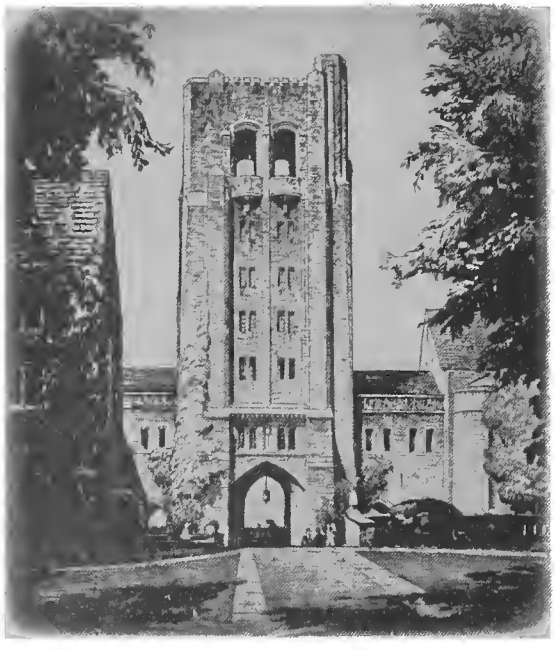

A SUPPLEMENT

TO

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW

A

SUPPLEMENT

TO A TREATISE ON THE SYSTEM OF

EVIDENCE

IN TRIALS AT COMMON LAW

CONTAINING

THE STATUTES AND JUDICIAL DECISIONS
1904-1907

BY

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PREFACE

EVEN a Supplement, it seems, must have a Preface. Yet, for a Supplement to a treatise of four volumes, the Preface ought to be little else than an apology. The elder Disraeli, in proffering his Good Advice of an Old Literary Sinner, refers to the "authors of moderate capacity who have been remembered only by the number of volumes their unhappy industry has produced," but cheeringly reminds us that books of a small size were regarded with contempt by scholars of a former age. Moretus, the great printer, successor to Plantinus, "complained to the learned Puteanus (who was considered as the rival of Lipsius) that his books were too small for sale, and that purchasers turned away, frightened at their diminutive size. Puteanus referred him to Plutarch, whose works consist of small treatises. But the printer took fire at the comparison, and turned him out of his shop for his vanity at pretending that he wrote in any manner like Plutarch!"

Yet a book that pretends to set forth, even in miniature, such a bulky body as our present mass of law, cannot itself avoid a crescent bulk. And if our Supreme Courts require two thousand rulings yearly to apply the rules of Evidence, even a mere compend, covering three and a half years of such prolix activity, must fill many pages.

A few lines must be taken for a personal acknowledgment of sincere appreciation, to those who have found this work a useful aid to their own labors at the bar and on the bench. Many kindly testimonies of this have been vouchsafed. They have also supplied a much-needed assurance that many of the views and policies advanced in the original work were not solely the individual lucubrations of its author, but justified themselves as a reflex expression of the solid convictions of the times, an echo of the common professional voice. Every one who ventures upon an analysis of the data of any department of human thought needs the corrective crucible of public verification. In China, by a sound convention of social manners, he who receives a compliment of approval must reply, "How shall I dare to persuade myself of what you say?" This self-cautionary mental attitude is a safe and healthy one. We find in many law books (nor these the oldest and dustiest) a confident championship of theories, systems, and principles, which to the authors seemed discoveries

of the ultimate Verity, but to the rest of us are plainly as naught but fruitless spear-breakings. Would indeed that some power the gift could give us to see our truths as others see them!

For the law of Evidence, then, the analysis of its present workings, methods, and spirit, as offered in this treatise, seems to have been in general confirmed by the experience of others. But what of its future? Does the practice of the past three years mark more plainly any trends or requirements? Such marks may be looked for either in the rules themselves, or in the judicial method of using them, or in their larger procedural environment.

First, as to the rules themselves. There seems to be but one that is radically discreditable, — the Opinion rule. The Opinion rule must go. Every year's practice confirms this. It but cumbereth the ground, and must be cut down and cast into the fire. An unbiassed judgment upon its merits leaves it no excuse for survival. The sooner it is discarded to the limbo reserved for historical blunders and practical failures, the better for our law's good sense. — Let all else stay, with only a mending of parts.

Secondly, as to the judicial methods of application. Here first stands out the great doctrine of Judicial Discretion, as the hope of the future. During a long century smothered and suppressed by the gradual growth of a monstrous mechanism of petty precedents, it still lives in our law, ready to resume its rightful reign. Nine-tenths at least of our present rulings in supreme tribunals ought not to have risen beyond the determination of the trial Court. But as yet there is little sign of recognition of this truth. "This ill must worsen ere it can be cured."— Next, the doctrine of New Trials for Erroneous Rulings will help to redeem us. Here, indeed, within these four years, great hopes can be already seen. All along the line of States, above and below in the Courts, and throughout the Bar, a renaissance of thought is visible. The future may here well be trusted; but there must be no abatement of effort. — Finally, the doctrine of Judicial Instructions on the Weight of Evidence has begun to threaten us and to annul the advances made in other fields. The judge for admissibility, the jury for weight, — such is the orthodox and unflinching rule of the inherited common law. But the judges, in instances too numerous not to be alarming, are now giving instructions of law upon the effect of particular pieces of Evidence. These instructions (pounced upon, of course, by the claws of an Exception) are gravely quibbled over in Supreme Courts; and these quibblings are recorded to form a new reticulation of rules. This dangerous fungus upon the body of the law of Evidence is now in rapid growth. Perhaps we can by direct excision remove the noxal condition. But it owes its stimulus to the suppression of a natural instinct to obtain the judge's personal views upon the evidence, — an instinct which cannot now receive its just satisfaction because of the prohibition against a

judge's informal comments on the evidence, — the original common-law "summing up." This prohibition, introduced almost universally in the United States by the popular democratic movement of three generations ago, cramps a natural outlet. Hence the present counter-strain and outbreak at another point, namely, in judicial instructions abstractly stating legal rules for Weight of Evidence. Nothing permanent can here be hoped until the original misguided prohibition is removed.

Thirdly, as to the environment of procedure at large. The law of Evidence, like the other parts of our law, is here suffering from general influences, which in their turn lead back to larger causes. Our great legal surgeon has lately diagnosed them; to resume them here is unnecessary. In the unerring analysis of Roscoe Pound [1] we may once for all see the sources of our imperfections laid bare. These plain and sober truths we must now face and ponder. Whether or how soon we shall develop the skill or the courage or even the desire to apply remedies, is a far question. We shall, indeed, have to enlarge transcendentally our professional spirit and purpose, — to rise beyond the essentially common-law demand of Shylock, "I crave the law!" and to live in the atmosphere of that broader appeal to the Magistrate-Duke Vincentio, "Give me Justice, Justice, Justice, Justice!" No less than this will suffice. Particular remedies and specific amendments, necessary though they be, will not go deep enough. For, as yet, trammelled by a narrow purpose, our labors can only avail

> In dead details to smother vital ends
> Which would give life to them; in the deft trick
> Of prentice-handling to forget great art;
> To base mechanical adroitness yield
> The Inspiration and the Hope a slave.

J. H. W.

Northwestern University Law School,
Chicago, October 1, 1907.

[1] Proceedings of the American Bar Association, 1906, Pt. I, and American Law Review, XL, 729 ("Causes of Popular Dissatisfaction with the Administration of Justice").

CONTENTS

LIST OF LATEST REPORTS AND STATUTES CONSULTED

I. Statutes

The titles and dates of the compilations of statutes referred to in this Supplement, and the years of the latest session laws consulted in its preparation, are shown in the table below. In a few jurisdictions new official revised compilations have been made during the period covered by this Supplement, but the usual (and culpable) lack of a table of cross-references in the new revisions to the former numbering has made it impracticable in this work to use them; for North Carolina, however (where a perfect table is published), the citations to the revisions of 1905 have been added. The examination of the session laws, to date of printing, made it reasonably certain that the legislative changes would all be represented, under one or another form of citation.

In the following Table are shown, for convenience of reference, the dates of both the latest statutes consulted for this Supplement and of those consulted for the original work:

Jurisdiction	Title and Date of Compilation Used	Date of Latest Session Laws Examined	
		for the original Work	for this Supplement
England		1903	1906
Canada:			
Dominion[1]	Revised Statutes 1886	1902	1906
Alberta[2]		....	1906
British Columbia	Revised Statutes 1897	1903	1906
Manitoba	Revised Statutes 1902	1903	1906
New Brunswick	Consolidated Statutes 1877	1903	1906
Newfoundland	Consolidated Statutes 1892	1903	1906
Northwest Territories[3]	Consolidated Ordinances 1898	1903	1904
Nova Scotia	Revised Statutes 1900	1903	1906
Ontario	Revised Statutes 1897	1903	1906
Prince Edward Island		1902	1906
Saskatchewan[2]		....	1906
Yukon[2]	Consolidated Ordinances 1902	....	1906
United States:[4]			
Alabama	Code 1897	1901	1905
Alaska	Carter's Laws of Alaska 1900 (U. S. St. 1900, March 3 and June 6)	1903	1907
Arizona	Revised Statutes 1887; Penal Code 1887	1903	1905
Arkansas	Sandels and Hill's Digest of Statutes 1894	1903	1905
California	Codes 1872; Deering's Supplements 1889, Pomeroy's edition of 1901	1902	1905
Colorado	Mills, Annotated Statutes 1891, Supplement 1896, and Code of Civil Procedure 1896	1902	1905
Columbia (District)	Abert and Lovejoy's Compiled Statutes 1894; Code 1901 (U. S. St. 1901, c. 854)	1903	1905
Connecticut	General Statutes 1887	1903	1905
Delaware	Revised Statutes 1893	1903	1905

[1] A new Revision has been authorized, but is not completed.

[2] Newly organized out of the former Northwest Territories.

[3] The legislation for this region is continued, since 1902 and 1904, in the newly organized Provinces of Alberta, Saskatchewan, and Yukon.

[4] The Legislatures in most States meet biennially, so that the laws of 1905 were in such cases usually the latest. In Alabama the laws of 1907 had not come to hand in July, 1907, and there will not be another session for four years.

Jurisdiction	Title and Date of Compilation Used	Date of Latest Session Laws Examined	
		for the original Work	for this Supplement
UNITED STATES:			
Florida	Revised Statutes 1892	1903	1905
Georgia	Code 1895; Van Epps' Supplement 1900	1903	1906
Hawaii[1]	Penal laws 1897; Revised Civil Laws 1897	1901	
Idaho	Revised Statutes 1887; Constitution 1899	1903	1905
Illinois	Revised Statutes 1874, Hurd's edition of 1898	1903	1907
Indiana	Thornton's Revised Statutes 1897	1903	1905
Indian Territory[2]			
Iowa	McClain's Annotated Code 1897	1902	1906
Kansas[3]	Webb's General Statutes 1897	1903	1905
Kentucky	Carroll's Statutes 1899, and Codes of Civil and Criminal Procedure 1895, edition of 1900	1902	1906
Louisiana	Saunders' Revised Civil Code 1888; Garland's Revised Code of Practice 1894 and Supplement 1900; Wolff's Revised Laws 1897; Constitution 1898	1902	1906
Maine	Public Statutes 1883, Supplement 1895	1903	1905
Maryland	Poe's Public General Laws 1888; Supplement 1900	1902	1906
Massachusetts	Public Statutes 1882; Revised Laws 1902	1903	1906
Michigan	Miller's Compiled Laws 1897	1903	1905
Minnesota	Wenzell, Lane, and Tiffany's General Statutes 1894	1903	1905
Mississippi	Thompson, Dillard, and Campbell's Annotated Code 1892	1902	1906
Missouri	Revised Statutes 1899	1903	1905
Montana	Sanders' Codes and Statutes 1895	1903	1905
Nebraska	Brown and Wheeler's Compiled Statutes 1899	1903	1905
Nevada	Baily and Hammond's General Statutes 1885	1903	1905
New Hampshire	Public Statutes 1891	1903	1905
New Jersey	General Statutes 1896	1903	1906
New Mexico	Compiled Laws 1897	1903	1905
New York	Birdseye's Revised Statutes 1896	1903	1905
North Carolina	Code 1883; Long and Lawrence's Amendments 1897	1903	Revision 1905
North Dakota	Revised Codes 1895	1903	1905
Ohio	Bates' Annotated Revised Statutes 1898	1902	1906
Oklahoma	Statutes 1893	1903	1905
Oregon	Hill's Codes and General Laws 1892	1903	1905
Pennsylvania	Pepper and Lewis' Digest 1896	1903	1906 Special
Rhode Island	General Laws 1896	1903	1906
South Carolina	Revised Statutes 1893; Code 1902	1903	1906
South Dakota	Grantham's Statutes 1899	1903	1905
Tennessee	Shannon's Annotated Code 1896	1903	1905
Texas	Revised Civil Statutes 1895; Penal Code 1895; Code of Criminal Procednre 1895	1903	1905
United States	Revised Statutes 1878, Supplements 1891, 1895	1903	1907
Utah	Revised Statutes 1898	1903	1905
Vermont	Statutes 1894	1902	1906
Virginia	Code 1897, Supplement 1898	1903	1906
Washington	Ballinger's Annotated Codes and Statutes 1897	1903	1905
West Virginia	Code 1891, third edition	1903	1905
Wisconsin	Sanborn and Berryman's Statutes 1898	1903	1905
Wyoming	Revised Statutes 1887	1903	1905

[1] The Revision of 1905 is here the latest legislation that has come to hand; but as it contains no table of cross-references to the Revision of 1897, no use could be made of it.

[2] Governed by Federal and Arkansas statutes and by Indian law.

[3] For the judicial status of this compilation, see State *v.* Carter, — Kan. —, 86 Pac. 138 (1906).

II. Reports of Decisions

The printing of this Supplement began in June, 1907, and occupied four months; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in bringing the later citations down to the date of their consultation. The point taken was therefore that volume of the different National Reporters which ended nearest to July 1, 1907; this ranged (dating by the weekly issues) between April, 1907, and September, 1907. Substantially, then, the citations come down to the beginning of July, 1907. The latest volumes of Reports consulted were as follows:

Jurisdictions of latest Reports Examined		for the original Work	for this Supplement
		Vol.	Vol.
National Reporter System:	Atlantic Reporter	55	66
	Federal Reporter	125	152
	Northeastern Reporter	68	81 [1]
	Northwestern Reporter	96	111
	Pacific Reporter	73	89
	Southern Reporter	35	43
	Southeastern Reporter	45	56
	Southwestern Reporter	76	102
	Supreme Court Reporter	23	27
Official Reports (not covered by the National Reporter System):	District of Columbia Appeals	21	28
	Hawaiian Reports	13	17
British Reports:	England:		
	Law Reports	1903	1906
	Cox's Criminal Cases	18	20
	Ireland: Law Reports	———	1894–1906
	Canada Supreme Court	32	36
	British Columbia	10, pt. 1	11
	Manitoba	12	14
	New Brunswick	34	35
	Newfoundland	5	5
	Northwest Territories	5, pt. 2	5
	Nova Scotia	35	37
	Ontario: Law Reports	5	12
	Prince Edward Island	2	2

The reports of the Appellate (intermediate) Courts in Colorado, Illinois, Indiana, Kansas, New York (Supreme Court), and Texas have not been cited, except on interesting matters for which there is scanty authority; partly because their rulings are not final, and partly because in some jurisdictions they are expressly made not binding as precedents. The trial rulings of Federal District and Circuit Courts have also been left unnoticed to a similar extent.

III. Citation of this Treatise

Citations of other parts of this treatise are made herein by number of section (§) and number of note. The notes are numbered continuously within each section.

[1] Only as far as No. 18.

EVIDENCE

IN

TRIALS AT COMMON LAW

SUPPLEMENTARY VOLUME

§ 4. Distinction between Ex parte and Responsory Proceedings.

[*Note* 6; *add:*]

1906, Goodwin *v.* Blanchard, 73 N. H. 550, 64 Atl. 22 (the trial judge has discretion to refuse oral examination of jurors who have made affidavits, on a motion for a new trial).
Contra: 1906, Kipp *v.* Clinger, 97 Minn. 135, 106 N. W. 108 (affidavit on motion to open a judgment; rule of personal knowledge applied).

§ 5. Conflict of Laws, in general.

[*Note* 1; *add,* at the end:]

It should be added that the *lex loci acti*, or law of the place of the act to be proved, has been proposed as the rule, by the Institute of International Law (Annuaire de l'Institut, 1878, pp. 44, 50), at least as regards admissibility and weight. But this solution seems both unsound and unpractical. It finds favor in France and Italy, as well as in South America; but it is not accepted in Germany nor in the majority of countries of Continental Europe (Weiss, Traité de droit international privé, Tome V, 1905, p. 475, and references). Moreover, this French rule has been forcibly dissented from by Professor de Vareilles-Sommières, of Lille (Clunet, Journal du droit int. privé, 1900, XXVII, 258, 287). The rule for conflict of laws as to the *form of acts, i. e.* whether a legal transaction must be in writing, etc., was made a part of the programme for the first Hague Conference on Private International Law in 1893, but was apparently not regulated by any of the enactments of that body in any of its conferences hitherto (Actes de la Conference, etc., 1893, p. 18; Conference of 1904, p. 205). A list of articles on the subject may be found in the Tables Générales to Clunet's Journal du droit int. privé, vol. 1, p. 770.

[*Note* 2; *add,* under *Accord:*]

1906, *Re* Wogan, 103 Mo. App. 146, 77 S. W. 490 (a deposition taken in Missouri for use in a trial in Oklahoma; the latter's law as to notice, held to apply).
1905, Supreme Lodge *v.* Meyer, 198 U. S. 508, 25 Sup. 754 (New York insurance contract).
1905, Doll *v.* Equitable Life Ass. Soc'y, 138 Fed. 705, 710; C. C. A. (the New York rule as to a physician's privilege, held not applicable in a trial in the Federal court in New Jersey, though the parties' contract made the law of New York the rule of the contract; "the law of the forum, and not of the place of the contract, must govern").

[*Note* 3; *add,* under *Contra:*]

1906, Kaufman *v.* Barbour, 98 Minn. 158, 107 N. W. 1128 (agreement between makers of a Missouri note that some should be sureties only; Minnesota law applied).

§ 6. Conflict of Laws; Federal and State Jurisdictions in the United States and Canada.

[*Note* 5; *add:*]

1904, Balliet *v.* U. S., 129 Fed. 510, 515, 16 Sup. 62 (the Iowa statute for indorsing witnesses; whether it obtained in place of the Federal statute, *post*, § 1851, not decided).
1903, Hanks Dental Ass'n *v.* Tooth Crown Co., 194 U. S. 303, 24 Sup. 700 (refusing to apply N. Y. C. C. P. § 870, as to discovery before trial).
1906, Smith *v.* Au Gres, — C. C. A. — , 150 Fed. 257, 260 (U. S. Rev. St. 858, as to survivor's disqualification, held to supersede the Michigan statute).

On the question of *depositions* under Federal statutes, compare the citations *post*, §§ 1381, n. 3, 1856, n. 10.

[*Note* 6; *add:*]

1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 66, C. C. A. (U. S. Rev. St. 1878, § 861, and Ohio Annot. Rev. St. 1898, § 5242 *a*, relating to the use of testimony at a former trial, held not to be in conflict, and the latter followed).

[*Note* 7, l. 6 from below; *add:*]

1904, Manhattan L. Ins. Co. *v.* Albro, 127 Fed. 281, 284, C. C. A. (adopting the Massachusetts Court's interpretation of a Massachusetts statute as to parol evidence).

[*Note* 9; *add:*]

1904, Lang *v.* U. S., 133 Fed. 201, C. C. A. (cross-examination to the witness' record of conviction, allowed, contrary to the Illinois rule; no authority cited).

[*Note* 10; *add:*]

1904, Withaup *v.* U. S., 127 Fed. 530, 533, C. C. A. (following Logan *v.* U. S.; the common-law rule, and not the Colorado statute of 1893, as to comparison of handwriting, applied, because "the common law, by reason of the territorial act of 1861, was the law of Colorado when it was admitted into the Union as a State").

[*Note* 11; *add,* at the end:]

A similar conflict, however, may arise in regard to the Federal executive regulation forbidding disclosure of *liquor-tax receipts* by revenue collectors; this rule of privilege has been recognized by the Federal Courts; but if the State Courts do not recognize such a privilege in their own law, there is no reason why they should not compel disclosure from a Federal official within their jurisdiction; the practice may be seen from the citations, *post,* § 2375.

[*Text,* l. 4 on p. 19; *add* a new paragraph (*d*), and new note 10*a:*]

(*d*) In *all civil actions*, the foregoing distinctions are now subject to be modified by the statute of 1906, which applies uniformly the *lex fori territorialis*.[10a] Just how far this statute will be construed to overthrow the hitherto settled distinctions, and how far § 721 of the Revised Statutes can be harmonized with it, remains to be seen. In the pending Revision, now in the hands of a Committee of Congress, these unavoidable problems should be solved in advance, if possible.

[10a] St. 1906, June 29, § 3608, Stat. L. vol. 34, p. 618 (U. S. Rev. St. 1878, § 858, is amended so as to read as follows: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held").

[*Note* 14, at the end, *add:*]

But the following case seems *contra:* 1903, Cockerill *v.* Harrison, 14 Man. 366 (Eng. St. 1869, 32 & 33 Vict. c. 68, § 2, quoted *post,* § 2061, relating to actions for breach of promise, held applicable to Manitoba, and not impliedly repealed by Manitoba Evidence Act, 57 Vict. c. 11).

[*Note* 21; *add:*]

1904, Attorney-General *v.* Toronto J. R. Club, 7 Ont. L. R. 248 (Can. St. 1893, c. 31, quoted *post,* § 2252, relating to the privilege against self-crimination, held not applicable in Ontario, upon claim of privilege by a witness in a civil proceeding for revoking a corporate charter).
1906, Chambers *v.* Jaffray, 12 Ont. L. R. 377 (claim of privilege on a civil trial; the trial judge treated Can. St. 1893, c. 31, *supra,* as applicable; but on appeal the judge disposed of the claim under Ont. St. 1904, c. 10, § 21, quoted *post,* § 2281).

§ 7. Conatitutional Rules; Ex post facto Laws.

[*Note* 7, par. 1; *add:*]

1906, People *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164 (dispensing with the oath for children).

[*Note* 9; *add,* under *Accord:*]

1905, Wester *v.* State, 142 Ala. 56, 38 So. 1010 (St. 1903, No. 32, allowing the wife to testify against the husband in certain cases, is not unconstitutional as *ex post facto*).
1907, Campbell *v.* Skinner, — Fla. — , 43 So. 875 ("a right to have one's controversies determined by existing rules of evidence is not a vested right"; said of a statute enabling proof of lost deeds).
1907, State *v.* Dunn, — Ida. — , 88 Pac. 235 (St. 1905, Mar. 7, p. 352, excluding parol evidence of the ownership of a recorded brand, held applicable to a brand on an animal sold before the statute).

[*Note* 9 — *continued.*]

1906, Hall *v.* Reinherz, — Mass. — , 77 N. E. 880 (declarations made before the statute of 1898, quoted *post*, § 1576, and admissible only by virtue thereof, received).
1907, Woodvine *v.* Dean, — Mass. — , 79 N. E. 882 (a statute enacting a rule of evidence "general in form . . . and having reference only to civil cases, must be regarded as applicable to any future trial, whether or not in a case pending at the time it took effect"; here, a rule of St. 1905, c. 288, making the land court's report *prima facie* evidence).
1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (a statute having limited the admissibility of certificates of death, since the first trial of the case, the certificate admitted on the first trial was held inadmissible on the second).
1906, Samuel & Jessie Kenney P. Home *v.* Kenney, — Wash. — , 88 Pac. 109 (a statute of 1890 held applicable to prior evidential utterances; "there appears to be no vested right to any rule of evidence").

[*Note* 9; *add,* under *Contra:*]

1903, State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918 (admission of an illegal keeping of liquor, as a misdemeanor, in December, not admitted to prove intent in April, a statute having meanwhile made the act a felony; obscure theory).

[*Text*, p. 23, l. 8:]

For "property deprivations," read "penal measures."

§ 15. Prior Introduction of Inadmissible Evidence as Estopping from Subsequent Objection.

[*Note* 2, par. 1; *add:*]

1903, R. *v.* Noel, 6 Ont. L. R. 385 ("Even if inadmissible matters are introduced in cross-examination, the right to re-examine remains; . . . if it was desired to avoid re-examination upon it, it should have been expunged"; Blewett *v.* Tregonning followed).
1905, Louisville & N. R. Co. *v.* Quinn, — Ala. — , 39 So. 616 (carrier putting off a passenger before reaching destination).
1905, German-Amer. Ins. Co. *v.* Brown, 75 Ark. 251, 87 S. W. 135 (opinion testimony).
1904, See *v.* Wabash R. Co., 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, contradiction allowed).
1905, Warren L. S. Co. *v.* Farr, 142 Fed. 116, C. C. A. (conversion).
1906, Ball *v.* U. S., 147 Fed. 32, 41, C. C. A. (conviction of crime, offered to discredit the accused as witness).
Compare the rules for *re-examination* (*post*, § 1896) and *rebuttal* (*post*, § 1873).

[*Note* 3, par. 1; *add:*]

1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (a party introducing the opponent's admission during an offer of compromise by the former was not allowed to exclude the opponent's evidence in explanation).
1906, Mash *v.* People, 220 Ill. 86, 77 N. E. 92 (rule applied to justify the counsel's allusion to the defendant wife's failure to testify).

[*Note* 3, par. 2; *add:*]

So, too, the trial Court's discretion in *admitting* it will not be disturbed: 1906, Bennett *v.* Susser, — Mass. — , 77 N. E. 884.

§ 16. Judicial Discretion.

[*Text*, par. (*c*), line 7; after "evidence," *insert* a new note 3*a:*]

[3a] In more recent times the Court of Massachusetts seems to have emasculated its former doctrine — in words, at least — by utterances like the following, which illogically undermine the very idea they profess to support:
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 ("The finding of the trial Court, so far as respects facts [affecting admissibility of evidence], cannot be revised by this Court, provided the finding is justified by the evidence").

[*Note* 4; *add:*]

1906, State *v.* Monich, — N. J. L., — 64 Atl. 1016.

[*Note* 5, par. 2; *add:*]

1904, Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998 (the counsel "now makes formal offer to prove that S. knew of this transaction," etc., held insufficient without calling the witness or affirmatively showing that the offer is made in good faith, etc.).
1905, Indianapolis & M. R. T. Co. *v.* Hall, — Ind. — , 76 N. E. 242 ("There must be a question asked which is calculated to elicit the testimony excluded").

[*Note* 8; *add:*]

1905, Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242.

[*Note* 10; *add:*]

Accord: 1905, Deitrich *v.* Kettering, 212 Pa. 356, 61 Atl. 927.
Contra, but unsound:
1904, State *v.* Charles, 111 La. 933, 36 So. 29 (homicide; certain declarations of the deceased, offered improperly as dying declarations and *res gestæ*, admitted, being properly receivable as self-contradictions of other declarations of the deceased; no authority cited).

§ 17. The Offer of Evidence.

[*Text*, p. 52, par. *b* (1); at the end of the sentence, after note 7, *add:*]

A common application of this rule is found where on objection the trial Court excludes an indefinite question (*e. g.*, "What did he say?") whose answer might or might not contain irrelevant or otherwise objectionable matters. In other words, the Court and the opponent are entitled to an offer *specific enough* to permit of intelligent objection and ruling; whether the offering party need specify precisely the expected answer or only the general objective of the question, and whether he needs to volunteer this or may wait until the Court requests it, and whether the context of the testimony may suffice for the purpose, — these must depend much upon the case in hand.[7a]

[7a] 1905, Marshall *v.* Marshall, 71 Kan. 313, 80 Pac. 629 (citing cases; good opinion by Mason, J.). This question, however, tends often to merge into that of § 20, *post* (embodying the answer in a bill of exceptions) and that of § 1871, *post* (whether there was an implied offer to prove other facts making the offer relevant).

§ 18. The Objection.

[*Text*, p. 53, l. 7; *insert:*]

1833, *Shaw*, C. J., in *Cady* v. *Norton*, 14 Pick. 236: "The right to except [*i. e.*, object] is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on, and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice for a party, knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it as erroneous and void, if it should be against him."

[*Text*, p. 59; rewrite the paragraph beginning "But," so as to read:]

But when a general objection is *sustained* by the trial Court, it may be presumed that some valid ground was apparent to the judge without express statement; and as the exception is here to be taken by the proponent of the evidence, it is fair to insist that he should have asked for the specific ground of objection, if he did not perceive it, or should have made an offer to obviate it, if he did perceive it, or should have stated clearly the precise basis of his claim for admissibility, etc.

[*Note* 1, par. 1, l. 9; *add:*]

1905, Tutwiler C. C. & I. Co. *v.* Nichols, — Ala. — , 39 So. 762.
1906, Patton *v.* Bank, 124 Ga. 965, 53 S. E. 664.
1904, People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098.
1904, Macfeat *v.* Phila. W. & B. R. Co., — Del. — , 62 Atl. 898.
1905, State *v.* Castigno, 71 Kan. 851, 80 Pac. 630.
1905, State *v.* Crawford, 96 Minn. 95, 104 N. W. 822.
1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, C. C. A.
1905, Shandrew *v.* Chicago St. P. M. & O. R. Co., 142 Fed. 320, C. C. A. ("immaterial, incompetent, and irrelevant").

For the effect of a *motion to strike out*, see *post*, § 19, par. (2), and *infra*, this section, n. 17.

[*Note* 1 — *continued.*]

Of course, where the objection could have been made at the time of the question, a later *motion to strike out* need not be granted; this seems elementary logic:
1906, State *v.* Forsha, 190 Mo. 296. 88 S. W. 746.

This rule, as sometimes stated, is given a supplement, namely, that where objection is not made, to an obviously improper question, until the answer of the witness has been given, then the trial Court's discretion in not striking out the answer will be conclusive unless abused: 1906, State *v.* Hummer, — N. J. L. — , 65 Atl. 249. This qualification is too loose; if counsel does not make timely objection, that should be an absolute end of any prohibitory rule of evidence that might have been involved.

[*Note* 4; *add:*]

1905, White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411 (applying Code § 5314).
1906, Columbus R. Co. *v.* Patterson, 143 Fed. 245, C. C. A.

[*Note* 7; *add:*]

1904, Cudlip *v.* Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925 (under C. C. P. § 911, since objections to a deposition need not be noted at the taking, the cross-examiner may on the trial object to parts of his cross-examination when offered by the opponent after the former's refusal to offer them).

[*Note* 8; *add:*]

1903, Bair *v.* Struck, 29 Mont. 45, 74 Pac. 69.
1904, Mease *v.* United T. Co., 208 Pa. 434, 57 Atl. 820.
1904, Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

[*Note* 10; *add:*]

An objection to a *deposition* on the ground that the witness is present in the court need not be made till then; but special circumstances affect the time of making this objection (*post*, § 1415).

[*Note* 13; *add:*]

1904, Meekins *v.* Norfolk & S. R. Co., 136 N. C. 1, 48 S. E. 501 (former testimony of one deceased between the trials; a certain hearsay part of his testimony excluded, although not objected to at the former trial).

[*Note* 14; *add*, as a new paragraph:]

There is, however, a rule of general application to *infants*, as a part of which the Court will rule in their favor on points upon which no exception was taken on their behalf:
1904, Parker *v.* Safford, 48 Fla. 290, 37 So. 567. Compare § 1076, notes 7, 8, *post*, and § 1063, n. 1.

[*Note* 15; *add:*]

1906, Benton *v.* State, — Ark. — , 94 S W. 688 (an objection "to all evidence of actions, conversations, etc., after the commission of the offence," does not avail for subsequent testimony of the sort, unless by consent).

[*Note* 17; *add:*]

The term "motion to strike out evidence" is used in some localities to represent a form of objection. It is, however, an ambiguous and unsatisfactory term, because the things signified by it are otherwise better known in orthodox practice. The following uses of the term are to be distinguished: (1) A motion to strike out a piece of evidence which *ought to have* been *objected to* at the time of its offer is merely another term for an objection, and is governed by the rules as to the time of an objection (*supra*, par. *a*, notes 1–14). (2) A motion to strike out evidence which was admitted *conditionally on the subsequent supplying of other evidence* is a mode of taking advantage of the doctrine of *conditional admissibility* (*ante*, § 14, *post*, § 1871). (3) A motion to strike out a certain class of testimony which is required by law to be *corroborated* in order to be legally effective may be a proper method of taking advantage of such rules (*post*, §§ 2030–2091). (4) A motion to strike out a *document* which in the course of the evidence turns out not to be properly authenticated may be a proper method of excluding it (*post*, §§ 2129–2169). (5) A motion to strike out *any mass of evidence* which at the close of a case appears insufficient for the particular issue may serve to eliminate it; but more usually the same purpose will be better attained by a motion to take the case from the jury or by an instruction to the jury (*post*, §§ 2494–2496). An example of the usual failure to distinguish these different uses will be seen in Walker *v.* Lee, — Fla.— , 40 So. 881 (1906).

[*Note* 18, par. 1; *add:*]

1904, Weaver *v.* State, 139 Ala. 130, 36 So. 717.
1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (qualified rule).
1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641.
1907, Williams *v.* State, — Ind. —, 79 N. E. 1079 (irrelevant and immaterial).
1904, Weatherford *v.* Union P. R. Co., — Nebr. — , 98 N. W. 1089.
1904, Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655 (hypothetical question).
1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247 (pointing out special modes of curing the defect).
1905, Willett *v.* Morse, — N. J. L. — , 60 Atl. 362.
1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96.
1906, Newcomb *v.* State, — Tex. Cr. — , 95 S. W. 1048 (irrelevant and immaterial).
1904, Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 24 Sup. 24.
1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.

[*Note* 18 — *continued.*]

For the same reason, an objection may not be *in gross* to a mass of unspecified testimony:
1905, O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 582 (motion to strike out all testimony on a certain subject, insufficient).

[*Note* 19; *add:*]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919.
1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147.
1905, Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223 (marital communications).
1907, Chicago R. I. & P. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119.
1906, Sparks *v.* Terr., 146 Fed. 371, C. C. A. ("when the reason for the objection is readily discernible").

[*Note* 20; *add:*]

1904, Matthews *v.* Farrell, 140 Ala. 298, 37 So. 325 (but here the Court puts its decision on inappropriate grounds).
1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515.
1904, State *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140.
1906, Luckenbach *v.* Sciple, — N. J. L. — , 63 Atl. 244 (good opinion by Garrison, J.).
Contra, on the facts: 1906, Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106 (here the unusual suggestion is made that "the judge could have called upon the counsel to state what he expected to prove"; but why could not the counsel himself speak up, without waiting to be prodded?).

[*Note* 21; *add:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (but otherwise where the nature of the answer may be presumed).
1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565 (witness' contradiction).
1904, Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575.
1906, O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639 (conviction of crime to impeach a witness; the objection that a copy of the record should be used was not allowed to be raised on appeal).
1906, Magnolia M. Co. *v.* Gale, 191 Mass. 487, 78 N. E. 128.
1903, Weeks *v.* Hutchinson, 135 Mich. 160, 97 N. W. 695.
1905, Bragg *v.* Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527 (hypothetical questions; pungent opinion by Lamm, J.).

[*Note* 23; *add:*]

The following ruling seems erroneous: 1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (perjury; offer of the defendant's good character for veracity, admissible for him as defendant, but not admissible for him as witness because he did not testify; an objection to it was sustained; held erroneous, though the offering counsel did not state the specific purpose).

[*Note* 24; *add:*]

1904, Kirby *v.* State, 139 Ala. 87, 36 So. 721.
1904, Markey *v.* State, 47 Fla. 38, 37 So. 53.
1903, Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656.
1906, Johnson *v.* State, 125 Ga. 243, 54 S. E. 184.
1906, State *v.* Crump, 116 La. 978, 41 So. 229 (dying declaration).
1905, Thornton-Thomas M. Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10 (series of documents).

[*Note* 25; *add:*]

1904, Rhodes *v.* State, 141 Ala. 66, 37 So. 365.
1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289.
1904, Alford *v.* State, 47 Fla. 1, 36 So. 436.
1905, Freeman *v.* State, — Fla. — , 39 So. 785.
1906, Hoodless *v.* Jernigan, — Fla. — , 41 So. 195 (several documents).
1906, Mash *v.* People, 220 Ill. 86, 77 N. E. 92.
1906, State *v.* Simmons, — Kan. — , 88 Pac. 57 (deposition).
1904, Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360.
1906, Metz *v.* Willitts, 14 Wyo. 511, 85 Pac. 380.

[*Note* 26, l. 5 from below; *add:*]

1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (custom as to switch-lights on other railroads).

[*Note* 26, at the end; *add:*]

1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (personal injuries; the plaintiff having introduced against objection hearsay evidence negativing prior injuries received, the defendant was held not to waive by afterwards rebutting with similar hearsay affirming the injuries).
1900, Richardson *v.* Webster City, 111 Ia. 426, 430, 82 N. W. 921 (objection to opinion evidence of damage, not waived by subsequent similar evidence).
1906, State *v.* Beckner, 194 Mo. 281, 91 S. W. 892 (murder; the prosecution having erroneously introduced the defendant's bad character for violence, his rebuttal by evidence of good character held not a waiver).
1907, Cheney's Estate, — Nebr. — , 110 N. W. 731 (opinion evidence).

[*Note* 26 — *continued.*]

1900, Horres *v.* Chemical Co., 57 S. C. 192, 35 S. E. 500 (objection to improper opinion of speculative damages, held not waived by subsequent similar evidence).

Compare the rule for *curative admissibility* (*ante*, § 15).

[*Note* 27, l. 4; *add:*]

1905, Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491 ("where an objection has once been distinctly raised and overruled, it need not be repeated to the same class of evidence").
1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (an offer of a part of former testimony was rejected as being too fragmentary; the whole was then offered and admitted; this was held a waiver of the exception).
1904, Cheek *v.* Oak G. L. Co., 134 id. 225, 46 S. E. 488 (similar).

[*Note* 27, at the end; *add:*]

The tender by an objector of an *instruction limiting the evidential effect* of evidence admitted against the objection is not a waiver of the objection to that ruling:
1904, Myers *v.* Manlove, 164 Ind. 128, 71 N. E. 893.

A *failure to object* to a *document* will extend, not only to the genuineness of it, but also to an agent's authority to execute, yet not to its legal sufficiency (*post*, § 2132).

Usually, a failure to renew an offer, after the opponent's *withdrawal of an objection improperly sustained*, would be a waiver of the error; but not always: 1905, Main *v.* Radney, — Ala. — , 39 So. 981.

It is common learning that a party obtaining a *responsive answer* (*post*, § 785) to a *question asked by himself* has waived objection by the very asking: 1905, O'Brien *v.* Knotts, 105 Ind. 308, 75 N. E. 582. Thus the only question usually can be as to responsiveness. An example of a poor ruling on this subject is seen in Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (1905).

§ 19. The Ruling.

[*Note* 1, at the end; *add:*]

Compare the following case: 1906, Stitt *v.* Rat Portage L. Co., 98 Minn. 52, 107 N. W. 824 (collecting prior rulings in this jurisdiction).

Compare the following, said of a trial in chancery: 1904, Asbury *v.* Hicklin, 181 Mo. 658, 81 S. W. 390 ("The practice . . of reserving the ruling until the decision of the case is erroneous").

But the reservation of a ruling on evidence *admitted* may well require that the opponent should formally except later for failure to rule, in order to raise the point on appeal: 1904, Naas *v.* Welter, 92 Minn. 404, 100 N. W. 211.

[*Note* 3, par. 1; *add:*]

1904, De Yampert *v.* State, 139 Ala. 53, 36 So. 772.
1905, Johnson *v.* People, 33 Colo. 224, 80 Pac. 133.
1906, Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833.
1906, State *v.* Moran, — Ia. — , 109 N. W. 187 (confession).
1907, Gulliford *v.* McQuillan, — Kan. — , 89 Pac. 927.
1904, Allen *v.* Com., — Ky. — , 82 S. W. 589.
1905, White *v.* Com., — Ky. — , 85 S. W. 753.
1905, Baumgartner *v.* Eigenbrot, 100 Md. 508, 60 Atl. 601.
1904, McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382.
1903, Morgan *v.* Terr., 16 Okl. 530, 85 Pac. 718.
1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738.

[*Note* 3; *add,* in a new paragraph:]

So, also, an erroneous exclusion of evidence may be cured by *subsequently admitting it:* 1904, Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

Distinguish the question whether the *party objecting* is entitled to do so by a *motion to strike out* or an *instruction to disregard*, made later in the cause; here, on the principle of § 18, par. *a*, *ante*, the motion or instruction comes too late, if the ground of it was knowable at the time of the offer of the testimony: 1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330.

§ 20. The Exception.

[*Note* 2; *add:*]

1903, Cady *v.* Cady, 91 Minn. 137, 97 N. W. 580.
1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733.
1904, Alden *v.* Supreme Tent, 178 N. Y. 535, 71 N. E. 104 (applying special Code provisions).
1906, Morgan *v.* Lehigh V. C. Co., — Pa. — , 64 Atl. 633 (referee).
1907, Thomas *v.* Com., — Va. — , 56 S. E. 705.

The following seems peculiar: 1905, Close *v.* Chicago, 217 Ill. 216, 75 N. E. 479 (whether a city ordinance is void on its face does not need an exception, otherwise where the objection is to the insufficiency of description, etc.).

[*Text*, p. 66, in par. (2), at the end of the second quotation, *add* a new *note* 3*a*:]

[3a] The practice as to bills of exception, certificates, etc., depends largely on local rules of court; compare the following: 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (practice in criminal cases, under St. 1896, no. 113).
1906, Lemmert *v.* Lemmert, 103 Md. 57, 63 Atl. 380.
1904, Hillier *v.* Farrell, 185 Mass. 434, 70 N. E. 424 (before a master, under chancery rules 31 and 32).

[*Note* 4; *add*, under *Evidence Admitted*:]

1905, Starke *v.* State, — Fla. — , 37 So. 850.
1905, Caldwell *v.* State, 50 Fla. 4, 39 So. 188 (here the objection to the question was useless, because the question was not shown, and no objection to the answer as such was made by a motion to strike out).
1906, Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656, — Fla. — , 41 So. 195.
1904, Dunn *v.* State, 162 Ind. 174, 70 N. E. 521.
1903, State *v.* Booth, 121 Ia. 710, 97 N. W. 74.
1904, State *v.* Lewis, 112 La. 872, 36 So. 788.
1906, Purinton *v.* Purinton, 101 Me. 250, 63 Atl. 925.
1905, Robinson *v.* Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190.

[*Note* 4; *add*, under *Questions Excluded*:]

1904, Ross *v.* State, 139 Ala. 144, 36 So. 718.
1905, Macon *v.* Humphries, — Ga. — , 50 S. E. 986.
1904, Georgia N. R. Co. *v.* Hutchins, 119 Ga. 504, 46 S. E. 659.
1904, Com. *v.* Bavarian B. Co., — Ky. — , 80 S. W. 772.
1904, South Omaha *v.* Sutliffe, — Nebr. — , 101 N. W. 797.
1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (stating the rule's limitations).
1904, Richmond & P. E. R. Co. *v.* Rubin, 102 Va. 809, 77 S. E. 834.
1904, Williams *v.* Belmont C. & C. Co., 55 W. Va. 84, 46 S. E. 802.

[*Note* 7; *add*:]

Campbell says of Lord Mansfield (Lives of the Chief Justices, III, 293): "In all his time, there was never a bill of exceptions tendered to his direction." It is worth noting that the old reason, namely, distrust of the judge's accuracy, which led to the original English statute, produced recently in Louisiana, in consequence of the overt-act doctrine for a deceased's threats in homicide, a statute stiffening the practice as to the immediate recording of the evidence leading to the exception (*post*, § 246, n. 13).

[*Note* 8, par. 1; *add*, under *Accord*:]

1905, McClintock *v.* Frohlich, 75 Ark. 111, 86 S. W. 1001.
1905, Spring Valley Coal Co. *v.* Chiaventone, 214 Ill. 314, 73 N. E. 420.
1905, Storer *v.* Markley, 164 Ind. 535, 73 N. E. 1081.
1903, Glaser *v.* Glaser, 13 Okl. 389, 74 Pac. 944.
1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95.
1905, Foss *v.* Van Wagenen, — S. D. — , 104 N. W. 605.
See also the following: 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 (motion overruled must be excepted to, etc.).
So, too, in any other form of carrying the case higher, the specific errors relied upon must be mentioned: 1905, Barker *v.* State, — Nebr. — , 103 N. W. 71 (petition of error).

§ 21. New Trial for Erroneous Ruling.

[*Note* 5; *add*, at the end:]

1905, McClelland *v.* Bullis, — Colo. — , 81 Pac. 77 (opinion by Bailey, J., collecting the authorities).
1904, Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591.
1904, Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643.
So, too, for a judge *sitting without a jury:* 1905, Kreiling *v.* Northrup, 215 Ill. 195, 74 N. E. 123 ("The rule is that no improper or immaterial evidence will be presumed to have influenced the Court in reaching a decision, where there is sufficient proper evidence to justify the judgment").
1907, McCready *v.* Crane, — Kan. — , 88 Pac. 748.
1904, Mankato Mills Co. *v.* Willard, 94 Minn. 160, 102 N. W. 202.
1904, *Ex parte* Dennison, — Nebr. — , 101 N. W. 1045.
1905, State *v.* Harris, — N. D. — , 105 N. W. 621.
1904, Godfrey *v.* Faust, 18 S. D. 567, 101 N. W. 718.
1905, Godfrey *v.* Faust, — S. D. — , 105 N. W. 460 (local rule revised in statement).

[*Note* 10; *add*:]

In the following opinions good statements of the rule are found; it remains only for these Courts to be consistent with themselves in constantly observing the spirit of these rulings:
Connecticut: 1903, Munroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498, per Hamersley, J.
Idaho: 1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227.
Iowa: 1906, Wiltsey's Will, — Ia. — , 109 N. W. 776 ("We are not justified in reversing a case because of the improper admission of evidence, where the result could not have been different had such evidence been excluded").
Maryland: 1904, Joseph Bros. Co. *v.* Schonthal I. & S. Co., 99 Md. 382, 58 Atl. 205 (good statement by McSherry, C. J.).

[*Note* 10 — *continued.*]

Michigan: 1891, People *v.* Neumann, 85 Mich. 98, 48 N. W. 290.

Minnesota: 1903, State *v.* Nelson, 91 Minn. 143, 97 N. W. 652.

1905, State *v.* Crawford, — Minn. — , 104 N. W. 822 (in which Jaggard, J., for the Court, fully and emphatically proclaims the adherence of this Court to the orthodox and enlightened rule); 1905 State *v.* Williams, — id. — , 105 N. W. 265 (Start, C. J., explaining the rule laid down in the preceding cases).

Missouri: 1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (under Rev. St. 1899, § 865).

1906, State *v.* Barrington, — Mo. — , 95 S. W. 235 (showing a healthy attitude on this subject).

1906, State *v.* Feeley, 194 id. 300, 92 S. W. 663.

1904, Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19 (Bland, P. J.: "Whether or not there was error committed in the admission of evidence, the error will not avail appellant, for the reason that under the competent evidence, . . . the judgment is clearly for the right party and should not be reversed").

1904, Hanna *v.* Orient Ins. Co., 109 id. 152, 82 S. W. 1115.

Montana: 1906, State *v.* Fuller, — Mont. — , 85 Pac. 369.

Nevada: State *v.* Williams, — Nev. — , 82 Pac. 353.

Rhode Island: One of the broadest and best statements of the rule is as follows: "Where the evidence is such that a new trial would be of no avail, it will be denied, although there may have been error in the trial"; per Stiness, C. J., in Clarke *v.* N. Y. N. H. & H. R. Co., 26 R. I. 59, 58 Atl. 245.

South Dakota: 1904, Fowler *v.* Iowa Land Co., — S. D. — , 99 N. W. 1095 ("Where there is sufficient evidence to sustain the judgment, independently of the evidence objected to and admitted, the admission of such evidence does not constitute reversible error").

Tennessee: The following phrasing of the rule, under Tenn. Code, § 6351, would be the ideal one, if the last two clauses were omitted:

1904, Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124 (Neil, J.: "The rule has been laid down by this Court that there can be no reversal for error in the charge of the Court below, where we can clearly see that a correct result was reached by the jury, and that another trial with a proper charge could not change that result. The same rule must obtain where evidence was improperly excluded in the Court below, if it be perfectly apparent to this Court that the result was the correct one, that the excluded evidence could not have changed the result, and that upon a new trial . . . the jury could not fail to reach the same conclusion").

West Virginia: 1905, Tucker *v.* Colonial F. Ins. Co., — W. Va. — , 51 S. E. 86 ("If it appear to the Court on the whole matter that the verdict ought to be affirmed," no new trial will be granted).

[*Note* 12; *add:*]

The following rulings are to be numbered among those which still take part in the Saracenic invasion, led by Fanatic Technicality, into the realms of Truth and Common Sense.

Alabama: 1904, Southern R. Co. *v.* Morris, — Ala. — , 42 So. 17 (on several exceptions, the only one sustained was that, upon a proper question to a witness as to the defendant's payment of his expenses, the witness' answer showed that no more had been paid than was due; solely for failing to strike out this answer, the verdict for the plaintiff was reversed and a new trial ordered; this was a plain failure of justice).

1905, Shelton *v.* State, ib., 42 So. 30 (murder; out of two dozen exceptions, the verdict was set aside solely because of a charge upon confessions, the defendant's statement being finically construed not to be a confession).

1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (on some thirty exceptions, and twenty refused charges, the judgment was reversed solely because of an error in refusing to admit the details of the deceased's intoxication).

1906, Jacobs *v.* State, — Ala., — , 42 So. 70 (murder; out of a dozen exceptions, the only one sustained was to a casual phrase of the judge amounting to a charge upon the evidence; and for this the verdict was set aside). In this State, the Bar, led by the Attorney-General and Judge Thomas of Montgomery, among others, have been endeavoring to reform the practice by statute at the 1907 session of the Legislature.

California: 1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 ("A party cannot, after insisting upon the admission of improper evidence, over an objection to its admissibility, defend his course by contending that the error was harmless. . . . This Court in such cases sits only as a Court for the correction of errors. The judgment upon the facts, to which every litigant is entitled as of right absolute, is the judgment of the trial Court." Here is indeed frankly the Trilogy of Technicalism, which may be thus restated: "1. It is a crime to violate by mistake the rules of evidence; the penalty is the forfeiture of one's just rights and estates. 2. The Supreme Court is not a real Court of Justice, but only a Referee to decide Bets on Rules of Evidence. 3. Every person has an Absolute Right to profit unjustly by the trial Court's mistakes in deciding such Bets").

1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101.

But the new Court of Appeal seems to be making a better start in enforcing the rational doctrine:

1905, Greene *v.* Murdock, — Cal. App. — , 81 Pac. 993; and a recent marked turn for the better is observable in the Supreme Court, in People *v.* Weber, — Cal. — , 86 Pac. 671 (1906); Dolbeer's Estate, ib., 86 Pac. 695 (1906).

Georgia: 1906, Young *v.* State, — Ga. — , 54 S. E. 82 (third conviction for murder; the first two were set aside for minor technicalities; this third was set aside by a majority, because the trial judge erroneously assumed that the defendant did not dispute the death of the deceased; in fact, the victim assaulted was riddled with shot "from about the middle," and at the time of this ruling his corpse had been putrefying in the graveyard for two years; yet the trial Court, in withdrawing that issue from the consideration of the jury, is deemed to have committed a fatal error; this kind of ruling is itself a putrefaction of justice).

Iowa: A rich piece of judicial artificiality, as it contrasts with natural justice, is found in State *v.* Wheeler, — Ia.— , 105 N. W. 374 (1905), and State *v.* Brown, 106 N. W. 379 (1906); in the former case, a verdict of guilty was found against one Wheeler, for throwing acid in the eyes of Mrs. R., but the verdict was set aside for improper evidence; in the latter case, the jury found one Brown guilty of instigating the criminal act of Wheeler as above, and this verdict was affirmed by the Supreme Court, with the incidental statement that "there is ample evidence in the case to establish Wheeler's guilt." *I. e.*, Wheeler

[*Note* 12 — *continued.*]

was not guilty when he was himself tried, yet he was guilty when Brown was tried! Of course there is a legal twist of thought by which this can be easily explained. But the fact remains that Justice was bungled here, and that it was bungled because the judges are slaves of a machine-like method and are not bold enough as Justiciars to put two such cases together and solve them rationally and sensibly.

Kansas: 1905, State *v.* Miller, — Kan. — , 80 Pac. 51 (rape under age; the Court overruled three exceptions, but sustained the fourth and granted a new trial solely because at the trial was admitted a priest's copy, brought over by the family from Russia, of an extract of the parish-register showing the girl's age; the girl herself and both her parents having testified to her age, and the certificate being merely cumulative; the usual paltry and plaintive excuse is made, "How much weight may have been given by the jury, we are unable to say, etc.").

1906, Federal B. Co. *v.* Reeves, — Kan. — , 84 Pac. 560 (among numerous alleged errors, the Court declared many of the objections "frivolous," and found only one error, and even this was by the better rule not an error; without the slightest consideration whether it could or should have affected the verdict, the reversing lever of the decision factory was set a-going, and the wheels of justice were run back to where they had started two years before).

Kentucky: 1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864, 1105.

1905, Whitt *v.* Com., — Ky. — , 84 S. W. 340 (reversed for a single error in evidence).

Louisiana: 1906, State *v.* Rugero, 117 La. — , 42 So. 495 (verdict of manslaughter set aside solely because, on the defendant having read his affidavit for continuance on account of a witness whom he could secure "in due time for trial at this term," the prosecuting attorney read the sheriff's return for the witness as not found because out of the State in Texas; the defendant's affidavit being by fiction of law deemed conclusive, this return of the sheriff was treated as reflecting fatally upon the defendant's veracity; the prosecution having argued that this error was trivial, the Supreme Court warmly retorts, "Why jeopardize the result of a trial by insisting on evidence so utterly insignificant?" This opinion is pitiably lacking in the true spirit of criminal justice; it must remain for a new generation to cure this).

Michigan: 1905, Seymour *v.* Bruske, 140 Mich. 644, 103 N. W. 613 (there was one error in the admission of evidence; reversed; "The testimony . . . impresses us with the idea that the jury was not in fact prejudiced by this evidence. We cannot say, however, that it was not prejudicial. We can say that it was incompetent." And the plain-minded observer can say that such language is that of the helpless slave of a legal treadmill, not that of an administrator of justice).

Missouri: 1904, State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123 (St. Louis bribery case; reversed on a technicality).

The preposterously illogical result of the heresy often is that the greater the probative value of the erroneously admitted evidence, the more necessary to order a new trial; *e. g.* in Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26, the Court, having declared a conductor's statement, made just after the accident, to have been erroneously admitted, proceeds: "Coming as it did from the conductor of the train, it was *calculated to carry conviction* that the cause of the accident was, etc.," and therefore "the admission of this evidence was reversible error." A system of proof pretending to call itself rational should not be found employing such a parody on reasoning. In the above opinion, the new trial was ordered for that error alone.

Nebraska: 1906, McCook *v.* McAdams, — Nebr. — , 106 N. W. 988 (a very pretty piece of machine-made justice; after two trials, a verdict for the plaintiff was reversed solely because of testimony to the total damage to the goods, the objections being, first, that it was an opinion, and secondly that it was based in part on cost price).

New Hampshire: 1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 (new trial for a single error, in excluding cumulative opinion in evidence).

North Carolina: 1904, State *v.* Parker, 134 N. C. 209, 46 S. E. 511 (corroborating a child under ten in rape, by her prior statements; the judge's failure to charge as to the precise nature of the corroboration, though no request was made of him by defendant's counsel, and no objection taken, held ground for a new trial; a second trial also having been already ordered for a mere technicality; Clark, C. J., diss.).

Oregon: 1904, Carter *v.* Wakeman, 45 Or. 427, 78 Pac. 362 ("When it is manifest that an error has been committed, prejudice will be presumed").

South Carolina: 1906, State *v.* Rowell, — S. C. — , 56 S. E. 23 (murder; out of twelve errors, only one was sustained, and that was a quibble over the trial judge's wording of his instruction as to self-defence; for this alone a new trial was ordered, though the jury had only condemned him to five years' imprisonment for manslaughter on facts which made this a paltry penalty).

Texas: 1903, Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14.

1906, Chancey *v.* State, — Tex. Cr. — , 96 S. W. 12 (the judge remarked, excluding evidence of a witness' intoxication, that if he was drunk his testimony "would not amount to much"; it was held that this *might* apply to the defendant, who was also drunk, and on this ground alone the judgment was set aside!).

1905, Watkins L. M. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424 (reversed for a single error in admitting cumulative evidence; the same pitiable *non possumus* recurs, "It cannot be known that the jury was not influenced, etc.").

1903, Texas & P. R. Co. *v.* Goggin, 33 Tex. Civ. App. 667, 77 S. W. 1053.

United States: 1905, Sandorn, J., in Union Pacific R. Co. *v.* Field, 137 Fed. 14, C. C. A.

1905, National Biscuit Co. *v.* Nolan, 138 Fed. 6, C. C. A. (Philips, J.: "Error presumptively works a prejudice to the party against whom it was committed").

1906, Sparks *v.* Terr., 146 Fed. 371, C. C. A. (the admission of irrelevant evidence "is a violation of a legal right, and it constitutes fatal error").

Utah: 1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (this is perhaps the most glaring example of our modern failures of justice to be found in the records of a decade; the defendant, who had in July, 1903, three times robbed street cars in Salt Lake City, was charged with the murder of two passengers in a fourth attempted robbery of a car in January, 1904; the defendant took the stand and confessed all the facts, endeavoring to make exculpation by declaring that he had only intended "to try to hit his arm"; the verdict was reversed by the majority, solely on two erroneous rulings of evidence, first, because the claim of witness' privilege was required to be made by the defendant himself and not his counsel,

[*Note* 12 — *continued.*]

and secondly, because of improper cross-examination to past misconduct; not only were the trial Court's rulings easily supportable on orthodox principles, but the Supreme Court majority opinion gave not even one word's consideration to the question whether the alleged errors should have affected the verdict; on a perusal of the testimony of the defendant, full of the self-justifying ethics of a reckless desperado, it is hard to say whether one is more aghast at the cold-bloodedness of the robber in taking the lives of his innocent victims, or the cold-bloodedness of the Supreme Court in mechanically grinding out a reversal without a regard to the demands of justice).

[*Note* 13; *add:*]

Jaggard, J., in State *v.* Crawford, — Minn. — , 104 N. W. 822.

[*Note* 15, p. 76; *add:*]

New York. In this State, in criminal cases (*e.g.* 1904, People *v.* Bonier, 179 N. Y. 315, 72 N. E. 226) the Court continue obstinately to block efforts at reform by frankly declaring that "a presumption of injury *conclusively arises* whenever it is apparent that the erroneous ruling *may have* affected the verdict"; yst in an opinion filed on the very same day (People *v.* Davey, Nov. 15, 1904, 179 id. 345, 72 N. E. 244) the same Court has the blindness to assert that "it has become one of the accepted maxims of our jurisprudence that appellate courts will not be astute to find mere technical errors upon which to reverse judgments"; in the Davey case, the opinion does not make a pretence of considering whether the conviction was actually just upon the evidence; its own condemnation is furnished by the language of the same Court in an opinion written by the very same judge, filed one month later (People *v.* Rimieri, 180 N. Y. 163, 72 N. E. 1002), and ruling the opposite way upon almost precisely the same facts (cited *post*, § 1157, n. 3), in which the proper criticism is made that "to hold that a jury, sitting in judgment in a case involving a human life, could be influenced by such an incident to render a verdict not warranted by the evidence, would be an unjust imputation on the system").
1906, People *v.* Cascone, — N. Y. — , 78 N. E. 287 (the phrase "reversible error" repeated).
Mr. (Assistant District Attorney) Arthur Train, in his valuable book "The Prisoner at the Bar" (1906, p. 339), while taking an optimistic view of the present practice in the New York Court of Appeals, adds his weighty opinion as to the harm done by reversals, however rare, on trivial technicalities.
In civil cases the Court promulgates an enlightened principle: 1906, Hindley *v.* Manhattan R. Co., — N. Y. — , 78 N. E. 277 ("If no reasonable view of all the evidence in the record would permit a conclusion favorable to the defendants on that issue, it is clear that the erroneous rulings [of admission for the plaintiffs], did no harm, and that the judgment [for the plaintiffs] should be affirmed"; this is by the same judge who wrote the opinion in People *v.* Cascone, *supra*).

[*Note* 16; *add:*]

This statute seems to have been followed by an improvement: 1904, State *v.* Simon, 71 N. J. L. 142, 58 Atl. 107.

§ 26. Circumstantial and Testimonial Evidence; Relative Value.

[*Note* 11; *add:*]

1905, State *v.* Foster, — N. D. — , 105 N. W. 938 (whether an instruction must be given).

§ 29. Relevancy, distinguished from Weight.

[*Note* 1; *add:*]

1905, McSherry, C. J., in Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 1084 (supplementary opinion).

§ 38. Circumstantial Evidence; Degree of Probative Value required.

[*Note* 1; *add:*]

1906, Johnson *v.* Atlantic C. L. R. Co., 140 N. C. 574, 53 S. E. 362 (good illustration).
1906, United States F. & G. Co. *v.* Des Moines Nat'l Bank, 145 Fed. 273, 279, C. C. A.

§ 41. Circumstantial Evidence proved by the same Kind.

[*Note* 2; *add:*]

1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder; deceased's despondency, as evidence of a plan of suicide, excluded).
1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574 (rape).
1904, Taylor *v.* General Acc. Ins. Co., 208 Pa. 439, 57 Atl. 830.
1903, East Tennessee & W. N. C. R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99.
1903, Cunard S. S. Co. *v.* Kelley, 126 Fed. 610, 614, C. C. A. (U. S. *v.* Ross followed; here, as to an inference of knowledge of marks on goods).

[*Note* 4; *add:*]

For an acute analysis of this fallacy, and a demonstration of its unsoundness, with citations of additional rulings involving it, see an article "Presumptions built on Presumptions," by Professor Wm. Trickett, of the Dickinson School of Law, in *The Forum*, X, 123, March, 1906 (Carlisle, Pa.).

§ 42. Irrelevancy and Multifariousness, distinguished.

[*Text*, p. 114; *add*, after the other quotations:]

1881, *Ruffin*, J., in *State* v. *Brantley*, 84 N. C. 766: "Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main fact sought to be established, had the effect to render trials complicated, and to confuse and mislead, rather than enlighten, the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a visible, reasonable connection with it; not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes — or, indeed, often — go together, but such as would show that they most usually do so."

§ 56. Defendant's Good Character, admissible.

[*Note* 1; *add:*]

1904, Maston *v.* State, 83 Miss. 647, 36 So. 70.
1906, Powers *v.* State, — Tenn. — , 97 S. W. 815 (and upon all parts of the defendant's conduct).

[*Note* 2; *add:*]

1904, Maston *v.* State, 83 Miss. 647, 36 So. 70.

[*Note* 4; *add:*]

1905, Nelms *v.* State, 123 Ga. 575, 51 S. E. 588.
1904, People *v.* Bonier, 179 N. Y. 315, 72 N. E. 226.
1905, Schutz *v.* State, 125 Wis. 452, 104 N. W. 90.
The following shrewd observation comes down to us from yore: 1664, Turner's Trial, 6 How. St. Tr. 565, 613: L. C. J. Hyde: "The witnesses he called in point of reputation, — that I must leave to you [the jury]. I have been here many a fair time. Few men that come to be questioned but shall have some come and say, 'He is a very honest man, I never knew any hurt by him.' But is this anything against the evidence of the fact?"

[*Note* 6; *add:*]

1904, Maston *v.* State, 83 Miss. 647, 36 So. 70 (even where insanity is the defence).
Whether the accused's good character should be *presumed* is noticed *post*, § 290.

§ 59. Kind of Character of Accused.

[*Note* 1; *add*, under *Accord:*]

1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (homicide; defendant's character for honesty, excluded).
1905, Wistrand *v.* People, 218 Ill. 323, 75 N. E. 891 (rape; character as a "peaceable and quiet citizen," excluded).
1905, State *v.* Bessa, 115 La. 259, 38 So. 985 (assault with intent; character for honesty and industry, excluded).
1906, State *v.* Griggsby, 117 La. 1046, 42 So. 497 (murder; defendant's character for honesty and trustworthiness, excluded).
1904, Maston *v.* State, 83 Miss. 647, 36 So. 70 (murder; character for "peace or violence," and a "peaceable and law-abiding citizen," admitted).
1905, Horton *v.* State, 84 Miss. 473, 36 So. 1033 (rape; character for peace or violence, admissible).
1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6 (rape; defendant's general reputation, excluded).
1907, Saye *v.* State, — Tex. Cr. — , 99 S. W. 556 (negligent homicide by a deputy sheriff; defendant's character as a cautious and prudent officer, admitted).
1905, State *v.* Meyer, 58 W. Va. 146, 52 S. E. 30 (embezzlement; character for honesty, admissible).

[*Note* 2; *add:*]

and the cases cited *post*, § 1981, n. 3.

[*Text*, p. 129; at the end of l. 4, *add* a new note 3:]

[3] 1905, State *v.* Bessa, 115 La. 259, 38 So. 985 ("Do you believe that a man like him would commit, etc.?" excluded).

§ 62. Character of Complainant in Rape.

[*Note* 1; *add,* under *Accord:*]

1907, People *v.* Ryno, — Mich. — , 111 N. W. 740.
1906, State *v.* Detwiler, — W. Va. — , 55 S. E. 654.

[*Note* 4; *add:*]

1907, State *v.* Blackburn, — Ia. — , 110 N. W. 275, *semble.*

[*Note* 5; *add:*]

The following case is peculiar: 1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (carnal intercourse with consent; the prosecutrix' unchaste character, not admitted for defendant).

§ 63. Character of Deceased in Homicide.

[*Note* 1; *add,* in columns 1, 2, and 3:]

1907, State *v.* Barber, — Ida. — , 88 Pac. 418 (not admitted where there was "no question as to who was the aggressor").
1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 (excluded, where the defendant was the aggressor on uncontradicted evidence).
1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (deceased's reputed character, admissible on the present principle; repudiating State *v.* Kennade, 121 Mo. 405, 26 S. W. 347).
1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (excluded).
1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (rule of State *v.* Turpin applied).
1905, Sovereign Camp *v.* Welch, 16 Okl. 188, 83 Pac. 547 (see the citation *post,* § 64, n. 3).
1907, State *v.* Thompson, — Or. — , 88 Pac. 583 (admissible).

[*Note* 1, col. 4, at the end; as to *peaceable character, add,* as *Accord:*]

1905, Bloomer *v.* State, 75 Ark. 297, 87 S. W. 438.
1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (but the State may use character for peaceableness in general, in rebuttal, even though the defendant has offered only the deceased's character for quarrelsomeness when in liquor).
The rule in *Texas* on this point rests on the statute, P. C. 1895, § 713, quoted *post,* § 246, n. 13; and its singular interpretation is noticed in the citations ib. note 12.

The same question may arise where the homicide is said to have been provoked by some *other immoral act* of the deceased:
1904, Melton *v.* State, — Tex. Cr. — , 83 S. W. 822 (defendant killed deceased for insulting his wife; the prosecution was not allowed to introduce the deceased's character for courtesy to ladies).
1904, Orange *v.* State, — Tex. Cr. — , 83 S. W. 385 (defendant killed deceased for incest with his daughter the wife of defendant; deceased's character for unchastity, admitted to show the probability of the incest).
1906, Gregory *v.* State, — Tex. Cr. — , 94 S. W. 1041 (murder; the State alleged that the motive was a quarrel over rents; the defendant alleged that it was his discovery of the deceased in intended adultery with his wife; after evidence of the latter fact, the State was not allowed to show the deceased's good reputed character for chastity and virtue, such evidence being admissible only if the defendant had offered the deceased's reputed bad character for chastity; of such a rule, all that can be said is that it would be regarded as abominable, in any other community; apparently, the innocent dead are to receive no right to defend themselves in this court).
Compare the interesting point, raised in the Thaw Case, as to contradicting the truth of the provocation in such an issue (*post,* § 262).

§ 64. Character of Civil Parties, in general.

[*Note* 3; *add:*]

1892, Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605 (divorce "In civil actions, evidence of general reputation is not admissible, except when directly in issue).
1905, Mattingly *v.* Shortell, — Ky. — , 85 S. W. 215 (plea of payment; the party's character for honesty, not admitted).
1905, Sovereign Camp *v.* Welch, 16 Okl. 188, 83 Pac. 547 (whether the deceased insured, killed by E., was killed while "in violation of the law" under the policy; the deceased's character as a peaceful law-abiding citizen admitted; following Scott *v.* Fletcher, Tenn., *infra*).
1905, Coruth *v.* Jones, 77 Vt. 441, 60 Atl. 814 (assault and battery; defendant's character as a peaceable man, excluded).

§ 65. Character in Negligence Issues.

[*Note* 2; *add:*]

1907, St. Louis I. M. & S. R. Co. *v.* Inman, — Ark. — , 99 S. W. 832 (contributory negligence; deceased's character as a "cautious, careful, and prudent man," excluded).
1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (engineer killed by the explosion of his locomotive boiler; there being no eye-witness of his conduct, his character, for carefulness was admitted).

[*Note* 2 — *continued.*]

1906, Chicago & A. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56 (death on a railroad track; no eye-witness of the actual moment of injury having testified, the "careful habits of the deceased" were admitted).
1903, Reeves *v.* Southern R. Co., 68 S. C. 89, 46 S. E. 543 (train running past a signal; engineer's testimony that he had never done it, excluded; improperly treated as a question of character).
1904, Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53 (injury of a person on a railroad track; the plaintiff's general intoxicated habits excluded, there being direct testimony of his condition at the time; erroneous).

For *habits of intemperance*, see also *post*, §§ 85, 96.

§ 68. Character of Third Persons.

[*Note* 1; *add:*]

Accord: 1904, Kennington *v.* Catoe, 68 S. C. 370, 47 S. E. 719 (title depending on legitimacy of a son born eleven months after marriage; character of the mother for chastity about the time of gestation, but not otherwise, admitted against the son).
Contra, as to particular acts: 1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247 (conspiracy between two men and a woman to obtain an inheritance from B. by fraudulently pretending a marriage between B. and the woman and producing a child as B.'s heir; acts of criminal intimacy between the woman and certain third persons, excluded, as against the two men; erroneous; this was good evidence of her likelihood to defraud in the manner alleged, and was also admissible under the principle of § 133, *post*). Compare the citations *post*, § 134.

[*Text*, p. 144, l. 6; after "received," *add* a note 1*a*:]

[1a] In the following case it was of course not relevant: 1905, Toliver *v.* State, 142 Ala. 3, 38 So. 801 (robbery; character of H., with whom defendant was at the time, excluded).

[*Note* 2; *add:*]

Accord: 1906, Sutton *v.* State, 124 Ga. 815, 53 S. E. 381 (fornication with A.; reputation of A. as a prostitute, and of her house as a bawdy-house, admitted).

[*Note* 3; *add:*]

Contra: 1904, People *v.* Wilson, 136 Mich. 298, 99 N. W. 6 (bastardy; the woman's repute for unchastity about the time of begetting, excluded). Compare the citations in § 133, *post*.

[*Note* 4, par. 1; *add:*]

Accord: 1906, Ford *v.* Ford, 27 D. C. App. 401, 411 (good repute of a notary certifying to an acknowledgment alleged to be false).
1906, Hannah *v.* Anderson, 125 Ga. 407, 54 S. E. 131 (caveators alleged fraud and threats by the propounder of a will; his good character admitted).
Contra: 1905, West *v.* Houston Oil Co., 136 Fed. 343, 348, C. C. A. (alleged forgery of a certificate of acknowledgment; the notary's reputation as a forger, excluded; unsound).

[*Note* 4, par. 2; *add:*]

and for character as a *motive for murder* (*post*, § 390, n. 1).

§ 70. Character Mitigating Damages in Defamation.

[*Text*, p. 147, l. 10 from below, in the quotation from *Jones* v. *Stevens; insert*, after "character:"]

"is not admissible."

§ 73. Mitigating Damages, etc.; State of the Law.

[*Note* 1; *add:*]

Canada, (1): *Newf.* St. 1904, c. 3, Rules of Court 32, par. 22. (like Ont. Rule 488, with two days' notice).
Ill. (1): 1905, Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243 (excluded).
N. J.: (1) and (2); General bad character is admissible: 1855, Sayre *v.* Sayre, 25 N. J. L. 235 (exhaustive opinion by Green, C. J.).
Wis. (2): 1906, Earley *v.* Winn, — Wis. — , 109 N. W. 633 (slander that plaintiff whipped her mother; reputation as to ill-treating her mother, admitted; the rule being that the reputation is confined to "the fault or trait of character involved in the offence charged," citing some of the above cases as authority for this).
1877, Kimball *v.* Fernandez, 41 id. 329 (habit of evil conduct charged; single instances allowed to be proved; whether in justification only or on general issue, not decided).

§ 74. Rumors as Affecting Reputation.

[*Note* 1; *add:*]

1873, Strader *v.* Snyder, 67 Ill. 404, 410 (general repute as to the fact charged, excluded).
1906, Earley *v.* Winn, — Wis. — , 109 N. W. 633 (slander that plaintiff whipped her mother; Haskins *v.* Lumsden followed).

§ 75. Character in Mitigation of Damages in Other Actions.

[*Note* 1; *add:*]

1904, Wyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163 (assault and criminal abuse; the daughter's subsequent character, excluded).
Compare also the rulings on *character as a motive* (*post*, § 390, n. 1).

[*Note* 2; *add:*]

1906, Hardwick *v.* Hardwick, — Ia. — , 106 N. W. 639 (loss of consortium; plaintiff's bad moral character, admitted).
Compare also the cases cited *post*, § 390, n. 1.

[*Note* 6; *add:*]

1907, Emory *v.* Eggan, — Kan. — , 88 Pac. 740.

§ 76. Plaintiff's Good Character as affecting Damages.

[*Note* 1; *add*, under *Defamation, Excluded:*]

1906, Burkhart *v.* North American Co., 214 Pa. 39, 63 Atl. 410 (Clark *v.* North American Co. followed).

§ 78. Character of a House of Ill-fame.

[*Note* 1, at the end; *add:*]

Whether *knowledge* may be shown by *reputation*, is noticed *post*, § 254.

[*Note* 3, part 1; *add:*]

1906, State *v.* Hoyle, — Minn. — , 107 N. W. 1130.
The same issues might arise on a charge of keeping a house for illegal *gaming;* but usually the statute does not make repute a part of the issue, and the question of *knowledge* (*post*, § 254) or *intent* (*post*, § 367) is the important one.

§ 80. Character of an Employee.

[*Note* 2; *add* :]

1904, Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 (discharge of an employee for moral misconduct: the reputation for unchastity of his women associates, held material).

§ 84. Strength.

[*Note* 1; *add:*]

The inference from *heredity* belongs under this principle. Its propriety has been conceded, with certain limitations, as evidence of *insanity* (*post*, § 232) and of *long life* (*post*, § 223).

§ 85. Intoxication.

[*Note* 1; *add*, at the end:]

Compare also the cases dealing with intemperance as a question of *negligence* (*ante*, § 65).

§ 87. Skill, Technical Knowledge.

[*Note* 3; *add*, under *Accord:*]

1886, Scott *v.* Crerar, 11 Ont. 541, 553, 562, 14 Ont. App. 152 (libel in anonymous typewritten circulars sent to lawyers, imputing to the plaintiff improper professional conduct; the similarity of phrases therein to phrases recently used by the defendant in conversation, held admissible; but not the opinion of a witness, based on the style of expressions, that the defendant was the author; Rose, J., diss. on the latter point, in a sensible opinion; on appeal, the ruling below was held erroneous in excluding evidence, though the language of the opinion shows no essential difference of views; the report's failure to state precisely the evidence offered leaves the ruling obscure).

[*Note* 3 — *continued.*]

1906, Atkins *v.* Best, 27 D. C. App. 148, 153 (that a testatrix was "an unskilled person, . . . unlearned in the law," considered, in interpreting the will).
1903, Thurston's Adm'r *v.* Prather, — Ky. — , 77 S. W. 354 (execution of a will; that the testator "was a learned lawyer," considered).
Compare here the cases cited *post*, §§ 270, 2024, 2148, 2149.

§ 89. Possession or Lack of Money as affecting the Probability of a Loan, etc.

[*Note* 1; *add*, under *Accord:*]

1905, Henderson *v.* Henderson, 165 Ind. 666, 75 N. E. 269 (whether B. had deposited $1300; her lack of money at the alleged time, admitted).

[*Note* 1; *add*, under *Accord:*]

1886, State *v.* Henderson, 29 W. Va. 147, 164, 1 S. E. 225 (forgery of a receipt; that the party whose name was receipted was in embarrassed circumstances and unable to pay such a sum, admitted).
1904, Rickeman *v.* Williamsburg C. F. Ins. Co., 120 Wis. 655, 98 N. W. 960 (over-insurance; the insured's financial condition, admitted to show the improbability of carrying a large stock of goods).

§ 93. Habit; Miscellaneous Instances.

[*Note* 1; *add:*]

1905, Carwile *v.* State, — Ala. — , 39 So. 220 (deceased's habit as to carrying a billbook, admitted).
1904, Wright *v.* Davis, 72 N. H. 448, 57 Atl. 335 (making of a loan; the alleged borrower's habit of depositing at a bank, admitted).
1905, Tucker *v.* B. & M. R. Co., 73 id. 132, 59 Atl. 943 (deceased's habit to stop and look at a crossing; Smith *v.* R. Co., followed).
1906, Parrott *v.* Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432 (expulsion from a car for lack of a ticket; conductor's habit as to taking tickets, admitted).
1904, Nelson *v.* Grondahl, — N. D. — , 100 N. W. 1093 (notary's habit to present notes for payment at the place where payable, admitted).
1905, Custer *v.* Fidelity M. A. Ass'n, 211 Pa. 257, 60 Atl. 776 (custom to attach a copy of the application to an insurance policy, excluded, as not sufficient of itself, on the theory of Schoneman *v.* Fegley, *supra*).
For a *habit of intoxication*, see *ante*, §§ 65, 85, *post*, § 96.

§ 95. Course of the Mail and Telegraph.

[*Note* 1; *add:*]

1904, Planters' Mut. I. Ass'n *v.* Green, 72 Ark. 305, 80 S. W. 151.
1905, Merchants' Exch. Co. *v.* Sanders, 74 id. 16, 84 S. W. 786.
1904, National Bldg. Ass'n *v.* Quin, 120 Ga. 358, 47 S. E. 962.
1906, Burch *v.* Americus G. Co., 125 Ga. 153, 53 S. E. 1008.
1906, Clark *v.* People, — Ill. — , 79 N. E. 941.
1904, Bloom *v.* Wanner, — Ky. — , 77 S. W. 931 (notice).
1903, Long Bell L. Co. *v.* Nyman, — Mich. — , 108 N. W. 1019.
1905, Sherrod *v.* Farmers' M. F. I. Ass'n, 139 N. C. 167, 51 S. E. 910 (insurance notice).
1905, Neubert *v.* Armstrong W. Co., 211 Pa. 582, 61 Atl. 123 (demand-letter).
1906, Beeman *v.* Supreme Lodge, — Pa. — , 64 Atl. 792 (the due mailing, etc., at 9 A. M. in Philadelphia is evidence of delivery to destination in the same city on the same day).
1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 318, C. C. A.

[*Note* 4; *add:*]

1906, Burch *v.* Americus G. Co., 125 Ga. 153, 53 S. E. 1008 (business habit as to using only government-stamped envelopes, admitted to show that a particular letter was stamped).

§ 98. Habit as a Substitute for Recollection.

[*Note* 1, l. 4 from the end; *add:*]

also the cases cited under the attesting-witness rule (*post*, § 1302).

§ 104. Plan, Design; Miscellaneous Instances.

[*Note* 1; *add:*]

1905, The San Rafael, 141 Fed. 270, 278, C. C. A. (whether a person was lost at sea on a certain vessel and trip; his expression of intent to travel thither at that time, etc., admitted).

§ 105. Threats of one Charged with Crime.

[*Note* 1, col. 1; *add:*]

1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101.
1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377 (assault with intent).
1905, Johnson *v.* State, 85 Miss. 572, 37 So, 926 (threats, and an attempt to secure help in the intended killing, admitted).
1905, Sinclair *v.* State, 87 Miss. 330, 39 So. 522.
1905, State *v.* Atkins, 77 Vt. 215, 59 Atl. 826 (breach of the peace by driving a wagon into collision).

[*Note* 1, col. 2, at the end; *add:*]

1906, State *v.* Quen, — Or. — , 86 Pac. 791 (threats of a third person, in the accused's presence, with no evidence of conspiracy, excluded).

The following case is peculiar: 1905, Schroeder *v.* Blum, — Nebr. — , 103 N. W. 1073 (malicious prosecution on a charge of assault with a gun; threats of the now plaintiff, made before the alleged assault, but not communicated to the now defendant until after the prosecution, and therefore inadmissible if offered on the principle of § 258, n. 2, *post*, held admissible on the present principle).

§ 106. Generic Threats.

[*Note* 1; *add:*]

1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (merely asking for a pistol is no more than a general threat).
1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330 ("I will stamp the life out of somebody," excluded).
1904, People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093 (threats against D. and A., admitted, the deceased F. having been killed while preventing the execution of these threats).
1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (threats against the father of the children killed, admitted).
1906, State *v.* Yates, — Minn. — , 109 N. W. 1070 (arson for insurance; the defendant's statement, about a year before, to a friend who had a stock of goods, "Why don't you get everything you have got here insured for $800 or $1000 and in four or five days after you get the insurance all right set them afire?" excluded, though the opinion concedes that it "tended to characterize her as an incendiary, willing to burn property for the purpose of procuring the insurance thereon"; this is one of the most depressing rulings in our records).
1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (a threat showing "general malice" and a disposition "to an act which was criminal" is admissible).
1906, People *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164 (threats five months before, repeated, admitted).
Compare, with the above cases, those cited *post*, §§ 363, 396, where other principles may lead to different results.

§ 108. Time of Threats.

[*Note* 1; *add:*]

1905, State *v.* Coleman, 186 Mo. 151, 84 S. W. 978 (threats eighteen months before, admitted).
1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (threats nine months before, admitted).

§ 111. Decedent's Threats.

[*Note* 6; *add:*]

1904, Lee *v.* State, 72 Ark. 436, 81 S. W. 385.
1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993.
Del.: 1905, State *v.* Powell, — Del. — , 61 Atl. 966 (murder with a knife; the deceased's admissions that she had poisoned the defendant's coffee, and was going to kill the defendant, admitted).
1904, McKinney *v.* Carmack, 119 Ga. 467, 46 S. E. 719 (rule applied).
1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (prior cases reviewed, and the ruling in McKinney *v.* Carmack approved "as stating both the general rule . . . and the exceptional instance").
1907, Neathery *v.* People, — Ill. — , 81 N. E. 16 (admitted).
1905, Burroughs *v.* U. S., — Ind. T. — , 90 S. W. 8 (decedent's threats admissible, even where the issue is provocation to manslaughter, and not self-defence).
1907, State *v.* Blee, — Ia. — , 111 N. W. 19 (admissible; "the precise question is now before this Court for the first (!) time").
1887, Hart *v.* Com., 85 Ky. 77, 2 S. W. 673 (uncommunicated threats, admitted).
1905, Wheeler *v.* Com., — Ky. — , 87 S. W. 1106 (Young *v.* Com. followed).
1906, Brown *v.* State, — Miss. — , 40 So. 737 (prior threats, and details of prior quarrels, admissible, following Holly's Case, *supra;* the majority opinion, however, errs on another point, noted *post*, § 396).
1907, State *v.* Kelleher, — Mo. — , 100 S. W. 470 (admissible).
1907, State *v.* Scaduto, — N. J. L. — , 65 Atl. 908 (uncommunicated threats held admissible if "there was an overt act of attack" and "the defendant at the time of the collision was in imminent danger"; the latter clause is hardly required; State *v.* Zellers practically repudiated, though not cited).
1907, State *v.* Thompson, — Or. — , 88 Pac. 583 (uncommunicated threats, admissible).
1906, State *v.* Trail, 59 W. Va. 175, 53 S. E. 17 (murder of B.; B.'s prior declaration that he was going to defendant's to debauch his daughter if he could get defendant drunk, excluded, not being communicated to defendant; Sanders, J., diss. and properly).

[*Note* 6, par. 2, p. 186; *add:*]

1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303.

The threats of a *third person* may also be admitted, where it is desired to show that he, and not the accused, was the aggressor:

1905, State *v.* Gaylord, 70 S. C. 415, 50 S. E. 20; and compare the cases cited *post*, § 140.

In *other issues* in which the *aggression* of the plaintiff or prosecuting witness is material, his threats are admissible on the foregoing principles:

1905, State *v.* Atkins, 77 Vt. 215, 59 Atl. 826 (breach of the peace by intentional collision; the prosecuting witness' threats of running into the defendant, admitted, to show aggression).

§ 112. Testamentary Plans.

[*Note* 1; *add:*]

1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (revocation; general principle stated).

The only case ever intimating the contrary seems to be Throckmorton *v.* Holt, U. S., cited *post*, § 1734, n. 2.

§ 118. Motive not Essential.

[*Note* 2; *add:*]

1904, Robinson *v.* State, — Nebr. — , 98 N. W. 694 (murder).
1904, State *v.* Jaggers, 71 N. J. L. 281, 58 Atl. 1014 (murder).
1903, Cupps *v.* State, 120 Wis. 504, 97 N. W. 210.

§ 133. Bastardy, Seduction, Rape; Other Intercourse, etc.

[*Note* 1; *add:*]

1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (bastardy; admitted).
1906, Kesselring *v.* Hummer, — Ia. — , 106 N. W. 501 (seduction, with birth of a child as aggravation; intercourse with a third person within the period, admitted).
1906, State *v.* Gerike, — Kan. — , 87 Pac. 759 (rape under age, with pregnancy; the woman's intimate association at night with other men, admitted; no precise rule stated).
1906, State *v.* Mobley, — Wash. — , 87 Pac. 815 (rape under age, with pregnancy; the woman's habit of staying away from home till after midnight, received).
1906, Busse *v.* State, — Wis. — , 108 N. W. 64.

Compare § 68, *ante*.

[*Note* 2; *add,* under *Accord:*]

1890, Maynard *v.* People, 135 Ill. 416, 433, 25 N. E. 740 (bastardy; that the woman was "out late at night with men and boys" about the time in question, admissible).
1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (with other evidence).

[*Note* 4; *add:*]

Compare State *v.* Hendrick, N. J. L. (1903), and other cases cited *ante*, § 68, nn. 1, 2, 3,

[*Note* 5; *add:*]

Contra: 1906, State *v.* Gerike, — Kan. — , 87 Pac. 759 (cited *supra*, n. 1); 1906, State *v.* Mobley, — Wash. — , 87 Pac. 815 (cited *supra*, n. 1). This view may be justified, and is perhaps preferable to that stated above in the text, on the ground that, though paternity is not in issue, yet, since there must have been intercourse with some one, it is more likely that it was exclusively with some other person, on the principle of §§ 400, 402, par. (1) (*a*), *post*.

[*Note* 6; *add:*]

1904, State *v.* Bebb, 125 Ia. 494, 101 N. W. 189 (like People *v.* Craig, Mich.).

§ 140. Threats by a Third Person.

[*Note* 1; *add:*]

1906, State *v.* McLain, — Wash. — , 86 Pac. 390 (arson; mere threats of a third person, excluded).

§ 141. Motive of a Third Person.

[*Note* 1; *add:*]

1904, Bowen *v.* State, 140 Ala. 65, 37 So. 233 (murder; facts showing a motive in third persons, excluded).
1904, Walker *v.* State, — Ala — , 35 So. 1011 (murder; a third person's motive, without other connecting evidence, excluded).
1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (murder; certain threats by third persons against the deceased, excluded).

[*Note* 1 — *continued.*]

1905, State *v.* Gaylord, 70 S. C. 415, 50 S. E. 20 (threats, etc., of a third person received; here, to show that the third person, not the defendant, was the aggressor; compare § 112, n. 6, *ante*).
1906, Porch *v.* State, — Tex. Cr. — , 99 S. W. 102 ("there must be something more than mere motive" evidenced against the third person).

§ 144. Motive for Suicide.

[*Note* 1; *add:*]

1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (deceased's despondency several months before, excluded; unsound).

§ 149. Miscellaneous Traces, in Criminal Cases.

[*Note* 1; *add:*]

1907, State *v.* Kehr, — Ia. — , 110 N. W. 149 (burglary while armed with a revolver; the possession of a revolver when arrested two months later, excluded; this is finical).
1905, State *v.* McAnarney, 70 Kan. 679, 79 Pac. 137 (blood-stains on trousers; excluded here, because the trousers had been placed in contact with the deceased's bloody clothing before chemical testing).
1906, State *v.* Freshwater, — Utah — , 85 Pac. 447 (defective typewriter showing the mark on a letter).

§ 150. Brands on Animals and Timber.

[*Text,* p. 209, lines 4–8 from below; *substitute* :]

Its real probative foundation is the well-established presumption of ownership from possession (*post,* § 2515). Courts have usually held, when the question was raised, that the inference of *ownership* may be drawn, as a matter of common law;[1] and it has been universally conceded that the presence of the brand is evidence of *identity* (*i. e.* of the animal being one of those originally branded by the brand-user) even though not of ownership. The larger scope of the evidence has been generally confirmed by legislation.

[*Text,* last line; *add* as a cross-reference:]

and § 1647.

[Note 1; *add:*]

1886, People *v.* Bollinger, 71 Cal. 17, 11 Pac. 799; (larceny; "an earmark used by the alleged owners of the hogs was some evidence of ownership").
1907, State *v.* Wolfley, — Kan. — , 89 Pac. 1046 (on common-law principles a brand may be evidence of ownership as well as of identity).
1865, Plummer *v.* Newdigate, 2 Duv. Ky. 1 (a brand "U. S." is admissible as evidence of ownership, but is not *per se* sufficient evidence).
1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433, *semble* (at common law a cattle-brand may be some evidence of ownership).
1888, Stewart *v.* Hunter, 16 Or. 62, 16 Pac. 876 ("Branding stock furnishes evidence of its ownership"). *Contra:* 1872, Peoples *v.* Devault, 11 Heisk. 431 (a "U. S." brand is not evidence of ownership unless shown to have been put on by U. S. officers).

[*Note* 2; *add:*]

Ariz.: St. 1905, c. 51, § 70 (on trial for violation of the stock laws, the presence of brand or earmark "claimed by the accused to be his brand or mark," though not recorded, is evidence of conversion; and the ownership of live-stock from a foreign State, etc., "may be shown by the marks or brands thereupon" though not recorded); ib. § 65 (official record of live-stock brands, proved by certified copy, is "*prima facie* evidence of all the facts required to be entered in said book," and of the rights of the person named, or of the assignee on proof of assignment, "to use said brand," etc.).
Ida.: Rev. St. 1887, § 1179; St. 1905, Mar. 7, p. 352, §§ 5, 14 (in all proceedings where title or right of possession is involved, the brand on an animal, if duly recorded, shall be *prima facie* evidence that "the animal belongs to" the brand-owner and that the latter has the right of possession at the time of action; "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted" unless the brand is recorded; the State recorder's certified copy of the record, or the original certificate, shall be evidence of the right to use the brand; "parol evidence shall be inadmissible to prove the ownership of a brand").

[*Note* 2 — *continued.*]

1907, State *v.* Dunn, — Ida. — , 88 Pac. 235 (under the statute oral evidence of the ownership of a brand is inadmissible; since the statute, "still the brand itself may serve as the means to the owner himself for the identification of the animal"; compare § 1639, *post*).
Nev.: 1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433 (an unrecorded brand may be evidence of ownership).
Okl.: 1906, Hurst *v.* Terr., 16 Okl. 600, 86 Pac. 280 (larceny of cattle; an unrecorded brand is evidence of ownership; the statutory rule merely provides an additional, not an exclusive sort of evidence; Texas rulings distinguished).
Tex.: 1903, Sapp *v.* State, — Tex. Cr. — , 77 S. W. 456 (Turner and Welch Cases, *supra*, both approved).

[*Note* 4; *add:*]

W. Va.: St. 1905, c. 36 (licenses required for automobiles, and tags provided; "in any controversy respecting the identity or ownership or control of an automobile, the number borne by it shall be *prima facie* evidence that it was owned and operated" by the licensee).

§ 153. Possession of Chattels, as Evidence of Other Crimes.

[*Note* 1; *add:*]

1904, McCormick *v.* State, 141 Ala. 75, 37 So. 377 (watch).
1905, Flanagan *v.* People, 214 Ill. 170, 73 N. E. 347; and cases cited *post*, § 2513, n. 8.

[*Note* 4; *add:*]

1905, People *v.* Jackson, 182 N. Y. 66, 74 N. E. 565 (murder; the defendant's possession of the deceased's watch and pocket-book, admitted).

§ 154. Possession of Money, to evidence Larceny, etc.

[*Note* 1; *add:*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (murder; the accused's lack of money before the crime and possession of it afterwards, and the loss of money from the house of the victim, admitted).
1886, New York & B. F. Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293 (civil action for embezzlement by an employee).

[*Note* 1; *add:*]

1905, People *v.* Gaffey, 182 N. Y. 257, 74 N. E. 836 (forgery; the defendant's small salary and large deposits, admitted to show the probable mode of disposition of the cash-stealings covered by the forged notes; the Court seems to err in calling this "evidence of motive").
Distinguish the use of *lack of money* to show *motive* (*post*, § 392).

§ 157. Possession of a Document, to show Seisin, etc.

[*Note* 2; *add:*]

1904, State *v.* Bruni, — Tex. Civ. App. — , 83 S. W. 209 (ancient deeds admitted to show possession and other acts of ownership).
1905, Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524 (boundary of town land; certain leases, town votes, and treasurer's entries, not all ancient, admitted to show "actual possession by the town, through its lessees, under a claim of title").
Whether *payment of taxes* (as evidenced by tax-receipts) is evidence of possession of the land, has been a large question; see the following opinion, and cases cited: 1904, Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799.

§ 158. Lack of News, to show Death, etc.

[*Note* 1; *add:*]

Compare the cases cited *post*, § 664.
So, too, the *fictitious nature* of a name, or the *non-existence* of an alleged person of a certain name and residence, may be evidenced by the failure to find any such person after diligent search:
1907, Phelps *v.* Nazworthy, 226 Ill. 254, 80 N. E. 756 (whether a deed-grantee was a fictitious person; that no person by that name had ever lived in the township, admitted).
1858, State *v.* Wentworth, 37 N. H. 217; and cases cited *post*, §§ 1313, 1725, 1789, and 2531, n. 7.
Contra: 1906, Taylor *v.* State, — Tex. Cr. — , 97 S. W. 474 (forgery of names of persons said to be fictitious; the sheriff's returns of "not found" on subpœnas issued in various counties for these persons as witnesses, excluded; such a ruling may be a suitable part of some little esoteric game of quibbles; but it is so vast a distance sundered from the world of common sense as to create a suspicion that the Court is under some mistake as to the nature of the objective, called Truth, which it was placed there to ascertain).
That a *voter*, alleged to have voted illegally as a *non-resident*, cannot be found or heard of on diligent search in the district, is another example of the principle; but some Courts are pedantically strict in their application of it: 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

§ 166. Resemblance of Child, to show Paternity.

[*Note* 1; *add:*]

1827, 1836, Morris *v.* Davis, 3 C. & P. 214, 5 Cl. & F. 163 (legitimacy; "the defendant's counsel much relied . . on the circumstance of personal resemblance that was proved by several witnesses to exist" between the plaintiff and the mother's paramour; on appeal, similar evidence was admitted on both sides without question).
1853, Doe *v.* Marr, 3 U. C. C. P. 36, 51 (inheritance; to show the defendant a bastard, his resemblance to S. and not to the husband M. was held admissible, as "auxiliary evidence").

[*Note* 2; *add:*]

1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (bastardy; exhibition of the child — here ten months old — allowed).
1854, Wright *v.* Hicks, 15 Ga. 160, 172 (legitimacy; resemblance of the child to the alleged paramour, considered).
1904, McCalman *v.* State, 121 Ga. 491, 49 S. E. 609 (testimony to resemblance excluded; following Hanawalt *v.* State, Wis.; Candler, J., diss.).
1896, People *v.* Wing, 115 Mich. 690, 74 N. W. 179 (bastardy; People *v.* White followed).
1905, State *v.* Danforth, 73 N. H. 215, 60 Atl. 839 (rape; rule of the foregoing cases confirmed; here the child was exhibited and its peculiarities pointed out; the rule as stated above in the text "appears reasonable").
1888, State *v.* Horton, 100 N. C. 443, 6 S. E. 238 (State *v.* Woodruff followed).

§ 167. Corporal Traits, to show Race or Nationality.

[*Note* 1; *add:*]

1904, U. S. *v.* Hung Chang, 134 Fed. 19, 23 (Chinese descent, evidenced by appearance).
The same principle should apply to the resemblance of an *animal*, as evidence of its pedigree:
1904, Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886, *semble* (qualities of a horse, admitted on the question of its siring by a Hambletonian).

§ 168. Birth of a Child, or Pregnancy, to show Intercourse.

[*Text; add,* at the end, a new paragraph (3):]

(3) So, too, in prosecutions for *rape*, *rape under age*, and *seduction*, the pregnancy is admissible as evidence at least of the intercourse; the accused's identity being provable by other evidence.[3]

[3] *Accord:* 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (seduction under promise of marriage; birth of a child, as shown by its presence in court, admitted).
1906, State *v.* Dolan, — Ia. — , 109 N. W. 609 (seduction; an obscure ruling, which finds fault with the trial court for not clearly instructing the jury; birth is said to be admissible as evidence of a seduction, but not of the defendant's being the seducer). 1907, State *v.* Nugent, — Ia. — , 111 N. W. 927 (seduction; birth of a child, admitted).
1904, State *v.* Walke, 69 Kan. 183, 76 Pac. 468 (statutory rape).
1905, State *v.* Miller, 71 id. 200, 80 Pac. 51 (same).
1906, State *v.* Gereke, — Kan. — , 86 Pac. 160, *semble* (rape under age; birth of a child, admitted).
1905, People *v.* Stison, 140 Mich. 216, 103 N. W. 542 (incest).
1906, State *v.* Palmberg, — Mo. — , 97 S. W. 566 (rape under age; birth of child, admitted).
1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114 (rape under age).
1906, State *v.* Thompson, — Utah — , 87 Pac. 709 (adultery with a single woman; her pregnancy admitted as corroborating her, but not as connecting the defendant).
1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (rape under age; Fullerton, C. J.: "It conclusively proves her testimony to the effect that the crime charged was committed, and the truth of that lends credence to her testimony to the effect that the person she names is the guilty party"; said of the birth or miscarriage of a child).
1905, State *v.* Nelson, 39 id. 221, 81 Pac. 721 (adultery; birth of child twenty months after husband's absence, admitted); and some of the cases cited *post*, § 398.
Contra: 1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574, *semble* (rape).
1906, People *v.* Brown, — Mich. —, 106 N. W. 149 (rape under age in June, 1904, the statutory age being reached on July 15, 1904; pregnancy in March and May, 1905, excluded; a queer decision, the present question not being distinguished from others involved).

