brown color at the end of six weeks, which it retained for the long period mentioned. Indeed it is extremely difficult in any case after the lapse of a week to give an opinion as to the actual date of the stain. Upon colored stuff or dirty clothes, it is, of course, impossible to trace the physical change in stains of blood. On red-dyed stuff the stain appears simply darker from the first, and in all cases the fibre of the stuff is more or less stiffened, as a result of the drying of the albumen associated with the red coloring matter. In examining the article of clothing, attention should be paid to the side of the stuff which has first received the stain. Sometimes both sides are stained."

They proposed various modes of doing it, and asked Grant to be concerned, which he declined. George said the housekeeper would be away all the time; that the object of Joseph J. Knapp, Jr., was first to destroy the will, and that he could get the keys of the iron chest from the housekeeper. Frank called the same day in a chaise and rode away with Richard, and on the night of the murder, Grant stayed at the half-way house in Linn. In the meantime suspicion was greatly strengthened by Joseph J. Knapp, Jr., writing a pseudonymous letter to the vigilance committee, trying to throw the suspicion on Stephen White, and Richard and George Crowninshield and Joseph and John Knapp were arrested for the murder. Richard Crowninshield tried to get Grant not to testify against him; failing in this, he committed suicide, and the two Knapps were convicted. Their motive was to destroy the will, kill White, have him die intestate, and thereby increase the interest of Mrs. Beckford in the estate, but it did not have that effect, they were mistaken as to the law, and she took less than she would have received under the will.[1]

Murder — indications a violent death — identity.

§ 273. In making proof of the *corpus delicti* in a murder case, as suggested by an eminent writer, the state of the clothing, if torn, cut, or otherwise disordered, or stripped in apparent haste, or attempted to be put on again in an unusual manner, or if the pockets are found rifled, or the like, goes to indicate a violent death. Stains of blood or other substances, and marks or incisions or perforations near the wounds, or corresponding with them in size, shape and direction, serve a similar purpose, and require to be accurately observed. The condition of the ground in the immediate vicinity of the dead body, where it is found in the open air, as disturbed in any manner, or bearing impressions of any kind, marks of struggles, and of dragging the body, indicate the violent agency of another as the cause of the death. Footprints conclusively show the presence of others, and their number, their character and direction are always to be carefully attended to. * * * Weapons or other means of taking life, whether found in immediate contact with the body, or in its vicinity. The most minute circumstances connected with objects of this kind require close attention and examination; such as the distance at which the weapon is found, the direction in which it lies, and its relative position to the body, its condition, whether

[1] Whart. Cr. Ev. (8th ed.) § 704, n.

bloody or otherwise, and whether sheathed or closed. If poison, the state of the phial containing or having contained it, whether corked or otherwise. The absence of all weapons or means of destroying life serve to negative the supposition of an accidental or a suicidal death. On the trial of one Sturtivant for murder, the evidence showed that scrip of a particular issue, not then in circulation, was found the day after the murder, in the house of the deceased, and that the prisoner passed similar scrip on the same day. The witness was asked to describe the scrip. This was objected to upon the ground that the scrip should be produced. The prosecuting attorney stated that the scrip would be produced. It was held that it was proper to permit the witness to describe it for the purpose of identifying the scrip when it should be produced.[1]

Corpus delicti — identification of the dead.

§ 274. The identification of the deceased need not in all cases be proved by witnesses who recognized the body by an inspection to be that of the person alleged to have been killed; the identification may be established in the same manner and by evidence of the same nature, as is admissible to identify the accused, or to prove any other fact in the case. In a Texas case in 1871, it was held that evidence of this character was admissible and might conclusively establish the identification beyond a reasonable doubt. The deceased was identified by his clothing, by a wagon and team, and by papers which were found on his person, when the body was found, though no witness who knew him while living could swear that the body found was the corpse of the alleged deceased.[2] But where there is no proof of the *corpus delicti*, except an uncorroborated extra-judicial confession, a conviction of murder is impossible.[3]

Same — death by poisoning — experts — conflict.

§ 275. The *corpus delicti* is said to consist of two parts, or facts— the death of the alleged victim, and the existence of a criminal agency in producing it. The former must be established by direct evidence, as held by some courts, or by the strongest presumptive evidence, while the latter may be shown by circumstantial evidence. Where a person in general good health dies suddenly, and the symptoms indicate narcotic poison of Jamestown weed or *stramonium*, but are similar also to symptoms common to disease of the heart, or

[1] Com. v. Sturtivant, 117 Mass. 123.
[2] Taylor v. State, 35 Tex. 97.
[3] State v. German, 54 Mo. 526.

congestion of the brain or stomach, and the testimony of medical experts, who made an examination of the stomach and its contents, without analysis, conflict, and leave a doubt, with the probabilities equally balanced, whether the death resulted from poison or disease — it was held that such facts, though accompanied by a confession of the accused that he had administered Jamestown weed, were not sufficient to warrant the jury in finding a verdict of guilty.[1] Where medical experts differ as to the cause of death, the jury may well doubt.

Identity of deceased — opinion evidence.

§ 276. One Wilson was indicted in New York for murder, and the principal question on the trial was the identity of the deceased. A brother-in-law of the alleged deceased, as a witness for the prosecution, testified to having seen and examined the body about five months after the date of the alleged murder, and mentioned specifically several points of resemblance; he was then asked by the prosecuting attorney for his opinion as to whether it was the body of his brother-in-law, who was alleged to have been killed, and he was permitted to give his opinion. On appeal to the Supreme Court, it was held that the opinion of the witness could not be taken in the case, he not being an expert, and it being the province of the jury to decide upon the identity from the facts detailed by the evidence, the body being much decomposed, and so much changed in appearance.[2] But we find many later cases holding a different rule; in fact identification is generally established, either by circumstantial evidence or by opinion evidence, but the witnesses should state the facts upon which their opinions are based, as we see it generally held.[3] It is true that the general rule did not permit non-experts to give their opinions to the jury, but it is now a well-recognized exception to that rule, that it is permitted in questions of identity; in fact this exception is now as well recognized as the rule itself.[4]

Footprints establishing the fact of murder.

§ 277. In the trial of an indictment for murder in Mississippi in 1849, the defendant, one Cicely, a slave, and others, charged

[1] Pitts v. State, 43 Miss. 472.
[2] People v. Wilson, 3 Park. Cr. 206.
[3] Com. v. Pope, 103 Mass. 440; Com. v. Dorsey, id. 412; Com. v. Sturtivant, 117 id. 132; M'Kee v. Nelson, 4 Cow. 355; Brink v. Ins. Co., 49 Vt. 442; Cooper v. State, 23 Tex. 339.
[4] Kearney v. Farrell, 28 Conn. 317; Bennett v. Meehan, 83 Ind. 569.

with the murder of her mistress, Mrs. Longon, wife of Dr. Longon. The evidence was circumstantial, and much depended upon the footprints found in and about the scene of the murder. There was much testimony. One Johnson, for the defense, testified, that he examined the bloody footprints on the floor of Dr. Longon's house, and said they resembled a stocking footprint, as the toes were not distinctly marked. She was convicted in the court below, and it was affirmed by the Supreme Court on writ of error.[1]*

[1] Cicely v. State, 13 S. & M. (Miss.) 202–219.

*In Cicely v. State, *supra*, after examining the facts of the case, SMITH, J., said: "From this statement of the testimony, the facts which militate against the accused, and lead to conclusions of her guilt, are: 1. Her presence at the commission of the homicide, and the perfect means which were at her command for the accomplishment of her object. 2. The fact that from the door of the house, in the walk, to the spot where the corpse of Mrs. Longon was found, during the night, after cautious and careful examination, there were discovered but two sets of tracks or 'footprints,' one of which was supposed to be those of the deceased, and the other corresponded with those of the accused. 3. The fact that at the place where the homicide was committed the traces of a scuffle were visible, and the prints of feet were discovered, which corresponded with the tracks of the accused. 4. The fact that from the point at which the corpse was found to the gate, there was found but one set of tracks and they corresponded with those of the accused. 5. The prisoner's declining to advance into the light at Brown's, where the witness Perry was standing with others, and her retreat into a dark corner. 6. The statement prisoner made to witness James E. Watts, in the road between Longon's and Brown's, before any suspicion of her agency in the matter had arisen in the mind of the witness. She stated that after the robbers had killed Longon and his family, Mrs. Longon and herself ran out of the house and were pursued by the robbers, who overtook Mrs. Longon and killed her where she lay; but that she outran Mrs. Longon and escaped and ran over to Brown's. 7. The stains of blood on the front of her dress. Witness says: 'There was many specks or spots on it.' 8. The blood-stains on the pantaloon pocket of Longon, coupled with her possession of his purse, secreted, and her ignorance of the amount of its contents. 9. The improbable version she gave of the whole transaction and her palpable contradictory statements. The question which naturally presents itself is: Can all the facts distinctly proven stand, and yet the prisoner be guiltless of the homicide? It is, in the first place, insisted that the presence of the prisoner, who would necessarily have been there, whether guilty or innocent, creates no presumption of her guilt; and that the absence of any sufficient motive for the commission of so dreadful a crime is a circumstance strongly in her favor. It is difficult to estimate the force of any motive which may arise in any given case. We have evidence, from painful experience, that a desire to possess the wealth of another has often constituted the operative motive for the perpetration of the deepest crimes. The prisoner may have been ignorant of the amount of money which Longon possessed, or the glittering contents of the purse may have presented a temptation which she did not resist. We are forced to infer that the acquisition of the purse, with the attendant circumstances, formed at least a part of her motive. Again, it is urged that the existence of the footprints in the walk from the door to the point where the dead body was found, and from thence to the gate, is in harmony with the prisoner's statement, and must have existed if her statement were true. This assumption is directly rebutted by the facts. If Mrs. Longon was slain by the robbers, who rushed from the house in pursuit of the fugitives, there must have been other tracks made in the walk besides those of the two persons in the flight; and the place where the blow was struck and the victim fell, which bore evidence of a scuffle, would also have been eloquent of the presence of the murderers. It is again insisted that the stains of blood upon her dress, as that circumstance may be accounted for in various ways consistent with the innocence of the accused, creates no presumption of her guilt. Her own explanations are unsatisfactory and untrue. It did not proceed from the old wound on her finger, as she first stated and afterward denied, etc. Her counsel asked this instruction: 'If the jury, after weighing the evidence, have a reasonable doubt that the prisoner is guilty they are bound by law to find her not guilty." The judge gave it with this addition: 'To warrant the jury in finding the prisoner guilty, there should be evidence before them sufficient to satisfy

Footprints as evidence of identification.

§ 278. Mr. Burrill in his valuable work on Circumstantial Evidence, has wisely condensed the rule as to footprints as a means of identity, thus: "Impressions *directly* from the person; such as prints, in earth or snow, of the feet or shoes, and impressions of other parts of the body. Of these (especially in cases of crime committed in rural districts), *footprints* are the most common. They are among the first indications observed after the discovery of a crime, and, indeed, are naturally sought for, as furnishing an important clue to the discovery of the criminal, and a means of satisfactory identification of his person; much of their value consists in the circumstance that they are usually made and left (especially where a crime has been committed at night), unconsciously and inadvertently, the attention of the criminal being engrossed by the perpetration of the crime itself. They may be considered of two kinds: *Ordinary* footprints, exhibiting no peculiar characteristics; and impressions of a *peculiar* character. The former are important, first, as showing the general fact that one or more persons have been present; secondly, as indicating the direction from which they approached, or in which they left the scene of the crime, and their movements about it; and, thirdly, as more immediately indicating the particular perpetrator by inferences which they tend to establish.[1] In the English case of Mrs. Arden and others, who were convicted of the murder of her husband at Feversham, in England, A. D. 1551,[2] the crime was committed in the house of the deceased, and the dead body was carried out the same evening, through the garden, into an adjoining field, where it was laid on the ground. Snow having fallen in the meantime, impressions of the murderers' footprints were left upon it, by which they were traced from the body to the house, where new indications of guilt were discovered. The crime was effectually brought home to them.

Footprints — tracks — murder — rule of evidence.

§ 279. The tracks of the perpetrator of crime often lead to other facts which prove the most satisfactory identification. Mr. Burrill

[1] Burrill Cir. Ev. 264.

[2] 5 London Legal Observer, 59.

their minds of her guilt, beyond a reasonable doubt; that which amounts to mere probability only, or to conjecture or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence; and if such a reasonable doubt should arise from the evidence, the prisoner is entitled to the benefit of that doubt.' Held to be correct. It may be noted, that in this case the prisoner was made to put her foot in the track; compelled to do so by a witness, and his evidence of the fact was received."

gives a case of this description substantially as occurring in Scotland in 1786. One Richardson was convicted for the murder of a young woman, who resided with her parents in a rural district. Her parents returned from the harvest field at noon and found her a corpse, with her throat cut, as it appeared, with some sharp instrument, evidently in the left hand of the perpetrator of the crime, and she was found to be pregnant. There were footprints near the cottage, seemingly of a person who had been running from the cottage and, by an indirect road, through a *quagmire* or *bog*, and slipped his foot into the mire; the tracks were accurately measured and an exact impression taken. The shoes worn had been "newly mended," and had iron *knobs* or *nails* in them. Along the tracks or footsteps, at intervals, there were drops of blood, and on the gateway near the cottage. But no one was yet suspected. A number of persons attended the funeral; and the steward — deputed to obtain a clue to the murderer — called the men together, about sixty, and had their shoes measured. *Richardson* being present, it was found that his shoes corresponded exactly with the impression, in size, shape of the foot, form of the sole, newly mended, and the number and position of the nails. He was shown to be left handed. It appeared that he had been absent from his work on the forenoon of the day of the murder a sufficient time to go to the cottage and return; and one of his stockings worn on that day was soiled with mud like that in the bogs. A young girl, who was about a hundred yards distant from the cottage, said about the time the murder was supposed to have been committed, she saw a man, exactly with dress and appearance like defendant, running hastily toward the cottage, and this corresponded with the time he was absent from his work. He was convicted and executed, confessed his guilt, and said he did it to hide his shame, he being the father of her unborn child. He informed the clergyman where the knife would be found with which he committed the horrid deed. Thus, the tracks of the murderer limited the inquiry, suspicion fell upon him and led to facts and circumstances which brought the guilty to punishment.[1] And yet, too much caution cannot be used in the application of circumstances to prove a satisfactory identification.

Impression made by clothing.

§ 280. A singular fact as evidence of identification is given by Mr. Burrill thus: "In the case of *Rex* v. *Brindley*, impressions were

[1] Burrill Cir. Ev. 243. Citing Burnett Cr. Law of Scotland, 524 *et seq.*

found in the soil, near the scene of the crime, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight; and the ribs of the patch meeting the hollow of the garment into which it had been inserted, which circumstance exactly corresponded with the dress of the prisoner.[1] Mr. Best very wisely remarks, that being left-handed or having lost front teeth are not very uncommon occurrences.[2] The value of these marks consist in their narrowing the range of inquiry, by excluding all persons not possessing them. Many objects at or near the scene of a crime may serve as a means of identifying the perpetrator, when they correspond with other objects found in the possession of the supposed offender. A bullet extracted from the body of the deceased, fitting the barrel of a pistol, or a bullet mould found on the person of the defendant; patches and tow-wadding found near the body of the deceased, corresponding with those found in the possession of the accused. These are familiar instances.[3]

Firearms — proximity — direction — rule as to.

§ 281. Where the wound which resulted in death indicates that the firearm causing it was in close proximity to the person of the deceased, or the direction of the wounds left by the ball shows it to have entered in front, in the rear, or at the side, or from a higher or lower point, this will be a satisfactory indication of the relative position of the party firing.[4] Wounds inflicted by the deceased upon the person of the accused, in the course of resistance or in self-defense, in a particular manner or with a particular instrument; as in the case of a robbery, the prosecutor struck the robber in the face with a key; and a mark of a key corresponding was visible on the face of the accused, and this went far to identify him.[5]

Infanticide — birth — death — what amounts to.

§ 282. In all cases of killing, whether it be homicide or infanticide, the general rule is, that the death of the alleged deceased must be proven (though there are some exceptions to this general rule). In an English case decided in 1834, the prisoner, Eliza Brain, was indicted for the murder of her male bastard child. It appeared that the prisoner had been delivered of a child at Sandford ferry, and that the body of

[1] Burrill Cir. Ev. 269.
[2] Best Presumption, § 218.
[3] Burrill Cir. Ev. 272.
[4] McCann v. State, 13 S. & M. (Miss.) 471, 482, 494.
[5] Best Presumption, § 218.

the child was afterward found in the water, about fifteen feet from the lock-gate, near the ferry-house; but it was proved by two surgeons, Mr. Box and Mr. Hester, that the child had never breathed. In summing up, PARK, J., said: "A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after birth. But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder. This is not only my opinion, but the law was laid down in a case as strong as this, by a very learned judge (Mr. Justice LITTLEDALE), at the Old Bailey."[1] The weight of authority now seems to be, in cases of alleged infanticide, that it must be shown that the child had acquired an independent circulation and existence; and that it had breathed in course of birth is not sufficient.

Of the deceased — identity — confession.

§ 283. In all trials for murder, the *corpus delicti* must be proved beyond a reasonable doubt, as it has been said "where there is no proof of the *corpus delicti*, except on uncorroborated extra-judicial confession, a conviction of murder is impossible." And the *corpus delicti* is said to be in two parts: 1. The death of the alleged deceased person; and 2. The criminal agency in effecting the death. And the proof of both must be made out; hence the necessity of identifying the victim and the accused. In a Missouri case, decided in 1874, one German was indicted for the murder of Canaday. On the first trial he was convicted of the offense, and on the second trial there was a verdict of murder in the second degree, and that was reversed upon the rule above stated. The defendant and Canaday lived together, Canaday having married German's wife's mother. On the day Canaday disappeared, the two started together in a wagon, to work in a corn-field about two miles distant. Defendant returned alone in the evening. When asked where Canaday was, he said: "A couple of men came along where they were at work, and gave the old man a drink of whisky, and he went off with them." And he uniformly told the same story. After a few months, the woods between their house and the field was searched, a pair of old boots, some clothing and bones were found, but no one could iden-

[1] Reg. v. Dredge, 1 Cox, 235. And see Rex v. Brain, 6 Carr. & Payne, 349; Rex v. Enoch, 5 id. 539.

tify either. Eight months thereafter, defendant removed to Kansas, forty miles distant, where he was subsequently arrested. He stated to an officer while under arrest, and as the officer said "completely broke," that he was guilty. This confession, uncorroborated by proof of the *corpus delicti*, was held insufficient.[1] In this case, the court, WAGNER, J., quotes from Lord HALE, as follows: "I would never convict any person for stealing the goods of a person unknown, merely because he would not give an account how he came by them, unless there was due proof made that a felony had been committed. 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."[2] The court also refers to another author, who says: "It may be doubted whether justice and policy ever sanction a conviction where there is no other proof of the *corpus delicti* than the uncorroborated confession of the party."[3]

Corpus delicti — how it may be proved.

§ 284. While the *corpus delicti* must be proved, in every case of murder, to the satisfaction of the jury, beyond a reasonable doubt, it does not follow that the proof shall be direct and positive; identification of the deceased need not be by witnesses who recognize the body, from an inspection thereof, as that of the person alleged to have been killed. A certain nature and degree of proof is required to identify the accused with the person charged in the indictment, and the proof of the identity of the deceased may be of the same nature and degree. But the best evidence possible must be given. In a Texas case, decided in 1872, Taylor was indicted for the murder of Evans. The question of identity was all important. OGDEN, J., said: "In the case at bar there was no direct and positive proof of the identity of the body found as the body of Morgan Evans, by any person who knew the deceased during his life, and saw the body after his death. But there was proof of a minute description of the body after death, and the father, who listened to the testimony, recognized it as a description of the body of his son. Both father and brother recognized the clothing, hat and other articles found on or near the dead body. There were papers found on the person of the deceased, which had been given to a man calling himself M. Evans, but a short time before his death. The wagon and team found in the possession of the defendant, and some portion of the loading of

[1] State v. German, 54 Mo. 526.
[2] 1 Whart. Cr. L., §§ 745–46.
[3] Wills Cir. Ev., § 6.

the wagon were proven to have been Evans' a short time before his death; and even the dog on the premises of defendant was proven to have belonged to M. Evans. These circumstances were held sufficient to identify the deceased.[1] In a trial for murder in Virginia, decided by the Court of Appeals in 1871, the court said: "Whatever may be the circumstances of strong suspicion against the accused, it would be dangerous to the last degree to convict a person of a capital offense unless the party charged with having been murdered is proved to be actually dead, either by the finding and identification of the body, or by proof of such criminal violence as would likely produce death, and exerted in such manner as to account for the disappearance of the body.[2] This general rule on the subject of identification of the dead is also held by the courts of New York.[3]*

[1] Taylor v. State, 35 Tex. 98, 112.
[2] Smith v. Com., 21 Gratt. 809–819.
[3] Ruloff v. People, 18 N. Y. 179; People v. Bennett, 49 id. 137.

*Mr. Archbold in his Crim. Pr. and Pl., at page 728, note, says: "The *corpus delicti*, that a murder has been committed by some one, is essentially necessary to be proved, and Lord HALE advises that in no case should a prisoner be convicted, where the dead body has not been found — where the fact of murder depends upon the fact of disappearance. Although this remark of Lord HALE has often been quoted, yet it has not been generally regarded as authority, but at most as merely advisory. Mr. Russell, in his work on Crimes, after quoting the language of Lord HALE, says: 'But this rule, it seems, must be taken with some qualification; and circumstances may be sufficiently strong to show the fact of murder though the body has never been found.' Mr. Starkie, in his work on Evidence, remarks: 'It has been laid down by Lord HALE, as a rule of prudence in cases of murder, that to warrant a conviction proof should be given of the death, by evidence of the fact, or the actual finding of the dead body. But, although it be true that no conviction ought to take place unless there is the most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential.' Starkie Ev., vol. 2, p. 513. Mr. Wills in his essay on Circumstantial Evidence, after quoting the remarks of Lord HALE, says: 'To require the discovery of the body, in all cases, would be unreasonable, and lead to absurdity and injustice, and is, indeed, frequently rendered impossible by the act of the offender himself. The fact of death therefore, may be inferred from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground of reasonable doubt.' And Mr. Chitty (1 Chitty's Cr. Law, 738) says: 'It is said to be a good general rule, that no man should be found guilty of murder, unless the body of the deceased is found; because instances have arisen of persons being executed for murdering others, who have afterward been found to be alive. But this rule must be taken rather as a caution than as a maxim to be universally observed; for it would be easy, in many cases, so to conceal a body as to prevent it from being discovered.' These authorities were quoted with approbation by the Supreme Court of New York, in a recent case (People v. Ruloff, 3 Park. 401), and the rule laid down that, 'Where the body cannot be discovered, the *corpus delicti* may be proved by circumstantial evidence, where the facts and circumstances are so strong as to render it morally certain, and leave no ground for reasonable doubt.' (This case was, however, reversed on appeal by the New York Court of Appeals, on the ground that the *corpus delicti* had not been sufficiently proved, and the prisoner was subsequently discharged.) And the same has been held in Indiana. Stocking v. State, 7 Ind. 320. But see People v. Wilson, 3 Park. 199. In the case of Eugene Aram, the skeleton was found in a cave, thirteen years after the murder, the proof of the identity of the body was very faint, and, but for the strong circumstantial evidence, a conviction could never have been justified.

"Charles I, after being much disfigured, was identified by a resemblance to the head upon the coins issued during his reign. The Marchioness of Salisbury, found among the ruins of Hatfield House, was identified by gold appendages to the artificial teeth. In the case of Mary Martin, the identification was by missing teeth. In the case of Clewes, the body was identified

Circumstances — remote or proximate.

§ 285. To fix the identity of an accused party, as connected with the crime charged in the indictment, the circumstances must be remote or proximate, and the inference of approximation to identity narrows the range in which the criminal agent is to be sought, using this to aid the proof by circumstances the more approximate. Then, other circumstances less remote and more directly connecting the defendant with the crime, which may in some cases, but not in all,

twenty-three years after the murder, by the peculiarity of the teeth. Cases of mistaken identity, however, are not uncommon. * * * A very remarkable case occurred recently in Connecticut. A lad by the name of Sage, during one of the coldest mornings of the winter, was sent by his father to the barn to feed the cattle. The boy declined going because he had been threatened with violence by an Irishman named Patrick Nugent, who kept his horse at the barn. The father thought the excuse a frivolous one, and compelled the son to go, who departed in tears. This was the last seen of him by the family. Suspicion of foul play was at once aroused, and Nugent was arrested, but the evidence was not then deemed sufficient to commit him. A hole was found in the ice in the river in rear of the barn, and it was suggested that the body of the boy had been put through the opening into the river. Some time after, a body was found on the river bank, and was believed to be that of young Sage. The father saw upon it several marks which corresponded with those upon the body of his son. The height was precisely the same, and a piece of the coat was recognized as resembling the coat worn by his son. In the spring the lining of an overcoat, corresponding with that of young Sage, was found on the banks of the river. Still there was no positive evidence against Nugent; but suspicion grew stronger daily, until at length all doubt was removed by the appearance of a sailor named John Amos Benson, whose testimony was direct and positive. We give the statement below, as it was given during the examination. Nugent was then arrested. Benson stated that he was passing on the day of the disappearance of young Sage, and when near the barn he heard an altercation. He looked in and saw Nugent and his wife, and a boy whom he described, and whose description answered perfectly to that of young Sage. Nugent, with an oath, struck down the boy with a club, and then stabbed him with a knife. As he looked out of the door he saw the witness Benson — asked what he was doing there, and finally compelled him to come in and help him to remove the body (when he said this, Nugent's wife exclaimed 'Oh, what a lie!') Benson added, that he did remove the body to the haymow, which he had never seen before or since. He was asked what young Sage had on his feet, and he answered, a pair of cowhide boots, one of which was worn through at the side and the other was worn through on the ball. The father said that was true, and that his son was about having the boots mended. Blood was found on the barn floor, and pieces of the floor were sawed and saved for the trial. The jack-knife was also found, or one supposed to be the knife used to complete the murder. Benson described the gangway through which the body was carried to the haymow in an adjoining barn, and here tracks in the snow were remembered to have been seen from one barn to the other Benson said he never saw the boy before the murder, but he remembered his appearance. He picked out a man in the room who had such hair, and the father said the comparison was correct. No doubt now remained in the mind of any person in the room of the guilt of Nugent. When the prisoner was brought in, he was asked if he knew Benson. He said no; he had never seen him before. Benson replied: 'Yes you do, Nugent, and you know you killed that boy, and that I helped to put the body under the hay.' Benson was then told to look Nugent in the face and tell the whole story. He did so, Nugent all the while trembling like a condemned culprit. On being told that he was in a bad scrape, he said: 'I know it, but God is my man — he will get me out of it.' Nugent was then remanded to prison, and accidental circumstances delayed his trial. Notwithstanding the direct character of the above testimony, subsequent events showed that the eye that never sleeps — the Providence that is ever active in all the affairs of mankind — was watchful and vigilant as ever, to bring out the astounding truths that seem to lie so far beyond all human vision. The missing lad (Sage) made his appearance, and the sailor confessed that he picked up the facts about the town, and then concocted the whole story for the sole purpose of obtaining the $200 reward offered."

amount to the most complete proof of identification. Wounds may often serve as an indication of the position of the parties at the time a murder was committed. And this often becomes especially important when the case depends entirely upon circumstantial evidence.[1] And so, the fragments of garments, or written or printed papers, or other articles found in the possession of the parties charged with crime, with other fragments or parts at the scene of the crime, may relate to the *corpus delicti* and from which may be inferred a satisfactory identification. Or it may be shown by wounds or marks which have been inflicted upon the person charged with the crime.[2] A Spaniard was convicted of having caused a grievous injury to an officer of the post-office, by means of several packages containing fulminating powder, put by him into the post-office, one of which exploded in the act of stamping. The letters, which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havanna and Matanzas, who appeared to be objects of the writer's malignant intentions. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters in the post-office on the evening of the 22d, the explosion having occurred on the 24th, and there was found upon his person a seal which corresponded with the impression on the letters, which circumstance (though there were other strong facts) was considered as conclusive of his guilt, and he was convicted on these facts.[3]

Death, the result of criminal agency.

§ 286. The Court of Appeals of New York decided, in 1872, a case involving the question of *corpus delicti*. One Bennett was indicted for the murder of his wife, and convicted of manslaughter in the second degree. It was there held that of the crime of murder or manslaughter, the *corpus delicti* has two components, viz.: death as the result, and the criminal agency of another as the cause. That there must be direct proof of one or the other; where one is proven by direct evidence, the other may be established by circumstantial evidence. And in determining a question of fact upon a criminal trial from circumstantial evidence, the facts proved must not only be consistent with, and point to the guilt of the prisoner, but must be inconsistent with his innocence.[4] Mr. Burrill says: "A dead body or

[1] McCann v. State, 13 S. & M. (Miss.) 472.
[2] Wills Cir. Ev. 118.
[3] Wills Cir. Ev. 121. Citing Rex v. Palayo, Liverpool Mids, Quarter Sessions, 1836.
[4] People v. Bennett, 49 N. Y. 137.

its remains having been discovered and identified as that of the person charged to have been slain, and the basis of the *corpus delicti* having been thus far established, the next step in the process, and the one which seems to complete the proof of that indispensable preliminary fact, is to show that the death was caused by the criminal act of *another person*.[1]

Fatal wound — dying condition — identity.

§ 287. Where a person is found not dead, but in a dying condition, or with fatal injuries from which death results, the process of proof is much facilitated, identity being easily shown; and the declarations of the injured person himself furnish important and often conclusive evidence, not only as to the fact of the crime but also as to the criminal. The subject of identification is most frequently involved in the leading description of persons, and this becomes the most difficult and perplexing question with which the courts and juries have to deal, involving (1) the person of the subject of the crime, and (2) the identity of the criminal. The first process in cases of homicide, or presumed murder, forms the most essential proof as to the *corpus delicti*. This is essentially necessary in every case where the identification of the criminal is made a question or put in issue; and this is equally essential as the identification of the deceased.

[1] Burrill Cir. Ev. 682.

CHAPTER VIII.

ANCIENT RECORDS AND DOCUMENTS.

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SEC.
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322. Same — index—rule in Nebraska.
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324. Same — same — rule in Iowa.
325. Name misspelled—fraudulent purchaser.
326. Entering on the docket — when lien attaches.

Ancient documents — at thirty years old.

§ 288. In the identification of ancient deeds, wills and other documents, which have been duly attested by subscribing witnesses, and which documents have arrived at the age of thirty years, they prove themselves, when produced from the proper custodian or repository, and it is not necessary to produce the attesting witnesses; yet they may be called by the contesting party, if he has put in issue the genuineness of the document, when the burden of proof will devolve upon him.[1] This rule found its reason and justice in

[1] Stockbridge v. West Stockbridge, 14 Mass. 256; Talbot v. Hodson, 7 Taunt. 251.

the presumption that within thirty years the witnesses will have died, or otherwise disappeared; and so where the instrument has been legally executed thirty years prior, it proves itself without the attesting witnesses. As it is necessary to fix some period of time at which the attesting witnesses may be dispensed with, and the document to identify and prove itself, the law has fixed that period at thirty years.[1] But the instrument to be received and admitted in evidence must, it is held, be fair and free from any suspicion of fraud or unfairness. It must, at least, appear in all things to be complete, valid and regular.[2] In a case in England where the will in question was more than thirty years old, the handwriting of two of the attesting witnesses was proved, and no account was given of the other. The will appeared by the date to be thirty years old. "The testator died upwards of twenty years ago," and upon his death it was proved in the ecclesiastical court, since which it has not been acted upon. The question was whether the rule applicable to deeds should be applied as well to wills. And the rule was held to apply in the same manner and with like force. Mr. Greenleaf (vol. 1, § 21) says: "The same principle applies to the proof of the execution of *ancient deeds and wills*. Where these instruments are more than thirty years old, and are unblemished by any alterations, they are said to prove themselves; the bare production of them is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living." This rule of evidence is general, and has been often applied to deeds, wills and other documents, both in England and America, and has been established too long to be disregarded, or to justify an inquiry into its origin or its reason.[3] And it must in all such cases be made to appear that the document or instrument

[1] Vattier v. Hinde, 7 Pet. 253; King v. Little, 1 Cush. 436; Pitts v. Temple, 2 Mass. 538; Stockbridge v. West Stockbridge, 14 id. 256; Burling v. Patterson, 9 Carr. & P. 570; Northrop v. Wright, 24 Wend. 226; Talbot v. Hodson, 7 Taunt. 251; Stoddard v. Chambers, 2 How. 284; Burgin v. Chenault, 9 B. Mon. 285; M'Kenire v. Fraser, 9 Ves. 5; Clark v. Owens, 18 N. Y. 434; Little v. Downing, 37 N. H. 355; Urket v. Coryell, 5 Watts & S. 60; Doe v. Roe, 31 Ga. 593; McReynolds v. Longenberger, 57 Pa. St. 13; Carter v. Chaudron, 21 Ala. 72; Bell v. McCawley, 29 Ga. 355.

[2] Willson v. Betts, 4 Denio, 201; Fell v. Young, 63 Ill. 106; Doe v. Samples, 8 Ad. & El. 151; Reaume v. Chambers, 22 Mo. 36; Roe v. Rawlings, 7 East, 291; Jackson v. Davis, 5 Cow. 123; Lau v. Mumma, 43 Pa. St. 276.

[3] Doe v. Deakin, 3 Carr. & P. 402; Chelsea Water-works v. Cowper, 1 Esp. 275; Rex v. Farringdon, 2 T. R. 471; Rex v. Long Buckby, 7 East, 45; Doe v. Wolley, 8 Barn. & Cres. 22; Rex v. Ryton 5 T. R. 259; M'Kenire v. Fraser, 9 Ves. 5; Cook v. Totton, 6 Dana, 110; Walton v. Coulson, 1 McLean, 124; Settle v. Alison, 8 Ga. 201; Winn v. Patterson, 9 Pet. 674; Thruston v. Masterson, 9 Dana, 233; Jackson v. Blanshan, 3 Johns. 292.

thus produced comes from such custody and repository as to afford, at least, a reasonable presumption in favor of its genuineness, and that will, in all respects, free it from any just ground of suspicion.[1] In an English case Lord Tenterden, C. J., said: "The rule of computing the thirty years from the date of the deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence without proof of execution is, that the witnesses may be presumed to have died."[2] He omitted, however, the distinction that, in the *deed*, the thirty years will commence running from the date of the *deed*, but as to *wills*, from the death of the testator; as we shall see. In a case in Illinois, it was held that a conveyance, though more than thirty years old, cannot be admitted as an ancient deed, when purporting to be executed by one acting in a fiduciary character, in the absence of proof of his authority to make the deed. That when a deed purports to have been made under a *power*, and is sought to be used in evidence, that *power* must be made to appear.[3] In New York it was held that, in order to entitle a deed to be read in evidence as an ancient deed, without further evidence of its execution, proof that part of the premises contained in it have been possessed under it for thirty years is sufficient, even against one in possession of another part.[4]

Same — rule in several States.

§ 289. In an action of trover in Georgia, it was said that muniments of title, proven to have been in existence for forty years, with possession in conformity, and coming from the proper custody, are admissible *as ancient documents*.[5] And in the same State, that a deed for land more than thirty years old, found in the proper custody, accompanied by other deeds, together constituting a chain of title, and free from all suspicious appearance, is admissible in evidence without any further proof of execution.[6] And in New Hampshire, in an action of trespass *quare clausum fregit*, it was held that ancient records, when accompanied by admission that they came from the proper custody, are admissible in evidence without further proof of their authenticity; and further, that when a record becomes illegible by lapse of time, the testimony of a witness who had examined

[1] Jackson v. Davis, 5 Cow. 123; Doe v. Deakin, 3 Carr. & P. 402; Fetherly v. Waggoner, 11 Wend. 603; Doe v. Wolley, 8 Barn. & Cres. 22; Jackson v. Christman, 4 Wend. 277; Winn v. Patterson, 9 Pet. 674.

[2] Doe v. Wolley, 8 Barn. & Cres. 22.

[3] Fell v. Young, 63 Ill. 106.

[4] Jackson v. Davis, 5 Cow. 123.

[5] Bell v. McCawley, 29 Ga. 355.

[6] Doe v. Roe, 31 Ga. 593.

and copied it while legible was properly received to supply the defect.[1] The same rule was held in Alabama in an action of ejectment, that a deed more than thirty years old, and having nothing suspicious about it, is presumed to be genuine, without express proof, the witnesses being presumed to be dead; and when it was found in the proper custody, and is corroborated by the enjoyment under it, or by other equivalent explanatory proof, is allowed to prove itself.[2]

Same — rule in Pennsylvania and New York.

§ 290. The same rule prevails in Pennsylvania. When the instrument is more than thirty years old, and unblemished by alterations and found in the proper custody, it proves itself and is admissible, although the subscribing witnesses are living.[3] The courts of New York adhere to it. In an action of ejectment, involving a will as one of the muniments of title, held, that when it was produced on a trial, and was more than thirty years old, the legal presumption attached that the witnesses were dead, and that the party might resort to secondary evidence to prove the will, and that its production with the probate attached was sufficient evidence to authorize its being read in evidence on the trial.[4] Other American States hold this same rule, and as we have seen, it prevails in England, the source from whence we borrow it and many other valuable rules.

Ancient writings — comparison — ejectment.

§ 291. In an action of ejectment, brought in Pennsylvania, it was held that, in order to prove the handwriting of a person who had been dead more than forty years, witnesses may speak from comparison with signatures and writings in family records, admitted by them to be in such person's handwriting; from letters in possession of his family, purporting to have been signed by the party in his lifetime; and from official documents received in the proper office, and acted upon as genuine.[5] And in New York, in an ejectment case, it was held that where a witness to an ancient deed is dead, and such a period of time has elapsed after the paper was signed, that no person can be presumed to be then alive, who can testify to the signature of the witnesses or parties, evidence of a witness identifying, by

[1] Little v. Downing, 37 N. H. 355.
[2] Carter v. Chaudron, 21 Ala. 72.
[3] McReynolds v. Longenberger, 57 Pa. St. 13.
[4] Northrop v. Wright, 24 Wend. 221.
[5] Sweigart v. Richards, 8 Pa. St. 436. Citing M'Cormick v. M'Murtrie, 4 Watts, 192; Payne v. Craft, 7 Watts & S. 458; Nieman v. Ward, 1 id. 82.

verification, the signatures of both parties and witnesses should be received in evidence, though the witness may have no knowledge of the handwriting except that derived from an inspection of such ancient writings, which writings have been preserved as muniments of title to the estate in question.[1]

Same — deeds — evidence — rule in Illinois.

§ 292. In Illinois ejectment was brought, and it appeared that an ancient deed, to be admitted in evidence, must be proved as having been duly executed in some way to the satisfaction of the court, or it cannot be received. The party producing it must do every thing in his power to raise the presumption in favor of its genuineness. The main question in that case was, as to the admissibility of two deeds which were admitted as ancient deeds, without any proof of their execution. One of them bore date in 1819, and there was a certificate upon it, purporting to show that it was acknowledged in open court in Tennessee in the same year, and from the certificate of the record of deeds of Madison county, where the land lay, it appeared to have been recorded in 1820. But it was not insisted that the acknowledgment was according to law.[2] In the trial of the right of property in England, it was held that, where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for the jury to say, on the evidence, if the deed was sealed and delivered, as all that is very likely to have occurred, though the witness did not remember it.[3] It was also held that a will of land which has accompanied the possession for thirty years is evidence, without proof of its execution.[4]

Expert testimony — its use — its weakness.

§ 293. In an action in Michigan by a bank against the indorser of a promissory note for $5,000, the defense was, that the indorsement was not genuine. It was held that, where the genuineness of the defendant's signature is put in issue, experts may properly compare it, before the jury, with his acknowledged signature to other papers in the case. But defendant could not, on cross-examination, be required to write his name in court, for the purpose of comparison; nor to introduce signatures made by him before the instrument in suit. The evidence for the bank, to prove that the instrument was genuine,

[1] Jackson v. Brooks, 8 Wend. 426.
[2] Smith v. Rankin, 20 Ill. 14.
[3] Burling v. Paterson, 9 Carr. & P. 570.
[4] Shaller v. Brand, 6 Binn. 435.

was confined to the testimony of certain experts, who were allowed to compare it, before the jury, with signatures of the defendant to papers in the case, and admitted to be his. But the court refused to permit the defendant to bring in his signatures prior to the signing of the note, and not in the case and having no connection with it.[1] The rule in this country seems to be very generally settled that, in such cases, signatures not connected with the case cannot be introduced for the purpose of comparison.[2] In a case in the District of Columbia, CARTTER, C. J., said: "These three exhibits presented by Mrs. Cowan are either true, or they involve a series of complications and forgeries that would do credit to the hand of a masculine adept who has had the benefit of two or three convictions and the experience of some years' service in the penitentiary. * * * But upon what basis is it claimed that there is any proof of forgery here, after departing from the oath of the parties? The signatures of these papers are claimed not to be genuine, and here we are treated to the opinion of a half dozen who claimed to be experts, and who came up and gave us their views as to the genuineness of these signatures. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepid as scarcely to deserve a place in our jurisprudence." The remarks of this learned judge must meet with the concurrence of every lawyer who has bestowed much thought on the subject.[3]

Deed — will — thirty years old — evidence — execution.

§ 294. It is now generally held to be the settled rule that to authorize the reading in evidence of a deed more than thirty years old, without proof of its execution, as prescribed by the rules of law, it must be accompanied by possession.[4] And where a

[1] First Nat. Bank of Houghton v. Robert, 41 Mich. 709; Vinton v. Peck, 14 id. 295.

[2] Little v. Beazley, 2 Ala. 703; Myers v. Toscan, 3 N. H. 47; Goodyear v. Vosburgh, 63 Barb. 154; Randolph v. Loughlin, 48 N. Y. 456; Wilson v. Kirkland, 5 Hill, 182; Bowman v. Sanborn, 25 N. H. 110; Pope v. Askew, 1 Ired. 16; Hanley v. Gandy, 28 Tex. 211; Moore v. United States, 91 U. S. 271; Bank v. Whitehill, 10 Serg. & R. 110; Vickroy v. Skelley, 14 id. 372; Hazleton v. Bank, 32 Wis. 34; Pierce v. Northey, 14 id. 9; Cowan v. Beall, 1 McArth. (D. C.) 270; Tome v. R. Co., 39 Md. 36; Bishop v. State, 30 Ala. 34.

[3] Cowan v. Beall, 1 McArth. 270.

[4] Crane v. Marshall, 16 Me. 27; Ridgeley v. Johnson, 11 Barb. 527; Wagner v. Aiton, 1 Rice (S. C.), 100; Homer v. Cilley, 14 N. H. 85; Brown v. Wood, 6 Rich. Eq. (S. C.) 155; Green v. Chelsea, 24 Pick. 71; Dishazer v. Maitland, 12 Leigh (Va.), 524; Barr v. Gratz, 4 Wheat. 213; Bank, etc., v. Rutland, 33 Vt. 414; Willson v. Betts, 4 Denio, 201; Townsend v. Downer, 32 Vt. 183; Stockbridge v. West Stockbridge, 14 Mass. 257; Jackson v. Laroway, 3 Johns. Cas. 283; Hewlett v. Cock, 7 Wend. 371; Hall v. Gittings, 2 Harr. & J. 380; Winston v. Gwathmey, 8 B. Mon. (Ky.) 19.

will of lands is relied upon, and the party has been in possession for thirty years, it has been held that the thirty years will not commence running, like a deed, from its date, but from the death of the testator. The reason of this distinction is obvious — the deed takes effect from the date of its execution, while the will never takes effect until the death of the testator [1] In an action of ejectment in New York, the plaintiff's title depended upon the execution of a will. Where a witness testified, in the case of a lost will, thirty years old, that she was called upon to witness the execution of the will; that the testator signed it in the presence of herself and her husband and a third person, but that she did not recollect that the other person signed his name as a witness, it was held that the evidence was competent to submit it to the jury, and that it would authorize the finding of the due execution of the will.[2]

Will — lands — possession — thirty years.

§ 295. A will more than thirty years old, from the death of the testator, and possession of the land, held in conformity to it for that length of time, may be read in evidence as a link in the chain of title without further evidence of its execution. Where the existence, due execution and loss of a will are proved, its contents may be shown by parol, and the proof of the loss, being addressed to the court, need not be as strict and technical as when submitted to the jury. And in an action of ejectment, where the plaintiff derives title from his grandfather, which action is brought subsequent to the death of his father and mother, admissions made by the father and mother during their life-time, as to the existence and loss of the will alleged to have been executed by the grandfather, may properly be received in evidence.[2]

Ancient will — date — ejectment — rule in New York.

§ 296. It was held, in an action of ejectment in New York, that in order to entitle a will to be read in evidence as an ancient deed without further proof than its mere production, it must be at least thirty years old from the death of the testator, for the age of the will must be computed from the time of the testator's death, and not from its date. And so, where a will was dated in 1770, and possession of the land was taken under it and held from 1780 (when the testator died), for

[1] Doe v. Wolley, 8 Barn. & Cres. 22; Harris v. Eubanks, 1 Speers (S. C.), 183. And see Doe v. Owen, 8 Carr. & P. 751; Jackson v. Blanshan, 3 Johns. 292.

[2] Fetherly v. Waggoner, 11 Wend. 599.

twenty-seven years, it was not allowed to be read in evidence, without proof of its execution.[1]

Will — devisees — name — identity of testator.

§ 297. One C. died in Ohio, devising his property to his children, William and Ellen. The executor, being unable to find the devisees, turned the property over to the widow, an imbecile; and after the lapse of fourteen years, the plaintiffs came forward and claimed to be such children and sought to recover the property; and the question was, whether the father, who had abandoned them in another State, was the same "C." as the testator. It was held that any tendency of the courts to relieve parties from the *onus* of proving identity, because easier disproved than established, does not apply where the defendant is at a greater disadvantage than the plaintiff, as in this case, where he was a guardian of an imbecile, and without personal knowledge or access to the facts. Identity may be proved by the concurrence of several characteristics. Identity of person may be presumed from identity of name. Evidence of the personal appearance of a man, from memory, fifty years back, is too unreliable to be considered. The memory of an old lady, as to domestic occurrences of her youth, such as marriage, is entitled to more weight than the memory of an old man; and his memory as to business matters would be more reliable then hers. Declarations of the testator as to his history and family are admissible. So is a comparison of handwriting. In tracing the movements of the deceased, the court will take judicial notice of the history of the country, as to the date of the Seminole war in Florida, and the length of its duration.[2]

Name in judgment — idem sonans.

§ 298. As to the identity of the name, raising a presumption of the identity of the person, it was held in New York, that the omission of the middle letter of the middle name of the defendant in the entry and docket of a judgment recovered against him does not prevent its becoming a lien upon his real estate, as against subsequent purchasers from him in good faith. This does not seem clear, and perhaps is not the general rule.[3] It will be readily perceived that the above differs from the rule as to *idem sonans*, which is not to be rigidly enforced; the questions being mainly, whether

[1] Jackson v. Blanshan, 3 Johns. 292. And see Doe v. Phillips, 9 Johns. 169; Doe v. Campbell, 10 id. 475; Rex v. Meekley, 7 East, 45.

[2] Sperry v. Tebbs, 20 Week. L. Bull. 181.

[3] Clute v. Emmerich, 26 Hun, 10.

the variance from the true name is material, and this may be a question of fact for the jury, or it may be, under the general rule on the subject, decided by the court, unless there is a doubt as to whether it is *idem sonans;* yet, except in very clear cases, it would seem to be the safer practice to submit the question to the jury, as one of fact for their determination.

Identity of devisee — evidence of heirship.

§ 299. Gagani brought ejectment against Dupoyster in Kentucky to recover a tract of land, claiming as a devisee under the last will and testament of Baker Woodruff, deceased, to whom the land had been granted by the Commonwealth of Kentucky, and which land had been set apart to her by partition. The question finally resolved itself into one of relationship, and, therein, the question of identity; and it was held, substantially, that to prove by a third person declarations of another, as to relationship of the person in question to another, it must appear that the person making the declarations is dead, and that he was related to the person in question by blood or marriage, and the person hearing the declarations may prove them, whether he (the witness) be related or not, if otherwise competent to testify. But, where relationship is attempted to be proved by general repute in the family, and not by the declarations of deceased members of the family, it can be proved only by surviving members of the family. But, as in the case in hand, the issue being whether appellee was the devisee named in the will, the declarations of other devisees in the will, that the appellee was the person named, were hearsay and incompetent, the contest not being between the appellee and other devisees. This does not seem very clear, in view of the general rule on the subject. But to use the language of Bennett, J., who delivered the opinion of the court in this case: "In this contest between appellant and appellee, wherein it was denied that the appellee was the devisee under the will of Baker Woodruff, the fact attempted to be established by the witness was that he heard these persons, who claimed to be devisees under said will, say that the appellee was the person named as one of the devisees in said will. The evidence was clearly incompetent."[1]

Railroad accident — death — damages — identity of heirs.

§ 300. An action was brought against a railroad company to recover damages for injuries resulting in death. The action was

[1] Dupoyster v. Gagani, 84 Ky. 403 (1886).

brought under the statute of Colorado, by an administrator, for the use and benefit of the surviving children of the deceased. To prove lawful issue surviving the intestate, plaintiff relied mainly upon the conduct and demeanor of the adults, who came to their death in the accident on the railroad, and upon certain letters and documents found in a chest being then transported with them in the shape of baggage. It was held that declarations of a decedent, contained in letters shown to have been written by him, are competent to show his marriage; that documents purporting to be transcripts from certain official registers found in the baggage of a railway passenger who was killed in an accident are admissible upon the question of marriage of the party, without evidence of their authenticity.[1] The importance of this branch of the law of evidence is suggested, and fully shown by the great variety of cases, and the great multiplicity of circumstances under which its aid is invoked to enable the jury to understand the case before them; and the legal means to be resorted to, in order to establish identity, must, of necessity, be suggested by the facts of the particular case. Identity, like other facts, may be, and very often is, proved wholly by circumstances — often singular and peculiar, and yet sufficient to generate full belief. It has been well said, that "many curious cases of doubtful or disputed identity might be cited to illustrate the singular fortuitous resemblance between individuals, not only in their general appearance, but also in accidental marks. Other cases might be cited and also related, in which long absence and various circumstances have so changed a person, that his nearest relatives have not been able to recognize him. Usually in cases of disputed identity, whether of the dead or living, a scar, a deformity, or some congenital or indelible mark, as *navus maternus*, or mother's mark, a male, tattooing, etc., has proved the only means of recognition." And these difficulties in identity often arise in the attempt to prove an *alibi*, either of the prisoner or of the deceased, in either of which cases the same degree of evidence is required to prove identity.

Church register — marriages — baptisms.

§ 301. As a proof of personal identification, the aid of church registers are often invoked. But there has been quite a difference in the ruling in England and in this country, as to their admissibility, owing to the requirements as to keeping them, how they shall

[1] Kansas, etc., Ry. Co. v. Miller, 2 Col. 442.

be kept, and what they shall contain. And they were admissible there, in evidence when, and only when, they possessed all the requisites; and this was said to be the principle upon which they are entitled to credit. And as a rule they are admissible in evidence, not to prove all that they may contain, but all that they are required to contain, not to be evidence of what they are not required to contain.[1] But it is obviously essential to the official character of these records that the entries be promptly made, as long delay may impair their credibility; and to be made by the person who is the proper custodian, or whose business and duty it is to make them, and in the mode prescribed, if, in fact, any mode has been prescribed.[2] And the entire record of the matter should be certified; a mere certificate that certain facts do so appear will not suffice.[3] In proof of marriages, the parish register is, when taken alone, but an evidence of the marriage and its celebration, for these are the only facts that can be entered.[4] And the same may be said of the register of baptisms, as an evidence to be furnished by the record.[5] And it has been held (though now doubted) that the register must be one which the law requires to be kept.[6] It is not so in this country.

Same — same — identity — plea of infancy.

§ 302. The register of a child's age, not being in the record of his baptism, is not proof of his age and could not be used in support of a plea of infancy.[7] And in such case the register, while it is evidence of the identity of the name, cannot be evidence of the identity of the person. The identity of the person must, when in doubt or dispute, be proved by competent evidence.[8] As it was held in Maine in an attempt to prove marriage, that "proof of identity must be produced in such cases — it must be proof of identity of person and not of name merely; it may serve as a guard against fraud and deception."[9]

Proof of pedigree — rule as to evidence.

§ 303. The general rule as to the proof of pedigree is, that the reg-

[1] Brown v. Hicks, 1 Ark. 232; Haile v. Palmer, 5 Mo. 403.
[2] Walker v. Wingfield, 18 Ves. 443; Doe v. Bray, 8 Barn. & Cres. 813.
[3] Farr v. Swan, 2 Pa. St. 245; Owen v. Boyle, 3 Shepl. 147.
[4] Doe v. Barnes, 1 M. & Rob. 386.
[5] Clark v. Trinity Church, 5 Watts & S. 266; Rex v. North Petherton, 5 Barn. & Cres. 508.
[6] Morris v. Harmer, 7 Pet. 554.
[7] Huet v. Le Mesurier, 1 Cox Eq. 275; Burghart v. Angerstein, 6 Carr. & P. 690.
[8] Bain v. Mason, 1 Carr. & P. 202 Birt v. Barlow, 1 Dougl. 171.
[9] Wedgwood case, 8 Greenl. (Me.) 75.

ister of births, marriages and burials are competent evidence on a trial to prove pedigree; and where the original is of a public nature (*e. g.*, the records of the Reformed Dutch Church in the city of New York), a copy from the record, sworn to by the proper custodian of such record, was held to be admissible in evidence. Hearsay in the family, and among relations, traditions, and any thing which shows a general reputation, is also admissible to establish pedigree. Producing letters-patent to one, and then tracing a descent from one of the same name, are *prima facie* evidence that the patentee and the ancestor are one and the same person, and it then lies with the defendant to rebut or overcome this, by showing another of corresponding name, age, etc., or in some other legal way.[1]

Same — ejectment — agent — correspondence.

§ 304. In an action of ejectment in New York, decided in 1811, the lessors of the plaintiff resided in *England*, and claimed to be heirs of the person who died seized of the land in question, the recovery of which was sought by the action. A witness here deposed that he knew the ancestor, and had charge of the land as his agent, and corresponded with him, and, after his death, with the lessor, who sent him a power to act for him, as heir and devisee, and that his information was also derived from persons acquainted with the family of the lessors. It was held that this was sufficient evidence, *prima facie*, of pedigree and heirship, in the lessors, to go to the jury, for their consideration. Hearsay evidence is sufficient to prove pedigree or heirship. And it was also held that the acknowledgment of a deed from persons describing themselves as heirs, taken according to the directions of an act, before the mayor of London, is also a circumtance of weight in evidence of pedigree, but this, of itself, would perhaps be insufficient.[2]

Same — declarations — documents — land titles.

§ 305. In an English case decided in 1771, it was held that general declarations, or the answer of a parent in chancery, were good evidence, after the death of such parent, to prove that a child was born before marriage, but not to prove that a child born in wedlock was a bastard.[3] In speaking of these general declarations as evidence, Lord KENYON said: "I admit that declarations of members of a family, and perhaps of others living in habits of intimacy with them,

[1] Jackson v. King, 5 Cow. 237.
[2] Jackson v. Cooley, 8 Johns. 128.
[3] Goodright v. Moss, Cowp. 591.

are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in such cases."[1] Where a person who has no title to real property makes a conveyance of the same to another with the general covenants of warranty, and subsequently acquires title thereto, his title inures to, and vests in, his grantee, by operation of law, in discharge of his covenants. Parties in successive deeds of conveyance, constituting a chain of title, of the same name, are presumptively the same persons; and, in this country, there is no intendment that a party in twenty years may not change his residence, and a deed from Elijah Gore of Halifax, to Elijah Gore, Jr., of Halifax, was presumed to be from father to son, they being both of that name.[2] It was held that the presumption "*omnia rite essa acta*," would justify the court in treating as genuine, a paper purporting to be an answer, and found among the papers of the suit, although there is no indorsement of the filing thereof by the clerk, in the absence of proof to the contrary. But the testimony of one of the members of the firm, whose signature was attached to the answer, shows that he wrote the answer and he thought it was filed, and that the outside page of the double sheet was torn off.[3]

Of child — legacy — necessary evidence.

§ 306. Where a legacy was left to a certain child, and the question was whether he survived the ancestor, and whether a certain person who did survive her, and who was claimed to be the legatee, was in fact so. On the question of identity, it was held admissible to show the name such person bore, his personal appearance and conversation, and the account he gives of himself, his family connections and associations. Identity of person may be proved by the concurrence of several characteristics. The tendency of the courts is to relieve parties from the *onus* of proving identity, it being, as a general rule, more easily disproved than established.[4] The question of identity is a fact for the jury, and the court cannot presume the identity of a person.[5] But the proof of the name will raise the presumption.

Church register — day-book — evidence.

§ 307. In a New York case, decided in 1853, which was an action to recover dower in the premises described, as the widow of one

[1] Rex v. Inhab. of Eriswell, 3 T. R. 723.
[2] Cross v. Martin, 46 Vt. 14.
[3] Boyd v. Wyley, 18 Fed. Rep. 356.
[4] Mullery v. Hamilton, 71 Ga. 720 (1883).
[5] Ellsworth v. Moore, 5 Iowa, 486.

Maxwell, defendant denied that the plaintiff was the widow of Maxwell, or that he ever was her husband. To identify the plaintiff as the widow of Maxwell, the church record was produced to show the marriage. The court said: "The second ground of objection is founded on an erroneous view of the law. Dr. Berrian testified that 'since he had been rector of the church, it had been the practice for each minister of the parish to keep an account of the marriages solemnized by him, in a book kept by himself, as the marriages occur or soon after. The minister handed in the marriages on a slip of paper and I entered them in the book when at leisure.' And that he 'entered all the marriages solemnized by himself and his assistants, in the same book or marriage register. Cannot say what was the practice of Bishop Provost.' There are two answers to the objection: 1. There is not a particle of evidence to show that this practice prevailed when Eve Maxwell was married. 2. If it did, the register only, and not the original book of entry, is admissible in evidence. Mr. Starkie, in his treatise on Evidence (part 2, § 50, p. 715), when treating of public registers of births, marriages and burials, lays down the rule in the following language: 'Although the entries are first made in a *day-book*, such day-book is not evidence when the entry has been in a register.' See, also, to the same effect, 2 Phil. Ev. (3d Am. ed.) 112. The objection, therefore, is not well taken. The third ground of objection assumes that the register is only evidence of pedigree in any case. This cannot be so. It is laid down in Greenleaf (vol. 1, § 493), that a register of a marriage is evidence of the fact of the marriage, and of the time when it was solemnized."[1]

Children — when legitimate — proof of marriage.

§ 308. An important case from Maryland was decided by the Supreme Court of the United States in 1865. Dr. Crawford died in Maryland *intestate*, in 1859. He left a large estate, but left no widow or children, and no brothers or sisters surviving him. Claimants to his estate, however, as usual in such cases, were not long wanting; relations on the one hand by the name of Blackburn, and on the other hand, the Crawford family — four children of his brother, Thomas B., who had died before him. They being nephews and nieces, were nearer of course than the Blackburns, who were only cousins, but for one difficulty — their legitimacy was called into

[1] Maxwell v. Chapman, 8 Barb. 579.

question. It was alleged that their mother had been the mistress and not the wife of their father. The intercourse of the parties had, confessedly, in its origin been irregular; but the allegation was, that a marriage had subsequently taken place. The family name of the mother was Elizabeth Taylor. In May, 1860, Mr. Crawford being dead, she gave under oath, in a judicial proceeding, her own account of her relations with him; in which, among many other things, she stated, they were married at St. Patrick's Church in Washington city by Rev. Mr. Fiziac, in the presence of her sister, Mrs. Evans, and her brother, Samuel Taylor, both of whom were then dead; that the marriage was kept secret on account of Dr. Crawford's opposition to it; that two of her children, George and Victoria, were born after this marriage, and that after this marriage they lived together as husband and wife, until his death. A jury in Maryland found specially that there had never been a lawful marriage of the parties, etc., and letters of administration were granted to Blackburn. The deposition of the priest, Fiziac, was taken in France. He had no memorandum or register of the marriage, nor any recollection of it; but said he never married parties without a license. It was held that a marriage in the District of Columbia, if celebrated by a clergyman *in facie ecclesiæ*, was not invalid for want of a marriage license; that if parties having had children in concubinage, marry and after the marriage recognize and treat such children as heirs, such children by the laws of Maryland are regarded as legitimate; that although parties had lived long together, and a marriage had been sworn to and the circumstances particularly described by one of the parties, and other witnesses have testified to facts indicative of wedlock as distinguished from concubinage, still the jury may find, on counter-evidence, that the cohabitation during the whole time was illicit. It was further held that it was error in the trial court to charge the jury, that "if a man and woman live together as husband and wife, and the man acknowledges the woman as his wife, and always treats her as such, and acknowledges and treats the children which she bore him as his children, and permits them to be called by his name, then the *presumption of law* is in favor of their legitimacy." The question of legitimacy under such circumstances is a question for the jury, the law making no presumption about it.[1]

[1] Blackburn v. Crawford, 3 Wall. 176, 189.

Church records — evidence of pedigree.

§ 309. The rule on the subject of proof by a church register in Missouri seems to be a little peculiar. It was held that church registers were not admissible in evidence, except by special statute, unless they are, by the civil law of the country or state where kept, recognized as documents of an authentic or public nature; and that recitals in such registers are not admissible as evidence of pedigree.[1] And that a child's baptism as shown by a church register is not evidence of his birth, or of his identity, nor evidence at all, unless the law requires the register to be kept.[2] But in England there is a different rule, to the effect that the certificate of births, baptisms, marriages and deaths are admissible in evidence, without proof of the identity of the person mentioned in them with the person as to whom the fact recorded by them is sought to be established.[3] And this, in fact, seems to be the rule both in England and in this country.

Identity of parties to actions.

§ 310. Identity is a quality or state of being identical, the same, or a sameness, or as given by Webster, the condition of being the same with something described or asserted, or of possessing a character claimed. And it has been very generally held by the courts of this country, that when the question refers merely to the identity of the person, the name raises a presumption of the identity of the person, and is *prima facie* evidence that the party is the same, when it is shown that the party bears the same name as the party to the action or the party sought to be affected. But the identity of the person, when that is in question, is an inference to be drawn from facts, latent or patent, and varied by the circumstances which may surround the case.[4] And, like all other legal presumptions, may be rebutted or overcome by the circumstances surrounding the case, though in the absence of some sufficient evidence to raise a doubt of the identity, the fact of the mere name has been held sufficient to identify the party. In an action of ejectment to recover nine-sixteenths ($\frac{9}{16}$) of a certain tract of land, the claim on both sides depended ultimately upon the will of one Peter Goodell, by which he

[1] Childress v. Cutter, 16 Mo. 25.

[2] Morrissey v. Wiggins Ferry Co., 47 Mo. 521.

[3] Sayer v. Glossop, 2 Exch. 409; Hubbard v. Lees, L. R., 1 id. 255; Jackson v. Boneham, 15 Johns. 226; Hyam v. Edwards, 1 Dallas, 2; Jackson v. King, 5 Cow. 237–241; Maxwell v. Chapman, 8 Barb. 579; Kingston v. Lesley, 10 Serg. & R. 383; Blackburn v. Crawford, 3 Wall. 189.

[4] Whart. Cr. Ev., §§ 13, 803, note 6; id., §§ 378, 807.

gave to his brother twenty-five acres of the north portion of the land in question, and if he died without heirs, to go to his sister Betsey, and the remainder of his estate to his said sister, she to support the testator's mother during her life, and if the sister died without heirs, her part to go to his five brothers. Plaintiff claimed under Frank Goodell who, it was insisted, was a son of Alexander, a brother of the testator. The proof of the name was the only evidence of identity. This was held sufficient.[1]

Ejectment — burden of proof.

§ 311. An action of ejectment was brought to recover real estate in New Madrid, in Missouri. It was located in the name of one Nathaniel Shaver. The decree in the chancery court was against the unknown heirs of said Shaver. Under this the defendant claimed title. Shaver in his life-time had transferred his certificate of location to George Ballinger, from whom Beverly Allen derived title. Allen sued and obtained a decree in 1835, and prior to a conveyance by Shaver's heirs to the plaintiff. Both parties claimed under Shaver, and it was held that if there was a want of identity of the person Shaver, the burden of showing it was on the plaintiff. That the names being identical, *prima facie* they were the same person, and that it rested with the plaintiff to show that they were not. That the name being identical raises the presumptive evidence that the party is the same, and this presumption will stand unless overthrown by other testimony.[2]

Same — ancient documents — wills — deeds.

§ 312. A recent case of some importance was decided in Pennsylvania. Ejectment was brought by Gehr against Sitler. It was held that the rule to which we have referred, *i. e.*, that identity of name is *prima facie* evidence of the identity of the person, is not good where the transactions are remote; that a mortgage executed one hundred and forty (140) years prior to the bringing of the suit by a person of a certain name is inadmissible in evidence to prove that a certain person of that name then resided in the locality of the land upon which the mortgage was given, in the absence of evidence to establish identity; and that on questions of pedigree, ancient wills, deeds mortgages and other documents executed by parties having the same name as the parties to the suit, in the absence of continuing recitals

[1] Goodell v. Hibbard, 32 Mich. 48 (1875).

[2] Gitt v. Watson, 18 Mo. 274. Citing Flournoy v. Warden, 17 id. 435.

as to relationship, are inadmissible in evidence, in the absence of proof that the parties who executed them were relations of the parties to the suit.[1]

Same — holding under sheriff's deed — name.

§ 313. Where, in an action of ejectment by the grantee in a sheriff's deed, the evidence showed that the judgment under which the sheriff sold was rendered in favor of one "Mariah H. Mather," but the deed recited that it was in favor of "Mariah Mathews," it was held inadmissible, as the names were not *idem sonans*. But the court said: "It matters not how two names are spelled, what their orthography is; they are *idem sonans* within the meaning of the books, if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in their pronunciation."[2]

Married woman — deed to land — in former name.

§ 314. In an action brought in Texas to recover a certain tract of two hundred and five acres of land, it appeared that the land had been conveyed to Mary A. Rudicil, the wife of W. A. Rudicil. She for the purpose of enabling her son, J. A. Rudicil, to sell it, and for no other consideration, made him a deed of the land. Subsequently she married one J. Schoonmaker; and still subsequently to such marriage, the son reconveyed the land to his mother, in her former name of *Rudicil*, instead of her then name of Schoonmaker. This deed was not recorded until half-past twelve, A. M., on February 5, 1884. Appellant held a note for $50, against J. A. Rudicil and Mary A. Rudicil, payable to McGregor and Lott, and indorsed by them. A judgment was recovered thereon against J. A. Rudicil and Mary A. Schoonmaker, and her husband, John Schoonmaker; and execution was levied on the land as the property of J. A. Rudicil, and the land was sold, and Wilkinson became the purchaser and took a deed. It was held that a deed made to a married woman by her name previous to marriage, where her identity as the same person is shown, is valid to convey the land.[3]

Evidence of identity — exceptions to general rules.

§ 315. In England, at a provisional meeting of a committee of a

[1] Sitler v. Gehr, 105 Pa. St. 577.

[2] Robson v. Thomas, 55 Mo. 582. Citing State v. Havely, 21 id. 498; Cato v. Hutson, 7 id. 142. And see Alexander v. Merry, 9 id. 514; State v. Curran, 18 id. 320.

[3] Wilkerson v. Schoonmaker, 77 Tex. 615.

railroad company, the plaintiff was appointed engineer of the railroad company. Previous to this the defendant had agreed to join the committee, and had forwarded applications for shares, but whether before or after the meeting was left in doubt. An individual answering to the defendant's name was present at the meeting, and visited the office of the company. It was held that there was no evidence of the identity of the defendant with that individual.[1] But the general rule in this country is, as stated in Michigan, that, "In the absence of circumstances to cast doubt upon the fact of identity, the identity of name is enough to raise the presumption of identity of person.[2] Upon the proof of identity Mr. Wharton says: "But questions of identity are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing."[3] And questions of identity are an exception to another important and well-recognized rule of evidence, which is, that the opinions of non-expert witnesses are inadmissible in evidence to go to the jury, upon the trial of any question of fact.[4]

Identity of ancestor — claim of land.

§ 316. A judgment will not be reversed, it was held, for want of identity of the ancestor of the party, who died in another State, with a person of the same name, to whom a deed was made about the time the ancestor was in the State where the deed was made, when the question of identity was first raised on appeal. And so in Texas in 1889, in an action brought to recover one hundred and twenty-five acres of land, part of a larger grant, the plaintiffs showed that Daniel J. Adonis acquired title to the land in 1858, through a regular chain of title from the sovereignty of the soil; and further, that a person of that name died in West Virginia in 1886, having lived there for many years. They further showed that Daniel J. Adonis, through whom they claim, was in Texas about the time the deed to a person of that name was made. There was no evidence tending to show that the person to whom the deed was made was not the same person through whom they claimed, nor was there any question of identity raised in the court below; but it was insisted on appeal that the judgment ought to be reversed for want of further proof of identity. But the judgment was affirmed. The court held

[1] Giles v. Cornfoot, 2 Car. & Kirw. 653.
[2] Goodell v. Hibbard, 32 Mich. 48.
[3] 2 Whart. Ev., § 1287.
[4] Hallahan v. R. Co., 102 N. Y. 194; Com. v. Pope, 103 Mass. 440.

that the sufficiency of proof as to the identity of the intestate with the grantor named in the deed could not be raised for the first time on appeal.[1]

Judgment docket — names — rule in Pennsylvania.