[*Text; add* a new paragraph (4):]

(4) So, also, a condition of any *disease*, subsequent to a time in issue, may evidence its prior existence.[4]

[4] Cases cited *post*, § 225, n. 1.

§ 177. Conduct of Animals, to evidence a Human Act.

[*Note* 2; *add:*]

Compare the following: 1905, Miller *v.* Terr., — Ariz. — , 80 Pac. 321 (larceny of a colt; testimony from stockmen who had observed the animal's conduct that "the colt belonged to certain mare which it had been following," admitted).

Compare the bigoted ruling in State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

In State *v.* Hunter, — N. C. — , 56 S. E. 547 (1907), Chief Justice Clark reminds us of "the classical incident of Ulysses, on his return from his memorable wanderings, being recognized by his dog Argos (who died from joy), when his family and his followers knew him not," and "the more modern incident of Aubry's dog of Montargis, who procured the confession of his master's murderer by his recognition of him."

[*Note* 3; *add:*]

1892, Hodge *v.* State, 98 Ala. 10, 11, 13 So. 385 (murder; that a trained dog had followed the trail to the defendant's house, admitted, on the facts).
1905, Little *v.* State, — Ala. — , 39 So. 674 (the animal must be shown to have been trained to track human beings and to be able to do so accurately).
1906, Richardson *v.* State, — Ala. — , 41 So. 82 (tracing by hounds; admitted).
1906, Hargrove *v.* State, — Ala. — , 41 So. 972 (burglary; trailing of accused by bloodhounds, shown to be trained to the purpose, admitted).
1903, Davis *v.* State, 46 Fla. 137, 35 So. 76 (burglary; trailing by dogs is admissible, on certain conditions indicating "that reliance may reasonably be placed upon the accuracy of the trailing").
1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (former opinion applied).
1904, Allen *v.* Com., — Ky. — , 82 S. W. 589 (rule of Pedigo *v.* Com. applied to exclude such evidence where the dog's qualities were not sufficiently shown).
1905, Denham *v.* Com., 119 Ky. 508, 84 S. W. 538 (Pedigo *v.* Com. followed).
1907, State *v.* Hunter, — N. C. — , 56 S. E. 547, (arson; trailing by a trained bloodhound, admitted)
1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (bloodhound's tracking of defendant, admitted; rule of Pedigo *v.* Com., Ky., approved).
Contra: 1903, Brott *v.* State, — Nebr. — , 97 N. W. 593 (Sullivan, C. J.: "That the bloodhound is frequently wrong is a fact well attested by experience. . . . It is unsafe evidence, and both reason and instinct condemn it").
In McClurg *v.* Brenton, 123 Ia. 368, 98 N. W. 881 (1904), where the defendant had trespassed on the plaintiff's premises, looking for stolen fowls, and led by bloodhounds, the Court disparaged such methods.

§ 194. Accused's Character; Reasons of Policy.

[*Note* 2; *add:*]

and the citations *post*, § 2251, note.
In some of the opinions in R. *v.* Bond, 1906, 2 K. B. 389, 408, reference is made to the contrasting French principle.

[*Note* 3; *add:*]

That the jurors' knowledge of an accused's criminal record would in actual experience, not merely in theory, affect their conclusions, and that the guilty and the innocent are alike affected by this ignorance of the jurors, or by their knowledge if incidentally obtained, may be seen from the instances collected in Mr. Arthur Train's invaluable book, "The Prisoner at the Bar," pp. 155–169 (1906).

[*Note* 6; *add:*]

1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377.

§ 196. Particular Misconduct of Defendant, to increase Sentence.

[*Note* 1; *add:*]

1904, People *v.* Smith, 143 Cal. 597, 77 Pac. 449.
1871, St. 34 & 35 Vict. c. 112 (Prevention of Crimes), § 9 (rule of St. 24 & 25 Vict. incorporated).
1902, R. *v.* Penfold & Edwards, 20 Cox Cr. 161 (St. 34 & 35 Vict. construed, for an offence which as such applied only to persons previously convicted).

§ 198. Character of Deceased in Homicide, from Particular Acts of Violence.

[*Note* 1; *add:*]

Accord: 1907, State *v.* Blee, — Ia. —, 111 N. W. 19 (recent assault by the deceased, admitted; citing seven cases from other jurisdictions, but not State *v.* Beird, *supra*).
1906, McQuiggan *v.* Ladd, — Vt. — , 64 Atl. 503 (battery; plea, self-defence, the plaintiff being intoxicated and in that condition quarrelsome, his repute being known to defendant; prior instances of quarrelsomeness when intoxicated, admissible, though not known to defendant).
Contra: 1904, People *v.* Farrell, 137 Mich. 127, 100 N. W. 264.
1904, State *v.* Ronk, 91 Minn. 419, 98 N. W. 334 (acts of violence towards third persons, excluded).

[*Note* 1 — *continued.*]

1904, U. S. *v.* Densmore, 12 N. M. 99, 75 Pac. 31.
1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (specific acts excluded, "because each specific act shown would create a new issue"; apparently unsound, because here the record of conviction for assault was offered, and the defendant's knowledge that the deceased had been in the State prison, though not a knowledge of the nature of his crime).
1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (specific acts of prior violence on others, excluded).
1906, State *v.* Andrews, 73 S. C. 257, 53 S. E. 423 (specific acts of violence, excluded, unless admissible on the principle of § 248, *post*).

§ 199. Party's Negligence, from Particular Negligent Acts.

[*Note* 1; *add:*]

1903, Munroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498 (collision of a street-car with a wagon; the motorman's negligence when employed on another line, excluded).
1906 Lexington R. Co. *v.* Herring, — Ky. — , 96 S. W. 558 (injury on a street-car while entering; that the plaintiff had been "frequently seen getting on and off street-cars while in motion," excluded).
1896, Baker *v.* Irish, 172 Pa. 528, 532, 33 Atl. 558 (cited *ante*, § 98, n. 1).
1906, Veit *v.* Class & N. B. Co., — Pa. — , 64 Atl. 871 (explosion of a boiler, the pump and valve having been plugged and tied, and the deceased being an employee about the engine; the fact that he had several times before plugged the pump, etc., excluded; unsound).
1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (negligence of a switchman; cited more fully *post*, § 987, n.).
1902, Atherton *v.* Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39 (similar to Christensen *v.* U. T. Line, *supra*). Compare the cases cited *ante*, § 98.

§ 200. Rape Complainant; Character from Particular Acts.

[*Note* 2; *add:*]

1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (excluded, on a charge of rape under age).
1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (excluded, on a charge of incest).
1904, Black *v.* State, 119 Ga. 746, 47 S. E. 370 (acts of intercourse with a third person T., offered by his testimony, excluded).
1907, State *v.* Blackburn, — Ia. — , 110 N. W. 275 (rape under age; excluded, on the principle of § 1001, *post*, without noticing the present principle).
1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (carnal knowledge with consent; the prosecutrix' unchaste conduct, not admitted for the defendant; this is a curious ruling, for it excludes for the defendant that which would have been relevant for the prosecution).
1904, State *v.* Smith, 18 S. D. 341, 100 N. W. 740 (excluded, on cross-examination, on a charge of rape under age of consent, and *semble*, also of rape generally).
1905, Nolen *v.* State, — Tex. Cr. — , 88 S. W. 242 (admissible).
1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (cross-examination of the prosecutrix to former acts of prostitution, not allowed on a charge of rape under age, consent being immaterial).

§ 201. Animal's Disposition, from Particular Instances of Behavior.

[*Note* 2; *add:*]

1905, Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; former-vicious acts of the horse, admitted).

§ 203. Common Offenders; Gambling.

[*Note* 2; *add:*]

1904, State *v.* Behan, 113 La. 701, 37 So. 607 (keeping a house for illegal faro-banking; dealing faro in the same place ten or fifteen days before, admitted).
Compare the cases cited *post*, § 367, n. 3 (prior offences to show intent in illegal gaming).

§ 205. Seduction.

[*Note* 2; *add:*]

1905, State *v.* Hummer, 128 Ia. 505, 104 N. W. 722 (nature of chastity defined).
1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114 ("specific acts of lewdness" are admissible).
For the use of *reputation* in *rebuttal* in such cases, see *post*, § 1620.

[*Note* 3; *add:*]

1907, Russell *v.* State, — Nebr. — 110 N. W. 380 (excluded).
1907, State *v.* Slattery, — N. J. L. — , 65 Atl. 866 (Foley *v.* State followed).

§ 207. Justification of Defamation of Character.

[*Note* 1; *add:*]

1905, Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243, *semble* (the proof under the plea, held here not to meet the defamatory statements sued for).

[*Note* 2, par. 1; *add:*]

1904, Hewson *v.* Cleeve, L. R. 2 Ire. 536, 542 (on a general charge of swindling, justified, particulars must be notified; J'Anson *v.* Stuart, cited *ante*, § 73, and subsequent cases and statutes, commented on).
1906, Pier *v.* Speer, — N. J. L. — , 64 Atl. 161 (slanderous charge of fornication and bastardy; under a plea of justification, an offer to prove the plaintiff to have had gonorrhœa, not admitted on the facts).

[*Note* 2, par. 2; *add:*]

1906, Earley *v.* Winn, — Wis. — , 109 N. W. 633 (slander that plaintiff whipped her mother; particular other violent acts to her mother, excluded; but this seems inconsistent with Talmadge *v.* Baker, *supra*, which is not cited).

§ 208. Incompetency of Employee.

[*Note* 1; *add:*]

1893, Holland *v.* Southern P. Co., 100 Cal. 240, 34 Pac. 666 (specific acts of an engineer, held admissible to show incompetence; but a single act is insufficient of itself).
1905, Staunton Coal Co. *v.* Bub, 218 Ill. 125, 75 N. E. 770 (injury in a mine by an engineer's negligence in hoisting the cage; the engineer's habitual hoisting of the cage without signal, admitted to show his incompetence).
1906, Joseph Taylor Coal Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by the lowering of the cage at a speed exceeding the statutory rate; that "the engineer respeatedly lowered the cage" at excessive speed, held not admissible on the present principle, but admissible to show a knowing and wilful violation of the statute, on the principle of § 367, *post*).
1902, Green *v.* Western Amer. Co., 30 Wash. 87, 70 Pac. 310 ("specific acts of incompetency of the pit boss," held admissible).
1905, Conover *v.* Neher R. Co., 38 Wash. 172, 80 Pac. 281 (two prior acts of an engineer, admitted to show incompetence).
1905, Dossett *v.* St. Paul & T. L. Co., 40 id. 276, 82 Pac. 273 (similar).

§ 209. Mitigation of Damages; Defamation.

[*Note* 3; *change* the note number to 1; and *add:*]

1906, Pier *v.* Speer, — N. J. L. — , 64 Atl. 161 (excluded).
1904, Cudlip *v.* Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925 (excluded).

§ 211. Criminal Conversation or Alienation of Affections.

[*Note* 1; *add:*]

1906, Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. 207, 109 N. W. 23 (the wife's criminal intimacy with other men, before the act in question, but not afterwards, admissible; also her intimacy with lewd women).

Compare the cases cited *post*, § 390, n. 1.

[*Note* 3; *add:*]

1904, Angell *v.* Reynolds, 26 R. I. 160, 58 Atl. 625 (wife's action for alienation of affections; the husband's unchaste conduct with other women, admitted).

§ 216. Criminality of Conduct, Immaterial.

[*Note* 2; *add:*]

1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43.
1906, People *v.* Soeder, — Cal. —, 87 Pac. 1016.
1904, State *v.* Franklin, 69 Kan. 798, 77 Pac. 588.
1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (stolen coins, identifying the defendants charged with murder).
1905, State *v.* Hummer, 72 N. J. L. 328, 62 Atl. 388.
1905, State *v.* Rea, 46 Or. 620, 81 Pac. 822 (larceny of a horse; another larceny involving an admission by the defendant, received).
1906, Thompson *v.* U. S., 144 Fed. 14, 18, C. C. A.

For the use of other crimes as stated in a *defendant's confession* of the crime charged, see also *post*, § 2100, n. 3.

§ 218. Res Gestæ; Inseparable Crimes.

[*Note* 1; *add:*]

1906, Hammond *v.* State, — Ala. — , 41 So. 761 (shooting the deceased's brother immediately after shooting the deceased; admitted).
1906, People *v.* McClure, 148 Cal. 418, 83 Pac. 437 (killing another person in the same affray; admitted).
1904, State *v.* Robinson, 112 La. 939, 36 So. 811 (shooting a second person, a moment later; admitted).
1906, State *v.* Vaughan, — Mo. — , 98 S. W. 2 (murder of a prison-guard in escaping; the killing of two other guards at the same time, admitted).
1904, State *v.* Howard, 30 Mont. 518, 77 Pac. 50 (robbery of a mail clerk; the robbery of the baggage-car, etc., at the same time, admitted).
1906, Terr. *v.* Livingston, — N. M. — , 84 Pac. 1021 (horse and mule stolen at the same time).

For the use of an *accused's confession* of other crimes, see *post*, § 2100, n. 3.

§ 220. Power or Strength, from Other Instances.

[*Note* 1; *add:*]

1905, State *v.* Donovan, 128 Ia. 44, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances).

Compare also the instances cited *post*, § 460, some of which illustrate equally the present principle.

§ 221. Skill or Means, from Other Instances.

[*Note* 4; *add:*]

1905, Shockley *v.* Tucker, 127 Ia. 456, 103 N. W. 360 (negligent use of X-ray instrument by a physician; other instances of injury caused by the defendant with such instruments, excluded; no authority cited).

§ 223. Health or Disease, from Appearance, Occupation, or Heredity.

[*Note* 1; *add:*]

For intemperance, see *post*, § 235.

For instances of *subsequent disease*, see *post*, § 225, n. 1.

[*Note* 2; *add:*]

1905, Sterling *v.* Union Carbine Co., — Mich. — , 105 N. W. 755 (personal injury; ancestral long life, admitted as evidence of plaintiff's expectancy of life).
1906, Haynes *v.* Waterville & O. St. R. Co., 101 Me. 335, 64 Atl. 614 (personal injuries and expectancy of life; the ages of the plaintiff's father and grandfather at death, admitted; "a descent from robust, long-lived stock gives greater promise of long life than descent from frail, short-lived ancestry, other things being equal").

But it seems better to hold, as to the specific trait of longevity, that ancestral longevity ought not to be considered in estimating the probability of life of a particular person, because too many other circumstances combine to effect the total chance of survival of a particular person; see Hamilton *v.* Michigan C. R. Co., 135 Mich. 95, 97 N. W. 392 (1903), and § 232, *post*.

§ 225. Prior or Subsequent Condition; Illness.

[*Note* 1; *add:*]

1906, Nophsker *v.* Supreme Council, — Pa. — , 64 Atl. 788 (fraudulent insurance of life; the insured's illness after the issuance of insurance, admitted, its nature indicating a prior existence).
1904, Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550 (condition of a horse).

§ 228. Insanity, evidenced by Conduct.

[*Note* 2; *add:*]

1906, Kempf *v.* Kuppa, — Kan. — , 85 Pac. 806.
1904, Cashin *v.* N. Y. N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930.
1906, State *v.* Speyer, 194 Mo. 459, 91 S. W. 1075 (certain letters excluded).

[*Note* 6; *add:*]

Compare also the proof of the *falsity of the alleged fact*, as evidence discrediting the witness who testifies to the repute or rumor of it as the source of an insane person's belief (*post*, § 263).

§ 229. Testamentary Capacity.

[*Note* 1; *add:*]

1906, Swygart *v.* Willard, — Ind. — , 76 N. E. 759 (statements as to property given to a child, admitted).

[*Note* 3; *add:*]

1906, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1.
1906, Dillman *v.* McDanel, ib. 276, 78 N. E. 591.
1904, Townsend's Estate, 122 Ia. 246, 97 N. W. 1108 (but here the instruction is grossly misconstrued).
1906, Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883.

§ 231. Insanity, from Predisposing Circumstances.

[*Note* 1, par. 3; *add:*]

Distinguish also the principle of § 263, *post*, that the non-existence of the fact said to have been reputed or rumored and thus to have caused a certain belief or deranged condition is evidence to *discredit the witness* who testifies to the repute or rumor.

§ 232. Hereditary Insanity.

[*Note* 1; *add*:]

1905, State *v.* Wetter, 11 Ida. 433, 83 Pac. 341 (principle approved).
1906, Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591 (insanity of a paternal aunt of the testator, lasting only eighteen months, admitted, there being other evidence of the testator's insanity; the Court's opinion cites cases from other jurisdictions, but ignores the foregoing three from its own jurisdiction; this is censurable).
1868, Shailer *v.* Bumstead, 99 Mass. 112, 131 (paralysis, etc., of "several of the family of the testatrix," not admitted because of lack of foundation; but a proof of hereditary insanity is competent in support of evidence of the existence of insanity in any given case").
1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (general paresis of the testatrix' mother and brother, excluded for lack of evidence that the particular form was hereditary or transmissible).
1906, Pringle *v.* Burroughs, 185 N. Y. 375, 78 N. E. 150 (ancestral or collateral insanity, not admitted without conduct-evidence of the person himself).

§ 233. Prior and Subsequent Insanity.

[*Note* 1; *add:*]

1904, Shaffer *v.* U. S., 24 D. C. App. 417, 433 (accused).
1905, Starke *v.* State, 49 Fla. 41, 37 So. 850.
1904, Chicago U. T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024 (mental condition of an injured person).
1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (presumption as to senile dementia, discussed).
1906, Jones' Estate, — Ia. — , 106 N. W. 610 (presumption defined).
1906, Wharton's Will, — Ia. — , 109 N. W. 492.
1904, State *v.* Lyons, 113 La. 959, 37 So. 890.
1905, Gesell *v.* Baugher, 100 Md. 677, 60 Atl. 481 (a sibylline utterance, purporting to follow the foregoing cases).
1904, McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 (will; the range of time is in the trial Court's discretion).
1905, Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., by deceased; Shailer *v.* Bumstead followed).
1904, State *v.* Quigley, 26 R. I. 263, 58 Atl. 905.

§ 235. Intoxication.

[*Note* 1; *add:*]

1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (conduct in a saloon, admitted to show the extent of intoxication).
1904, Ford *v.* Kansas City, 181 Mo. 137, 79 S. W. 923 (specific instances of intoxication, admitted to corroborate medical testimony to a general intemperance, as being the real cause of plaintiff's suffering).

[*Note* 3; *add:*]

1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (limits of time as to the taking of intoxicating liquor, considered).

§ 238. Design or Plan; Sundry Instances of Conduct.

[*Note* 3; *add:*]

1906, State *v.* Nethken, — W. Va. — , 55 S. E. 742.

[*Note* 6; *add:*]

1904, Wilmington S. Bank *v.* Waste, 76 Vt. 331, 57 Atl. 241 (forgery by H. of a note bearing W.'s signature; that in H.'s desk were found sheets of paper with defendant's name written several times, excluded, because no other evidence of H.'s authorship, was given; erroneous).

§ 246. Belief of Defendant in Homicide; Deceased's Reputation.

[*Text*, p. 310, lines 2 and 3 from below:]

For "three," read "two;" omit "and Massachusetts."

[*Note* 8; *add:*]

1883, Com. *v.* Barnacle, 134 Mass. 215 (repudiating Com. *v.* Mead, *infra*, note 13).
1905, Com. *v.* Tircinski, 189 id. 257, 75 N. E. 261 (approving Com. *v.* Barnacle).

[*Note* 9; *add:*]

1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (excluded, because the defendant's knowledge was not shown).
1906, Rodgers *v.* State, 144 Ala. 32, 40 So. 572 (but the defendant's knowledge must be shown).
1906, Jackson *v.* State, — Ala. — , 41 So. 179.
1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (but the defendant's knowledge must be shown).
1904, State *v.* Clayton, 113 La. 782, 37 So. 754, *semble*.

[*Note* 11; *add:*]

1904, Kennedy *v.* State, 140 Ala. 1, 37 So. 90.
The rule in *Texas* rests on the statute, P. C. 1895, § 713, quoted *infra*, note 13; but the Court has read into the statute a limitation which does plain violence to its express words.
1906, Arnwine *v.* State, — Tex. Cr. — , 96 S. W. 4 ("after proof of the communicated threat, the State may introduce evidence of the good character of the deceased, even where the defendant has not sought to do so; but this has never been extended, so far as we are aware, to instances of uncommunicated threats").
1906, Puryear *v.* State, — Tex. Cr. — , 98 S. W. 258.

[*Note* 13; *add:*]

1905, Green *v.* State, 143 Ala. 2, 39 So. 363 (rule stated).
1904, Long *v.* State, 72 Ark. 427, 81 S. W. 387 (reputation of the deceased residing in another State, excluded).
1905, People *v.* Lamar, — Cal. — , 83 Pac. 993.
1904, State *v.* Golden, 113 La. 791, 37 So. 757 (the trial judge, not the jury, determines whether the overt act has been sufficiently evidenced, but his ruling may be reviewed).
1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (mode of preparing the judge's certificate of finding as to the overt act, under St. 1896, No. 113, requiring a bill of exceptions to be taken down at the time in writing; Provosty, J., diss., says that "the recognized purpose of that act was to take from the control of the trial judge, where the doctrine of State *v.* Ford [*supra*] had placed it, the statement of the facts upon which a bill has been retained").
1906, State *v.* Craft, 118 La. — , 42 So. 718 (rule of the trial Court's discretion, affirmed: this ruling indicates a respect for precedents, which renders no longer applicable the remarks *supra* in this note upon the lack of respect formerly shown by this Court for its own precedents).
1905, Com. *v.* Tircinski, 189 Mass. 257, 75 N. E. 261 (the foregoing cases repudiated; the deceased's general character as a violent and quarrelsome man, known to the defendant, admitted).
1907, State *v.* Zorn, — Mo. — , 100 S. W. 591.
1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (admissible, if the reputation has come to the defendant's knowledge).

§ 247. Threats of Deceased in Homicide.

[*Note* 3; *add:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259 (rule applied).
1905, Dunn *v.* State, 143 Ala. 67, 39 So. 147 (rule applied).
1904, Gilmore *v.* State, 141 Ala. 51, 37 So. 359 (rule applied).
1906, Martin *v.* State, 144 Ala. 8, 40 So. 275 (rule applied).
1905, Skipper *v.* State, 144 Ala. 100, 42 So. 43 (excluded, because no issue of self-defence arose).
1904, Lee *v.* State, 72 Ark. 436, 81 S. W. 385.
1906, People *v.* Lamar, — Cal. — , 83 Pac. 993.
1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (communicated expressions of peaceful intent, admitted in rebuttal).
1903, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (mode of preparing an exception to the judge's ruling as to the overt act; cited more fully *ante*, § 246, n. 13).
1906, State *v.* Craft, 118 La. — , 42 So. 718 (rule of the trial Court's discretion, affirmed; "that question is no longer open for discussion"; Breaux, C. J., diss.).
1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675 (murder of a man by a woman; the man's prior attempts to violate her, excluded in the absence of any act at the time indicating "a present intention to harm the defendant").

[*Note* 3, last paragraph; *add:*]

1906, State *v.* Mitchell, — Ia. — , 107 N. W. 804 (threats of the defendant's landlord, a third person, excluded).

§ 248. Deceased's Violent Acts, in Homicide.

[*Note* 1; *add:*]

1883, Doyal *v.* State, 70 Ga. 134, 147 (specific acts of violence, excluded).
1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (excluded).
1904, People *v.* Farrell, 137 Mich. 127, 100 N. W. 264 (admissible).
1903, Sneed *v.* Terr., 16 Okl. 641, 86 Pac. 70 (prior violence by deceased, the same night, admitted).
1906, McHugh *v.* Terr., — Okl. — , 86 Pac. 433 (assault with intent; State *v.* Burton, — Kan. — , approved).
1905, State *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551 (excluded).
1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (State *v.* Dill approved).
1906, State *v.* Andrews, 73 S. C. 257, 53 S. E. 423 (admissible if "so connected in point of time or occasion with the fatal rencontre as to produce reasonable apprehension," etc.).
1906, McQuiggan *v.* Ladd, — Vt. — , 64 Atl. 503 (cited *ante*, § 198, n. 1).

Distinguish here the use of *prior quarrels* or difficulties between the deceased and the accused as evidence of *motive* (*post*, § 396).

For the propriety of *contradicting* the fact of such prior acts of violence, see *post*, § 263.

§ 249. Reputation of Incompetent Employee.

[*Note* 1; *add:*]

1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 276, 285, C. C. A. ("a general reputation for incompetence" is admissible).
1905, Huntt *v.* McNamee, 141 Fed. 293, 299, C. C. A., *semble* (admissible only after other evidence of specific acts).

§ 250. Acts of Incompetent Employee.

[*Note* 1; *add:*]

Accord: 1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 726, C. C. A. (previous bursting of two similar pulleys made by the same employees, admitted).
1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 279, C. C. A. (negligence of a fellow-servant; "specific acts of incompetence of the servant, notice of which was brought home to the master before the accident" are admissible, and also acts "so notorious that they ought to have been known"; but not specific acts "of which the master had no notice or knowledge prior to the alleged accident").
1905, Huntt *v.* McNamee, 141 Fed. 293, 299, C. C. A. (there must be either specific acts "brought home to the knowledge of the master" or acts "of such nature and frequency that the master in the exercise of due care must have had them brought to his notice").
Contra: 1894, Cosgrove *v.* Pitman, 103 Cal. 268, 275, 37 Pac. 232 (specific acts, not admissible; here, of intemperance; following Frazier *v.* R. Co., Pa.).

§ 251. Owner of a Vicious Animal.

[*Note* 1; *add:*]

1905, Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; the reputation of the horse, admitted to show defendant's knowledge).

[*Note* 2; *add:*]

1906, Warren *v.* Potter, — Mich. — , 108 N. W. 435 (injury by a runaway team; a former instance of its running away, known to the defendant, admitted).

§ 252. Owner of a Dangerous Machine or Place.

[*Text*, p. 324, l. 2; *add:*]

or to show *negligence of the employees* (*ante*, § 199).

[*Note* 6; *add:*]

1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury to an employee at a machine; prior similar defects of operation, admitted).
1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147 (prior accident to a boiler on a third person's premises; held not admissible against the defendant on the facts).
1905, Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 (Chicago *v.* Powers approved).
1905, Frank *v.* Hanly, 215 Ill. 216, 74 N. E. 130 (employee's injury at a machine; prior injury to another employee at the same machine, and his notification to the defendant, admitted to show the latter's notice of the defect).
1907, Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079 (prior falls at a coal-hole, admitted to show knowledge).
1904, Potter *v.* Cave, 123 Ia. 98, 98 N. W. 569 (injury at a stairway; "previous accidents on this stairway and warnings to the defendant that it was dangerous," excluded, on the singular theory that "if dangerous in fact, his knowledge would be immaterial"; wholly ignoring the above Iowa cases, citing a few of those in § 458, *post*, but ignoring the later ones; a reprehensible opinion).

[*Note* 6 — *continued.*]

4, Harrison *v.* Ayrshire, 123 Ia. 528, 99 N. W. 132 (defect near the walk where plaintiff was hurt, nitted).
5, Farrel *v.* Dubuque, — Ia. — , 105 N. W. 696 (condition of other similar frames erected on the et, admitted to show notice).
4, Crigler *v.* Ford, — Ky. — , 82 S. W. 599 (previous falls of an elevator, admitted).
4, Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592 (see the citation *post*, § 458, n. 2).
4, Gregory *v.* Detroit U. R. Co., 138 Mich. 368, 101 N. W. 546.
5, Hunter *v.* Ithaca, 141 Mich. 539, 105 N. W. 9 (Strudgeon *v.* Sand Beach followed).
3, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (defective bridge; other accidents at the same place, l other defects in the bridge, admitted to show notice).
4, Nelson *v.* Union R. Co., 26 R. I. 251, 58 Atl. 780 (injury by a trolley-pole's breaking a light globe; or similar breakages admitted to show knowledge).
2, District of Columbia *v.* Armes, 107 U. S. 519, 2 Sup. 840 (see the citation *post*, § 458, n. 2).
4, Johnson *v.* Union P. C. Co., 28 Utah 46, 76 Pac. 1089 (prior defective operation of a mine-car, mitted).
4, Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84 (trap-door to a cellar; Elster *v.* Seattle followed).
5, Hansen *v.* Seattle L. Co., 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar s-wheels, admitted).
4, Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317 (general condition of a sidewalk, admitted).
4, Lynn *v.* Grand Rapids, ib. 609, 99 N. W. 311 (similar evidence excluded, not being material to ow notice here).
4, Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051 (general condition of a sidewalk, for three years st, admitted).
5, Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464 (similar).
Compare the citations *post*, § 438, n. 6.

§ 254. Adverse Possession, Stolen Goods, Gambling Houses.

[*Note* 1; *add:*]

5, Henry *v.* Brown, 143 Ala. 446, 39 So. 325.
6, Doe *v.* Edmondson, — Ala. — , 40 So. 505 (title by prescription).
4, Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385.

[*Note* 1, last line; *add:*]

d § 1587.

[*Note* 3; *add:*]

4, State *v.* Simon, 70 N. J. L. 407, 57 Atl. 1016 (receiving stolen goods; conversations with the seller, lmitted).
Compare the cases cited *post*, § 1781 (declarations by the accused).

[*Text*, p. 326, l. 3; *add:*]

he leasing of premises for *gaming* may raise an issue of knowledge, which provable by the repute of the house;[5] but usually other kinds of evidence re involved (*post*, § 367).

[5] 1905, Bashinski *v.* State, 122 Ga. 164, 50 S. E. 54.
4, State *v.* Steen, 125 Ia. 307, 101 N. W. 96.

§ 255. Dealer with a Partnership.

[*Note* 2; *add:*]

7, Bush & H. Co. *v.* McCarty Co., — Ga. — , 56 S. E. 430 (evidence not here sufficient as offered).
For *reputation as* evidence of the *existence of a partnership*, see *post*, § 1624.

§ 256. Maker of False Representations.

[*Note* 2; *add:*]

5, Connelly *v.* Brown, 73 N. H. 193, 60 Atl. 750 (deceit by a tenant; the landlord's statements to her, lmitted, to show her belief in the truth of representations by her to the plaintiff as to the landlord's tent).

§ 257. Seller of Liquor to Intemperate or Minor.

[*Note* 1, par. 2; *add:*]

ıd the following decision:
6, State *v.* Brooks, — Kan. — , 85 Pac. 1013 (knowingly permitting the use of a building for liquor les; repute of the place as a liquor nuisance, admitted).

§ 258. Party Prosecuting or Arresting without Probable Cause.

[*Note* 1, col. 1, first point; *add*, under *Accord:*]

1907, Emory *v.* Eggan, — Kan. — , 88 Pac. 740 (but reputation in another city, such as not to be known to the defendant, is inadmissible).
1906, Martin *v.* Corscaddon, — Mont. — , 86 Pac. 33.

[*Note* 1, col. 1, second point; *add*, under *Accord:*]

1904, Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283.
1905, Shea *v.* Cloquet L. Co., — Minn. — , 105 N. W. 552.

[*Note* 2; *add:*]

1906, Martin *v.* Corscaddon, — Mont. — , 86 Pac. 33 (prosecution for larceny, the plaintiff's confession, communicated to the defendant, of prior larcenies, excluded; unsound).

[*Note* 5; *add:*]

1904, Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672 (malicious proceedings in lunacy; the family physician's report to defendant, admitted to show his probable cause).

§ 260. Possessor of a Document.

[*Note* 1, par. 1; *add:*]

1906, U. S. *v.* Greene, 146 Fed. 784, D. C. (a letter by defendant, in his letter-book, locked up and not sent, admitted).

§ 261. Miscellaneous Instances of Belief or Knowledge.

[*Note* 2; *add:*]

1906, Ditto *v.* Slaughter, — Ky. — , 92 S. W. 2 (duress of a wife in signing a note under threats by the payee to prosecute the husband; whether the husband's report to the wife that threats had been made to him was admissible; the Court divided evenly).

[*Note* 4; *add:*]

1906, Gulf C. & S. F. R. Co. *v.* Matthews, — Tex. — , 93 S. W. 1068 (whether a person knew of M.'s death; his reading of newspapers and hearing conversations on the subject, admitted).
Compare also the cases admitting *character to show motive* (*post*, § 390, n. 1).

[*Text*, p. 330; *add* two new sections:]

§ 262. (14) **Insane Belief, as shown by Facts told to the Party.** The present principle sometimes comes into play where a deranged mental condition is said to have been caused in part by a belief in certain facts. Here it may therefore be shown that the party was made aware of the supposed exciting facts by a repute or rumor or other form of communication, which thus tended to create the belief and cause the derangement.[1]

§ 263. **Disproof of the Facts communicated.** In some of the foregoing classes of cases — notably those of § 248 (deceased's violent acts) and § 262 (facts exciting mental derangement) — the question may arise whether the *objective facts themselves may be disproved.* On the one hand, the non-existence of those facts seems at first sight to have no bearing; because it is the mere report or repute or communication (and not the truth of it) which has been introduced to show the party's state of mind; for example, in homicide, the reasonableness of the accused's apprehension of the deceased's aggression is equally great, if the accused has heard of a cruel and violent act of the deceased, even though that act was never committed. On the other hand, assuming that for any purpose the objective fact has a bearing, the rule against contradicting a witness on a collateral point (*post*,

[1] Cases cited *ante*, § 231.

§ 1001) should not stand in the way; for if the fact is relevant at all, it is not any more collateral than the rumor of it.[1]

That the objective truth, however, of the fact reported or rumored, may sometimes be relevant seems clear, namely, when the *non-existence of the fact* is offered as tending *to show that the witness testifying to the communication of the alleged fact is not testifying truly.* For example, on a prosecution for murder, the defence being insanity caused by brooding over the deceased's persistent pursuit of the virtue of the defendant's wife, suppose that the defendant's wife testifies in his behalf to numerous reports, made by her to the defendant, of the deceased's attempts to seduce her; now if it could be shown indubitably that such attempts upon the witness never took place, would this not make it less likely that the alleged communications of them were made by her? In other words, would not the witness to these communications be discredited on the material question whether the communications were ever made? As a mere question of natural instinctive reasoning, the affirmative answer would seem plain. If we add to this the feature that the wife further testifies (on cross-examination) that the deceased's alleged attempts did in fact take place, we thus add the circumstance that the witness is proved to have falsified on that point; and thus the lie on the fact of the attempts enables the prosecution to argue additionally that the witness is falsifying on the other fact of the communication of the alleged attempts to the defendant. From both points of view, therefore, it seems proper to allow the prosecution to disprove the alleged acts, the communication of which is alleged to have produced the defendant's mental condition.[2]

[1] *Post*, § 1005, n. 7.

[2] The following ruling confirms this result: 1907, Knapp *v.* State, — Ind .— , 79 N. E. 1076 (homicide; plea, self-defence; the defendant testified to having heard before the affray that the decessed had clubbed to death a certain old man while arresting him; this fact, if true, was admissible on the principle of § 248, *ante*, to evidence the defendant's state of mind; the prosecution offered to show that in truth the old man had not been clubbed, but had died of senility and alcoholism; this was admitted as tending to show the improbability of the clubbing having occurred and therefore of the witness having heard of it by report; good opinion by Gillett, J.; it will be noticed that this is in effect the same point that arose in the Thaw trial for murder, N. Y., March, 1907). *Contra*, in principle: 1883, People *v.* Hurtado, 63 Cal. 288 (murder; the wife's confession of adultery with the deceased was testified to by the defendant; evidence tending to prove the fact of that adultery was not admitted for the defendant as corroborating his testimony to her confession; nor would the prosecution have been allowed to prove her innocence). 1907, Shipp *v.* Com., — Ky. — , 99 S. W. 945 (murder; defence, insanity, partly caused by his wife's confession of infidelity with S.; his wife's character for chastity, held not admissible for the prosecution to show that she "was not guilty of the conduct ascribed to her"). 1907, Jones *v.* State, — Tex. Cr. — , 101 S. W. 993 (homicide; the defendant's wife had told the defendant that the man had raped her; proof of a continued illicit intimacy between deceased and the wife, tending to show that her intercourse had been voluntary, excluded).

Compare the citations *ante*, § 228, n. 6, § 231, n. 1, *post*, § 1005, n. 7.

The judicial view contrary to that above expressed was given general notoriety in consequence of *nisi prius* rulings in the Thaw trial (N. Y. City, March, 1907; murder of one believed to have seduced the defendant's wife), and the Loving trial (Houston, Va., June 27, 1907; murder of one believed to have ravished the defendant's daughter). The public comment called forth by these cases emphasized further the unfortunate possibilities of abuse inherent in that solution for unscrupulous or reckless persons.

§ 266. Conduct and Utterances as Evidence of Knowledge or Belief.

[*Note* 2, col. 1; *add:*]

1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder by strychnine; the defence being suicide, the deceased's statement when speaking of suicide, "I have got the stuff to do it with," not admitted to show possession of strychnine or knowledge of its qualities; also excluding the deceased's statements, on finding dead chickens, "They are dead from strychnine," etc., on the ground of the *res gestæ* rule, *post*, § 1773;

[*Note* 2 — *continued.*]

this is unsound; the accused may have been plainly guilty, in the Court's opinion, and no new trial needed (*ante*, § 21), but that does not excuse the distortion of the rules of evidence; all the above evidence was admissible on the present principle).
1905, Fox *v.* Manchester, 183 N. Y. 141, 75 N. E. 1116 (negligent maintenance of an electric wire; the defendant's officer's testimony at an inquest after the injury, stating that he knew of the defective wire before the injury, held to be a hearsay assertion of a past fact; a good illustration of the limits of the principle).

[*Note* 3; *add:*]

The following case ignores this principle: 1906, Salem Newe P. Co. *v.* Caliga, 144 Fed. 965, C. C. A. (libel for asserting that the plaintiff's picture was a mere copy of T.'s picture; conversations of persons showing their belief in the assertion, excluded).

[*Note* 4; *add:*]

1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592 (insured's statements pending application for insurance, admitted to show "knowledge of his physical condition at the time of making the alleged false and fraudulent statements").
1906, Nophsker *v.* Supreme Council, — Pa. — , 64 Atl. 788 (rule of Swift *v.* Ins. Co., N. Y., applied, but not with a careful statement of the principle).

§ 269. Legitimacy, as evidenced by Parents' Conduct.

[*Note* 3, par. 1; *add:*]

1906, Breidenstein *v.* Bertram, 198 Mo. 328, 95 S. W. 828 (but here the further question is involved of the effect of a statute declaring that recognition of an illegitimate child, after marriage with the mother, shall legitimate it).

§ 270. Identity, as evidenced by Belief, etc.

[*Note* 4; *add:*]

1906, Thompson *v.* U. S., 144 Fed. 14, 20, C. C. A. (a witness allowed to identify a man by name, though she had "come to know" his name subsequently; "knowledge of the name by which the person is generally known is of sufficient reliability to be put in evidence").
Compare the cases cited *ante*, § 87, *post*, §§ 2024, 2148, 2149.

§ 273. Demeanor when Arrested.

[*Note* 2; *add:*]

1903, People *v.* Farrington, 140 Cal. 656, 74 Pac. 288 (demeanor when found with stolen property, admitted).
1904, Austin *v.* Bartlett, 178 N. Y. 310, 70 N. E. 855 (defendant's failure to call upon plaintiff after her injury, not admitted).

§ 276. Flight, Escape, Resistance, or Concealment.

[*Note* 3; *add*, in par. 1:]

1905, Franklin *v.* State, — Ala. — , 39 So. 979 (false statements as to identity).
1906, Allen *v.* State, — Ala. — , 41 So. 624 ("all the facts connected with the flight" are admissible).
1906, Glass *v.* State, — Ala. — , 41 So. 727 (resistance at the time of arrest, admitted).
1905, People *v.* Easton, 148 Cal. 50, 82 Pac. 840 (rule applies to a defendant pleading insanity).

[*Note* 3; *add*, under *Florida:*]

1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (and here the governor's proclamation of a reward, the sheriff's testimony of search, etc., were admitted to show the circumstances of the flight).
1904, Johnson *v.* State, 120 Ga. 135, 47 S. E. 510 ("the events and circumstances connected with the flight" are admissible; here, the denial of identity, etc.).
1905, Grant *v.* State, 122 Ga. 740, 50 S. E. 946 (flight on seeing the officer in another town, where he had no authority to arrest, admitted).
1904, McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693 (resisting arrest, admitted).
1904, State *v.* Poe, 123 Ia. 118, 98 N. W. 587.
1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439.
1905, State *v.* Matheson, — Ia. — , 103 N. W. 137.
1905, State *v.* Kesner, 72 Kan. 87, 82 Pac. 720 (failure to appear for trial in pursuance to a recognizance bond).
1905, State *v.* Nash, 115 La. 719, 39 So. 854 (flight is admissible, even when the killing was open and public; explaining State *v.* Melton, 37 La. An. 77 and later cases).
1906, State *v.* High, 116 La. 79; 40 So. 538 (two shots fired by defendant, in resisting arrest, admitted).
1906, State *v.* Spaugh, — Mo. — , 98 S. W. 55 (resistance, and other circumstances, while in flight admitted).
1904, Kennedy *v.* State, — Nebr. — , 99 N. W. 645 (attempt to escape).
1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114.

[*Note* 3 — *continued.*]

1890, State *v.* Lee, 17 Or. 488, 21 Pac. 455.
1905, State *v.* Ryan, 47 Or. 338, 82 Pac. 703.
1904, Bennett *v.* State, — Tex. Cr. — , 81 S. W. 30 (efforts of the sheriff to find the defendant, admitted).
1904, State *v.* Deatherage, 35 Wash. 326, 77 Pac. 504.

The dissenting opinion of Deemer, C. J., in State *v.* Poe, Ia., *supra*, is the most sensible deliverance on this subject, and ought to put an end to judicial quibbling.

On the same principle, an *attempt at suicide* is admissible: 1904, State *v.* Jaggers, 71 N. J. L. 281, 58 Atl. 1014.

[*Note* 4; *add:*]

The followiug is of course correct: 1906, Boykin *v.* State, — Miss. — , 42 So. 601 (that the county had paid the reward for the arrest of defendant as a fleeing homicide, excluded).

§ 278. Falsehood, Fraud, Spoliation, etc.

[Text, p. 357; after the quotation from *R.* v. *Castro, insert:*]

1905, *Phillimore*, J., in *R.* v. *Watt*, 20 Cox Cr. 852 : "The principle is in fact well established. . . . It is this, that the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieves in his own case, may be proved and used as evidence against him."

[*Note* 3; *add,* in par. 1:]

1907, Weaver *v.* State, — Ark. — , 102 S. W. 713 (affidavit for continuance; repudiating Burris *v.* State, 38 Ark. 221, *infra*, and Polk *v.* State, 45 id. 165, on the ground that they were decided when an accused was disqualified to testify).
1906, Bennett *v.* Susser, 191 Mass. 329, 77 N. E. 884 (a "deliberate misstatement of fact" by a party on a material point may be considered by the jury "as an admission that his claim is wrongful"; but here the instruction was not held demandable.
1905, People *v.* Hoffmann, — Mich. — , 105 N. W. 838 (false affidavit of continuance).
1906, State *v.* Jennings — Or. — , 87 Pac. 524 (false statements).
1893, Tucker *v.* U. S., 151 U. S. 164, 168, 14 Sup. 299 (affidavit of continuance).
Contra: 1905, Darrell *v.* Com., — Ky. — , 88 S. W. 1060 (this astonishing ruling holds that where the State has avoided a demand for continuance by admitting an affidavit of testimony of absent witness, the State cannot show that the witness is dead and that the sworn statement as to his absence was false; compare § 2595, n. 2, *post*).
The apparent ruling in Brown *v.* State, 142 Ala. 287, 38 So. 268 (1904), that the fabrication of a *statement of testimony of an absent witness* ("showing") cannot be proved, where the party has neither formally introduced the showing nor called the witness, seems erroneous.

Compare the principle of *falsus in uno* as applied to witnesses (*post*, § 1008).

[*Note* 4; *add:*]

1680, Earl of Stafford's Trial, 7 How. St. Tr. 1461, 1479 (that the defendant had tried unsuccessfully to bribe a person to come as witness, admitted).
1905, R. *v.* Watt, 20 Cox Cr. 852 (that the defendant had induced a witness to testify falsely on a prior day in the same cause, admitted; good opinion by Phillimore, J.).
1905, State *v.* Koller, — Ia. — , 105 N. W. 391 (adultery; the wife's attempt to dissuade the husband's witnesses, admitted).
1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 (offer of bribe to the deputy to release him).
1905, Dickey *v.* State, 86 Miss. 525, 38 So. 776 (attempt to suborn perjury).
1904, Blair *v.* State, — Nebr. — , 101 N. W. 17 (removal of the prosecutrix).

[Note 5; add:]

1907, State *v.* Mathews, — Mo. — , 100 S. W. 420 (threats to dissuade the prosecuting witness from appearing, admitted).

§ 279. Other Rules discriminated.

[*Note* 1, par. 1; *add,* under *Accord:*]

1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (false statements as to alibi).

[*Text,* p. 359; *add* a new paragraph:]

(4) An *offer of compromise* is in general inadmissible (*post,* § 1062); hence, in a criminal prosecution, an offer of money to the injured party, which might otherwise be admissible as an attempt to bribe a witness, may be inadmissible if construable merely as an offer to redress the wrong.[2]

[2] 1906, Sanders *v.* State, — Ala. — , 41 So. 466 (rape; offer of money to the woman's father).

§ 280. Fraud by Agents.

[*Note* 2; *add:*]

1907, Jeffries *v.* State, — Miss. — , 42 So. 801 (eloignment of the prosecutrix by the defendant's brother, excluded).

§ 282. Taking Precautions to prevent Injury; etc.

[*Note* 1; *add,* in a new paragraph:]

So, too, an *employer's general rule* of conduct for *employees* may be some evidence against him, on this principle, as an admission of the standard of care required, where the act of his employee in violation of the rule, is charged against the employer as an act of negligence: 1902, Chicago & A. R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784 (cited *post,* § 283, n. 5, par. 2).
1904, Stevens *v.* Boston Elev. R. Co., 184 Mass. 476, 69 N. E. 338 ("A rule made by a corporation for the guidance of its servants in matters affecting the safety of others," and its violation, raises an implication that there was a breach of duty towards the third person "as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such matters. Against the proprietor of a business the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety"; good opinion by Knowlton, C. J., citing authorities).
For the use of *other persons' regulations,* or municipal *ordinances,* to evidence negligence, see *post,* § 461.

[*Note* 2; *add:*]

Accord: 1904, Camsusa *v.* Coigdarripe, 11 Br. C. 177, 192 (action for breach of trust; the trustee's conveyance of his property pending suit, held a proper subject fer cross-examination).
1906, State *v.* Kincaid, 142 N. C. 657, 55 S. E. 647 (seduction; transfer of property to evade the result of conviction, admitted).

[*Note* 3; *add:*]

Contra: 1904, Darrell *v.* Com., — Ky. — , 82 S. W. 289 (but here because the charge was rape, and the defendant admitted the intercourse and alleged consent; no authority cited).

[*Text,* p. 363, l. 1, after "occur," *add* a new note, 3*a*:]

[3a] 1904, Clarke *v.* N. Y. N. H. & H. R. Co., 26 R. I. 59, 58 Atl. 245 (setting fire to timber by locomotives; that the defendant's employees aided in putting out the fire, held not to allow an inference).

[*Note* 4, par. 1; *add:*]

1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147 (defendant's insurance against accidents held inadmissible to evidence negligence, and also to evidence the fact that the plaintiff was an employee of defendant and not of a third person).
1906, Capital C. Co. *v.* Holtzman, 27 D. C. App. 125, 138 (the fact of defendant's insurance against accident, excluded, except as affecting a witness' bias).
1896, Barg *v.* Bousefield, 65 Minn. 355, 68 N. W. 45 (that defendant was insured against accidents in a particular mill, admitted solely as an admission that the employees there working, including the plaintiff, were employees of the defendant and not of a third person).

[*Note* 4, par. 1; for "69 Vt. 486," substitute:]

"90 Me. 369."

[*Note* 4; *insert,* after par. 1:]

But the taking out of a policy may be an admission of *ownership,* where that is disputed (on the principle of § 283, note 5, *post*).
1904, Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323 (ownership of an elevator).

[*Note* 4, par. 2; *add:*]

and cases cited in §§ 393, 969, *post.*

§ 283. Repairs after an Injury.

[*Note* 5; *add:*]

Ala.: 1904, Jackson L. Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445 (defective roadbed; changes of track-timbers, etc., admitted, to identify other timbers).
1904, Frierson *v.* Frazier, 142 Ala. 232, 37 So. 825 (ferry accident, subsequent placing of a rail, admitted only on cross-examination of a defendant who had testified to that subject).
1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; protective construction since the injury, excluded).
Ark.: 1906, St. Louis S. W. R. Co. *v.* Plumlee, — Ark. — , 95 S. W. 442 (subsequent removal of hand-car wheels for safety, excluded). 1907, Bodcaw L. Co. *v.* Ford, — Ark. — , 102 S. W. 896 (subsequent repairs to a machine, excluded).
Cal.: 1904, Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710 (subsequent sharpening of planer's knives, excluded).
Ga.: Georgia S. F. R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405; in the note now in the original citation strike out the word "not" before "however," and the author's comment "a singularly unjudicial utter-

[*Note 5 — continued.*]

ance"; the word "not" was thus erroneously printed in the advance sheets of 42 S. E. Rep., from which the author took the citation; but by the courtesy of W. H. Fleming, Esq., of Augusta, Ga., the author has learned that in the bound volume and in the official report the judge in revising corrected the error, omitting "not."

Ia.: 1888, Kuhns *v.* Wisconsin I. & N. R. Co., 76 Ia. 68, 72, 40 N. W. 92 (subsequent repairs of a track, not receivable as "an admission that the track was out of repair").

1899, Beard *v.* Guild, 107 Ia. 476, 479, 78 N. W. 201 (subsequent repairs to a hack, excluded; no Iowa cases cited, but three cases from other States).

1899, Frohs *v.* Dubuque, 109 Ia. 219, 221, 86 N. W. 342 (subsequent repairs to a sidewalk; the incidental mention of it, under proper instructions, held not error).

1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884 (subsequent condition of a track, excluded).

1904, See *v.* Wabash, R. Co., 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, excluded).

1906, Fitler *v.* Iowa Tel. Co., — Ia. — , 106 N. W. 7 (injury by telephone poles; defendant's subsequent change in method of work, excluded, in an opinion which at last seems squarely to lay down a general rule against this evidence; of the above cases, however, only Hudson *v.* R. Co. is cited).

1907, Patton *v.* Sanborn, — Ia. — , 110 N. W. 1032 (sidewalk; subsequent replacement, here admitted for other purposes).

Ky.: 1905, Louisville & N. R. Co. *v.* Morton, — Ky. — , 89 S. W. 243 (defective method of loading logs; subsequent safe use of another method, excluded, on the present principle; erroneous on the facts, because the principal object was merely to show by experiment that there was another method which was safe).

1891, Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025 (fire of oil during transit; subsequent change of mode of shipping, etc., excluded).

1897, Louisville & N. R. Co. *v.* Bowen, — Ky. — , 39 S. W. 31 (precautions at a crossing; preceding case followed).

Md.: 1906, Ziehn *v.* United El. L. & P. Co., — Md. — , 64 Atl. 61 (subsequent change in location of wires, excluded).

Mass.: 1904, Stevens *v.* Boston Elev. R. Co., 184 Mass. 476, 69 N. E. 338 (rule as to sounding a gong).

Mich.: 1906, Moon *v.* Pere Marquette R. Co., — Mich. — , 106 N. W. 715 (collision; defendant's change of rules to prevent collisions, excluded).

Mo.: 1887, Brennan *v.* St. Louis, 92 Mo. 488, 2 S. W. 481.

1891, Alcorn *v.* R. Co., 108 Mo. 90, 18 S. W. 188 (repairs to a switch-block, excluded).

1905, Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182 (subsequent repairs to a sidewalk, excluded).

1904, Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535 (excluded).

N. Y.: 1907, Loughlin *v.* Brassil, — N. Y. — , 79 N. E. 854 (subsequent repair of a machine, excluded).

U. S.: 1904, Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 24 Sup. 24 (subsequent changes, admitted to explain away the evidence of subsequent measurements introduced by the defendant).

1904, Southern R. Co. *v.* Simpson, 131 Fed. 705, 711, 65 C. C. A. 544 (custom of whistling at a crossing since the accident, excluded).

1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 318, C. C. A. (subsequent precautions as to a breakwater, excluded).

Wash.: 1906, Thomson *v.* Issaquah S. Co,. — Wash. — , 86 Pac. 588 (subsequent change here admitted to show that there was another feasible method of guarding a machine).

Wis.: 1907, Odegard *v.* North Wis. L. Co., — Wis. — , 110 N. W. 809 (sawmill; subsequent working, excluded).

[*Note 6; add:*]

1904, Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323 (like Readman *v.* Conway).

1887, Brennan *v.* St. Louis, 92 Mo. 488, 2 S. W. 481 (acts of repair of a highway).

1905, Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182 (city's repairs, not admitted where control was conceded).

§ 284. Failure to Prosecute, etc.

[*Note 1; add,* under *Accord:*]

1902, R. *v.* Higgins, 35 N. Br. 18, 24 (failure of the accused to name G. as the guilty person, until the accused testified in his own behalf at the trial, admissible).

1907, Page *v.* Hazelton, — N. H. — , 66 Atl. 1049 (failure to demand an alleged debt, though in need of money).

For a *failure to make or file a claim*, in answer to a request, etc., as constituting an admission by silent assent, see *post*, § 1072.

[*Note 3; add:*]

Here also must be considered the scarcely distinguishable *admissions by silence* (*post*, § 1072) in failing to include a claim, to deny an opponent's claim, and the like.

§ 285. Failure to Produce Evidence.

[*Note 2; add:*]

1906, Alexander *v.* Blackman, 26 D. C. App. 541, 551 (inventor's wife and daughter, etc., in a patent case).

1904, Chicago, B. & O. R. Co. *v.* Krayenbuhl, — Nebr. — . 98 N. W. 44 (failure to call defendant's employee; inference allowed).

[*Note* 2 — *continued*]

1862, Steininger *v.* Hoch's Ex'r, 42 Pa. 432 (failure to call a witness to the transaction, held open to inference).
1893, Hall *v.* Vanderpool, 156 Pa. 152, 26 Atl. 1069 (title to property claimed under the plaintiff's father; the plaintiff's failure to call her father, held open to inference).
1906, Green *v.* Brooks, — Pa. — , 64 Atl. 673 (title to personalty; the plaintiff's failure to call his son, who was in court, held open to inference).
1906, Grunburg *v.* U. S., 145 Fed. 81, 89, C. C. A. (failure to call employees, inference allowed).

§ 286. Witnesses not Produced; Unavailable or Privileged.

[*Note* 5; *add:*]

1904, Wright *v.* Davis, 72 N. H. 448, 57 Atl. 335 (a plaintiff disqualified as a survivor to some of the facts; the defendant's counsel allowed to allude to the plaintiff's failure to testify at all, but, on the principle of § 1807, *post*, not to assert that the defendant would have waived any disqualification of the plaintiff).

§ 287. Witnesses Prejudiced or Inferior in Value.

[*Note* 2; *add:*]

1904, Cavanagh *v.* Riverside, 136 Mich. 660, 99 N. W. 876 (highway injury; failure to call the highway overseer; inference not allowed).

§ 288. Witnesses equally Available to both Parties.

[*Note* 1; *add:*]

1906, Mutual Industrial I. Co. *v.* Perkins, — Ark. — , 98 S. W. 709.

[*Note* 3; *add:*]

1905, Lambert *v.* Hamlin, 73 N. H. 138, 59 Atl. 941 (employee of defendant, in the city at the time of trial; inference allowed against the defendant).

§ 289. Party Himself Failing to Testify.

[*Note* 1; *add:*]

1906, Hull *v.* Douglas, — Conn. — , 64 Atl. 351 (inference allowed).
1906, Reinhardt *v.* Mark's Adm'r, — Ky. — , 93 S. W. 32 (but here not applicable, because the party was disqualified).
1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.
1906, Aragon Coffee Co. *v.* Rogers, — Va. — , 52 S. E. 843 (*bona fide* purchase of a note by the plaintiff; the plaintiff's refusal on the stand to explain his motive for the investment, held open to inference).
1906, Sears *v.* Duling, — Vt. — , 65 Atl. 90.
1906, Loverin & B. Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000 (defendant's failure to testify in denial of letters, etc., though present at the trial, held open to inference).

The same inference may apply to the *prosecuting witness* in a criminal case: 1905, Morgan *v.* State, 124 Ga. 442, 52 S. E. 748.

§ 290. Sundry Distinctions.

[*Note* 2, l. 1; *add:*]

1905, People *v.* Davis, 147 Cal. 346, 81 Pac. 718; People *v.* Lee, — Cal. App. — , 81 Pac. 969 (qualifying the preceding).
1906, Lowdon *v.* U. S., — C. C. A. — , 149 Fed. 673, 677.

[*Note* 2, last line; *add:*]

1904, Gater *v.* State, 141 Ala. 10, 37 So. 692.
1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294.

[*Note* 6, par. 1; *add:*]

1904, People *v.* McGarry, 136 Mich. 316, 99 N. W. 147.

[*Note* 8, under *Accord; add:*]

1905, Starke *v.* State, 49 Fla. 41, 37 So. 850 (but merely the service of a subpœna does not suffice, where an attachment for non-appearance was available).
1904, Foster *v.* Atlanta R. T. Co., 119 Ga. 675, 46 S. E. 840 (but the explanation cannot include a statement that the absent alleged eye-witnesses know nothing of the affair; this ruling is over-strict.
1905, Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569.
1905, Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 378 (why a party's brother had left the country, allowed).

[*Note* 9; *add*, at the beginning:]

Accord: 1904, Harrison *v.* Harrison, 124 Ia. 525, 100 N. W. 344 (attempting to eloign a witness).
1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

§ 291. Documents or Chattels Destroyed or not Produced.

[*Note* 1; *add*, under *Canada:*]

1905, Hale *v.* Leighton, 35 N. Br. 256 (a book of entries kept for both parties, but in the plaintiff's possession; the plaintiff's refusal to produce it, held open to inference, on the facts, but not merely because he did not produce the original on notice to produce).

[*Note* 2; *add:*]

1904, Hannay *v.* New Orleans Cotton Exch., 112 La. 998, 36 So. 831 (agency for investment; inference allowed from failure to produce contemporaneous writings).
1905, Com. *v.* Bond, 188 Mass. 91, 74 N. E. 293 (forgery; the defendant's destruction of the proceeds, etc., admitted).
1905, Sullivan *v.* Sullivan, 188 Mass. 380, 74 N. E. 608 (action on a note requiring an attesting witness' signature; an instruction that the defendant's destruction of it would justify the inference that it was a witnessed note, held proper on the facts).
1879, Jones *v.* Knauss, 31 N. J. Eq. 609, 614 (declaration of trust destroyed; "slight evidence of the contents of the instrument will usually in such a case be sufficient").
1905, Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294, 60 Atl. 74 (boycott by a union; the defendant refused to produce its books; held that "the spoliation of evidence . . . cannot supersede the necessity of other evidence"; on the facts, this ruling was too favorable).
1905, Neece *v.* Neece, 104 Va. 343, 51 S. E. 739 (executor's suppression and concealment of deceased's title-deeds from the family, held open to inference under the present principle).
1904, Stout *v.* Sands, 56 W. Va. 663, 49 S. E. 428 (the suppression is not an admission to the fullest extent; "there must be some other evidence in support of the claim; a *prima facie* case must be made"; here said of a contract).
1879, Dimond *v.* Henderson, 47 Wis. 172, 174 (partner's accounting; the imperfect method of keeping the accounts, held to involve this principle against the accountant).

§ 293. Conduct as Evidence of Consciousness of Innocence.

[*Note* 1; *add:*]

1904, Walker *v.* State, — Ala. — , 35 So. 1011 (murder; defendant's offer to be taken to the dying person to see if she identified him, excluded).
1906, Allen *v.* State, — Ala. — , 41 So. 624 (voluntary surrenders admissible only as contradicting or explaining evidence of flight).
1904, Thomas *v.* State, 47 Fla. 99, 36 So. 161 (excluded, where not part of the *res gestæ*).
1906, Sneed *v.* Terr., 16 Okl. 641, 86 Pac. 70 (voluntary surrender, excluded).

§ 306. Other Evidential Purposes discriminated.

[*Text*, par. (3) at the end; *add* new note 1:]

[1] For the use of an *accused's confession* of other crimes, see *post*, § 2100, n. 3.

§ 318. Forgery and Counterfeiting; Law in Various Jurisdictions.

[*Note* 1; *add:*]

1894, Langford *v.* State, 33 Fla. 233, 14 So. 815 (uttering of a note with forged indorsements; other prior and subsequent utterings of notes with forged indorsements, etc., admitted to show knowledge and intent; knowledge of the others being forgeries, at the time of the uttering charged, need not be expressly shown).
1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (forgery of school warrants; forgery of other similar warrants, admitted to show intent).
1906, Pittman *v.* State, — Fla. — , 41 So. 385 (rule of Langford *v.* State applied).
1907, State *v.* Calhoun, — Kan. — , 88 Pac. 1079 (forgery of a note; forgery of similar notes transferred at the same time, admitted).
1905, People *v.* Peck, 139 Mich. 680, 103 N. W. 178 (embezzlement; a certain receipt from W. offered by the defendant was alleged to be forged; the forgery of other documents as W.'s, excluded).
1907, State *v.* Stark, — Mo. — , 100 S. W. 642 (forgery of a deed; possession of another forged deed to the same land, admitted).
1906. State *v* Newman. — Mont. — , 87 Pac. 464 (forgery of bounty certificates; other forged certificates, admitted).
1904, People *v.* Weaver, 177 N. Y. 434, 69 N. E. 1094 (other forged notes, not admitted on the facts; Werner, J., diss.).
1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569 (forgery of a note; utterance of other forged notes in the same and other names, admitted to show knowledge, and also to show a general plan; People *v.* Weaver, distinguished).

[*Note* 1 — *continued.*]

1907, State *v.* Kelliher, — Or. —, 88 Pac. 867 (forgery of school-land certificate papers; joint-indictee's forgery of numerous similar documents, not admitted on the facts).
1903, Withaup *v.* U. S., 127 Fed. 530, 531, 62 C. C. A. 328 (forgery of a pension-check indorsement; forged vouchers, etc., admitted as evidencing a "single scheme to defraud").
1904, Bryan *v.* U. S., 133 Fed. 495, 66 C. C. A. 369 (uttering counterfeit 5-cent pieces, possession of a mold for counterfeit 25-cent pieces, admitted).
1905, Dillard *v.* U. S., 141 Fed. 303, 308, C. C. A. (forgery of Chinese immigrant duplicate certificates; other forged duplicate certificates admitted to show intent).

§ 321. False Pretences or Representations; Law in Various Jurisdictions.

[*Note* 1; *add:*]

1904, R. *v.* Wyatt, 20 Cox Cr. 462, 1 K. B. 188 (obtaining credit for lodging, etc., under false pretences to W.; the facts that the accused had left other persons' apartments while in debt to them were admitted to show a fraudulent system and to negative mistake or honest motive).
1905, R. *v.* Smith, 20 Cox Cr. 804 (obtaining credit on false pretences as agent of M., the defendant alleging that he had merely given M.'s name as a reference, his representations to another vendor a few days later that he was agent of M. were admitted; R. *v.* Wyatt commented on; R. *v.* Holt discredited).
1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905 (conspiracy to cheat by betting on a race; similar acts, including subsequent ones, admitted to show intent).
1905, Malley Co. *v.* Button, 77 Conn. 571, 60 Atl. 125 (goods procured by false representations; other similar representations to other stores, excluded).
1905, State *v.* Seligman, 127 Ia. 415, 103 N. W. 357 (false pretences as life insurance agent; other similar transactions with other persons, admitted to show intent).
1906, Elbert *v.* Mitchell, — Ia. —, 109 N. W. 181 (fraudulent representations as to hogs sold; similar false representations to other persons, admitted for the plaintiff to show intent or scienter, but similar honest transactions with others, not admitted for the defendant).
1906, State *v.* Briggs, — Kan. —, 86 Pac. 447 (false pretences as to real estate loans; similar pretences to other persons, admitted).
1905, Com. *v.* Clancy, 187 Mass. 191, 72 N. E. 842 (false pretences concerning a business sold; other similar transactions admitted, on the theory of conspiracy; Com. *v.* Jackson distinguished).
1905, People *v.* Hoffmann, — Mich. —, 105 N. W. 838 (obtaining money by false vouchers for inquests; similar false vouchers, admitted to show knowledge and intent).
1904, State *v.* Boatwright, 182 Mo. 33, 81 S. W. 450 (false pretences by a fake race; other fake races, etc., more than a year before, excluded). 1907, State *v.* Roberts, — Mo. —, 100 S. W. 484 (fraud in exchange of lands for goods; similar fraud on another person about the same time, admitted to show intent).
1906, State *v.* Oppenheimer, 41 Wash. 630, 84 Pac. 588 (obtaining money by false pretences; the obtaining from various other parties by similar false pretences, excluded, because not shown to be part of a scheme, following State *v.* Bokien and the unsound Massachusetts doctrine; it is a pity that this over-strict and unpractical rule should be approved instead of repudiated).
1903, Baker *v.* State, 120 Wis. 135, 97 N. W. 566 (false pretences; certain other pretences and lies, excluded).
1904, Standard Mfg. Co. *v.* Slot, 121 Wis. 14, 98 N. W. 923 (contract; plea, false representations; similar representations to others, excluded, intent being immaterial).

§ 326. Knowing Possession or Receipt of Stolen Goods; Law in Various Jurisdictions.

[*Note* 1, *add:*]

1904, Schultz *v.* People, 210 Ill. 196, 71 N. E. 405 (receiving stolen rings; W. having stolen five or six rings, and D. having shown them all to the defendant, she purchased the two in issue; held error to offer the others in evidence; this is an over-strict ruling, especially as the opinion ignores the purpose of the evidence to show knowledge). 1907, Lipsey *v.* People, — Ill. —, 81 N. E. 348 (receiving stolen goods, — here, electric light sockets; the delivery of another quantity of such goods about the same time, held admissible, citing one N. Y. case and a loose generality from a treatise, and ignoring the foregoing case).
1905, Beuchert *v.* State, 165 Ind. 523, 76 N. E. 111 (that "other stolen goods" were found, is admissible; here, on a charge of possessing bars of steel stolen from B., the possession of watches and jewelry stolen from other persons was admitted).
1905, State *v.* Levich, 128 Ia. 372, 104 N. W. 334 (receipt of other stolen goods from the same person, admissible).

§ 331. Embezzlement; Law in Various Jurisdictions.

[*Note* 1; *add,* under *Florida:*]

1904, Eatman *v.* State, 48 Fla. 21, 37 So. 576 (embezzlement; prior conversions of other sums collected for the same employer, admitted to show intent).
1905, State *v.* Carmean, 126 Ia. 291, 102 N. W. 97 (other transactions, held inadmissible on the facts).
1906, State *v.* Newman, — N. J. L. —, 62 Atl. 1008 (embezzlement of timber; another act of the same sort, excluded; erroneous on the facts).

§ 334. Fraudulent Transfers; Law in Various Jurisdictions.

[*Note* 1; *add:*]

1905, Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131 (sale in fraud of creditors; another sale at the same time, admitted to show the intent).
1904, Kaufman *v.* Tredway, 195 U. S. 271, 25 Sup. 33 (preference to a brother under the bankruptcy act; certain transactions six or seven months before, admitted to show knowledge).

§ 340. False Claims; Fraudulent Insurance.

[*Note* 1; *add:*]

1906, State Life Ins. Co. *v.* Johnson, — Kan. — , 85 Pac. 597 (insurance fraud).

§ 341. Sundry Frauds.

[*Note* 2; *add:*]

1904, Howard *v.* State, 72 Ark. 586, 82 S. W. 196 (false warrants by a county clerk; similar warrants to other persons, admitted to show intent).

[*Note* 3; *add:*]

1905, Yakima V. Bank *v.* McAllister, 37 Wash. 566, 79 Pac. 1119 (action on a note; defence, that the signature was made by signing another document under which the defendants had fraudulently placed the note; other similar frauds by the defendants upon other persons, admitted to show a general scheme).

[*Note* 4; *add:*]

1906, Packham *v.* Glendmeyer, 103 Md. 416, 63 Atl. 1048 (the testatrix left three wills; on an issue of fraud as to one of them, fraud as to another by the same parties was not admitted on the facts).
1904, Balliet *v.* U. S., 129 Fed. 689, 693, 64 C. C. A. 201 (fraudulent use of the mails; sundry reports, etc. of defendant, admitted).
1905, Murray *v.* Moore, 104 Va. 707, 52 S. E. 381 (conspiracy to defraud; certain letters as to other fraudulent devices, excluded).

§ 343. Bribery.

[*Note* 2; *add:*]

1905, Haynes *v.* Com., 104 Va. 854, 52 S. E. 358 (bribery of an officer while under arrest on a charge of keeping a disorderly house; the defendant's acts of prostitution of little girls in the house, excluded).

[*Note* 3; *add:*]

1904, State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123 (municipal officer receiving a bribe for a street railway bill; receipt of another bribe for a lighting bill, admitted, as part of a general scheme).

§ 347. Larceny; Law in Various Jurisdictions.

[*Note* 1; *add:*]

1905, Ryan *v.* U. S., 26 D. C. App. 74, 83 (larceny of a trunk; possession of a forged letter, held inadmissible).
1902, Bishop *v.* State, 194 Ill. 365, 62 N. E. 785 (larceny of wire; larceny of other similar wire, excluded on the facts).
1905, Clampitt *v.* U. S., — Ind. T. — , 89 S. W. 666 (larceny; possession of other similar stolen property, admissible).
1905, Bank of Irwin *v.* American Exp. Co., 127 Ia. 1, 102 N. W. 107 (loss of a package of money; that the bank had suffered recently from thefts of an unknown employee, excluded).
1906, Mier *v.* Phillips F. Co., — Ia. — , 107 N. W. 621 (action for coal mined by the defendant underneath the plaintiff's land by crossing the boundary of the defendant's land; the fact that defendant had also mined under H.'s land adjacent was excluded; the present principles are ignored; R. *v.* Bleasdale, *supra*, not cited).
1905, Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613 (conversion of logs; defendant's "general business of converting the logs of other people on this lake," excluded; erroneous).
1906, State *v.* Allen, — Mont. — , 87 Pac. 177 (larceny of horses; other larcenies of horses about the same time, admitted).

§ 348. Larceny; Sundry Limitations.

[*Text*, p. 428, l. 8, from the top; *omit* the word "radical," and *add* in *Note* 1, at the end:]

No doubt it would be fairer to the cause of the defendant to exclude the evidence, if he *does not propose to make any issue* as to intent or inadvertence. But if the State should therefore wait till the defendant's case was put in, so as to find out whether such an issue is to be met by him, the State would then presumably be met by his objection that new matter cannot be first introduced on rebuttal (*post*, § 1873), and would thus be prevented from using the evidence at all. Either, then, (1) the rule for the scope of rebuttal

[*Note* 1 — *continued.*]

must be liberally construed for the State in such cases; or (2) the accused must be required to announce, before the State closes, whether he will make an issue on the point of Intent (both of which alternatives seem improbable of acceptance); or (3) the rule must stand as stated in the text.
The above qualification was called forth by comments by H. H. Coleman, Esq., of Vicksburg, Miss.

§ 351. Robbery and Burglary.

[*Note* 3; *add:*]

1905, State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584 (murder during robbery; the deceased's presence under a warrant for the accused for another robbery, admitted).

[*Note* 4; *add:*]

1904, State *v.* Donavan, 125 Ia. 239, 101 N. W. 122 (burglary; the finding of goods stolen from other parties, admitted).
1907, State *v.* Toohey, — Mo. — , 102 S. W. 530 (burglary of a sleeping-car; burglary of another car, coupled to the former, at the same time, admitted).
1904, People *v.* Loomis, 178 N. Y. 400, 70 N. E. 919 (confession of another burglary, not admitted on the facts).
1907, Herndon *v.* State, — Tex. Cr. — , 99 S. W. 558 (burglary; possession of goods stolen from another house, excluded on the facts).

§ 354. Arson.

[*Note* 6; *add:*]

1904, Mitchell *v.* State, 140 Ala. 118, 37 So. 76 (arson of H.'s house; the arson of the house of H.'s brother on the same night, admitted).
1906, Raymond *v.* Com., — Ky. — , 96 S. W. 515 (arson of the barn of V., landlord of R.; the defendant was subtenant of R., and had been evicted by R. at the instigation of V.; the burning of R.'s barn four weeks before, excluded; flagrantly erroneous, the defendant having threatened to get even with both R. and V.; Hobson, C. J., diss.).
1905, Palatine Ins. Co. *v.* Santa Fé M. Co., — N. M. — , 82 Pac. 363 (fraudulent arson; former burning of the plaintiff's goods after increase of insurance, one year and a half before, excluded).

§ 357. Rape.

[*Note* 1; *add,* under *Rape:*]

1905, Funderburk *v.* State, — Ala. — , 39 So. 672 (rape; subsequent intercourse with the woman's consent, on the same evening, not admissible for the State).
1904, State *v.* Trusty, 122 Ia. 82, 97 N. W. 989 (rape; prior intercourse, etc., admitted).
1904, State *v.* Carpenter, 124 id. 5, 98 N. W. 775 (similar).
1906, State *v.* Crouch, — Ia. — , 107 N. W. 173 (rape of an imbecile; defendant's prior lascivious conduct towards the prosecutrix, admitted).
1904, State *v.* Johnson, 111 La. 935, 36 So. 30 (rape; that the defendants broke and entered another house near by on the same night, admitted, to show proximity and intent).
1904, State *v.* Lewis, 112 La. 872, 36 So. 788 (former rapes and threats of rape upon the same woman, offered to show her state of fear and submission; not expressly ruled upon).
1905, State *v.* Hummer, 72 N. J. L. 328, 62 Atl. 388 (carnal abuse; charges by other girls against the defendant, here admitted merely to explain away the impeachment of the police officer's testimony).
1905, Harmon *v.* Terr., 15 Okl. 147, 79 Pac. 765 (rape of another woman at the same time, by other men in the defendant's company, admitted).

§ 359. Abortion.

[*Note* 5; *add:*]

1906, R. *v.* Bond, 2 K. B. 389 (abortion; the use of similar instruments upon another woman three months later, to procure a miscarriage, admitted on the facts; two judges dissenting; it is rather odd that neither counsel nor any of the seven judicial opinions, though canvassing the related precedents, cites the above ruling of R. *v.* Perry, which appears to be the only prior one in England on this precise crime).
1904, Sullivan *v.* State, 121 Ga. 183, 48 S. E. 949 (prior unsuccessful attempts on the same female, admitted.
1906, Clark *v.* People, 224 Ill. 554, 79 N. E. 941 (murder in attempting abortion; testimony by five or six persons that the defendant during several years preceding had "solicited patronage and held herself out as being able and willing to commit abortion," etc., admitted to show intent).
1905, People *v.* Hodge, 141 Mich. 312, 104 N. W. 599 (manslaughter by abortion; performance of a similar operation upon a third person for the purpose of an abortion, admitted).

§ 363. Homicide.

[*Note* 10; *add:*]

Murder by Violence: 1904, Terr. *v.* Watanabe, 16 Haw. 196, 221 (murder; testimony as to the defendant's blackmailing, etc., admitted, presumably to show a general plan).

[*Note* 10 — *continued.*]

1905, Brom *v.* People, 216 Ill. 418, 74 N. E. 790 (murder of R.; an assault in another room, a few minutes before, on M., excluded; unsound).
1905, Shepherd *v.* Com., 119 Ky. 931, 85 S. W. 191 (murder; defendant's admission that "he is the third one I have knocked down," excluded).
1905, Com. *v.* Snell, 189 Mass. 12, 75 N. E. 75 (murder of K., who lived with H.; the defendant's plan to murder H., against which K.'s presence was an obstacle, etc., admitted).
1905, State *v.* Brown, 188 Mo. 451, 87 S. W. 519 (murder; assault on a hackman the same evening, excluded; on the facts, the ruling is an extreme example of morbid phantasmagoria).
1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733 (murder of a non-union hack-driver; assault and robbery of another such driver just before, admitted).
1904, People *v.* De Garmo, 179 N. Y. 130, 71 N. E. 736 (manslaughter by beating a child; certain former acts of violence to the same child, not admitted: an over-strict ruling).
1905, State *v.* Adams, 138 N. C. 688, 50 S. E. 765 (murder of M. B.; the killing of her two children at the same time, admitted).
1906, State *v.* Smalls, 73 S. C. 516, 53 S. E. 976 (murder; defendant's violent conduct to third persons just before, admitted).
1904, State *v.* Coleman, 17 S. D. 594, 98 N. W. 175 (murder; certain forgeries admitted as showing motive and plan).

Compare the cases cited *ante*, § 106, *post*, § 396.

Murder by poisoning: 1904, Cawthon *v.* State, 119 Ga. 395, 46 S. E. 897 (poisoning of T.; after T.'s death, H. died, after drinking T.'s brandy; obscure ruling).
1906, People *v.* Collins, — Mich. — , 107 N. W. 1114 (murder of L. by arsenic; death of W. by arsenic, four months before, W. living in the defendant's family, not admitted; no sufficient foundation being shown; Grant and Montgomery, JJ., diss., on the ground that it was admissible to show defendant's possession of arsenic).
1904, State *v.* Sargood, 77 Vt. 80, 58 Atl. 971 (poisoning of B.'s colts; H. having opposed defendant's desires, the attempted poisoning of H. was admitted as part of a plan).

§ 364. Assault with Intent.

[*Note* 4; *add:*]

1904, Livingston *v.* State, — Tex. Cr. — , 83 S. W. 1111 (assault by a father on his daughter; repeated attempts of the father to have intercourse with her, explaining her refusal to go with him, which led to the assault, excluded; unless the Supreme Court knew of facts not disclosed in the decision, it was a brutally unjust one).

§ 367. Miscellaneous Offences; Gaming, etc.

[*Note* 3; *add:*]

1904, State *v.* Behan, 113 La. 754, 37 So. 714 (keeping a house for illegal faro-banking; prior similar acts of gaming not more than two weeks before, admitted to show knowledge and intent).

Compare the cases cited *ante*, § 203, n. 2 (proof of an habitual or continuing offence, *e. g.*, keeping a gaming house).
For *reputation* to evidence knowledge, see *ante*, § 254.

[*Note* 9; *add:*]

1906, Joseph Taylor Coal Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by an unlawful lowering of the cage at a speed forbidden by statute; the engineer's repeated lowering of the cage at such speed, admitted to show knowledge and wilfulness).

[*Note* 12; *add:*]

1903, State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918 (keeping in December, not admitted to prove intent in April, on peculiar facts and theory).
1905, State *v.* Costa, 78 Vt. 198, 62 Atl. 38.

§ 371. Copyright Infringement.

[*Note* 1; *add:*]

1904, Encyclopaedia Brit. Co. *v.* American N. Ass'n, 130 Fed. 460, 464, C. C. A.

§ 376. Habit; Miscellaneous Examples.

[*Note* 2; *add:*]

1906, Parrott *v.* Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432 (to disprove an alleged custom of a conductor in taking tickets, instances of his not doing so were received).

[*Note* 3; *add:*]

1903, Reagan *v.* Manchester St. R., 72 N. H. 298, 56 Atl. 314 (collision; by a motorman, that he had often run at a speed of twenty miles, admitted).

§ 377. Habit in Contracts.

[*Note* 1; *add:*]

Contra: 1905, Patterson *v.* First N. Bank, — Nebr. — , 102 N. W. 765 (certificate of deposit signed by the president of a bank; prior instance of the bank's honoring such a document, excluded, partly because too remote, but partly on the erroneous theory that such evidence must involve an issue of fraud).

[*Note* 4; *add:*]

1905, Galvin *v.* Beals, 187 Mass. 250, 72 N. E. 969 ("The fact that a landlord makes other repairs is not evidence that he agreed to keep the premises in repair ").
1905, Waldner *v.* Bowdoin S. Bank, — N. D. — , 102 N. W. 169 (usury; habit of the defendant to charge usurious interest; not decided).

[*Note* 5; *add:*]

1906, Taylor *v.* Schofield, 191 Mass. 1, 77 N. E. 652 (commission on a patent-sale to C.; defendant's former agreement with P. for a sale, not admitted to show the terms of the present one or the reason for breaking it).
1904, Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612 (goods not equal to sample; similar insufficiency of similar goods sold to another person on the same day, excluded).
1904, Sullivan *v.* Manston M. Co., 123 Wis. 360, 101 N. W. 679, *semble* (whether grain was bailed or sold; usage admitted).

§ 382. Prior or Subsequent Status.

[*Note* 8; *add:*]

1906, Winkleman *v.* White, — Ala. — , 42 So. 411 (domicile of a non-resident mortgagor, presumed to continue).

§ 390. Motives for Murder.

[*Note* 1; *add:*]

1904, People *v.* Wright, 144 Cal. 161, 77 Pac. 877 (certain adulterous relations, excluded, following People *v.* Gress).
1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43 (murder of K. for indecent proposals to defendant's daughter; incestuous relation of defendant and his daughter, admitted; People *v.* Gress, *supra*, discredited on this point).
1905, Gossett *v.* State, 123 Ga. 431, 51 S. E. 394 (murder; the defence being that the killing was done on sight of the deceased seducing the accused's daughter, the prosecution was allowed to prove the daughter's lewd character and the accused's knowledge of it, but not particular acts of her unchastity).
1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227 (relations with prostitutes).
1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.; that defendant had seduced M., admitted as showing motive).
1906, State *v.* Legg, 59 W. Va. 315, 53 S. E. 545 (wife's murder of husband; the wife's adultery, admitted).
For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

[*Note* 2; *add:*]

1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018 (deceased's information against defendant for burglary, admitted).
1904, State *v.* Lewis, 181 Mo. 235, 79 S. W. 671 (that the deceased officer was killed while searching defendant's house to discover money robbed from a bank a month before, admitted).
1906, State *v.* Spaugh, — Mo. — , 98 S. W. 55 (prior assault, as a motive for murdering the sheriff seeking to arrest, admitted).
1906, Thompson *v.* U. S., 144 Fed. 14, 18, C. C. A. (counterfeiting notes; defendant's admission that he was liable to arrest as an abortionist, admitted as showing a motive for the use of counterfeit money).

[*Note* 3; *add:*]

1906, Hayes *v.* State, 126 Ga. 95, 54 S. E. 809 (murder; indictment and judgment against the accused for gaming, the deceased having testified thereon against him, admitted).

[*Note* 5; *add:*]

1903, Bess *v.* Com., 116 Ky. 927, 77 S. W. 349 (insurance-money, personalty, and defendant's arson, etc., admitted).

§ 391. Motive for Other Deeds.

[*Note* 1; *add:*]

1905, State *v.* Koller, — Ia. — , 105 N. W. 391 (adultery; the defendant's wife's violence, etc., to him, admitted in his favor).
For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

§ 392. Pecuniary Circumstances as creating a Motive.

[*Note* 1; *add:*]

1905, Security Trust Co. *v.* Robb, 142 Fed. 78, 84, C. C. A. (conversely, the defendant's possession of ample means may evidence the plaintiff's lack of good faith in making a demand for security).

[*Note* 5; *add:* under *accord:*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Com. *v.* Jeffries approved).

[*Note* 6; *add:*]

1905, Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141 (larceny by a clerk of the mint; that he was in debt while there, admitted).

[*Note* 7; *add,* under *accord:*]

1871, Chahoon's Case, 20 Gratt. 733, 738, 791 (forgery of the signature of H. on a bond; H.'s good pecuniary condition, admitted to negative the probability of his borrowing); 1871, Sands' Case, ib. 800, 803, 821 (similar).
1905, State *v.* Moyer, — W. Va. — , 52 S. E. 30 (embezzlement).

[*Note* 9; *add:*]

1906, Green *v.* Dodge, — Vt. — , 64 Atl. 499 (market value of a lease, admitted to show the terms agreed on).
1907, Anderson *v.* Arpin H. L. Co., — Wis. — , 110 N. W. 788 (services in piling lumber, etc.; good opinion by Marshall, J.).

§ 393. Legal Liability as creating a Motive.

[*Note* 1; *add:*]

1907, Virginia — Carolina C. Co. *v.* Knight, — Va. — , 56 S. E. 725 (defendant's insurance against accidents to employees, not admissible to show that he would be less careful).
Compare the cases cited *post,* §§ 949, 969.

§ 396. Hostility in General, at Other Times.

[*Note* 3; *add:*]

But the details of prior quarrels as showing the hostility of the *deceased,* on a charge of homicide, are not open to the same objection, and may be received on the principle stated in the opinion of Whitfield, C. J., in Brown *v.* State, Miss., cited *infra,* n. 5.

[*Note* 5; *add:*]

Alabama: 1900, Longmire *v.* State, 130 Ala. 66, 30 So. 413 (after the State's improper examination into particulars of a prior difficulty, the defendant was allowed to show all the particulars in rebuttal).
1905, Kroell *v.* State, 139 Ala. 1, 36 So. 1025 (particulars of a former difficulty allowed on re-direct examination for the State, the defendant having gone into them on the cross-examination).
1904, Gordon *v.* State, 140 Ala. 29, 36 So. 1009 (murder; previous difficulties, not admitted for the defendant).
1904, Plant *v.* State, 140 Ala. 52, 37 So. 159 (a difficulty with deceased before the killing, and the defendant's expressions of animus immediately after, admitted).
1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (deceased's curses, in a prior difficulty, excluded, under the rule forbidding details).
1905, Dunn *v.* State, 143 Ala. 67, 39 So. 147 (particulars of a prior difficulty, excluded).
1905, Sanford *v.* State, 143 Ala. 78, 39 So. 370 (prior difficulty of deceased with a third person; particulars admitted on the facts to show motive; but the particulars of a prior difficulty between deceased and defendant were excluded).
1906, Patterson *v.* State, — Ala. — , 41 So. 157 (particulars of a prior difficulty, excluded).
1906, Stallworth *v.* State, ib. — , 41 So. 184 (similar).
1906, Morris *v.* State, — Ala.— , 41 So. 274 (murder; expressions of hostility, admitted).
California: 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252 (hostility of a legatee charged with undue influence).
Georgia: 1906, Graham *v.* State, 125 Ga. 48, 53 S. E. 816 (defendant's hostile language before and after the homicide, admitted).
1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 (wife-murder; acts of ill treatment to the wife, not too remote, admissible).
Kansas: 1893, State *v.* Sortor, 52 Kan. 531, 34 Pac. 1036 (prior quarrels admitted, but not the details).
Maine: 1906, Lenfest *v.* Robbins, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed to explain that the hostility "was not on his side").
Mississippi: 1904, Schrader *v.* State, 84 Miss. 593, 36 So. 385 (murder of C.; a prior quarrel between C. and A., a friend of the defendant, admitted).
1904, Thompson *v.* State, 84 Miss. 758, 36 So. 389 (murder; prior difficulties, etc., excluded on the facts).
1905, Brown (Tom) *v.* State, 85 Miss. 511, 37 So. 957 ("where the State itself introduces the previous difficulty, the defendant should be permitted to show the details and character of such difficulty," — in this case, "in order to show who was the aggressor in the difficulty resulting in the killing").

[*Note 5 — continued.*]

1906, Brown (Tom) *v.* State, — id. — , 40 So. 737 (same case; held by the majority, per Calhoun, J., that "the nature and character of previous difficulties" is admissible for the accused, even when the State does not first introduce the subject, on the theory of uncommunicated threats, *ante*, § 111; the trial Court is rebuked for not following "the plain statement" in the former opinion; but the truth is that the trial Court did follow it literally, and that the Supreme Court itself is in error in confusing the principle and precedents for uncommunicated threats of the deceased, *ante*, § 111, with the present principle; the opinion of Whitfield, C. J., specially concurring, takes the correct ground, and admits the details of the prior quarrel "so far as essential to show the common motive").

1905, Hughes *v.* State, — Miss. — , 38 So. 33 (details of a prior quarrel not connected with the present affray, not admitted for the defendant; preceding authorities not cited).

1906, Brown (Leora) *v.* State, — Miss. — , 40 So. 1008 (homicide; another difficulty between the families of the parties thirty minutes before, admitted; following Brown (Tom) *v.* State, *supra*).

Oklahoma: 1904, Wells *v.* Terr., 14 Okl. 436, 78 Pac. 124 (former difficulty, admitted to show malice of defendant).

1906, McHugh *v.* Terr., — Okl. — , 86 Pac. 433 (assault with intent to kill; details of a prior difficulty, admitted for the defendant on the facts).

Oregon: 1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.; prior difficulty with the deceased, over the seduction of M. by defendant, admitted).

South Carolina: 1904, State *v.* Adams, 68 S. C. 421, 47 S. E. 676 (prior difficulty admitted, but not the details).

1905, State *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551 (details of a quarrel, just preceding, with a third person, admitted for the State.

Washington: 1905, State *v.* Armstrong, 37 Wash. 51, 79 Pac. 490 (details of prior quarrels, admitted for the State in rebuttal of similar evidence for the accused).

[*Text;* at the end, *add:*]

(4) *former assaults* to show Intent (*ante*, § 363); (5) *former hostility of a witness* to show Bias (*post*, § 951).

§ 397. Hostility to Wife or Paramour.

[*Note* 8; *add:*]

1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 ("a long course of ill-treatment and cruelty," admitted).

1905, Campbell *v.* State, 123 Ga. 533, 51 S. E. 644 (husband-murder; the wife's prior expressions of ill-feeling, held admissible).

1905, Parsons *v.* People, 218 Ill. 386, 75 N. E. 993 (wife-murder; prior quarrels, disagreements, and expressions of ill-feeling, admitted).

1905, Miera *v.* Terr., — N. M. — , 81 Pac. 586 (paramour-murder; a threat of three years before, admitted).

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

§ 398. Sexual Passion at Other Times.

[*Note* 1; *add:*]

Adultery, Bigamy, Crim. Con., Fornication, Incest:

1906, Adams *v.* State, — Ark. — , 92 S. W. 1123 (incest; prior intercourse, beyond the period of limitations, admitted).

1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (incest; like People *v.* Patterson, *supra*, but the Court's opinion forgets to cite it).

1904, People *v.* Koller, 142 Cal. 621, 76 Pac. 500 (incest; subsequent and prior acts of intercourse or improper familiarity, admissible; "the only case in this State which has been called to our attention" is People *v.* Stratton, *supra*).

1906, People *v.* Morris, — Cal. App. — , 84 Pac. 463 (preceding case followed).

1906, Dodge *v.* Rush, 28 D. C. App. 149, 156 (crim. con.; prior conduct, admitted).

1903, Lipham *v.* State, 125 Ga. 52, 53 S. E. 817 (incest; prior intercourse in another county and another State, admitted).

1906, Nobles *v.* State, — Ga. — , 56 S. E. 125 (adultery; improper conduct in another county, admitted).

1906, State *v.* Judd, — Ia. — , 109 N. W. 892 (incest; prior acts admitted).

1907, State *v.* Pruitt, — Mo. — , 100 S. W. 431 (incest; prior acts of intercourse and lascivious familiarity, admissible).

1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738 (adultery; intercourse between the parties at other prior times, admitted).

1904, Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 (incest; a series of subsequent acts, including some covered by other indictments, excluded; Burnett *v.* State, *supra*, overruled, on the authority of Smith *v.* State, *infra*, *Rape under Age*, and no other of the above cases cited; this opinion merits the censure of the Texas bar; it not only overthrows exact precedents, but in so doing it introduces, upon the scantiest consideration, a heretical and inferior rule, and creates unnecessary difficulties in the proof of this crime).

1905, Wiggins *v.* State, — Tex. Cr. — , 84 S. W. 821 (rape and incest; prior acts of intercourse, excluded; Clifton *v.* State not cited).

1905, French *v.* State, — Tex. Cr. — , 85 S. W. 4 (adultery; rule of Clifton *v.* State applied, but now held to admit acts of intimacy short of criminal intercourse, if not too remote).

[*Note* 1 — *continued.*]

1906, Gillespie *v.* State, — Tex. Cr. — , 93 S. W. 556 (Clifton *v.* State followed; here excluding prior acts more than ten years before).
1903, State *v.* Wood, 33 Wash. 290, 74 Pac. 380 (incest; other prior acts of intercourse between them, admitted).
1905, State *v.* Nelson, 39 id. 221, 81 Pac. 72 (similar).

Seduction, Bastardy:

1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (bastardy; the defendant, alleging that B. was the father, was allowed to introduce the relatrix' admissions that she and B. had had intercourse on occasions prior to the time of conception).

Rape under Age:

1904, State *v.* Lancaster, 10 Ida. 410, 78 Pac. 1081 (rape under age; prior acts of intercourse between the parties, admitted).
1905, State *v.* Sheets, 127 Ia. 73, 102 N. W. 415 (rape under age; assault on other girls in the same place and the same day, admitted).
1904, State *v.* Borchert, 68 Kan. 360, 74 Pac. 1108 (other acts of intercourse between the parties, admitted).
1905, State *v.* Oswalt, — Kan. — , 82 Pac. 513 (subsequent intercourse inadmissible).
1906, State *v.* Stone, — Kan. — , 85 Pac. 808 (carnal knowledge under age; subsequent as well as prior acts of intercourse, etc., admitted; State *v.* Borchert approved).
1906, People *v.* Brown, — Mich. — , 106 N. W. 149 (subsequent acts of intercourse, after the statutory age, excluded, approving People *v.* Etter, 81 id. 570, 45 N. W. 1109, and apparently disapproving People *v.* Jamieson, *supra;* no principle is stated, and the opinion entirely ignores the reasoning applicable to the question, and tends to confuse the precedents in this State).
1906, State *v.* Palmberg, — Mo. — , 97 S. W. 566 (rape under age; subsequent acts are inadmissible, but prior acts are admissible; it is unfortunate that this Court, upon a careful consideration of the subject, should adopt this illogical and unpractical view, which makes the rule of evidence run counter to human nature; in selecting People *v.* Clark, Mich., *supra*, as its guide, it took a Court which has been the most inconsistent on this subject and one whose precedents are therefore of small value).
1904, Blair *v.* State, — Nebr. — , 101 N. W. 17 (rape under age; improper familiarities between the two, admitted).
1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114 (subsequent intercourse with the prosecutrix, admitted).
1906, State *v.* Lawrence, 74 Oh. 38, 77 N. E. 266 (rape under age; the defendant's confessions of other acts of intercourse with the child more than two years later, excluded).
1905, Cecil *v.* Terr., 16 Okl. 197, 82 Pac. 654 (rape under age; prior acts of intercourse, admitted, but not subsequent ones; the Court's assertion that "it is just as well settled that such subsequent acts" are inadmissible is wholly unjustifiable; only Michigan decisions are cited for this, and in that jurisdiction the precedents are confused and inconsistent).
1904, Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185 (rape under age; prior and subsequent intercourse, admitted).
1904, Henard *v.* State, 46 Tex. Cr. 90, 79 S. W. 810 (rape under age; subsequent intercourse, excluded, following the foregoing cases; but the ruling is unsound on the facts, for the evidence tended to explain away a circumstance discrediting the prosecutrix).
1904, Henard *v.* State, — Tex. Cr. — , 82 S. W. 655 (intimacy short of criminal intercourse is admissible).
1905, French *v.* State, — id. — , 85 S. W. 4 (foregoing rule approved).
1905, State *v.* Willett, 78 Vt. 157, 62 Atl. 48 (rape under age; other acts of intercourse before and since, admitted).
1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (other acts of intercourse between the parties, admitted).
1906, State *v.* Marselle, — Wash. — , 86 Pac. 586 (rape under age; defendant's attempt to seduce another girl, excluded).
1906, State *v.* Mobley, — Wash. —, 87 Pac. 815 (rape under age; other acts of intercourse, admitted).
1905, Grabowski *v.* State, 126 Wis. 447, 105 N. W. 805 (indecent liberties; prior liberties, admitted).

For *pregnancy*, as evidence, see *ante*, § 168, n. 3.

§ 406. Malice in Defamation; Law in the Various Jurisdictions.

[*Note* 1; *add:*]

1904, Grant *v.* State, 141 Ala. 96, 37 So. 420 (prior utterances of a similar tenor, admitted).
1903, Smith *v.* Hubbell, — Mich. — , 106 N. W. 547 (subsequent similar utterance, admitted).
1903, Yager *v.* Bruce, — Mo. App. — , 93 S. W. 307 (unproved plea of justification may be considered, but only if filed in bad faith).
1905, Ott *v.* Press P. Co., 40 Wash. 308, 82 Pac. 403, *semble* (subsequent similar utterances about other persons in the same business, excluded).
1906, Earley *v.* Winn, — Wis. — , 109 N. W. 633 (repetitious admissible).

§ 411. General Principle of Identity-Evidence.

[*Text*, last line; *add* a new note 1:]

[1] 1906, Webb *v.* Ritter, — W. Va. — , 54 S. E. 484 (the above principle cited, in identifying land by the payment of taxes, etc.).

§ 413. Circumstances Identifying a Person.

[*Note* 8; *add:*]

and *ante*, § 270, n. 4.

[*Note* 9; *add:*]

1905, Smith *v.* State, 165 Ind. 180, 74 N. E. 983 (the same witness need not testify to all the identifying circumstances; here the witness testified merely that she sold a revolver to a colored man, the defendant being colored).

§ 414. Identity; Criminality of Act Immaterial.

[*Note* 1; *add:*]

1907, State *v.* Toohey, — Mo. — , 102 S. W. 530 (burglary).

§ 416. Utterances used to Identify Time or Place.

[*Note* 1; *add:*]

1850, Com. *v.* Webster, Mass., Bemis' Rep. 269, 295 (fixing the time of seeing a person, by notes written and received on that day, allowed).

§ 437. Existence, from Prior or Subsequent Existence.

[*Note* 2; *add:*]

1904, Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699 (sidewalk).

[*Note* 4; *add:*]

1906, Redus *v.* Milner C. & R. Co., — Ala. — , 41 So. 634 (condition of a railway track eighteen months later, excluded).
1906, Dean *v.* Kansas C. St. L. & C. R. Co. — Mo. — , 97 S. W. 910 (condition of rails six months before, admitted; "we may be presumed to know that bad steel rails do not get any better by further use for six months or improve like wine with age").

[*Note* 7; *add:*]

1906, Foley *v.* Pioneer M. & M. Co., 144 Ala. 178, 40 So. 273 (condition of mine ventilation, thirteen hours after an accident, admitted).
1904, Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547 (condition of an elevator the next day, admitted, no change having been suggested).
1904, Meyers *v.* Highland B. G. M. Co., 28 Utah 96, 77 Pac. 347 (position of a plank in a mine, several hours later, allowed).

[*Note* 9; *add:*]

1904, Giffin *v.* Martel, — Conn. — , 58 Atl. 788 (value of a stock of goods sixteen months before, admitted).
1904, Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384 (joint use of steam; to show the amount of coal used, the consumption in the two or three years preceding and the year following, was held not improperly excluded in the trial Court's discretion, for dissimilarity of conditions, etc.).

[*Text*, p. 517, l. 4; *insert:*]

The *presumption of continuity* (*post*, § 2530) is founded on this inference.

§ 438. Existence, from Concurrent Existence.

[*Text*, p. 518; *add* a new note 1*a*, at the end of par. (*b*) of the text:]

[1a] 1904, Chicago & A. R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 (size of a freight-car, evidenced by the size of the series to which it belonged).

[*Note* 2; *add:*]

1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (defective bridge; "other defects in the bridge," admitted).

[*Note* 4; *add:*]

1907, Lamb *v.* Philadelphia & R. R. Co., — Pa. — , 66 Atl. 762 (condition of other parts of a roof, admitted).

§ 451. Material Effects; Miscellaneous Instances.

[*Note* 1; *add:*]

1904, Attorney-General *v.* Nottingham, 1 Ch. 673 (smallpox hospital as a nuisance; experience of other similar hospitals as to the risk of infection, admitted by consent, following Hill *v.* Metrop. Asylum District, *supra*, but Farwell, J., writing the opinion, suggesting that "the admission of such evidence in chief is wrong in principle," on the ground of surprise and confusion of issues).

[*Note* 2; *add:*]

1905, Baltimore B. R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654 (smoke nuisance; the effects produced on other property in the immediate neighborhood, admitted).

[*Note* 3; *add:*]

1906, Central of Ga. R. Co. *v.* Keyton, — Ala. — , 41 So. 918 (effect of prior overflows of a sewer admissible to show "the consequences of the overflow under similar circumstances").
1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82 (overflow of a sewer; an instance of overflow two years before, held not improperly excluded on cross-examination; but the Court cites Collins *v.* Dorchester, *post*, § 458, n. 2, which ought rather to be treated as discredited by later rulings).

[*Note* 4; *add:*]

1904, Rowe *v.* Northport S. & R. Co., 35 Wash. 101, 76 Pac. 529 (injury to orchards, etc., by smelting furnaces; effect of the gases on vegetation in the vicinity, under similar conditions, admissible; but experiments before the jury as to the effect of sulphuric acid on different substances were excluded as not involving similar conditions; the partly dissenting opinion of Dunbar, J., is the preferable one).

[*Note* 5; *add:*]

1905, Castner *v.* Chicago B. & O. R. Co., 126 Ia. 581, 102 N. W. 499 (effect of fire upon land similarly situated, admitted).
1906, Huggard *v.* Glucose S. R. Co., — Ia. — , 109 N. W. 475 (former effects of wind in blowing objects similarly situated, held properly admitted, but experiments as to vibrations, etc., held properly excluded, in the trial Court's discretion).

[*Note* 6; *add:*]

1904, State *v.* Ronk, 91 Minn. 419, 98 N. W. 334 (experiments with a gun-target, excluded).
1904, Cheetham *v.* Union R. Co., 26 R. I. 279, 58 Atl. 881 (derailment; experiments under similar conditions, admitted).

[*Note* 7; *add:*]

1904, Birmingham R. L. & P. Co. *v.* Bynum, 139 Ala. 389, 36 So. 736 (defective coupling; a witness allowed to state how often he had known cars with that coupling to break loose).
1904, Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741 (defective boiler; lack of complaint by other purchasers of plaintiff's boilers, excluded, for confusion of issues, absence of similar conditions, etc.).
1905, Gregory *v.* American Thread Co., 187 Mass. 239, 72 N. E. 962 (former defective operation of a machine, excluded in the trial Court's discretion as too remote).
1903, Saucier *v.* N. H. Spinning Mills, 72 N. H. 292, 56 Atl. 545 (experiments with a carding-machine to test its operation, made under similar circumstances, admitted in the trial Court's discretion).
1904, Halverson *v.* Seattle El. Co., 35 Wash. 600, 77 Pac. 1058 (experiments as to running an electric car, held not improperly excluded in discretion, for lack of similarity of conditions).

[*Note* 8; *add:*]

1906, Standard C. Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650 (condition of other machines on the same floor, with reference to a pulley slipping, admitted).
1905, Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738 (injury by frame-gears; the defective operation of another frame, not shown to be similar, excluded).
1905, Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406 (action for the price of a stove; plea that it was defective and worthless; worthlessness of a similar stove sold to a third person by plaintiff, excluded; following Stockton C. H. & A. W. *v.* Ins. Co., Cal., *supra*).

§ 454. Sparks as Cause of Fire; Same Locomotive.

[*Note* 1; *add:*]

1904, Cheek *v.* Oak G. L. Co., 134 N. C. 225, 46 S. E. 488 (setting of fire by the same engine one year later, excluded, on the ground of confusion of issues).
1906, Johnson *v.* Atlantic C. L. R. Co., 140 N. C. 574, 53 S. E. 362 (emissions of fire by the same engine shortly before or after, admissible; but here not the mere fact of a freight car being on fire without any other evidence of the engine causing it).

§ 455. Sparks as Cause of Fire; Other Locomotives.

[*Note* 8; *add:*]

1906, Birmingham R. L. & P. Co. *v.* Martin, — Ala. — , 42 So. 618 (prior emissions by the defendant's engines, admitted).

[*Note* 8 — *continued.*]

Kan.: 1904, Sprague *v.* Atchison T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828 (to show the origin of the fire, where it is disputed, emissions by other engines of the defendant are receivable, whether the engine is identified or not).
1872, Burke *v.* Louisville & N. R. Co., 7 Heisk. 451, 456, 464 (emissions of sparks by other engines of defendant, admitted to show "the possibility of the building being fired in the manner alleged").
1882, Nashville & C. R. Co. *v.* Tyne, 7 Am. & Eng. R. R. Cases, 515 (foregoing case approved).
1904, Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429 (foregoing cases approved).

§ 456. Sparks as Evidence of Defective Construction.

[*Note* 4; *add:*]

1906, Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 (rule of First Nat'l Bank *v.* R. Co. followed, but citing no authority).
1906, Cleveland C. C. & St. Louis R. Co. *v.* Loos, — Ind. App. —, 77 N. E. 948 (where the engine is identified, fires by other engines are excluded).
1904, Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828 (where the engine is identified, emissions by other engines of the defendant is not admissible to show negligent construction or operation; the Court cites fourteen decisions from other jurisdictions, but pays no attention to the last two in its own records; the Court's logic is also fallacious).
1907, Chesapeake & O. R. Co. *v.* Richardson, — Ky. —, 99 S. W. 642 (spark-emissions by other engines under the same management and similarly equipped, admitted).
1906, Knott *v.* Cape Fear & N. R. Co., 142 N. C. 238, 98 S. E. 150 (former emissions by the same engine, admitted).
1904, Anderson *v.* Oregon R. Co., 45 Or. 211, 77 Pac. 119 (Koontz *v.* R. Co. cited).
1905, Shelly *v.* Phila. & R. R. Co., 211 Pa. 160, 60 Atl. 581 (Henderson case approved).
1903, Louisville & N. R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936 (fires set nine or ten months before, admitted, but not fires set when the engines were equipped differently; the rule as to identified engines, not passed upon).
1904, Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429 (other emissions of sparks from other locomotives of the defendant, admitted, "to show habitual negligence"; Pennsylvania rule of identification repudiated).
1904, Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521 (fires set by other unidentified engines, not shown to be of the same construction, excluded).

§ 457. Corporal Effects and Symptoms.

[*Note* 1; *add:*]

1906, Hisler *v.* State, — Fla. —, 42 So. 692 (target-experiments, to show the scattering of shot, admitted).
1906, State *v.* Nowells, — Ia. —, 109 N. W. 1016 (experiments as to powder-marks from gunshots, admitted, in discretion).
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (experiments as to cutting a body, excluded).
1904, Lillie *v.* State, — Nebr. —, 100 N. W. 316 (experiments to show the distance of a pistol, as shown by powder-marks, admitted).

[*Note* 2; *add:*]

1903, Bair *v.* Struck, 29 Mont. 45, 74 Pac. 69 (killing and injuring sheep by dipping into a poisonous mixture for quarantine purposes; defendant's offer to show a similar dipping of other sheep without fatal results, excluded, because not based on similarity of effects).

[*Note* 3; *add:*]

1904, State *v.* Good, 56 W. Va. 215, 49 S. E. 121 (sale of an intoxicating liquor called "Rikk"; the purchase and use of the same drink in similar bottles by other persons about the same time, without intoxicating effect, admitted; citing other rulings).

[*Note* 4; *add:*]

Compare the citations in § 439, *ante.*

§ 458. Similar Injuries to Other Persons.

[*Note* 2; *add:*]

1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; prior defects of operation, admitted).
1906, Sheehan *v.* Hammond, 2 Cal. App. 371, 84 Pac. 340 (injury at a telephone factory; that no such injury had been received before, excluded, but on the futile and absurd ground that "the owner cannot by way of excuse show that no prior injury had occurred").
1905, Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 (injury at a coal chute; absence of injuries at that place for the several years it had been in use, offered to show its safety, excluded, on the ground of multifarious issues; the only "legitimate purpose of such evidence is to show notice," under § 252, *ante*).
1907, Chicago, R. I. & P. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119 (freight car injury; that the witness did not know of any prior instance of a "stake being high enough to strike the rail," allowed).

[*Note* 2 — *continued.*]

1907, Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079 (fall at a coal-hole; prior falls of ten or eleven other people, admitted to show "that the common cause of the accidents was a dangerous and unsafe thing").
1906, Heinmuller *v.* Winston, — Ia. — , 107 N. W. 1102 (cited *post*, § 461, n. 2; Hudson *v.* R. Co., *supra*, apparently approved, ignoring the intervening cases).
1904, Cunningham *v.* Clay, 69 Kan. 373, 76 Pac. 907 (Topeka *v.* Sherwood followed; admitting the fright of other teams to show the nature of a highway obstruction).
1904, Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592 (defective sidewalk; frequent instances of falls by other persons at the same place, admitted; following Dist. Columbia *v.* Armes, U. S., etc.).
1904, Cohen *v.* Hamblin & Russell Mfg. Co., 186 Mass. 544, 71 N. E. 948 (injury to a child at a machine; prior injuries to other children at the same machine, excluded).
1907, Yore *v.* Newton, — Mass. — , 80 N. E. 472 (upsetting of a wagon in a highway; the effect of the highway on other wagons during five years, held not improperly excluded in the trial Court's discretion).
1904, Gregory *v.* Detroit U. R. Co., 138 Mich. 368, 101 N. W. 546 (prior accidents at the same place, excluded; "such testimony is only admissible to show notice and knowledge of the defects," which was here conceded; the above cases prior to Corcoran *v.* Detroit are ignored).
1905, Vander Velde *v.* Leroy, 140 Mich. 359, 103 N. W. 812 (that others had fallen off the same sidewalk, excluded, the conditions having been materially changed).
1906, Charlton *v.* St. Louis & S. F. R. Co., — Mo. — , 98 S. W. 529 (proximity of a crane; another person's former experience, admitted).
1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (injury on a defective bridge; other prior accidents at the same place, admitted to show the "state of repair").
1901, Hansen *v.* Seattle L. Co., 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar cogwheels, admitted).
1903, Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674 (trap-door in a sidewalk; falls of other persons at the same place, admissible to show the condition of the sidewalk; following Elster *v.* Seattle and District *v.* Armes, U. S., *supra*).
1904, Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84 (preceding cases followed).
1905, Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22 (prior instances of safe driving at a highway defect, excluded).

§ 459. Mental and Moral Effects; General Principle.

[*Note* 2; *add:*]

In a few jurisdictions it is settled that the usual conduct of other persons is of itself a legal standard of care; *e. g.:* 1905, Boop *v.* Laurelton L. Co., 212 Pa. 523, 61 Atl. 1021.

§ 460. Measures of Time, Space, Light, etc.

[*Note* 1; *add:*]

1905, Spires *v.* State, 50 Fla. 121, 39 So. 181 (whether a person could be recognized by the flash of a gun; an experimsnt for that purpose in the the jury-room, held not improperly refused in the trial Court's discretion, chiefly because similarity of conditions was not shown).
1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416 (burglary; whether the accused could he identified as testified to, allowed to be shown by tests of visibility made under the same conditions).
1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (experiment as to seeing a railroad track, excluded, because the conditions were dissimilar).
1904, Healey *v.* Bartlett, 73 N. H. 110, 59 Atl. 617 (whether a testator was in such a position that he could see the attesting witnesses; experiments allowed in the trial Court's discretion).

[*Note* 3; *add:*]

1906, Dow *v.* Bulfinch, — Mass. — , 78 N. E. 416 (experiments to show whether conversation could be distinguished in an adjacent room, held not improperly excluded in discretion).

[*Note* 8; *add:*]

1905, State *v.* Donovan, 128 Ia. 44, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances).
1906, Tackman *v.* Brotherhood, — Ia. — , 106 N. W. 350 (suicide by hanging with a bridle; experiments with other persons under similar conditions, admitted to show the probability of accidental death).
1904, Zimmer *v.* Fox R. V. E. R. Co., 123 Wis. 643, 101 N. W. 1099 (experiments as to riding on a car, held allowable in the trial Court's determination as to similarity).

§ 461. Measure of Negligence, Danger, Insufficiency, etc.

[*Note* 1; *add:*]

It is sometimes said that a *statute* or *municipal ordinance* forbidding or enjoining certain conduct is *evidence* of negligence, on the question whether the doing or not doing of that kind of act was negligent; *e. g.:*
1904, Frontier Steam Laundry Co. *v.* Connolly, — Nebr. — , 101 N. W. 995 (ordinance requiring fire-shutters).
1905, Finnegan *v.* S. W. S. Mfg. Co., 189 Mass. 580, 76 N. E. 192.
Now it is true that such an ordinance might be used evidentially, on the same theory as the numerous instances cited *post*, because it is virtually a custom or usage having orthodox status. But in many of

[*Note* 1 — *continued.*]

such opinions the Court has rather in mind the operation of the ordinance in substantive law, fixing a standard of negligence *per se*, on the theory explained in all treatises on Torts, and by the present writer in an article in the Harvard Law Review (VIII, 389). It seems unwise, therefore, to give any secondary status to such an ordinance, as evidence of negligence, whenever it is not to have the substantive status of a rule of negligence *per se*. No doubt some Courts, in referring to it as evidence, are virtually thinking of it as a rule of substantive law. Compare § 283, n. 8, and § 459, n. 2, *ante*.

The *regulations of a railroad* or similar *company* may have a bearing in cases like the present; but they are then virtually *admissions* by the company that certain conduct is or is not negligent (*ante*, §§ 282, 283, n. 8).

[*Note* 2; *add:*]

1906, Heinmiller *v.* Winston, — Ia. — , 107 N. W. 1102 (horses frightened by a steam shovel; fright of two other horses on the same day at the same place, admitted).
1904, Powell *v.* Nevada C. & O. R. Co., 28 Nev. 40, 78 Pac. 978 (fright of a horse at a whistle; fright of another horse at the same whistle, admitted).

[*Note* 3; *add:*]

1904, Mullin *v.* Boston Elev. R. Co., 185 Mass. 522, 70 N. E. 1021 (injury received, while a passenger, during a collision of cars; that no other passengers received any injury, admitted to show the force of the collision, etc.)

Distinguish the following: 1905, Foss *v.* Portsmouth D. & Y. R. Co., 73 N. H. 246, 60 Atl. 747 (collision; that no other passenger had made complaint or claim, excluded).

[*Note* 4; *add:*]

1906, Wallace *v.* Seaboard A. L. R. Co., 141 N. C. 646, 54 S. E. 399 (custom as to coupling cars, adopted by the master carbuilders' association, admitted).

[*Note* 5, p. 569; *add:*]

Ala.: 1903, Northern Ala. R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459 (death at a stock-gap; the usage on other well-regulated roads, admitted, but not taken as a standard).
1906, Denver & R. G. R. Co. *v.* Burchard, — Colo. — , 86 Pac. 749 (experience of other railroads as to the location of mail cranes, admitted).
1904, Orient Ins. Co. *v.* Northern P. R. Co., 31 Mont. 502, 78 Pac. 1036 (relative quantity of spark-emissions of other engines, admitted).
1905, Pittsburgh S. & N. R. Co. *v.* Lamphere, 137 Fed. 20, 69 C. C. A. 542 (custom as to telltales on low bridges, admitted).
1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (custom of other railroads in Virginia, and other parts of defendant's railroad, as to switchlights, admitted).

[*Note* 5, p. 571; change the note-number to *5a*, and *add:*]

1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; correct rule laid down).
1905, Hazard P. Co. *v.* Somersville M. Co., 78 Conn. 171, 61 Atl. 519 (time of running of mills, on an issue as to unreasonable diversion of water; custom of other mills, admitted).
1905, Clements *v.* Potomac E. P. Co., 26 D. C. App. 482, 495 (custom as to uninsulated wires, excluded because here an express municipal prohibition applied).
1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (boiler-explosion; the custom of other companies as to inspection must be that of "well regulated and prudently managed" ones).
1905, Hansell-Elcock F. Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 (iron column causing injury; the Court ignore the distinction between admitting evidence and fixing a standard of care; "usual and customary manner" of construction, said to be inadmissible).
1905, Siegel, Cooper & Co. *v.* Treka, 218 Ill. 559, 75 N. E. 1053 (usual manner of constructing elevator doors, excluded).
1906, Wilder *v.* Gt. Western C. Co., — Ia. — , 109 N. W. 789 (usual method of fastening pile-drivers, admitted).
1905, Mahan *v.* Daggett, — Ky. — , 84 S. W. 525 (nuisance; manner of disposing of sawdust in other mills, admitted).
1906, Louisville B. & I. Co. *v.* Hart, — Ky. — , 92 S. W. 951 (custom in rolling-mills, admitted; good opinion, by O'Rear, J.).
1904, Dolan *v.* Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025 (uncovered machine-gearing; the condition of such gearing in other mills, held admissible, in the trial Court's discretion; distinguishing the rulings as to actions against towns for defective highways).
1904, Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357 (custom to use a certain tool, admitted, but not as conclusive).
1904, Dell *v.* McGrath, 92 Minn. 187, 99 N. W. 629 (customary number of men in skidding, admitted).
1903, Saucier *v.* N. H. Spinning Mills, 72 N. H. 292, 56 Atl. 545 (equipment of other machines not shown to be in common use, excluded, but equipment in general use, admitted).
1904, Jenks *v.* Thompson, 179 N. Y. 20, 71 N. E. 266 (injury on a scaffold; general custom as to building scaffolds, admitted).
1905, Jones *v.* Reynolds T. Co., 141 N. C. 202, 53 S. E. 849 (general custom as to protecting a machine, admitted).
1904, Pence *v.* California M. Co., 27 Utah 378, 75 Pac. 934 (custom as to using inexperienced miners, admitted).
1904, Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467 (usual method of putting up a derrick, allowed).

[*Note 5 — continued.*]

1904, Richmond & P. E. R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834 (guard wires on telephone lines).
1906, Norfolk & W. R. Co. *v.* Bell, 104 Va. 836, 52 S. E. 700 (water-gauge; making a peculiar distinction against testimony that other appliances are safer).
1904, Crooker *v.* Pacific L. & M. Co., 34 Wash. 191, 75 Pac. 632 (custom as to guarding ripsaws, admitted).
1905, Dossett *v.* St. Paul & T. L. Co., 40 Wash. 276, 82 Pac. 273 (customs in other mills as to sawyers' duties, admitted).
1905, Rylander *v.* Laursen, 124 Wis. 2, 102 N. W. 341 (spark-arrester of a mill; distinguishing between the evidence and the standard of care).

[*Note* 6; *add:*]

1904, Norris *v.* Cudahy P. Co., 124 Ia. 748, 100 N. W. 853 (conduct of other people at a highway trench, admitted).
1904, Kein *v.* Ft. Dodge, 126 Ia. 27, 101 N. W. 443 (highway injury; that the mode of construction was similar to that in general use in the city, admitted, but only to show the plaintiff's knowledge).
1906, Moynihan *v.* Holyoke, — Mass. — , 78 N. E. 742 (slippery cellar-lights in a sidewalk; usual use of similar lights in other sidewalks, held admissible or not in the trial Court's determination; good opinion by Knowlton, C. J.).
1906, Erickson *v.* American S. & W. Co., — Mass. — , 78 N. E. 761 (boiler-tests; similar ruling).
1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (custom as to the load taken upon a bridge, admitted in an action for an injury to the driver of a traction engine).
1904, Chaffin *v.* Fries M. & P. Co., 135 N. C. 95, 47 S. E. 226 (overflow by a dam; certain similar effects excluded and others admitted).
1903, Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674 (protected condition of other sidewalks in the same city, admitted, partly on the present ground and partly as negativing contributory negligence).

[*Note* 7; *add:*]

1905, Pauksztis *v.* Raeder B. L. & P. Co., 212 Pa. 403, 61 Atl. 901 (customer's books burned at a book-binder's; the usage of book-binders to insure customers' books, admitted).

[*Note* 12, col. 1, l. 2 from below; *add:*]

how the case of R. *v.* Hone influenced this result is interestingly told in J. Routledge's "Chapters in the History of Popular Progress, chiefly in Relation to the Freedom of the Press and Trial by Jury," p. 433 (1876).

§ 462. Business Patronage.

1907, Hutchinson L. Co. *v.* Dickerson, — Ga. — , 56 S. E. 491 (that similar lumber sold to other sawmills was sound, not admitted).

Compare the cases cited *ante*, § 377; there the question involves the variability of human conduct in forming contracts; here, the uniformity of quality of some inanimate substance; and in the present class of cases the doubt arises to the extent that the variability of human conduct in the performance of similar contracts is involved.

§ 463. Value, from Sales of Similar Property.

[*Note* 1; at the end, *add:*]

Whether an *offer* to purchase or sell, as distinguished from an actual sale, is admissible, is a question of the standard of value:
1906, Yellowstone P. R. Co. *v.* Bridger C. Co., — Mont. — , 87 Pac. 963 (collecting cases).

[*Note* 2, *add:*]

1904, Tennessee C. I. & R. Co. *v.* State, 141 Ala. 103, 37 So. 433 (sales of other similar coal lands, received).
1904, Comstock *v.* Conn. R. & L. Co., 77 Conn. 65, 58 Atl. 465 (corporal injury to a keeper of a boarding-house; profits before and after the injury, admitted).
1891, O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 157, 28 N. E. 923 ("voluntary sales of other lands, in the vicinity and similarly situated as affecting their value," are admissible; but here a mere deed reciting consideration was excluded).
1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (allowable on cross-examination).
1904, Illinois, I. & M. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880 (eminent domain; price paid for other lands, excluded).
1904, Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088 (breach of contract to sell land; sales of similar lands in the vicinity, admitted to show "the actual cash value of the land in controversy at a certain time"; prior rulings not noticed, except St. Louis V. & T. H. R. Co. *v.* Haller).
1904, Springer *v.* Borden, 210 Ill. 518, 71 N. E. 345 (appraisal of valuation of lease; rental values in the vicinity, held not admissible; no authority cited).
1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 ("voluntary sales of other lands in the vicinity similarly situated" in locality and character, admissible).
1906, Chicago & S. L. R. Co. *v.* Mines, 221 Ill. 448, 77 N. E. 898 (sales of property not similar, excluded).
1907, Chicago & A. R. Co. *v.* Scott, 225 Ill. 352, 80 N. E. 404 (eminent domain; the amounts paid by this and other railroads for land in the vicinity, excluded).
1905, Simons *v.* Mason C. & F. D. R. Co., 128 Ia. 139, 103 N. W. 129 (eminent domain; price paid by the railway company for other rights of way, not similarly situated, excluded; but the ruling seems to apply to all prices paid under eminent domain).

[*Note* 2 — *continued.*]

1904, Chicago, St. L. & N. O. Co. *v.* Rottgering, — Ky. — , 83 S. W. 584 (similar).
1904, Union P. R. Co. *v.* Stanwood, — Nebr. — , 91 N. W. 191, 98 id. 656 (particular sales, excluded, except on cross-examination).
1906, Hadley *v.* Board, — N. J. L. — , 62 Atl. 1132 (Laing *v.* R. Co. followed).
1906, Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlements with two hundred other abutters, excluded; following Jamieson *v.* R. Co.).
1907, Shaw *v.* N. Y. Elev. R. Co., — N. Y. — , 79 N. E. 984 (value of adjacent premises, admitted on the facts; three judges diss.).
1906, Vidger Co. *v.* Great Northern R. Co., — N. D. — , 107 N. W. 1083 (apples; not decided).
1906, Gorgas *v.* Philadelphia H. & P. R. Co. — Pa. — , 64 Atl. 680 (eminent domain; "a witness may qualify himself . . by showing that he has a knowledge of sales in the community, . . . but he cannot be interrogated in chief as to the money values of similar properties"; on cross-examination he may be asked "his knowledge of particular sales and the prices asked").
1906, Davis *v.* Pennsylvania R. Co. —, Pa. — , 64 Atl. 774 (a witness to land-value may be cross-examined on *voir dire* to test his qualifications, by asking him as to values; compare § 654, *post*). 1907, Schonhardt *v.* Pennsylvania R. Co., — Pa. — , 65 Atl. 543 (cross-examination to other sales, not allowed where its object was "to have his testimony go to the jury on the question of value").
1905, Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421 (value of timber on adjoining land, admitted).
1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (eminent domain; sales in the neighborhood, admitted).

§ 478. Analysis of Elements of a Testimonial Assertion.

[*Note* 1; *add:*]

1906, Train, The Prisoner at the Bar, 224 ("The probative value of all honestly given testimony depends, naturally, first, upon the witness' original capacity to observe; second, upon the extent to which his memory may have played him false; and third, upon how far he really means exactly what he says. . . . The authoritativeness of everything these witnesses have to say must lie in their ability to see, remember, and describe accurately what they have seen.").

§ 488. Statutes affecting Testimonial Qualifications.

[*Note* 1; *add:*]

ENGLAND: 1904, St. 4 Edw. VII. c. 15, § 12 (Prevention of Cruelty to Children Act; in trials of any person for offences under this act, "such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case and shall be competent but not compellable to give evidence").

CANADA: *Dominion:* St. 1906, 6 Edw. VII, c. 10 (amending the Evidence Act 1893, c. 31, § 4, by inserting in subsect. 1, after the first "and," the words "except as hereinafter provided," and after "competent witness" the words "for the defence;" in subsect. 2, by omitting the words "in addressing the jury"; and by adding new subsections 3 and 4 as follows: "3. Subject to the provisions of subsection 1 of this section, the wife or husband of a person charged with an offence against any of the sections of the Criminal Code 1892, mentioned in schedule C to this act, shall be a competent and also a compellable witness for the prosecution without the consent of the person charged. 4. Nothing in this act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of a person"; this statute seems to have been enacted in consequence of the divided opinions in Gosselin *v.* King, 1903, 33 Can. Sup. 255, cited *post*, § 2245, n. 10).

New Brunswick: St. 1905, c. 7, § 41 (offences under the factory act; the person charged shall be "competent and compellable to give evidence in or with respect to such complaint, proceeding, matter, or question").

Northwest Territory: Can. Rev. St. 1886, c. 50, § 31 (interest as executor or as legatee of a will is not to disqualify a person as witness in proving the will).

Prince Edward Island: St. 1906, 6 Edw. VII, c. 12 (St. 1889, c. 9, § 10, amended by striking out the words "not being a crime").

Yukon: St. 1904, c. 5 (Evidence Ordinance), § 34 (like N. Sc. Rev. St. 1900, c. 163, § 34); ib. § 35 (like N. Sc. Rev. St. 1900, c. 163, § 35); ib. § 36 (like N. Sc. Rev. St. 1900, c. 163, § 36); ib. § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37); ib. § 38 (like N. Sc. Rev. St. 1900, c. 163, § 38).

UNITED STATES: *Alabama:* St. 1903, No. 9, Feb. 2 ("in all cases where a husband is charged with abandoning his family and leaving them in danger of becoming a burden to the public, the wife shall be a competent witness against her husband").

California: St. 1905, c. 139 (amending P. C. § 1322 by adding to the exceptions: "or in cases of criminal actions or proceedings brought under the provisions of § 270 of this Code, or in cases of criminal actions or proceedings for bigamy").

Columbia (District): St. 1906, Mar. 23, § 2, c. 1131, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "in all prosecutions under this act any existing provisions of law respecting confidential communications between husband and wife shall not apply, and both husband and wife shall be competent and compellable witnesses to testify to any and all relevant matters, including the fact of such marriage and the parentage of such child or children").

Delaware: St. 1887, c. 230, § 21, 18 Laws, p. 447 (desertion of family; "any wife so deserted shall be a competent witness in any proceeding under this act to prove the fact of desertion or neglect to maintain her or any minor children under the age of ten years"); this Act seems to have been omitted from the Revised Statutes of 1852, ed. 1893, and thus was not inserted in the first edition of the present work).

[*Note* 1 — *continued.*]

Georgia: 1905, Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318 (under Code § 5272, the parties to an action for breach of promiss of marriage are disqualified).
1905, Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (in divorce for adultery, the husband and wife are disqualified, and in a proceeding for alimony pending suit for divorce for desertion, neither may testify to the other's adultery).

Indiana: Rev. St. 1897, § 1004 Rev. St. 1852, pt. 4, c. 3, § 1, Burns' Rev. St. 1901, § 990; in a bastardy charge, "the mother of the child, if of sound mind, shall be a competent witness," and her written examination on making complaint before the justice may be used "to sustain or impeach the testimony of such witness"); ib. § 1008 (on the death of the complainant in bastardy, her written examination before the justice "may be read in evidence").
St. 1905, p. 584, §§ 235, 241 (re-enacts the above Rev. St. 1897, §§ 1889, 1895).

Kansas: 1905, May *v.* May, 71 Kan. 317, 80 Pac. 567 (St. 1903, cc. 387, 388, applied to admit a husband's testimony to his wife's admissions).

Louisiana: St. 1904, No. 41 (amending St. 1902, No. 185, *supra*, by adding to § 1, c. 29, St. 1886, *supra*, the words "and except in cases where either the husband or wife is on trial for bigamy"; also amending St. 1902 by inserting, in § 2 of St. 1886, *supra*, instead of the words "jointly indicted," the words "jointly tried").

Maryland: St. 1904, c. 661 (amends Art. 35, § 2, *supra*, keeping the clause that "it shall not be competent for any party to the cause, etc., to corroborate, etc."; but substituting, for all the remainder, the following: "In acts or proceedings by or against executors, administrators, heirs, devisees, legatees or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate, ancestor, or party so incompetent to testify, either personally or through an agent since dead, lunatic, or insane, unless called to testify by the opposite party, or unless the testimony of such testator, intestate, ancestor, or party incompetent to testify shall have [been?] already given in evidence, concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest; . . . [here re-enacting as above stated]").
Compare the decisions cited *post*, § 2065, n. 5., applying St. 1902, c. 495, *supra*.

Michigan: St. 1901, No. 239, *supra* (amending Comp. L. § 101), amended by St. 1903, No. 30, by adding: "and provided further that whenever the deposition, affidavit, or testimony of such deceased party taken in his lifetime shall be read in evidence in such suit or proceeding, that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit, or testimony; and provided further that when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was, when so taken and used, competent and admissible under this act, the subsequent death of such witness or of any other person, shall not render such testimony incompetent under this act, but such testimony shall be received upon any subsequent trial of such cause").
St. 1905, No. 136 (in prosecutions for illegal marriage of persons sexually diseased, "a husband shall be examined as a witness against his wife and a wife shall be examined as a witness against her husband whether such husband or wife consent or not").

Nebraska: St. 1905, c. 172 (amending § 331, C. C. P., being Comp. St. 1897, § 5905, *supra*, by adding: "provided however that a wife shall be a competent witness against the husband in all prosecutions arising under § 2375 *a* of Cobbey's Annotated Statutes for 1903").

North Carolina: Revision 1905, §§ 870–872 (like Code 1883, §§ 585–587; it does not appear why these sections should be any longer preserved in the law); Rev. 1905, § 1628 (like Code §§ 589, 1350); Rev. 1905, § 1630 (like Code § 1351); Rev. 1905, § 1631 (like Code § 590); Rev. 1905, § 1636 (like Code § 588); Rev. 1905, § 1634 (like Code § 1353); Rev. 1905, § 1635 (like Code § 1354); Rev. 1905, § 1564 (like Code § 1288; omitting the proviso as to divorce for pregnancy at marriage; St. 1889, p. 422, *supra*, seems also to be omitted); Rev. 1905, §§ 1632, 1633 (provision for the testimony of interested persons in actions on judgments rendered before Aug. 1, 1868); Code 1883, § 1192, is omitted being superfluous.

United States: St. 1906, June 29, c. 3608, Stat. L. vol. 34, p. 618 (Rev. St. 1878, § 858, is amended so as to read as follows: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held").

Vermont: St. 1904, Nov. 9, c. 60 ("Husband and wife shall be competent witnesses for or against each other in all cases civil or criminal, except that neither shall be allowed to testify against the other as to any statement, conversation, letter, or other communication made to the other or to another person; nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence").

Virginia: St. 1902, Extra, c. 22 (bribery offences; similar to Code 1887, § 3899, *supra*).

Wisconsin: St. 1905, c. 131 (offence of abandonment of family; the wife of the defendant "shall be competent to testify for or against him").

§ 492. Mental Derangement; General Principle.

[*Note* 3; *add:*]

1906, State *v.* Simes, — Ida. — , 85 Pac. 914.

§ 496. Trial Court's Discretion.

[*Note* 1; *add:*]

1906, State *v.* Crouch, — Ia. — , 107 N. W. 173.

§ 497. Methods of Ascertainment of Capacity.

[*Note* 3; *add:*]

It would seem that it is not the *judge's duty* to examine, if he does not choose to; so that if the opponent himself declines to examine on *voir dire*, the judge's refusal to do so is proper in his discretion; *contra:* 1906, State *v.* Simes, — Ida. — , 85 Pac. 914.

§ 498. Deaf-and-Dumb Persons.

[*Note* 2; *add:*]

1906, State *v.* Simes, — Ida. — , 85 Pac. 914 (rape of a female mentally incapable of consent; the woman held not thereby also incompetent as a witness).
1906, State *v.* Crouch, — Ia. — , 107 N. W. 173.

[*Note* 4; *add:*]

1907, State *v.* Smith, — Mo. — , 102 S. W. 526 (rape on a deaf-and-dumb woman).

§ 499. Intoxication.

[*Note* 4; *add:*]

1904, State *v.* Sejours, 113 La. 676, 37 So. 599 (intoxication at the time of the shooting, held not to disqualify on the facts).

[*Note* 5, col. 1; *add:*]

1904, R. *v.* Lai Ping, 11 Br. C. 102 (confession while depressed by opium, admitted).
1906, State *v.* Hogan, 117 La. 863, 42 So. 352.
1906, State *v.* Church, — Mo. — , 98 S. W. 16 (insanity).
1902, State *v.* Haworth, 24 Utah 398, 68 Pac. 155 (intoxication).

§ 500. Disease, etc.

[*Note* 2, l. 4; *add:*]

1891, State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385 (soliloquy at night while on a couch, admitted; *semble*, admissible even though made while asleep).

§ 506. Infancy; Capacity, etc.

[*Note* 4; *add:*]

1907, Clinton *v.* State, — Fla. — , 43 So. 312.
1905, Bright *v.* Com., — Ky. — , 86 S. W. 527.

§ 507. Standard of Intelligence; Trial Court's Discretion.

[*Note* 1; *add:*]

1906, Birmingham R. L. & P. Co. *v.* Wise, — Ala. — , 42 So. 821.
1904, People *v.* Stouter, 142 Cal. 146, 75 Pac. 780.
1904, Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869.
1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675.
1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089 (good opinion).
1905, Freasier *v.* State, — Tex. Cr. — , 84 S. W. 360.

[*Note* 2; *add:*]

1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (a girl of nine, admitted).
1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675 (child of six years, admitted).

§ 508. Capacity Presumed.

[*Note* 2; *add:*]

1905, Clark *v.* Finnegan, 127 Ia. 644, 103 N. W. 970 (child of seven, admitted)

[*Note* 3; *add:*]

1904, Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869 (at fourteen there is a presumption of competency; below that age, there is to be an inquiry into his qualifications).

§ 516. Alienage, Race, or Color.

[*Note* 1, l. 1; *add:*]

"*Nullum valere fœdus cum hostibus religionis.*" Different phases are seen in the following works: Hallam, Middle Ages, II, 103; Laurent, Histoire du droit des gens, ed. 1865, X, 439.

[*Note* 7; *add:*]

U. S. St. 1906, June 29, § 4, c. 3592, Stat. L. vol. 34, p. 598 (naturalization laws revised; beside the applicant's oath is required "the testimony of at least two witnesses, citizens of the U. S., as to the facts of residence, moral character, and attachment to the principles of the Constitution"); ib. § 10 (in case of less than five years' residence in the State where petition is filed, etc., etc., the residence there may be established by two witnesses, and the residence elsewhere by "two or more witnesses who are citizens of the U. S.," upon notice to the Bureau, etc., and the U. S. attorney for the district of their residence).

§ 521. Infamy; Judgment, not Guilt, Disqualifies.

[*Note* 2, col. 2, l. 17; *add:*]

1907, Rice v. State, — Tex. Cr. — , 100 S. W. 771 (verdict without sentence does not disqualify).

§ 522. Infamy; Conviction in Another Jurisdiction.

[*Note* 3; *add,* under *Accord:*]

1905, Robinson v. State, 50 Fla. 115, 39 So. 465 (conviction not shown to be in a court of the State, held not to disqualify under Rev. St. 1892, § 1096).

§ 523. Disqualification Removed by Pardon, etc.

[*Note* 2; *add:*]

1904, Miller v. State, 46 Tex. Cr. 59, 79 S. W. 567 (here a question as to the application of a pardon to a different conviction).

[*Note* 5; *add:*]

1906, Quillin v. Com., 105 Va. 874, 54 S. E. 337 (confinement for sixty days in a jail on a *capias pro fine* is not a satisfaction of a punishment of fine).

§ 524. Infamy; Statutory Changes.

[*Note* 1; *add:*]

1904, Illinois C. R. Co. v. McManus' Adm'r, 118 Ky. 780, 82 S. W. 399 (conviction for burglary does not exclude).
1904, Martin v. Terr., 14 Okl. 593, 78 Pac. 88 (convict, admissible).
1905, Wells v. Terr., 15 Okl. 195, 81 Pac. 425 (similar).

§ 526. Accomplice.

[*Note* 1; *add,* at the end:]

It is surprising to see the point raised nowadays:
1905, Miller v. State, 165 Ind. 566, 76 N. E. 245 (receiving stolen goods; the thief may prove the theft).

§ 527. Witness retracting Former Perjured Testimony.

[*Note* 2, par. 1; *add:*]

Accord: 1906, Trafton v. Osgood, — N. H. — , 65 Atl. 397 (a witness admitting prior perjury on the same point is not excluded).
1906, Chandler v. State, 124 Ga. 821, 53 S. E. 91 (retracting a self-confessed perjury).
1887, U. S. v. Thompson, 31 Fed. 331 (subornation of perjury; disapproving People v. Evans, N. Y., *infra*).
1905, State v. Pearson, 37 Wash. 405, 79 Pac. 985 (witness admitting perjury at a former trial of himself, held competent).
Contra: 1869, People v. Evans, 40 N. Y. 1, 6 (suhornation, following Dunlop v. Patterson; *supra*, and ignoring Dunn v. People).

§ 528. Attesting Witness Contradicting his Attestation.

[*Note* 1; under *Accord, add:*]

1905, Theriot's Succession, 114 La. 611, 38 So. 488 (notary and attesting witnesses allowed to testify to non-observance of formalities).

§ 530. Contradicting One's Own Official Certificate.

[*Note* 1; *add:*]

1895, Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108 (notary public not allowed to impeach his certificate of acknowledgment).
1904, First Nat'l Bank *v.* Glenn, 10 Ida. 224, 77 Pac. 623 (acknowledgment of a mortgage by an Indian married woman; the notary not allowed to deny the taking of the acknowledgment; placed on the ground of vested rights).
1858, Stone *v.* Montgomery, 35 Miss. 83 (an officer certifying to a married woman's acknowledgment cannot be admitted to impeach the correctness of the certificate).
1890, Hockman *v.* McClanahan, 87 Va. 33, 39, 12 S. E. 230 (approving Hawkins *v.* Forsyth, supra).
1905, Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220 (notary allowed to impeach his certificate of acknowledgment of an aged woman's deed).

§ 555. General Theory of Experiential Capacity.

[*Text*, p. 668, par. (2), at the end; *add* a new note 2:]

[2] This principle is expressly approved by Powers, J., in Conley *v.* Portland G. L. Co., 99 Me. 57, 58 Atl. 61 (1904).

§ 560. Qualification must be Expressly Shown.

[*Note* 1, l. 3; *add:*]

and the cases cited *post*, § 654, n. 1 (knowlege qualifications).

§ 561. Discretion of the Trial Court.

[*Note* 1; *add:*]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919.
1905, Hamilton *v.* U. S., 26 D. C. App. 382, 391 (medical men).
1904, Schley *v.* State, 48 Fla. 53, 37 So. 518.
1904, Conley *v.* Portland G. L. Co., 99 Me. 57, 58 Atl. 61.
1904, Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61 (conclusive, unless "erroneous in law").
1905, Corse & Co. *v.* Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728.
1905, Paterson *v.* Chicago, M. & St. P. R. Co., 95 Minn. 57, 103 N. W. 621.
1904, State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156.
1904, Burns *v.* Del. & A. T. & T. Co., 70 N. J. L. 745, 59 Atl. 220.
1906, State *v.* Monich, — N. J. L. — , 64 Atl. 1016 ("if there be any legal evidence to support the finding" of admissibility, this suffices).
1906, State *v.* White, — Or. — , 87 Pac. 137.
1905, Borneman *v.* Chicago, St. P. & M. R. Co., — S. D. — , 104 N. W. 208.
1908, Inland & S. C. Co. *v.* Tolson, 139 U. S. 551, 559, 11 Sup. 653.
1891, Chateaugay O. & I. Co. *v.* Blake, 144 id. 476, 484, 12 Sup. 731.
1905, Virginia I. C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362.

§ 562. Sundry Principles; Securing Unbiassed Experts.

[*Note* 1, l. 6; *add:*]

Hon. L. A. Emery, in 39 Amer. Law Rev. 481 (1905); S. S. Cohen, Esq., in 39 Amer. Law Rev. 187 (1905).

[*Note* 1, at the end; *add:*]

The first attempt at legislative reform in this subject has now been made in Michigan, by St. 1905, No. 175 (Sect. 1: No expert shall receive a sum "in excess of the ordinary witness fees," unless by court order; and to pay or receive such a fee is made a misdemeanor; Sect. 2: "No more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide," unless the trial Court permits additional ones; Sect. 3: "In criminal cases for homicide where the issues involve expert knowledge or opinion, the Court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify to the trial"; the compensation is to be paid by the county, "and the fact that such witness or witnesses have been so appointed shall be made known to the jury"; but "this provision shall not preclude either prosecution or defence from using other expert witnesses at the trial"; Sect. 4: "This act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion").

The Medico-Legal Society, of New York, at its March and May meetings (1907), discussed the subject, and the March, June, and September numbers (1907) of the Society's Journal published contributions. A Committee was appointed, under the chairmanship of Chief Justice Emery, of the Maine Supreme Court, to prepare a memorial to the Legislatures of the various States. The following bill was drawn under his advice, and has been introduced into the Legislature of Maine: "Section 1. In any case, civil or criminal, in the supreme judicial court, or any superior court, when it appears that questions may arise therein upon which expert or opinion evidence would be admissible, the court, or any justice thereof in vacation, may appoint as examiner one or more disinterested persons qualified as experts upon the questions. The

[*Note* 1 — *continued.*]

examiner, at the request of either party, or of the court or justice appointing him, shall make such examination and study of the subject matter of the questions as he deems necessary for a full understanding thereof, and such further reasonable pertinent examination as either party shall request. Reasonable notice shall be given each party of physical examination of persons, things and places, and each party may be represented at such examinations. Section 2. At the trial of the case either party or the court may call the examiner as a witness, and if so called he shall be subject to examination and cross-examination as other witnesses. For his time and expenses incurred in the examination and in attending court as a witness he shall be allowed by the court a reasonable sum, to be paid from the county treasury as a part of the court expenses. The court may limit the witnesses to be examined as experts to such number on each side as it shall adjudge sufficient for an understanding of the contention of the parties on the question. Section 3. When upon the trial of any case in either of said courts questions arise upon which expert or opinion evidence is offered, the court may continue the case and appoint an examiner for such questions as provided in Section 1. Section 4. In all cases in said courts where a view by the jury may be allowed, the court, instead thereof, may appoint one or more disinterested persons to make the desired inspection in the manner and under the same rules and restrictions as in the case of a view by the jury. The viewer thus appointed may be called as a witness by either party or by the court, and shall be subject to examination and cross-examination like other witnesses. He shall be allowed by the court a reasonable sum for time and expenses incurred, to be paid by the party asking for the view and taxed in his costs, or to be paid by the county as a part of the court expenses, at the discretion of the court."

§ 568. Medical and Chemical Matters; Lay Witness.

[*Note* 1; *add:*]

Laymen held admissible: 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 (smell of carbolic acid).
1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (that the plaintiff was "in a nervous condition").
1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (coroner's clerk allowed to identify the organs struck by the bullet).
1906, Krapp *v.* Metrop. L. Ins. Co., — Mich. — , 106 N. W. 1107 (whether certain persons had died of consumption).
1907, Souchek *v.* Karr, — Nebr. — , 111 N. W. 150 (a professional nurse, as to the development of a child at birth, etc.; allowed).
1907, State *v.* Megorden, — Or. — , 88 Pac. 306 (effect of a blow).
1906, Semet-Solway Co. *v.* Wilcox, 143 Fed. 839, C. C. A. (plaintiff's ability to work, as affected by his health).
1906, Davis *v.* Oregon S. L. Co., — Utah — , 88 Pac. 2 (ability to work, etc.).
Laymen held inadmissible: 1906, State *v.* Nowells, — Ia. — , 109 N. W. 1016 (whether a dying declarant was "delirious," excluded, but whether he was "wild" or "incoherent," allowable; this is indeed a valuable morsel of quibbling, — a veritable ensample of Carlyle's "owl-eyed Pedantry").

§ 569. Special Medical Experience Necessary.

[*Note* 1; *add,* under *admitted:*]

1906, Rice *v.* State, — Tex. Cr. — , 94 S. W. 1024 (medical experts who had had no personal experience in cases of strychnine poison, allowed to testify to its symptoms).

[*Note* 2, l. 1; *add:*]

1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (like Toomes' Estate).

[*Note* 3; *add:*]

1905, Hamilton *v.* U. S., 26 D. C. App. 382, 391 (medical student excluded).

[*Note* 4; *add:*]

1905, Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569 (personal injury; a graduated but unlicensed osteopath, admitted to testify to the nature of the injury).

[*Note* 5; *add:*]

1907, Hocking *v.* Windsor S. Co., — Wis. — , 111 N. W. 685 (St. 1903, c. 426 held not applicable to a physician not testifying as an expert); St. 1903, c. 426, p. 689 (like Stats. 1898, § 1436, but extended to testimony " in a professional capacity as a physician or surgeon or insanity expert," and narrowed so that it shall not prevent a Court from receiving the testimony of any person in a criminal action).

§ 570. Handwriting and Paper Money.

[*Note* 1, at the end; *add:*]

Compare the cases cited *post,* § 2012.

[*Note* 6; *add:*]

1905, Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668 (bank-officers, and a court-clerk, admitted to testify to the sameness of ink and the relative age of writings).
On the above points, compare the cases cited *post,* § 2024.

§ 571. Miscellaneous Instances (Speed of a Train, etc.).

[*Note* 2; *add:*]

1906, Colorado & S. R. Co. *v.* Webb, — Colo. — , 85 Pac. 683.
1903, Metropolitan R. Co. *v.* Blick, 92 D. C. App. 194, 213.
1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884.
1904, Gregory *v.* Wabash R. Co., 126 Ia. 230, 101 N. W. 761.
1906, Line *v.* Grand Rapids & I. R. Co., — Ia. — , 106 N. W. 719.
1905, Atchison, T. & S. F. R. Co. *v.* Holloway, 71 Kan. 1, 80 Pac. 31.
1906, Garran *v.* Michigan C. R. Co., — Mich. — , 107 N. W. 284.
1906, Stotler *v.* Chicago & A. R. Co., — Mo. — , 98 S. W. 509 (reviewing the cases).
1903, Omaha St. R. Co. *v.* Larson, — Nebr. — , 97 N. W. 824.
1905, Borneman *v.* Chicago St. P. & M. R. Co., — S. D. — , 104 N. W. 208 ("any person may become proficient").
1906, Porter *v.* Buckley, 147 Fed. 140, C. C. A. (speed of an automobile).

[*Note* 5; *add:*]

1906, Halliday M. Co. *v.* Louisiana & N. W. R. Co., — Ark. — , 98 S. W. 374 (railroad rates).
1904, Conley *v.* Portland G. L. Co., 58 Me. 61, 58 Atl. 61 (water-gas).
1903, U. S. *v.* Hung Chang, 126 Fed. 400, D. C. , (whether a person was of Chinese race).

§ 575. Interest-Disqualification; History.

[*Note* 28; *add:*]

For some references upon the later history of other forms of the party's decisory oath, see *post*, § 1815. n. 2.

In the Boston *Globe* of Aug. 21, 1907, is noted a pending lawsuit in Lynn, Mass., the settlement of which was, by consent, to be left to the defendant's decisory oath, taken according to the Jewish law before a rabbi.

§ 576. Interest-Disqualification.

[*Note* 11; *add:*]

Distinguish, however, the rule for a valid *attestation* by a credible witness (*post*, §§ 582, 1292).

§ 578. Survivor's Disqualification.

[*Text*, p. 769, l. 3 from above; after "adopted in," *insert:*]

Illinois, Oregon.

§ 579. Accused in Criminal Cases.

[*Text*, p. 710; at the end of the quotation from People *v.* Tyler, *add*, as note 7*a*:]

[7a] The apprehensions of conservative lawyers, at the time of enacting this reform, as to its ill consequences upon interests of the innocent accused, may be seen forcibly set forth in an article on "Testimony of Persons accused of Crime," 1 Amer. Law Rev. 443 (1866); and it was even argued by some of the obstinate ones that the reform was unconstitutional: Wm. A. Maury, in 14 Amer. Law Rev. 752 (1880).

[*Note* 9; *add:*]

1894, Serjeant Robinson, Bench and Bar, 4th ed., 296.

A rational statement of the American experience under the modern rule will be found in Mr. (Assistant District Attorney) C. C. Nott's article, "In the District Attorney's Office," Atlantic Monthly, 1905, p. 481. The best survey of the question, from the point of view of experience, is found in Mr. (Assistant District Attorney) Arthur Train's invaluable and entertaining book, "The Prisoner at the Bar" (1906), pp. 161–164.

§ 580. Co-Indictees and Co-Defendants.

[*Note* 3; *add:*]

1906, Barbe *v.* Terr., 16 Okl. 562, 86 Pac. 61.

[*Note* 4; *add:*]

1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99 (admitted for the State).
1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (same; here an accomplice separately charged and convicted).

[*Note* 11; *add*, under *Pro:*]

1863, R. *v.* Jerrett, 22 U. C. Q. B. 499, 511; 1906, R. *v.* Blais, 11 Ont. L. R. 345.

[*Note* 12, *add*:]

Accord: 1905, State *v.* Knudston, 11 Ida. 524, 83 Pac. 226 (pleading guilty, but not yet discharged from the information).
1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (convicted).
1905, Wells *v.* Terr., 15 Okl. 195, 81 Pac. 425 (pleading guilty but not sentenced).
1905, Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law).
Contra: 1906, State *v.* White, — Or. — , 87 Pac. 137.

[*Note* 13; *add*:]

Accord: 1855, People *v.* Labra, 5 Cal. 184.
1862, People *v.* Newberry, 20 id. 439.
1905, State *v.* Knudston, 11 Ida. 524, 83 Pac. 226.
La. St. 1902, no. 185 (quoted *ante*, § 488).
Contra: 1884, State *v.* Drake, 11 Or. 396, 402, 4 Pac. 1204.
1906, State *v.* White, — Or. — , 87 Pac. 137 (the trial Court has discretion as to the discharged).
1907, Burdett *v.* State, — Tex. Cr. — , 101 S. W. 988 (for a misdemeanor).

[*Note* 15; *add*, as a new paragraph:]

There is a peculiar doctrine in Texas as to the right of a defendant to insist on the State's *guaranty of immunity* to a co-defendant thus dismissed, in order that the defendant may call him without the obstacle of his claim of privilege.
1906, Puryear *v.* State, — Tex. Cr. — , 98 S. W. 258.

[*Note* 16; *add*:]

In Louisiana, St. 1904, No. 41 (quoted *ante*, § 488) now removes all disqualification on the above grounds.

§ 581. Testifying to One's Own Intent.

[*Note* 3; *add*:]

1906, Boulder & W. R. D. Co. *v.* Leggett D. & R. Co., — Colo. — , 86 Pac. 101 (by a party, whether he intended to abandon a water-right, allowed).
1904, Eatman *v.* State, 48 Fla. 21, 37 So. 576 (embezzlement; defendant allowed to speak as to his belief in his right to the money).
1906, Huggard *v.* Glucose S. R. Co., — Ia. — . 109 N. W. 475 (to an employee, whether he relied on a promise to repair, allowed).
1906, Helm *v.* Anchor F. Ins. Co., — Ia. — , 109 N. W. 605 (fraud in insurance, by the plaintiff, that he had no intent to deceive the defendant, admitted).
1906, State *v.* Morin, — Me. — , 66 Atl. 650 (intention in taking a Federal liquor-license).
1874, Knight *v.* Peabody, 116 Mass. 362 (false representations; "What induced you to sign, etc?", allowed).
1906, Toole *v.* Crafts, — Mass. — , 78 N. E. 775 (false representations inducing a waiver by defendant; defendant's testimony to his state of mind as to knowledge, allowed).
1905, Grout *v.* Stewart, 96 Minn. 230, 104 N. W. 966 (intent in delivering a deed in performance of a contract; allowed).
1904, Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554 (estoppel; whether the other party relied on the statement, allowed).
1906, Brown *v.* State, — Wis. — , 106 N. W. 536 (rape; to the prosecutrix, "Was it against your will?", allowed).
Compare the cases cited *post*, § 1963 (opinion rule).

§ 582. Testamentary Attesting Witness.

[*Note* 4; *add*:]

1907, Gump *v.* Gowans, 226 Ill. 635, 80 N. E. 1086.
1904, Lanning *v.* Gay, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407.
1903, Savage *v.* Bulger, — Ky. —, 76 S. W. 361, 77 S. W. 717.
1905, Mann *v.* Balfour, 187 Mo. 290, 86 S. W. 103.
1904, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013.
Compare also the cases cited *post*, § 1510, n. 4 ("credible" attesting witnesses).

§ 584. Burden of Proving Disqualification.

[*Note* 1; *add*:]

1903, Terr. *v.* Cheong Kwai, 15 Haw. 280 (wife).

§ 586. Time of Making Objection.

[*Note* 7; *add*:]

1905, Vickery *v.* State, 50 Fla. 144, 38 So. 907 (the trial Court in discretion may let all the witnesses be sworn to testify, and postpone their *voir dire* examination till each one is called).

[*Note* 10, l. 3 from the end; *add:*]

In Missouri, a cross-examination is a waiver as to new matter only: 1907, McCune *v.* Goodwillie, — Mo. — , 102 S. W. 997.

§ 600. Marital Relationship; History.

[*Note* 3; *add:*]

1904, Brown *v.* State, 142 Ala. 287, 38 So. 268 (father).
1848, N. Y. Commissioners' Report (quoted *ante*, § 576).

§ 605. Mistress; Bigamous Marriage.

[*Note* 4, l. 1; *add:*]

1905, State *v.* Wilson, — Del. — , 62 Atl. 227 (assault with intent; a woman who had signed a bond, etc., as defendant's wife, not excluded).

[*Note* 4; *add*, in a new paragraph:]

So, also a marriage *since the time* of the transaction or crime will disqualify.
1904, Elmore *v.* State, 140 Ala. 184, 37 So. 156 (wife excluded). Compare § 2239, notes 9–11, *post.*

§ 607. Interest in the Cause; Nominal Party.

[*Note* 2; *add:*]

1904, Lanning *v.* Gay, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407 (husband of a legatee, allowed to testify at probate as a subscribing witness).

§ 608. Effect of Statutes qualifying Parties.

[*Note* 2; *add:*]

Accord: 1904, Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19.

[*Note* 4, par. 1; *add:*]

Accord: 1905, Hiskett *v.* Bozarth, — Nebr. — , 105 N. W. 990 (distinguishing, but not soundly, between husband and wife as witness).
Contra: 1906, Bentley *v.* Jun, — Nebr. — , 107 N. W. 865 (husband of plaintiff admitted, where the plaintiff's success would give her property "in which her husband would have no direct legal interest").
1906, White *v.* Poole, — N. H. — , 65 Atl. 255.
1906, Guillaume *v.* Flannery, — S. D. — , 108 N. W. 255 (under a statute expressly qualifying husband and wife in general, a wife not pecuniarily interested may testify).

§ 609. Co-Defendants.

[*Note* 1; *add:*]

1904, Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135 (wife of one of several will-contestants, not admissible for the others).
1903, Dovey *v.* Lam, 117 Ky. 19, 77 S. W. 383 (action for battery against five jointly; the wife of one of them, admitted to testify for the other four; cases cited from Idaho and Indiana, but not the preceding ones in this State).
1904, State *v.* Sargood, 77 Vt. 80, 58 Atl. 971 (killing of colts; wife of a co-respondent, jointly tried, excluded, for the defendant).

§ 610. Death and Divorce.

[*Note* 2; *add*, under *Accord:*]

1878, Jaquith *v.* Davidson, 21 Kan. 341, 347 (action by G. D., revived after his decease; his widow and executrix admitted for his estate; "Mr. D. being dead, she was no longer testifying for or against him").
1903, McDowell *v.* McDowell's Est., 75 Vt. 401, 56 Atl. 99 (wife of a deceased mortgagee, admitted in a foreclosure suit).
1905, Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234 (widow admitted in an action against the executor on a contract).

[*Note* 3; *add:*]

1904, Turner's Trustee *v.* Washburn, — Ky. — , 80 S. W. 460.

§ 612. Necessity, as creating Exceptions.

[*Note* 1; *add:*]

In Louisiana, under St. 1898, No. 190 (quoted *ante*, § 488), in action for personal injuries to a wife, the wife is admissible, but not the husband:

[*Note* 1 — *continued.*]

1899, Dunning *v.* West, 51 La. An. 618, 623, 25 So. 306 (here both were admitted).
1906, Martin *v.* Derenbecker, 116 La. — , 40 So. 849 (modifying the preceding case, in the light of St. 1902, No. 68, amending Civ. Code, § 2402).

§ 613. Statutory Exceptions; Joint Parties.

[*Note* 4; *add,* under *Louisiana:*]

1904, Schoppel *v.* Daly, 112 La. 201, 36 So. 322 (husband admitted, in an action by the wife for personal injuries).
1906, Bianchi *v.* Del Valle, 117 La. 587, 42 So. 148 (in the wife's suit for personal injuries, the husband, being joined, may not testify for her); but the effect of these rulings is altered, for actions for *personal injuries to a wife,* by the statute and cases cited *ante,* § 612, n. 1.

§ 614. Separate Estate.

[*Note* 1; *add,* under *Illinois:*]

1904, Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709.
1907, Linkemann *v.* Knepper, 226 Ill. 473, 80 N. E. 1009.

§ 615. Wife as if Unmarried.

[*Note* 1; *add:*]

1904, Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135; 1907, Taylor *v.* Johnson, — Ky. — , 99 S. W. 320 (action to cancel shares of stock).

§ 616. Agents.

[*Note* 1; *add:*]

Kentucky: 1904, Logsden *v.* Stern, 117 Ky. 217, 77 S. W. 927 (St. 1898, c. 1, construed to mean that each may testify to the matters within his or her knowledge, but not both to the same matters).
Louisiana: 1905, Shepherd *v.* Schomaker, 115 La. 542, 39 So. 554.
Vermont: 1905, Miller *v.* Stebbins, 77 Vt. 183, 59 Atl. 844.
1906, Boyce *v.* Bolster, — Vt. — , 64 Atl. 79 (wife not admitted to prove a book account; the trial took place before St. 1904, No. 60, p. 78, quoted *ante,* § 488).

§ 617. Sundry Statutory Provisions.

[*Note* 1; *add:*]

1904, Floore *v.* Green, — Ky. — , 83 S. W. 133 (under Civ. C. § 606, a husband is admissible in a probate contest where his wife is interested but does not testify).
1905, Com. *v.* Woelfel, — Ky. — , 88 S. W. 1061 (preliminary issue of an accused's sanity; the wife not admissible for him).
1907, Mitchell's Adm'r *v.* Brady, — Ky. — , 99 S. W. 266 (under Civ. C. § 606, a wife may testify for the administrator-husband in an action for the death of their child).
1905, Grabowski *v.* State, 126 Wis. 447, 105 N. W. 805 (lascivious conduct; defendant's wife excluded).

§ 654. Burden of Proof of Knowledge Qualification.

[*Note* 1; *add:*]

1903, Friday *v.* Pennsylvania R. Co., 204 Pa. 405, 411, 54 Atl. 339 (a witness to land-values may be subjected to cross-examination as to his qualifications before expressing an opinion on direct examination).
1903, Davis *v.* Pennsylvania R. Co., — Pa. — , 64 Atl. 774 (similar).
Compare the general rule for *voir dire* as *to interest* (*ante,* § 585) and as to *experience* (*ante,* § 560, n. 1).

[*Note* 2; *add:*]

1904, Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499 (where a deposition shows that the witness speaks from hearsay only, the answer may be struck out; though "if the witness had been present to testify, the Court could have received these answers on the assumption that he was speaking of what he knew; leaving it to the defendants to show the contrary if they could, on cross-examination or otherwise").

§ 655. Witness Specifying the Grounds of his Knowledge.

[*Note* 1, par. 1; *add:*]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (insanity).
1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (occurrence of a fire, as the reason for fixing a date of seeing defendant, allowed).

[*Note* 1 — *continued.*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (certain experiments, not admitted under the present rule).

But he is not *obliged* on direct examination to state his reasons:
1905, Com. *v.* Johnson, 188 Mass. 382, 74 N. E. 939.

§ 657. Knowledge founded on Personal Observation.

[*Note* 1; *add:*]

1905, Davis *v.* Arnold, 143 Ala. 228, 39 So. 141 (ownership).
1905, King *v.* Bynum, 137 N. C. 491, 49 S. E. 955 (proceedings at an auction).
1906, Rouss *v.* King, 74 S. C. 251, 54 S. E. 615 (accounts, etc.),

§ 659. Knowledge involving Rational Inferences.

[*Text*, par. 1, at the end; *add* a new note 1:]

[1] For the use of testimony based on *vacuum-rays*, *phonograph*, *telepathy*, etc., see *post*, § 795.

§ 660. Identity of a Person, etc.

[*Note* 1, par. 1; *add:*]

1906, Waggoner *v.* State, — Tex. Cr. — , 98 S. W. 254.
1904, Com. *v.* Kelly, 186 Mass. 403, 71 N. E. 807 (assault by night).

[*Note* 2, par. 1; *add:*]

1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (identification from clothes, etc., allowed; but the witness must have had personal knowledge).

[*Note* 7; *add:*]

1905, Bryce *v.* Chicago, M. & St. P. R. Co., — Ia. — , 105 N. W. 497 (by a brakeman, that he could tell by the sensation, etc., that the emergency brake was set, allowed; good opinion by Weaver, J.).
1905, Wright *v.* Crane, — Mich. — , 106 N. W. 71 (speed of an automobile; witness not qualified on the facts).

§ 661. Another Person's State of Mind.

[*Note* 1, par. 1; *add*, under *contra:*]

1906, Sneed *v.* Marysville G. & E. Co., — Cal. — , 87 Pac. 376 (boy killed by electrical contact; his mother's testimony that he did not know of electrical dangers, excluded; unsound on the facts; McLaughlin, J., diss.).

§ 662. Improbabilities in Scientific Testimony.

[*Note* 2, l. 2; *add:*]

1905, Sun Fire Office *v.* Western W. M. Co., — Kan. — , 82 Pac. 513 (spontaneous combustion).
1905, Post *v.* U. S., 135 Fed. 1, 11, 67 C. C. A. 569 (fraud in mental healing; good opinion by Shelby, J.).

§ 664. Negative Knowledge.

[*Note* 1; *add:*]

1906, Kastor Advertising Co. *v.* Coleman, 11 Ont. L. R. 262, 267 (whether certain advertisements were published, etc.).
1904, Hart *v.* Taylor, 37 N. Sc. 155 (conversations).
1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (murder).
1905, Northern C. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19 (bystanders not hearing an engine-bell, said to be some evidence).
1904, McDonald *v.* N. Y. C. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55 (railroad signals).
1906, Cotton *v.* Willmar & S. F. R. Co, — Minn. — , 109 N. W. 835 (ringing of bell).
1904, Chicago & N. W. R. Co. *v.* Andrews, 130 Fed. 65, 70, 64 C. C. A. 399 (railroad train).

This kind of evidence usually gives rise to a quibbling and futile discussion as to the *relative weight* of positive and negative testimony; the rule of law, however, has really nothing to say on such subjects, which go to the jury for determination. In the following cases, and many cited *supra*, the Supreme Court was improperly asked to hold that an instruction on the relative weight of negative knowledge should be given:
1906, Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591.
1905, State *v.* Murray, 139 N. C. 540, 51 S. E. 775.

For the use of analogous circumstantial evidences, inferring a *person's non-existence* from the *failure to know or find* him in the region, see *ante*, § 158, n. 1.

§ 665. Hearsay Knowledge from Experts.

[*Note* 6; *add:*]

1906, Remsburg *v.* Iola P. C. Co., — Kan. — , 84 Pac. 548 (expert on explosives, speaking partly from book-learning, admitted).

§ 667. Testifying to One's Own Age.

[*Note* 1; *add,* under *Accord:*]

1904, McCollum *v.* State, 119 Ga. 308, 46 S. E. 413 (selling liquor to A., a minor; A. allowed to testify to his own age, though he knew it only from his mother, who was living and in the county).
1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (even though parents are available).
1905, People *v.* Colbath, 141 Mich. 189, 104 N. W. 633 (rape under age; the prosecutrix being permitted to testify to her own age, a cross-examination as to what others, not members of the family, had told her, was held properly excluded; three judges diss.).
1906, Curry *v.* State, — Tex. Cr. — , 94 S. W. 1058.
1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

§ 669. Information received by Telephone.

[*Note* 2; *add,* as par. 3:]

Distinguish also the following: 1904, McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029 (contract; the plaintiff conversed by telephone with the defendant, and a person present with the plaintiff was allowed to testify to the plaintiff's words, as a part of the conversation of the defendant, there being other evidence that the defendant was the person conversing from the other end of the line; this rests on the principle of § 2115, *post*).

§ 676. Hypothetical Questions; When Necessary.

[*Note* 1; *add:*]

1906, Federal B. Co. *v.* Reeves, — Kan. — , 84 Pac. 560 ("From the history of the case, as you learned it [from others], and from your diagnosis," excluded; Porter, J., diss.).

§ 677. Personal Observation not Necessary.

[*Note* 1; *add,* under *Accord:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012.

§ 679. Only Skilled Witnesses, etc.

[*Note* 1; *add:*]

1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695.

§ 680. If the Premises Fail, etc.

[*Note* 1; *add:*]

1904, Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105.

§ 681. Form and Scope of Question; Particularized Premises.

[*Note* 5; *add,* under *Admitted:*]

1905, Com. *v.* Johnson, 188 Mass. 382, 74 N. E. 939 ("From all you have observed of this man, and from all you have heard in court," allowed, where the only evidence as to insanity consisted of the defendant's own witnesses and admissions, accepted as true, and the expert's personal observation; the trial Court's discretion to control).

[*Note* 7; *add:*]

1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82 (question based on the testimony of several witnesses not conflicting, held proper).

[*Note* 8; *add,* under *Excluded:*]

Ill.: 1905, Elgin A. & S. Traction Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436 (opinion based in part on the testimony of the plaintiff, excluded).
Minn.: 1906, State *v.* Cowing, — Minn. — , 108 N. W. 851, *semble.*
Mo.: 1903, State *v.* Dunn, 179 Mo. 95, 77 S. W. 848 (testimony of defendant himself).
N. J.: 1904, Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 Atl. 940.

[*Note* 9; *add:*]

1904, Smith *v.* Minneapolis St. R. Co., 91 Minn. 239, 97 N. W. 881 (excluded where it did not appear that the witness had heard the testimony referred to in the question).

§ 682. Kind of Data that may be Assumed.

[*Note* 1; *add,* under *Illinois:*]

1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28.
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Anderson *v.* Albertstamm, approved).
1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.
1904, McDonald *v.* Rhode Island Co., 26 R. I. 467, 59 Atl. 391 (the evidence must be offered before stating the question; unless in the discretion of the trial Court).

[*Note* 2; *add:*]

1906, Ince *v.* State, 77 Ark. 426, 93 S. W. 65 (approving the above passage).
1904, State *v.* Underwood, 35 Wash. 558, 77 Pac. 863.
1904, Schissler *v.* State, 122 Wis. 365, 99 N. W. 593.

[*Note* 3, l. 2; *add:*]

1906, Pyke *v.* Jamestown, — N. D. — , 107 N. W. 310.

[*Note* 4; *add:*]

1904, Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338.

§ 687. Physician's Knowledge based on Books.

[*Note* 2; *add:*]

Admitted: 1905, State *v.* Donovan, 128 Ia. 44, 102 N. W. 791 (possibility of a surgical operation under hypnotism).
Excluded: 1904, Kath *v.* Wisconsin C. R. Co., 121 Wis. 503, 99 N. W. 217 ("what he learns entirely from medical works, unsupported by practical experience of his own," is inadmissible).
For analogous cases, under a slightly different principle, see *ante,* § 569.

§ 688. Physician's Knowledge based on Hearsay.

[*Note* 2; *add,* under *Accord:*]

1907, Chicago *v.* McNally, — Ill. — , 81 N. E. 23 (testimony admitted on the facts).

[*Note* 2; *add,* under *Contra:*]

1905, Stevens *v.* People, 215 Ill. 593, 74 N. E. 786 (abortion; physician's opinion based in part on "information derived from the patient," excluded; unsound).
1905, Chicago City R. Co. *v.* McCaughna, 216 id. 202, 74 N. E. 818 (personal injury; similar ruling).
1906, Federal B. Co. *v.* Reeves, — Kan. — , 84 Pac. 560 (Porter, J., diss.).
1904, Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89 (not appreciating the precise nature of the question).

[*Note* 5; *add,* under *Contra:*]

1904, Schissler *v.* State, 122 Wis. 365, 99 N. W. 593 (opinion based on the patient's statement of a past illness, excluded).

§ 689. Layman's or Physician's Acquaintance with Person Insane.

[*Note* 2, *add:*]

Ala.: 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (witness held not qualified by observation).
Cal.: 1904, People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177 (Holland *v.* Zollner and People *v.* McCarthy, *supra,* followed; this distinction is now a settled and important one in this court).
1904, People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093 (trial Court's determination controls as to who are "intimate acquaintances").
1904, McKenna's Estate, 143 id. 580, 77 Pac. 461 (same).
1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (question based in part upon "the facts you have learned" by hearsay, excluded).
Ill.: 1904, Chicago U. T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024 (certain witnesses held qualified on the facts).
Ia.: 1904, Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105.
Kan.: 1906, Kempf *v.* Koppa, — Kan. — , 85 Pac. 806.
Ky.: 1904, Irvine *v.* Gibson, 117 Ky. 306, 77 S. W. 1106.
La.: 1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (there must be an adequate opportunity of observation).

§ 690. Knowledge of Foreign Law.

[*Note* 3, par. 1; *add:*]

1905, Massucco *v.* Tomassi, 78 Vt. 188, 62 Atl. 57 (an Italian priest, allowed to testify that a religious ceremony alone was not valid in Italy).

§ 691. Character-Witness must appear Qualified.

[*Note* 1, par. 1; *add:*]

1906, State *v.* Rester, 116 La. 985, 41 So. 231.

§ 692. Knowledge based on Residence.

[*Note* 1; *add,* under *Accord:*]

1907, Tingley *v.* Times M. Co., — Cal. — , 89 Pac. 1097 (a witness from Arkansas who went to Newburyport, Mass., and stayed a few days to make the inquiries, excluded).

[*Note* 2; *add,* in col. 1:]

Ind.: 1904, South Bend *v.* Turner, — Ind. — , 71 N. E. 657 (a witness who has heard only one person speak to the repute of another, and does not know the latter personally, is not qualified).

[*Note* 2, col. 2, l. 3, from below; *add:*]

Contra: South Bend *v.* Turner, Ind., *supra, semble.*

§ 693. Handwriting; Identifying Illiterate's Mark.

[*Note* 2, par. 2; *add,* under *Accord:*]

1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (an illiterate mortgagor may identify his own mark, but perhaps not the attestation of the witness thereto; but here the execution was held not sufficiently proved, because it appeared that the illiterate mortgagor was not actually testifying from a knowledge of the peculiarity of his mark, but from having been told by C. that this was the mortgage he signed).

§ 694. Handwriting; Number of Times.

[*Note* 1; *add:*]

1906, State *v.* Bond, — Ida. — , 86 Pac. 47 (general principle approved).
1905, Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358, *semble.*
1906, State *v.* Freshwater, — Utah — , 85 Pac. 447.

§ 696. Quantity of Writing seen.

[*Note* 1; *add:*]

1907, Rinker *v.* U. S., 151 Fed. 755, 760, C. C. A. (witnesses of "limited acquaintance" admitted).

§ 701. Implied Admissions.

[*Note* 1, par. 1; *add:*]

1904, Shaffer *v.* U. S., 24 D. C. App. 417, 430 (various persons held qualified on the facts).

[*Note* 1, par. 2; *add:*]

1905, State *v.* McBride, — Utah — , 85 Pac. 440 (here the offer was treated as being in effect a comparison of specimens; Straup, J., correctly dissents).

§ 702. Mere Exchange of Correspondence.

[*Note* 3; *add:*]

1860, Bruce *v.* Crews, 39 Ga. 544, 547 (a clerk in a commercial house who had seen letters purporting to come from C., but not in reply to others, held not qualified to C.'s handwriting).
1906, State *v.* Goldstein, 72 N. J. L. 336, 62 Atl. 1006 (business correspondence with a tenant for three years, held to qualify).

§ 704. Custodians of Records.

[*Note* 1, par. 1; *add:*]

1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (a member of a school board who had often seen the superintendent's handwriting on warrants, held qualified).

[*Note* 1 — *continued.*]

1904, Gress Lumber Co. *v.* Georgia P. S. Co., 120 Ga. 751, 48 S. E. 115 (clerk of a city council, who had many times seen the signature of O. in the minutes of the city council in former years, held not qualified to O.'s signature; wholly erroneous; none of the cases on this part of the doctrine are considered).
1905, Whitaker *v.* Thayer, — Tex. Civ. App. — , 86 S. W 364 (deceased deputy-clerk's writing in a land-office, proved by the officer).

§ 714. Knowledge of Land-Value.

[*Note* 1; *add:*]

1905, Hope *v.* Phila. & W. R. Co., 211 Pa. 401, 60 Atl. 996.

[*Note* 4; *add:*]

1906, Lally *v.* Central V. R. Co., — Pa. — , 64 Atl. 633.

[*Note* 9; *add:*]

1904, Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61 (assessor).

[*Note* 10; *add:*]

1906, Lewis *v.* Englewood Elev. R. Co., 223 Ill. 223, 79 N. E. 44 (eminent domain).
1906, Louisiana R. & N. Co. *v.* Morere, 116 La. — , 41 So. 236 (land).
1906, St. Louis M. & S. E. R. Co. *v.* Continental B. Co., 198 Mo. 698, 96 S. W. 1011 (right of way through a brickmaking plant).
1904, Riley *v.* Camden & T. R. Co., 70 N. J. L. 289, 57 Atl. 444 (shade-trees).
1905, Reed *v.* Pittsburg C. & W. R. Co., 210 Pa. 211, 59 Atl. 1067 (land).
1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (land).
1905, Watkins L. M. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424 (land).
1905, Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092 (realty benefits).

§ 715. Services-Value.

[*Note* 1; *add:*]

1905, Fuller *v.* Stevens, — Ala. — , 39 So. 623 (one testifying to the value of attorneys' services need not know the special value of the plaintiff's attorney's services).

[*Note* 5; *add:*]

1905, Lawrence *v.* Methuen, 187 Mass. 592, 73 N. E. 860 (physician's services).

§ 716. Personal Property Value.

[*Note* 1; *add:*]

1906, Moss *v.* State, — Ala. — , 40 So. 340 (shoes).
1904, Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17 (mare).
1905, Withey *v.* Pere Marquette R. Co., — Mich. — , 104 N. W. 773 (value of clothing, etc., damaged in a railroad collision).

[*Note* 2; *add:*]

1906, Echols *v.* State, — Ala. — , 41 So. 298 (sundry goods stolen).
1906, Tubbs *v.* Mechanics' Ins. Co., — Ia. — , 108 N. W. 324 (owner of a building, etc.).
1905, Union Pacific R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218 (land and buildings).
1907, Smith *v.* Mine & S. S. Co., — Utah — , 88 Pac. 683 (household goods).
1906, Palmer *v.* Goldberg, — Wis. — , 107 N. W. 478 (a farmer, held qualified as to the value of his own horses).
Contra: 1905, Motton *v.* Smith, 27 R. I. 57, 62, 60 Atl. 681 (owner of jewelry, not shown to have knowledge, excluded; but on rehearing the Court conceded that "an owner is doubtless qualified to state the cost price of articles of personal property, and from that, with information as to age and wear, the jury may estimate value. . . . We did not attempt to lay down a general rule upon the subject").

Some uncertainty may have been created in the modern rulings, by a misapprehension of certain earlier ones, rendered while a party was still disqualified by interest, and dealing with the question, then a living one (*post*, § 612, n. 4), whether a husband or wife of a party, or a party generally, should be granted a special exception of necessity for testifying to the contents and value of a package lost by a carrier; *e. g.* 1860, Illinois C. R. Co. *v.* Taylor, 24 Ill. 323.

[*Note* 3; *add:*]

1904, Pacific Mill Co. *v.* Enterprise Mill Co., 16 Haw. 282, 288 (mouldings, etc.).
1905, Gossage *v.* Phila. B. & W. R. Co., 101 Md. 698, 61 Atl. 692 (ship).
1905, Tucker *v.* Colonial F. Ins. Co., 58 W. Va. 30, 51 S. E. 86 (merchandise insured).

§ 717. Witness must know Market Value.

[*Note* 1; *add:*]

1877, Berg *v.* Spink, 24 Minn. 138 (horses).

[*Note* 3; *add:*]

1904, Sylvester *v.* Ammons, 126 Ia. 140, 101 N. W. 782 (stock of goods).

§ 718. Knowledge of Value in the Vicinity.

[*Note* 1; *add:*]

1906, Walsh *v.* Board, — N. J. L. — , 64 Atl. 1088 (a former owner of the land, not shown to know values in the locality, held properly excluded).
1903, Lynch *v.* Troxell, 207 Pa. 162, 56 Atl. 413 (land).

§ 719. Knowledge of Value by Hearsay.

[*Note* 2; *add:*]

1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (here an expert testifying to the price of land solely by having read the deed-recital of consideration was excluded).
1905, Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393 (dealers in cattle, knowing in part from perusal of trade-journals, admitted).

§ 720. Acquaintance with the Specific Object.

[*Note* 1; *add:*]

1905, Keeney *v.* Fargo, — N. D. — , 105 N. W. 93 (rental).
1905, Hope *v.* Phila. & W. R. Co., 211 Pa. 401, 60 Atl. 996 (land).

[*Note* 2; *add:*]

1906, Harris *v.* Quincy O. & K. C. R. Co., 115 Mo. App. 527, 91 S. W. 1010 (cattle).

§ 728. Impression, Belief; Law in Various Jurisdictions.

[*Note* 1; *add:*]

Fla.: 1905, Jordan *v.* State, 50 Fla. 94, 39 So. 155 (identity of a person "to the best of my judgment").
1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (identity of a person).
1906, Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413 ("I think he always voted," admitted).

§ 735. History of Past Recollection.

[*Text*, p. 827, l. 2 of the quotation from Doe *v.* Perkins:]

For "the book was in court," read: "the original was not in court."

[*Text*, p. 830; after the last quotation, *add* a note 1:]

[1] So also: 1906, Sanders, J., in State *v.* Legg, 59 W. Va. 315, 53 S. E. 545.

§ 736. History in Particular Jurisdictions.

[*Note* 1; *add:*]

1905, Clark *v.* Union Traction Co., 210 Pa. 636, 60 Atl. 302 (obscure).

[*Note* 5; *add:*]

Ind.: 1905 Southern R. Co. *v.* State, 165 Ind. 613, 75 N. E. 272 (Johnson *v.* Culver approved; this is a virtual repudiation of the general doctrine, and is unsound).
Wis.: 1905, Manning *v.* School District, 124 Wis. 84, 102 N. W. 356 (sanctioned).

§ 745. Recollection Must have been Fresh, etc.

[*Note* 1; *add:*]

1906, Murray *v.* Dickens, — Ala. — , 42 So. 1031 ("No precise time is fixed by law").
1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704 ("at or about the time. . . . so that it may be safely assumed that the recollection was then sufficiently fresh to correctly express it").

§ 747. Witness must Guarantee Accuracy.

[*Note* 1; *add:*]

1907, Diamond Glue Co. *v.* Wietzychowski, — Ill. — , 81 N. E. 392.

[*Note* 3; *add:*]

1906, St. Louis S. W. R. Co. *v.* White S. M. Co., — Ark. — , 93 S. W. 58 (telegrapher's service-marks).

[*Note* 5, par. 1; *add,* under *Accord:*]

1906, Franklin *v.* Atlanta & C. A. L. R. Co., 74 S. C. 332, 54 S. E. 578 (hospital record; the opinion is not very clear).
1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (a certain signed letter, excluded; the opinion confuses this principle and that of § 2099, *post*).

[*Note* 6, par. 1, at the end; *add:*]

1906, Holden *v.* Prudential L. Ins. Co., 191 Mass. 153, 77 N. E. 309 (here a medical man's writing of the answers to an insurance application was allowed to be used).

[*Note* 7, l. 9 from the end; *add:*]

and in First Nat'l Bank *v.* Yeoman, 14 Okl. 626, 78 Pac. 388 (1904).

[*Note* 8, par. 1; *add:*]

1906, Jones *v.* State, — Ala. — , 41 So. 299 (account books).
1903, Peterson *v.* Mineral K. F. Co., 140 Cal. 624, 74 Pac. 162 (memorandum held not sufficiently verified).
1905, Dryden *v.* Barnes, 101 Md. 346, 61 Atl. 342 (a list testified to by plaintiff, but made up from prior lists by H. and by B., the plaintiff having no personal knowledge, excluded).
1905, Hoogewerff *v.* Flack, 101 Md. 371, 61 Atl. 184 (books offered through a clerk who did not keep them nor know of the facts, excluded).
1906, State *v.* Trimble, — Md. — , 64 Atl. 1026 (certain hospital records, proved by a physician who did not make the entries, etc., excluded).
1905, Allwright *v.* Skillings ,188 Mass. 538, 74 N. E. 944, *semble* (stock-exchange transactioos).
1905, Rosenthal *v.* McGraw, 138 Fed. 721, 724, C. C. A. (a witness who did not make the entries and did not know that they were correct, excluded).
1906, Grunberg *v.* U. S., 145 Fed. 81, 92, C. C. A. (invoices, etc.).
1904, Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057 (rule applied).
In Conover *v.* Neher R. Co., 38 Wash. 172, 80 Pac. 281 (1905), a party's time-book was excluded on the ground that the parties (corporate officers) themselves had testified and "their knowledge was the primary evidence," citing no authority but a cyclopedia article; the ruling could not have been justified had the Court explicitly invoked the theory of § 1560, *post*; but, as it stands, it merely confuses the law; and the case of Mathes *v.* Robinson, later cited in the opinion on another point, is *contra* on this point.

§ 748. Witness need not be the Writer.

[*Note* 1; *add,* under par. 1:]

1906, People *v.* Brown, — Cal. App. — , 84 Pac. 670.
1906, Wood *v.* Holah, — Conn. — , 64 Atl. 220 (Curtis *v.* Bradley applied; here excluding the memorandum).
1905, McCarthy *v.* Meaney, 183 N. Y. 190, 76 N. E. 36 (certain memoranda not made nor verified by T., not allowed to be received as his testimony).

§ 749. Original required.

[*Note* 1, par. 1; *add:*]

1906, O'Brien *v.* U. S., 27 D. C. App. 263, 272 (bookkeeper's memorandum of total sums represented in a document given to the defendant, admitted).
1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (approving Volusia Co. Bank *v.* Bigelow).
1904, Eatman *v.* State, 48 Fla. 21, 37 So. 576 (memorandum taken from a ledger, excluded).
1904, Chicago & E. I. R. Co. *v.* Zepp, 209 Ill. 339, 70 N. E. 623 (a Chicago weather-record made by forming a book from letterpress copies of original sheets sent to Washington, admitted as an original; the opinion ignores the further ground of admissibility, that the original sheets, being in another jurisdiction, were unobtainable by subpœna, under the rule of § 1213, *post*).
1904, Donner *v.* State, — Nebr. — , 100 N. W. 305 (stockyards-book, not the original, excluded).
1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 162, 79 Pac. 60 (engine inspection-book).

§ 751. Bookkeeper's Entry of Salesman's Oral Statement.

[*Note* 2, col. 1, under *Accord; add:*]

1906, Murray *v.* Dickens, — Ala. — , 42 So. 1031 ("It would seem, on reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item"; applied to a time-book; the opinion cites

[*Note* 2 — *continued.*]

an encylopedia of law, but does not notice the recent ruling in this Court to the contrary, Snow H. Co. *v.* Loveman, *infra*).
1906, Pettey *v.* Benoit, — Mass. — , 79 N. E. 245 (books of account verified by the plaintiff and his clerks, admitted; citing Kent *v.* Garvin, *supra*).

§ 754. Memorandum goes as Testimony to the Jury.

[*Note* 1; *add:*]

1905, Alabama G. S. R. Co. *v.* Clark, — Ala. — , 39 So. 816.
1904, State *v.* McGruder, 125 Ia. 741, 101 N. W. 646.
1904, First Nat'l Bank *v.* Yeoman, 14 Okl. 626, 78 Pac. 388.
1905, Manning *v.* School District, 124 Wis. 84, 102 N. W. 356 ("may be put in evidence").

[*Note* 5; *add:*]

Mass.: 1906, Holden *v.* Prudential L. Ins. Co., 191 Mass. 153, 77 N. E. 309 (here the Court is still unappreciative of the true nature of the process; the memorandum is said to be "plainly inadmissible," but the witness may "use it to aid him in testifying").
U. S.: 1906 Grunberg *v.* U. S., 145 Fed. 81, 96 (again the subject is confused by ignoring the two kinds of memoranda).

§ 759. Present Recollection; Writing not made by Witness.

[*Note* 1, par. 1; *add,* under *Accord:*]

1905, Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702 (record of mortgages).
1906, Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44.
1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from a memorandum made by R.'s bookkeeper).

[*Note* 2; *add:*]

1905, State *v.* Teachey, 138 N. C. 587, 50 S. E. 232 (dying declarant's affidavit, used by an auditor).

§ 760. Writing not Original.

[*Note* 1; *add,* under *Accord:*]

1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (witness allowed to refer to a copy of stenographic notes, made after adjournment; approving Volusia Co. Bank *v.* Bigelow, cited *ante,* § 749, n. 1).
1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from memoranda made by his bookkeeper from books made up from data furnished by R.'s foreman).

§ 761. Writing not made at the Time, etc.

[*Note* 4; *add:*]

1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (stenographic report of former testimony).
1904, Portsmouth St. R. Co. *v.* Peed's Adm'r, 102 Va. 662, 47 S. E. 850.

§ 762. Writing Shown to the Opponent.

[*Note* 2; *add:*]

1907, Morris *v.* U. S., — C. C. A. — , 149 Fed. 123.

[*Note* 5, l. 4; *add:*]

Accord: 1906, Lowrie *v.* Taylor, 27 D. C. App. 522, 526, *semble* (here the production of the book was not demanded).
Contra: 1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526 (but the Court may require production).

§ 763. Writing is not Part of Testimony.

[*Note* 1; *add:*]

1906, State *v.* Legg, 59 W. Va. 315, 53 S. E. 545 (reading aloud to a witness his former testimony; this seems strained, for the reading aloud was merely a mode of questioning him to stimulate recollection, and not an offering of the paper in evidence).

[*Note* 2; *add:*]

1905, Logan *v.* Freerks, — N. D. — , 103 N. W. 426.

§ 770. Leading Questions; Trial Court's Discretion.

[*Note* 2, par. 1, *add:*]

1904, Schley *v.* State, 48 Fla. 53, 37 So. 518.
1905, Reyes *v.* State, 49 Fla. 17, 38 So. 257.
1904, O'Dell *v.* State, 120 Ga. 152, 47 S. E. 577.
1904, Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934.
1905, Phinazee *v.* Bunn, 123 Ga. 230, 51 S. E. 300.
1906, State *v.* Simes, — Ida. — , 85 Pac. 914.
1904, State *v.* Robinson, 126 Ia. 69, 101 N. W. 634.
1905, State *v.* Drake, 128 Ia. 539, 105 N. W. 54.
1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51.
1906, Gray *v.* Kelley, 190 Mass. 184, 76 N. E. 724.
1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114.
1906, Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 Atl. 244.
1905, State *v.* Hazlett, — N. D. — , 105 N. W. 617.
1904, Koon *v.* Southern Ry. 69 S. C. 101, 48 S. E. 86.
1905, State *v.* Cambron, — S. D. — , 105 N. W. 241.
1904, Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857.
1904, Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

§ 772. Question calling for Answer "Yes" or "No."

[*Note* 3; *add:*]

1906, Hix *v.* Gulley, 124 Ga. 547, 52 S. E. 890 (good example).
1905, State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247.

§ 773. Opponent's Witness under Cross-Examination.

[*Note* 1, par. 1; *add:*]

1906, Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55 (in discretion).

§ 774. Witness Hostile, Biassed, or Unwilling.

[*Note* 1; *add:*]

1907, State *v.* Walker, — Ia. —, 110 N. W. 925.
1907, People *v.* Sexton, — N. Y. — , 80 N. E. 396 (the opponent's wife and daughter).

§ 778. Witness not Understanding, etc.

[*Note* 3; *add:*]

1906, State *v.* Simes, — Ida. — , 85 Pac. 914 (simple-minded woman, in rape).
1903, Campion *v.* Lattimer, — Nebr. — , 97 N. W. 290 (a person ignorant and dull).

§ 780. Misleading Questions by Cross-Examiner.

[*Note* 2; *add:*]

1905, Briggs *v.* People, 219 Ill. 330, 76 N. E. 499 (rule illustrated).
1905, State *v.* Boice, 114 La. 856, 38 So. 584.

§ 781. Intimidating Questions.

[*Note* 4; *add:*]

1904, Cleveland, P. & E. R. Co. *v.* Pritschau, 69 Oh. 438, 69 N. E. 662.

§ 782. Repetition of Questions.

[*Note* 2; *add:*]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919.
1904, Thomas *v.* State, 47 Fla. 99, 36 So. 161 (excluded).

[*Note* 4; *add:*]

1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515.

So, too, the cross-examination questions may, in discretion, be repeated on ***re-direct examination:*** 1904, Caven *v.* Bodwell G. Co., 99 Me. 278, 59 Atl. 285; and cases cited *post*, § 1896.

§ 783. Multiple Examiners, etc.

[*Note* 1; *add:*]

1906, State *v.* Nugent, 116 La. 99, 40 So. 581 (two defendants and three counsel; only one allowed to examine the same witness).

[*Note* 5; *add:*]

1906, Barnes *v.* Squier, — Mass. — , 78 N. E. 731 (similar to Munro *v.* Stowe).

§ 784. Questions by the Judge.

[*Note* 1, par. 1, p. 884; change the number to note 5; and *add:*]

1888, Sharp *v.* State, 51 Ark. 147, 154, 10 S. W. 228 ("The judge has the right in a criminal prosecution to interrogate the witnesses; but he has no right to usurp the place of the State's attorney").
1905, Arkansas C. R. Co. *v.* Craig, 76 Ark. 258, 88 S. W. 878 (quoting the above passage).
1905, Grant *v.* State, 122 Ga. 740, 50 S. E. 946.
1905, O'Shea *v.* People, 218 Ill. 352, 75 N. E. 981 (the proper course for a judge in cross-examining witnesses, defined).
1904, Eckhout *v.* Cole, 135 N. C. 583, 47 S. E. 655 (good opinion, by Connor, J.).
1905, State *v.* Hazlett, — N. D. —, 105 N. W. 617.
1905, Howard *v.* Terr., 15 Okl. 199, 79 Pac. 773 (good opinion, by Burwell, J.; DeFord *v.* Painter not cited).
1906, Komp *v.* State, — Wis. — , 108 N. W. 46.
Mr. (Assistant District Attorney) Arthur Train, in his book "The Prisoner at the Bar" (1906), pp. 181, 182, has some valuable comments.

§ 785. Continuous Narration; Responsive Answers.

[*Note* 2; *add:*]

1905, Horton *v.* State, 123 Ga. 145, 51 S. E. 287 ("The practice [of continuous narrative] is to be commended rather than condemned").
1907, Hendricks *v.* St. Louis Transit Co., — Mo. App. — , 101 S. W. 675.

[*Note* 4; *add:*]

Sometimes it is said that the *party questioning* may object on this ground, but not the opposing party.
1906, Dunahugh's Will, — Ia. — , 107 N. W. 925. There should be no such distinction; if the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by justice.
That a party *waives objection* to a responsive answer, by the very asking of the question, is noticed *ante*, § 18, n. 27.

§ 786. Improper Suggestion other than by Questions.

[*Note* 5; *add:*]

1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (co-defendants not allowed as of right to consult a co-indictee in jail and about to be used as a witness for the State).
1906, State *v.* Barker, — Wash. — , 86 Pac. 387 (exchange of signals between witness and attorney, held improper).

§ 789. Dramatic Communication.

[*Note* 2, par. 1; *add:*]

1905, Turner *v.* Com., — Ky. — , 89 S. W. 482 (putting on a vest worn by one of the parties, to illustrate an affray).
1904, Clark *v.* Brooklyn H. R. Co., 177 N. Y. 357, 69 N. E. 647 (plaintiff-witness' illustration of his nervous affection caused by the injury, held doubtful, as being "under the sole control of the witness himself"; here not improper in discretion).

[*Note* 3, par. 1; *add:*]

1905, Birmingham R. L. & P. Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338 (personal injury; the plaintiff allowed to "walk the best he could before the jury").
1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (rape under age; the prosecutrix testifying with the babe in her lap, held not erroneous).
1904, Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94 (a motion to permit the plaintiff in a personal injury suit to testify while reclining on a stretcher, held not improperly denied on the facts, in the trial Court's discretion).
1906, State *v.* Barrick, — W. Va. — , 55 S. E. 652 (rape; that the prosecutrix testified while lying ill on a cot, held not improper).

§ 791. Instances of Models, Maps, and Diagrams.

[*Note* 1, par. 1; *add:*]

1906, Hisler *v.* State, — Fla. — , 42 So. 692 (map of location of homicide).
1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (handwriting; cited *post*, § 797, n. 4).
1905, Carman *v.* Montana C. R. Co., 32 Mont. 137, 79 Pac. 690.
1906, Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441 (map and plat of boundaries).

[*Note* 1, par. 2; *add:*]

1906, People *v.* Maughs, — Cal. — , 86 Pac. 187 (murder; model of the part of the house, admitted).
1905, Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520 (skeleton of a foot, used to explain an injury).

[*Text*; at the end, *add:*]

(4) A map, model, or diagram, though *made out of court*, is nevertheless subject to cross-examination through the witness who verifies and uses it. Hence the objection based on the Hearsay rule, that it is prepared *ex parte*, is entirely unsound (*post*, § 1385).

§ 792. Instances of Photographs.

[*Note* 1; *add:*]

1905, Russell *v.* State, — Ala. — , 38 So. 291 (person of the defendants).
1906, Kansas C. S. R. Co. *v.* Morris, — Ark. — , 98 S. W. 363 (railroad injury).
1905, People *v.* Mahatch, 148 Cal. 200, 82 Pac. 779 (locality of homicide, showing the position of body, knife, hat, etc., as re-arranged by a witness who testified to the correct placing).
1906, People *v.* Maughs, — Cal. — , 86 Pac. 187 (murder; photograph of a person in the supposed position of the deceased, excluded).
1904, Shaffer *v.* U. S., 24 D. C. App. 417, 424 (accused).
1904, MacFeat *v.* Phila. W. & B. R. Co. — Del. — , 62 Atl. 898 (scene of a railroad accident).
1905, State *v.* Powell, — Del. — , 61 Atl. 966 (wounds on the deceased).
1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (railroad accident at a crossing; photographs taken twelve months afterward, excluded).
1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 (eminent domain; photographs of adjoining estates, excluded, as offered merely in evasion of the rule of proof of value).
1905, Considine *v.* Dubuque, 126 Ia. 283, 102 N. W. 102 (footpath).
1905, Ottawa *v.* Green, 72 Kan. 214, 83 Pac. 616 (sidewalk).
1904, Stone *v.* L. B. & B. St. R. Co., 99 Me. 243, 59 Atl. 56 (photograph of the scene of a railroad injury, excluded in discretion).
1904, Babb *v.* Oxford P. Co., 99 Me. 298, 59 Atl. 290 (photograph of a coal conveyer, held not improperly excluded in the trial Court's discretion).
1904, Martin *v.* Moore, 99 Md. 41, 57 Atl. 671 (battery; photograph of the plaintiff on the day of the battery, excluded for lack of verification).
1904, Com. *v.* Fielding, 184 Mass. 484, 69 N. E. 216 (arson).
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (murder; photograph of the deceased's corsets, taken six months before trial, held properly admitted in the trial Court's discretion, though the corsets were in court; photograph of pieces of a knife-blade, admitted, to aid testimony, though the pieces were in court).
1905, Ness *v.* Escanaba, — Mich. — , 105 N. W. 879 (sidewalk; excluded on the facts).
1907, Davis *v.* Adrian, — Mich. — , 110 N. W. 1084 (personal injury).
1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (of a deceased, showing his wounds).
1904, Smith *v.* Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729 (action for death; photograph of deceased excluded, her appearance being immaterial).
1904, Davis *v.* Seaboard A. L. Ry., 136 N. C. 115, 48 S. E. 591 (injured person).
1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (of deceased, showing wounds, excluded, on the principle of § 1158, *post*).
1904, Maynard *v.* Oregon R. & N. Co., 46 Or. 15, 78 Pac. 983 (railway wreck).
1906, Newcomb *v.* State, — Tex. Cr. — , 95 S. W. 1048 (room of a homicide; excluded, because the position of furniture was not the same).
1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 66, 69 C. C. A. 28 (plaintiff's injured leg).
1906, Porter *v.* Buckley, 147 Fed. 140, C. C. A. (automobile accident; photographs of the locality, taken more than a year afterwards, excluded).
1907, Foss *v.* Smith, — Vt. — , 65 Atl. 553 (exchange of furniture for tools, etc.; a photograph of the furniture held not improperly excluded, the appearance not being important in evidencing value).
1906, Hupfer *v.* National Dist. Co., — Wis. — , 106 N. W. 831 (vat-hoops).