§ 317. A party purchased land from the grantors, who sold to him as "John Bubb" and wife, and paid off two judgments as part of the purchase-money. These judgments were entered on the docket as against "John Bubb." He was thereafter served with a *sci. fa.* on a judgment against *John Bobb*, which he resisted upon the ground that it was not a lien upon the property which he had purchased from "John Bubb" and wife. But it was held that the variance in the name was immaterial, both forms having the same sound in the German counties, and that the judgment was a lien upon the land so purchased. LOWRIE, C. J., said: "Courts cannot administer justice properly by a strict adherence to general customs, and by overlooking the modifications or limitations of those by special usage and customs. Even the language of a people, usually the most universal of its customs, is subject to local differences, which must be respected in the ascertainment of rights. The language spoken in some of the old German parts of this State is a special custom of this sort. It is neither correct German, nor correct English, and yet it is the means of verbal intercourse among a very large portion of our people. It has *norma loquendi* of its own, and is not to be tested by the rules of either good German or good English. In its vowels and in its consonant sounds, it differs from both; and of course this difference shows itself in the spelling of the names of persons. Bubb is the name here, as the party owning it spells it, but in the judgment docket, it is in this case written *Bobb*. According to our German mode of pronunciation prevailing in Lancaster county, the sound of both forms are identical, and the latter from the spelling is doubtless the most used in analogous cases; as in that of 'Pott,' pronounced 'Putt,' and as in other instances given by the learned judge of the Common Pleas. We cannot disregard such anomalies without doing great injustice; and people having relations with them, in the localities where they prevail, are bound to take notice of them. Persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled and to make their searches accordingly; unless, indeed, where the spelling is so entirely

[1] Holstein v. Adams, 72 Tex. 485.

unusual that persons cannot be expected to think of it. It may be well to notice, however, that since, in modern days, the surname has been the principal name instead of the christian name, and since surnames have become comparatively well settled, we could hardly allow the same variety in spelling these as was allowed in more ancient times, when Sanders, Sanderson, Allison and Ellison might have all been treated as one name, 'Allexanderson.' After the learned discussion of the subject by the judge of the Common Pleas in his opinion, it seems to us these remarks are sufficient for the case."[1]

Same — idem sonans — judgment liens.

§ 318. In Pennsylvania one man was given three names. Nicholas Heil and C. F. Lauer obtained a judgment in the District Court of Allegheny county in April, 1859, against George P. *Joest*, an exemplification of which was entered in Westmoreland county, July 9, 1859. Before this was entered in that county, there were judgments obtained against the same person, but the name was spelled "*Yoest.*" There were also judgments entered in Westmoreland county, subsequent to the judgment of Heil and Lauer — one in favor of *Lightner* v. *George P. Yeust*, and two in favor of *Fahnestock* v. *George P. Yosst.* These judgments were all against the same man, but in each case the name was spelled differently. Defendant's real estate in Westmoreland county was sold, and John Armstrong was appointed auditor to distribute the funds, $800, then in court. The court disposed of the case thus: "We think the auditor and the court below were right in refusing to permit the judgment of the appellants to participate in the distribution of the money in court. The fund was raised out of the sale of the real estate of George P. *Yoest*, and the judgment of the appellants was entered against George P. *Joest.* It is true that George P. *Yoest* and George P. *Joest* are the same person, and that in the German language the letters "Y" and "J" are pronounced alike. But in the distribution of the proceeds of a sheriff's sale, beside the question of identity of the debtor, there is one of record notice. Upon this second question no light is thrown by the fact that the name of the debtor, though spelled with different capitals, is the same in sound. The Act of Assembly, which requires that judgment dockets and indexes shall be kept, provides for notice to the eye, not to the ear. It contemplates that the docket shall be kept in English, and it does not impose upon any one who searches, the duty of

[1] Myer v. Fegaly, 39 Pa. St. 429.

inquiring whether some other letters may not spell the name of the debtor in another language. It was the duty of the appellants to see that their judgment was properly entered: *Wood* v. *Reynolds*, 7 W. & S. 406; entered so as to furnish to the eye of purchasers and subsequent incumbrancers that record notice which the Act of Assembly contemplates. We do not think that the legislature intended that a purchaser or incumbrancer, in searching for a name, the initial letter of which is "Y," should be under obligation to examine the index through the letters of "Y" and "J." We must so hold, or the judgment dockets and indexes would be shorn of their value, and the statutory purpose defeated. There are many sounds in our language which are indicated by different letters in other languages. This is true both of vowels and consonants. Thus, in the Spanish language the initial *J* has the sound of *H*. Must the purchaser search under the letters "J" and "H?"[1]

Judgment — defective entry — effect — notice.

§ 319. Under the statutes of Pennsylvania, it was held that a judgment against a partnership firm, docketed without setting forth the christian names of the several individual members of the firm, was not effective as a lien on the property of the firm, so far as it may affect subsequent *bona fide* purchasers or incumbrancers. But if such subsequent purchasers or incumbrancers have actual notice of the judgment, so defectively entered, before their rights attach to the property, it will be equivalent to the constructive notice required by law, to be given by the docket entry of the judgment. But between the immediate parties to the record in the action in which the judgment was rendered, the entry on the judgment docket or roll is unnecessary to create the lien on the defendant's real property. These statutes requiring entries of judgments on a docket or roll to be kept for that purpose, were established for the same purpose for which records of deeds, mortgages, deeds of trust and wills were provided, that is, to be a notice to purchasers, incumbrancers and others requiring rights in real estate.[2]

Same — purchaser or incumbrancer.

§ 320. A judgment entry required by statute, when defective, as we have seen, may be remedied by actual personal notice to subse-

[1] Heil & Lauer's Appeal, 40 Pa. St. 453. And see Ridgway's Appeal, 15 Pa. St. 177.

[2] York Bank's Appeal, 36 Pa. St. 458.

quent lien creditors, of the actual existence of the judgment. And it has been held that a judgment entered and indexed in such docket in the name of a firm, and not in the names of the individuals who compose the firm, will be postponed to the claim of a subsequent lien creditor, without notice, whose judgment is properly indexed in the names of the several partners who compose the firm.[1] A subsequent purchaser, incumbrancer, or judgment creditor is not bound to look beyond the *jugdment docket.* If the christian name of the defendant or defendants in the judgment is not entered in the judgment docket, the judgment, though valid as between the immediate parties, cannot affect subsequent purchasers or judgment creditors. It is the duty of the judgment creditor to see that his judgment is properly entered on the judgment docket.[2] A valid judgment lien upon real estate, which is a notice, will follow the property, not only into the hands of the first purchaser, but into the hands of any second, sub, or remote vendee, who is charged with notice of such lien.

Judgment — indexing — when is not docketing.

§ 321. Suits were brought in equity, one by Clark and Woodward, partners, and the other by T. J. Jones and Thos. Knapp, late partners, to subject real estate to sale to satisfy their judgments against D. B. Bridgford and N. F. Pate, partners, under the firm name of Bridgford & Co. The judgments were properly entered by the clerk in the body of the judgment docket, but were not indexed in the name of Pate, but merely in the name of Bridgford & Co. Subsequently Pate sold his land to O., who had no knowledge of C.'s judgment. On bill filed by C. to subject the lands in the hands of O. to the lien of the judgment, it was held that indexing was not a part of the docketing, and that the land was, therefore, subject to the lien of C.'s judgment, and the decree of sale thereof was granted.[3] This was the rule in Virginia.

Same — index — rule in Nebraska.

§ 322. Under the statute of Nebraska, as between judgment debtor and creditor, a judgment which is valid becomes a lien on realty without indexing, but it does not become a lien on realty, as against subsequent purchasers without notice, until properly indexed,

[1] Hamilton's Appeal, 103 Pa. St. 368. And see Smith's Appeal, 47 id. 128.

[2] Mann's Appeal, 1 Barr (Pa.), 25; Bear v. Patterson, 3 W. & S. (Pa.) 233; Mehaffy's Appeal, 7 id. 200.

[3] Old Dom. Gr. Co. v. Clarke, 28 Gratt. 617.

and a purchaser need not search beyond the index for judgment liens. A subsequent purchaser, however, is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such examination; and if he should fail to do so, he cannot plead ignorance of such facts as an examination of the record would have disclosed. If the index is of a character which would put him on inquiry, it is incumbent on him to make such inquiry. On September 21, 1874, the bank recovered a judgment against one Hall, in the Probate Court, for $374.85. The plaintiff took a transcript of the judgment and filed it with the clerk of the District Court on February 13, 1875. Hall then owned land in that county. This transcript was entered in the judgment-roll against Hall, Hill and Hill. In the general index Hall's name did not appear, but it was indexed thus: "Defendants, Hill, Theodore & Co. Plaintiffs, State Bank, Brownville." On September 22, 1875, Hall sold his real estate for $2,500, to plaintiff Metz, receiving $100 in cash, and executing a bond for title upon the payment of the remaining $2,400. Two days thereafter, upon examination, the condition of the title to the property in question was not discovered, in consequence of the general index failing to show, under the letter *H*, that Hall was a judgment debtor. Hall's deed to plaintiff was dated March 4, 1876. The court, speaking of the judgment and lien thereby created, said: "Therefore judgments which are valid as soon as rendered do not become liens upon real estate as against subsequent purchasers without notice, until properly indexed. And such purchasers are not required to search for judgment liens further than to examine the proper index."[1]

Judgment — names — rule in Texas.

§ 323. In Texas, the registration of the abstract of a judgment, which does not substantially describe the judgment, gives no notice, and fixes no lien, and a judgment which was rendered as a judgment in favor of Joan *Burkhead* and William *Burkhead* against W. T. & J. C. Roberts, fix no lien for a judgment rendered in a cause in which Joan *Bankhead* and William *Bankhead* were plaintiffs and W. T. Roberts and J. C. Roberts were defendants. It was said that "the names of the real plaintiffs and of the plaintiffs shown by the rec-

[1] Metz v. Bank, 7 Neb. 165. Citing Hance's Appeal, 1 Pa. St. 408; Ridgway's Appeal, 15 id. 177; Wood v. Reynolds, 7 W. & S. 406; Buchan v. Sumner, 2 Barb. Ch. 167; Braithwaite v. Watts, 2 Cromp. & J. 318.

ords are not *idem sonans*."[1] And this is the general rule which seems to prevail in this country and in England, where the pronunciation is different.

Same — same — rule in Iowa.

§ 324. It was held in a recent case in Iowa, adhering to the general rule on the subject, that where a party is not charged with the constructive notice of liens, by the index-book of judgments, he will not be bound by what may appear of record. And when two names differing in sound are commonly used as the same, or are derived from the same source, as understood in the English language, the use of one for the other was held not to be a misnomer; and so it was held that "Helen" and "Ellen" are distinct names, and that where a judgment was entered in the index of the judgment-roll, and indexed against Ellen Desney, it was not a constructive notice of a judgment lien upon the real estate belonging to "Helen" Desney, in that county.[2]

Name misspelled — fraudulent purchaser.

§ 325. A judgment, it was held in Minnesota, duly recovered against a defendant, whose name is incorrectly spelled in the proceeding, is, when entered on the docket, no lien on his real property, unless as against those who can claim that by reason of such misspelling the docket is not a notice to them. But no objection can be made to it by a fraudulent purchaser. The plaintiffs were partners, under the firm name of Fuller & Johnson. The defendant, Andrew *Nelson*, being indebted to the firm, judgment thereon was rendered against him in the name of Andrew *Neilson*. He was then the owner of lands in that county; but before the judgment was docketed, he sold his land to Helmbrecht, fraudulently, and with intent to defeat his creditors, Helmbrecht being privy to that intent; and an action was brought to set aside the conveyance. To use the language of the court: "Although *Nelson's* name was spelled wrong in the judgment, it having been duly recovered, was a good judgment against him, and, when docketed, a lien on his property, unless as to those (such as subsequent *bona fide* purchasers and incumbrancers) who could claim that, by reason of the misspelling, and their not being *idem sonans*, the docket was not a notice to them. Helmbrecht was

[1] Anthony v. Taylor, 68 Tex. 403. Citing Barron v. Thompson, 54 id. 235; Muller v. Boone, 63 id. 94. Citing Trimble v. State, 4 Blackf. 437; State v. Shaw, 28 Iowa, 67; 5 Bacon Abr., title "Misnomer."

[2] Thomas v. Desney, 57 Iowa, 58.

not in that position. He can make no objection to the judgment or docket, unless *Nelson* can make it."[1]

Entering on the docket — when lien attaches — rule in California

§ 326. It was held in California that if the clerk of the court, in docketing a judgment, omits the christian name of the debtor in the judgment, or fails to write the names in alphabetical order, this omission will not prevent the docket from making the judgment a lien on the real property of the judgment debtor; and if the debtor executes a conveyance of such property before the judgment is docketed, but the deed is not delivered to the purchaser until after the judgment is docketed, the judgment lien will attach to the property. If the former proposition is correct (which will probably admit of a doubt), the latter is clearly correct, for the reason that the rights of the purchaser do not attach until the *delivery* of the deed, which is the execution thereof, and conveys the title.[2]

[1] Fuller v. Nelson, 35 Minn. 213. [2] Hibberd v. Smith, 50 Cal. 511.

CHAPTER IX.

HANDWRITING — SUBSCRIBING WITNESS.

SEC.

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Identity of signature of attesting witness — origin of the rule.

§ 327. The history of the rule which requires the proof and identity of the handwriting of a subscribing witness to the execution of an instrument in the first instance, and before you are permitted to identify the signature of the maker or obligor, grew up in England it seems about the year 1786. The law upon the subject had long been unsettled; many doubts were expressed, and the opinions were conflicting. The rule which required the proof of the execution of the bond by the subscribing witness was reasonable, well recognized as a rule founded in reason, because he was chosen by the parties to bear witness to their contract, and proof of his handwriting in case he could not be found, and also proof of the handwriting, or the confession of the obligor would be, it was thought, very satisfactory, when not counteracted by opposing evidence; and for a long time the courts had been quite rigid in the enforcement of this rule, in case the witness was living. At length it was thought that this excessive strictness was productive of more harm than good.[1] Then an act of the English Parliament was passed to facilitate the proof of written instruments in the *East Indies* in 1786.[2] The courts were then soon of opinion that where the witness was in foreign countries, proof of his handwriting might be admitted on common-law principles. The question came up before the Court of Common Pleas in 1798, in an action of debt on a bond, where the instrument was executed in *Jamaica*, and attested by two witnesses, but it being produced at the trial at *Westminster*, appeared to have no seal, though a mark of a particular kind had been made with a pen, in the place where bonds are usually sealed; and evidence was admitted to show a custom in *Jamaica* to execute bonds in this manner. One of the attesting witnesses was dead, and the other resided in *Jamaica*. The handwriting of the former only was essential, and no evidence was given as to the handwriting of the obligor. There was judgment for the plaintiff subject to the opinion of the court. BULLER, J., said: "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. The handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of every thing on the face of the paper which

[1] Clark v. Sanderson, 3 Binn. (Pa.) 194.

[2] Act 26 Geo. 3d, chap. 57, § 38 (1786).

imports to be sealed by the party."[1] This was one of the early mistakes made by the courts, and it has been followed up, as we shall see in our next sections.

Same — admission — rule in England.

§ 328. Following up the rule as treated in our last section, another case in England was decided in 1808. The plaintiff put in a paper signed by defendant's attorney, whereby the signatures of the defendant and the attesting witness were admitted. Lord ELLENBOROUGH (given to doubting) first doubted whether the delivery of the bond by the defendant, as his deed, ought not also to have been admitted, or must not still be proved, to entitle the plaintiff to a verdict; but upon further consideration, his lordship said, as the attesting witness' handwriting was admitted, this might be taken as a presumptive admission of all he professed to attest, and would have been called upon to prove in the case, thereby attaching all importance to the admission of the signature of the subscribing witness, and no importance to the admission of the signature of the obligor who executed the paper.[2]

Same — same — signature of attesting witness.

§ 329. A previous case had been decided in England in 1803, in an action of debt on a bond, where it was held that the frank admission by the defendant — the obligor on the bond — was held not to be conclusive evidence of its execution by him, but mere secondary evidence of that fact, and could not be received as evidence of its execution, without showing that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown.[3] In these cases, perhaps, we find the origin of this fallacy. But at length that court did admit that it was reasonable that where the witness was out of the jurisdiction of the court, proof of his handwriting should be received in evidence. This may seem incredible, but, by reference to the cases above cited, you may find, to your astonishment, it is even so. Not only so, but the courts of New York have established the same rule, without giving the slightest reason for it.[4]

Same — error — doubtful rule — conflict.

§ 330. But some of our American courts, with probably not sufficient temerity to overrule decisions which are without reason, but

[1] Adam v. Kerr, 1 Bos. & Pull. 360.
[2] Milward v. Temple, 1 Campb. 375.
[3] Call v. Dunning, 4 East, 53.
[4] Jackson v. Waldron, 13 Wend. 178.

established as rules, have yet evinced a disposition to recede from these long-established rules. Other courts might have followed and changed the whole current of decisions on this subject, had it not been for the fact that the Supreme Court of the United States, in 1830, in a case involving this question, said: "Whatever may have been the origin of this rule, and in whatever reason it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness."[1] But we have heard it said that courts do sometimes blindly follow erroneous precedent. But the court of Pennsylvania, in 1810, had the boldness to express a doubt, without overruling, like Lord ELLENBOROUGH (more given to doubting than overruling). In an action of assumpsit against an executor on a promissory note, held, that if the subscribing witness be out of the jurisdiction of the court, or cannot be found after diligent search, and no person can be found within the jurisdiction who can prove the handwriting of the witness, the handwriting of the obligor may be proved. But the question there arose, whether, if the handwriting of the attesting witness be proved, that of the obligor should not be proved also. On the trial of the case plaintiff proved that the only subscribing witness resided, about seven years before, in *Cumberland* county; that about six years before, she was residing in *Baltimore;* that inquiry had been made for her in *Cumberland* without finding her, but that no inquiry had been made in *Baltimore*, and finally that diligent search had been made in *Cumberland* for some person who could prove the handwriting of the witness, but without effect. Plaintiff then offered to prove the handwriting of the obligor. This evidence was objected to, and overruled by the court, who sealed a bill of exceptions, which presented the question to the Supreme Court, where it was reversed.[2]*

[1] Clarke v. Courtney, 5 Pet. 344 (1831). [2] Clark v. Sanderson, 3 Binn. (Pa.) 195 (1810).

*Speaking on this subject, in Clark v. Sanderson, 3 Binn. (Pa.) 195, TILGHMAN, Ch. J., said: "This appears to me, on the whole, to be the best rule for the admission of secondary evidence, because it produces the greatest certainty. If the matter is made to depend on the degree of difficulty in procuring the testimony of the subscribing witness, no man will know what the law is. Whether the distance of a thousand or one hundred miles would be sufficient cause to admit secondary evidence, would depend on the ideas of the judge who tried the cause; nor is there any thing unreasonable in admitting this kind of evidence, when the witness is out of the jurisdiction of the court; the witness cannot be compelled to attend the court, consequently the writing to be proved, must be sent to the witness, which is attended not only with inconvenience, but some risk of loss, and after all, the jury are to decide whether the secondary evidence is satisfactory. It is always to be understood that there must be no fraud or collusion in getting the witness out of the way. If any thing of that kind can be proved, his testimony is not to be dispensed with. In the case before us the subscribing witness was out of the State. According

Witness — out of the way — collusion.

§ 331. In a case in England, the clerk of the defendant was a subscribing witness on a bond, and, when subpœnaed, said he would not attend, and the case was continued twice on account of his absence; search had been made at the defendant's house and in the neighborhood; and upon receiving information at the defendant's that the witness

to the principle that I have laid down then, proof of her handwriting was admissible, but this was not to be obtained, although search was made for proof in that part of the State where she had formerly resided. It will often happen that the handwriting of witnesses cannot be proved because persons are called as witnesses who reside in the family of the parties, not much accustomed to writing, and whose writing is very little known. What, then, is the next best evidence? The handwriting of the obligor. I rank the handwriting of the obligor after that of the witness, in compliance with the rule which has been established; although in my own opinion it is more convincing evidence of the execution of the bond by the obligor, than proof of the writing of the witness. When there is no doubt of the writing of the obligor, it is so difficult to account for his name being there, unless he executed the writing, that there will be little doubt of the execution. So important indeed is the handwriting of the obligor, that I am not satisfied its proof ought to be dispensed with, even where the writing of the subscribing witness has been proved. Considering all the facts stated in the bill of exceptions, I am of opinion that the evidence offered by the plaintiff in the court below, of the handwriting of *John Sanderson*, was improperly rejected; and therefore the judgment should be reversed and a *venire facias de novo* awarded." BRACKENRIDGE J., said: "I consider the rule of calling the subscribing witnesses to a writing or proving their handwriting, before proof can be let in of the handwriting or even acknowledgment of the maker, as founded upon very questionable reason, and to be restrained in its application. It is founded on this reason: The subscribing witnesses are supposed to be called upon by the person to whom the writing is made, as those on whom he depends to attest it in case of the want of proof; and he must resort to these by his own agreement, before he can recur to other proof. Or for another reason, that the person who makes the writing has an interest in having them; as by the act of witnessing they were considered as those who must in the first instance be called upon to prove it; so that if the making was attended with any circumstance that might avoid it in law or equity, it might be shown. It might rather be said, and which, in the understanding of the people, is the case, and is the true reason in fact of calling witnesses, that if the person to whom the writing is made should not be able to prove the handwriting of the maker, or acknowledgment that it is his handwriting, he might recur to the witnesses or proof of their handwriting, so as to have an enlarged chance of establishing the instrument. In such case the proof of handwriting of witnesses, or maker, might be considered of the same grade, and as all of a nature primary and original. At all events, proof of the handwriting of the maker is of equal rank with that of proof of the handwriting of the witnesses. The rule, however, is settled otherwise; but in analyzing the reason of it, and seeing that to be questionable or otherwise, we are justified in amplifying or restraining the application of it. I am, therefore, disposed to think that the being out of the reach of the process of the court should be the circumstance on which the letting in what is called the secondary evidence ought to be left to depend; though I should be as well satisfied, that proof of the handwriting of the maker could be admitted in the first instance, and that it should be left to the defendant to give notice that he meant to call the subscribing witnesses with a view to make out an equity explaining the assumpsit."

Under the strict adherence to, and enforcement of the above rule, difficulties sometimes arose. When the defendant, or party who had executed the instrument, wished to avoid it, or throw obstacles in the way of proving it, he would, by fraud and collusion, have the witness out of the way when he was most needed. But, when this could be proved, due diligence must be shown, before proof of the signature of the witness could be let in. And in Mills v. Twist, 8 Johns. 121, decided by the New York court in 1811, the witnesses to a written contract were the sons of the defendant, who executed the contract; and the plaintiff, the day before the sitting of the court, inquired of the defendant for the witnesses in order to have them subpœnaed, and was falsely told by the defendant that they were gone on a journey. This was held not to be a sufficient reason for admitting other testimony of the handwriting, the plaintiff not having used sufficient diligence to procure the witnesses. And see Cunliffe v. Sefton, 2 East, 183, and Crosby v. Percy, 1 Taunt. 365.

had gone to *Margate*, inquiry was there made without success. It was held that, under the circumstances, evidence of his handwriting was admissible. ABBOTT, C. J., said: "I remember the case well, and there was strong ground for believing that the witness was kept out of the way, purposely, by the defendant. It appears that upon receiving the subpœna, the witness said he would not attend. I do not believe that he did attend, with any view of exhibiting himself as a witness. I think that due diligence was made for him and that the search was made with reference to his condition. The case of *Crosby* v. *Percy*, 1 Taunt. 365, is as strong as the present, and upon the ground of collusion, and not believing that the postponement of the trial would have assisted the plaintiff in obtaining the attendance of this witness, I think that the evidence of his handwriting was properly admitted." BAYLEY, J., said: "The search must certainly be made with reference to the condition of the witness. I think that it has been so made in the present case. The clerk was referred to *Margate* and went thither." BEST, J., said: "The circumstance of the witness being subpœnaed would have been a very strong feature, if the court could believe that the witness actually attended according to the subpœna, but we do not believe this."[1]

Reason of the rule — difference in ruling.

§ 332. It was held in England in 1828, that to dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to show that he expressed an intention of leaving the country to avoid a criminal prosecution, and that he had good reason for doing so, and that his relations have not seen him since that time; that it was not necessary, in the absence of the subscribing witness, to prove the handwriting of the party who executed the deed, it is enough to prove the handwriting of the witness. And here, for the first time that I have noticed, was a slight disagreement of two of the English judges on this point. CAMPBELL, for defendant, said: "Mr. Justice BAYLEY holds that the handwriting of the party executing ought to be proved; and Lord TENTERDEN holds, that it need not. But Mr. Justice BAYLEY'S practice appears to me to have the better reason in its favor, because, if the subscribing witness is not produced, it will stand as if there was no subscribing witness, and then the handwriting of the party executing should be proved. But BEST,

[1] Burt v. Walker, 4 B. & Ald. 697. And see Mills v. Twist, 8 Johns. 121.

C. J., said: "I have a great respect for the opinion of my brother BAYLEY, but I think I am bound in such a case to act as my predecessors have done. It has been the uniform practice only to prove the handwriting of the attesting witness, and I am of opinion that it is the most convenient course. I consider that mode the most desirable which tends to diminish the number of witnesses." In a note to this case, we find a note, attempting to answer this objection, as follows: "I may perhaps be asked how, if the subscribing witness be not called, is the *identity* of the party executing to be proved unless by calling somebody who knows his handwriting? But to this it may be replied, that it is not to be presumed that the subscribing witness would have attested the executing of any other person than the person described in the deed; and this will be an answer to the argument relied on, that in the absence of the subscribing witness it would stand as if there were none."[1] It certainly would not strike the average reflecting mind as an answer. And I submit that it has neither reason or logic, and so far from being an answer to the question raised, it is not a fit answer for any imaginable question.

Same — when secondary evidence to be admitted.

§ 333. An action was brought on a bond for £600 executed in 1811. Defendant interposed a plea of *non est factum*. It was testified that the attesting witness kept out of the way to avoid an arrest. It was held that this was not a sufficient reason for dispensing with the attendance of such subscribing witness to prove the execution of the bond by the obligor, and evidence of his handwriting having been given *aliunde* on which the obligee obtained a verdict, the court ordered a new trial. Lord ELLENBORUGH is reported as having said: "The proof of the fact of a subscribing witness going to sea about twenty years ago (so great a portion of the life of man), and never being heard of since, would, of itself, be sufficient to admit proof of his handwriting."[2] To this case is appended a note from 1 Phillips on Evidence (5th ed.) 472, to-wit: "It is not possible by any general rule to ascertain precisely in what cases proof of the subscribing witness' handwriting will be admitted. Each case must depend upon its own peculiar circumstances. But in all cases it ought to be satisfactorily proved that a reasonable, honest and diligent inquiry has been made, without any evasion, and without any design to overlook the witness."

[1] Kay v. Brookman, 3 Carr. & P. 555. [2] Pytt v. Griffith, 6 Moore, 538.

Same — attesting witness — avoiding subpœna.

§ 334. In another English case an action of assumpsit was brought on a bill of exchange against an executor. There was a subscribing witness, whose name was George Phillips, a son of the defendant. He was not called as a witness, but to account for his absence, it was proved that many unsuccessful attempts had been made to subpœna him. He lived with his father, and on application at the house, at different hours of various days, answers were given, sometimes that he was out of town, and sometimes that he was gone out for a walk. One witness stated, that when told that he was gone out for a walk, he watched the house for hours, but did not see him return. On another occasion he watched from five in the morning till nine, and then inquired for him. The servant said, he had been gone out for an hour. The witness said: "It is impossible, for I have been watching since five." The servant replied, laughingly, "He went out the back way this morning." TINDALL, J., said: "I think you have hunted enough after George Phillips. It is evident that they are keeping you at arm's length."[1]

Same — secondary evidence — when received.

§ 335. In a Massachusetts case where it became necessary to prove the execution of a deed, to which there were two subscribing witnesses, one of whom deposed that he did not recollect witnessing it, but knew the attestation to be in his handwriting, and that the other subscribing witness had, a short time previously, but long after the commencement of the suit in which the deposition was taken, left the State, after advertising his intention to do so, and that though the deponent did not recollect having seen him write his name, he had often received letters from him and thought the signature in question was his handwriting. This was held sufficient proof of the execution to read it in evidence. No question was asked as to the signature of the party signing the instrument. If this witness knew the handwriting of the grantor in the deed, he kept it to himself; if it were a forgery, it seemed that, under this rule, the fact might be concealed.[2] In an important case on this point Lord ELLENBOROUGH said: "I am disposed to treat whatever falls from the learned chief justice of the Common Pleas with the greatest respect, but I do not see how secondary evidence is to be admitted

[1] Hill v. Phillips, 5 Carr. & P. 356 (1832). [2] Russell v. Coffin, 8 Pick. 143.

or received according to the nature of the deed to be proved. It must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give."[1]

Witness — signature — circumstance not remembered.

§ 336. An action was brought on a bond, to which the defendant pleaded *non est factum*. An attesting witness thereto recognized his own signature, and was inclined to believe, from the circumstances, that the deed was executed in his presence. He remembered that the parties to it were assembled together at the time of the supposed execution of it. It was sufficient evidence to go to the jury, although the witness had no recollection of having seen either of the parties sign it, seal or deliver it, or heard either of them acknowledge it, at the time, to be their deed. The other subscribing witness was called by the opposite party, who testified that one of the parties had not signed it at the time of the attestation; nor had this witness any recollection, nor had ever been asked to sign it at any time that the witness knew of; and that in fact he was not present at the attestation. The case was submitted to the jury upon this testimony, and they found for the plaintiff, and the court refused to interfere or disturb their verdict.[2] In an English case in 1828, the attesting witness recognized his signature, but had no recollection of the fact of the instrument having been executed in his presence, but that seeing his signature to it he had no doubt he saw it executed. This was received by the court as sufficient to admit it to go in evidence to the jury.[3]

Same — same — rule in Kentucky.

§ 337. In a case decided in Kentucky in 1824, involving this question, the subscribing witness was called to prove the execution of the written instrument. He testified that he had then no recollection of the transaction, but although he could not remember attesting the paper, it was done in his handwriting; that the name of the party was not in his, the party's, handwriting. The witness further testified, that it had been his invariable practice in such cases never to attest a paper unless he saw the party sign it, or heard him acknowledge that it was his signature, and that he was confident the case then in question was not an exception to his general rule.

[1] Crosby v. Percy, 1 Taunt. 364.
[2] Collins v. Lemasters, 2 Bailey (S. C.), 141 (1831).
[3] Maugham v. Hubbard, 2 Mann. & Ry. 7.

This was held sufficient evidence of its execution to admit the paper in evidence to go to the jury.[1]

Two attesting witnesses — one absent.

§ 338. An action of debt was brought in England against an executor on a bond executed by the testator in his life-time, and the defendant interposed a plea of *non est factum*. The bond in question purported to have been executed in Ireland and to have been attested by two subscribing witnesses. The plaintiff, having called one of the witnesses, who swore to the execution of the bond, and having also given evidence to show that the bond had been signed by the testator, proposed to prove the handwriting of the other attesting witness, who, it appeared, was then in Ireland, but had not been applied to to attend. Lord ELLENBOROUGH was first of opinion that this evidence was inadmissible in the absence of proof of any steps having been taken to procure the attendance of the other witness. But PARK citing the case of *Prince* v. *Blackburn*, 2 East, 250, in which it had been laid down that evidence of the handwriting of the subscribing witness is admissible where the witness resided beyond the jurisdiction of the court. His lordship on the strength of this authority admitted the evidence.[2]

Same — one dead — one in Canada.

§ 339. In an action of covenant for rent reserved in a lease, to which there were two attesting witnesses, the court of New York, in compliance with the English rule on the subject, held that the proof of the handwriting of the witnesses, one of whom was dead and the other residing in Upper Canada, was sufficient without proving the handwriting of the lessor or the lessee. This, to pacify the rule we have seen on secondary evidence, that in cases requiring a resort to proof of handwriting of attesting witnesses, the presumption is that he has attested what took place, and that this is sufficient without proof of the signature of the maker, the latter being held to be of less importance than the former.[3] Where there were several witnesses to a deed or power of attorney, it was held not enough to prove that one of them is dead or beyond the jurisdiction, and then prove his handwriting with that of the party, but the absence of all must be accounted for; as that they are dead or beyond the jurisdic-

[1] Brown v. Anderson, 1 T. B. Monroe (Ky.), 198.

[2] Hodnett v. Forman, 1 Starkie, 90 (1815).

[3] Lush v. Druse, 4 Wend. 313 (1830).

tion of the court, or that diligent inquiry has been made and they cannot be found.[1]

Witnesses — absence to be accounted for.

§ 340. Where there was a dispute as to the identity of a witness to a deed, there being several persons of the same name, a witness, in order to identify him, was allowed to compare the handwriting subscribed as an attestation to the deed, with another writing, long in his possession, and reputed to be the handwriting of a man of the name subscribed, though he had never seen that man write. This evidence was received without objection; and the court inclined to think the evidence would have been admissible for the purpose of identity, even if it had been objected to.[2]

Same — power of attorney — presumption of death.

§ 341. In an action of ejectment which came to the Supreme Court of the United States from Georgia in 1835, claiming under a land grant from the State of Georgia to Bazil Jones, who gave a power of attorney to Thomas Smith to sell the land, which power of attorney was witnessed by Abraham Jones, J. P., and Thomas Harwood Jr., and a certified copy from the records of Richmond county, and to account for the loss of the original power of attorney, of which the copy was offered, and the use of diligence in search of the same, plaintiff read the deposition of William Patterson and others. William Robinson, clerk of the court, stated that he was deputy clerk at the time, and that the record of a power of attorney from B. Jones to Thomas Smyth, Jr., made by himself while clerk of the court, was a copy of the original, and he believed it to be genuine, for that the official signature of Abraham Jones must have induced him to commit the same to record. And it was admitted in evidence, though forty years old; and this was held to be a correct ruling, because after the lapse of thirty years the witness is presumed to be dead.[3] In a petition for the partition of land involving the execution of the will of Benajah Brown, Sr., it was held that one of the attesting witnesses to a will of lands may prove its execution on a trial at law, and where a witness to a last will and testament proved its due attestation, by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness,

[1] Jackson v. Gager, 5 Cow. 383 (1826).
[2] Jackson v. Cody, 9 Cow. 140 (1828).
[3] Winn v. Patterson, 9 Pet. 663, 674.

this was held to be sufficient evidence of the execution of the will to justify the court in submitting the will in evidence for the consideration of the jury, not, however, as conclusive of its validity.[1]

Witness — recollection — name — circumstances.

§ 342. In Pennsylvania in 1808, an action was brought upon a judgment entered by warrant of attorney against one Pigott. A joint commission was issued to London for the examination of witnesses, with interrogatories, etc.; depositions were taken and admitted in evidence, over the objection of the defendant; the depositions proved the power of attorney, and the judgment was affirmed. The attesting witness to the power of attorney testified that his name was subscribed as a witness and was of his own handwriting, as was also the defeasance of the warrant of attorney; that on having recourse to some private minutes of his own he found that on the day of the date of the said warrant he was at a certain house in *London*, where he supposes it was executed; that the seal was an impression from an engraving which belonged to him; and from all the circumstances he is convinced that he was present and witnessed the execution of the said instrument, and that there was no other subscribing witness to the instrument.[2]

Bond — deputy sheriff — signatures.

§ 343. An action was brought upon a bond given by one Luther as deputy sheriff, executed by him and sureties; the bond was produced on the trial. The subscribing witness testified that he subscribed his name to the execution of the bond; that he remembered that the sheriff was, on the day of its date, taking bonds of his deputies; that he recollected seeing some of the obligors at the time; that he could not say that he saw *Skinner* and *Carpenter* (two of the obligors), but he presumed that he saw *all* the obligors sign the bond, or that they acknowledged the execution of it, or he would not have witnessed it. This was held to be sufficient.[3] An action was brought in England in 1812, by a sheriff on a bail bond, taken by a lower sheriff, who made the caption to the bond; it was held that he (the lower sheriff) was a competent witness to prove the execution of the bond, if the defendant and obligor, knowing his situation, asked him to become attesting witness. It was objected by the counsel for the defendant, that Copeland, the bailiff, was not a com-

[1] Dan v. Brown, 4 Cow. 483 (1825).
[2] Pigott v. Holloway, 1 Binn. (Pa.) 436 (1808).
[3] Hall v. Luther, 13 Wend. 491 (1835).

petent witness, as this was, in substance, his own action, brought in the name of the sheriff. Lord ELLENBOROUGH held as above indicated, that the defendant could not take this objection, after having requested the witness, with full knowledge of the situation in which he stood, to attest the execution of the bond.[1]

Handwriting of subscribing witnesses.

§ 344. It has been held in New York, that the proof of the handwriting of a subscribing witness to a deed was sufficient evidence of its execution, although the witness be dead; and the party seeking to establish the deed is not bound, in addition to such testimony, to prove the handwriting of the grantor, or other facts to show his identity. But it was then said: "Whether proof of the identity of the grantor or obligor in addition to the signature of the subscribing witness is necessary or not is a point very much afloat in England." Some of the English cases hold to the rule above stated,[2] while others hold a different rule.[3] Lord Chief Justice ABBOTT held that proof of the signature of a subscribing witness was sufficient, even where the obligor signed with his mark."[4] And NELSON, Ch. J., of the Supreme Court of New York, said that this has been the uniform practice in that State since 1800. And in an early New York case an action was brought on a bond. It was held that where the witnesses to the bond were absent, out of State, proof of their handwriting was sufficient without proving the signature of the obligor.[5]

Proof of name — when prima facie.

§ 345. But a different rule was held in Kentucky in 1833. It was an action upon an injunction bond, which was attested by the clerk of the court. It was held that the *onus* was on the plaintiff; for if the attestation were an official act, and evidence of the signing, it would not still identify the individual as the one who signed.[6] The general rule on the subject was clearly the other way; upon showing that the names are identical, that alone was sufficient to throw the *onus* upon the defendant to rebut the presumption raised by the proof of the name.[7] It was sufficient in the first instance to

[1] Honeywood v. Peacock, 3 Campb. 196.

[2] Kimball v. Davis, 19 Wend. 437. And see Parkins v. Hawkshaw, 2 Stark. 239; Nelson v. Whittall, 1 B. & Ald. 19; Middleton v. Sandford, 4 Campb. 34; Whitelocke v. Musgrove, 1 Cromp. & M. 511.

[3] Adam v. Kerr, 1 Bos. & Pul. 360; Gough v. Cecil, 1 Selw. N. P. 563, n.; Milward v. Temple, 1 Campb. 375; Page v. Mann, 1 Mood. & Malk. 79; Mitchell v. Johnson, id. 176.

[4] Mitchell v. Johnson, 1 Mood. & Malk. 555.

[5] Mott v. Doughty, 1 Johns. Cas. 230; Sluby v. Champlin, 4 Johns. 461.

[6] Lush v. Druse, 4 Wend. 313.

[7] Robards v. Wolfe, 1 Dana (Ky.), 155.

raise the presumption, which will stand unless overcome or rebutte , but may be done by countervailing evidence, but in the absence of any such countervailing evidence, that presumption will support a verdict, if that be the only question. And where the name, residence and profession is the same, the *onus* is on the defendant to disprove the identity.[1] And in Massachusetts in an indictment for forgery in the execution of a bond to dissolve an attachment, the judge instructed the jury that, although a party might sign or use a fictitious name, which he had adopted for innocent purposes, he could not acquire a right to use it for fraudulent purposes, by so using it any number of times; and that there may be a forgery by the use of a fictitious name as well as by using a person's own name, if the intention exists to commit the fraud, by deception as to the identity of the person who so uses the name.[2]

Same — idem sonans.

§ 346. Where two persons had the same name and the same agent, evidence tending to show that one of them had ceased to do business, and that the other is in business and had transactions with the plaintiff which might have resulted in making him a creditor, was held to be sufficient to warrant a verdict.[3] In a Vermont case, decided in 1857, one Aaron J. Boge appeared in the charter of Granville (formerly Kingston) as one of the proprietors. The name of the plaintiff's ancestor was Aaron Jordan Bogue; but at an early period of his life his name had been usually written Boge. In the proprietor's records, Aaron J. Boge in one instance, and Aaron Jordan Bogue in another was mentioned as one of the proprietors. It was held that the names were *prima facie* to be considered identical for the purpose of establishing plaintiff's claim in ejectment.[4] One Henry V. Libhart sued Bennett before a justice of the peace on a judgment rendered by another justice. On the trial Libhart produced a record of a judgment in favor of H. V. Libhart, and there was no averment that the plaintiff was ever known by that name, nor was there any evidence of the identity of the plaintiff, and that Henry V. Libhart was not entitled to recover in an action on a judgment in favor of H. V. Libhart.[5]

[1] Russell v. Smyth, 9 M. & W. 818.
[2] Com. v. Costello, 120 Mass. 369. And see 2 East P. C. 941; Mead v. Young, 4 T. R. 28; Reg. v. Rogers, 8 C. & P. 629; Com. v. Foster, 114 Mass. 311.
[3] Jones v. Parker, 20 N. H. 31.
[4] Bogue v. Bigelow, 29 Vt. 179.
[5] Bennett v. Libhart, 27 Mich. 489.

Deed to father or son — same name.

§ 347. Where a father and son had the same name and lived together, and a conveyance of land was made to one of them by name, without designating whether it is to the father or the son; it was held that the law would presume that the father was intended as the grantee, in the absence of any proof to the contrary. And that it devolved upon the party claiming under the son, to introduce evidence sufficient *prima facie* to rebut such presumption, and thereby the *onus* will be shifted to the party claiming under the father, and then he will be bound to produce proof sufficient to overcome, or at least to equal in probative force, the case of the adverse party. And it was held to be error for the trial court to exclude from the consideration of the jury, by instructions, the character and circumstances of the occupancy as bearing upon the question whether the deed was to the father or the son.[1]

Parties to actions — variance — name.

§ 348. A. B. being the younger person of two of the same name residing in the same town brought an action by the name of A. B. only, omitting the addition of *junior*. The court below refused to allow him to amend by making the addition, and to give evidence of a written promise of the defendant to the plaintiff, by the name of A. B., *junior*. This was held to be error.[2] Where there are several persons of the same name in the same locality, and the facts raise a doubt as to the identity of the person, the mere identity of the name will not be sufficient.[3] A declaration described a note sued on as having been made by "Andrew A. Louden," and the general issue was pleaded without oath. It was held that the production of a note signed by "A. A. Louden" was insufficient without further proof of identity to authorize a judgment in the case for plaintiff.[4]

Identity of pilot — collision of vessels.

§ 349. In an English case, the action was brought against William Henderson, the pilot of a vessel, for negligently navigating the vessel and causing a collision with another vessel. The facts and circumstances under which it took place having been proved, it was

[1] Graves v. Colwell, 90 Ill. 612. Citing Lepiot v. Browne, 6 Mod. 198; Kincaid v. Howe, 10 Mass. 203; Padgett v. Lawrence, 10 Paige, 170; State v. Vittum, 9 N. H. 519; 2 Whart. Ev. 1273.

[2] Kincaid v. Howe, 10 Mass. 203 (1813).

[3] People v. Rolfe, 61 Cal. 541; Hamsher v. Kline, 57 Pa. St. 403; Aultman v. Timm, 93 Ind. 158; Goodell v. Hibbard, 32 Mich. 48; State v. Moore, 61 Mo. 276; Gitt v. Watson, 18 id. 274; Hamber v. Roberts, 7 M., G. & S. 861.

[4] Louden v. Walpole, 1 Ind. 319.

objected that no evidence had been given that the defendant was the pilot in charge of the vessel at the time she collided; whereupon counsel for plaintiff called out "Mr. Henderson," upon which a person in court answered "here," and said "I am the pilot." It was proved by one witness who had gone on the vessel at the time of the collision, that he had seen that person acting as pilot. This was held to be sufficient to identify the defendant as the pilot.[1]

Name — promissory note — suit for rent.

§ 350. It was held in Indiana that where, in a civil action on a promissory note, the proof showed the liability of a person bearing the name of the defendant, and there was no countervailing evidence on the question of identity, it was sufficient to establish defendant's liability,[2] and a similar rule is held in England;[3] and in Missouri identity of name was held to be *prima facie* evidence of identity of person, even where the party was indicted for arson.[4] Where William J. Douglas was plaintiff in an action to recover rent, and the defendant set up a judgment obtained in another court against William J. Douglas, without averring the identity, it was held that the identity of the parties is to be presumed from the identity of the names.[5] This seems to be the general rule. It is not necessary to aver the identity; if the person be not the same, the proof of that fact may come from the other side, and if it does not, the legal presumption will stand.

Subscribing witness — proof of.

§ 351. Upon the subject of the proof or identity of handwriting, it was held in California that an instrument in writing, executed and attested by a subscribing witness in a foreign country, or at a place beyond the jurisdiction of the court, can be proved by evidence of the handwriting of the party who executed it.[6] It was held in Massachusetts that a party was not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which is denied.[7] Where a party signs a name not his own, but one which he has

[1] Smith v. Henderson, 9 M. & W. 798.
[2] Aultman v. Timm, 93 Ind. 158.
[3] Hamber v. Roberts, 7 M., G. & S. 861.
[4] State v. Moore, 61 Mo. 276.
[5] Douglas v. Dakin, 46 Cal. 49.
[6] McMinn v. Whelan, 27 Cal. 300. And see Landers v. Bolton, 26 id. 394.
[7] King v. Donahue, 110 Mass. 155. Citing Stanger v. Searle, 1 Esp. 14; Keith v. Lothrop, 10 Cush. 453. And see Doe v. Newton, 5 A. & E. 514; Doe v. Suckermore, id. 703-5.

adopted, using it without intent to deceive as to the identity of the person signing, it is not a forgery.[1]

Photograph — writing — signature — evidence.

§ 352. Upon the issue of the genuineness of a signature, magnified photographic copies of the signature are admissible in evidence, accompanied by competent preliminary proof that the copies are accurate in all respects, except as to size and color. A photographer who is accustomed to examine handwriting in connection with his business, with a view to detect forgeries, is qualified to give an opinion as an expert, as to the genuineness of a disputed signature; even if his opinion is based in part on enlarged photographic copies made by himself of the disputed signature and of admitted genuine signatures of the same person, which he testifies are accurate copies except as to size and color.[2] As to the photographic copies of handwriting, it was held in New York, that a comparison of a signature in dispute with photographic copies of other writings for the purpose of getting an opinion from an expert as to the character of the signature as real or feigned, where the original from which the copies were made are not brought before the jury, and cannot be shown by other witnesses, should not be permitted, at least where there is no proof as to the manner and exactness of the photographic method used.[3]

Authority to sign the name of another.

§ 353. An indenture having been prepared for binding a boy as an apprentice, the apprentice and his father, being unable to write, desired a third person to write their names opposite two seals, and he did so. The indenture was not read over to them before signing. The apprentice immediately took and carried the indenture to the master, and left it with him; and afterward stated that, when he did so, he considered himself bound by the terms of the indenture, and that he went into service under it. Under these circumstances it was held that the indenture was sufficiently executed and delivered because they authorized their names to be affixed to the indenture.[4] Perhaps the decision of this case attached too much importance to the admissions of the minor.*

[1] Rex v. Bontien, Russ. & Ry. 260 and cases there cited.

[2] Marcy v. Barnes, 16 Gray, 161

[3] Hynes v. McDermott, 82 N. Y. 41 (1881).

[4] Rex v. Inhab. of Longnor, 4 Barn. & Adol. 647.

*In Ingram v. Hall, 1 Hayw. (N. C.) 207, the court said: "If the deed be lost, and that appear to the court, then the copy shall be read, as affording a presumption. But if there be no copy, then an abstract may be admitted, that affording a probable presumption; and if no abstract,

Subscribing witness to promissory note.

§ 354. The subscribing witness to a promissory note in Massachusetts having removed beyond the limits of the Commonwealth, other evidence was held to be admissible to prove the due execution of the promissory note by establishing the handwriting of such witness. Comparison of the contested signature of a party to a written contract with other writings proved or admitted to be genuine, was said to be, by the common law of that Commonwealth, proper evidence. It was insisted that the handwriting of the subscribing witness ought to have been proved before the plaintiff should have been permitted to resort to other evidence. But the court said: "As the instrument in question is good without a subscribing witness, we do not think this strictness necessary, however it might be in relation to deeds or instruments under seal, where something more is necessary to be proved than the mere signature of the party.[1]

Ejectment — notice — witness to.

§ 355. But, in an action of ejectment in England, where it appeared that a notice to quit had been given in writing, signed by the party giving it and attested by a subscribing witness, it was held that it must be proved by calling that witness, or his absence must be accounted for. Proof that it was served on the tenant, that he read it, and did not object to it, was held to be insufficient as a service of notice. On this point, Lord ELLENBOROUGH, C. J., said: "The objection to it as a parol notice is, that it appears to be a written one, and as a written one that the handwriting of the party was not proved by calling the attesting witness. It is among the first principles, that if the handwriting must be proved, and there is an attesting witness, that witness must be called or his absence accounted for." DAMFIER, J., said: "The execution of a bond is a fact, but the obligor's subscription must be proved by the attesting witness, if there be one."[2]

[1] Homer v. Wallis, 11 Mass. 309.

[2] Doe v. Durnford, 2 Maule & S. 62.

parol evidence of the contract may be offered. The true intent of the parties to be regulated by that contract, shall not be defeated and justice overturned so long as any evidence remains which throws any glimmering of light on the subject, from which a jury may be enabled to infer the real state of the transaction. The subscribing witnesses in the case above stated are not required, because the deed cannot be proved without them, as has been already evinced, but because, were they not produced, the defendant would be deprived of the cross-examination of those persons he had provided to give testimony for himself, as well as for the other party; and who, if produced, upon such cross-examination, would, perhaps, give material testimony for him. But if the subscribing witnesses are not to be had, the law chooses the least of two evils. It is better to dispense with the witnesses and receive other proof which may be sufficient, than adhere to the rule when they cannot be had, and so, at any rate, destroy the deed; thus, if the obligee removes the witness, his acknowledgment that he executed the deed is proof."

Interested witness — when incompetent.

§ 356. Where a subscribing witness becomes interested as a party to the proceeding, or otherwise, and thus becomes incompetent to testify in the cause, then other evidence may be introduced to prove the due execution of the paper; for instance, where goods sold were attached as the property of the vendor, and were then replevied by the vendee, and the subscribing witness to the bill of sale of the goods became a surety on the replevin bond. At the trial of the replevin the officer (who was the defendant) objected to the introduction of such witness by the vendee to prove the execution of the bill of sale, upon the ground that he was surety on the bond when the vendee offered to procure a new surety, to which the defendant refused his consent. It was held that the execution of the bill of sale might be proved by other evidence than the testimony of the attesting witness; and that the vendee was not bound to produce the vendor for that purpose.[1]

Witness — search for — diligence required.

§ 357. In an action on a bond in England, evidence was offered to show that proper and due diligent inquiry had been made to find and procure the testimony of one of the subscribing witnesses at the place of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstances relating to him. The court, upon this proof, held that it was sufficient, and that the party then had the right to come in with the proof of the handwriting of the other subscribing witness, who had since become interested as administratrix to the obligee and was the plaintiff on the record in this case. Did the proof of her signature prove the execution of the bond? By no means; it proved merely the attestation. Why not prove the handwriting of the obligor? But the technicality must be pacified. LAWRENCE, J., said: "It is now admitted, as a general rule, that proof of the acknowledgment of the debt is not sufficient in an action on a bond, without calling the subscribing witness. The only question now is on that part of the report of the learned judge which states that he was not satisfied that sufficient inquiry had been made after *Richard Bates*, one of the subscribing witnesses, in order to let in the proof of the handwriting of the other subscribing witness, who has since become one of the parties interested. Now, no doubt a subscrib-

[1] Haynes v. Rutter, 24 Pick. 242.

ing witness' handwriting may be proved, if diligent inquiry has been made after him and he cannot be found. Then the question is, whether it be not sufficient to inquire after a witness whom nobody knows at the place where the obligor and obligee lived? It is stated that diligent inquiry was made after the witness there, but without success; then where else were the parties to inquire? It does seem that they have done every thing that could have been expected of them; and if so, I think they ought to have been let into the secondary evidence offered."[1] It would seem to be difficult to lay down a general rule as to the nature and degree of diligence required.

Same — diligence — rule in United States Supreme Court.

§ 358. An action was brought to recover household goods. Plaintiffs produced in evidence, in support of their title to the goods, a certain paper signed by one John Withers, to which John Pierson had subscribed his name as a witness, and offered parol evidence to prove that the subscribing witness "had, upward of a year ago, left the District of Columbia, and that before he left the said district, he declared that he should go northward, that is to say, to Philadelphia or New York, and said he had a wife in New York. That the subscribing witness went from said district to Norfolk, and that when he got there, he declared that he should go on further to the south, but where was not known, and that he has not been heard of by the witness for the last twelve months." It appeared that a subpœna had been issued in this case for him, directed to the marshal of the District of Columbia, but he could not be found. Plaintiffs then offered to prove the handwriting of the subscribing witness and also of the said John Withers to the said writing, but the court refused to permit him to produce evidence of the handwriting of the subscribing witness, and also refused to permit him to prove the handwriting of John Withers, otherwise than by the testimony of the said subscribing witness; to which refusal and ruling the plaintiffs' counsel excepted. This presented the rule in its full force, and as applied in this case, put it to a practical test, and which, perhaps, amounted to a denial of justice; and if it did not, it was most certainly not the fault of the rule. MARSHALL, Ch. J., said: "That the court had some difficulty upon the point. The general rule of evidence is, that the best evidence must be produced which the na-

[1] Cunliffe v. Sefton, 2 East, 183.

ture of the case admits, and which is in the power of the party. In consequence of that rule, the testimony of the subscribing witness must be had if possible. But if it appear that the testimony of the subscribing witness cannot be had the next best evidence is proof of his handwriting. In the present case it does not appear to the court that the testimony of the subscribing witness could not have been obtained if proper diligence had been used for that purpose. It does not appear that the witness had ever left Norfolk. It is not stated that any inquiry concerning him had ever been made there. If such inquiry had been made, and he could not be found, evidence of his handwriting might have been permitted. But as the case appears in the bill of exceptions, the court below did not err."[1]

Subscribing witness — secondary evidence — general rule.

§ 359. Where the name of a fictitious person is inserted as a subscribing witness to an instrument, it may be proved by other evidence, and there is no doubt but that in such cases you may treat the instrument as though it was unattested, and prove its execution by any other competent testimony, by proving the handwriting of the maker of the instrument, or his acknowledgment thereof.[2] The general rule seems to be, both in this country and England, that, where there is a subscribing witness to an instrument, his handwriting should be proved as the best secondary evidence, and in the first instance, in the absence of his testimony, and before the handwriting of the maker or his acknowledgment can be proved; either of which is secondary evidence; this is making degrees and drawing distinctions in secondary evidence. This rule requires, that before you can prove the signature of the maker or obligor, you must give a sufficient reason for not proving the handwriting of the subscribing witness. It is certainly difficult to perceive any reason in such a rule; the only idea advanced as a substitute for a reason to support the rule is, that the presumption is that he would not attest a falsehood; admitting that, and you have only raised a presumption, you have not proved the execution of the instrument, you have, at most, proved only the attestation, yet it is taken by the courts as proof of the due

[1] Cooke v. Woodrow, 5 Cranch, 13.

[2] Handy v. State, 7 Harr. & J. 42; Pelletreau v. Jackson, 11 Wend. 123; Gilliam v. Perkinson, 4 Rand. 325; Jackson v. Waldron, 13 Wend. 183; Farnsworth v. Briggs, 6 N. H. 561; Holloway v. Laurence, 1 Hawks, 49; Clark v. Sanderson, 3 Binn. 192; Duncan v. Beard, 2 Nott & McC. 400; M'Pherson v. Rathbone, 11 Wend. 99; Gregory v. Baugh, 4 Rand. 636; Whittemore v. Brooks, 1 Greenl. 57; Miller's Estate, 3 Rawle, 318; Raines v. Philips, 1 Leigh (Va.), 483; Bennet v. Robinson, 3 Stew. & Port. 229; Boyer v. Norris, 1 Harrington, 22.

execution of the instrument; and they blindly follow an erroneous English precedent; when the plain, reasonable and safe course lies open before them, to prove, in the first instance, the signature of the maker or obligor. The New York courts seem to have fixed the rule in their enlightened system of jurisprudence as firm as the laws of the Medes and Persians; and the Supreme Court of the United States adhere to it with a commendable tenacity. But Massachusetts, Pennsylvania and a few other States evince a disposition to recede from it.

Same — conflict — rule as to handwriting.

§ 360. As we have just suggested, when the maker or obligor of an instrument is dead, or denies his signature, and the subscribing witness is dead or absent, would it not be better, safer, more direct and satisfactory to make direct proof of the handwriting of the maker or obligor than that of the subscribing witness? This is the view taken by the courts of Massachusetts and Pennsylvania,[1] and substantially held in North Carolina,[2] Virginia,[3] Delaware,[4] and Maryland.[5] But the former rule, requiring proof of the signature of the attesting witness, as we remarked, is established in New York,[6] and by the Supreme Court of the United States,[7] and in England.[8] Some of the courts seem to draw a distinction in the requirement in the proof when an instrument is under seal, or when it requires a subscribing witness, and are less rigid in the enforcement of the rule when the instrument is a mere promissory note; and yet the reason for this distinction does not seem at all apparent.[9] It has been frequently held that where it becomes competent to prove the signature of the maker or obligor, you may then prove his declarations, admissions or confessions in relation to the instrument in question.[10] In an action of ejectment in New York, where a bond was signed by several obligors, and it came collaterally in question, and the name of one of the obligors and one of the witnesses was the same, and the judge

[1] Hamilton v. Marsden, 6 Binn. 45; Clark v. Sanderson, 3 id. 192; M'Gennis v. Allison, 10 S. & R. 199.

[2] Jones v. Blount, 1 Hayw. (N. C.) 238; Holloway v. Laurence, 1 Hawks, 49; Irving v. Irwing, 2 Hayw. (N. C.) 27.

[3] Gilliam v. Perkinson, 4 Rand. 325; Gregory v. Baugh, id. 636.

[4] Boyer v. Norris, 1 Harrington, 22.

[5] Handy v. State, 7 Harr. & J. 48.

[6] Jackson v. Waldron, 13 Wend. 178; M'Pherson v. Rathbone, 11 Wend. 96; Pelletreau v. Jackson, id. 110.

[7] Crane v. Morris, 6 Pet. 598; Cooke v. Woodrow, 5 Cranch, 13.

[8] Crosby v. Percy, 1 Taunt. 364.

[9] Whitaker v. Salisbury, 15 Pick. 534; Homer v. Wallis, 11 Mass. 309.

[10] Miller's Estate, 3 Rawle, 318; Holloway v. Laurence, 1 Hawks, 49; Taylor v. Meekly, 4 Yeates (Pa.), 79; Irving v. Irwing, 2 Hayw. (N. C.) 27; Conrad v. Farrow, 5 Watts, 536.

at the trial admitted the bond to be read in evidence, upon the proof of the handwriting of the other witness who was shown to be dead, without requiring the absence of the other witness to be accounted for; this was held to be error; and that, in the absence of proof, he was not authorized to say, from the identity of the name, that the obligor and the witness were the same person, thus adhering strictly to the rigid rule.[1]

Proof of receipt — common carrier — early rule.

§ 361. An action of assumpsit was brought on written agreement, dated May 23, 1822, by which defendant's testator acknowledged the receipt of twenty-eight bales of cotton, which he undertook to transport to Charleston as soon as possible, and for the freight to take one James Biddie "for pay." The declaration also contained counts on a general undertaking by the defendant's testator as a common carrier. Damages were claimed as the result of delay and negligence, etc. Defendant pleaded the general issue and the statute of limitations. In commenting upon the proof, JOHNSON, J., said: "Now, the only proof of the execution of the receipt by the defendant's testator was that of a witness who saw him sign a paper, stated to him to contain similar contents, but he did not pretend to identify the paper itself, either by the handwriting, for he was incompetent to judge of that, or by any mark; and for any thing that appears, the defendant's testator was accustomed to write, and his genuine signature might have been known to many. This evidence was, therefore, incompetent, inadmissible and proved nothing. There was, therefore, no proof of a special agreement.[2]

Rule as to admitting secondary evidence of signature.

§ 362. The rule prevails very generally, as we have seen, that diligent inquiry must be made for the subscribing witness before you can prove his handwriting (as though it was necessary to prove his handwriting at all), but when it is relied upon, it is not necessary to show that he is dead or out of the country, it is enough to show that he is beyond the process and jurisdiction of the court, and then you could invoke the aid of secondary or inferior evidence to prove the due execution of the paper.[3] Further comment upon the glaring absurdity of such a rule is unnecessary.

[1] Jackson v. Christman, 4 Wend. 278.
[2] Hunter v. Glenn, 1 Bailey (S.C.), 542.
[3] Sluby v. Champlin, 4 Johns. 461; People v. Rowland, 5 Barb. 449; Clark v. Sanderson, 3 Binn. 192; Foote v. Cobb, 18 Ala. 585; Jackson v. Gager, 5 Cow. 383; Selby v. Clark, 4 Hawks, 265; M'Pherson v. Rathbone, 11 Wend. 98; Ungles v. Graves, 2 Blackf. 191; Pelletreau v. Jackson, 11 Wend. 123; Hempstead v. Bird, 2 Day, 293; Homer v. Wallis, 11 Mass. 309.

Search for attesting witness.

§ 363. Where the subscribing witness to an instrument cannot be found upon diligent inquiry it will be the same as though there were no attesting witness, or as though he were dead or absent from the State, and evidence may be let in to prove his signature, and establish the execution of the instrument, to go in evidence to the jury for their consideration, but not as conclusive of the fact.[1] In an action of debt, one Jones, the attorney, was attesting witness; his signature was proved upon the ground that he could nowhere be found, after diligent inquiry. It appeared that a month before the trial, application was made to the defendant to admit the execution of the bond; but, before defendant decided to do so, a fortnight before the trial, inquiry was made for *Jones*, of his agent in *London*, and of his clerk, but neither could tell where he was to be found. Five or six days before the trial, inquiry was made at Jones' residence; but neither his wife, his servant or his brother could state where he was. On the 11th of July, and three days before the trial, his clerk received a letter from him, but this did not disclose his retreat; and a bailiff, from whom he had escaped, stated that search had been made for him a twelvemonth in vain. This was held sufficient, and the evidence of his handwriting was held to have been properly received.[2]

Same — where the witness disappears.

§ 364. In an action on a bond, witnessed by one William Wrangham, an attorney who had an office in *Seething Lane*, and resided with his family at Sydenham. It was an action on a post-obit bond; and it appeared that this attesting witness was not found, and they undertook to show that he had disappeared, but the search was held to be insufficient to let in the secondary evidence. Lord MANSFIELD said: "The balance of convenience was in favor of extending the rule, and that more inconvenience would result from excluding the secondary evidence than from admitting it. Nor was this doctrine, as had been usually supposed, a modern innovation. In an anonymous case (12 Mod. 607), which had been overlooked in the recent discussions upon this subject, Lord HOLT laid down the rule that 'in debt or bond, upon issue of *non est factum*, if the plaintiff prove the witnesses dead, beyond the sea, or that he had made strict in-

[1] Jackson v. Root, 18 Johns. 60; Spring v. Ins. Co., 8 Wheat. 269; Jackson v. Gager, 5 Cow. 383; Jones v. Cooprider, 1 Blackf. 47; Clark v. Sanderson, 3 Binn. 192; Sluby v. Champlin, 4 Johns. 461; Jackson v. Cody, 9 Cow. 140; Baker v. Blount, 2 Hayw. (N. C.) 404; Ingram v. Hall, 1 id. 207; Jackson v. Chamberlain, 8 Wend. 620.

[2] Morgan v. Morgan, 9 Bing. 359.

quiry after them and cannot hear of them he shall be let in to prove their bond. Lord ELLENBOROUGH said: "Upon these authorities I will admit the secondary evidence if you show that you could not by any means find out the attesting witness. But I shall watch very narrowly your proof of search. This extension of the rule may lead to dangerous consequences. If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may not be amused at the trial with an account of his having absconded." The testimony was let in.[1]

Diligent search for witness — what is?

§ 365. In an action of assumpsit on a written agreement, where the attesting witness to the execution of it was not produced at the trial, it was held sufficient to let in the handwriting, to prove by a person who knew him, but had not seen him for eighteen months, that at the request of the plaintiff's attorney he had made inquiry for him, at coffee-houses and other places where he thought he might hear from him, but without success; and that it was not necessary to show that inquiry had been made of both the parties who had executed the agreement.[2] As to what amounts to proper and due diligence and inquiry to let in the proof of the handwriting of the attesting witness, as secondary evidence, under this rule, as we see it laid down by the courts, it seems that no precise or definite rule or guide can be laid down, but each case must be made to depend upon its own particular circumstances; that it will, however, be sufficient, generally, if he should go to the place where the instrument was executed, if he knows where that is, and make diligent inquiry there, and the place where the parties reside who executed the instrument, and if unsuccessful in this, it would seem sufficient;[3] and circumstances might vary this rule very materially.

Same — degree of search — good faith.

§ 366. But the inquiry, search and effort to secure the attendance of the attesting witness to identify the signature and execution of the instrument must be *bona fide* and without any design to over-

[1] Wardell v. Fermor, 2 Campb. 282.

[2] Evans v. Curtis, 2 Carr. & P. 296.

[3] Jackson v. Cody, 9 Cow. 140; M'Gennis v. Allison, 10 Serg. & R. 199; Crosby v. Percy, 1 Taunt. 365; Cunliffe v. Sefton, 2 East, 183; Conrad v. Farrow, 5 Watts, 536; Evans v. Curtis, 2 Carr. & P. 296; Morgan v. Morgan, 9 Bing. 359; Wardell v. Fermor, 2 Campb. 282; Whittemore v. Brooks, 1 Greenl. 59; Mills v. Twist, 8 Johns. 121.

look the witness; in short, there must be no fraud, collusion, evasion or subterfuge, or intent to keep the witness out of the way, as the court will watch very narrowly the proof of search and inquiry.[1] But the declaration of the attesting witness as to the place of his residence, and as to inquiries made for him at his late residence, may be received in evidence to account for his non-production.[2] It was held that to dispense with the testimony of the attesting witness, his removal from the State must be shown by the evidence of a person residing at the place of his former residence, or from information there derived. A co-obligor was not permitted to prove the execution of a bond, unless after due diligence the party has failed to obtain proof of the handwriting of the witness.

When contract proved without writing.

§ 367. Where the contract or agreement has been reduced to writing by the parties and signed by them, it has been generally supposed to contain all the stipulations of such contract, and to constitute the only means of making the proof of such contract or agreement. But this is not always true; as a rule it has its exceptions, as it is not necessarily true as to all the matters to which it relates. But the transaction, though it may have been committed to writing, may often be sustained by evidence independent of the writing. But where it is the best evidence, it must be produced, under the well-recognized rule requiring the best evidence, or to be properly accounted for before secondary evidence is admissible.[3]

Writing — knowledge of — how acquired.

§ 368. But when proof can be made independent of the writing, if it is called for it must be produced or accounted for, because as to transactions of matters to which the instrument directly relates it is the primary evidence.[4] Knowledge of handwriting is a matter of the first importance, to enable a witness to give reliable testimony;

[1] Jackson v. Chamberlain, 8 Wend. 620; Wardell v. Fermor, 2 Campb. 282; Burt v. Walker, 4 B. & Ald. 697; Mills v. Twist, 8 Johns. 121; Baker v. Blount, 2 Hayw. (N. C.) 404; Hill v. Phillips, 5 Carr. & P. 356; Kay v. Brookman, 3 id. 555.

[2] Van Dyne v. Thayre, 19 Wend. 162; People v. Royland, 5 Barb. 449; State Bank v. Seawell, 18 Ala. 616.

[3] Van Dyne v. Thayre, 10 Wend. 163; Avery v. Butters, 2 Fairf. 404; Vanhorn v. Frick, 3 Serg. & R. 278; Campbell v. Wallace, 3 Yeates, 271; Davis v. Prevost, 7 La. 274; Grubbs v. M'Clatchy, 2 Yerg. 432; Boynton v. Rees, 8 Pick. 329; Condict v. Stevens, 1 Monroe, 74; M'Kinney v. Leacock, 1 Serg. & R. 27; United States v. Porter, 3 Day, 283.

[4] Wiggins v. Pryor, 3 Porter, 430; Hart v. Yunt, 1 Watts (Pa.), 253; Van Deusen v. Frink, 15 Pick. 449; Northrup v. Jackson, 13 Wend. 86; Raymond v. Sellick, 10 Conn. 480; Sebree v. Dorr, 9 Wheat. 558; Brush v. Taggart, 7 Johns. 19; Bloxam v. Elsee, 1 Carr. & P. 558; Wilmer v. Harris, 5 Harr. & J. 3; Cary v. Campbell, 10 Johns. 363.

and that knowledge may be acquired in various ways, and by many means, as by seeing the party sign the very signature in dispute, or by seeing him write his name at any time; by carrying on an epistolary correspondence with the party; by seeing much of his writing in business transactions, or official business; by handling many bank notes one may become familiar with the signature of the president and cashier of a bank, etc., and then by comparison, and other modes not here mentioned, where the question is the *identity* of the signature. Most of these rules are now well recognized. Formerly they were more restricted.[1] It is now, in fact, not very material how or by what means the witness may have acquired his knowledge of the handwriting in question. The real question is, and the true test for determining the admissibility of the testimony on the subject is, whether he has adequate knowledge of the genuine handwriting.[2] And the jury may form their judgment from a comparison of the writing in dispute with that shown to be genuine.[3]

Knowledge acquired from examining papers.

§ 369. The rule which we have just seen generally prevails where the witness has never seen the party write, nor even had correspondence with him, but is yet able to testify from other authenticated papers seen or received and examined in the course of business, in business relations or official matters.[4] One Sharp died, as it was supposed, intestate, and Brown was appointed administrator; but subsequently a will was found. Brown had never seen Sharp write, but acquired a knowledge of his handwriting from handling and examining his papers after his death, and testified, from a knowledge thus acquired, that the will was wholly in the handwriting of the deceased.[5]

By observation and comparison.

§ 370. An English case was a little singular. It was an action of assumpsit, and it became necessary to prove the signature of Mary

[1] Furber v. Hilliard, 2 N. H. 480; Hammond's case, 2 Greenl. 33; State v. Allen, 1 Hawks, 6; Turnipseed v. Hawkins, 1 McCord, 278; Clark v. Wallace, 3 Penn. 441; Titford v. Knott, 2 Johns. Cas. 211; Russell v. Coffin, 8 Pick. 143; Carey v. Pitt, 2 Peake Cas. 130.