§ 794. Anonymous Pictures; Personal Knowledge, etc.

[*Note* 3; *add:*]

1905, People *v.* Mahatch, 148 Cal. 200, 82 Pac. 779 (cited *ante*, § 792, n. 1).

[*Note* 5, par. 1; *add:*]

1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86 (drawing of a pile-driver).

[*Note* 5, par. 2; *add*:]

1907, McKarren *v.* Boston & N. St. R. Co., — Mass. — , 80 N. E. 477 (plaintiff's spinal vertebræ; verification by the physician present and directing the photographer, held sufficient).
1904, Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442 (witness need not have been present at the photographing).

§ 795. Vacuum-Ray Photographs.

[*Note* 4; *add*:]

1904, Miller *v.* Minturn, 73 Ark. 183, 83 S. W. 918 (malpractice; radiograph of the injured ankle, taken by an expert, admitted).
1904, Chicago & J. El. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796 (X-ray skiograph of the plaintiff's body received, after preliminary evidence of correctness of method).
1907, Chicago City R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716 (personal injury; certain X-ray photographs held properly introduced).
1905, State *v.* Matheson, — Ia. — , 103 N. W. 137 (X-ray radiograph of a bullet, taken by an expert and verified by him, admitted).

[*Text*, par. (5), at the end; *add* a new note 5:]

[5] The use of the *phonograph* is legitimate, on the same principle:
1905, Loring *v.* Boston Elev. R. Co., Superior Court of Suffolk Co., Mass., Boston Transcript, Dec. 12 (damage by noise; Wait, J., allowed the use of phonograph records, to show the noise made by the defendant's trains).
1906, Boyne C. G. & A. R. Co. *v.* Anderson, — Mich. — , 109 N. W. 429 (eminent domain; "a phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel").

[*Text*, par. (6), at the end; *add* a new note 6:]

[6] *Not decided:* 1906, Boles *v.* People, — Colo. — , 86 Pac. 1030 (spiritualistic communication as to a murderer).

§ 797. Photographs of Handwriting.

[*Note* 4; *add*:]

1906, McClellan's Estate, — S. D. — , 107 N. W. 681 (inheritance; photographic reproductions of enlistment papers on record at barracks in Ireland, admitted; here the custodian's certified copies were also in evidence).

[*Note* 6; *add*:]

1904, Johnson *v.* Com., 102 Va. 927, 46 S. E. 789 (enlarged photographs of specimens, admitted).
So, too, enlarged drawings or *diagrams* are allowable: 1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (blackboard illustrations of handwriting by an expert, allowed);
1890, McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 (cited *ante*, § 791, n. 1).
1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (blackboard reproductions of the disputed signatures, held not improperly excluded in the trial Court's discretion).

§ 803. Deposition; Officer not to be Party's Agent or Kinsman.

[*Note* 3; *add*:]

1682, Newton *v.* Foot, Dick. 793 (deposition suppressed, because "the clerk of the plaintiff's solicitor sat as clerk to the commissioners").
1819, Cooke *v.* Wilson, 4 Madd. 380 (solicitor's clerk).
1906, Bledsoe *v.* Jones, — Ala. — , 40 So. 111 (counsel).
1906, Southern P. Co. *v.* Wilson, — Ariz. — , 85 Pac. 401 (deposition in a foreign country, not excluded merely because the solicitor of the witness, a party interested, read to him the interrogatories in the commissioner's presence).
Ark. St. 1905, c. 326 (deposition may be written "by any one who may be called on to do the writing by the officer").
1848, Glanton *v.* Griggs, 5 Ga. 424, 426, 433 (a student of defendant's counsel acting as commissioner).
1904, Knickerbocker Ice Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869 (deposition written by the office-clerk and stenographer of one of the attorneys, excluded, because not by a "disinterested person"; good opinion by Dowling, C. J.).
N. C. Rev. 1905, § 1652 (like Code 1883, § 1357).

§ 811. Interpreted Testimony; Deaf-Mutes, Aliens, etc.

[*Note* 1; *add*:]

This important reason why Courts are reluctant to allow the use of an interpreter unless really necessary, *i. e.*, that his intervention cripples a cross-examination, is equally noted in modern practice: Train, The Prisoner at the Bar, 1906, p. 239 (quoted *post*, § 1367, n. 5).

[*Note* 2; *add:*]

1906, Dobbins *v.* Little Rock R. & E. Co., — Ark. — , 95 S. W. 794 (deaf-mute).
1906, People *v.* Salas, 2 Cal. App. 537, 84 Pac. 295 (trial Court's discretion controls).

[*Note* 3, col. 1; *add:*]

1906, Dobbins *v.* Little Rock R. & E. Co., — Ark. — , 95 S. W. 794 (deaf-mute's testimony, taken by a sign-interpreter, instead of through written questions and answers)
Minn. St. 1905, c. 47 (a deaf or dumb person charged with insanity is entitled to an interpreter "as a matter of absolute right").

[*Note* 7, par. 1; *add:*]

1907, State *v.* Smith, — Mo. — , 102 S. W. 526 (like State *v.* Burns, Ia.).

§ 815. Confessions; Rule applies to Accused, not to Witness.

[*Note* 2; *add:*]

1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (a confession of an accomplice having been obtained by officers through fear, but not being admitted, the jury were allowed, in weighing the accomplice's testimony on the stand, to consider evidence that he had been put in fear "and still labored under this fear").

§ 821. What is a Confession.

[*Note* 2, par. 1; *add:*]

1905, Carwile *v.* State, — Ala. — , 39 So. 220.
1906, Neville *v.* State, — Ala. — , 41 So. 1011 (larceny).
1904, People *v.* Jan John, 144 Cal. 284, 77 Pac. 950 (People *v.* Ammermann followed).
1905, People *v.* Kelly, 146 Cal. 119, 79 Pac. 846.
1906, People *v.* Weber, — Cal. — , 86 Pac. 671 (statements showing an alibi).
Colo.: but see Tuttle *v.* People, 1905, 33 Colo. 243, 79 Pac. 1035, *contra*, ignoring Mora *v.* People.
1906, State *v.* Thomas, — Ia. — , 109 N. W. 900.
1904, State *v.* Aspara, 113 La. 940, 37 So. 883.
1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268.

[*Note* 2, par. 3; *add:*]

1904, Parks *v.* State, 46 Tex. Cr. 100, 79 S. W. 301 (Bailey *v.* State followed; the Quintana and Ferguson cases apparently repudiated, where the statement is not used to impeach the defendant as a witness; Brooks, J., diss.).

In State *v.* Gianfala, 113 La. 463, 37 So. 30 (1904), is a ridiculous example of an accused's exculpatory statement excluded because the Court thought that "he may well have been in fear and may well have hoped to mitigate his act," *i. e.*, being probably a false exculpation, therefore it should be rejected; his is the rule of law gone mad).

[*Note* 3; *add:*]

1904, Owens *v.* State, 120 Ga. 296, 48 S. E. 21 (an absurd ruling; the Court incidentally makes the remarkable pronouncement that "a confession is rather a fact to be proved by evidence than evidence to prove a fact"; Lamar and Candler, JJ., diss.).
1904, Michaels *v.* People, 208 Ill. 603, 70 N. E. 747 (defendant on being arrested and charged with forgery, said, "Can't this thing be fixed up?"; held, not a confession).
1906, State *v.* Campbell, — Kan. — , 85 Pac. 784 (statement of the receipt of money lawfully).

§ 825. Confession induced by Threat or Promise.

[*Note* 5; *add:*]

1905, R. *v.* Ryan, 9 Ont. L. R. 137 (confession of a letter-carrier to a post-office inspector, admitted on the facts; R. *v.* Thompson followed).

§ 829. Person in Authority; Threats or Promises, etc.

[*Note* 4; *add:*]

1901, R. *v.* Todd, 13 Man. 364 (detectives obtaining a confession by trick, held not persons in authority).
1905, R. *v.* Ryan, 9 Ont. L. R. 137 (a post-office inspector questioning a letter-carrier; not decided).

§ 831. Nature of the Inducement; Statutory Definitions.

[*Note* 2; *add:*]

Ind.: St. 1905, p. 584, § 239 (amending the above statute by adding, after the word "threats" the words, "or by intimidation or undue influences").
Wash.: the Supreme Court of Washington has unfortunately thus far given very little effect to this reform, as the decisions cited *post*, §§ 851, 852, will indicate.

§ 832. Advice that "it would be better to tell the truth."

[*Note* 1; *add:*]

1904, Brewer *v.* State, 72 Ark. 145, 78 S. W. 773 (Hardin *v.* State approved).

[*Note* 3; *add:*]

1905, State *v.* Wescott, — Ia. — , 104 N. W. 341.
1904, Com. *v.* Hudson, 185 Mass. 402, 70 N. E. 436, *semble.*
1906, State *v.* Johnny, — Nev. — , 87 Pac. 3 (by a sheriff, "You might as well tell the truth").
1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113.

§ 833. Threat of Corporal Violence.

[*Note* 3; *add:*]

1904, Edmonson *v.* State, 72 Ark. 585, 82 S. W. 203 (threat of hanging, excluded).
1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 (excluded; poor ruling).

[*Note* 4, l. 4 from below; *add:*]

1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35 (confession obtained by threats of whipping, etc., excluded).
1906, Jackson *v.* State, — Tex. Cr. — , 97 S. W. 312 (confession obtained by hanging and burning, excluded).

[*Note* 5; *add:*]

The "sweat-box" and "third degree" practices, in their legitimate scope, are well explained by Mr. Thomas Byrnes, former chief of detectives in New York City, in the *Sunday Magazine*, Oct. 9, 1905, with which is to be compared the long-established and highly-developed French method, as illustrated in the citations of § 2251, n. 12, *post.* In the Illinois Legislature of 1907 an ill-advised bill was introduced, forbidding under heavy penalties various practices of this sort, but it did not pass.

§ 835. Inducements involving Lighter Punishment, etc.

[*Note* 1; *add:*]

1906, Smith *v.* State, 125 Ga. 252, 54 S. E. 190 ("it would be lighter on him").
1906, Maxwell *v.* State, — Miss. — , 40 So. 615.
1906, Johnson *v.* State, — Miss. — , 42 So. 606 (promise to intercede with the judge, etc.; excluded).
1906, Sorenson *v.* U. S., 143 Fed. 820, C. C. A.

§ 836. Promises of other Favorable Legal Action.

[*Note* 1, par. 1; *add:*]

1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955 (promise not to prosecute).

§ 841. Confession induced by Trick or Fraud.

[*Note* 1, par. 1; *add:*]

1904, R. *v.* Todd, 13 Man. 364 (detectives pretended to be a gang of criminals, and obtained a confession from the accused as qualifying him to join their gang; admitted).
1907, People *v.* Furlong, — N. Y. — , 79 N. E. 978 (People *v.* White, *supra*, followed).

[*Note* 2; *add:*]

So, too, of insanity: 1906, State *v.* Church, — Mo. — , 98 S. W. 16 (confession admitted, subject to impeachment by evidence of insanity).

§ 847. English Practice; Confessions under Arrest.

[*Note* 10; *add:*]

The difference of attitude in English judges still continues: 1893, R. *v.* Male & Cooper, 17 Cox Cr. 689 ("The prisoner should be previously cautioned").
1895, R. *v.* Miller, 18 Cox Cr. 54 (answers to questions by an inspector without caution, admitted; "it is impossible to discover the facts of a crime without asking questions").
1898, Rogers *v.* Hawken, 19 Cox Cr. 122 (R. *v.* Male & Cooper not followed; there is "no such rule" that a statement made in answer to an officer's question, without caution but without inducement, is inadmissible; good opinion by Russell, L. C. J.).
1898, R. *v.* Histen, 19 Cox Cr. 16 ("When a prisoner is once taken into custody, a policeman should ask no questions at all without administering the usual caution).
1905, R. *v.* Knight & Thayre, 20 Cox Cr. 711 ("When a police-officer has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. . . . I am not aware of any distinct rule of evidence that if such improper questions are asked the answers to them are inadmissible, but . . . in my opinion that is the right course to pursue").
Canada: 1904, R. *v.* Kay, 11 Br. C. 157 (answers to police officer, without a caution, and under arrest,

[*Note* 10 — *continued.*]

excluded; "the arrest and charge are in themselves a challenge to the accused to speak, — an inducement within the rule"; a caution of the purpose and consequences must be given).
1890, R. *v.* Day, 20 Ont. 209 ("Although we reprehend the practice of questioning prisoners, we cannot come to the conclusion that evidence obtained by such questioning is inadmissible").
1899, R. *v.* Elliott, 31 Ont. 14 ("R. *v.* Day is the case settling the law in this Province").

§ 850. English Practice; Confessions by a Witness, etc.

[*Note* 17, par. 1, col. 2, l. 12; *add:*]

1898, R. *v.* Bird, 19 Cox Cr. 180 (the accused testified before the magistrate and signed the written report; then, on being asked whether he had anything to say in answer to the charge, replied, "What I have already said is true"; the Court of Crown Cases Reserved held (1) that this answer made the written report admissible, (2) that, even without the answer, the written report was admissible, following R. *v.* Erdheim).

[*Note* 17, par. 2; *add:*]

1904, R. *v.* Golden, 11 Br. C. 349 (forgery; after the statutory caution, the accused declined to say anything, but on request of the magistrate signed his name to the written statement; the signature was admitted to compare with the alleged forgery).

§ 851. United States; Confessions under Arrest.

[*Note* 1, par. 1; *add:*]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919.
1907, Terr. *v.* Emilio, — Ariz. — , 89 Pac. 239.
1904, McNish *v.* State, 47 Fla. 69, 36 So. 176 (the accused under arrest in chains, alone with the officer; admitted).
1904, Williams *v.* State, 48 Fla. 65, 37 So. 521.
1905, Folds *v.* State, 123 Ga. 167, 51 S. E. 305.
1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356.
1904, State *v.* Icenbice, 126 Ia. 16, 101 N. W. 273.
1905, State *v.* Inman, 70 Kan. 894, 79 Pac. 162.
1904, Hathaway *v.* Com., — Ky. — . 82 S. W. 400.
1904, State *v.* Lewis, 112 La. 872, 36 So. 788.
1904, State *v.* Lyons, 113 La. 959, 37 So. 890.
1906, State *v.* Hogan, 117 La. 863, 42 So. 353.
1906, Birkenfeld *v.* State, — Md. — , 65 Atl. 1.
1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460 (but here the Court improperly rebukes the prosecuting attorney for questioning the accused in his office; the confession in writing here stated that it was made "of my own free will and accord," and that the prosecuting attorney had informed him that it "will be used against me," yet the Court prates about his being "compelled to testify against himself"; such causeless rebukes merely proclaim the bigotry of the Court itself).
1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235.
1906, State *v.* Church, — Mo. — , 98 S. W. 16.
1906, State *v.* Spaugh, — Mo. — , 98 S. W. 55.
1905, State *v.* Smith, 138 N. C. 700, 50 S. E. 859.
1905, State *v.* Horner, 139 N. C. 603, 52 S. E. 136.
1906, State *v.* Henderson, 74 S. C. 477, 55 S. E. 117.
1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794.
1906, State *v.* Poole, 42 Wash. 192, 84 Pac. 727 (this opinion devotes a page to this point, and cites authorities from other jurisdictions, apparently forgetting that the local statute, cited *ante*, § 831, has replaced the common law rule and made a new and unique one; this Court should be urged to recall its words in State *v.* Hopkins, quoted *ante*, § 831, that "the former rule does not obtain," and to look only at the statutory question of "fear produced by threats," instead of keeping alive all the old controversies and quibbles and thus losing the benefit of the statutory reform).
1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113.
Compare the rulings cited *ante*, § 833, n. 5 ("sweat-box").

[*Note* 1, par. 2; *add:*]

1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (this decision finally reads all life out of the statute, by excluding the defendant's answers to the county attorney's questions, after due warning, under arrest, at the inquest; the ground is that testimony given under a severe cross-examination is not voluntary; this kind of judicial vapidity certainly makes the way smooth for the accused and hard for the prosecution, and may throw some light on the remarkably high record of homicides in this State).

§ 852. Confessions made before a Magistrate or as a Witness.

[*Note* 1; *add:*]

1906, Peck *v.* State, — Ala. — , 41 So. 759 (an entrapping interrogation by the magistrate just before the preliminary hearing of the accused; excluded).
1905, Tuttle *v.* People, 33 Colo. 243, 79 Pac. 1035 (testimony on oath as witness subpœnaed before the coroner, knowing that he was under suspicion, and without warning, excluded; the Court thus takes this

[*Note* 1 — *continued.*]

opportunity to ally itself with the old-fashioned and absurd quibbles, which, in a State not hampered with a past record on this subject, an enlightened judiciary could have afforded to repudiate; the ruling is the more inexcusable in that the statements offered were conceded to be not confessions in the proper sense — *ante*, § 821 — but statements of "their whereabouts"; the Court in a defensive manner remarks that "Crime should be punished," etc., but fails to explain how it can be punished so long as Courts maintain an obstructive anachronistic attitude on such questions).
1905, Davis *v.* State, 122 Ga. 564, 50 S. E. 376 (statements to the grand jury as witness, after a caution, admitted; no authority cited).
1905, Green *v.* State, 124 Ga. 343, 52 S. E. 431 (defendant's testimony, under arrest, at the coroner's inquest, admitted).
1887, State *v.* Taylor, 36 Kan. 329, 13 Pac. 550 (testimony at the inquest, without subpœna or questioning, admitted).
1905, State *v.* Finch, 71 Kan. 793, 81 Pac. 494 (testimony as witness subpœnaed at the inquest, not in custody nor under suspicion, admitted).
1903, Tines *v.* Com., — Ky. — , 77 S. W. 363 (affidavit made to the district attorney, excluded; no precedents cited).
1904, Seaborn *v.* Com., — Ky. — , 80 S. W. 223 ("voluntary testimony" before committing magistrate, admitted).
1904, Bess *v.* Com., 118 Ky. 858, 82 S. W. 576 (defendant's voluntary testimony on his former trial, admitted).
1906, Cooper *v.* State, — Miss. — , 42 So. 601 (testimony under oath before the grand jury, while in custody as accused, excluded; Steele *v.* State distinguished).
1890, State *v.* Mullins, 101 Mo. 514, 14 S. W. 625 (murder; voluntary testimony at the inquest, admitted, the accused being "well known" to be the killer).
1904, State *v.* Woodward, 182 Mo. 391, 81 S. W. 857 (statement to a judge in chambers, not on oath and voluntary, admitted; not one of the foregoing cases, except State *v.* Mullins, is cited; cannot this Court discover its own precedents?).
1906, State *v.* Banusik, — N. J. L. — , 64 Atl. 994 (confession not under oath, to a police magistrate, in jail, after warning, admitted).
1906, Miller *v.* State, — Tex. Cr. — , 91 S. W. 582 (testimony as witness before the examining magistrate, admitted).
1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787 (answers made by a bankrupt on citation before a referee, not being in custody nor charged with a criminal offence, held admissible).
1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794 (larceny; plea of guilty before a justice of the peace, without counsel or warning, admitted).
1904, State *v.* Washing, 38 Wash. 465, 78 Pac. 1019 (statement of defendant, an Indian, made before a magistrate on arraignment, without oath but without warning, admitted; compare the statute in this State, quoted *ante*, § 831; it does not seem to have produced its intended effect, in preventing further discussion of questions like the present one; this is seen also in the cases cited *ante*, § 851).

§ 855. Was the Inducement brought to an End?

[*Note* 1; *add:*]

1904, R. *v.* Lai Ping, 11 Br. C. 102 (confession in jail; the caution by the magistrate, held to remove a prior inducement).
1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (Beery *v.* U. S. not cited).
1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700.
1905, Milner *v.* State, 124 Ga. 86, 52 S. E. 302.
1904, Green *v.* Com., — Ky. — , 83 S. W. 638 (confession to a private person, the next day after an inducement by an officer and an inadmissible confession to him, received).
1906, State *v.* Rugero, 117 La. 1040, 42 So. 495.
1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35 (discretion of the trial Court).

§ 857. Admission of the Part Confirmed.

[*Note* 1; *add:*]

Of course, the accused's subsequent confirmation of the confession *on the stand* cures any shortcoming: 1906, State *v.* Johnny, — Nev. — , 87 Pac. 3.

§ 858. Prevailing Doctrine; No Part Received.

[*Note* 2; *add:*]

Ky.: 1904, Com. *v.* Phillips, — Ky. — , 82 S. W. 286 (the fact of finding, "together with the statement of the accused as to their location," admitted).
1906, Com. *v.* Johnson, 213 Pa. 432, 62 Atl. 1064 (Laros *v.* Com. approved).
1904, State *v.* Middleton, 69 S. C. 72, 48 S. E. 35.

[*Note* 5; *add:*]

1906, State *v.* Moran, — Ia. — , 109 N. W. 187 ("such facts, and so much of the confession as distinctly relates thereto").

§ 860. Burden of Proof.

[*Note* 1; *add:*]

1905, State *v.* Stallings, 142 Ala. 112, 38 So. 261 (an improper decision).
1904, Watts *v.* State, 99 Md. 30, 57 Atl. 542.
But in any case the trial Court may properly be presumed to have found the necessary preliminary facts until the opposite is shown *in the record:*
1905, Whatley *v.* State, 144 Ala. 68, 39 So. 1014.

[*Note* 2; *add,* under *Contra:*]

1904, Jenkins *v.* State, 119 Ga. 431, 46 S. E. 628.

[*Note* 4; *add:*]

1904, State *v.* Icenbice, 126 Ia. 16, 101 N. W. 273, *semble.*

§ 861. Judge and Jury.

[*Note* 2; *add:*]

1905, State *v.* Willing, — Ia. — , 105 N. W. 355, *semble.*
1906, Howard *v.* Com., — Ky. — , 90 S. W. 578.
1906, Pearsall *v.* Com., — Ky. — , 92 S. W. 589.
1906, State *v.* Monich, — N. J. L. — , 64 Atl. 1016 (good opinion by Pitney, J.; quoted *post,* § 1451, n. 1; Bullock *v.* State, *infra,* n. 3, repudiated; settling the doubt in State *v.* Young, *infra,* n. 3).
1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110; Roszczyniala *v.* State, ib. 414, 104 N. W. 113.
1906, Clay *v.* State, — Wyo. — , 86 Pac. 17, *semble.*

[*Note* 3; *add:*]

1904, Shaffer *v.* U. S., 24 D. C. App. 337, 385.
1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700.
1905, State *v.* Wescott, — Ia. — , 104 N. W. 341 (State *v.* Storms followed).
1885, Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494 ("the human practice" is for the judge, if he admits the confession, after a conflict of evidence, to tell the jury that "they should exclude the confession, if upon the whole evidence in the case they are satisfied that it was not the voluntary act of the defendant").
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Com. *v.* Preece approved).
1906, People *v.* Maxfield, — Mich. — , 108 N. W. 1087.
1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460 (this opinion faces both ways).
1904, State *v.* Washing, 38 Wash. 465, 78 Pac. 1019.

[*Note* 4; *add:*]

1904, Zuckerman *v.* People, 213 Ill. 114, 72 N. E. 741 (embezzlement; the judge may hear both sides).

[*Note* 6; *add:*]

1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700 (not error not to withdraw).
1905, State *v.* Stebbins, 188 Mo. 387, 87 S. W. 460.
1907, Harrold *v.* Terr., — Okl. — , 89 Pac. 202 (Kirk *v.* Terr. followed).

§ 862. Trial Judge's Discretion.

[*Note* 1; *add:*]

1906, State *v.* Monich, — N. J. L. — , 64 Atl. 1016 (the only question on review is whether there was evidence to support the trial judge's finding of admissibility).
1904, State *v.* Rogoway, 45 Or. 601, 78 Pac. 987, 81 Pac. 234.
1905, Hintz *v.* State, 125 Wis. 405, 104 N. W. 110 (as to the existence of the inducement); Roszczyniala *v.* State, ib. 414, 104 N. W. 113.

§ 866. Value of Confessions.

[*Note* 7; *add:*]

1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169.
1905, Griner *v.* State, 121 Ga. 614, 49 S. E. 700.
1905, State *v.* Willing, — Ia. — , 105 N. W. 355.

§ 867. Future of the Doctrine.

[*Note* 1, l. 8 from the end; *add:*]

1846, Trailor's Case, 4 West. L. J. 25, Chicago Daily Law Bull. Dec. 14, 1904. Mr. J. F. Geeting has a note carefully collating these cases in his edition of American Criminal Cases, vol. 12, p. 213.

§ 876. Process of Impeachment; Distinctions, etc.

[*Text*, p. 1005, l. 5 from below; *add* a new note 1:]

[1] In a series of articles by Professor Hugo Munsterberg (Professor of Psychology in Harvard University), in the *Times Magazine* (N. Y.) for January and March, 1907, the assertion is made (p. 427) that within the past few years "a new special science has grown up," by means of which a witness could be accurately tested directly "with regard to his memory and his power of perception, his attention and his [mental] associations, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology"; and the reproach is made that Courts are "still unaware" of this; that they "proceed as if experimental psychology, with its efforts to analyze the mental faculties, still stood where it stood two thousand years ago"; that Courts are "completely satisfied with the most unscientific and haphazard methods of common prejudice and ignorance when a mental product, especially the memory report of a witness, is to be examined"; and that "the Courts will have to learn sooner or later" that these tests should be employed. As to all this, a sufficient brief answer is that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound and practical. If there is any reproach, it does not belong to the Courts or the law. A legal practice which has admitted the evidential use of the telephone, the phonograph, and the vacuum-ray, within the past decade, cannot be charged with lagging behind science. But where *are* these practical psychological tests, which will detect and expose the memory-failure and the lie on the witness-stand? Let us have volume and page of the demonstration; and let us have proof of general scientific recognition that they are valid and feasible. The vacuum-ray photographic method, for example, was accepted by scientists the world over, within a few months after its promulgation. If there is ever devised a psychological test for the impeachment of witnesses, the law will run to meet it. Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him.

Professor Munsterberg's researches are to be further expounded by him in volumes entitled "On the Witness Stand" and "Applied Psychology," to appear in 1908: and in the American Journal of Criminology and McClure's Magazine for September, 1907. In the Strand Magazine for September, 1907, there is a similar article by Professor Claparede, of the University of Geneva.

§ 894. Impeachment of an Impeaching Witness.

[*Note* 2; at the end, *add*:]

1905, Dunn *v.* Com., 119 Ky. 457, 84 S. W. 321.

§ 898. Second Reason; the Party guarantees Credibility.

[*Text*, par. (2), l. 3; *add* a *note* (1)]:

[1] 1906, Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122 (calling the opponent as witness).

It is disappointing to find a recent opinion repeating this cant formula, "The party who calls a witness certifies his credibility" (1907, People *v.* Sexton, — N. Y. — , 80 N. E. 396).

§ 900. Impeaching One's Own Witness; Bad Character.

[*Note* 1; *add*:]

1905, State *v.* Gallo, 115 La. 746, 39 So. 1001 (but here the offer was to show the witness to be an accomplice and hence fell rather under the principle of § 901, *post*).

§ 901. Bias, Interest, or Corruption.

[*Note* 1, under *Corruption; add*:]

1905, State *v.* Moon, 71 Kan. 349, 80 Pac. 597 (a witness had before trial told the prosecution of the defendant's conversations planning the larceny; on the stand, the witness denied all these things; on cross-examination, the prosecution was allowed to ask about them; after adjournment, he was arrested for perjury; he then sent for the prosecuting attorney, and retracted, and next day on the stand retold his story with all details as to the defendant's subornation; held proper, in a good opinion by Burch, J.; this opinion is a brilliant example of what a Court can and should do in repudiating the artificial trammels of the present rule).

§ 905. Prior Self-Contradictions; Law in Various Jurisdictions.

[*Note* 2; *add*:]

Yukon: St. 1904, c. 5, § 40 (like Eng. St. 1854, c. 125, § 22).

[*Note* 3; *add*:]

1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101 (like People *v.* Crespi, *supra*).
1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43 (cross-examination by the prosecution to several contrary statements, allowed on the facts).
1906, Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112 (contradiction of a medical witness by his memorandum given beforehand to the party, not allowed, for impeaching him).

[*Note* 3 — *continued.*]

1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 604 (statute applied, in a bastardy case, to impeach the third person called by the defendant and said to be the father of the child).
1894, State *v.* Keefe, 54 Kan. 197, 201, 38 Pac. 302 (Johnson *v.* Leggett followed).
1905, State *v.* Moon, 71 Kan. 349, 80 Pac. 597 (Johnson *v.* Leggett followed; see the citation *ante*, § 901).
1904, Com. *v.* Bavarian B. Co., — Ky. — , 80 S. W. 772 (use of former testimony as evidence under the guise of refreshing memory is not allowable).
1906, Garrison *v.* Com., — Ky. — , 93 S. W. 594 (prosecution allowed to prove by other witnesses the witness' contrary assertions). 1907, Dukes *v.* Davis, — Ky. — , 101 S. W. 390 (rule of C. C. P. § 596 applied).
1903, State *v.* Williams, 111 La. 179, 35 So. 505 (cross-examination allowed, in case of surprise, to stimulate recollection).
1906, State *v.* Stephens, 116 La. 36, 40 So. 523 (witness for the State; cross-examination allowable if the purpose is to stimulate recollection, but not "if the sole purpose . . . is to discredit him. . . . unless the party offering it has been entrapped into calling a hostile witness," and even then only when the witness affirmatively testifies against him).
1906, Lindquist *v.* Dickson, — Minn. — , 107 N. W. 958 (proof of former self-contradiction, by extrinsic testimony, admitted in the trial Court's discretion, in a case of surprise).
1906, State *v.* Sederstrom, — Minn. — , 109 N. W. 113 (prior inconsistent statements of the witness to the State's attorney, allowed to be shown).
1904, Dunk *v.* State, 84 Miss. 454, 36 So. 609 (self-contradiction of a witness for the prosecution, where the State's attorney had been "neither misled nor entrapped by the witness," excluded; but the ruling is erroneously put also on the ground of the immateriality of the assertion, misunderstanding Williams *v.* State, *post*, § 1038).
1906, Dodd *v.* State, — Miss. — , 40 So. 545 (Dunk *v.* State followed; rule of discretion applied).
1905, Clancy *v.* St. Louis T. Co., 192 Mo. 615, 91 S. W. 509 (rule of State *v.* Burks. *supra*, applied).
1906, Beier *v.* St. Louis T. Co., 197 Mo. 215, 94 S. W. 876 (a witness who had been subpœnaed by both parties, but introduced by the defendant only, and whose memory failed on various points covered by a written statement made by him two years before; the written statement not allowed to be put in evidence, no entrapment being shown).
1906, State *v.* Johnson, — N. J. L. — , 63 Atl. 12 (prior self-contradiction, allowed to be shown on cross-examination, on the ground of surprise; the foregoing precedents ignored, and none others cited).
1906, Terr. *v.* Livingston, — N. M. — , 84 Pac. 1021 (rule in Hickory *v.* U. S.; why did not the Court cite and follow the rule of its own statute, which is broader?).
1906, State *v.* Jennings, — Or. — , 87 Pac. 524 (proof by other testimony, allowed).
1896, Putnam *v.* U. S., 162 U. S. 687, 16 Sup. 923 (cited *ante*, § 761, n. 5; this case confuses several principles, and should have no weight).
1904, State *v.* Callahan, 18 S. D. 145, 99 N. W. 1099 (cross-examination to prior testimony, forbidden; rule obscure; the opinion takes no note of the difficulties of the subject).
1905, Dallas C. E. St. R. Co. *v.* McAllister — Tex. Civ. App. — , 90 S. W. 933.
1907, Skeen *v.* State, — Tex. Cr. — , 100 S. W. 770 (rape; after the prosecuting witness' denial of the intercourse charged, the prosecution was not allowed to prove her prior affirmation of it).
1904, Portsmouth St. R. Co. *v.* Peed's Adm'r, 102 Va. 662, 47 S. E. 850 (allowable to refresh but not to contradict; statute not cited).
1905, McCue *v.* Com., 103 Va. 870, 49 S. E. 623 (statute held applicable to criminal cases).

Compare also the cases *post*, §§ 1020–1043 (*self-contradiction* in general).

§ 907. Contradiction by Other Witnesses.

[*Note* 5; *add*, under *Canada*:]

1904, R. *v.* Hutchinson, 11 Br. C. 24, 32.
Yukon St. 1904, c. 5, § 40.

[*Note* 7; *add*:]

1904, Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143.
1906, Mississippi Glass Co. *v.* Franzen, 143 Fed. 501, C. C. A.
1905, Jennett *v.* Patten, 78 Vt. 69, 62 Atl. 33.
1904, Stout *v.* Sands, 56 W. Va. 663, 49 W. Va. 428.

§ 912. Impeachment by Second Caller; Deposition.

[*Note* 2; *add*:]

1876, Fountain's Adm'r *v.* Brown, 56 Ala. 558.

§ 913. Impeachment by First Caller.

[*Note* 1, par. 1; *add*, under *Accord*:]

1906, Johnston *v.* Marriage, — Kan. — , 86 Pac. 461 (negligent setting of fire; an employee of defendant, called by the plaintiff, was afterwards called by the defendant on the same subject; the plaintiff's impeachment of him by self-contradictions was forbidden, there being "no special circumstances which would make the rule's application work an injustice").

§ 914. Making a Witness One's Own by Cross-Examination.

[*Note* 3; *add:*]

1874, Hatch *v.* Brown, 63 Me. 410, 416.

§ 916. Calling the Other Party as Witness.

[*Note* 2; *add:*]

Manit. St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding Rule 460 A, quoted *post*, § 1890, n. 3).
1905, Carney *v.* Hennessey, 77 Conn. 577, 60 Atl. 128 (plaintiff called by defendant, allowed to be impeached by prior self-contradiction).
Ill. St. 1905, May 18 (Municipal Court), § 33 (a party "may be examined upon the trial thereof as if under cross-examination" at the instance of the adversary, and is compellable, "in the same manner and subject to the same rules for examination as any other witness, to testify," but the calling party is not concluded but may rebut).
1904, Emerson *v.* Wark, 185 Mass. 427, 70 N. E. 482 (the proponent of a will was called by the contestant as a witness; held, that under Rev. L. c. 175, § 24, an instruction that "in putting him on, they put him before you as a person entitled to be believed" was erroneous).
1899, Bennett *v.* Lumber Co., 77 Minn. 198, 79 N. W. 682 (under the words of the statute, the "directors, officers, superintendents, or managing agents" of a corporation include the superintendent of a saw-mill).
1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, C. C. A. (under Minn. Gen. St. 1894, § 5659, *supra*, the master of a vessel owned by a corporation is included).
1906, Sharp *v.* Erie Co., 184 N. Y. 100, 76 N. E. 923 (plaintiff held not bound by the statements on cross-examination of an agent of defendant called by the plaintiff).
N. C. Code 1883, § 580 (a party-opponent may be compelled to testify "subject to the same rules of examination as any other witness"); Rev. 1905, §§ 865, 868 (like Code 1883, §§ 580, 583).
1904, Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598 (Dravo *v.* Fabel followed, in a chancery case).

[*Note* 3; *add:*]

1907, Sullivan *v.* Fugazzi, — Mass. — , 79 N. E. 775 (consolidated actions by S. against F. and against R. Co.; rule for such a case examined).

§ 918. Prosecution's Witness.

[*Note* 2; *add:*]

1905, State *v.* Gallo, 115 La. 746, 39 So. 1001 (rule held equally applicable to the State).

§ 921. Relevancy and Auxiliary Policy; their Different Bearings.

[*Text*, p. 1058, at the end of the section; *add:*]

1900, Hon. *J. F. Daly*, in "The Brief," III, 15: "In my experience and that of many judges there has been no successful impeachment of a witness by proof of bad reputation. There is something distasteful to the average juryman in the 'swearing away a man's character'; and the general feeling in that regard is evidenced by the reluctance, on the one hand, of witnesses to come forward and testify that they would not believe a witness under oath, and the readiness, on the other hand, with which all a man's acquaintances hasten to his support. . . . The advice to clients should be: Do not attempt to impeach the character of an adversary or a witness unless you are absolutely certain there is no character to impeach."

§ 923. Kind of Character; Rule in Various Jurisdictions.

[*Note* 5; *add:*]

1904, Ross *v.* State, 139 Ala. 144, 36 So. 718 (general character, but not character for turbulence, allowed).
Ark. St. 1905, c. 52 (amends the above statute by substituting "morality" for "immorality").
1906, Maloy *v.* State, — Fla. — , 41 So. 791 (manslaughter; accused's character for veracity, admitted).
Ind. St. 1905, p. 584, § 239 (foregoing statute re-enacted).
1904, State *v.* Haupt, 126 Ia. 152, 101 N. W. 739 (prosecutrix in seduction).
1904, Helm *v.* Com., — Ky. — , 81 S. W. 270 (general moral character, admitted).
1905, Newman *v.* Com., . . Ky. — , 88 S. W. 1089 (character for peace and quiet of a defendant taking the stand, excluded; "his character for truthfulness, or his general moral character," might have been shown).
1906, State *v.* Baudoin, 115 La. 837, 40 So. 239 (assault with intent to kill; prosecuting witness' character for chastity, excluded).
1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (a woman's character for unchastity, not admissible).
1893, People *v.* Mills, 94 Mich. 630, 54 N. W. 488 ("lack of chastity cannot be used to impeach the credibility of a female witness").

[*Note 5 — continued.*]

1904, People *v.* Wilson, 136 Mich. 298, 99 N. W. 6 (bastardy; the woman's character for unchastity, excluded).
1900, State *v.* Evans, 158 Mo. 609, 59 S. W. 994 (defendant's general moral character, admissible).
1905, State *v.* Woodward, 191 id. 617, 90 S. W. 90 (similar).
1906, State *v.* Beckner, 194 id. 281, 91 S. W. 893 (murder; defendant's character for violence, excluded; only general bad moral character can be used; prior decisions reviewed).
1903, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (State *v.* Beckner followed; but the defendant's character for turbulence may be used, on the principle of § 58, *ante*, if he has first offered his character for peaceableness).
1906, York *v.* Everton, — Mo. App. — , 97 S. W. 604 (reputation for unchastity, admitted; here, against a woman, though the rule is laid down for "both male and female witnesses"; but why should the Court rest this on State *v.* Sibley, *supra?*).
1904, Com. *v.* Williams, 209 Pa. 529, 58 Atl. 922 (preceding cases approved).
1906, Powers *v.* State, — Tenn. — , 97 S. W. 815 (homicide; defendant's character for violence, not admitted to impeach him as a witness; purporting to follow State *v.* Beckner, Mo., *supra*, but obscure as to the precise rule laid down).
1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (rape under age; the woman's character as a prostitute excluded).
1906, State *v.* Detwiler, — W. Va. — , 55 S. E. 655 (rape; prosecutrix' character for chastity, not admitted to impeach credibility).

For the use of the woman's *character for chastity*, in *rape* and *bastardy*, compare §§ 62, 68, *ante*, and § 987, *post.*

§ 925. Accused's Character as Witness and Party.

[*Note* 1; *add:*]

1907, Clinton *v.* State, — Fla. — , 43 So. 312.
1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (perjury; an offer of defendant's character for veracity, held improperly excluded, though the defendant had not taken the stand, because it was relevant to the charge of perjury; although the offering counsel did not specify that it was for the latter purpose).

§ 928. Prior Character; Competing Rules.

[*Note* 1; *add:*]

1904, People *v.* Nunley, 142 Cal. 441, 76 Pac. 45 (reputation in a place twelve miles away, two years before, where he had lived, admitted in rebuttal).
1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (character some years before, admitted on the facts).
1906, State *v.* Simmons, — Kan. — , 88 Pac. 57 ("No hard and fast rule" can be laid down).
1905, Craft *v.* Barron, — Ky. — , 88 S. W. 1099 (character in Kentucky, ten years before, and in California at the time of trial, admitted in the Court's discretion).
1905, State *v.* Bryant, — Minn. — , 105 N. W. 974 (reputation not allowed to be proved, in the trial Court's discretion, by one who had known the witness since youth, but had not heard his reputation mentioned for four years).
1905, State *v.* Shouse, 188 Mo. 473, 87 S. W. 480 (excluding the accused's character in Tennessee seven or eight years before).

§ 933. Intoxication.

[*Note* 1; *add:*]

1905, Morris *v.* State, — Ala. — , 39 So. 608 (at the time of the affray).
1905, Sharpton *v.* Augusta & A. R. Co., — Ga. — , 51 S. E. 553 (intoxication at the time of the injury, admitted).
1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (intoxication at the time of testifying may be shown).

[*Note* 2; *add:*]

1904, Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068 (cumulative evidence of intemperate habits, here excluded).
1903, State *v.* Castle, 133 N. C. 769, 46 S. E. 1 (that the accused, who testified, "drank liquor," excluded, the proof not relating to the time of the homicide or of testifying).

§ 934. Disease, Age, etc.

[*Note* 1; *add,* in a new paragraph:]

Hypnotism may here have a bearing: 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283, *semble* (that defendant had occasionally hypnotized his wife, now testifying for him, allowed on cross-examination). So, too, the habitual use of *cocaine; Contra:* 1904, Williams *v.* U. S., — Ind. Terr. — , 88 S. W. 334 (unless the witness is under its influence when examined, or is expressly shown to be affected in his faculties).

[*Note* 2; *add:*]

1905, Mathison *v.* State, 87 Miss. 739, 40 So. 801 (near-sightedness of an eye-witness to a homicide).

§ 935. Religious Belief.

[*Note* 5, par. 1; *add:*]

1882, Bush *v.* Com., 80 Ky. 244 (the Constitutional provision "was intended to prevent any inquiry into that belief" as affecting credibility).
1904, Louisville & N. R. Co. *v.* Mayes, — Ky. — , 80 S. W. 1096 (foregoing case followed).
For the *privilege* against disclosing religious belief, see *post*, § 2214.

§ 944. Cross-Examination; Broadness of Scope.

[*Note* 1; *add:*]

1905, Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 So. 590.
1903, Porter *v.* People, 31 Colo. 508, 74 Pac. 879.
1905, Smith *v.* State, 165 Ind. 180, 74 N. E. 983.
Ky. C. C. P. 1895, § 593 (quoted *ante*, § 981, n. 4).
1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923.
1906, Greer *v.* Union St. R. Co., — Mass. — , 79 N. E. 267.
1906, State *v.* Standard Oil Co., — Mo. — , 91 S. W. 1062.
1905, State *v.* Foster, — N. D. — , 105 N. W. 938.
1905, Guthrie *v.* Carey, 15 Okl. 276, 81 Pac. 431.
1905, State *v.* Sauls, 70 S. C. 393, 50 S. E. 17.
1905, Worrell *v.* Kinnear, 103 Va. 719, 49 S. E. 988.

§ 946. Demeanor of a Witness.

[*Note* 1; *add:*]

1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.

§ 949. Relationship, etc., as Evidence of Bias.

[*Note* 2; *add:*]

1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (similar to Thomas *v.* David, *supra;* cited more fully *post*, § 986, n. 11).
1905, Funderburk *v.* State, — Ala. — , 39 So. 672 (rape; marital separation of the woman's brother-in-law, testifying for the defendant, allowed to be shown for the State).
1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (hostility between the families of deceased and accused).
1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820 (paramour of the defendant).
1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788 (rape; illicit relations of the woman's sister with a third person, admitted to show the sister's motives for her testimony).

[*Note* 3; *add:*]

1904, Adkinson *v.* State, 48 Fla. 1, 37 So. 522 (questions as to the witness' daughter's illicit relations with the defendant's brother, excluded).
1904, Hogen *v.* Klabo, — N. D. — , 100 N. W. 847 (pecuniary relations of plaintiff and his principal witness, admitted).

[*Note* 4, par. 1; *add:*]

1905, People *v.* Cowan, 1 Cal. App. 411, 82 Pac. 339 (membership in the same miners' union).
1904, Gregory *v.* Detroit U. R. Co., 138 Mich. 368, 101 N. W. 546 (here the Court commits the error of ruling that "there must be something in the testimony itself or in the manner of the witness to justify the conclusion" of bias; yet the Court has no right to control the jury's inferences of bias by some rule of law; the simple fact that the witness is the father or husband or surety or employee of a party may be given just as much or as little weight as the jury please in affecting their trust of the testimony; this opinion exhibits a radical misapprehension of the common-law theory of testimony on a jury-trial; instructions of any sort to the jury on such subjects are out of place).
1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 726, 61 C. C. A. 639 (physician).

[*Note* 6; *add:*]

1906, Glass *v.* State, — Ala. — , 41 So. 727 (quarrel over a former indictment, admitted).

[*Note* 7; *add,* under *Accord:*]

1904, Smith *v.* State, 48 Fla. 307, 37 So. 573 (murder; indictment against defendant for stealing the deceased's cattle, admitted).

[*Note* 8; *add:*]

1886, State *v.* Henderson, 29 W. Va. 147, 159, 1 S. E. 225 (that certain witnesses for the prosecution were indebted to the prosecuting witness, not allowed even on cross-examination; unsound).

§ 950. Expressions and Conduct as Evidence of Bias.

[*Note* 5; *add:*]

1905, Creeping Bear *v.* State, 113 Tenn. 322, 87 S. W. 653 (soliciting against a pardon for defendant).

[*Note* 6; *add:*]

1904, Hanners *v.* State, — Ala. — , 41 So. 973 (threats).
1906, Vaughn *v.* State, — Fla. — , 41 So. 881 (threats to kill).
1904, People *v.* Rice, 136 Mich. 619, 99 N. W. 860 (helping to secure a conviction).

§ 951. Details of a Quarrel on Cross-Examination.

[*Note* 2; *add:*]

1877, Fincher *v.* State, 58 Ala. 215, 219 (extent of hostility may be inquired into).
1905, McDuffie *v.* State, 121 Ga. 580, 49 S. E. 708 (details excluded; citing the intervening rulings).
1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poison; the deceased's sister, being asked as to reasons for bias, answered that she disliked accused because he poisoned her sister; held erroneous; the ruling is indefensible, because the cross-examiner himself called for a specific answer).
1905, Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613.
1905, State *v.* Mahnberg, — N. D. — , 105 N. W. 614 (details of political rivalry, etc., allowed in discretion; good opinion by Engerud, J.).
1906, State *v.* Baird, — Vt. — , 65 Atl. 101 (details excluded, in the trial Court's discretion).

§ 952. Explaining Away, etc.; Details on Re-Examination.

[*Note* 1; *add:*]

1906, Lenfest *v.* Robbins, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed on re-examination to explain that the hostility "was not on his side").

Compare the rule for *party's hostility* (*ante*, § 396).

[*Note* 3; *add:*]

Distinguish the application of the rule for details of employment creating *interest* (*post*, § 969), as in State *v.* Bean, 77 Vt. 384, 60 Atl. 807 (1905).

§ 953. Preliminary Inquiry to Witness.

[*Note* 1; *add:*]

1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (not necessary).
1905, State *v.* Bardelli, 78 Vt. 102, 62 Atl. 44 (same).

§ 957. Willingness to Swear Falsely.

[*Note* 1; *add:*]

1907, State *v.* Caron, 118 La. — , 42 So. 960 (whether he had said that he would swear to anything that would help his brother, held allowable).

§ 958. Offer to Testify Corruptly.

[*Note* 1; *add,* under *Admitted:*]

1895, Alward *v.* Oakes, 63 Minn. 190, 65 N. W. 270 (letters "evincing a corrupt disposition to make his testimony in this case depend upon the pecuniary or other valuable consideration," etc., admitted).
1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835 (question as to an offer for money to leave the State, when a witness in another suit, allowed in discretion).

§ 959. Confession that Testimony was False.

[*Note* 1, par. 11; *add,* under *Excluded:*]

1905, State *v.* Wells, — Mont. — , 83 Pac. 476 (cross-examining a witness who has identified his former testimony, "Is that testimony true or false?" not allowed; unsound). The pedantic error of such rulings can be seen by comparing the marvellously successful use of such a cross-examination by Sir Charles Russell with Pigott in the Parnell Case (quoted *post*, § 1260).

§ 961. Receipt of Money, etc.; Payment of Expenses.

[*Note* 1; *add:*]

1904, Chicago City R. Co. *v.* Handy, 208 Ill. 81, 69 N. E. 917 (that an expert medical witness is to receive more than the statutory fee, and that he is frequently employed as such by one of the litigants, allowable).

[*Note* 1 — *continued.*]

The following ruling perhaps belongs here: 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 (that the witness was interested as a medical man in similar suits against other corporations, excluded).

[*Note* 2; *add:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (whether he paid his own travel expenses, held properly disallowed).
1904, Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17 (but payment of charges already due is not admissible).
1906, Kansas C. S. R. Co. *v.* Belknap, — Ark. — , 98 S. W. 363 (that the witnesses of defendant received free transportation, allowed).
1905, Union Pacific R. Co. *v.* Field, 137 Fed. 14, 16, 69 C. C. A. 536 (that a witness for the defendant corporation "came to the trial upon passes . . . was not a proper subject of comment"; unsound).
1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (payment of expenses, etc., may be inquired into).

§ 963. Habitual Falsities; Sundry Corrupt Conduct.

[*Note* 1; *add:*]

1905, Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918 (that the witness employed a person to negotiate with a judge for a corrupt decision in a prior stage of the cause, allowed).

§ 966. Interest in Civil Cases; General Principle.

[*Note* 1, col. 1; *add:*]

1906, Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845.
1904, Conner *v.* Missouri P. R. Co., 181 Mo. 397, 81 S. W. 145.

[*Note* 1, col. 2, l. 3 from below; *add:*]

1904, Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494 (form of instruction, considered).
1905, Denver C. T. Co. *v.* Norton, 141 Fed. 599, 608, C. C. A. (party-opponent; an instruction may be demanded).

§ 967. Accomplices and Co-Indictees.

[*Note* 2; *add:*]

1906, Hayes *v.* State, 126 Ga. 95, 54 S. E. 809.
1905, Terr. *v.* Boyd, 16 Haw. 660 (indictment for the same offence, admitted).
1904, State *v.* Rosa, 71 N. J. L. 316, 58 Atl. 1010 (that the witness was arrested on the same charge, admitted on cross-examination).

[*Note* 3, par. 1; *add:*]

1905, Stevens *v.* People, 215 Ill. 593, 74 N. E. 786 ("Do you expect to be no further prosecuted in this matter?", allowed, whether or not his expectation was justified by any binding promise).

[*Note* 4; *add* under *Accord:*]

1904, Wilkerson *v.* State, 140 Ala. 165, 37 So. 265 (indictment for the same illegal sale of liquor; admitted).

§ 968. Accused in a Criminal Case.

[*Note* 1; *add:*]

1904, People *v.* Wells, 145 Cal. 138, 78 Pac. 470.
1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681.
1904, Schultz *v.* People, 210 Ill. 196, 71 N. E. 405 (form of instruction determined; prior rulings collected).
1895, Reagan *v.* U. S., 157 U. S. 301, 305, 15 Sup. 610.
1904, Alexis *v.* U. S., 129 Fed. 60, 63 C. C. A. 502.
1905, Schutz *v.* State, 125 Wis. 452, 104 N. W. 90.

§ 969. Bonds, Rewards, Insurance, etc., as affecting Interest.

[*Note* 1; *add:*]

1903, Terr. *v.* Sing Kee, 14 Haw. 586, 590 (informer).

[*Note* 2; *add:*]

1905, Borck *v.* State, — Ala. — , 39 So, 580 (buyer of liquor illegally sold).
1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807.

[*Note* 3; *add:*]

1903, Southern R. Co. *v.* Bunnell, 138 Ala. 247, 36 So. 380 (railroad passenger's ejection; whether the ticket-agent testifying for the defendant, was under indemnity-agreement for the case, allowed).

[*Note* 5; *add:*]

1902, Fuller Co. *v.* Darragh, 101 Ill. App. 664 (that an insurance company is defending a case, held improper to be asserted to the jury).
1906, Hamner *v.* Janowitz, — Ia. — , 108 N. W. 109 (defendant's insurance against employer's liability, not admitted).
1904, Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202 (that defendant was insured, excluded).
1904, Edwards *v.* Burke, 36 id. 107, 78 Pac. 610 (principle affirmed).
1905, Lowsit *v.* Seattle L. Co., 38 id. 290, 80 Pac. 431 (Iverson *v.* McDonald followed).
1905, Stratton *v.* Nichols L. Co., 39 id. 323, 81 Pac. 831 (similar).
1905, Dossett *v.* St. Paul & T. L. Co., 40 id. 276, 82 Pac. 273 (similar).

[*Note* 6; *add:*]

1905, Teston *v.* State, 50 Fla. 137, 138, 39 So. 787 (embezzlement from a labor union; witnesses being members of the union were allowed to be questioned as to the bonding company's non-liability for indemnity unless upon conviction).
1906, Howard *v.* Beldenville L. Co., — Wis. — , 108 N. W. 48 (proper mode of procedure in questioning jurors as to an interest in a casualty company, considered).

Yet a *witness* not a party may be affected by his interest in an insurance company:
1906, Capital C. Co. *v.* Holtzman, 27 D. C. App. 125, 138.
1902, Hedlun *v.* Holy Terror M. Co., — S. D. — , 92 N. W. 31 (cited *ante*, § 949, n. 4).

Compare the cases cited *ante*, § 949.

[*Note* 7; *add:*]

1905, State *v.* Jackson, 128 Ia. 543, 105 N. W. 51 (prosecuting witness in false pretences; repudiating the prior intimation in State *v.* Rivers, 58 id. 102, that the motives of interest or bias thus created could be considered as evidence, not merely as to the credibility of the witness, but also as to the guilt of the accused).

§ 980. Record of Judgment of Conviction.

[*Note* 5; *add:*]

Of course the rule about asking the witness before proving a self-contradiction (*post*, § 1025) has no application here.

§ 983. Cross-Examination; Relevant Questions excluded, etc.

[*Text*, p. 1112, l. 1 of the quotation; *insert:*]

in *R.* v. *Kennedy* (Kilkenny; Mongan's Celebrated Trials in Ireland, p. 28).

[*Note* 3; *add:*]

and the citations *post*, § 1810.

§ 986. History and State of the Law in England and Canada.

[*Note* 11; *add:*]

Canada: B. C.: St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act, Amendment Act, § 4 (repeals St. 1902, c. 22, § 6).
Newf.: St. 1904, c. 3, Rules of Court 32, par. 23 (like Eng. Ord. 36).
Ont.: 1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (rape on a woman who had been alone in company with B.; questions to the woman and to B. as to having intercourse at the time of being in company were disallowed on the trial; held, on appeal, that the former question was proper to be put, but the witness was "not generally compellable to answer," though "to some extent" the trial Court's discretion controls, citing R. *v.* Laliberté, *supra;* and that the latter question was additionally proper as evidencing bias, on the principle of § 949, *ante*, and an answer ought to have been compelled).
Yukon: Consol. Ord. 1902, c. 17, Ord. XXII, R. 259 (like Eng. Ord. 36, *supra*).

[*Note* 16; *add,* under *Canada:*]

1906, R. *v.* Finnessey, 11 Ont. L. R. 338 (cited *supra*, n. 11).

[*Note* 18; *add:*]

Yukon: St. 1904, c. 5, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

[*Note* 19; *add:*]

Compare the cases cited *post*, § 2277, construing this statute.

§ 987. State of the Law in the Various Jurisdictions of the United States.

[*Note* 1; *add:*]

Alabama: Par. (2): 1904, Ross *v.* State, 139 Ala. 144, 36 So. 718 (concealed weapon; cross-examination to other misconduct, allowed).
Par. (4): Line 6, for "ib." read "129 id."; and add the following: 1904. Ross *v.* State, 139 Ala. 144, 36 So. 718 (indictment for assault to murder, excluded).

[*Note* 1 — *continued.*]

1904, Gordon *v.* State, 140 Ala. 29, 36 So. 1009 (conviction for throwing stones into a railroad train, excluded, under Code 1896, § 1795; the statute was not intended to include crimes not disqualifying at common law).
1904, Wilkerson *v.* State, 140 Ala. 165, 37 So. 265 (indictment for public drunkenness, excluded).
1906, Williams *v.* State, 144 Ala. 14, 40 So. 405 (only infamous crimes are admissible; hence, "Were you ever convicted of a crime?" is too general).
1906, Fuller *v.* State, — Ala. — , 41 So. 774 (conviction for a statutory felony is admissble to impeach; distioguishing prior rulings as to misdemeanors, and admitting that they contain "expressions calculated to mislead").
1907, Mitchell *v.* State, — Ala. — , 42 So. 1014 (conviction for gaming, not admitted).
Alaska: Par. (4): 1906, Ball *v.* U. S., 147 Fed. 32, 38, C. C. A. (under C. C. P. 1900, § 669, the conviction may be of a misdemeanor, and may be of a court in another jurisdiction).
Arkansas: Par. (1): St. 1905, c. 52 (re-enacts Stats. 1894, § 2959).
1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (rape under age; acts of intercourse of prosecutrix with other men, excluded).
Par. (2): 1905, Little Rock V. & I. Co. *v.* Robinson, 75 Ark. 548, 87 S. W. 1029 (questions as to immoral conduct, held not improperly excluded in the trial Court's discretion).
1906, Benton *v.* State, — Ark. — , 94 S. W. 688 (certain questions as to past domestic life; some held proper, others not).
Par. (4): 1905, Smith *v.* State, 74 Ark. 397, 85 S. W. 1123 (conviction of petit larceny, admitted, against a defendant-witness).
California: Par. (4): 1904, People *v.* White, 142 Cal. 292, 75 Pac. 828 (the conviction must be for a felony not a misdemeanor).
1905, People *v.* Kelly, 146 Cal. 119, 79 Pac. 846 (conviction of five different felonies shown).
1906, People *v.* Gray, 148 Cal. 507, 83 Pac. 707 (arrest for drunkenness, excluded).
1906, People *v.* Soeder, — Cal. — , 87 Pac. 1016 (felony; here against a defendant).
Connecticut: Par. (2): 1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (bastardy; questions to the defendant, a clergyman, as to prior charges of immorality, dismissal from employment, etc., in other communities, held to be allowable in the trial Court's discretion; yet "most of the foregoing questions . . . should have been properly excluded, because, if proved or admitted, they had no legitimate tendency to affect his character for truthfulness").
Delaware: Par. (4): 1905, State *v.* Powell, — Del. — , 61 Atl. 966 (conviction for carrying a concealed weapon, excluded).
Florida: Par. (2): 1906, Baker *v.* State, — Fla. — , 40 So. 673 (murder; a witness for the State, not allowed to be cross-examined as to being the mother of bastards; conviction of crime and character for veracity are alone available).
Georgia: Par. (1): 1904, Black *v.* State, 119 Ga. 746, 47 S. E. 370 (rape; extrinsic testimony to the woman-witness' acts of lewdness with third persons, excluded).
Par. (2): 1906, Allred *v.* State, 126 Ga. 537, 55 S. E. 178 (to a defendant, on cross-examination, whether he "had ever bought any spurious money," not allowed, under Code 1895, § 1027).
Idaho: Par. (1): 1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788 (statute not applicable to misconduct affecting the witness' animus against the defendant).
Illinois: Par. (2): 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (personal injuries; cross-examination as to domestic misconduct, excluded, as not concerning "the truth or falsity of his testimony").
Par. (4): 1904, McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693 (Rev. St. 1874, c. 38, § 279, as amended in 1899 to exempt from the civil consequences of infamy a person sentenced to the State Reformatory, does not affect the admissibility of a conviction under ib. § 426, where the sentence on such conviction is to the Reformatory).
Indiana: Par. (1). 1904, Dunn *v.* State, 162 Ind. 174, 70 N. E. 521 (murder; testimony to an act of adultery with another person, eight years before, contradicting the defendant's denial of it on his cross-examination, held improper).
1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (excluded).
P. 1129, col. 2, l. 6, add: "and bastardy (§ 399)."
Indian Territory: Par. (2): 1906, McCoy *v.* U. S., — Ind. Terr. — , 98 S. W. 144 (to the defendant, "How many larceny cases have there been here against you?" allowed; Oxier *v.* U. S. followed, but the various rules are not carefully discriminated).
Kansas: Par. (4): 1904, State *v.* Coover, 69 Kan. 382, 76 Pac. 845 (questions to defendant as to prior arrest and sentence to the reform school, allowed).
Kentucky: Paragraphs 2, 3, 4: 1904, Mullins *v.* Com., — Ky. — , 79 S. W. 258 (prior arrest, excluded; no authority cited).
1904, Seaborn *v.* Com., — Ky. — , 80 S. W. 223 (obscure).
1906, Henderson *v.* Com., — Ky. — , 91 S. W. 1141 (conviction for forgery, admitted).
1906, Britton *v.* Com., — Ky. — , 96 S. W. 556 (murder; cross-examination of the accused as to killing a man in Virginia and being indicted for it, excluded, on the ground that it is "not competent to show any particular wrongful act that the witness has been guilty of, or that he has been indicted for an offence," unless by showing a conviction therefor; this ruling seems to follow precisely Welch *v.* Com., 111 Ky. 530, *supra*, and to straighten out at last the long tangle in the foregoing rulings; notice that it virtually assimilates the rule to that of the California Code type).
1907, Wells. *v.* Com., —Ky. — , 99, S. W. 218 (conviction misdemeanor, excluded).
1907, Ball *v.* Com., — Ky. — , 99 S. W. 326 (similar).
Louisiana: Par. (2): 1906, State *v.* High, 116 La. 79, 40 So. 538 (murder; cross-examination of a witness for the State as to a seduction, held properly excluded in discretion).
1906, State *v.* Barrett, 117 La. 1086, 42 So. 513 (questions to the defendant-witness, "how often have you been prosecuted before the courts, and for what offences," held improper, in asking for mere prosecutions not convictions; prior cases explained; Breaux, C. J., diss.).
Par. (4): 1906, State *v.* Griggsby, 117 La. 1046, 42 So. 497 (conviction in a city court, admitted, here against a defendant-witness).

[*Note* 1 — *continued.*]

Maryland: Par. (1): 1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317 (woman witness in bigamy).
Massachusetts: Par. (2): 1906, Taylor *v.* Schofield, 191 Mass. 1, 77 N. E. 652 (trial Court's discretion controls).
Michigan: Par. (2): 1904, People *v.* Dowell, 136 Mich. 306, 99 N. W. 23 (People *v.* Gotshall, *supra*, followed).
Par. (4): 1906, Lansing *v.* Michigan C. R. Co., — Mich. — , 106 N. W. 692 (disbarment of an attorney for criminal conduct; Dickinson *v.* Dustin, *supra*, explained).
1906, People *v.* DeCamp, — Mich. — , 109 N. W. 1047 ("a crime").
Minnesota: Par. (2): 1905, Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372 (civil arson; questions as to domestic morals, etc., held improperly allowed in the trial Court's discretion).
1905, State *v.* Bryant, — Minn. — , 105 N. W. 974 (liquor sale; cross-examination of the prosecuting witness as to a recent forgery, flight, and arrest, held properly excluded; foregoing cases not cited).
1906, State *v.* Peterson, — Minn. — , 108 N. W. 6 (liquor-selling; trial Court's discretion confirmed).
Mississippi: Par. (2): 1904, Ivy *v.* State, 84 Miss. 264, 36 So. 265 (murder; cross-examination of the defendant's mistress as to her children by other fathers, held improper).
1907, Starling *v.* State, — Miss. — , 42 So. 798 (to a defendant, whether he had been charged with any other offence, excluded).
Par. (4): 1905, Cook (Dan) *v.* State, 85 Miss. 738, 38 So. 111 (the preposterous ruling is made that convictions of crime to discredit cannot be used "unless the witness had at first denied it"; no authority is or could be cited for this ruling).
1905, Cook (Lon) *v.* State, 85 Miss. 738, 38 So. 111 (similar to the preceding).
Missouri: Par. (1): 1905, Wright *v.* Kansas City, 187 Mo. 678, 86 S. W. 452.
Par. (2): 1907, State *v.* Long, — Mo. — , 100 S. W. 587 (cross-examination to the fact of a detestable crime, allowed in the trial Court's discretion).
Par. (4): 1905, State *v.* Heusack, 189 Mo. 295, 88 S. W. 21 (statute applied to allow questions as to a misdemeanor).
1905, State *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (but the question should ask directly for the conviction, and not as to being in the penitentiary, etc.).
1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (compare the rule of § 1270, *post*).
1907, State *v.* Brooks, — Mo. — , 100 S. W. 416 (conviction for manslaughter, admitted against defendant as witness).
Montana: Par. (2): 1904, State *v.* Howard, 30 Mont. 518, 77 Pac. 50 (cross-examination as to being under arrest, allowed on the facts).
1904, State *v.* Rogers, 31 Mont. 1, 77 Pac. 293 (questions as to a plan to commit another crime, excluded).
Nebraska: Par. (2): 1905, Razee *v.* State, — Nebr. — , 103 N. W. 438 (criminal libel; cross-examination of the accused as to domestic relations, etc., held improper; no authority cited).
Nevada: Par. (4): 1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (conviction must be of felony).
1905, State *v.* Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination of a defendant as to convictions of felonies, allowed).
New Jersey: Par. (1): 1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247.
Par. (2): 1905, State *v.* Mount, 72 N. J. L. 365, 61 Atl. 259 (assault and battery; cross-examination of the defendant to prior convictions for assault, allowed).
Par. (3): St. 1906, c. 206, § 6, c. 208, § 5 (privilege abolished for bribery and other offences).
Par. (4): 1906, State *v.* Mount, — N. J. L. — , 64 Atl. 124 (the accused, on a charge of assault, having admitted a prior conviction for assault, further inquiries as to the aggravated nature of the prior assault, and rebuttal testimony contradicting his version of it, held improper).
New York: Par. (1): 1904, People *v.* De Garmo, 179 N. Y. 130, 71 N. E. 736.
Par. (2): 1904, People *v.* De Garmo, 179 N. Y. 130, 71 N. E. 736 (defendant allowed to be cross-examined, on a charge of manslaughter by beating, to other acts of violence).
1906, People *v.* Cascone, 185 N. Y. 317, 78 N. E. 287 (People *v.* Crapo approved, and the rule applied to an accused).
North Carolina: Par. (3): Rev. 1905, § 4407 (in election contests, no witness shall be excused from discovering his qualification to vote, "except as to his conviction for an offence which would disqualify him").
Oklahoma: Par. (2): 1904, Flohr *v.* Terr., 14 Okl. 477, 78 Pac. 565 (larceny; cross-examination of witnesses to adultery, excluded).
1905, Hill *v.* Terr., 15 Okl. 212, 79 Pac. 757 (discretion of the trial Court controls).
Pennsylvania: Par. (2): 1904, Com. *v.* Williams, 209 Pa. 529, 58 Atl. 922 ("Weren't you running a sporting-house?" to a woman, excluded; ignoring Elliott *v.* Bayles, *supra*, and erroneously treating it on the principle of § 924, *ante*).
South Carolina: Par. (2): 1904, Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719 (questions to an unmarried woman as to her children, etc., held properly excluded in the trial Court's discretion).
1906, State *v.* Stukes, 73 S. C. 386, 53 S. E. 643 (murder; cross-examination to the defendant's relations with a woman connected with the case, allowed).
South Dakota: Par. (2): 1904, State *v.* Smith, 18 S. D. 341, 100 N. W. 740 (rape under age; cross-examination of the prosecutrix to prostitution, etc., excluded).
Texas: Par. (4): 1903, Lee *v.* State, 45 Tex. Cr. 51, 73 S. W. 407 (indictments admissible; Henderson, J., diss.).
1907, Fanin *v.* State, — Tex. Cr. — , 100 S. W. 916 (rule of Lee *v.* State recognized, that prior indictments could be used to impeach).
1907, Cecil *v.* State, — Tex. Cr. — , 100 S. W. 390 (former indictment for felony against defendant as witness, admissible).
United States: Par. (2): 1906, Glover *v.* U. S., 147 Fed. 426, C. C. A. ("a mere accusation or arrest," not allowed to be asked about).
1906, Miller *v.* Terr., 149 Fed. 331, 336, — C. C. A. — (whether stolen property had been found in his possession, whether he had associated with persons reputed to be thieves, etc., not allowed).

[*Note* 1 — *continued*.]

Par. (3): U. S. St. 1901, c. 809, Mar. 2, 31 Stat. L. 950 (civilians before a court-martial; privilege recognized).
Vermont: Par. (2): 1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (rape under age; cross-examination of prosecutrix as to prior prostitution, not admitted to affect credit).
Virginia: Par. (2): 1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (whether a collision was caused by a wrong setting of a switch; the switchman having testified that it was properly set, a cross-examination as to having made a similar mistake shortly before, was allowed "to test his accuracy, veracity, or credibility," on the principle of § 979, *ante;* but testimony from another witness would have been excluded).
Washington: Par. (2): 1904, State *v.* Eder, 36 Wash. 482, 78 Pac. 1023 (cross-examination of the defendant's wife to show that he had been confined in the penitentiary, held improper).
1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561 (question as to having been tarred and feathered, held properly excluded).
1906, State *v.* Belknap, — Wash. — , 87 Pac. 934 (seduction; cross-examination of witnesses testifying to other intercourse with the prosecutrix was held to exceed the trial Court's discretion; unsound on the facts).
Par. (4): 1903, State *v.* Champoux, 33 Wash. 339, 74 Pac. 557 (conviction for murder, appealed from and pending, admitted).
Wisconsin: Par. (2): 1903, Meehan *v.* State, 119 Wis. 621, 97 N. W. 173 (assault, question to the prosecuting witness, "whether he ran a sporting-house," excluded).
1905, State *v.* Nergaard, 124 Wis. 414, 102 N. W. 899 (violation of game law; questions to defendant as to prior arrest for a similar offence, held not prejudicial error, as he admitted his conviction therefor; questions as to being under police surveillance, held allowable in discretion).
Par. (4): 1906, Koch *v.* State, 126 Wis. 470, 106 N. W. 531 (arrest and conviction for being drunk and disorderly; question allowed; the statute held to include misdemeanors, but not violations of a city ordinance).

§ 988. Rumors of Particular Misconduct, etc., distinguished.

[*Note* 1; *add:*]

1905, Harrison *v.* State, — Ala. — , 40 So. 57 (defendant's character).
1906, Williams *v.* State, 144 Ala. 14, 40 So. 405 (witness' character).
1904, Long *v.* State, 72 Ark. 427, 81 S. W. 387, *semble.*
1894, People *v.* Gordon, 103 Cal. 573, 37 Pac. 535 (rule stated).
1904, People *v.* Perry, 144 Cal. 748, 78 Pac. 284 (rule applied).
1906, People *v.* Weber, — Cal. — , 86 Pac. 671 (cross-examination as to being told of misconduct, allowed).
1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (where actual character has been testified to, the cross-examination may ask as to actual misconduct).
1906, State *v.* LeBlanc, 116 La. 822, 41 So. 105.
1891, State *v.* Crow, 107 Mo. 345, 17 S. W. 745 (rule applied).
1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.
1905, Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019 (Barton *v.* Morphes, approved).
1903, Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14 (here erroneously allowing proof of the acts, not merely the rumors).

§ 991. Skilled Witness; Evidencing Incapacity, etc.

[*Note* 3; *add:*]

1903, State *v.* Snyder, 67 Kan. 801, 74 Pac. 231 (illegal sale of beer; testing of a witness for the prosecution by his drinking from an offered bottle and then saying whether it was the same as that sold to him, excluded, on the ground of collateral issues).
1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294 (cross-examination of an alienist; Hoag *v.* Wright, *supra*, approved).

§ 995. Memory; Testing the Capacity, etc.

[*Note* 2; *add:*]

In McDermott's Estate, 148 Cal. 43, 82 Pac. 842 (1905) is found the record of a witness whose testimony exhibited Majocchi's striking trait.

[*Note* 3; *add:*]

1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (negligence of a switchman cited *ante*, § 987, n. 1).

§ 1003. Test of Collateralness.

[*Note* 3; *add:*]

1906, State *v.* Arthur, — Ia. — , 109 N. W. 1083 (burglary; B. being one of the persons breaking in, defendant's statement that he did not know B. was allowed to be contradicted).

[*Note* 3 — *continued.*]

1906, Finn *v.* New England T. & T. Co., 101 Me. 279, 64 Atl. 490 (a foreman's attempt to suppress a newspaper account of the accident, held collateral).
1905, McKenzie *v.* Banks, 94 Minn. 496, 103 N. W. 497.
1904, Ferguson *v.* State, — Nebr. — , 100 N. W. 800.

§ 1005. Facts discrediting in Respect to Bias, etc.

[*Note* 3, par. 1; *add:*]

1905, Morris *v.* State, — Ala. — , 39 So. 608.
1906, State *v.* Craft, 117 La. 213, 41 So. 550 (similar to Thomas *v.* David, quoted *supra*).
1905, State *v.* Mahnberg, — N. D. — , 105 N. W. 614.

[*Note* 7; *add:*]

1904, Smith *v.* Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729 (plaintiff not allowed to contradict the defendant's engineer, who testified on cross-examination that the bell had been automatically ringing for several miles, by showing that it did not ring at certain points within that distance; the opinion by Parker, C. J., confuses the issue; Cullen, J., diss.).

A peculiar example of the operation of this principle is seen in the cases cited *ante*, § 228, n. 6, § 231, n. 1, and § 263, especially the last, where a witness has testified to a rumor or repute as causing a party's alleged *belief* or deranged mental state, and then the opponent offers to *disprove the fact* thus alleged to have been rumored or reported; its non-existence makes less probable the alleged report of it, and thus discredits the witness; from the point of view of the present rule, there ought to be no obstacle.

[*Note* 9, l. 1; *add:*]

and the following case: 1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (a Syrian witness having insisted that he could not speak English, and having testified through an interpreter, the fact of his ability to speak and understand it was allowed to be shown to discredit him; sensible opinion by Porter, J., trial judge).

[*Note* 10; *add:*]

But the following exceptional case "proves the rule"; 1906, Gulf C. & S. F. R. Co. *v.* Matthews, — Tex. — , 93 S. W. 1068 (a witness to the whereabouts of the deceased testified that he had told W. about the deceased M., soon after the death; W. was allowed to contradict this, because on the facts if the witness had not mentioned to anybody, on hearing of M.'s death, what he knew about M., it indicated that his testimony was fabricated; good opinion by Williams, J.).

§ 1006. Collateral Questions on Cross-Examination.

[*Text*, p. 1168, par. 1; *add:*]

1904, *James W. Osborne*, Esq., former Assistant District Attorney of New York City, in the *Sunday Magazine*, Nov. 27: "The rule in the case of bias is the familiar one of 'give the witness rope.' In other words, give his bias full swing, and he will reveal it so unmistakably that the truth will come out. In an amusing instance of this kind in Brooklyn the late Charles Patterson revealed the quickness of his perceptions and his salient possession of that ingenuity which every lawyer needs in order to be a good cross-examiner. The case was one for damages, a peddler's cart having been run over by a train and the peddler having been killed. The point at issue was that which has been laid down by the Courts as 'look and listen.' The question was as to whether the peddler, in driving across the track, looked and listened and exercised proper care. A highly respectable farmer testified that he saw the wagon drive upon the track; that he did not see the peddler, who was thus presumably lying back in the cart, asleep or dozing, and that he distinctly and unmistakably heard the engine blow its whistle and ring its bell. He insisted upon this, and although it did not appear to Mr. Patterson that the blowing whistle and ringing bell were true, the evidence could not be shaken. He accordingly asked: 'You came to town with the engineer and fireman of the train, did n't you?' 'Yes.' 'Good fellows, are n't they?' 'Yes.' 'Good friends of yours?' 'Yes.' 'What did they do for you, while in town? Did they take you around?' 'Yes.' 'Where did they take you?' 'To the Eden Musée.' 'You saw all there was to see at the Eden Musée?' 'Yes.' 'Are you sure?' 'Yes.' 'Saw the Chamber of Horrors?' 'Yes.' 'All the curiosities?' 'Yes.' 'Saw the little toy locomotive going around on the track?' 'Yes.' 'Hear its little whistle blow in the darkness?' 'Yes.' 'Hear it ring its little bell?' 'Yes.' 'Plainly?' 'Yes.' 'Now, sir,' said Mr. Patterson, '*there is no little locomotive at the Eden Musée;* it never blew its whistle, and it never rang its bell. You explain to the jury how you can swear to such statements.' The bias of the witness who, Mr. Patterson said, could 'hear bells and whistles anywhere, at any time,' had led him entirely astray, and his testimony, which was strongly biased, was completely discredited."

[*Note* 3; *add* under *Contra:*]

1905, Cook (Dan) *v.* State, 85 Miss. 738, 38 So. 110 (conviction of crime).

§ 1007. Contradicting Answers on the Direct Examination, etc.

[*Note* 3; *add:*]

1905, Louisville & N. R. Co. *v.* Quinn, — Ala. — , 39 So. 756.

The ruling in Brown *v.* State, 142 Ala. 287, 38 So. 268 (1904), that the opponent cannot show error in a *statement of the testimony of an absent witness* not formally introduced nor used is of course sound.

§ 1010. Falsus in Uno; Second Form of Rule.

[*Note* 1, p. 1173; *add:*]

1903, People *v.* Stevens, 141 Cal. 488, 75 Pac. 62 ("distrust").
1906, *Ex parte* Vandiveer, — Cal. App. — , 88 Pac. 993 (distrusted, not necessarily rejected).
1906, Com. *v.* Ieradi, — Pa. — , 64 Atl. 889.

[*Note* 2; *add:*]

1907, Addis *v.* Rushmore, — N. J. L. — , 65 Atl. 1036 (it is "not a mandatory rule of evidence").

§ 1012. Same: Fourth Form of Rule.

[*Note* 1; *add:*]

1906, Chandler *v.* State, 124 Ga. 821, 53 S. E. 91, *semble.*
1905, Titterington *v.* State, — Nebr. — , 106 N. W. 421.
1906, Barber *v.* State, — Nebr. — , 106 N. W. 423.

[*Note* 2; *add:*]

1905, Little *v.* State, — Ala. — , 39 So. 674.
1905, State *v.* Walo, — Ida. — , 80 Pac. 221.
1904, Chicago & Alton R. Co. *v.* Kelly, 210 Ill. 449, 71 N. E. 355 (but the corroborating evidence need not be believed by the jury, in order to make the rule applicable; this is a good instance of the jargon of futile intricacies to which this rule gives rise).
1904, Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908 (the corroboration must be by "credible," not merely "competent" witnesses; a vain quibble).
1906, United Breweries Co. *v.* O'Donnell, 221 Ill. 334, 77 N. E. 547.
1906, State *v.* Fuller, — Mont. — , 85 Pac. 369.
1904, Suckow *v.* State, 122 Wis. 156, 99 N. W. 440.

§ 1013. Same: There must be a Conscious Falsehood.

[*Note* 1; *add:*]

1906, Hamilton *v.* State, — Ala. — , 41 So. 940.
1904, Lee *v.* State, 72 Ark. 436, 81 S. W. 385 ("wilfully").
1904, Glenn *v.* Augusta R. & E. Co., 121 Ga. 80, 48 S. E. 684.
1905, Maguire *v.* People, 219 Ill. 16, 76 N. E. 67 ("wilfully and corruptly").
1907, Pittsburg C. C. & St. L. R. Co. *v.* Haislup, — Ind. — , 79 N. E. 1035 ("knowingly and intentionally").
1905, Sardis & D. R. Co. *v.* McCoy, 85 Miss. 391, 37 So. 706 ("wilfully, knowingly, and corruptly").
1903, Nielson *v.* Cedar Co., 70 Nebr. 637, 97 N. W. 826 ("knowingly and wilfully").
1904, Nielson *v.* Cedar Co., — Nebr. — , 98 N. W. 1090.
1905, State *v.* Johnson, — N. D. — , 103 N. W. 565.

[*Note* 2; *add:*]

1905, Powell *v.* State, 122 Ga. 571, 50 S. E. 369 ("successfully impeached").
1906, Georgia R. & B. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76 ("successfully impeached" suffices; this is ruled under the authority of Code 1895, § 5295, quoted *ante*, § 1008, n. 1, which does not justify it).

Of course it is improper to charge that self-contradictions may *per se* create a reasonable doubt of guilt in a criminal case:
1904, Brown *v.* State, 142 Ala. 287, 38 So. 268.

[*Note* 3; *add:*]

1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (but wilful and knowing "exaggeration" equally involves the rule).
1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 (yet the rule does not apply to a witness who has "knowingly belittled any material fact").
1906, Chicago City R. Co. *v.* Ryan, 225 Ill. 287, 80 N. E. 116.
1907 Godair *v.* Ham Nat'l Bank, 225 Ill. 572, 80 N. E. 407.

§ 1014. Same: Falsehood must be on a Material Point.

[*Note* 1; *add:*]

1904, Doyle *v.* Burns, 123 Ia. 488, 99 N. W. 195.
1905, Boykin *v.* State, 86 Miss. 481, 38 So. 725.

It is not necessary that the lie should be "palpable" to the jury: 1906, Chicago C. R. Co *v.* Shaw, 220 Ill. 532, 77 N. E. 139; this is another example of the wretched and wasteful sophistry to which the rule leads.

§ 1015. Same: Time of the Falsehood, etc.

[*Note* 1; *add,* in a new paragraph:]

Whether an *instruction* on this principle of *falsus in uno* may be demanded, is considered in Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464 (1905).

§ 1018. Self-Contradictions; not admitted as Substantive Testimony.

[*Note* 2; *add:*]

1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820.
1904, Fletcher *v.* Com., — Ky. — , 83 S. W. 588.
1905, Whitt *v.* Com. — Ky. — , 84 S. W. 340.
1904, McDonald *v.* N. Y. C. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55.
1905, Donaldson *v.* N. Y. N. H. & H. R. Co., 188 Mass. 484, 74 N. E. 915.
1904, People *v.* Miner, 138 Mich. 290, 101 N. W. 536.
1905, Simms *v.* Forbes, 86 Miss. 412, 38 So. 546.

It is this principle which so much affects Courts in reaching the rule forbidding *impeachment of one's own witness by self-contradiction* (*ante,* § 904).

§ 1021. Two Classes of Facts not Collateral; (1) Facts Relevant, etc.

[*Note* 1; *add:*]

Ark. St. 1905, c. 52 (cited *ante,* § 923, ignores this limitation).
1905, Western Union O. Co. *v.* Newlove, 145 Cal. 772, 79 Pac. 542 (boundary).
1906, Swygart *v.* Willard, — Ind. — , 76 N. E. 755 (intoxication of testator).
1907, State *v.* Sweeny, — Kan. — , 88 Pac. 1078 (rule of Attorney-General *v.* Hitchcock applied).
1905, State *v.* Rogers, 115 La. 164, 38 So. 952.
1905, Robinson *v.* Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190 (motorman's conduct).
1906, American Woolen Co. *v.* Boston & M. R. Co., 190 Mass. 152, 76 N. E. 658 (records of a railroad).
1904, People *v.* Row, 135 Mich. 505, 98 N. W. 13 (rape).
1905, Davis *v.* State, 85 Miss. 416, 37 So. 1018 (here an over-strict ruling).
1905, Bell *v.* State, — Miss. — , 38 So. 795 ("Would the cross-examining party be allowed to prove it as a part or in support of his case?").
1905, Scott *v.* State, — Miss. — , 39 So. 1012.
1904, Ferguson *v.* State, — Nebr. — . 100 N. W. 800 (approving the last two Nebraska cases, but not noticing their difference).
1905, Dillard *v.* U. S., 141 Fed. 303, 310, — C. C. A. — (rule of Attorney-General *v.* Hitchcock applied).

§ 1022. Same: (2) Facts Discrediting the Witness, etc.

[*Note* 1; *add:*]

1877, Fincher *v.* State, 58 Ala. 215, 219 (bias; admitted).
1904, People *v.* Row, 135 Mich. 505, 98 N. W. 13 (attempt to persuade persons not to go surety for defendant; allowed).
1905, Creeping Bear *v.* State, 113 Tenn. 322, 87 S. W. 653 (here the witness had asked people not to sign a pardon for the defendant).

§ 1023. Cross-Examination to Self-Contradiction, etc.

[*Note* 1; *add:*]

1905, Starke *v.* State, 49 Fla. 41, 37 So. 850.
1904, Illinois Steel Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399.

Compare the examples cited *ante,* § 1006, n. 2.

§ 1028. Preliminary Warning; State of the Law in Various Jurisdictions.

[*Note* 1; *add:*]

England: St. 1854, c. 125, § 22 (like the last half of ib. § 23, *infra,* for adverse witnesses).
Yukon: St. 1904, c. 5 § 41.
U. S.: 1905, Villineuve *v.* Manchester St. R. Co., 73 N. H. 250, 60 Atl. 748 (same as Titus *v.* Ash).

[*Note* 1 — *continued.*]

1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (former testimony excluded, for lack of the inquiry to the witness).
1903, Brown *v.* Gillett, 33 Wash. 264, 74 Pac. 386 (rule adopted).

§ 1029. Preliminary Question must be Specific, etc.

[*Note* 1; *add:*]

1904, Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 698.
1907, Clinton *v.* State, — Fla. — , 43 So. 312.
1904, Stancliff *v.* U. S., 5 Ind. T. 486, 82 S. W. 882 ("time, place, and other surroundings").
1903, Barton *v.* Shull, 70 Nebr. 324, 97 N. W. 292.
1904, State *v.* Gray, 43 Or. 446, 74 Pac. 927.
1905, State *v.* Strodemier, 40 Wash. 608, 82 Pac. 915 (here the Court went to the other extreme, and rebuked a prosecuting attorney because in laying the foundation for impeachment of the defendant by his former testimony he asked the stenographer for the testimony "at the trial of the State of Washington *v.* Henry Stroudemier;" this is finical; the Court might have tenderly suppressed all reference to the indictment in the present case, so as to prevent the unfortunate accused from being prejudiced by the grand jury's opinion of him).
1904, Wysocki *v.* Wisconsin L. I. & C. Co., 121 Wis. 96, 98 N. W. 950.

§ 1031. Testimony of Absent or Deceased Witness; (1) Depositions.

[*Note* 1; *add:*]

1906, Chany *v.* Hotchkiss, — Conn. — , 63 Atl. 947, *semble* (the trial Court has discretion; the question not indispensable where there is no danger of surprise).
1903, Brown *v.* Gillett, 33 Wash. 264, 74 Pac. 386 (deposition; self-contradiction not admissible without asking).

§ 1032. Same: (2) Testimony at a Former Trial.

[*Note* 1; *add:*]

1907, People *v.* Peck, — Mich. — , 110 N. W. 495 (deceased witness' testimony at a former trial; rule enforced).
1906, Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967 (Mattox *v.* U. S., *infra*, followed).
1900, Ely Walker D. G. Co. *v.* Mansur, 87 Mo. App. 105 (question not indispensable, in impeaching former testimony preserved in a bill of exceptions made admissible by Rev. St. 1899, § 3149, cited *post*, § 1668, n. 2; careful opinion by Goode, J.).
1905, Omaha St. R. Co. *v.* Boesen, — Nebr. — , 105 N. W. 303 (testimony at a second trial offered on the sixth trial; the testimony at the first trial, excluded, for lack of asking at the second trial).

§ 1033. Same: (3) Dying Declarations; (4) Attesting Witness, etc.

[*Note* 1; *add*, under *Accord:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259.
1906, State *v.* Fleetwood, — Del. — , 65 Atl. 772.
1907, State *v.* Uzzo, — Del. — , 65 Atl. 775.
1904, State *v.* Charles, 111 La, 933, 36 So. 29.
1906, Arnwine *v.* State, — Tex. Cr. — , 96 S. W. 4.
1906, McCorquodale *v.* State, — Tex. Cr. — , 98 S. W. 879 (excluded on the facts).
1906, State *v.* Mayo, 42 Wash. 540, 85 Pac. 251.

[*Note* 3, l. 1:]

For "2 Johns." read "2 Hill."

§ 1034. Same: (5) Testimony admitted by Stipulation, etc.

[*Note* 1; *add*, under *Accord:*]

1878, State *v.* Miller, 67 Mo. 604, 608 (under statute).
1904, Nagel *v.* St. Louis T. Co., 104 Mo. App. 438, 79 S. W. 502.

[*Note* 1; *add*, under *Contra:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259.
1905, Funderburk *v.* State, — Ala. — , 39 So. 672.

§ 1036. Recall for Putting the Question, etc.

[*Note* 1, par. 1, col. 1; *add:*]

1904, Vann *v.* State, 140 Ala. 122, 37 So. 158.
1906, Hammond *v.* State, — Ala. — , 41 So. 761.

[*Note* 1 — *continued.*]

1906, Pitman *v.* State, — Ala. — , 42 So. 993.
1905, United States Wringer Co. *v.* Cooney, 214 Ill. 520, 73 N. E. 803.
1907, Hirsch & S. I. & R. Co. *v.* Coleman, — Ill. — , 81 N. E. 21.
1905, Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

[*Text,* par. 2); at the end, *add* a new note 2:]

[2] But of course the *oral* asking is not necessary where the contradictory statement is in a *writing shown to the witness* as required by the rule in The Queen's Case (*post,* § 1259): 1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565.

§ 1037. Contradiction admissible, no matter what the Answer, etc.

[*Text,* p. 1024, l. 2:]

After "does," insert "not."

[*Note* 3; *add,* under *Accord:*]

1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (here the witness said "he might have" made the statement).

[*Note* 4; in l. 12, *add:*]

1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565, *semble.*
1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (rule applied).
1907, Rice *v.* State, — Tex. Cr. — , 100 S. W. 949.

Moreover, the cross-examiner may *continue the probing* (if he cares to risk it) by further asking, "Is that former statement true or false?"; compare Sir Charles Russell's cross-examination of Pigott in the Parnell Case, quoted *post,* § 1260, and the cases cited *ante,* § 959, n. 1.

§ 1038. Assertion to be Contradicted must be Independent, etc.

[*Note* 2, l. 5; *add:*]

1905, Bell *v.* State, — Miss. — , 38 So. 795.

§ 1039. Preliminary Question not necessary, etc.

[*Note* 4; *add:*]

Of course the rule has also no application to proof of error by *contradiction* through other witnesses (*ante,* § 1006, n. 3); nor to proof of bad character by a *record of conviction for crime* (*ante,* § 980).

§ 1040. Tenor and Form of Inconsistent Statements, etc.

[*Note* 2; *add:*]

1905, Cox *v.* State, 124 Ga. 95, 52 S. E. 150 (assault).
1905, State *v.* Rogers, 115 La. 164, 38 So. 952 (letter excluded, on the facts).
1907, Blickley *v.* Luce, — Mich. — , 111 N. W. 752 (action against a landlord for loss of goods in a building which collapsed and then burned; the plaintiff's suit against the insurer claiming loss by fire, not admitted as inconsistent).
1906, Rossenbach *v.* Supreme Court, 184 N. Y. 92, 76 N. E. 1085 (insured's intoxication).

[*Note* 3; *add:*]

1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (defendant's own affidavit for a continuance, admitted).
1905, Glasgow *v.* Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915 (deposition not certified nor filed, but signed).

[*Note* 3, l. 4; insert:]

see the cases cited *ante,* § 278, n. 3 (false affidavits by the accused), and *post,* § 1075, n. 2 (depositions used).

[*Note* 9; *add:*]

Other cases are noted *post,* § 1041, n. 3.

§ 1041. Opinion, as Inconsistent.

[*Note* 2; *add:*]

1904, Jordan *v.* State, 120 Ga. 864, 48 S. E. 352 (seduction; a witness to lewd conduct of the prosecutrix impeached by expressions of belief in her chastity).
1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013 (murder; a witness for the defendant having testified to seeing

[*Note* 2 — *continued.*]

a part of the difficulty, it was held improper to admit his statement that he had "seen the killing of M., and that it was as cold-blooded as you ever saw"; this is indeed bigotry in favor of technicality).
1905, State *v.* Matheson, 130 Ia. 440, 103 N. W. 137 (the defendant's father, having testified that he, though present, did not see the defendant use his pistol, allowed to be impeached by a statement that the boy "has shot the deputy sheriff").
1903, Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196 (negligence of an automobile; the driver's statement that he considered himself responsible, admitted).
1905, Jacobs *v.* Boston El. R. Co., 188 Mass. 245, 74 N. E. 349 (a paper bearing the alleged signature of the witness, excluded; the reason for the ruling is unascertainable from the opinion).
1906, Cotton *v.* Boston El. R. Co., 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the petitioner's offer to sell at a price exceeding the value as testified to by him, admitted).
1907, Gleason *v.* Daly, — Mass. — , 80 N. E. 487 (a witness present but not attesting a will; his statement "that it was a shame to make that man make a will, they might as well have a dead man," held not improperly excluded by the trial Court; the opinion sails rather close to the wind, in order to avoid overthrowing the trial Court's ruling).
1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 ("Little did I think I would have married a murderer," admitted against the defendant's wife).
1904, Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490 (witness to the value of his own property).
1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (defendant's daughter, not allowed to be impeached by the statement "I believe that my father killed T.").
1905, Kirk *v.* State, — Tex. Cr. — , 89 S. W. 1067 ("I tried to keep K. from killing him," etc., excluded).
1905, Coolidge *v.* Ayers, 77 Vt. 448, 61 Atl. 40 (failure to assert a fact in former testimony, admitted).

[*Note* 3; *add.*]

1901, O'Regan *v.* Trench, L. R. 1 Ire. 274, 287, 297 (value of land; inconsistent statements admitted).

§ 1042. Silence, Omissions, or Negative Statements, etc.

[*Note* 2; *add.*]

1902, R. *v.* Higgins, 35 N. Br. 18, 24 (accused's silence, until his trial, as to G. being the real murderer, admissible against him; good opinion by Tuck, C. J.).
1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 ("Have you testified to material facts here to-day that you did not testify to before the coroner's jury?", excluded; this is unsound).
1906, Larrance *v.* People, 222 Ill. 155, 78 N. E. 50 (failure to mention a fact in testimony at an inquest; not admitted, unless on a showing that he was asked on that point or asked for all relevant facts).
1905, Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694 (witness' failure to deny a statement of R. in his presence, not admitted, there being on the facts no duty to speak).
1904, State *v.* Rosa, 71 N. J. L. 316, 58 Atl. 1010 (omitting to state a material circumstance in former testimony, admitted).
1906, Green *v.* Dodge, — Vt. — , 64 Atl. 499 (former failure to dispute the amount of rent, admitted).

§ 1043. Silence, etc., as constituting the Testimony to be Impeached.

[*Note* 1; *add.*]

1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101 (rule approved).
1905, People *v.* Cook, 148 id. 334, 83 Pac. 43 (rule affirmed).
1903, Dunk *v.* State, 84 Miss. 452, 36 So. 609 (following, but misconceiving, the ruling in Williams *v.* State, Miss., quoted *ante*, § 1038).
1907, Ozark *v.* State, — Tex. Cr. — , 100 S. W. 927 (prior affirmative statements by the prosecution's witness, not allowed to be proved by the prosecution where the witness had failed to testify to that effect).

Where the witness *now expressly denies* a fact, on direct examination, *contrary* to the expectation of the party calling, the principle of *impeaching one's own witness* by showing a former contrary assertion becomes involved (*ante*, §§ 905, 1018, n. 2).

§ 1044. Explaining away the Inconsistency; in general.

[*Note* 1; *add.*]

1903, People *v.* Glover, 141 Cal. 233, 74 Pac. 745 (explaining that the former statement was not true).
1904, Spearman *v.* Sanders, 121 Ga. 468, 49 S. E. 296.
1907, Hirsch & S. I. & R. Co. *v.* Coleman, — Ill. — , 81 N. E. 21.
1904, Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494 (affidavits).
1906, Hoggan *v.* Cahoon, — Utah — , 87 Pac. 164 (reasons for the inconsistent statements).

[*Note* 1; *add*, at the end:]

For the use of *prior consistent statements*, to corroborate a witness who has been impeached by an inconsistent failure to speak on a former occasion, see *post*, § 1129.

§ 1045. Putting in the Whole of the Contradictory Statement.

[*Note* 2; *add.*]

1906, Hupfer *v.* National Dist. Co., 127 Wis. 306, 106 N. W. 831 (witness allowed to put in parts of his former testimony in explanation; English rule followed).

§ 1048. Nature of Admissions.

[*Note* 4; *add:*]

1905, Castner *v.* Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499 ("substantive evidence").

[*Text*, p. 1218; at the end, *add* a new note 5:]

[5] The oft-repeated warning against the *slight weight* of oral admissions or confessions on account of their liability to misunderstanding or distortion by the witness hearing them, is due to the principle of Completeness, and is considered thereunder (*post*, § 2094, *ante*, § 866).

§ 1049. Admissions, distinguished, etc.; Death not Necessary.

[*Note* 2; *add:*]

1905, Stewart *v.* Doak Bros., 58 W. Va. 172, 52 S. E. 95.

§ 1051. Admissions, distinguished, etc.; Prior Warning not Necessary.

[*Note* 1, par. 1; *add*, under *Accord:*]

1906, State *v.* Allen, — Mont. — , 87 Pac. 177.
1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838.
1907, Southern Bank *v.* Nichols, — Mo. — , 100 S. W. 613.
1905, Coolidge *v.* Ayers, 77 Vt. 448, 61 Atl. 40.
1905, State *v.* Strodemeier, 40 Wash. 608, 82 Pac. 915.

[*Note* 2; *add:*]

1906, Carey *v.* Nissle, 145 Mich. 383, 108 N. W. 733 (vendor testifying).

[*Note* 3, l. 5; *add:*]

1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (a defendant's testimony on a former trial may be read against him as containing admissions, though he does not take the stand now; three judges dissenting, on the principle of § 2272, *post*, citing no authority; the dissent is totally without grounds).

§ 1053. Admissions, etc.; Personal Knowledge, Infancy.

[*Note* 1, par. 1; *add:*]

1906, Stone *v.* Stone, 191 Mass. 371, 77 N. E. 845 (opinion).

[*Note* 2; *add:*]

Contra: 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (this is "suggested").
Compare § 1063, n. 1, *post*, at the end.
For a *guardian's admissions*, see *post*, § 1076.

§ 1055. Admissions as Insufficient, etc.