[2] Jackson v. Murray, Anthon N. P. 143; Johnson v. Daverne, 19 Johns. 134; Gould v. Jones, 1 W. Bl. 384; Duncan v. Beard, 2 Nott & McC. 400.

[3] Myers v. Toscan, 3 N. H. 47; Goldsmith v. Bane, 3 Halst. 87; Homer v. Wallis, 11 Mass. 312; Farmers' Bank v. Whitehill, 10 Serg. & R. 110; Titford v. Knott, 2 Johns. Cas. 211; Plunket v. Bowman, 2 McCord, 138; Griffith v. Williams, 1 Cromp. & Jer. 47.

[4] Johnson v. Daverne, 19 Johns. 134; Thatcher v. Goff, 11 La. 94; Titford v. Knott, 2 Johns. Cas. 214; Furber v. Hilliard, 2 N. H. 481.

[5] Sharp v. Sharp, 2 Leigh, 249.

Smith, as attesting witness to an agreement purporting to have been signed by the plaintiff; for this purpose the defendant's attorney was called. He stated that he believed he was acquainted with Mary Smith's handwriting; that he never saw her write, but that he had observed the name of Mary Smith, signed to an affidavit which had been used by the plaintiff's counsel in answer to an affidavit to postpone the cause, and which was filed. In the affidavit it was sworn that Mary Smith was the wife of the plaintiff. PARK, J., said: "I think as you, the plaintiff's counsel, used the affidavit, the jury are bound to believe, at least, that your client did not think it was a fraud. If it was a mere comparison of handwriting, it would not do. But it is not so; the witness says he took notice of the signature, and in his mind formed an opinion which enabled him to swear to his belief. I have no doubt that it is evidence.[1] But proved specimens of the signature of a party are admissible in evidence for the purpose of showing by a comparison that a memorandum not signed by such party is in his handwriting.[2]

Attesting witness — proof — when and how made.

§ 371. Where there are several attesting witnesses to an instrument, before being allowed to prove their signatures, or any of them, the non-production of each attesting witness must be accounted for.[3] But if all of them are dead or absent and accounted for, the proof of the handwriting of any one of them will be sufficient.[4] But when the execution of the instrument is duly proved and goes to the jury in evidence, it is not conclusive; it is merely admitted to go to the jury, then the defense may be made; it may yet be shown to be void for fraud, want of consideration or other causes.[5] So extremely technical were the courts in requiring in the early cases in North Carolina, and so tenacious to the English rule, that it was held in an ac-

[1] Smith v. Sainsbury, 5 Carr. & P. 196.

[2] Richardson v. Newcomb, 21 Pick. 315.

[3] Jackson v. Root, 18 Johns. 60; Stump v. Hughes, 5 Hayw. (Tenn.) 93; Jackson v. Gager, 5 Cow. 383; Booker v. Bowles, 2 Blackf. 90; Jones v. Cooprider, 1 id. 47; Davison v. Bloomer, 1 Dall. 123; Hautz v. Rough, 2 Serg. & R. 349; Jackson v. Cody, 9 Cow. 140; Jackson v. Christman, 4 Wend. 277; Whittemore v. Brooks, 1 Greenl. (Me.) 57.

[4] Jackson v. Chamberlain, 8 Wend. 620; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 434; Coulson v. Walton, 9 Pet. 62; Mott v. Doughty, 1 Johns. Cas. 230; Jackson v. Cody, 9 Cow. 140; Jackson v. Lewis, 13 Johns. 504; Jackson v. Burton, 11 id. 64; Jones v. Cooprider, 1 Blackf. 49; Dudley v. Sumner, 5 Mass. 444.

[5] Clark v. Sanderson, 3 Binn. 192; Hamilton v. M'Guire, 2 Serg. & R. 478; Lautermilch v. Kneagy, 3 id. 202; Farnsworth v. Briggs, 6 N. H. 561; Spring v. Ins. Co., 8 Wheat. 268; Bell v. Cowgell, 1 Ashm. (Pa.) 7; Hamilton v. Marsden, 6 Binn. 45; Jackson v. Waldron, 13 Wend. 183.

tion on a bond or promissory note or bond for the payment of money without an attesting witness, could only be declared on as a sealed instrument, and proof of the obligor's handwriting would be admitted as proof of the seal; but proof of the seal was not evidence of delivery, which is to be inferred from other circumstances.[1] In an action of assumpsit against a party sought to be charged as indorser on a promissory note, and where it was proved that the signature of the indorser was not in the handwriting of the party, but that of the maker, it was held competent for the plaintiff, for the purpose of identifying it, and of *showing authority* in the maker and acquiescence in the indorser, to prove that the defendant remained silent after receiving protest, was sued and suffered judgment by default, and never complained till the maker absconded.[2]

Attesting witness to deed — proof.

§ 372. In an action to recover two hundred and ten acres of land upon which many houses had been built, it was held that the *onus* of proving the genuineness of the signature of an attesting witness to a deed in a civil suit rests on the party presenting the deed, and not on the party impeaching it, as in criminal proceedings; and it was held to be a misdirection in the judge, to tell the jury that, under the circumstances, they must try the question as to whether the deed was forged or not, in the same manner as if the defendant was on his trial for forgery. This entitled the plaintiff to a new trial. A witness to a deed being dead, his daughter, who was called at the trial to prove his handwriting, testified that the signature was not her father's handwriting, and in her examination, spoke of a letter, which she had with her, from her father to her mother, which letter, at the request of the judge, she produced in court, and the judge handed it to the jury to compare with the witness' alleged signature to deed. It was held that as the letter was not in any way connected with the cause, it ought not to have been handed to the jury, and for this cause the judgment of the court below was reversed.[3] Of all the various means or methods of acquiring a knowledge of a person's handwriting, the first and best is said to be by seeing the person write; and this has been the primary mode, but it does seem that it may well be doubted; for it is doubtless true that we may become as well, perhaps better acquainted with a man's handwriting by keeping up a protracted correspondence with him,

[1] Ingram v. Hall, 1 Hayw. (N. C.) 194.
[2] Weed v. Carpenter, 10 Wend. 404.
[3] Doe v. Wilson, 10 Moore P. C. 502.

than by seeing him write a few times; it is, at best, in either case, but a mental standard of comparison. But surely the former is the general rule.[1]

Several witnesses — necessity of calling them.

§ 373. Where an action was brought on a bond, to which there were two subscribing witnesses, one of the witnesses denied his signature thereto. It was held that the other, if he could be procured, should be examined, to identify the signature of the obligor, but if he could not be found, secondary evidence might be resorted to. In such case, the instrument stands as though his name was not attached thereto.[2] If the attesting witness to a bond resides in another and different State, beyond the reach of the process of the court, the party may resort to proof of his handwriting, and then offer the bond in evidence.[3] The rule is that where there are more attesting witnesses than one to an instrument in writing, one of them at least must be called, or the absence of all of them must be accounted for. The attesting witness is presumed to know all the facts attending the execution of the instrument; the parties having agreed to rest on his testimony; therefore, if possible, he must be procured.[4] Even proof of the admission of the obligor, that he did execute the deed, has been held, in several cases, insufficient, under the harsh rule we have seen, as an excuse for not calling the attesting witness.

Confession by obligor — not sufficient.

§ 374. It was held in the State of New York, in an action brought on a bond in 1808, that where there was an attesting witness to the execution of a bond, proof of the confession by the obligor that he did execute the bond was not sufficient to entitle the obligee to a judgment; that the witness must be called, or in case he is dead or out of the State, his handwriting must be proved. But it has long been held that where a deed was thirty years old, it may be admitted in evidence without any proof of execution; and this rule it

[1] George v. Surrey, M. & M. 516; Rex v. Tooke, 25 How. St. Tr. 71; Doe v. Suckermore, 5 A. & E. 703; Garrells v. Alexander, 4 Esp. 37; Lewis v. Sapio, M. & M. 39; Eagleton v. Kingston, 8 Ves. 473; Hopkins v. Megquire, 35 Me. 78; Hartung v. People, 4 Park. Cr. 319; Edelen v. Gough, 8 Gill, 87; Strong v. Brewer, 17 Ala. 706; Pepper v. Barnett, 22 Gratt. 405; United States v. Prout, 4 Cranch C. C. 301; Board v. Misenheimer, 78 Ill. 22; Hess v. State, 5 Ohio, 7; Rideout v. Newton, 17 N. H. 71; Magee v. Osborn, 32 N. Y. 669; Smith v. Walton, 8 Gill, 77; Bowman v. Sanborn, 25 N. H. 87; State v. Gay, 94 N. C. 814; Keith v. Lothrop, 10 Cush. 453; Com. v. Smith, 6 Serg. & R. 568; Hammond v. Varian, 54 N. Y. 398.

[2] Booker v. Bowles, 2 Blackf. 90.

[3] Jones v. Cooprider, 1 Blackf. 47.

[4] 1 Stark. Ev. 330.

seems applies to deeds conveying lands, bonds, receipts and other ancient writings.[1] What was held above as to the insufficiency of the confession by the obligor has gone as far as any of the English courts have ever gone. And PARK, J., did say: "What a party says is evidence against himself, whether it relates to the contents of a written instrument or any thing else."[2]

Signature — admission not received.

§ 375. Where an action was brought by an indorsee against the drawer and indorser of a bill of exchange, and called a witness to prove the signatures of the defendants, but the witness testified that he believed that neither the drawing nor indorsement were of the handwriting of the persons whom they purported to be, but it was proved that the defendant had acknowledged the acceptance to be his, and it was contended, that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and indorsement were of the same handwriting. But it was held to be necessary to give some proof as to whose the handwriting was. Here it seems that the defendant's admission would not be taken as against him; the only plausible reason that could be given would seem to be that the court did not believe the admission of the defendant. It is certainly a reflection upon a man's credibility, when the courts refuse to take his admission against himself; not only so, but it is an infringement upon one of the first rules of evidence.[3]

Same — attesting witness — satisfactory evidence.

§ 376. When the courts once concede the doctrine laid down in the above rule, they lose control of the whole subject, and it leads to dangerous consequences, and in many cases, perhaps, to a denial of justice. We have seen that the English courts, and some of our own, where the attesting witness cannot be produced, require proof of the handwriting of the attesting witness in the first instance; a rule for which it seems that no court has ever given a satisfactory reason. But in justice to some of the courts, growing restive under the iron chain of erroneous precedent, to say, in justice to them, that they require also some proof of the handwriting of the party executing the instrument, and this in addition to that of the handwriting of the at-

[1] Fox v. Reil, 3 Johns. 477; Governor v. Cowper, 1 Esp. 275; Roberts v. Stanton, 2 Munf. 129; Jackson v. Schoonmaker, 4 Johns. 161.

[2] Earle v. Picken, 5 Carr. & P. 542.

[3] Allport v. Meek, 4 Carr. & P. 267.

testing witness.[1] Why not require this in the first instance, in the absence of the subscribing witness. Secondary evidence is intended to supply the want of primary evidence, *i. e.*, to prove the same fact; in these cases to prove the execution of the instrument. If the testimony of the attesting witness (primary evidence) would prove it, then in his absence resort to secondary evidence, to prove the execution, not to prove the handwriting of the attesting witness, but the obligor, is more direct and satisfactory, because, when the plaintiff has proved the attestation, and has not proved the execution, it falls short.

Fictitious witness — attestation — evidence.

§ 377. An instrument purporting to be attested by a subscribing witness may be proved, as if there were no subscribing witness, where the name of a fictitious person is inserted as that of an attesting witness; or where the name of a real person has been written upon the instrument, but not by himself; or where the person who has put his name as attesting witness did so without the knowledge or consent of the parties; or where the attesting witness, on being called, denies having any knowledge of the execution.[2*] A rule somewhat different prevailed in England. Where the witness was infamous, and thereby unable to testify, in that case he was to be con-

[1] Jackson v. Waldron, 13 Wend. 178; Hopkins v. DeGraffenreid, 2 Bay. (S. C.) 187; Jackson v. LeGrange, 19 Johns. 386; Clarke v. Courtney, 5 Pet. 319; Gough v. Cecil, 1 Selw. N. P. 563, n.; Clark v. Sanderson, 3 Binn. 192; Dunbar v. Marden, 13 N. H. 311; Thomas v. Turnley, 2 Rob. (La.) 206.

[2] Lemon v. Dean, 2 Campb. 636; Fitzgerald v. Elsee, id. 635; Grellier v. Neale, 1 Peake, 146; Talbot v. Hodson, 7 Taunt. 251.

* Where the name of the attesting witness is shown to be fictitious, it will stand as if there were no witness, and the maker's signature may be proved, and the execution of the instrument proved by any other testimony; treating it as unattested. Handy v. State, 7 Harr. & J. 42; Farnsworth v. Briggs, 6 N. H. 561; Pelletreau v. Jackson, 11 Wend. 123; Gilliam v. Perkinson, 4 Rand. 325; Jackson v. Waldron, 13 Wend. 183; Clark v. Sanderson, 3 Binn. 192; Miller's Estate, 3 Rawle, 318; Raines v. Phillips, 1 Leigh (Va.), 483; Boyer v. Norris, 1 Harrington, 22; Duncan v. Beard, 2 Nott & McCord, 400; M'Pherson v. Rathbone, 11 Wend. 99. As we have seen, it has been generally held that where there is an attesting witness, the proof of his handwriting, in his absence, is considered the next best evidence; and as we have also seen, this must be produced or his absence accounted for, before the proof of the handwriting or confession of the maker can be admitted in evidence. But this rule so long established, without sufficient reason, has been frequently doubted, and in Pennsylvania and some other States, it has been said that the proof of the handwriting of the maker is more direct and satisfactory. Clark v. Sanderson, 3 Binn. 192; Raines v. Philips, 1 Leigh (Va.), 483; M'Gennis v. Allison, 10 Serg. & R. 199; Gregory v. Baugh, 4 Rand. 636; Hamilton v. Marsden, 6 Binn 45; Bogle, etc., Co. v. Sullivant, 1 Call. (Va.) 560. But in the latter case — Bogle, etc., Co. v. Sullivant, 1 Call. 56C (1799) — there was a plea of *non est factum*, and proof of the handwriting of the witnesses, and that they were dead. It was held that this was sufficient to admit the testimony to go to the jury, and that it was the province of the court to decide on the admissibility of the testimony — and of the jury to decide on its weight. And see Sigfried v. Levan, 6 Serg. & R. 308.

sidered as dead. One John Ward, of Hackney, who had been convicted of forgery, was a subscribing witness to a bond; on producing the record of his conviction, proof of his handwriting was let in.[1]

Witness to instrument — identity of person — name.

§ 378. In a Pennsylvania case, a witness testified that a signature as witness to a paper to which was the plaintiff's name, was his (the witness') signature, but that he did not know that the plaintiff was the person who signed in his presence. It was held that the paper was receivable in evidence; that if there is any evidence, however slight, tending to prove the formal execution of a deed, it is sufficient to entitle it to go to the jury; that identity of name is sufficient in the first instance as presumptive evidence of identity of person; that where a witness to an instrument has lost all memory of a transaction, the same rule applies as if he were dead, was out of the State, or had become interested. The presumption *prima facie* is that what a witness had attested has taken place in his presence.[2]

Comparison of writings — rule in Massachusetts.

§ 379. In Massachusetts, on a writ of dower, the tenant at the trial introduced in evidence a deed releasing dower, which she testified was a forgery. She thereupon wrote her name in the presence of the jury, seven or eight times in succession, upon slips of paper, and offered to submit it to the jury for comparison, to show that the signature was not genuine. The court permitted it, but this was held to be error.[3] But the courts of the same State do allow, in a proper case, and in a proper manner, comparison of handwriting, to show its identity, or that it is not genuine, and it is held as the common law of the State of Massachusetts.[4]

Assignment — indorsement of note.

§ 380. In the same State, an action of trover was brought by Brigham & Dodge, assignees of Lambert, on a promissory note for $578. The defense was, that the note had been indorsed by Lambert or his clerk to one Way, and that the right was not in the assignees of Lambert. Thus, the identity of the signature of Lambert became important. A witness testified, that as he was standing at

[1] Jones v. Mason, 2 Strange, 833.
[2] Hamsher v. Kline, 57 Pa. St. 398.
[3] King v. Donahue, 110 Mass. 155.
[4] Salem Bk. v. Gloucester Bk., 17 Mass. 1; Homer v. Wallis, 11 id. 309; Emory v. Goodwin, 3 Dane Abr. 76; Cabot Bank v. Russell, 4 Gray, 167; Hall v. Huse, 10 Mass. 39; Moody v. Rowell, 17 Pick. 490.

the door opening on the street, he saw Lambert, sitting in a vehicle before the door, write, as the witness thought, upon some papers handed him by his clerk; but that he was not near enough to see what Lambert wrote; that he afterward went up with the clerk into the counting-room, and the clerk had there some signed and indorsed notes (the witness testified), that were handed back by Lambert to his clerk. It was held that the witness was not competent to testify as to the genuineness of a signature on another note, purporting to be the signature of Lambert. It was also held in this case (in 1854) that a teller of a bank, who, as such, has paid many checks purporting to be drawn by a person who has a deposit account with the bank, was incompetent to testify to the handwriting of such person, if some of the checks so paid were forged.[1]

Means of knowledge — handwriting.

§ 381. One of the methods of acquiring knowledge of handwriting which is in dispute, is by written correspondence, receiving letters on matter of business, found to have been written by the person whose writing is in dispute, or if the letters are of such a nature as to render it probable that they are written by the person professing to send them, the witness receiving them may testify. This rule is now generally adopted in this country.[2] The testimony of a witness (except subscribing witnesses), can seldom be more than an opinion, at best, and yet the rule seems to be established that the witness is competent to testify as to it, if he has even once seen the party write.[3] And it has been even held that a witness may testify to the identity of a person's mark, from having seen him make it several times.[4] But this would seem to press the rule of evidence to the very verge of the law, if not beyond it.*

[1] Brigham v. Peters, 1 Gray, 139.

[2] Redford v. Peggy, 6 Rand. 316; Furber v. Hilliard, 2 N. H. 480; Titford v. Knott, 2 Johns. Cas. 211; Carey v. Pitt, 2 Peake, 130; Turnipseed v. Hawkins, 1 McCord, 278; Russell v. Coffin, 8 Pick. 143; State v. Allen, 1 Hawks, 6; Clark v. Wallace, 3 Pa. 441; Lyon v. Lyman, 9 Conn. 55; Hammond's case, 2 Greenl. 33.

[3] Layer's case, 16 State Trials, 94; Stranger v. Searle, 1 Esp. 14; Lewis v. Sapio, M. & M. 39; Francia's case, 15 State Trials, 897; Smith v. Sainsbury, 5 Carr. & P. 196; Rex v. Hensey, 1 Burr. 644; Garrells v. Alexander, 4 Esp. 37; Willman v. Worrall, 8 Carr. & P. 380; De la Motte's case, 21 How. St. Tr. 810.

[4] George v. Surrey, M. & M. 516.

* Of handwriting, Mr. Burrill, at page 661, says: "Important links in a chain of criminative evidence are often furnished by *letters* written by the accused, as to an accomplice, to the person upon or against whom a crime has been committed, and n some instances, to other persons. Where these are in the ordinary hand of the accused, they are identified in the usual way of proof of handwriting, upon which it will not be necessary to dwell. But it more commonly happens that they are in hands more or less completely disguised, and this introduces a

kind of proof which is in its nature thoroughly circumstantial; being based upon a minute and sometimes literally microscopic examination of particular words and letters, with a view of detecting those involuntary adhesions to the natural manner of writing, which, from the pure force of mechanical habit, maintain their existence in the most elaborate specimens of imposture and fraud, and can seldom be completely excluded from them A very prominent instance of this kind of proof occurred in the case of Com. v. Webster. in which, out of three letters which it became important to trace to the prisoner, one was marked by the most extraordinary characteristics. In order, apparently, to give greater effect to the deception intended, the use of the ordinary pen was avoided, and the letters were made with a marking instrument called 'a cotton pen;' some of the words being so rudely shaped as to be almost illegible, and the coarse heavy strokes produced throughout, giving to the entire letter a most singular aspect. The more thoroughly (as it would appear) to guard against involuntary adhesions to the natural manner, some of the letters were rudely printed; and to secure the deceptive effect of the whole, the manner of an illiterate person, in regard to spelling, punctuation and the like, was studiously counterfeited; the letter being, moreover, written in a straggling, uneven manner, upon a torn scrap of paper. Yet, under all this exterior of ingenious and labored uncouthness, the practiced eye of an expert was enabled to detect those traces of the usual and natural manner which have been alluded to, and the existence of which was afterward confirmed as the truth, by the confession of the prisoner himself."

CHAPTER X.

HANDWRITING — COMPARISON.

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Handwriting — comparison — rule in England.

§ 382. The English courts and some of our own have, for a long time, with more or less consistency, denied the rule which would authorize the admission of evidence founded upon a mere comparison of handwriting by the witness;[1] yet we have seen that, although the

[1] Greaves v. Hunter, 2 Carr. & P. 477; Clermont v. Tullidge, 4 id. 1; Hutchinson v. Allcock, 1 Dowl. & Ryl. 165; Dickinson v. Prentice, 4 Esp. 32.

witness was not permitted to compare two papers to make up his own opinion, the jury have been permitted, under some circumstances, to compare the papers, to aid them in their determination and decision of the case;[1] but in other cases, and in a great majority of cases, this rule has been denied.[2] The English courts, at one time, seemed to evince a disposition to recede from the rule rejecting such evidence, and in a few cases held that, where papers were in evidence in the case before the jury for another purpose, the witnesses and the jury might compare them. But this, it seems, was more from necessity than otherwise, because, when the papers went to the jury, there was no rule known to the practice by which the court could prevent the jury from comparing them, provided they could *read* them, and that they would resort to a comparison to determine the genuineness of the signature in all cases where that was the question in issue.[3] This course was pursued in several cases, but it was then yielded as a matter of necessity.[4] Mr. Greenleaf says: "In considering the proof of private handwritings, we are naturally led to consider the subject of *comparison of hands*, upon which a great diversity of opinions have been entertained."[5] In some of our own States the rule of permitting the comparison of hands has gone to a considerable extent; perhaps fully as far as it should be permitted, and perhaps as far as the English courts have gone in the opposite direction. In an action of trover for chattels, plaintiff offered in evidence a material paper, purporting to have been signed by the vendor to the defendant, and testified that it was signed by him in the presence of the plaintiff. The vendor, being called by the defendant, testified that it was not signed by him, and was not genuine. Being requested by plaintiff, the witness wrote his name on a piece of paper, and plaintiff offered that in evidence, to be compared by the jury with the former, and this was held to be admissible.[6] Perhaps this may have gone too far. He may have disguised the specimen for the occasion.

Expert testimony — American rule.

§ 383. Upon the subject of the admission of evidence in proof of

[1] Allesbrook v. Roach, 1 Esp. 351.
[2] Da Costa v. Pym, 2 Peake, 144; Macferson v. Thoytes, 1 Peake, 20; Brookbard v. Woodley, id. n.
[3] Doe v. Newton, 1 Nev. & P. 4; Doe v. Suckermore, 5 Ad. & El. 703.
[4] Griffith v. Williams, 1 C. & J. 47.
[5] 1 Greenl. Ev. (13th ed.), § 576.
[6] Chandler v. Le Barron, 45 Me. 534 (1858). Citing Homer v. Wallis, 11 Mass. 309; Moody v. Rowell, 17 Pick. 490; Hammond's case, 2 Greenl. 33; Stranger v. Searle, 1 Esp. 14; Keith v. Lothrop, 10 Cush. 453.

handwriting, the court of Maine laid down a liberal rule in 1822: That a witness may testify to his belief of the genuineness of handwriting from his acquaintance with the handwriting of the party; whether his acquaintance was gained by having seen the person write, or having received letters from him, or having at any time seen writing either acknowledged or proved to be his. And that there was no difference in civil and criminal cases, in the application of the rule.[1] The English rule that handwriting could not be proved by comparison never was in force in Maine or Massachusetts.[2] As to whether an expert may examine papers and compare them with a view to acquiring a sufficient knowledge of the handwriting to become competent to testify as to the same, has not been doubted, except in a few of our States, where the English rule was early adopted, when the decisions there were in all sort of confusion.[3] The witness may acquire a knowledge of the handwriting of the party, proposed to be introduced in the case, by satisfying himself by some information or evidence that certain papers are genuine, then to study them so as to acquire a knowledge of the handwriting of the party, and fix an exemplar in his mind, and then the party may ask him for his opinion in regard to the writing in dispute; or by offering such papers to the jury, with proof of their genuineness, and then asking the witness to testify his opinion, whether these and the papers in dispute are in the same handwriting. And of this Mr. Greenleaf says: "This method supposes the writing to be generally that of a stranger; for if it is that of a party to the suit, and is denied by him, the witness may well derive his knowledge from papers admitted by that party to be genuine, if such papers were not selected nor fabricated for the occasion.'"[4] But the English rule is different.

Same — comparison — English rule.

§ 384. On an issue as to the defendant's signature as acceptor of a bill of exchange, witnesses were called for him, who testified that they knew his handwriting, and did not believe the signature to be his. Whereupon plaintiff proposed to ask each witness whether a paper, placed on the witness box, was signed by the defendant, purposing by this inquiry to test the knowledge of the witnesses by their

[1] 2 Phillips Ev. 613, n.; Rex v. Cator, 4 Esp. 117; MacNally Ev. 394–417.

[2] Homer v. Wallis, 11 Mass. 312; Hammond's case, 2 Greenl. 33.

[3] Lodge v. Phipher, 11 Serg. & R. 333; Hubley v. Vanhorne, 7 id. 185; Goodtitle v. Braham, 4 T. R. 497; Lyon v. Lyman, 9 Conn. 55; Moody v. Rowell, 17 Pick. 490; Com. v. Carey, 2 id. 47.

[4] 1 Greenl. Ev. (13th ed.), § 579.

agreement or disagreement. The paper was not in evidence for any other purpose, and this was not permitted. LITTLEDALE, J., said: "I think there should be no rule in this case. The second document was allowed not to be evidence in the cause. Mr. Jarvis says that the practice has been to permit the course of examination which he attempted; but I never knew it done when I was at the bar. The practice must have been adopted only recently. It would be going much farther than we have hitherto gone, and I am not disposed to advance one iota beyond that which has been expressly decided on this point."[1]

Claim to an ancient peerage — signature — evidence.

§ 385. On a claim to an ancient peerage, a family pedigree, produced from the proper custodian, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks and of official correspondence, and who said that, from a few inspections he had of two or three other documents which were proved to be in the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other documents that might be produced to him were, or were not in the same handwriting.[2] Under the strict ruling of English courts, even this was rejected.

Expert — comparison — rule in Massachusetts.

§ 386. We have shown that some if not most of our American courts hold a ruling far more liberal. An expert may give the grounds and reasons of his opinion in his examination in chief, as well as the opinion itself, and if he has done business with the party and seen him write only since the date of the disputed note, he may give his opinion that the signature to the note is not genuine. The objection to it goes to the weight and not to the competency of the evidence.[3] The question whether the whole of a promissory note was written at the same time was held proper to put to an expert.[4] And contrary to the well-recognized English rule, the court of

[1] Griffits v. Ivery, 11 Ad. & El. 322 (1840).

[2] Fitzwalter Peerage case, 10 Clark & Finn. 193.

[3] Keith v. Lothrop, 10 Cush. 453.

[4] Bank v. Hobbs, 11 Gray, 250.

Massachusetts held that, upon questions as to the genuineness of a signature, the genuine one, of the same person, to a paper not otherwise competent evidence in the case, is admissible to enable the court and jury, by a *comparison* of hands, to determine the question; and that the opinion of a writing-master, professing to have skill in detecting forgeries, formed from the *comparison* of hands, without any actual knowledge of the handwriting of the party, may be given in evidence.[1]

Libel — book entries — comparison.

§ 387. In an action for libel in England, and plea of not guilty, when counsel for plaintiff was stating that he should call a witness to swear to his belief of the handwriting of the defendant, who had been in his employ, and whom he had seen make entries in his books, which books would be produced for the jury to see, and form their judgment upon them, Lord DENMAN, C. J., said: "My impression is, that the books will not be evidence." *Counsel* remarked: "I apprehend that when I have a document which the defendant is actually seen to have written, and not depending on belief, I may put it into the hands of the jury." Lord DENMAN: "There is a question pending, as to whether you may furnish the witness with such proof, to enable him to judge." *Counsel* — "That goes further than I propose to go in this case; it is a matter of so much importance that I shall feel it my duty to tender the evidence and take your honor's opinion upon it." But the evidence was rejected by the court, and yet there was a judgment for the plaintiff.[2]

Comparison on cross-examination.

§ 388. In an English case, the action was brought by the indorsee, against the defendant as the acceptor of a bill of exchange, who insisted that it was a forgery, and it became important to identify his signature to the bill. The defendant called witnesses to disprove his signature to the acceptance, among whom was one who stated that he believed it was not the signature of the defendant, and gave as a reason for such opinion that he had never seen a signature of the defendant, written "Robert Honner" as the defendant always signed "R. W. Honner." Counsel for plaintiff, on cross-examination, put into the hands of the witness a paper, not at all connected with the cause, which bore the signature, "Robert Honner," and

[1] Moody v. Rowell, 17 Pick. 490.

[2] Waddington v. Cousins, 7 Carr. & P. 595.

asked the witness if he believed that to be written by the defendant; the witness said that he believed it was so. This was admitted, to test the knowledge of the witness. ALDERSON, B., conferred with ABINGER and PARK, and they agreed with him, that it was competent.[1] This was not considered as an infringement of the established rule as to admission of testimony based upon a knowledge acquired from a comparison of handwriting; in fact it did not, and had no more to do with the handwriting than would the spelling of a word — incorrect orthography.[2]

Comparison — rule in North Carolina.

§ 389. Some of our State courts adopt the English rule, while others, as we have seen, have been quite liberal in permitting the comparison of handwriting. The Supreme Court of North Carolina, with its proverbial liberality in practice, for some unknown reason, adopted the English rule as early as 1820, when one Allen was under indictment for counterfeiting. That court held that a witness who had never seen a person write, nor received letters from him, could not testify to his handwriting; that he could not testify to the signature of the president or cashier of a bank, from having received, handled and paid out the bills of the bank.[3] And again in 1840, that court adhered to the rule, in an action for libel, and held that the doctrine of the comparison of handwriting was exploded in this country, and in support of that position cites a leading English case.[4]

Same — rule in Kentucky.

§ 390. The court of Kentucky seemed to incline to the English rule on this subject as late as 1852. In a case involving the due execution of a last will and testament, that court held, substantially, that a witness who was not acquainted with the handwriting of a party would not be permitted, where the writing appeared to have been altered by erasures and interlineations, to testify and give their opinion, whether the whole or any part of the same is genuine; that in such case the opinion of the witness who testified to it, must be founded upon a previous knowledge of the handwriting of the party; and it was there said, that the opinions and decisions of that court were against comparison of handwriting even by the jury,

[1] Younge v. Honner, 1 Car. & Kir. 51 (1843).
[2] Brookes v. Tichbornè, 2 Eng. L. & Eq. 374.
[3] State v. Allen, 1 Hawks, 6.
[4] Pope v. Askew, 1 Ired. 16. Citing Doe v. Suckermore, 5 Ad. & El. 703.

to determine their genuineness. And this court refers to the same English case referred to by the court of North Carolina.[1]

Same — rule in New York.

§ 391. The Supreme Court of New York, falling into the same error, if error we shall call it, blindly followed the English precedent, which prevails there, without any conceivable reason to support it. An action was brought, even in 1872, to recover for the value of standing wood and timber, under a written instrument, called a bill of sale. It was held that where the signature of an attesting witness was alleged to be a forgery, the defendant cannot read in evidence the assignment of the lease, put in evidence by the plaintiff, and purporting to be witnessed by the same person (since deceased) for the mere purpose of getting a signature for comparison with that alleged to be forged.[2]*

Experts — when called — for what purpose.

§ 392. The rule of expert testimony in the comparison of handwriting seems to have been laid down for the identification of documents which are so antiquated that no living witness can be found

[1] McAllister v. McAllister, 7 B. Mon. (Ky.) 269. Citing Doe v. Suckermore, 5 Ad. & El. 703.

[2] Goodyear v. Vosburgh, 63 Barb. 154.

* Mr. Kerr, in his recent and valuable work on Homicide, § 459, says: "Where the identity of the prisoner with the slayer is in dispute, it is competent for the jury to compare handwriting by the prisoner with signatures or other writing shown to have been written or signed by the slayer; or they may consider signatures of different names, where it is claimed that all were written by the defendant, in order to determine if such be the case, and a writing may be part introduced by one side, and the remainder by the other." Citing Crist v. State, 21 Ala. 137; Early v. State, 9 Tex. App. 476. In the Alabama case above cited it appeared that the question before the jury on the trial for murder was the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each from a different city, and each containing a different name, accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities. They were admitted without objection. It was held that, in considering the question whether the three names were written by the same person, the jury might compare the handwriting in the several registers. And yet, the court cites Doe v. Suckermore, 5 Adol. & El. 703; Greaves v. Hunter, 2 C. & P. 477; 2 Stark. Ev. 375; Myers v. Toscan, 3 N. H. 47; People v. Spooner, 1 Den. 343; Pope v. Askew, 1 Ired. (Law) 16; U. S. v. Craig, 4 Wash. C. C. 729, in which cases it was held not to be allowable to prove the handwriting of a party by comparison of the disputed paper with other writing admitted or proven to be genuine. And see Eagleton v. Kingston, 3 Ves. 475. In Early v. State, 9 Tex. App. 476, the party was on trial for murder. It was held to be incumbent on the State to put in evidence only so much of a written document as was shown to be in the handwriting of the accused, as is desired by the prosecution; and it is then the privilege of the accused, if he so desires, to put in evidence the whole of the document. This is upon the same rule of evidence that entitles a party to the whole of a conversation, when the adversary puts in evidence a portion of it: where he desires to call it out. Or if evidence of part of a transaction is put in by one party, the other will generally have the right to call for the whole of the transaction, and especially where the transaction amounts to, or purports to be, a contract between the direct parties to the action.

to identify them, and yet not so old as to prove themselves, that other documents may be produced, the genuineness of which has been admitted, or proved to have been recognized, respected and acted upon by the parties as genuine, then experts may be called to compare them and give their opinions as to the genuineness of the document in issue.[1] But where other writings are in the case, the comparison may be made by the jury without the aid of an expert.[2] The rule in England as it is now stated to be, that the law recognizes no degrees in the various kinds of evidence, rejecting instrument upon the sole ground of comparison of handwriting, and that if any document, be it will or deed, be lost or mislaid, in the hands of the adversary, if he refuse to produce it, upon notice given, the party giving it may resort to his recourse by parol testimony, though he may have them in his possession, or an abstract copy of the paper called for.[3]

Comparison by jury — papers taken to jury-room.

§ 393. It was held in an insurance case that a party has no right to an instruction to the jury, allowing them to take to the jury-room a letter, the genuineness of which is denied, for the purpose of comparing it with a genuine letter. Such comparison, it was held, was only permissible during the progress of the trial. BLODGET, J., said: "Now the authorities clearly go to show that if, upon the progress of the trial, the plaintiff had insisted that the jury should have the privilege of comparing the *Shaw* and *Foster* letters together, and determining their genuineness, they should both be passed to the jury, and they have the privilege of examining them.[4]

Comparison — signature — photograph — rule in Maryland.

§ 394. In Tichborne's case,[5] letters were photographed and documents resorted to, to facilitate the comparison of handwriting, to identify the writer of the paper in question; and this is the general rule in

[1] Doe v. Tarver, Ry. & M. 143; Morewood v. Wood, 14 East, 328; Gould v. Jones, 1 W. Bl. 384; Roe v. Rawlings, 7 East, 282.

[2] Doe v. Newton, 5 Ad. & El. 514; Solita v. Yarrow, 1 Mood. & R. 133; Griffith v. Williams, 1 Cromp. & Jer. 47; Waddington v. Cousins, 7 Carr. & P. 595; Rex v. Morgan, 1 Moody & Rob. 134. n.; Hammond's case, 2 Greenl. 33; Bromage v. Rice, 7 Carr. & P. 548.

[3] Brown v. Woodman, 6 Carr. & P. 206; Quick v. Quick, 33 L. J. (Pt. 4) 146; Brown v. Brown, 27 id. (Pt. 2) 173; Jeans v. Wheedon, 2 Mood. & R. 486.

[4] Solita v. Yarrow, 1 Mood. & R. 133; Griffith v. Williams, 1 Cromp. & Jer. 47; Bromage v. Rice, 7 Carr. & P. 548; Doe v. Newton, 5 Ad. & El. 514; Rex v. Morgan, 1 Moody & R. 134, n.; Allport v. Meek, 4 Carr. & P. 267.

[5] Brookes v. Tichborne, 2 Eng. L. & Eq. 374.

this country, and seems to be founded in the best of reason. In Massachusetts, magnified copies of photographs were admitted and used, not as copies, but as *fac similes*.[1] In a Maryland case it became important to prove the handwriting of one Van Winkle to a certificate of stock, and on the question of the genuineness of his signature, a witness, professing to be an expert in the matter of handwriting, was called to prove that the signature to such certificate was not genuine. He stated that he had never seen Mr. Van Winkle write, nor received letters from him, nor had he become acquainted with it in the course of business, but that his own knowledge on the subject was acquired from an inspection of his signature on the two certificate books in evidence, which had been placed in his hands to enable him to testify, and that he had examined them carefully for the period of five or six months, and had by this means acquired a knowledge of Van Winkle's handwriting. He was held to be incompetent to testify as to the genuineness of the signature; his opinion being derived only from a comparison of the hands. Thus seeming to adopt the English rule on this subject. On the same question, a photographer by profession, and expert in handwriting, offered as a witness by defendant, stated that he had, at the instance of the defendant, made photographic copies of the signature of Van Winkle to the certificate sued on, and of others admitted to be genuine; that some of these copies were in the actual size of the original, and others of enlarged size. The defendant thereupon proposed to offer said copies in evidence, to be examined by the jury, together with the explanations by the witness as to the difference between the genuine and those alleged to have been forged, and his opinion derived from the comparison of these copies, as to the genuineness of the signature to the certificate sued upon, to which the counsel for the plaintiff objected; and this evidence was held to be inadmissible.[2] But notwithstanding the ruling, the photographs are now received in evidence by the courts, and acted upon, both in this country and in England.[3]*

[1] Marcy v. Barnes, 16 Gray, 161.
[2] Tome v. R. Co., 39 Md. 37 (1873).
[3] Blair v. Pelham, 118 Mass. 420; Church v. Milwaukee, 31 Wis. 512; Stephens, *In re*, 8 Moak's Eng. Rep. 482; Cozzens v. Higgins, 3 Keyes, 206; Udderzook v. Com., 76 Pa. St. 340; Eborn v. Zimpelman, 47 Tex. 503; Daly v. Maguire, 6 Blatchf. 137; Ruloff v. People, 45 N. Y. 213.

* In Brookes v. Tichborne, 2 Eng. L. & Eq., PARK, J., said: "On showing cause it was hardly disputed that if the habit of the plaintiff so to spell the word was proved, it was not some evidence against the plaintiff to show that he wrote the libel; indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it. But it was ob-

Information — libel — letters — evidence.

§ 395. An information was presented for libel, alleged to be contained in several letters written by defendant to the prosecutor. The main question was, how far comparison of hands is evidence? To establish the fact of the libelous letters, and to identify them as being in the handwriting of the defendant, the prosecuting attorney produced several letters avowedly written by the defendant, in fact, written to the prosecutor himself, in answer to letters written by the prosecutor to him, and proved these letters to be in the handwriting of the defendant; and then proposed to call a clerk of the post-office, who held the place of inspector of franks, to prove that the hand in which the libels were written was a feigned one; and to prove that notwithstanding the disguise, the hand in which the libel was written was the same with that of those letters admitted to be defendant's handwriting in the letters above stated. The prosecution called one *Bonner*, a deputy inspector of franks in the post-office, and asked him whether in consequence of his situation, and the duty of his office, he had occasion to inspect the character of a great number of handwritings? He answered, yes. Whether it was not part of his daily duty to look at the franks which came in, to ascertain whether they were the general handwriting of the members whose hands they purport to be, or whether they were forgeries? He said it was. Whether he could discern, upon inspecting

jected that the mode of proof of that habit was improper, and that the habit should be proved as the character of the handwriting ought, by producing one or more specimens and comparing them, but by some witness who was acquainted with it, from having seen the party write, or corresponding with him. But we think this is not like the case of general style or character of handwriting; the object is not to show similarity of the form of the letters and the mode of writing of a particular word, but to prove a peculiar mode of spelling words, which might be evidenced by the plaintiff having orally spelt in a different way, or any sort of character, the more frequently the greater the value of the evidence. For that purpose, one or more specimens written by him with that peculiar orthography would be admissible. We are of opinion, therefore, that this evidence ought to have been received, and not having been received, the rule for a new trial must be made absolute."

Mr. Greenleaf (Ev., 13th ed., vol. 1, § 581) says: "But with respect to the admission of papers, irrelevant to the record, for the sole purpose of creating a standard for comparison of handwriting, the American decisions are far from being uniform. If it were possible to extract from the conflicting judgments a rule which would find support from the majority of them, perhaps it would be found not to extend beyond this; that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them, which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibited them in confirmation and explanation of his own testimony." Citing Smith v. Fenner, 1 Gallison (C. C.), 170, 175; Goldsmith v. Bane, 3 Halst. 87; Bank of Pa. v. Haldemand, 1 Pa. 161; Greaves v. Hunter, 2 Carr. & P. 477; Clermont v. Tullidge, 4 id. 1; Burr v. Harper, Holt Cas. 420; Sharp v. Sharp, 2 Leigh, 249; Baker v. Haines, 6 Whart. 284; Finch v. Gridley, 25 Wend. 469; Fogg v. Dennis, 3 Humph. (Tenn.) 47; Com. v. Eastman, 1 Cush. 189; Hicks v. Pearson, 19 Ohio, 426.

a handwriting, whether it was the natural current hand of the person who wrote it, or whether it was an imitation of some other hand? He said he thought that he could easily discern whether the hand was a disguised one or not. He was then asked whether he thought that he had acquired knowledge by which from comparing a handwriting, acknowledged to be the party's handwriting, with another, he could say they were the same? He answered that he had made that a part of his study. He then examined both, and gave his opinion, when objection was made. His testimony, upon very full hearing, was rejected.[1] *

Comparison of signature — why not allowed.

§ 396. It seems that one reason why the English judges would not trust the jury to determine upon handwriting by comparison, was on account of the illiteracy of the jurors. An action of assumpsit was brought on a bill of exchange by the indorsee against the acceptor. The bill was drawn by one *Parry* and payable to his own or-

[1] Rex v. Cator, 4 Esp. 117.

* In the case of Rex v. Cator, 4 Esp. 117, HOTHAM, Baron, said: "This case has been argued very fully, and I have spent three weeks upon thinking of the question; I certainly cannot receive more information than I have received; and it is my duty, such as my opinion is, to give it fairly and frankly; I perfectly agree with counsel for the prosecution, that there is no difference in point of evidence, whether the case be a criminal or a civil case; the same rules must apply to both; at the same time it has been stated that one is more disposed to resist, and more cautious in receiving evidence in a case where the party has much at stake, as in favor of life. Two persons have been called, who, having looked at these libels, have spoken without any doubt of their being the handwriting of the party accused. As far as that goes, there is no objection to it. Then comes the inspector of franks from the post-office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the handwriting, unless he could say he has seen the party write, or unless he had been in the habit of corresponding with him, excepting that he is called to speak as a man of science to an abstract question; in that light he has been called, and his evidence has been admitted. He is shown these papers, and he is asked to look at them, and without inquiring who wrote them or for what purpose. He is asked, "from your knowledge of handwriting in general, do you believe that writing to be a natural or fictitious hand?" His science, his knowledge, his habit, all entitle him to say, I am confident it is a feigned hand. To that there is no objection; and so far as that goes, I see no reason for rejecting the evidence. Then comes the next and important point. It is said to him, "Now, look at this paper, and tell me whether the same hand wrote both?" Why, one cannot help seeing, evidently, what must be the consequence. I cannot conceive there is any thing in the idea of a comparison of hands if this is not to be considered as comparison of hands. The witness says: I never saw him write in my life. Why, then, I collect all my knowledge of his being the author of this, by comparing the same hand with that which other witnesses have proved to be a natural hand. By looking at the two, he draws his conclusions. It seems to me, therefore, directly and completely a comparison of hands. This question seems to have been solemnly decided; but when I see the same noble and learned judge repenting of what he has suffered in the former case, and expressly saying he could not receive such evidence, and observing that, though such evidence was received in Renett v. Braham, he had, in his summing up to the jury, laid no stress upon it; this being the case, I cannot consider it so adjudged, but that I may exercise my own judgment in rejecting it." The fact is, that the English courts have very solemnly, and very frequently decided this question of the comparison of handwriting both ways. And you can there find a decision of the question either way that you may desire, as we shall presently see in the text.

der, and the name of *Parry* was indorsed on it. Plaintiff proved the handwriting of all the indorsers, except the first, and the defendant insisted that he should prove that also. It was answered that the acceptance was an admission of the handwriting of the drawer, and that by comparing that handwriting with the *indorsement*, they would be found to correspond. Lord KENYON said: "Comparison of hands is no evidence. If it were so, the situation of the jury, who could neither write nor read, would be a strange one, for it is impossible for such a jury to compare the handwriting.[1] To this case is the following note, 'But in cases of forgery a *literate* jury may compare the forged instrument with other papers in the defendant's handwriting.' But who is to determine when the jury comes up to that standard?"

Same — same — conflicting opinions.

§ 397. It was held that where the defense to a bill of exchange is forgery, the jury shall be allowed to decide on the comparison of hands, by comparing the bill in question with other acceptances admitted to be the defendants. Lord KENYON said: "Some judges have doubted the policy of that rule of evidence, respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis the juries are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have been always inclined to admit it, and shall do so in this case.[2] Here we have, in this and in the preceding section, two cases, both civil actions, each on a bill of exchange, presenting the same question decided by the same judge, and held both ways; it is true, one was five years later than the other.

Same — ejectment — proof of a will.

§ 398. In an action of ejectment, defendants produced what purported to be the last will of John Brookbank, and on which they rested their title. The genuineness of the signature was the question in dispute. It was held that on a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause, but not else.[3] But subsequently in a case involving the same question, referring to some of

[1] Macferson v. Thoytes, 1 Peake N. P. 20 (1790).

[2] Allesbrook v. Roach, 1 Esp. 351 (1795).

[3] Doe v. Newton, 5 Adol. & El. 514.

these cases, we have just noticed, PATTERSON, J., said: "I always thought the rule laid down in *Griffith* v. *Williams*, 1 Cro. & J. 47, was limited to documents which were already before the jury. It is not said in the report of that case that necessity was the ground upon which the comparison was allowed; but I think that must have been so. It was impossible, in such case, to prevent the jury from making a comparison. I have rejected evidence upon the ground of the distinction now taken in a case which came before me at *Gloucester*, I think on the crown side; my opinion on the point, therefore, is not now formed for the first time; I did not know of the case of *Allesbrook* v. *Roach*, 1 Esp. 351, but, whatever respect I may feel for the authority of Lord KENYON, I think that in ruling as he did there, he went beyond the law, and introduced a practice which would be dangerous if followed up."[1]

Bill of exchange — letter — comparison.

§ 399. An action of assumpsit was brought in England by the indorsee against the drawer and indorser of a bill of exchange. The bill of exchange was drawn for the sum of seven pounds sterling money, and which was admitted to have been drawn and indorsed by the defendant, but this was not the question. The plaintiff put in a letter purporting to have been written by the defendant, and bearing date but a few days before the bill of exchange fell due, ordering the plaintiff, who was a tailor, to send three yards of cloth to a Mr. Lindos for him, the said defendant. The three yards of cloth were accordingly sent to Mr. Lindos by the tailor, but it was denied by the defendant, that the order was written by him; and witnesses were called on both sides to prove and to disprove the handwriting, respectively. *Platt*, for the plaintiff, relied on the comparison of the disputed writing with the admitted writing in the bill of exchange. Lord TENTERDEN, C. J., in summing up, made use of similar remarks, and desired the jury to take the papers and compare them.[2]

Counterfeit — signature — bank president and cashier.

§ 400. A party was indicted in Ohio for selling counterfeit bank notes in 1831.[3] It was held that the teller of the bank was a competent witness to testify concerning the handwriting of the president and cashier of the bank, and that persons skilled in the knowledge

[1] Griffith v. Williams, 1 Cro. & J. 47.
[2] Solita v. Yarrow, 1 Moody & Rob. 133.
[3] Hess v. State, 5 Hammond (Ohio), 5.

of handwriting are competent to testify concerning them, although they never saw the parties write, and so the testimony of experts or persons skilled seem to be admitted as competent. It seems also that it is not necessary that the experts should have seen the party write. And that any person who had been in the habit of receiving and passing bank bills may be called to prove their character, though his knowledge may be acquired by any of the known sources of information, from observation or from seeing it circulated in the community, and he may never have even seen one of the officers of the bank.[1] And in an indictment for forgery, the party whose name is alleged to have been forged may testify as to the fact, notwithstanding there is a subscribing witness who has not been called.[2] And it has been held that the existence of the bank may be proved by its mere reputation.[3]

Same —best evidence — rule in New York.

§ 401. A party in New York was indicted for having in his possession, with intent to pass to others, one counterfeit bank note on the Bank of Chenango, and a six dollar note on the Bank of Geneva, etc. It was held that in such cases the best evidence must be produced. In order to prove the signature alleged to be forged, the testimony of those who have seen the parties write, or have corresponded with them, must be given; in the absence of such evidence, the testimony of brokers and others well acquainted with bank notes will be received.[4] Where a party was indicted and convicted for uttering forged bank notes, with intent to defraud, etc., it was held that it was not necessary to prove that the note was forged, by the president and cashier of the bank, whose signatures are alleged to have been counterfeited. A witness who has been acquainted with their handwriting in course of an official correspondence is sufficient; and the case is strengthened, if the witness can state that, from his knowledge of the paper, type and whole appearance of the note, he believes it to be a counterfeit.[5]

[1] Com. v. Carey, 2 Pick. 47; May v. State, 14 Ohio, 461; People v. Caryl, 12 Wend. 547; United States v. Keen, 1 McLean, 429.

[2] Simmons v. State, 7 Ohio, 116.

[3] Sasser v. Ohio, 13 Ohio, 453; Reed v. State, 15 id. 217.

[4] People v. Badger, 1 Wheeler Cr. Cas. 543.

[5] Com. v. Smith, 6 Serg. & R. 568. Citing Anne Lewis' case, Foster C. L. 116; James Bolland's case, Leach, 83; Murphy's case, 19 State Trials, 693; Lord Ferrers v. Shirly, Fitzgib. 195; Gould v. Jones, 1 W. Bl. 384.

Obligor's admission — conflict.

§ 402. The English courts and some of ours refuse to take the admission of an obligor to a written instrument, that he executed it, in lieu of the proof of the attesting witness, but upon this important point our authorities are not uniform. There seems to be a discrepancy and a diversity of opinion as to whether an admission of the contents of a written instrument will supersede the necessity of notice to produce it, and this relates directly to the question of the admission of secondary evidence to establish it, and to fix the identity. When it is proposed to prove a deed of conveyance by an admission of the execution thereof, though such admission be an oath, it was held would not dispense with the calling of the attesting witness to prove it. But this, upon principle, it would seem, should depend upon how far the subscribing witness may have had any knowledge of the facts. But whatever the witness may have known of the facts in the matter, though not within the knowledge of the parties, would go, not to the proof of the execution of the paper which he is called upon to prove; but, if admissible at all, would go only to latent facts; or to the ambiguity of the instrument. He is not called upon to give the circumstances connected with it, but to prove its execution, which the parties called him to attest.[1] But in an action for an infringement of a patent granted to one who was a bankrupt, and the action was against the assignee, counsel for the defendant asked plaintiff's witness if he had not heard the bankrupt say that by deed between him and one D. an interest in the patent belonged to D. It was held by the court, that you are not permitted to ask a witness what the opposite party has said as to the contents of a deed executed by him, unless such party has been given notice to produce the deed.[2]

Deed — name — widow's dower in lands.

§ 403. Where it was shown that plaintiff's husband conveyed the land in question by his proper name, and that a person of that name previously acquired the title thereto, it will be presumed, in the absence of proof to the contrary, that they were the same person. An action was brought to foreclose a mortgage; Sarah K. Sheets claimed a dower interest in a part of the mortgaged premises, and a

[1] Call v. Dunning, 4 East, 53; Johnson v. Mason, 1 Esp. 89; Cunliffe v. Sefton, 2 East, 187; Abbot v. Plumbe, 1 Doug. 216.

[2] Bloxam v. Elsee, 1 Carr. & P. 558. But see Earle v. Picken, 5 id. 542.

decree was rendered in her favor, from which an appeal was taken. On this point the court said: "It is said that the evidence fails to show that John W. Sheets was ever the owner of any part of the mortgaged premises. It is shown that a person of that name acquired title to the west half of the mortgaged quarter section, and that the husband of the appellee conveyed the same land by warranty deed; in the absence of any attempt to show that there were two persons bearing the same name, we think the showing of identity is *prima facie* sufficient." Thus, following the general rule that the identity of name is evidence presumptive of the identity of the person in the absence of any countervailing evidence.[1]

Name in a deed — in an indictment.

§ 404. Where the only difference between the names of an infant grantee in a deed, and his father, who executed the purchase-money mortgage, is the middle initial letter, the presumption that the intention of the parties was that the title should pass to the father will not be overcome by the testimony of a single witness, that the grantor consented to make the conveyance to the child and take the mortgage from the father.[2] As to the mere question of name, there seems to be a difference between the civil practice and a case of misdemeanor; one Henry was indicted for selling beer to John Brown on Sunday, upon the affidavit of a police officer. The evidence showed that the person to whom he sold the beer was not named John Brown; but that he had been a slave and belonged to a man by the name of Brown, by which name he had been known ever since. On this, it was held that there was no variance between the indictment and the proof.[3]

Will — codicil — forgery — Act of 1854.

§ 405. An issue in the English Chancery Court was made to test the validity of a codicil to a will. An attesting witness to the codicil was called by plaintiff to prove the execution, and on cross-examination he denied that it was in his handwriting; other documents, which were admitted by him to be in his handwriting, were allowed to be submitted to the jury for the purpose of comparison of handwriting under the act of Parliament of 1854, § 27, which

[1] Gilman v. Sheets, 78 Iowa, 499. Citing Hatcher v. Rocheleau, 18 N. Y. 87; Gitt v. Watson, 18 Mo. 274; Abb. Tr. Ev. 56.

[2] McDuffie v. Clark, 30 N. Y. St. Rep. 444.

[3] Henry v. State, 113 Ind. 305.

provides that "comparison of disputed handwriting with any other writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings and evidence of witnesses respecting the same may be submitted as evidence of the genuineness, or otherwise, of the writing in dispute." The jury found the codicil a forgery.[1] Another issue was tried from the court of equity. Plaintiff's counsel proposed to ask defendant's witness if he had not heard the defendant say that one S. had agreed to give a certain sum for the estate in question. This was objected to, that the written agreement ought to be produced. PARK, J., said: "What a party says is evidence against himself, whether it relates to the contents of a written instrument, or any thing else."[2] The same learned judge, in another case, said: "I have no doubt that what a party says, admitting a debt, is evidence, notwithstanding the promise to pay is reduced to writing."[3] And yet that same court has long since established the rule that where the obligation was in writing with an attesting witness thereto, the admissions of the obligor will not be received in evidence; but the attesting witness must be produced.

Witness — absent — denies attestation.

§ 406. But a subscribing witness to a deed had been diligently inquired after, having gone to sea and been absent for four years without being heard from, was held to be sufficient to let in secondary evidence of his handwriting.[4] And where an attesting witness to a deed testified that he did not see it executed, it was held that it may be proved by evidence of the handwriting of the party. It will be treated as though there was no attesting witness to it.[5] The rule to which we have been so often referred, that the attesting witness must be procured, but if dead or beyond the sea, his handwriting must be proved, is adhered to. If he is produced and denies that he saw it executed, you may prove the signature of the maker.

Best evidence — rule — nisi prius.

§ 407. It was held in England that parol evidence could not be given of the transfer of bank stock, but copies from the books of the bank must be produced; and in the same case it was held that an instrument executed in the presence of a subscribing witness

[1] Cresswell v. Jackson, 2 Fost. & F. 24.
[2] Earle v. Picken, 5 Carr. & P. 542.
[3] Singleton v. Barrett, 2 C. & J. 368.
[4] Spring v. S. C. Ins. Co., 8 Wheat. 269 (1823).
[5] Fitzgerald v. Elsee, 2 Campb. 635.

cannot be proved by any other person than such witness, even after it is canceled.[1] Upon the same principle, a party interested in the testimony of a witness, who was objected to on account of having been convicted of a felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction, by the record, though admitted by the witness himself.[2] And yet it was held that parol evidence of the fact of a tenancy was admissible, though the tenant held under a written agreement with the landlord.[3] In an action to recover for injuries to a reversion, speaking of the practice in the *nisi prius* courts, Best, C. J., used the following language: "I seldom pass a day in a *nisi prius* court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of the transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule in all cases, that the best evidence that could be had should be produced; and great writers on the law of evidence say, that if the best be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost."[4] It was held that where an agreement in writing for the letting of a tenement at a certain rent had been lost, parol evidence of its contents could not be admitted for the sake of proving thereby the value of the tenement. Referring to another case, Abbott, C. J., said: "But this case is very different, for the parties here seek to show the value of a tenement by the proof of a contract previously entered into respecting it. The contract was not, therefore, in this case collateral, but of the very essence of the case. Nor can it be introduced as a declaration, for it is a declaration made under such circumstances as prevent its being admitted in evidence."[5]

[1] Breton v. Cope, 1 Peake Cas. 30.
[2] Rex v. Castell Careinion, 8 East, 77.
[3] Rex v. Inhab. Holy Trinity, 7 Barn. & Cres. 611.
[4] Strother v. Barr, 5 Bing. 137.
[5] Rex v. Inhab. Castle Morton, 3 B. & Ald. 588.

Promissory note — forgery — identity.

§ 408. An important case decided in New York, on the identity of handwriting, in 1864, is deemed worthy of note. One Dubois, as administrator of Allen, deceased, sued Baker on two promissory notes for $673.53, given by Baker to Allen in his life-time. The signatures to these notes were not denied, nor the amount, but Baker set up that in the life-time of Allen, they met and had an adjustment of mutual claims and demands, and that Allen was found to be indebted to him (Baker) in the sum of $5,000, for which he executed the following note: "$5,000. One day after my death, for services rendered and value received I promise to pay, and there shall be paid out of my estate, to A. C. Baker or bearer, the sum of five thousand dollars. HYDE PARK, *Nov.* 19, 1860. ISAAC ALLEN."

Plaintiff insisted that the signature to this note was a forgery, or if genuine, that the note had been written over a blank signature of the intestate by the defendant, without the knowledge or consent of the alleged maker; and the validity of this note (as a set-off) was the only question in the case. It was shown that Isaac Allen died January 20, 1862, at Hyde Park, on his farm, where he had resided for many years. He left neither wife nor children, was eighty years of age and had property valued at $40,000. The weight of the evidence went to show that the signature was in Allen's handwriting. Defendant resided in the neighborhood and was quite intimate with Allen and frequently at his house; was not a professional man, but attended to some business for Allen; sold produce, collected money, paid taxes, and attended to some business in a justice's court, etc. Beyond this there was little to show any consideration for the note; and plaintiff produced his receipts for small amounts paid him by Allen in full of all demands in May and August, 1861. One Burdit testified that he heard Allen speak of the $5,000 note to Baker in December, 1860. The character of the witness, however, was impeached; Dr. Parker, an expert, testified that he had examined the note through the microscope; that the word "year" in the body of it had been erased, and the word "day" written upon the erasure; and that the body of the note, which was in blue ink, had been written after the signature, which was in black ink, *because certain parts of the blue ink passed on and overlapped the black ink.* Hull, cashier of a bank, testified that he was well acquainted with Allen's handwriting, and that the signature of the note was written by him. He was asked by the plaintiff's counsel, "Are the signature and the

body of the note written with the same ink?" He said, "I think it is not." He was asked, "Does there appear to have been any erasures in the note?" "Was the erasure made before or after the body of the note was written?" "Are either edge of the note in question cut edges, or the ordinary fools-cap edge?" Each of these were objected to, but objections overruled. The jury found for the plaintiff and rejected the $5,000 note as a fraud, and the judgment was affirmed.[1]

Testing knowledge of witness — identity.

§ 409. An action was brought on a promissory note for $1,000, made by John Wilson, Jr., payable to his own order, indorsed by him as first indorser, Mudgett as second, and Wilson and Booth as third indorsers. It was held that on an issue as to the genuineness, (when denied by Mudgett as indorser) the question, "Would you take it against denial of the signature," when put to the witness, was purely hypothetical and immaterial; that a witness may be asked whether, in the course of official duty, he is called upon to pass and act upon the signature of alleged indorser. It is competent, as showing the extent and means by which he acquired a knowledge, not for comparison of signatures. And the opinion of the witness as to the genuineness of other alleged signatures of the same indorser is immaterial. But it was held incompetent for the purpose of comparison, or to exhibit to the jury, and, as a test of the knowledge of the witness, would involve the trial of a collateral issue. This was to test the knowledge of the witness. "No precedent can be found for such a test."[2]

Identity of lease — signature — witness.

§ 410. An action to recover a sum of borrowed money. The plea denied the debt, and the question in the case was, whether a memorandum was in the handwriting of the defendant; having in the course of cross-examination *been got* to write something on a piece of paper, this was allowed to be shown to the jury for the purpose of comparison of handwriting under the Common-law Procedure Act of 1854, § 26.[3] This act of Parliament made a radical change of the law upon this particular point of evidence, from the extreme rule we have seen prevailing in England formerly. The extreme ruling of

[1] Dubois v. Baker, 30 N. Y. 355.
[2] Bank of Com. v. Mudgett, 44 N. Y. 490.
[3] Cobbett v. Kilminster, 4 Fost. & F. 514.

the courts induced special legislation; and perhaps a little wholesome legislation in that direction might not be amiss on this side of the Atlantic. Where, in an action of covenant in New York, the plaintiff declared as assignee of a lease, it was held that a witness who proves a deed before a commissioner must state that he was present *at the execution* thereof; it seems that it is not sufficient that he testify that the parties *acknowledged the execution* of the instrument, and that he subscribed his name as a witness thereto.[1] But it was there held that one who has seen a party, whose signature is in question, write his name once, or who has held his note, acknowledged and conceded to be genuine, is a competent witness as to the genuineness of such signature.[2]

Ship-building — account — bill of sale — blanks filled.

§ 411. In an action for money advanced for the building of a vessel, defendant offered in evidence a paper purporting to be the plaintiff's account with such vessel, which was identified as in the handwriting of the plaintiff, but was not signed by him; plaintiff did not deny that handwriting, but objected to its introduction for want of such signature and proof of delivery. And it was held (1) that the paper was sufficiently authenticated to make it evidence; (2) that the possession of the account by the defendant raised a presumption (which must prevail until repelled) that it was rendered by the plaintiff, and that it came properly into the hands of the defendant.[3] And in the case of the sale of a ship, a bill of sale was given containing blanks for the recital of the register; afterward the blanks were filled up by the consent of the vendor and vendee. The bill of sale was held to be valid; and that a deed, after it has been executed, may be changed in a material part, with the consent of the parties, without rendering it void.[4]

Bill single — official bond.

§ 412. As a general rule, a written instrument will not be submitted to the jury for their consideration in evidence until it is properly authenticated and identified; but where the facts and circumstances in evidence tend to prove the authenticity of the instrument, or from which it may be presumed, it may be read to the jury. Then it becomes a question of fact, like other facts, for the

[1] Norman v. Wells, 17 Wend. 136.
[2] Hammond v. Varian, 54 N. Y. 398.
[3] Nichols v. Alsop, 10 Conn. 263.
[4] Woolley v. Constant, 4 Johns. 54.

jury to determine.[1] In an action on a bill single, it appeared that at the time of its execution a blank was left where the name of the payee was afterward to be inserted, but evidence was given tending to show that it was left blank in order that the payee's name might be subsequently filled in. It was held that the due execution of the instrument was for the jury to determine, and that it was error for the court to reject the bill when offered in evidence.[2] In an action upon the official bond of a tax collector in Massachusetts, in 1809, which bond was alleged to have been executed by the defendant to the plaintiff as treasurer of the town of *Pembroke* for the penal sum of $3,000, as collector of taxes for said town, etc., it was held that a bond executed by a surety, being signed by him before his name was inserted in the body of the bond, his name being afterward inserted in his absence, was good against him.[3]

Note — indorser — alleged forgery.

§ 413. In an action against the indorser on a promissory note, the defense was, that the indorsement was a forgery. It was proved that the note was given for two bills of goods sold by plaintiff to the makers of the note; that when the bills were presented, the note in question was in the hands of Thomas McIntosh, one of the makers, and son of the defendant, with the defendant's name upon it as indorser, but the amount in blank; that it was filled up by Thomas with the amount of the two bills, and delivered to plaintiff's clerk in payment for the goods. The genuineness of the signature was proved, and that other notes had been indorsed in the same way, to be used by Thomas in the business of his firm. Then several witnesses testified that they did not believe the signature was genuine. Plaintiff cross-examining two of defendant's witnesses, who had testified that the signature was his, exhibited two other promissory notes on which defendant's name appeared as indorser, and inquired of them severally, if the name indorsed on those notes was defendant's signature? Defendant's counsel objected, the objection was overruled, and they testified generally that the signatures on these notes were not his. Plaintiff then offered to prove that defendant had admitted the genuineness of his signatures on these two notes, and this was permitted. But it was held to be

[1] Stahl v. Berger, 10 Serg. & R. 170; Sigfried v. Levan, 6 id. 308; Turnpike Co. v. Myers, id. 12; Pigott v. Holloway, 1 Binn. 442.

[2] Dodge v. Bank, 2 Marsh. (Ky.) 613.

[3] Stahl v. Berger, 10 Serg. & R. 170.

error.[1] Thus adhering to the English rule on the subject of the comparison of handwriting.*

Execution of deed — bond — rule in Pennsylvania.

§ 414. In an action on a bond, brought in Pennsylvania, the plea of defendant was *non est factum*. The question was directly presented, what is sufficient proof of the identity of a signature to the execution of a bond, to entitle it to go to the jury in evidence, for their consideration? It was held, according to the rule, that "if there is an attesting witness, and the witness confess himself to be the attesting witness, *prima facie* the presumption is, that what he has attested has taken place in his presence; and if he denies that, evidence is admissible from other circumstances, as where there is no attesting witnesses. Proof of the handwriting is sufficient to enable the jury to presume, in such case, that sealing and delivery took place, although the handwriting does not import sealing and delivery; it is not only proof of the obligor's signature, but it is presumption that it is a deed executed." It was further said that "the signature, the sealing and delivery are matters of fact, to be tried by the jury. They are matters *in pais*, and may be made out by circumstances. So where the attesting witness did not see the obligor sign, seal and deliver, it may be inferred by the jury from circumstances. The circumstances must be submitted to a jury, and the court cannot take from them the exercise of their judgment. The learned judge then says: "If the subscribing witness denies the attestation, or is unable or unwilling to prove the execution of the deed, collateral circumstantial evidence, proof of handwriting and acknowledgment are admissible. Where the handwriting of the obligor is proved, it is evidence of every thing in favor of the instrument; and where there is proof of

[1] Van Wyck v. McIntosh, 14 N. Y. 439.

*To the report of this case (Van Wyck v. McIntosh, 14 N. Y. 439, Banks' ed.) we find appended the following note: "The opinion of a witness as to the genuineness of other alleged signatures, not in evidence, is inadmissible. Bank of Com. v. Mudgett, 44 N. Y. 514. Nor can other papers, executed by the party, the signatures of which are admitted to be genuine, but which are not in evidence, be submitted to the jury, to enable them to compare the signatures. Randolph v. Loughlin, 48 N. Y. 456; Hynes v. McDermott, 82 id. 41; s. c., 7 Abb. N. C. 98; Goodyear v. Vosburgh, 63 Barb. 154; Glover v. Mayor, 7 Hun, 232; Hoyt v. Stuart, 3 Bosw. 417; Ellis v. People, 21 How. Pr. 356; Gilbert v. Simpson, 6 Daly, 29. But where different instruments are in evidence in the cause, the jury may make a comparison of the several signatures, where the question is, whether one of them is genuine. Dubois v. Baker, 30 N. Y. 355. And even in a criminal case, on a question of forgery, the jury may compare the alleged forged instrument with another document in evidence, in the handwriting of the prisoner. Pontius v. People, 82 N. Y. 339; s. c., 21 Hun, 328; Hunt v. Lawless, 7 Abb. N. C. 113. This question has been passed upon by the legislature, in a recent statute (Act of 1880, chap. 36) which does not appear to have as yet received a judicial construction."

the handwriting of the attesting witness, this is evidence of all that he professed to attest by his signature — the sealing and delivery of the bond. The mistake arises from supposing that the court, in suffering the deed to go in evidence to the jury, decided the issue; nothing can be more unfounded. * * * If the subscribing witness proves the execution of the bond, it is admitted it then goes in evidence to the jury, but it does not pass to them as *res judicata*, for the defendant may show it to be a forgery supported by forgery. 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."[1] The above decision was rendered by DUNCAN, J., in 1820, but a similar doctrine had been announced by the same court as early as 1803, in which it was then held, in an action on a bond, that when a suit was on the bond and on plea of *non est factum*, its execution must generally be proved by the subscribing witnesses; but if they cannot be found or are unable to prove the execution, collateral testimony is admissible.[2]

Expert testimony — questions of identity.

§ 415. It has been held that where the business or avocation of a witness has not been such as to require him to distinguish between true handwriting and that which is simulated, it is not a reason to exclude him from giving an opinion, though it be founded merely upon a comparison.[3] Where the question is one of identity, as in case of a disputed signature, or other contested questions of identity, any witness may give an opinion based upon his knowledge of the facts. It is an exception to the rule which permits none but expert witnesses to give opinions. And expert testimony is received by all the courts, though some regard it as weak, feeble and decrepid. In a recent case, the following instruction to the jury was held to be correct, to-wit: "Opinion of experts was evidence to be considered by the jury in connection with other evidence bearing on the subject, but was not of itself conclusive; that the value of the rule of law, permitting them to testify their opinions, was grounded on the fact that generally such opinions are correct. The value of such opinion was to be determined by the jury, having reference to the skill and competency which the witness manifested, in connection with the other

[1] Sigfried v. Levan, 6 Serg. & R. 308.
[2] Taylor v. Meekly, 4 Yeates (Pa.), 79.
[3] Sweetser v. Lowell, 33 Me. 446.

evidence which was produced before them, to be considered in determining whether the disputed letters were in the plaintiff's handwriting; that experts were not infallible; generally their opinion was reliable, but that sometimes they were wrong; that the court had in many instances known them to hit right and in some instances wrong.[1]

Evidence — comparison — new witness.

§ 416. In an action of ejectment in New York, decided in 1826, it was held by that court, in a question of identity of handwriting, that proof by comparison of handwriting, *i. e.*, the juxtaposition of two writings, in order to ascertain whether both were written by the same person, was inadmissible; that the witnesses cannot testify from such comparison alone, nor can the writing be submitted to the jury. And it was also held that where there was only one attesting witness, and he did not prove the deed, but the party to the deed acknowledged the execution before another witness at a subsequent period, who subscribed his name as a witness, this last witness might prove the deed. It was equivalent to an original execution in the presence of this new witness.[2]

Witness to signature — source of knowledge.

§ 417. The writing from which a witness forms his judgment, acquires his knowledge and makes up his opinion as to the genuineness of a handwriting may be severed from any and all proof or fact that he ever saw the party write. Such evidence will be admitted where there is an acknowledgment by the party writing, that the writing from which the witness has formed his opinion is genuine, as where a continued and protracted espistolary correspondence has been conducted and carried on with the party whose handwriting is in dispute, in such a manner, under such circumstances and to such an extent as to lead to the assurance which raises the presumption of the genuineness of the letters and signatures.[3] As it is of course

[1] Pratt v. Rawson, 40 Vt. 183. And see Bank v. Haldeman, 1 Pa. 161; Lodge v. Phipher, 11 Serg. & R. 333; Lyon v. Lyman, 9 Conn. 55; State v. Cheek, 13 Ired. (N. C.) 114; Sackett v. Spencer, 29 Barb. 180.

[2] Jackson v. Phillips, 9 Cow. 94.

[3] Page v. Homans, 14 Me. 478; Lyon v. Lyman, 9 Conn. 55; Bruce v. Crews, 39 Ga. 544; Cody v. Conly, 27 Gratt. 313; Greaves v. Hunter, 2 Carr. & P. 477; Burnham v. Ayer, 36 N. H. 182; Com. v. Carey, 2 Pick. 47; Reyburn v. Belotti, 10 Mo. 597; Baker v. Squier, 1 Hun, 448; State v. Shinborn, 46 N. H. 497; Doe v. Suckermore, 5 Ad. & El. 731; United States v. Simpson, 3 Pa. 437; Gordon v. Price, 10 Ired. (N. C.) 385; Jackson v. Van Dusen, 5 Johns. 144; Empire Co. v. Stuart, 46 Mich. 482; South. Ex. Co. v. Thornton, 41 Miss. 216; Chaffee v. Taylor, 3 Allen, 598; Johnson v. Daverne, 19 Johns. 134; State v. Spence, 2 Harring. 348; Com. v. Smith, 6 Serg. & R. 568.

always understood, that in all cases where the witness bases his standard of comparison upon other writings, and draws an opinion from them, they must be identified as the handwriting of the party whose writing is in dispute.[1] *

Signature — alleged forgery of note.

§ 418. On the trial of an action in New York on a promissory note, the issue was upon the genuineness of the note. Upon the trial the plaintiff introduced one Eldridge as a witness, who testified to his knowledge of defendant's handwriting, and that he believed the signature to the note was his; that he was teller in a bank, and had been accustomed to examine writings to ascertain whether or not they were genuine. After defendant had given evidence tending to show that the note was not in his handwriting, and that the plaintiff had been seen imitating his hand, he recalled Eldridge and proved by him that within a certain period of time the bank in which he, Eldridge, was teller had loaned no money to plaintiff; and further examining him, asked, "What kind of a hand does the plaintiff generally write?" This was objected to, objection overruled and witness said: "He generally wrote a careless and poor hand." "From your knowledge of his handwriting should you think he could have written the note in question?" Witness, "I should not think that he could have written it." Of this the court remarked: "The question secondly put and answered called for an opinion of the witness upon a matter not directly in issue, but bearing directly upon the main issue, and upon which the opinion of the witness was not admissible in evidence.[2]

Same — bank checks — discounted.

§ 419. It was held that in an action by a bank to recover of the

[1] McKeone v. Barnes, 108 Mass. 344; Boyle v. Colman, 13 Barb. 42; Cun-Cochran v. Butterfield, 18 N. H. 115; ningham v. Bank, 21 Wend. 556.

[2] Boyle v. Colman, 13 Barb. 42.

*Mr. Best lays down a rule thus: "1. A standard of the general nature of the handwriting of the person may be formed in the mind by having on former occasions observed the character traced by line while in the act of writing, with which standard the handwriting in the disputed document may, by mental operation, be compared. 2. A person who has never seen the supposed writer of the document write, may obtain a like standard by means, either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his. 3. A judgment as to the genuineness of the handwriting to a document may be formed by a comparison, instituted between it and other documents known or admitted to be in the handwriting of the party." Best Ev. (5th ed.), § 233. It is certainly very doubtful whether having seen a person write a few times, is to form a better standard than a familiarity with the hand from correspondence or business relations. It is still doubtful whether either of these sources is better than a direct comparison.

defendant $146, amount of a check, the mere fact that checks upon one bank had been passed to the credit of another, which had discounted them and transmitted them to a correspondent for collection, is not sufficient to support the testimony of a witness who testified to the signature of the drawer of the check, when he has no knowledge of it except that derived from its similarity to the signatures on the checks paid. But we have seen in New York that identity could not be proved by a comparison of handwriting.[1] This rule seems to be carried fully as far as any of the English decisions have, and in fact much farther than some of them. The English court in 1825, in an action of assumpsit for the charge for expense in keeping some horses, the defendant's attorney was called as a witness to prove his signature to a certain paper, when he testified that he had never seen the defendant write, but that he did believe that the signature to that instrument was in the defendant's handwriting, from having received letters from him, upon which he had acted. BEST, Ch. J., held that this was quite sufficient for the witness to ground a belief upon, which was all that was required.[2]

Suit by freed woman — two notes.

§ 420. An action was brought in South Carolina against the executor of an estate, on two promissory notes. The defense set up was, that the notes and each of them were, either *nudum pactum* or *ex turpi contractu*. In support of this defense, the executor offered the following evidence; proving that the plaintiff, the woman Tabitha, was a dependent on Bremar, even for the means of subsistence; that she had been first his slave, and afterward his freed woman, and notoriously carried on an adulterous intercourse with him, from the time of his marriage to the time of his death, etc., and certain letters were offered. NOTT, J., said: "The usual method of proving an instrument of writing, where there is no subscribing witness, is to prove the 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 may 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

[1] Cunningham v. Hudson Riv. Bank, 21 Wend. 556.

[2] Tharpe v. Gisburne, 2 Carr. & P. 21.

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 constitute 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. Whether it would have been sufficient to establish the fact is another question; but I think it ought to have been submitted to the jury." The presiding judge had charged the jury: "That these notes, even if voluntary, were not *nudum pactum*, and that if a man makes a voluntary note, he is legally bound by it. But that it was unnecessary to consider this point inasmuch as an ample consideration had been proved."[1] This was clearly error. The court should not tell the jury what has been amply proved. It is invading the province of the jury, whose duty it is to judge of what has been proved, otherwise the jury would be an awkward appendage to the court.

Proof of signature — admissions of obligor.

§ 421. We have seen the rule to be, where there is an attesting witness to a written instrument, no proof of the instrument or its execution can be made except by such witness, unless his absence is first duly accounted for; thus far, the rule seems sound enough; but then it does not permit proof of the execution until you have proved the handwriting of the witness; if you do this, though this does not prove the execution, it satisfies the rule. But if, after due diligence, you cannot procure the attesting witness, nor any witness to prove his handwriting, the court will then, under this rule, permit you to do directly what you have failed to do by indirection and circumlocution—prove the handwriting of the obligor. And the admissions of the obligor, it is held, though against himself, of the execution of bond, will not be taken as true, so as to waive the necessity of the circuitous course above indicated. But some of the courts have so far receded from this English rule as to hold that the declarations of

[1] Singleton v. Bremar, Harp. (S. C.) 201.

the maker may be resorted to, to prove the execution of the instrument, whenever it becomes proper to admit proof of the maker's handwriting.[1]

Note destroyed — receipt — signature.

§ 422. Where an action was brought on a promissory note which had been improperly canceled and destroyed, a receipt in full was offered in evidence, with the name of Peter Welsh as subscribing witness. Welsh being asked whether the name thus subscribed was his handwriting, testified that he did not believe it was. On the part of Patterson, a witness testified that Welsh taught school in the neighborhood; he had frequently seen him write and seen his handwriting, and he believed it was his handwriting, but would not swear to it positively. He also testified, that on the day and before the release was executed, in a conversation, Tucker told him, on being asked if Patterson owed him any thing, that Patterson owed him nothing, and again in the presence of Patterson, Tucker said he owed him nothing. That they had a settlement, and Patterson paid him $20 on that settlement. It was held that where a subscribing witness to an instrument denies his handwriting, or attestation, other evidence of the execution of the instrument may be received; and proof of the handwriting of the subscribing witness, by other persons acquainted therewith, will in such cases be sufficient to authorize the reading of the instrument to the jury.[2]

Land contract — receipt — forgery.

§ 423. In an action of ejectment in Pennsylvania in 1824, there was involved the proof of a parol agreement, in proof of which a receipt was produced in part payment for the land. The defendant asserted that the receipt was a forgery, and gave evidence of the declarations of Lodge, one of the plaintiffs, as to the place where he found it. Upon this, Lodge offered a witness to prove the place in which he found the receipt in contradiction to the evidence of his declarations. The court rejected the testimony, and the plaintiff excepted. It was held that a witness, though a man of business, and much conversant with writings, who had never been employed in detecting forgeries, cannot properly be asked whether papers proved

[1] Conrad v. Farrow, 5 Watts, 536; Miller's Estate, 3 Rawle, 318; Taylor v. Meekly, 4 Yeates (Pa.), 79; Irving v. Irwing, 2 Hayw. (N. C.) 27; Holloway v. Laurence, 1 Hawks, 49.

[2] Patterson v. Tucker, 4 Halst. (N. J.) 322.

to be in the handwriting of a particular person, and a paper alleged to have been forged, were, in his opinion, the same handwriting. But a jury may compare writings, and it seems that men of business, who are much in the habit of seeing many hands, would be better qualified to judge of their genuineness than jurors generally are; though the rule is, perhaps, otherwise, where the witness declares that he is not an expert in the detection of writing, as to whether they are or are not forgeries.[1] But upon this point our decisions are not at all in harmony. Where an information was filed against a defendant for a riot, a letter from the prosecutor was offered in evidence by the defendant, which letter was admitted to be in his handwriting. Then it was proposed to prove a letter which had been lost, by a witness who was produced for that purpose; this was held inadmissible, for the reason that the witness had never seen the party write.[2]

Money loaned — usury — letters — signature.

§ 424. In an action for borrowed money, a witness for plaintiff stated that he was present when the sum of £20 was advanced by plaintiff to defendant. This witness stated that he was in the habit of writing letters for the plaintiff, and he admitted that a letter put into his hand was written by him, by direction of the plaintiff and signed by her; the defendant's counsel then put another letter into his hand, which he said was not written by him, and he stated that he did not believe it was written or signed by the plaintiff. A second witness was called by plaintiff's counsel, for defendant wanted to show both these letters to this witness, and ask him whether, in his belief, the two letters were both of the same handwriting. Lord TENTERDEN, C. J., said: "I think that that question cannot be put. It was formerly held that persons conversant with handwriting could be asked whether certain letters were genuine or not; but it has been since held that that is not evidence."[3] A defendant in an action of debt pleaded usury. The proof of usury depended on the authenticity of an account purporting to be signed by the plaintiff. The plaintiff contended that it was a forgery, which was the only question in the cause. It was held that a witness called to identify handwriting should form his judgment from the handwriting, and not from extrinsic circumstances.[4]

[1] Lodge v. Phipher, 11 Serg. & R. 333.
[2] Rex v. Sir T. Culpepper, Skin. 673.
[3] Clermont v. Tullidge, 4 Carr. & P. 1.
[4] Mendes da Costa v. Pym, 2 Peake Cas. 144.

Ejectment — marriage — lease — signature.

§ 425. In a recent case in New York, plaintiffs brought ejectment, claiming to be the widow and sons of William R. Hynes, deceased, and to identify themselves as such was one question in the case, and that depended upon the validity, as a marriage contract, of what took place in his life-time between the intestate and the plaintiff, who claimed as his widow. Enough took place, it was said, at those times, if it had been done in New York, to have made a valid contract. "Enough took place afterward to furnish a presumption, under the laws of this State, of a prior legally-formed and subsisting marriage relation." And as to the lease of the premises, it appeared that the court did not permit the witness Loader to testify that the handwriting of the signature to the lease of the premises in Leverton street was that of the adult plaintiff; the witness had never seen her write; he had no knowledge of her handwriting save *that* got by looking upon two writings other than the signature to that lease, which other writings she had acknowledged in his presence, and with the writings then before them, to have been penned by her. Those other writings were two signatures of names of persons, and one written name of a place of residence, and as shown by a signature-book kept by the bank at which she had opened two accounts of money deposited by her. These writings were not in evidence in the case; that is, they were not produced before the jury and kept in court throughout the trial. The witness who controlled them was examined beyond the seas on commission. He produced them before the commissioners, but refused to part with them. Copies were taken in manuscript by the commissioners and annexed to the deposition of the witness. Copies were also taken by the phonographic process, and certified to by the commissioners, and annexed to the said deposition. "The witness Loader was presented to the court," said FOLGER, C. J., "doubly competent to speak on an issue as to the genuineness of the handwriting as an expert, and as having personal knowledge of the handwriting of the adult plaintiff. It does not appear from the case that the trial court determined whether he was qualified to speak as an expert. We will assume that he was, and that had the trial court thought it needful to pass upon the question, it would have held that he was. Yet, in our judgment, it was not proper to receive his testimony as an expert and by a comparison of writings. An expert in handwriting, when speaking only as a witness from a comparison of handwriting, that is, with two

pieces of it in juxtaposition under his eye, should have before him in court the writing to which he testifies and the writing from which he testifies; else there can be no intelligent examination, either in chief or cross; nor can there be a fair means of meeting his testimony by that of other witnesses. This requirement is included in the rule that there can be no comparison of handwriting, unless the piece of writing by which comparison is made, are properly in evidence in the case for some purpose other than that of being compared."[1]

Comparison — English and American rule — statute.

§ 426. Witnesses when testifying as to handwriting, it is said, should declare their *belief* on the subject; but in an English case, Lord KENYON held the testimony admissible, when the witness merely stated that the paper produced in evidence was *like* the handwriting of the person by whom it purported to have been written.[2] But later English cases seem to doubt the soundness of this rule.[3] Witnesses are sometimes extremely cautious in stating their *belief;* or in announcing an *opinion*, a witness may say that he *thinks.*

It must be admitted as a general rule, perhaps without exception, that the proof of handwriting is in its nature a comparison, with the exception, of course, of a subscribing witness, or one who wrote the document or saw it signed; in such case, it became a matter of fact, and not a question of *belief*, or of opinion; then comparison, belief or opinion is not necessary. It is a question merely of previous knowledge. This is a rule of itself, and not an exception to the above rule.[4] The English rule, prior to the act of Parliament, was held by the courts to exclude comparison of handwriting to ascertain whether the one in controversy was genuine, had been adhered to in practice, was based upon no possible reason, or common sense, or common justice, but merely to pacify a technicality of the common law; and when the English courts became restive and evinced a disposition to recede from the rule, which prevailed without reason, they were called back to ancient landmarks by the iron chain of erroneous precedent, until relieved by Parliament in 1854. Now, if we are to follow English precedents, why not follow them in legislation as well as in adjudications. And in some of our States it

[1] Hynes v. McDermott, 82 N. Y. 41 (1880). Citing Randolph v. Loughlin, 48 id. 456; Dubois v. Baker, 30 id. 355; Miles v. Loomis, 75 id. 288.

[2] Garrells v. Alexander, 4 Esp. 37.

[3] Gagleton v. Kingston, 8 Ves. 476.

[4] Doe v. Suckermore, 5 A. & E. 731.

has become the practice to admit any papers to the jury for comparison, and this, whether they are relevant to the issue or not.[1] In fact the English decisions, long before the act of Parliament above referred to, will be found in all sorts of confusion; and our own decisions, in a vain attempt to follow English precedents, are, perhaps, not less confused.

Same — statutes — constructions — omissions — comparison.

§ 427. Still there are other questions that have arisen, and may still come before the courts, upon the construction of wise and well-digested statutes upon this important subject. It is difficult to enact a statute upon a subject of importance, which has been complicated, not to say confused, by former adjudications, without overlooking matters which relate to the subject. And one rule of statutory construction seems to be that they are to be considered with reference to former adjudications, if any, upon the subject. Potter's Dwarris 274, says: "Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same State or country, or that of another, that construction is to be given to the later statute. * * * It is to be presumed in such cases that the legislature who passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law."[2] The statute admitting comparison of handwriting by witnesses and jurors has doubtless omitted the question as to what extent the witness may be tested by cross-examination, by presenting to him other documents, not proven to be genuine, nor relating to the question at issue, or the matter in controversy. And again: the act fails to provide for the mode in which a party may disprove his signature to a document by comparison, and this must remain an open question until settled by adjudication.

Same — documents — thirty years old.

§ 428. In cases of ancient documents, where witnesses cannot be produced who have seen the person write, whose handwriting is in dispute, or in doubt, the rule, of course, is not so strict, since the law, from necessity, does not require the same degree of proof as in doc-

[1] Lyon v. Lyman, 9 Conn. 55; Moody v. Rowell, 17 Pick. 490; Homer v. Wallis, 11 Mass. 309; Richardson v. Newcomb, 21 Pick. 315.

[2] Com. v. Hartnett, 3 Gray, 450; Ruckmaboye v. Mottichund, 32 Eng. L. & Eq. 84; Bogardus v. Trinity Church, 4 Sandf. Ch. 675; Rigg v. Wilton, 13 Ill. 15; Adams v. Field, 21 Vt. 256.

uments recently executed.[1] The law has fixed the time, as a general rule, that they prove themselves at the age of thirty years. This is a legal presumption, a limitation for the quiet of community; emphatically a law of repose; yet, questions may arise in which the handwriting must be proved, as where the evidence in the case overcomes, or rebuts the legal presumption, as sometimes in a disputed pedigree of the claimant.[2]*

Where one or more letters were seen by witness — rule as to.

§ 429. It was held in Michigan that where one or more letters, purporting to come from a certain person, and known by the addressee to be such person, have been received, and are in subsequent transactions acted upon, they may, it has been held in some cases in questions of handwriting, be admissible. But the mere receipt of letters purporting to be from a person never seen, and with whom no business relations had existed which were based on them as genuine, will not be regarded as means of knowledge. And if there be no direct knowledge of handwriting, there should be something to assure the recipient of letters, in a business way, of their genuineness, before he can testify as to the writer, or use comparisons of handwriting. And so where a witness, who was called to prove the indorsement on a note, said he never saw the indorser write, but had one or two letters from him, and saw two or three that the bank had received, and believed the signature was his.[3]

But in order to the proof of the execution of a deed or mortgage,

[1] Doe v. Suckermore, 5 A. & E. 717.
[2] Taylor v. Cook, 8 Price, 652; Morewood v. Wood, 14 East, 328.
[3] Pinkham v. Cockell, 77 Mich. 265.

* In Ram on Facts (4th ed. page 70), we find in the text this rule: "A person who comes to recognize another's handwriting is obviously very liable to fall into error. One, and an abundant source of mistake is, that many persons write very much alike; so much so, that it is often difficult to distinguish one person's hand from that of another." In a note he says: "One among the many instances that might be cited in corroboration of the text was what occurred in the course of the investigation of the charge of forgery against John W. Hunter, in New York. Mr. Hunter was employed in the sub-treasury, and Mr. Cisco, the head of the department, was examined as a witness, and swore positively that no person could imitate Mr. Hunter's handwriting so as to deceive him (Cisco), and that he (Cisco) could not be imposed upon in regard to writing with which he was familiar. When he had committed himself beyond all reservation to this positive opinion, he was presented by ex-Judge Pierpont, the counsel for Mr. Hunter, with a slip of paper with writing on it, and was asked if that was his own handwriting. He replied that it was. His attention was called to the fact that it was somewhat blurred, but he said that made no difference; he recognized it perfectly; it was his own. The counsel then informed the court that the paper was written by Mr. Levi, a clerk of Mr. Low, in the presence of several eminent witnesses who had attached their mark to it so as to be able to identify it, and that Mr. Cisco had thus unwittingly testified to another man's handwriting as his own; if he could be so easily deceived in his own handwriting, how much more likely was he to be mistaken in that of another man."

it is not necessary that the witness called for that purpose should have been an attesting witness to the execution of the instrument. And so in an action in Missouri to foreclose a mortgage, where it was shown that the witness was not present when it was executed, his evidence was not inferior to the proof of the same fact by one whose name appeared as a subscribing witness.[1]

[1] Moss v. Anderson, 7 Mo. 337.

CHAPTER XI.

HANDWRITING — COMPARISON — Continued.

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479. Same — English precedents.

Handwriting — comparison — civil-law rule.

§ 430. It was held in Missouri, under the act of 1839, that it was not necessary to call the subscribing witnesses to the deeds to iden-

tify the grantor, or account for his absence, nor was their presence required by the rule that the best evidence shall be produced. The proof of the identity of a grantor in a deed, by a person who is not a subscribing witness, is not evidence inferior to the proof of the fact by one who has attested it as a witness.[1] As to the proof of handwriting by comparison, it was not permitted by the strict rules of the common law of England, with perhaps some few exceptions. But not so under rules of the civil law — for a more reasonable and liberal rule and practice prevailed under the enlightened system of Roman jurisprudence. There the genuineness of a doubtful, disputed or contested writing might be established and sustained by witnesses comparing such writing with other writings acknowledged or proved to be genuine. Yet, upon this there arose a question of very considerable importance, which brought out conflicting decisions; that was, as to the nature, character or kind of papers or writings that were to be taken as a basis for such comparison. It was supposed at first, by some, that in order to prevent forgery, writings to be accepted as a basis of comparison should be attested by at least three witnesses, or be a matter of public register. But this was found to be without reason, and hence gave way to the more liberal rule.[2]

Same — same — common-law rule.

§ 431. But as above suggested, this was not permitted by the harsh rules of the common law. Where an action of assumpsit was brought on a promissory note, the declaration stated David Jones and John Jinkins made their promissory note for £250 in favor of the defendant, who indorsed it to plaintiff, etc. The plea was that he did not indorse the note. It was insisted by *Maule*, for the plaintiff, that in addition to the usual proof of the defendant's handwriting by the evidence of the witnesses acquainted with it, he should also put into the hands of the jury a great number of other bills of exchange and notes which bore the genuine signature of the defendant, and which had been paid, so that the jury might compare the handwriting of those signatures with the signature in dispute in the present case, and cited authorities. But in deciding this question, LITTLEDALE, J., said: "The strictness of the ancient rule respecting the comparison of handwriting is broken in upon by the

[1] Moss v. Anderson, 7 Mo. 337.

[2] Hughes v. Rogers, 8 Mees. & Wels. 123. And see Bromage v. Rice, 7 Carr. & P. 548; Garrells v. Alexander, 4 Esp. 37.

modern cases. * * * I shall reject the evidence; the jury are not to compare any other writings with that in dispute, except documents which are otherwise evidence in the cause.[1]

Same — comparison — signature of attesting witness.

§ 432. In another English case the question was as to the genuineness of the signature, not of the defendant, but of a subscribing witness to the execution of a bond. In this case, a witness was introduced to prove the signature of an attesting witness to a bond alleged to have been given by a party then deceased; the witness stated that the signature was not in the handwriting of the supposed attesting witness. Another paper (not in evidence in the cause) was placed in the hands of the witness, which he also stated was not in the handwriting of that person. It was held that the plaintiff could not prove, for the purpose of contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond. The reason for rejecting it does not seem very clear.[2]

Witness — voluntary attestation.

§ 433. In an action on a promissory note attested by two witnesses, it was held that a person who sees an instrument executed, but is not requested by the parties to attest it, cannot, by afterward putting his name to it, prove it as an attesting witness. One of the witnesses to the note was called to prove it; he stated that he did not put his name to it in the presence of the defendant, nor was he ever called upon by the defendant to attest it; but he saw the defendant deliver it as his note of hand, to the payee, and afterward put his name to it without the knowledge of the defendant. Lord ELLENBOROUGH said: "I cannot receive the evidence of this person as an attesting witness to the note. He was no attesting witness, but a mere volunteer. If the other person, whose name is on the note as attesting witness, really was so, it can only be proved by his evidence." It appeared, however, that this latter person had placed his signature to the note exactly under the same circumstances as the former witness had done, and the defendant's acknowledgment was considered sufficient to fix the liability upon him as the maker of the note, and the plaintiff had a judgment.[3]

[1] Bromage v. Rice, 7 Carr. & P. 548. And see Allesbrook v. Roach, 1 Esp. 351; Griffith v. Williams, 1 C. & J. 47; Solita v. Yarrow, 1 Mood. & Rob. 133.

[2] Hughes v. Rogers, 8 M. & W. 123.

[3] M'Craw v. Gentry, 3 Campb. 232.

Evidence — identification of handwriting.

§ 434. Where the proof of the handwriting admits of secondary evidence, it will not be necessary to prove it by more than one witness.[1] This is the general rule, whatever the instrument may be, when it is necessary thus to identify the handwriting.[2] But this, of itself, is not sufficient — it must be followed up by proof of the identity of the person who is alleged to have signed the paper, if his identity is in dispute or in doubt. This is obviously essential, unless that fact is to be presumed from the identity of the name.[3] This rule finds an illustration, thus: One William Seal Evans was sued for goods sold and delivered; it was proved that the goods were sold to a man of that name who was a customer, and that he had written a letter acknowledging the receipt of the goods. That did not prove that this person was the defendant. And as to the sufficiency of the proof of the handwriting of an attesting witness, the learned judges are not entirely agreed.

Witnesses to a will — proof of signature.

§ 435. In an action of trespass to try the title of land in South Carolina, plaintiff introduced a grant to James Moore, and next, the will of James Moore, and as two of the subscribing witnesses were dead, and the other had left the State, a witness, John Pratt, was called to prove all their handwritings, and he proved the handwriting of each of the three witnesses to the will. It was held that the proving of the handwriting of the three witnesses to the will by any one credible witness was sufficient, if they were dead or out of the State; that it did not by any means impugn or contravene the statute of frauds, which requires three witnesses to a will; on the contrary, it established the requirements of the statute.[4] In an action of ejectment in England the proof of a will became necessary at the trial. "The lessor of the plaintiff produced and proved the will of 1743, under which he was devisee of the estate in fee. To encounter this evidence, the defendant produced this will or instrument of 1745, and both the witnesses to it (*Elizabeth Mitchell and William Medlicott*) being dead, they proved their handwritings, and also the

[1] Adam v. Kerr, 1 B. & P. 360.

[2] Powers v. M'Ferran, 2 S. & R. 44; Webb v. St. Lawrence, 3 Bro. P. C. 640; Douglass v. Sanderson, 2 Dall. 116; Hamilton v. Marsden, 6 Binn. 45; Kay v. Brookman, 3 C. & P. 555; Adam v. Kerr, 1 B. & P. 360; Sluby v. Champlin, 4 Johns. 461; Cooke v. Woodrow, 5 Cranch. 13; Prince v. Blackburn, 2 East, 250; Cunliffe v. Sefton, id. 183.

[3] Nelson v. Whittall, 1 B. & Ad. 19; Whitelocke v. Musgrove, 1 C. & M. 511; Warren v. Anderson, 8 Scott, 384.

[4] Hopkins v. DeGraffenreid, 2 Bay. (S. C.) 187.

handwriting of old *John Clymer*, in the common and ordinary form."[1]

Proof of signature — rule in New York.

§ 436. In an action of ejectment in New York in 1822, plaintiff offered in evidence the last will of Amie LeGrange, of January 28, 1796. To prove the will he called John N. Quackenbush, one of the subscribing witnesses, who proved the due execution of the will by the executrix and all the handwriting of the other witnesses.[2] The New York court has laid down a rule in these cases, where it is necessary to make proof of sealed instruments, thus: "(1) The witness must be produced if practicable. (2) If he cannot be found, or his testimony cannot be used, his handwriting must be proved. (3) If his handwriting cannot be proved, after diligent exertion for that purpose, proof of the handwriting of the party executing the instrument is admissible in evidence." But evidence that a subscribing witness cannot be found will not warrant the inference that his handwriting cannot be proved. The party seeking to avail himself of such testimony must show due diligence to obtain as well proof of the handwriting as attendance of the witness. And it may be as well to superadd proof of the handwriting of the person who executed the instrument.[3]

Same — rule in Massachusetts.

§ 437. According to the above rule, as announced in New York, the proof of the signature of the party who executed the paper cannot be made unless you have made an exertion and failed to prove the signature of the subscribing witness. It is difficult to perceive any good reason why this order of things should not be exactly the reverse; and it has been so held in Massachusetts, with what appears to be better reason. In a well-considered case involving this question, after commenting upon the case on its merits, SHAW, C. J., said: "Different rules prevail on this subject; in some instances, and this we believe is the more general rule, it has been held that where an instrument under seal, and commonly requiring attesting witnesses, is to be proved by secondary evidence, the handwriting of the subscribing witness is to be proved in the first instance. The court are of opinion that where the attesting witnesses are not within

[1] Clymer v. Littler, 3 Burr. 1247.
[2] Jackson v. Le Grange, 19 Johns. 178.
[3] Jackson v. Waldron, 13 Wend. 386.

the jurisdiction of the court, proof of the handwriting of the party is a species of proof which has often been admitted in this Commonwealth, and is more direct and satisfactory than that of the handwriting of the witnesses."[1] This seems to be a rule based on sound reason.

Proof of confession of signature to a note.

§ 438. An early case in New York, which went up on *certiorari*, was brought on a promissory note, to which there was a subscribing witness. Defendant denied the execution of the note, and plaintiff called a witness to prove that defendant had *confessed* that he executed the note to plaintiff; this was objected to, and the objection overruled, and the evidence received, and there was judgment for the plaintiff, when it came up on error. SPENCER, J., said: "I think it results that an instrument, though attested by a subscribing witness, may be proved by the confession of the party who gave it."[2] This decision is referred to in a note to a case subsequently decided in Maine.[3]

Proof of unregistered deed.

§ 439. Adopting the same prevailing rule as to secondary evidence, the court of Maine, in 1820, required diligent inquiry after the subscribing witness to a deed. An execution issued and was levied upon lands as the estate of *George Whittemore*, and in an action to recover possession of the land against the judgment debtor, the tenant, to show an intermediate conveyance from the demandant to the judgment creditor, proved the execution of a deed of the land, seen by the witness in the possession of the debtor, but not registered; and he also made proof of the fact of the signature of the demandant as grantee in the said deed of conveyance, and of one of the subscribing witnesses to the deed, who was also the magistrate before whom the deed was acknowledged; but who, being interested, could not be examined as a witness. This was held to be insufficient, without proof of diligent inquiry after the other subscribing witness to the deed.[3]

Proof of signature — rule in New Hampshire.

§ 440. It is well recognized as a very general rule in the law of evidence, that the best evidence must be produced which the nature

[1] Valentine v. Piper, 22 Pick. 90.
[2] Hall v. Phelps, 2 Johns. 451 (1807).
[3] Whittemore v. Brooks, 1 Greenl. 57.

of the case will permit, and which is within the power of the party. In an action of assumpsit on a promissory note, to which there was a subscribing witness, plaintiff offered evidence to show that the witness resided out of the State, produced evidence to prove his handwriting, and that of the defendant. It was held that, as the witness resided beyond the jurisdiction of the court and in another State, the testimony was competent.* [1] Now, we have seen that in New York, the handwriting of the subscribing witness must be proved in the first instance, or good cause shown why it is not done.[2] In Massachusetts it is held to be more direct and satisfactory to prove first, the signature of the party who executed the instrument.[3] And in New Hampshire it is proper to admit the proof of the signature of both the subscribing witness and the obligor. And in New York, it was competent to prove the confession of defendant, that he did execute the note.[4] And it appears that in England, in one case, at least, a witness has been permitted to speak of, and as to the genuineness of a person's mark, made when he could not write his name, from having seen it affixed by him on several occasions, yet it might be difficult to detect the forgery of a man's mark. This looks as though it had, at least, gone to the very verge of the law on the subject.[5]

Disputed writing — rule in Alabama.

§ 441. It was held in Alabama, in 1841, that proven specimens of handwriting of the defendant could not be given in evidence to the jury, to be compared by them with the signature to the genuine writing, the genuineness of which is controverted. The action was on a promissory note; the genuineness of defendant's signature thereto was put in issue. GOLDTHWAIT, J., following a leading English case, briefly said: "This is one of those questions upon which so much has been said and written, that a review of all the cases would be alike impracticable and uninteresting. We shall, therefore, content

[1] Dunbar v. Marden, 13 N. H. 311. Citing 1 Phil. Ev. (2d ed.) 473; Holmes v. Pontin, 1 Peake, 99; Cooper v. Marsden, 1 Esp. 1; Burt v. Walker, 4 B. & Ald. 697; Dudley v. Sumner, 5 Mass. 462; Cooke v. Woodrow, 5 Cranch, 13; Jackson v. Burton, 11 Johns. 64; Wallis v. Delancey, 7 T. R. 266, note; Whittemore v. Brooks, 1 Greenl. 59, and note.

[2] Jackson v. Waldron, 13 Wend. 178.

[3] Whittemore v. Brooks, 1 Greenl. 57.

[4] Hall v. Phelps, 2 Johns. 451 (1807).

[5] George v. Surrey, 1 M. & Malk. 516.

* In Pytt v. Griffith, 6 J. B. Moore, 538, PARK, J., said: "Formerly proof of the handwriting of an attesting witness was only admissible where such witness was dead; and I can remember the first deviation from that rule, when it was extended to cases where the party was abroad, or out of the jurisdiction of the courts of this country."

ourselves with declaring the rule as we consider it exists at the present day. Comparison of handwriting, by submitting different writings having no connection with the matter in issue, is not permitted by law. The present case presents the naked question, whether signatures proved to be in the defendant's handwriting can be given in evidence to the jury, to enable them to determine, by comparison with the disputed signature, whether the letter is genuine or otherwise. In our opinion this was not competent evidence. We decline entering into a discussion whether there are any cases in which mere comparison is permitted, though it is obvious that when more than one paper is before the jury as evidence, a comparison will be made, if any dispute takes place as to the authenticity of either. We may also add our wish to be understood as neither deciding or intimating an opinion on any other than the precise question now presented." Thus following the English rule on the subject.[1]

Same — English statute.

§ 442. The unsettled condition of this question in this country certainly demands some uniform system of practice, that we may know what the law is upon this important subject. Many of our courts held as we see announced by the Alabama court, in the preceding section; and most of them, without attempting to give a reason, except to follow the leading English cases, and especially *Suckermore's case*, so often cited. So unjust was the rule, that Parliament took it in hand in 1854, and passed the "Common Law Procedure Act,"[2] which provides that "comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine shall 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." And so this troublesome question is settled in England by statute.

Writing — witness — cashier of bank.

§ 443. In a case decided in Ohio as early as 1833 it was held that while those who gave to the jury an opinion, or the greater number of them, upon a disputed signature, believed that it was that of the defendant, the counsel claimed that the superior skill and opportunity of the defendant's witnesses entitled them to the most

[1] Little v. Beazley, 2 Ala. 703.

[2] 17 & 18 Vict., chap. 125 (1854).

weight, and particularly that the experience acquired by the cashier of a bank enables him to judge with greater certainty of handwriting. "It was true," said the court, "that experience and practice in judging of writing, as well as experience and practice in every thing else, will enable a witness more readily to form an opinion upon the subject of his experience; but the knowledge is not confined to particular stations. Any person may acquire it." Experts in handwriting may have acquired a knowledge thereof; but that is no good reason why all other witnesses should be excluded. In the charge to the jury, the court said: "We judge of writing as of other things, by its individual character as a whole. You must take the opinion of these witnesses, then, altogether, and judge of their testimony as, under all the circumstances, they shall appear entitled to weight from their opportunity of knowing the defendant's handwriting, and your estimate of their skill and judgment. A cashier of a bank is entitled to no more credit than any other person of equal skill."[1]

Draft — proof of letters.

§ 444. An action was brought for money had and received. Wells, Fargo & Co. sent a draft to plaintiff from San Francisco to New Bedford, Mass., but sent it in a letter to the care of defendant. When it arrived plaintiff had gone to sea on a whaling voyage. There was evidence that defendant opened the letter, indorsed plaintiff's name on the draft, and sold it to a broker. Defendant claimed that he had authority to do what he did. The non-production of the letter being accounted for, the defendant offered to prove the contents of two letters, which had been seen, and which purported to be from Manuel, and authorized the appropriation of the money which might be obtained upon the draft by Isabella, for whom he claimed to have acted in the matter. He stated that he did not know Manuel's handwriting, and had never seen him write. This evidence was rejected. The court said: "The rule in Massachusetts in regard to the admission of evidence to identify handwriting is much more liberal than in England, and in some of the other States; but the decisions of this Commonwealth justify, if they do not require, the rejection of the evidence offered in this case."[2]

[1] Murphy v. Hagerman, Wright (Ohio), 292.

[2] Nunes v. Perry, 113 Mass. 274 (1873). Citing Richardson v. Newcomb, 21 Pick. 315; Com. v. Eastman, 1 Cush. 189, 216; Brigham v. Peters, 1 Gray, 139; McKeone v. Barnes, 108 Mass. 344.

Maker of note — partial payment — limitations.

§ 445. A joint and several promissory note was made by defendant Porter, John Hoskins Shearman, Thomas Shearman and James Wheeler. The making of the note was proved, and the question presented arose upon the statute of limitations. The note was dated July 12, 1824, and payable on demand. To take the case out of the statute, the plaintiff proved that a person named *Thomas Shearman* had paid a part of the principal and interest on the note, within six years next before the bringing of the suit. The plaintiff's counsel proposed to prove that the signature of *Thomas Shearman* was in the handwriting of the person who had made the payment; to which defendant's counsel objected, as there was a subscribing witness to *Thomas Shearman's* signature on the note, who was not called. To meet this objection it was proved that the signature of *Thomas Shearman* was on the note before defendant signed it; and that the defendant and *Wheeler* had executed the note as sureties to the two *Shearmans*, whose names were on the note. The judge expressed the opinion that the evidence did not show *prima facie* that the payment had been made by a party to the note; but directed a verdict for the plaintiff, with leave to move for a nonsuit. *Whitehurst* showed cause. The defendant is not entitled to dispute the fact that *Thomas Shearman* was a party to the note; and then the case is within the rule. *Whitcomb* v. *Whiting*, 1 Doug. 652, and other decisions of the same class. The defendant, having signed the note as surety, has, in effect, subscribed his name to a representation that *Thomas Shearman* was indebted; *he* is, therefore, estopped from disputing that *Shearman* was indebted, or that he might act (as by making payment) in respect of this note. And his signature following that of *Thomas Shearman* is equivalent to representation that the latter is genuine. If the facts do not amount to an estoppel, they are at least conclusive evidence against the defendant. The rule was made absolute. The court held that they could not show that the name on the note was in *Shearman's* handwriting without calling the subscribing witness, and without this there was no *prima facie* case in answer to the plea.[1]

Proof — handwriting — limited knowledge.

§ 446. In an action by the payee against the acceptor of a bill of exchange, a witness called to prove the handwriting of the defend-

[1] Wylde v. Porter, 1 Ad. & El. 742.

ant upon the bill of exchange, upon which both the christian and surname was written by the acceptor, stated that he had seen the defendant write once before, when he executed a bail bond, and that he had since compared the handwriting upon the bill with that upon the bail bond, and believed the former to have been also written by the defendant; he also stated, that from having seen the defendant execute the bail bond, he believed the acceptance was in his handwriting; but that when the defendant signed the bail bond, he did not write his name at length, but only "M. Ford." Lord ELLENBOROUGH said: "That if the witness had seen the defendant write his name at full length, it might have been sufficient, if from the exemplar lodged in his mind, he could have sworn to a belief that the handwriting was the same; but that the evidence given was insufficient, since the witness had never seen the defendant write his christian name, and that it was necessary to prove the christian name as well as the surname to be in the defendant's handwriting, and that the one was not to be inferred from the other, any more than the rest of the name itself could be inferred from proof that one or two letters were in his handwriting."[1]*

Signature — identity — bill of exchange.

§ 447. An action was brought by the indorsee against the acceptor of two bills of exchange. Defendant paid the money into court on the first bill, and as to the second, he pleaded that he did not accept it, and it became essential to identify his handwriting. Plaintiff accepted the money paid into court on the first bill, and joined issue on the plea as to the second. Defendant at the trial produced a

[1] Powell v. Ford, 2 Stark. 164.

* In Clarke v. Courtney, 5 Pet. 344, involving a lease, the court said: "In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. Where he is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the next best secondary evidence is the proof of his handwriting; and that, when proved, affords *prima facie* evidence of a due execution of the instrument; for it is presumed that he would not have subscribed his name to a false attestation. If upon due search and inquiry no one can be found who can prove his handwriting, there is no doubt that resort may be had to proof of the handwriting of the party who executed the instrument; indeed such proof may always be produced as corroborative evidence of its due and valid execution; though it is not, except under the limitations above suggested, primary evidence. Whatever may have been the origin of this rule, and in whatever reasons it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness. The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. The instrument purports to be an ancient one; but no evidence was offered in this stage of the cause, to connect it with possession under it, so as to justify its admission as an ancient deed, without further proof."

witness, who testified that he was acquainted with his handwriting and believed that the acceptance was not his. Plaintiff's counsel then proposed to lay before the witnesses a paper purporting to be signed by the defendant, for examination, and to ask them, in turn, whether they believed the signature to be that of the defendant, for the purpose of testing their knowledge of the handwriting, to the agreement or disagreement of their testimony on this point. Defendant's counsel objected to this course, and the lord chief justice ruled that the paper could not be shown to the witnesses, unless it was *aliunde* made relevant and evidence in the cause, or unless it was proved by independent evidence to have been written by the defendant.[1] And as to the necessity of calling a subscribing witness to prove a signature, it was held in England, that where it becomes necessary to introduce secondary evidence there are no *degrees* in it. But where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence which he may have within his power.[2] This rule which the courts adhere to with such commendable tenacity, viz.: when the party who executed the instrument is dead, and the subscribing witness is dead or cannot be found, the next best and secondary evidence is to prove the handwriting of the subscribing witness. The rule is wrong; it is without reason; it is followed because it is a precedent, and the Supreme Court of the United States said in 1830: "Whatever may have been the origin of this rule, and in whatever reason it may have been founded, it has been too long established to be disregarded, or to justify an inquiry into its original correctness."[3] What a fatal concession! It infringes one of the most important rules of evidence, that the matter must be relevant; that it must tend to prove something that is in issue. The handwriting of the subscribing witness is not in issue. And when you have proved it, you have proved a mere attestation, which is not in issue. Why not make direct proof of the handwriting of the party who executed the instrument?

Alias — middle name — addition to name.

§ 448. A party was indicted in England by the name of Elizabeth Newman, *alias* Judith Hancock, for keeping a bawdy house. There was a motion to quash, because a woman could not have two christian names, and for this reason the indictment was quashed.[4] It is held

[1] Griffits v. Ivery, 11 Ad. & El. 322.
[2] Doe v. Ross, 7 Mees. & Wels. 102.
[3] Clarke v. Courtney, 5 Pet. 344.
[4] Rex v. Newman, 1 Ld. Raym. 562.

that a middle name is not necessarily a part of the name of a party to a suit. And where a party to a writ of error was described in the record below as "Anderson Bletch," and in the writ of error as "Andrew J. Bletch," it will be presumed they were the same person, the contrary not being shown.[1] A private in a militia company was enrolled as John Fletcher, and appeared and answered to that name. In a suit against his guardian (he being a minor) for the penalty incurred by his not being duly equipped, it was held to be no objection that his real name was John A. Fletcher.[2] In an action of covenant, the declaration described the defendant as Samuel P. Lord, Junior, otherwise called "Samuel P. Lord, Junior and Josiah Barber," and stated that the defendant executed the covenant by that name. The defendant pleaded in abatement, and asked that the bill might be quashed, because he is known only by the name of Samuel P. Lord, Junior, and never called as above. To this the plaintiff interposed a general demurrer, which the court sustained.[3]

Middle letter — immaterial variance.

§ 449. A party was indicted in Illinois for robbery, and on the trial the court instructed the jury, among many other things, that "It is essential, in all criminal prosecutions, that the name of the party injured should be proved as charged in the indictment, and if the proof shows that the robbery was committed on Isaac *B.* Randolph and not on Isaac *R.* Randolph, as charged in the indictment, they must acquit the defendants." It was held that if the proof were as charged it was immaterial.[4] And in a civil action brought in Illinois, the plaintiff's declaration set out only the substance of an indorsement. It was held that there was no material variance, if the declarations call the indorsee by the name of R. Solon Craig and the indorsement calls him R. S. Craig.[5]

Middle letters omitted in name — transposed.

§ 450. We have seen that the law recognizes but one christian name though a person may have many, and hence if there be two or three middle letters the omission of one or all of them will not be fatal; and, therefore, where in an order of the court issued, the omission of the middle letters "V. S." in the name of one of the plain-

[1] Bletch v. Johnson, 40 Ill. 116.
[2] Wood v. Fletcher, 3 N. H. 61.
[3] Reid v. Lord, 4 Johns. 118.
[4] Miller v. People, 39 Ill. 457.
[5] Speer v. Craig, 22 Ill. 433.

tiffs in the title to such an order was not such a misentitling as would render it null.[1] Where there was an action on a promissory note, and the defendant suffered a judgment to go by default and then appealed, the error assigned was, that the note sued on was executed and signed D. S. McKay and N. J. Johnson, and that the judgment as entered was against D. L. McKay and N. J. Johnson. This difference in the middle letter was held to be immaterial.[2]

Where a defendant was indicted for a misdemeanor by the name of James E. L. H. Manning, he pleaded in abatement that such was not his name; that his name was James E. H. L. Manning. The State demurred to the plea, which was overruled and the indictment quashed. But this was reversed by the Supreme Court.[3]*

Handwriting — bill of exchange — acceptance.

§ 451. In an English case, the action was brought against one Henry Thomas Ryde, as acceptor of a bill of exchange. It appeared that a Henry Thomas Ryde had kept cash at the bank where the bill was made payable, and had drawn checks on the bank, and the cashier had paid them. The cashier knew the party's handwriting by these checks, and testified that the acceptance on the bill of exchange was in the same handwriting; but it had been some time since he had paid the checks; he did not know the party personally, and could not, therefore, further identify him with the defendant. The Supreme Court, when the case went up, held that this evidence was sufficient to make a *prima facie* case.[4]† In another action, brought

[1] Roosevelt v. Gardinier, 2 Cow. 463.
[2] McKay v. Speak, 8 Tex. 376.
[3] State v. Manning, 14 Tex. 402.
[4] Roden v. Ryde, 4 Ad. & Ell. (N. S.) 626; 3 G. & D. 604.

*In Isaacs v. Wiley, 12 Vt. 674 (1839), REDFIELD, J., said: "It is objected that in the record of the committee's advertisements, the name of Luther W. Brown appears, whereas Luther H. Brown was appointed to that office, and the court cannot know, from the record, that the same person acted, who was appointed. I do not find any case in which it has been decided that the *middle letter* is any necessary and essential part of the name. If one have two christian names and be sued by the last one only, it was held bad. Arbouin v. Willoughby, 4 Eng. C. L. 348; 1 Marsh. 477. In this case the defendant's name was Hans William Willoughby, and he was sued by the name of William only. A similar doctrine is held in Com. v. Perkins, 1 Pick. 388. But in the English courts, as far as I have been able to learn (and I know it to be so in the courts of justice in the Canadian provinces), the middle letter of the name is never permitted to be put upon the record. The names, be there ever so many, are written out at length." Citing Reynolds v. Hankin, 4 Barn. & Ald. 536; Parker v. Bent, 16 Eng. Com. Law, 75; Franklin v. Talmadge, 5 Johns. 84; Roosevelt v. Gardinier, 2 Cow. 463. Since the date of the above decision, this seems to have become the general rule, both in this country and in England, and applies now as well to corporations as to individuals. See Peake v. Wabash R. R. Co., 18 Ill. 88; Chadsey v. McCreery, 27 Id. 253; Jowett v. Charnock, 6 M. & S. 45.

† In Whitelocke v. Musgrove, *supra*, BAYLEY, J., said: "There was a case of Whitelocke v. Musgrove which was argued before us in the course of this term. It was an action upon a promissory note; and the only question was, whether upon the death of the subscribing witness, or

on a bill of exchange, which was directed to Charles Bonner Crawford, East India House, and "accepted, C. B. Crawford," it was testified by one witness that the acceptance was in the handwriting of C. B. Crawford, and that he was formerly in the East India House; but the witness could not tell whether or not that same person was the defendant in the action. It was held that the evidence was sufficient without the proof of identity.[1]*

[1] Greenshields v. Crawford, 9 M. & W. 314.

his residence abroad, out of the jurisdiction of the court, being proved, evidence of the handwriting of such subscribing witness merely is sufficient proof of the note as against the defendant. The only evidence in the case was that of one *John Hardie;* and he stated that the subscribing witness was gone to reside in America; and he proved the handwriting of the subscribing witness to the note. He knew nothing at all about the defendant, or about his circumstances, or even where he lived. Now, the note was dated at *Reeth*, and purported to be signed by two persons of the name of Musgrove, both of whom were marksmen. The residence of the defendant was not proved, for the witness said, whether he lived at *Reeth*, or whether he had connections there, he did not know. There was a perfect blank in the evidence as to any proof to identify the defendant with the party signing the note; and the question, therefore, is whether the naked evidence of the handwriting of the subscribing witness is sufficient to fix the defendant in such case? There are many cases in which the instrument gives some description, as by stating the residence of the party, so as to give some ground for presuming that the party proved to reside in the same place is the party who has signed the note; and in many instances you have the handwriting of the party, by which he may be identified as the party having signed; but here the case for the plaintiff rests on the mere proof of the handwriting of the subscribing witness. Now, what is the effect which, with this 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 established that the defendant 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 case attest? Why, that the instrument was duly executed by a person of the name of *Francis Musgrove*. There may be many persons of that name; if you do not show that the defendant was the Francis Musgrove who has so 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. Suppose that a subscribing witness, when called into the box, were to say merely I saw the note executed; will that suffice? He would be asked, by whom did you see it executed? If he were to say, I saw it executed by a person who was called into the room, but I do not know whether that person was the defendant, the plaintiff would be nonsuited. Why? Because it is an essential part of the issue 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 evidence of the identity of the defendant with the party who has signed the instrument."

* In Roden v. Ryde, 4 Adol. & El. (N. S.) 626, Lord DENMAN, C. J., said: "The doubt raised here has arisen out of the case of Whitelocke v. Musgrove, 1 C. & M. 516. But there the circumstances were different; the party to be fixed with liability was a marksman, and the facts of the case made some explanation necessary. But where a person, in the course of the ordinary transactions of life, has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required, except Jones v. Jones, 9 M. & W. 75. There the name was proved to be very common in the country. I do not say that evidence of this kind may not be rendered necessary by particular circumstances, as for instance, length of time since the name was signed. But in cases where no particular circumstances tend to raise a question as to the party being the same name, even identity of name is something from which an inference may be drawn. If the name were merely John Smith, which is a very frequent occurrence, there might not be much ground for drawing the conclusion. But Henry Thomas Rydes are not quite so numerous; and from that, and from the circumstances generally, there is

Same — suit on note — identity of maker.

§ 452. In an English case, where an action was brought on a promissory note for £50, defendant denied the execution of the note; there was an attesting witness to it, who testified that he saw the signature (Hugh Jones) on the note written by a party whose occupation and residence he described, but that he had no communication with him since, and that this was a common name in the neighborhood where the note was made. It was held that there was no evidence to go to the jury of the identity of the defendant with the maker of the note. So, it does not follow that, because a note was signed by J., a particular J. who is sued is the same person who signed the note.[1] As to the question of the defendant in an action, Lord ABINGER, C. B., said: "There is ample evidence on which the jury could have found that point against the defendant. The name, residence and profession were the same, and the party defending the action must have known that his identity would be disputed, and yet he called no witness to show that he was not the party who was alleged to have married the female plaintiff.[2]

[1] Jones v. Jones, 9 M. & W. 75. [2] Russell v. Smyth, 9 M. & W. 818.

every reason to believe that the acceptor and the defendant are identical. The doctrine of BOLLAND, B., Whitelock v. Musgrave, 3 Tyrwh. 558, has been already answered. Lord LYNDHURST, C. B., asked why the *onus* of proving a negative in these cases should be thrown upon the defendant? The answer is, because the proof is so easy. He might come into court and have the witnesses state whether he was the man. The supposition that the right man has been sued is reasonable, on account of the danger a party would incur if he served process on the wrong man; for, if he did so willfully, the courts would no doubt exercise their jurisdiction of punishing for contempt. But the fraud is one which, in the majority of cases, it would not occur to any one to commit. The practice, as to proof, which has constantly prevailed in cases of this kind, shows how unlikely it is that such fraud should occur. The doubt now suggested has never been raised before the late cases which have been referred to. The observations of Lord ABINGER and ALDERSON, B., in Greenshields v. Crawford, 9 M. & W. 314, apply to this case. The transactions of the world could not go on if such objections were to prevail. It is important that the doubt should ever have been raised; and it is best that we should sweep it away as soon as we can."

Pursuing this decision a little further in the opinions delivered *seriatim*, PATTERSON, J., said: "I concur in all that has been said by my lord. And the rule always laid down in the books of evidence agrees with our present decision. The execution of deeds has always been proved by mere evidence of subscribing witness' handwriting, if he was dead. The party executing an instrument may have changed his residence. Must a plaintiff show where he lived at the time of the execution, and then trace him through every change of habitation till he is served with the writ? No such necessity can be imposed." WILLIAMS, J., said: "I am of the same opinion. It cannot be said here that there was not some evidence of identity. A man of defendant's name had kept money at the branch bank; and this acceptance is proved to be his writing. Then is that man the defendant? That it is a person of the same name is some evidence, till another party is pointed out, who might have been the acceptor. In Jones v. Jones, 9 M. & W. 75, the same proof was relied upon, and Lord ABINGER said: "The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Joneses in the neighborhood where the note was made." It appeared that the name Hugh Jones, in that particular part of Wales, was so common as hardly to be a name; so that a doubt was raised on the evidence by cross-examination. That is not the case here, and, therefore, the conclusion must be different.

Same — writing — subscribing witness — rule in England.

§ 453. A very well-considered case in England, involving the identity of a subscribing witness to a written instrument, about which there has been, and still is, a diversity of opinion, was an action brought upon a written instrument, the subscribing witness to which was dead or resided abroad. It was held to be necessary, besides proving the handwriting of the subscribing witness, to give some evidence of the identity of the party sued with the party who appears to have executed the instrument.[1]

Signature on receipts — proof of— insufficient.

§ 454. In an action in New York for work and labor, when plaintiff closed his testimony, defendant offered in evidence two receipts, to which the name of plaintiff was subscribed, and called Campbell, a witness, to prove them; witness being asked, said he had never seen the plaintiff write, but had had dealings with him, and had received promissory notes from him, which he had paid, except one; that, on looking at the receipt, he was inclined to think that the signature was in the handwriting of plaintiff; but that this opinion was founded upon the circumstances he had stated, not having seen plaintiff write; could not positively say that he had ever seen him write. The court, while holding this evidence to be insufficient, said: "The attorney did not push the question far enough."[2]

Attesting witness — proving his own signature.

§ 455. Another mode of acquiring knowledge of a person's handwriting, so as to identify it, is by having received letters or other documents from such person, and subsequently having personal correspondence with the person in relation to the subject-matter of them, or acting upon them in a manner that was conclusive proof of their genuineness. In an action of ejectment in England, in which a will became important evidence, it was produced, and on one day of the trial (which lasted several days), defendant called an attesting witness to the will, who testified that the attestation was his; he was cross-examined and two signatures to depositions respecting the same will, and several other signatures were shown him (none of which were in evidence in the cause), and he said he believed they were his. On the next day plaintiff offered a witness to prove that the attestation was not genuine. This witness was an inspector at

[1] Whitelocke v. Musgrove, 1 Cromp. & Mees. 511.

[2] Johnson v. Daverne, 19 Johns. 134.

the Bank of England, and had no knowledge of the handwriting of the attesting witness, except from having, before the trial, and again during it, examined the signature admitted by the attesting witness, which admission he had made in court. Upon examination the statement was received in evidence.[1]

Means of knowing handwriting.

§ 456. The general rule is, as we have seen, that handwriting may be proved by any witness who has previously acquired a general knowledge of the handwriting of the party whose signature is in doubt, dispute or question, from having seen him write, from having carried on correspondence with him, or from an acquaintance gained from having seen handwriting acknowledged by him or proved to be his. These are some of the means of acquiring a knowledge necessary to render a witness competent to testify in such cases. But where a witness testified in relation to the genuineness of a signature, and on examination a slip of paper was handed to him with the name of the person written three times on it, and he was asked to say whether the writing was the same, or by different persons, and he answered that they were all the same; and another witness testified that they were written by different hands, it was held that, although the judge might have rejected the testimony, yet its admission was not grounds for granting a new trial.[2] *

Handwriting — imitation — spelling detected.

§ 457. The imitation of handwriting is sometimes so very successful that it may deceive the very man whose name appears on the paper that is forged or counterfeited, and he be unable to identify it

[1] Doe v. Suckermore, 5 Ad. & El. 731. [2] Page v. Homans, 14 Me. 478.

* In Hopkins v. Megquire, 35 Me. 78, APPLETON, J., said: "The plaintiff claims to recover as indorser of a note, signed by the defendant, payable to Pierce & Pool, or order, and by them indorsed. To prove the indorsement of the note, he called a witness, who, on his direct examination, testified that he had seen Pool write five or six times, and that it was his strong impression that the indorsement was in his handwriting; that it looked like it; and being cross-examined, he said that the writing on the back of the note resembled Pool's, but that he could not swear to the indorsement, nor to his writing. * * * The strength of his belief will depend on the greater or less similarity. He can only testify to his own state of mind on the question. The language used as indicative of the strength of his belief was properly before the jury for their consideration, and it was for them to determine its sufficiency to establish the fact which it was offered to prove. When the witness stated that he could not swear to the handwriting, nor to the indorsement, he was probably understood by the jury as referring to his own knowledge, and not as intending thereby to limit or restrain the testimony previously given, and it is not for us to say that they misunderstood him." The judgment was for plaintiff, and was affirmed. In the matter of proving the identity of handwriting, forgeries and counterfeits are often so near a *fac simile*, that men are cautious in testifying positively to a signature, nor does any rule of evidence require it. The witness must be competent, by having acquired sufficient knowledge of the person's handwriting; then his belief or opinion is all that is required of him.

as a forgery. A case is reported in Scotland, in which one Careswell was indicted for forgery or counterfeiting bank notes. A clerk of the bank was called as a witness, whose name was on the note. He swore positively to the handwriting as his own; and when his genuine signature was presented to him, he hesitated, before he would identify it.[1] Mr. Wills gives the case of a tailor, by the name of Alexander, who, having learned that a person of his name had died, leaving considerable property, and without any heirs apparent being in existence, obtained access to the garret in the family mansion, where he found a collection of old letters about the family. He carried them off, and by their aid simulated a mass of productions, which it was said clearly proved his connection with the family, and the lord ordinary decided the cause in his favor. The case, however, was carried to the Inner House. When it came into court, certain circumstances led Lord MEADOWBANK, then a young man at the bar, to doubt the authenticity of the documents. One circumstance was, "that there were a number of words in the letters purporting to be from different individuals, spelt, or rather misspelt in the same way, and some of them so peculiar, that, on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table and was there examined in the presence of the court. He was desired to write a dictation of the lord chief clerk, and he misspelled all the words that were misspelled in the letters, and in precisely the same way, and this and other circumstances proved that he had fabricated all of the documents himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and this result was arrived at in the teeth of the testimony of half a dozen engravers, all saying that they thought the letters were written by different hands.[2]

Comparison of signatures — American rule.

§ 458. Some of the late decisions seem to indicate that, contrary to the former ruling, the knowledge of a witness may be tested on cross-examination by placing other writings in his hands, which are not in the case for any other purpose, and which are not admissible in evidence for any other purpose, and asking him to say whether it and the writing in question were written by the same person, and

[1] Rex v. Carsewell, Burnett's Cr. L. Scotland, 502.

[2] Wills Cir. Ev. 139.

that such papers may be given to the jury for comparison.[1] But the former rule has been followed in the United States by a long series of decisions, *i. e.*, following the English rule, and refusing to adopt the more liberal rule of comparison so long practiced under the enlightened system of Roman jurisprudence; but have excluded evidence of the genuineness of handwriting whenever that evidence has been based upon a knowledge derived from a mere comparison thereof.[2] But in an action to try the right of property in 1883, the court seemed to foreshadow a different view of the subject, and held that no instrument could be proved by comparison of handwriting, unless it is shown that the signatures offered for comparison were made by the individual whose name is written to the instrument sought to be established by such evidence.[3]

Murder — comparison — letters — writings.

§ 459. One Ward, *alias* La Vigne, was indicted jointly with another in Vermont, for murder, and Ward was convicted; one exception taken was, that among the matters of evidence introduced by the prosecution, were two letters dated respectively September 22 and 30, 1865, signed "Jerome La Vigne," containing evidence against the accused, if they were, in fact, written by him. In order to prove the handwriting of the letters, the prosecution established by proof other letters as a standard of comparison; and also produced a railroad ticket, which one Appleton, a conductor on the Vermont Central railroad, testified he took from the accused, La Vigne, just before his arrest, which had written on it "Jerome La Vigne, 93 River street, Troy, N. Y.," and also produced a ballad (Pat Maloy) which the officer who arrested La Vigne testified he took from him at the time of his arrest, and which had the words written upon

[1] Young v. Honner, 2 M. & Rob. 537; Griffits v. Ivery, 11 Ad. & El. 322; Sarvent v. Hesdra, 5 Redf. 47.

[2] Goodyear v. Vosburgh, 63 Barb. 154; Van Wyck v. McIntosh, 14 N. Y. 439; Titford v. Knott, 2 Johns. Cas. 210; Berryhill v. Kirchner, 96 Pa. St. 489; Slaymaker v. Wilson, 1 Pa. 216; Penn. R. Co. v. Hickman, 28 Pa. St. 318; Jones v. State, 60 Ind. 241; Chance v. R. Co., 32 Ind. 472; Shorb v. Kinzie, 80 Ind. 500; Hazzard v. Vickery, 78 id. 64; Singer Co. v. McFarland, 53 Iowa, 540; Jumpertz v. People, 21 Ill. 375; Brobston v. Cahill, 64 id. 356; Snyder v. McKeever, 10 Ill. App. 188; Kernin v. Hill, 37 Ill. 209; Burdick v. Hunt, 43 Ind. 381; State v. Givens, 5 Ala. 747; Williams v. State, 61 id. 33; Bishop v. State, 30 id. 34; State v. Fritz, 23 La. Ann. 55; Hazleton v. Bank, 32 Wis. 34; Pierce v. Northey, 14 Wis. 9; Herrick v. Swomley, 56 Md. 439; Niller v. Johnson, 27 Md. 6; Burress' case, 27 Gratt. 940; Rowt v. Kile, 1 Leigh (Va.), 216; Pope v. Askew, 1 Ired. (N. C.) 16; State v. Allen, 1 Hawks (N. C.), 6; Yates v. Yates, 76 N. C. 143; Howard v. Patrick, 43 Mich. 121; State v. Clinton, 67 Mo. 380; Woodard v. Spiller, 1 Dana, 179; Matlock v. Glover, 63 Tex. 231; Shank v. Butsch, 28 Ind. 19.

[3] Sartor v. Bolinger, 59 Tex. 411.

it in pencil, as follows: "John Ward, canal-boat S. F. Davis, Albany to Oswego." All these papers were submitted to two witnesses as experts in the identification of handwriting, who testified that, in their opinion, they were all in the same hand. All these papers were then submitted to the jury, and the letters read to the jury, and also the writings on the railroad ticket and the ballad; all against the objection of defendant. This was sustained. The court laid down the rule thus: "In criminal prosecutions where the guilt of the accused is sought to be established by proof afforded by comparisons of handwriting, although the courts have decided that the writing offered as a standard is genuine, still it is the right and duty of the jury to judge for themselves in respect to the sufficiency of the proof of the genuineness of the writing. They should weigh the testimony by the same rule, and require the same measure of proof they would require in respect to any other essential point in the case. In England, it was long held that a comparison of handwriting was not admissible; but that rule was modified by more recent decisions, under which their courts admitted in evidence comparison of hands, but confined it to documents which were proved to be genuine, and which were in evidence on the trial of the cause for other purposes. The doctrine of those cases (except where the writing was an ancient document) was the law of England for a long period of time; finally, a different, and, as we think, more reasonable rule was introduced by Parliament. In 1854, an English statute, known as the Common Law Procedure Act, was passed, which did permit it. It has been found in many cases that the interest of truth and justice required the introduction and use of such testimony, and when guarded by proper rules, it is as far from objection as any other human testimony which requires the exercise of judgment and discretion of court and jury to determine whether it is sufficient to prove the alleged fault."[1]

Comparison — writing known to the court.

§ 460. In an action of trover in New Hampshire to recover corn, hay and potatoes, the case involved a written lease of certain premises, and the signature of one Pike. It was held that if the evidence relating to Pike's signature was addressed to the court, as it was supposed to have been, in order to make the lease competent to be submitted to the jury, then there would seem to be no occasion

[1] State v. Ward, 39 Vt. 225.

to undertake to prove to the court something which was known to the court without proof; nor was there any need to introduce more evidence on the part of plaintiff, when the facts within the knowledge of the court made a *prima facie* case in his favor, until some evidence was introduced in opposition to, and rebutting the case thus made.[1]

Same — rule in England.

§ 461. While it is true that the courts of England did set themselves against the admission of proof of handwriting, they did not adhere to it with a very commendable tenacity, or with their proverbial consistency, but in one important case involving this question, seem to have yielded to a more liberal view in 1830, when that court made the following remarks: "When two documents are in evidence, it is competent for the court and jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined, with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence."[2]

Same — rule in Alabama.

§ 462. It is certainly remarkable how blindly some of our courts follow English precedents. The court of Alabama in 1841 adhered to the old English rule with a commendable tenacity in a promissory note case. GOLDTHWAITE, J., briefly said: "This is one of those questions upon which so much has been said and written, that a review of all the cases would be alike impracticable and uninteresting. We shall, therefore, content ourselves with declaring the rule as we consider it to exist at the present day. Comparison of handwriting by submitting different writings having no connection with the matter in issue, is not permitted by law. The present case presents the naked question, whether signatures proved to be in the defendant's handwriting can be given in evidence to the jury to enable them to determine whether the letter is genuine or otherwise. In our opinion this was not competent evidence.

Comparison of hands — skill of witness.

§ 463. Upon an action of assumpsit on a promissory note, it was

[1] Brown v. Lincoln, 47 N. H. 468.

[2] Griffith v. Williams, 1 Crompt. & Jer. 47.

said that when the signature is in dispute, the genuine signature of the party, to a paper not otherwise competent evidence in the case, may be admitted, to enable the court and jury, by a comparison of the hands, to determine the question of its genuineness, and the opinion of a writing-master, professing to have skill in detecting forgeries, formed from a comparison of hands, without any actual knowledge of the handwriting of the person whose signature is in controversy, is competent evidence, and the opinion of such witness, formed merely from an inspection of the contested signature in regard to its being in a natural or simulated hand, was received in Massachusetts as competent evidence.[1]

Comparison — experts — bank officers.

§ 464. The fact that the employments of a witness have not been such as to require him to distinguish between true and simulated handwritings, was held not, of itself alone, a sufficient reason for precluding him from giving an opinion as to the genuineness of a doubtful or disputed signature, though the opinion be founded merely upon a comparison of writings. TENNY, J., said: "When handwriting is the subject of controversy in judicial proceedings, witnesses who, by steady occupation and habit, have been skilled in marking and distinguishing the characteristics of handwriting, are allowed to compare that in question with other writings, which are admitted or fully proved to have come from the party, and to give opinions formed from such comparison." * * * The definition of the word "expert" in Webster's dictionary is, "properly experienced, taught by use, practice and experience; hence, skillful and instructed, having familiar knowledge of." The testimony of William B. Smith and Ignatius Sargent, severally, brought each fully within the definition, when applied to the term in reference to skill and experience in judging of handwriting. They are not the less experts because they did not profess to know the precise meaning of the word 'expert;' or because they had not been in situations where their duty required them to distinguish between genuine and counterfeit handwriting."[2]

Where the officers of banks are accustomed to receiving and paying out the bills and notes of another bank, they in that way, and by that means, acquire a knowledge of the signatures of the presi-

[1] Moody v. Rowell, 17 Pick. 490.
[2] Sweetser v. Lowell, 33 Me. 446. Citing Hammond's case, 2 Greenl. 33; Richardson v. Newcomb, 21 Pick. 315.

dent and cashier of such other bank, and will be enabled to identify their genuine signatures.[1]

Passing counterfeit bank bill — evidence.