[*Text*, par. (3); *add* a new note 1:]

[1] For the doctrine that *oral admissions* are to be received with caution, owing to their liability to being misunderstood and misreported, see *post*, § 2094, n. 4.

§ 1056. Admissions, as distinguished from Estoppels, etc.

[*Text*, p. 1225; in the quotation from *Corser* v. *Paul*, l. 1:]

For "31 N. H.," read "41 N. H."

[*Note* 5; *add:*]

1904, Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 Atl. 460.

§ 1058. Admissions not Conclusive, etc.

[*Note* 2; *add:*]

1903, Davis *v.* Davis, 98 Me. 135, 56 Atl. 588 ("No mere admissions *in pais*, however express or formal, are conclusive, unless they operate as an estoppel").
1902, State *v.* Paxton, 65 Nebr. 110, 134, 90 N. W. 983 (mistake of law may be shown).
1904, Wesnieski *v.* Vanek, — Nebr. — , 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, not conclusive).
1906, Com. *v.* Monongahela Bridge Co., — Pa. — , 64 Atl. 1058 (pleadings in another suit; cited *post*, § 1066, n. 2).
1906, Mullins *v.* Shrewsbury, — W. Va. — , 55 S. E. 736 (pleading in another suit).

[*Note* 4; *add:*]

1906, State *v.* Morin, — Me. — , 66 Atl. 650 (liquor-nuisance; why the defendant took out a Federal license, allowed to be explained).
1905, Chamberlain *v.* Iba, 181 N. Y. 486, 74 N. E. 481 (meaning of a letter, explained).

§ 1060. Implied Admissions; Sundry Instances.

1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (defendant's affidavit for a continuance, used as an admission).
1905, Chadwick *v.* U. S., 141 Fed. 225, 238, — C. C. A. — (conspiracy to defraud; letters written by defendant, though not shown to have been sent, received as admissions).
For admissions *by conduct*, see *ante*, §§ 274–291.

§ 1061. Hypothetical Admissions; Offers to Compromise, etc.; General Principle.

[*Note* 1; *add:*]

Another amusing instance (probably originating in the same anecdote of Mr. Chitty) is found in Mr. Guppy's celebrated proposal "without prejudice," to Esther Summerson ("Bleak House," c. 1X); cited by Mr. John Marshall Gest, of Philadelphia, in his richly interesting essay on The Law and Lawyers of Charles Dickens (44 Amer. Law Reg. N. s. 401; 1905).

[*Note* 3, l. 1; *add:*]

1906, Mackey *v.* Kerwin, 222 Ill. 371, 78 N. E. 817 (though a tender pleaded or paid into court is a conclusive admission, a tender before trial not pleaded nor paid into court is not conclusive).

[*Note* 3, l. 4; *add:*]

Cases cited in Greenleaf on Evidence, I, § 205, and in 18 Harvard Law Review 460.

[*Note* 4; *add:*]

1905, Cecil *v.* Terr., 16 Okl. 197, 82 Pac. 654 (rape under age; offer of settlement by defendant's father, excluded).
Here compare the rulings as to impeaching a witness or a party by his *agent's corrupt offers* (*ante*. §§ 278, 280, 962).

§ 1062. Offer to Compromise; Law in Various Jurisdictions.

[*Note* 1, p. 1235; *add*, under *Alabama:*]

1904, Matthews *v.* Farrell, 140 Ala. 298, 37 So. 325 (performance of contract; admissions of "distinct facts" made in the course of compromise negotiations, received).
1906, Sanders *v.* State, — Ala, — , 41 So. 466 (rape; offer of money to the prosecutrix' father, to "squash" the charge, excluded).
1904, Teasley *v.* Bradley, 120 Ga. 373, 47 S. E. 925 (prior ruling in this case, 110 Ga. *supra*, affirmed).
1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (a subsequent offer to compromise does not exclude prior independent admissions).
1905, Georgia R. & E. Co. *v.* Wallace, 122 Ga. 547, 50 S. E. 478 (plaintiff's wagon and driver were injured by defendant's car; defendant's settlement with the driver for $25, not admitted on his re-direct examination).
1903, Kroetch *v.* Empire M. Co., 9 Ida. 277, 74 Pac. 868 (offer of compromise, excluded).
1905, Castner *v.* Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499 (an admission may be explained by the party's uncommunicated intent to accept a lower amount in compromise).
1905, State *v.* Campbell, 129 Ia. 154, 105 N. W. 395 (defendant's settlement of a former claim against the defendant, excluded).
1904, List's Ex'x *v.* List, — Ky. — , 82 S. W. 446 (rule applied).
1906, Fine *v.* New England T. & T. Co., 101 Me. 279, 64 Atl. 490 (an offer of money, made before any demand for redress by the plaintiff, falls within the rule excluding offers of compromise).
1904, Snow *v.* N. Y. N. H. & H. R. Co., 185 Mass. 321, 70 N. E. 205 (plaintiff's letter of claim, admitted on the facts).
1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (injury to a traction engine and plaintiff at a bridge; the township's settlement with the engine-owner, excluded).
1904, Musselman G. Co. *v.* Casler, 138 Mich. 24, 100 N. W. 997 (offer to settle, excluded).
1905, Misner *v.* Strong, 181 N. Y. 163, 73 N. E. 965 (compromise negotiations admitted; the error, if any, held harmless; two judges diss.).
1906, Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlement with two hundred other abutters, not admitted to rebut the claim of prescription; "the acknowledgment of title in Tom and Dick is not an acknowledgment by implication of title in Harry").
N. C. Rev. 1905, § 860, Code 1883, § 573 (offer to allow judgment, unaccepted, "cannot be given in evidence").
1904, State *v.* Wideman, 68 S. C. 119, 46 S. E. 769 (malicious arson; defendant's statement of willingness to pay, though denying his guilt, admitted).
1906, Nickles *v.* Seaboard A. L. R. Co., 74 S. C. 102, 54 S. E. 255 (railroad wreck; that one of the injured employees, testifying for defendant, had received a sum in settlement from the defendant, admitted, citing

[*Note* 1 — *continued.*]

no authority; Woods, J., diss. on the present ground; but it was really admissible, if at all, on the principle of § 961, *ante*).
1905, Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161 (an offer of settlement of claims, construed as not "an effort to buy peace," and admitted).
1906, Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026 (an expression of willingness to compromise as to a boundary, held ineffective).

§ 1063. Admissions in Pleadings; Attorney's Admissions.

[*Note* 1; *add:*]

1906, Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665 (letter from the plaintiff's attorney stating an assignment of the claim, admissible).
1906, Cadigan *v.* Crabtree, — Mass. — , 78 N. E. 412 (counsel's answer to a question of the judge at a prior hearing of the same issue, excluded).
1905, Hicks *v.* Naomi F. M. Co., 138 N. C. 319, 50 S. E. 703 (certain admissions of the attorney at a former trial, excluded).
1907, Virginia-Carolina C. Co. *v.* Knight, — Va. — , 56 S. E. 725 (letter of an attorney naming the witnesses to be summoned, excluded).

[*Note* 1; *add* a new paragraph 3:]

It is sometimes said that the incompetency of evidence (here in a partition suit) cannot be waived by counsel for *infant* defendants:
1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (no authority cited).
1904, Jesperson *v.* Mech, 213 Ill. 488, 72 N. E. 1194 (no authority cited).
But surely this is erroneous; for if counsel are authorized to act at all, in particular, to raise objections, they are certainly empowered to waive them. Compare § 1053, n. 2, *ante*, and § 1076, n. 7, *post*.

§ 1064. Common-Law Pleadings in the Same Cause, etc.

[*Note* 1; *add:*]

1904, Yates *v.* People, 207 Ill. 316, 69 N. E. 775 (if introduced by the opponent, he is bound by them).
1905, Palmer T. Co. *v.* Eaves, — Ky. — , 85 S. W. 750 (here erroneously said that the opponent's pleadings may be "introduced in evidence").

[*Note* 2, **col. 1**; *add:*]

1905, Fudge *v.* Marquell, 164 Ind. 447, 73 N. E. 895 (contract; confession and avoidance).
1906, Fifer *v.* Clearfield & C. C. Co., 103 Md. 1, 62 Atl. 1122.

[*Note* 2, **at the end**; *add:*]

1905, People *v.* Hoffmann, 142 Mich. 531, 105 N. W. 838 (affidavit for a continuance).

§ 1066. Common-Law Pleadings in Other Causes.

[*Note* 2; *add:*]

1905, De Montague *v.* Bacharach, 187 Mass. 128, 72 N. E. 938 (subsequent pleading of defendant in a second suit concerning the same contract, admitted merely to show that the defendant had pleaded the statute of limitations; Dennie *v.* Williams, *supra*, distinguished).
1906, Com. *v.* Monongahela Bridge Co., — Pa. — , 64 Atl. 909 (quo warranto; the defendant's answer in a prior suit for taxes, admitted, but not as conclusive).
1902, Murmutt *v.* State, — Tex. Cr. App. — , 67 S. W. 508 (plea of guilty on a charge of theft, admitted on a charge of burglary).
U. S. Rev. St. 1878, § 860 (quoted *post*, § 2281, n. 5).
1904, Miller *v.* U. S., 133 Fed. 337, 350, 66 C. C. A. 399 (conspiracy to use the mails to defraud; arguments of the defendant's attorney before a State insurance commissioner when opposing a rival's attempt to do business there, not admitted).

[*Note* 7; *add:*]

1904, Wesnieski *v.* Vanek, — Nebr. — , 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, admitted).

Some instances of the use of a former plea in a *criminal* case used in a subsequent criminal case will be found in the citations *supra*, n. 2, and *post*, § 1067.

§ 1067. Superseded or Amended Pleadings.

[*Note* 1; *add:*]

1907, Pollitz *v.* Wickersham, — Cal. — , 88 Pac. 911 (the California rule as to superseded pleadings held not applicable to exclude a creditor's claim formerly presented by plaintiffs to defendant and differing from the later one relied on at the trial).
1889, Com. *v.* Brown, 150 Mass. 330, 23 N. E. 49 (accused's plea of guilty before the magistrate on complaint, admitted).

[*Note* 1 — *continued.*]

1888, People *v.* Gould, 70 Mich. 240, 38 N. W. 232 (request to the justice to be allowed to withdraw a plea of not guilty, and to plead guilty, admitted).
1904, Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396 (not decided).
1905, Stearns *v.* Kennedy, 94 Minn. 439, 103 N. W. 212 (verified amended answer, admitted).
1906, Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363 (abandoned answers, admitted).
1882, Adams *v.* Utley, 87 N. C. 356 (amended answer, admitted; "as a declaration of the defendant, it can lose none of its vigor because of that circumstance").
1906, Norcum *v.* Savage, 140 N. C. 472, 53 S. E. 289 (parts of an original answer, admitted).
1906, Page *v.* Geiser Mfg. Co., — Okl. — , 87 Pac. 851 (here the original of an amended pleading in the probate court below was erroneously treated as a binding admission; "the plaintiff . . . is bound by the admissions made in his original answer").
1906, Limerick *v.* Lee, — Okl. — , 87 Pac. 859 (the original of an amended petition in a lien proceeding held admissible but not conclusive; this Court has not let its left hand know what its right was inditing, for this and the preceding opinion were written by the same judge, and were filed on the same day, but neither opinion distinguishes or refers to the other; illustrating that a youthful Commonwealth can quickly enough plunge into that mire of legal uncertainty which has been supposed to be an inheritance of the older ones only).
1905, O'Connell *v.* King, 26 R. I. 544, 59 Atl. 926, *semble* (a withdrawn plea of tender may be used as an admission, subject to explanation).
1903, Orange R. M. Co. *v.* McIlhenny, 33 Tex. Civ.App. 592, 77 S. W. 428 (abandoned pleading, admitted).
1903, Texas & P. R. Co. *v.* Goggin, 33 Tex. Civ. App. 667, 77 S. W. 1053 (similar; that it is not signed or sworn to by the party is immaterial).
1905, State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132 (accused's plea of guilty before the justice of the peace, afterwards withdrawn, admitted).
1883, Norris *v.* Cargill, 57 Wis. 251, 256 (original of an amended answer, allowed to be read to the jury as an admission "for what it was worth").
1905, Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234 (original of an amended pleading, unverified and unsigned, admitted).

[*Note* 2; *add:*]

1906, Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665 (attorney's letter, not offered in evidence, but merely placed on file for a motion, not regarded as introduced).

§ 1070. Admissions by Reference to a Third Person.

[*Note* 1; *add:*]

1904, Drake *v.* Holbrook, — Ky. — , 78 S. W. 158 (defendant told F. to tell the witness "anything I wanted to know"; admitted).
1904, Skidmore *v.* Johnson, 70 N. J. L. 674, 57 Atl. 450 (a letter written by the defendant's daughter, which he had directed her to write, "without telling her what to write or being told what she did write," admitted).

§ 1071. Third Person's Statement assented to by Party's Silence.

[*Note* 1; *add:*]

1906, State *v.* Sudduth, — S. C. — , 54 S. E. 1013.

§ 1072. Same; Specific Rules, etc.

[*Note* 1; *add:*]

1906, People *v.* Weber, — Cal. — , 86 Pac. 671 (a mother's statement in the defendant's presence, excluded).
1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574 (rape; the father's repetition to the accused of his daughter's charge against him, admitted, but only "in substance," and not the precise words; this is trivial and unsound; three judges diss.).
1906, Eaton *v.* Com., — Ky. — , 90 S. W. 972 (general rule stated).
1906, Finch *v.* Com., — Ky. — , 92 S. W. 940.
1906, State *v.* Johnson, — N. J. L. — , 63 Atl. 12 (liquor at a polling-place; remarks about it, in defendant's presence, admitted).
1905, State *v.* Major, 70 S. C. 387, 50 S. E. 13 (larceny).
1906, State *v.* Mungeon, — S. D. — , 108 N. W. 552 (incest; the father's silence when charged by the daughter as her child's father, in the presence of a Children's Home agent, admissible).
1905, Phelan *v.* State, 114 Tenn. 483, 88 S. W. 1040 (defendant's silence, just after a homicide, when his wife stated that he had provoked the affray; an over-strict opinion).

[*Note* 3; *add:*]

1904, Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741 (whether the acceptance of goods without protest is an admission that they comply with the contract).
1905, Nichols *v.* New Britain, 77 Conn. 965, 60 Atl. 655 (failure to include an item in a claim of damages; inference allowed).
1904, People *ex rel.* Hillel Lodge *v.* Rose, 207 Ill. 352, 69 N. E. 762 (St. 1901, May 10, applied and held constitutional; the statute makes a corporation's failure to file an annual report *prima facie* evidence of non-user).

Compare the cases cited *ante*, § 284, which are sometimes hardly distinguishable in practice.

[*Note* 4; *add:*]

1905, State *v.* Rosa, 72 N. J. L. 462, 62 Atl. 695 (conversation in a jail).

[*Note* 7; *add:*]

1905, Bloomer *v.* State, 75 Ark. 297, 87 S. W. 438 (statement in the presence of the accused when drunk, excluded).
1906, Parulo *v.* Philadelphia & R. R. Co., 145 Fed. 664, 669, C. C. A. (remarks by a railroad employee to a physician in the presence of the injured plaintiff, excluded).

[*Note* 8; *add:*]

1906, Lumpkin *v.* State, 125 Ga. 24, 53 S. E. 810 (excluded on the facts).

[*Note* 10; *add:*]

1904, Merriweather *v.* Com., 118 Ky. 870, 82 S. W. 592 (Com. *v.* Kennedy, Mass., followed; here the defendant was under arrest, at a railroad depot, in the presence of spectators and fellow-prisoners).
1905, State *v.* Swisher, 186 Mo. 1, 84 S. W. 911 (State *v.* Foley followed).
1905, State *v.* Ethridge, 188 Mo. 352, 87 S. W. 495 (defendant's wife's statements made in his presence to the constable arresting him, excluded).
1906, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (State *v.* Foley followed).
1907, State *v.* Kelleher, — Mo. — , 100 S. W. 470 (statements by the deceased in the presence of the accused under arrest, excluded).
1906, People *v.* Cascone, 185 N. Y. 317, 78 N. E. 287 (deceased's statement, made in the accused's presence, excluded, because on the facts, the parties being Italians but English also being used, it did not appear that the accused understood questions and answers).
1904, Geiger *v.* State, 70 Oh. 400, 71 N. E. 721 (wife-murder; the accused was brought before the chief of police, under arrest, and in his presence his child of four years recounted a story of the murder in answer to questions of the police; his silence was held not to admit this conversation; an over-strict ruling; the Court inappropriately stigmatizes the occasion as a "star-chamber investigation").
1906, State *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013 (dying victims' accusation of the accused in the jail, admitted).

[*Note* 11; *add:*]

1906, Foster *v.* Hobson, — Ia. — , 107 N. W. 1101 (plaintiff's silence during counsel's assertion in another trial, when she was not a party, that her husband owned the farm now claimed by her, held not an admission).
1904, Thayer *v.* Usher, 98 Me. 468, 57 Atl. 839 (statements of U. in a court on the stand, the defendant being present and not denying, excluded).
1907, Hauser *v.* Goodstein, — N. J. L. — , 66 Atl. 932 (defendant's silence during testimony to an agency, excluded).

[*Note* 13; *add:*]

1907, Johnson *v.* State, — Miss. — , 43 So. 435.

§ 1073. Third Person's Document; Unanswered Letter, etc.

[*Note* 1; *add:*]

1906, Rogers *v.* Krumrei, 143 Mich. 15, 106 N. W. 279 (memorandum of a contract, made by one party in the sight of the other, admitted against the latter).
1905, Pacific Export L. Co. *v.* North P. L. Co., 46 Or. 194, 80 Pac. 105 (memorandum dictated by A in B's presence to a stenographer, typewritten, and a copy given to B, received for A as an admission of B).

[*Note* 2, par. 1; *add:*]

1905, Knox *v.* State, 164 Ind. 226, 73 N. E. 255 (letter found on the accused when arrested, admitted).

[*Note* 3, par. 1; *add:*]

1905, Parker *v.* Farmers' F. Ins. Co., 188 Mass. 257, 74 N. E. 286 (insurer's failure to answer a letter of the insured about the agent, held not an admission of its statement; the ruling seems wrong on its facts).
1904, State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20 (demand of money; failure to reply held not to admit the statement of claim; making an arbitrary distinction between written and oral statements).
1905, Klein *v.* East River E. L. Co., 182 N. Y. 27, 74 N. E. 495 (receipt of a letter of the defendant's attorney advising him that certain instruments were valid, held not an admission by the defendant).
1906, Rumble *v.* U. S., 143 Fed. 772, 780, C. C. A. (unanswered letter, admitted on the facts).

[*Note* 4, par. 1; *add:*]

1904, Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. 445 (the objection to the account need not have been made immediately, but within a reasonable time).

[*Note* 4, par. 2; *add,* under (1):]

1906, Little & H. I. Co. *v.* Pigg, — Ky. — , 96 S. W. 455.

[*Note* 5; *add:*]

1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592.
1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (not conclusive).
1906, Tackman *v.* Brotherhood, — Ia. — , 106 N. W. 350 (Supreme Tent *v.* Stensland, — Ill. — , approved).
1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (proofs of death in general).
1886, Goldschmidt *v.* Ins. Co., 102 N. Y. 486, 492 (coroner's verdict, expressly denied in the proofs to be true, excluded).
1896, Hanna *v.* Connecticut M. L. Ins. Co., 150 N. Y. 526, 44 N. E. 1099.
1903, Stevens *v.* Continental C. Co., 12 N. D. 463, 97 N. W. 862 (excluded as against an infant).
1883, Insurance Co. *v.* Schmidt, 40 Oh. St. 112 (physician's answers, based on hearsay, excluded).
1906, Felix *v.* Fidelity M. L. Ins. Co., — Pa. — , 64 Atl. 903 (suicide; physician's statement, etc., in proofs of death, admitted).
1904, Fey *v.* I. O. O. F. Ins. Soc'y, 120 Wis. 358, 98 N. W. 206.

The cases are collected and examined in an article by Professor A. M. Kales, in 6 Columbia Law Review, 509; 1906 ("Declarations of the Insured against the Beneficiary").

In *Kentucky*, the "proofs of loss" are not receivable at all against the beneficiary, except as containing his own statements: 1904, American Benevolent Ass'n *v.* Stough, — Ky. — , 83 S. W. 126.

§ 1074. Books of a Corporation or Partnership.

[*Note* 3, l. 1; *add:*]

Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890 (1905).

[*Note* 4; *add:*]

In Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890 (1905), there is a full collection of rulings; but the opinion of the majority does not appreciate the inherent distinctions of the subject; Brannon, P., diss. on this point, expounds the correct view, illustrating the discrimination above taken.

[*Note* 6; *add:*]

1904, Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499 (a corporation record-book, containing a certificate by a majority of the directors reciting a receipt of assets, excluded, as not a regular entry in a book of account).
1905, Lowry Nat'l Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 396 (not clear).

[*Note* 8, par. 1; *add:*]

1904, French *v.* Millville Mfg. Co., 70 N. J. L. 969, 59 Atl. 214 (question not decided; here the books were used to refresh the secretary's memory).
1905, Harrison *v.* Remington P. Co., 140 Fed. 385, 402, C. C. A. (Carey *v.* Williams, *supra*, followed; but here the defendant's admissions were received, in the shape of certificates signed on the stubs and corresponding assignments written in the certificate book).
1906, State *ex rel.* Biddle *v.* Superior Court, — Wash. — , 87 Pac. 40 (following Turnbull *v.* Payson, U. S.).

[*Note* 8, par. 2; *add:*]

Yukon Consol. Ord. 1902, c. 57, § 53 (like Ont. Rev. St. 1897, c. 191, § 76).
Colo. St. 1903, c. 77 (stock-book to be evidence against a stockholder).

§ 1075. Depositions in another Trial, used, etc.

[*Note* 2, par. 1; *add:*]

1907, Becker *v.* Philadelphia, — Pa. — , 66 Atl. 564 (personal injuries; the testimony of a physician, offered by the plaintiff in a former suit against another defendant, admitted for the present defendant as "adopted and used as her own" by the plaintiff).

So, also, on other principles, a party's *own deposition or affidavit* may be used as a self-contradiction (*ante*, § 1040, n. 3) or as a falsification showing consciousness of guilt (*ante*, § 278, n. 3).

§ 1076. Admissions of Other Parties to the Litigation, etc.

[*Note* 4; *add:*]

1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6 (rape-prosecutrix).
1905, State *v.* Hummer, — id. — , 62 Atl. 388 (same).
1906, Brown *v.* State, 127 Wis. 193, 106 N. W. 536 (rape-prosecutrix).

[*Note* 5; *add:*]

Yet in some cases the contrary is a practically better rule: 1904, Starr B. G. Ass'n *v.* North L. C. Ass'n, 77 Conn. 83, 58 Atl. 467 (admissions of members of a corporation may sometimes be received against the corporation; good opinion by Hamersley, J.).

[*Note* 6; *add:*]

1906, Stone *v.* Stone, 191 Mass. 371, 77 N. E. 845 (executor; admitted).

[*Note* 7; *add:*]

1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066.

But not of a guardian *against the minor:* 1905, Kidwell *v.* Ketler, 146 Cal. 12, 79 Pac. 514; this is really on the principle of § 1078, *post.*

For an *infant's admissions* against himself, see § 1053, *ante*, and § 1063, n. 1, at the end.

[*Note* 8; *add:*]

1903, Stevens *v.* Continental C. Co., 12 N. D. 463, 97 N. W. 862 (infant).

[*Note* 10; *add*, under *Accord:*]

1907, Postal Tel. C. Co. *v.* Likes, — Ill. — , 80 N. E. 136.
1905, Illinois C. R. Co. *v.* Hutchins, — Ky. — , 89 S. W. 530 (but the Court must instruct as to its limited use).

[*Note* 11, par. 1; *add:*]

So on a charge of *adultery:* 1868, Com. *v.* Thompson, 99 Mass. 444 (adultery).
1902, Terr. *v.* Castro, 14 Hsw. 131 (adultery).

§ 1077. Privies in Obligation, etc.

[*Note* 2, par. 1; *add:*]

1904, Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173 (citing cases).
1906, Jangraw *v.* Perkins, — Vt. — , 64 Atl. 449.

This principle is occasionally ignored through the tendency to look only at the state of the parties under § 1076, *ante; e.g.:* 1904, McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27 (trust deed of wife's separate property, to secure a debt recited to be that of husband and wife; the deceased husband's admissions that the debt was unpaid were excluded, because his estate was not a party to the action to foreclose).

§ 1078. Agent, Partner, Attorney, etc.

[*Note* 1; *add:*]

The provision in *Georgia*, Code 1895, § 3034, that "the declarations of an agent . . . are not admissible against his principal unless they were a part of the negotiation and constituting the *res gestæ, or else the agent be dead,*" has been properly construed to mean, not that a deceased agent's statements are always receivable though not a part of the *res gestæ*, but that, apart from the present rule of *res gestæ*, the deceased agent's statements may be received as exceptions to the Hearsay rule whenever they fulfil the requirements of any of those exceptions, *e.g.* as regular entries, statements against interest, etc.: 1905, Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

[*Note* 2, l. 3; *add:*]

1903, Luman *v.* Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307.
1904, Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26.
1904, Cook *v.* Stimson Mill Co., 36 Wash. 36, 78 Pac. 39.

[*Note* 2, l. 8; *add:*]

Havens *v.* R. I. Suburban R. Co., 26 R. I. 48, 58 Atl. 247 (1904).

[*Note* 3; *add:*]

1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (agent of land).
1904, National Bldg. Ass'n *v.* Quin, 120 Ga. 358, 47 S. E. 962 (contract of loan).
1904, Baier *v.* Selke, 211 Ill. 512, 71 N. E. 1074 (brewmaster).
1904, Parker's Adm'r *v.* Cumberland T. & T. Co., — Ky. — , 77 S. W. 1109 (foreman).
1905, Shelbyville W. & L. Co. *v.* McDade, — Ky. — , 92 S. W. 568 (engineer).
1905, Bachant *v.* Boston & M. R. Co., 187 Mass. 392, 73 N. E. 642 (railroad station-agent).
1906, McDonough *v.* Boston El. R. Co., 191 Mass. 509, 78 N. E. 141 (motorman).
1905, Poindexter & O. L. S. Co. *v.* Oregon S. L. R. Co., 33 Mont. 338, 83 Pac. 886 (railroad section boss).
1904, Clancy *v.* Barker, 71 Nebr. 83, 98 N. W. 440 (hotel).
1905, Alden *v.* Grande R. L. Co., 46 Or. 533, 81 Pac. 385 (foreman of a logging camp).
1905, Austin *v.* Forbis, — Tex. — , 89 S. W. 405 (injury by electricity).
1906, Baker *v.* Washington I. Co., — Wash. — , 86 Pac. 1125 (drover).
1904, Kamp *v.* Coxe Bros. & Co., 122 Wis. 206, 99 N. W. 366.

[*Note* 4, col. 1; *add:*]

1904, Russell *v.* Washington S. Bank, 23 D. C. App. 398, 406.
1906, Peyton *v.* Old Woolen M. Co., — Ky. — , 91 S. W. 719.
1905, Jackson *v.* American T. & T. Co., 139 N. C. 347, 51 S. E. 1015.

[*Note* 4, at the end; *add:*]

1905, Aultman T. & E. Co. *v.* Knoll, 71 Kan. 103, 79 Pac. 1074.

[*Note* 5; *add:*]

1906, Fifer *v.* Clearfield & C. C. Co., 103 Md. 1, 62 Atl. 1122 (requiring the evidence of agency to precede the declarations).
1905, Singer Mfg. Co. *v.* Christian, 211 Pa. 534, 60 Atl. 1087.
Compare the cases cited *post*, § 1777.

§ 1079. Co-Conspirators, etc.

[*Note* 1, par. 1; *add:*]

1906, Chapline *v.* State, 77 Ark. 444, 95 S. W. 477 (bribery).
1906, Butt *v.* State, — Ark. — , 98 S. W. 723.
1905, Johnson *v.* People, 33 Colo. 224, 80 Pac. 133 (abortion; the woman a co-conspirator).
1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1.
1904, Miller *v.* John, 208 Ill. 173, 70 N. E. 27.
1904, Graff *v.* People, 208 id. 312, 70 N. E. 299.
1905, Knox *v.* State, 164 Ind. 226, 73 N. E. 255.
1904, State *v.* Walker, 124 Ia. 414, 100 N. W. 354.
1906, State *v.* Brown, 130 Ia. 57, 106 N. W. 379 (instigator of a crime).
1907, State *v.* Crofford, — Ia. — , 110 N. W. 921 (murder).
1907, Com. *v.* Hargis, — Ky. — , 99 S. W. 348.
1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud).
1904, State *v.* Boatright, 182 Mo. 33, 81 S. W. 450.
1906, State *v.* Ruck, 194 Mo. 416, 92 S. W. 706 (the co-conspirator need not be a party to the record).
1906, State *v.* Darling, — Mo. — , 97 S. W. 592.
1906, State *v.* Forshee, — Mo. — , 97 S. W. 933.
1906, Terr. *v.* Neatherlin, — N. M. — , 85 Pac. 1044.
1905, State *v.* Ryan, 47 Or. 338, 82 Pac. 703 (larceny).
1906, State *v.* White, — Or. — , 87 Pac. 137.
1905, Sprinkle *v.* U. S., 141 Fed. 811, C. C. A. (revenue frauds).
1905, Brown *v.* U. S., 142 Fed. 1, C. C. A. (misappropriation of bank funds).
1905, Smith *v.* State, — Tex. Cr. — , 89 S. W. 817 (reviewing prior cases).
1903, State *v.* Dix, 33 Wash. 405, 74 Pac. 570 (embezzlement).
1906, State *v.* Dilley, — Wash. — , 87 Pac. 133 (robbery).
1905, Schutz *v.* State, 125 Wis. 452, 104 N. W. 90 (bribery).

[*Note* 2; *add:*]

1904, R. *v.* Hutchinson, 11 Br. C. 24, 33 (good opinion, by Hunter, C. J.).
1904, People *v.* Donnolly, 143 Cal. 394, 77 Pac. 177.
1873, Solander *v.* People, 2 Colo. 48, 64.
1904, State *v.* Walker, 124 Ia. 414, 100 N. W. 354 (good opinion. by McClain, J.).
1904, Wells *v.* Terr., 14 Okl. 436, 78 Pac. 124.
1904, Lorenz *v.* U. S., 24 D. C. App. 337, 373.

[*Note* 4; *add:*]

1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561.

§ 1081. Decedent, Insured, Co-Legatee, etc.

1905, O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 582 (indebtedness of an estate).

[*Note* 2, l. 4; *add:*]

1906, Cross *v.* Iler, 103 Md. 592, 64 Atl. 33 (husband's admissions, in an action by his widow against the administratrix).
1905, Benson *v.* Raymond, 142 Mich. 357, 105 N. W. 870 (declarations of grantee of a deed, as to grantor's insanity, received against the grantee's heirs).
1903, Dixon *v.* Union Ironworks, 90 Minn. 492, 97 N. W. 375 (wife-administratrix' action for death of husband).
Compare the rule for *statements of facts against interest* (*post*, § 1461, n. 1).

[*Note* 3; *add:*]

1906, Jacksonville El. Co. *v.* Sloan, — Fla. —, 42 So. 517 (action by a widow, in her own right, for the death of her husband).

[*Text*, p. 1287, par. (1), l. 3 from below:]

Omit the sentence beginning, "The distinction sometimes taken."

[*Note* 6; *add:*]

These cases, with the others on the 'subject,' are exhaustively analyzed and the correct theory lucidly expounded in an article by Professor A. M. Kales, "Declarations of the Insured against the Beneficiary," 6 Columbia Law Rev. 509 (1906).

Add the following cases: 1907, Taylor *v.* Grand Lodge, — Minn. — , 111 N. W. 919; 1906, Hews *v.* Equitable L. A. Soc'y, 143 Fed. 850, C. C. A.

[*Text*, par. (1), at the end; add a new note 6*a*:]

[6a] For the question whether an *insurer's* admissions, as the real plaintiff in an action for loss by fire, are receivable, see a careful opinion by Gray, J., in Judd *v.* N. Y. & T. S. S. Co., 128 Fed. 7, 62 C. C. A. 515 (1904).

[*Note* 9; *add:*]

Nor of a *prior mortgagee:* 1903, Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493 (a first mortgagee's admissions, not received against a second mortgagee).

[*Note* 11; *add:*]

1848, Roberts *v.* Thawick, 13 Ala. 68, 80 (mental incapacitv).
1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (mental incapacity).
1889, Dale's Appeal, 57 Conn. 127, 140, 17 Atl. 757 (undue influence).
1906, Robinson *v.* Duvall, 27 D. C. App. 535, 548 (caveatee's admissions of testator's sanity, excluded, except to contradict him as a witness).
1891, Campbell *v.* Campbell, 138 Ill. 612, 615, 28 N. E. 1080 (undue influence).
1879, Hayes *v.* Burkam, 67 Ind. 359, 363 (mental incapacity).
1879, Ames' Will, 51 Ia. 596, 602, 2 N. W. 408 (undue influence).
1905, Fothergill *v.* Fothergill, 129 Ia. 93, 105 N. W. 377.
1906, Kelly *v.* Kelly, 103 Md. 548, 63 Atl. 1082 (admissions of the testator's insane conduct, made before his death, by K., the executor and sole devisee, excluded; this is an *absurditas absurditatum*).
1804, Phelps *v.* Hartwell, 1 Mass. 71 (mental capacity; but see Atkins *v.* Sanger, 1822, 1 Pick. 192, *semble, contra*).
1891, McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 114 (undue influence).
1893, O'Connor *v.* Madison, 98 Mich. 183, 190, 57 N. W. 105 (undue influence).
1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000.
1855, Prewett *v.* Coopwood, 30 Miss. 369, 388 (pecuniary claim).
1905, King *v.* Gilson, 191 Mo. 307, 90 S. W. 367.
1906, Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883 (rule in Schierbaum *v.* Schemme, *supra*, not applied, where the devisees were charged as co-conspirators to defraud).
1907, Seibert *v.* Hatcher, — Mo. — , 102 S. W. 962 (Schierbaum *v.* Schemme followed).
1888, Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219 (mental incapacity).
1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (admissions of the principal legatee as to testatrix' incapacity, excluded).
1906, Linebarger *v.* Linebarger, — N. C. — , 55 S. E. 709 (*semble*, not decided in general, but here excluded).
1862, Thompson *v* Thompson, 13 Oh. St. 356 (mental capacity).
1825, Nussear *v.* Arnold, 13 S. & R. 323.
1851, Mullins *v.* Lyles, 1 Swan 337 (fraud and undue influence).
1889, Ormsby *v.* Webb, 134 U. S. 47, 65, 10 Sup. 478 (excluded, except to contradict as a witness, where the declarant was not sole legatee).
1899, Whitelaw *v.* Whitelaw, 96 Va. 712, 32 S. E. 458 (mental incapacity).
1871, Forney *v.* Ferrell, 4 W. Va. 729, 739 (undue influence).
Undecided: 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252.

[*Note* 12; *add:*]

1904, Powers' Ex'r *v.* Powers, — Ky. — , 78 S. W. 152 (devisee's admissions).
1906, Miller's Estate, — Utah — , 88 Pac. 338 (sole legatee's admissions, received).

§ 1082. Grantor, etc.; Admissions before Transfer.

[*Note* 1; *add:*]

1905, Stewart *v.* Doak Bros., 58 W. Va. 172, 52 S. E. 95 (boundaries).

§ 1083. Same: Personalty, etc.

[*Note* 4; *add:*]

1905, Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (Foote *v.* Beecher, Merkle *v.* Beidleman, *supra*, approved, *obiter*).

§ 1085. Admissions after Transfer; in general.

[*Note* 1; *add:*]

1903, Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493.
1906, Jones *v.* Tennis C. Co., — Ky. — , 94 S. W. 6.
1905, Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (a mortgagor, who was also executor; his admissions, made after execution of the mortgage, that the legacies had not been paid, not admitted against the mortgagee).
1905, Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308.
1905, West *v.* Houston Oil Co., 136 Fed. 343, 348, 69 C. C. A. 169 (land).

§ 1086. Same: Transfers in Fraud of Creditors.

[*Note* 2; *add:*]

1904, Urdangen *v.* Doner, 122 Ia. 533, 98 N. W. 317 (Bixby *v.* Carskaddon followed).
1905, Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286 (personalty; excluded).
1906, Borden *v.* Lynch, — Mont. — , 87 Pac. 609 (debtor's declarations of fraud, prior to the plaintiff's mortgage, held admissible against him, but here excluded for lack of evidence of his knowledge of the fraud).
1903, Walker *v.* Harold, 44 Or. 205, 74 Pac. 705 (vendor's declarations after deed executed, admitted, after evidence of a "prior dishonest combination").
1904, Woods *v.* Faurot, 14 Okl. 171, 77 Pac. 346 (attachment of H.'s goods, F. claiming by prior sale from H.; H.'s declarations of claim to the sheriff, not admitted for the creditor; no authority cited).
1906, Mower *v.* McCarthy, — Vt. — , 64 Atl. 578 (defendant loaned money to his son to buy a stock of goods and took a mortgage; the son's declarations of intent to defraud creditors, not admitted against the father, except on evidence of a conspiracy).

[*Note* 3; *add:*]

Accord: 1906, Mower *v.* McCarthy, — Vt. — , 64 Atl. 578.
Contra: 1903, Lumm *v.* Howells, 27 Utah 80, 74 Pac. 432 (no authority cited).

§ 1105. Good Character, after Evidence of General Character.

[*Note* 1; *add:*]

For the rebuttal of testimony to the *unchaste character* of the prosecutrix in *seduction*, see *post*, § 1620.

§ 1108. Good Character, after Evidence of Self-Contradiction.

[*Note* 1; *add:*]

1904, Brown *v.* State, 142 Ala. 287, 38 So. 268 (same).
1903, Runnels *v.* State, 45 Tex. Cr. 446, 77 S. W. 458 (admitted).

§ 1111. Discrediting the Impeaching Witness, etc.

[*Note* 2; *add:*]

1884, State *v.* Woodworth, 65 Ia. 141, 21 N. W. 490.
1905, Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488 (Deemer, J.: "The writer would be inclined to adopt a contrary rule. . . . But as there seems to be nothing sustaining such a [contrary] rule save an unsupported remark of Professor W. in his new work on Evidence, § 1111, it is better, perhaps, to follow the current of authority").
Contra: 1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905, *semble* (cited *post*, § 1117, n. 6).

§ 1116. Rehabilitation of Witness; Denial of the Fact, etc.

[*Note* 4; *add:*]

1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (Sims *v.* Sims approved).

[*Note* 5; *add:*]

1904, Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842.

§ 1117. Same: Explaining away the Fact.

[*Note* 4; *add:*]

1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (assault; plaintiff's explanation of his plea of guilty to a charge of assault on the same occasion, allowed on re-examination).

[*Note* 6; *add:*]

1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905 (*semble*, charges brought out by an impeaching witness to character, may be denied in rebuttal, if no rule of estoppel applies).

§ 1124. Prior Consistent Statements; Offered in Chief, etc.

[*Note* 1; *add:*]

1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525.
1904, Ranck *v.* Brackbill, 209 Pa. 499, 58 Atl. 884.

§ 1126. Same: After Impeachment by Inconsistent Statements.

[*Note* 4; *add:*]

1906, Burks *v.* State, — Ark. — , 93 S. W. 983 (similar statements, not admitted, though the witness denied making the self-contradictory ones; rule of Cooley, J., in Stewart *v.* People, Mich., *supra*, repudiated).
1874, Georgia R. Co. *v.* Oaks, 52 Ga. 410, 416 (excluded).
1893, Fussell *v.* State, 93 id. 450, 456, 21 S. E. 97 (same).
1901, Knight *v.* State, 114 id. 48, 39 S. E. 928 (same).
1906, Cook *v.* State, 124 Ga. 653, 53 S. E. 104 (same).
1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (excluded).
1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641 (admitted; but only such statements as corroborate the impeached parts, not other parts, of the testimony).
Md. St. 1904, c. 661 (preserves this part of the above statute, while amending the rest; quoted *ante*, § 488).
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.
1904, State *v.* Sharp, 183 Mo. 715, 82 S. W. 134 (admitted, purporting to follow State *v.* Taylor, *supra*).
1906, Cincinnati Traction Co. *v.* Stephens, 75 Oh. 171, 79 N. E. 235 (excluded, where the witness admitted the making of the inconsistent statements).
1904, State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384 (excluded).

§ 1127. Same: After Impeachment by Contradiction.

[*Note* 1; *add:*]

1905, Maryland Steel Co. *v.* Engleman, 101 Md. 661, 61 Atl. 314 (this sort of corroboration is not permitted for parties, under St. 1874, now Pub. G. L. 1904, art. 35, § 3, cited *ante*, § 1126, n. 4).
1906, Inman *v.* Dudley & D. L. Co., 146 Fed. 449, 456, C. C. A. (excluded).

§ 1128. Same: After Impeachment by Bias, etc.

[*Note* 1; *add:*]

1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681.
1903, Legere *v.* State, 111 Tenn. 368, 77 S. W. 1059 (rule conceded, but held not applicable on the facts).
1906, Welch *v.* State, — Tex. Cr. — , 95 S. W. 1035 (excluded on the facts).
1906, Anderson *v.* State, — id. — , 95 S. W. 1037 (excluded on the facts).
1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807 (State *v.* Flint followed).

[*Note* 2; *add:*]

1906, Green *v.* State, — Tex. Cr. — , 90 S. W. 1115.

§ 1129. Same: After Impeachment as to Recent Contrivance.

[*Note* 1; *add:*]

1904, Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984.
1904, Waller *v.* People, 209 Ill. 284, 70 N. E. 681 (the witness was impeached by certain former narrations of his omitting an essential fact; his statement at the time of the occurrence, including that fact, was admitted).
1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (the present exception held not applicable on the facts).
1907, National Cereal Co. *v.* Alexander, — Kan. — , 89 Pac. 923 (principle applied).
1904, Com. *v.* Kelly, 186 Mass. 403, 71 N. E. 807 (here, to rebut an alleged failure of the witness to identify the accused at the time).
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (rule recognized).
1907, McClellan's Estate, — S. D. — , 111 N. W. 540 (prior consistent statements, admitted to explain away the suggestion of recent fabrication; former opinion modified, as applied to the evidence here offered).

§ 1130. Same: Statements Identifying an Accused, etc.

[*Note* 1; *add*, under *Contra:*]

1904, State *v.* Egbert, 125 Ia. 443, 101 N. W. 191.
1906, Turman *v.* State, — Tex. Cr. — , 95 S. W. 533 (rape; approving Murphy *v.* State, and prior cases; here the prosecutrix testified that as soon as she had identified the accused in the presence of the sheriff, and upon a further question by him, she fainted; the fainting was held improperly proved, as it "was calculated to greatly imperil and jeopardize the defendant's rights"; such a maudlin rule defies reason, and exhibits Justice in this State as needing either a stimulant or a strait-jacket).

§ 1131. Same: After Cross-Examination, etc.

[*Note* 1; *add:*]

1904, State *v.* Sharp, 183 Mo. 715, 82 S. W. 134 (State *v.* Taylor approved).
1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (why does the Court devote two pages discussing this rule, after it has been so long settled in this State? Presumably because it did not cite and did not know of any of its foregoing decisions rendered since 1885).

§ 1133. Statements of Claim by a Party, etc.

[*Note* 1; *add:*]

1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support the plaintiff; after admitting for the plaintiff declarations by the testator that plaintiff was his son, the Court excluded for the defendant declarations of the testator that he was only guardian; the present principle not noticed).
1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (with possible exceptions; here in an action for personal injuries).
1904, Bernard *v.* Pittsburg Coal Co., 137 Mich. 279, 100 N. W. 396 (the original unamended declaration of the plaintiff having been offered as an admission, his letter to his counsel stating the fact as now claimed was received).

§ 1135. Rape Complaint; First Theory, etc.

[*Note* 1, l. 3; *add:*]

Contra: 1898, R. *v.* Kiddle, 19 Cox Cr. 77 (indecent assault on a child of six).
1905, R. *v.* Osborne, 1 K. B. 551 (indecent assault on a child of twelve; "such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix").
1905, State *v.* Oswalt, — Kan. — , 82 Pac. 513 (said to be "at least doubtful").

[*Note* 2, col. 2, l. 14; *add:*]

1905, State *v.* Willett, 78 Vt. 157, 62 Atl. 48.

[*Note* 1, col. 2, par. 1, l. 5 from the end; *add:*]

1906, State *v.* Winslow, 30 Utah 403, 85 Pac. 433 (incest with a minor daughter, there being no consenting fact).

[*Note* 3; *add:*]

1904, State *v.* Icenbice, 126 Ia. 16, 101 N. W. 273.

[*Note* 4; *add:*]

1906, State *v.* Griffin, — Wash. — , 86 Pac. 951 (complaint six months afterwards, excluded, on the facts).

[*Note* 5, l. 3; *add:*]

1904, State *v.* Bebb, 125 Ia. 494, 101 N. W. 189.

[*Note* 5, at the end; *add:*]

The *total failure to complain* is of course not fatal *per se* to the prosecution:
1906, Garvik *v.* Burlington, C. R. & N. R. Co., — Ia. — , 108 N. W. 326.

§ 1136. Same: Consequences of this Theory, etc.

[*Note* 1; *add:*]

1905, Posey *v.* State, 143 Ala. 54, 38 So. 1019.
1904, People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098.
1904, State *v.* Harness, 10 Ida. 18, 76 Pac. 788.
1905, State *v.* Andrews, 130 Ia. 609, 105 N. W. 215 (the precise scope of the "fact" of the complaint here seems to be enlarged to include "who her assailant was and what he did to her," with further qualifications; the rule is now loose and unsettled in this State; see § 1761, *post*).
1905, State *v.* Barkley, 129 Ia. 484, 105 N. W. 506 (the rule further obscured; preceding case not cited).
1906, State *v.* Griffin, — Wash. — , 86 Pac. 951 (statement naming the accused, excluded).
For the admissibility of a *child's* complaint, compare § 1751, par. c, § 1761, n. 2, *post.*

[*Note* 2, par. 1; *add,* under *England:*]

1898, R. *v.* Kiddle, 19 Cox Cr. 77, *semble, contra* (indecent assault; the prosecutrix being too young to be sworn, her unsworn testimony was admitted by virtue of St. 1885, quoted *post,* § 1828; an objection to the admission of the complaint, on the ground that "there was no evidence on oath to be corroborated," was overruled).
1905, R. *v.* Osborne. 1 K. B. 551, 558, *semble, accord* (indecent assault; the opinion appears to proceed on this theory; quoted *ante,* § 1135, n. 1).

§ 1138. Same: Second Theory; Consequences of this Theory.

[*Note* 3; *add:*]

1907, State *v.* Fowler, — Ida. — , 89 Pac. 757.
1888, State *v.* Campbell, 20 Nev. 126, 17 Pac. 620 (excluded, unless after impeachment).
1905, *Re* Kelly, 28 Nev. 491, 83 Pac. 223 (State *v.* Campbell followed).
1904, State *v.* Parker, 134 N. C. 209, 46 S. E. 511 (a technical rule laid down as to the judge's charge).

§ 1139. Third Theory, etc.

[*Text;* at the end, *add* a new paragraph:]

(4) If the prosecutrix is *too young to be a witness*, nevertheless the statement is receivable.

§ 1141. Complaint in Travail by a Bastard's Mother.

[*Note* 3; *add:*]

1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (Booth *v.* Hart approved).

[*Note* 4; *add:*]

1904, Burns *v.* Donoghue, 185 Mass. 71, 69 N. E. 1060 (statute applied).
1904, Baxter *v.* Gormley, 186 Mass. 168, 71 N. E. 575 (her testimony on the complaint-hearing suffices).

[*Note* 6; *add:*]

1905, Johnson *v.* Walker, 86 Miss. 757, 39 So. 49 (declarations of paternity made during travail are admissible to corroborate the mother's testimony apart from the statute cited *supra*, n. 5, and even though the mother is alive).

[*Note* 7, par. 1; *add:*]

1904, State *v.* Lowell, 123 Ia. 427, 99 N. W. 125 (since a complaint would be inadmissible, the failure to complain is equally so).
1905, People *v.* Stison, 140 Mich. 216, 103 N. W. 542 (incest; dying declarations of paternity, made at childbirth, excluded).

§ 1151. Real Evidence (Autoptic Proference); General Principle.

[*Text*, p. 1347, at the end; *add* a new note 1:]

[1] Quoted with approval in Moorhead *v.* Arnold, — Kan. — , 84 Pac. 742 (1906).

§ 1152. Sundry Instances of Production, etc.

[*Note* 12; *add:*]

1906, State *v.* Wallace, 78 Conn. 677, 63 Atl. 448 (photograph of a building, examined with a magnifying glass).
1906, Cotton *v.* Boston El. R. Co., 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the trial Court's refusal to allow the jury to look through a microscope at particles of steel collected in the building and emanating from the defendant road, held to be within his discretion).

§ 1154. Irrelevant Facts, etc.

[*Note* 2; *add:*]

Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 3 (the judge, jury, etc., "may infer as a fact the nationality or race of the person in question from the appearance of such person"; the foregoing to be § 53 of Rev. St. 1897, c. 71).
U. S.: 1904, U. S. *v.* Hung Chang, 134 Fed. 19, 23, 67 C. C. A. 93 (Chinese descent, evidenced by the person's appearance; "it is a case of *res ipsa loquitur*").

[*Note* 5; par. 1, *add:*]

1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (seduction; child's presence in court held not improper).
1905, Johnson *v.* Walker, 86 Miss. 757, 39 So. 49 (not decided).
1904, Esch *v.* Graue, — Nebr. — , 101 N. W. 978 (mere presence of the child, held not improper on the facts).
1906, State *v.* Palmberg, — Mo. — , 97 S. W. 566 (rape under age; child exhibited).

[*Note* 7, par. 1; *add:*]

Eng.: 1904, St. 4 Edw. VII, c. 15, § 17 (offences concerning children; where "the child appears to the Court to be under that age" alleged, such child shall "be deemed to be under that age, unless the contrary is proved").

[*Note* 16; *add:*]

Compare the bigoted ruling in State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

§ 1157. Unfair Prejudice to an Accused Person.

[*Text;* note to quotation from *Scintillæ Juris:*]

This *libellus*, by Mr. C. J. (later Justice) Darling, published at first anonymously, has recently gone into its fifth edition.

[*Note* 3; *add:*]

1905, State *v.* Powell, — Del. — , 61 Atl. 966 (photographs of wounds on the deceased, admitted).
1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 (curtain-pole as a weapon for killing, shown).
1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 (knife found on defendant).
1905, State *v.* Laster, 71 N. J. L. 586, 60 Atl. 361 (articles found on accused, exhibited).
1904, People *v.* Davey, 179 N. Y. 345, 72 N. E. 244 (rape of a child; asking questions of the defendant as to similar acts upon other children who are made to stand up for identification by him, held improper on the facts).
1904, People *v.* Rimieri, 180 N. Y. 163, 72 N. E. — (murder; the deceased left a widow and child, and there was some issue as to whether the deceased when shot was crossing the street to overtake the child or to seek the defendant; the widow testified that she was then pregnant with another child, and the living child was brought into court and shown; these facts were held to be hardly called for, but the error if any "entirely harmless"; this ruling, and People *v.* Davey, *supra*, are further commented on *ante*, § 21, n. 15).
1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (photographs of gunshot wounds on the deceased, excluded as "gruesome" and unnecessary; unsound on the facts).
1904, Melton *v.* State, — Tex. Cr. — , 83 S. W. 822 (deceased's bloody garments, held improperly exhibited by his wife, there being no controversy as to that part of the case).
1905, Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113 (rape; accused's shirt and trousers, admitted).

Compare also the cases cited *ante*, § 789, n. 3, as to *dramatic modes of testifying* so as to excite undue prejudice.

§ 1158. Unfair Prejudice to a Civil Defendant, etc.

[*Note* 2; *add:*]

1905, Anderson *v.* Seropian, 147 Cal. 201, 81 Pac. 521 (amputated hand preserved in liquid, admitted).
1905, Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520 (injured ankle).
1906, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, — Ind. — , 78 N. E. 1033 (injured foot exhibited).
1907, Ford *v.* Providence C. Co., — Ky. — , 99 S. W. 609 (plaintiff's amputated leg).
1904, Chicago B. & Q. R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44 (maimed leg exhibited, even though the defendant did not deny the injury).
1904, Minden *v.* Vedene, — Nebr. — , 101 N. W. 330 (personal injury; the lame plaintiff's act of walking to the witness-stand, held not objectionable).
1904, Felsch *v.* Babb, — Nebr. — , 101 N. W. 1011 (plaintiff's exhibition and movements of arm and legs, allowed).

§ 1159. Indecency, or other Impropriety, etc.

[*Note* 2; *add:*]

1904, Garvik *v.* Burlington C. R. & N. R. Co., 124 Ia. 691, 100 N. W. 498 (action for rape by D., an employee of the defendant; the trial Court permitted the jury to inspect the private parts of D., with his consent, in a separate room, on an allegation that the parts were defective; held improper, first, because it was not shown that the man's condition was the same as at the time alleged, and secondly, because it was a "shocking and indecent performance." As to the latter reason, such false judicial morality is so odd as to be incredible in these days; why was it "indecent" for the jury, but not for the experts, who made a similar examination? The Court declares that it found no authority for such examination, and "doubts if there is any to be found in the books"! It is regrettable for modern justice not only that Sir Matthew Hale, in the instance above cited, should have shown more good sense two centuries ago than we now possess, but that his celebrated example should even have become buried in oblivion from some of his learned successors).
1907, State *v.* Stevens, — Ia. — , 110 N. W. 1032 (rape; the defendant's request to have the jury examine his parts in a private room was denied; following Garvick *v.* R. Co.; this is another perverse ruling).

[*Note* 4; *add:*]

1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (liquor sales; handing labelled bottles to the jury, held not improper on the facts).
1905, State *v.* Olson, 95 Minn. 104, 103 N. W. 727 (liquor offence; jurors allowed to take the sample as an exhibit, without tasting).

§ 1160. Incapacity of the Jury, etc.

[*Note* 1; *add:*]

1905, Spires *v.* State, 50 Fla. 121, 39 So. 181 (experiment with a gun in the jury-room, refused in discretion; see the citation *ante*, § 460, n. 1).
1895, Moore *v.* R. Co., 93 Ia. 484, 61 N. W. 992 (collision on a railroad track; the jury having been taken to view the place, and an engine having been run over the track in their sight to illustrate the occurrence, this very sensible proceeding was held fatally improper).
1907, Chicago Telephone S. Co. *v.* Marne & E. T. Co., — Ia. — , 111 N. W. 935 (sale of telephones; tests of the instruments in the jury's presence, held not improperly refused in the trial Court's discretion).
1906, Train, The Prisoner at the Bar, 312 (N. Y.; a striking experiment in testing poisons was performed before the jury).

[*Note* 5; *add:*]

1905, Benson *v.* Raymond, 142 Mich. 357, 105 N. W. 870 (bill by a grantor to set aside his deed for mental incompetency; the Court held it proper to bring the complainant in court, "and afford the judge an opportunity of seeing him, and, if he desired, of questioning him").

§ 1161. Physical or Mechanical Inconvenience, etc.

[*Note* 1; at the end, *add:*]

and *ante*, §§ 451–460.

§ 1163. View by Jury; (2) View allowable upon any Issue, etc.

[*Note* 3, col. 2, l. 6; *add:*]

1904, Terr. *v.* Watanabe, 16 Haw. 196, 220 ("It has been the practice" to allow it; question left undecided).

[*Note* 6; *add:*]

1904, O'Berry *v.* State, 47 Fla. 75, 36 So. 440 (larceny of cattle; under Rev. St. 1892, §§ 1087, 2918, a view of the cattle was held proper).
1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (larceny of a mare; the jury went to view another mare claimed by the defendant to be the mother of the one in controversy; the mare claimed by the prosecuting witness to be the mother was also present, and the behavior of the mare in controversy "indicated a preference" for the latter; the Court held the view of the horses improper, going upon the narrow wording of P. C. § 2097, cited *infra*, n. 6, and citing no other authority on this point; although the behavior in question was plainly evidential on the principle of §§ 167, 177, 1154, *ante*, and the defendant himself had requested the view; this is one of the most depressing instances in modern records of judicial obscurantism strangling practical wisdom; when compared with Lord Eldon's celebrated experiment, quoted *ante*, § 1154, it seems to discountenance the optimistic belief that the world grows wiser as it grows older, and that the judges of a new community are less encased than others in narrow and perverse formalism).

[*Note* 7; *add:*]

Newf. St. 1904, c. 3, Rules of Court 46, par. 4–6 (like Eng. Rules of 1883, Ord. 50, RR. 3–5).

[*Note* 8; *add:*]

1903, McMillen *v.* Ferrum M. Co., 32 Colo. 38, 74 Pac. 461 (statute held not to make a view-order obligatory where the applicant had not other sufficient evidence to go to the jury).
Ind. St. 1905, p. 584, § 264 (re-enacts the foregoing statute.)

§ 1164. Same: (3) View allowable in Trial Court's Discretion.

[*Note* 1; *add:*]

1906, Mier *v.* Phillips F. Co., 130 Ia. 570, 107 N. W. 621 (action for coal mined by the defendant under the plaintiff's land; view held properly refused; this ruling seems absurdly pedantic; the evidence was in conflict; is it an enlightened rule of law that forbids the jury to take the common-sense method of getting at the truth?)
1898, Henderson & C. G. R. Co. *v.* Cosby, 103 Ky. 184, 44 S. W. 639 (discretion).
1904, Green's Adm'r *v.* Maysville & B. S. R. Co. — Ky. — , 78 S. W. 439 (discretion).
1904, Mise *v.* Com., — Ky. — , 80 S. W. 457 (homicide).
1906, Louisville *v.* Caron, — Ky. — , 90 S. W. 604 (discretion).
1906, Cohankus Mfg. Co. *v.* Rogers' Gdn., — Ky. — , 96 S. W. 438 (injury at a machine; view refused in discretion).
1904, Blanchard *v.* Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94 (personal injuries; view of plaintiff in her home, held not improperly refused in the trial Court's discretion).
1907, Yore *v.* Newton, — Mass. — , 80 N. E. 472 (time of view during trial is in the trial Court's discretion; but a motion by one of the parties is necessary).
1906, Dupuis *v.* Saginaw V. T. Co., — Mich. — , 109 N. W. 413 (view of the scene of a street-car accident, and an experiment under the same conditions).
1904, Maloney *v.* King, 30 Mont. 158, 76 Pac. 4 (applying C. C. P. § 1081).

§ 1168. Non-Transmissibility of Evidence on Appeal.

[*Note* 1; *add:*]

1904, Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748 (rape; the jury not allowed to consider the defendant's appearance "to fix his age"; citing and following the erroneous theory of Stephenson *v.* State, Ind., *infra*).

[*Note* 5; *add:*]

1906, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, — Ind. — , 78 N. E. 1033 (injured foot exhibited; L. N. A. & C. R. Co. *v.* Wood followed).
1895, Moore *v.* R. Co., 93 Ia. 484, 61 N. W. 992 (collision on a railway track; view held improper because of an experiment with an engine).

[*Note* 5 — *continued.*]

1906, Mier *v.* Phillips F. Co., 130 Ia. 570, 107 N. W. 621 (trespass in mining coal; "evidence afforded by the condition of the premises on a view "is not permissible").
1904, Rose *v.* Harllee, 69 S. C. 523, 48 S. E. 541 (a statute provided that a mortgage of chattels should not be valid unless the description in the document was "in writing or typewriting, but not printed"; in an action on such a mortgage, the jury found a verdict based on the document being valid, and the judge ordered a new trial because the description was printed; held, that the order could not be reversed "on the ground that there was no evidence of the description being printed").

[*Note* 7; *add:*]

1905, People *v.* Wood, 145 Cal. 659, 79 Pac. 367 (map used by witness).
1905, Harmon *v.* Terr., 15 Okl. 147, 79 Pac. 757, 765.

[*Note* 12; *add:*]

1899, Seaverns *v.* Lischinski, 181 Ill. 358, 54 N. E. 1043 (rope exhibited to the jury; error can be assigned, even though the bill of exceptions cannot embody all the evidence; but a verdict cannot be "based exclusively on knowledge so acquired"; this is a correct way of stating such a rule).
1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515.
1903, Groves & S. R. R. Co. *v.* Herman, 206 id. 34, 69 N. E. 36.
1904, Illinois, I. & M. R. Co. *v.* Humiston, 208 id. 100, 69 N. E. 880.
1906, Moorhead *v.* Arnold, — Kan. — , 84 Pac. 742 (ballots tampered with).
1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (view of a mare; jury's view is only to "enable them to understand and apply the evidence").
1905, Blincoe *v.* Choctaw, O. & W. R. Co., 16 Okl. 286, 83 Pac. 903 (eminent domain; "you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence, etc.," held a proper instruction; good opinion by Gillette, J.).
1906, Hughes *v.* Chicago, St. P., M. & O. R. Co., 126 Wis. 525, 106 N. W. 526 (preceding rulings held not to forbid a juror testifying on a subsequent trial from knowledge obtained by a view at a former trial).

§ 1177. Documentary Originals; History of the Rule.

[*Note* 6; *add:*]

Compare further the historical data in Professor James Barr Ames' article on "Specialty Contracts and Equitable Defences," Harvard Law Review, IX, 49 (1895).

§ 1181. Rule not applicable to Uninscribed Chattels.

[*Note* 1; *add:*]

1881, McClary *v.* State, 75 Ind. 260, 265 (failure of prosecution to produce the knife used in an assault, not error).

§ 1182. Rule as applicable to Inscribed Chattels.

[*Note* 1; *add:*]

1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (rule of production applied to the date and postmark of a letter).
1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (a card inscribed: "L. Y., 3030 Indiana Avenue, phone Douglas 2685"; production required).

[*Note* 1; *add:*]

1906, Mattson *v.* Minn. & N. W. R. Co., 98 Minn. 296, 108 N. W. 517 (death by a dynamite explosion; to prove the numbers marked on the wrappers of the dynamite sticks, the trial Court's refusal in discretion to order production of the dynamite in wrappers was held proper).

§ 1186. Production of Original Always Allowable.

[*Note* 1; *add:*]

1907, Sellers *v.* Page, — Ga. — , 56 S. E. 1011 (record of same court).
Kan. St. 1905, c. 323 (quoted *post*, § 1225, n. 1; nothing therein "shall prevent the production of the original").
1907, Carp *v.* Queen Ins. Co., — Mo. — , 101 S. W. 78 (judicial record).
1904, Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957 (judicial record).
U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (original applications, etc., in the land office, may be produced; cited more fully *post*, § 1676, n. 11).

[*Note* 7; *add:*]

Distinguish also the question whether *ballots* produced are to be preferred as evidence to the finding or certificate of the election officers who first counted them (*post*, § 1351).

§ 1190. Production made; may a Copy also be Offered?

[*Note* 2; *add:*]

1902, Hong Quon *v.* Chea Sam, 14 Haw. 276 (like Walker *v.* Walker, *post*, § 1226, **n. 7**).
1853, Foulke *v.* Bray, 1 Wis. 104 (judgment).

§ 1193. Loss or Destruction; History.

[*Note* 2; *add:*]

The history can be further seen in other lines of cases cited in Professor Ames' article, "Specialty Contracts and Equitable Defences," Harvard Law Review, IX, 49 (1895).

§ 1194. Same: General Tests, etc.

[*Note* 4; *add:*]

1904, Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101.
1904, Koehler *v.* Schilling, 70 N. J. L. 585, 57 Atl. 154.
1905, Tucker *v.* Tucker, 72 S. C. 295, 51 S. E. 876.
1906, Leesville Mfg. Co. *v.* Morgan W. & I. Wks., — S. C. — , 55 S. E. 768.
Contra: 1904, Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519 (a reactionary ruling).

§ 1195. Same: Specific Tests, etc.

[*Note* 1; *add:*]

1906, Saunders *v.* Tuscumbia, R. & P. Co., — Ala. — , 41 So. 982 (approving Foster *v.* State).
1904, Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; the rule is that "the person in whose possession it was last traced must be produced, unless shown to be impossible, in which case search among his papers must be proved, if that can be done").
1883, Kearney *v.* Mayor, 92 N. Y. 617, 621.

[*Note* 2; *add:*]

1905, Tagert *v.* State, 143 Ala. 88, 39 So. 293 (search for a note, held not sufficient on the facts).
1905, Alabama Const. Co. *v.* Meador, 143 Ala. 336, 39 So. 216 (similar, for a letter).
1906, Saunders *v.* Tuscumbia R. & P. Co., — Ala. — , 41 So. 982 (mechanics' lien, search held sufficient on the facts).
1903, Mortgage T. Co. *v.* Elliott, — Colo. — , 84 Pac. 980 (note; loss sufficiently shown).
1904, Rhodus *v.* Heffernan, 47 Fla. 206, 36 So. 573 (administrator's schedule; loss sufficiently shown).
1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (sheriff's *fi. fa.*, sufficiently shown lost).
1904, Wolters *v.* Redward, 16 Haw. 25 (bond; loss sufficiently shown).
1906, Interstate Inv. Co. *v.* Bailey, — Ky. — , 93 S. W. 578 (deed; loss sufficiently shown).
1904, Koehler *v.* Schilling, 70 N. J. L. 585, 57 Atl. 154 (contracts; Johnson *v.* Arnwine followed).
1904, Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519 (postal card; loss not sufficiently shown).
1904, State *v.* Leasia, 43 Or. 410, 78 Pac. 328 (letter; loss sufficiently shown).
1904, Brown *v.* Harkins, 131 Fed. 63, 66 C. C. A. 301 (distiller's books and transcript in collector's office; loss not sufficiently shown on the facts).

§ 1196. Same: Kinds of Evidence admissible, etc.

[*Note* 7, par. 2; at the end, *add:*]

and the cases cited *ante*, §§ 158, 664.

[*Note* 8; *add:*]

1906, Interstate Inv. Co. *v.* Bailey, — Ky. — , 93 S. W. 578 (deed).

§ 1198. Same: Intentional Destruction by the Proponent.

[*Note* 1; *add:*]

1906, Gibbs *v.* Potter, — Ind. — , 77 N. E. 945 (rule applied to an altered document).
1905, Nelson *v.* Nat'l Drill Mfg. Co., — S. D. — , 105 N. W. 630 (letters destroyed without improper motives; other evidence of them admitted).

[*Text*, p. 1419, l. 4 from the end of the section; after "grantee," *insert:*]

" Or whether an *alteration avoids* the instrument,"

[*Note* 3; *add:*]

1906, Crossman *v.* Keister, 223 Ill. 69, 79 N. E. 58; 1904, Tabor *v.* Tabor, 136 Mich. 255, 99 N. W. 4; and the exhaustive article by Professor S. Williston, Harvard Law Review, XVIII, 105 (1904), on "Discharge of Contracts by Alteration."

§ 1200. Detention by Opponent: (*a*) Opponent's Possession.

[*Note* 1; *add:*]

1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (letter last seen in possession of K.; notice to K. required, before evidence of contents was admissible).

§ 1201. Same: Mode of Proving Possession.

[*Note* 1; *add:*]

1903, Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 (lease).
1906, Elmslie *v.* Thurman, 87 Miss. 537, 40 So. 67 (bill to enforce a vendor's lien on land conveyed to defendants; the latter not denying execution, their possession of the deed was presumed).
1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569 (forgery of notes; other forged notes being relevant to show knowledge, etc., the prosecution was excused from producing the originals, without proof of loss, due notice to produce having been given to the defendant, since here the course of business raised the inference "that they were all returned to the possession of the defendant").

[*Note* 2; *add:*]

1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569.

[*Note* 3; *add,* under *Accord:*]

1905, City Bank *v.* Thorp, 78 Conn. 211, 61 Atl. 428 (assignments sent to defendant, who denied their receipt and possession; copies admitted).
1904, Supreme Council *v.* Champe, 127 Fed. 541, 63 C. C. A. 282 (press-copy admitted, the letter having been proved written, but its mailing and its receipt being doubtful).

§ 1203. Same: (*b*) Notice to Produce; Rule not Applicable.

[*Note* 5; *add:*]

1906, Stark *v.* Burke, — Ia. — , 109 N. W. 206 (plaintiff's document traced to R., a hostile witness, who denied possession of such a document; plaintiff not required to call R. to produce a document which he admitted having but asserted not to be the plaintiff's).
1905, Neubert *v.* Armstrong W. Co., 211 Pa. 582, 61 Atl. 123 (copy of letter received without notice; but the point is not raised).
Compare the situation noticed *post,* § 1209, n. 1.

§ 1207. Same: Exceptions to Rule of Notice.

[*Note* 3, par. 1; *add,* under *Contra:*]

1906, O'Brien *v.* U. S., 27 D. C. App. 263, 273 (copy of document delivered to the defendant charged with embezzlement; notice not required; the ruling goes upon a misunderstanding of the principle of McGinnis *v.* State, quoted *ante,* § 1205).

[*Note* 4; *add:*]

1904, Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804 (like Gilbert *v.* Boyd).
But distinguish the rule of some statutes as to another kind of *notice* in such cases (*post,* § 1859, par. 4).

§ 1208. Same: Procedure of Notice.

[*Note* 7; *add:*]

1903, Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 (*semble*).

§ 1209. Same: (*c*) Failure to Produce, etc.

[*Note* 1; *add:*]

The following case is peculiar: 1904, Romero *v.* N. I. M. & D. Co., 113 La. 110, 36 So. 907 (the plaintiff alleging a certain contract, the defendant admitting a contract but denying its terms to be as alleged and alleging its loss, the trial judge's order before trial, taking the contract to be as alleged by the plaintiff, was held erroneous).
Compare the cases cited *ante,* § 1203, n. 5.

§ 1210. Same: Consequences of Non-Production, etc.

[*Note* 2; *add:*]

1906, Hanson *v.* Lindstrom, — N. D. — , 108 N. W. 798 (plaintiff failed to supply on demand before trial a copy of a contract, for the defendant's use in preparing his answer; on the facts the statute, Rev. C. 1899, § 5644, quoted *post,* § 1858, was held not applicable).
1904, Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076 (penalty for non-production, not enforced on the facts).

§ 1212. Detention by Third Person; (*a*) Person within the Jurisdiction.

[*Note* 1; *add:*]

1905, De Leon *v.* Terr., — Ariz. — , 80 Pac. 348 (jailer allowed to testify to the contents of a letter by the accused to his wife).

[*Note* 3; *add:*]

1905, Security Trust Co. *v.* Robb, 142 Fed. 78, C. C. A. (letter in a third person's hands; subpœna necessary).
1906, Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299 (letters sent to the county clerk, who had not been subpœnaed; copies excluded).

§ 1213. Same: (*b*) Person without the Jurisdiction.

[*Note* 1; *add:*]

1904, New England M. S. Co. *v.* Anderson, 120 Ga. 1010, 48 S. E. 396 (witness annexing a copy to his deposition; original required to be accounted for).
1883, Kearney *v.* Mayor, 92 N. Y. 617, 621 ("the last person known to have been in possession of the paper must be examined as a witness," and "even if he is out of the State, his deposition must be procured if practicable, or some good excuse given for not doing so").
1906, Pringey *v.* Guss, 16 Okl. 82, 86 Pac. 292 (action on a contract, the original being in the possession of R., living in Nebraska; copy excluded, no diligence being shown to procure the original).
1846, McGregor *v.* Montgomery, 4 Pa. St. 237 (lease in the hands of a third person, out of the State, who had been notified to produce; other evidence excluded).
1907, McCollum *v.* Southern P. R. Co., — Utah — , 88 Pac. 663 (special ruling upon a railroad ticket).
1906, Bruger *v.* Princeton & S. M. M. F. Ins. Co., — Wis. — , 109 N. W. 95 (application for an insurance policy out of the jurisdiction; "some fair showing should be made of efforts to obtain the original, unless it is clear that they would have been fruitless").

[*Note* 2; *add:*]

1906, Hoyle *v.* Mann, 144 Ala. 516, 41 So. 835 (ejectment; a writing "out of the State," held provable orally).
1907, Sellers *v.* Farmer, — Ala. — , 43 So. 967 (unrecorded deed presumed to be in possession of grantee out of the State, proved orally).
1904, Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979 (a lease presumed to be in D.'s possession out of the jurisdiction, and therefore provable orally).

[*Note* 3; *add:*]

1906, Hanson *v.* Lindstrom, — N. D. — , 108 N. W. 798 (document sent to a third person out of the State; diligence to procure it not being shown, secondary evidence was rejected).
1903, Speiser *v.* Phoenix M. L. Ins. Co., 119 Wis. 530, 97 N. W. 207 (insurance-application in N. Y., the holder refusing to give it up; proved by copy attached to deposition).

§ 1215. Irremovable Judicial Records.

[*Note* 10; *add:*]

N. C. Rev. 1905, § 1616 (like Code § 1342).

§ 1219. Irremovable Official Documents; Specific Instances, etc.

[*Note* 3; *add:*]

1906, State *v.* Nippert, — Kan. — , 86 Pac. 478 (Federal revenue collector's records, proved by examined copy).
1906, State *v.* Schaeffer, — Kan. — , 86 Pac. 477 (similar).
1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers, filed in his office, held to be of a public nature).

§ 1223. Private Books of Public Importance.

[*Note* 10, par. 1; *add:*]

Yukon St. 1904, c. 5, § 11 (like Dom. St. 1893, c. 31, § 12; quoted *post*, § 1680).
1895, Mandel *v.* Swan L. C. Co., 154 Ill. 177, 189, 40 N. E. 462 (certain corporate records, etc., held not properly proved under this statute by copies in a deposition).
1904, Chicago, W. & V. C. Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38 (contract between a miners' union and a coal company, held not properly proved under § 18 of the above statute by a sworn copy without seal).

[*Note* 10 — *continued.*]

1905, Chicago, B. & Q. R. Co. *v.* Weber, 219 Ill. 372, 71 N. E. 489 (a lease of the defendant railroad's entire property, evidenced by a copy certified by its secretary under corporate seal, held to be a "paper," under § 15 of the above statute).

§ 1225. Recorded Conveyances; Statutes and Decisions.

[*Note* 1; *add:*]

Canada: Alberta: St. 1906, c. 24, § 17 (land-titles; quoted *post*, § 1651).
British Columbia: St. 1906, 6 Edw. VII, c. 23, § 118 (like Rev. St. 1897, c. 111, § 48); ib. § 120 (the land registrar's certified copies of "any instruments affecting land which may be deposited, kept, filed, or registered in his office," and affecting land in his district, are admissible "as *prima facie evidence* of the document of which it purports to be a copy, without proof of the signature or seal of such registrar").
Nova Scotia: 1904, Nova Scotia Steel Co. *v.* Bartlett, 35 Can. Sup. 527 (under N. Sc. Rev. St. 1900, c. 163, § 20, *supra*, a plan on file, referred to in a duplicate original grant, is not provable by certified copy; the ruling is a perverse one, for if the theory of substantive law sufficed to make the plan a part of the grant by reference, why could not the same theory make the statute admitting certified copies of the grant suffice also for the plan forming part of the grant?).
Saskatchewan: St. 1906, c. 24, § 38 (land-titles; like Alb. St. 1906, c. 24, § 38).
Yukon Consol. Ord. 1902, c. 39, § 28 (registered bills of sale and mortgages of personalty; the registration clerk's certified copy "shall be received as *prima facie* evidence for all purposes as if the original instrument was produced").
St. 1904, c. 5, § 21 (copies of recorded deeds; quoted *post*, § 1651); ib. §§ 24, 26 (like N. Sc. Rev. St. 1900, c. 163, §§ 24, 26, for the Gold Commissioner's office).
United States: *Fla.* Const. 1885, Art. 16, § 21 (recorded deeds and mortgages are provable by certified copy, provided "the original is not within the custody or control of the party offering the copy").
Ga.: 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (deed; search held not sufficient on the facts, under Code § 3630).
1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175 (Cox *v.* McDonald, *supra*, followed, as to the trial Court's discretion).
Ill.: 1905, Baltimore & O. S. W. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523 (evidence held insufficient).
1906, Tucker *v.* Duncan, 224 Ill. 453, 79 N. E. 613 (proof held insufficient).
1906, People *v.* Wiemers, 225 Ill. 17, 80 N. E. 45 (plat of an addition, from the recorder's office; under Rev. St. c. 30, § 35 and c. 109, § 2, *supra*, the original must be shown not to be within the offeror's control).
Kan. St. 1905, c. 323 (amending Gen. St. 1897, c. 97, § 3, being § 372, c. 80, Gen. St. 1868; certified copies or the record of such documents may be admitted "without proof that the original is not in the possession or under the control of the party desiring to use the same)"; c. 324 (similar, for instruments defectively recorded with the register of deeds for ten years past).
Minn. St. 1905, c. 305, §§ 35, 42 (registration of title; similar to the Illinois act *supra;* provision made for using certified copies of the certificate of title and also of deeds, etc., filed with the registrar, etc.).
Mo.: 1904, Patton *v.* Fox, 179 Mo. 525, 78 S. W. 704 (original shown to be in defendant's possession; no notice required; see the citations *ante*, § 1207, n. 4).
N. Mex. St. 1905, c. 38, § 3 (recorded contract of sale, etc., of animals, provable by certified copy).
N. Y. St. 1905, c. 450 (validates acknowledgments recorded for thirty years).
N. C. Rev. 1905, §§ 1598, 1599, 1023 (like Code, §§ 1251, 1253, 1263); Rev. 1905, § 1619 (like Code, § 1344).
Okl.: 1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under Rev. & Ann. St. 1903, § 4575).
S. C.: 1905, Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253 (loss of original sufficiently proved by the admission of the opponents, residing in the house of the last custodian, that they did not have it).
S. D.: 1904, Reeder *v.* Wilber, 18 S. D. 426, 100 N. W. 1099 (statute applied).

§ 1226. Same: Sundry Consequences, etc.

[*Note* 7; *add:*]

1905, Senterfeit *v.* Shealy, 71 S. C. 259, 51 S. E. 142 (the original deed appearing to be mutilated, the record of it was shown in court).

Such a statute as Kan. St. 1905, c. 323, providing that "the original when produced shall prevail over the record or copy" would probably not forbid the above use of a copy.

§ 1230. Voluminous Documents, etc.

[*Note* 1; *add:*]

1904, Mendel *v.* Boyd, 71 Nebr. 657, 99 N. W. 493 (summary statement of six simple transactions, excluded).
1906, Kannow *v.* Farmers' C. S. Ass'n, — Nebr. — , 107 N. W. 563 (expert's computation of the result of weigh-checks in evidence, admitted).
1871, State *v.* Rhoades, 6 Nev. 352, 376 (expert accountant allowed to state the net balance of receipts and disbursements in the State Treasurer's books as examined by him, so as to show the cash that ought to be on hand).
1905, State *v.* Nevada C. R. Co., 28 Nev. 186, 81 Pac. 99 (expert accountant's statements of the "net earnings" of a railroad company as shown by the books, excluded, partly on the principle of § 1960, *post*, and partly because the questions were not framed in proper application of the present principle).

[*Note* 4; *add:*]

Whether an official custodian of records is a *preferred witness* is noticed *post*, § 1272.

§ 1232. What is the Original Writing; Duplicates and Counterparts, etc.

[*Note* 1; *add:*]

1907, Walker *v.* Southern R. Co., — S. C. — , 56 S. E. 952 (bills of lading being made in triplicate, one signed by the shipper and filed with the carrier's auditor, another sent to the shipper with copied signature, and another filed by the carrier with copied signature, the first two were held to be duplicate originals, the third to be secondary).

§ 1233. Same: All Duplicates must be Accounted for, etc.

[*Note* 1; *add,* under *Accord:*]

1904, Norris *v.* Billingsley, — Ala. — , 37 So. 564 (oral testimony of defendant's counterpart, excluded, where plaintiff's was not accounted for).
1906, Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211.
1906, Peaks *v.* Cobb, — Mass. — , 77 N. E. 881 (duplicate of a lease required).

§ 1234. Same: Duplicate Notices, etc.

[*Note* 3, par. 1; *add:*]

1905, Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161.
1906, Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299 (letters).

[*Note* 4; *add:*]

1906, State *v.* Teasdale, — Mo. App. — , 97 S. W. 995 (a carbon-copy is not a duplicate original).
1907, Cole *v.* Ellwood Power Co., — Pa. — , 65 Atl. 678 (duplicate notices, one being carbon-copy, executed in the same manner as the other, held counterparts).
1905, Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161 (a carbon-copy made by the same impression of type is a duplicate original).

§ 1235. Copy Acted on or Dealt with, etc.

[*Note* 5, par. 1; *add:*]

1904, Simonds *v.* Cash, 137 Mich. 558, 99 N. W. 754 (copy referred to in conversations).
1904, Wright *v.* Michigan C. R. Co., 130 Fed. 843, 65 C. C. A. 327 (what is a "duplicate" bill of lading, under St. 1898, June 13, c. 448, 30 Stat. 459).

§ 1236. Copy made an Original, etc.; Telegraphic Dispatches.

[*Note* 1; *add:*]

1906, Flynn *v.* Kelly, 12 Ont. L. R. 440 (contract by telegram, the dispute being as to its terms; the defendants' message handed to the telegrapher, held the original, and the plaintiff bound to prove its loss or destruction; destruction not presumed after six months).
Yukon St. 1904, c. 5, § 30 (like N. Sc. Rev. St. 1900, c. 163, § 30).
1906, Young *v.* People, 221 Ill. 51, 77 N. E. 536 (swindling by bets; sender's telegram filed in Wisconsin, held to be the original on the facts, and the copy filed in the Chicago receiving office, excluded).
1904, Bond *v.* Hurd, 31 Mont. 314, 78 Pac. 579 (contract for medical services; message handed to telegrapher, held the original, on the facts).
1903, Yeiser *v.* Cathers, — Nebr. — , 97 N. W. 840 (telegram excluded on the facts).
1905, Cobb *v.* Glenn B. & L. Co., 57 W. Va. 49, 49 S. E. 1005 (principle considered).

§ 1237. Same: Printed Matter.

[*Note* 1; *add:*]

1904, Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 (action for libel against the author of a letter published in a newspaper; the letter held to be the original; unsound, for the declaration alleged publication in the newspaper, and the plaintiff offered to connect the defendant with it).

§ 1239. Same: Government Land Grants, etc.

[*Note* 4; *add:*]

1905, Butt *v.* Mastin, 143 Ala. 321, 39 So. 217 (not a certified copy from a tract book, but the patent or a certified copy, held the original).
1905, Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976 (State land commissioner's exemplification of a swamp-land patent, without accounting for the original patent, not admitted).
1905, Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005 (similar).
1905, Carpenter *v.* Dressler, 76 Ark. 400, 89 S. W. 89 (State land commissioner's certified transcript of

[*Note* 4 — *continued.*]

his records, not admissible "without first accounting for the deed or certificate"; careful opinion by Hill, C. J., confirming Covington *v.* Berry, Carpenter *v.* Smith, *supra*, and explaining and modifying the opinion in Boynton *v.* Ashabraoner, 75 Ark. 415, 88 S. W. 566, 1011).
Ia. St. 1906, c. 159 (U. S. and State land patents may be recorded with the county recorder without acknowledgment, and the record or the recorder's certified copies "read in evidence in all Courts with like effect" as for other instruments).
N. C. Rev. 1905, § 1597, St. 1901, c. 613 (Secretary of State's certified copy, under seal of State, of land grants, admissible when duly registered, etc.).
1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under Rev. & Ann. St. 1903, § 4575).
S. D. St. 1905, c. 149 (amending Rev. Civ. Code 1903, § 961, so that the record, or a certified copy, of the recorded copy of U. S. land patents, etc., or of a recorded certified copy thereof, are "admissible in evidence without further proof").
U. S. St. 1904, April 19, c. 1396, Stat. L. vol. 33, p. 185 ("copies of any patents, records, books, or papers in the general land office, authenticated by the seal and certified by the recorder" shall be admissible equally with the originals "as when certified by the commissioners of said office").
St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (original applications, etc., in the land office may be produced; cited more fully *post*, § 1676, n. 11).

§ 1240. Same: Tax-Lists, Ballots, etc.

[*Note* 4, par. 1; *add:*]

1904, Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301 (distiller's books, and the transcript in the collector's office, required to be kept by U. S. Rev. St. 1878, §§ 3318 and 3330; status as originals, considered).

§ 1243. Application of the Principle; Oral Utterances, etc.

[*Note* 1; *add:*]

1902, Brown *v.* Equitable L. Assur. Soc'y, 14 Haw. 80, 82 (reading from a letter).
1906, Purinton *v.* Purinton, 101 Me. 250, 63 Atl. 925 (letters read aloud by the plaintiff; the defendant not required to account for the letters).
Contra: 1904, State *v.* Leasia, 45 Or. 410, 78 Pac. 328 (rule applied to the defendant's reading aloud of a letter; unsound; no authority cited).

§ 1244. Same: Identity of Documents.

[*Note* 2; *add:*]

1904, Smythe's Estate *v.* Evans, 209 Ill. 376, 70 N. E. 906 (a bookkeeper's statement of the footings of figures, etc., is admissible, but not of the amount of profits shown).

[*Note* 2, last line:]

For "§ 1429," read "§ 1339."

[*Note* 4; *add:*]

1905, McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 Atl. 477 (that no entry of a certain marriage occurred in a parish-book, allowed).
1907, Wilson *v.* Wood, — Ga. — , 56 S. E. 457 (that no administration has been granted, admissible from one who has made a thorough examination of the records).
1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (attorney's testimony to the absence of a decree of a certain tenor, admitted; the official custodian not preferred; Sykes *v.* Beckwith, — N. D. — , disapproved; good opinion by Ladd, J.).
1907, Stamper *v.* Com., — Ky. — , 100 S. W. 286 (by the county clerk, that no deed of a certain sort was recorded, allowed).
1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (that no record of naturalization existed, allowed, for one who had made a search).

§ 1246. Same: Fact of Ownership.

[*Note* 1; *add:*]

1904, Leon *v.* Kerrison, 47 Fla. 178, 36 So. 173 (conversion of a yacht; production of the bill of sale to the plaintiff, not required).

[*Note* 2; *add:*]

1906, Minnesota Deb. Co. *v.* Johnson, 96 Minn. 91, 107 N. W. 740 (whether defendant claimed land under D.; "Did you hold it under D.?" "Yes, I rented it from him," held proper without producing the lease; "the terms of the tenancy were not in issue"; lucid opinion by Elliott, J.).

§ 1249. Same: Sundry Dealings with Documents.

[*Note* 6; *add:*]

1905, Elgin, J. & E. R. Co. *v.* Thomas, 215 Ill. 158, 74 N. E. 109 (death of a person riding on cars; the fact that he had in his satchel a ticket between two named points, admitted, without producing the ticket).

[*Note* 7; *add:*]

1905, Goslin *v.* Com.; — Ky. — , 90 S. W. 223 (perjury; that a prosecution was pending; production required).
1905, State *v.* Costa, 78 Vt. 198, 62 Atl. 38 (illegal sale of liquors; a witness to search and finding under a warrant, not required to produce the warrant).

§ 1250. Miscellaneous Instances.

[*Note* 1; *add:*]

1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (testimony that certain building work was extra; production of plans and contracts required).

§ 1254. "Collateral" Facts; Specific Instances.

[*Note* 1; *add:*]

1904, Garrison *v.* Glass, 139 Ala. 512, 36 So. 725 (contract for land; his ownership of adjoining land, "being a collateral or incidental matter," allowed to be shown by parol).
1905, Woodall *v.* State, — Ala. — , 39 So. 718 (charge of desertion of family; questions as to the affidavit of complaint and the voter's registration, held collateral).
1905, Franklin *v.* State, — Ala. — , 39 So. 979 (same, for notice of apprehension and arrest, in a charge of homicide).
1905, Wooldridge *v.* State, — Fla. — , 38 So. 3 (signing of certain warrants).
1904, State *v.* Mackinnon, 99 Me. 166, 58 Atl. 1028 (keeping a liquor nuisance; the telephone contract for the building, held a collateral document).

§ 1256. Party's Admission of Contents; Forms of Rule, etc.

[*Note* 3; *add:*]

1906, Purinton *v.* Purinton, 101 Me. 250, 63 Atl. 925 (rule of Slatterie *v.* Pooley, allowed to admit proof of letters by the opponent's oral reading aloud of their contents).
1904, Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979, *semble* (Loomis *v.* Wadhams approved).
1906, Norcum *v.* Savage, 140 N. C. 472, 53 S. E. 289 (heirs of P.'s first wife claiming against heirs of his second wife, the land being on record as granted by deed to P., but plaintiffs claiming that this deed had been obtained by P. in place of a lost deed to his first wife; P.'s admissions that there was such a lost deed to his first wife, received).
Undecided: 1906, Minnesota Deb. Co. *v.* Johnson, 96 Minn. 91, 107 N. W. 740.

[*Note* 4; *add:*]

1904, Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; held, that until the loss of the original was sufficiently shown, the printed copy could not be used as equivalent, merely upon oral admissions of its identity by the defendant or his testimony on the stand to that effect; upon the latter point the ruling is unsound).

[*Note* 5; *add:*]

1905, Security Trust Co. *v.* Robb, 142 Fed. 78, — C. C. A. — , (letter in the hands of a third person; the defendant's agent's admission on the stand that "the paper offered was a copy of it," not sufficient; "the most conclusive proof of its correctness will not render a copy available, without ground laid for dispensing with the production of the original"; this is in itself a perversely rigid rule; but furthermore the opinion shows no appreciation of the rule at issue and cites irrelevant precedents).

§ 1257. Same: Related Rules, etc.

Note 4; *add:*]

1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (Carver *v.* Jackson approved).

[*Note* 7, par. 2; *add:*]

1904, Phillips *v.* Laughlin, 99 Me. 26, 58 Atl. 64 (issue whether J.'s recorded deed to C., under whom defendant claimed, was forged by C.; C.'s letters to J., during C.'s possession, admitting the forgery, excluded, as against the defendant claiming by recorded mortgage from C.; following the opinion of Cooley, J., in Cook *v.* Knowles, Mich., *infra*).
1905, Fall *v.* Fall, 100 Me. 98, 60 Atl. 718 (deed to M. by T., and will by M. to O.; C. claims apparently by adverse possession against M., T., and O.; M.'s declarations, that she was not the owner and C. was, excluded, following Phillips *v.* Laughlin; the opinion is obscure in naming the parties).

[*Note* 7 — *continued.*]

1906, Rix *v.* Smith, 145 Mich. 203, 108 N. W. 691 (grantor's statements, contemporaneous with making the deed, as to the location of boundaries, admitted; opinion obscure, ignoring the principles involved).
1897, High's Ex'rs *v.* Pancake, 42 W. Va. 607, 26 S. E. 537 ("Mere oral declarations to destroy title are inadmissible," because of the statute of frauds).
1906, Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026 (foregoing case approved).

§ 1259. Witness' Admission of Contents; Rule in The Queen's Case.

[*Text*, p. 1514, l. 19 of the first quotation:]

For " second," read " third."

§ 1260. Same: Arguments against the Rule.

[*Note* 9; *add:*]

One of the neatest illustrations is found in the examination of Mr. McClelland by Mr. Hughes, before the New York Legislative (Armstrong) Committee on Insurance, on Nov. 29, 1905.

§ 1261. Details of the Rule.

[*Note* 1; *add:*]

1883, Horton *v.* Chadbourn, 31 Minn. 322, 17 N. W. 865 (but here the rule was too strictly applied).

[*Note* 3; *add:*]

For the question whether the *whole of the writing*, or only the parts strictly contradictory, may be introduced, see *post*, § 2113.

[*Note* 4; *add:*]

1904, Terr. *v.* Boyd, 16 Haw. 660, 665 (the witness may be cross-examined to a document shown him, without necessarily filing it and making it evidence).
1904, Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12 (like Romertze *v.* Bank).
Distinguish also the question whether the whole *may* be put in evidence by the opponent (*post*, § 2113).

§ 1262. Same: Rule as applied to Depositions, etc.

[*Text*, p. 1526, last line; *add* a new note 9:]

[9] Distinguish also the question whether the whole of a document *may* be put in evidence by the opponent (*post*, § 2113).

[*Note* 8; *add:*]

Presumably the foregoing application of the rule in The Queen's Case would no longer be law in England, since St. 28 & 29 Vict. c. 18, § 5 (quoted *post*, § 1263, n.) abolished the rule for criminal cases.

§ 1263. Same: Jurisdictions recognizing the Rule, etc.

[*Note* 3; *add:*]

Yukon St. 1904, c. 5, § 42 (like Eng. St. 1854, c. 125, § 24).

[*Note* 5; *add:*]

1905, Washington *v.* State, 124 Ga. 423, 52 S. E. 910 (rule applied to a letter).
1905, Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 378 (questions as to statements made by the witness in a deposition not introduced, allowed).
1904, McDonald *v.* Bayha, 93 Minn. 139, 100 N. W. 679 (cross-examination of the plaintiff to letters, without showing them, held improper; the Court is so far ignorant of the impolicy of its own rule that it stigmatizes the trial Court's procedure as "inquisitorial").
1905, Villineuve *v.* Manchester St. R. Co., 73 N. H. 250, 60 Atl. 748 (Haines *v.* Ins. Co. followed; here a signed unsworn statement; the practice here sanctioned seems a poor one).
1905, State *v.* Hayes, 138 N. C. 660, 50 S. E. 623 (rape; defendant allowed to cross-examine prosecutrix as to the contents of her letter in defendant's possession; decided on the theory of § 1252, *ante*).

§ 1267. Kinds of Copies; Is a Written Copy the Exclusive Form, etc.?

[*Note* 6; *add:*]

Can.: 1903, Stewart *v.* Walker, 6 Ont. L. R., 495, 501 (Sugden *v.* St. Leonards followed; but some corroboration is required).

§ 1268. Is a Written Copy conditionally Preferred, etc.

[*Note* 5; *add:*]

1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235, *semble* (letter).

§ 1269. Same: Copy preferred for proving Public Records.

[*Note* 1, par. 1; *add:*]

1904, R. *v.* Drummond, 10 Ont. L. R. 546 (perjury; the indictment and judgment of the other trial must be evidenced by an exemplified or sworn copy, or certificate of substance under Dom. Cr. C. § 691, and not by the clerk's minute book).

[*Note* 3; *add:*]

1906, People *v.* Christian, 144 Mich. 247, 107 N. W. 919 (oral testimony to a land-officer's letter, admitted, though a copy of the press-copy in the land office could have been had; "there are no degrees in secondary evidence"; no authority cited).

[*Note* 4; *add:*]

1907, Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767 (whether preliminary proof of lack of a certified copy of burnt records of a court should be required; not decided).

§ 1270. Same: Copy of Record of Conviction, etc.

[*Text*, p. 1542, at the end of the quotation from *Clemens* v. *Conrad*, *add* a new note 2*a*:]

[2a] The best opinion, discussing the principle and policy, is now that of Powers, J., in State *v.* Knowles, 98 Me. 429, 57 Atl. 588 (1904).

[*Note* 5; *add:*]

Yukon St. 1904, c. 5, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").
1906, Thrash *v.* State, — Ark, — , 96 S. W. 360 (Vance *v.* State followed).
1904, McKevitt *v.* People, 209 Ill. 180, 70 N. E. 693 (copy of record required in criminal cases).
1906, O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639 (Bartholomew *v.* People followed).
1904, Bise *v.* U. S., 5 Ind. T. 602, 82 S. W. 921 (record required, to disqualify the witness; otherwise for mere impeachment).
1904, State *v.* Knowles, 98 Me. 429, 57 Atl. 588 (cross-examination to conviction, allowed, as an application of common-law principles).
1905, Deck *v.* Baltimore & O. R. Co., 100 Md. 168, 59 Atl. 650 (what there was in the witness' record that led an officer to arrest him, not allowed on cross-examination; "the proper evidence of such convictions should have been produced"; no authority cited).
1905, State *v.* Heusack, 189 Mo. 295, 88 S. W. 21 (statute applied).
1905, State *v.* Forsha, 190 Mo. 296, 88 S. W. 754 (after the witness' admission of conviction for common assault, the State was allowed to show a conviction for assault with intent to kill).
1905, State *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (rule applied to a defendant cross-examined).
1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (if the witness denies the conviction, the record-copy must be produced, if further proof is desired).
1904, State *v.* Fox, 70 N. J. L. 353, 57 Atl. 270 (the witness may be asked as to conviction of any other crime "without specifying time or place").
1905, State *v.* Mount, 72 N. J. L. 365, 65 Atl. 259 (statute applied).
1904, Gulf C. & S. F. R. Co. *v.* Johnson, 98 Tex. 76, 81 S. W. 4 (record required; and this must include the sentence, not merely the judgment on the verdict).
1906, Grabill *v.* State, — Tex. Cr. — , 97 S. W. 1046 (for disqualifying a witness, a copy of the record is required; but for impeachment, his answer on cross-examination suffices).
1907, Fanin *v.* State, — Tex. Cr. — , 100 S. W. 916 (defendant's oral extra-judicial admission of conviction, excluded).
1906 Bise *v.* U. S., 144 Fed. 374, C. C. A. (for disqualification of a witness, a copy of the record is necessary; here applied for Indian Territory).

§ 1271. Same: Copy of Foreign Statutory Law, etc.

[*Note* 3; *add:*]

N. Sc.: 1903, Merritt, *v.* Copper Crown Co., 36 N. Sc. 383, 393 (West Virginia statute proved by an admission).

[*Note* 4; *add:*]

1907, Cook *v.* Chicago R. I. & P. R. Co., — Nebr. — , 110 N. W. 718 (witness to contents of statutes of Idaho, no copy being offered, excluded).
N. C. Rev. 1905, § 1594 (like Code 1883, § 1338).

§ 1272. Preferences as between Recollection-Witnesses.

[*Note* 1; *add*, under *Accord*:]

1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (see the citation *ante*, § 1244, n. 4).
1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (clerk of court is not a preferred witness to search of records).

§ 1273. Preference as between Different Kinds of Written Copies, etc.

[*Note* 1, par. 1; *add*:]

1906, State *v.* Nippert, — Kan. — , 86 Pac. 478 (Federal revenue records; an examined copy admitted, the officer having refused to certify a copy); State *v.* Schaeffer, — Kan. — , 86 Pac. 427 (similar; general rule as to preference, not decided).
1904, Terry *v*, State, 46 Tex. Cr. 75, 79 S. W. 320 (U. S. collector's records).
1906, Smithers *v.* Lawrence, — Tex. — , 93 S. W. 1064 (certified copy, not preferred to examined copy of land-office records).

§ 1275. Copy of a Copy; Specific Rules of Preference.

[*Note* 5; *add*:]

N. C. Rev. 1905, § 569 (like Code 1883, § 428).

[*Note* 8; *add*:]

N. C. Rev. 1905, § 2661 (like Code 1883, § 3662).
1904, New York, N. H. & H. R. Co. *v.* Horgan, 26 R. I. 448, 59 Atl. 310 (certified copy of an authorized record-copy of a dilapidated record of a town-meeting vote, admitted).

[*Note* 11, par. 1; *add*:]

1906, Mansfield *v.* Johnson, — Fla. — , 40 So. 196 (certified copy from the record of H. county court, of a judgment there recorded on certified copy from D. county court, admitted).