§ 465. One Kinnison, in Massachusetts, was indicted, in 1808, for having in his possession a counterfeit bank note. It was held not to be sufficient for the witnesses to swear to the identity of the note, unless it had been constantly in their possession, or they had put a private artificial mark upon it before parting with it. He was charged with having in his possession a false, forged and counterfeit note of the Vermont State Bank. The jury found him guilty on the testimony of Pecker and his wife, who testified positively to the identity of the bill, on which there was no private artificial mark, but there were three accidental ones. Pecker had received it some two weeks previous, during which time it remained in the hands of a justice of the peace. PARSONS, C. J., laid down the rule thus: "It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher nature, and which may be had, shall not be admitted. In the present case, *Pecker* was an unexceptional witness to prove that the defendant passed the note to him; but when he testified that the bank note he received had been out of his possession, and in the possession of the justice, whose testimony might have been had, it was irregular to admit him to testify to the identity of the note produced, from his recollection of the accidental marks. The testimony of the justice would have been direct, and is of a superior nature.[2]

Same — evidence — rule in South Carolina.

§ 466. One Hooper was indicted in South Carolina, in 1830, for counterfeiting, in which case the court seems to have overruled its former opinion on the admission of evidence of identity. In this latter case, for counterfeiting, it was held that the officers of the bank in no case were the only competent witnesses to prove the counterfeit; and the case of Petty, in Harp. 59, was considered and the rule denied; and the rule was laid down thus: "That where the officers of the bank are in reach of the process of the court, they ought to be produced, or their absence accounted for, particularly where the forgery is not so gross and palpable as to be susceptible of detection by any one acquainted with the notes of the bank; but that

[1] Com. v. Carey, 2 Pick. 47.

[2] Com. v. Kinison, 4 Mass. 646.

a resort to the private marks of the bank is necessary to afford a satisfactory conviction to the mind. But that in all cases, the opinion of any person familiar with the notes of the bank is admissible in the first instance, and the weight and volume of that opinion is for the consideration of the jury."[1]

Same — testimony — officers of the bank.

§ 467. A prisoner was indicted in South Carolina in 1823, under the act of 1736, for forging a note of the bank of that State, and passing the same as and for a true and genuine note. He was convicted, and the ground taken on motion for a new trial was, that a proper officer of the bank should have been called to testify to the forgery. Three of the judges were of opinion that one of the officers who was conversant with the handwriting of all the officers, and who knew the various devices and private marks affixed to the notes of the bank, should have been produced, the other two judges gave no opinion upon the point. But the case went off upon another point, on which the judges all agreed.[2] But this point as to the evidence was overruled in 1830.

Same — bill of exchange — bank note.

§ 468. In another case in the same State, and near the same time, it appeared that the defendant was indicted for forging a bill of exchange or order purporting to have been drawn by the president of the branch of the Bank of the United States at Charleston, on the cashier of the principal bank. The bill was drawn payable to A. G. Rose or order, and his indorsement was likewise forged. A witness was permitted in testifying to give his opinion that certain bills were counterfeit, though he was not a bank officer, and had only seen a part of the persons write whose names were to the bill, he professing to be acquainted with the handwriting of the others from a general familiarity with the bills of those banks; his testimony was admitted.[3] One Martin was indicted in Virginia in 1830, for passing a counterfeit note of $20, was convicted and sentenced to the penitentiary for ten years. The court said: "We think it may be fairly deduced from the whole evidence, that the prisoner and *Lewallen* were jointly interested and had confederated in the passing of counterfeit notes in the purchase of horses during their expedition over the mountains. If so, there could be no stronger evidence to

[1] State v. Hooper, 2 Bailey (S. C.), 37.
[2] State v. Petty, Harper (S. C.), 59.
[3] State v. Tutt, 2 Bailey (S. C.), 45.

prove that the note mentioned in the indictment, which was of the same description, and was passed to Smith upon the same journey, was known by the prisoner to be counterfeit. The Commonwealth proved, by persons well acquainted with the notes of the Bank of *Virginia*, that the note in the indictment mentioned was counterfeit. The prisoner insisted that the proof should be made by an officer of the bank. We are of opinion that the evidence was legal, and competent to be weighed by the jury, and that the objection was properly overruled."[1]

Larceny — bank notes — not produced on trial.

§ 469. The identity of bank notes became all important in the trial in Virginia of an indictment for the larceny of bank notes to the aggregate value of $30, the property of one William Lauck. He was convicted and the notes were not brought into court, but this was held to be immaterial. The court remarked: "The second question is, whether, in every prosecution for the larceny of bank notes, it is *necessary* for the conviction of the prisoner, that the notes should be produced on the trial; conceding, for the sake of argument, that, in prosecutions of this kind, the jury cannot convict unless they are satisfied that the stolen notes are genuine, we yet deny that the production of them is indispensable to prove the fact. Indeed, it seems to be admitted by the prisoner's counsel, that if they are lost or destroyed, or if the prisoner prevents the production of them, they need not be produced. If the production of them be indispensable, it is not easy to perceive how the loss or destruction of them obviates the necessity. It is the province of the jury to judge of their genuineness by the evidence."[2] While this is true, it is also true that the best evidence should be produced, or accounted for, and the production of the notes is certainly the best evidence of their genuineness, and if not genuine, they have no value and are not the subject of larceny.

Counterfeiting — evidence — competent witnesses.

§ 470. As to the mode of proving handwriting, singular rules have prevailed. In an indictment for passing counterfeit money in North Carolina in 1820 — a bank note on the Bank of Augusta, Georgia, signed by *Thomas Cumming*, president, and *E. Ealy*, as cashier of that bank — the court laid down what was then supposed

[1] Martin v. Com., 2 Leigh, 745. [2] Moore v. Com., 2 Leigh (Va.), 701.

to be the law, thus: "The only methods of proving the handwriting of a person, sanctioned by the law, are: (1) By a witness who saw him sign the very paper in dispute. (2) By one who has seen him write, and has thereby fixed a standard in his own mind, by which he ascertains the genuineness of any other writing imputed to him. (3) By a witness who has received letters from the supposed writer, of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason to believe that the letters from which the witness has derived his knowledge were really written by the supposed writer of the paper in question. (4) When the witness has become acquainted with his manner of signing his name by inspecting other ancient writings bearing the same signature, and which have been regarded and presumed as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow."[1] It seems that the clerk of a court, for instance, would soon become acquainted with the signature of his predecessor, and be able to prove it.

Witness — post-office clerk — detective of forgeries.

§ 471. In an action against a defendant as acceptor of a bill of exchange, the defendant set up that the signature to the bill was not his, but a forgery. Two witnesses on the part of the plaintiff identified it as the signature of the defendant; testifying that they believed it to be his. Defendant called a clerk of the post-office, whose business it was to inspect and detect the forgery of franks. He was previously asked by plaintiff's counsel, if by the bare inspection of a handwriting he could pretend to ascertain whether it was a real or an imitated one? He said (that except in a very few cases) he could only do it by comparison of hands, or by knowing the party's handwriting. It was admitted that he did not know the defendant's handwriting. Lord KENYON ruled that the witness should not be allowed to decide on such comparison of hands, and his testimony was rejected.[2] Soon thereafter his lordship made a similar ruling in an action of assumpsit against the indorser on a bill of exchange.[3]

Same — signature — warrant of attorney.

§ 472. The above ruling was adhered to in England, in 1795, in

[1] State v. Allen, 1 Hawks (N. C.), 6.
[2] Stranger v. Searle, 1 Esp. 14.
[3] Batchelor v. Honeywood, 2 Esp. 714.

an action on the acceptance of a bill of exchange, which defendant claimed to be a forgery; among others plaintiff called one *Coulson*, who was an inspector of franks in the post-office, to prove that he had frequently seen stamps pass the office in defendant's name (he being a member of Parliament), and that from the character in which those franks were usually written, he believed this acceptance to be the defendant's handwriting. He had never seen him write or received any letters from him. Lord KENYON held that the evidence was not admissible. That the farthest extent to which the rule had been carried was to admit a person who had been in the habit of holding an epistolary correspondence with the party to prove handwriting from the knowledge he acquired in the course of that correspondence.[1] Upon an issue involving the genuineness or forgery of a warrant of attorney, the verdict established the genuineness of the signature, upon evidence satisfactory to the trial judge. An inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not genuine, but an imitation; the evidence having been rejected, the court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and the issue being to satisfy the court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict.[2]

Libel — signature — expert testimony received.

§ 473. In an action for libel it was held that where, to prove that the paper alleged to be libelous was in the handwriting of the defendant, plaintiff introduced witnesses who had seen him write, and who testified that they believed the paper to be in the handwriting of the defendant, but who, on their cross-examination, said that they did not know that they were sufficiently acquainted with his hand to determine, except by comparing it with the other writings of his proved to be genuine, such testimony was admissible. Where the plaintiff, in such case, offered the testimony of cashiers of banks, who had never seen the defendant write, and who had no knowledge of his handwriting, but who had compared the paper in question with other writings proved to be his, and who testified that they were written by the same hand, and that such paper was in a

[1] Carey v. Pitt, 2 Peake, 130.

[2] Gurney v. Langlands, 5 Barn. & Ald. 330.

disguised hand, it was held that such cashiers as persons of skill in their art were competent witnesses to establish these points.[1]*

Libel — newspapers — identity — type — handwriting.

§ 474. In action on the case brought in Pennsylvania in 1812, against defendant, for two libels published in his gazette, known as the *Democratic Press*, the plaintiff being editor of a gazette called the *Freeman's Journal*, it was held that evidence from a comparison of handwriting, supported by other circumstances, is admissible upon the same principle from a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly; the jury may be authorized to infer that both were printed by the same person. To print and publish of "A." that he has been deprived of a participation of the chief ordinances of the church to which he belongs, and that, too, by reason of his infamous "groundless assertions," is a libel. So held to be.[2]

Words — insurance — proof of policy.

§ 475. In an action of libel in New York in 1813, parol evidence was held to be admissible to prove the averment in the declaration that the plaintiff was State printer and president of the Mechanics and Farmers' Bank; those facts being stated as matter of inducement, and collaterally. Where a witness swore that he was a printer, and had been in the office of the defendant, where a paper called the *Ontario Messenger* was printed, and he saw it printed there, and the paper produced by the plaintiff he believed was printed with the type used in the defendant's office, this was held to be *prima facie* evidence of the publication of such newspaper by the defendant.[3]

[1] Lyon v. Lyman, 9 Conn. 55. Citing Francia's case, 15 St. Tr. 897; Lyon's case, 16 id. 93; Rex v. Hensey, 1 Burrow, 642; Lord Preston's case, 12 St. Tr. 645; De la Mott's case, 21 id. 810.

[2] M'Corkle v. Binns, 5 Binn. (Pa.) 340.

[3] Southwick v. Stevens, 10 Johns. 443.

* In United States v. Holtsclaw, 2 Hayw. (N. C.) 379, there was a rule laid down prior to 1806, it seems, embodying the following: "The objection made by Mr. Seawell, that no one shall speak as to the handwritings of the president and cashier of a bank but one who has seen them write, or has been in the habit of receiving letters from them in a course of correspondence, is not a sound one. These signatures are known to the public, and persons who have been much in the habit of distinguishing the genuine from the counterfeit signature, and conversant in dealing for bank bills, are as well qualified to determine of their genuineness, as persons who in private correspondence have received letters from the person whose handwriting is in question. Moreover, it is determined by the skillful whether a bill be genuine not only by the signature, but also by the face of the bill, and by the exact conformity of the devices which are used for the detection of counterfeits to those in true bills. We are of opinion that the judgment of persons well acquainted with bank paper is sufficient evidence to determine whether the one in question be genuine or otherwise." For a witness to be competent to testify as to the genuineness of a person's signature he must possess the knowledge, that is the test; and it does not depend so much upon the means by which he acquired that knowledge.

In an action for words spoken, to the effect that plaintiff had insured his house against loss by fire, and burnt it to defraud the insurance company, it became necessary to prove and identify the policy of insurance. It bore the names of two of the directors, and one J. S. as attesting witness, who was called to prove the execution of the policy. He testified that it was not executed in his presence. Lord ELLENBOROUGH said: "The policy purports to have been executed in the presence of the witness; I must, therefore, take it to have been executed in his presence, if it was executed at all. If it was not executed in his presence, the conclusion of law is, that it was never executed as a deed, although it may have been signed by these two directors. Nor can I admit evidence of their acknowledgment, since the attestation points out the specific mode in which the execution is to be proved."[1]

Bond attested in the absence of obligor.

§ 476. An action was brought on a bond for £1,000. On the trial, the witness whose name appeared as attesting witness on the bond, and who was a sister of the obligor, swore that the defendant never executed the bond in her presence, but that it was brought to her into a room when the defendant was not present, and she was desired to subscribe her name to it as a witness, which she did; and that she did not remember whether there was at the time any seal affixed to the bond, nor whether she was ever present when any seal was affixed. The plaintiff then called a co-obligor, having released him; he was a bankrupt, and the son of the defendant; it was insisted that his evidence was not admissible. It was held that signing the bond, which purported to be sealed with the obligor's seal, was evidence to be left to the jury of the sealing and delivery, and that they, disbelieving the second witness, found for the defendant.[2]

Alteration in written instrument — word.

§ 477. In the trial of an action of ejectment in California, defendant's counsel, in his argument to the jury, insisted that a word in a document offered in evidence was originally written different from what it there appeared, and that the same had been changed by another word, and the court then permitted the jury to examine and inspect the document and judge for themselves if such were the fact.

[1] Phipps v. Parker, 1 Campb. 412. [2] Talbot v. Hodson, 7 Taunt. 251.

It was held not to be error for the court then to refuse to instruct the jury that they might determine for themselves whether or not the word had been changed; that an alteration made in a word or words in an instrument, after it is written, and not noted at the bottom before it is signed, was not void as evidence, if made innocently or by consent of the parties; and if the alteration be made after the signing, and innocently made, if made to conform the paper to the intention of the parties, it is not thereby rendered void.[1]

Witness — knowledge — how acquired.

§ 478. Ancient writings may be proved and established in England by those who are familiar with handwriting without the production of any instrument or document for the purpose of a direct comparison. But the comparison of handwriting under investigation may be proved by any witness, if the witness be acquainted with the handwriting in the ordinary course of business. It was so held in the case of Sir B. W. Bridges to the barony of Fitzwalter, as reported in *Fitzwalter Peerage*, 10 Cl. & Fin. 193. In which case it became necessary to show family pedigree from the proper custody of records made ninety years before, by his ancestor. To establish this, the family solicitor was called to establish the fact, and when he testified that he was acquainted with the ancestor's handwriting, from having examined the same, as having purported to have been signed by him, the lords considered his testimony competent to prove pedigree. How easy it is to prove pedigree in England, when the claimant to the peerage is favored. But how was it in the Berkley Peerage case, where the case failed? Again, in the case of *Doe* v. *Davies*, 10 Q. B. 314, where it became necessary in pedigree to rely upon a marriage certificate, signed eighty-five years prior thereto by W. Davies, the then curate of the parish, the document was held admissible, on proof, by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies. While there were several objections to this, all objections were held to be untenable, and this testimony was admitted. But all this fails to settle the question:—Can a witness testify that he acquired a knowledge of the handwriting of a person, not from the course of business, but from studying the signature proved and admitted to be genuine, but not produced to identify the writing? The above cases were

[1] Sill v. Reese, 47 Cal. 294.

decided in direct opposition to the earlier English cases, and this, too, prior to the act of Parliament of the year 1854.[1]

Same — English precedents.

§ 479. Even before the act of Parliament of 1854, the courts of England, in many well-considered cases, had admitted evidence of comparison of handwriting, and it was held that the testimony of skilled witnesses (not experts) would be admitted, to throw light upon doubtful or disputed signatures, by actual comparison.[2] And upon this, the testimony is, perhaps, as unreliable as expert testimony itself. When a witness is called to testify as to the genuineness of a signature to a paper in court, and he has acquired a knowledge of the handwriting from any of the sources which the courts have held sufficient, the witness carries the recollection of such handwriting in his memory, and this he compares with the signature in dispute, is this better proof than an actual comparison, in court, of the disputed paper and one proved to be genuine? It is no more or less than comparison at best; and to exclude the comparison of the two papers, or signatures, and then permit the witness to compare one paper with his recollection of another paper (previously seen by him), is a glaring absurdity in the very nature of things. And to exclude such comparison from a jury is equally absurd, unless it be upon the untenable position taken by the early English cases that the jurors were illiterate. And even then the witness may be equally illiterate. What then? Call an expert, whose testimony is conceded to be the weakest, most feeble and delicate that has ever been produced in a court of justice, especially on a question of handwriting? It does not arise to the dignity, and scarcely deserves the nature of testimony, much less evidence. And doubtless this was the view taken by the English Parliament in 1854, when the act was passed, which admits comparison of handwriting by the witness and by the jurors, of papers, whether filed in court in the case or not.[3]

[1] Doe v. Lyne, 2 Phil. Ev. 618; Doe v. Suckermore, 5 A. & E. 717. The latter case has been followed by the American decisions, and also by the English decisions prior to the act of the English Parliament of 1854.

[2] Spencer v. Spencer, 40 L. J. Pr. & Mat. 45.

[3] Tracy Peerage, 10 Cl. & Fin. 154; Doe v. Suckermore, 5 A. & E. 718.

CHAPTER XII.

IDENTITY OF REAL ESTATE.

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513. Deed to father — instead of son — rule in Vermont.
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515. Acknowledgment — what complies with the statute.
516. Same — same — rule on the subject.
517. Same — certificate — when fatally defective — rule in Wisconsin.
518. Identity of land — mistake in numbers.
519. Description of land — identity of survey — rule in Ohio.
520. Description of land — identification — rule in Maine.
521. Description of land — identity — rule in Massachusetts.
522. Identity of land sold for taxes.
523. Misdescription of land — decree — sale.

Real estate — identity — boundaries — river.

§ 480. In all questions involving the identity of real estate, resort must be had to its boundaries — the boundary lines which mark the confines or divisions of contiguous or adjacent estates. It signifies the line which fixes the limits of any specified piece, parcel or tract of land, or real property, or ascertained limits of adjoining lands owned by different proprietors. A line or connected series of lines

going around a territory or tract of land, and inclosing it on all sides. These are boundaries, usually designated by some monument—conspicuous object, as rocks, trees, stakes, a heap of stones, etc. The boundaries which identify certain parcels of real property, as between adjacent owners, is usually settled by the conveyances by which they hold title. In the construction of a grant, where it is described as bounded by a house, it is not to be construed so as to include the house, as the boundaries are not generally included in the grant. But if bounded by a river or a ditch, the grant would extend to the center thereof, unless otherwise provided or indicated in the conveyance itself.

Same — land bounded by a pond — boundary of pond.

§ 481. Where the conveyance described the land as bounded by the "bank of a river" or "bank of a stream," the Pennsylvania court held that the bank of the stream is the margin where vegetation ceases, and the shore is the pebble, sandy or rocky space between that and low-water mark.[1] In a Massachusetts case, the deed described the land as bounded by a certain pond, and in the application of the deed to the objects described by the terms of the deed, it was found that the pond was a natural pond, which was raised more or less at different times by means of a dam existing and in use at the time of the conveyance; so there was a latent ambiguity, and it was held to be competent for the party to prove by parol evidence that a certain line was agreed on, and understood at the time of the conveyance, as to the boundary of the pond.[2]

Land bounded by a river — not navigable.

§ 482. Where the deed of land described it as bounded on one side by a certain river, which river was not navigable, and the line ran to the bank thereof, and by and along said stream or bank, it was held to extend to the middle or center of the stream, unless there be some other description in the deed indicating clearly a contrary intention.[3] Where a hotel was sold and conveyed "with the lands adjoining it," it was held that a small island at the rear of the hotel did not pass by such description in the deed.[4] The description in a deed,

[1] McCullough v. Wainright, 14 Pa. St. 171.

[2] Waterman v. Johnson, 13 Pick. 261.

[3] Comrs. v. Kempshall, 26 Wend. 404; Morgan v. Reading, 3 Smedes & Mar. (Miss.) 366; Morrison v. Keen, 3 Me. 474; Yates v. Judd, 18 Wis. 128; State v. Gilmanton, 9 N. H. 461; Hammond v. Ridgely, 5 Harr. & J. 245; Hatch v. Dwight, 17 Mass. 289; Gove v. White, 20 Wis. 432; People v. Platt, 17 Johns. 195; Arnold v. Elmore, 16 Wis. 514; Browne v. Kennedy, 5 Harr. & J. 195.

[4] Miller v. Mann, 55 Vt. 475.

commencing at a certain point on the river, and only running around three sides of the tract of land to another point on the same river, closed with these words, "meaning to convey all the land east of the said mentioned bounds that I own." The land was on the east side of the river; it was held to be sufficiently identified to pass the property.[1]

Construction of deed — two descriptions.

§ 483. It is a cardinal rule in the construction of deeds, to ascertain, if possible, the intent and meaning of the grantor upon exploring the whole instrument; and then to give effect to that intent, if it can be done without doing any violence to the recognized rules of law.[2] It seems now to be a well-recognized rule of the construction of deeds that if the deed recite two descriptions of the property conveyed, one of which sufficiently identifies the property, while the other is false, in fact, the false description should be rejected as surplusage. That a deed conveying a right of way upon land, in, to, and for a ditch called the Mountain Brow Ditch, was a conveyance the ditch itself.[3]

Two descriptions — rule in New Hampshire.

§ 484. Where a deed attempts to give two descriptions of the premises conveyed, and one is general and the other is particular, and they are contradictory, conflicting or irreconcilable, the general rule seems to be, that the latter will be rejected, where the former sufficiently identifies the premises to pass the title to the grantee.[4] The exact location of monuments, such as trees, stakes, stones and the like, referred to in a deed, may always be proved by parol evidence.[5] An action was brought in New Hampshire to foreclose a mortgage on real estate, and involved the identity of the premises, the defendant insisting that the mortgage did not include the land described in the bill, and there was much complication and difficulty in identifying the land. The court announced the rule thus: "In construing a description of property granted or devised in a deed

[1] Buck v. Squiers, 22 Vt. 484; Ammidown v. Bank, 8 Allen, 292.

[2] Peyton v. Ayres, 2 Md. Ch. 64; Hamner v. Smith, 22 Ala. 433; Collins v. Lavelle, 44 Vt. 230.

[3] Reed v. Spicer, 27 Cal 57.

[4] Makepeace v. Bancroft, 12 Mass. 469; Beeson v. Patterson, 36 Pa. St. 24; Havens v. Dale, 18 Cal. 359; Myers v. Ladd, 26 Ill. 415. But see Woodman v. Lane, 7 N. H. 241; Thorndike v. Richards, 1 Shepl. 430.

[5] Blake v. Doherty, 5 Wheat. 359; Claremont v. Carlton, 2 N. H. 373; Hedge v. Sims, 29 Ind. 574; Owen v. Bartholomew, 9 Pick. 520; Reamer v. Nesmith, 34 Cal. 624.

or will, the facts of the case are to be first ascertained, that the *instrument* may be interpreted with reference to the actual facts which were before the grantor or devisor, because in this way their intention may be most readily and satisfactorily ascertained. The whole language of the deed is to be taken together, and effect, if possible, is to be given to every part. If by any rational construction, the several parts can be made to harmonize and to consist with the obvious general intent of the maker, there can be no good reason for rejecting any part, or denying to it its legitimate effect. No word or clause is to be rejected or overlooked, if a reasonable and consistent construction can be given to them."[1] And again, "there is another elementary principle applicable to cases of this kind: that where the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree with the several particulars of the description.[2]

When the title to pass — true and false description.

§ 485. The rule which we have just seen announced in New Hampshire seems to be subject to some modifications and limitations. Where there are several particulars in a description of land conveyed, some of them may be incorrect and false, and others correct and true; then if it can be ascertained from such parts of the description as are correct, what was intended to be conveyed, the property will pass thereby, the incorrect or false description will be rejected; this has been often held.[3] Though it was held in one case in New York, involving this question, in 1865, where the description contained several particulars, that the title would not pass, except such as corresponded with all the particulars.[4] But this case and the New Hampshire case seem to stand alone. It has been very often decided, both in England and America, that if any one of the descriptions is sufficient, the others may be rejected and the land

[1] Bell v. Woodward, 46 N. H. 315, 331. Citing Drew v. Drew, 28 id. 495; Webster v. Atkinson, 4 id. 23; Jackson v. Moore, 6 Cow. 706; Hibbard v. Hurlburt, 10 Vt. 178.

[2] Hathaway v. Power, 6 Hill, 453; Jackson v. Clark, 7 Johns. 217; Jackson v. Marsh, 6 Cow. 281.

[3] Rumbold v. Rumbold, 3 Ves. Jr. 65; Robinson v. Button, 2 Rolle Abr. 52; Lambe v. Reaston, 5 Taunt. 207; Hastead v. Searle, 1 Ld. Raym. 728; Mosley v. Massey, 8 East, 149; Hull v. Fuller, 7 Vt. 100; Lyman v. Loomis, 5 N. H. 408; Bott v. Burnell, 11 Mass. 163; Mason v. White, 11 Barb. 173; Lush v. Druse, 4 Wend. 313; White v. Gay, 9 N. H. 126; Smith v. Strong, 14 Pick. 128; Wendell v. People, 8 Wend. 183; Vose v. Handy, 2 Greenl. 322; Jackson v. Moore, 6 Cow. 702; King v. Little, 1 Cush. 436; Bosworth v. Sturtevant, 2 Cush. 392.

[4] Finlay v. Cook, 54 Barb. 9 (1865).

will pass. On this Mr. Tyler says on the construction of deeds: "A false or mistaken particular in a conveyance may be rejected, where there are definite and certain particulars sufficient to locate the grant. But *prima facie*, a fixed and visible monument can never be rejected as false or mistaken, in favor of mere course or distance, as the starting point, where there is nothing else in the terms of the grant to control and override the fixed and visible call. The general rule that course and distance must yield to natural or artificial monuments or objects is upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties."

Monuments — distances — location of street.

§ 486. It is a rule, subject to few exceptions, that the monuments of a survey control the courses and distances. In a case involving this question, the Indiana court said: "If controversy had arisen between the proprietors and the public as to the eastern boundary of the street, in the first instance, there can be no doubt that the monument fixed on the ground to mark its boundary, and with reference to which neighboring lot-owners made their purchases and improvements, would have controlled, however much measurements might have indicated it to be otherwise. The question was, and is, where was the street actually located?"[1]

Courses and distances yield to monuments.

§ 487. Where the true intention of the parties to a deed can be plainly ascertained and the property identified, the courts should never resort to arbitrary rules of construction.[2] In speaking of the boundaries of real property conveyed by deed, Mr. Washburn says:[3] "But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially on rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land." Where the distance given was but a few feet, and given in feet and inches.[4]

[1] Evansville v. Page, 23 Ind. 525, 527.
[2] Kimball v. Semple, 25 Cal. 449.
[3] 3 Washb. Real Prop. (5th ed.) 427; Davis v. Rainsford, 17 Mass. 207, 210.
[5] Howe v. Bass, 2 Mass. 380; Frost v. Spaulding, 19 Pick. 445; M'Pherson v. Foster, 4 Wash. C. C. 45; 1 U. S. Dig., "Boundaries," § 15, where many cases are collected; Lodge v. Barnett, 46 Pa. St. 484; Evansville v. Page, 23 Ind. 527; Harris v. Hull, 70 Ga. 831; Frost v. Angier, 127 Mass. 212.

Construction of deeds — identity of lands.

§ 488. The description of real estate in a deed of conveyance is to identify what the parties intended, the one to receive and the other to convey; and if, in all cases, the description in the deed would fully identify the property, it would save the courts the difficult work of construing the deed, to ascertain what the parties really intended by executing such a document; but that is not so; and the courts must often resort to the rules of interpretation to determine the real intent of the parties.[1] And the deed must be construed with reference to the state of the property, as the parties are presumed to refer to it in its state at the time of the execution of the deed, and to use the terms which they supposed would be a sufficient identification of the property in its then condition.[2] Where the owner of land, through which a stream runs, changes the course of such stream by cutting a ditch to carry off the water, and he then conveys to another, thereafter, the land upon which the natural channel ran, and upon which the burden of the stream is cast, the grantee will hold his portion according to its changed condition, and with the burden of the stream.[3]

Same — description — rule in California.

§ 489. In an action in California to recover lands, it was held that all doubts as to the meaning of a deed must be solved in favor of the grantee. If a deed contain different descriptions, one of which applies to the land which the grantor owned, and the other to land which he did not own, the former should be taken as true, and the latter as false. Where there is a latent ambiguity in a deed, testimony as to the facts and circumstances surrounding the parties, and the subject-matter at the time of the execution of the deed, is relevant. That where the general descriptions are followed by particular descriptions in a deed, the latter will not restrict the former, if they have been used in the sense of reiteration or affirmation. That the rule that, in the execution of deeds, facts and events which have transpired since the deeds were executed, cannot be considered, does not exclude events which, at the time of the execution of the deed, the parties knew might happen.[4]

[1] Walls v. Preston, 25 Cal. 65.

[2] Adams v. Frothingham, 3 Mass. 352; Pollard v. Maddox, 28 Ala. 325; Lane v. Thompson, 43 N. H. 324; Dunklee v. R. Co., 24 id. 489; Karmuller v. Krotz, 18 Iowa, 356; Rider v. Thompson, 23 Me. 244; Richardson v. Palmer, 38 N. H. 218; Abbott v. Abbott, 51 Me. 581.

[3] Roberts v. Roberts, 55 N. Y. 275.

[4] Piper v. True, 36 Cal. 606.

Same — description in deed — identity — construction — metes and bounds.

§ 490. It is held that where it becomes necessary to explain the calls in a deed for the purpose of their application to the subject-matter, and then to give effect to the deed, extrinsic evidence is always admissible. When the true intent has been once ascertained, it is then competent to admit parol evidence to establish the proper location of all the descriptive designations and calls of the deed, for the purpose of determining whether or not the land in controversy passed by such deed, and thus aid in carrying out the true intent of the parties. And so, for the same purpose, for the explanation of the meaning of particular expressions used in the deed, parol evidence is admissible, where such expressions do not carry a definite meaning without such explanation.[1]*

Land bounded by stream — riparian rights.

§ 491. In Texas, where land was bounded by a river, and where the contest was between two riparian possessors, it was held to be a principle of law, well settled, that where a fresh-water stream is made the

[1] Reamer v. Nesmith, 34 Cal. 624.

* In the case of Reamer v. Nesmith, 34 Cal. 624, the court, giving the facts, said: "The case shows that the land in dispute lies upon the side of Swindle Hill, in Yankee Jim's mining district, Placer county, being crossed near its lower line by the road leading from Yankee Jim's to Todd's Valley, which road runs along the side of the hills, with a front, as it is called, of about four hundred feet, and running back to the summit or center of the hill. The description given in the deed is as follows: "All that certain piece of mining ground situated in Comer's field, on Swindle Hill, south of the road leading from Yankee Jim's to Todd's Valley, known as the Booth claim, and marked by stakes and corners, four hundred feet front, more or less, and running back into the hill." In view of this description the court below charged the jury that no part of the ground lying above or north of the road was included in the deed. In this we think the court was in error. For the purpose of determining the question, it was competent to ascertain, by extrinsic evidence, the precise location of the land in dispute, and also the several calls or descriptions in the deed. For that purpose extrinsic parol evidence is always admissible, for in no other way can effect be given to the deed by applying it to the subject-matter. Parol evidence was, therefore, admissible; the true location of the ground in dispute having been agreed upon, or otherwise ascertained to show the true location of all the descriptive designations and calls named in the deed. This being done, it will be found that the descriptive terms found in the deed apply to the land in dispute, or that they do not; if the latter, the land has not passed by the deed; but if some of them apply to the land and others do not, then, if those which do apply describe the land with sufficient certainty, the land has passed, for those which do not apply may be rejected as false. This must be done in order to give effect to the intent of the parties; and as ancillary to this, it is also competent to explain, by parol testimony, the meaning of expressions used in the deed for the purpose of describing the land, which do not carry a definite meaning without such explanation. Stark. Ev. with notes by Sharswood, 612. It was, therefore, competent for the defendant to show, by parol testimony, the precise location of Comer's field, the road from Yankee Jim's to Todd's Valley, the ground known as the "Booth claim" and what is the full meaning of the expression "running back into the hill." This having been done, if it appeared that some of these descriptions applied to the land in dispute, and others did not, the court was bound to reject the latter and look only to the former; and if they describe the land with sufficient certainty, to hold that it passed by the deed. Reed v. Spicer, 27 Cal. 57; Mulford v. Le Franc, 26 id. 88."

boundary line between the two, the middle or center of the stream was the lineal partition between them, unless there be in the deed some terms expressing a contrary intent in the grant. And that in legal parlance the lines of a survey do not always have a mathematical definition, that they are as broad as the rivers and passways which are appropriated as monuments for public as well as private convenience. "But, when so used, in adjusting the legal rights of parties by them, the center or middle of them, whether a river, a creek, a spring or a passway, fixes the limitation of the rights of the parties, unless otherwise expressly provided for in the feoffment.[1] Monuments, such as well-known objects, must control in ascertaining a boundary.[2] The riparian proprietor may convey the stream without the soil, or he may convey the soil without the stream.[3]

Same — cutting ditch for mill-race.

§ 492. In an Illinois case in 1869, there was an injunction to restrain the appellees from cutting a ditch or race from their mill to carry off the water from the wheel, upon the ground that it would work an irreparable injury to the land of the complainant. The point was made that the complainant's east line was the center thread of Cedar creek, and the ditch was cut in the middle of the creek, and through an island below the mill. BREESE, J., said: "It is a familiar principle that the proprietor of land situated on a river or stream, not navigable, is presumed to own to the center thread of the stream. It is, however, but a presumption, for one man may own the body of such a stream, and another may own the banks; and where, in a deed conveying land, the boundary is limited to the bank of the stream, instead of on and along the stream, the presumption must fail. The party must be controlled by the terms of his deed."[4]

Same — boundary lines — objects — monuments.

§ 493. The rule would seem to be different from that above stated where the land is bounded on and along the bank of the stream.[5] It is held that one piece or parcel of land itself may be a monument to

[1] Muller v. Landa, 31 Tex. 265.

[2] Urquhart v. Burleson, 6 Tex. 502; Hubert v. Bartlett, 9 id. 97; Brown v. Huger, 21 How. 305; Whiteside v. Singleton, 1 Meigs, 207; Knight v. Wilder, 2 Cush. 199.

[3] Knight v. Wilder, 2 Cush. 199.

[4] Rockwell v. Baldwin, 53 Ill. 19; Hatch v. Dwight, 17 Mass. 298; Child v. Starr, 4 Hill (N. Y.), 369.

[5] *Ex parte* Jennings, 6 Cow. 537; Canal Trustees v. Haven, 5 Gilm. (Ill.) 548; King v. King, 7 Mass. 496; Ingraham v. Wilkinson, 4 Pick. 268; Gavit v. Chambers, 3 Ohio, 495.

determine the boundary line and the limit of another.[1] A general rule on this subject was laid down by the court of Massachusetts,[2] in 1866, in which it was held that wherever land is described as bounded by other land, or by a house or structure, the deed of which, according to its legal or ordinary meaning, includes the title in the land of which it has been made part, as a house, mill or wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant. "But when the boundary is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary and not as describing a title or fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall or fence, a tree, a stake or a stone, then the center of the thing so running over or standing on the land is the boundary of the lot of land granted."

Same — description — extrinsic evidence.

§ 494. It was held in California that where a deed describes land by a particular name or number, it is sufficient; and if it could be rendered certain by extrinsic evidence, the description was as good as one by metes and bounds, so that it be capable of identification. FIELD, J., said: "Undoubtedly effect should be given, if possible, to every part of the description; still if some part is inapplicable or untrue, and enough remains to show what was intended, the deed must be upheld. The false or mistaken part should be rejected, and when that happens to be a mere statement of the quantity, it will be done without the least hesitation. I understand this deed to be in effect the same as if the description had been *all the land in lot number fourteen, being one hundred and sixty acres.* Such description, although mistaken as to the quantity, would, beyond doubt, have carried the entire lot."[3] A peculiar case arose in Texas. A. sold to B. one hundred and sixty acres out of a large tract of land, and the deed did not describe the land by metes and bounds or by any other identification than as above stated. It was held that the grantee had the right to select and locate his hundred and sixty acres on any

[1] Bates v. Tymason, 13 Wend. 300; Ake v. Mason, 101 Pa. St. 17; Bloch v. Pfaff, 101 Mass. 538; Carroll v. Norwood, 4 Harr. & McH. 287; Smith v. Murphy, 1 Tayl. (N. C.) 303; Flagg v. Thurston, 13 Pick. 150.

[2] Boston v. Richardson, 13 Allen, 146, 154.

[3] Stanley v. Green, 12 Cal. 148, 162. Citing Jackson v. Barringer, 15 Johns. 471; Howe v. Bass, 2 Mass. 380; Powell v. Clark, 5 id. 355; Smith v. Dodge, 2 N. H. 303; Large v. Penn, 6 S. & R. 488; Belden v. Seymour, 8 Conn. 19; Benedict v. Gaylord, 11 id. 332; Brown v. Parish, 2 Dana, 6.

part of the large tract. WHEELER, C. J., said: "A grant by the owner of a certain number of acres in a particular tract would confer a right of election upon the grantee, and authorize him to locate the quantity in any part of the tract he saw proper to elect, upon the principle that a conveyance must be held to pass some interest, if such effect may be given to it, consistently with the rules of law, and that, if uncertain and ambiguous, it must be construed most strongly against the grantor."[1]

Same — description — rule in California.

§ 495. In California a complaint in an action of ejectment to recover real estate, described the premises as "lot No. 1, in block No. 23, as per plat of the town of Red Bluff, as laid out by the Red Bluff Land Corporation in 1853, being on the corner of Maine and Sycamore streets, twenty-five feet on Maine, by one hundred and fifteen on Sycamore and running back to the alley. This was held sufficient, and that the description by metes and bounds is required only when necessary to identify the property with certainty.[2] In the same State a description of land was held not to be defective, but sufficient, which called for a lot of land, one hundred varas square, bounded on three sides by well-known streets, upon the plat of a city laid out, surveyed and platted, and on the other by the unsurveyed lands.[3] The same rule as in the case where the land lay on a river, and was surveyed on three sides.

Fire insurance — identity — ejectment — description.

§ 496. Where real property was described in a policy of fire insurance, and a portion of the description was false, the latter portion was rejected, there being sufficient remaining to satisfactorily identify the property so insured.[4] Where, in an action of ejectment, the plaintiff claimed under a deed which described the land by name, as "all the undivided two-thirds of all the lands known by the name of Rancho de San Vicente, situated in the county of Los Angeles and State of California," and then added a particular description which was erroneous, it was held that the deed was intended to convey two-thirds of the whole rancho, however erroneous the particular description might be.[5]

[1] Wofford v. McKinna, 23 Tex. 45.
[2] Doll v. Feller, 16 Cal. 432.
[3] Garwood v. Hastings, 38 Cal. 216.
[4] Hatch v. Ins. Co., 67 Cal. 122.
[5] Haley v. Amestoy, 44 Cal. 132.

Description — when sufficient — oral testimony.

§ 497. As a legal proposition the description of real estate given in a deed of conveyance is sufficient if the property can be identified; and to aid in so doing, oral testimony is always admissible, not to make a new contract, but to explain one already made. Where the plaintiff brought ejectment, and in the complaint the starting point of the land was described as two hundred and eight chains, twenty links east of the corner to township 1 and 2 north, range 4 and 5 west, Mount Diablo meridian, this was objected to for want of certainty in identifying the property. A witness testified that he was a surveyor and made a map of the land, and that the starting point mentioned in the complaint was definite, and that there could be but one such point. The description was held sufficient.[1] In an action of ejectment for a lot in the city of San Jose, of a lot in Pueblo, described by an alcalde as "Twenty-five yards in front by fifty in depth, and bounded south-east by Chaifa Garcia's house and lot." This was held to be valid, and conveyed ownership to a definite tract of land, if Chaifa Garcia occupied a lot in Pueblo, and a lot twenty-five by forty yards could be located immediately north-west of hers.[2] This seems self-evident, from a geographical standpoint.

Deed — construction of description.

§ 498. In an action in California, a deed of the land in controversy contained a call which referred to a creek "running from San Rafael to the bay of San Francisco." It appeared that the stream above the village of San Rafael was a running stream but a part of the year, and was not known by the same name as the part below; also, that below the village, the stream was navigable a portion of the distance from its mouth. The stream was referred to in another portion of the deed as "the creek running from San Rafael to the bay of San Francisco. It was held that the parties making the deed intended to refer to the portion of the stream below San Rafael only and that a straight line drawn from the head of the stream to its mouth would establish a base line for a right-angle called for in the deed.[3]

Description — reference to another deed.

§ 499. In another California case it was held that where a deed conveying a large number of lots in a city, states about the number

[1] Sherman v. McCarthy, 57 Cal. 507. And see Anderson v. Hancock, 61 id. 88.
[2] Holloway v. Galliac, 47 Cal. 474.
[3] Irwin v. Towne, 42 Cal. 326.

of lots sold, and refers to another deed given to the grantor of such other deed, and the names of the parties thereto, it was a sufficient identification of the deed referred to, to incorporate the particular description therein contained into the deed given; and that the description in the deed given is not vitiated by the fact that the deed referred to is also falsely stated to have been recorded in the county where the property is situated.

What is a sufficient identification.

§ 500. Where a piece of real estate was described in a deed as a piece of land in a town, lot No. 62, containing fifty and fifty-two one-hundredth acres "* * * and numbered and marked on the official map or plan as outside lands of the town, * * * made by W. H. Norway," it was held that the court could not say, as a matter of law, that it was void for uncertainty in description and identity.[1] It was also held that, where a piece of mining property was claimed, a conveyance of land was not void on its face for uncertainty in description of the property, if, so far as can be seen from the description itself, the points named as boundaries may be well-known monuments.[2]

Survey — difficulty in identifying lands.

§ 501. A question of identity of lands was raised in a California case, not unusual in that State; it involved the calls in the deed of conveyance, as often occurs, and the difficulty arose in the attempt to apply the description in the deed, to the land, and out of the first and third lines. The starting point was fixed beyond doubt or dispute. The first course was "thence in a south-easterly direction forty chains more or less," and of course, both distance and course was indefinite, for "south-easterly" may be any course between south and east, and there may be "more or less" than forty chains. And upon this the court said: "If a fixed monument had been designated, the rule would be to run to it, whether the distance was more or less than the number of chains stated, or whether the course to the monument varied either one way or the other from due south-east. There being no monument named at the termination of this call, if there were no other call to aid it, undoubtedly the survey would run due south-east forty chains and stop. But there were other calls, and running due south-east forty chains, the course and distance could neither be made to harmonize with the other calls, if

[1] Thompson v. Thompson, 52 Cal. 155. [2] Meyers v. Farquharson, 46 Cal. 190.

properly identified, or inclose any land at all; the second call was, 'thence north 71° 15′ east twenty-seven chains to a high rock and stone on a low hill.' Now here was an exact course and distance and a fixed physical call. One of the surveyors said that by finding the rock and stones designated and running back south 71° 15′ west twenty-seven chains, would give the exact terminus of the first line, which should be run thence to the point of beginning, and that surveyors so find the true line from the description. The third line, as designated, runs 'thence in a north-easterly direction sixty-six chains to a road leading,' etc. This is also indefinite as to course, and if the line were run due north-east the given distance, the call would not harmonize with the other calls, or inclose any land; but it is apparent from the testimony of the surveyor, that, upon principles similar to those already indicated, the line can be so run to the road as to fix monuments, and with reference to the other calls, as to harmonize with the other lines and inclose the land."[1] This is but a sample of the loose manner in which surveys are often made, causing great difficulty in the *identity* of the land.

Description of land — plan lost — identity thereof.

§ 502. An action of ejectment was brought by Goldsborough against Patton, Smith and Morgan, executors of Dr. William Smith, deceased, in 1822, to recover a house and lot in Huntingdon, marked No. 11, and which deceased had deeded in his life-time, with three other lots, to his daughter, in 1783, and the question was, whether this was one of those lots embraced in the deed, there being then no *recorded* plan of the town. Dr. Smith appeared to have been mistaken in referring to a *recorded* plan. The plan was presumed to have been lost and never recorded. The court said: "In that case the law admits parol evidence of its contents, and what evidence could be more proper than the declarations of Dr. Smith, who made the deed, and was proprietor of the land on which the town of Huntingdon was laid out. He did not say expressly that the plan referred to in his deed was in his possession, but he said that the lot No. 11 was one of those which he had conveyed to his daughter. It was very proper that the jury should have this evidence, from which they might draw their own conclusions."[2] The evidence of Dr. Smith's declarations, if favorable to his own interests, would not have been admissible on this trial; but the declarations being made

[1] Moss v. Shear, 30 Cal. 468, 480.

[2] Patton v. Goldsborough, 9 S. & R. 46.

subsequent to the execution of the deed to his daughter, were against his own interest, and hence admissible.

Deed — fifty years old — identity of grantor.

§ 503. A deed of land after a lapse of fifty years, from the person whose name was used in an application for land in what was then *Northumberland*, since *Westmoreland* county, both the grantor and grantee being described as of the city of *Philadelphia*, and the handwriting of the grantor being proved, though possession did not accompany the deed, and there was a short adverse possession, were all facts allowed by the trial court to go to the jury for their consideration as a link in the chain of title. The title being traced to the grantee, described in the deed executed to him, as of the city of *Philadelphia*, a copy of the deed, alleged to be his, being offered in evidence, in which he describes himself as of *London Grove*, *Chester* county, whether he is the same person was held to be a question of fact for the jury; that the possession of the deed by his devisees was some evidence that he was the same person.[1]

Oral testimony — latent ambiguity.

§ 504. Where a writing, such as a deed or other writing, which purports to convey property, fails to identify it, the identity of the subject-matter often presents a most difficult question for the consideration of the courts and juries. This question was presented in a case decided by the Supreme Court of Pennsylvania in 1858, in which WOODWARD, J., said: "But when the writing itself refers to a subject-matter, without defining it, which is outside of the instrument, the parties must expect a jury to be employed to ascertain it, under the directions of the court, always jealous of evidence that touches a written instrument. * * * Latent ambiguities may be explained by parol in order to identify the thing intended to be conveyed, but not to make a new contract, or to convey what the parties did not intend to convey."[2]

Land — identity of boundaries — rule in Maine.

§ 505. As to the boundaries of land, the court of Maine, in 1863, laid down the rule on the subject as follows: "Where there are no government surveys, *what are* the boundaries of land conveyed

[1] M'Gennis v. Allison, 10 S. & R. 197. Hamilton v. Marsden, 6 id. 50; Healy v. Citing Clark v. Sanderson, 3 Binn. 196; Moul, 5 S. & R. 185.

[2] Hetherington v. Clark, 30 Pa. St. 393.

by a deed is a question of law. *Where* the boundaries *are*, is a question of fact. An existing line of adjoining land may as well be a monument as any other object. And the identity of a monument found on the ground with one referred to in the deed is always a question for the jury. These propositions have been so often applied in real actions, that no citation of authorities is necessary to sustain them; and upon this question of identity, parol evidence is always admissible."[1]

Same — rule in California.

§ 506. As held in California in 1854, the question of the identity of land, as well as possession, is for the jury. An action was brought to recover a tract of land, called "the Pocket," and an injunction was granted to restrain waste. Defendants set up that it was public land and that they had complied with the law relating to public lands, etc. That they had made a ditch. The difficulty was in the exact boundaries of the land in controversy, and the identification of the same, and the court held that it was a question of fact, to be determined by the jury under proper instructions from the court; and this seems to be the general rule.[2]

Same — call for all lines — for the jury.

§ 507. Where a deed, in describing the land, called for an old line "from A. down the bottom with Hill's line to a forked white oak," and it was uncertain what bottom was meant, the question of identity was one of fact for the jury.[3] Where land was described in a will as the "Red House tract," the limits of the tract being left thus indefinite, it became necessary to identify it; this was held to be a question of fact for the jury. Whether a land warrant is laid on the land it calls for is also a question of fact.[4]

Same — tax deed — rule in Ohio.

§ 508. In the State of Ohio it was held to be an insufficient description of taxable lands, to say: "Cooper, James, 5 acres, section 24, T. 4, F. R. 1," and that a deed made pursuant to such a sale for taxes, with no other description, was void, as not identifying the land sold; and the case went to the Supreme Court of the United States, where the same ruling was adopted.[5] A de-

[1] Abbott v. Abbott, 51 Me. 581.
[2] Hill v. Mason, 7 Jones (N. C.), 552.
[3] Hicks v. Davis, 4 Cal. 67.
[4] Cassidy v. Conway, 25 Pa. St. 244.
[5] Raymond v. Longworth, 14 How. (U. S.) 76. Citing Massie's Heirs v. Long, 2 Ohio, 287; Treon v. Emerick, 6 id. 391; Lafferty v. Byers, 5 id. 458. See, also, Hannel v. Smith, 15 id. 134; Smith v. Handy, 16 id. 214.

fective description of land assessed for taxes cannot be cured by the description in a tax deed, nor by other proof. The statute must be complied with; the land must be identified, as the deed is only *prima facie* evidence of title, and its validity depends upon a compliance with the statute.[1]

Same — land sold for taxes — identification.

§ 509. It was held that a list of forfeited lands, furnished by the auditor of State to the county auditor, for sale, must be authenticated by his official seal, and signed by himself or his chief clerk, and a sale of such lands will not be valid unless they have been previously listed for taxation by some pertinent description.[2] An exchange of land in Louisiana is an executed contract; it operates *per se* as a reciprocal conveyance of the thing given and the thing received. The thing given or taken in exchange must be specific, and so distinguishable from all things of the like kind as to be clearly known and identified.[3]

Same — patent —land in Virginia.

§ 510. In an action of ejectment, involving certain land in Virginia, which was much complicated in its description and difficult to identify, it was held by the Supreme Court of the United States, that if the grant appropriate the land, it is only necessary for the person claiming under it to identify the land called for; that the entire description of the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls of the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, the grant will be void.[4]

Same — Tennessee lands — North Carolina laws.

§ 511. In Tennessee, the courts of law, construing the land laws of North Carolina, permitted the parties in ejectment to go back to the original entry and connect the patent with it. *Notoriety* was not essential, as it was in Kentucky. The statute of Virginia was the land law of Kentucky, and required that entries should be so special and certain that any subsequent locator should know how to appro-

[1] Turney v. Yeoman, 16 Ohio, 24.
[2] Hannel v. Smith, 15 Ohio, 134.
[3] Preston v. Keene, 14 Pet. 133.
[4] Boardman v. Lessees of Reed and Ford, 6 Pet. 328.

priate the adjoining residuum. But the land laws of North Carolina contained no such provision, and the doctrine which required notoriety as well as *identity* was never received in Tennessee.[1] And in Ohio, in 1819, so far as it related to the question of identity, a description which would identify it would validate the grant.[2]

Patent — lands — mistake — jurisdiction.

§ 512. As a general rule, where lands are involved in suit, which have been granted by the United States, and the patent is involved, the Supreme Court of the United States has jurisdiction. But it was held that error would not lie to a State court where the issue was solely upon the identity of the person to whom the record of land titles conferred or intended to be confirmed, certain lands as, *e. g.*, whether when confirmed in the name of A. B., it did not mean C. B., and this, though both claim title to the same land under the Federal government.[3]

Deed to father — instead of son — rule in Vermont.

§ 513. Where, in a recent Vermont case, finally decided in 1861, a father and son being both named D. F., the father purchased a tract or parcel of land, taking the deed to D. F., Jr., describing him as of the town where both of them resided; and himself executed promissory notes for part of the purchase-money, *i. e.*, the deferred payments, and a mortgage on the land to secure the payment of the same, by and in the name of D. F., Jr., and said nothing of acting as agent for his son, and the grantor supposing the father was in fact the purchaser, that his name was D. F., Jr., and that he was deeding the land to the father. Some of the evidence in the case tended to show that the son had authorized the father to purchase the land in his, the son's, name, and that he paid, directly or indirectly, the whole of the purchase-money. It was held that the question was one of fact to be determined by the jury.[4]

Deed — alleged forgery — rule in Vermont.

§ 514. Another case in the same State, decided in the same year (1861), the defendant in the action offered in evidence a copy of a deed which plaintiff had introduced, purporting to be dated on May 24, 1807, which was in fact the day of the date of the defective deed which plaintiff had introduced, between the same parties and sub-

[1] Blunt's Lessee v. Smith, 7 Wheat. 248 (1822).
[2] M'Arthur v. Browder, 4 Wheat. 488.
[3] Carpenter v. Williams, 9 Wall. 785.
[4] Prentiss v. Blake, 34 Vt. 460.

stantially identical, at least in terms, with the defective deed, but which was not recorded until 1856, and the plaintiff claimed it was a forgery. It was held that the copy of the deed was properly admitted, and that the question of the genuineness of the original deed was a question of fact, not of law, to be determined, not by the court, but by the jury.[1] In all matters of this nature, when the identity of either the grantor or grantee becomes a question in issue, the court cannot decide it, but must submit the question to the jury, because it is a question, not of law, but of fact. And where a written instrument, such as bonds, bills, notes, deeds, wills, mortgages and the like, are offered in evidence, their admissibility as evidence is a question of law, to be determined by the court. But when admitted by the court, the weight of such evidence, as also the proof of the fact for which it is introduced, is for the jury, under proper instructions by the court.

Acknowledgment — what complies with the statute.

§ 515. In all deeds, mortgages or other conveyances, it is necessary to identify the premises intended to be conveyed. And it often occurs that the description as given in the instruments is so vague, uncertain and indefinite as to require the aid of oral testimony to ascertain and identify it. While this is important, it is equally important to identify the grantor. This is done, to an extent which is generally satisfactory, by the certificate of acknowledgment. In this the statutes of most of our States require the certificate of acknowledgment to state that the grantor is known to the officer making it, and thus he is identified, so far as this evidence may go. This is to prevent fraud; it is for the safety and protection of the grantee.[2] The United States Supreme Court held that a magistrate's certificate attached to a deed of land in Illinois, that on the 27th day of May, 1856, personally came C. L. and W. H., her husband, "known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their act and deed," was equivalent to stating that they came before the officer, and were personally known to him to be the real persons who subscribed the deed, and in this respect complied with the requirements of the statute of the State of Illinois then in force.[3]

[1] Pratt v. Battles, 34 Vt. 391.
[2] Smith v. Garden, 28 Wis. 685; Schley v. Pull. Car Co., 120 U. S. 575; Livingston v. Kettelle, 1 Gilm. 116.
[3] Schley v. Pull. Car Co., 120 U. S.

Same — same — rule on the subject.

§ 516. The Supreme Court of the United States, in deciding a case from Tennessee, says the laws of Tennessee prescribe a formula for the acknowledgment of deeds: "Personally appeared before me * * * the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." The court held that the certificate of an officer taking the acknowledgment of the grantor in a deed of trust, in which the officer certifies that said grantor is "personally known" to him, is a compliance with the statute.[1] But it will be seen that the State courts have been more strict in their construction.

Same — certificate — when fatally defective — rule in Wisconsin.

§ 517. In a Wisconsin case involving the same question, it appeared that the statute in force required the officer taking the acknowledgment of a deed or other instrument to certify that the grantor was known to him, or that his or her identity had been satisfactorily proved. It was held that a deed purporting to be made by D. W. and C. L. W., his wife, the certificate merely stating that D. W., the party grantor in the within instrument, personally appeared and acknowledged the same to be his act and deed, and at the same time personally appeared C. L. W., the wife of said D. W., and acknowledged, etc., was fatally defective, and not a compliance with the statute. Neither of the parties were shown by the certificate to have been personally known to the officer, or their identity proved.[2] And the same, or similar rule was held by the Supreme Court of Illinois, that an acknowledgment of a deed, the certificate of which was a blank space, where the word "known" usually appears in the clause "who is personally known to be the real person," etc., is fatally defective, because such certificate fails to identify the grantor in the deed."[3]

Identity of land — mistake in numbers.

§ 518. In a recent case in Iowa, a bill was filed to foreclose a mortgage. It was shown that the plaintiff's husband conveyed the land in question by his proper name and that a person of that name previously acquired the title thereto. It was presumed that they were the same person. And in an action to foreclose a mortgage on a

[1] Kelly v. Calhoun, 95 U. S. 710.
[2] Smith v. Garden, 28 Wis. 685.
[3] Tully v. Davis, 30 Ill. 103.

quarter-section of land the defendant claimed dower in the east half of it; her claim was allowed in the decree, but the evidence showed that her husband had owned the west half only; but since the decree provided for the sale of the whole tract, and for the reservation out of the proceeds of the value of defendant's dower interest, which was not affected by the mistake — the east and west halves being of equal value — the mistake was held to be no ground to reverse the decree, and that there was no ground for rendering judgment against plaintiff or in favor of defendant for the value of the dower interest, but only for costs, and the error was corrected, and the decree accordingly modified and affirmed.[1]

Description of land — identity by survey — rule in Ohio.

§ 519. The Supreme Court of Ohio, in 1858, in the interpretation of surveys to identify lands intended to be conveyed in a certain deed, SWAN, C. J., delivering the opinion of the court, said: "Where an original survey has been made by the true meridian, and contracts and deeds are made and executed for parts of such survey, calling for and adopting the calls of parts of the original survey, with its lines in the description, it is clear that such calls of the original courses mean the true meridian; and if the contracts or deeds thus made call for courses originally surveyed by the magnetic meridian, it is equally true and clear that such calls mean the magnetic meridian. In the subdivision lines and in contracts of sale and deeds for parts of sections originally surveyed by the true meridian, subdivision lines, having no reference to the original lines, would, in general, be surveyed by the magnetic meridian, as such is the usual mode of surveying lands in all parts of the State. It is manifest from all this, that, in respect to the surveys in this State, 'west' and 'due west' in one class of original surveys, means a line at a right angle to the true meridian; and in another class 'west' or 'due west' is west according to bearings of the surveyor's compass at the time of the original survey. In giving, thus, our interpretation of these words, a fixed, determinate, judicial construction cannot be adopted, and their meaning must frequently depend upon and be controlled by extraneous facts. In the case before us, the fact that the original section was owned in common; that the calls of the course of the original surveys were for the true and magnetic meridian; that the original purchases from the government, or their rep-

[1] Gilman v. Sheets, 78 Iowa, 499.

resentatives, in using the words 'due west' were or were not doing so with a view to a subdivision of the section between them, and with reference to the original courses, were proper subjects of inquiry and consideration for the jury, under directions of the court, to determine the disputed lines."[1]

Description of land — identification — rule in Maine.

§ 520. The question of the description of land for the purpose of identifying the same arose in a case decided by the Supreme Court of Maine in 1863. That court, in disposing of this branch of the case, merely laid down a rule briefly as follows: "What the boundaries of land conveyed is a question of fact. An *existing line* of an adjoining tract may as well be a *monument* as any other object, and the identity of a monument found upon the ground with one referred to in the deed is always a question for the jury. These propositions have been so often applied in real actions, that no citation of authority is necessary to sustain them. And upon this question of identity parol evidence is admissible."[2] The same court, as early as 1836, in a case of some importance, and in a well-considered opinion, held substantially the same rule that we have just seen announced in the above cases, to the effect that where a stake or stone is referred to, as a monument, in a deed or in a levy, parol proof is admissible to show the location.[3]

Description of land — identity — rule in Massachusetts.

§ 521. The Supreme Court of Massachusetts, in 1832, held that where in the conveyance of land a description is given, which has not acquired a fixed legal construction, or a boundary is referred to, which is variable, parol evidence is admissible for the purpose of ascertaining the meaning and proper construction of the deed and the identity of the land.[4] And the contract for the conveyance of land, says the court of Illinois, will not fail for want of the proper identification of the premises intended to be conveyed; and it will be held valid, if the land is sufficiently identified as to enable a surveyor to locate it.[5] In Massachusetts a case arose involving this question, decided in 1845. The land was described in different deeds as bounded "on the mountain" and "by the mountain" and "the foot of the mountain." It was held that the words were too indefinite and un-

[1] McKinney v. McKinney, 8 Ohio St. 426.
[2] Abbott v. Abbott, 51 Me. 581.
[3] Wing v. Burgis, 13 Me. 111.
[4] Waterman v. Johnson, 13 Pick. 261.
[5] White v. Hermann, 51 Ill. 243.

certain to identify the land by controlling the courses, distances and other references in the deed, descriptive of the land; that it was a mixed question of law and fact what part of the mountain was included, and that this was a question for the jury to determine and to ascertain the proper boundary.[1]

Identity of land sold for taxes.

§ 522. In Pennsylvania, in 1794, a tract of four hundred acres of land was warranted, as it was called, in the name of "Daniel Kritler," and surveyed as four hundred and sixty acres. It was assessed in Frankstown (cut off from Woodbury) till 1846, in the name of "Daniel Kladder," and the taxes paid by owner. Blair township was afterward erected from Frankstown, and the tract continued to be assessed in Blair in the name of "Kritler," the owner still paying the taxes. After 1846, a tract of three hundred and twenty acres was assessed in Frankstown in the name of "Kladder," and another tract of two hundred and thirty acres in the same name in Huston, which had been cut off from Woodbury. The two hundred and thirty acres in Frankstown were sold for taxes. The purchaser entered on the tract in Blair, claiming that it was the one he had purchased. It was held that, as a matter of law, there was no evidence of identity of the Frankstown three hundred and twenty acres with the Blair tract, and it was a mere question of identity.[2] The evidence necessary to identify land does not differ essentially from that required to identify personal property or other things, except in case of disputed boundary lines, when actual measurement or survey becomes necessary. Where an agent or trustee invests a trust fund in real estate and takes title to himself, the *cestui que trust* or beneficiary may trace the fund into the property; then it will become necessary to identify both the fund and the property.

Misdescription of land — decree — sale.

§ 523. The effect of a misdescription in a decree and notice of a sale of land was adjudicated in Wisconsin in 1875. The decree directed the sale of certain mortgaged premises mentioned in the bill of complaint (in which the land was correctly described), but at the close of the decree the premises were incorrectly described as the "*north-east*" quarter, instead of the "*south-east*" quarter of a

[1] Williston v. Morse, 10 Metc. (Mass.) 17.

[2] Brotherline v. Hammond, 69 Pa. St. 128. Citing Phila. v. Miller, 49 Pa. St. 440; Lyman v. Phila., 56 id. 488; Glass v. Gilbert, 58 id. 266.

section. The sheriff advertised and offered for sale the "north-east" quarter, and his report of the sale was confirmed, and judgment rendered against the mortgagor for a deficit. It was held that the decree was merely void, could be amended by correcting the mistake, and the land could be resold under it as amended.[1]

[1] Seeley v. Manning, 37 Wis. 574.

CHAPTER XIII.

IDENTIFICATION OF PERSONAL PROPERTY.

SEC.

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Personal property — chattel mortgage.

§ 524. As to the identity of chattels, it is said by Mr. Jones in his valuable work on Chattel Mortgages, § 54: "The description need not be such as would enable a stranger to select the property. A description which will enable third persons, aided by inquiries, which the instrument itself suggests, to identify the property, is sufficient."[1]

It is held in Iowa that a description in a chattel mortgage which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property covered by it, is sufficient. This was in an action to recover thirty-one head of work oxen; the plaintiffs claimed title under a mortgage executed by one R. C. Durham, October 7, 1865, to them, to secure a debt of $1,750, and in this the question of identity arose, and the court held as above.[2]

Same — description — rule in Massachusetts.

§ 525. A party in Massachusetts in 1856 executed a chattel mortgage, conveying the following personal property, to-wit: "One bay mare, one cow, one chaise and harness, one sleigh, robes and harness, one saddle and bridle, all the farming tools and other personal property in and about the barn and premises at Herbert Hall; all the furniture, and all the articles of personal property in and about Herbert Hall, so called." A family carriage belonging to the grantor was held to pass by the mortgage when on the premises aforesaid, at the time of the execution of the mortgage, and evidence that the mortgagor, immediately afterward, pointed out the carriage to the mortgagee as included in the mortgage, was competent evidence to identify it.[3]

Same — two mortgages on one horse.

§ 526. In Iowa, there were two mortgages on one horse, and in a contest as to the right of the property, the holder of the second mortgage insisted that the record of the first was insufficient to impart constructive notice to him, because the horse was improperly described in the plaintiff's mortgage, in respect to his color. In the plaintiff's mortgage he was described as a brown color; in the other

[1] Jones Chat. Mort., § 54. Citing Winter v. Landphere, 42 Iowa, 471; Smith v. McLean, 24 id. 322; Yant v. Harvey, 55 id. 421; Jordan v. Bank, 11 Neb. 499; Connally v. Spragins, 66 Ala. 258; Lawrence v. Evarts, 7 Ohio St. 194; Tindall v. Wasson, 74 Ind. 495.

[2] Smith v. McLean, 24 Iowa, 323.

[3] Goulding v. Swett, 13 Gray, 517. Citing Winslow v. Ins. Co., 4 Metc. 306; Harding v. Coburn, 12 id. 333; Lawrence v. Evarts, 7 Ohio St. 194; Eddy v. Caldwell, 7 Minn. 225.

he was described as a black horse; the evidence was conflicting, and ROTHROCK, J., said: "As we are required to determine this question upon the preponderance of this evidence, we think that if the defendant, at the time he took his mortgage, had taken the description contained in the plaintiff's mortgage, and gone to the farm named therein, as the place where the mortgaged property was kept, and made inquiry, he would have learned that the horse in question was covered by plaintiff's mortgage. When the description in a chattel mortgage is correct as far as it goes, but fails fully to point out and identify the property intended to be conveyed, a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument itself could reasonably be deemed to suggest."[1]

Same — mortgage on two mules — description.

§ 527. A mortgagee in Indiana brought his action to recover possession of two mules held by the mortgagor, and in his complaint described them as "two brown female mules." The answer set up that the only claim the plaintiff had was founded upon a chattel mortgage conveying "two mule colts, one year old next spring," and no other description was given. It was held that a description in a chattel mortgage which will enable third persons, aided by inquiries which the instrument itself indicates and directs to identify the property, is sufficient, and that parol evidence was admissible to identify the particular property described in the mortgage, that is, parol evidence may aid, not make a description in such a mortgage.[2]

Same — one black mule — rule in Alabama.

§ 528. In an action in Alabama, the chattel mortgage described the property as "one black mule about eight years old." It was held that when those words are used, without more, in describing the animal, they are not so general and indefinite as to render the mortgage void, nor to exclude it as evidence of notice when properly recorded; that such a general description may be rendered more certain when read in the light of the circumstances surrounding the parties at the time the instrument was executed, and it was sufficient when recorded to excite the inquiry of strangers dealing with the mortgagor, and thus to charge them with notice of the incumbrance.[3]

[1] Yant v. Harvey, 55 Iowa, 421. Citing Smith v. McLean, 24 id. 322.

[2] Tindall v. Wasson, 74 Ind. 495. Citing Duke v. Strickland, 43 id. 494; McCord v. Cooper, 30 id. 9; Ebberle v. Mayer, 51 id. 235; Smith v. McLean, 24 Iowa, 322.

[3] Connally v. Spragins, 66 Ala. 258.

Description of mare — constructive notice.

§ 529. A chattel mortgage was intended to convey a mare, described in the instrument as having "four white legs," when in fact she had but one white foot to the pastern joint, and there was a little white on another foot. It was held that the description was not sufficient to make the recording of the mortgage constructive notice. But it was held that in such case it would be competent to show by evidence *aliunde* that the mare in controversy was the one mortgaged, together with such facts and circumstances as would tend to show the ability of the adverse party claimant, aided by inquiry whichthe mortgage itself indicated, to identify the mare.[1] An action of replevin was brought by Aultman & Co. against King, to recover possession of a certain mare, described as follows: "One bay mare, one hind foot white, and white spot in face, branded 'G,' seventeen hands high, five years old, formerly the property of John Hamerberg." It was held that as the description applied to the mare in controversy in so many particulars, and not applying to any other animal, the description was not void, and although partially untrue, did not render the mortgage void in any respect. The brand was "J" instead of "G," and the mare fifteen and three-fourths hands high instead of seventeen. In Michigan, a chattel mortgage was held to be sufficient where it conveyed all the cattle, consisting of two yoke, aged six and seven years, color "red, white and blue," * * * and all other property now in our possession in or about said village, etc., and that full description need not apply, as to the color, to each one of the cattle, *i. e.*, it was not necessary that each one should be "red, white and blue."[2]

Variance — description of a mule — horses and oxen.

§ 530. It was held in Alabama in 1887, that where an animal was conveyed by a chattel mortgage and described as a "black mare mule," while the one sued for was described by the witnesses as a "dark mouse-colored mare mule," or a "mouse-colored mare mule;" the variance was not so great as to render the mortgage inadmissible as evidence; but the question of identity was one for the jury. In this case the mule was mortgaged, and finally sold under the mortgage, or under an execution, and the rights of the claimant arose, and in this was involved the question of identity, and the court held

[1] Rowley v. Bartholemew, 37 Iowa, 374. Citing Smith v. McLean, 24 id. 322. Farwell v. Fox, 18 id. 169; Willey v. Snyder, 34 id. 60.

[2] Fordyce v. Neal, 40 Mich. 705. Citing

as above stated.[1] And in Minnesota, in a case decided in 1889, it was held that evidence that a person had purchased from a mortgagor two red oxen five years old, and one black ox five years old, is not sufficient to identify the oxen purchased with those bearing that description, on which there was an existing mortgage given by the vendor. The court, after disposing of another point in the case, said: "There was no effort made to identify the black ox and red oxen found in defendant's possession on April 29 at the place mentioned in the evidence as the animals which were mortgaged while in Raymond's possession, in the town of Mitchell, three months previously. The bare fact that the mortgagor owned the cattle in April was insufficient. Their identity should have been more clearly established."[2]

In a former case in the same State, one Tolbert mortgaged personal property to plaintiff, including "three four-year old horses," and described as being in the possession of the mortgagor. It was held to be a general rule that a description of the mortgaged property is sufficient if it will enable a third person, aided by inquiries which the instrument suggests, to identify the property. Application of this rule to a mortgage in which three horses three years old, coming four, appear to be misdescribed as "three four-year-old horses," that the jury were warranted in rejecting the misdescription as to age, and finding that the three-year-olds were included in the mortgage.[3]

Identity of cattle — ages — rule as to description.

§ 531. It was held in Wisconsin that a mortgage conveying cattle was not void because it describes them incorrectly as to their ages, when it clearly appears from the evidence that cattle were intended between the parties to be conveyed by the mortgage; and that this was especially true, and will be so held where the party claiming in opposition to the mortgage was not misled by the erroneous description, and could not have been misled in the exercise of ordinary care.[4] It would seem that this is the only correct rule. The description of personalty in a chattel mortgage should be so certain as to not mislead, and the mortgagee should look to it, for his lien upon it, as a security may and does often depend upon the description given in the instrument itself. Where it is obscure, vague and in-

[1] Tompkins v. Henderson, 83 Ala. 391.
[2] Kellogg v. Anderson, 40 Minn. 207.
[3] Tolbert v. Horton, 33 Minn. 104.
[4] Harris v. Kennedy, 48 Wis. 500.

definite, and so uncertain as to mislead innocent parties, parol evidence will not be admissible to explain the matter of description. For instance, "one horse," "one mule," or "one wagon," is too uncertain for identity. But on the other hand, where there is a double description, and part of it will be sufficient without the other, such other, whether false or uncertain, may be rejected as surplusage. This is a similar rule to that which we have seen applied to the identity of real estate by the description given in the deed, will or other conveyance.[1]*

Stock of goods — description of.

§ 532. An action of trover was brought in Maine to recover the value of a stock of goods in Brunswick. Plaintiff claimed under a mortgage from Stout to him, dated December 29, 1868. The mortgage described the property as "the goods and chattels now in my store in Brunswick, a schedule of which is hereto annexed." It was executed to secure an indebtedness of $700. The defendant claimed under a mortgage from said Stout to one Thompson, deceased, to secure a debt of $300, and bearing date August 8, 1864. The above description was in the defendant's mortgage, however, and was held sufficient to cover the goods in the store, which were embraced in the schedule.[2] But in Illinois it was held that where a mortgage purports to convey personal property, the mortgagee must see to it that the property conveyed is correctly and truly described, so that other persons may not be misled. That the description in the mort-

[1] Hamner v. Smith, 22 Ala. 433; Peyton v. Ayres, 2 Md. Ch. 64; Reed v. Spicer, 27 Cal. 57; Collins v. Lavelle, 44 Vt. 230.

[2] Partridge v. White, 59 Me. 564.

* In Mills v. Kansas Lumber Co., 26 Kans. 576, VALENTINE, J., said: "Personal property can seldom be so described in any instrument as to enable a stranger to select it from other property of like kind without the aid of other facts than those mentioned in the instrument itself. The name of the horse in the present case was 'George,' but there may have been several other horses in the same county by the same name; and a stranger could not tell without inquiries what this horse's name was, or whether it was one of the horses whose name was George or not. Resort must be had in nearly all cases to other evidence than that furnished by the mortgage itself, to enable third persons to identify mortgaged property; and generally, where there is a description of the property mortgaged, and the description is true, and by the aid of such description and the surrounding circumstances, the third person would, in the ordinary course of things, know the property that was mortgaged, the description should be held to be sufficient. In the present case the defendant Mills was bound to take notice of the mortgage, for it had been properly recorded. He was bound to know that a bay horse, six years old in 1878, owned by and in the possession of John G. Raner, was mortgaged. We think he was bound to know, from the mortgage itself, that the property was situated in McPherson county on November 2, 1878, * * * as the property of Raner, and that it was mortgaged. Under such circumstances, we think, as between the mortgagee, the Kansas Lumber Company, and the defendant Mills, we must hold that the description was and is sufficient."

gage must control, as to the rights of parties, otherwise great fraud and injury may be done.[1]

Same — description — goods — groceries.

§ 533. In an action of tort, it appeared that one Smith kept a country store, and mortgaged certain goods to plaintiff; Smith subsequently went into insolvency, and the defendants were appointed assignees, and took possession and sold the goods; the case was referred to an auditor, who reported, and this was put in evidence. Plaintiff offered in evidence the value of the goods named in the writ. Defendant objected because the plaintiff had not put in any evidence of their value before the auditor. The evidence was held to be admissible. That an auditor's report is only *prima facie* evidence, and a party has the right to retry before the jury the whole case, and to introduce any competent evidence which is material to the issue involved. But it was held in the language of the court "that many of the articles which were in Smith's store, and which were specified in the plaintiff's declaration, are of this description, such as spades, snathes, pails, buckets, traps, cards and others. The fact that such things are usually kept in a country store does not make them "groceries" within the meaning of the mortgage, or extend the natural and accepted meaning of the description so as to include them.[2]

Same — misdescription — surplusage.

§ 534. In Iowa, where a lease made the rent charge for a store building a lien on "any and all goods, wares and merchandise then in or thereafter to be put in, on or about the building," it was held not to include teams and wagons used by the lessee in delivering goods to his customers, nor notes and accounts due him, and kept in the building.[3] Where a chattel mortgage is executed on personal property, and the property is misdescribed, as to the lot of ground upon which it is situated, such misdescription will be rejected as surplusage, and a court of equity will not take jurisdiction to make a useless correction of the mortgage, and parol evidence would be admissible to establish the identity of the property, and in this the law affords a full and ample remedy; and it must be sought on the common-law side of the court. And where creditors hold an exe-

[1] Hutton v. Arnett, 51 Ill. 198.
[2] Fletcher v. Powers, 131 Mass. 333.
[3] Van Patten v. Leonard, 55 Iowa, 520. Citing Vawter v. Griffin, 40 Ind. 593; Whittemore v. Gibbs, 24 N. H. 488.

cution against the mortgagor of chattels, they may sell the chattels subject to the lien of the mortgage, and equity will not enjoin the sale.[1]

Same — portable steam engine.

§ 535. Where an object conveyed is sufficiently described by the terms used, a false mention of some particulars, not producing obscurity as to the intention of the parties, will not defeat the operation of the instrument upon the maxim *falso demonstratio non nocet.* And so where a mortgage conveyed a portable steam engine, grist and saw-mill of forty-horse power, now on a certain plantation, also a certain portable steam engine used for ginning and shelling corn, it was held: 1. That parol evidence was admissible to show that the engine first mentioned was intended to be included in the mortgage, though misdescribed as to the location. 2. That the dealings and declarations of the parties with respect to such engine were receivable on the question as to whether or not it was the intention of the parties to include it in the mortgage.[2]

Deed in trust — crop of cotton — description.

§ 536. A trust deed was executed describing the property as "a crop of cotton now being cultivated and raised by him on certain lands on which he is now living, and rented by him from Newman." At that time the grantor resided upon and cultivated lands rented from Weatherly; but he also cultivated land rented from Newman. It was held that the trust deed conveyed only the crop on the land rented from Weatherly, upon which Washington was living, the words "and rented from Newman" are to be rejected as an erroneous addition, in accordance with the maxim *falso demonstratio non nocet*, and parol evidence of the intention of the parties as to the property to be conveyed was held to be inadmissible.[3] In Alabama, it was held that the property was sufficiently identified when the mortgage described it as "my entire crop of cotton and corn of the present year," without any other descriptive words.[4]

Indefinite mortgage — mixed logs — wagon.

§ 537. It was held in Michigan that a mortgage upon a stated quantity of mixed logs in the drive was void for uncertainty as against third parties who have acquired rights, if it does not furnish

[1] Spaulding v. Mozier, 57 Ill. 148.
[2] Goff v. Pope, 83 N. C. 123. Citing 1 Greenl. Ev., § 301; Bryan v. Faucett, 65 N. C. 650; Johnson v. Nevill, id. 677.
[3] Hunt v. Shackleford, 56 Miss. 397.
[4] Ellis v. Martin, 60 Ala. 394.

the *data* for separating them from the mass. MASTON, J., said: "As well might we undertake to enforce a chattel mortgage given on a pile of lumber in a certain yard containing fifty or a hundred piles, or given upon twenty sheep in a flock of a hundred, or upon ten head of cattle in a drove or herd of fifty. To sustain such mortgages would, we think, enable parties to commit gross frauds, and would also tend to prevent third parties from afterward purchasing or acquiring interests in the property, a part of which had been thus mortgaged, and thus tend to discourage trade.[1]

And where, in the State of Mississippi, the mortgaged property was described as "one four-horse iron-axle wagon," without any further designation or description as to ownership, possession or location, was held to be insufficient, as against subsequent purchasers or incumbrancers.[2]

Description — furniture — wheat — oxen.

§ 538. In a Connecticut case, the mortgaged property was a specified number of different kinds of furniture, not otherwise described than by a general designation, and as contained in the hotel of the mortgagor, there being at the time a great number of some of the articles and a less number of others, owned by him and in the hotel. It was held that the mortgage was good as to those articles that were less in number than those described in the mortgage, and that as to the others, it was void for uncertainty.[3] Where a mortgage covered "a ten-acre field of growing wheat on the north-west quarter of the south-west quarter of section thirty-four, township eighteen, range ten, in Henry county, Indiana," as appears from the opinion in the case, this was a sufficient identification of the property conveyed by the mortgage. But where the property was described as "three yoke of oxen," and there was no location or other circumstances of identification, this was held insufficient to give notice to third parties who purchase *bona fide* for value, without further notice.[4]

Same — staves — stock and chattels.

§ 539. Where personal property was mortgaged and described as "all the staves I have in Monterey, the same I had of Moses Fargo,"

[1] Richardson v. Lumber Co., 40 Mich. 203.

[2] Nicholson v. Karpe, 58 Miss. 34.

[3] Crosswell v. Allis, 25 Conn. 301. And see Kelly v. Reid, 57 Miss. 89; Draper v. Perkins, id. 277; Fowler v. Hunt, 48 Wis. 345; Washington v. Love, 34 Ark. 93; Bullock v. Williams, 16 Pick. 33; Person v. Wright, 35 Ark. 169.

[4] Duke v. Strickland, 43 Ind. 494; McCord v. Cooper, 30 id. 9; Frost v. Beekman, 1 Johns. Ch. 288; Jennings' Lessee v. Wood, 20 Ohio, 261.

and it appeared that the mortgagor had no staves in Monterey, but had a quantity in the adjoining town of Sandisfield, near the boundary of Monterey, which he had of Moses Fargo; it was held that the first part of the description might be rejected as false, and the remainder was sufficient to pass the property.[1] It was held in Massachusetts that a mortgage of "all and singular the stock and chattels belonging to the mortgagor in and about the wheelwright shop occupied by him," was not void as against his creditors; and if they attach the property, the mortgagee could claim the proceeds of the sale thereof from the attaching officer under the statute.[2]

Chattel mortgage — goods in shop.

§ 540. A person in Bangor, Maine, executed a chattel mortgage conveying all the property "now in the shop occupied by me in the said Bangor," and the instrument was without date. It was held that parol evidence was admissible to show the date; and that the description conveyed the property. An action was brought to recover the goods. Plaintiffs, to show their title, offered a mortgage from Kellen to them, without date, recorded February, 1, 1842, of all and singular the goods, wares and merchandise, stock, harness and other articles of every kind and description now in the shop occupied by me in the said Bangor," and then proved the date of the mortgage. The property was left in the possession of Kellen, the mortgagor, to sell, as agent, for cash. He sold a portion of the goods to Hunt, and the plaintiffs refused to ratify the sale, and insisted that it was invalid, and hence the action against Hunt. The description was held to be sufficient to identify the goods by the aid of oral testimony.[3] In a later case in the same State, an action was brought against the sheriff for the acts of his deputy, in taking goods of plaintiff. It was held that where a stock of goods mortgaged, "in store No. 2, Glidden Block," were subsequently removed to another store, all the goods in store No. 2 at the time the mortgage was executed were covered by it. That moving them from one store to another would not destroy the mortgagor's right to them, though it might render it more difficult for the plaintiff to identify them.[4] The description was held sufficient when it conveyed "all the tools, stock, fixtures and materials on hand in the shop formerly occupied by said Kreber & Co., on Central avenue, in the city of Madison,

[1] Pettis v. Kellogg, 7 Cush. 456.
[2] Harding v. Coburn, 12 Metc. 333.
[3] Burditt v. Hunt, 25 Me. 419.
[4] Wheelden v. Wilson, 44 Me. 11.

in Indiana; and being the same property this day sold to us by the said Kreber & Co." was sufficiently identified.[1]*

Larceny — cattle — marks — brands.

§ 541. A defendant in Texas was indicted for the larceny of a "beef steer." It was held that unrecorded marks are competent

[1] Ebberle v. Mayer, 51 Ind. 235.

* In Willey v. Snyder, 34 Mich. 60, which involved the identity of a bull, COOLEY, Ch. J., said: "An able and ingenious argument was made in this case to convince us that a description of property in a chattel mortgage as 'One Durm bull known as the Grinnalls bull — said bull is four years old and weighs about 2,400 pounds,' was so vague and indefinite as to prevent the mortgage, when duly filed, becoming constructive notice to a subsequent purchaser of the bull from the mortgagor. The position of the plaintiff is perhaps sufficiently shown by the instruction which he requested in the court below; namely: 'that the description must be such as would enable a stranger, with the mortgage, to select the property.' It was shown in the case that the mortgagor had but the one bull; that he was called a Durham, and was Durham blood in part, and that he was known as the Grinnalls bull. It would seem that the supposed stranger, with a knowledge of these facts and the mortgage in his hand, could have had no difficulty in selecting the property if he was a man of ordinary intelligence. It ought not to be very difficult to select one when there is only one to select from; especially when certain particulars are mentioned in which the animal would differ from all others in case the number had been greater. But if a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of, which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect — the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needed to his protection, and he purchases in view of that knowledge. If he purchases a bull, known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of the bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defense to be set up by him to the mortgage, that being a stranger, he discovered no such name on or about the bull, and, therefore, could not in fairness be bound by a mortgage which undertook to identify the animal by the name. Descriptions do not identify of themselves, they only furnish the means of identification. They give us certain marks or characteristics — perhaps historical *data* or incidents — by the aid of which we may single out the thing intended from all others, not by the description alone, but by that, explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject-matter which they had at the time."

In Smith v. McLean, 24 Iowa, 331, BECK, J., said: "It is urged that the mortgage is void for uncertainty of description of the property conveyed, which is in these words, namely, 'five freight wagons and twenty-five yoke of cattle, being the train now in my possession.' It is contended, that, as this description is not such as would enable any one to identify the property, if it should not be in the mortgagor's hands, the instrument must, therefore, be void for that reason. It cannot, with reason, be claimed, that a description of the property should be set out in the instrument with such certainty that it is capable of being identified by such description alone. It often happens that this cannot be done; certain kinds of personal property, that are frequently conveyed by such instruments, it would be impossible to so describe. It is true that there must be certainty in the description of the property, but *id certum est quod certum reddi potest.* Hence, if from the description contained in the instrument, the mind is directed to evidence whereby it may ascertain the precise thing conveyed, if thereby absolute certainty may be obtained, the instrument is valid. The rule may be stated in different words, thus: That description which will enable third persons, *aided by inquiries* which the instrument itself indicates and directs to identify the property, is sufficient."

evidence to prove title or ownership of animals alleged to have been stolen; that the prohibition of the Code was confined to unrecorded *brands*.[1] Where one was indicted in the same State for stealing a "steer" from one Prather, which was identified by a brand, it was held that the court did not err in admitting evidence showing the character and description of the brand used by Prather, although this *brand* had not been recorded. The evidence was not offered or relied upon to prove title, but for the purpose, in connection with other evidence before the jury, to identify the steer referred to by the witness, with the one described in the indictment.[2]

Same — hog — identity of hog and prisoner.

§ 542. Where a party in Texas was indicted, charged with feloniously taking a hog, the property of one Isaac Mann, who undertook to identify the swine. He testified that the *sow* taken was his property, one of the Essex breed, and worth $10; that his Essex sow had been absent without leave since December 1, 1874; that a few days thereafter, his neighbor, Carnes, came with the head of his *sow* and threw it over the fence where he was; he recognized it by the ear-marks, two splits in the right ear, and under-bit in the left ear; recognized the head by these marks only. Carnes testified that he found the head, skin and tail in his field and carried it to Mr. Mann. The next and principal witness testified that he was hired to defendant to work; that he and defendant, and another went to Mann's at night and got a hog, and that he ate some of it. There was much other and conflicting testimony. But the court said: "The witness, Peter Blount, on his examination, it is true, denied any criminal complicity with the defendant in the killing of the hog testified to by him. Still, the jury might reasonably infer that he was equally guilty with the defendant, if they believed that the hog which he says he helped to kill was the animal that Mann lost. If so, then the jury should have been instructed that Blount's testimony would not warrant a conviction unless corroborated by other evidence tending to connect the defendant with the offense." It was necessary to identify the prisoner as well as the hog.[3]

Larceny — treasury notes — instructions as to identity.

§ 543. A defendant was tried and convicted for the larceny of treasury notes, and it appeared that certain notes claimed to be

[1] Johnson v. State, 1 Tex. App. 333.
[2] Poage v. State, 43 Tex. 454.
[3] Kelly v. State, 1 Tex. App. 628.

identical with those stolen were found at a place where the accused had concealed them. The court gave the jury an instruction which contained the following: "One of the twenty-dollar bills was positively identified." This was held to be an error, and for which the judgment was reversed; and it was said: "While courts may present to the minds of the jury, in a criminal case, such considerations as are appropriate to aid them in the proper and legal discharge of their duties, they must be scrupulously careful to leave to the jury the full exercise of their own functions. And as this was not done in this instance, the judgment must be reversed.[1]

Receiving stolen goods — produced in court.

§ 544. In an indictment for receiving stolen property, knowing it to be such, it appeared that the defendant was a junk dealer; and the alleged stolen property, twelve "brass couplings" for hose, belonging to a railroad company, were found in his possession, of the value of about $3 each. The party who sold them to defendant said he stole them, but did not so inform the defendant. A witness testified that the couplings belonged to an engine hose, which were in a little shed or shop; that they were taken away and were like the ones in court, and proved their value, etc. Here the witness was handed the brass couplings for the purpose of identifying them as those which were missing. Objection was made and overruled, and the witness said: "The missing couplings were never perfect." Other witnesses who were present when the couplings were sold, spoke of them as compared with those in court, thus: "Three or four of the brasses were like the one here; they were like these, only they had small shoulders; the others were different." Another said: "I think they were like that; they were all just like that except one, which was rough." The man who sold them said: "The brass I sold him was some like that, and some had the corners come down." The defendant was convicted upon this evidence of identity of the couplings, and the case went to the Supreme Court on error. The court held that though a *prima facie* case was made by the prosecution, yet it was not conclusive, and the judgment was reversed.[2]

Robbery — money and watch — rule in England.

§ 545. In an English case, five defendants were indicted for robbery and tried separately. Woodward was robbed of money, and

[1] Hill v. State, 17 Wis. 675.

[2] Jupitz v. People, 34 Ill. 516.

Urwick of money and his watch. On the trial of the first indictment it appeared that on the evening of March 23, 1836, Woodward and his nephew Urwick were traveling in a gig, and were stopped by five persons, who beat and robbed them. In commenting upon the further testimony and rule of law, LITTLEDALE, J., said: "I think it makes no difference that Mr. Urwick's watch is the subject of the next indictment; I must own that I think a part of the evidence is inadmissible. Suppose Mr. Urwick had not been there at all, and that when Mr. Woodward was robbed, a watch had been under the seat of his gig; and that after the robbery, he had discovered that the watch was missing; I have no doubt evidence might be given of the loss of the watch at that place. So I think you may give evidence that Mr. Urwick lost his watch at the same time and place. But you must not go into evidence of the violence that was offered to him. One question in this case is, whether those persons were at the place in question when Mr. Woodward was robbed; and as proof that they were so, we must hear evidence that one of them has got something that was lost there, and at that time.[1]

Burglary — carriage heard — bad spelling.

§ 546. Parties were indicted in New Hampshire, charged with burglary, in breaking into a store at night. As a witness, Mrs. Bellows, subject to exceptions, was allowed to testify that she lived near said store, and that on the night in question, between one and two o'clock, she heard a carriage driven from the square near her; she should say that it started from somewhere near the square. This evidence was held to be competent.[2]

In a case on indictment for burglary in Texas, the jury found the accused guilty of *burgerally* and theft; and he moved in arrest of judgment. It was held that there was no such offense, and no such word as *burgerally*, nor was it *idem sonans* with "burglary;" wherefore the verdict was held to be unintelligible, and it was error to overrule the motion in arrest of judgment.[3] Bad spelling by the jury will often amount to no verdict, where the words are not *idem sonans*.

Same — possession of horse — variance.

§ 547. Defendant Tinney was indicted for stealing a horse. The indictment charged that the stolen horse belonged to,

[1] Rex v. Rooney, 7 Carr. & P. 517.
[2] State v. Shinborn, 46 N. H. 497.
[3] Haney v. State, 2 Tex. App. 504.

and was taken from the possession of one M. C. Doyal. It was proved that Doyal was the owner of the horse; that it left his premises in Gonzales county, Texas, and strayed off with a bell upon it on July 17th, was seen in Caldwell county on the 18th, about twelve miles from home. On the 21st, it was taken up by Hurst, who, after making inquiry for the owner, and failing to find him, took the horse to his home, intending to estray him, and there staked him out in his field and also fed him. That night the horse was taken from Hurst's field, and the next seen of him was in the possession of defendant in De Witt county on the 24th. It was insisted that there was a fatal variance between the allegation and the proof, as to the party from whose possession the horse was taken; that it was taken from the possession of Hurst and not Doyal. He was convicted. But the Supreme Court held that the point was well taken, and the conviction was reversed.[1]

Robbery — identity — evidence of accomplice.

§ 548. Where an accomplice in a case of robbery testifies against his co-defendants, and if the jury believe his statement of the robbery, they may convict of the capital offense, though such testimony may stand totally uncorroborated by any other evidence in the case. So held in England. Atwood and Robbins were tried for robbery on the highway. The prosecutor testified 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 his money, which he accordingly delivered to them; 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, and so he failed to identify them. He could prove only the *corpus delicti*, when the identity of the prisoners was equally important. Their accomplice was then permitted to testify, and deposed that he and the two prisoners at the bar had, in the company of each other, committed the robbery. Upon his testimony the two men were convicted and sentenced to death. The only evidence of any importance given by the accomplice was that of identity, without which they must have escaped.[2]

Larceny — cattle — brand — identity.

§ 549. One Boren, in Texas, was convicted for the larceny of one steer, the property of one Slayton. The question of identity became

[1] Tinney v. State, 24 Tex. App. 112–119.

[2] Rex v. Atwood, 1 Leach Cr. Cas. 464.

the important question, and it was attempted to prove the identity of the steer by a brand on the animal. Defendant set up the claim that the animal belonged to one Gartin and that he had authority from Gartin to take the animal, and then the question was, whether or not defendant knew that it did not belong to Gartin. The court, giving the facts on this point, said: "It appears from the record that Gartin's brand was a *long eleven*, placed lengthwise on the animal; the brand on the animal in question was a *perpendicular eleven*, and not so long as the brand used by Gartin. Appellant offered to prove by the stockmen that they, by accident, sometimes misplaced their brand on their stock. To this evidence the State objected, and its objection was sustained by the court. We think this was erroneous. The State relied upon the shape and manner in which the brand was placed upon the animal, as strong proof of guilty knowledge. Appellant may have known Gartin's brand, as well as the manner in which it was usually placed on his stock; and yet, he may have believed that in this particular case the brand was accidentally placed in an unusual manner."[1]

Larceny — cattle and horses — possession — identity.

§ 550. In case of larceny it is necessary to identify the property as being the property of the alleged owner, and to prove that it was taken from his possession, if the indictment so charges. In Texas, one Alexander was charged by indictment with stealing a cow, and that it was the property of, and taken from the possession of one E. N. Wilson. The evidence showed that the animal, at the time it was missed from its accustomed range, was under the care, management and control of one Fernandez, who had been hired by Wilson to take charge of his ranch. This was held to be a fatal variance.[2] In the same court a similar question was decided. The indictment charged the ownership and possession of an alleged stolen horse to be in one J. C. Benton; the proof showed that the animal was taken by the accused from the place at which one Bull had hoppled it by direction of D. H. Benton, who had borrowed the horse from J. C. Benton. It was held that the proof established the possession of the horse at the time of the larceny in D. H. Benton, and that the variance was fatal to a conviction.[3]

[1] Boren v. State, 23 Tex. App. 28.
[2] Alexander v. State, 24 Tex. App. 126.
[3] Conner v. State, 24 Tex. App. 245.

Identity of stolen goods and box.

§ 551. Where a party was indicted for burglary, on the trial of the case, a witness testified that, early in the morning after the burglary, she saw the prisoner and two other persons come to the prisoner's house with a light wagon covered over with old canvas; that the driver took from the wagon two or three large sacks, the contents of one of which she saw, and they appeared to be velvets and silks; they also took out a cigar box and a small trunk, answering the description of those taken from the store; that on the same day the prisoner went to a carpenter's shop, adjoining his house, and had a box made, which he took into his house, and which was soon after brought out and put on an express wagon, with a large trunk, three valises and a small trunk. This box was produced in court and identified by her. It was marked with the prisoner's name and directed to Boston. It was found at the express office in Boston, where the prisoner was arrested when he called for it. The box and contents were presented and received in evidence, and identified, over the objection of prisoner. This was held to be admissible, and sufficient to warrant a verdict of guilty.[1]

Same — stolen cow — identity of accused.

§ 552. The question of identity came up in a Texas case, in which one Curry was indicted for stealing a cow from John Morris in August, 1879. When Morris missed the cow, he learned that Curry had been killing beeves, and went to where Curry lived with other tenants and renters, and found there, spread out on the roof of a stable in the horse-lot, the hide of an animal, which he identified as the hide of his cow, with the tail and ears cut off. This evidence looked to be quite conclusive. The animal, it appeared, had not been branded. Morris and others continued the search on the next day and found the head of an animal, which he identified as the head of his cow, about three hundred and fifty yards from prisoner's house. Several tenants occupied and used the same horse-lot, and so it was uncertain who was the guilty party. This was held to be insufficient to identify the accused as the guilty man.[2] It was necessary to identify the accused as well as the cow.

Bank robber — identified by his voice.

§ 553. Scott and Dunlap were indicted for breaking and entering a banking-house on January 26, 1876, and stealing a large quantity

[1] Foster v. People, 63 N. Y. 619. [2] Curry v. State, 7 Tex. App. 267.

of securities. Whittlesey, the cashier of the bank, was taken from his room and the combination of the safe lock on the vault of the bank extorted from him by two men, whom he claimed to identify as the defendants. As to Scott, the witness Whittlesey undertook to identify him by his voice, but when asked whether there was any peculiarity in the voice, he could not answer; Scott was then called upon to stand up and repeat something, and he did so, and the witness said that Scott was suppressing his voice. Scott's attorney said to him: "Speak it right out." The judge said: "I do not think this is competent." Then defendant's counsel insisted that he had the right to have the peculiarities of the defendant's voice pointed out by the witness, and that for this purpose the voice itself was competent to be introduced in evidence; but the court thought not, and rejected it. On error, the court said: "The court properly ruled that it was not competent for the defendant Scott, to prove what was his usual and natural voice, in the court-room "to repeat something" when not under oath as a witness. His manner of speaking being in question, there was no way of determining whether he would use his voice in his natural, or in a constrained simulated manner, the genuineness of the voice used not being supported by his oath.[1]

Confession in jail — identified by voice.

§ 554. Where the prisoner was in jail at the same time with the witness, though not in the same room, the witness testified to a conversation with the prisoner in which the prisoner confessed his guilt. He testified that he conversed with the accused through the soil pipes of the jail, and that he, the prisoner, confessed or admitted to him, the witness, that he was guilty of the charge on which he had been cast into prison, and that he knew the prisoner from his voice. The court upon this statement, with seeming reluctance, permitted it to go to the jury. *Held*, that it was competent to go to the jury, and that it was their province to consider it, and give it such weight as it might be entitled to.[2]

Burglary — evidence of identity — rule in Iowa.

§ 555. As to the evidence of identity in a case of burglary, the prosecuting witness and his wife both testified that defendant was the person who entered their house on the night of the

[1] Com. v. Scott, 123 Mass. 222. Citing Reg. v. Cheverton, 2 Fost. & F. 833; King v. Donahue, 110 id. 155. And see Harrison's case, 12 St. Tr. 850.

[2] Brown v. Com., 76 Pa. St. 319.

burglary; and there were other circumstances proved by the testimony of other witnesses, which tended strongly to identify him as the criminal. The fact that the person who committed the offense stated, before he entered the house, that he was the defendant, was proper to be considered by the jury, in connection with the other circumstances in evidence, in determining the question of identity. And where the indictment charged burglary with intent to commit assault and battery, and the body of the crime was established, it was held that it was competent, for the purpose of identifying the defendant as the criminal, to show that he knew that there was a sum of money in the house at the time, even though it tended to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that which was alleged.[1]

Identity of horse thief — rule in Texas — yeast can.

§ 556. One Ruston was indicted in Texas for stealing a horse. On the trial of the case, an important question was the identity of the prisoner. The witness for the State could not recognize the prisoner at the bar with sufficient certainty to identify him as the person in whose possession he had seen the horse, but stated that, on a previous trial, in which he was a witness, he had identified the accused as the man. Then the State's attorney testified that the prisoner was the same man identified by the witness on the previous trial. This was held proper, and that the evidence was sufficient proof of identity.[2] In Illinois, one Spellman brought suit against the American Express Company to recover damages for the loss of a can of yeast shipped on defendant's line, to be used for purpose of distilling. It was alleged to have been broken or punctured by the negligence of the company. It was held that, for the purpose of identity, there was no error in allowing in evidence a can similar to that in which the yeast was shipped, for the examination of the jury, and to aid them in their determination.[3]

Larceny by millers — English and American.

§ 557. An indictment was tried in Massachusetts, in which it appeared that a miller having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris. It was held to be larceny. It was also held that the government was not bound to produce the truckman who carried the

[1] State v. Kepper, 65 Iowa, 745 (1885).
[2] Ruston v. State, 4 Tex. App. 432.
[3] Am. Ex. Co. v. Spellman, 90 Ill. 455 (1878).

barilla to and from the mill, to prove that it was not adulterated in course of transportation; though there was only circumstantial evidence that it was adulterated by the miller, it was held to be a sufficient identification.[1] A similar case occurred in England, in which the indictment charged the miller with receiving two separate parcels of barley, each parcel containing four bushels, to be ground at his mill, and that he delivered three bushels and forty-six pounds of oatmeal and barley mixed. The indictment was held to be bad, because it did not identify, but left it uncertain as to which of the two separate parcels of four bushels it related.[2]

Larceny of trunk and money — identity of money.

§ 458. One Bishop was indicted for larceny of a leather trunk, the property of W. J. Bishop, in October; 1874. The trunk contained a new $50 bill of the Exchange National Bank of Norfolk, Va. The prisoner had previously been in the service of the prosecutor, occasionally waiting on his office, from which the trunk was stolen, and was familiar with the locality and the habits of the prosecutor; he then resided a mile and a-half from the prosecutor, and frequently visited the prosecutor's premises, on which his father and brother lived. In the following December he passed to one Charles, for small bills, a new $50 bill, of the same Exchange Bank of Norfolk, at the same time cautioning Charles not to use his name when passing the bill, and left the county for Raleigh on the next day. This evidence was objected to. It was also shown that the prisoner had no means but his labor, for which he had received in 1874 only about $30. This was held sufficient to warrant a verdict of guilty, and the judgment of conviction was affirmed.[3] Where, in a trial for murder, the defense of *alibi* of the alleged principal is set up, though the matter is affirmative, the doctrine of reasonable doubts may be considered and cannot be eliminated by instructions to the jury.[4]

Money — metallic — identification of it — difficulty

§ 559. There is, perhaps, more difficulty in identifying money than any other thing, whether it be in bank notes or in coin, when the identity depends upon the mere appearance of the money, and without the aid of some circumstance. Especially is this true in respect to metallic money, unless it has been marked for the purpose

[1] Com. v. James, 1 Pick. 375.
[2] Rex v. Haynes, 4 M. & S. 214.
[3] State v. Bishop, 73 N. C. 44.
[4] Crook v. State, 27 Tex. App. 198.

of identification. The number of pieces coined from the same die being so great, and exactly similar in every particular, it is said that even the exact coincidence between a particular combination of denomination of ordinary coin contained in a purse lost, and precisely the same number of coin of the same denomination contained in a purse found on another person, would not, of itself, amount to proof of identity; and as has been further suggested, not only are the pieces of coin, when new, precisely similar, but the same degree of use and wear to which they are generally subjected, continue to preserve the same resemblance. And it is extremely difficult, if not impossible, to say of any coin, however old or rare, that there are not two pieces in existence exactly similar. And it is said by Mr. Burrill, "that the only effectual means of identifying metallic" money is by peculiar marks upon the individual coins, produced either by accident in the process of coining, or in the course of wear, or intentionally made, either for the express purpose of identification, or out of mere wantonness, such as scratches, abrasions, indentations, discoloration by heat or chemical substances, and the various mutilations by chipping, perforating, hammering and the like, so commonly seen upon silver coin. Sometimes, though more rarely, the process of mere wear is found to communicate to a coin an appearance by which it is more easily distinguishable from others of the same denomination and issue."[1]

Same — currency — bank notes — identity of.

§ 560. The same author, speaking of the currency of the country, substantially lays down the same rule in regard to paper money; the same observations are for the most part applicable. The complete similarity necessarily given to notes of the same denomination, and of the same bank, by their engraved portions, is little affected by the written portions, or filling up, which also bear a close resemblance to each other; the only real difference consisting in the bank numbers, and letters and dates; which, however, are rarely so much as noticed by the majority of persons holding and using the money; hence the necessity of resorting to marks upon the particular note or notes in question, such as the bank numbers, letters and dates already mentioned, but more commonly marks intentionally made by the holder, or accidentally made in the course of circulation — such as stains, rents or mutilations of various kinds.

[1] Burrill Cir. Ev. 171, 657.

Same — indictment for uttering counterfeit coin.

§ 561. The coin must be specifically described, but it is a question of fact for the jury to determine whether or not proof in the case supports the description given. One Connell, in England, was indicted in 1842 for uttering a counterfeit coin intended to resemble and pass for "a groat," well knowing the same to be false and counterfeit. All the witnesses called it a *four penny piece* Mr. Field, the inspector of coin to the Mint, having said that the *groat* was counterfeit, was asked on cross-examination, "What do you call the coin?" He replied a groat — it has had that name, I *believe*, from the earliest period; it has the words four pence on it, but the original name was groat in the time of Edward the Third; they were not then the same size and weight of this." On re-examination he was asked, "have you heard them called groats?" and his reply was, "yes, they are called groats as well as four penny pieces in the proclamation." MAULE, J. (ERSKINE, J., being present), said in summing up: "'A groat' is a common word belonging to our mother tongue, such as 'uttering,' 'public house,' 'half pint,' and many other expressions; and you are here as Englishmen, to use your knowledge of your own language; and if, understanding the matter without any evidence, you are satisfied that a four penny piece and a groat are the same thing, then the prisoner is rightfully indicted. It is very true that a groat in Edward the Third's reign weighed a great deal more than a four penny piece does now; and so it is with respect to other coins. Things have kept their names, though they have changed their value."

It appears that the jury, upon the facts in the case, were not satisfied, beyond a reasonable doubt, that a groat and a four penny piece were one and the same, as they found the defendant "not guilty."[1]

Articles — goods — how identified.

§ 562. One of the modes of identifying personal property, whether in or out of court, is by appearance of the property itself, or by marks, and not infrequently by both, but in these matters, as in many others, the weight of the testimony must generally depend upon the knowledge or familiarity of the witnesses with the subject upon which they speak. And if the witness has often seen, handled or used the article of personal property, this will most likely give him a familiarity with such article which will enable him to

[1] Reg. v. Connell, 1 Carr. & K. 190 (1842).

testify to its identity, and such familiarity alone can give value to his testimony; articles of the same kind or nature may not, and generally are not. distinguishable, in the absence of such familiarity. We may take, for instance, money of the various kinds, medals, jewelry, a watch, a pocket-book, or wearing apparel worn by the witness, and especially if there should be any marks of designation, or other peculiarities about the article. These will ever enable the witness to identify them with a greater degree of certainty.

Same — knowledge or opinion — reason.

§ 563. In all cases, the witness who attempts to identify either persons or things should be able to give some reason why he can swear to their identity. Every identifying witness, to give credit and value to his testimony, should have a knowledge or an opinion on the subject, and a reason therefor; otherwise, as a rule, his testimony is of little value, because the jury want to know, and have a right to know, his reason for his statement. One of the great uncertainties of personal identity, which is generally a mere matter of opinion, and frequently unreliable, is given by Mr. Wills, and he gives a statement of the case in full, which I have not space to insert. The case was tried three times. On the two first trials the jury were unable to agree as to the identity of the prisoner. At the Assizes on the third trial, being the next year, the prisoner was discharged; a circumstance believed then to have been unparalleled in the history of English jurisprudence.[1]

Same — articles — general appearance — marks.

§ 564. It is undoubtedly ever true that in all articles of a specific nature the most accurate impression of identity is to be found by the witness in the general appearance of the property itself, the confirmation of which may be by marks for a better designation. These may shed a ray of light on the subject, and impart a strength and value to the testimony of the identifying witness; and his testimony may be further strengthened, and its value greatly enhanced, if the article is familiar to him, and well known, by possession, use or otherwise. And these are generally sufficient, because he can give a reason for his statement; and it shows the two first important things to be considered in the testimony of every witness: *first*, his opportunities *for* observing; and *second*, his at-

[1] Wills Cir. Ev. 106, 111. And see Reg v. Newton, Salop Spring Assizes, 1850.

tentiveness *in* observing; these are cardinal rules of evidence, which impart value to all direct testimony. And, indeed, in these we find the sources of accurate impression — information, reliability.

Same — questions of identity — appearances — mistake.

§ 565. The fact of identity based upon the general appearance of specific property is not always to be relied upon, but wants confirmation by other facts which the jury have a right to know. And yet, even with all these, the most discriminating minds are not infrequently led to a wrong conclusion in questions of identity, because it is possible to mistake marks and peculiarities, as well as the thing itself; because there may be the same marks, peculiarities and characteristics on other things of the same nature, that are relied upon to distinguish and identify; and these peculiar coincidents are liable to lead into error, wrong conclusion and mistaken identity. Cases of this kind are of frequent occurrence, as in cases of money, especially of metallic money, or of medals, all struck from the same die, where resort is had to marks and signs. Where two different persons claim the same article of property, both relying upon the same marks, it may cause even experts to do "curious swearing," not more curious, however, than we often see, when experts disagree.

Larceny of paper money — identity — presumption.

§ 566. On the trial of an indictment for the larceny of paper money, the actual production of the money on the trial is often dispensed with, to a considerable extent, where there are other circumstances from which the general inference of guilt may be drawn. Thus: in a case in Massachusetts, where the prisoner had been indicted for stealing a package of bank bills in December, it was held that evidence that two of the bills (which were identified), each for the sum and denomination of $100, were in the defendant's possession, one of them in March, and the other in April following, might be submitted to the jury, and that they might infer therefrom, and from accompanying circumstances, that he stole the whole package. It was also held, in the same case, that, although *none* of the stolen bills were identified, yet that evidence was admissible to prove that the defendant, after the larceny, was in possession of two $100 bills *like* those that were proved to have been stolen, and also of a large amount of bank bills; and that such evidence, together with evidence that the defendant was destitute of money before the larceny,

might be submitted to the jury, to be considered by them in connection with other accompanying circumstances indicative of his guilt.[1]*

Larceny — goods — mistaken identity of goods.

§ 567. There is often a mistake in the identity of personal property — chattels — articles, as well as in the identity of persons, and in a case of larceny, the mistake in the one may prove as disastrous as the other, to the interest of the accused. At the Spring Assizes at Bury St. Edmunds in 1830, a respectable farmer, occupying twelve hundred acres of land, was tried for a burglary and stealing a variety of articles. Among which alleged to have been stolen, were a pair of sheets and a cask, which were found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution, to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark, "P. C. 84" inclosed in a circle on the end of it. On the other hand a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side, as being the prosecutor's. With respect to the cask, it was proved by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of keeping cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman

[1] Com. v. Montgomery, 11 Metc. 534; Burrill Cir. Ev. 658.

*In the case of Com. v. Montgomery, 11 Metc. 534, decided in 1846, DEWEY, J., said: "The objection to the instructions of the judge, as to the competency of the evidence of the possession, by the defendant, of a certain portion of the stolen property, after the period of time that had elapsed between the time of the alleged larceny and such possession of the stolen goods by the defendant, is not well founded. We understand from the bill of exceptions that the rule of law (Roscoe Crim. Ev., 2d Am. ed. 17-20), as to any inferences that might be drawn from such evidence, and if any, to what extent, was stated in accordance with the principles of the law of evidence, and with all the proper distinctions and qualifications as to a recent possession or one more distant from the time of the alleged larceny. The possession of a part of the stolen property at a period somewhat distant would be competent testimony to be submitted to the jury, and might, with other sufficient evidence, tend to satisfy them of the guilt of the party. But its weight and effect are very different from that of evidence of possession immediately after the larceny. It might be entirely insufficient to raise any such presumption against the party as would call upon him to explain his possession. The further objection is, that the judge instructed the jury that the possession by the defendant, of two $100 bills, though not identified as a part of the property stolen, was still a circumstance proper for their consideration, as tending to show large sums of money in the hands of the defendant subsequently to the larceny. Such evidence may be competent. Its effect may be very slight, and, in many cases, furnish not the least ground for charging a party. The possession of a large sum of money, with strong accompanying circumstances of guilt, of an independent character, accompanied with evidence of entire destitution of money before the time of the larceny, may properly be submitted to the jury, to be considered with all the evidence in the case. We understand the instructions upon this point to go no further than this."

in Norwich, whose casks were all marked "P. C. 84," inclosed in circles, precisely as the prisoner's were, the letters P. C. being the initials of his name, and that the cask in question was one of them. In summing up, the learned judge remarked, that this was one of the most remarkable and extraordinary cases ever tried, and that it certainly appeared that the witnesses for the prosecution were mistaken." The prisoner was acquitted.[1]*

Bank notes —non-production — parol testimony.

§ 568. In New York, in a case decided in 1816, the defendant was indicted for stealing four promissory notes, commonly called bank notes, of $50 each, on the Mechanics' Bank, and four other notes, of $20 each, aggregating the sum of $280, the property of one Peleg Clark. It was held that parol evidence of the contents of the bills or notes was admissible, without accounting for their non-production, or any further identification.[2] In a civil action of covenant in the same State, this rule was held in 1820.[3] But it seems now that the better means of identifying bills, notes or other instruments is, to bring

[1] 1 Wills Cir. Ev. 127.
[2] People v. Holbrook, 13 Johns. 90.
[3] Hardin v. Kretsinger, 17 Johns. 293.

* Mr. Burrill, in his valuable work on Circumstantial Evidence, lays down some rules well worth remembering. He says, at p. 171: "The force and effect of coincidence, in its general result, always depends upon the number, exactness and concurrence of the several particular coincidences proved. A single coincidence, however perfect in itself, is seldom or never sufficient as proof. Thus; in the first of the above examples, the two facts of seven sovereigns lost by one person, and seven sovereigns found in the possession of another, though coincident, are perfectly consistent with the innocence of the person in whose possession the coins are discovered. It is possible, and, in a large assemblage of persons, not improbable, that two or even more individuals might have in their purses identically the same number of pieces of coin, of the same denominations. But suppose the fact to be, that the money lost or taken from the purse of the one individual consisted of the following varieties in combination:—One penny, two six pences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns; and the money found in the purse of another consisted of precisely the same combination of coins. Here is a coincidence composed of seven minor and exact concurring coincidences, increasing, to a very high degree, the probability of the supposition that the coins lost or taken and those found are identically the same; and rendering proportionately improbable the supposition of an accidental coincidence, and a consequently innocent possession. Indeed, on the latter supposition, the coincidence would be most extraordinary; and yet in the absence of the actual proof of the identity of any part of the money, and of any other circumstance operating against the accused, it would not amount to legal proof. The reason given is, that the probability, in this case, however high, is one of a definite and inconclusive nature. 'The probability,' observes a learned writer, 'that the coins lost and those discovered are the same is so great, that, perhaps, the first impulse of every person, unaccustomed to this kind of reasoning, is, unhesitatingly to conclude that they certainly are so; yet, nevertheless, the case is one of probability only, the degree of which is capable of exact calculation; but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would and that which would not justify the infliction of penal retribution in other cases of inferior probability. In the case of a small number of coins, two or three, for instance, the probability of their identity would be very weak; and yet the two cases, though different in degree, are, in principle, the same; and the chance of identity is, in both cases, equally capable of precise determination.'"

them into court, or to account for their absence, before their contents can be proven by oral testimony. And this is not requiring too much.

Same — goods — receiving stolen — non-production.

§ 569. In Massachusetts, in 1852, one Hills was indicted for receiving and aiding in the concealment of stolen goods. One Palmer, the person whose property was alleged to have been stolen, testified that he saw a certain pair of pantaloons on one Hilliard, which he examined, and found on them certain marks by which he knew them to have been once his; that he did not take the pantaloons from Hilliard, but for some reason permitted him to wear them. Palmer was at the time accompanied by an officer, and they took the clothing found on several other persons, and claimed by Palmer. The defendant's counsel objected to the evidence of Palmer respecting the marks upon the pantaloons, the same not being produced, but Hilliard having been a witness, and having testified that he bought the pantaloons which Palmer saw, of the defendant, and that they were all worn out, the judge admitted the evidence. DEWEY, J., remarked: "The testimony of Palmer, as to the marks on the pantaloons he saw on Hilliard, was competent. If it was necessary to show any reason for not producing them before the admission of this evidence, that reason was furnished."[1] And on the trial of an indictment for stealing goods from a store, the prosecutor may have the goods shown to him and be asked whether they were stolen from his store at a certain time.[2]

Larceny — identity of goods and owner.

§ 570. In an indictment for larceny of goods alleged to have been stolen, it is indispensable that the goods shall be identified; and they must also be proven to be the property of the prosecutor, or alleged owner, as charged in the indictment; and the offense may perhaps be complete if the goods were taken from the possession of a bailee. But it seems that if the goods are stolen from a thief, by another thief, they may be charged and proved to be the property of the real owner, and yet the identity of the goods must be proven, as well as the ownership; but as to the proof of the ownership, under an act of English Parliament (14 and 15 Vict., chap. 100, § 1), the indictment may be amended. And some of our American statutes are

[1] Com. v. Hills, 10 Cush. 530. [2] State v. Lull, 37 Me. 246.

equally liberal in this respect. But this does not dispense with the necessity of identifying both the goods and the owner. The goods or property must be identified; there must be an owner; if so, he must be identified as such; otherwise there can be no larceny, because the goods or property stolen must be the property of *another* person.

Same — extent of ownership — identity.

§ 571. In an indictment for larceny, the owner of the goods alleged to have been stolen, of course, is a competent witness to prove his ownership as alleged in the indictment, and thus, prove his own identity as alleged; and so, a hotel-keeper in whose hotel goods were stolen from his guest may prove the facts as alleged in the indictment.[1] Proof that the alleged owner had a special property in the goods, or that he held it in trust for the benefit of another, for the purpose of selling it, or for some other purpose, as agent or bailee, or in some fiduciary capacity, will be sufficient to support the allegation of ownership in an indictment for larceny, upon a proper identification.[2] In Georgia, in 1846, where the property in a negro alleged to have been stolen was charged in the indictment as being the property of the prosecutor, evidence that he was the purchaser of the slave at sheriff's sale, under the incumbrance of a mortgage, after condition broken, as the property of the prisoner, coupled with the lawful possession, was held sufficient to maintain the allegation.[3] This case was peculiar in many respects.

Indictment — larceny — description — name of owner.

§ 572. An indictment for stealing a black horse will not be supported by evidence which shows that the horse was one of another color, for the allegation of color is descriptive of that which is legally essential to the offense and cannot be rejected.[4] And an indictment for stealing nineteen shillings in money of the moneys of A. B. will not be supported by evidence that the prisoner stole a sovereign in gold.[5] But such a variance between the statement and the proof is now amendable in England. And where an indictment for stealing a bank note described it as signed by A. H. for the governor and company of the Bank of England, it was held by the judges that there could be no conviction without evidence of the signature of A.

[1] Salisbury v. State, 6 Conn. 101; United States v. Williams, 1 Ware, 175.
[2] State v. Somerville, 21 Me. 14.
[3] Robinson v. State, 1 Kelly (Ga.), 563.
[4] 2 Archb. Cr. Pl. & Ev. 226.
[5] 2 Archb. Cr. Pl. & Ev. 226.

H.[1] Where the goods and chattels of J. N. were alleged to have been stolen, it must be proved upon the trial that the goods are the absolute or special property of the person thus named in the indictment. If he be misnamed, if the name thus stated be not either his real name or the name by which he is usually known, or if it appear that the owner of the goods is another and a different person from him thus named as such in the indictment, the variance, unless amended, will be fatal, and the defendant must be acquitted.[2] So, if he be described in the indictment as a certain person to the jurors unknown, and it appear in evidence that his name is unknown, if the name by which the prosecutor is well known be used, it will be sufficient, as where "John Walter Hancock" was called in the indictment "John Hancock," by which name he was usually called and known, PARK, J., held it to be sufficient.[3]

Chattels — cards — in court — inspection.

§ 573. It is for the purposes of identification that the goods and chattels are frequently brought into court and examined in the presence of the jury to enable them to determine the question in issue; but in Maryland, contrary to the general rule, in an action of covenant, it was held that the party was not entitled to produce the chattel in court in order to prove the injury by an inspection thereof, but that the injury must be proved by witnesses who testify before the jury.[4] This is certainly not the rule of practice, either in this country or in England. An action was brought to recover a penalty of defendant, as a broker, for acting as such without having procured a license therefor. To prove that the defendant acted as a broker, a witness produced one of the cards of defendant and his partner, "Capp & King, Ship's Brokers, Etc." ABBOTT, C. J., said: "This card cannot be given in evidence, unless it was received from the defendant himself; the proper way is, to give the defendant notice to produce his cards, and then prove one as a copy, or give parol evidence of the contents."[5]

Dog in court for identification — premises.

§ 574. An action of trespass was brought, in England, against a defendant for seizing and detaining a dog. Notice was given to the defendant to produce the dog in court at the trial; when called upon

[1] 2 Archb. Cr. Pl. & Ev. 226.
[2] 2 Archb. Cr. Pl. & Ev. 342.
[3] 2 Archb. Cr. Pl. & Ev. 342.
[4] Jacobs v. Davis, 34 Md. 204.
[5] Clark v. Capp, 1 Carr. & P. 199.

in the course of the trial to show up with the dog, he respectfully declined to bring the animal to the bar for identification. He insisted upon his right to use the dog to defend the case, and put in evidence for his defense, but the court permitted the plaintiff to *call the dog*, and let him in as evidence. ABINGER, C. B., said: "That cannot be done; the only object which the defendant could have in producing the dog as a part of his own case was in substance to contradict the description which the plaintiff's witnesses gave of his marks."[1] But it is held to be improper for the jury to leave the court-room in search of evidence during a trial. A defendant in Louisiana was convicted of burglary. In the midst of the trial, on motion of the State, the judge *a quo*, directed the jury to retire from the court-room and visit and inspect the premises where the burglary was alleged to have been committed. He directed a witness for the State to accompany the jury and point out the place marked out on the diagram of the premises, which the witness had testified to the day before, and which the State had offered in evidence, and the defendant was not permitted to accompany the jury. For this reason a new trial was awarded.[2] Under some circumstances, in the trial of a civil action, and by consent of parties, perhaps such a course might be permitted.

Machine for inspection — and a dog.

§ 575. In an action to recover for injuries alleged to have been inflicted by a machine, the court had no power to compel the defendant to permit the attorney on the other side to inspect the machine to enable him to conduct the cross-examination. Upon an affidavit made by plaintiff's attorney, stating that he could not cross-examine his client on the examination before trial, or comprehend such examination without a previous inspection of the machine, an order was made directing the defendant to allow the inspection to be made. It was held that the court had no power to make such an order.[3] And in New York, upon the trial of an action for the breach of a warranty for the sale of a chattel, it was held that a justice of the peace had no power to compel the party in possession to produce the chattel in court for inspection, by the use of a *subpœna duces tecum*, or by any other means in the power of the court.[4] In an English case in 1862, it was alleged that the defendant wrong-

[1] Lewis v. Hartley, 7 Carr. & P. 405.
[2] State v. Bertin, 24 La. Ann. 46.
[3] Cooke v. Lalance, etc., Co., 3 N. Y. Civ. Proc. 332.
[4] Hunter v. Allen, 35 Barb. 42.

fully and knowingly kept a *fierce* and *mischievous* dog which bit and wounded the plaintiff. It was held to be necessary to prove that he has injured the plaintiff, and was *used* to injure people, and a mere habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial accidental damage to clothes, would not sustain the action. It was also held that the dog may be brought into court and shown to the jury to assist them in judging of his temper and disposition. ERLE, C. J., said: "When I last went upon circuit with the late lamented Lord Chief Justice CAMPBELL, I recollect that in a similar case his lordship allowed the dog to be brought into court. I see no objection to it. The dog was accordingly brought in, led by his keeper with a chain. The jury had him brought up to them, and at their desire the keeper let go of him. They examined him, and appeared to be of opinion that from the expression of his eye and other indications, he was not of a vicious disposition. And there was a verdict for the defendant.[1]

Chattels in court for identification — rule in England.

§ 576. In an English case passing through the papers in the spring of 1876, it is stated that Priscilla Wolfe, a widow lady of independent means, residing at Kilsby, near Rugby, sued Richard Jones, a butcher of the same place, for £5 damages, for illegally killing a cockatoo parrot belonging to her. The defense was that the defendant shot the cockatoo, mistaking it for an owl. The fellow-bird of the deceased cockatoo was brought into court, and afforded great amusement by strongly recommending the parties to "shake hands," "shut up," and asking for "sugar."[2] Animals may sometimes be brought into court for identification, or for inspection, as in the case of the mischievous dog which was brought before the jury for their examination as to his disposition and determination, as to whether the said canine was quiet and free from vice.[3]*

[1] Line v. Taylor, 3 Fost. & Fin. 731.
[2] Whart. Crim. Ev. (8th ed.), § 312, note.
[3] Line v. Taylor, 3 Fost. & Fin. 731.

* In the above case (Line v. Taylor, *supra*) appears the following note: "The case is worth noting, not only as deciding a point of law as to the right of action, but as illustrating a point of *nisi prius* practice, and, perhaps, as throwing some light upon the probable construction of an important clause in the C. L. P. Act, 1854, § 58, as to inspection by jury or witnesses of any real or personal property which may be material to the proper determination of the question in dispute; which it can hardly be, of course, unless it belongs to or is in the possession of one or the other of the parties to the suit; and *may* be in such case in many ways, as with reference to forgery, identity, value or utility — or as in this instance, in the case of animals, temper

Inspection — portable goods in court.

§ 577. For the identification of personal property, such things as are portable are often brought into court for examination, such as stolen goods found in the possession of a thief or burglar,[1] and burglar's tools and implements used in his trade.[2] The weapons used by a murderer, models of inventions in patent cases, and even children in cases of bastardy,[3] and specimens of handwriting, and pamphlets and other publications in actions for slander and libel, and numerous other things are brought before the court and jury for inspection and identification. A party was indicted in England for publishing an obscene libel, in offering for sale a snuff-box containing an indecent painting; a witness testified that defendant exhibited to him the box produced on the trial, or a box exactly similar. This was held not sufficient — the witness must identify it as the very box exhibited to him. PARK, J., said: "If the jury are not satisfied by the evidence that this was the identical snuff-box offered by the prisoner, he must be acquitted. It is absolutely essential that the box itself shall be shown to be the very same, which is not

[1] Jupitz v. People, 34 Ill. 516.
[2] Com. v. Webster, 5 Cush. 295.
[3] Risk v. State, 19 Ind. 152; State v. Britt, 78 N. C. 439.

and disposition. It will be observed that though the plaintiff had given notice *to produce* the dog, it might be doubtful how far he could, under an order to produce, call for any thing but books, papers or documents; and the dog was produced by the other party, the *defendant*. But it seems clear, that under the above clause, the plaintiff might have had inspection before trial, or perhaps *at* the trial by the jury and witnesses. A *view*, it will be observed, applies to *real* property, fixed and immovable, and such as could not be brought into court; and of which, therefore, as in cases of inscriptions or notices fixed to walls, so as to not be removable, parol evidence is admissible. And a *view* applies also only to juries. There can be but little doubt that the clause is meant to be construed by analogy to the old law as to *view*, and will be applied in cases where, if the property were *real*, a *view* might be obtained; as a *view* is allowed where the property is immovable, but is so far material as to necessitate evidence by witnesses as to its nature, state, value and the like. Turquand v. Strand Union, 8 D. P. C. 201. There is a similar jurisdiction in equity even to the extent of allowing tests to be applied. Twentyman v. Barnes, 2 DeGex & S. 225, and in a similar provision in the Patent Act, 15 and 16 Vict., chap. 82, § 42, as to which, see Patent Type Company v. Harrison, 29 L. J. Ex. 219; Holland v. Fox, 3 E. & B. 977. If, for any reason, the property cannot conveniently be brought into court, as in this case, if there had been any reason really to suppose danger, or if the animal had been a bull, the above clause would probably be applied, to allow the inspection *out* of court. But wherever the property can conveniently be produced *in* court, that course can be followed with or without previous inspection And on the other hand, it should seem that wherever the state of the property is so far material that, if immovable, the court would allow a *view*, and admit evidence about it; and, if movable, it would be producible in court, then the court can and probably will allow an inspection before trial by the party and his witnesses."

In Kerr on Homicides at section 346, it is said: "Where, during the progress of a trial for any of the various degrees of homicide, on application, the court grants an inspection of the premises, where the homicide is alleged to have been committed, the accused must be permitted to attend such inspection; because, to allow such examination to be made out of the presence and in the absence of the accused, would be a violation of his constitutional rights and a ground for reversal." Citing State v. Bertin, 24 La. Ann. 46 (1872). See Benton v. State, 30 Ark. 328 (1875); State v. Sanders, 68 Mo. 202 (1878); Carroll v. State, 5 Neb. 31 (1876); Eastwood v. People, 3 Park. (N. Y.) 25 (1855). *Compare* State v. Adams, 20 Kans. 311 (1878).

done in this case."[1] Mr. Wharton gives the following illustration from Jessop's edition of North's Autobiography (1887): It is said of Saunders, "a good humored barrister" of monstrous bulk, and much given to drink, that he was present at a trial in which the excisable value of brandy was in issue, and in which several specimens were produced for inspection. The judge tasted, the jury tasted, and Saunders, seeing the phials moving, took one, set it to his mouth and drank it all off. The court, observing the pause and some merriment at the bar, about Saunders, called to Jeffries (counsel in the case) to go on with his evidence. My lord, said he, we are at a full stop, and can go no further. "What's the matter," asked the chief. Jeffries replied. "Mr. Saunders has drank up all our evidence."[2]

Comparison of articles — in and out of court.

§ 578. The identity of articles by comparison may often present a question as difficult and doubtful as that of the identity of handwriting. Mr. Taylor, in his valuable work on Evidence, treating of this subject, makes the following wise suggestion at section 555: "These observations apply to all cases in which the guilt or innocence of a prisoner depends upon the *identity* or *comparison* of two articles found in different places; as for example, the wadding of a pistol with portions of a torn letter found on the person of the accused, or the fractured bone of a sheep, with mutton found in his house, or fragments of dress with his rent garment, or damaged property with the instrument by which the damage is supposed to have been effected. In all these, and the like cases, it is highly expedient, if possible, to produce to the court the articles sought to be compared; and although the law, in demanding the production of the best evidence, does not expressly require that this course shall be adopted; but permits a witness to testify as to his having made the comparison without first proving that the article cannot be produced in court at the trial; their non-production, when unexplained, may often generate a suspicion of unfairness, and will always furnish an occasion for serious comment." Again, he says in regard to the jurors in his country, which is true, judging from what the English court has said of them at section 559: "Though evidence addressed to the jurors, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its

[1] Rex v. Rosenstein, 2 Carr. & P. 414. [2] 1 Whart. Ev. (3d ed.), § 347, note.

legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved." The same observations will doubtless apply with equal force, and to the same extent, to jurymen, indiscriminately chosen in our country, at least in some of our States; and too much caution cannot be observed in giving in charge to them the proper rule for their guidance.

Damages — machinery — in court to identify.

§ 579. In an action against a railroad company to recover damages for injuries resulting from the breaking of an iron hook, and the falling of a mast to a derrick belonging to the defendant, on an allegation of negligence in not furnishing a sufficient hook, plaintiff produced a piece of iron, which his evidence tended to show was a part of the broken hook; and after the testimony of experts had been received as to the weakness of the iron, it was shown to the jury, being thus identified. This was held to be admissible.[1] In another action against a railroad company, to recover damages for injuries resulting in the death of plaintiff's intestate, aged fourteen years, who was run over on the street and killed by one of defendant's locomotives, in crossing a street in New York, in returning from a store where she had been to make some purchases, the witness, McCormick, was asked, "whether from a certain position the interior of the yard can be seen so as to observe the first northern track, and as to the ringing of the bells." This was claimed to be error, as calling for the opinion of the witness. DALY, Ch. J., said: "It is insisted that it was for the jury, and not for the witness, to judge whether he could, from the position he occupied, hear the bell. It was for the jury to determine whether the bell was rung or not; but as to the witness' faculty of hearing, he knew better than the jury could possibly know how far he could hear the ringing of the bell of a locomotive. He knew that at a certain distance from a locomotive which he saw passing, he could hear the ringing of its

[1] King v. R. Co., 72 N. Y. 607.

bell, and could swear to that as a fact. It was not testifying that he must have heard it if it were rung, but simply as to his ability to hear the ringing of such a bell at a given distance, which was testimony to go to the jury for what it was worth. It is often difficult to determine the line of demarcation which separates the expression of an opinion from the statement of a fact; and this, in my judgment, was the statement of a fact."[1]

Belief of facts according to evidence.

§ 580. The case of "the Amber Witch," as translated and as given by Mr. Taylor in his work on Evidence, section 557, illustrates the danger that not only jurors but courts will arrive at conclusions without evidence to warrant them, especially in cases of identity -- that most difficult question with which the courts and jurors have to deal. The author says: "In the interesting story of 'the Amber Witch,' the poor girl charged with witchcraft — after complaining that she was the victim of the sheriff, who wished to do 'wantonness with her'— added, that he had come to her dungeon the night before for that purpose, and had struggled with her, 'whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her.' To this the sheriff replied, 'that it was his little lap-dog, called Below, which had scratched him while he played with it that very morning;' and having *produced the dog*, the court was satisfied with the truth of his explanation." When courts will thus abuse this kind of evidence, what can be expected of jurors in our rural districts? It must be a source of the greatest injustice in many instances. The only true rule is to believe a fact according to evidence. And it may, perhaps, be safe to lay down a rule something like the following: 1. To believe a thing *without sufficient evidence* is credulity. 2. To believe *beyond evidence*, enthusiasm. 3. To believe *contrary to evidence* is superstition; and 4. To not believe *according to evidence* is infidelity. It may not be amiss in this connection to give a rule somewhere used for testing a witness, and which is generally necessary and always applicable; though the witness be of high repute and undoubted veracity. He may demean himself in a manner that inspires the highest confidence, without a doubt lurking upon his countenance to shed suspicion upon his sincerity; yet the court and jury will do well to know: 1. His opportunity of *observing* (what

[1] Casey v. R. Co., 8 Daly, 220.

he states). 2. His attentiveness in *observing*. 3. The power of his intellect. 4. The strength of his recollection; and 5. His disposition to speak the truth. And especially is this true in the difficult questions of identity.

CHAPTER XIV.

VIEW OF PREMISES BY JURY.

SEC.
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When the jury may view the premises.

§ 581. In criminal cases it appears that the jury were not permitted to view the premises where the crime was alleged to have been committed, unless it was authorized by statute. It was not permitted by the common law, because the jury could not or should not act on the case except upon information received by the evidence given in court. The question was presented in a murder trial in Massachusetts in 1829, and it was refused, though moved for by the prisoner and consented to by the attorney-general. But on the second trial of the same case, the jury made the request that they be permitted to see the place of the murder, and both parties consented, and the court hesitated, but finally granted the request. "Because," the court said, "this course was without precedent, and if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent." And in this case, the court directed that no person should go with the jury, except the officers having them in charge, and that no person should speak to them under penalty of a contempt. Plans were exhibited and explained to the jury in court, and they were permitted to take them with them to aid them in making the view.[1]

Civil cases — England and America.

§ 582. A view of the premises was granted in England in civil cases, but that was granted under the provisions of a statute.[2] Many

[1] Com. v. Knapp, 9 Pick. 515. See Rev. Stat. Mass., chap. 137, § 10.

[2] Stat. 4 Anne, chap. 16, § 8; Stat. 3 Geo. II, chap. 25, § 14; Com. Dig., *View*, A.

of our American States have statutes making similar provisions in civil cases. But under these statutes it is often a matter of discretion, and the court may or may not permit it, and this discretion is not generally reviewable on appeal, except in cases where there has been an abuse of power.[1] In Iowa, in a proceeding to condemn land for a railroad, a map was used upon the trial showing the farm and the right of way through it, and a full description was given by the witnesses of the premises; the court held that a view of the farm was not necessary to enable the jury to understand and properly apply the evidence in this case, and reach a just determination of the rights of the parties.[2] And similar rules prevail in courts of equity.

Larceny — view of a hog — error.

§ 583. But as we have seen, in criminal trials viewing will seldom be permitted in the absence of a statute authorizing it. The statute of Massachusetts of 1843 authorized a view of the premises, and it was permitted in the noted Webster trial in 1850. The jury taking a view of the medical college, attended by two officers and one counsel on each side.[3] In Texas in the absence of a statute, on a trial for the larceny of a hog, it was held that for the court to permit a view was error, and the cause was reversed. There arose a controversy as to the identity of the hog alleged to have been stolen, and the jurors were permitted by the court to leave the court-room during the trial, and to inspect the animal to aid them as to the identity and ownership.[4]

In Oregon, on the trial of an indictment for murder, it was held that when the jury, by agreement of counsel and by direction of the court, visited the scene of the murder and also the county jail, without the presence of the prisoner, this was not a reason why the sentence of the law should not be pronounced upon him.[5] Mr. Wharton says: "The practice which obtains in civil suits, in permitting the jury to visit the scene of the *res gestæ* is adopted in criminal issues whenever such a visit appears to the court important for the elucidation of the evidence. The visit, however, should be jealously guarded, so as to exclude interference by third parties, and should be made under sworn officers. Such view may be granted after the judge has summed up the case. But where only a part of the

[1] Boardman v. Ins. Co., 54 Wis. 364; Pick v. Rubicon, etc., Co., 27 id. 446.
[2] Clayton v. R. Co., 67 Iowa, 238.
[3] Com. v. Webster, 5 Cush. (Mass.) 295, 298.
[4] Smith v. State, 42 Tex. 444.
[5] State v. Moran, 15 Oreg. 262.

jury visited the premises, and this after the case was committed to the jury for their final deliberation, this was held ground for a new trial. The visit also must be made in the presence of the accused, who is entitled to have all evidence received by the jury, taken in his presence."[1] There are several views presented upon this subject, each having a reason to support it. And as the courts are not agreed, perhaps the best we can do is to examine the weight of the authority by the reasons offered on either side.

Burglary — jurors viewing the premises.

§ 584. One Adams and three others were indicted for burglary, and Adams put on trial. The statute authorized an inspection of the premises, and the jury to make the visit in charge of an officer. This was done and the jury not permitted to separate while absent from the court-room. The court, on this point, remarked: "In contemplation of law the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that goes to make up the organization of the court, remain in the court-room. The jury retire to discharge one duty connected with the trial, and yet, though absent while discharging that duty, inasmuch as it is done under the direction of the court and while in charge of an officer appointed by the court, they are, in legal contemplation, in the presence of the court. Though the defendant may not go with them into their place of retirement, he is, nevertheless, personally present during that portion as well as the rest of the trial." But this reasoning does not seem to meet the question. The bill of rights guarantees to every person the privilege of meeting the witnesses against him, face to face. The jury leave the court and visit the scene for the purpose of acquiring knowledge to aid them in their determination; this they receive from inanimate witnesses, and in the absence of the accused; and neither he, his counsel or the court know what information they have received or what impressions it has made upon their minds. Nor is this all. The court has no jurisdiction to try a criminal in his absence. If this position be tenable, then it would seem to be conclusive, because the consent of parties confers no jurisdiction upon a court. But can the accused waive this constitutional right? Can he consent for the jury, on his trial for a crime, to go out in the neighborhood, in his absence, and collect informa-

[1] 3 Whart. Cr. L. (7th ed.), § 3160, p. 151. And in this connection see the case of State v. Houser, 28 Mo. 233, where the juror measured the tracks, and the case was reversed.

tion from inanimate witnesses, to convict him? The court in the above case held that he could. That the language of the Bill of Rights is permissive, "the accused shall be allowed," that is, he may leave if he wishes; if he does not wish, he may forego. "If he does not wish then he cannot complain that they are not forced upon him."[1] It seems that the force of this reasoning may well be doubted. It is his right to be present at all stages of the proceedings. Suppose one indicted for a crime prefers to remain in his cell in jail, and let his trial proceed in his absence, would the trial be legal, and would the conviction be sustained?

Same — murder — rule in Arkansas and Georgia.

§ 585. In Arkansas, in the progress of a trial, a witness was sworn to accompany the jury, which he did, to view the premises and scene of the alleged murder, and he pointed out the place where one John Morrow and the defendant resided at the time of the homicide, and the house in which the deceased resided at the time, and the place where the dead body lay, and the jury inspected these places with him. The defendant did not accompany them, but was left with the sheriff in the court-room. He was convicted, but a new trial was granted upon the facts above stated.[2] One Bostock was convicted of murder in causing the deceased to fall or leap from a portico. It appeared that during the trial, the court asked the counsel for the defendant, in the presence of the jury, if he objected to the jury examining the premises by going to the house, who replied that he did not, whereupon the court sent the jury to the house where the defendant lived at the time the alleged offense was committed, to examine the same, in the custody of two officers of the court, but neither the defendant nor the court were present when this part of the trial was had in and about the defendant's house. This extraordinary proceeding was held to be error; that the court had no legal right to request defendant's counsel to say whether or not he objected to such a proceeding, and especially in the presence of the jury; and the fact that he did not object, under the circumstances, did not legalize that extraordinary proceeding.[3]

Same — burglary — rule in Louisiana.