§ 1281. Witness must be called, etc.

[*Note* 1; *add*:]

1906, Hall *v.* Callingham, — N. J. L. — , 65 Atl. 123 (purporting copy of a letter, not verified by any witness, excluded).

§ 1290. Attesting-Witness Rule; Kind of Document covered, etc.

[*Note* 3; *add*:]

Yukon St. 1904, c. 5, § 32.

[*Note* 4; *add*:]

1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (under Code § 1797, the maker's testimony suffices ordinarily; but where attestaton is required for the validity of execution under Code § 2151, — here, an illiterate's mortgage, signed by mark — the attestation also must be proved by the maker; as to whether an illiterate's mark is identifiable, see *ante*, § 693); Code 1897, § 1797 (quoted *post*, § 1299, n. 3).
1906, Castor *v.* Bernstein, 21 Cal. App. 703, 84 Pac. 244 ("The Code makes no distinction in rank between the various modes in which a writing may be proved"; here said of an attested release).
N. C. Rev. 1905, § 329, Code 1883, § 57 (special rule provided for proving a copy of a lost probated will).
S. D.: Stats. 1899, § 533 ("The execution of witnessed instruments, except wills, may be proven in the same manner as the execution of unwitnessed instruments").
1905, Mississippi L. & C. Co. *v.* Kelly, — S. D. — , 104 N. W. 265 (statute applied to a witnessed note; the statutes for proof to a recording officer held not applicable).

§ 1292. Who is an Attesting Witness.

[*Note* 2; *add*:]

Whether the witness is *competent* or *credible* by the substantive law, so as to affect the validity of the attestation, is also a different question (*post*, § 1510, n. 4).

[*Note* 6; *add*:]

Undecided: 1907, Gump *v.* Gowans, 223 Ill. 635, 80 N. E. 1086 (notary).
Contra: 1903, Kelly *v.* Moore, 22 D. C. App. 9 (collecting cases).

For the rule of substantive law as to the *sufficiency*, for purposes of attestation, of a defective or unauthorized certificate of acknowledgment, see Keely *v.* Moore, 196 U. S. 38, 25 Sup. 169 (1904), collecting the cases).

[*Text*, p. 1576; *add* a new par. (6):]

(6) An *illliterate* person may be an attesting witness, subscribing by mark; but the proof of the mark may raise a difficulty (*ante*, § 693, n. 2).

§ 1297. Execution not disputable because of Opponent's Claim, etc.

[*Note* 1; *add*:]

1810, Pearce *v.* Hooper, 3 Taunt. 60 (cited *post*, § 1298, n. 2).
1905, McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95 (administrator of grantee, claiming under the deed; the grantor allowed to use without authentication an admission of usury indorsed by the grantee on the deed).

§ 1299. Attester preferred to any Third Person, etc.

[*Note* 3; *add*:]

1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (statute applied; see the citation *ante*, § 1290, n. 4).
1904, Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348 (statute applied).

§ 1300. Attester preferred to Opponent's Extra-judicial Admissions.

[*Note* 2; *add*:]

1903, Sledge *v.* Singley, 139 Ala. 346, 37 So. 98 (Code § 1797, quoted *ante*, § 1299, n. 3, applies only to testimony on the stand or by deposition; hence the alleged maker's extra-judicial admissions do not dispense with calling the attester of a deed).
1905, Lewis *v.* Glass, — Ala. — , 39 So. 77 (admissions excluded).

§ 1302. Attester need not Testify Favorably.

[*Note* 1; *add*:]

1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95 (mortgage).
In *Illinois*, by a queer forgetfulness of the present principle, the words of the local statute are made to reach a contrary result: 1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614 (by Rev. St. c. 148, § 2, quoted *post*, § 1304, n. 6, the oath of two attesting witnesses "that they were present and saw the testator sign, etc.," "shall be sufficient proof of the execution"; in this case, the will bore a full attestation clause, but one of the attesters could testify only that he did not remember whether he saw the testatrix sign, but that he would not have signed it except in her presence nor have let her sign it except in his presence, etc.; this was held insufficient, ignoring the present principle aod citing no authority whatever, and then invoking the peculiar local rule of § 1303, n. 3, *post*, to exclude all other testimony; the result is to establish an unjust rule of hardship, contrary to two centuries of settled law).

[*Note* 2; *add*:]

1906, Shapter's Estate, — Colo. — , 85 Pac. 688.

§ 1303. Same: Discriminations, etc.

[*Note* 3; *add*:]

1904, O'Brien *v.* Bonfield, 213 Ill. 428, 72 N. E. 1090 (rule held constitutional).
1905, Senn *v.* Greundling, 218 Ill. 468, 75 N. E. 1020.
1905, Barry's Will, 219 Ill. 391, 76 N. E. 577.
1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614.
1906, Stuke *v.* Glaser, 223 Ill. 316, 79 N. E. 105 (meaning of the proviso as to "fraud," determined).

§ 1304. Number of Attesters required to be Called.

[*Note* 6; *add*:]

1906, Greene *v.* Hitchcock, 222 Ill. 216, 78 N. E. 614 (on a grant of probate, the two attesters must testify).
Kan. St. 1905, c. 526, § 1 (the Court shall cause "the witnesses to such will" to attend and be examined).
N. C. Rev. 1905, § 3127 (like Code 1883, § 2148).
1906, Steadman *v.* Steadman, — N. C. — , 55 S. E. 784 (rule applied to a will dating 1857).

§ 1310. Statutory Enumerations of Causes of Unavailability.

[*Note* 1; *add*:]

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148, adding "or cannot after due diligence be found within the State").

§ 1311. Causes of Unavailability; (2) Ancient Document.

[*Note* 2; *add:*]

1904, O'Neal *v.* Tennessee C. I. & R. Co., 140 Ala. 378, 37 So. 275.

§ 1312. Same: (3) Absence from Jurisdiction.

[*Note* 2; *add:*]

1906, Terry *v.* Broadhurst, — Ga. — , 56 S. E. 282 (attendance at school in another State, sufficient).

[*Note* 6; *add:*]

1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95 (one witness called, the other out of the county; other testimony then allowed).

[*Note* 8, par. 2, l. 2; *add:*]

and the cases cited *ante*, §§ 664, 1196.

§ 1313. Same: (4) Absence in Unknown Parts.

[*Note* 5, par. 2; *add:*]

and the cases cited *ante*, §§ 664, 1196, *post*, § 1725.

§ 1316. Same: (9) Incompetency, etc.

[*Note* 4, last line; *add:*]

For an illiterate attester, see *ante*, § 693, n. 2.

§ 1320. If the Witness is Unavailable, must his Signature be proved, etc.?

[*Note* 2; *add:*]

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148; adding, "In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead," etc., shall suffice).

§ 1326. Magistrate's Report of Accused's Statement.

[*Note* 1; *add:*]

Ill. St. 1907, May 17, p. 213 (re-enacting this part of c. 32, § 18, *supra*).
N. H. St. 1905, c. 60, amending St. 1903, c. 134 (the testimony before a medical referee as coroner "shall be reduced to writing").
N. C. Rev. 1905, § 3196 (like Code 1883, § 1147).
Rev. 1905, § 3193 (like Code 1883, § 1150).

[*Note* 3; *add:*]

Compare the comments of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

§ 1328. Written Examination usable as Memorandum, etc.

[*Note* 3; *add:*]

Accord: 1906, Lowe *v.* State, 125 Ga. 55, 53 S. E. 1038, *semble.*

§ 1329. Magistrate's or Coroner's Report of Witness' Testimony.

[*Note* 2; *add:*]

Can.: 1905, Farlinger *v.* Thompson, 37 S. C. 513, 534 (examination of a debtor).

[*Note* 3; *add:*]

1905, Sanford *v.* State, 143 Ala. 78, 39 So. 370.
1904, McKinney *v.* Carmack, 119 Ga. 467, 46 S. E. 719 (neither committing magistrate's nor coroner's report is preferred, where the testimony is used in impeachment; prior cases not cited).
1905, Green *v.* State, 124 Ga. 343, 52 S. E. 431 (coroner's report of testimony, not preferred).
1905, Briggs *v.* People, 219 Ill. 330, 76 N. E. 499 (coroner's minutes of testimony need not be used; no authority cited).

[*Note 5*; *add:*]

1906, State *v.* Thompson, 116 La. 829, 41 So. 107 (the magistrate's report of the testimony being excluded for irregularity, the testimony of one who heard the former testimony was received).

§ 1330. Report of Testimony at a Former Trial.

[*Note* 1, par. 1, at the end; *add:*]

The same point is implied in many of the rulings cited *post*, § 2098 (whether the *precise words* must be proved).

[*Note* 2; *add:*]

1905, Petty *v.* State, 76 Ark. 515, 89 S. W. 465 (the witness may read his memorandum to the jury; of course; it is curious that a Court should dignify such an objection by noticing it).
1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805.
1904, State *v.* Woolridge, 45 Or. 389, 78 Pac. 333.
1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (here because the stenographer could not verify the completeness and accuracy of the report).

[*Note* 3; *add,* under *Not Required:*]

1905, Meyer *v.* Foster, 147 Cal. 166, 81 Pac. 402 (not preferred to oral testimony from memory).
1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (official stenographer's report; "we have no statute giving any special weight to stenographic notes").
1906, Austin *v.* Com., — Ky. — , 98 S. W. 291 (cited *post*, § 1669).
1905, Harmon *v.* Terr., 15 Okl. 147, 79 Pac. 765 (official report, not preferred to the stenographer's testimony on the stand from his carbon copy).
1905, Wells *v.* Chase, 126 Wis. 202, 105 N. W. 799 (a perverse ruling, excluding the official stenographer's sworn verification of his notes on the stand, because they were not "certified" by him under Rev. Sts. 1898, § 4141, cited *post*, § 1669, which declares his certified minutes admissible without calling him in person; the object of the statute was merely to make the minutes admissible without calling him, and his sworn testimony was of course at least as good as his certificate; here the Court, citing no authority, turned the abundant caution of the trial counsel into an error).

[*Note* 3; *add,* under *Required:*]

1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (under P. C. § 869; cited *post*, § 1669, n. 2).
1905, Estes *v.* Missouri P. R. Co., 111 Mo. App. 1, 85 S. W. 909 (citing none of these cases).

[*Note* 3; *add,* at the end:]

The proper method is exemplified in State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (1903).

The following doubt is unnecessary: 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (the witness having identified a person in his former testimony by saying, "There is one; that fellow," and pointing, the stenographer was offered to identify the now defendant as the person pointed out; the Court remarks, "There is certainly much force in the contention that the statutory deposition cannot be thus added to"; on the contrary, there is no reason whatever for doubting that it can be thus supplemented).

§ 1331. Deposition taken de bene esse.

[*Note* 1; *add:*]

Contra, and on this point preferable. 1904, State *v.* Woolridge, 45 Or. 389, 78 Pac. 333 (cited *post*, § 1349, n. 12; collecting authorities).

§ 1335. Official Certificates.

[*Note* 1, par. 2, under *Contra, add:*]

The above Louisiana doctrine has now been abandoned: 1903, State *v.* Menard, 110 La. 1098, 35 So. 360. 1906, State *v.* Romero, 117 La. 1003, 42 So. 482.

§ 1339. Sundry Preferences for Eye-Witnesses, etc.

[*Note* 4; *add:*]

1905, Washington *v.* State, 143 Ala. 62, 39 So. 338 (forgery).

[*Note* 7; *add:*]

Ind. St. 1905, p. 584, § 238 (foregoing statute re-enacted).

[*Note* 10; *add:*]

Compare the useful remarks of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

§ 1347. Cases involving the Effect of Judgments, etc.

[*Note* 3, par. 2; *add*:]

1905, Chattanooga N. B. & L. Ass'n *v.* Vaught, 143 Ala. 389, 39 So. 215.
1904, Hall *v.* Hall, 118 Ky. 656, 82 S. W. 269.

[*Note* 7; *add*:]

1906, Kennedy *v.* Dickie, — Mont. — , 85 Pac. 982 (citing cases).

§ 1349. Magistrate's Report of Testimony.

[*Note* 1; *add*:]

Mr. J. R. Gulson, in his treatise on Philosophy of Evidence (1905), at §§ 392–426, analyzes these problems in a careful and enlightening manner.

[*Note* 2; *add*:]

1905, Bell *v.* State, — Miss.— , 38 So. 795 (Wright *v.* State approved).

[*Note* 3; *add*:]

1906, Willis *v.* U. S., — Ind. Terr. — , 98 S. W. 147 (under a statute requiring the magistrate to make only a "general" statement in writing, the testimony of witnesses who heard is admissible).

[*Note* 5, par. 1; *add*:]

1904, State *v.* Busse, 127 Ia. 318, 100 N. W. 536, *semble* (a confession before a sheriff, written down by a bystander, read to the defendant, sworn and signed by him); 1905, State *v.* Usher, — Ia. — , 102 N. W. 101 ("Such we conceive to be the rule," citing State *v.* Busse).

[*Note* 9; *add*, under *Accord*:]

1904, Godfrey *v.* Phillips, 209 Ill. 584, 71 N. E. 19 (clerk's certificate of testimony of witnesses at probate of a will, under Rev. St. c. 148, § 7, cannot be contradicted as to the date by the clerk).
1906, State *v.* Jennings, — Or. — , 87 Pac. 524 (but the coroner was here allowed to prove the witness' oral statement, to impeach him, because the witness denied the correctness of the signed written report).

[*Note* 12; *add*:]

Whether *perjury* may be committed in testifying by deposition where the deposition is not perfected so as to be admissible, is in theory a different question; and if the oral utterances constitute perjury, they should be provable: 1904, State *v.* Woolridge, 45 Or. 389, 78 Pac. 333 (citing authorities).

§ 1350. Enrolled Copy of Legislative Act, etc.

[*Note* 2; *add*:]

1904, People *v.* McCullough, 210 Ill. 488, 71 N. E. 602 ("the departure . . . has never been extended beyond an inspection of the journals").

[*Note* 3; *add*:]

1906, State *v.* Brodie, — Ala. — , 41 So. 180.
1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (Speaker's testimony excluded).
1904, State *v.* Armour Packing Co., — N. C. — , 47 S. E. 411.

[*Note* 4, par. (1); *add*:]

1904, Gibson *v.* Anderson, 131 Fed. 39, 42, 65 C. C. A. 277 (the "published statutes of the U. S." showed that a joint resolution was approved May 27, 1902; plaintiff not allowed to show that the true date wss after June 1; unsound; erroneously taking as authority Field *v.* Clark, U. S., *infra*, note 5).
1906, Clagett *v.* Duluth, 143 Fed. 824, 827, C. C. A. (a printed official compilation of statutes, held not to prevail over "the original legislation").

[*Note* 4; *add*, at the end:]

(9) Whether the rule applies to the *veto of a governor also:* 1904, People *v.* McCullough, 210 Ill. 488, 71 N. E. 602 ("Only record evidence can be introduced to show that the Governor filed the bill in the office of the Secretary of State with his objections, in case the bill was vetoed by him").
1905, Commissioners *v.* Warfield, 100 Md. 516, 60 Atl. 599 (here the Governor had signed by mistake and afterwards erased his signature).

[*Note* 5; *add*:]

1904, Yancy *v.* Waddell, 139 Ala. 524, 36 So. 733 (similar).
1904, Rogers *v.* State, 72 Ark. 565, 82 S. W. 169 (tenor of the act; journals consulted, citing Chicot Co. *v.* Davies but no other of the thirteen foregoing cases).
1905, Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031 (whether a bill was read, printed, etc.; journals consulted).
1906, Adams *v.* Clark, — Colo. — , 85 Pac. 642 (Lieutenant-governor's signature; *Re* Roberts followed).

[*Note 5 — continued.*]

1906, State *v.* Savings Bank, — Conn. — , 64 Atl. 5 (whether a bill was duly passed; journals, etc., consulted; here the Secretary of State had not recorded it; no precedents cited).
1906, Wade *v.* Atlantic L. Co., — Fla. — , 41 So. 72 ("This Court is firmly committed to the holding").
1906, Belleville *v.* Wells, — Kan. — , 88 Pac. 47 (title of bills; journals consulted).
1907, Missouri K. & T. R. Co. *v.* Simons, — Kan. — , 88 Pac. 551 (constitutional majority; rule re-affirmed).
1906, Palatine Ins. Co. *v.* Northern P. R. Co., — Mont. — , 85 Pac. 1032 (due passage by entering the vote, etc.; journals consulted; repudiating anything to the contrary in State *v.* Long, cited *supra*, n. 4, par. 5).
1904, Colburn *v.* McDonald, — Nebr. — , 100 N. W. 961 (like State *v.* Frank, *supra*).
1884, Passaic Co. *v.* Stevenson, 46 N. J. L. 173 (rule of Pangborn *v.* Young approved).
1890, Standard Underground C. Co. *v.* Att'y-Gen'l, 46 N. J. Eq. 270, 19 Atl. 733 (similar).
1907, Bloomfield *v.* Board, — N. J. L. — , 65 Atl. 890 (that a bill was not approved within sixty days after adjournment; enrolled attested statute not allowed to be overthrown collaterally).
1896, New York & L. I. B. Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 (journals consulted, to learn whether a two-thirds vote was received).
1906, Stickney's Estate, 185 N. Y. 107, 77 N. E. 993 (journals consulted to determine the constitutional quorum).
1904, State *v.* Armour Packing Co., — N. C. — , 47 S. E. 411 (triple reading after amendment, etc.; authentication is conclusive, except so far as the Constitution requires that certain matters must appear in the journal).
1905, Bray *v.* Williams, 137 N. C. 387, 49 S. E. 887 (private act; like Wilson *v.* Markley).
1904, Board *v.* Traveler's Ins. Co., 128 Fed. 817, 825, 63 C. C. A. 467 (first reading; following Carr *v.* Coke, N. C., *supra*, the journals were consulted).
1906, Board *v.* Tollman, 145 Fed. 753, 764, C. C. A. (roll-call; N. C. rule applied).
1904, Portland *v.* Yick, 44 Or. 439, 75 Pac. 706 (journals will be consulted only to determine whether mandatory provisions there appear to have been observed).
1897, Missouri, K. & T. R. Co. *v.* McGlamory, 92 Tex. 150, 41 S. W. 466 (journals examined to see whether an act took effect from date of passage).
1907, El Paso & S. W. R. Co. *v.* Foth, — Tex. Civ. App. — , 100 S. W. 171 (Williams *v.* Taylor followed).
1904, State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433 (signing, etc., of a bill; journals may be consulted for facts constitutionally required to be recorded).
1904, Younger *v.* Hehn, 12 Wyo. 289, 75 Pac. 443 (preceding case approved).

[*Note* 11; *add:*]

1906, State *v.* Terre Haute & I. R. Co., — Ind. — , 77 N. E. 1078 (corruption).

§ 1351. Certificate of Election.

[*Note* 4; *add:*]

1905, People *v.* Davidson, 2 Cal. App. 100, 83 Pac. 161.
1904, Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494 (construing the law as to gravel-road elections).
1906, Moorhead *v.* Arnold, — Kan. — , 84 Pac. 742 (good opinion by Burch, J.).
1905, Stafford *v.* Sheppard, 57 W. Va. 84, 50 S. E. 1016.
1906, Williamson *v.* Musick, — W. Va. — , 53 S. E. 706.

§ 1352. Sundry Official Certificates, etc.

[*Note* 3; *add:*]

1904, Markey *v.* State, 47 Fla. 38, 37 So. 53 (on a charge of perjury). Compare the similar question for *perjury in a deposition* (*ante*, § 1331, n. 1).

[*Note* 4; *add:*]

1906, Sebesta *v.* Supreme Court, — Nebr. — , 109 N. W. 166 (foreign notary's certificate of taking of an affidavit, the certificate itself reciting only the fact of signature, not of oath-taking, excluded, under statutory wordings; here the ruling however is perversely technical, because the affidavit itself recited that the signers were "each duly sworn upon their oaths").

[*Note* 5, l. 7; *add:*]

1906, Ford *v.* Ford, 27 D. C. App. 401, 408 (collecting the authorities).
1904, Walker *v.* Shepard, 210 Ill. 100, 71 N. E. 422 (notary's certificate of acknowledgment is not conclusive as to the grantor's mental capacity).
1905, Swiger *v.* Swiger, 58 W. Va. 119, 52 S. E. 23.

[*Note* 5; *add,* at the end:]

For the *measure of proof* required in overturning such a certificate, see *post*, § 2498.

[*Note* 9, par. 2; *add:*]

Otherwise to some extent, as to *offences of seamen:* Rev. St. 1878, § 4597, amended by St. 1898, Dec. 21, c. 28, §§ 19, 20, 30 Stat. 760 (the court in admiralty may refuse to receive evidence of offences by seamen when not entered in the official log).
1906, The Amazon, 144 Fed. 153, D. C. (statute applied).

[*Note* 11, par. 1; *add:*]

Ky. Gen. Stats. 1899, c. 81, § 17, Stats. 1903, § 3760 ("Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which by law he is required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer").

1906, Husbands *v.* Polivick, — Ky. — , 96 S. W. 826 (statute applied as a rule of presumption to a tax-collector's return on a tax sale).

§ 1354. Constitutionality of Statutes, etc.; Applications of Principles.

[*Note* 4; *add:*]

1906, Husbands *v.* Polivick, — Ky. — , 96 S. W. 826 (tax-deed is presumptive only).

[*Note* 6; *add:*]

1905, Calkins *v.* Howard, 2 Cal. App. 233, 83 Pac. 280 (statute declaring that a sale in bulk without notice is "conclusively presumed to be fraudulent and void" as against creditors, enforced as valid).

[*Note* 14, l. 6 from the end; *omit* the remaining six lines, and *insert* the following:]

1902, Japanese Immigrant Case, 189 U. S. 86, 99, 23 Sup. 611 (the arbitrariness of an executive officer's action under such a statute will be reviewed); 1903, Gonzales *v.* Williams, 192 U. S. 1, 15, 24 Sup. 177 (passing on St. 1903, Mar. 3, c. 1012, 32, Stat. 1213); 1904, Hopkins *v.* Fachant, 130 Fed. 839, 65 C. C. A. 1 (same statute); 1904, Tom Hong *v.* U. S., 193 U. S. 517, 24 Sup. 517.

A similar statute, making conclusive, for certain purposes, a *Chinese immigrant's certificate of occupation*, has been enforced: U. S. 1884, July 5, c. 220, 23 Stat. L. 115, 1 Rev. St. Suppl. 458; 1891, Wan Shing *v.* U. S., 140 U. S. 424, 11 Sup. 729; 1904, U. S. *v.* Gin Hing, — Ariz. — , 76 Pac. 639.

But a partial halt seems now to have been taken in the license to Executive usurpation granted by this particular line of statutes. The extreme result of the logic of the foregoing rulings would have been to sanction the exclusion or deportation, by administrative fiat, of an *American-born person*, a citizen by express constitutional provision, without affording a judicial review of the administrative officer's erroneous assertion that the citizen was a Chinese alien. This step was taken, with one foot, for the case of an American citizen *excluded* on his return from abroad: 1904, U. S. *v.* Sing Tuck, 194 U. S. 161, 24 Sup. 621, overruling Sing Tuck *v.* U. S., 128 Fed. 592, C. C. A. (U. S. St. 1894, Aug. 18, c. 301, § 1, makes the decision of the Secretary of Commerce and Labor conclusive, after a due hearing, upon the fact of non-citizenship of a person of Chinese parentage claiming entrance as a native-born citizen; constitutionality of the statute, not decided); 1905, U. S. *v.* Ju Toy, 198 id. 253, 25 Sup. 645 (constitutionality of the preceding statute affirmed; "with regard to him [a returning citizen], due process of law does not require a judicial trial; . . . the decision may be entrusted to an executive officer"; three judges dissenting; Brewer, J.: "Such a decision is to my mind appalling; . . . an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of the State proceeding in strict accord with exactly similar rules").

But the final step, namely, the same ruling for the case of an American citizen ordered to be *deported*, though now here and having never left the country, has not yet been taken by the Supreme Court; and the tendency shown by the lower and intermediate Courts has thus far been to refuse to take this step; for the extraordinary and broad consequences of it (as suggested in the dissenting opinion of Brewer, J., in U. S. *v.* Ju Toy, *supra*) are presumably becoming apparent:

1903, *Re* Lea, 126 Fed. 234, D. C. (under the immigration laws, a claim of citizenship is a judiciable question.

1903, U. S. *v.* Hung Chang, 126 Fed. 400, 405, D. C., *semble* (the deportation of a native-born citizen is unconstitutional; hence the issue whether a particular person to be deported is native-born is a judiciable one).

1906, Moy Suey *v.* U. S., 147 Fed. 697, C. C. A. ("Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the Courts, in the usual and ordinary way of adjudicating constitutional rights"; distinguishing U. S. *v.* Sing Tuck on the ground that here the alleged citizen is within the country, and not seeking to re-enter it after departure).

The tendency of the times towards the expansion of administrative finality is lucidly discussed and favored, and the decisions collated, by Professor F. J. Goodnow, in an article entitled "The Growth of Executive Discretion," in the Proceedings of the American Political Science Association, II, 29 (1905); this author, however, does not clearly face the distinction vital to the objectors against the new tendency, namely, the distinction between administrative finality within the sphere of administrative services (*e. g.* the postal service), and administrative finality as extended to fundamental private rights (*e. g.* property and citizenship) which the Judiciary exist inherently to protect. The new tendency is criticised by Mr. E. M. Parker, in 20 Harvard Law Review, 116 (1906; "Executive Judgments and Executive Legislation"), and is advocated by Mr. T. R. Powell, in 1 American Political Science Review, 583 (1907; "Conclusiveness of Administrative Determinations in the Federal Government"). The most philosophical and sane treatment anywhere to be found is that of Professor Roscoe Pound, in his article "Executive Justice" (American Law Register, N. S., March, 1907), in which he analyzes the fundamental reasons for the appearance of the new tendency of decision.

[*Note* 15; *add:*]

So also *postal officials:*

1904, Public Clearing House *v.* Coyne, 194 U. S. 497, 24 Sup. 789 (order excluding fraudulent communications from the mails).

For the Federal *land-office* decisions, see *ante*, § 1347, n. 7.

[*Note* 18; *add:*]

1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (policy slips; possession as raising a presumption of knowledge).

[*Text,* p. 1671, last line; *add:*]

and in sundry other respects.[22a]

[22a] 1904, People *ex rel.* Hillel Lodge *v.* Rose, 207 Ill. 352, 69 N. E. 762 (St. 1901, May 10, declaring the failure of a corporation to file an annual report *prima facie* evidence of non-user, is constitutional; otherwise if a rule of conclusiveness had been declared; Magruder, J., diss. on other grounds).
1905, Williams *v.* Fourth Nat'l Bank, — Kan. — , 82 Pac. 496 (sales in bulk).
1905, State *v.* Lawson, — Kan. — , 82 Pac. 750 (official records of physicians' licenses).
1905, Andricus' Adm'r *v.* Pineville Coal Co., — Ky. — , 90 S. W. 233 (statute making a mine inspector's report *prima facie* evidence, held constitutional).
1904, Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790 (a statute making the possession of registered bottles, etc., *prima facie* evidence of crime).

§ 1367. Cross-Examination as a Distinctive Feature, etc.

[*Note* 5; *add:*]

Mr. (Assistant District Attorney) Arthur Train, points out the analogous failures of cross-examination through an interpreter (The Prisoner at the Bar, 1906, p. 239): "It is practically impossible to cross-examine through an interpreter, for the whole pyschological significance of the answer is destroyed; ample opportunity being given for the witness to collect his wits and carefully to frame his reply."

§ 1368. Theory and Art of Cross-Examination.

[*Note* 10; *add:*]

1906, Train, The Prisoner at the Bar, 290 (cross-examination of the old lady).

[*Note* 14; *add:*]

Mr. Train has collected (The Prisoner at the Bar, 1906, pp. 286–290) some useful examples on this point.

§ 1371. Opportunity of Cross-Examination, etc.

[*Note* 1, par. 1; *add:*]

1904, Union I. & F. Co. *v.* Sonnefield, 113 La. 436, 37 So. 20.

The ruling in Hosch Lumber Co. *v.* Weeks, 123 Ga. 336, 51 S. E. 439 (1905), that where the taking party fails to attend but the opponent attends and cross-examines, the latter cannot use his cross-examination but must give notice again and take the deposition again as his own, is both unsound and unjust.

Distinguish the principles of § 912, *ante,* § 1983, n. 7, *post.*

§ 1373. Sundry Tribunals.

[*Note* 1; *add:*]

So also *court commissioners* of various sorts:
1906, U. S. *v.* Greene, 146 Fed. 796, D. C. (deceased witness' testimony before a U. S. commissioner on a proceeding for extradition, admitted).

§ 1374. Testimony at a Coroner's Inquest.

[*Note* 5; *add:*]

Accord: 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (excluded).
Not decided: 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165.

§ 1375. Testimony before Committing Magistrate, etc.

[*Note* 4, col. 2, l. 1; *add:*]

N. C. Rev. 1905, § 3205 (like Code 1883, § 1157).

[*Note* 4, at the end; *add:*]

Compare Ill. St. 1907, Feb. 11, p. 56 (bastardy complaint; the woman shall be examined by the magistrate upon oath, etc., "in the presence of the man alleged to be the father of the child").

§ 1378. Depositions; Notice and Sufficient Time, etc.

[*Note* 1; *add:*]

Whether the notice must be served on *party* or *attorney* depends chiefly on statutory wordings: 1906, Webb *v.* Ritter, — W. Va. — , 54 S. E. 484.

[*Note* 4, par. 1; *add*, under *Accord:*]

1905, Real Estate T. Co. *v.* Union T. Co., — Md. — , 61 Atl. 228.

§ 1379. Same: Plural Depositions, etc.

[*Note* 2; *add:*]

1906, Ivey *v.* Bessemer C. C. Mills, — N. C. — , 55 S. E. 613 (notice to attend in F. and in P.; the opponent attended at P., and the deposition at F. was not taken).

§ 1380. Depositions; English and Canadian Statutes.

[*Note* 3; *add:*]

Eng.: 1904, St. 4 Edw. VII, c. 15, § 14 (Prevention of Cruelty to Children Act; for depositions of children, notice and opportunity of cross-examination are required).
Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 15, § 69 (all witnesses before any judge, etc., "shall give their testimony *viva voce* on oath, and be subject to examination by counsel in the presence of the Court," etc., "unless it is otherwise ordered by the Court or a judge on special grounds, or with the consent of the parties," etc.); ib. § 70 (nothing herein shall "affect the mode of giving evidence by the oral examination of witnesses in trials by jury or before a judge without a jury," "save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read").
St. 1905, 5 Edw. VII, c. 14, § 95 (county courts; like Rev. St. 1897, c. 52, § 134).
Newf. St. 1904, c. 3, Rules of Court 33 (provisions for notice; further provisions as quoted *post*, § 1411, n. 1).
Yukon Consol. Ord. 1902, c. 17, Ord. XXVI, R. 262 (like Ont. Rules of Court, § 483); R. 292 (like Eng. Ord. 38).

§ 1381. Same: U. S. Federal Statutes.

[*Note* 3; *add:*]

The latest pronouncements on this question are as follows:
1903, Hanks Dental Ass'n *v.* Tooth Crown Co., 194 U. S. 303, 24 Sup. 700 (U. S. St. 1892, c. 14, Mar. 9, "does not purport to repeal in any part, or to modify, § 861, or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions"; here applied to forbid following New York law as to depositions of a party for discovery before trial; collecting the intervening rulings of the Federal intermediate courts on St. 1892).
1904, Zych *v.* American Car & F. Co., 127 Fed. 723, 728, C. C. (Thayer, J.: "It will not be out of place to observe, because the question has been to some extent discussed, that the law as declared in *Ex parte* Fisk has not been altered by the act of Congress of Mar. 9, 1892, *supra;* . . . there seems to be a general consensus of judicial opinion that the act relates merely to the mode of taking testimony, adopting in that respect the provisions of the laws of the various States relative to the method of taking depositions, without altering the conditions prescribed by §§ 863 and 866 of the Revised Statutes of the U. S., under which depositions for use in the Federal courts may be taken").
1905, Carrara P. A. Co. *v.* Carrara P. Co., 137 Fed. 319, C. C. (the statute of 1892 does not "add to the classes of witnesses" but "provides an additional mode" for taking depositions).
Compare the new statute quoted *ante*, § 6.

§ 1382. Same: U. S. State Statutes.

[*Note* 1; *add:*]

Ala.: 1905, Edwards *v.* Edwards, 142 Ala. 267, 39 So. 82 (Chancery statute applied).
Cal. St. 1903, c. 255 (adding to C. C. P. 1872 a new § 2025½, providing for depositions of non-resident witnesses on oral interrogatories, with rules for notice). St. 1905, c. 540 (amends P. C. 1872, §§ 1335–1341, as to the mode of taking the depositions). St. 1905, c. 570 (amends P. C. 1872, §§ 872, 882). St. 1905, c. 540 (amending P. C. § 882; prosecution's depositions in criminal cases; quoted *post*, § 1411, n. 1).
Ill.: 1903, Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77 (*semble*, under R. S. c. 148, § 4, providing for depositions in probate cases by commission, the failure of the opponent to receive notice of the taking does not prevent the use of the deposition).
Ind. St. 1905, p. 584, § 242 (phraseology of the foregoing statute changed).
Ia.: 1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105 (Code § 4688, as to deposition by Court order, construed).
La.: 1905, Honor Co. *v.* Stevedores' & L. B. Ass'n, 114 La. 361, 38 So. 271 (notice required). 1905, De Renzes *v.* His Wife, 115 La. 675, 39 So. 865 (under Rev. St. § 611, for a foreign commission, no notice of time and place is required when interrogatories are annexed and notice thereof given).
Md. St. 1906, c. 239 (repealing Pub. Gen. L. 1904, art. 35, § 36; provision made for taking testimony on a commission from without the State).
Mo.: 1903, *Re* Wogan, 103 Mo. App. 146, 77 S. W. 490 (time of notice).
N. J.: 1904, Stokes *v.* Hardy, 71 N. J. L. 116, 58 Atl. 650 (proof of notice).
N. C. Rev. 1905, § 1652 (like Code 1883, § 1357, as amended by later statutes).
Tex. St. 1905, c. 76 (Rev. Civ. St 1895, §§ 2282, 2284, as to notice, etc., amended, and § 2274*a* added).
Utah St. 1905, c. 41, Mar. 7 (providing a mode of depositions taking without the State on oral interrogatories).
Wis. St. 1905, c. 237 (rules for notice, in Stats. 1898, § 4102, amended).

§ 1384. Affidavits, etc.

[*Note* 1, par. 1; *add:*]

1906, People *v.* Wolf, 183 N. Y. 464, 76 N. E. 592 (affidavits forming a criminal information against the defendant).

§ 1385. Ex parte Expert Investigations, etc.

[*Note* 1; *add:*]

Accord: 1906, Lenoir *v.* People's Bank, 87 Miss. 559, 40 So. 5 (maps and surveys testified to by the surveyor, taken in a survey made with the notice provided in Code 1892, § 1653, admitted).
Contra: 1903, Wood *v.* LeBlanc, 35 N. Br. 47, 56, by two judges among seven (a witness using a plan to illustrate his testimony should prepare it in court, not before trial; this is unsound).

§ 1387. Issue the Same.

[*Note* 1; *add:*]

1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (murder by abortion; testimony of the deceased, in a prior criminal prosecution against the defendant for the seduction, as to the handwriting of certain letters there and here offered, admitted, the particular issue being identical).
1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (a former trial, in which the case had been rested but no formal termination reached, owing to the referee's death, held sufficient under C. C. P. § 830.
1907, Shaw *v.* N. Y. Elev. R. Co., — N. Y. — , 79 N. E. 984 (action to enjoin the operation of an elevated railroad; a deceased witness' testimony for the plaintiff at the first trial, admitted at the second trial against a party becoming a lessee after the first trial and brought in by stipulation as a defendant on the second trial; St. 1899, c. 352, p. 762, and St. 1893, c. 595, p. 1375, amending C. C. P. 1877, § 830, held not to affect this result, the testimony being admissible on common-law principles).

[*Note* 2; *add:*]

Newf. St. 1904, c. 3, Rules of Court 33, par. 25.
N. W. Terr. Consol. Ord. 1898, c. 21, R. 287 (like N. Sc. Ord. 35, R. 24).
Yukon Consol. Ord. 1902, c. 17, Ord. XXVI, R. 286 (like N. Sc. Ord. 35, R. 24).
Cal. St. 1905, c. 540 (amends P. C. 1872, § 882, so as to admit depositions for the prosecution taken before a committing magistrate; quoted *post*, § 1411, n. 1).
Ia. St. 1898, p. 16, c. 9, § 1, Code Suppl. 1902, § 245 *a* (quoted more fully *post*, § 1669, n. 2; notes of testimony are admissible "on any retrial of the case or proceeding in which the same were taken," and "shall have the same force and effect as a deposition").
Ky. St. 1904, c. 79 (real estate controversies; elaborate provisions for notice; the deposition to be evidence in any court having jurisdiction).
Wash. St. 1905, c. 26 (testimony "given in a former action or proceeding, or in a former trial of the same cause or proceeding," if a civil one, "where it is between the same parties and relates to the same matter," is admissible).

[*Note* 6; *add:*]

A similar question arises where a surety *or joint-tortfeasor* sues *principal* or *co-tortfeasor* for *contribution* to a claim sued for and paid; here the testimony at the first trial may be received as a part of the record (even without showing the witnesses unavailable) to define the scope of the issue adjudged, but not as testimony to the facts: 1896, Washington G. Co. *v.* District, 161 U. S. 316, 16 Sup. 564. 1906, Spokane *v.* Costello, 42 Wash. 182, 84 Pac. 652.

§ 1388. Parties or Privies the Same.

[*Note* 6; *add:*]

1905, Hunter *v.* District Court, 126 Ia. 357, 102 N. W. 156 (contempt; testimony in a similar charge against an accomplice, excluded).
1906, Wiltsey's Will, — Ia. — , 109 N. W. 776 (testimony at a former probate proceeding for the same will, with parties slightly different in form, admitted under Code Suppl. 1902, § 245 *a*, cited *ante*, § 1387, n. 2).
1905, Andricus' Adm'r *v.* Pineville Coal Co., — Ky. — , 90 S. W. 233 (two fellow-workmen killed at the same time and place by the same cause, and two actions by the same person their administrator against the same defendant; a deposition taken in one, admitted in the other).
1904, Edgerly's Estate, — Minn. — , 99 N. W. 896 (deposition not admitted against one not a party).
1903, Persons *v.* Smith, 12 N. D. 403, 97 N. W. 551 (testimony between the same parties on the same issues in the Federal Circuit Court, admitted).
1905, Martin *v.* Ragsdale, 71 S. C. 67, 50 S. E. 671 (former testimony in 1882 in a suit between the present plaintiffs and a remote assignor of defendants on the same subject, admitted).
1902, Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451 (deposition taken by defendant in a creditor's suit to avoid a conveyance, not usable against another creditor in a suit to avoid the same conveyance).

§ 1389. Deposition used by Either Party, etc.

[*Note* 2; *add:*]

1907, Chesapeake Stone Co. *v.* Fossett, — Ky. — , 100 S. W. 825.
1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668 (by Circuit Court Rule 41 *a*).

§ 1390. Failure of Cross-Examination through Witness' Death, etc.

[*Note* 4; *add:*]

1804, O'Callaghan *v.* Murphy, 2 Sch. & Lefr. 158, Ire. (where a witness in chancery died after direct examination but before any cross-examination, the testimony was read, on the facts of the case).

§ 1391. Failure of Cross-Examination through Witness' Refusal, etc.

[*Note* 1; *add:*]

Contra: 1826, Courtenay *v.* Hoskins, 2 Russ. 253 (the refusal of the witness to be cross-examined is no reason for later suppressing the direct examination; because the cross-examiner should insist at the time on the enforcement of his right).

§ 1392. Non-Responsive Answers, etc.

[*Note* 4; *add:*]

1906, Taylor *v.* Globe Ref. Co., — Ga. — , 56 S. E. 292.
1906, Sparks *v.* Taylor, — Tex. — , 90 S. W. 485 (further pertinent answers by an opponent in discovery, made by advice of his attorney, admitted).

[*Note* 5, par. 1; *add:*]

1904, Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 (an oral answer stricken out before signing, and therefore not subject to cross-examination, cannot be used).

§ 1393. Sundry Insufficiencies of Cross-Examination.

[*Text*, par. (*c*), at the end; *add:*]

The same principle applies to an accused who is *deaf* or *dumb* or *blind.*[3a]

[3a] 1905, Ralph *v.* State, 124 Ga. 81, 52 S. E. 299 (the accused being deaf, the Court refused to let the testimony be taken by a stenographer and then typewritten and read by the accused as the trial progressed, but allowed the counsel to write down the testimony and show it to the accused; held sufficient, in the trial Court's discretion).
Minn. St. 1905, c. 47 (a person deaf or dumb, charged with insanity, is entitled "as a matter of absolute right" to an interpreter).
1906, Felts *v.* Murphy, 201 U. S. 123, 26 Sup. 366 (an accused, in a State court, unable by deafness to hear the testimony, which was not repeated to him by his ear-trumpet; this was held not to give ground for complaint as a Federal question under the Fourteenth Amendment).

§ 1398. Effect of Constitutional Sanction, etc.; Law in Various Jurisdictions.

[*Note* 4; *add:*]

1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105, *semble* (rule not applicable in disbarment proceedings; but "were this a criminal case, the point might be well taken").
1899, *Re* Wellcome, 23 Mont. 260, 58 Pac. 711, *semble.*

[*Note* 5, par. 1; *add:*]

Ida.: 1890, Terr. *v.* Evans, 2 Ida. Hasb. 651, 23 Pac. 232.
Kan.: 1904, State *v.* Nelson, 68 Kan. 566, 75 Pac. 505 (thus presumably disposing of the doubt in State *v.* Tomblin, *supra*, n. 4). 1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (foregoing case approved).
Ky.: 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased witness, admitted; St. 1903, § 4643, quoted *post*, § 1413, and providing that the consent of the defendant in criminal cases shall be necessary, applies in that respect "alone to the testimony of living witnesses so taken"). 1906, Austin *v.* Com., — Ky. — , 98 S. W. 291 (former testimony).
Me.: 1906, State *v.* Herlihy, — Me. — , 66 Atl. 643.
N. Y.: 1891, People *v.* Fish, 125 N. Y. 136, 26 N. E. 319.
Tex.: 1907, Porch *v.* State, — Tex. Cr. — , 99 S. W. 1122 (testimony of a deceased witness before the committing magistrate, received; "we therefore, without a further tedious discussion of the question, overrule the majority opinion in the Cline case [cited *supra*, n. 4], and reaffirm the opinions of this Court rendered prior to the Cline case as the law"; this is a sensible and praiseworthy attitude, which sets right once for all the law in this State; this decision therefore practically repudiates also on this point Smith *v.* State, — Tex. Cr. — , 85 S. W. 1153, cited more fully *post*, § 1405, n. 1).
U. S.: 1906, U. S. *v.* Greene, 146 Fed. 796, D. C.
Utah: 1902, State *v.* King, 24 Utah 482, 68 Pac. 419.

[*Note* 5, par. 2; *add:*]

Cal.: 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted for the State; no cases cited). The statute of 1905, c. 540 (quoted *post*, § 1411, n. 1), may be intended to cure in part the anomaly in this State. Compare here also the peculiar local rulings under the statute for using a *stenographic report* of the testimony (*post*, § 1669).

[*Note* 5, at the end; *add:*]

In *Indiana*, the following statute applies: St. 1905, p. 584, § 242 (a defendant's request or notice, in a criminal case, to take depositions "shall be deemed a waiver of his constitutional right to object to the taking of depositions by the State," etc.).

The Sixth *Federal* Amendment, quoted *ante*, § 1397, n. 1, does not control State legislation: 1904, West *v.* Louisiana, 194 U. S. 258, 24 Sup. 650 (cross-examined testimony before a committing magistrate, the witness now being permanently a non-resident, offered against a defendant). The only Federal question, therefore, can be whether there was due process of law under the Fourteenth Amendment, and this is not thereby violated; West *v.* Louisiana, *supra;* Felts *v.* Murphy, cited *ante*, § 1393, n. 3 *a*.

Whether *disbarment* proceedings are criminal, in the constitutional sense, has usually been answered in the negative:

1905, State *v.* McRae, 49 Fla. 389, 38 So. 605.
1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105.
1899, *Re* Wellcome, 23 Mont. 260, 58 Pac. 711.

[*Note* 7, par. 1; *add,* under *Accord:*]

1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (following Tucker *v.* People).

§ 1404. Witness Unavailable; Absence from Jurisdiction.

[*Note* 4; *add:*]

Contra (*i. e.* holding that this is unnecessary): 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313. 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 61, 69 C. C. A. 28.

[*Note* 5; *add:*]

Ala.: 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (a witness to a dying declaration, shown merely to have gone to Texas; former testimony excluded). 1904, Wilson *v.* State, 140 Ala. 43, 37 So. 93 ("residence and indefinite absence from the State" suffices). 1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (removal permanently or for an indefinite time suffices). 1904, Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702 (similar).
Ark.: 1905, Petty *v.* State, 76 Ark. 515, 89 S. W. 465.
Ga.: 1906, Taylor *v.* State, 126 Ga. 557, 55 S. E. 474 (absence from the county, being last heard from within the State, does not suffice, under P. C. 1895, § 1001).
Kan: 1904, State *v.* Nelson, 68 Kan. 566, 75 Pac. 505. 1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (absence from the State suffices).
La.: State *v.* Kline, 109 La., cited *supra* (affirmed on writ of error, under the U. S. 14th Amendment, *s. v.* West *v.* Louisiana, U. S., cited *infra*). 1904, State *v.* Sejours, 113 La. 676, 37 So. 599 (permanent absence from the State suffices).
U. S.: 1904, West *v.* Louisiana, 194 U. S. 258, 24 Sup. 650 (permanent non-residence suffices, at least under the fourteenth Amendment; here applied to testimony before a committing magistrate offered against a defendant).
1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 57, 69 C. C. A. 28 (former testimony of a witness in Indiana, out of the jurisdiction of this court and more than 100 miles away, admitted).

[*Note* 8, par. 1; *add,* under *Accord:*]

U. S.: 1873, Burton *v.* Driggs, 20 Wall. 125 (lost deposition of a witness living in another State and more than 100 miles away; contents allowed to be proved). 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313 (depositions burned; Burton *v.* Driggs approved).

For the case of a witness *once present during the time of trial, but subsequently departing,* see *post,* § 1415.

§ 1405. Same: Disappearance, etc.

[*Note* 1, par. 1; *add,* under *Accord:*]

Ala.: 1905, Bardin *v.* State, 143 Ala. 74, 38 So. 833 (mere inability to find, after search in the county of usual residence, insufficient). 1906, Woodstock Iron Works *v.* Kline, — Ala. — , 43 So. 362.
Cal.: 1899, People *v.* Plyler, 126 Cal. 379, 58 Pac. 904 (trial Court's determination controls in applying P. C. § 686, cited *post,* § 1411). 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (same). 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted under P. C. § 686; here the witness was in Mexico). 1904, People *v.* Barker, 144 Cal. 705, 78 Pac. 266 (similar).
Fla.: 1904, Dorman *v.* State, 48 Fla. 18, 37 So. 561 (witness for the defendant; former testimony not admitted on the facts).
Mo.: 1904, State *v.* Riddle, 179 Mo. 287, 78 S. W. 606 (due diligence not found on the facts).
Tex.: 1905, Smith *v.* State, — Tex. Cr. — , 85 S. W. 1153 (former testimony of an absent person, excluded; this Court here appears to be unable or unwilling to tell the profession just what rules it means to lay down on these points; from this opinion it is impossible to say whether the exclusion is (1) because the witness was not sought for with sufficient diligence, or (2) because mere inability to find is never enough, but only absence from the jurisdiction, or (3) because the Texas statutes for depositions, *post,* §§ 1411, 1413, are the only sources of admissibility, and under them no provision at all is made for using testimony at a former trial in a criminal case, or (4) because the use of former testimony in a criminal case is always unconstitutional, under Cline *v.* State, cited *ante,* § 1398, n. 4; the only things fairly apparent from the opinion are that Sullivan *v.* State, *supra,* is regarded as overruled, in Evans *v.* State, 12 Tex. App. 370, on some point or other, and that Cline *v.* State, *supra,* may be still law for some purpose or other, though in 1907 it was repudiated on another point in Porch *v.* State, *ante,* § 1398, n. 5).

[*Note* 1, par. 1; *add*, under *Contra*:]

826, Wilbur *v.* Selden, 6 Cow. 164 (former testimony of a witness who could not be found and had declared that he was going to Pennsylvania, excluded).

[*Note* 1, par. 2, l. 4; *add*:]

and for *attesting witnesses* (*ante*, § 1313), *persons not heard from* (*ante*, §§ 158, 664), and *statements of intent* (*post*, § 1725).

§ 1409. Same: Disqualification by Infamy.

[*Note* 2, par. 1; *add*:]

1907, Greenlee *v.* Mosnat, — Ia. — , 111 N. W. 996 (former testimony of a party now disqualified by the opponent's death; St. 1898, c. 9, § 1, quoted *post*, § 1669, n. 2, held not to alter this result).

§ 1411. Statutes affecting Depositions de bene esse.

[*Note* 1; *add*:]

Eng.: 1894, St. 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children; like St. 4 Edw. VII, *infra*, with an additional clause that the Court must be satisfied that the evidence of the child "is not essential to the just hearing of the case"). 1904, R. *v.* Hale, 20 Cox Cr. 739 (St. 57 & 58 Vict. c. 41, § 16, construed as to the child's evidence being "essential"). 1904, St. 4 Edw. VII, c. 15, § 13 (Prevention of Cruelty to Children Act; in trials for offences under this act, "where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child," in respect of whom an offence of cruelty is charged, "would involve serious danger to its life or health," the sworn deposition of the child may be taken); ib. § 14 (similar provision for the admission of a child's depositions taken under this or certain other acts).
Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 15, §§ 69, 70 (quoted *ante*, § 1380). St. 1905, 5 Edw. VII, c. 14, § 95 (county courts; like Rev. St. 1897, c. 52, § 134).
Newf. St. 1904, c. 3, Rules of Court 33, par. 1 (a judge may order that an affidavit be read "on such conditions" as may be thought reasonable, or that the attendance of a witness may "for some sufficient cause" be dispensed with; but where the other party "*bona fide* desires the production of a witness for cross-examination" and "such witness can be produced," no affidavit is to be ordered); ib. par. 18 (unless by special order no deposition is to be used unless "the deponent is dead, or beyond the jurisdiction of the court, or resident in Labrador, or is unable from sickness or other infirmity to attend the trial").
Yukon Consol. Ord. 1902, c. 17, Ord. XXVI, R. 262 (like Ont. Rules of Court, § 483); R. 266 (like N. W. Terr. Rule 267).
Cal. St. 1905, c. 134 (amends C. C. P. 1872, § 2021, by adding, under par. 2, "or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route"). St. 1905, c. 540 (amends P. C. 1872, § 882, applying to depositions for the prosecution before the committing magistrate, by providing that "such deposition may be used upon the trial of the defendant, except in cases of homicide, under the same conditions as mentioned in § 1345," but this section is not to apply to an accomplice).
Kan. St. 1905, c. 526, § 1 (depositions may be used in probate proceedings in the same manner as under the Code of Civil Procedure).
La.: 1904, Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 So. 800 (deposition excluded for lack of proper notice).
N. C. Rev. 1905, § 1645 (like Code, § 1358, adding under par. 96, "or the superintendent or any physician" of a State insane hospital). Rev. 1905, § 1654, St. 1889, c. 428 (depositions taken in certain *quo warranto* proceedings are admissible "without regard to the place of residence of such witness or distance of residence from said place of trial"). Rev. 1905, § 1655 (rules for taking a deposition in the State in aid of a suit without the State).
U. S.: 1904, Zych *v.* American Car & F. Co., 127 Fed. 723, 728, C. C. A. (cited *ante*, § 1381, n. 1).
Utah St. 1905, c. 41, Mar. 7 (depositions taken out of the State on oral interrogatories "may be used . . . as now provided by the laws of this State").
Va. St. 1904, c. 18, § 3 (deposition of the female in rape or attempted rape may be read without accounting for her absence).

[*Text*; at the end of the last line, p. 1778, *add* a new note 2:]

[2] *Accord:* 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 58, 69 C. C. A. 28 (the term "except" in U. S. Rev. St. 1878, § 861, "was simply an opening for letting in an addition to the powers of the Court as they had been customarily exercised"; here admitting the former testimony of a witness out of the jurisdiction, though the statute names only depositions; good opinion by Severens, J.).

§ 1412. Statutes affecting Depositions in perpetuam memoriam.

[*Note* 1: *add*:]

Ky. St. 1904, c. 79 (real estate controversies; no conditions specified).
Pa.: 1906, International Coal M. Co. *v.* Pennsylvania R. Co., — Pa. — , 63 Atl. 877 (rule considered for depositions to perpetuate testimony).

§ 1413. Statutes affecting Testimony at a Former Trial

[*Note* 1; *add:*]

Ia. St. 1898, p. 16, c. 9, § 1, Code Suppl. 1902, § 245 *a* (quoted more fully *ante*, § 1387, n. 2, *post*, § 1669, n. 2; admits former testimony with "the same force and effect as a deposition").
Kan. St. 1905, c. 494, § 1 (court stenographer's transcript of former testimony, admissible like a deposition; cited more fully *post*, § 1669).
Ky.: 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (the proviso in the statute for the consent of the defendant in a criminal case applies "alone to the testimony of living witnesses so taken"; a better construction would be that it applies only to the use of the official report, leaving the sworn testimony of the stenographer on the stand unaffected by the statute).
N. Y. St. 1893, c. 595, and St. 1899, c. 352 (amending C. C. P. § 830, but not on this point; quoted *ante*, § 1387, n. 2).
N. C. Rev. 1905, § 3121, St. 1899, c. 680, § 2 (when a subscribing witness "shall die or be absent beyond the State," the affidavits and proofs taken in common form shall be *prima facie* evidence). Rev. 1905, § 3205 (like Code 1883, § 1157).
Tex.: 1905, Smith *v.* State, — Tex. Cr. — , 85 S. W. 1153 (cited more fully *ante*, § 1405 n.).
Wash. St. 1905, c. 26 ("The testimony of any witness, deceased, or out of the State, or for any other sufficient cause unable to appear and testify," when written and certified as in § 1669, *post*, may be used in any civil case).

§ 1414. Proof of Unavailability of Witness.

[*Note* 2; *add,* under *Accord:*]

1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (deposition of a non-resident taken under C. C. P. § 2024; continued non-residence presumed).
1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (age, and inability to travel).
1904, Chicago B. & Q. R. Co. *v.* Krayenbuhl, — Nebr. — , 98 N. W. 44 (non-residence in Iowa presumed to continue).

[*Note* 2; *add,* under *Contra:*]

1904, Carter *v.* Wakeman, 45 Or. 427, 78 Pac. 362 (because the statute, cited *ante*, § 1411, n. 1, expressly requires that proof be made that the witness "still continues" unavailable).

§ 1415. If Witness is Available, etc., Deposition is not Usable.

[*Note* 1; *add:*]

1904, Handy *v.* Smith, 77 Conn. 165, 58 Atl. 694.
1904, Lanza *v.* LeGrand Quarry Co., 124 Ia. 659, 100 N. W. 488 (testimony at a former trial, assimilated to a deposition, under St. 1898, 27 Gen. Ass. c. 9, excluded, the witnesses being present).
1906, State *v.* Coleman, — Mo. — , 97 S. W. 574 (testimony at a former trial, excluded, the witness being present in court).
1904, Hughes *v.* Chicago, St. P. M. & O. R. Co., 122 Wis. 258, 99 N. W. 897.

[*Note* 3; *add:*]

1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (trial began Nov. 2, deposition was taken Nov. 11, witness left the State Dec. 5, deposition was offered Dec. 7; admitted).
1904, Flannery *v.* Central B. Co., 70 N. J. L. 715, 59 Atl. 157 (a deposition of the plaintiff taken by consent was offered and received on the opening of the trial; on the second day the plaintiff appeared in court; after close of the plaintiff's case, a motion to strike out the deposition was made by the defendant; held, that the defendant's unexplained delay was a waiver of objection).

[*Note* 5; *add:*]

1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (under Comp. L. 1897, §§ 10136–142, quoted *ante*, § 1411, the judge's discretion controls).

§ 1416. Rule not applicable to Deposition of Party-Opponent.

[*Note* 1; *add:*]

1874, Hatch *v.* Brown, 63 Me. 410, 419.
1907, Southern Bank *v.* Nichols, — Mo. — , 100 S. W. 613.
1887, Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.
1904, Hughes *v.* Chicago, St. P. M. & O. R. Co., 122 Wis. 258, 99 N. W. 897 (rule for parties not applicable to employees of a corporation).
1905, Johnson *v.* St. Paul & W. C. Co., 126 Wis. 492, 105 N. W. 1048 (rule applied to an officer of a corporation, distinguishing Hughes *v.* R. Co., *supra*).
1906, Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231 (similar).
1906, Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077 (like Hughes *v.* R. Co., *supra*).

But an oral answer which has been *stricken out* of the written deposition before signing cannot be used at all: 1904, Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643.

[*Note* 8; *add* a new paragraph:]

For a similar question arising in suits by a *surety* or *joint-tortfeasor* against *principal* or *co-tortfeasor* for *contribution* to a claim sued for and paid, see *ante*, § 1387, n. 5.

§ 1417. Exceptions to the Rule, for Chancery Proceedings, etc.

[*Text*, par. (2); at the end, *add* a new note 7*a*:]

[7a] It seems to be, however, in *Colorado:* 1906, Stone *v.* Victor E. Co., — Colo. —, 85 Pac. 327 (for a deposition taken out of the State).

[*Note* 11; *add:*]

1903, Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77.
1905, Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874.
Compare *post*, § 1658, par. 5, and n. 4.

[*Note* 12; *add:*]

1905, McLaughlin *v.* Joy, 100 Me. 517, 62 Atl. 348 (here merely to show compliance with the statute as to complaints).

§ 1418. Anomalous Jurisdictions, etc.

[*Note* 1; *add:*]

Compare here also some of the varying local rules as to proving testimony by a *stenographic report* (*post*, § 1669).

§ 1432. Dying Declarations; Rule applicable in Certain Criminal Cases only.

[*Note* 2; *add:*]

1905, People *v.* Stison, 140 Mich. 216, 103 N. W. 542 (incest, followed by death at childbirth; deceased's declarations excluded).

[*Note* 3, par. 1; *add*, under *Contra:*]

1906, State *v.* Fleetwood, — Del. —, 65 Atl. 772.
In l. 6 from the end, for "id.," read "N. J. L."

§ 1433. Death in Question must be Declarant's.

[*Note* 1; *add:*]

1904, Taylor *v.* State, 120 Ga. 857, 48 S. E. 361 (like State *v.* Bohan, Kan., quoted *supra*).

§ 1434. Circumstances of Death Related.

[*Note* 1; *add:*]

1905, Com. *v.* Spohr, 211 Pa. 542, 60 Atl. 1084 (declaration stating the defendant's conversation just before shooting, in which he referred to his prior threats and arrest, admitted).

§ 1435. Further Limitations rejected.

[*Note* 1; *add:*]

1905, Lyles *v.* State, — Tex. Cr. —, 86 S. W. 763.

§ 1438. Solemnity of the Situation.

[*Note* 2; *add:*]

1905, People *v.* Thomson, 145 Cal. 717, 79 Pac. 435.
1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018.
1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042.

§ 1439. Consciousness of the Approach of Death.

[*Note* 4; *add*, under *Accord:*]

1904, Sims *v.* State, 139 Ala. 74, 36 So. 138.

§ 1440. Certainty of Death.

[*Note* 2, col. 1; *add:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259.
1904, Brown *v.* Com., — Ky. — , 83 S. W. 645.
1904, State *v.* Harris, 112 La. 937, 36 So. 810 ("Bill Harris is my friend, and I don't want nothing done to him," excluded).
1904, State *v.* Gianfala, 113 La. 463, 37 So. 30.
1905, Craven *v.* State, — Tex. Cr. — , 90 S. W. 311.

[*Note* 2, col. 2, l. 6 from the end; omit the word "no," and *add:*]

1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101.
1904, State *v.* Bordelon, 113 La. 690, 37 So. 603.
1904, Hawkins *v.* State, 98 Md. 355, 57 Atl. 27.

§ 1441. Speediness of Death.

[*Note* 1; *add:*]

1905, Brom *v.* People, 216 Ill. 418, 74 N. E. 790 (statement excluded on the facts).

§ 1442. Consciousness of Approaching Death, how Determined.

[*Note* 1, par. 1; *add,* under *Accord:*]

1905, Gipe *v.* State, 165 Ind. 433, 75 N. E. 881.
1907, Williams *v.* State, — Ind. — , 79 N. E. 1079.
1907, Kennedy *v.* Com., — Ky. — , 100 S. W. 242.
1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100.
1903, State *v,* Gray, 43 Or. 446, 74 Pac. 927.

[*Note* 2; *add:*]

1904, State *v.* Knoll, 69 Kan. 767, 77 Pac. 580 (the deceased was assaulted on Feb. 19, died on Mar. 23, and declared on Mar. 7 "any hour, any day, he might die, and he had to die of the whipping of John K."; a priest administered the last rites; his declaration was excluded; "there is nothing indicating that he considered death imminent"; a brilliant *tour de force* in judicial reasoning).

[*Note* 3; *add:*]

1907, Fogg *v.* State, — Ark. — , 99 S. W. 537.
1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018.
1905, Anderson *v.* State, 122 Ga. 161, 50 S. E. 46.
1905, State *v.* Bonar, 71 Kan. 800, 81 Pac. 450, 484.
1904, Martin *v.* Com., — Ky. — , 78 S. W. 1104.
1907, Com. *v.* Hargis, — Ky. — , 99 S. W. 348.
1904, State *v.* Bordelon, 113 La. 690, 37 So. 603.
1905, State *v.* Daniels, 115 La. 59, 38 So. 895.
1904, Hawkins *v.* State, 98 Md. 355, 57 Atl. 27.
1905, Ashley *v.* State, — Miss. — , 37 So. 960.
1905, Pryor *v.* State, — Miss. — , 39 So. 1012.
1905, State *v.* Brown, 188 Mo. 451, 87 S. W. 519.
1905, State *v.* Craig, 190 id. 332, 88 S. W. 641.
1907, State *v.* Kelleher, — Mo. — , 100 S. W. 470.
1905, State *v.* Teachey, 138 N. C. 587, 50 S. E. 232.
1904, State *v.* Gray, 43 Or. 446, 74 Pac. 927.

[*Note* 3; *add* at the end:]

1904, Sims *v.* State, 139 Ala. 74, 36 So. 138.
1907, Williams *v.* State, — Ind. — , 79 N. E. 1079.
1906, State *v.* Monich, — N. J. L. — , 64 Atl. 1016 (the only question on review is whether there was any evidence to support the finding of admissibility).

§ 1445. Testimonial Qualifications, etc.

[*Note* 6; *add,* under *Accord:*]

1906, Park *v.* State, 126 Ga. 575, 55 S. E. 489.

§ 1446. Testimonial Impeachment, etc.

[*Note* 1, par. 2; *add:*]

1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (declarant's character impeached by intemperate habits).

[*Note* 2; *add:*]

1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder; deceased declarant's malice and revengefulness to the accused, admitted).
1907, State *v.* Zorn, — Mo. — , 100 S. W. 591 (whether the deceased's religious infidelity could be shown, not decided; that he did not want a minister to pray for him, held immaterial).

[*Note* 5; *correct:*]

For "N. C.," in l. 3, read "Cal."; for "id.," in l. 4, read "N. C."

§ 1447. Rule against Opinion Evidence.

[*Note* 1; *add:*]

1905, Walton *v.* State, 87 Miss. 296, 39 So. 689 (why the defendant shot the deceased; excluded).
1905, Wilson *v.* State, — Tex. Cr. — , 90 S. W. 312 ("They killed me for nothing," admitted; prior rulings cited).

§ 1448. Rule of Completeness.

[*Note* 1, par. 1; *add:*]

1906, Park *v.* State, 126 Ga. 575, 55 S. E. 489.
1906, Cooper *v.* State, — Miss. — , 42 So. 666 (declaration reported in part only, excluded).

[*Note* 1, par. 3; *add:*]

The following belongs here: 1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (wife-murder by poison; her statement to the doctor "I have taken nothing except what you gave me," admitted; but the question by the doctor "I told her her husband was under suspicion, and it was her duty to tell me if she had taken anything herself," excluded; this seems unsound, because the answer was an implied adoption of the question, and the only doubt could be whether she was qualified to accuse the husband).

§ 1450. Rule of Preferring Written Testimony.

[*Note* 2, under *Accord; add:*]

1907, Mitchell *v.* State, — Ark. — , 101 S. W. 763.
1906, Brennan *v.* People, — Colo. — , 86 Pac. 79.

[*Note* 3; *add:*]

1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (the writing not preferred, if not signed; repudiating the contrary intimation in Boulden *v.* State, *infra*, n. 4).
1894, State *v.* Reed, 53 Kan. 767, 37 Pac. 174.
Not decided: 1906, Willoughby *v*, Terr., 16 Okl. 577, 86 Pac. 56.
That the writing may also be used, under the ordinary rules, to refresh *the witness' memory*, see *ante*, §§ 759, ff.

[*Note* 4; *add:*]

1906, Phillips *v.* State, — Tex. Cr. — , 94 S. W. 1051, *semble* (writing assented to; the opinion is faultily inconsistent).

[*Note* 5; *add:*]

1907, Cleveland *v.* Com., — Ky. — , 101 S. W. 93 (like Hendrickson *v.* Com.).
1904, State *v.* Gianfala, 113 La. 463, 37 So. 30.

§ 1451. Judge and Jury.

[*Note* 1, par. 1; *add:*]

1904, R. *v.* Aho, 11 Br. C. 114 (but it is not incumbent on the judge to exclude the jury "during the inquiry as to admissibility).
1907, Williams *v.* State, — Ind. — , 79 N. E. 1079.
1906, Coyle *v.* Com., — Ky. — , 93 S. W. 584 (the judge alone passes on admissibility; good opinion, by Nunn, J.).
1907, State *v.* Zorn, — Mo. — , 100 S. W. 591 ("the jury have absolutely nothing to do with their admissibility").
1906, State *v.* Monich, — N. J. L, — . 64 Atl. 1016 ("In our opinion the question admits of but one answer; . . . [the condition of admissibility] is not reviewable by the jury"; prior cases considered; lucid opinion by Pitney, J.).

[*Note* 1; *add* as a new paragraph:]

For the *trial judge's discretion*, see *ante*, § 1442, n. 3, at the end.

[*Note* 2; *add:*]

1907, Fogg *v.* State, — Ark. — , 99 S. W. 537.
1907, State *v.* Zorn, — Mo. — , 100 S. W. 591.

[*Note* 3; *add:*]

1905, People *v.* Thomson, 145 Cal. 717, 79 Pac. 435.
1906, Findley *v.* State, 125 Ga. 579, 54 S. E. 106.
A careful discussion of principle and precedents will be found in Professor V. H. Lane's article in 1 Michigan Law Review 624 (1903), "The Right of the Jury to review the Decision of the Court upon the Admissibility of Dying Declarations."

§ 1452. Declarations usable by Either Party.

[*Note* 1; *add,* under *Accord:*]

1907, Green *v.* State, — Miss. — , 42 So. 797.

§ 1456. Statements against Interest; Death, Absence, etc.

[*Note* 6, par. 1; *add,* under *Accord:*]

1906, Matko *v.* Daley, — Ariz. — , 85 Pac. 718.
1906, Walnut Ridge M. Co. *v.* Cohn, — Ark. — , 96 S. W. 413 (on rehearing, reversing the original ruling, which was based on Greenleaf's statement quoted *infra*).
1905, British Amer. Ins. Co. *v.* Wilson, 77 Com. 559, 60 Atl. 293.
1904, Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052.

§ 1458. Statements predicating a Limited Interest in Property.

[*Note* 1; *add:*]

1907, Tompkins *v.* Fonda G. L. Co., 188 N. Y. 261, 80 N. E. 933 (declarations of a director of a corporation, admitting knowledge of the plaintiff's title to goods bought, received).
1906, Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275 (deceased life-tenant's declaration, while in possession, that "she had made a deed to Mr. M. for the lot," admitted).

§ 1460. Statements predicating a Fact against Pecuniary Interest.

[*Note* 1; *add:*]

1905, Massee-Felton L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92 (sheriff's entry; cited *post,* § 1464).

§ 1461. Statements of Sundry Facts against Interest.

[*Note* 1; *add:*]

1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support the plaintiff as a son; the testator's declarations that he was the plaintiff's guardian, not admitted for the defendant; the reason for the ruling is questionable, because as guardian the testator was under liability to account, but not merely as adoptive father).
1906, Drefahl *v.* Security Sav. Bank, — Ia. — , 107 N. W. 178 (contract by intestate to transfer funds to R.; the iotestate's statements that "R. was after her money, and she did not want him to have it," not admitted as statements against interest).
1904, Smith *v.* International & G. N. R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556 (by the deceased, injured on a railroad track, that he was asleep when struck, admitted).

§ 1464. No Motive to Misrepresent, etc.

[*Note* 2; *add:*]

1905, Massee-Felton L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92 (sheriff's entry of a sale of land under a *fi. fa.*, admitted to prove the fact of an execution and levy, though it also recited his discharge from liability by payment).

§ 1465. Statement admissible for All Facts Contained in it.

[*Note* 2; *add:*]

1905, Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969 (statement admitting a debt, received also to show the facts of a conveyance, etc., stated at the same time).
1906, Knapp *v.* St. Louis T. Co., — Mo. — , 98 S. W. 70 (testamentary insanity; an entry in a deceased physician's book of accounts "By Cash paid, $2.," held to admit the preceding entry of the disease for which the visit was made).
1906, Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275 (obscure).

§ 1466. Against Interest at the Time of the Statement.

[*Note* 3, par. 1; *add:*]

1881, Bailey *v.* Danforth, 53 Vt. 504 (in spite of the statute, providing that an indorsement, etc., shall not be "sufficient proof," an indorsement of payment by the payee, whether made before or after the statute has run, is admissible; the opinion cites no precedents, and does not fairly consider the inadmissibility of an indorsement made after statute run).
1903, McDowell *v.*McDowell's Estate, 75 Vt. 401, 56 Atl. 98 (Bailey *v.* Danforth approved and followed).

§ 1476. Statements of Facts against Penal Interest.

[*Note* 9; *add:*]

1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820 (here offered to impeach the witness).
1860, Reilley *v.* State, 14 Ind. 217 (receiving stolen goods; the thief's confession, not admitted to show the theft; "it would seem to be the dictate of natural reason, but the authorities are otherwise").
1905, Miller *v.* State, 165 Ind. 566, 76 N. E. 245 (Reilley *v.* State approved).
1855, Com. *v.* Elisha, 3 Gray, 460 (record of conviction of the stealer, on his plea of guilty, not receivable against the receiver of stolen goods, with certain limitations).
1904, People *v.* Hutchings, 137 Mich. 527, 100 N. W. 753 (testimony of an accomplice in the police court, the accomplice claiming privilege on the trial, excluded).
1904, Mays *v.* State, — Nebr. — , 101 N. W. 979 (written confession of a fugitive from justice, excluded; no authority cited).

§ 1481. Declarations about Family History; Death, etc., of Declarant.

[*Note* 4; *add:*]

1904, State *v.* Trusty, 122 Ia. 82, 97 N. W. 989.
1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (age of a child; copy of a Russian parish record, made by the priest at the father's instance and brought over with the family, excluded, on the ground that the father was still living).

§ 1483. Declarations, etc., before Controversy.

[*Note* 2; *add:*]

1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (recitals in a petition concerning confiscated lands, excluded).

[*Note* 5; *add:*]

1906, Gorham *v.* Settegast, — Tex. Civ. App. — , 98 S. W. 665.

§ 1486. Sufficiency of the Declarant's Means of Knowledge, etc.

[*Note* 1, par. 2, l. 6; *add:*]

1906, Scott *v.* Herrell, 27 D. C. App. 395, 400 (attorney's testimony excluded; following Blackburn *v.* Crawfords, — U. S. — , *post*, § 1491).
1904, Grand Lodge *v.* Bartes, 69 Nebr. 631, 98 N. W. 715 (same case as in 96 N. W., *supra*; the witness appearing, on the whole of the record, to have lived 20 years with her husband, during which period his parents lived in the family, and thus to have become "acquainted with family history, and tradition" independently of the priest's statement, her testimony was held admissible; "the date of a person's birth may be testified to by members of his family, although he may know of the fact only by hearsay founded on family tradition").

§ 1489. Declarations of Relatives, etc.

[*Note* 3; *add,* under *Accord:*]

1905, State *v.* Hazlett, — N. D. — , 105 N. W. 617 (mother's father's family Bible admitted).

§ 1490. Declarant's Qualifications must be Shown.

[*Note* 1, col. 1, l. 9; *add:*]

1905, Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632.
1904, Grand Lodge *v.* Bartes, 69 Nebr. 631, 98 N. W. 715; and cases cited *ante*, § 1486, n. 1.
1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174.
1906, Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 818, 843.
1906, Bernards Tp. *v.* Bedminster Tp., — N. J. L. — , 64 Atl. 960.
Nor need the *witness on the stand*, of course, have *personal knowledge* of the fact, provided he knows the family repute: Cases cited *supra*, and *ante*, § 1486, n. 1.

§ 1491. Relationship always Mutual, etc.

[*Note* 2, par. 1; *add:*]

1906, Scheidegger *v.* Terrell, — Ala. — , 43 So. 26, *semble.*

But of course the deceased declarant's statements about *his own* age, birth, etc., are admissible under the present rule: 1905, Travelers' Ins. Co. *v.* Henderson C. Mills, — Ky. — , 85 S. W. 1090; 1907, Taylor *v.* Grand Lodge, — Minn. — , 111 N. W. 919; this is assumed in the English cases settling the rule.

[*Note* 3; *add:*]

1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support plaintiff; the testator's declarations that he was only the guardian of the plaintiff, excluded on the present principle). Of course this is erroneous; it is a pity that the negative form of such statements seems to puzzle and mislead the minds of so many judges. If we have regard to the general principles of the Exception, and imagine a man having a boy in his family and about to speak of his relationship with the boy, it is obvious that his utterances will be neither more nor less credible whether on speaking he happens to say "He *is*" or "He is *not* my son"; *i. e.*, it is the *subject* of sonship that makes it a pedigree utterance, not the negative or affirmative tenor of the assertion.

§ 1492. Relationship of Illegitimate Child.

[*Note* 3; *add:*]

Contra: 1907, Champion *v.* McCarthy, — Ill. — , 81 N. E. 808 (whether plaintiff H. was the illegitimate son of S. the mother of J., who was also an illegitimate, and the intestate; S. was married to C. and had also legitimate children; declarations of J., S., and deceased members of the C. family, as to H. being a relative, held admissible; rule of Crispin *v.* Doglioni repudiated).

§ 1493. Testimony to One's Own Age.

[*Note* 1; *add:*]

Of course, a *deceased* declarant's statement as to his *own age* is admissible; cases cited *ante*, § 1491, n. 2; and doubtless in many of the earlier precedents this is assumed.

§ 1496. Authentication; Proving Individual Authorship.

[*Note* 1; *add:*]

Accord: 1905, State *v.* Hazlett, — N. D. — , 105 N. W. 617 (grandfather's family Bible admitted).
Contra: 1906, Bryant *v.* McKinney, — Ky. — , 96 S. W. 809 (entry on a fly-leaf of a Bible, copied from another Bible, excluded; no authority cited for this point; the ruling is entirely unsound).

In State *v.* Neasby, 188 Mo. 467, 87 S. W. 468 (1905), was admitted a paper containing pencil entries made at the time of each child's birth by neighbors at the father's request, who testified; this was really on the principle of § 748, *ante*, though treated by the Court under the present principle.

§ 1502. Sundry Kinds of Facts.

[*Note* 1; *add,* under *Excluded:*]

1905, Luttrell *v.* Whitehead, 121 Ga. 699, 49 S. E. 691 (family repute as to possession of land by an ancestor).

§ 1503. Kind of Issue or Litigation involved.

[*Note* 3; *add:*]

1905, Travelers' Ins. Co. *v.* Henderson C. Mills, — Ky. — , 85 S. W. 1090 (action to indemnify for a sum paid for the death of a minor).

§ 1510. Attesting Witness; Must be Competent at Time of Attestation.

[*Note* 4; *add:*]

1904, Boyd *v.* McConnell, 209 Ill. 396, 70 N. E. 649.
1904, O'Brien *v.* Bonfield, 213 Ill. 428, 72 N. E. 1090; and compare the cases cited *ante*, § 582.

§ 1511. Implied Purport of Attestation; All Elements of Due Execution implied.

[*Note* 2; *add:*]

As to the sufficiency of the attestation, when the witness *on the stand fails to remember* and merely verifies by asserting that he would not have attested without knowing the facts, see the cases cited *ante*, § 1315, and also compare § 747, 98.

[*Note* 3; *add*:]

1889, Canatsey *v.* Canatsey, 130 Ill. 397 (the testimony of one of the witnesses, who identified his signature but recollected nothing of the circumstances, held sufficient; Wilkin, J., diss.).
1906, Robertson's Estate, — Nebr. — , 109 N. W. 506 (witnesses' failure of memory).
1905, Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874.
1906, Bogert *v.* Bateman, — N. J. Eq. — , 65 Atl. 238.

[*Note* 4; *add*, under *Accord*:]

1904, More *v.* More, Ill., cited *post*, § 1512, n. 2.

§ 1512. Same: Lack of Attestation — Clause is Immaterial.

[*Note* 2; *add*:]

1903, Kelly *v.* Moore, 22 D. C. App. 9, 25 (imperfect clause).
1904, More *v.* More, 211 Ill. 268, 71 N. E. 988 ("an inference arises, from the mere fact of attestation, that the witnesses believed that the testator possessed testamentary capacity," and that the execution and attestation were duly performed; here one of the attesters was a lawyer).

§ 1519. Regular Entries; Statutory Regulation.

[*Note* 1; *add*:]

Br. C. St. 1905, 5 Edw. VII, c. 14, § 89 (like St. 1902, c. 22, § 5).
Newf. St. 1904, c. 3, Rules of Court 30, par. 3.
N. Sc. 1905. Carstens *v.* Muggah, 37 N. Sc. 361 (supplies of meat; plaintiff's books of account not admitted; no authority cited).
Yukon Consol. Ord. 1902, c. 17, Ord. XXII, R. 234 (like N. Sc. Ord. 32, R. 3).
Conn. Gen. St. 1902, § 981 ("In all actions for a book debt, the entries of the parties in their respective books shall be admissible in evidence"; and the defendant may have an order for oyer before pleading).
1904, Handy *v.* Smith, 77 Conn. 165, 58 Atl. 694 (statute applied, without noting the specific point involved.
N. C. Rev. 1905, §§ 1622–1624 (like Code 1883, §§ 591–593); Rev. 1905, § 1625, St. 1897, c. 480 (in actions on an account for goods sold and delivered, "a verified itemized statement of such account" shall be *prima facie* evidence).

§ 1521. Death, Absence, etc., of the Entrant.

[*Note* 5; *add*, under *Accord*:]

1906, Godfrey *v.* Rowland, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted).
1903, Haas *v.* Chubb, 67 Kan. 787, 74 Pac. 230, *semble* (railroad-agent's entries, excluded, the entrant being out of the county but in the State).

§ 1523. Regular Course of Business, etc.

[*Note* 2; *add*:]

The following ruling belongs here:
1904, Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627 (forgery of an acknowledged deed; to overthrow the certificate of acknowledgment, the deceased grantor's diary, with entries showing him to have been in Kentucky on the day in question, was offered; excluded, because "not in the nature of a book account"; no authority cited; the ruling is of no value, because the present point is not considered, and on the facts the ruling is thoroughly unsound).

[*Note* 3; *add*:]

1905, Hagarty *v.* Webber, 100 Me. 305, 61 Atl. 685 (scale-books of a timber-surveyor).

§ 1524. Same: English Rule; Duty to a Third Person.

[*Note* 1; *add*:]

1904, Mellor *v.* Walmesley, 2 Ch. 525 (to identify a boundary, a field-book of a deceased surveyor, employed by the Local Board to survey, was excluded).
1904, Mercer *v.* Denne, 2 Ch. 534, 541 (reports of a surveyor in 1610–1625, excluded).
1905. Mellor *v.* Walmesley, 2 Ch. 164, 166 (Mellor *v.* Walmesley, *supra*, reversed on appeal; Vaughan Williams, L. J.: "Here the duty of the surveyor was . . . to record everything without which he could not arrive at that ultimate conclusion. If it was his duty to record those matters at the time, and he in fact did so contemporaneously, I think the rule as to admissibility applies").
1905, Mercer *v.* Denne, 2 Ch. 538, 554 (Mercer *v.* Denne, *supra*, affirmed on appeal).

§ 1530. Personal Knowledge of Entrant, etc.

[*Note* 2; *add:*]

1905, Firemen's Ins. Co. *v.* Seaboard A. L. Co., — Ga. — , 50 S. E. 452 (time of arrival of a train at H.; the "train-sheet," verified by the train-dispatcher at R., admitted, without calling the operator at H. who reported the arrival; one of the best modern opinions, by Connor, J.).
1904, State *v.* Stephenson, 69 Kan. 405, 76 Pac. 905 (ledger verified by the bookkeeper, admitted, without calling salesmen, shipping clerks, etc.).
1906, Louisville & N. R. Co. *v.* Daniel, — Ky. — , 91 S. W. 691 (train-movements at M., allowed to be evidenced by the train-sheet record of the train-dispatcher at E., based chiefly on telegraphic reports from others, but verified on the stand by the train-dispatcher as a correct record, without calling the various employees making the reports; lucid and forceful opinion by O'Rear, J., one of the best on the subject).
1907, Madunkeunk D. & I. Co. *v.* Allen C. Co., — Me. — , 66 Atl. 537 (logging scale-book, made up by an assistant, used by the surveyor, without calling the assistant).
1904, Wells Whip Co. *v.* Tanners' M. F. Ins. Co., 209 Pa. 488, 58 Atl. 894 (testimony to the amount of a stock of goods, by the secretary of the company, based on an inventory compiled in part by clerks, received without calling the clerks).
1906, Pelican Lumber Co. *v.* Johnson, — Tex. Civ. App. — , 98 S. W. 207 (a secretary-manager allowed to testify that the books were to his own knowledge correct, though he was not the bookkeeper making the entries and the bookkeeper was not called).
1906, Grunberg *v.* U. S., 145 Fed. 81, 97 (invoices, ledgers, etc.; principle apparently recognized).

[*Note* 3; *add:*]

1899, R. *v.* Dexter, 19 Cox Cr. 360 (a witness, who was a solicitor, had had interviews with the accused, and had after each interview dictated to his stenographer an account of what was said, and the stenographer had written out the notes in longhand; the solicitor had within three weeks after such interview gone over the notes and could say that he believed them correct; the stenographer was now in New Zealand; Grantham, J., allowed the solicitor to use the notes, saying that "the shorthand clerk is his *alter ego*"; but the opinion pays no attention to the distinction between the two kinds of recollection, and rests in part on the circumstance that the solicitor had himself verified the notes within a short time after taking, thus invoking the principle of § 748, *ante*).

[*Note* 4; *add:*]

1906, Matko *v.* Daley, — Ariz. — , 85 Pac. 718 (certain pay-rolls, in part kept by a former paymaster not accounted for, excluded).
1905, Monarch Mfg. Co. *v.* Omaha, C. B. & S. R. Co., 127 Ia. 511, 103 N. W. 493 (weather records, kept by a railroad, but not verified by the agent in charge at the time in issue, excluded; opinion obscure, and erroneous on principle, though correct on the facts).
1905, Gould *v.* Hartley, 187 Mass. 561, 73 N. E. 656 (bill for cigars, liquor, etc.; the plaintiff offered an original book, sworn to by the clerk keeping it, and made up by him from tickets punched by a registering machine operated by the salesman, who sent the tickets to the clerk, who made up the entries; neither the tickets nor the salesman were produced; excluded; thus the Court refused a plain opportunity to make a liberal and safe application of the principle to modern business methods).
1906, Einstein *v.* Holladay K. L. & L. Co., 118 Mo. App. 184, 94 S. W. 296 (abstracts of title, made partly by S. and partly by K., but verified by S. only, excluded).
1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 162, 79 Pac. 60 (shop-book record of engine inspections, by E. and W. and a clerk; *semble*, the testimony of all three required; opinion confused).

§ 1532. Production of Original Book.

[*Note* 2, par. 1; *add:*]

1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 162, 79 Pac. 60,

§ 1538. Not Admissible where a Clerk was Kept.

[*Note* 2, par. 1; *add,* under *Contra:*]

1907, Hinkle *v.* Smith, — Ga. — , 56 S. E. 464.

§ 1539. Not Admissible for Cash Payments or Loans.

[*Note* 1, l. 6; *add:*]

1904, Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191.
1904, Proctor *v.* Proctor's Adm'r, 118 Ky. 474, 81 S. W. 272.
1906, Clark *v.* Clark, — Ky. — , 91 S. W. 284.
1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (loan items, admitted).

§ 1542. Not Admissible in Certain Occupations.

[*Note* 1, l. 4; *add:*]

1900, Produce Exchange T. Co. *v.* Bieberbach, 176 Mass. 577, 587, 58 N. E. 162 (whether entries in bank-books fall within the rule; not decided).

§ 1544. **Rules not Flexible; Existence of Other Testimony.**

[*Note* 1:]

Omit Eastman *v.* Moulton, N. H.

[*Note* 2, par. 2, l. 2; after "plaintiff," insert:]

"Or the goods delivered to a servant of the defendant."

[*Note* 2, l. 3:]

Omit "but this, etc.;" and insert: 1825, Eastman *v.* Moulton, 3 N. H. 156.

§ 1548. **Regularity as affecting the Kind of Book, etc.**

[*Note* 1; *add:*]

1904, Freehart *v.* Stanford, 77 Vt. 36, 58 Atl. 790 (Post *v.* Kenerson approved).

§ 1549. **Regularity as affecting the Kind of Item or Entry.**

[*Note* 2; *add:*]

1904, McKnight *v.* Newell, 207 Pa. 562, 57 Atl. 39.

[*Note* 4; *add:*]

1907, Page *v.* Hazelton, — N. H. — , 66 Atl. 1049.

§ 1554. **Party's Suppletory Oath; Cross-Examination, etc.**

[*Note* 5; *add*, under *Accord:*]

1904, Cather *v.* Damerell, — Nebr. — , 99 N. W. 35.

§ 1555. **Personal Knowledge of Entrant, etc.**

[*Note* 1; *add:*]

1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (entries in the business of an illiterate saloon-keeper, made by his wife, employees, and others, admitted).

[*Note* 2; *add:*]

1906, Wright *v.* Chicago B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555 (stockyards books made up from scale-tickets, admitted to show cattle-weight; who verified them is not stated).

§ 1556. **Form and Language of the Entry, etc.**

[*Note* 3; *add:*]

1904, Cather *v.* Damerell, — Nebr. — , 99 N. W. 35 (physician's book, the items noted by dots and crosses, admitted).

[*Note* 5; *add:*]

1905, Conover *v.* Neher-R. Co., 38 Wash. 172, 80 Pac. 281 (time-book not admitted, to show that a witness was not employed on a certain day).

§ 1557. **Impeaching the Book, etc.**

[*Note* 3; *add:*]

1905, Cairns *v.* Murray, 37 N. Sc. 451, 469.

§ 1558. **Production of Original Book, etc.**

[*Text*, p. 1913, at the end; *add:*]

Since the book is merely a statement about the transaction, and is not the transaction itself, the Parol Evidence rule does not apply, and therefore the transaction, as such, can be proved orally *without producing or accounting for the book.*[3]

[3] 1899, Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221.
1899, Rissler *v.* Ins. Co., 150 Mo. 366, 51 S. W. 755 (cited *ante*, § 1339, n. 10).
1904, Halverson *v.* Seattle El. Co., 35 Wash. 600, 77 Pac. 1058; and cases cited *ante*, §§ 1245, 1339, *post*, § 2432; but compare the principles of §§ 1230, 1235, 1244, *ante*.

[*Note* 2; *add,* under *Admitted:*]

1904, State *v.* Stephenson, 69 Kan. 405, 76 Pac. 905 (modern ledger made directly from order-slips, admitted as the original; good opinion by Johnston, C. J.).
1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (ledger entries admitted on the facts, to explain the original slips of paper).

[*Note* 2; *add,* under *Excluded:*]

1906, Putnam *v.* Grant, 101 Me. 240, 63 Atl. 816 (a journal, made up by summarising from certain prior books and bills, held not an original, on the facts).

§ 1561. Relation of this Branch to the Main Exception, etc.

[*Note* 3; *add:*]

1907, Davis *v.* Lloyd, — Colo. — , 88 Pac. 446.

§ 1564. Declarations about Private Boundaries; General Scope.

[*Note* 1; *add:*]

1904, Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782 (collecting the cases).
1905, Hemphill *v.* Hemphill, 138 id. 504, 51 S. E. 42.
1905, Hill *v.* Dalton, 140 id. 9, 52 S. E. 273.
1906, Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340.

This kind of evidence seems never to have obtained recognition in *England* or *Canada:* Mellor *v.* Walmesley, 1904, 2 Ch. 525, and 1905, 2 Ch. 164; Mercer *v.* Denne, 1904, 2 Ch. 535, 541, and 1905, 2 Ch. 538, 554; and cases cited *post,* § 1584.

1905, Bartlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264.

In Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (1906), this Exception seems to have been forgotten in excluding a surveyor's map.

Compare the cases on *official surveys* (*post,* § 1665).

§ 1566. Same: No Interest to Misrepresent.

[*Note* 2; *add:*]

1905, Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42 (deed by the owner).

[*Note* 3, par. 1; *add:*]

1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835 (owner's declarations as to boundary, admitted).

§ 1567. Same: Massachusetts Rule, etc.

[*Note* 2; *add,* under *Vermont:*]

The last aberration has now been repudiated in turn, and the rule of Powers *v.* Silsby restored, but with some obscurity of language:
1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835.

[*Note* 3; *add:*]

1905, Emmet *v.* Perry, 100 Me. 139, 60 Atl. 872 (preceding cases said to be "settled law").

§ 1573. Ancient Deed-Recitals, etc.

[*Note* 2; *add:*]

1890, Havens *v.* Sea Shore L. Co., 47 N. J. Eq. 365, 375, 20 Atl. 497 (recital, "in an ancient deed or will, of any antecedent deed or document," admissible).

[*Note* 3; *add:*]

1906, Rollins *v.* Atlantic C. R. Co., — N. J. L. — , 62 Atl. 929 (quoted *infra,* n. 7).

[*Note* 4, par. 1; *add:*]

1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (certain recitals of confiscation in a petition of 1795 and 1799 excluded, the theory being obscure).

[*Note* 7, par. 1; *add:*]

1906, Rollins *v.* Atlantic C. R. Co., — N. J. L. — , 62 Atl. 929 (recital that "she being the issue and heir at law of G. A.," admitted; "The rule I think may be regarded as settled that a recital, whether of an ancient deed, will, lease, or pedigree, may be [admitted when] supported by any testimony which renders credible the truth of the fact recited"; here the recording of the deeds, etc., were held to suffice; the opinion does not properly distinguish the present question, that of par. (1) *supra,* and the general pedigree rule).

[*Note* 7 — *continued.*]

1905, Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632 (recital of heirship in a deed of 1871, not admitted, at least without corroboration by possession or the like).
1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (recitals of descent in a petition to the Legislature, excluded, for lack of proof of the reciter's relationship).
1904, Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409 (recitals as to widow and heir, admitted).
1906, Webb *v.* Ritter, — W. Va. — , 54 S. E. 484 (recitals of heirship in a deed of 1843, admitted).

§ 1576. Statutory Exception for all Statements of Deceased.

[*Note* 8; *add:*]

1904, Cogswell *v.* Hall, 185 Mass. 455, 70 N. E. 461 (action by a husband's heir against his widow's executor on a promise to pay relating to the dower estate; the deceased widow's declarations and conduct, admitted in disproof of the promise).
1904, Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361 (action on a contract by the testator; testator's declarations admitted).

[*Note* 9; *add:*]

1900, Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386 (deceased's declarations as to sending money to his mother, etc., admitted under St. 1898).
1902, Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074 (deceased third person's statement as to tide-water height, admitted under St. 1898).
1905, Nagle *v.* Boston *v.* N. St. R. Co., 188 Mass. 38, 73 N. E. 1019 (declarations of a deceased motorman, admitted; that they were made in answer to leading questions, held immaterial).
1905, Dickinson *v.* Boston, 188 Mass. 535, 75 N. E. 68 (personal injury; a statement made after serving notice of the injury to the city, held admissible; the trial Court's finding of good faith, presumed).
1906, Gray *v.* Kelley, 190 Mass. 184, 76 N. E. 724 (declarations as to boundary, admitted).
1906, Weeks *v.* Boston El. R. Co., 190 Mass. 563, 77 N. E. 654 (more than one statement of the deceased is admissible).
1906, Hall *v.* Reinherz, — Mass. — , 77 N. E. 880 (statute applied to a written statement made before the statute).
1906, Luce *v.* Parsons, — Mass. — , 77 N. E. 1032 (statute applied to declarations about land).
1906, Putnam *v.* Harris, — Mass. — , 78 N. E. 747 (statute applied, the question here being as to the declarant's personal knowledge).
1907, Chaput *v.* Haverhill G. & D. St. R. Co., — Mass. — , 80 N. E. 597 (decedent in an action for personal injury).

§ 1582. Reputation as to Land Boundaries, etc.; Matter must be Ancient.

[*Note* 2; *add:*]

1905, Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101.
1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (reputation no earlier than 1884, in a suit brought in 1901, excluded).

§ 1584. Reputation, not Individual Assertion.

[*Note* 3; *add:*]

1904, Mercer *v.* Denne, 2 Ch. 534 (fishing-rights; depositions taken in 1639, under an information by the Attorney-General, stating the point to which the sea extended, excluded; Farwell, J., holding that "depositions of deceased witnesses" are admissible against strangers "if they relate to a custom where reputation would be evidence; but then those depositions must be depositions of matters of reputation, and not of matters of fact").
1905, Mercer *v.* Denne, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal, but on the principle of § 1591, *post*, by one of the three judges).
1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 ("reputation" and "hearsay" distinguished).
1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (a reputation sifting down merely to what J. C. said, J. C. being alive, excluded).

§ 1586. Reputation must relate only to Matters of General Interest.

[*Note* 1; *add:*]

Admitted: 1905, Heath *v.* Deane, 2 Ch. 86, 91 (court rolls of a manor, admitted as to right of common for tenants to take stone; but not plainly on this ground).
Rejected: 1904, Hartford *v.* Maslen, — Conn. — , 57 Atl. 740 (whether land was tendered by the city to the State in lieu of another site; the understanding of citizens at a mass-meeting in 1872, excluded; the precise point is obscure).

§ 1587. Same: Application of the Rule to Private Boundaries, etc.

[*Note* 3; *add:*]

Can.: 1905, Bartlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264.

[*Note* 7; *add:*]

1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 (Shaffer *v.* Gaynor followed).
1905, Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42 (the reputation must be ancient and *ante litem motam*, and must refer to some monument or natural object or be corroborated by possession, etc.).
1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (approving the foregoing cases, but here rejecting reputation because "no deed covering this tract of land is introduced, no monument or natural object is shown . . and no occupation or possession of any such tract by H. or any of his descendants," etc.).

[*Note* 8; *add,* under *Accord:*]

1905, Henry *v.* Brown, — Ala. — , 39 So. 325 (land).
1906, Doe *v.* Edmondson, — Ala. — , 40 So. 505 (land).
1904, Crippin *v.* State, 46 Tex. Cr. 455, 80 S. W. 372 (permitting gambling in a house under control; ownership not provable by reputation; compare the cases cited *post*, § 1626, n. 7).

In these days of complicated stockholdings the following departure seems sound: Reputation is admissible to show *ownership of railroad premises or vehicles* by a specific *corporation:*
1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.
Contra: 1903, Louisville & N. R. Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954 (reputation of ownership of locomotives causing a nuisance). Compare the presumption of *ownership from possession* (*post*, § 2515).

§ 1588. Reputation Post Litem Motam, etc.

[*Note* 1, par. 1, l. 7; *add:*]

(but in Mercer *v.* Denne, 1904, 2 Ch. 534, 1905, 2 Ch. 535, 560 an ancient deposition was said to be admissible, ignoring the present principle).

§ 1591. Reputation must come from a Competent Source, etc.

[*Note* 1; *add:*]

1904, Mercer *v.* Denne, 2 Ch. 535, 544 (a map of the sea-shore, made by an engineer, etc., in 1837, and found both in the British Museum and in the Admiralty, excluded, per Farwell, J., apparently on the present ground in part; but the opinion is a strange one).
1905, Mercer *v.* Denne, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal; Vaughan Williams, J.: "The second question is: Were the deponents persons to whom we ought to impute such knowledge of the subject-matter as would render their statements evidence of reputation?"; but this part of the opinion was applied to certain ancient depositions, not to the map ruled upon by Farwell, J., *supra*).

§ 1604. Reputation of Marriage: Sufficiency, etc.

[*Text,* last line; *add* a new note 1:]

[1] The singular rule is laid down in Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (1905) that where a ceremonial marriage is relied on reputation is inadmissible; this law would disturb thousands of honest couples; the opinion of the majority in this case is an extraordinary one, full of loose law.

§ 1605. Reputation of Other Facts of Family History.

[*Note* 3; *add:*]

1853, Doe *v.* Marr, 3 U. C. C. P. 36, 49 (inheritance and legitimacy; repute as to the mother having had illicit intercourse with S., excluded).
1843, Fuller *v.* Saxton, 20 N. J. L. 61, 66 (that G. K. was the daughter of D. C.; reputation admitted, though not "traced to the family").

[*Note* 7; *add:*]

1906, Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413 (reputation as to the white race of an ancestor, admitted, here the reputation was shown by the fact that he had always been allowed to vote at public elections without objection).

§ 1614. Reputation of Character; Never Hearing anything against the Person.

[*Note* 1; *add,* under *Accord:*]

1905, Sinclair *v.* State, 87 Miss. 330, 39 So. 522.
1906, Johnson *v.* State, — Miss. — , 40 So. 324.

§ 1615. Reputation must be in Neighborhood of Residence.

[*Note* 1; *add:*]

1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (reputation in different places, admitted).
1904, Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550 (reputation in places of brief residence, admitted on the facts).
1905, State *v.* Cambron, — S. D. — , 105 N. W. 241 (rule applied to a house of ill-fame).

§ 1616. Same: Reputation in a Commercial or Other Circle, etc.