§ 586. Two reasons have been urged against the adoption of such a proceeding in criminal practice: 1. That a verdict upon facts thus obtained would be a finding on facts known only to the jury,

[1] State v. Adams, 20 Kans. 311.
[2] Benton v. State, 30 Ark. 328.
[3] Bostock v. State, 61 Ga. 639.

not publicly developed on the trial, and concerning which the defendant had no opportunity to cross-examine them as witnesses, and upon which the defendant or his counsel had not been heard, and of which the judge had no information, and to which he could not charge the jury. 2. As held by other courts, the prisoner has the right to meet the witnesses face to face, and that no evidence can be communicated to the jury, except in the presence of the accused. This latter view was taken by the Supreme Court of Louisiana in 1872. Two defendants were convicted of burglary while armed with a dangerous weapon. During the trial, on motion of the State, the court directed the jury to retire from the court-room, and visit and inspect the premises where the burglary was alleged to have been committed. The court said: "He directed a witness for the State to accompany them and point out the places marked out on the diagram of the premises, which the witnesses had testified to the day before, and which the State had offered in evidence. The accused were not permitted to attend this inspection of the premises, and the explanations of the State witness, his pointing out to the jury the relations between the diagram, already in evidence, and the premises inspected, took place out of the presence of the accused. Why such proceedings were permitted, we are not informed, and cannot imagine. The judge *a quo* states at the foot of the bill of exceptions, that the jury were especially instructed not to converse with the witness, and the witness was instructed, 'to make no explanations, but to confine himself to pointing out appearances as described in the said diagram.' Concede that in the absence both of the accused and the judge (for the judge did not accompany the expedition) the witness and the jury obeyed these instructions to the letter. It would result merely that the witness gave testimony on the premises, out of court, and in the absence of the accused, in the same way that a dumb person gives testimony, namely, by signs (1 Greenleaf, § 366, and cases cited). And it needs no argument to prove that the effect of such 'pointing out,' in dumb show, is as potent with a jury as if the verification of the diagram had been enforced with a multitude of words."[1] Some of the courts have taken still another view, to the effect that in viewing the premises, the jurors are not to be converted into witnesses, acting on their own inspection, but only to enable them the more clearly to understand and apply the evidence.[2] But this was a civil action involving lands in litigation.

[1] State v. Bertin, 24 La. Ann. 46. [2] Wright v. Carpenter, 49 Cal. 607.

Jurors — knowledge acquired by inspection.

§ 587. In a Texas case, decided in 1875, John Smith was indicted for stealing a sow and six pigs from one Houston. It appeared to be quite uncertain, from the evidence, who was the real owner of the property, Smith or Houston. There was a mistrial, the jury failing to agree, and by consent of parties, another trial was had at the same term of the court, and he was convicted and his punishment assessed at one year at hard labor in the penitentiary. During the progress of the trial, on the suggestion of the district attorney, the jury was taken in charge of an officer, to "see and examine the sow as part of the testimony in the cause." The case was reversed and remanded. The court held (1) that there was no authority in that State for such a mode of enlightening the minds of the jury as to the material facts of a case which they have to try; (2) that a verdict upon facts thus ascertained would be a finding of facts known only to the jury — not publicly developed on the trial of the issue joined, concerning which defendant had no opportunity to cross-examine them as witnesses, upon which defendant or his counsel had not been heard, and of which the judge had no information.[1] This is certainly correct as a legal proposition, and it is based upon the same rule of law that if one juror has knowledge of a material fact in the case on trial, he cannot, for the first time, disclose that fact in the jury room, for the jury to act upon. If a juror has in his possession a knowledge of material facts, which should be considered by the jury upon their retirement, he should be sworn as a witness in the case, for the benefit of the court and his fellow jurors (and there is no objection to a juror being a witness in the case he is called upon to try), unless, however, he has formed or expressed an opinion based upon the knowledge he possesses, and which might bias his mind as a juror, and upon this he is subject to a rigid cross-examination, upon which he may disqualify himself as a juror. So it is well enough to poll the jury in all important cases, so as to have a fair and impartial trial of the issue.

View of highway — rule in Massachusetts.

§ 588. A photographic view of a defective highway may be taken and used in evidence in an action against a corporation for damages for injuries sustained while traveling thereon, and which defendant was bound to keep in repair. Plaintiff was traveling in the night-

[1] Smith v. State, 42 Tex. 444.

time with a horse and buggy; there was a mud-hole in the center of the road, which caused the travel to take one side or the other of this hole; the road was a raised causeway, built through a hollow, the embankment, which was not protected by a rail, being twenty-three inches high; the horse and buggy went over the embankment. The defendant put in evidence a photograph of the place of the accident, which was not exhibited to the jury, until evidence of the photographer, who took it, was put in. He testified to the taking of it, and that he placed his instrument in the middle of the road, about one rod from where the face of the picture begins; that he made no measurement, but made the photograph as fairly as could be.[1]*

Same — view — railroad bridge — wreck.

§ 589. In an action for damages against a railroad company, it appeared that the plaintiff's husband was a conductor on one of defendant's trains, which fell through a bridge on the night of August 24, 1875, whereby he was killed. It was alleged that the deceased was without fault, but that the bridge was defectively constructed. There was a photographic view of the wreck, bridge, etc., taken. SEEVERS, J., said: "What was claimed to be a photograph of the wreck and bridge, taken after the accident, was shown a witness, and in reference thereto he testified: 'It is a very correct picture of wreck next morning. It is as near correct as can be.' Whereupon the plaintiff offered to introduce the same in evidence, to which the defendant objected, because 'incompetent, and that it does not show any thing,' which was overruled, and the same admitted as evidence. It is claimed in argument that there was no evidence showing that the photograph was a copy from the negative taken of the wreck, and that, to be competent evidence, it must have been taken before there was any change made in the appearance of the broken bridge, and that the photograph shows that work had

[1] Blair v. Pelham, 118 Mass. 420.

* In Blair v. Pelham, *supra*, GRAY, C. J., said: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. Marcy v. Barnes, 16 Gray, 161; Hollenbeck v. Rowley, 8 Allen, 473; Cozzens v. Higgins, 1 Abb. Ct. App. Dec. 451; Ruloff v. People, 45 N. Y. 213; Udderzook v. Com., 76 Pa. St. 340; Church v. Milwaukee, 31 Wis. 512. Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception. Com. v. Coe, 115 Mass. 481, 505; Walker v. Curtis, 116 id. 98. The evidence of what happened at the same place the year before was rightly rejected, because it tended to raise a collateral issue; and because, it being admitted that the highway had been in the same condition for twenty-four hours before the injury now sued for, the previous length of time for which it had existed was immaterial. Aldrich v. Pelham, 1 Gray, 510; Payne v. Lowell, 10 Allen, 147.

been done about the wreck before it was taken. In support of such claim, *Hollenbeck* v. *Rowley*, 8 Allen, 473, is cited. In that case, however, there was the further objection that the photograph was a view of only a part of the premises. Besides this, it was held that it was a matter within the discretion of the court to either admit or reject the photograph. As the photograph is not before us, we cannot tell whether it shows that work had been done about the wreck before it was taken or not. There is no testimony so showing. It was shown to be a correct delineation of the bridge. Now, it was not objected below that the witness was not competent to so testify, or that no one but the photographer was competent to testify as to its being a correct copy of the negative, and, therefore, these questions cannot be raised for the first time in this court. We are unable to say what was shown by the picture introduced in evidence, but if it was a correct delineation of the wreck, broken bridge and stream we conceive it would be competent testimony, for the same reason that the jury, if it was possible for them so to do, would have been permitted to have viewed and inspected the same for the purpose of more readily understanding and properly applying the other evidence."[1]

Photographic views — rule in New York.

§ 590. Where a party was indicted for vending obscene and indecent photographs, the photograph itself was the proper instrument of evidence to be introduced for examination and inspection by the jury on the trial of the indictment. The New York statute (§ 317, Penal Code), declaring it to be a misdemeanor for any person "to sell, lend, give away, or offer to give away, show, or to have in his possession with intent to sell or give away, or show, or advertise, or otherwise offer for loan, gift, sale or distribution, an obscene or indecent book, writing, paper, picture, drawing or photograph," was held to include all pictures, drawings and photographs of an indecent tendency, embracing such as are offensive to chastity, and demoralizing and sensual in their character, by exposing what purity and decency forbids to be shown, and which are productive of libidinous, lewd thoughts or emotions. One Muller was indicted for selling a certain indecent and obscene photograph, representing a nude female in a lewd, obscene, indecent, scandalous and lascivious attitude and posture, and also with having in his possession divers lewd, scandalous, obscene and indecent photographs representing

[1] Locke v. R. Co., 46 Iowa, 109, 112.

divers nude female figures in various lewd, indecent, immoral, lascivious, scandalous and obscene attitudes and postures, etc. These photographs were produced in evidence for the inspection and observation of the jury, and there was no denial on the part of the defendant that such photographs were kept for sale in the store in which he was a clerk, and were there exhibited and sold, as that was desired by customers dealing with him at the store. DANIELS, J., said: "As the statute has given this general definition of the character of the acts constituting the offense, it must necessarily have been designed that the drawing, picture, photograph or writing, should be exhibited to and observed by the jury, for them to determine as a matter of fact, in the exercise of their good sense and judgment, whether or not they were obscene and indecent.[1] This rule of permitting the jury to examine photographs has been adopted in England and America in all proper cases.[2]

Inspection — ancient and modern rules.

§ 591. As a matter of identification in former times, trial by inspection was recognized as the proper mode to determine questions at issue in the courts; this was laid down as the proper rule by the ancient writers, when the judges resorted to the mode without the intervention of that awkward appendage then known as a jury. It was the rule in many questions besides personal identity. Much of the old rule still prevails, with modifications to meet the exigencies of the present age, and the march of ideas. Mr. Thompson, in his law of Trials, vol. 1, § 851, lays down cases to which our modern rule applies, among which are cases of alleged pregnancy; when an examination becomes necessary under the issue presented to the court. When a jury of matrons was called, they asked for the assistance of a surgeon,[3] who knew probably less about the matter than they did, for want of experience. And the statute of New York seems to have provided for a jury of medical men,[4] whose judgment is, perhaps, no more reliable than other experts. And in divorce cases, when it becomes necessary under these state of pleadings, where impotency or sexual incapacity is alleged as the ground upon which the divorce is claimed. A few lead-

[1] People v. Muller, 32 Hun, 209.

[2] Reg. v. Hicklin, L. R., 3 Q. B. 360 (1867). And see Marcy v. Barnes, 16 Gray, 161; Ruloff v. People, 45 N. Y. 213; Church v. Milwaukee, 31 Wis. 512; Udderzook v. Com., 76 Pa. St. 340; Walker v. Curtis, 116 Mass. 98.

[3] Reg. v. Wycherley, 8 Carr. & P. 262.

[4] 2 Rev. Stat. (Edm.) 679, § 20; Code Crim. Proc., § 500.

ing cases may be cited.[1] On this branch of the subject in an English case, Sir William Scott said: "Courts of law are not invested with the power of selection. They must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy and the court cannot refuse to entertain it on any fastidious notions of its own."[2] And the court will be more reluctant to grant the inspection where the person is old, or where it is the wife who is to be inspected.[3]

View of premises — civil action — ejectment.

§ 592. The rule is laid down by Mr. Wharton, that as to permitting the jury to view premises, the same rule prevails in civil and criminal practice, except that in the latter the accused should accompany the jury on the visit. In California, in an action of ejectment, decided in 1875, the court, in relation to the examination of the land, and its character as swamp or dry land, said: "In authorizing the court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of the overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence; the cause would be determined, not upon the evidence given in court to be discussed by counsel, and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors founded on the personal inspection, the value or the accuracy of which there would be no method of ascertaining.[4] If this reasoning of the court of California be sound in a civil action, would it not apply with equal force in a criminal

[1] Devanbagh v. Devanbagh, 5 Pai. 554; Briggs v. Morgan, 3 Phillim. 325; Norton v. Seton, id. 147; Shafto v. Shafto, 28 N. J. Eq. 34; Harrison v. Harrison, 4 Moore P. C. 96; Le Barron v. Le Barron, 35 Vt. 365; Newell v. Newell, 9 Pai. 25.

[2] Briggs v. Morgan, 3 Phillim. 325.

[3] Shafto v. Shafto, 28 N. J. Eq. 34; Brown v. Brown, 1 Hagg. Ecc. 523.

[4] Wright v. Carpenter, 49 Cal. 607.

trial, where the life or liberty of the defendant is involved? The jurors can visit the premises or view the scene of an alleged crime for no other purpose than to acquire information, and that only to guide them in the finding of their verdict. When they have received information from two sources, one in court and the other out of court, who can say which influenced their action? or if both, which had the greater weight? if the latter, the judge had no knowledge of it; and how can he give in charge the law applicable to facts, of which he has no knowledge? or how can he decide a motion for a new trial?

CHAPTER XV.

COMPULSORY PHYSICAL EXAMINATION.

SEC.
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Examination of persons — injured parts — by jury.

§ 593. In questions of personal identity it is generally admissible for the jury to examine the person whose identity is in dispute, as well as the testimony of witnesses as to the identification. In England a party against whom an information was filed for importing goods prohibited by law, had himself brought into court on a *habeas corpus ad testificandum*, that he might show that the guilty party had personated him.[1] It is now the usual practice in criminal proceedings as well as in civil actions for damages, for the injured person to exhibit to the jury for examination, verification and identification, the injured part or parts of the body, whereever there is any question as to the extent, nature or character of the injury. This may be done voluntarily.[2] But it was held in Illinois that it would not be enforced. And where an action was brought to recover damages to plaintiff's eyes, caused by the use of smoking tobacco with gunpowder in it, it was held that there was no error in the court below refusing to compel the plaintiff to submit his eyes to the examination of a physician in the presence of the jury — that the court had no power to make or enforce such an order.[3]

[1] Attorney-General v. Fadden, 1 Price, 403.

[2] Parker v. Enslow, 102 Ill. 272; Loyd v. R. Co., 53 Mo. 515.

[3] Parker v. Enslow, 102 Ill. 279.

The same rule was held in Missouri. One Mrs. Loyd brought an action against the railroad company for injuries sustained by her in alighting from the car at Monroe City, where it was alleged that the train did not stop a sufficient length of time for her to alight with safety. The court said: "The proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law.[1] She recovered a judgment for $4,000, and it was affirmed. But upon this the courts are not agreed, many of them holding that a compulsory examination is proper and right in the exercise of a proper discretion. And where it is a proper case, and the application is made at the proper time, the inspection may be made.

Same — different rule — examination — when necessary.

§ 594. In Texas, in 1885, in an action by Underwood against the International Railroad Company, for damages alleged to have been sustained while a passenger on defendant's railroad, in consequence of defendant's negligence, plaintiff claimed $28,000 and $5,000 as exemplary damages. He had verdict and judgment for $15,000. This was reversed, as being excessive. It was held by the Supreme Court, that though the right to have an examination made of one who sues to recover damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under the order of the court, has been maintained, when shown to be necessary to further the ends of justice; yet, a case will not be reversed for a refusal to order the making of such an examination, where it was not shown to be necessary to a full presentation of the facts of the case, and where it was not shown that the plaintiff was unwilling that such examination should be made by competent persons.[2]

Same — railroad employee — rule in Iowa.

§ 595. In an action in Iowa, in 1877, by an employee of a railroad company, to recover damages for personal injuries sustained by reason of the negligence of defendant's employees, there was a judgment for plaintiff, and defendant appealed. On the question of the examination of the plaintiff as to the extent of his injuries, and their effect upon his health and strength, he had testified on a former

[1] Loyd v. R. Co., 53 Mo. 515. And see Stuart v. Havens, 17 Neb. 211.

[2] Int. R. Co. v. Underwood, 64 Tex. 463.

trial that he was so far disabled that he could not engage in labor requiring the exercise of common strength and activity; that he had great pain in his hips and back, impairing his nervous system, paralyzing his limbs and some of his internal organs. Defendant, after the impaneling of the jury, and before any testimony was introduced, filed an application for an order requiring plaintiff to submit to an examination by physicians and surgeons as to the injuries complained of, their nature, character and extent. The court said: "If, for this purpose, the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose, upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men.[1]

Same — compulsory examination by experts.

§ 596. In Kansas, in 1883, a case was decided in which one Thul sued the railroad company to recover damages for injuries to him while in the employ of the company as a section hand. Going to his work, with others, on a hand-car, they met an approaching train, when, needlessly and carelessly, hot steam and hot water was thrown upon him, and into his face and eyes, so that his sight was impaired, injured and destroyed. He had judgment for $400, and this was reversed, the court holding, substantially, that in actions for personal injuries of a permanent or temporary character to plaintiff's eyes, where he himself testifies as to the injuries, and where there was no physician or surgeon or medical expert examined in the case, the plaintiff may be required by the court, when the application is properly made, to submit his eyes to examination by some competent expert, for the purpose of ascertaining the nature, character and extent of the injuries received; the court exercising in all such cases a sound discretion.[2]

Same — compulsory — right — discretionary power.

§ 597. The Supreme Court of Missouri, in 1885, on this subject, held that the power in the trial court to compel an examination of the plaintiff's injuries was a discretionary power, and when exercised, would not be interfered with, unless there appeared to be a manifest abuse of such power. Shepard, the plaintiff, sued the railroad for

[1] Schroeder v. R. Co., 47 Iowa, 375, 383.

[2] Atchison, etc., R. Co. v. Thul, 29 Kans. 466.

personal injuries, but it was held in his case that the right is not absolute.[1] This seems to have overruled a former case decided by the same court in 1873, in which it was said: "The proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law."[2]

Same — action against street railroad company.

§ 598. In Wisconsin, in 1884, an action was brought for personal injuries against a street railroad company, alleged to have been received by plaintiff through the negligence of the defendant, its agents or servants, while a passenger on the street cars. A separate track was used for the cars going in each direction, and frogs were so placed as to prevent cars going in the proper direction from being thrown from the track while going from or to a swing-bridge. A loaded wagon having been broken down on the bridge on one of the tracks, a car approaching thereon was necessarily lifted to the other track and, being then driven rapidly upon the bridge, was thrown from the track, injuring a passenger. It was held that, in an action for the personal injuries, the court might, in a proper case, at the trial, direct the plaintiff to submit to a personal examination by physicians, on application of the defendant.[3]

Same — turnpike company — rule in Ohio.

§ 599. In an action in Ohio, in 1881, against a turnpike company for damage, for injuries to plaintiff's back, hips, etc., alleged to have resulted from the negligence of defendant in unlawfully permitting a certain bridge on its road to be and to remain out of repair and unsafe, by reason whereof, he, his daughter, wagon and team were precipitated from the bridge, etc., the court held that the trial court had the power to require the plaintiff to submit his person to an examination by physicians and surgeons when necessary to ascertain the nature and extent of the injury. And, upon refusal to comply with the order when made on proper application, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury; that the matter was in the discretion of the court; that where the application is not made until after the close of plaintiff's evidence in chief, and the commencement of defendant's

[1] Shepard v. R. Co., 85 Mo. 629.
[2] Loyd v. R. Co., 53 Mo. 515.
[3] White v. R. Co., 61 Wis. 536.

evidence, and no reasonable showing is made for the delay, it may be properly refused on that ground.[1]

Same — conflict — rule in Arkansas.

§ 600. We have seen that the courts are not agreed on this subject or rule of practice. While some of the courts hold that it is unknown to the practice and the law, others hold it to be a matter of discretion. There is a third view held, to the effect that it is a matter of right. In an action in Arkansas, decided by the Supreme Court in 1885, Smith sued Sibley, as receiver of a railroad corporation, for damages for being forcibly ejected from a moving train, whereby he alleged that he received internal injuries, for which he recovered a judgment for $2,000, which was reversed. The court, after citing and commenting on several cases, said: "The rule to be deduced from these cases is, that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition — an opinion based upon personal examination."[2]

Same — rule in Pennsylvania.

§ 601. An action was brought in Pennsylvania on a written agreement for the building of a house agreeably to specifications, and a working plan or draft, referred to as a part of the contract. The defense was that the house was not properly constructed. The plaintiff, before trial, sent persons to examine the house, so that they would be able at the trial to testify how the work had been done. The defendant refused to permit them to go through the house for such purpose. On this point Black, J., delivering the opinion, said: "To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents the jury from learning a material fact, must take the consequence of any honest indignation which his conduct may excite. * * * It ought to be understood that where one party has the subject-matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it, unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the

[1] Turnpike Co. v. Baily, 37 Ohio St. 104.

[2] Sibley v. Smith, 46 Ark. 275.

house to as many others as he chose, and overwhelm the one perjured man by a host of honest ones."[1] The same reasoning will apply with equal force to the examination of personal injuries, in a proper case, and where it becomes necessary to elucidate the question. But the weight of authority seems to be that it is not a matter of right, but one of discretion, and that such discretion will be exercised only when it becomes necessary, in the opinion of the court, to promote the ends of justice.

Same — rule in Minnesota.

§ 602. In Minnesota an action was brought by Mrs. Hatfield against the railroad company to recover damages for personal injuries received while leaving defendant's car, she having fallen, or been thrown, from the platform or steps of the car upon the ground, injuring the sciatic or great nerve of the thigh, giving great pain and causing the thigh to shrink, rendering her lame and causing her to "limp" in walking. The counsel for the defendant requested the court to direct her to walk across the court-room in presence of the jury, which the court declined to do, to which refusal defendant excepted. The refusal by the court was sustained, the court saying: "In the present case, we think the court very properly refused to direct the plaintiff to exhibit herself to the jury and bystanders by walking across the room. Such an act would have furnished the jury little or no aid in determining the extent or character of her injuries.[2]

Same — rule in New York.

§ 603. Where the plaintiff was injured in alighting from a street car, and sued for damages, it was held proper for him to exhibit the wounded limb to a surgeon in the presence of the jury, but this was a voluntary act on the part of the plaintiff.[3] In Nebraska, in 1884, an action was brought against a railroad company for injuries to an employee by the explosion of an engine. It was held not to be error for the court, during the progress of the trial, to refuse to order the plaintiff to submit to an examination of his person by physicians who were witnesses for the defendant, in the absence of any showing that justice would be promoted thereby, and especially so where the plaintiff submits to an examination by such witnesses in the

[1] Bryant v. Stilwell, 24 Pa. St. 314.
[2] Hatfield v. R. Co., 18 Am. & Eng. Ry. Cas. 292.
[3] Mulhado v. City R. Co., 30 N. Y. 370.

presence of the jury. A judgment for $6,250 was affirmed.[1] In an action for damages for malpractice by a surgeon upon a child, the defendant asked for an examination of the patient by competent surgeons. This was held to be a proper case, to promote the ends of justice, and the court ordered the examination.[2]

Notice to produce a dog in court.

§ 604. In an action brought in England in trespass for seizing and detaining a dog, the defendant refused to produce the dog (under notice) during the examination of plaintiff's witnesses. It was held that he would not be permitted to produce it afterward for the purpose of invalidating the testimony of the witnesses.[3] This is upon an old rule of evidence announced in Massachusetts in 1827. In an attempt to charge one as a dormant partner, notice was given to him to produce at the trial the original contract of partnership, a copy of which was annexed to the notice. It was held that notwithstanding the supposed copy differed materially, in one particular, from the original contract, the notice was sufficient to let the plaintiff into parol evidence of such contract; but that the defendant might introduce parol evidence to show that he had not entered into any written agreement of copartnership, though he could not then show by parol that the written agreement was different from that proved by the plaintiff.[4]

Compulsory physical examination.

§ 605. In criminal trials, whether the defendant can be compelled by order of the court, against his consent, to submit to a physical examination, there is a difference of opinion. It has been supposed that it could not be done, because this compels the accused to produce evidence against himself, and violate a fundamental principle; as was held in an English custom-house case, where a motion to compel the production of books was denied.[5] A forcible examination of a female prisoner, under an order of a coroner, by physicians, to ascertain if she had been pregnant and recently delivered of a child, was a violation of the Constitution.[6] But we find on this subject that the authorities are in great conflict, especially upon questions of identity of the prisoner, when that is the issue, and it

[1] Sioux City R. Co. v. Finlayson, 18 Am. & Eng. Ry. Cas. 68.
[2] Walsh v. Sayre, 52 How. Pr. 334.
[3] Lewis v. Hartley, 7 Carr. & P. 405.
[4] Bogart v. Brown, 5 Pick. 18.
[5] Rex v. Worsenham, 1 Ld. Raym. 705. And see Reg. v. Mead, 2 id. 927.
[6] Roe v. Harvey, 4 Burr. 2489.

becomes necessary to identify him by marks or scars on his person.[1] We find a case decided in Nevada in 1879, in which the defendant was indicted for murder, and the question of his identity became important. A witness stated that he knew the defendant, and that he had *tattoo marks* (a female head and bust) on his right fore-arm. Defendant was compelled by the court, against his protest, to exhibit his arm to the jury and show the marks to them. This was held to be proper, and that it did not violate any constitutional provision, as meaning that no person shall be compelled to testify as a witness against himself; that it was not prejudicial to defendant and was not erroneous. HAWLEY, J., among many other things, said: "The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify against himself. To use the common phrase, it 'closes the mouth' of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation, or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but as before stated, for the reason that in the sound judgment of the men who framed the Constitution, it was thought that, owing to the weakness of human nature, and the various motives that actuate mankind, a defendant accused of crime might be tempted to give evidence against himself that was not true." In fairness, an extract from the *dissenting* opinion of LEONARD, J., should be noticed. After quoting from the above opinion, he says: "In my opinion, the court has not stated the only reason why the provision in question was placed in the Constitution. Had that been the only one, there would have been a prohibition against allowing a defendant to testify for himself; because in the latter case there was and is a hundred-fold more danger of falsehood than in the former. Is there not an additional reason why this provision was adopted? Was it not, in part, at least, because of the enlightened spirit of the age, that a man accused of a crime should not be compelled to furnish evidence of any kind which might tend to his conviction? Did it not come, to some extent, from the spirit of justice and humanity which established the first of all legal presump-

[1] People v. McCoy, 45 How. Pr. 216.

tions — that every person shall be considered innocent until proven guilty?[1]

Same — accused not to convict himself.

§ 606. Can the person of a criminal be examined against his objection, to furnish evidence of his identity, and tending to his conviction? Starkie on Ev. 40, says: "Upon a principle of humanity, as well as of policy, every witness is protected from answering questions, by doing which, he would criminate himself; of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors." It is an invariable rule that no witness or party shall be compelled to furnish evidence which has a tendency to, or may expose him to a criminal charge, and the courts cannot legally compel a person to submit to inspection, private or public documents in his possession or custody, if such inspection is sought for the purpose of establishing or supporting a prosecution against him. In an English case, the defendant and eight others were incorporated as trustees of the charity known as *Bedford's* gifts. The defendant was prosecuted for failing to take the oath of office. Mr. Raymond moved for a rule that the prosecutor might have two books produced, which these persons kept, in which they entered their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next Assizes at the trial. This was denied, because they were perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution.[2] In this respect, our courts have followed the English precedents, and though it has been said that our Constitution did not go as far as the common law, yet it was intended, and has been so construed as to cover the whole scope of the subject. This is altogether a different question from voluntary confessions, which are said to deserve the highest credit, though involuntary confessions will not be received in evidence because they cannot be depended upon as the truth; at least those that have been induced by fear of injury or hope of benefit. On this view in crim-

[1] State v. Ah Chuey, 14 Nev. 79, 98. As to examination of party before trial, see R. Co. v. Bottsford, 141 U. S. 250; McQuigan v. R. Co., 45 Alb. L. J. 66; Schroeder v. R. Co., 47 Iowa, 375.

[2] Reg. v. Mead, 2 Ld. Raym. 927. And see Rex v. Cornelius, 2 Strange, 1210.

inal prosecutions some of our courts have held that the accused shall not be compelled to disclose any material fact which tends to establish his guilt.[1]

Murder — accused examined by coroner.

§ 607. A peculiar case was decided in North Carolina, in 1874. Anica Garrett and Lucy Stanley were indicted for the murder of Alvina Garrett, a girl fourteen years of age; Lucy Stanley was acquitted. It appeared that the prisoner Garrett made an outcry that the deceased came to her death by her clothes accidentally catching fire while she was asleep; and when the witness reached the house where the body of the girl, and where the prisoner were, Anica Garrett told the witness that she, Anica, was asleep when she was awakened by deceased screaming; that she went to her, her clothes were still burning, and in attempting to put out the flames, she, Anica, burnt one of her hands." It was shown by Dr. Walker, the examining physician on the coroner's inquest, that the body of the deceased girl was not burnt before, but after death, there being no serum in the blisters, etc. The prisoner, at the inquest, under arrest and after the jury had decided against her, was ordered by the coroner to unwrap the hand she alleged had been burnt; she did so, and there was no indication whatever of any burn upon it. This was proved on the trial of the indictment against her, to which her counsel objected. She was convicted, and it was affirmed. The court said: "The later cases are uniform to the point that a circumstance tending to show guilt may be proved, although it was brought to light by declarations, inadmissible, *per se*, as having been obtained by improper influence."[2]

Indictment for rape — identity of accused.

§ 608. In another case, decided in the same State, the accused was indicted for rape, charged to have been committed on one *Susan*, while her real name was *Susannah*, though she was generally called *Susan*. Held to be sufficient. Evidence of the name of a prisoner, as given by him when brought before the examining magistrate, is admissible, whether the examination was reduced to writing or not. On the trial, the prosecutrix was asked by the solicitor to look around the court-room, and see if she could see the man who com-

[1] State v. Garrett, 71 N. C. 87, 95; v. Quarles, 13 Ark. 311; Wilkins v. Ma-
Latimer v. Alexander, 14 Ga. 259; State lone, 14 Ind. 156.

[2] State v. Garrett, 71 N. C. 85, 87.

mitted the rape on her, and having done so, she pointed to the prisoner and said: "That is the black rascal." It was insisted that this was to make the prisoner furnish evidence against himself. But it was held by the court that he was sufficiently identified, and this was not error.[1]

Tracks in cornfield — rule in North Carolina.

§ 609. On the trial of an indictment for stealing growing corn from one Ricketts, the defendant was in the employment of the prosecutor. Fresh tracks, apparently of a single person, were discovered in the field, leading from stalk to stalk, where the corn was missing. There was a fence between that portion of the prosecutor's premises where the defendant lived, and the place where the corn was missing. The tracks, both going and coming, led to this fence. He was arrested, and the officer found under his bed about one and a half bushels of corn, apparently new corn. The officer carried him to the field where the tracks were discovered. The State was permitted to prove by the officer that he compelled the defendant to put his foot in the tracks and that it corresponded therewith. This ruling was sustained by the Supreme Court.[2]

Free negro — carrying arms — rule in North Carolina.

§ 610. But in the same State, in 1858, one Jacobs was indicted as a free negro, for carrying arms. The State offered the defendant to the inspection of the jury, that they might see that he was within the prohibited degree. Defendant objected to this measure, but the evidence was admitted. He was convicted, and appealed This was reversed, because the court had no such power.[3] The court refers to a case in which the same thing was done, but in that case it was done at the request of defendant's counsel. In the above case cited, the court said: "It has been often held, that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were, will be received, provided the goods were found at the place described. This seems to be sustained by the cases cited by the court.[4]

Tracks — accused compelled to make.

§ 611. On a trial for murder in Texas, in 1879, the prosecution

[1] State v. Johnson, 67 N. C. 55.
[2] State v. Graham, 74 N. C. 646 (1876).
[3] State v. Jacobs, 5 Jones (N. C.), 259.
[4] Reg. v. Gould, 9 C. & P. 364; Duffy v. People, 26 N. Y. 588; White v. State, 3 Heisk. 338; Selvidge v. State, 30 Tex. 60.

proved that footprints were found on the premises where the homicide was committed, and was further allowed, over objection by the defense, to prove that the examining magistrate compelled the accused to make his footprints in an ash-heap, and that the footprints so made corresponded with those found on the premises where the homicide occurred. It was objected that the evidence was incompetent, because it violated the guaranty in the Bill of Rights that "one accused of crime shall not be compelled to give evidence against himself." The case seems to have gone to the appellate court a second time. It was first reversed and remanded. The second time it came up, the court, upon a review of the authorities, held that the objection was not well taken, that the evidence was not within the inhibition of the Bill of Rights, and the court drew a distinction between this case and the case of *Stokes* v. *State*, a late Tennessee case. In the latter case a pan of mud was brought into court and Stokes asked to put his foot in the mud, and make evidence against himself in the presence of the jury. It is said there is an essential difference. The difference in effect is difficult to perceive.[1] Mr. Wharton in his work on Homicide, p. 506, says: "No principle of law is better settled than that a person shall not be compelled to be a witness, or compelled to testify against himself. This is a right guaranteed by the Constitution in most, if not all the States." And he refers to Stokes' case, above referred to.

Prisoner's testimony used against him.

§ 612. In Maine in a trial for murder, in 1862, it was held that the prisoner's testimony before the coroner's inquest upon the body of the person alleged to have been murdered, given without objection by him, before his arrest, though after he had been charged with the murder, and after being cautioned that he was not obliged to testify to any thing which might criminate himself, and not purporting to be a confession, was admissible in evidence against him.[2] But this is a digression, and will not be pursued. The direct question is, how far can the court order a defendant, charged with the commission of a crime, to disclose facts, or produce evidence which tends to prove his guilt. On this point, some of our courts have gone to the very verge of the law, if not beyond it. It is easy to charge a man with crime, but it must be proved; he is presumed to be innocent until

[1] Walker v. State, 7 Tex. App. 246. But see Stokes v. State, 5 Baxt. (Tenn.) 619.

[2] State v. Gilman, 51 Me. 206.

the contrary is shown, and he cannot be compelled to show his own guilt to rebut the presumption of his own innocence.*

* A peculiar case, that of Warlick v. White, 76 N. C. 175, was decided in 1877. Warlick claimed title to lands formerly belonging to Joseph Carpenter, deceased. Plaintiff claimed as assignee of Mrs. Eaton, the sister and only heir at law of Carpenter. The defendant's wife, Naomi White, before her marriage to White, was the widow of Carpenter, and claimed an undivided half under the will of her former husband, and the other half in the right of her daughter Sarah, who was born shortly after the death of Carpenter, her father. Her legitimacy was in dispute. RODMAN, J., said: "The plaintiff having introduced evidence tending to prove that Sarah, one of the defendants, was illegitimate and not the heir of Joseph Carpenter, the defendant Naomi, the mother of Sarah, was allowed to testify that she had been faithful to the said Joseph during his life, and that no person but him could have been the father of the child. To this evidence the plaintiff excepted, upon the ground of incompetency. * * * The plaintiff then proposed to ask the witness what was the general character of Naomi White in 1864 and 1865 (July, 1865, was the date of the birth of the child Sarah, whose legitimacy was in dispute). The judge excluded the question. * * * Plaintiff excepted. * * * As Naomi was a witness, we think her general character for truth might be inquired into as of the time when she testified. If the witness should say that her reputation was bad in that respect at the time of her testifying, it would be open to defendants to prove, by cross-examination or otherwise, that her reputation had been made bad by reason of the charges made by the plaintiff, or by Lawson Carpenter, or others, respecting the legitimacy of the child, and that it was good before. If that appeared, it is reasonable to suppose that the evidence would have no weight with the jury because it would tend to establish the fact in controversy (the illegitimacy of the child), by a reputation based on the presumption of such illegitimacy. * * * A different rule would apply as to the reputation of the defendant Naomi for chastity. It is clear that a reputation for want of chastity, acquired (if such was acquired at all), after the death of Joseph Carpenter, would not be competent upon the question of the legitimacy of the child begotten during his life-time. And, although it is not so clear, we think that such a reputation existing during his life-time would not be competent for the purpose of disproving legitimacy. When the husband had access, the presumption of paternity is very strong, though not absolutely conclusive. It can only be met by proof that it was impossible that he could have been the father of the child, as in this case it is attempted to be, by proof of the color of the child. As the question covered the whole general character, or more properly, the general reputation of the witness, we think it was properly refused. The character of Naomi was in issue only by reason of her being a witness. There was nothing in the nature of the action to put her character in issue otherwise. Joseph Carpenter and wife Naomi, the defendants, were whites. The plaintiff alleged and gave evidence tending to prove that the defendant, Sarah, was of mixed blood, and, therefore, could not be the child of said Joseph. She was examined by experts, who testified on the trial and differed in their opinions. The plaintiff then proposed to exhibit the said Sarah to the jury, for the purpose of aiding them, by her appearance, in deciding whether she was of mixed blood or not. The plaintiff did not otherwise propose to examine her as a witness. The defendant objected, and the judge sustained the objection, and refused to order the said Sarah to be placed on the witness stand for the purpose proposed. Plaintiff excepted. We think the plaintiff was entitled to exhibit Sarah to the jury in the manner proposed. It is said that such an exhibition, to be useful, must be such as would be indelicate and even indecent. Mr. Polk produced from Coke an instance where a woman, whose then pregnancy was in issue, was permitted by an inferior court to expose herself to the jury, and the Superiour Court justly condemned it as indecent. No such thing was proposed, and we confine ourselves to holding that what was proposed should have been allowed. No question arises as to the manner in which the attendance of the defendant for the purpose might be enforced. It appears that she was present in court under a subpœna. If, however, an infant who was a proper witness should neglect to obey a subpœna, a court would have no difficulty in enforcing her attendance by a writ of *habeas corpus ad testificandum*, directed to the mother or other person having control of her person.

CHAPTER XVI.

MISTAKEN IDENTITY

SEC.
613. Debtor—bank deposit — execution — identity.
614. Arrest — wrong name — trespass.
615. Same — rule in England.
616. False personation — claiming an estate.
617. Casali — absent thirty years — returned.
618. Mistaken identity—singular cases — England and America.
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620. Mistaken identity — Mrs. McCaffrey's case.
621. The Govan murder — mistaken identity
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626. *Corpus delicti*—how to be proved.
627. Dead body—raised — indictment—mistake.
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Debtor — bank deposits — execution — identity.

§ 613. Ram on Facts, at page 462, gives the case of *Brown* v. *Seaman's Bank*, as follows: "This was an action to recover two deposits amounting to $100. The trial took place in the Court of Common Pleas held in Boston, Mass., and the following report of it was published in the Boston *Daily Advertiser:* The plaintiff was a seaman and had but one arm. The first deposit was made by his wife, Emily Jane, who signed the book by a cross. The second deposit was made by the plaintiff himself, who was not required to sign. Sometime after he had gone to sea, a provision seller in Broad street sued John Brown, a Scotchman, for balance of account, and attached the Seaman's Bank as trustee. The principal and trustee being defaulted, the provision seller took out execution, and sent an officer to the bank, demanding these deposits. The officers of the bank denied the identity of the debtor, John Brown, as being the same John Brown who deposited the money. After some parley, the provision dealer gave a bond of indemnity to the bank, and the money was paid over. Some months after these transactions, the real depositor, John Brown, came home from sea and carried his bank book to the bank to withdraw a small sum, which was refused upon the ground that all his funds had been paid out on the execution. To remedy this injustice, this action was brought, and the bank was defended by the provision seller under the bond of in-

demnity. Among other evidence, the plaintiff's counsel produced the John Brown who was sued by the butcher. He testified he owed the debt; that he never deposited any money in the savings bank; that his wife's name was *Jean*, not Emily Jane; that he did not get his summons in the trustee case until the court was over, and that the other John Brown was also a Scotchman, and like him, had but one arm, and that he knew him. The wife of the witness was also examined, and testified she never deposited any money in the bank, and never went by the name of Emily Jane. Under these circumstances, the plaintiff obtained a verdict."*

* In the noted *Tichborne* case in England, involving a large estate and depending upon the identity of one who claimed the estate, the trial lasted one hundred and three days. Wharton & Stille in their Med. Jur., vol. 3, § 623, referring to this case, say: "A roving impostor — to take the adverse view — named Orton, *alias* Castro, *alias* Doolan, so arranged to personate a baronet of the United Kingdom, and the heir to a large entailed estate, that he * * * was sworn to be Sir Roger Tichborne by eighty-five witnesses, comprising Sir Roger's mother, the family solicitor, 'one baronet, six magistrates, one general, three colonels, one major, two captains, thirty-two non-commissioned officers and privates in the army, four clergymen, seven tenants of the Tichborne estates, and seventeen servants of the family.' The claimant's case, however, broke down on cross-examination." The Lord Chief Justice COCKBURNE, in summing up (as appears in the report printed in London in 1874, page 4), said: "Now, the question is one of identity, and it is no doubt one of the most difficult questions with which the courts of justice and juries have to deal. They are mostly cases in which the persons to be identified have only been seen for a moment or for a short time. A man stops you on the highway, puts a pistol to your head, and demands your purse; a garroter seizes your throat, and while you are half strangled, his confederate rifles your pocket; a burglar invades your dwelling by night, and you have only a rapid glance at your unwelcome visitor — in all these cases the opportunity of observation is so brief that mistake is possible; and yet the lives of people would not be safe if we did not act on recollections, even though they are so brief. There are cases in which recollection of witnesses has proved faulty. I recollect a case on the western circuit in which two men were tried for murder and both convicted — one on his identity being sworn to by numerous persons. If execution had followed as rapidly then as it was accustomed to do in earlier times, he would have been executed; but it was proved afterward, beyond all possibility of doubt, that those who had sworn to the identity of the man were mistaken. He had committed an offense of picking a pocket hundreds of miles away, and when the murder had been committed, he was in confinement at the time under that charge. There was not the slightest doubt in the world about it, and the man was released. I tried a case myself not long ago, at Hereford, where a man was charged with night poaching, and with a most serious assault upon the keeper.

"The keeper swore positively to the prisoner. He was a respectable man, head keeper of a nobleman in the county, nobody could doubt his voracity, or intention to tell the truth. He swore to the man most positively. I had myself not the slightest doubt of his testimony. The jury convicted the prisoner. It turned out afterward that we were all wrong, for it was proved satisfactorily that he had been taken for another man. And, therefore, I quite agree with what was said by the learned counsel for the defendant — that identity was a very difficult point; and here it is the question at issue. But in the cases I am speaking of, you have merely the evidence of persons who had only a short and casual opportunity of becoming acquainted with the appearance of the person whose identity is disputed. Here we have a much wider field of inquiry, but at the same time it is an inquiry which has its own peculiar difficulties. For whereas in the cases to which I have referred, the recollection is called forth speedily after the event, here we are dealing with the identity of a man alleged to have been dead ever since the year 1854 — now twenty years ago — and the asserted identity of another man who has disappeared from the knowledge of all those who knew the undoubted man for a great number of years — from the year 1854 till, at all events, the year 1866 or 1867, when he first came forward. If in ordinary cases evidence of identity is calculated to mislead us or to

Arrest — wrong name — trespass.

§ 614. A defendant, who was in custody on *mesne* process, showed by his affidavit that he was baptized by the name of *Berend* at *Memel*, in the Kingdom of *Prussia*, and had always gone by that name, and had never, to his knowledge, been called by the name of *Bernard*, until the sheriff arrested him by that name, on which ground *Onslow*, Sergeant, obtained a rule *nisi*, for discharging him out of custody, and cited authorities on the point raised. LAWRENCE, J., said: "Those cases go to the length of showing that, if the sheriff arrests a man who is named in the writ by another name than his

embarrass us, how much more so must it be in a case like the present, when you have a host of witnesses confronted with an equal number on the one side and the other; when you have an entire family — for I really do not value the evidence of Mr. Biddulph — on the one side, but you have on the other a whole body of persons as familiar with Roger Tichborne, whose existence is in dispute, as it is possible for people to be, denying the identity of the claimant; and on the other hand, the mother of the undoubted Roger Tichborne asserting that he is her son; heaps, I may say, of witnesses coming forward to say that he is not the man, an equal or perhaps greater number coming forward to say that he is? And we have the matter still further complicated by this extraordinary circumstance, that while the defendant says 'I am Roger Tichborne' and produces numerous witnesses to swear that he is, and another vast array of witnesses come forward to say that he is not, we have the identity of the person who claims to be Roger Tichborne asserted with reference to a totally different individual. And what is equally strange, the same conflict which occurs with reference to his identity with Roger Tichborne occurs with reference to his identity with that other person — Arthur Orton; and you have witness after witness produced to say that he is Arthur Orton, and witness after witness declaring that he is not."

One of the most peculiar cases of mistaken identity was that of Martin Guerre, so often referred to in the books. I have not the space to give it, even as we find it condensed, but in substance, Guerre married at the age of eleven years to a wife of the same age, whose name was Mademoiselle Bertrande del Role of Artigues. In the ninth year after their marriage, a third was added to the family circle; a boy, named Sanxi. Clouds came over the domestic sky, Martin, fearing the displeasure of his father, absented himself for an agreed period of *eight days*, but eight years elapsed before his return. One evening a visitor called, or rather a traveler claiming to be Guerre, presented himself as the penitent husband, resolved to atone for the past offense. No one questioned that the visitor was Martin Guerre. His own sisters, his uncle, and every member of his wife's family then at hand, acknowledged him without an instant's hesitation; for not only was the new arrival identical in form and features with Martin Guerre, but he showed himself familiar with circumstances which could be known only to Martin. Madame Guerre, whose attachment had never diminished, received him with tokens of the fondest affection; they lived together three years, and she presented him with two children; after which suspicion arose in the mind of Pierre Guerre, Martin's uncle. Bertrande, the deceived wife, was induced to invoke the vengeance of the law on the impostor. He was arrested. He made an eloquent defense, stoutly maintaining his identity with Martin Guerre; explained his absence, gave a history of the circumstances of the seven or eight years, served as a soldier and passed into the service of the king of Spain, at length returned to his wife, and was recognized by all. He answered every question of family history, the time of his birth, and the family relations, gave the day and year of his marriage, parties present, the incidents of the occasion, dresses of the guests, and the incidents of the next day. Spoke of his son Sanxi; Bertrande corroborated all these, but denied that he was her husband. One hundred and fifty witnesses were summoned — forty identified him unquestionably as Guerre. A great body of witnesses positively identified him as Arnaud du Tihl, called "Pansette," some having known him from his cradle. Sixty witnesses affirmed that so close was the resemblance they dared not announce an opinion. He was convicted and executed. He made a full confession. He was Arnaud du Tihl. He declared that imposture had first suggested itself to him on his being mistaken by intimate friends of Martin Guerre for that individual himself. From them and others he gleaned all necessary particulars of the past life and ways of the man he proposed to personate.

true name, the sheriff will be a trespasser, and is liable to an action of false imprisonment, and perhaps the plaintiff is so likewise, and they are equally liable, whether the court summarily interfere or not."[1]

Same — rule in England.

§ 615. A writ was sued out against a defendant by the name of *John*, and common bail filed against him by the same name, and the plaintiff declared against him as *Richard* (his real name), sued by the name of *John*, on which *Espinasse* obtained a rule *nisi* to set aside the proceedings for irregularity, against which *Richardson* now showed cause by citing *Oakley* v. *Giles*, 3 East, 167. But the court observed that the application to set aside the proceedings for irregularity was not made till after judgment, and when the defendant might have before pleaded in abatement; but here it is before plea, and the rule was made absolute.[2] Another case in England was one in which the defendant, whose christian name was *Edward*, was served with a writ, in which he was sued by the name of *William*, and not having appeared to it, the plaintiff filed common bail for him in his right name of *Edward*, *sued* by *the name* of *William*, and served him with notice in the same manner as to names, and took an interlocutory judgment, and gave notice of executing a writ of inquiry, and the proceedings, on motion, were set aside.[3]

False personation — claiming an estate.

§ 616. It is stated that at the period of the revocation of the edict of Nantes, the Sieur De Caille fled to Savoy, he being a Protestant. At Vevay his son died before his eyes. Some years after, an impostor pretended that he was the son of this person, and claimed his estate. He was imprisoned and his case remained before the Parliament of Aix for seven years. Hundreds of witnesses (among which were the nurses and domestics of the family) swore that he was the son of De Caille, and the public sentiment was strongly in his favor, as he was a Catholic. Testimonials sent from Switzerland that the real son was dead were of no avail; and the Parliament declared in 1706, that he was what he pretended to be. The wife of this impostor shortly after discovered that, although she had been silent, yet his elevation would not profit her; she, therefore, began to mention who he actually was, and on appeal the cause was transferred to the Parliament of Paris. The evidence adduced showed that the late son of De Caille had some distinguishing

[1] Wilks v. Lorck, 2 Taunt. 399.
[2] Delanoy v. Cannon, 10 East, 328.
[3] Dring v. Dickenson, 11 East, 225.

peculiarities in shape and make — he was of small height, and his knees approached each other very closely in walking. A long head, light chestnut hair, blue eyes, aquiline nose, fair complexion, and a high color, were his other characteristics. The stature of the impostor (Pierre Megé, a soldier) was, on the contrary, five feet six inches; and his black hair, brown and thin complexion, flat nose and round head, sufficiently distinguished him from the former individual. It was decided that he was an impostor.[1]

Casali — absent thirty years — returned.

§ 617. The same author gives another case substantially as follows: "A noble Bolognese named Casali left his country at an early day and engaged in military pursuits. He was supposed to have lost his life in battle; but, after an absence of thirty years, returned and claimed his property, which his heirs had already appropriated to themselves. Although there were some marks which appeared to identify him, yet the change in appearance was so great that none who remembered the youth were willing to allow that this was the individual. He was arrested and imprisoned. The judges were in great doubt and consulted Zacchias whether the human countenance could be so changed as to render it impossible to recognize the person. This distinguished physician, in his consultation, assigns several causes which might produce such an alteration, as age, change of air, ailments, the manner of life, and the diseases to which we are liable. Casali had departed in the bloom of youth; he then entered on the hardships of a military life, and if the narrative given by him was to be credited, he had languished for years in prison. All these causes, he conceived, might produce a great change in the countenance, and render it difficult to recognize him. The judges, on receiving this opinion, examined into the physical marks, and as the heirs could not prove the death of Casali, his name and estate were decreed to him and he put in possession thereof.[2]

Then the author adds these appropriate lines from *Marmion:*

> "Danger, long travel, want and woe,
> Soon change the form that best we know,
> For deadly fear can time outgo,
> And blanch at once the hair;
> Hard toil can roughen form and face,
> And want can quench the eye's bright grace,
> Nor does old age a wrinkle trace,
> More deeply than despair."

[1] 1 Beck Med. Jur. 675. [2] 1 Beck Med. Jur. 678.

Mistaken identity — singular cases — England and America.

§ 618. Singular cases are presented, one by Mr. Ram, in his Facts at page 459. He says: "The following account was published in the *Fayetteville North Carolinian*, as having occurred in Orange county, North Carolina. A married woman whose husband was off at work about thirty miles, was attacked one night by a negro man, who succeeded no further than to frighten her very much. She forthwith gave information, and had a free negro in the neighborhood arrested. The trial came on, and she swore positively that the free negro was the man. Another witness, an old man who was passing by the house just before the act was committed, also swore that he had met this free negro, and that the free negro spoke to him (at some distance), and asked him if the man who lived at that house was at home, and if there were any dogs there. The old man told him that the man was not at home, and that there were no dogs there. The free negro proved by two highly respectable young gentlemen, that he was at their father's house on the very night, and at the very hour when the act was said to be committed. What would have been done with the negro is hard to say, under the circumstances, had not the matter taken quite a new turn. It so happened, as many other strange things happen, that there was a slave man or boy in the neighborhood, the very counterpart of the free negro as to color, face and form, and belonging to the father of the young gentlemen who testified that the free negro was at their house on the night of the crime. The slave boy confessed that it was him that committed the crime, and not the free negro. The confession was made to the clerk of the court, and also to one of the counsel; of course he was immediately arrested. This put a new aspect on the matter, and the two prisoners were brought into court. The woman was then directed to point out the man, and she still declared it was the free negro. The old man witness was then called on, and he decided it was the free negro. Such is the tenacity with which people cling to first impressions, and originally expressed opinions. But what is stranger than all, the very counselor to whom the slave man made the confession, when asked to point out the man that made the confession, pointed to the free negro. But the clerk of the court, to whom also he confessed, knew the slave perfectly well, and had known him from a boy; he very readily corrected the mistake made by the counselor. Another singular circumstance is, that the woman should make such a mistake, when the free negro had been em-

ployed about the premises for a day or two in plowing, which circumstance also proved something in his favor, from the fact that he knew that the woman's husband was not at home, and that there were no dogs there, and consequently would not have asked the old man the questions which were asked by the slave. At the same time such knowledge might also be made to operate against him. The slave confessed that he had deceived the old man in this way; he hallooed to the old man and asked him how he was; and the old fellow returned the salutation and asked him if that was Ben (the free negro). The boy, finding that he was not known, did not discover himself, but carried out the deception by answering in the affirmative. The boy also said (as he was naturally a wild boy, many believed it to be true) that he had no intention of doing any harm; only intended to frighten the woman; that he did not start from home with any intention of such a thing, but just as he got near the house, the devil seemed to put it into his head to do some mischief. The free negro was released, and the slave boy was hung. The evidence of the woman and the old man made such an impression against the free negro, that some were loth to believe but that it was him; but the slave persisted in his statement of his own guilt, and said just before he was hung that it was all right; he was the one, and not the free negro."

Same — theft — mistaken identity.

§ 619. A case not dissimilar to the above is copied from an English paper by the same author, at page 461, entitled the case of Greenwood. "A young gentleman, articled to an attorney in London, was tried on five indictments for different acts of theft. A person resembling the prisoner in size and general appearance had called at various shops in the metropolis, for the purpose of looking at jewelry, books and other articles, with the pretended intention of making purchases, but managed to make off with the property placed before him, while the shopkeepers were engaged in looking out other articles. In each of these cases, the prisoner was positively identified by several persons, while in a majority of them an *alibi* was clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money, to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner; and those proved

that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. The prisoner was convicted on one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the prisoner had been mistaken, and that the prosecutors had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge upon which the conviction had taken place. Not many months before the last-mentioned case, a respectable young man was tried for a highway robbery committed in the neighborhood of Bethnal Green, in which neighborhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. The counsel for the prisoner called a genteel young woman, to whom the prisoner paid his addresses, who gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval, another young man of the name of Greenwood, who awaited his trial on a capital charge of felony, was introduced and placed by the side of the prisoner. The prosecutor was again placed in the witness box, and addressed thus: 'Remember, sir, the life of this young man depends upon your reply to the question that I am about to put. Will you swear again that the young man at the bar is the person who assaulted you?' The witness turned his head towards the dock, when beholding two men so nearly alike, he became petrified with astonishment, dropped his hat, and was speechless for a time, but at length declined swearing to either. The young man was of course acquitted. Greenwood was tried for another offense and executed, and a few hours before his death acknowledged that he had committed the robbery with which the other was charged."*

* In Harris' "Before and at Trial" (Kerr's Am. ed.), 372, it is said: "There are several interesting cases on record where the remains of persons supposed to be dead have been identified, and such death clearly proved by circumstantial evidence, and the supposed dead person subsequently reappeared; and also where persons have been identified as the party guilty of some heinous crime, and executed therefor, and it was subsequently ascertained that the person was not the wretch it was thought, but an entirely different and innocent one. Cases like this are so common that the testimony as to identity should be received with great caution, not only on criminal trials, but in the ordinary affairs of life. A case has been brought to our notice of a man having been singled out from a crowd of more than twenty people as the man who had done a certain act at a certain time, in the doing of which there was much conversation, and an occurrence of peculiar circumstances, all of which were detailed by the witness, who was a person of unusual intelligence and penetration. And yet the next day it was proved beyond a doubt that the man was not the person in question, and that he had been far away from the scene at the time of the alleged action. While it is true that we must all trust to the evidence of our senses, yet the testimony of very few people is entirely trustworthy as to identity.

Mistaken identity — Mrs. McCaffrey's case.

§ 620. Mr. Ram, in his work on Facts, gives a most singular case of mistaken identity, for which he might well afford to vouch, it having been published in a newspaper. He says: "The following

It is not every person, not even every intelligent person, who really sees what is before his eyes. Indeed, much of the discrepancy in evidence, which counsel and judges have to sift and harmonize, results from the fact, as every lawyer of experience knows, that people do not really see what they think they see. And as to personal identity there is such likeness as well as such difference between many individuals, that persons who have not a clear and quick perception of form and color and expression, may very easily mistake one man or woman for another, especially when they are led that way by the inquiries of an interested investigator."

"A case of the first kind above referred to occurred at Benton, Illinois, in 1866. A skeleton was found in the woods, and the jury of inquest declared it to be the skeleton of a young man named Henry Mahorn, who was supposed to have enlisted in the army; but on inquiry, it was found that he had not been heard from subsequent to the time of his supposed enlistment; which corroborated the finding of the jury. The clothing attached to the body was identified as having belonged to Mahorn, and certain teeth were found to have been extracted during his life-time, which teeth were found wanting in the skeleton. A young man named Daniel Williams was last seen in the company of Mahorn, being on their way to enlist as substitutes. Williams returned and reported that Mahorn had enlisted in the Tenth Volunteers. This was found to be false, and Williams was arrested and brought to trial. The circumstances pointing to the guilt of the prisoner were so strong that nine-tenths of the community were satisfied of his guilt. In the midst of the trial Henry Mahorn appeared in the court-room to the utter astonishment of all, he having enlisted under an assumed name, and being discharged by reason of the expiration of the time of service, had returned to his home to learn of his supposed death. The judge at once ordered the release of the prisoner."

"The action of the court in this case was very different from what it was in that of M. de la Privadière, which is one of the most singular instances of criminal precipitation that the annals of French justice furnish. Madame de Chauvelin, his second wife, was accused of having had him assassinated in his castle. Two servant maids were witnesses of the murder, his own daughter heard the cries and last words of her father, which were 'My God, have mercy upon me.' One of the maid servants falling dangerously ill took the sacrament, and while she performed the solemn act of religion, declared before God that her mistress intended to kill her master. Several other witnesses testified that they had seen linen stained with his blood; others declared that they had heard the report of a gun by which the assassination was supposed to have been committed. And yet, notwithstanding, it turned out after all that there was no gun fired, no blood shed, nobody killed. M. de la Privadière returned home; he appeared in person before the judges of the province, who were preparing every thing to execute vengeance on his murderer, and strange to relate, the judges, who were resolved not to lose their process, affirmed in his face that he was dead; they branded him with the accusation of an impostor for saying that he was alive; they told him that he deserved exemplary punishment for coining a lie before the tribunal of justice, and maintained that their procedure was more creditable than his testimony. It is related that this criminal process continued eighteen months before the poor gentleman obtained a declaration of the court that he was alive."

"One of the singular cases of bereavement by the sinking of the *Metis* a few years ago was complicated with interesting circumstances, and a strange confusion of personalities. A husband who was saved, lost the wife he had married only two days before, and finding a body which he recognized as hers, he had it coffined and taken to the house of her parents, where it was found to be the body of a stranger; but the hopes raised by this remarkable mistake were dashed by the discovery that the dead body of her who was really his wife had been picked up by a schooner and taken to Newport. This adds another to the numerous recorded cases of mistaken identity, which are almost countless, and which are becoming so frequent of late as very much to impair the value of the clearest and most positive testimony, as to whether a certain person was at a certain place at a certain time. If any testimony as to identity of person can be trusted, is it not that of a man as to the woman whom he has courted and just married, and whose face and other personal traits might be reasonably supposed to be clearly and indelibly fixed upon his memory?" * * * Another case is given, as follows: "We had recently from England the report of another case of mistaken identity, which, but for the ability of the person mistaken to establish an *alibi*, would

case, beyond all question authentic, we extract from a New York paper: 'On the 9th inst., the police found at 132 Cherry street, New York, and conveyed to the morgue, the body of an unknown woman, who was supposed to have been murdered. Her skull was fractured as if by a blunt instrument. Ellen Davis, 241 West Fourteenth street, called at the morgue the day after the body of the woman was sent there, and identified it as that of her mother,

have had deplorable and, perhaps, ruinous results. At the Salford Hundred Sessions, a young man about thirty years of age, named Higgins, a professor of music, and organist at St. George's Church, Manchester, was put upon trial on an indictment for stealing thirteen billiard balls about a month before. He had been arrested, handcuffed, and taken in irons from the Manchester detective office to the town of Oldham, where the magistrates committed him to prison for trial. He protested his innocence, and was able to procure bail. The evidence was clear and positive. A pawnbroker, with whom the balls were pledged, identified him as the man who had pawned them, and the pawnbroker's assistant gave the same testimony, and also swore that he saw this very man in a barber's shop in Manchester. Higgins was able to show that his reputation was perfectly good; but the evidence was so decisive that if he had happened to be alone at the time of the alleged pawning, and the presence in the barber's shop, he must surely have been convicted and imprisoned, and probably ruined for life. But it so happened that at the time the balls were pawned, he was with a lady and her daughters, who had known him for a long time, and to the latter of whom he was giving music lessons, and that he went from their house to a picnic where he was when the pawnbroker's assistant swore he was in the barber's shop. This was established so clearly that the jury acquitted him without leaving the box. But the man had been arrested, carried from Manchester to Oldham in irons, his reputation and liberty put in jeopardy, because two men mistook him for another man."

One of the most singular cases of personal resemblance was that which was tried at York some years ago. Mrs. Williams kept a public house in that place, and had in her employ as waiter a person by the name of Thomas Geddely. She was a blustering woman, and a favorite with customers, and had the reputation of being well-to-do. One morning it was found that her scrutoire had been broken open, rifled of a considerable sum of money; and as on that morning Thomas Geddely did not make his appearance, everybody concluded that he was the robber. A year afterward, or thereabouts, a man came to York under the name of James Crow, and picked up a scanty living for a few days as porter; unluckily, there was a great resemblance of Crow and Geddely, and he began to be mistaken for the thief. Many people addressed him as Thomas Geddely, but he declared that he did not know them; that his name was James Crow, and that he had never lived in York before. He was not believed, and when arrested Mrs. Williams was sent for; she singled him out from a number of people and called him Geddely, upbraided him for his ingratitude, and charged him with having robbed her. Upon his examination Crow affirmed stoutly as any man could that his name was not Geddely; that he had never known any person by that name; that he had never lived in York; that his name was Crow. Not being able to get any one else to substantiate his affirmations, and being forced to admit that he had led a vagabond life, he was not believed; and as the landlady of the inn and several other persons swore positively that he was the identical Thomas Geddely; that he was waiter when she was robbed; and a servant girl deposed that she had seen him on the morning of the robbery in the room where the scrutoire was broken open, with a poker in his hand; he was found guilty, condemned to death, and executed. He persisted to his latest breath in affirming that he was not Thomas Geddely, but that he was James Crow. The truth of the poor fellow's declaration was subsequently established to the satisfaction of all. Not long after Crow's unjust punishment, the real Thomas Geddely, who, after the robbery, had fled from York to Ireland, was apprehended in Dublin for a crime of the same stamp, and there condemned and executed. After conviction, and before execution, he confessed himself to be the very Thomas Geddely who had committed the robbery at York for which the unfortunate James Crow had suffered. A gentleman, a native of York, who happened to be in Dublin at the time of Geddely's execution, and who knew him at the time he lived with Mrs. Williams, declared that the resemblance between the men was so remarkable that it was next to impossible to distinguish their persons asunder." Harris Before and at Trial, pp. 387, 388.

Anna McCaffrey, and on the next day her sister, the other daughter, Kate McKeon, 247 Avenue B, called, and also identified the body. On the day of the funeral, Monday last, a number of friends of the late Mrs. McCaffrey looked at the corpse in company with the two women named, and recognizing the features, bade it a last adieu. The circumstance of the murder brought a large concourse to the funeral, which was quite imposing. The relatives went home afterward to mourn, and the friends to speculate on the shortness of life and the frequency of mysterious murders. It was an exciting topic and was not exhausted until the next day, when, to the astonishment of all, Mrs. McCaffrey walked into the house where her daughters were, and tartly inquired what they were blubbering about? The living Mrs. McCaffrey, it appears, was expected on a visit from Providence, R. I., to her daughters in this city, about the time they heard of the body awaiting identification at the morgue, but she delayed her visit a few days, and in the meantime her daughters gave decent burial to a poor unfortunate.'"[1] He gives another case which he says Southey cut from a journal of the day, of a coroner's inquest on the body of a girl found drowned, between whom and another young woman living there was a likeness so extraordinary, that a number of witnesses, among whom was the mother of the latter, swore positively to the body as that of the girl living. Toward the close of the inquest, however, the girl so supposed to be dead, walked into the room, and said to one of the most positive witnesses, "How could you make such a mistake as to take another body for mine?" The result was there was no evidence to show who the deceased was. These cases, be they true or imaginary, serve to illustrate the uncertainty even of positive testimony as to human identity.*

[1] Ram on Facts, 467.

*Wharton & Stille in their Med. Jur., vol. 3, § 636, say: "Besides the general appearance, dress, manner and voice of a person, peculiar marks upon the body are a very important, perhaps much the most reliable means of identification. Scars, burns, cicatrices, fractures, etc., upon some portion of the body of the prisoner, distinctly remembered by those who have seen them, will generally be received as evidence of identity. Very often where the scars resemble each other they may have been caused by different agencies. In such cases the evidence of physicians can be brought to testify as to the cause of the wound. Still such evidence is not always reliable, for a mark of such a nature may exist from exactly the same cause in two different persons. It goes, however, a great way in establishing identity, and is generally conclusive, unless rebutted by stronger contradictory evidence." Diverging from this, the same authors say, in the next section (637): "According to Böcker, the gender, age, size, stature, walk, bearing, color of hair and eyes, shape of eyes and nose, appearance of teeth, the condition of the hands, feet, bones and joints must be observed, together with changes produced by pregnancy; birth, miscarriage, disease, etc. Moles leave important evidence, which continue through life, unless cut away, and then a scar remains." The same authors give a case as having occurred in New York, some thirty-five years ago. At section 641, it is said: "In 1857 the body of a young

The Govan murder — mistaken identity.

§ 621. We frequently find cases of mistaken identity in which the innocent party suffers, but we find one English case of the kind in which a guilty party went free. The *Journal of Jurisprudence*

woman, upon whom an abortion had been produced, and who had been murdered by a blow upon the head, was found in a ploughed field near Newburgh, N. Y. The body was supposed to have been identified as that of Miss Sarah Bloom, and a man named Jenkins, with whom Miss Bloom was last seen, was arrested, and already a strong chain of circumstantial evidence, fixing, it was thought, the murder upon him, was made out. Jenkins insisted that the corpse was not that of Miss Bloom, and as a matter of fact, after four days, when the mysterious corpse had been buried, Miss Bloom made her appearance alive and well. The resemblance between herself and the corpse, however, was remarkable. 'The body,' so speaks a reporter, 'had a scar on the left eyebrow precisely where Sarah has one; the body had a cut on the main finger of the left hand precisely where Sarah has one of the same character; the body had a small black mole about half way between the ankle and the knee, on the shin bone, exactly where Sarah has one; but, strangest of all, the body had two toes of the left foot grown together, precisely like Sarah's, except that Sarah's are not grown together so far down on the joint; the toes of both feet of the body, like Sarah's, were pressed together from wearing tight shoes, and Sarah wears a coral ring on just the finger from which on the corpse a ring had been stripped.' These facts connected with Sarah's disappearance, the equivocal story of Jenkins as to where he had left her, the incident of her going in a direction where she did not hear of the discovery of the body, and was not herself heard from for four days, combined to make a case of indicatory evidence on which a conviction might well have rested."

An important case of mistaken personal identity was that of Bertrande De Rols v. Martin Guerre, alias Arnold du Tilh, given in Ram on Facts (4th ed.), 430, so often referred to and so familiar to the legal profession, it need not be given in full, and especially when the case, as given by Mr. Ram, covers so many pages, I cannot spare the space, further than merely to cite the case as one well worth the time required to read it. We find many cases of mistaken identity in our own country. One deemed worthy of note is the case of The People v. Thomas Hoag, alias dictus Joseph Parker, decided in New York in the year 1801 (City H. Rec. 124). The version of the case as given by Ram on Facts, Appendix, 442, is as follows: "The prisoner was indicted for that whereas Thomas Hoag, late of Haverstraw, in the county of Rockland, laborer otherwise called Joseph Parker, now of the city of New York, cartman, on the 8th of May, 1797, at the said city of New York, was lawfully married to Susan Faesch, and the said Susan then and there had for a wife, and that the said Thomas, alias, etc., afterward, to-wit, on the 25th day of December, 1800, at the county of Rockland, his said wife being then in full life, feloniously did marry, and to wife did take, one Catharine Secor, etc. To this the prisoner pleaded *not guilty*. Mr. Ricker, district attorney, prosecuted on the part of the people. Washington Morton and Daniel D. Tompkins were of counsel for the prisoner. The testimony in the cause was as follows: The first marriage was admitted by the counsel for the prisoner to be as stated in the indictment, and that the wife was still alive. On the part of the prosecution, Benjamin Coe testified that he was one of the judges of the Court of Common Pleas in the county of Rockland; that he well knew the prisoner at the bar; that he came to Rockland at the beginning of September, in the year 1800, and there passed by the name of Thomas Hoag; that there was a person with him who passed for his brother; but between those two persons there was no sort of resemblance; that the prisoner worked for witness about a month, during which time he ate daily at witness' table, and he of course saw him daily; that on the 25th day of December, 1800, witness married the prisoner to one Catharine Secor; that witness is confident of the time, because he recollected that on that very day one of his own children was christened; that during all the time the prisoner remained in Rockland county, witness saw him continually; he was, therefore, as much satisfied that the prisoner was Thomas Hoag, as that he himself was Benjamin Coe. John Knapp testified that he knew the prisoner in 1800 and 1801; he was then in Rockland county and passed by the name of Thomas Hoag; that he saw him constantly for five months, during the time the prisoner was at Rockland; that he was at the prisoner's wedding; that Hoag had a scar under his foot; the way that witness knew it was that he and Hoag were leaping together, and witness outleaped Hoag, upon which the latter remarked that he could not leap as well now as formerly, in consequence of a wound in his foot by treading on a drawing knife; that Hoag then pulled off his shoe and showed witness the scar under his foot, occasioned by that wound; the scar was very perceptible. Witness was confident that the prisoner at the bar was

gives it thus: "The following case of mistaken identity arose out of what was known at the Last Spring Circuit at Glascow, as 'the Govan murder,' in which an unfortunate cabman lost his life. It is so

Thomas Hoag. Catharine Conklin (formerly Catharine Secor) testified that she became acquainted with the prisoner in the beginning of September, 1800, when he came to Rockland; he then passed by the name of Thomas Hoag; that witness saw him constantly; that prisoner, shortly after their acquaintance, paid his addresses to her, and finally, on the 25th of December, married her; that he lived with her till the latter end of March, 1801, when he left her; that she did not see him again until two years after; that on the morning of his leaving her, he appeared desirous of communicating something to her of importance, but was dissuaded from it by a person who was with him, and who passed for his brother; that Hoag, until his departure, was a kind, attentive and affectionate husband; that she was as well convinced as she could possibly be of any thing in this world, that the prisoner at the bar was the person who married her by the name of Thomas Hoag; that she then thought him and still thinks him the handsomest man she ever saw.

Here the prosecution rested the cause, and the counsel for the defense called as a witness for the prisoner, Joseph Chadwick, who testified that he had been acquainted with the prisoner, Joseph Parker, a number of years; that witness resides in this city, is a rigger by trade; that prisoner worked in the employ of the witness a considerable time as a rigger; that prisoner began to work for witness in September, 1799, and continued to work for him till the spring of 1801; that during that period he saw him constantly; that it appeared from witness' books that Parker received money from witness for work which he had performed on the following days, viz.: On the 6th of October and 6th and 13th of December, 1800; on the 9th, 16th and 28th of February, and 11th of March, 1801; that Parker lived from May, 1800, till some time in April, 1801, in a house in the city of New York, belonging to Capt. Pelor; that during that period and since, witness has been well acquainted with the prisoner. Isaac Ryckman testified that he was an inhabitant of the city of New York; that he was well acquainted with Joseph Parker, the prisoner at the bar, and had known him a number of years; that witness and Parker were jointly engaged, in the latter part of the year 1800, in loading a vessel for Capt. Tredwell, of New York; that they began to work on the 20th day of December, 1800, and were employed the greater part of the month of January, 1801, in the loading of the vessel; that during that time the witness and Parker worked together daily; the witness recollected well that they worked together on the 25th day of December, 1800; he remembered it, because he never worked on Christmas day, before or since; he knew it was in the year 1800, because he knew that Parker lived, that year, in a house belonging to Capt. Pelor, and he remembered their borrowing a screw for the purpose of packing cotton into the hold of the vessel they were at work at, from a Mrs. Mitchell, who lived next door to Parker; that witness was one of the city watch, and that Parker was also at that time upon the watch; and that witness had served with him from that time to the present day, upon the watch, and never recollected missing him any time during that period from the city. Aspinwall Cornwall testified that he lived in Rutger street, and had lived there a number of years; that he kept a grocery store; that he knew Parker, the prisoner at the bar, in 1800 and 1801; that Parker then lived in Capt. Pelor's house; that he lived only one year in Pelor's house; that Parker, while he lived there, traded with witness; that witness recollected once missing Parker for a week, and, on inquiring, found he had been at work on Staten Island, on board one of the United States frigates; that, excepting that time, he never knew him to be absent from his family, but saw him constantly.

"Elizabeth Mitchell testified that she knew Parker, the prisoner at the bar, well; that in the years 1800 and 1801, Parker lived in a house adjoining to one in which witness lived; that the house Parker lived in belonged to Capt. Pelor; that witness was in habits of intimacy with Parker's family, and visited them constantly; that Parker being one of the city watch, she used to hear him rap with his stick at the door, to awaken his family upon his return from the watch in the morning; that she also remembered perfectly well, Parker's borrowing a screw from her on Christmas day in 1800; she offered him some spirits to drink, but he preferred wine, which she got for him; the circumstance of her lending the screw to him she was the more positive of, from recollecting, also, that it was broken by Parker in using it; that Parker never lived more than one year in Capt. Pelor's house, and from that time to the present day, witness had been on the same terms of intimacy with Parker's family; she, therefore, considered it almost impossible that Parker could have been absent from town any time without her knowing it; and she never knew him to be absent more than one week while he lived at Pelor's house.

remarkable in some respects that it deserves to be chronicled. At the Glascow Spring Circuit, 1877, three men named Thomas Farrell, Thomas Hannacher, and John Joyce were charged with the murder of Alexander M'Crae, cabman, by stabbing him with a knife. The

"James Redding testified that he had lived in the city a number of years; that he had known Parker, the prisoner at the bar, from his infancy; that Parker was born at Rye, in Westchester county; that Parker, in the year 1800, lived in Captain Pelor's house; that witness saw him then continually, and never knew him during that time to be absent from town during any length of time; that witness particularly remembered that some time in the beginning of the month of January, 1801, while Parker lived in Captain Pelor's house, witness assisted Parker in killing a hog.

"Lewis Osborne testified that he had been acquainted with Parker, the prisoner at the bar, for the last four years; that witness had been one of the city watch; that from June, 1800, to May, 1801, Parker served upon the watch with witness; that at first Parker served as a substitute; that witness remembered that Parker a few days after Christmas in 1800, was placed upon the roll of the regular watch, in place of one Ransom, who was taken sick; witness was certain it was in the period above mentioned, because that was the only time witness ever served upon the watch; that during the above period witness and Parker were stationed together while on the watch, at the same post. Witness was certain that Parker, the prisoner at the bar, was the person with whom he had served upon the watch; and was confident that during that time, Parker was never absent from the watch more than a week at any one time. The defendant's counsel rested.

"Moses Anderson, on behalf of the prosecution, sworn. I have lived in Haverstraw, in Rockland county, since the year 1791. I know the defendant well. He came to my house in the beginning of September, 1800. He then passed by the name of Thomas Hoag; worked for me eight or ten days, and from that time until the 25th of December following, passed almost every Sunday at my house. During his stay in our county I saw him constantly. If he is Thomas Hoag, he has a scar on his forehead which he told me was occasioned by the kick of a horse. He had also a small mark on his neck. He had also *a scar under his foot, between his heel and the ball of his foot*, occasioned, as he said, by treading on a drawing knife. *That scar is easy to be seen.* His speech is remarkable; his voice is effeminate and he speaks quick and lisps a little (all these marks and peculiarities were found true on examination). He supped at my house the night of his marriage in December, 1800. I have not seen him until this day since he left Rockland, and this is between three and four years ago. I am perfectly satisfied in my own mind that he is Thomas Hoag.

"Lavinia Anderson, sworn. This witness corroborated the testimony of the last, her husband, in relation to the identity of the defendant, Thomas Hoag. She further testified that she washed for him, and there was no mark on his linen; and that during his stay at her husband's house, the person who passed for the defendant's brother, having cut himself severely with a scythe, complained much of the pain, when Thomas Hoag told him he had been much worse wounded, and showed the scar on his foot. She also testified that about a year ago, after a suit, in which the identity of the defendant's person came in question, had been brought in the justice's court in this city, she was here; and having heard much said on the subject, was determined to see him and judge for herself. Accordingly she went to his house, but he was not at home. She then went to the place where she was informed he stood with his cart, that she there saw him lying on his cart with his head on his hand; that in that situation she instantly knew him, that she spoke to him, and when he answered she immediately recognized his voice—that it was very singular; it was shrill, thick, hurried, and something of a lisp; that Hoag had also a habit of shrugging up his shoulders when he spoke; which she also observed in prisoner; said he had been told she was coming to see him and it was surprising people could be so deceived; and that prisoner asked if she thought he was the man; to which witness replied that she thought he was, but would be more certain if she looked at his forehead; that she accordingly lifted up his hat and saw the scar upon his forehead, which she had often before seen, and he then told her it was occasioned by the kick of a horse. Witness added that it was impossible she could be mistaken; the prisoner is Thomas Hoag.

"Margaret Secor, sworn. About four years ago I lived in Rockland with my father, Moses Anderson. The defendant Hoag came to our house in September, 1800, and remained in Rockland five or six months. He had a scar on his forehead. He used to come every Saturday night to my father's house to spend the Sunday with us. I used to comb and tie his hair every Sunday,

facts of the case admit of short narration. About nine o'clock on the preceding New Year's eve, being a Sunday, three employees in the dockyards of Govan were being driven home in a cab from Renfrew, a distance of three miles. When about half-way, they came upon two men struggling together, and as one of the two was shouting for help

and thus saw the scar. About two years ago I married and came immediately to this city to live. After I had been here a fortnight, I was one day standing at our door when I heard a cartman speaking to his horse, and immediately recognized the voice to be that of Thomas Hoag; and upon looking at him, saw the defendant, and instantly knew him. As he passed me he smiled and said, 'How d' ye do, cousin?' The next day he came to our house and asked me how I knew he was the man? I replied that I could tell better if he would let me look at his head. Accordingly I looked, and saw a scar upon his forehead, which I have often remarked on that of Hoag. After I had seen the defendant in the street, I mentioned it to my husband, who told the defendant of it, and my husband brought him to the house. I am confident he is the person who passed at Rockland as Thomas Hoag.

"James Secor, sworn. I have been married about two years and a half, and brought my wife to town about a week after our marriage. I knew Hoag in Rockland, and have repeatedly seen him there; and when I saw him at our house in town, I thought him to be the same person. My wife had remarked to me that Hoag had a remarkable scar on his forehead; and when he was at my house, I saw the scar which she had described, on his head.

"Nicholas W. Conklin, sworn. I live in Rockland county and know the defendant. His name is Thomas Hoag. I cannot be mistaken in the person. He worked a considerable time for me; and during that time ate at my table. He was a stranger, and understanding that he was paying his addresses to Catharine Secor, I took a good deal of notice of him. I thought him a clever fellow. He lived in a house belonging to me. When I saw him at this place I knew him instantly. His gait, his smile, which is very peculiar, and his very look is that of Thomas Hoag. I have endeavored, but in vain, to find some difference in appearance between the defendant and Hoag. I am satisfied in my own mind that he is the same person. I think he is about twenty-eight or thirty years old, and had a small scar on his neck.

"Michael Burke, sworn. I live in Catherine street, and formerly lived in Haverstraw. I saw the defendant there several times before and after his marriage in December, 1800. I am as well satisfied as I can be of any thing, that he is the same person I saw at that place. About two years ago, and at the time of the Harlem races, I met him in the Bowery, when he spoke to me and said: 'Am I not a relation of yours?' I replied that I did not know. He said, 'I am; I married Caty Secor.' On his cross-examination, this witness admitted that he had had a quarrel with the defendant by reason of having called him Thomas Hoag; that the above conversation was after the trial in the justice's court. The witness, when first asked whether he was at that trial, said he was not; but when interrogated particularly, whether he was not in the court-room at the time, admitted that he was.

"Abraham Wendell, sworn. In the latter part of the year 1800, I knew Thomas Hoag at Haverstraw. I was intimate with him, and knew him as well as any man. I have worked with him, breakfasted, dined and supped with him, and often have been at frolics with him. The defendant is the same man. I have no doubt whatever about it. About a year ago, I was in this city, and was told by some persons that Hoag had beaten the Haverstraw folks in a suit, wherein his identity was in question. I told them I could know him with certainty, and they said they would send him down. I was on board my sloop, saw him one hundred yards off, coming down street, and instantly knew him. He came up to me and said, 'Mr. Wendell, I am told that you will say you know me.' I replied, 'So I do; you are Thomas Hoag.' I am as confident he is the person as I am of my own existence.

"Sarah Conklin, sworn. I live in Haverstraw. In September, 1800, a person calling himself Thomas Hoag was intimate at our house, and called me aunt. I am sure the defendant is the same person, and never can believe that two persons can look so much alike. He talks, laughs, and looks like Hoag, whom I would know among a hundred people by his voice. The defendant must be Hoag.

"Gabriel Conklin, sworn. Thomas Hoag was at my house at Haverstraw often in September, 1800. The defendant must be Thomas Hoag; he had a scar on his forehead, and a small scar just above his lip. (*Defendant had these marks.*) The counsel for the prosecution again rested.

and seemed to be in danger, the cabman pulled up his horses, and two of the persons inside got out and went to see what was the matter. Apparently, however, resenting this interference, the two combatants, on their approach, immediately ceased their struggle, and turned to attack the newcomers. Seeing this, the latter immediately ran back and got into the cab; but before the cabman could get the door of it closed, he was stabbed by one of the two assailants, who had now come up. He was able, however, to mount the box and drive a short distance; but just as he was starting, one of the two men while attempting to get at the persons in the cab was kicked in the left cheek by one of these, receiving a severe and distinct wound. After driving a few hundred yards, the cabman, feeling faint, got inside the cab; and an examination being made, a deep wound, caused by a knife, was found on his stomach. As by this time the cab was approaching Govan, the occurrence was quickly made known to a large number of people, who were met upon the road; and a hue and cry was at once raised. Thomas Farrell was caught a few minutes after the affair was made known, while running along the streets of Govan, was taken into the presence of the cabman almost immediately, and was identified by him as one of the men who had assaulted him. On the following day he was brought before the three men who had been passengers in the cab, and was likewise identified by all of them, one of them putting his identification apparently beyond dispute by pointing out that he had, as just mentioned, kicked one of the assailants on the left cheek, leaving a mark; and Farrell was seen

"James Juquar, sworn on behalf of the defendant. I have known Joseph Parker, the defendant, seven years, and have been intimate with him all the time. We worked together as riggers until he became a cartman. I knew him when he lived at Pelor's house, and never knew him absent from the city during that time for a day, except when working on a frigate, about a week, at Staten Island. In 1799, he burnt himself on board the Adams frigate, and then went to his father's in Westchester county, and stayed nearly a month. He was very ill when he left town. I went with him and brought him back. He was not quite recovered. I recollect, perfectly, of Parker and others passing Christmas eve at my house in the year 1800, when he lived at Pelor's house.

"Susanna Wendell, sworn. I have known the defendant six years; he married my daughter. When he lived in Pelor's house, his wife was ill, and I visited her often and saw him there almost daily. He has never been absent from the city more than a week since his marriage except the time when he went to his father's in Westchester." It was agreed by the respective counsel, that the defendant should exhibit his foot to the jury, that they might ascertain whether there was *that scar* which had been mentioned by several of the witnesses for the prosecution. Upon exhibiting his foot, no mark or scar could be seen upon either of them.

"Magnus Beekman, sworn. I am captain of the city watch of the second district, and am well acquainted with the defendant, Joseph Parker. He has been for many years a watchman, and as such has constantly done his duty. Upon recurring to my books, where I keep a register of the watchmen, and of their times of service, I find that he was regularly on as a watchman during October, November and December, 1800, and in January and February, 1801, and, particularly, he was upon duty the 26th of December, 1800. The jury, without retiring, found a verdict of *not guilty*."

to have such a mark. The police authorities, being upon this satisfied that Farrell was guilty, looked about for his associates in the crime. Two men, named Hannacher and Joyce, were soon arrested upon suspicion, and Hannacher was identified by the cabman before he died, and by the three others, as having been participant. Joyce was not identified. In the declarations which Hannacher and Joyce separately made, they agreed in stating that they had met Farrell (whom they had not previously known) in Renfrew, on the Sunday, and had spent part of the day with him there, drinking, in an inn; that they had started together to go home to Govan where they all resided, in the evening; but that Farrell had soon left them and gone on along the public road in front, and that they themselves had ultimately gone home by a footpath through some fields, and had not seen the cab, and knew nothing of the occurrence. In addition to this they made certain other statements, as to their having gone home to their lodgings the same night, etc., which were found, however, to be quite false. Farrell's statement in his declaration was this: He admitted having been in Renfrew during the day, having met Hannacher and Joyce there, and having been drinking with them in an inn. He further stated that he had started to walk to Govan with them in the evening, but that just outside Renfrew he had parted company with them, that he had walked home alone, had met no cab, and knew nothing of the occurrence. He accounted for the cut on his cheek by saying that shortly after leaving Renfrew, he had, under the influence of the drink he had taken, fallen on the road and cut it. Shortly after Farrell's declaration had been made, two persons came forward and made a statement that they had been walking from Govan to Renfrew on the evening of the event, and had met Farrell (whom they personally knew) near Govan, and that several minutes afterward they came upon two men fighting, and immediately after met a cab which was approaching the combatants when they passed it. This, it should be noticed, corroborated a statement made by Farrell in his declaration, that he had met these men. It should also be added that, so far as the external appearances went, the wound on Farrell's cheek might have been caused either by a kick or a fall. These then were the leading facts which the crown prosecutors had before them, and, in preparing the case for trial, they found themselves placed in a difficult dilemma. It was, in the first place, clear that the declarations made by Hannacher and Joyce were false, Hannacher being distinctly identified; and in the second place

that, as all the evidence went distinctly to show, only two persons were directly concerned in the crime. The cabman and the men in the cab were certain that only two persons were participants and there were here three prisoners. But naturally the crown authorities were quite satisfied, looking to their declarations, and other incidents, that Hannacher and Joyce had been together all the evening, and that Joyce if not accessory, at least, knew all about the affair. In these circumstances, Farrell and Hannacher being clearly identified by all the persons who were present, and Joyce not being identified, it was resolved to give Joyce the opportunity of becoming a witness, relieving him thereby as 'Queen's evidence' from all liability to prosecution. Joyce expressing willingness, his recognizance was accordingly taken, and was to the effect that Farrell and Hannacher were guilty of the deed; he himself being close by at the time, but not taking part in it. As the day of the trial, however, approached, Joyce, on being again carefully questioned on the part of the crown, and by the agent for the defense, displayed great hesitation and confusion in replying to interrogatories put to him, and became self-contradictory in details. And finally, on the day previous to that fixed for the trial, Hannacher made a confession to the agent for the defense, to the effect that Joyce and he were alone concerned in the crime, and that Farrell was not present at all. Upon this being intimated to the crown prosecutors, they were, reading the evidence in a new light, ultimately forced to the conclusion, even in the face of all the direct evidence of identification, that Joyce was, after all, the guilty party, and that Farrell was wholly innocent. And accordingly the case against Farrell was at once withdrawn, and Hannacher, having pleaded guilty to culpable homicide, received a sentence of penal servitude. Thus the guilty Joyce escaped as 'Queen's evidence.' Yet no possible blame can be attached to the crown prosecutors for the mistake, as the case, as one of mistaken identity, is most remarkable. We have Farrell distinctly identified by the dying cabman within an hour after the occurrence, and on the following day by the three other persons present. And what especially seemed to place this identification beyond all reasonable doubt was the fact that Farrell had a mark on the left cheek, on the very spot where one of the men had kicked his assailant."[1]*

[1] 12 Irish Law Times, 38.

*The following case of "an innocent sufferer" is given by Mr. Phillips, in his famous cases of Circumstantial Evidence, vol. 2, p. 92, as follows: "About the year 1766, a young woman who

Pentonville prison case — mistaken identity of a prisoner.

§ 622. The Irish Law Times says the following proceedings have been recently taken in connection with the death, in the Pentonville convict prison, of Edwin Lewis, who, by some mistake of the police, was arrested and sent to prison as Duval, a noted convict, who hav-

lived as servant of a man of very depraved habits in Paris, having rejected certain dishonorable proposals that he made her, became the object of his revenge. He clandestinely put into the box where she kept her clothes, several things belonging to himself and marked with his name; he then declared that he had been robbed; sent for a constable, and made his deposition. The box was opened, and he claimed several articles as belonging to him. The poor girl being imprisoned, had only tears for her defense, and all that she said to the interrogatories was that she was innocent. The judges, who in those days seldom scrutinized any case very deeply, pronounced her guilty, and she was condemned to hang; she was led to the scaffold, and very unskillfully executed, it being the first essay of the executioner's son in this horrid profession. A surgeon bought the body; and as he was preparing in the evening to dissect it, he perceived some remaining warmth; the knife dropped from his hand, and he put into bed the unfortunate woman he was going to dissect. His endeavors to restore her to life succeeded. At the same time he sent for an ecclesiastic, with whose discretion and experience he was well acquainted, as well to consult him on this strange event, as to make him witness of his conduct. When the unfortunate girl opened her eyes and saw the figure of the priest (who had features strongly marked) standing before her, she thought herself in the other world. She clapsed her hands with terror and exclaimed: 'Eternal Father! you know my innocence; have mercy on me!' She did not cease to invoke the ecclesiastic, and it was long before she could be convinced that she was not dead, so strongly had the idea of punishment and death impressed her imagination. The accuser was unexpectedly confronted with his victim. Terrified by the sudden appearance of one whom he believed dead, his courage failed him, and falling on his knees, he confessed his atrocious crime."

Another case is given by the same author, at page 16, of importance, though not altogether germane to this discussion, and whether well authenticated or not, seems to come within the range of probability, as follows: "A German violin-maker, intending to return home, had bought his wife a silver coffee-pot, which was left standing on the table in his chamber. Some one knocked at the door, and two Jews entered. One bespoke a violin; the other, while he was conversing, snatched up the coffee-pot and ran. The German looked around and missed the coffee-pot, but the other Jew said to him, 'Do not be uneasy, my friend; go with me, and I will make my friend give you back your coffee-pot. It is only some trick; he is a mad-headed fellow.' The poor German went with the Jew, who brought him into a chamber where were four other Jews, and his coffee-pot on the table. He took it and said, 'God be praised, I have found it once more.' The Jews answered not a word; and the German returned home with the coffee-pot. Forthwith went the five Israelites to the justice, and swore that the German had entered their chamber and stole thereout a silver coffee-pot. A constable attended them to the German's house. The Jew said: 'That is my coffee-pot.' 'Yes, that is yours,' said the others. The German was taken into custody, and being destitute of witnesses, was hung upon the evidence of the five Jews." See Harris Before and at Trial, 339.

The same author, in vol. 2, p. 127, gives a case in Ohio, thus: "Several years since a man, residing about seventy miles from Cincinnati, died from the effects of poison, and suspicion rested on a near neighbor. He was arrested and brought to trial. The wife of the deceased made positive oath that the prisoner at the bar was at her house previous to the sickness of her husband, and administered the poison in a cup of coffee, as she had reason to believe. It was also proven that the prisoner purchased poison in Cincinnati, about that time, of the description found in the stomach of the deceased. In defense, the prisoner admitted that he purchased poison, but declared that he had purchased it for the woman who had sworn against him, and who said, when she sent for it, that she wished to employ it to exterminate the rats; that he gave it into her hand on his return, and was utterly ignorant of when or how it was administered to her husband. This story, however, availed nothing with the jury. The woman was a religious woman, and her story was entitled to credit. He was accordingly convicted and hung, protesting his innocence to the hour of his death. A few years passed, and the guilty woman confessed, not long before her death, that she was the guilty person, and that the man who was executed knew nothing of the circumstances of the murder." See Harris Before and at Trial, 358.

ing been out of prison as a license holder, or ticket-of-leave man, had broke the terms of his license by committing felony. On Saturday, the 30th of January, the deceased man, while the worse for liquor, was accused of having a piece of meat in his possession, and on Monday, the 1st of February, was placed before Mr. Hannay at Worship street on the charge. Lewis, to prevent his family being disgraced, gave a false name, viz.: Davis; also a false address. He was sentenced by the magistrate to six months' imprisonment, and sent to the county prison, Coldbath fields. He was a thin, delicate man, and while at Coldbath fields, was under the care of the surgeon, at times being in the infirmary or convalescent wards. On his release at the expiration of his term, he was seized by the police and carried directly back to prison. While on the way, in the cab, he told the two police officers that the constable had made a mistake, and that he was not the man the constable had sworn him to be. His protests were unheeded and he was handed over to the authorities at the prison, whose duty it was to carry out the order of the Home office, which set forth that he was William Davis, who had been convicted of burglary in 1868, and sentenced for seven years and released on ticket-of-leave in 1874, and had broken its terms, etc. After he was in the hands of the authorities, he repeated his protest from time to time, that he was not the leave-of-absence man; that the police had made a mistake, or sent him there purposely, and he demanded his liberty. This was of no avail without an order from the Home office. And the unfortunate man, who was very weak and ill, gave way to despair, grew worse, and the officials in the governor's office informed his relations of his condition; they visited him and applied for his release, but were informed that they must apply in writing, which they did, and the delay in the circumlocution in office, and to get up the facts in the case, occupied many days, and in the mean time this innocent man died in prison, all resulting from mistaken identity, and the delay of justice, and it was not a very great source of comfort to his father, when, some time after the death of his son, he received a communication from the secretary of State, regretting the circumstance and apologizing for the delay.[1] (Condensed report.)*

[1] 9 Irish Law Times, 484.

* In the revised edition of the New York Medico-Legal Papers (third series) at page 367, in an article by James Appleton Morgan, Esq., appears the following: "At first this question of personal identity might seem to be the simplest that could possibly come before a court. But the fact is precisely the reverse. Even in life, the question whether a living man, speaking and moving,

Mistaken identity — in ancient history.

§ 623. Pliny, in his Natural History, devotes a chapter to *Exempla Similitudinum*, in which he gives many instances of characters in ancient history, of great resemblance, and goes largely into the important question of mistaken identity, not only in comparatively modern times, but among the ancients, and now there is more danger to be apprehended than formerly. If there be, as often asserted, no two individuals precisely alike, yet the vast increase of human beings on earth must increase the variety, and hence, in a corresponding degree, increases the danger of mistaken identity and the necessity, in criminal practice, and especially in cases of homicide, in requiring strict proof of the *corpus delicti*. Pliny states that it was almost impossible to distinguish Pompey the great, from the plebeian Vibias; that Cneus Scipio was called "Seropion," from a strong likeness he bore to a slave of that name; while the consuls Lentulus and Metullus were called after certain actors to whom they bore a striking resemblance. That a fisherman of Sicily resembled the pro-consul, Sura, not only in features, but also in possessing a peculiar defect in his speech.

capable of being watched and questioned, is one individual or another, has proved itself over and over again, by far, instead, the most perplexing. Cases of mistaken personal identity have been all but innumerable, since the days of Antipholus of Syracuse and his twin brother Antipholus of Ephesus and the two Dromios, their servants. 'Cases of resemblance' we remember is the title of one chapter of Pliny's Natural History, wherein the author cites the instances of the great Pompey, of whom personally the plebeian Vibias was the double and counterpart; the Consuls Lentulus and Metullus; and the impostor Artemon, the double of Antiochus, King of Syria. And without referring to the very recent Tichborne trial, in which no less than eighty-five witnesses — under the most rigorous and vigorous cross-examination that possibly the world has ever seen — maintained positively that a certain Englishman was Sir Roger Charles Doughty Tichborne, a baronet, while a corresponding number were equally unshaken in their conviction that he was Arthur Orton, a Wapping butcher. The books are full of puzzles of this nature. Jack Cade, the pretended Mortimer; Lambert Simnel, the false Earl of Warwick; Perkin Warbeck, the sham Duke of York; the various personators of Don Sebastian, the lost King of Portugal; Jemeljan Pugatscheff, the sham Peter III; Padre Ottomau, the supposed heir of the Sultan Ibrahim; Mahommed Bey, the counterfeit Viscount de Cigala; the case in 1748, of the false Prince of Modena; the monk Otrefief, claiming to be Prince Dimitri; Joseph, the pretended Count Solar; John, claiming to be the Earl of Crawford; John, claiming to be Sir William Courtenay; James Annesley, calling himself Earl of Anglesea; Hans, claiming to be Earl of Huntingdon; Rebok, the counterfeit Voldemar, Elector of Bradenburgh; Arnold Du Tihl (or Dutille) the pretended Martin Guerre, who successfully deceived the living wife so far as to live with her three years, surrounded by four sisters and two brothers-in-law, and beget two children before his discovery, and whose case came before the Parliament of Toulouse in 1560, wherein forty witnesses on each side swore to his personality; Pierre Mege, the fictitious DeCaille; Michael Feydy, the sham Claude de Verre; the claimants to the Banbury and Douglass Peerages; James Percy, calling himself Earl of Northumberland; Alexander Humphreys, the pretended Earl of Stirling; William George Howard, the false Earl of Wicklow; the numerous so-called heirs of the Stuarts; John Hatfield, claiming to be the Hon. Alexander Hope; Thomas Provis, calling himself Sir Richard Smythe; Lavinia Jannetta Horton Byves, who is now, or was within a few months living in England, calling herself Princess of Cumberland; Amelia Radcliffe, pretending to be Countess of Derwentwater." And many other instances are given.

In the Irish Law Times, vol. 20, p. 354 (1886), appears the following: "No coroner's jury

Same — false personations — ancient history.

§ 624. The same author refers to this subject as one which has given to governments and courts so much trouble. The false Demetrius is one of the notable figures in Roman history. Boris, the artful and wicked minister of the Czar Basiforitz, upon the death of his sovereign, assassinated Demetrius, the rightful heir to the crown, and usurped the throne. A monk "as like the murdered prince as one cherry is like another," said a chronicler, proclaimed that he was Demetrius, and that a substitute had died from the poison administered by Boris. The mother and all the most intimate friends of Demetrius were called in and recognized him by marks and peculiarities which they said could not be mistaken. The revolt was raised, and this monk was crowned czar of all Russians. A similar imposture was perpetrated by a Cossack, who successfully passed himself off for the Emperor Peter, whom he claimed had escaped from the assassins. No less than three persons were so like the Dauphin, the son of Louis XVI, who died in prison during the reign of terror, that they were induced to personate him, and each had many dupes and followers amongst the leading figures around the French throne.[1]

[1] 1 Southern L. J. 392.

has probably ever looked upon a stranger scene than that which was presented to the good citizens, who the other day assisted the investigations of Mr. St. Clare Bedford into the identity of a man who was found drowned near Charing-cross bridge last Monday evening. The principal witness at the inquest was one Thomas Kirby, a clerk in the employ of Messrs Carter & Co., the seed merchants, who identified the deceased as a fellow clerk of the name of Wilson, who was engaged temporarily from December last to the beginning of June for the work of packing samples and sending them off by post for advertising purposes. Kirby recognized him, among other reasons, because of 'a peculiarity in the finger of the right hand' — a mark, to the existence of which, Dr. Howard, who had examined the body, also testified. To complete the evidence establishing the identity of the deceased, Inspector Hodson, of the Thames police, stated that a metal box, answering to the description given by the witness Kirby, was found in the drowned man's pocket. In short, the theory that the corpse was that of Charles John Wilson seemed to be unanswerably made out. There could be only one opposing fact which would avail to overthrow it; but at this stage of the inquiry, that fact presented itself in the person of Charles John Wilson, himself, who walked into the court with Inspector Hodson. What effect he produced by this dramatic entrance — too dramatic to need the assistance of lowered lights or the ghost music from 'the Corsican Brothers' — the reporter reporteth not; but it must have been more profound than would appear from the observations, self-contained to the point of frigidity, with which his narrative concludes. The coroner who seems to have admirably retained his presence of mind, remarked that 'this was a startling case of mistaken identity,' to which the foreman of the jury added, that 'many a man had been hanged on less circumstantial evidence.' * * * Had somebody been present who was last seen in Wilson's company, and who might have had a conceivable motive for putting him out of the way, and had it occurred to Wilson himself at this juncture to take a trip to the Antipodes, it is quite possible and even likely that it might have gone hard with that somebody on a prosecution for murder. In a former period of our criminal jurisprudence when evidence as to the existence of what lawyers call the *corpus delicti* was less strictly insisted on than it is nowadays, instances of persons being condemned and executed for murders which had never, in fact, been committed at all, were by no means unknown."

Uncle executed — niece returned home.

§ 625. Among the many cases of curious and singular facts, of fraud, deception and mistaken identity, there is a case given, to the effect that an uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for some offense, she was heard to say: "Good uncle, do not kill me!" After which she could not be found. The uncle was committed on suspicion of having murdered her, and was admonished by the judge of the Assizes to find out the child by the next Assizes. Being unable to discover his niece, he brought another child, dressed like his niece, and resembling her in person and years; but, on examination, the fraud was detected, and upon the presumption of guilt which these circumstances afforded, he was found guilty and executed. The child afterward reappeared, when of age, and claimed her land. On being beaten by her uncle, she had run away, and had been received by a stranger.[1]

Corpus delicti — how to be proved.

§ 626. As a general rule, there can be no conviction for murder unless the *corpus delicti* is shown; *i. e.*, there can be no murder unless some person is shown to have been killed. And even where the father and mother of a bastard child threw it into the dock and the body was never afterward found, an acquittal was directed, because the flow of the tide might have carried out the body of the living infant.[2] But there are well-recognized exceptions to the general rule, that the body of the deceased must have been discovered; notably, where the murder has been committed on the high seas, at a great distance from the shore, and the body was thrown overboard; or where the body has been entirely consumed by fire, or so that it is impossible to identify it.[3] A sailor having been seen to throw his captain overboard, it was put to the jury, on the circumstances of a previous scuffle between them, a billet of wood on the deck, and stains of blood on the deck and on the prisoner's clothes, whether he had not killed the deceased before he threw him overboard; and so the dead body might be said to have been seen by the witnesses within the rule.[4]

Dead body — raised — indictment — mistake.

§ 627. Mr. Beck gives a statement of a singular and curious case

[1] 1 Archb. Crim. Pr. & Pl. 731. Citing Roscoe Cr. Ev. 18.
[2] 1 Archb. Crim. Pr. & Pl. 731. Citing Russ. Cr. 682.
[3] People v. Wilson, 3 Park. 199.
[4] 1 Archb. Crim. Pr. & Pl. 731. Citing Hindmarsh's case, 2 Leach, 571.

of the identification of a dead body. It appeared that a resurrection man was tried for the raising of the body of a young woman from the churchyard of Sterling, nine weeks after death; the body was discovered and identified by all the relations, not only by the features, but by a mark which they believed could not be mistaken, she being lame in the left leg, which was shorter than the right. There was a good deal of curious swearing as to the length of time after death that the body could be recognized; but the jury was convinced that the *libel was proven*, and gave a verdict accordingly. The writer says: "Now I am certain that this was not the body of the woman who was taken from the churchyard at Sterling, but one that, at least six weeks after the time libeled, was buried in the churchyard of Falkirk, from which she was taken by this man, who also took the other, for which he was tried. She was also lame of the left leg; thus, though guilty of the offense laid to his charge, he was found guilty by a mistake of the *corpus delicti*."[1] This, and similar instances of mistaken identity of the dead, shows the utter unreliability of expert testimony in such cases. When experts disagree, we generally have, as above stated, "curious swearing."

Taking dead bodies from the grave.

§ 628. At common law, though it was not larceny to take from the grave a dead body, as no one had a property therein, yet it is an offense against decency to take the dead body with intent to sell and dispose of it for profit; and such offense is punishable with fine and imprisonment as a misdemeanor. In England, in one case, an indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, willfully, unlawfully and indecently, did take and carry away, with intent to sell and dispose of the same for gain and profit; and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offense that no case was reserved.[2]*

[1] 1 Beck Med. Jur. 516, note.

[2] 2 Archb. Crim. Pr., 1463, note. Citing Russ. & Ry. 365, 366. And see cases cited by Archbold at pages 1463, 1464 and 1465.

* A singular case of mistaken identity occurred in Washington city, among the policemen of the city, on September 7, 1891, as reported in the *Post* of the 8th. "Three policemen, a desperate prisoner, a couple of hundred excited citizens, and a bull dog figured yesterday afternoon in about the liveliest sensation South-east Washington has experienced in a long while. The affair was a badly complicated one, and the dog was the only participant which escaped

without injury, while the officers were badly used up, the using-up process being administered by the officers themselves. The whole affair was clearly a case of mistaken identity, but in future they will know each other whether they meet at a prayer meeting or a dog fight. John Stewart, a white man, who has spent many years of his life in the penitentiary and jail, was the cause of the whole trouble. He was sent to the penitentiary for stealing copper from the navy yard, and Officer Bob Dyer succeeded in making him a boarder at the jail for house-breaking. His offenses have been various, but after his last confinement Stewart promised to reform, and began to abandon his ways. He lived with his sister, Mrs. Higgs, on Virginia avenue near Eighth street, south-east, and did show a considerable disposition to reform; but yesterday morning he began drinking, and before the shades of evening came, he was in a mood to resent any little insult. A young boy named Jim Langley owed Stewart five cents, and he was asked to pay it. Refusing to do so, Stewart cuffed him, and some one called 'police.' Officer Horton responded, and after a struggle got Stewart to the call box, but while the policeman was turning in the patrol call, the prisoner made a break and escaped. As he ran down the street, Officer Cramer, who was in citizen's clothes, pursued him, and catching up with him, a pitched battle ensued, in which the officer's bull dog took part, biting Stewart on the leg in three places. 'Little Cramer,' as he is called, was not enough for Stewart, who knocked him down with a rock and kicked him unmercifully. A crowd gathered, but no one offered to take the officer's part until Officer Horton came up and pulled Stewart off. Officer Cramer was about played out, but aided in taking the prisoner back to the call box, where another altercation took place. Officer Lightfoot appeared, and he too was in citizen's clothes. Seeing Officer Cramer pulling at the prisoner, and not knowing that he was an officer, Lightfoot began to pound him, thinking he was doing his duty in preventing citizens from rescuing a prisoner. Officer Horton did not know Officer Lightfoot, and seeing him pounding Officer Cramer, he began to beat tattoo over Lightfoot's head with his billy, cutting some deep and painful gashes. In the fight Officer Horton was badly kicked in the breast, and it was not until Sergeant Mulhall and Officer Bob Dyer came up with the patrol wagon that the situation was understood and explained.

"Both Officers Cramer and Lightfoot were badly injured, but when it was understood how the trouble came about, the officers made apologies, or tried to; but all agreed that each had simply done what he believed to be his duty. Stewart was locked up, and he too has several ugly wounds besides the dog-bites. The pounding of the policemen by each other gives rise to the rumor that they were drinking, and some of the sympathizers with Stewart began circulating a petition last night asking for the removal of the officers. Lieutenant McCotteran and Sergeant Mulhall say the men had not been drinking "

CHAPTER XVII.

MISCELLANEOUS.

SEC.
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Res adjudicata—judgment—identity of parties and subject-matter.

§ 629. The question of identity is often involved in actions of various kinds, where the plea of *res adjudicata* is interposed. A verdict for the same cause of action between the same parties, involving the same subject-matter, is, as a general rule, absolutely conclusive. But this rule is subject to the qualification that there must be the identity of facts. It is not sufficient that there is an identity of persons to the record, but that the identity of facts should have been in issue in a former cause; for if not in issue, it would not conclude the plaintiff.[1] The cause of action is the same when the same evidence will support both actions, although the actions may be founded on different writs; for instance, it has been held that a judgment in trespass would bar an action of trover for the same taking, because the actions are of the same nature.

Actions on contract — then in tort — rule as to.

§ 630. In questions of *res adjudicata*, where it becomes necessary to identify a former judgment or a recovery, with that sought in another proceeding, very nice questions of identity are often presented; as, for instance, where, in a matter of contract, and breach thereof, where a suit has been brought on the contract, in an action

[1] Ricardo v. Garcias, 12 Cl. & Fin. 368; Carter v. James, 13 M. & W. 137.

ex contractu, and a judgment is rendered in favor of the defendant, whether the plaintiff may subsequently maintain an action *ex delicto*, on the same breach of such contract, to recover damages based upon a fraudulent representation; and whether or not the former judgment will bar the latter action. This question arose in Massachusetts in a case decided in 1859: One Thompson had a contract with defendant in the coaling business; failing to carry out the same, and desiring aid, he called on plaintiff, who, to ascertain the facts, applied to defendant, who informed him that there was sufficient funds to pay Thompson when the contract was performed. Plaintiff, relying upon this, took an assignment of the contract from Thompson. The statement as to the funds was untrue, as Thompson had been overpaid for the work *he had done*. Plaintiff sued on the contract and failed; then sued in tort to recover on the false representation which induced him to take the assignment. MERRICK, J., said: "It is very plain, upon a comparison of the declarations and cause of action set forth in the former suit, the record of which the defendant produced and offered to give in evidence, with the allegations, and the allegations of cause of action set forth in this, that the points or questions in issue are not the same in the two suits, and consequently that the judgment in the former constitutes no bar to the maintenance of the present action. It is true that both arose in the same series of transactions, and in the same conversations and communications which took place between the parties concerning them. But the result of the former suit shows that the plaintiff there wholly mistook the effect of what was said by defendant, and so failed to establish the claim which he then attempted to enforce. That was an action of contract, in which a promise and a breach of the promise were averred. This is an action of tort, in which the plaintiff alleges that he sustained damage by the willfully fraudulent representations of the defendant. Proof that would fully support the one would have no tendency to maintain the other; for the reason that the questions involved in the respective issues are essentially unlike. It follows, as a necessary consequence, that the judgment in one of them is not competent evidence upon the trial of the other, and cannot have the effect of precluding the plaintiff from maintaining it. The ruling of the court was to this precise effect, and the record of the former suit was, therefore, properly excluded from being given in evidence upon the trial of this.[1]

[1] Norton v. Huxley, 13 Gray, 290.

Same — early rule in New York.

§ 631. A peculiar case, involving a question not dissimilar to the above, was decided in New York in 1833, in which the defendant offered to show a former judgment. The action was brought to recover damages for the non-delivery of a quantity of wheat. It was held that a verdict and judgment, in an action by B. against A., in which the plaintiff claimed to recover the price of the wheat, alleging a delivery of part, and a readiness to deliver the balance, was a bar to A.'s right to recover, B. having claimed to recover as well for *rye and corn*, as for *wheat* sold, and it not appearing that any part of the verdict was for the *wheat*. This was the ruling, although, on the trial of B.'s suit, the recovery for the wheat was contested on the ground that the plaintiff had failed to perform his part of the contract in reference thereto. The judgment of a court of competent jurisdiction, or in the same court, *directly on the point*, is, as a plea, a bar, and as evidence in certain cases, conclusive as between the same parties upon the same subject-matter.[1]

Same — lien — ship-builder — rule in Massachusetts.

§ 632. A similar rule to the above was held in Massachusetts in 1868, where a petition had been filed against a vessel, to enforce a lien for labor performed in its construction, and the petition was, upon an agreed state of facts, submitted to the court, as being prematurely brought. In a subsequent action, the former decree was set up in bar to the action. But the entry was in general terms, and no specific reasons were assigned, and the court said: "We cannot explore the mind of the court to ascertain what the real reasons were. It may, therefore, be left uncertain whether the former judgment was against the merits of the petitioner's claim, or was based on the technical objection. To be a bar to future proceedings it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit; it must also appear to have been precisely determined.[2]

Promissory notes — identity of consideration.

§ 633. In this connection it may, perhaps, not be out of place to

[1] Lawrence v. Hunt, 10 Wend. 80.

[2] Foster v. The Richard Busteed, 100 Mass. 409. Citing Burlen v. Shannon, 99 id. 200.

notice, that where two promissory notes have been executed on one and the same identical consideration, and suit is brought on one of them, and facts are put in issue and tried, which are true, they must necessarily have the same effect upon one as on the other; and where there is a verdict and judgment upon the facts in issue, this judgment and record of proceedings may be set up in bar of an action on the other promissory note, and in such case it is only necessary for the defendant to establish the identity of notes and of the consideration.[1]

Record — proof — parol — general issue.

§ 634. A record of a suit between the same parties, involving the same subject-matter, which has been put in issue and tried, and where it is identified as the same cause of action, is an estoppel.[2] An action was brought to recover the proceeds of the sale of a cargo shipped by the plaintiff to the West Indies on board the brig *Active*, of which the defendant was master, and to whom the cargo was assigned. STORY, J., said: "The defendant offered in evidence a record of a former suit between the same parties, in which judgment was rendered for the defendant, supported by parol proof that the former suit was for the same cause of action as the present. The plaintiff denied its admissibility under the general issue; and we are of opinion that the objection could be supported." Whatever the pleading may have been in a former suit, the identity of the first and second actions cannot be determined by such pleadings, but by the proof to be adduced in the second action, as to whether the same matter was involved in the former suit.[3]

Same — parol evidence — to aid judgment — identification.

§ 635. It seems to be held, and with good reason too, that the identity of the parties do not require that suit should be by and against precisely the same persons who had been parties to the former proceeding; that the character of identity extends also to their representatives and successors, universal or particular, provided the quality of successor had been acquired subsequent to the judgment in question. When a former judgment is used by way of estoppel, the plaintiff may reply that it did *not relate* to the same property or transaction in controversy in the action to which it is set up in bar;

[1] Treadwell v. Stebbins, 6 Bosw. 538.
[2] Young v. Black, 7 Cranch, 565.
[3] Herman Estoppel and Res Judicata, p. 330. And see id. p. 88.

and the question of identity thus raised is to be determined by the jury upon the evidence adduced, like other questions of fact.[1]

Former conviction — robbery — burglary.

§ 636. A party in Georgia being indicted for robbery, pleaded a former conviction for the same offense on an indictment for burglary, which defendant alleged to be the same felony as that embraced in the latter indictment. The State demurred to the plea and the trial court sustained the demurrer. It was held that the plea of a former conviction or acquittal is sufficient only whenever the proof shows the second cause to be the same transaction with the first, and a conviction of burglary is sufficient in an indictment for robbery based on the same offense, when the record shows that, in order to show felonious intent in the former, circumstances of the stealing were proved, and thus the same transaction — the robbery — was involved in both cases.[2]*

[1] Herman Estoppel and Res Judicata, p. 234. Citing Packet Co. v. Sickles, 24 How. 333; Smith v. Johnson, 15 East, 213; Whittemore v. Whittemore, 2 N. H. 26; Parker v. Thompson, 3 Pick. 429; Phillips v. Berick, 16 Johns. 136; Wheeler v. Van Houten, 12 id. 311; Coleman's Appeal, 62 Pa. St. 252; R. Co. v. Daniel, 20 Gratt. 363; Spradling v. Conway, 51 Mo. 51; White v. Simonds, 33 Vt. 178; Badger v. Titcomb, 15 Pick. 416; Webster v. Lee, 5 Mass. 334; Golightly v. Jellicoe, 4 T. R. 147; Seddon v. Tutop, 6 id. 607; Smith v. Talbot, 11 Ark. 666; Easton v. Bratton, 13 Tex. 30; Wilcox v. Lee, 1 Robt. (N. Y.) 355; Perkins v. Parker, 10 Allen, 22. It is generally held that parol evidence is admissible to aid the judgment in the identification of the parties to the record. Herman Estoppel and Res Judicata, p. 235; R. Co. v. Yeates, 67 Ala. 164; Tarleton v. Johnson, 25 Ala. 300.

[2] Roberts v. State, 14 Ga. 8.

*In the case of Roberts v. State, 14 Ga. 8, the jury found the defendant guilty on the first 'account' instead of 'count,' and the court directed the erasure of the first syllable to change the orthography, and this was held immaterial. It is said that the same offense cannot be divided or split up and tried twice under different heads or names, and an acquittal or conviction under one charge is a good bar to any subsequent indictment or prosecution for the same offense under another name. Fisher v. Com., 1 Bush, 211; Moore v. State, 71 Ala. 307; Com. v. Kinney, 2 Va. Cas. 139; Jackson v. State, 14 Ind. 327; Francisco v. State, 24 N. J. 30; Rex v. Britton, 1 Moo. & R. 297; Holt v. State, 38 Ga. 187; State v. Cameron, 3 Heisk. 78. A different description in the second indictment will not constitute a different offense, and the offenses may be shown by parol to the indictment, notwithstanding the record. Rake v. Pope, 7 Ala. (N. S.) 161; Buhler v. State, 64 Ga. 504; Hirshfield v. State, 11 Tex. App. 207. It would not do to permit the State, when many articles are stolen at one and the same time, *i. e.*, in the same act of larceny, to find one indictment for one article, and to convict the defendant for that, and then bring in successive indictments, one for each of the articles, if so the plea of jeopardy would be of no avail in such cases. Lorton v. State, 7 Mo. 55; Hamilton v. State, 36 Ind. 280; State v. Hennessey, 23 Ohio St. 339; Jackson v. State, 14 Ind. 327; Wilson v. State, 45 Tex. 76; Hoiles v. United States, 3 McArthur, 270; Fritz v. State, 40 Ind. 18; State v. Williams, 10 Humph. 101. Where two pigs were stolen in the same act, it incurred but one liability. Rex v. Britton, 1 Moo. & R. 297. But where two articles were taken, and a half an hour intervened between the taking of the first and the last, it was held to constitute two felonies. Rex v. Birdseye, 4 Carr. & P. 386. Where the offenses are distinct, and not identical, two or more indictments, one for each, may be prosecuted by separate indictments, and the conviction and punishment for one will be no bar to the others. Teat v. State, 53 Miss. 439; State v. Rankin, 4 Cold. 145; Com. v. Tenney, 97 Mass. 50; Wemyss v. Hopkins, L. R., 10 Q. B. 378; Hawkins v. State, 1 Port. 475; State v. Taylor, 2 Bailey, 49. The same rule will prevail where an assault and battery has

Counterfeiting — former judgment — identity.

§ 637. In a case decided by the court of Massachusetts, it appeared that the defendant was indicted for having in his possession counterfeit money. It was held that the question whether or not certain words had been erased from the indictment was for the court, and that leaving it to the jury was ground for an exception.[1] But in civil practice, where a question arises as the same cause of action in different suits, as where the defendant pleads a former judgment, and the issue presented is, whether such a former judgment has, in fact, been rendered; this, though a question of law, if it is not pleaded, it seems, may go in evidence to the jury under the general issue.[2] It was held in Maine, that where a judgment was rendered against a corporation by a name variant from the name in its charter, and a question arose in an action against the sheriff for trespass in making a levy, as to whether the corporation was, in fact, a party to the judgment, it was a question for the jury.[3]

Liability for a misrepresentation — identity.

§ 638. In an action for false representation in Massachusetts as to the pecuniary liability or responsibility of the maker of a promissory note, whereby the plaintiff was induced to take the note for goods sold, the bill of exceptions stated merely that the plaintiff testified as to the representations made by the defendant in regard to the pecuniary standing of the maker of the note and its value, and that he took it upon the representations of the defendant; but the bill of exceptions did not say that *he* stated what those representations were, but no objection was made, that they were mere expressions of opinion, or were intended to be so understood. It was held that it was to be presumed that the defendant's statements were of facts susceptible of knowledge, as distinguished from matters of mere opinion and belief, and were calculated to have materially influenced the plaintiff.[4]*

[1] Com. v. Davis, 11 Gray, 49.
[2] Weathered v. Mays, 4 Tex. 389; Finley v. Hanbest, 30 Pa. St. 194.
[3] Mfg. Co. v. Butler, 34 Me. 438.
[4] Safford v. Grout, 120 Mass. 20.

been committed on several persons at the same time. Crocker v. State, 47 Ga. 568; State v. Nash, 86 N. C. 650; State v. Damon, 2 Tyler, 387; State v. Standifer, 5 Port. 523; State v. Parish, 8 Rich. 322; Greenwood v. State, 64 Ind. 250." Where there were three counts in an indictment, and on the trial the defendant was acquitted on two, and convicted on one count only, and on writ of error a new trial was granted, he could be tried only on the one count upon which he had been convicted. Campbell v. State, 9 Yerg. 333. One of the most complicated cases was perhaps that of Teat v. State, 53 Miss. 439.

* As to the matter of liability for false identification, the *Banking Law Journal*, vol. 4, p. 169, says: "Bankers have long wanted more light upon the question of the liability of a

Patent — identity — infringement — rule in cases.

§ 639. The identity of patented articles is, perhaps, the most common question of the kind, and generally arises in actions for infringement, or injunctions to prevent the same, as in the case of the identity of machines or instruments. And these, or models, or drawings thereof, are generally brought into court for inspection. And at law, where a patent of a prior date is offered in evidence as covering the invention described in the plaintiff's patent, on a charge of infringement, the question of identity of the two instruments or machines must be left to the jury, where there is sufficient resemblance to raise the question at all.[1] Where the specifications of an improvement which has been patented, described the pieces or parts of mechanism, their quality, manner of combination and result, an admission by the plaintiff that pieces of it were like his in general nature, and employed for various purposes, was held not to be an admission that his machine was the same as others.[2]

[1] Tucker v. Spalding, 13 Wall. 453. [2] Turrill v. R. Co., 1 Wall. 491.

party who identifies a stranger as Mr. so and so, where the identification turns out to be false, and the bank has suffered loss. Such cases are not infrequent. Payees of drafts and other instruments are often strangers at the bank of payment, and call upon accommodating friends, known to the bank, to identify them. Sometimes the friend is deceived, and makes a wrong statement of identity. If he made such a representation, knowing its falsity, no question would exist as to his liability for the injury. But where, without fraudulent intent in fact, and acting under a mistaken belief, he asserts that he knows the party to be of such a name, and the bank, itself ignorant, acts on the assertion to its injury, will the asserter be liable when the statement proves untrue? The banking community is at last favored with a precedent on this question from the Supreme Court of Colorado. A party stated to a bank that the holder of an instrument was the payee therein named. The bank thereupon paid the money. The statement turned out to be erroneous, and the bank was compelled to pay the money over again to the real payee. It sued the party making the statement. He attempted to shield himself behind the general rule that in an action of deceit, a party making a false statement must be shown to have had *knowledge of its falsity*, in order to be held; and contended that, as it was not so shown, he was not liable. The court, however, upholds the liability, saying: 'To the general rule requiring a party relying upon false representations to show not only that they were false, but that the party making the same knew such to be the case, there are some exceptions; as when one, as in this case, positively assures another that a certain statement is true, preferring at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated.' In this case, the bank was adjudged not only entitled to recover the amount paid, but also costs and counsel fee paid in unsuccessfully defending a suit by the real payee, of which it had given the party who made the representation notice. This decision should be welcomed by bankers as a progressive step in the line of increasing definiteness in the law regarding liability of third persons for identifications. The general principles which underlie the action of deceit are now applied to the particular case of identity at bank, and a party who makes a positive statement as to the identity of a person, which the bank relies on to its injury, may be made liable, although he may not have known of the falsity of the statement when he made it. Aside from the instruction which this case affords to bankers, it is useful, furthermore, to those who are called upon to accommodate customers, patrons or supposed friends by identifying them at the bank, by showing them the liability incurred in making positive statements of identity which turn out erroneous, and thus teaching the necessity for the exercise of care and caution before making such statements."

Same — rule as to the trial.

§ 640. It has been held that a court of equity has the discretionary power to send to the jury the question whether or not a reissued patent was for the same invention as the original patent.[1] But in England, it seems to have been held that, in an action for an alleged infringement of a patent, where the defense is that the supposed invention is not new, the judge may compare the plaintiff's specification with the specification of a previous patent, and may, on such comparison, direct the jury to find a verdict in the case.[2] The rule that where the defendant omits entirely one of the ingredients of plaintiff's combination, and substitutes no other, he does not infringe; and if he substitutes another in place of the one omitted, which is new, or which performs a substantially different function, or even if it is old, but unknown at the date of plaintiff's patent, he does not thereby infringe.[3]

Same — patent — original and reissue.

§ 641. The question of identity often arises in patent cases, of original and reissue of patents. Where, upon comparison of the original letters-patent of a turning machine and its reissue, it was apparent that the invention had been originally for the turning of logs on their own axes on a log-carriage, and the reissued patent to the same patentee had been so extended as to embrace the rolling of logs from place to place on the log-deck, or from the log-deck upon the carriage, and in so doing required the omission of parts essential in turning logs on their axes when upon the carriage, it was held that this involved, not only a change of purpose, of location of parts, of the manner of operation, but of effect produced, and this involved a change of mechanism, and, therefore, the reissue covered a different invention from that described in the original patent, and the first claim based upon such change was void.[4]

Same — photographs — camera — invention.

§ 642. An action in equity was brought to restrain the infringement of reissued letters-patent granted to Southworth for certain improvements in photographic impressions. The answer denied the novelty and utility of the invention, denied infringement, and alleged that the invention described in the reissued patent was not

[1] Poppenhusen v. Falke, 4 Blatchf. C. C. 493.
[2] Bush v. Fox, 38 Eng. L. & Eq. 1.
[3] Gill v. Wells, 22 Wall. 1-32.
[4] Torrent, etc., Lumber Co. v. Rodgers, 112 U. S. 659.

identical with the original patent. The court dismissed the bill, and complainants appealed. The camera is a rectangular, oblong box, in one end of which is inserted a tube containing a double convex lens, while at the other end is a plate-holder, immediately in front of which is a sliding shield. The patent claimed was for the plate-holder in combination with the frame in which it moves, constructed and operating in the manner and for the purpose set forth. It was construed to be for a mechanism to accomplish a specific result, and the claim in the reissue for the bringing of the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purposes specified, was construed to be for a process. It was held that the reissue was void, being broader than the original.[1] The identity of patents opens up a field too broad for this volume. The reader may refer to Brodix's American and English Patent Cases, now in course of publication.*

Of money in bank — equitable owner.

§ 643. In an attachment case, in Pennsylvania, it appeared that one John H. Curtis, a real estate broker, deposited in bank, money belonging to his clients or principals; $835.81 belonged to the Philadelphia Saving Fund Association and to the trustees of the Patterel

[1] Wing v. Anthony, 106 U. S. 142; 27 L. Ed. 110.

* In a note to Blunt v. Patten, 2 Paine, 402, which was an action for the infringement of a copyright, Lord MANSFIELD is reported as having, in a similar case, in charging the jury, said: "The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes, equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors, guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject, as in the case of histories and dictionaries. In the first, a man may give a relation of the same facts and in the same order of time; in the latter, an interpretation is given of the identical same words. In all these cases, the question of fact to come before a jury is, whether the alteration be colorable or not; there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same pictures. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby becomes more serviceable and useful for the purposes to which it is applied. But here you are told that there are various and very material alterations. This chart of the plaintiffs' is upon a wrong principle, inapplicable to navigation. The defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant. If you think it is a mere servile imitation, and printed from the other, you will find for the plaintiffs." (There was a verdict for the defendant.)

estate. Curtis died and the business was continued by his son, the former partner. Curtis had, before his death, deposited his own funds in a different bank. The attaching creditors garnished the bank, and the bank was at once notified that the money belonged to the principals above named, and though deposited in the name of John H. Curtis & Son, the court said: "Their right to it was not lost because so deposited. It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner, so long as it can be identified, and it does not matter in whose name the legal right stands. If money has been converted by a trustee, or agent, into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. * * * The attaching creditor stands in the position of the depositor and can recover only what the depositor could."[1]* The identity of land may be proved, as a general rule, like the identity of personalty. Often in the case of disputed boundary lines, it becomes necessary to identify it by actual survey. And if one acting in a fiduciary capacity, invest the trust fund in real property, and takes the deed to himself, the beneficial owner of the fund must identify not only the fund, but also the property, by tracing it into property; which may be done in equity, through any number of transmutations.

[1] Farmers', etc., Bank v. King, 57 Pa. St. 202.

* Mr. Burrill, in his Circumstantial Evidence, p. 140, gives what seems worthy of note. Speaking of the destruction of evidence of a murder, he says: "The remains of a poisonous liquid, for instance, are got rid of, under the pretense of being a nauseous mixture, offensive to the sense, and, therefore, requiring removal. *Donellan's* case may be here again referred to, for some very instructive facts. The deceased had become suddenly and violently ill, after taking a harmless draught prescribed by a physician, for a trifling ailment, and in a few minutes died. There being great reason to suspect poison, it was of course of the utmost importance to any satisfactory conclusion on the point, that the remains of the draught and the phials containing it should be preserved undisturbed, until an examination of them could be made by competent persons. This was effectually prevented by the obtrusive and determined conduct of the prisoner, as the following statement may illustrate. On coming into the room where the deceased lay, and being told what had happened, he inquired for the physic-bottle; and on its being pointed out to him by the mother of the deceased, he poured some water out of the water-bottle, which was near, into the phial, shook it and then emptied it into some dirty water, which was in a wash-hand-basin. Upon this the mother of the deceased remarked, 'You should not meddle with the bottle.' Upon which the prisoner snatched up another bottle which stood near, poured water into that also, shook it, and then put his finger to it and tasted it. The mother of deceased asked again what he was about, and said he ought not to meddle with the bottles; on which he replied that he did it to taste it, though he had not tasted the first bottle. Not content with this degree of interference, the prisoner next ordered the servant to *take away* the basin and the bottles, and put the bottles into her hands for that purpose. She put them down again, on being directed by the mother of the deceased to do so; but subsequently removed them on the *peremptory order* of the prisoner. Here was grossly obtrusive conduct, persisted in, in spite of repeated remonstrances; and its effect was to remove every vestige of any poisonous ingredient which the phials might have contained." Citing Rex v. Donellan, Gurney's Rep. (1781.)

Patents — identification of — rule on the subject.

§ 644. In an action at law for the infringement of a patent, it seems to be a question for the jury to determine, and necessarily so because it is a question of fact, a question for the jury upon the subject of identity. Where a patent was taken out for a new and useful improvement in the machine for breaking and screening coal, and the claim was for the manner in which the party had arranged and combined with each other the breaking rollers and the screen, and the amended specification of the reissued patent described essentially the same machine as the former one did, but claimed as the thing invented, the breaking apparatus only, a dedication to the public did not accrue in the interval between the one patent and the other. The jury should determine, from the evidence in the case, whether the specifications, including the claim upon which the patent was granted to the party, were sufficient in their precision to enable experts in machinery to make the one described, and whether there was a patentable novelty, and whether the renewed patent was for the same invention as the original patent, and whether it had been abandoned to the public, as well as the identity of that used by the defendant, or whether they had been invented to operate upon the same principle.[1]

Same — to withdraw metal from smelting furnace.

§ 645. A more recent case was decided by the United States Supreme Court, in 1886, in which an action was brought at law to recover damages for the infringement of a patent for an improved method of tapping and withdrawing bad and other metals, when in a molten state, from the bottom of a smelting furnace. It was held that when the defendant in a suit for the infringement of a patent sets up a prior publication of a machine anticipating the patented invention, and it appears that there are obvious differences between the two machines in the arrangement of the separate parts, in relation of the parts to each other, and in their connection with each other in performing the functions for which the machine is intended, and experts differ upon the question whether those differences are material to the result, and whether they require the faculty of invention, those are all questions of fact and should be left to the determination of the jury, properly instructed by the court as to the law applicable to the facts in the case. And so in all questions involving identification.[2]

[1] Battin v. Taggert, 17 How. (U. S.) 77. [2] Keyes v. Grant, 118 U. S. 25.

Dying declarations — identity — name.

§ 646. One Cooper in Massachusetts was indicted, tried and convicted for the killing of Phebe Fuller by striking her on the head with an instrument called a "fid." It was held that where dying declarations had been admitted to prove the identity of the accused as the perpetrator of the crime, it was competent to receive evidence in reply to show that the deceased had met and talked with persons with whom she was well acquainted, mistaking them at the time for other persons whom they did not resemble, and was in the habit of thus mistaking persons.[1]

In Nebraska, on a trial for murder, it was held that the name a man "always went by," which he declares is his name, in his dying declaration, and by which his own mother knew him, may be deemed his right name, although one witness has testified that it was not his right name.[2]

Witness — hearing — suing — color-blindness.

§ 647. It is certainly clear to every thinking man that the value and weight of the testimony of a witness must ever depend upon the knowledge he has acquired upon the matter of which he speaks, from whatever source acquired, and whether it be stated as a matter of fact or mere opinion. And the court or jury have a right to know his means of information and his reason for making the statement. Not only is this true, but it is proper to inquire into the strength of his intellect and the retentiveness of his memory; and more important, especially in questions of identification, is the power of his perception and discrimination, as these questions often depend upon circumstances and opinion testimony, and, not unfrequently, experts Persons receive information *only* through the five senses — hearing, seeing, tasting, smelling and feeling (the sense of touch, not a feeling of consciousness). Of these, the two former (hearing and seeing) are far the most important. In questions of personal identity, we find cases where persons have been identified by their voice; for this, the witness depends upon his sense of hearing. This is rendered doubly uncertain; *first*, the voice he hears may be bold and harsh, regular and distinct, mild, soft, or faint, or wholly disguised; *second*, the witness' hearing may be defective, or it may be deceptive. Many persons, from want of attention or appreciation, cannot discriminate between sounds, or, at least, have not a quick perception of them,

[1] Com. v. Cooper, 5 Allen, 495. [2] Binfield v. State, 15 Neb. 484.

and can never make musicians or appreciate music, for the want of power to discriminate between a sound, a noise and a racket; or in accent, to perceive the difference between a *trochee* and an *iambus*.

Seeing.— The sense of seeing may be imperfect, or the object we see deceptive. Personal identity is most generally determined by the sense of seeing; and that is often unreliable. We want no better proof of this than is found in the chapter of "Mistaken Identity." A person is often identified, in part at least, by the color of his hair, beard, eyes and complexion. This involves a discrimination between colors; and is rendered all the more uncertain when we see science demonstrating the fact that many persons are color-blind; and this is becoming now an important question, especially as it relates to navigation and railroad commerce, where it is the duty of those engaged to observe the signal lights of the different colors, where the color-blind are wholly incompetent. And this may have caused many accidents, disasters, and loss of life and property.*

. * *Color blindness.*— The only books the writer has had access to upon this subject, which is now exciting some interest among scientists, is a work on the theory of color and its relation to art, and art industry, by Wilhelm Von Bezold of Germany, translated by Koehler, with notes by Edward C. Pickering, published in Boston in 1876, and another work by Dr. B. Joy Jeffries, entitled "Color Blindness, its Dangers and Detection," published in Boston in 1879, though the subject had received some attention in other countries a few years earlier. The writer has taken a few brief extracts from the latter, for the mere purpose of showing some of the danger so our commerce, and as they have been discovered by scientific tests and demonstrated by actual examination, and the percentage of persons color-blind, and especially those employed as sailors and on railroads whose duties require them to observe signals of different colors. While it may be said that the proportion is not very great, the danger of disaster from this cause is in proportion to the number of persons having this defect. Pilots and other officers on the seas, rivers, lakes, and railroad engineers and other officers and employees whose duty it is to know all the signals by day and by night are clearly incompetent to fill such important stations if they cannot distinguish the colors of the different signals displayed as guides and warnings. If the collisions and disasters resulting from this cause be even few, yet if there be any danger, it should be promptly avoided, and there is, perhaps, but one remedy, and that is for every person to undergo a thorough examination, testing his competency in this respect. Now, in the light of these scientific discoveries, if owners of vessels, or our railroad companies employ officers or servants thus incompetent, and disaster results therefrom, the owners or masters should be held to a strict liability, as for a culpable negligence. If they be ignorant of such unfitness, which they might have known, their ignorance of the fact is negligence.

Dr. Jeffries, on this point (p. 158), says: "There is another peculiar danger on railroads. A mixture of the two complementary colors, red and green, necessarily employed, produce white light. This of course does not affect the color-blind in the same way as the normal-eyed; yet it adds to their confusion." The author refers to an article in the "Chicago Railroad Review" of March 30, 1878, in which the writer, Dr. Nelson, an optician, says: "I have kept records of various accidents that have occurred, both upon land and water, during the past few years; and I have gathered such information about some of them as I could get outside of official sources Often I was unable to get any of any value; but I am convinced beyond a doubt that a large proportion of them could have been traced to color-blindness for a correct solution as to the primary cause of the accident." Dr. Jeffries, at p. 137, speaking of this danger to the community, and the necessary protection, says: "For instance, an engineer has run on one road for some five or ten years without accident of importance. The superintendent requires him to pass examination by an expert, who finds that he is markedly red-blind, and shows it most convincingly to the officials of the board. It becomes known, and they then do not, of course,

dare to keep him in his place. He is dismissed, to protect the community from danger. We need no better proof of the recognition of the danger than the measures so rapidly taken for the last two years on so many of the European roads, and which are being initiated by the others. Our very practical American people have recognized the danger from numerous colored lights or signal-flags in having gradually discarded them. Many roads already use only red by night or by day. *Green* and *red* are, however, most generally used to signify safety and danger. From experiment and experience I agree that they are right. We cannot give up color for form by night. It is, however, possible by day. Is the danger any less great in the United States? I believe the danger from *ignorance* of its existence is not small. The chief of the Brotherhood of Locomotive Engineers told me he had not heard of color-blindness, although he had run an engine twenty years; and asked me with some feeling, whether I 'thought a man was fit to run an engine who could not tell green from red.'" The same author, at p. 146, says: "Prof. Holgreen reports that of seven thousand nine hundred and fifty-three railroad employees, one hundred and seventy-one were color-blind." Dr. Krohn reports on railroads in Sweden, out of one thousand two hundred employees, sixty color-blind. Dr. Jeffries, p. 161, says: "If we turn from the land to the sea, we shall find the dangers from color-blindness as great or even greater. The large majority of those color-blind are so for red or green. These, however, are colors necessarily chosen by all nations to be by law carried on the two sides of all vessels from sunset to sunrise — the green light on the starboard side, and the red light on the port side. These are so arranged that they can only both be seen when the vessel is directly ahead, and far enough off to allow us to see both sides. These lights show us, therefore, the position and the direction of motion of a vessel. Mistaking their color will of course be most disastrous." Dr. Romberg has classified the reports of some maritime accidents from 1859 to 1866. The author shows that he made out the classification, thus: "They numbered..... 2,408

Want of skill, or carelessness of the ship's *personnel*, or the accidents, which it was impossible to prevent or avoid.....	1,562
Error of the pilot or captain	215
Want of observation or proper interpretation of the rules of the way.....	537
Undetermined causes.....	94

Under the last three heads, in the large number of eight hundred and forty-six, there are probably some attributable to color-blindness. They all are not accidents from carelessuess or want of skill; for those are included in another series." At p. 164, Dr. Favre, speaking of the loss of a vessel, said: "After the loss of the *Ville de Havre*, the newspapers which described the collision, stated most positively that the green light was not recognized in time. If the steamer's officers and crew, who should have seen the signal light, were never tested for color-blindness, there is one chance in twenty that the officer or sailor whose duty it was could not distinguish *green*, and one in seventy-five that he would confound this color with *red*. We know how the matter ended. The English admiralty decided that the English vessel was free from all blame, and the French admiralty declared that the French vessel could not be in any way criminated. No one thought of attributing the mistake to the very probable one of color-blinduess." The same author (p. 164) says: "I lately had curious proof of the color-blindness of a sea captain, who, I understand, has now retired from active service. He was in the habit of working worsteds, to while away the monotony of a sea voyage. Those worsteds, however, always had to be picked out for him, and the colors marked, to avoid his making mistakes."

These few extracts from a late and valuable scientific work are here noted, because they are questions of identification. And it is certainly obvious to all, that a person who has not the perception and discrimination to identify the different colors is clearly incompetent to fill a position which requires him to observe signals of the different colors, for the safety of community by land or sea. And when, in the light of science, owners of vessels and railroad companies, as common carriers of freight or passengers, will employ or retain incompetent officers or servants, they should be held liable in damages for losses resulting from accidents or disasters by reason of such negligence.

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