[*Note* 2; *add:*]

1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993 ("A man may possess different characters, or different reputations, adapted to different localities"; here, in saloons).
1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6 (rape; the accused's repute for chastity and morality "among his fellow-workmen," excluded).
1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 285, 68 C. C. A. 26 (reputation of a fellow-servant engineer, among conductors and brakemen, and not including "engineers and others acquainted with him," excluded).

§ 1618. Time of Reputation; (2) Reputation after the Time in Issue.

[*Note* 1, par. 1; *add,* under *Accord:*]

1904, Gordon *v.* State, 140 Ala. 29, 36 So. 1009 (reputation of the deceased after the killing, excluded).
1905, State *v.* Day, 188 Mo. 359, 87 S. W. 465 (prosecutrix in rape under age; reputation prior to the trial but after birth of the child, excluded).
1906, Powers *v.* State, — Tenn. — , 97 S. W. 815 (defendant's repute after the homicide, excluded: but here the rule was erroneously applied to forbid cross-examination of a good-character witness as to reports of violent conduct; this was admissible on the principle of § 988, *ante*).
1906, State *v.* Biscome, 78 Vt. 485, 63 Atl. 877 (assault; excluded, but no authority is cited and the reasoning is confused).
1906, State *v.* Berrick, — W. Va. — , 55 S. E. 652 (prosecutrix in rape; reputation after the alleged offence, inadmissible).

§ 1620. Kind of Character; Chastity, House of Ill-fame, etc.

[*Note* 1; *add:*]

1906, *Ex parte* Vandiveer, — Cal. App. — , 88 Pac. 993.
1906, State *v.* Connor, 142 N. C. 700, 55 S. E. 787 (criminal elopement with a married woman of virtuous character; the woman's virtuous character admitted).

[*Note* 2; *add:*]

Accord: 1904, Woodruff *v.* State, — Nebr. — , 101 N. W. 1114.
Contra: 1905, State *v.* Hummer, 128 Ia. 505, 104 N. W. 722 (reputation, admissible in rebuttal, but only for chastity and not for general moral character).

[*Note* 7, par. 1; *add:*]

Admitted: 1904, State *v.* Steen, 125 Ia. 307, 101 N. W. 96 (statute applied).
S. D. St. 1903, c. 154, § 3, p. 179 (to show the character of a house of ill-fame, "evidence of the general reputation of the house" is admissible).
1905, State *v.* Cambron, — S. D. — , 105 N. W. 241 (the statute does not exclude other proper evidence).
Undecided: 1905, State *v.* Harris, — N. D. — , 105 N. W. 621.
For reputation as evidence of *ownership* of such a house, see *ante*, § 1587, n. 8.

[*Note* 8; *add:*]

Contra: 1906, State *v.* Brooks, — Kan. — , 85 Pac. 1013 (liquor nuisance).
Here compare the use of reputation to show *knowledge* merely (*ante*, § 257).

§ 1621. Same: Sanity, Temperance, etc.

[*Note* 1; *add,* under *Accord:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012.
1906, Reed *v.* State, — Nebr. — , 106 N. W. 649.

[*Note* 5, par. 1; *add:*]

1903, Fisher *v.* Weinholzer, 91 Minn. 22, 97 N. W. 426 (reputation of a dog, admitted: the foundation for such a repute, discussed).

§ 1623. Reputation to prove Solvency.

[*Note* 2; *add,* under *Contra:*]

1905, Allison's Ex'r *v.* Wood, 104 Va. 765, 52 S. E. 559 ("particular opinions and particular acts," inadmissible).

§ 1624. Reputation to prove Partnership.

[*Note* 1; *add:*]

1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864 (excluded).

[*Text,* p. 1973, after the second quotation *add* a new note 2:]

[2] *Accord:* 1907, Grey *v.* Callan, — Ia. — , 110 N. W. 909.

§ 1625. Reputation to prove Incorporation.

[*Note* 2; *add:*]

1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083 (statute applied).
1905, State *v.* Wise, 186 Mo. 42, 84 S. W. 954 (statute applied).
For reputation to show a corporation's *ownership* of realty of personalty, see *ante*, § 1587.

§ 1626. Reputation to prove Sundry Facts.

[*Note* 1; *add:*]

1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (repute as to prior injuries sustained by plaintiff, excluded).
For reputation as evidence of *title* or *possession* of realty or personalty, see *ante*, § 1587.

§ 1633. Official Statements; Nature of the Duty, etc.

[*Note* 2; *add*, under *Accord:*]

1905, Florscheim *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023 (but the foreign law must be shown; here a record of incorporation).

[*Text*, p. 1985, l. 19 from below; *insert:*]

1824, *Richardson* v. *Mellish*, 2 Bing. 229, 240; the plaintiff ship-captain brought an action against the defendant ship-owner, in which a part of the issue of fact was the value or profit of a voyage to the East Indies by one of the East India Company's ships; as evidence of the value of such a voyage, a book was offered, "containing a list of passengers, made by the captain, and deposited in the India House, pursuant to the Act of 53 Geo. III," which provided that every ship in that trade should before clearing exhibit to the customs-officer upon oath, "a true and perfect list . . . setting forth the names, capacities, and descriptions of all persons embarked," etc., etc., and that the officer receiving such list should upon receiving it "transmit a copy of such list to the secretary of the court of directors of the said United Company." It was objected that "the captain's book is not such a public document as to entitle the plaintiff to give it in evidence." *Best*, C. J. (overruling the objection): "I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the St. 53 Geo. III, c. 155, §§ 15, 16. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer,[9a] under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But, it may be said, 'Ay, but those are papers which come from Government officers.' I go on: But the books of the Bank of England have been made evidence, — all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform, and whose duty it is to make them out accurately. On account of that duty and responsibility, credit is given to them. . . These are papers which the captain is ordered, by the 15th section of the statute to which we have been referred, to make out upon oath, which oath an officer of the customs is authorized to administer; for what purpose? for the purpose of informing the East India Company (who, though subjects in England, are great sovereigns in India) what kind of persons, and with what sort of arms, these persons are going to settlements the administration of the affairs of which are committed to them. If these are not public papers, made with a view to great principles of public policy, I am at a loss to know what are public papers." [9b]

[9a] This phrase of the learned judge was here applied liberally; for the ship was a private ship, owned by Messrs. S. T. & S., and chartered by the East India Company for six voyages.

[9b] The above principle is exemplified in the following case: 1906, McInerney *v.* U. S., 143 Fed. 729, 736, C. C. A. (ship's manifest; cited more fully *post*, § 1672, n. 1).

§ 1634. Publicity of the Document as Essential.

[*Note* 1; *add:*]

1904, Mercer *v.* Denne, 2 Ch. 534, 541, 544 (fishing-rights; a report of a surveyor, in 1610, made by order of the Warden of the Cinque Ports, and maps prepared in 1641–47 by the War Office, not admitted as public

[*Note* 1 — *continued.*]

documents, following Sturla *v.* Freccia; Farwell, J.: "The test of publicity as put by Lord Blackburn is that the public are interested in it, and entitled to go and see it, so that if there is anything wrong in it, they would be entitled to protest; but two charts prepared by order of the Admiralty were admitted).
1905, Mercer *v.* Denne, 2 Ch. 538, 554 (Mercer *v.* Denne, *supra*, affirmed on appeal; Vaughan Williams, L. J., referring to Sturla *v.* Freccia, thought that "Farwell, J., in his judgment carried the ruling of Lord Blackburn rather further than Lord Blackburn himself intended," and believed that under that principle "records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title are admissible against all the world" in a proper case; though the documents here offered did not satisfy that rule).

§ 1635. Personal Knowledge of the Official, etc.

[*Note* 4; *add:*]

1905, Ohio Nat'l Bank *v.* Berlin, 26 D. C. App. 218, 225.
1904, Lalakea *v.* Hilo Sugar Co., 15 Haw. 570.
1906, Com. *v.* Johnson, — Ky. — , 96 S. W. 801 (whether a county clerk is liable for taking an acknowledgment of an impostor).
1907, Barnard *v.* Schuler, — Minn. — , 110 N. W. 966 (good opinion by Start, C. J.).

[*Note* 6; *add:*]

1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (rule stated for an official stenographer's transcript of testimony); People *v.* Donnolly, ib. 394, 77 Pac. 177 (similar).

§ 1639. Official Registers; General Principle, etc.

[*Note* 1, par. 1; *add:*]

1905, Monarch Mfg. Co. *v.* Omaha, C. B. & S. R. Co., 127 Ia. 511, 103 N. W. 493 (Huston *v.* Council Bluffs approved).
1906, Jones' Estate, 130 Ia. 177, 106 N. W. 610 (record of supervisors of a county as to a pauper, held not authorized).
1904, Jordan *v.* Carberry, 185 Mass. 181, 69 N. E. 1062 (town clerk's issuance of dog-license to C. is no evidence of C.'s ownership or keeping, unless brought to C.'s knowledge).
1904, Cashin *v.* N. Y. N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930 (certain hospital records, excluded).
1906, Levels *v.* St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275 (public school teacher's register of pupils' ages, kept by requirement of law, admitted).
1905, Anderson *v.* Hilker, 38 Wash. 632, 80 Pac. 848 (records of the U. S. Weather Bureau, read by the officer in charge, admitted).

[*Note* 2; *add:*]

Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897 c. 71, and substitutes a requirement of "reasonable notice," the judge to determine reasonableness, but the time "shall not in any case be less than ten days").
Ont. St. 1906, 6 Edw. VII, c. 11, § 55 (books and files of the mining recorder's office, to be evidence).
Yukon St. 1904, c. 5, § 13 (like Dom. St. 1893, c. 31, § 17, adding "or of this Territory").
Ky. Gen. St. 1899, c. 81, § 17, Stats. 1903, § 3760 (official records in general; quoted *ante*, § 1352, n. 11).
St. 1904, c. 127 (livery keeper's register of hirings, required to be kept, and made admissible in evidence for offences under this act "if the livery keeper at the time issue a duplicate memorandum to the person hiring," etc.).
Utah St. 1905, c. 108, Mar. 9, § 17 (State engineer's maps and records to be "*prima facie* evidence of the facts stated or delineated therein").

§ 1640. Assessor's Books; Electoral Register.

[*Note* 1; *add,* under *Admitted:*]

1905, Gossage *v.* Phila. B. & W. R. Co., 101 Md. 698, 61 Atl. 692 (county commissioners' books, based upon the plaintiff's admissions, received against him to show the value of a ship).

[*Note* 1; *add,* under *Excluded:*]

1905, Sanitary District *v.* P. F. W. & C. R. Co., 216 Ill. 575, 75 N. E. 248 (question reserved).
1906, Lewis *v.* Englewood Elev. R. Co., 223 Ill. 223, 79 N. E. 44 (eminent domain; the assessed valuation of the land, not allowed to be asked of the owner producing his tax receipts; on the ground that, for real property, the owner is not required to list its value for taxation and therefore the assessed valuation does not involve any admission on his part; as to the theory of official statements by the assessor, the Court merely adds that "the assessor himself might have been a competent witness").
1904, Suffolk & C. R. Co. *v.* West End L. & I. Co., 137 N. C. 330, 49 S. E. 350 (assessor's list, not admitted to show value; collecting prior cases).
1904, Spink *v.* N. Y. N. H. & H. R. Co., 26 R. I. 115, 58 Atl. 499 (damage by a railroad fire; the assessor's valuation not admitted).

[*Note* 3; *add*, under *Accord:*]

1905, Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436 (tax-return, receivable as an admission, to show the contents of lots of land).
1904, Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565 (action on a note; plaintiff's tax schedules received as an admission of non-ownership by omission of the note).

[*Note* 9; *add:*]

Ont. St. 1904, 4 Edw. VII, c. 23, § 67 (certified copy of an assessment roll "shall be received as *prima facie* evidence").
N. C. Rev. 1905, § 4331 (electoral register, and a certified copy thereof, shall be *prima facie* evidence of a voter's right to vote); ib. § 4338 (poll-books shall be evidence in a trial for illegal or fraudulent voting).
Colo. St. 1905, c. 100, § 14 (electoral registration books, admissible to prove the taking of oath, etc.).

§ 1641. Military and Naval Registers; Ship's Log-Book.

[*Note* 5; *add*, at the end:]

The following cases, though not involving log-books, should serve to indicate a common-law basis for any such books required by law to be kept:
1824. Richardson *v.* Mellish, 2 Bing. 229 (list of passengers, kept under statute, admitted; quoted *ante*, § 1633).
1846, Buckley *v.* U. S., 4 How. U. S. 251, 258 (Richardson *v.* Mellish, Eng., *supra*, cited with approval).
1906, McInerney *v.* U. S., 143 Fed. 729, 736, C. C. A. (manifest of a shipmaster, required to be made by St. 1891, Mar. 3, c. 551, § 8, 26 Stat. 1085, reporting the name, etc., of immigrants, admitted to show the time of arrival of the defendant in the U. S.).

[*Note* 6; *add:*]

1907, The Kentucky, 148 Fed. 500, D. C. (log-books admitted, after being used by the other party for cross-examination, though "ordinarily the entries in such books are not receivable in support of the party who makes them").

§ 1644. Registers of Marriage, Birth, and Death; Law in the Various Jurisdictions.

[*Note* 1; under *Statutes, add:*]

P. E. I. St. 1906, 6 Edw. VII, c. 6, § 30 (certified copies of the official records of birth, marriage, and death, are evidence "of the facts therein stated").
Yukon Consol. Ord. 1902, c. 6, § 20 (certified extract of returns of births, marriages, and deaths, by the registrar of vital statistics, "shall be evidence of the entry and *prima facie* evidence of the facts therein stated").

[*Note* 1, l. 8 from the end; *add:*]

1904, Goodrich's Estate, P. 138 (certified copy of an entry of "a register of births" for 1844, admitted, as "evidence of its contents"; here, to show the date of birth of defendant).

[*Note* 6; *add:*]

Cal. Pol. C. 1872, § 3083, as amended by St. 1905, c. 107 (State registrar's certified copy of the record of "any marriage or birth registered under the provisions of this chapter shall be *prima facie* evidence in all courts and places of the facts therein stated"). St. 1905, c. 498 (open adultery; a new P. C. § 269 *b* provides that "a recorded certificate of marriage or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this section").
Haw.: 1905, Kapiolani Estate *v.* Thurston, 16 Haw. 471 (a "book of marriage records," kept by a minister, recording marriages among his parishioners, admitted), 1906, Godfrey *v.* Rowland, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted).
Ill.: 1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (marriage record of N. Y. City health department, not shown to be official, excluded; but a marriage contract purporting to be by the law of Moses was admitted). 1904, Murphy *v.* People, 213 Ill. 154, 72 N. E. 779 (N. Y. Catholic church register, excluded because the priest's handwriting was not proved).
Kan.: 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (copy of a Russian parish record, excluded, because not shown to be official).
Mich.: 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (certain certificates of death and cause of death, admitted under Comp. L. § 4617, *supra*).
Mo.: 1905, Collins *v.* German-Amer. M. L. Ass'n, 112 Mo. App. 209, 86 S. W. 891 (certain Roman Catholic registers in Ireland, deposed to be admissible by Irish law, received; Childress *v.* Cutter and Morrissey *v.* W. F. Co. are presumably but not expressly overruled; the opinion makes an extraordinarily confusing mixture of the Exceptions for pedigree statements, shop-books, and public documents, and is calculated to discourage any further scientific study of the Hearsay rule in this State).
N. J.: 1907, Sparks *v.* Ross, — N. J. Eq. — , 65 Atl. 977 (a certain marriage record from a county clerk's office; its standing doubted on the facts).
Pa. St. 1905, No. 221, § 21 (State Registrar's certified copy "of the record of any birth or death registered under the provisions of this act" shall be "*prima facie* evidence in all courts and places of the facts therein stated").

[*Note* 6 — *continued.*]

Tex.: 1907, Burton *v.* State, — Tex. Cr. — , 101 S. W. 226 (bigamy; rule of § 2085, *post*, applied to a recorded marriage certificate).
Tenn.: 1904, Murray *v.* Supreme Hive, 112 Tenn. 664, 80 S. W. 827 (records of a board of health, admitted to show age).
Utah St. 1905, c. 120, Mar. 16, § 20 (certified copy of the State Registrar's "record of a birth or death" shall be *prima facie* evidence "of the facts therein stated").

§ 1645. Certificates of Marriage.

[*Note* 6; *add:*]

1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; certificate of defendant's marriage in Germany, formerly exhibited by him as genuine, admitted against him).

§ 1646. Personal Knowledge required, etc.

[*Note* 1; *add:*]

1904, Goodrich's Estate, P. 138 (cited *ante*, § 1644, n. 1).

[*Note* 2; *add:*]

1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (assault; the same certificate as in McKinstry *v.* Collins, 74 Vt., *supra*, not admitted to show the cause of death; St. 1902, *supra*, having intervened between the two trials).
1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (physician's official certificates of death, admitted to show cause of death).

§ 1647. Registers of Title; Shipping Registers, etc.

[*Note* 1; *add:*]

Yukon St. 1904, c. 5 (like N. Br. Consol. St. 1877, c. 46, § 15).

[*Note* 5, l. 1; *add:*]

see also the statutes for certified copies, cited *post*, §§ 1674, 1680.

§ 1650. Registers of Conveyances; History.

[*Note* 1, par. 1, at the end; *add:*]

now reprinted in Vol. I of Select Essays on Anglo-American Legal History (ed. for the Association of American Law Schools, 1907).

§ 1651. Same: Law in the United States and Canada.

[*Note* 5; *add,* under CANADA:]

Alberta: St. 1906, c. 24, § 17 (land-title registry; the registrar's exemplification or certified copy of "any instruments affecting lands which are deposited, filed, or registered in his office" is admissible "in the same manner and with the same effect as if the original was produced").
British Columbia: St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another rule, as quoted *ante*, § 1639, n. 2). St. 1906, 6 Ed. VII, c. 23, § 118 (like Rev. St. 1897, c. 111, § 48); ib. § 120 (quoted *ante*, § 1225, n. 1).
Saskatchewan: St. 1906, c. 24, § 38 (land-titles; like Alb. St. 1906, c. 24, § 17).
Nova Scotia: 1905, Bartlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264 (certified copies of a plan found in the Crown land-office, not admitted under Rev. St. 1900, c. 163, § 20; the Court's hostility to the statute, "of which I confess I knew nothing until the present argument," is so strong that its ruling is not to be wondered at).
Yukon: Consol. Ord. 1902, c. 39, § 28 (registered bills of sale and mortgages of personalty; the registration clerk's certified copies shall be "*prima facie* evidence of the execution of the original instrument," and of the date, etc.). St. 1904, c. 5, § 11 (grants, etc.; quoted *post*, § 1680); ib. §§ 19, 20 (provisions for proof of copies of town-site allotments, Crown grants, etc.; compare N. Sc. Rev. St. 1900, c. 163, § 20); ib. § 21 ("A copy of any deed, or any document on file in the land-titles' office, certified under the hand of the registrar, or proved to be a true copy taken therefrom, shall be taken in evidence in place of the original"; ib. § 23 (similar to N. Sc. Rev. St. 1900, c. 163, § 23, but requiring only five days' notice); ib. § 24 (similar to N. Sc. Rev. St. 1900, c. 163, § 24, for the Gold Commissioner's office); ib. § 25 (similar to N. Sc. Rev. St. 1900, c. 163, § 25); ib. § 26 (similar to N. Sc. Rev. St. 1900, c. 163, § 25, for the Gold Commissioner's office).

[*Note* 5; *add,* under UNITED STATES:]

Alabama: 1904, Norris *v.* Billingsley, — Ala. — , 37 So. 564.
Florida: Const. 1885, Art. 16, § 21 (certified copy of the record of a deed or mortgage is admissible as *prima facie* evidence "thereof, and of its due execution," on proof of loss, etc.). St. 1905, No. 33 (amending Rev. St. 1892, § 1973, as to mode of acknowledgment for record).

[*Note 5 — continued.*]

Georgia: 1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645. 1905, Flint R. L. Co. *v.* Smith, 122 Ga. 5, 49 S. E. 745 (power of attorney). 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918.
Illinois St. 1907, May 28, p. 376, § 5 (recorded claim for horse-shoer, provable by recorder's certified copy or the certified original).
Indiana: 1907, New Jersey I. & I. R. Co. *v.* Tutt, — Ind. —, 80 N. E. 420 (whether a 24-inch tile would suffice for a ditch, allowed).
Kansas: St. 1905, c. 323 (all papers lawfully "filed or recorded in any public office" are provable by the record or a certified copy of the custodian under official seal); c. 324 (similar, for instruments defectively recorded with the register of deeds for ten years past).
Minnesota: St. 1905, c. 305, §§ 35, 42 (registration of title; similar to the Illinois act *supra;* provision made for certified copies of the certificate of title, of deeds, etc., filed with the registrar, etc.).
New Jersey: St. 1904, c. 117 (record of deeds, etc., to be evidence of the time of recording or filing). St. 1906, c. 250 (mode of acknowledgment of foreign deeds, amended).
New Mexico: St. 1905, c. 38, § 3 recorded contract of sale, etc., of animals, provable by certified copy.
New York: For §§ 935, 936, 946, substitute the following corrected transcripts: C. C. P. 1877, § 975 ("A conveyance, acknowledged or proved, and certified, in the manner prescribed by law to entitle it to be recorded in the county where it is offered, is evidence without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance"); ib. § 936 ("The certificate of the acknowledgment, or the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof"); ib. § 946 ("A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as if it related to real property situated within the State. A conveyance of real property, situated within another State, or a Territory of the United States, which has been duly authenticated, according to the laws of that State or Territory, so as to be read in evidence in the courts thereof, is evidence in like manner").
North Carolina: Rev. 1905, §§ 1598, 1599, 1023 (like Code 1883. §§ 1251, 1253, 1263); Rev. 1905, § 1619 like Code, § 1344).
South Carolina: 1905, Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253 (State *v.* Crocker approved).
South Dakota: 1905, Bruce *v.* Wanzer, — S. D. —, 105 N. W. 282 (certified copy of a duly recorded mortgage, admitted, under Rev. C. C. P. 1903, § 533).
Texas: 1907, Burton *v.* State, — Tex. Cr. —, 101 S. W. 226 (bigamy; rule of Civ. St. 1895, § 2312, applied to a recorded marriage certificate).
United States: St. 1906, June 28, c. 3585, Stat. L. vol. 34, p. 552 (mode of certifying acknowledgments in Guam, Samoa, and the Canal Zone, provided).
Virginia: St. 1903, Extra, c. 486 (Code 1887, § 2501, as to mode of taking acknowledgments for record, amended).
Washington: 1905, Chrast *v.* O'Connor, 41 Wash. 360, 83 Pac. 238 (under the statute for deeds, the original's execution need not be otherwise evidenced than by the certified copy).

§ 1652. Registry out of the Jurisdiction.

[*Note* 4, l. 3; *add:*]

and cases cited *ante*, § 1633, n. 2 (nature of duty), and § 1644 (marriage-registers).

[*Note* 4, col. 3, l. 4; *add:*]

1906, McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921 (certified copy of a recorded deed in Iowa admitted, the acknowledgment being defective by the law of Illinois but correct by the law of Iowa; point not noticed). 1905, Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955 (certified copy of a deed-record in North Dakota; held, that the statutes of that State authorizing the record must be shown, and also "the effect given to certified copies as evidence in the Courts of that State").

[*Note* 4, at the end; *add:*]

Arkansas: Dixon *v.* Thatcher, McNeill *v.* Arnold.
Virginia: Peterman *v.* Laws.
see also Garrigues *v.* Harris, Pa., cited *post*, § 2105, n. 4.

§ 1653. Modes of Proof available when Registration is Unauthorized.

[*Note* 7; *add:*]

and compare the doctrines of § 1679, par. (2), *post*, and § 1635, n. 4, *ante*.

§ 1657. Record of Assignment of Patent.

[*Note* 2; *add:*]

1905, American Graphophone Co. *v.* Leeds & C. Co., 140 Fed. 981, C. C. (certified copy of the patent-office record of an assignment, excluded, in the absence of evidence of the existence and loss of the original; Mayor *v.* American Cable Co. and National C. R. Co. *v.* Navy C. R. Co., *supra*, followed).
Compare the statute for *patent-office records* (quoted *post*, § 1680, n. 1).

§ 1658. Record of Wills.

[*Note* 2; *add:*]

1906, Thomas *v.* Williamson, — Fla. — , 40 So. 831 (statutes as to the effect of probate, construed).

[*Text*, p. 2049, at the end; *add* a new paragraph:]

(5) The record of *preliminary probate*, before a judge without a jury, has in strictness no place as evidence on appeal at a final trial of probate before a jury, and therefore may be forbidden to be read;[4] but it seems an excess of judicial nicety to see any harm in it.

[4] 1904, Weston *v.* Teufel, 213 Il. 291, 72 N. E. 908 (citing prior cases). Compare the cases cited *ante* § 1417, n. 11.

§ 1660. Judicial Records, etc.

[*Note* 1; *add:*]

N. C. Rev. 1905, §§ 327–345 (like Code §§ 55–71 and later statutes).

§ 1662. Records of Legislature, etc.

[*Note* 5; *add:*]

1905, Wilder *v.* A. D. & R. E. Traction Co., 216 Ill. 493, 75 N. E. 194 (recital of a petition in a city ordinance, held *prima facie* evidence).
1893, Kinkead *v.* U. S., 150 U. S. 483, 498, 14 Sup. 172 (legal effect of recitals in private-claim acts, determined; distinguishing Branson *v.* Wirth, 17 Wall. 32, and U. S. *v.* Jordan, 113 U. S. 418).
1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (legislative report and recitals in a private act, as to the confiscation of certain land, excluded).

[*Note* 6; *add:*]

1904, Bosworth *v.* Union R. Co., 26 R. I. 309, 58 Atl. 982 (injury to a passenger during a riot; the Governor's proclamation to disperse the riot, noticed).
Compare the citations under *judicial notice* (*post*, § 2578).

§ 1664. Returns, in General; Sheriff's Return, etc.

[*Note* 6, par. 1; *add:*]

1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (prior cases examined).
1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175.

[*Note* 6, par. 2; *add:*]

1906, Husbands *v.* Polivick, — Ky. — , 96 S. W. 825 (collector's return of a tax-sale is presumptive evidence, under Stats. 1899, c. 81, § 7, Stats. 1903, § 3760, quoted *ante*, § 1352, n. 11).

§ 1665. Surveyor's Returns, etc.

[*Note* 1; *add:*]

Compare the rule for *inquisitions of domain* (*post*, § 1670), in which the application of the principle is slightly different.

[*Note* 2; *add*, at the beginning:]

1838, Evans *v.* Taylor, 7 A. & E. 617 (a survey of a manor in the duchy of Lancaster, not admitted to show the boundary of the manor, because the statute Extenta Maneriі, 4 Edw. I, c. 1, gave no authority to define the boundaries of a manor, and no authority for the survey except this statute was shown).
1867, Phillips *v.* Hudson, L. R. 2 Ch. 243 (a grant and survey of a manor formerly belonging to the Crown, made by the Crown under a general statute and recorded in the Augmentation Office, but relating to private property of the King, not admitted for the tenants against the lord).

[*Note* 2; *add*, at the end:]

but the following more recent cases, in which none of the above rulings were cited, are more strict:
1904, Mellor *v.* Walmesley, 2 Ch. 525 (report of a surveyor to a municipal board, excluded).
1904, Mercer *v.* Denne, 2 Ch. 534, 541 (report of a surveyor made to the Warden of the Cinque Ports, excluded; quoted *ante*, § 1634, n. 1); in Mellor *v.* Walmesley, 1905, 2 Ch. 164, 166, the Court of Appeal reversed the ruling in Mellor *v.* Walmesley *supra*, but rather on the principle of § 1524, *ante;* in Mercer *v.* Denne, 1905, 2 Ch. 538, 555, the Court of Appeal affirmed the ruling in Mercer *v.* Denne, *supra*.

[*Note* 4; *add*:]

1877, Maples *v.* Haggard, 58 Ga. 315 (surveys made by other than county surveyors are not admissible without calling the persons making them).
1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (map by one not a county surveyor nor acting under court order, excluded).
1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 (certificates of survey by a former county surveyor now in Texas, excluded; following Burwell *v.* Sneed, *supra*).

[*Note* 7; *add*:]

1903, Watkins *v.* Havighorst, 13 Okl. 128, 74 Pac. 318 (survey without notice held not binding).

§ 1669. Testimony at a Former Trial; (4) Notes of Stenographer, etc.

[*Note* 1, par. 1; *add*:]

1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (grand-jury's stenographic reports of testimony "are to be treated as memoranda to be used by these officials when they are called as witnesses").

Distinguish the question whether the official stenographic report, if admissible, is *preferred* to other reports of the testimony (*ante*, § 1330).

[*Note* 2, par. 1; *add*:]

Cal. P. C. 1872, § 869 (in cases of homicide, the testimony before the committing magistrate may be proved by a transcript in longhand certified by the reporter appointed by the magistrate and filed with the county clerk). 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (the certified transcript under P. C. § 869, *supra*, is in such cases the only mode of proving the testimony; but the record must affirmatively show the lack of such a proper certificate in the absence of a specific objection; prior cases cited on the interpretation of this statute). 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (preceding case approved). 1904, People *v.* Moran, 144 Cal. 48, 77 Pac. 777 (similar point).
Ia.: 1904, Wiltsey's Will, 122 Ia. 423, 98 N. W. 294 (Walker *v.* Walker, *supra*, followed). 1904, Lanza *v.* Le Grand Quarry Co., 124 Ia. 659, 100 N. W. 488 (testimony taken under the above statute is subject to the rules for depositions, *ante*, § 1415). 1907, Greenlee *v.* Mosnat, — Ia. — , 111 N. W. 996 (St. 1898, c. 9, § 1, *supra*, held not to make admissible the former testimony of a party now disqualified by the opponent's death, the testimony being otherwise inadmissible on the principle of § 1409, *ante*).
Kan. St. 1905, c. 494, § 1 (the transcript of a court stenographer's notes, verified by his affidavit or certificate, of "all the evidence of any witness" at any trial, etc., may be used "under like circumstances and with like effect as the deposition of such witness").
Ky.: 1904, Beavers *v.* Bowen, Ky., 80 S. W. 1165 (incomplete notes by stenographer, excluded; but the part of the opinion applicable to the stipulation for using the notes as if the stenographer were present is obscure and unsound). 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased witness, admissible in a criminal trial without the defendant's consent mentioned in the above statute).
1906, Austin *v.* Com., — Ky. — , 98 S. W. 291 (the official stenographer's bill of evidence, under Stats. 1899, § 4643, ib. Stats. 1903, *supra*, held not to be preferred to, nor to be exclusive of, the testimony of another stenographer verifying his notes).
Mo.: 1906, State *v.* Coleman, — Mo. — , 97 S. W. 574 (former testimony here not admitted under the statute, because the witness was present in court).
Wis.: 1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (statute *supra* not mentioned in excluding the stenographic reports of testimony before a grand jury). 1905, Wells *v.* Chase, 126 Wis. 202, 105 N. W. 799 (the statute *supra* perversely applied; see the citation *ante*, § 1330).

[*Note* 2, par. 2; *add*:]

Distinguish also the question whether the *official stenographic report* is *preferred* to other reports (*ante*, § 1330).

[*Note* 3; *add*:]

1907, Degg *v.* State, — Ala. — , 43 So. 484.
1906, Williams *v.* Sleepy H. M. Co., — Colo. — , 86 Pac. 337 (notes certified by a stenographer not called).

[*Note* 4; *add*:]

N. Y. C. C. P. § 830 is amended by St. 1893, c. 595, and St. 1899, c. 352.

In *Washington*, the stenographer need not be accounted for; St. 1905, c. 26 (testimony at a prior trial, etc., "when reported by a stenographer, or reduced to writing, and certified by the trial judge," upon three days' notice to the opponent with service of copy, "may be given in evidence in the trial of any civil action, etc.").

[*Note* 6, par. 1; *add*:]

1906, State *v.* Woodard, — Ia. — , 108 N. W. 753, *semble* (minutes of testimony before the grand jury, though not usable to impeach the witness, may be used by counsel as the basis for framing questions).

[*Note* 7; *add*:]

1906, State *v.* Woodard, Ia., *supra*, n. 6.
1905, Havenor *v.* State, Wis., *supra*, n. 1.

§ 1670. Reports and Inquisitions; Domain, etc.

[*Note* 4; *add:*]

1828, Rowe *v.* Brenton, 8 B. & C. 737, 743 (a "caption of seisin,' made by commissioners of the Duke of Cornwall, and showing the tenants and rental of each holding, admitted).

[*Note* 5; *add:*]

Compare the cases of an *official survey* (*ante*, § 1665), in which the application of the principle is slightly different.

[*Note* 7; *add:*]

Compare the cases cited *ante*, § 1664.

§ 1671. Same: Inquisitions of Lunacy, Death, Population.

[*Note* 1, par. 1; *add:*]

1905, King *v.* Gilson, 191 Mo. 307, 90 S. W. 367 (capacity of testator; guardianship not conclusive).
1907, Sbarbero *v.* Miller, — N. J. Eq. — , 65 Atl. 472 (bill of account by a lunatic's guardian; the finding of the commission of lunacy admitted).
1904, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013 (raising a presumption of testamentary incapacity).

[*Note* 4; *add:*]

Excluded: 1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641 (proceedings of committal for insanity, not admitted to impeach the person as a witness).
Admitted: 1904, Keely *v.* Moore, 196 U. S. 38, 25 Sup. 169 (committal to an asylum, received, and discharge therefrom, but not the certificate of the examining physicians; yet Leggate *v.* Clark, Mass., is approved).

[*Note* 6; *add:*]

1906, State *v.* Hopkins, 118 La. — , 42 So. 660 (murder; coroner's certificate of death, admitted).
1905, State *v.* Coleman, 186 Mo. 151, 84 S. W. 978 (murder; inadmissible).

[*Note* 8, par. 1; *add:*]

1906, Grand Lodge *v.* Banister, — Ark. — , 96 S. W. 742 (not decided).
1906, Dolbeer's Estate, — Cal. — , 86 Pac. 695 (testator's capacity; coroner's verdict, excluded).
1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (verdict admitted).
1900, Metzradt *v.* Modern Brotherhood, 112 Ia. 522, 84 N. W. 498, *semble* (admissible).
1904, Ætna L. Ins. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364 (excluded; best opinion on the subject, by O'Rear, J.).
1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165 (not decided).
1905, Kinney *v.* Brotherhood, — N. D. — , 106 N. W. 44 (coroner's inquest-blank, filled out, excluded, no inquest having been held; but Puls *v.* Grand Lodge, *supra*, is referred to as if it decided something on this point).
1904, Chambers *v.* Modern Woodmen, 18 S. D. 173, 99 N. W. 1107 (benefit insurance; coroner's verdict not admitted to show the cause of death).
1905, Boehme *v.* Sovereign Camp, 36 Tex. Civ. App. 501, 85 S. W. 444 (verdict not admitted to show suicide).
1884, Whitehurst *v.* Com., 79 Va. 556, 557 (murder; coroner's verdict excluded).
1904, Fey *v.* I. O. O. F. Ins. Soc'y, 120 Wis. 358, 98 N. W. 206 (doubted).

[*Note* 9; *add:*]

1907, Gregory *v.* Woodbery, — Fla. — , 43 So. 504 (population of a town; State census admitted, under the express provision of St. 1903, c. 5191, p. 134, § 3).
Ia. St. 1904, c. 8, § 8 (census of Iowa to be evidence of "all matters therein contained").

[*Note* 10; *add:*]

Accord: 1905, Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201 (census list, not admitted to show that L. W. was "not *in esse* at the date of the deed").
1906, Gorham *v.* Settegast, — Tex. Civ. App. — , 98 S. W. 665 (Federal census not admitted to show the existence, etc., of particular persons).
Contra: 1906, Priddy *v.* Boice, — Mo. — , 99 S. W. 1055 (title by deeds executed by minors; a certified copy of the Federal census record of the ages of these families, covering the censuses 1830–1890, admitted to show the ages of individuals).
1904, Murray *v.* Supreme Hive, 112 Tenn. 664, 80 S. W. 827 (British census report, admitted to show a person's age).

§ 1672. Sundry Instances of Returns and Reports.

[*Note* 1; *add:*]

1906, People *v.* Michigan C. R. Co., 145 Mich. 140, 108 N. W. 772 (taxation; certain official acts and reports, noticed and taken as evidence).
1846, Buckley *v.* U. S., 4 How. U. S. 251, 258 (official appraiser's appraisement of goods imported, in a return filed in the custom-house, admitted).

[*Note* 2; *add:*]

Cal. St. 1885, c. 43 (State analyst's certificate of analysis of food, drug, liquid, etc., duly submitted to him, to be "*prima facie* evidence of the properties of the articles analyzed by him"). St. 1903, c. 225, § 11 (the certificate of the State University director of the agricultural experiment station, under University seal, of his analysis of a sample of commercial fertilizer, shall be *prima facie* evidence, etc.).
Fla. St. 1905, No. 81, § 9 (State chemist's certificate of analysis of a sample of commercial feedstuff, to be evidence).
Ky. Gen. St. 1899, c. 81, § 17, Stats. 1903, § 3760 (official returns in general; quoted *ante*, § 1352, n. 11). Stats. 1903, § 2725 (report of the State inspector of mines; a certified copy "shall be *prima facie* evidence of the truth of the recitals therein contained"). 1905, Andrews' Adm'r *v.* Pineville Coal Co., — Ky. — , 90 S. W. 233 (inspector's report admitted, under the foregoing statute, to show defective ventilation of a mine).
N. C. Rev. 1905, § 3951 (certificate of State chemist, attested with the seal of the department of agriculture, to be evidence of his analysis of a sample of fertilizer drawn under the rules of the department); ib. § 3950 (analysis of the unlawful ingredients of a fertilizer, published in the Bulletin of the department, to be evidence in an action to recover the price).
U. S.: St. 1906, June 29, § 15, c. 3592, Stat. L. vol. 34, p. 601 (for cancelling a certificate of citizenship of a naturalized alien returning to his original country, the "statements duly certified" of U. S. diplomatic and consular officers as to the residence of such persons abroad are admissible).

[*Note* 4; *add:*]

1906, Austin *v.* Terry, — Colo. — , 88 Pac. 189 (inventory admitted to show property to be "parcel of the estate").

§ 1674. Certificates; Sundry Instances, etc.

[*Note* 6; *add:*]

1904, Taylor *v.* State, 120 Ga. 857, 48 S. E. 361 (certificate of honorable military discharge and of good character, excluded).

[*Note* 7; *add:*]

Eng. St. 1905, 5 Edw. VII, c. 15, § 51 (trade-marks; the registrar's certificate to be evidence of matters certified).
Dom. St. 1903, 3 Edw. VII, c. 11, § 33 (animal contagious diseases; an order of the Governor, or the minister, or a certified copy of the inspector's declaration, etc., is *prima facie* evidence of the existence of infection, etc., in a place, vehicle, etc.); ib. § 35 (officer's certificate is *prima facie* evidence of an animal's infection, etc.).
Ont. St. 1906, 6 Edw. VII, c. 47, § 16 (in prosecutions for liquor offences, the certificate of the government analyst as to "the analysis of any liquor" is conclusive).
Yukon St. 1904, c. 5, § 12 (Treasury board's certificate under Dom. St. 1893, c. 31, § 14, admissible, on proof of signature).
Ky. Gen. Stats. 1899, c. 81, § 17, Stats. 1903, § 3760 (official certificates in general; quoted *ante*, § 1352, n. 11).
N. D. St. 1905, c. 9, § 5, and c. 10, § 12 (State chemist's certificate of analysis of Paris green, drugs, or medicines, to be evidence).
Or. St. 1905, c. 106 (fish warden's certificate issuance or non-issuance of a license, admissible).
S. C. St. 1906, No. 97 (amending Code 1902, § 1538, to make the sworn certificate of the chemist of Clemson Agricultural College evidence of the "analysis and commercial value of the fertilizers or cotton-seed meal" analyzed by him).
Va. St. 1904, Extra, c. 565 (amending Code 1887, § 1345; county-clerk's certificate of a recorded log-brand or mark, to be evidence of it).

[*Note* 11; *add:*]

Newf. St. 1904, c. 3, Rules of Court 50, par 29 (similar to Man. Rev. St. 1902, c. 40, rule 164, inserting "expert and" before "scientific").
Yukon Consol. Ord. 1902, c. 17, Ord. XL, R. 498 (similar to Man. Rule 164, omitting the word "actuaries").

§ 1675. Notary's Certificate of Protest.

[*Note* 9; *add:*]

1904, Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575 (inland promissory note).

[*Note* 11; *add:*]

Yukon St. 1904, c. 5, §§ 28, 29.
Me. St. 1905, c. 58 (notaries' powers amended).
N. C. Code 1883, § 49 seems to be omitted in Rev. 1905.

§ 1676. Certificates of Execution of Deeds.

[*Note* 2; *add:*]

Fla. Const. 1885, Art. 16, § 21 (lawfully recorded deeds and mortgages are admissible "without requiring proof of the execution").
Ill. St. 1907, May 28, p. 376, § 5 (horse-shoer's lien).

[*Note* 11; *add:*]

Br. C. St. 1906, 6 Edw. VII, c. 23, § 62 (like Rev. St. 1897, c. 111, § 58).
Yukon St. 1904, c. 5, § 27 (like N. Sc. Rev. St. 1900, c. 163, § 26, inserting "bill of sale or other document").
1904, Long *v.* Powell, 120 Ga. 621, 48 S. E. 184 (U. S. consul's certificate of acknowledgment, admissible under Code § 3621).
1905, Werner *v.* Marx, 113 La. 1002, 37 So. 905 (power of attorney from Germany, held duly authenticated by a U. S. consul's certificate to the signature and seal of the German police officer taking the acknowledgment, under Rev. St. 1876, § 1436).
1903, McKenzie *v.* Beaumont, 70 Nebr. 179, 97 N. W. 225 (statute applied to a mortgage).
N. Y. C. C. P. 1877, § 937 ("any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for the taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property"); ib. § 946 (conveyance of real property; quoted *ante*, § 1651, n. 5).
U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (when a U. S. land-office register is subpœnaed to produce any original application for entry, etc., in any U. S. court or State court of record, the commissioner of the general office shall transmit it to him with a certificate of authenticity under official seal, and it shall then be received in evidence).
1904, Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240 (certificate of acknowledgment of a release unrecorded, or not entitled to be recorded, inadmissible).

[*Note* 12; *add:*]

1904, Markey *v.* State, 47 Fla. 38, 37 So. 53.
The *jurat* suffices as *prima facie* evidence of the taking of the oath, even though the witness if called to the stand *cannot remember* the circumstances (precisely as in the attestation of a subscribing witness, *ante*, § 1302): 1906, Komp *v.* State, — Wis. — , 108 N. W. 46.

§ 1678. Certified Copies; Certificate as to Effect, etc. of Original.

[*Note* 1; *add:*]

1905, Kelley *v.* Laconia L. Dist., 74 Ark. 202, 85 S. W. 249 (U. S. land office commissioner's letter as to entries in the office, excluded).
1905, Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757 (tax judgment; the clerk's certified copy of the proceedings "so far as relates to the premises described" held sufficient, where the only material part was in fact included; the clerk's conclusion being thus immaterial).
Compare the cases cited *post*, §§ 2109, 2110.

[*Note* 2; *add:*]

1906, Smithers *v.* Lowrance, — Tex. — , 93 S. W. 1064 (State land commissioner's certificates of contents of his records, admitted under the statute; but the precise distinctions taken are not clear).
Compare the citations *post*, §§ 2109, 2110.

[*Note* 3; *add:*]

1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (a certificate of the lack of a record of a particular document is inadmissible without statute).

[*Note* 4; *add:*]

1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (the foregoing statute is not exclusive of the method of proof noted in § 1244, *ante*).

§ 1679. Same: Authentication of the Copy.

[*Note* 5; *add:*]

and *ante*, § 1653, par. (4), § 1635, n. 4.

[*Note* 6; *add:*]

some cases are collected in Lalakea *v.* Hilo Sugar Co., 1904, 15 Haw. 570 (defective certificate of acknowledgment).

§ 1680. Certified Copies of Miscellaneous Public Documents.

[*Note* 1; *add:*]

England: St. 1882, 45 & 46 Vict. c. 50, § 24 (Municipal Corporations Act; a written copy of a by-law of a municipal council "authenticated by the corporate seal" is admissible).
1905, Robinson *v.* Gregory, 1 K. B. 534 (statute applied); St. 1905, 5 Edw. VII, c. 15, § 50 (trade-marks; the registrar's certified printed or written copies of the register, under seal of the patent-office, to be admissible "without further proof of production of the originals"); ib. § 51 (the registrar's purporting certificate of an entry, admissible).
Canada. *Dominion:* St. 1903, 3 Edw. VII, c. 58, §§ 26, 27 (railway act; similar to §§ 26, 27 of Ont. St. 1906, c. 31, cited *infra*, except that under § 26 copies by the minister or inspecting engineer are also included); St. 1904, 4 Edw. VII, c. 15, § 18 (certified copy, by the deputy minister of commerce or by a justice of the peace, of the oath of a grain inspection officer, admissible).

[*Note* 1 — *continued.*]

Alberta: St. 1906, c. 3, § 7, par. 55 (a regulation or order in council is provable by copy attested by "the signature of the clerk of the executive council; an order in writing signed by the council member acting as provincial secretary and purporting to be by command of the Lieutenant-Governor shall be received as his order); ib. § 9 (acts of the Legislative assembly are provable by clerk's certified copy under seal of the Province, etc., as in Yukon Consol. Ord. 1902, c. 1, § 10); St. 1906, c. 57, § 535 (certificate of registration of veterinary surgeon, "purporting to be signed and issued by the registrar and under the seal of the association," admissible); c. 28, §§ 64, 65 (provision for proof of registration as a medical practitioner, by certificate).

British Columbia: St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n, 2).

Ontario: St. 1904, 4 Edw. VII, c. 23, § 67 (certified copy of an assessment roll shall be received without "the production of the original assessment roll"); St. 1906, 6 Edw. VII, c. 11, § 55 (mining recorder's office; every copy of "any entry in any of the said books, or of any documents filed" in the office, certified by the recorder, shall be "evidence of the matters therein contained"); St. 1906, 6 Edw. VII, c. 30, § 59, par. 12 (railway maps, surveys, etc., when filed, provable by copy certified by the registrar of deeds or the secretary); St. 1906, 6 Edw. VII, c. 31, § 26 (documents signed by the chairman or secretary of the railway and municipal board, admissible as copies to prove any regulation, etc.); ib. § 27 (the secretary's certified copy of any document deposited with the board is admissible; the secretary's certified copy, under seal of the board, of any document in the custody of the board or of record with it, is admissible).

Prince Edward Island: St. 1906, 6 Edw. VII, c. 6, §§ 25, 30 (certified copies, by the registrar-general or his assistant, of the records of birth, marriage, and death, admissible).

Saskatchewan: St. 1906, c. 10, § 21 (records, documents, etc. in the department of public works, are provable by copy attested by the signature of the commissioner or deputy); c. 28, §§ 61, 62 (provision for certified copies of the official register of the medical profession).

Yukon: Consol. Ord. 1902, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by written copy attested by the Territorial secretary); ib. § 10 (Territorial secretary's certified copies of ordinances, under Territorial seal, "shall be held to be duplicate originals and also to be evidence, as if printed by lawful authority, of such ordinances and of their contents"); c. 6, § 20 (registry of vital statistics, provable by certified extract); c. 48, §§ 38, 48 (provision for certified copies of the official registry of medical practitioners); c. 50, § 28 (provision of similar purpose for pharmaceutical practitioners); c. 61, § 11 (certified copy, by the clerk of the territorial court or his deputy, of a filed declaration of benevolent incorporation, etc., admissible); c. 76, § 101 (provision for chief inspector's certificate of a license, in liquor cases); ib. § 102 (provision for certified copy of a regulation, in liquor cases); St. 1904, c. 5, § 5 (proclamation, etc., of Governor-General; like Dom. St. 1893, c. 31, § 8); ib. § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like Dom. St. 1893, c. 31, § 9); ib. § 9 ("Proclamations, treaties, and other acts of state of any foreign State or of any British colony may be proved by the production of a copy purporting to be sealed with the seal of the foreign State or British colony to which the original document belongs"); ib. § 11 (like Dom. St. 1893, c. 31, § 12, inserting "grant, map, plan, report, letter" and "belonging to or deposited in" for the first class, and "or of this Territory or of any Territory of Canada" for the second class); ib. § 13 (official books; like Dom. St. 1893 c. 31, § 17, adding "or of this Territory"); ib. § 14 (like Dom. St. 1893, c. 31, § 13); ib. § 31 (like Dom. St. 1893, c. 31, § 14, inserting "grant, map, plan, will, deed"); ib. § 17 (shipping register; like N. Br. Consol. St. 1877, c. 46, § 15).

UNITED STATES: *Alabama:* Code 1897, § 5086 (U. S. revenue liquor-license may be proved by parol evidence); 1904, Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350 (certified transcript of a constable's bond recorded with the probate judge, admitted under Code § 1816).

Arizona: St. 1905, c. 51, § 65 (certified copy of the official record of live-stock brands is admissible).

California: Pol. C. 1872, § 3083, as amended by St. 1905, c. 107 (State registrar's record of marriages and births, provable by his certified copy).

Colorado: St. 1905, c. 100, § 14 (county clerk's certified copy of electoral registration-book, admissible).

Illinois: 1904, Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030 (copies of records of tax-sales, etc., held inadmissible because certified by the clerk of the county court, instead of by the proper custodian the county clerk, though the same person filled both offices).

Indiana: St. 1905, c. 53, § 19 (railroad commission's certified or printed copies of rates, regulations, etc., admissible).

Kansas: St. 1905, c. 323 (amending one of the above statutes; quoted *ante*, § 1225, n. 1).

Kentucky: St. 1906, c. 27 (amending Stats. 1903, § 4545, by adding, for the Secretary of State, that "copies of records and papers in his office, certified by him, shall in all cases be evidence equally with the originals," and that when presented, "the same shall be *prima facie* evidence of their contents, and the personal presence of the Secretary of State as a witness in such case shall be dispensed with, provided that such records shall be mailed under seal to the circuit court clerk" like depositions).

Michigan: 1906, Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493 (exemplified copy of U. S. pension-vouchers, admitted, under U. S. Rev. St. 1878, § 882, cited *infra*).

Missouri: 1905, Florscheim *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023 (under Rev. St. 1899, § 3098, a certified copy of articles of incorporation in Illinois was excluded because the Illinois law authorizing the Secretary of State to keep or record was not proved; unsound, because the seal of State is of itself an authority for the purpose, *ante*, § 1679, par. *b*, *post*, § 2163); 1906, Stewart *v.* L. B. Land Co., — Mo. —, 98 S. W. 767 (properly certified copies of platbooks admissible under Rev. St. 1899, § 3094, *supra*).

Nebraska: 1905, Rieck *v.* Griffin, — Nebr. —, 103 N. W. 1061 (copy of sections of the Arkansas statutes, under seal of the Secretary of State, admitted).

New Mexico: St. 1905, c. 79, § 8 (certified copy of certificate of incorporation, by county recorder or Secretary of the Territory, admissible).

North Carolina: Revision 1905, § 300 (like Code 1883, § 662); Rev. 1905, § 1616 (like Code §§ 715, 1342); Rev. 1905, § 1593 (like Code § 1340); Rev. 1905 § 1594 (like Code § 1338); Rev. 1905, § 1595, St. 1899, c. 277, § 2 (violation of town ordinances; mayor's certified copy of the ordinance admissible); Rev. 1905, § 1596 (like Code § 1341); Rev. 1905, § 1617 (copies of "bonds, contracts, or other papers" concerning the "settlement of any account" between the U. S. and an individual, or "extracts therefrom when complete

[*Note* 1 — *continued.*]

on any one subject," or copies of "books or papers on file or records of any public office of the State or the U. S.," are receivable when certified under official seal by "the chief officer in said office or department"); Rev. 1905, § 4684 (papers in the office of the insurance commissioner may be proved by his certified copy under official seal, and conveyances, etc., executed by him under seal may be recorded with like effect as deeds); Rev. 1905, § 5070 (State librarian's certificate, under his and the official seal, "to the authenticity and genuineness of any document, paper, or extract from any document, paper or book or other writing which may be on file in his office," is admissible).

Oregon: St. 1905, c. 51 (C. C. P. § 731, *supra*, amended so as to read, "certified by the clerk, or other person having the legal custody of the record, with the seal of the Court affixed thereto, if there be a seal, together with the certificate of the chief judge, or presiding magistrate, that the certificate is in due form and made by the clerk or other person having the legal custody of the original").

South Carolina: 1906, Montgomery *v.* Seaboard A. L. R. Co., 73 S. C. 503, 53 S. E. 987 (under Code 1902, §§ 2051, 2888, the Secretary of State's certified copy of a charter of consolidated railroads is not admissible).

South Dakota: St. 1905, c. 125, § 8 (Secretary of State's certified copy of articles of incorporation for mutual life insurance, admissible).

Texas: 1906, Smithers *v.* Lawrance, — Tex. — , 93 S. W. 1064 (State land commissioner's records; certified copy admitted).

United States: St. 1906, June 29, § 5, c. 3591, Stat. L. vol. 34, p. 592 (contracts, reports, schedules, etc. of common carriers, preserved as public records by the Interstate Commerce Commission, shall be "received as *prima facie* evidence of what they purport to be"; and a copy certified by the secretary of the Commission under its seal is receivable); 1905, Howard *v.* Perrin, 200 U. S. 71, 26 Sup. 195 (certified copy of land-office papers, admitted under Rev. St. § 891); 1906, U. S. *v.* Pierson, 145 Fed. 814, C. C. A. (effect of a certified transcript of Treasury department records, in an action for official delinquency, under U. S. Rev. St. 1878, § 886).

Utah: St. 1905, c. 120, Mar. 16, § 20 (State Registrar's record of births and deaths, provable by his copy properly certified"); St. 1905, c. 108, Mar. 9, § 17 (State engineer's maps and records provable by certified copies).

Vermont: 1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (St. 1904, No. 24, p. 27, concerning the State auditor's certified copies, considered); St. 1906, No. 118, § 4 (amends Stats. 1894, § 3765, *supra*).

Washington: 1904, James *v.* James, 35 Wash. 650, 77 Pac. 1080 (a public record from another State, is not provided for under the above statutes); 1906, State *v.* Kniffen, — Wash. — , 87 Pac. 837 (deputy county clerk's certified copy of a marriage record in Michigan, excluded, because not certified according to U. S. Rev. St. 1878, § 906).

Wisconsin: 1906, Rohloff *v.* Aid Ass'n, — Wis. — , 109 N. W. 989 (certified copy of a death certificate filed in the register's office under Rev. St. 1898, §§ 1024, 1024 *a*, excluded, as "not the best evidence").

Compare also the rule against merely certifying to the *effect or non-existence* of the document (*ante*, § 1678), and the rule requiring the copy to include the *whole of the document* (*post*, § 2109).

[*Note* 3, p. 2138; *add:*]

Yet where the local State has not provided for proof of copies of records in other States, the Federal statute may have to be relied on:

1905, Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955 (North Dakota deed-records, admitted under the Federal statute, though the local statute made no provision for certified copies from other States); 1904, James *v.* James, 35 Wash. 650, 77 Pac. 1080; this doctrine, however, should not lead us to ignore the common-law propriety of using a copy duly certified according to the laws of the other State (*ante*, § 1633, n. 1, § 1652, n. 4).

§ 1681. Certified Copies of Judicial Records.

[*Note* 12; *add:*]

Canada: B. C. St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n. 2).

Newf. St. 1904, c. 3, Rules of Court 33, par. 3 (like Rules of 1892).

Yukon St. 1904, c. 5, § 15 (par. (1): "a copy of any document, writing, or proceeding, filed in any court in this Territory, shall be received as evidence to the same extent as the original, if it is certified under the seal of the court, or by the proper officer under his hand"; par. (2): "a copy of any order for judgment, or of the entry of the judgment in the docket of judgments, certified under the hand of the proper officer, suffices to prove the judgment without producing other part of the record"); ib. § 16 (like Dom. St. 1893, c. 31, § 10, inserting "or territory" of Canada); ib. §§ 22, 23, (like N. Sc. Rev. St. 1900, c. 163, §§ 21, 22, substituting as certifier the clerk of the Territorial court, and the word "probated" for "recorded," and requiring only five days' notice).

UNITED STATES: *Ark.:* 1904, Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147 (certified transcript of proceedings before a commissioner for U. S. Courts, admitted).

Colo: St. 1903, c. 181, § 172 (copies of probate "records and entries or of any papers or exhibits on file in such court," certified by the clerk or judge under seal of the court, are admissible).

St. 1903, c. 181, § 159 ("authenticated copies" of probate inventories, etc., are admissible).

D. C.: 1906, Scott *v.* Harrell, 27 D. C. App. 395, 398 (certified copy of a will, admitted under Code 1901, § 1071).

Fla.: 1906, Mansfield *v.* Johnson, — Fla. — , 40 So. 196 (execution returned and on file, proved by the clerk's certified copy); 1906, Thomas *v.* Williamson, — Fla. — , 40 So. 831 (statutory rule for certified copies of probated wills, construed).

Ga.: 1905, Conrad *v.* Kennedy, 123 Ga. 242, 51 S. E. 299 (under Code § 5237, a certified copy of a will probate in another State must be attested as in due form by the judge, etc.); 1906, Patterson *v.* Drake,

[*Note* 12 — *continued.*]

126 Ga. 478, 55 S. E. 175 (Code 1895, § 5214, *supra*, applied); 1907, Sellers *v.* Page, — Ga. — , 56 S. E. 1011 (transcript of a court of ordinary; Code § 4250 applied).
Ia.: 1904, Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135 (Code § 4646 applied to a California justice's record).
La.: 1904, State *v.* Allen, 113 La. 705, 37 So. 614 (bigamy; certified copy of an official Indiana marriage certificate, recorded in a circuit court, held properly authenticated).
Miss.: 1904, Wise *v.* Kerr Thread Co , 84 Miss. 200, 36 So. 244 (certified copy of a justice's judgment, admitted, under St. 1866, c. 101, Code 1892, § 2413).
Mo.: 1906, Stevens *v.* Oliver, — Mo. — , 98 S. W. 492 (certified copy of a recorded probate of an Ohio will, admitted under Rev. St. 1899, § 4635, *supra*).
Nebr.: 1903, Martin *v.* Martin, 70 Nebr. 207, 97 N. W. 289 (statute applied to admit a certified copy of a probate of a will in Pennsylvania); 1906, Gordon *v.* Wageman, — Nebr. — , 108 N. W. 1067 (transcript of Missouri justice's judgment, held properly authenticated under the above statute).
N. C.: Revision 1905, § 1616, 1618, 1619, 3133, 3130 (like Code 1883, §§ 1342, 1343, 1344, 2156, 2157); Rev. 1905, §§ 1603, 1607, 1608 (like Code §§ 2175, 2181, 2182); Rev. 1905, § 1609, Code 1883, § 2183 (copy, not certified, of a probated will destroyed during the war, admissible on certain conditions); 1907, Strecker *v.* Railson, — N. D. — , 111 N. W. 612 (justice of the peace's record in another State, held not to be within the statutes).
Vt.: St. 1900, No. 36 (amending Stats. 1894, § 2367, *supra*, as to foreign wills); St. 1904, No. 67 (similar).

Compare also the rule against merely certifying to the *effect or non-existence* of the record (*ante*, § 1678), and the rule requiring the copy to include the *whole of the record* (*post*, §§ 1664, 2109, 2110).

[*Note* 14, par. 1; *add:*]

1904, Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135.

[*Note* 14, par. 2, l. 4; *add:*]

or though the local statute provides nothing: compare the cases as to *records of foreign deeds*, cited *ante*, § 1652, n. 4, § 1680, n. 3.

[*Note* 16, par. 1; *add:*]

1905, Chapman *v.* Chapman, — Nebr. — , 104 N. W. 880.
1907, Strecker *v.* Railson, — N. D. — , 111 N. W. 612 (justice of the peace).

§ 1683. Quasi-Official Copies Certified by Private Persons.

[*Note* 3; *add:*]

Canada: Sask. St. 1906, c. 30, § 194 (regulation, etc. of a railway company, provable by copy certified "by the president, secretary, or other executive officer," under company seal).
Yukon St. 1904, c. 5, § 11 (like Dom. St. 1893, c. 31, § 12; quoted *ante*, § 1680).
U. S.: Nebr.: St. 1905, c. 157 (documents in the custody of the Nebraska State Historical Society are provable by certified copy of its secretary or curator "under seal and oath").

Compare also the cases cited *ante*, § 1674, notes 10, 11 (certificates by private persons).

§ 1684. Officially Printed Copies.

[*Note* 15; *add:*]

Canada: Dominion: St. 1903, 3 Edw. VII, c. 61, § 11 ("copies of the said Revised Statutes [of 190–, authorized by this act to be prepared], purporting to be printed by the King's printer, from the amended roll as deposited, shall be evidence of the said Revised Statutes").
Alberta: St. 1906, c. 3, § 7, par. 54 (a legislative act, public or private, is provable by a copy "printed by authority of law," and every copy so purporting shall be deemed *prima facie* to be so printed); ib. par. 55 (the King's printer's copy of a regulation or order in council is admissible).
N. W. Terr.: Can. Rev. St. 1886, c. 50, § 111 (cited *supra*, under *Dominion*).
Saskatchewan: St. 1906, c. 14, § 6.
Yukon: Consol. Ord. 1902, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by printed copy in the Yukon Official Gazette); ib. par. 53 (a printed copy of an ordinance, public or private, purporting to be printed by authority of law, is admissible); c. 57, § 74 (notice of joint-stock incorporation-patent in Yukon Official Gazette, admissible); c. 76, § 102 (provision for a printed copy of liquor regulations). St. 1904, c. 5, § 3 (statutes of the Imperial or Dominion Parliament, or of a province, etc., of Canada, or ordinances of this Territory or another of Canada, are provable by copy purporting to be printed and published by the King's printer or respective Government printer); ib. § 4 (Imperial proclamations, etc.; like Dom. St. 1893, c. 31, § 11, adding "Yukon Territory" under cl. *c*); ib. § 5 (Dominion proclamations, etc.; like Dom. St. 1893, c. 31, § 8); ib. § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like Dom. St. 1893, c. 31, § 9); ib. § 10 (like Dom. St. 1893, c. 31, § 16, adding the Yukon Gazette).
United States: Ill.: 1906, McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921 (printed book of Iowa statutes, with the title-page reading, "published by authority of the State," admitted under Rev. St. 1874, c. 51, § 10). 1906, Chicago & A. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56 (under Rev. St. c. 24, § 65, *supra*, the printed copy is of course not conclusive).
Ia.: 1904, Summitt *v.* U. S. Life Ins. Co., 123 Ia. 681, 99 N. W. 563 (N. Y. Session Laws, held to "purport to have been published, etc.," under Code § 4651).
Kan.: St. 1897, c. 136, § 4 (Webb's edition, 1897, of the general statutes of Kansas, shall be *prima facie* evidence of the statutes, etc., when approved in a certain tenor by the certificates of the Supreme Court

[*Note* 15 — *continued.*]

and the attorney-general). 1906, State *v.* Carter, — Kan. — , 86 Pac. 138 (the foregoing edition held not to be adequately approved as required, and therefore to be no more "than a private compilation, and are not even *prima facie* evidence of the statute law of the State").
Ky.: 1906, Graziani *v.* Burton, — Ky. — , 97 S. W. 800 (copy of the Ohio law, proved by the Secretary of State to have been received by him, etc., admitted under Stats. § 1642).
Minn.: 1906, Clagett *v.* Duluth, 143 Fed. 824, C. C. A. (Young's and Wenzel's official compilation of Minnesota statutes, held not conclusive).
Mo.: St. 1905, Mar. 10, p. 208 (adding § 4164*b* to Rev. St. 1899, making admissible the Secretary of State's printed compilation of amendments to the Constitution since 1898).
N. J.: St. 1905, c. 199 (amending St. 1899, Mar. 21, and making admissible in actions for penalties the printed copy of city ordinances, etc., published by authority of the common council).
N. C.: Rev. 1905, §§ 1592, 1593, 1594 (like Code 1883, §§ 1338, 1339, 1340). 1906, State *v.* Southern R. Co., 141 N. C. 846, 54 S. E. 294 (printed copy of Federal department of agriculture's regulations, not received on the facts).
U. S.: Rev. St. 1878, § 892 (printed copies of patent-office records; quoted *ante*, § 1680, n. 1). St. 1906, June 29, § 5, c. 3591, Stat. L. vol. 34, p. 589 ("authorized publications" of the reports and decisions of the Interstate Commerce Commission, in the form provided by it, are to be "competent evidence" of the reports and decisions). 1904, Drewson *v.* Hartje P. M. Co., 131 Fed. 734, 738, 65 C. C. A. 548 (patent-office printed copy of a patent, held sufficient to show the date of application, on the facts).
Va.: St. 1906, c. 20 (Pollard's edition of the authorized Code of Virginia of 1904, to be evidence).

[*Note* 15, p. 2160; *add*, at the end of par. (1):]

(6) A certified copy under seal by the Secretary of State may be usable on the principle of § 1680, *ante.*

§ 1691. Learned Treatises; General Principle, etc.

[*Text*, p. 2173, l. 2 from the end of the section; *add* a new note 4:]

[4] An example of the good sense and utility of such a rule, if it could be adopted, may be seen in Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904).

§ 1693. Jurisdictions in which the Exception is Recognized.

[*Note* 1, par. 1; *add:*]

1906, Birmingham R. L. & P. Co. *v.* Moore, — Ala. — , 42 So. 1024 (two books on surgery, admitted on a question concerning appendicitis).

[*Note* 3; *add:*]

1888, People *v.* Goldenson, 76 Cal. 348, 19 Pac. 170.
1891, Lilley *v.* Parkinson, 91 Cal. 655, 27 Pac. 1091.
1904, Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104.
1906, State *v.* Wilhite, — Ia. — , 109 N. W. 730 (a standard medical dictionary is admissible for definitions, as distinguished from "the symptoms and cure of disease").

§ 1697. Partial Recognition; (1) Legal Treatises.

[*Note* 2, under *Accord, add:*]

1904, Banco de Sonora *v.* Bankers' M. C. Co., 124 Ia. 576, 100 N. W. 532 (similar to the prior ruling in this case).

§ 1698. Same: (2) Life Tables, Almanacs, etc.

[*Note* 1, par. 1; *add:*]

1903, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, — Ind. — , 78 N. E. 1033 (Carlisle Tables admitted).
1904, Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173.
1905, Illinois C. R. Co. *v.* Hutchins, — Ky. — , 89 S. W. 530 (American Mortality Table, admitted).
1907, Banks *v.* Braman, — Mass. — , 80 N. E. 799 (a certain insurance table, not shown to be standard or recognized, not admitted).
1905, Horst *v.* Lewis, 71 Nebr. 365, 103 N. W. 460.
N. C. Rev. 1905, § 1626 (like Code, § 1352).
1905, Hyland *v.* Southern B. T. & T. Co., — N. C. — , 49 S. E. 879 (statute applied).
1904, Reynolds *v.* Narragansett E. L. Co., 26 R. I. 457, 59 Atl. 393 (standard annuity tables, admitted).

§ 1700. Same: (4) Sundry Instances, etc.

[*Note* 1, l. 9; *add:*]

Contra: cases cited *ante*, § 1693, n. 3, § 1696.

[*Note* 4; *add:*]

1907, Chicago Union T. Co. *v.* Ertrachter, — Ill. — , 81 N. E. 816 (Bloomington *v.* Schrock followed).
1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884.
1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377.
1907, State *v.* Blackburn, — Ia. — , 110 N. W. 275 (cross-examination to books stated by the witness to be standard authorities, allowed).
1906, Harper *v.* Weikel, — Ky. — , 89 S. W. 1125.
1904, Mitchell *v.* Leech, 69 S. C. 413, 48 S. E. 290.
1903, Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808.

[*Note* 7; *add:*]

1904, Quattlebaum *v.* State, 119 Ga. 433, 46 S. E. 677.

[*Note* 8; *add:*]

1905, Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. 358 (cyclopedias quoted on the experience of foreign countries as to vaccination against smallpox).

§ 1702. Reports of Judicial Decisions.

[*Note* 1, lines 2 and 3; *read,* instead:]

it is now known that the Year Books were not official, so that this is perhaps a precedent.

[*Note* 2; *add:*]

N. C. Rev. 1905, § 1594 (like Code, § 1338).

§ 1704. Standard Price-Lists and Market Reports.

[*Note* 1; *add:*]

1905, Kentucky Ref. Co. *v.* Conner, — Ala. — , 39 So. 728 (certain letters held not to be within the statute).
1906, Tri-State Milling Co. *v.* Breisch, 145 Mich. 232, 108 N. W. 657 (Sisson *v.* R. Co., followed; market quotations in a Detroit daily newspaper, received).
1905, Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393 (trade journals, not admitted without showing that reliable sources were used in their reports).
1905, Chicago, B. & Q. R. Co. *v.* Todd, — Nebr. — , 105 N. W. 83 (Sisson *v.* R. Co., *supra*, followed; Daily Drovers' Journal-Stockman admitted to show sales of sheep on certain days).
1907, Moseley *v.* Johnson, — N. C. — , 56 S. E. 922 (value of Georgia corporate securities; the market reports of a daily newspaper in Georgia, admitted).

§ 1705. Abstracts of Title.

[*Note* 1; *add:*]

But not, apparently, in this country: 1906, Einstein *v.* Holladay K. L. & L. Co., 118 Mo. App. 184, 94 S. W. 296 (lost deeds and burnt records; set of abstracts made partly by S., and partly by K., but verified by S. only, excluded).

[*Note* 2; *add:*]

Ill.: St. 1903, pp. 121, 122 (amending St. 1897, May 21, §§ 7, 18, being Hurd's Rev. St. 1903, c. 30, § 61, concerning title-registration, so as to permit the use of abstracts of title). 1903, Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634 (abstract rejected because it was not on file in the recorder's office and the loss of originals was not proved). 1904, Glos *v.* Paterson, 209 Ill. 448, 70 N. E. 911 (certain abstracts held sufficiently shown to be within the description of the statute). 1904, Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707 (certain abstracts held improperly admitted without proof of loss of the original, preparation in the course of business, etc.). 1906, Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80 (abstract excluded, for lack of statutory compliance). 1906, Messenger *v.* Messenger, 223 Ill. 282, 79 N. E. 27 (the above statute of 1903 held not to have been lawfully adopted in Cook Co., and certain abstracts therefore rejected).
Minn. St. 1905, c. 193, § 1 (on affidavit that an instrument or court records affecting a landed interest "are lost or destroyed and not within the power of such party to produce," and that the record of it is "destroyed by fire or otherwise," the Court may receive "any abstract of title to such lands made in the ordinary course of business before such loss or destruction," and also "any copy, extract, or minutes from such destroyed records or from the original thereof, which were, at the date of such destruction or loss, in the possession of any person then engaged in the business of making abstracts of title for others for hire"); ib. § 2 (a sworn copy of any such writing, made by the possessor, is receivable, provided reasonable notice is given to the opponent for verifying its correctness).
Mo. St. 1905, Mar. 23 and St. 1905, Apr. 15, pp. 148, 150 (certain abstracts of title to lands in Taney and Pulaski counties, made admissible).

§ 1706. Sundry Commercial and Professional Registers.

[*Note* 1; *add:*]

1907, Warrick *v.* Reinhardt, — Ia. — , 111 N. W. 983 (killing of a thoroughbred sow; a certificate of registry in the Iowa Breeders' Association, admitted).

[*Note* 1 — *continued.*]

Ky. St. 1904, c. 127 (livery-keeper's register; cited more fully *ante*, § 1639, n. 2). 1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864, 1105 (reports of a mercantile agency, not admitted as reputation to show a partnership.

Compare the cases cited *ante*, § 1621, n. 5 (reputation of an animal's character).

§ 1710. Affidavits; Exceptions created by Statute.

[*Note* 6; *add:*]

Newf. St. 1904, c. 3, Rules of Court 33, par. 1, par. 31, Rule 34, par. 1, par. 24 (similar; quoted *ante*, § 1411).

§ 1712 Voter's Declarations as to Qualifications, etc.

[*Note* 3; *add:*]

1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (State *v.* Olin, *supra*, followed).

§ 1715. Circumstantial Evidence and Res Gestæ Rule, distinguished.

[*Text*, p. 2207, l. 1; after "Exception," *add* a new note 3*a*:]

1901, Baldwin, J., in Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797: "A feeling is a fact; and an ultimate fact. If one says that he loves another, he expresses a sentiment existing at the time when he speaks."

§ 1719. Statements of Pain or Suffering; to a Physician or Layman.

[*Note* 8; *add:*]

1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (Carr case approved).
1905, Klingaman *v.* Fish & H. Co., — S. D. — , 102 N. W. 601 (here the Court, while adopting the inferior rule, inexcusably cites the Massachusetts cases as if they supported it).

[*Note* 9; *add:*]

Ala.: 1903, Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166 (complaints and crying, admitted). 1905, Kansas City M. & B. R. Co. *v.* Butler, 143 Ala. 262, 38 So. 1024. 1905, Kansas City M. & B. R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207. 1905, Birmingham R. L. & P. Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338.
Ia.: 1904, Buce *v.* Eldon, 122 Ia. 92, 97 N. W. 989. 1904, Battis *v.* Chicago R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543 (like Keyes *v.* Cedar Falls, *supra*). 1905, Fishburn *v.* Burlington & N. W. R. Co., 127 Ia. 483, 103 N. W. 481, *semble* (similar; but the point decided is inexcusably obscure). 1907, Patton *v.* Sanborn, — Ia. — , 110 N. W. 1032.
Mo.: 1905, McHugh *v.* St. Louis T. Co., 190 Mo. 85, 88 S. W. 853.
Nebr.: 1905, Western Travelers' Acc. Ass'n *v.* Munson, — Nebr. — , 103 N. W. 688.
N. D.: 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165.
W. Va.: 1905, Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132 (battery; complaints "exhibiting the natural symptoms and effects of the injury," admitted).

§ 1721. Statements Post Litem Motam.

[*Note* 1; *add:*]

1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (during treatment, but after action begun, admitted).
1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (testimony as to an injured person's "flinching," etc., at the touch of a doctor called a week before trial, and not for treatment, excluded).
1905, McCormick *v.* Detroit G. H. & M. R. Co., 141 Mich. 17, 104 N. W. 390 (Strudgeon *v.* Sand Beach, *supra*, approved and applied).
1905, O'Dea *v.* Michigan C. R. Co., 142 Mich. 265, 105 N. W. 746 (statements to the defendant's physician, called in expectation of his giving testimony, excluded).
1904, Kath *v.* Wisconsin C. R. Co., 121 Wis. 503, 99 N. W. 217 (not admissible when made to a physician "after action is brought or threatened").

§ 1722. Kind of Fact Narrated, etc.

[*Note* 1, par. 1; *add:*]

1906, Indiana U. T. Co. *v.* Jacobs, — Ind. — , 78 N. E. 325 ("She told me that she had an injured limb," admitted).
1905, Shade's Adm'r *v.* Covington C. E. R. & T. & B. Co., 119 Ky. 592, 84 S. W. 733 (that she had fallen on the ice on the defendant's bridge, excluded).
1904, Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009 (that a sprain was caused by a defective sidewalk, excluded).

[*Note* 2, par. 1; *add*, under *Accord*:]

1904, Cashin *v.* N. Y. N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930.
1906, Weeks *v.* Boston El. R. Co., 190 Mass. 563, 77 N. E. 654 (certain complaints, held here not to state past pain).
1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (poisoning; statements of symptoms a few days before, excluded).

[*Note* 3; *add*:]

In Louisville & N. R. Co. *v.* Smith, — Ky. — , 84, S. W. 755 (1905), statements as to *mental suffering* were excluded, but improperly, it would seem.

[*Note* 4, par. 1; *add*, under *Accord*:]

1905, Shade's Adm'r *v.* Covington C. E. R. & T. & B. Co., 119 Ky. 592, 84 S. W. 733 (perhaps qualifying the Omberg case).
1907, Com. *v.* Sinclair, — Mass. — , 80 N. E. 799 (abortion; statements by the patient to a physician that she had been operated on for pregnancy and had had a miscarriage, not admitted under the rule of Roosa *v.* Loan Co.).

§ 1725. Statements of Design or Plan.

[*Note* 1; *add*:]

1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (murder by abortion: deceased's expressions of intent to commit suicide, admitted).
1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder by poisoning; deceased's declarations of intention to commit suicide, held admissible, but confined in the trial Court's discretion to a period of two months before; good opinion by Prentice, J., on the subject of remoteness of time; Com. *v.* Trefethen approved).
1905, Clemens *v.* Royal Neighbors, — N. D. — , 103 N. W. 402 (note written by deceased just before death, admitted on the issue of suicide).

[*Note* 2; *add*:]

1904, People *v.* Barker, 144 Cal. 705, 78 Pac. 266 (letters from the absent person, admitted to show his absence and intent not to return).
1898, Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030 (absent person's declarations as to residence, and the sheriff's return of not found, admitted).

But the present principle need not be strained in admitting such evidence, for the broader principle of § 1789, *post*, suffices.

§ 1726. Same: Contrary Rulings Explained.

[*Note* 4; *add*:]

1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poisoning; deceased's expressions of intention to commit suicide, and of depression of mind, held admissible; Siebert *v.* People, *supra*, held to represent "undoubtedly the correct rule," but distinguished because here the declarations were "part of the *res gestæ*," explanatory of the acts of keeping liquor and strychnine in her room; this is a groundless distinction; the Court should have plainly abandoned the improper rule of Siebert *v.* People, instead of introducing new opportunity for confusion; Jumpertz *v.* People, *ante*, § 143, n. 1, is not cited).
1906, Clark *v.* People, — Ill. — , 79 N. E. 941 (murder by attempted abortion; the deceased's declarations, over a year before her death, that she had committed an abortion upon herself "and would repeat it if necessary," held inadmissible, as "mere hearsay," following Siebert *v.* People).

§ 1727. Statements of Intent, in Domicil Cases.

[*Note* 2; *add*:]

1895, Davis *v.* Adair, L. R. 1 Ire. 379, 396, 430, 438, 444 (a peculiar case).

§ 1729. Statements of Motive, Reason, or Intent.

[*Note* 2, par. 1; *add*:]

1905, Flynn *v.* Coolidge, 188 Mass. 214, 74 N. E. 342 (malicious prosecution, and damage by C.'s refusal to lease a building to the plaintiff; C.'s statement of his reason for refusing, excluded only because not made before action begun).
1906, Pierson *v.* Boston El. R. Co., 191 Mass. 223, 77 N. E. 769 (damage by noise; the statements of reasons given by the plaintiff's customers when leaving his restaurant, "We can't talk here and hear ourselves," admitted).

§ 1730. Statements of Emotion, Bias, Malice, Affection, etc.

[*Note* 2; *add*:]

1894, Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614 (alienation of a husband's affections by his mother; the husband's declarations as to the defendant's conduct, admitted "to determine the cause or motive which prompted his separation from his wife").

[*Note* 2 — *continued.*]

1906, Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639 (alienation of a husband's affections by a father-in-law; the husband's statements to his wife, on taking leave, as to being influenced by his father, admitted; inasmuch as the learned Court goes afield to cite ten cases from other jurisdictions, while ignoring the precise precedent of Kennedy *v.* Hensley, Ia., *supra*, it must be wondered what system of tracing its own decisions is here employed; two judges dissent, citing no authority).
1904, Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492 (alienation of affections; husband's statements admitted to show the source of his change of mind).

[*Text*, p. 2227, l. 3; *insert* the following:]

In such an action, in particular for *alienation of affections*, the utterances of the alienated spouse, exhibiting the mental condition of alienation and the motives therefor, sometimes refer to *acts and utterances of the defendant* as the alienating influence, *e. g.* when the alienated wife says to her husband, referring to the defendant, "He offered to marry me if I could get a divorce from you and so I am ready to leave you." Here the alleged utterances of the defendant need not be taken as facts, much less as true assertions (*post*, § 1768), but the wife's reference to them is plainly evidential of the relation *in her mind* between her present alienation of affections and the defendant's influence, *i. e.* her motive (*ante*, § 1729); therefore, supposing that the fact of the defendant's efforts and influence is otherwise evidenced, the wife's utterances of the above sort should be received to show their result on her state of mind.[2a] In this aspect, the defendant's utterances and acts as recited by her are not hearsay, but fall under the principle of § 1768, *post*.

[2a] *Accord:* 1887, Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501 (cited *supra*, n. 2).
1894, Williams *v.* Williams, 20 Colo. 51, 58, 37 Pac. 614.
Contra: 1905, Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.
1889, Huling *v.* Huling, 32 Ill. App. 519, 521.
1884, Higham *v.* Vanosdol, 101 Ind. 160, 164 (cited *supra*, n. 2).
1861, Preston *v.* Bowers, 13 Oh. St. 1, 11 (cited *supra*, n. 2).
1878, Westlake *v.* Westlake, 34 id. 621, 634.

§ 1732. Sundry Statements by an Accused Person.

[*Note* 3; *add*, under *Contra:*]

1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (murder; the accused's prior statsments of innocent purpose in going to the place, excluded).

[*Note* 6; *add:*]

1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (statements that he was afraid to go where the deceased was, excluded).
1905, State *v.* Atchley, 186 Mo. 174, 84 S. W. 984 (murder; defendant's application to have the deceased put under a peace-bond, excluded).
1904, State *v.* Raymo, 76 Vt. 430, 57 Atl. 993 (assault on B.; plea, self-defence; defendant's declarations of fear of B., prior to the assault, excluded).

[*Note* 7, par. 1; *add:*]

1905, Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777 (malicious prosecution; defendant's statements at the time of suing out the warrant, admitted in his favor).

[*Text*, p. 2230, l. 9 from below:]

After "should," insert "not."

§ 1736. Post-Testamentary Statements as to Execution, etc.

[*Note* 2; *add:*]

1895, Leslie *v.* McMurty, 60 Ark. 301, 30 S. W. 33 (declarations that he had made no will, admissible on an issue of forgery).
1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (certain declarations admitted, but only because of lack of proper objection).

[*Note* 2 — *continued.*]

1906, Dunahugh's Will, 130 Ia. 692, 107 N. W. 925 (whether a revoking will had been made; the testatrix' statements, just before death, that she had made one, excluded; the opinion relies upon a passage in an encyclopedia "citing the following cases" which include Sugden *v.* St. Leonards, Eng., Lane *v.* Hill, N. H., and Tynan *v.* Paschal, Tex., *infra*, n. 3; the learned judge evidently was not aware that the cases cited decide precisely the opposite).
1904, Colbert's Estate, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248 (whether a lost will had been revoked; the testator's statements that he was satisfied with it, excluded; following Throckmorton *v.* Holt, U. S.).
1903, Stevens *v.* Stevens, 72 N. H. 360, 56 Atl. 916 (will found, but alleged to have been revoked; declarations of the testator that he had revoked it, excluded; yet the opinion purports to approve Lane *v.* Hill, N. H., *infra*, n. 3, and perhaps would have admitted the evidence as corroborative).

Throckmorton *v.* Holt, U. S., cited *supra;* in view of the authority of this Court, and the frequent citation of this decision, it should be noted that the opinion is only a quicksand for those who seek guidance on this subject.

[*Note* 3; *add:*]

1903, Stewart *v.* Walker, 6 Ont. L. R. 495, 503 ("while the decision in Sugden *v.* Lord St. Leonards stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents").
1906, Inlow *v.* Hughes, — Ind. App. — , 76 N. E. 763 (post-testamentary declarations as to the tenor of a lost will, held admissible only "by way of corroboration" of the testimony of two witnesses required by Rev. St. 1901, § 2779, quoted *post*, § 2052).
1905, Mann *v.* Balfour, 187 Mo. 290, 86 S. W. 103 (after evidence of execution and loss, the testator's declarations as to contents, etc., are admissible in corroboration).
1904, Davenport *v.* Davenport, 67 N. J. Eq. 320, 58 Atl. 535 (lost will; the testator's declarations of contents "a few days after the alleged will was executed," admitted; purporting to follow Rusling *v.* Rusling, N. J., *post*, § 1738, which deals with a different question, and ignoring Boylan *v.* Meeker and Gordon's Will, N. J., *supra*, n. 2).
1906, Shelton's Will, — N. C. — , 55 S. E. 705 (exception recognized, following Jessel, M. R., in Sugden *v.* St. Leonards, and Reel *v.* Reel, N. C., cited *post*, § 1738, n. 2; here a will bore a revocatory writing, legally sufficient, and the testator's subsequent declarations were admitted on the issue of its genuineness).

[*Note* 4; *add:*]

1905, Lappe *v.* Gfeller, 211 Pa. 462, 60 Atl. 1049 (destroyed will, said to have been forged; declarations of the deceased, for some months prior to his death, "inconsistent with the existence and validity of the alleged will," admitted, "as throwing some light on the question of fraud and forgery").

§ 1737. Statements indicating Intent to Revoke.

[*Note* 1; *add:*]

Compare also the cases cited *post*, § 1777 (declarations of a testator accompanying a delivery of money or chattels).

§ 1738. Statements as to Undue Influence or Fraud.

[*Note* 1, par. 1; *add:*]

1901, Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797 (Comstock *v.* Hadlyme followed; good opinion, by Baldwin, J.).
1903, Utermehle *v.* Norment, 22 D. C. App. 31 (testator's declarations of intent to leave a share to the caveatee, excluded on the facts; principle obscure).
1879, Todd *v.* Fenton, 66 Ind. 25, 31 (similar to Hayes *v.* West).
1883, Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433, 438 (similar).
1906, Mueller *v.* Pew, — Wis. — , 106 N. W. 840 (Loennecker's Will approved).

[*Note* 2; *add:*]

1906, Shelton's Will, — N. C. — , 55 S. E. 705 (approving Reel *v.* Reel); 1906, Linebarger *v.* Linebarger, — N. C. — , 55 S. E. 709 (an opinion filed on the same day as the preceding, but by a different judge, refers to the rule of Reel *v.* Reel as a "much vexed question").

[*Note* 3; *add:*]

1896, Calkins' Estate, 112 Cal. 296, 44 Pac. 577.
1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252.
1905, Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628 (declarations, the day after signing, that he had never made a will, and that if he had signed a certain will, he did not know what he was doing, admitted, with the above discriminations).
1905, Townsend's Estate, 128 Ia. 621, 105 N. W. 110 (that "the boys would not hear to his giving E. anything," held, "if competent of slight value"; the opinion should have made a more explicit ruling).
1904, Wiltsey's Will, 122 Ia. 423, 98 N. W. 294 (Muir *v.* Miller followed).
1904, Powers' Ex'r *v.* Powers, — Ky. — , 78 S. W. 152 (Wall *v.* Dimmitt followed).
1883, Rusling *v.* Rusling, 36 N. J. Eq. 603 (quoted *supra* in the text).
1905, Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152 (cited *infra*, n. 4).

[*Note* 4; *add:*]

1905, Flowers *v.* Flowers, 74 Ark. 212, 85 S. W. 242 (the provisions of an alleged will may be compared with his "fixed purposes and intentions," including declarations that he had made no will; but the opinion erroneously admits this on an issue of "mental capacity").
1904, McKenna's Estate, 143 Cal 580, 77 Pac. 461 (conversations, on the issue of insanity, distinguished from the present question).
1894, Bevelot *v.* Lestrade, 153 Ill. 625, 631, 38 N. E. 1056 (declarations conflicting with the provisions of the will, not admitted).
1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (declarations of testamentary plans, admitted so far as harmonious with the will, *i. e.* in rebuttal of the alleged undue influence; but not so far as they conflict with the will's provisions; like Kaenders *v.* Montague, but not citing it).
1906, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1 (rule of Kaenders *v.* Montague followed).
1905, Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089 (Goodbar *v.* Lidikay, approved).
1904, Selleck's Will, 125 Ia. 678, 101 N. W. 453 (terms of a prior will, admitted).
1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (a trust deed of three years before, admitted, on an issue of undue influence, as a "written declaration").
1905, Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., under undue influence; the deceased transferor's declarations of intent as to the devolution of her property, admitted, following Shailer *v.* Bumstead).
1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000 (Bush *v.* Delano followed).
1905, Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152 (declarations admissible to "illustrate the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends," but not "as substantive evidence of undue influence"; the opinion specially denies that ante-testamentary declarations are usable for the last-named purpose, *i. e.* that noticed *supra*, n. 1).

§ 1739. Intelligent Execution.

[*Note* 1; *add:*]

1904, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013 (testator's letters, showing knowledge of the will, admitted). *Contra:* 1906, Lipphard *v.* Humphrey, 28 D. C. App. 355, 361 (the opinion oddly asserts that "the proposition is without any foundation either on principle or authority").

§ 1750. Spontaneous Exclamations (Res Gestæ); Requirements, etc.

[*Note* 2; *add:*]

1906, Christopherson *v*, Chicago M, & St. P. R. Co., — Ia. — , 109 N. W. 1077.
1904, State *v.* Foley, 113 La. 52, 36 So. 885.

[*Text*, p. 2257, l. 3 from below, after "trial Court," add a new note 2*a*:]

[2a] 1907, Pittsburg C. C. & St. L. R. Co. *v.* Haislup, — Ind. — , 79 N. E. 1035 (the above passage quoted with approval).

[*Note* 3; *add:*]

Ont.: 1903, Garner *v.* Stamford, 7 Ont. L. R. 50 (highway injury).
Ala.: 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (accused). 1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330 (murder; exclamation of the defendant's daughter, an eye-witness, admitted). 1905, State *v.* Stallings, 142 Ala. 112, 38 So. 261 (accused). 1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (deceased).
Ark.: 1906, Kansas C. S. R. Co. *v.* Morris, — Ark. — , 98 S. W. 363 (person killed at a railroad).
Cal.: 1905, Murphy *v.* Board, 2 Cal, App. 468, 83 Pac. 577 (injured person ; a glaring instance of illiberal ruling).
D. C.: 1904, District of Columbia *v.* Dietrich, 23 D. C. App. 577 (sidewalk injury). 1905, Patterson *v.* Ocean A. & G. Co., 25 D. C. App. 46, 66 (injured person). 1906, Grant *v.* U. S., 28 D. C. App. 169 (deceased in homicide).
Del.: 1904, Di Prisco *v.* Wilmington C. R. Co., 4 Del. 527, 57 Atl. 906 (child run over).
Ga.: 1905, Goodman *v.* State, 122 Ga. 111, 49 S. E. 922 (deceased). 1905, Kemp *v.* Central of Ga. R. Co., 122 Ga. 559, 50 S. E. 465 (engineer). 1905, Pool *v.* Warren Co., 123 Ga. 205, 51 S. E. 328 (injury at a bridge). 1905, White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411 (railroad injury). 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (accused). 1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (injured person). 1906, Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911.
Ill.: 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (arrest of train employees after an accident; excluded).
Ind.: 1907, Pittsburg C. C. & St. L. R. Co. *v.* Haislup, — , Ind. — 79 N. E. 1035 (passenger ejected).
Ia.: 1905, Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475 (injured person's statement after a fall). 1905, Hutcheis *v.* Cedar R. & M. C. R. Co., 128 Ia. 279, 103 N. W. 779 (passenger falling from a car; model opinion, by McClain, J.). 1906, Christopherson *v.* Chicago M. & St. P. R. Co., — Ia. — , 109 N. W. 1077 (injured person).
Ky.: 1904, Selby *v.* Com., — Ky. — , 80 S. W. 221 (accused, after a homicide). 1905, Lexington St. R. Co. *v.* Strader, — Ky. — , 89 S. W. 158 (motorman). 1906, Louisville & N. R. Co. *v.* Molloy's Adm'x, — Ky. — , 91 S. W. 685 (railroad injury).
La.: 1904, State *v.* Charles, 111 La. 933, 36 So. 29 (deceased in homicide). 1904, State *v.* Foley, 113 La. 52, 36 So. 885 (murder; prior cases cited and construed).
Minn.: 1905, State *v.* Williams, 96 Minn. 351, 105 N. W. 265 (deceased in a murder).
Nebr.: 1905, Lexington *v.* Fleharty, — Nebr. — , 104 N. W. 1056 (injured person).

[*Note* 3 — *continued.*]

N. J.: 1905, State *v.* Laster, 71 N. J. L. 586, 60 Atl. 361 (deceased).
N. Y.: 1904, Austin *v.* Bartlett, 178 N. Y. 310, 70 N. E. 855 (statements after a runaway accident).
N. D.: 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165 (by one who was ill, as to having taken horse medicine, admitted).
Okl.: 1905, Regnier *v.* Terr., 15 Okl. 652, 82 Pac. 509 (victim of a shooting).
S. C.: 1904, State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384 (defendant in homicide). 1904, State *v.* Lindsey, 68 S. C. 276, 47 S. E. 389 (wife of the assaulted person). 1904, Williams *v.* Southern R. Co., 68 S. C. 369, 47 S. E. 706 (person injured on a railroad track). 1904, Nelson *v.* Georgia C. & N. R. Co., 68 S. C. 462, 47 S. E. 722 (conductor). 1907, State *v.* Way, — S. C. — , 56 S. E. 653 (defendant in homicide).
S. D.: 1904, Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009 (sidewalk injury).
U. S.: 1904, Guild *v.* Pringle, 130 Fed. 419, 422, 64 C. C. A. 621, (person injured in the highway).
Ut.: 1905, Leach *v.* Oregon S. L. Co., 29 Utah 285, 8 Pac. 90 (brakeman knocked off a car).
Va.: 1904, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527 (deceased).
Wash.: 1905, Dixon *v.* Northern P. R. Co., 37 Wash. 310, 79 Pac. 943 (trespasser ejected from car). 1905, Starr *v.* Ætna L. Ins. Co., 41 Wash. 199, 83 Pac. 113 (person injured on a railroad track).
W. Va.: 1904, Williams *v* Belmont C. & C. Co., 55 W. Va. 84, 46 S. E. 802 (motorman). 1905, State *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545 (murder; accused's statement).
Wis.: 1905, Tiborsky *v.* Chicago M. & St. P. R. Co., 124 Wis. 243, 102 N. W. 549 (telegraph operator's reply to the injured person). 1906, Johnson *v.* State, — Wis. — , 108 N. W. 55 (defendant after a homicide).

§ 1751. Knowledge Qualifications.

[*Text*, p. 2260; *add* a new paragraph (*c*):]

(*c*) By the general principle applicable to these Exceptions to the Hearsay rule (*ante*, § 1424), the declarant must at least not lack the usual testimonial qualifications (*ante*, § 6256) that would be required of him if testifying on the stand. Which of those qualifications are here to be treated applicable and indispensable?

(1) Does the disqualification of *infancy* (*ante*, §§ 505–509) exclude declarations otherwise admissible? It would seem not; because the principle of the present Exception obviates the usual sources of untrustworthiness (*ante*, § 506) in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious (*ante*, § 509); and, finally, because the oath-test, which usually underlies the objection to children's testimony, is wholly inapplicable to them (*post*, § 1821, § 1828, notes 3–5).[1]

[1] *Accord:* 1904, Kenney *v.* State, 45 Tex. Cr. 500, 79 S. W. 570, 817 (good opinion by Henderson, J. Davidson, P. J., diss.).
For the cases as to a child's *complaint of rape*, see *post*, § 1761, n. 2.
Distinguish the rule for *dying declarations*, which may well be different (*ante*, § 1445, n. 1).

(2) Does the disqualification of *infamy by conviction of crime* (*ante*, §§ 519–524) here exclude spontaneous exclamations uttered under the influence of the *res gestæ?* Considering the peculiar nature of the present exception, and the now conceded anachronism of the disqualification by infamy, it ought not to be extended to apply here.[2]

[2] *Accord:* 1900, Neeley *v.* State, — Tex. Cr. — , 56 S. W. 625. 1904, Flores *v.* State, — Tex. Cr. — , 79 S. W. 808. 1904, Kenney *v.* State, — Tex. Cr. — , 79 S. W. 817 (approving the foregoing cases, and distinguishing Long *v.* State, 10 Tex. App. 186).
By an analogous principle a *slave's* declarations of this sort were not excluded by his disqualification to testify: 1845, Yeatman *v.* Hart, 6 Humph. 375; 1867, Rogers *v.* Crain, 30 Tex. 284, 288.

(3) For similar reasons, the marital disqualification should not exclude utterances of *husband* or *wife* otherwise receivable for each other;[3] for the

[3] Cases cited *ante*, § 604, n. 3.

present principle is assumed to override any considerations of interest in the declarant, and moreover the marital disqualification (*ante*, § 601) is now an

anachronism ; though the marital *privilege* rests on different grounds, and would equally exclude extra-judicial utterances.[4]

[4] Cases cited *post*, § 2233.

(4) The disqualification of *insanity* (*ante*, § 492) should probably be treated for the present purpose like that of infancy.[5]

[5] 1905, Wilson *v.* State, — Tex. Cr. — , 90 S. W. 312.
Distinguish, however, the rule for *dying declarations* (*ante*, § 1445, n. 2).

(5) The *oath-capacity* is a purely artificial one (*post*, §§ 1820–1829), and has no inherent relation to testimonial capacity. It has no place in excluding extra-judicial declarations forming exceptions to the Hearsay rule (*ante*, § 1362). The close resemblance of its requirements to those of the Exception for dying declarations (*ante*, § 1443) and for children's testimony (*ante*, § 1505) will account for the supposition, occasionally found, that those requirements have some general application to extra-judicial declarations of the present sort.[6]

[6] *E. g.* the dissenting opinion of Davidson, P. J., in Kenney *v.* State, Tex., *supra*, n. 1, and the treatises therein quoted.

§ 1755. Declaration must be by the Actor himself; Bystander's Utterances.

[*Note* 1; *add:*]

1905, Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045 (railroad injury; excluded on the facts).

[*Note* 2; *add:*]

1907, Atlantic C. L. R. Co. *v.* Crosby, — Fla. — , 43 So. 318.
1905, Baysinger *v.* Terr., — Kan. — , 82 Pac. 728 (murder).
1907, Kennedy *v.* Com., — Ky. — , 100 S. W. 242 (child of murdered man).

§ 1760. Woman's Complaint of Rape; History in England.

[*Note* 4; *add:*]

1896, R. *v.* Lillyman, 2 Q. B. 167, 170, 177, 18 Cox Cr. 346 (but here the peculiar distinction is taken that "we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made; . . . when the whole statement is laid before the jury, they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused"; yet "it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated," *i. e.* "to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent").
1898, R. *v.* Kiddle, 19 Cox Cr. 77 (cited *ante*, § 1136, n. 2; R. *v.* Lillyman followed).
1900, R. *v.* Merry, 19 Cox Cr. 442 (indecent assault upon a child; a complaint not volunteered, but elicited by a question from the mother, held not admissible under R. *v.* Lillyman).
1905, R. *v.* Osborne, 1 K. B. 551 (indecent assault upon a child of twelve; a complaint made in answer to a question by a companion, held admissible on the facts; but "questions of a suggestive or leading nature will indeed . . . render it inadmissible").

For the question whether the complaint is receivable on charges where the *woman's consent is immaterial*, see *ante*, § 1135, n. 1.

§ 1761. Same: American Doctrine.

[*Note* 2; *add:*]

1906, Terr. *v.* Schilling, 17 Haw. 249, 265 ("the entire conversation" admitted).
1904, Cunningham *v.* People, 210 Ill. 410, 71 N. E. 389 ("such complaint is admitted upon the theory that the statement of the prosecutrix represents the spontaneous expression of her outraged feelings"; hence a statement made "in response to questions put to her" — here, three weeks after the alleged offence — may be excluded).
1905, State *v.* Andrews, 130 Ia. 609, 105 N. W. 215 (admissible; but not citing McMurrin *v.* Rigby, and making a distinction between the complaints of a "very young child" and others).
1906, People *v.* Harris, 144 Mich. 12, 107 N. W. 715 (not decided).
1904, Kenney *v.* State, — Tex. Cr. — , 79 S. W. 817 (collecting prior cases). 1905, Wiggins *v.* State, — Tex. Cr. — , 84 S. W. 821.

[*Text*, p. 2273, at the end; *add* a new paragraph:]

Where the prosecutrix is a child *too young to be a witness*, the statements should nevertheless be receivable;[3] because, although in general a hearsay declarant must not lack the qualifications of an ordinary witness (*ante*, § 1424), yet the peculiar nature of the present Exception (*ante*, § 1747) renders this principle substantially inapplicable to children; furthermore, the orthodox common-law limitations as to children's testimonial capacity are inherently unsound and impractical (*ante*, § 509) and should not be extended by analogy.

[3] *Accord:* 1779, Brazier's Case, *semble*, (quoted *ante*, § 1760, and so understood by Parke, B., in R. *v.* Guttridges, 1840, 9. C. & P. 471).
1900, People *v.* Marrs, 125 Mich. 376, 84 N. W. 284 (cited *ante*, § 1136, n. 1).
1899, Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882.
1904, Kenney *v.* State, — Tex. Cr. — , 79 S. W. 817 (repudiating Smith *v.* State, 41 Tex. 352; Davidson, P. J., diss.).
1905, Wiggins *v.* State, — id. — , 84 S. W. 821.
1888, Hannon *v.* State, 70 Wis. 448, 452, 36 N. W. 1 (cited *ante*, § 1136, n. 1).
Contra: 1905, State *v.* Andrews, Ia., *semble* (cited *supra*, n. 2). 1869, Weldon *v.* State, 32 Ind. 81; 1845, People *v.* McGee, 1 Denio 19, 22; but these last two cases, cited *ante*, § 1138, n. 2, are attributable to the different theory of rape-complaint there applied. In *England* R. *v.* Nicholas, 2 C. & K. 246 (1846), is *contra*, but in England even an adult's statement was inadmissible (*ante*, § 1750); so that the Court there merely refused to do more for a child's statements than for an adult's.

§ 1770. Verbal Acts; Utterances of Contract, etc.

[*Note* 1; *add*:]

1905, King *v.* Bynum, 137 N. C. 491, 49 S. E. 955 (distinguishing testimony directly to the expressions of negotiation at a sale and testimony to subsequent hearsay statements of what occurred at the sale).

[*Note* 3; *add*:]

1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (the woman's preparations, unknown to the defendant, excluded).

But a *seduction* should not be evidence of a prior promise of marriage; the principle of § 268, *ante*, is here out of place:
1906, Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. 401 (citing other authorities).

[*Note* 4; *add*:]

1904, Parke & L. Co. *v.* S. F. Bridge Co., 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71 (certain letters admitted, as constituting performance).

[*Note* 5; *add*:]

1905, Order of U. C. Travellers *v.* Barnes, 72 Kan. 293, 82 Pac. 1099 (admissible for the plaintiff, but only with instruction limiting their use to their effect as performance of the condition precedent).
1906, Paquette *v.* Prudential Ins. Co., — Mass. — , 79 N. E. 250 ("Having been put in evidence generally, it was within the discretion of the presiding judge either to submit or to withhold them from the consideration of the jury").

§ 1777. Sundry Applications of the General Principle.

[*Note* 2, par. 1; *add*:]

1905, Gearty *v.* City of New York, 183 N. Y. 233, 76 N. E. 12 (contract; a certain letter from the defendant's agent, not admitted for the defendant).

Compare the cases on *agent's admissions* (*ante*, § 1078).

[*Note* 3, par. 1; *add*:]

1906, Napier *v.* Elliott, — Ala. — , 40 So. 752 (grantor's declaration when signing and acknowledging a deed, admitted on the question of delivery).
1904, Dawson *v.* Waggaman, 23 D. C. App. 428 (*donatio causa mortis*).
1905, Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209 (delivery of a deed).
1906, Hill's Guardian *v.* Hill, — Ky. — , 92 S. W. 924 (advancements).

Compare also the cases cited *post*, § 1782 (testator's declarations).

But for an alleged *advancement to a child* (in the usual case, a note from the child to the parent), the parent's declarations, even though made *after* the delivery of the money, may be nevertheless receivable as *admissions* (*ante*, § 1081), offered against his estate, and this distinction is emphasized in Missouri:
1904, Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1019 (citing cases).

[*Note* 5; *add:*]

1904, Quick *v.* Cotman, 124 Ia. 102, 99 N. W. 301.

[*Note* 8; *add:*]

1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant to adopt and support plaintiff; defendant's declarations that he was only guardian, excluded, the *res gestæ* not including the whole time of living together).
1905, Engel *v.* Conti, 78 Conn. 351, 62 Atl. 210 (separation of wife and husband; their conversation while in the same room, admitted in explanation of his acts).
1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (delay in performance of a contract; the contractor's agent's expressions of readiness to perform, admitted).
1905, Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928 (surety's agreement; subsequent declarations excluded).

§ 1778. Possessor's Declarations, in Adverse Possession.

[*Note* 4; *add:*]

1905, Henry *v.* Brown, 143 Ala. 446, 39 So. 325.
1905, Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544 (ancestor's declarations of claim in possession, admitted, following Knight *v.* Knight, Ill., *infra*).
1863, Draper *v.* Douglass, 23 Cal. 347 (location of a mining-claim; the miner's declarations, while working in the vicinity, admitted in his favor). 1866, Sneed *v.* Woodward, 30 Cal. 430, 434 (issue as to the plaintiff's acquiescence in an erroneous location so as to be estopped; their declarations at the time, received in their favor). 1871, Phelps *v.* McGloan, 42 Cal. 298, 302.
1905, Emmet *v.* Perry, 100 Me. 139, 60 Atl. 872 (defendant's grantor's declarations of claim, admitted).
1903, Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029. 1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (but declarations naming the source of an alleged title are excluded; this seems erroneous). 1906, Farmers' Bank *v.* Barbee, 198 Mo. 465, 95 S. W. 225 (Martin *v.* Bonsack followed).

[*Note* 5; *add:*]

1906, Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861 (declarations of M., at the time of renting, assented to by the tenant, that he was acting for the plaintiff, admitted).
1904, Murphy *v.* Dafoe, 18 S. D. 42, 99 N. W. 86 (declarations of an agent in possession for M., admitted).
1906, Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026 (declarations of C. and L., while cutting, etc., that they were doing so under N. the plaintiff, admitted).

[*Note* 7; *add:*]

1904, Mc Donald *v.* Bayha, 93 Minn. 139, 100 N. W. 679 (statements of an agent in possession).

§ 1779. Possessor's Declarations, as aiding the Presumption of Ownership, etc.

[*Note* 1; *add:*]

1906, Farmers' Bank *v.* Barbee, 198 Mo. 465, 95 S. W. 225 (plaintiff claiming under A, one of three children and heirs of B; A's assertions of a grant to himself from the other children, not admitted in favor of plaintiff claiming under A; following Turner *v.* Belden, Mo., *infra*, n. 2).

[*Note* 2; *add:*]

1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (Turner *v.* Belden approved; Darrett *v.* Donnelly, *supra*, n. 1, said not to be in conflict).

[*Note* 3; *add:*]

1905, Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88 (title to a horse; rule held not applicable on the facts).

[*Note* 5; *add:*]

Accord: 1905, Griswold *v.* Nichols, 126 Wis. 401, 105 N. W. 815 (sale by a son to a father in fraud of creditors; the father's declarations in possession, admitted in his favor, following Roebke *v.* Andrews, *supra*, n. 1).
Contra: 1906, Samaha *v.* Mason, 27 D. C. App. 470, 477 (replevin for rugs claimed by the defendant by purchase from H. who purchased from plaintiff; the defendant's statements as to the ownership of the rugs at the time of their seizure by replevin writ, excluded, not being merely explanatory of possession).

[*Note* 6; *add:*]

1906, Baker *v.* Drake, — Ala. — , 41 So. 845, *semble* (excluded).
1905, Terry *v.* Clark, 76 Ark. 435, 88 S. W. 987 (creditor claiming furniture against the debtor's wife; the debtor's declarations of ownership, not admitted for the creditor).
1905, Smiley *v.* Padgett, 123 Ga. 39, 50 S. E. 927 (execution under a lien by P. on goods possessed by H., but now claimed by S.; H.'s declarations of ownership, in possession, admitted for P.).
1904, Vermillion *v.* Parsons, 101 Mo. App. 602, 73 S. W. 994, 107 Mo. App. 192, 80 S. W. 916 (husband's declarations of claim, not admitted for the creditor against the wife claiming by prior title).

[*Note* 6 — *continued.*]

1905, Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657 (attachment on property of the husband, claimed by the plaintiff wife; the husband's declarations of claim in possession, admitted for the creditor).
1904, McKnight *v.* U. S., 130 Fed. 659, 667, 65 C. C. A. 37 (action for cattle of Josephine H., wife of John H., seized by defendant on attachment against John H.; the latter's declarations of claim in possession, not admitted for the defendant; reasons obscure).

[*Note* 8; *add:*]

1905, Ard *v.* Crittenden, — Ala. — , 39 So. 675 (mortgagor's statements to third persons, at unspecified times, not admitted).
1900, Produce Exchange T. Co. *v.* Bieberbach, 176 Mass. 577, 586, 58 N. E. 162 (ownership of notes by a bank; entries in the bank's books admissible as "acts of ownership competent to prove title in the bank"). Mo.: compare also the cases cited *ante*, § 1779, notes 1 and 2.
1905, Piedmont Sav. Bank *v.* Levy, 138 N. C. 274, 50 S. E. 657 (trustee in bankruptcy, allowed to prove declarations of the debtor in possession but after assignment, to evidence the buyer's knowledge and the character of the debtor's possession; following Askew *v.* Reynolds, *supra*).

[*Note* 9; *add,* under *Accord:*]

1906, Holman *v.* Clark, — Ala. — , 41 So. 765 (defendant claiming under a mortgage prior to plaintiff's; debtor's declarations of claim in possession, admitted for defendant),
Compare with the foregoing cases those cited *ante*, § 1086, n. 3.

§ 1781. Declarations by Accused found with Stolen Goods.

[*Note* 4; *add:*]

1902, R. *v.* Higgins, 35 N. Br. 18, 28 (R. *v.* Ferguson cited with approval).
1906, Lanier *v.* State, 126 Ga. 586, 55 S. E. 496 (accused's explanatory statement while in possession, admitted).
1905, State *v.* Conroy, 126 Ia. 472, 102 N. W. 417 (statements explaining the possession of a stolen revolver, made before accusation, admitted).
1904, State *v.* Simon, 70 N. J. L. 407, 57 Atl. 1016 (knowing receipt of stolen goods; defendant's conversation with the seller, admitted).
1904, Smith *v.* Terr., 14 Okl. 518, 79 Pac. 214 (statements on arrest when not in possession, excluded).
1905, State *v.* White, 77 Vt. 241, 59 Atl. 829 (larceny of a team; the defendant's declarations, before knowledge of suspicion or search, that the team was not his own but hired, admitted).

§ 1784. Declarations as to Domicil.

[*Note* 2; *add:*]

1904, Knox *v.* Montville, 98 Me. 493, 57 Atl. 792 (pauper settlement; declarations, while living in M., as to an intent to return to B., excluded; the declarations must "accompany acts which they explain").
1906, Jericho *v.* Huntington, — Vt. — , 65 Atl. 87 (pauper residence).

§ 1795. The Res Gestæ Phrase; History.

[*Text,* l. 10 of the quotation; add a note 1:]

An earlier instance than this has been found: 1637, Ship Money Case, 3 How. St. Tr. 988 (Mr. Holborne, arguing, refers to the truth of an historian "for *res gestæ* as this").

§ 1800. Juror having previous Private Knowledge, etc.

[*Note* 2; *add:*]

Ind. St. 1905, p. 584, § 262 (re-enacts the foregoing statute, adding: "If the Court deem any such evidence material to the cause," a new jury may be summoned).
1904, Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550.

§ 1802. Jurors not to receive Evidence out of Court.

[*Note* 3, par. 1; *add:*]

1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (verdict set aside because certain spectators laughed and demonstrated their opinion of the success of an experiment; this is absurd).

[*Note* 3, par. 2; *add:*]

1905, Underwood *v.* Com., — Ky. — , 84 S. W. 310.
Of course the present principle does not apply where it is the *defendant* himself who voluntarily testifies and afterwards objects: Underwood *v.* Com., *supra*.

[*Note* 5; *add:*]

1903, State *v.* Mortensen, 26 Utah 310, 73 Pac. 562, 633 (shower pointing out the places mentioned in the evidence; the dissenting opinion exhibits a morbid regard for petty technicalities irrespective of justice).

[*Note* 6, par. 1; *add:*]

Accord: 1904, Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395 (good opinion by Steele, J.).
Contra: 1904, O'Berry *v.* State, 47 Fla. 75, 36 So. 440 (larceny of cattle; a view of the cattle was ordered and witnesses allowed to identify them on the view as the cattle referred to in their testimony; the Court on appeal doubted the propriety of this; but the doubt is ill-founded, for the witnesses acted virtually as showers, and their pointing out was indispensable to the efficiency of the view).

§ 1807. Counsel; Improper Statements of Fact in Argument; Applications of the Principle, etc.

[*Note* 1, par. 1; *add:*]

1905, Smith *v.* State, 165 Ind. 180, 74 N. E. 983.
1906, State *v.* Wigger, 196 Mo. 90, 93 S. W. 390.
1907, Burns *v.* State, 75 Oh. 407, 79 N. E. 929.
1904, Robbins *v.* State, — Tex. Cr. —, 83 S. W. 690.
1905, Union Pacific R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536 (here the rule is pushed to a ludicrous extreme of technicality).
At to the *opening statement* by counsel, see *post*, § 1808, n. 1.

[*Note* 4, par. 1; *add:*]

1905, Chicago Union T. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341.
1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601.
1905, Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585, 587.

§ 1808. Improper Statements in Offering Evidence, etc.

[*Note* 1, par. 1; *add:*]

1906, Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023.
1904, Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 (the jury's withdrawal is in the trial Court's discretion).
1906, Chicago & S. L. R. Co. *v.* Mines, 221 Ill. 448, 77 N. E. 898.
1906, Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112.

[*Note* 1, par. 2; *add:*]

In this part of a counsel's address, the rule of § 1807, *ante*, has little application; the situation should rather be treated from the point of view of the rule for conditional relevancy (*post*, § 1871). In the following case the dissenting opinion of Haight, J., expresses a just indignation at the over-strict application of the present rule to such a case, and exposes the abuses to which it leads: 1906, People *v.* Wolf, 183 N. Y. 464, 76 N. E. 592.

[*Note* 2, par. 1; *add:*]

1904, Burks *v.* State, 72 Ark. 461, 82 S. W. 490.
1904, People *v.* Wright, 144 Cal. 161, 77 Pac. 877.
1904, People *v.* Perry, 144 Cal. 748, 78 Pac. 284.
1904, Streeter *v.* Marshalltown, 123 Ia. 449, 99 N. W. 114.
1905, Nickolizack *v.* State, — Nebr. — , 105 N. W. 895.
1903, Batchelder *v.* Manchester R. Co., 72 N.H. 329, 56 Atl. 752 (good opinion, by Chase, J.).
1904, People *v.* Davey, 179 N. Y. 345, 72 N. E. 244.

§ 1810. Hearsay Rule applicable to Interpreter.

[*Note* 1, par. 1; *add:*]

1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (official certified transcript of testimony delivered through an interpreter, and taken according to P. C. § 686, cited *ante*, § 1411, admitted).
1904, People *v.* Jan John, 144 Cal. 284, 77 Pac. 950 (former ruling *supra* in this case affirmed).
1905, State *v.* Williams, 28 Nev. 395, 82 Pac. 353.
1906, State *v.* Banusik, — N. J. L. — , 64 Atl. 994 (interpreter called to state the correctness of his interpretation of a confession written out and signed before a magistrate; held sufficient).

[*Note* 2, par. 1; *add:*]

1869, State *v.* Noyes, 36 Conn. 80 (a witness not allowed to be contradicted by L., who had had a conversation with him through an interpreter, without calling the interpreter, who was here the agent of L only).
1904, State *v.* Rogers, 31 Mont. 1, 77 Pac. 293.

[*Note* 2; *add* a new paragraph:]

On the same principle, an interpreted statement may be used against a *witness* (not a party-opponent) as a self-contradiction, without calling the interpreter, where the witness, by selecting his interpreter, virtually made him his agent to speak, or otherwise adopted the interpreter's statement.
1905, Davis *v.* First Nat'l Bank, — Ind. T. — , 89 S. W. 1015 (affidavit made through an interpreter out of court, used to contradict the witness without calling the interpreter).

§ 1815. The Oath; History.

[*Note* 1, l. 3 from the end; *add:*]

1903, T. R. White, Oaths in Judicial Proceedings, American Law Register, New Series, XLII, 372.

[*Note* 2; *add:*]

An example of the survival of this conclusive purgatorial oath of the party is probably seen in the traditional rule, observed still by some Courts, for making the respondent's sworn answers *conclusive in contempt proceedings;* this rule has been repudiated by the Federal Supreme Court: 1906, U. S. *v.* Shipp, — U. S. — , 27 Sup. 165 (interesting opinion by Holmes, J.).
1906, Municipal Court of Chicago. Memorandum of Cottrell, J. (privately printed; collecting the authorities).

[*Text,* p. 2348, l. 3 from below; *add* a new note 3:]

A full examination of this period is made in Professor White's learned article, cited *supra*, n. 1.

§ 1816. Theory of the Oath.

[*Text,* p. 2350, end of the section; *add:*]

1825, *Christopher North,* Noctes Ambrosianae, XXII: "*English Opium-Eater:* Mr. Hogg, I never could see any sufficient reason why, in a civilized and Christian country, an oath should be administered even to a witness in a court of justice. Without any formula, Truth is felt to be sacred; nor will any words weigh — *Shepherd:* You 're for upsettin' the haill frame o' ceevil society, sir, and bringing back on this kintra a' the horrors o' the French Revolution. The power o' an oath lies, no in the Reason, but in the Imagination. Reason tells that simple affirmation or denial should be eneuch atween man and man. But Reason eanna bind; or, if she do, Passion snaps the chain. But Imagination can bind; for she calls on her Flamin' Ministers, — the Fears; — they palsy-strike the arm that would disobey the pledged lips; — and thus oaths are as dreadfu' as Erebus and the gates o' hell."

§ 1818. Form of the Oath.

[*Note* 3, par. 2; *add:*]

1904, R. *v.* Lai Ping, 11 Br. C. 102 (oath to Chinese by burning a piece of paper on which the witness had written his name, etc., held to be the established practice).
1905, State *v.* Davis, 186 Mo. 533, 85 S. W. 354 (Chinese).

§ 1819. Time of Administration and Objection.

[*Note* 2; *add,* under *Accord:*]

1852, Birch *v.* Somerville, 2 Ir. C. L. R. 243 (a peer having testified without a legal oath, the party calling him and not objecting was held to have waived).
1882, Richards *v.* Hugh, 51 L. J. Q. B. 361 (witness depoeing on affirmation, without oath; a party not objecting at the time, held to have waived).
1888, Smith *v.* State, 81 Ga. 480, 8 S. E. 187.
1905, Rhodes *v.* State, 122 Ga. 568, 50 S. E. 361 (after verdict).
1905, Southern R. Co. *v.* Ellis, 123 Ga. 614, 51 S. E. 594.
1859, Slauter *v.* Whitelock, 12 Ind. 338 ("If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence"; failure to make a motion on discovery "would amount to an acquiescence").
1904, State *v.* Smith, 124 Ia. 334, 100 N. W. 40, *semble* (a failure to object to an inadvertent omission of the oath is a waiver).
1833, Cady *v.* Norton, 14 Pick. 236 ("The defendant, knowing that the witness had not been sworn, before the cause went to the jury, without giving notice thereof to the Court or taking an exception, has waived his right to except, after a verdict").
1889, State *v.* Hope, 100 Mo. 347, 13 S. W. 490 ("An oath may be waived . . . either expressly, or by going forward in the matter without inquiry or objection").
1906, People *v.* McAdoo, 184 N. Y. 304, 77 N. E. 260 (police-commissioner's hearing, upon three charges; a witness having inadvertently failed to take oath on a recall to speak to one of the charges, the defendant's knowing failure to object, and his cross-examination of the witness, held a waiver).

[*Note* 2 — *continued.*]

1895, Moore *v.* State, 96 Tenn, 209, 33 S. W. 1046 (after counsel has cross-examined, "having thus gone forward without inquiry or objection," there is an implied waiver).
1893, Goldsmith *v.* State, 32 Tex. Cr. 112, 22 S. W. 405 (on a motion for new trial it is too late to raise the question).

[*Note* 2; *add,* under *Contra:*]

1904, Lo Toon *v.* Terr., 16 Haw. 351, 356, *semble* (but here the presumption of an interpreter having been duly sworn was applied).
1829, Hawks *v.* Baker, 6 Greenl. 72 (omission not discovered till after verdict; held, no waiver, and a new trial granted; leading opinion,by Mellen, C. J.; its fallacy lies in the assumption that in administering the oath "the counsel for the opposite party has no concern with the transaction"; this is contrary to the fundamental principle, *ante,* § 18, by which the opponent must watch for all violations of the rules of evidence if he cares to take advantage of them).
1905, State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247 (even after verdict; this is absurd and pernicious).

[*Note* 3, par. 1; *add:*]

Accord: 1905, Curtis *v.* Lehmann, 115 La. 40, 38 So. 887 (where the oath is taken in the usual form without objection, that form will be presumed to be the binding one).

[*Note* 4; *add:*]

1898, People *v.* Board of Police Com'rs, 155 N. Y. 40, 49 N. E. 257 (hearing before a police commissioner; the commissioner intentionally omitted to swear any of the witnesses, erroneously believing that his power to act needed not to be based on sworn testimony; the omission was held to invalidate the decision).

[*Note* 4; *add* new paragraph:]

Swearing the witness, and causing him to re-testify before close of testimony, cures the irregularity: 1905, Southern R. Co. *v.* Ellis, 123 Ga. 614, 51 S. E. 594 (on being sworn, to cure the error, the witness may merely state that what he had testified was true).
1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283.

§ 1820. Mode of Ascertaining Capacity.

[*Note* 2, par. 1; *add:*]

In Young *v.* State, 122 Ga. 725, 50 S. E. 946 (1905), it is held that the judge *cannot decline* to examine a child, on demand by the party objecting; but this seems a pedantic interference with the trial Court's discretion.

[*Note* 10, l. 7; *add:*]

Compare also § 2214, *post* (privilege as to theological belief).

§ 1821. Capacity of Infants.

[*Note* 2; *add:*]

1905, Freasier *v.* State, — Tex. Cr. — , 84 S. W. 360.

[*Note* 3; *add:*]

1904, Landthrift *v.* State, 140 Ala. 114, 37 So. 287 (rape; a child of eleven held qualified on the facts).

[*Note* 6, par. 1; *add:*]

1906, Jones *v.* State, — Ala. — , 40 So. 947 (a girl who had been to church and Sunday school, and thought that, if she lied, God could put her in jail, excluded).
1906, Gordon *v.* State, — Ala. — , 41 So. 847 (child of twelve, admitted, though she did not "know the nature of a judicial oath").
1906, Young *v.* State, 125 Ga. 584, 54 S. E. 82 (a child of twelve, who did not know what is "the sanctity of an oath," but otherwise was theologically fit, admitted).
1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089 (good example of a liberal ruling).

[*Note* 9; *add:*]

1904, North Texas C. Co. *v.* Bostick, 98 Tex. 239, 83 S. W. 12 (a boy nine years old was instructed by counsel; but this the Court disparaged; moreover, "it ought to appear that the answers . . . are not a parrot-like repetition of what he has been told to say").

§ 1825. Infants, Peers, Accused Persons.

[*Note* 2; *add:*]

1907, Hodd *v.* Tacoma, — Wash. — , 88 Pac. 842.

§ 1827. Abolition or Optional Dispensation of the Oath.

[*Note* 1; *add:*]

1903, T. R. White, Oaths in Judicial Proceedings, American Law Register, N. S., XLII, 372 (the best consideration of the subject).

[*Note* 4; *add:*]

The history of the legislation is fully given in Professor White's article, cited *supra*, n. 1.

§ 1828. Same: State of the Law in the Various Jurisdictions.

[*Note* 1; *add*, under ENGLAND, at the end:]

1904, St. 4 Edw. VII. c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*, for offences under this act).

[*Note* 1, under ENGLAND, l. 3 from the end of the paragraph; *insert:*]

applying to offences of cruelty to children.

[*Note* 1; *add*, under CANADA:]

Yukon: St. 1904, c. 5, § 44 (like Eng. St. 51 & 52 Vict., c. 46, § 1).

[*Note* 1; *add*, under UNITED STATES:]

New York: C. Cr. P. 1881, § 392, as amended by St. 1892, c. 279 (in criminal proceedings, when a child "actually or apparently" under twelve "does not in the opinion of the Court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath, if in the opinion of the Court or magistrate such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offence upon such testimony unsupported by other evidence"). 1906, People *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164 (St. 1892, c. 279, applied; the presumption is that a child thus admitted without oath was duly found by the trial Court not to understand its nature). 1907, People *v.* Sexton, — N. Y. —, 80 N. E. 396 (C. Cr. P. § 392 is constitutional). *North Carolina:* Rev. 1905, §§ 2354, 2355, 2356 (like Code 1883, §§ 3309, 3310, 3311). Rev. 1905, § 2360 (under "Oaths of Office" are given forms of oath for witnesses, which are in the usual phrases of the common-law custom, and not in those of the foregoing sections).

[*Note* 4; *add:*]

as well as New York (*supra*, § 1828, n. 1).

[*Note* 5; *add:*]

In *Pennsylvania* such an exception has been virtually read into the law, without statute: 1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089.

[*Note* 7, par. 1; *add:*]

1905, Freasier *v.* State, — Tex. Cr. —, 84 S. W. 360 (to know that "it is wrong to tell a lie" suffices, for a child).
1907, Clinton *v.* State, — Fla. —, 43 So. 312 ("Neither belief in a Supreme Being nor in divine punishment is requisite to the competency of a witness" under the statute and Constitution; here applied to a child).
1905, Clark *v.* Finnegan, 127 Ia. 644, 103 N. W. 970 ("If a child has the necessary intelligence, and appreciates the moral duty to tell the truth, he need not fully understand the nature of an oath, or have any particular religious belief or training"; here, a child of seven, who "understood that he was to tell the truth," was admitted).
1905, Bright *v.* Com., — Ky. —, 86 S. W. 527 (like White *v.* Com., which however is not cited, the judge being new in office).

§ 1832. Perjury-Penalty; Rules of Exclusion, etc.

[*Note* 2; *add:*]

Contra: 1905, Freasier *v.* State, — Tex. Cr. —, 84 S. W. 360 (here proceeding on the words of the Constitution that oaths "shall be taken subject to the pains and penalties of perjury," and upon a statute making children of under nine years incapable of perjury; none of the above cases are cited; Brooks, J., dissenting, forcibly points out "the monstrosity of the result"). But a Texas statute of 1905 (c. 59, § 1) doubtless passed in response to the recommendation in this case, has made an infant below nine years capable of perjury "when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath"; so that the foregoing decision is presumably no longer law.

§ 1835. Publicity; Exceptions to the Rule.

[*Note* 1; *add*, under *Accord:*]

1904, State *v.* Worthen, 124 Ia. 408, 100 N. W. 330.
1907, State *v.* Callahan, — Minn. —, 110 N. W. 342 (assault of rape; exclusion of spectators held proper on the facts; Elliott, J., diss.).

[*Note* 1 — *continued.*]

1906, State *v.* Hensley, 75 Oh. 255, 79 N. E. 462 (rape under age; order of exclusion of the public held too general in its terms; here the ruling is reprehensible, because it gave no effect to the defendant's practical waiver of objection; it is an indignity to the Constitution to enforce its rights for a party who does not care enough about them to claim them at his trial).

§ 1837. Sequestration of Witnesses; History, Statutes.

[*Note* 10; *add:*]

N. C. Rev. 1905, § 3195 (like Code 1883, § 1149).

§ 1839. Demandable as of Right.

[*Note* 4; *add:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012.
1904, Coolman *v.* State, 163 Ind. 503, 72 N. E. 568.
1904, State *v.* Worthen, 124 Ia. 408, 100 N. W. 330, *semble.*
1904, Bromberger *v.* U. S., 128 Fed. 346, C. C. A. (one witness).
1906, State *v.* Dalton, Wash., 86 Pac. 590 (murder).
1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

§ 1840. Mode of Procedure.

[*Note* 2; *add:*]

1907, Joseph *v.* Com., — Ky. — , 99 S. W. 311 (in the trial Court's discretion; but not as of rule under Civ. C. Pr. § 601).

[*Note* 11; *add:*]

1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (co-defendants not allowed as of right to consult a co-indictee in jail and about to be used as a witness for the State).
1906, State *v.* James Co., 117 La. — , 41 So. 702 (prosecuting attorney may consult the witnesses in the trial Court's discretion).

§ 1841. Persons to be included in the Order.

[*Note* 1; *add:*]

1905, City Electric R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724.
1904, Coolman *v.* State, 163 Ind. 503, 72 N. E. 568 (prosecuting witness allowed to remain to aid the State's attorney).
1904, King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085.
1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586 (prosecutor).

[*Note* 3; *add:*]

1907, Atlantic & B. R. Co. *v.* Johnson, — Ga. — , 56 S. E. 482 (physician).

[*Note* 8, par. 1; *add:*]

It has now been so decided:
1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586.

[*Note* 9; *add:*]

1905, Greer *v.* Com., — Ky. — , 85 S. W. 166 (the trial Court may in discretion allow one witness to remain; here a prosecuting witness).

§ 1842. Disqualification as a Consequence of Disobedience.

[*Note* 3; *add:*]

1905, Braham *v.* State, — Ala. — , 38 So. 919.
1904, Davis *v.* State, 120 Ga. 843, 48 S. E. 305.
1904, Phillips *v.* State, 121 Ga. 358, 49 S. E. 290.
1905, Sharpton *v.* Augusta & A. R. Co., — Ga. — , 51 S. E. 553.
1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724.
1904, State *v.* Pray, 126 Ia. 249, 99 N. W. 1065.
1906, State *v.* Hogan, 117 La. 863, 42 So. 352.
1904, People *v.* McGarry, 136 Mich. 316, 99 N. W. 147.
1906, Luck *v.* State, — Tex. Cr. — , 98 S. W. 1059.
1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

[*Note* 4; *add:*]

1907, Degg *v.* State, — Ala. — , 43 So. 484 (for an accused's witness).
1905, State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873 (State *v.* Lee Doon, followed).

§ 1850. List of Witnesses; Criminal Cases, etc.; I. Common-Law Rule.

[*Note* 3, par. 1, l. 5; *add:*]

1895, Thiede *v.* Utah, 159 U. S. 510, 515, 16 Sup. 62 (murder; quoted *post*, § 1852, n. 4).
1904, Balliet *v.* U. S., 129 Fed. 689, 692, 64 C. C. A. 201 (fraud in the mails).
1906, Ball *v.* U. S., 147 Fed. 32, 36, C. C. A.

[*Note* 4, l. 9; *add:*]

1906, Baker *v.* State, — Fla. — , 40 So. 673 (neither under Rev. St. 1892, § 2901, allowing a copy of the indictment, nor otherwise, is the accused entitled to a list of witnesses before trial). 1907, Barrington *v.* Missouri, — U. S. — , 27 Sup. 582 ("The right of the accused to the indorsement of names of witnesses does not rest on the common law, but is statutory").

Much less may the defendant obtain before trial the *notes of testimony* taken before the *grand jury:*
1898, Franklin *v.* Com., — Ky. — , 48 S. W. 986.
1904, Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.
1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (here applied to a defendant desiring to peruse the grand jury's record of testimony in order to plead immunity for testimony there given by him). Compare Farnham *v.* Colman, S. D., cited *post*, § 1858, n. 16. This would also perhaps be a consequence of the privilege rule (*post*, § 2363, n. 8).

§ 1851. Same: II. Statutory Rule of Procedure, etc.

[*Note* 2; *add:*]

Ida. Rev. St. 1887, § 7668 (similar to N. D. Rev. Code, 1899, § 8034, including depositions).
Ind. St. 1905, p. 584, § 112 (re-enacts the foregoing Rev. St. 1887, § 1763).
Ky. C. Cr. P. 1895, § 120 ("When an indictment is found, the names of all the witnesses who were examined must be written at the foot of or on the indictment").
Md. Pub. Gen. L. 1904, art. 27, § 440 (false pretences; the defendant before trial "shall be entitled to the names of the witnesses and a statement of the false pretences intended to be given in evidence").
N. C. Rev. 1905, § 3241 (like Code 1883, § 1176).

[*Note* 3; *add:*]

Ida. St. 1899, Feb. 6, § 2, p. 125 (the information shall be indorsed, etc., substantially as in Mich. Comp. L., § 1193, *infra*).
Ind. St. 1905, p. 584, § 119 (on an information shall be indorsed "the names of all the material witnesses"; with a proviso for other witnesses as in the case of indictments).

[*Note* 4; *add:*]

Md. Pub. Gen. L. 1904, Art. 27, § 440 (false pretences; the State's attorney upon request shall furnish "the names of the witnesses and a statement of the false pretences intended to be given in evidence").

§ 1852. Same: (1) List of Grand-Jury Witnesses.

[*Note* 2, par. 1; *add:*]

1907, State *v.* Barker, — Ida. — , 88 Pac. 418 (unindorsed witness, called in rebuttal, excluded, for lack of a proper showing; but it does not here appear whether the witness had been examined before the grand jury).
1895, Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661 (motion to quash, not made in season).
1905, Thompkins *v.* Com., — Ky. — , 90 S. W. 221 (a motion to quash is the proper remedy).
1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (if some names are purposely omitted, to obtain undue advantage, the remedy is quashing or postponement).

[*Note* 3; *add:*]

1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235.

[*Note* 4; *add:*]

1906, Leftridge *v.* U. S., — Ind. Terr. — , 97 S. W. 1018 (Arkansas statute applied).
1905, Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310.
1905, State *v.* Henderson, 186 Mo. 473, 85 S. W. 576 (but here the Court intimates an exception for cases of surprise); 1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733 (similar).
1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (similar; reviewing the cases).
1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235.
1904, Cochran *v.* U. S., 14 Okl. 108, 76 Pac. 672.

[*Note* 5; *add*, under *Illinois*:]

1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.
1905, Thompkins *v.* Com., — Ky. — , 90 S. W. 221, *semble*.
1906, Schaumloeffel *v.* State, 102 Md. 470, 62 Atl. 803 (rule of Gardner *v.* People, — Ill. — , *supra*, approved).
1905, State *v.* Cambron, — S. D. — , 105 N. W. 241 (foregoing cases approved).

§ 1853. Same: (2) List of Witnesses Known to Prosecuting Attorney.

[*Note* 1; *add*:]

1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013.

[*Note* 2; *add*:]

1906, Reed *v.* State, — Nebr. — , 106 N. W. 649 (like Carroll *v.* State, *supra*).

[*Note* 4; *add*:]

Ida.: 1902, State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849; 1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013 (but such an indorsement made at the time of trial, without showing any reason for the tardy indorsement, is insufficient); 1904, State *v.* Rooke, 10 Ida. 388, 79 Pac. 82 (indorsement before trial, held proper on the facts).
Wash.: 1904, State *v.* Van Waters, 36 Wash. 358, 78 Pac. 897.

§ 1854. Same: (3) List of All Prospective Witnesses.

[*Note* 2; *add*:]

Accord.: 1904, Shaffer *v.* U. S., 24 D. C. App. 417, 432 (accused held not to have been misled on the facts by an ambiguous description). 1895, Thiede *v.* Utah, 159 U. S. 510, 515, 16 Sup. 62 (murder; quoted *ante*, § 1852, n. 4). 1904, Balliet *v.* U. S., 129 Fed. 689, 692, 64 C. C. A. 201 (fraud in the mails; the U. S. statute held not applicable).
Contra: 1906, Schaumloeffel *v.* State, 102 Md. 470, 62 Atl. 603; 1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105 (Schaumloeffel *v.* State approved).

[*Note* 3; *add*:]

1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105.

[*Note* 5; *add*:]

1906, Ball *v.* U. S., 147 Fed. 32, 36, C. C. A. (U. S. Rev. St. 1878, § 1033, does not apply to territorial courts; here in Alaska).

§ 1855. Same: III. Statutory Rule of Evidence, etc.

[*Note* 1; *add*:]

1907, State *v.* Johnson, — Ia. — , 110 N. W. 170.

[*Note* 5; *add*:]

1907, State *v.* Bennett, — Ia. — , 110 N. W. 150.

[*Note* 6; *add*:]

1904, State *v.* Trusty, 122 Ia. 82, 97 N. W. 989.

§ 1856. Civil Cases (Discovery in Equity, etc.).

[*Note* 5; *add*:]

1906, Union Coll. Co. *v.* Superior Court, — Cal. — , 87 Pac. 1035, *semble* (discovery from a third person as to the whereabouts of certain defendants, so as to be enabled to serve them with process, refused; but the ruling is absurd as regards the ground stated in the opinion, that the parties' whereabouts "cannot be said to be material"; such reasoning is not 6t logic for judicial officers having responsibilities to the life and property of the community; the opinion, moreover, refers to the question of compelling "the defendant or a stranger" to make discovery as if there were no distinction between the two, and it does not appear what was the precise status of the person summoned).
1906, *Ex parte* Schnepf, 74 Oh. 1, 77 N. E. 276, 279 (street-car injury).
1906, International Coal M. Co. *v.* Pennsylvania R. Co., — Pa. —, 63 Atl. 877 (here discussed as a deposition to perpetuate testimony).
1907, Kurtz *v.* Brown, 152 Fed. 372, C. C. A.

[*Note* 6, par. 2; *add*:]

Br. C. St. 1905, 5 Edw. VII, c. 14, § 87 (discovery in county courts).
Man. St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding further details as Rules 402 A, 402 B, 407 B).
Newf. St. 1904, c. 3, Rules of Court 28.
Yukon: Consol. Ord. 1902, c. 17 (Judicature), Ord. XXI, R. R. 200–224.

[*Note* 7, par. 1; *add:*]

Conn. St. 1889, c. 22; Gen. St. 1902, §§ 732–737.
Ill. St. 1905, May 18 (Municipal Court), § 32.
Ia. Code 1897, §§ 3610, 3611.
N. C. Rev. 1905, §§ 864–872 (like Code 1883, §§ 579–587).

[*Note* 7, par. 2, at the end; *add:*]

compare the following: 1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415 (parties compelled to give depositions before trial; "taking the deposition of a party is the only substitute we have for a bill of discovery under our practice").

[*Note* 8, par. 1, under *Accord; add:*]

1903, Gibbins *v.* Metcalfe, 14 Man. 364 (names of witnesses).
1904, Wood *v.* Dominion L. Co., 37 N. Sc. 250.
1905, Garland *v.* Clarkson, 9 Ont. L. R. 281 (range of discovery discussed; discovery from a beneficial party; powers of a referee).
1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105 (a bill of particulars need not include the names of witnesses).
1906, Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 786, 787 (cases collected, but the point not decided).
1906, *Ex parte* Schoepf, 74 Oh. 1, 77 N. E. 279 (street-car injury).
Compare the rule for names and testimony of *witnesses as disclosed to the attorney* under a privilege (*post*, § 2319).

[*Note* 8, par. 4; *add:*]

1900, Welsbach Incand. G. L. Co. *v.* New Sunlight I. Co., 2 Ch. 1.
1904, Kircher *v.* Imperial L. & I. Co., 7 Ont. L. R. 295 (discovery granted against a manager who had resigned).
1904, Cantin *v.* News Pub. Co., 8 id. 531 (discovery against a "former servant of the defendants," not granted).
1905, Clarkson *v.* Bank of Hamilton, 9 Ont. L. R. 317 (the corporation should suggest the officer or agent best qualified to give the due information).
1904, McWilliams *v.* Dickson Co., 10 Ont. L. R. 639 (whether the answer of a party corporation may be struck out, for refusal of its officer to give discovery).
1906, Davies *v.* Sovereign Bank, 12 Ont. L. R. 557 (a member of a municipal council, not being its head, is not examinable as an officer or servant of the corporation).
For the earlier English cases, there is a good collection and a careful study of them in an article by Mr. Alex. McGregor, "What Persons in the Service of a litigating Corporation are examinable for Discovery on its behalf," Canadian Law Review, II, 254 (1902).

[*Note* 9; *add:*]

1905, Spinney *v.* Boston Elev. R. Co., 188 Mass. 30, 73 N. E. 1021 (the demandant is entitled to the opponent's oath that the matters asked for are within the statute; here a report of the conductor upon a railroad accident, giving the names of persons present, etc.).

[*Note* 10, after par. 1; *add:*]

In *England* and *Canada*, the rule for discovery in *libel* seems to give special difficulty: 1905, White *v.* Credit Reform Ass'n, 1 K. B. 653 (libel by a mercantile agency; certain inquiries as to the source of information, etc., passed upon). 1905, Edmondson *v.* Birch, 2 K. B. 523 (similar). 1906, Plymouth M. C. & I. Soc'y *v.* Traders' P. Ass'n, 1 K. B. 403 (similar). 1906, Massey-Harris Co. *v.* DeLaval S. Co., 11 Ont. L. R. 227, 591 (libel; discovery of information concerning defendant's plea of privilege). 1906, McKergow *v.* Comstock, 11 Ont. L. R. 637 (libel; discovery of matters relevant to defendant's good faith in exercising a qualified privilege).

The statutes often provide that *judgment may be taken* against a party improperly refusing to answer such interrogatories; compare *post*, § 2218, n. 6, par. 3, and *ante*, § 1210, n. 2; 1907, Free *v.* Western U. Tel. Co., — Ia. — , 110 N. W. 143 (method of penalizing a refusal by entering judgment, etc., considered).

[*Note* 10, par. 2; *add:*]

1903, Hanks Dental Ass'n *v.* Tooth Crown Co., 194 U. S. 303, 24 Sup. 700 (the defendant took the deposition of the plaintiff's president before trial, under N. Y. C. C. P. 1877, § 870; held (1) that it was inadmissible under U. S. Rev. St. 1878, §§ 861, 863, 866, 867, following *Ex parte* Fisk, *supra;* (2) that under St. 1892, Mar. 9, c. 14, quoted *ante*, § 1381, n. 3, providing that in Federal courts an additional "mode of taking the depositions of witnesses" may be "the mode prescribed by the laws of the State," etc., the deposition was equally inadmissible, since the word "mode" in St. 1892 does not have "a broader significance" than in Rev. St. § 861; yet it would seem that if the Court in *Ex parte* Fisk held the word "mode" in Rev. St. § 861 to include discovery before trial and thus to conflict with N. Y. C. C. P. § 870, it is inconsistent here to hold that the word "mode" in St. 1892 does *not* include discovery before trial).
1905, Blood *v.* Morrin, 140 Fed. 918, C. C. (under U. S. Rev. St. §§ 863, 876, providing for depositions *de bene* of witnesses residing more than one hundred miles away, a party may take the deposition of his opponent, so residing, before trial; *Ex parte* Fisk distinguished).

§ 1857. Documents; Inspection by Discovery in Equity.

[*Note* 1; *add:*]

1905, Ormerod *v.* St. George's Ironworks, 1 Ch. 505 (earlier practice as to taking copies, considered).

§ 1858. Inspection at Common Law, etc.

[*Note* 2; *add* a new paragraph:]

For the right of a *citizen* to inspect *public records*, see the following:
1905 State *v.* McMillan, 49 Fla. 243, 38 So. 666 (records of deeds, etc.).
1903, Marsh *v.* Sanders, 110 La. 726, 34 So. 752 (poll-tax books).
1906, State *v.* Grimes, — Nev. — , 84 Pac. 1061 (collecting the cases).
1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers).
1904, Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927.

[*Note* 4; *add:*]

1903, Merritt *v.* Copper Crown Co., 36 N. Sc. 383.
1905, Guthrie *v.* Harkness, 199 U. S. 148, 26 Sup. 4.

[*Note* 11; *add:*]

1904, Alabama G. I. School *v.* Reynolds, 143 Ala. 579, 42 So. 114 (books kept by a party in a fiduciary relation are subject to inspection for pending litigation, irrespective of the general limitations of discovery in equity).

[*Note* 14; *add:*]

1904, Boulton *v.* Houlder, 1 K. B. 784 (action to recover insurance money paid in excess; the plaintiff was allowed discovery of certain ship's papers; practice in insurance cases reviewed).

[*Note* 16; *add:*]

In Farnham *v.* Colman, — S. D. — , 103, N. W. 161 (1905), where the defendant, charged with murder, asked mandamus against the committing magistrate to compel the State's attorney to produce a written dying declaration, which he had refused to produce on subpœna, the refusal of the writ was placed on other grounds. Compare § 1850, n. 4, *ante*.

§ 1859. Inspection under Statutes.

[*Note* 4, par. 1; *add:*]

Ill. St. 1907, June 3, p. 443, § 34 (re-enacts the foregoing c. 110, § 20).
In West Virginia, the common-law practice may still be invoked: 1905, Riley *v.* Yost, 58 W. Va. 213, 52 S. E. 40.

[*Note* 5, par. 2; *add:*]

Br. C. St. 1905, 5 Edw. VII, c. 14, § 87 (county courts).
Man. St. 1906, 5 & 6 Edw. VII, c. 17, § 4 (amends Rev. St. 1902, c. 40, Rule 392, as to mode of service, and amends Rule 421, as to penalty for refusal to produce).
Newf. St. 1904, c. 3, Rules of Court 28.
Yukon Consol. Ord. 1902, c. 17 (Judicature), Ord. XX, RR. 190–199 (similar to N. W. Terr.).

[*Note* 6; *add:*]

Colo. St. 1903, c. 181, § 160 ("the books and accounts of any deceased person or mental incompetent shall be subject to the inspection of all persons interested therein").
Conn. St. 1889, c. 22, Gen. St. 1902, §§ 732–737.
Ga.: 1904, Branan *v.* Nashville C. & St. L. R. Co., 119 Ga. 738, 46 S. E. 882 (Code applied).
Ill.: 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (provided the terms of the order require the exhibition of relevant documents and entries only, the statute is not unconstitutional; here, the books of an insured, in an action by a liability-insurer, were produced to show the date on which the premium was agreed to be based; but there is no occasion for invoking the Constitution to limit such statutes).
N. C. Rev. 1905, § 1656 (like Code 1883, § 578); 1905, Mills *v.* Biscoe L. Co., 139 N. C. 524, 52 S. E. 200 (procedure of inspection considered).
Wash.: 1906, Lawson *v.* Black Diamond C. M. Co., — Wash. — , 86 Pac. 1120 (Codes & Stats. 1897, § 6047, construed in relation to ib. §§ 6009, 6113, providing for giving judgment against a party refusing to answer interrogatories discovering documents).

[*Note* 8; *add:*]

1907, Cassatt *v.* Mitchell C. & C. Co., — C. C. A. — , 150 Fed. 32, 39 (careful but unconvincing opinion by Lanning, J.; Buffington, J., partly dissenting).

[*Note* 10, p. 2448; *add*, under *Accord:*]

1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (Lester *v.* People, *infra*, repudiated; the power is to require production, "whether before the trial, for the purpose of preparing for the same, or at the trial, to be used as evidence"; "Sect. 9 was intended in actions at law to be a substitute for the bill of discovery").

[*Note* 14, par. 1, l. 14; *add:*]

1906, Nelson & Sons *v.* Nelson Line, 2 K. B. 217 (discovery from a nominal plaintiff).

[*Note* 14, par. 2, l. 9: *add:*]

1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358.

[*Note* 14, par. 2, at the end; *add:*]

Whether the *applicant* party may *himself make the copy* from the document at the office of the producing party, or whether he is obliged to be satisfied with a copy made and furnished by the latter, is an interesting and often important point of practice: 1905, Ormerod *v.* St. George's Ironworks, 1 Ch. 505 (approving the former alternative).

[*Note* 15; *add:*]

The following ruling holds such a statute to be *constitutional:* 1906, Washington Nat'l Bank *v.* Daily, — Ind. — , 77 N. E. 53 (cited *post*, § 2193, n. 3).

[*Note* 17; *add:*]

Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n. 2).
N. Sc. Rev. St. 1900, c. 163, § 22 (probated wills; cited *ante*, § 1681).
Yukon St. 1904, c. 5, § 23 (probated wills; cited *ante*, § 1681).

§ 1860. Same: Other Principles discriminated.

[*Text*, par. (3), at the end; *add* a new note 2:]

[2] For rulings applying these statutes, see *ante*, § 1210, n. 2.

§ 1861. Document shown to Opponent at Trial.

[*Note* 1, par. 1; *add*, under *Accord:*]

1905, State *v.* Rogers, 115 La. 164, 38 So. 952 (here the ruling, that the opponent is entitled to see a contradictory letter before the witness answers whether it is his, seems over-strict).

§ 1862. Premises, Chattels, etc.; Inspection before Trial.

[*Note* 9; *add:*]

Newf. St. 1904, c. 3, Rules of Court 46, par. 4 (like Eng. Rules of 1883, Ord. 50, rule 3).
Mont.: 1903, Heinze (State *ex rel.*) *v.* District Court, 29 Mont. 105, 74 Pac. 132 (Parrot S. & C. Co. *v.* District Court, *supra*, followed; Hollaway, J., diss.). 1904, Mendenhall (State *ex rel.*) *v.* District Court, 29 Mont. 363, 74 Pac. 1078 (preliminary conditions for an order determined). 1904, Boston & M. C. C. & S. M. Co. (State *ex rel.*) *v.* District Court, 30 Mont. 206, 76 Pac. 206 (preliminary conditions for an order, determined).

§ 1867. Order of Evidence; Trial Court's Discretion.

[*Note* 2; *add:*]

1906, People *v.* Tollefson, 145 Mich. 449, 108 N. W. 751 (forgery).
1907, State *v.* Taylor, — Mo. — , 100 S. W. 41.

§ 1869. Proponent's Case in Chief, etc.

[*Note* 4, l. 12; *add:*]

1903, Savage *v.* Bulger, — Ky. — , 77 S. W. 717 (party admitted in rebuttal).
1906, Burkhardt *v.* Loughridge, — Ky. — , 98 S. W. 291 (rule applied to depositions).

§ 1871. Same: Conditional Relevancy, etc.

[*Note* 1, par. 1; *add:*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.

[*Note* 2, par. 2, at the end; *add:*]

Compare the rule for counsel *making offers* which they know will not be sustained, and *stating in argument* matters of which no evidence has been introduced (*ante*, § 1810).

[*Note* 3, par. 1; *add:*]

1905, Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547.
1904, Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49.

[*Note* 4; *add:*]

1906, State *v.* Green, 115 La. 1041, 40 So. 451 (identifying a pistol).

[*Note* 6, par. 2, at the end; *add:*]

1906, Hix *v.* Gulley, 124 Ga. 547, 52 S. E. 890.
1906, Tinkle *v.* Wallace, — Ind. — , 79 N. E. 355 (bribery).
1906, Putnam *v.* Harris, — Mass. — , 78 N. E. 747 ("It is more correct to say that the exception will not be sustained unless the fact that the evidence admitted *de bene* had not been properly connected afterwards was brought to the attention of the Court and a further ruling on that ground asked for").
1903, Jones *v.* Peterson, 44 Or. 161, 74 Pac. 661.
Contra: 1906, Root *v.* Kansas C. S. R. Co., 195 Mo. 348, 92 S. W. 621.
Not clear: 1906, Pittman *v.* State, — Fla. — , 41 So. 385 (opinion reading both ways).

[*Note* 8; *add:*]

1906, Brown *v.* State, — Miss. — , 40 So. 737.

§ 1872. Opponent's Case in Reply, etc.

[*Note* 3; *add:*]

1904, Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234.

§ 1873. Proponent's Case in Rebuttal.

[*Note* 1; *add:*]

1904, R. *v.* Wong On, 10 Br. C. 555 (alibi).
1902, R. *v.* Higgins, 35 N. Br. 18, 30.
1907, Nicholson *v.* State, — Ala. — , 42 So. 1015.
1904, Vincent *v.* Mutual R. F. L. Ass'n, 77 Conn. 281, 58 Atl. 963 (age, in an insurance policy).
1904, McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413.
1904, Lo Toon *v.* Terr., 16 Haw. 351, 357 (alibi).
1905, State *v.* Waln, — Ida. — , 80 Pac. 221.
Ind. St. 1905, p. 584, § 260 (Rev. St. 1897, § 1914, re-enacted).
1906, Tinkle *v.* Wallace, — Ind. — , 79 N. E. 355.
1905, State *v.* Seligman, 127 Ia. 415, 103 N. W. 357.
1906, State *v.* Thomas, — Ia. — , 109 N. W. 900.
1880, Williams *v.* Com., 90 Ky. 596, 14 S. W. 595 (here the Court disparages too easily the trial Court's ruling, on the theory that no discretion was actually exercised).
1904, Fletcher *v.* Com., Ky., 83 S. W. 588 (Williams *v.* Com. approved).
1905, Tetterton *v.* Com., Ky., 89 S. W. 8.
1905, State *v.* Boice, 114 La. 856, 38 So. 584.
1906, State *v.* Johnson, 116 La. 30, 40 So. 521.
1906, State *v.* Douglas, 116 La. 524, 40 So. 860.
1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82.
1906, People *v.* Harper, 145 Mich. 402, 108 N. W. 688 (corpus delicti and eye-witnesses; here, in a technical and ill-advised opinion, citing no authority, the Supreme Court unjustifiably interferes with the trial Court's discretion).
1904, Flowers *v.* State, 85 Miss. 591, 37 So. 814.
1904, Maloney *v.* King, 30 Mont. 158, 76 Pac. 4.
1906, State *v* Miles, — Mo. — , 98 S. W. 25.
1905, Willett *v.* Morse, — N. J. L. — , 60 Atl. 362.
1905, Petersburg School Dist. *v.* Peterson, — N. D. — , 103 N. W. 756.
1904, Cochran *v.* U. S., 14 Okl. 108, 76 Pac. 672.
1843, Smith *v.* Britton, 4 Humph. 201.
1905, Union R. Co. *v* Hunton, 114 Tenn. 609, 88 S. W. 182.
1904, Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.
1904, Schissler *v.* State, 122 Wis. 365, 99 N. W. 593 (sanity).
1905, Steward *v.* State, 124 Wis. 623, 102 N. W. 1079 (sanity).

§ 1874. Opponent's Case in Surrebuttal.

[*Note* 1; *add:*]

1905, State *v.* Forsha, 190 Mo. 296, 88 S. W. 746 (the rule applies equally to a defendant who did not testify in chief for the defence but offers himself in surrebuttal).

§ 1876. Case Closed: (1) Offeror's Case alone Closed.

[*Note* 1; *add:*]

1905, Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146.
1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.
1904, Hill *v.* Glenwood, 124 Ia. 479, 100 N. W. 522.
1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438.
1906, State *v.* Goodson, 116 La. 388, 40 So. 771.
1904, Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.
1904, Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469.
1906, Pocahontas C. Co. *v.* Williams, 105 Va. 708, 54 S. E. 868.

§ 1877. Same: (2) Case of Both Parties Closed.

[*Note* 1; *add:*]

1904, Alling *v.* Weissman, 77 Conn. 394, 59 Atl. 419.
1906, Bridger *v.* Exchange Bank, 126 Ga. 821, 56 S. E. 97 (during argument on a motion to direct a verdict).
1887, Tucker *v.* People, 122 Ill. 583, 593, 13 N. E. 809.
1906, People *v.* Wiemers, 225 Ill. 17, 80 N. E. 45 (trial without a jury).
1905, State *v.* Sexton, 37 Wash. 110, 79 Pac. 634.

§ 1878. After Argument Begun.

[*Note* 1; *add:*]

1905, Robinson *v.* State, 50 Fla. 115, 39 So. 465.
1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374.
1906, Bundrick *v.* State, 125 Ga. 753, 54 S. E. 683.
1904, Blair *v.* State, — Nebr. — , 101 N. W. 17.
1901, Harvey *v.* Terr., 11 Okl. 156, 65 Pac. 837.
1906, Jones *v.* State, — Tex. Cr. — , 95 S. W. 1044.
1906, Cincinnati N. O. & T. R. Co. *v.* Cox, 143 Fed. 110, C. C. A.

§ 1879. After Judge's Charge Given.

[*Note* 1, par. 1; *add:*]

1906, Todd *v.* Crail, — Ind. — , 77 N. E. 402 (judge sitting without a jury).
1905, Parker *v.* Ricks, 114 La. 942, 38 So. 687 (after cause submitted to judge).

§ 1880. After Jury Retired.

[*Note* 1; *add:*]

1906, Watson *v.* Barnes, 125 Ga. 733, 54 S. E. 723.

§ 1884. Cross-Examination in General, etc.

[*Note* 1; *add,* as *Accord:*]

1905, Miller *v.* Carnes, 95 Minn. 179, 103 N. W. 877.

But where the *party opponent* is called, under the statutes (*ante,* § 916) permitting him to be treated as if on cross-examination, this is perhaps to be regarded as a stage in itself, so that the opponent cannot thereupon as of right testify further for himself, as if on re-direct examination; the trial Court may therefore require him to wait till his own case is put in: 1900, Jones *v.* Bradford, 79 Minn, 396, 82 N. W. 651; 1904, Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128.

[*Note* 6, par. 1; *add,* under *Contra:*]

1905, Armour Packing Co. *v.* V. Y. Produce Co., — Ala. — , 39 So. 680, *semble* (the document cannot be put in until the cross-examiner's own case is opened).

[*Note* 6, after par. 2; *add:*]

Otherwise, naturally, in Courts which do not accept the orthodox rule for cross-examination: 1903, Kroetch *v.* Empire M. Co., 9 Ida. 277, 74 Pac. 868 ("The practice of allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness . . . should seldom be permitted").

§ 1890. Cross-Examining to One's Own Case; Law in Various Jurisdictions.

[*Note* 3; *add:*]

CANADA. *B. C.* St. 1903–4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 4 (repeals St. 1902, c. 22, § 6); this part of the repeal is an unfortunate step backwards, and should be reconsidered.
Man. St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding Rule 460 A, that a party, etc. to a civil action "may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules for examination, as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony"):
UNITED STATES. *Cal.* (rule for an accused): 1904, People *v.* Teshara, 141 Cal. 633, 75 Pac. 338 (like People *v.* McMullings, with qualifications). 1904, People *v.* Podilla, 143 Cal. 158, 76 Pac. 889 (rule applied in a bigoted fashion to prevent the impeachment of witnesses of the defendant). 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169. 1906, People *v.* Soeder, — Cal. — , 87 Pac, 1016 (similar to People *v.* Mullings).
Conn.: 1905, Nichols *v.* Wentz, 78 Com. 429, 62 Atl. 610 (rule applied to testimony to the execution of a will).
Fla.: 1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 (rule applied).
Haw.: 1904, Ahmi *v.* Waller, 15 Haw. 497, 501 (Booth *v.* Buckley, approved). 1904, Flint *v.* Flint, ib. 313 (similar).
Ill.: 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (but the trial Court has a "large discretion"). 1904,

[*Note* 3 — *continued.*]

Dick *v.* Zimmermann, 207 id. 636, 69 N. E. 754. 1904, Chicago City R. Co. *v.* Creech, 207 Ill. 37, 69 N. E. 919 (the cross-examiner may "elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining"; no precedents cited). 1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 ("When the direct examination opens on a general subject, the cross-examination may go into any phase of that subject"; said of the accused's conversations). 1905, Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089 (same rule, applied to testimony to a testator's sanity).
Ind. Terr.: 1905, Miller *v.* Springfield W. Co., — Ind. T. — , 89 S. W. 1011 (under Annot. St. 1899, § 2012, the trial Court may allow cross-examination on matters not touched on in the direct examination).
Miss.: 1905, Walton *v.* State, 87 Miss. 296, 39 So. 689 (rule applied).
Mo. For the *general rule:* 1905, Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608 ("What is called the 'orthodox rule' has always been the rule in this State"); for an *accused:* 1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838 (State *v.* Avery approved); 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (rule applied); 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (rule applied). The following statute has now intervened: St. 1905, Apr. 6, p. 307 (inserting a new § 4655 *a* into Rev. St. 1899, as follows: "A party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness (except where a defendant in a criminal case is testifying in his own behalf) on the entire case; but this shall not be construed to entitle a defendant who has pleaded a counterclaim or set-off in a civil case to cross-examine a plaintiff's witness in respect thereto, but as to said counterclaim or set-off such witness (if examined by defendant in relation thereto) shall be deemed defendant's witness and be so examined in the course of the trial"; of this statute, only the second part has anything that could be construed as a change in the law; and such petty tinkering is impolitic, especially when it is based on the erroneous theory noted *ante*, § 1887, par. *d*).
Mont.: 1904, State *v.* Howard, 30 Mont. 518, 77 Pac. 50; 1906, Borden *v.* Lynch, — Mont. — , 87 Pac. 609 (consideration of a note; the rule applies equally to a party-opponent).
N. D.: 1899, Kaeppler *v.* Red R. V. N. Bank, 8 N. D. 406, 410, 79 N. W. 869 (strict rule applied, though "much discretion should be given"). 1904, Hogen *v.* Klabo, 13 N. D. 319, 100 N. W. 847 (rule applied to an issue of payment on notes in a suit for a balance due; foregoing case not cited). 1905, Schwoebel *v.* Fugina, — N. D. — , 104 N. W. 848 (trial Court's discretion controls; moreover, "any fact in issue within the knowledge of the adverse party may be proved by cross-examination of him").
Okl.: 1904, Woods *v.* Faurot, 14 Okl. 171, 77 Pac. 346 (Federal rule illiberally applied).
Or.: 1904, Goltra *v.* Pentland, 45 Or. 254, 77 Pac. 129 (a good example of how the rule helps to suppress truth and reduce a trial to a game).
Pa.: 1905, Quigley *v.* Thompson, 211 Pa. 107, 60 Atl. 506 (negligence; rule applied).
S. D.: 1895, State *v.* Bunker, 7 S. D. 639, 642, 65 N. W. 33 (trial Court's discretion controls; here the complaining witness in bastardy).
U. S.: 1899, Davis *v.* Coblens, 174 U. S. 719, 726, 19 Sup. 832 (rule of discretion applied). 1904, Resurrection G. M. Co. *v.* Fortune G. M. Co., 129 Fed. 668, 674, 681, 685, 64 C. C. A. 180 ("In the Courts of the United States, the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error," per Sanborn, J. To speak here of "reversible error" is to bow to the most bigoted fetish-like form of the rule; in view of Wills *v.* Russell, 100 U. S., *supra*, such a doctrine in the Federal Circuit Court of Appeals is an anachronism, as well as an abomination to the name of Justice. It is justly dissented from by Hook, J., who declares for the pristine rule leaving this subject "generally a matter within the sound discretion of the trial Court"; and by Thayer, J., who expressed the view that it was "over-technical, unnecessary, and unwise" to invoke the rule of "reversible error"; it is to be hoped that the opinion of these two judges will prevail in the practice of the Circuit Courts of Appeals). 1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (rule applied to an accused taking the stand). 1904, Garlich *v.* Northern P. R. Co., 131 Fed. 837, 67 C. C. A. 237 (cross-examination held proper on the facts).
Wis.: 1905, Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220 ("In case the witness is also a party to the action, a somewhat broader range is allowed").

§ 1893. Same: What Constitutes Calling a Witness, etc., on Ordinary Subpœna, etc.

[*Note* 2; *add,* under *Accord:*]

1906, Harris *v.* Quincy O. & K. C. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

[*Note* 6; *add:*]

1891, Achilles *v.* Achilles, 137 Ill. 589, 594, 28 N. E. 45 (party examined and cross-examined, and the deposition excluded because of interest; the cross-examination was then also held inadmissible for the party). 1904, Bentley *v.* Bentley's Estate, — Nebr. — , 101 N. W. 976.

[*Note* 7, l. 1; *add,* under *Accord:*]

1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668, *semble.*
1904, Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898, *semble.*

§ 1895. Same: Other Principles of Evidence discriminated, etc.

[*Text,* l. 5, after "stage"; *add* a new note *a:*]

1905, Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608 (Valliant, J., quoting this sentence, adds, "That is really the only essential difference in effect between the two rules").

§ 1896. Re-Direct Examination.

[*Note* 1; *add:*]

1903, R. *v.* Noel, 6 Ont. L. R. 385 (Blewett *v.* Tregonning, followed).
1904, Caven *v.* Bodwell G. Co., 99 Me. 278, 59 Atl. 285.

§ 1899. Recall for Re-Cross-Examination.

[*Note* 1; *add:*]

1904, Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.
1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754.

§ 1907. Witnesses merely Cumulative, etc.

[*Note* 1; *add:*]

1904, White *v.* Boston, 186 Mass. 65, 71 N. E. 75 (the limited number having been used, a lay witness of the opponent cannot be used as an expert on cross-examination).
Mich. St. 1905, No. 175 (limits the number to three on each side; quoted in full *ante*, § 562, n. 1.)
1906, St. Louis M. & S. E. R. Co. *v.* Aubuchon, — Mo. — , 97 S. W. 867 (land damages; a ruling restricting the witnesses to four on each side, held unreasonable on the facts; but the opinion, though citing nine cases from other jurisdictions and two cases from an inferior court of Missouri, wholly ignores the four rulings in its own court, cited *infra*, notes 2 and 3; the Court's remark that "we are cited to no case by respondent that sustains such rule" will not properly account for such inattention to its own rulings, even on the part of a Minos so recently enthroned and so brilliant and sensible as the one who writes the opinion).
1904, Swope *v.* Seattle, 36 Wash. 113, 78 Pac. 607 (limitation to three witnesses to real estate value, held proper in discretion).

[*Note* 2; *add:*]

1906, State *v.* Rodriguez, 115 La. — , 40 So. 438 (under St. 1894, No. 67, a limitation of defendant's character-witnesses to six, with liberty to have process for more at his own cost, held proper).

[*Note* 3; *add:*]

1907, State *v.* Uzzo, — Del. — , 65 Atl. 775 (rule of Court limiting to six witnesses on the same fact, held applicable in capital cases).
1904, Trometer *v.* District, 24 D. C. App. 242, 247 (wife's testimony on a certain point, excluded as cumulative).
1861, Calvert *v.* Carter, 18 Md. 73, 109 (obscure; but *semble contra*).
1905, Carrara P. A. Co. *v.* Carrara P. Co., 137 Fed. 319, C. C. (depositions of 250 witnesses were allowed, no special reason for limitation of number being shown).

[*Note* 4; *add:*]

For the argument as to a constitutional *right to process*, see *post*, § 2191.

§ 1909. Judge as Witness.

[*Note* 5; *add:*]

Or.: Codes & Gen. L. 1892, § 856 (like Cal. C. C. P. § 1883, substituting "former case" for "such case").
1904, State *v.* Houghton, 45 Or. 110, 75 Pac. 887 (judge allowed to testify on the question of a witness' self-contradiction on the former trial).
Wash.: 1896, Maitland *v.* Zanga (quoted *supra*). 1905, State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132 (justice of the peace, allowed to testify to the proceedings on arraignment of the now defendant).

§ 1910. Juror as Witness.

[*Note* 1, par. 1; *add:*]

Or.: Codes & Gen. L. 1892, § 856 (like C. C. P. § 1883, substituting "former case" for "such case").

[*Note* 1, par. 4; *add:*]

Distinguish also the question whether a juror may at a *subsequent trial* disclose knowledge obtained by him at a *view of premises* on a former trial (*post*, § 2346).

§ 1911. Counsel or Attorney as Witness.

[*Note* 9; *add:*]

1907, Wilkinson *v.* People, 226 Ill. 135, 80 N. E. 699 (prior rulings approved, and "the unenviable attitude of a willing witness and a zealous attorney" commented on).

§ 1918. Theory of the Opinion Rule.

[*Note* 1; *add:*]

1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (accused's clothing; comparison between spots on it now and spots on portions cut off and destroyed, allowed).

§ 1920. Erroneous Theories; (2) Usurping the Function of the Jury.

[*Note* 2; *add:*]

1904, State *v.* McGruder, 125 Ia. 741, 101 N. W. 646.

§ 1921. Same: (3) Opinions on the Very Issue, etc.

[*Note* 1; *add:*]

1905, Sun Ins. Office *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (whether there was a "fire"; the issue being as to the spontaneous combustion of wool).

[*Note* 2; *add:*]

1906, Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805 (citing Chicago & A. R. Co. *v.* R. Co., *supra*, n. 1, and qualifying it by saying that "it is not always a good objection to such a question that it calls for an opinion upon *a* question to be decided by the jury," provided it is not "the ultimate question to be found by the jury).

§ 1922. Same: (4) Opinion admissible, etc.

[*Note* 1; *add:*]

1904, Morrow *v.* National Mas. Acc. Ass'n, 125 Ia. 633, 101 N. W. 468 (experts excepted).

§ 1938. Laymen's Opinions as to Sanity; State of the Law, etc.

[*Note* 1; *add:*]

Ala.: 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (an opinion to insanity must be preceded by a statement of observed facts; but an opinion to sanity need only negative generally any data of insanity). 1904 Porter *v.* State, 140 Ala. 87, 37 So. 81. 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (rule followed; but the addition of "State any other peculiarities about him" will make the question objectionable; this sort of quiddity may seem to our Courts to be worth enunciating; but they may be assured that from the standpoint of clear-minded and efficient justice it is as senseless as the mumblings of Macbeth's witch-hags; here its absurdity of quibbling is further shown by the allowance in the same case of a question to another witness, "Did you observe anything unusual, peculiar, or unnatural?").

Ark.: 1905, Byrd *v.* State, 76 Ark. 286, 88 S. W. 956.

Cal.: the prior decisions are now harmonized by the rule that a person who is an "intimate acquaintance," under C. C. P. § 1870, *supra* (cited and construed *ante*, § 689), may testify to the condition of sanity or insanity in general, while a person who is not an "intimate acquaintance," but has still observed the party's conduct, may state whether his conduct or appearance as observed was rational or irrational: 1904, People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177.

Conn.: 1905, Nichols *v.* Wentz, 78 Conn. 429, 62 Atl. 610.

Fla.: 1906, Leaptrot *v.* State, — Fla. — , 40 So. 616 (specific facts must be stated).

Ill.: 1904, Chicago U. T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024 ("If a non-expert witness gives an opinion without sufficient knowledge of facts to support it, opposing counsel may upon cross-examination show that it is of little value"). 1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (whether a testatrix was "easily influenced or susceptible to flattery," excluded).

Ind.: 1906, Heaston *v.* Kreig, — Ind. — , 77 N. E. 805. 1906, Swygart *v.* Willard, — Ind. — , 76 N. E. 755 (rule applied).

Ia.: 1904, Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105. 1905, Lucas *v.* McDonald, 126 Ia. 678, 102 N. W. 532 (precedent statement of data not required for witness to sanity). 1906, State *v.* Hayden, — Ia. — , 107 N. W. 929 (a witness to sanity need not limit his opinion to data expressly detailed by him).

Kan.: 1905, Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61.

Ky.: but the qualification referred to is now once more dallied with: 1906, Stafford *v.* Tarter, — Ky. — , 96 S. W. 1127.

La.: 1904, State *v.* Lyons, 113 La. 959, 37 So. 860 (an opinion to sanity need not be preceded by a recital of the facts and reasons; as to insanity, the question is left open).

Md.: 1904, Watts *v.* State, 99 Md. 30, 57 Atl. 542 (rule applied to exclude and admit certain opinions). 1905, Struth *v.* Decker, 100 Md. 368, 59 Atl. 727 (some opinions admitted and some excluded on the facts; opinion obscure).

Mass.: 1904, McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 ("From these facts . . . what do you infer in your own mind as to Mr. J.'s mental capacity?", excluded; but "Did you ever notice anything to indicate that he was not of sound mind?", admitted; this local rule of logomachy, unworthy though it is of the dignity of justice, seems to be consistently and skilfully applied by bench and bar).

Mich.: 1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000 (rule of O'Connor *v.* Madison applied). 1905, Hibbard *v.* Baker, 141 Mich. 124, 104 N. W. 399 (rule of Prentis *v.* Bates applied, in an instance which glaringly exhibits the fallacy of that rule).

[*Note* 1 — *continued.*]

Minn.: 1903, Scott *v.* Hay, 90 Minn. 304, 97 N. W. 106 (and even experts must first detail the facts observed).
Mo.: 1906, State *v.* Speyer, 194 Mo. 459, 91 S. W. 1075 (exclusion of the reasons for the opinion of insanity, held erroneous).
Nebr.: 1904, Bothwell *v.* State, 70 Nebr. 747, 99 N. W. 669. 1906, Issac's Estate, — Nebr. — , 107 N. W. 1016. 1907, Wilson's Estate, — Nebr. — , 111 N. W. 788 (where the witnesses testify to sanity, the particular data need not first be stated; prior cases reviewed).
N. H.: 1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 (discretion of the trial Court controls as to the witness' qualification).
N. Y.: 1904, People *v.* Spencer, 179 N. Y. 408, 72 N. E. 461 (rule applied). 1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 ("What was the impression these acts and conversations made on you as to whether they were rational or irrational?" "She was irrational"; the answer held improper). 1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294 (a sweetened morsel of quibbling; the Court also complacently declares, with the solemnity of a Roman augur, that the modern tweedledee rule has "run through the cases from an early day"!).
Or.: 1906, Lassas *v.* McCarty, 47 Or. 474, 84 Pac. 76 (statute applied).
S. D.: Lay opinion is admitted: 1903, Halde *v.* Schultz, 17 S. D. 465, 97 N. W. 369.
Wis.: 1907, Duthey *v.* State, — Wis. — , 111 N. W. 222 (proper form of question stated).

§ 1943. Opinion as to Value; (1) Property-Value.

[*Note* 2; *add:*]

Ala.: 1905, Alabama C. C. & I. Co. *v.* Turner, — Ala. — , 39 So. 603 (mill site). 1906, Central of Ga. R. Co. *v.* Keyton, — Ala. — , 41 So. 918 ("State if your property was damaged by the overflow," held improper, but "State the effect of the overflow on your houses and lot," held proper; if Justice is to be regarded as a machine for splitting hairs, then the machine works very delicately in this State).
Ind.: 1906, Schmoe *v.* Cotton, — Ind. — , 79 N. E. 184 (moreover, "a judgment should not be reversed merely because a part or all of the witnesses have stated the damages, instead of the value, where the damages depend wholly on the value before and after the injury").
Ia.: 1905, Parrott *v.* Chicago G. W. R. Co., 127 Ia. 419, 103 N. W. 352 (damage under eminent domain taking, excluded).
Md.: 1905, Baltimore B. R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654 (smoke-nuisance; expert testimony to the amount of damage and the diminution of land value, excluded). 1906, Western Union T. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801 (value of trees cut, excluded).
Mich.: 1905, Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773 (personalty injured in a railroad collision; testimony to the damage, allowed); and cases cited *ante*, § 716.
Mo.: 1906, Southern Mo. & A. R. Co. *v.* Woodard, 193 Mo. 656, 92 S. W. 470.
Mont.: 1905, Watson *v.* Colusa P. M. & S. Co., 31 Mont. 513, 79 Pac. 14 (land injured by smelting works; value before and after, admitted; opinion obscure).
Nebr.: 1906, McCook *v.* McAdams, — Nebr. — , 106 N. W. 988 (damage by flooding).
N. Y.: 1907, Shaw *v.* N. Y. Elev. R. Co., — N. Y. — , 79 N. E. 984 (rule of Roberts *v.* R. Co. held not to exclude certain opinions to value).
Or.: 1904, Pacific L. S. Co. *v.* Murray, 45 Or. 103, 76 Pac. 1079 (trespass by sheep; amount of damages, excluded; citing prior cases in this jurisdiction).
Tenn.: 1904, Wray *v.* Knoxville L. F. & J. R. Co., 113 Tenn. 544, 82 S. W. 471 (damage by taking land, allowed; settling a prior conflict of rulings).
Wash.: 1904, Ingram *v.* Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34 (value of realty before and after injury, and value of personalty destroyed; allowed). 1905, Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092 (value of benefits to realty; S. & M. R. Co. *v.* Gilchrist, followed).

§ 1944. Same: (2) Other Values, etc.

[*Note* 1; *add,* under *Services:*]

1906, Croft *v.* Chicago R. I. & P. R. Co., — Ia. — , 109 N. W. 723 (wife's services).
1907, Morehead's Trustee *v.* Anderson, — Ky. — , 100 S. W. 340 (attorney's services).

[*Note* 1; *add,* under *Personal Injuries:*]

1906, Cincinnati Traction Co. *v.* Stephens, 75 Oh. 171, 79 N. E. 235 (father's opinion of value of child's services, excluded).
Contra: 1905, Roundtree *v.* Charleston & W. C. R. Co., 72 S. C. 474, 52 S. E. 231 (plaintiff allowed to testify to the money amount of injury to her health).

[*Note* 1; *add,* under *Sundries:*]

1904, McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341 (amount of damages by false representations; excluded).

§ 1947. Opinion as to Insurance Risk; State of the Law, etc.

[*Note* 3, part 2; *add:*]

1904, Hanna *v.* Orient Ins. Co., 109 Mo. App. 152, 82 S. W. 115, *semble* (fire).

[*Note* 4, part 2; *add:*]

1905, Prudential F. Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812 (fire; erection of adjoining building).

[*Note* 10; *add:*]

1906, Provident S. L. Assur. Soc'y *v.* Whayne's Adm'r, — Ky. — , 93 S. W. 1049, *semble* (life; following Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., Fed., *infra*).

§ 1951. Opinion as to Conduct (Care, Safety, etc.); State of the Law, etc.

[*Note* 1; *add:*]

Ala.: 1904, Sloss-Sheffield S. & I. Co. *v.* Mobley, 139 Ala. 425, 36 So. 181 (whether a mode of coupling was safe, allowed). 1904, Davis *v.* Koroman, 141 Ala. 479, 37 So. 789 (the proper precaution to guard a dangerous machine; allowed). 1904, Northern Ala. R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796 (that a certain speed was dangerous, allowed). 1905, Western U. Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121 (that everything was done to send a message, etc., excluded). 1905, Wallace *v.* North Ala. T. Co., — Ala. — , 40 So. 89 (whether it was impossible to stop a car, allowed). 1906, Williamson I. Co. *v.* McQueen, 144 Ala. 265, 40 So. 306 (whether a furnace was in good condition, etc., allowed). 1906, Birmingham R. L. & P. Co. *v.* Martin, — Ala. — , 42 So. 618 (to an engineer, whether he handled the engine carefully, not allowed). 1907, Southern Coal & C. Co. *v.* Swinney, — Ala. — , 42 So. 808 (whether a latch was safe, allowed).

Ariz.: 1904, Huachuca W. Co. *v.* Swain, 4 Ariz. 113, 77 Pac. 619 (whether a person could "fail to perceive" a ditch, excluded; with a disquisition on the tweedledum and tweedledee of this subject).

Cal.: 1903, Luman *v.* Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307 (whether a hoisting-machine was safe, excluded). 1906, Bundy *v.* Sierra L. Co., — Cal. — , 87 Pac. 622 (safe mode of constructing a trestle; not decided).

Colo.: 1904, Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395 (whether an ore lead would justify expense in following, allowed).

Conn.: 1905, Campbell *v.* New Haven, 78 Conn. 394, 62 Atl. 665 (whether a sidewalk was in safe condition for travel, allowed).

Fla.: 1906, Jacksonville El. Co. *v.* Sloan, — Fla. — , 42 So. 516 (whether "all precautions possible" were taken, allowed).

Ga.: 1905, Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979 (whether cars were managed in a way "unusual or unnecessary," allowed). 1905, Evans *v.* The Josephine Mills, 124 Ga. 318, 52 S. E. 538 (whether a machine was dangerous, not allowed, for non-experts).

Haw.: 1906, Terr. *v.* Cotton, 17 Haw. 618, 635 (whether it was safe or prudent to moor a dredger, etc., allowed):

Ill.: 1904, Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 (whether certain conditions of a roadway made it safe, allowed, for experts). 1905, Kellyville Coal Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375 (practicability of using crossbar props in a mine; allowed). 1905, Siegel, Cooper & Co. *v.* Trcka, 218 Ill. 559, 75 N. E. 1053 (whether the construction of an elevator door was safe, excluded). 1906, Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65 (whether boards were fit for scaffolding, not decided).

Ia.: 1904, Collins *v.* Chicago, M. & St. P. R. Co., 122 Ia. 231, 97 N. W. 1103 (whether a cattle-gate was sufficient, excluded). 1905, Schroeder *v.* Chicago & N. W. R. Co., 127 Ia. 365, 103 N. W. 985 (whether an unblocked switch-frog is dangerous, allowed, for experts). 1905, Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488 (whether ice elsewhere was as bad, etc., allowed on cross-examination). 1905, German Ins. Co. *v.* Chicago & N. W. R. Co., 128 Ia. 386, 104 N. W. 361 (whether sparks could pass a netting, whether an engine could be operated without emitting cinders, etc., allowed). 1906, Hamner *v.* Janowitz, — Ia. — , 108 N. W. 109 (the proper and safe method of structure for a crane-track, allowed).

Mass.: 1904, Meehan *v.* Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61 (proper way of stringing telegraph wires, excluded). 1906, Erickson *v.* American S. & W. Co., — Mass. — , 78 N. E. 761 (that cast-iron was unsuitable for a steam-pipe, allowed).

Mich.: 1904, Johnson *v.* Detroit & M. R. Co., 135 Mich. 353, 97 N. W. 760 (efficiency of a cattle-guard, allowed).

Minn.: 1904, McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102 (whether a railing was safe, excluded). 1905, Scarlotta *v.* Ash, 95 Minn. 240, 103 N. W. 1025 (that a machine "operated all right," allowed). 1906, Carlin *v.* Kennedy, 97 Minn. 141, 106 N. W. 340 (whether a machine could be guarded, etc., allowed).

N. C.: 1904, Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432 (whether cog-wheels should have been covered, etc., not allowed).

S. C.: 1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86 (whether a pile-driver was safe, allowed).

U. S.: 1903, Crane *v.* Fry, 126 Fed. 278, 61 C. C. A. 260 (proper handling of a tie-boom, allowed). 1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 727, 126 C. C. A. 639 (whether a pulley was safe, allowed). 1906, Gila Valley G. & N. R. Co. *v* Lyon, — U. S. — , 27 Sup. 144 (whether a certain kind of buffer was a safe and proper one, allowed, in the trial Court's discretion).

Utah: 1904, Johnson *v.* Union P. C. Co., 28 Utah 46, 76 Pac. 1089 (safer way of letting rails down a mine, excluded). 1904, Meyers *v.* Highland B. G. M. Co., 28 Utah 96, 77 Pac. 347 (whether a light in a mine was necessary, sufficient, etc., not allowed; McCarty, J., diss.). 1905, Lee *v.* Salt Lake, 30 Utah 35, 83 Pac. 562 (difficulty of riding a bicycle over a depression, not allowed).

Va.: 1905, Virginia I. C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362 (whether a mode of starting a belt was dangerous, not allowed). 1907, Virginia-Carolina C. Co. *v.* Knight, — Va. — , 56 S. E. 725 (whether a snatch-block was a safe appliance, excluded).

Wash.: 1905, Lambert *v.* La Conner T. & T. Co., 37 Wash. 113, 79 Pac. 608 (whether a captain could have prevented a collision, allowed). 1906, Smith *v.* Dow, — Wash. — , 86 Pac. 555 (the proper way to tie packages, allowed).

W. Va.: 1905, Wheeling M. & F. Co. *v.* Wheeling S. & I. Co., 58 W. Va. 62, 51 S. E. 129 (certain testimony as to good faith, diligence, etc., in performing a contract, excluded under the issues).

[*Note* 1 — *continued.*]

Wis.: 1904, Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066 (whether potatoes were of good stock, etc., allowed). 1906, Hamann *v.* Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081 (whether work was done in a dangerous way, excluded; the opinion makes a well-meaning but vain effort to infuse into the rule some savor of rationality). 1906, Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077 (whether a machine was dangerous, excluded).

§ 1953. Opinion as to Foreign Law.

[*Note* 3, l. 5; *add:*]

1904, Slater *v.* Mexican Nat'l R. Co., 194 U. S. 120, 24 Sup. 581 (deposition of a Mexican lawyer to the construction of Mexican statutes, received, additionally to the agreed translation of them).
1906, *Re* International Mahogany Co., 147 Fed. 147, C. C. A. (copy of the text of a Cuban statute, held not to override the testimony of a Cuban lawyer).
1905, Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556 (construction of a Montana statute; the testimony of a Montana attorney as to the "consensus of opinion of the bench and bar of Montana," excluded; otherwise if he had testified that the Montana courts "had construed the statute in a certain manner" or "had never passed upon said statute").

§ 1955. Opinion as to Interpretation of Documents; (1) Technical Words.

[*Note* 1, par. 1; *add:*]

1906, Tubbs *v.* Mechanics' Ins. Co., — Ia. — , 108 N. W. 324 (expert opinion as to the meaning of "machinery" in a fire insurance policy, excluded).
1905, Kitchings *v.* Brown, 180 N. Y. 414, 73 N. E. 241 (meaning of "tenement house" in a deed; expert testimony admitted).
Compare the cases cited *post*, § 2464.

§ 1956. Same: (2) Location of Descriptions, etc.

[*Note* 1; *add:*]

1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (that the land described in a deed and in a declaration is the same, allowed).
1905, Brundred *v.* McLaughlin, 213 Pa. 115, 62 Atl. 565 ("Where in your opinion is the line between Nos. 83 and 84?", allowed).
1904, Baker *v.* State, — Tex. Cr. — , 83 S. W. 1122 (limits of Federal land).

§ 1957. Same: (3) Contents of a Lost Document.

[*Note* 1, par. 2; *add:*]

Compare the application of the rule requiring the production of the original, where the witness is desired to testify summarily to the *effect of a document* or to the *state of accounts therein* (*ante*, §§ 1230, 1244).

Compare also the rule that a *party may explain his meaning* in a document offered against him as an admission (*ante*, §§ 1044, 1058, *post*, § 1972).

§ 1958. Opinion as to Testator's or Grantor's or Accused's Capacity.

[*Note* 1, par. 1; *add:*]

1905, Denver & R. G. R. Co. *v.* Scott, 34 Colo. 99, 81 Pac. 763 (to a physician, "Whether S. was able to transact business, including such business as the settlement of the claim . . . for injuries from which he was suffering?", excluded; this is a bigoted application of the rule; if Courts cannot handle it any more practically than this, the whole rule will have to go by the board).
1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (whether the testator was capable of making the will, excluded; whether he was "capable of transacting ordinary business and of intelligently disposing of property," allowed; Betts *v.* Betts, *supra*, said to have been "practically overruled").
1905, Struth *v.* Decker, 100 Md. 368, 59 Atl. 727 (excluded; opinion obscure). 1906, Baugher *v.* Gesell, 103 Md. 450, 63 Atl. 1078 (Berry *v.* Safe D. & T. Co., *supra*, followed; whether the testator "was of sound and disposing mind and capable of making a valid deed or contract," excluded). 1906, Kelly *v.* Kelly, 103 Md. 548, 63 Atl. 1082 (similar; but decided on another ground, by another judge, without noticing the preceding opinion, dated the same day).
1907, Cheney's Estate, — Nebr. — , 110 N. W. 731 ("able to make" a will, not allowed).
1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 ("influence of the testator's wife over him," allowed).
1904, Peterson, *Re*, 136 N. C. 13, 48 S. E. 561 (question discussed).
1905, Nashville C. & St. L. R. Co. *v.* Brundige, 114 Tenn. 31, 84 S. W. 805 (opinion as to being "in a condition to transact business or make a contract," excluded; unsound).

[*Note* 2, par. 1; *add:*]

Accord: 1904, State *v.* McGruder, 125 Ia. 741, 101 N. W. 646.
Contra: 1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.
1906, Reed *v.* State, — Nebr. — , 106 N. W. 649 (Shults *v.* State, *supra*, followed; ignoring Pflueger *v.* State, *supra*).

[*Note* 2, l. 6:]

For "id," read "Mo."

[*Note* 2; *add* a new paragraph:]

A similar question arises for a *child's* capacity: 1906, Neville *v.* State, — Ala. — , 41 So. 1011 (larceny by a boy of ten; testimony that "he was a bright boy mentally," etc., admitted).

§ 1960. Miscellaneous Instances (Possession, etc.).

[*Note* 1; *add:*]

1906, Driver *v.* King, — Ala. — , 40 So. 315 (in possession, allowed, but not "in open and notorious possession of land").

[*Note* 2; *add:*]

1905, Rosco *v.* Jefferson, 142 Ala. 705, 38 So. 246 (title to personalty under a levy; testimony to ownership, allowed).
1903, Sparks *v.* Galena Nat'l Bank, 68 Kan. 148, 74 Pac. 619 (mining property; allowed).
1905, Hawley *v.* Bond, — S. D. — , 105 N. W. 464 ("Who was then the owner of that cow?", allowed).

[*Note* 3; *add:*]

1905, Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209 (that no deed had been received or accepted, allowed on the facts).

[*Note* 7; *add:*]

1906, Owen *v.* McDermott, — Ala. — , 41 So. 730 (owing money; allowed).
1905, Sampson *v.* Hughes, 147 Cal. 62, 81 Pac. 292 ("Did you wilfully, negligently, etc., omit to watch the fire, etc.?", excluded).
1905, Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831 (what would be a reasonable time for removing timber; not allowed).
1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (that the witness saw the defendant married by a rabbi, excluded, the validity of the marriage being in issue; why did not the Court also hold that it was matter of opinion whether the celebrant was a rabbi and the place was a synagogue?).
1905, National Fire Ins. Co. *v.* Hanberg, 215 Ill. 378, 74 N. E. 377 ("net receipts" of an insurance company, in a statute, not allowed to be interpreted by the opinion of insurance experts).
1905, State *v.* Nevada C. R. Co., 28 Nev. 186, 81 Pac. 99 (expert accountant's statement of the "net earnings" of a railroad company as shown by their books, etc., excluded, partly on this principle and partly on that of § 1230, *ante*).

§ 1963. Testimony to a State of Mind, in general, etc.

[*Note* 4; *add:*]

1907, State *v.* Bennett, — Ia. — , 110 N. W. 150 (seduction; by the prosecutrix, that she yielded because of the defendant's promises, allowed).
1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (delay in performing a contract; "He kept putting me off," allowed, on the facts).
1905, McCrohan *v.* Davison, 187 Mass. 466, 73 N. E. 553 (injury by a wagon while crossing a street; the plaintiff's testimony "I thought I would have plenty of time to pass," admitted).

§ 1966. Same: Alabama Doctrines.

[*Note* 1, par. (2), l. 7 of col. 1 on p. 2611; *add:*]

1904, Bell *v.* State, 140 Ala. 57, 37 So. 281 (P.'s opinion of defendant's state of mind, excluded). 1906, Delaney *v.* State, — Ala. — , 42 So. 815 (by a witness, that the deceased declarant "knew he was going to die," excluded). 1906, Richardson *v.* State, — Ala. — , 41 So. 82 (tracing a manslayer by hounds; on re-direct examination, "Why did the dogs leave the trail?" was not allowed, on the present ground; this is an edifying example of the dogged consistency with which this rule of superfine wisdom is here applied; presumably the dogs should have been X-rayed to ascertain their motives; inasmuch as the dogs here were named respectively "Rock" and "Rye," it might well have been inferred that they left the trail on a still hunt).

[*Note* 1, par. (3), l. 8 from the end; *add:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259 (like Holmes *v.* State). 1905, Barnewell *v.* Stephens, 142 Ala. 609, 38 So. 662 (excluding a witness' testimony to his "wish"). 1905, Sprouse *v.* Story, 144 Ala. 542, 42 So. 23 (forcible entry; to the defendant, "How came you to go into the house on the premises in dispute?", excluded; this is a farcical game). 1906, Smith *v.* State, — Ala. — , 40 So. 957 (homicide; to the defendant, by his counsel: "For what purpose did you have the pistol, etc.?" excluded; no authority cited).

[*Note* 1, par. (4), at the end; *add:*]

1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (a claimant resting on adverse possession; "whether you have been claiming to own," allowed). 1905, Carwile *v.* State, — Ala. — , 39 So. 220 (an impeached

[*Note* 1 — *continued.*]

witness may explain why he made certain statements). 1906, Reeder *v.* Huffman, — Ala. — , 41 So. 177 (constable's failure to execute a writ; to a witness, "Would you have told the constable, etc., if he had inquired?", excluded; no authority cited). 1906, Lawrence *v.* Doe, 144 Ala. 524, 41 So. 612 (adverse possession by defendant; to the defendant, "Why did you not pay the taxes?", excluded; this rule is certainly a successful device for suppressing the truth). 1906, Western Union T. Co. *v.* Long, — Ala. — , 41 So. 965 ("Why did you not give the telegram to your brother?", excluded).

§ 1967. Rules of Substantive Law, distinguished.

[*Note* 1; *add:*]

So too for an act of *adverse possession:* 1905, Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524 (a claimant going upon the land claimed; "the secret and undisclosed intention of the witness was immaterial").

Compare here the *res gestæ* rule (*ante*, § 1778).

[*Note* 3; *add:*]

1907, State *v.* Simmons, — N. C. — , 56 S. E. 701 (carrying a concealed weapon).

[*Note* 4; *add:*]

1906, Anderson *v.* Metrop. Stock Exchange, 191 Mass. 117, 77 N. E. 706 (statutory recovery for stock gambling; the defendant's manager's private intent, held immaterial).

§ 1969. Testimony to the Meaning of a Conversation, etc.

[*Note* 1, par. 1; *add:*]

1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838 (rape; whether the witness "understood" from what the prosecutrix said and did, that she had been raped, excluded).

[*Note* 2, par. 1; *add:*]

1905, Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384 (joint purchase of coal; the "understanding" of one of the purchasers as to the ownership, admitted).

§ 1971. Same: Rules of Substantive Law, distinguished.

[*Note* 3; *add:*]

1905, Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473 (wagering contract for wheat; the intent of one party only, held immaterial).
1904, Downing *v.* Buck, 135 Mich. 636, 98 N. W. 388 (brokerage).

[*Note* 5, par. 1; *add:*]

1903, Green *v.* Miller, 33 Can. Sup. 193.
1906, Goldborough *v.* Orem, 103 Md. 671, 64 Atl. 36.

§ 1974. Corporal Appearances of Persons and Things.

[*Note* 1, par. 1; *add:*]

Ala.: 1905, Tagert *v.* State, 143 Ala. 88, 39 So. 293 (that a person appeared angry or surprised, allowable). 1905, Dillard *v.* State, — Ala. — , 39 So. 584 ("looked like a bottle of wine," allowed). 1906, Sims *v.* State, — Ala. — , 41 So. 413 ("seemed excited and looked like she had been crying," allowed).
Conn.: 1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (whether a testator spoke affectionately or otherwise). 1905, Nichols *v.* Wentz, 78 Conn. 429, 62 Atl. 610 (whether E. did or said anything indicating an attempt at coercion of a testator, allowed).
Ga.: 1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 ("appeared to be excited," etc., allowed).
Ill.: 1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (whether cracks in boiler-bolts appeared old, allowed).
Ia.: 1905, Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475 (whether snow appeared as if a person had fallen, allowed). 1905, Kuhlman *v.* Wieben, 129 Ia. 188, 105 N. W. 445 (intoxicated; allowed). 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (seduction; one who had seen the parties often in company was asked how they acted, and answered, "They acted like lovers"; held properly excluded; here again a peddling-out of machine-made law, not fit for even the bargain-counter of Justice; this ruling rivals that of State *v.* Brown, *supra*, and shows no improvement of attitude in the fourteen years' interval).
La.: 1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (whether the accused looked scared, etc., allowed).
Mass.: 1905, Wolfe *v.* N. B. Cordage Co., 189 Mass. 591, 76 N. E. 222 (visual difference between iron and steel; not allowed).
Mich.: 1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (whether a patient "flinched," etc., at the touch, excluded). 1905, McCormick *v.* Detroit G. H. & M. R. Co., 141 Mich. 17, 104 N. W. 390 (whether a patient appeared to be feigning illness, excluded).
Minn.: 1904, Clarke *v.* Phila. & R. C. & I. Co., 92 Minn. 418, 100 N. W. 231 (intoxication, excluded on the facts).
Mont.: 1906, State *v.* Trueman, — Mont. — , 85 Pac. 1024 (intoxication; allowed).
Pa.: 1907, Com. *v.* Eyler, — Pa. — , 66 Atl. 746 (intoxication; allowed).

§ 1975. Medical and Surgical Matters.

[*Note* 1; *add:*]

1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 (how recently a wound had been made, allowed).
1906, Swygart *v.* Willard, — Ind. — , 76 N. E. 755 (the effect of increase of drinking upon the testator, allowed).
1904, Boyer *v.* Chicago, R. I. & P. R. Co., 123 Ia. 248, 98 N. W. 764 (whether a mare was with foal, allowed).
1906, McDonald *v.* City El. R. Co., 144 Mich. 379, 108 N. W. 85 (how much a man's ability to labor was reduced, allowed, for a physician).

§ 1976. Probability and Possibility; Capacity and Tendency; Cause and Effect.

[*Note* 1; *add:*]

Ala.: 1904, Kroell *v.* State, 139 Ala. 1, 36 So. 1025 (whether a quick succession of shots could have been fired by the same person, allowed). 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (that a wound was fatal, allowed). 1904, Dixon *v.* State, 139 Ala. 104, 36 So. 784 (whether defendant's physical condition was such that he could have travelled, killed G., etc., allowed). 1904, Nickles *v.* State, — Ala. — , 37 So. 312 (whether there was time to return from a place, not allowed). 1904, Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702 (how far a headlight could have been seen, allowed). 1906, Foley *v.* Pioneer M. & M. Co., 144 Ala. 178, 40 So. 273 (cause of death, allowed). 1907, Dupree *v.* State, — Ala. — , 42 So. 1004 (whether it was possible to break a lock in a certain way, not allowed).
Fla.: 1904, Clemons *v.* State, 48 Fla. 9, 37 So. 647 (whether a wound could have been caused by a fist, allowed).
Ga.: 1904, Central of Ga. R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641 (whether a man could work at a place without seeing a certain thing, excluded). 1904, Moran *v.* State, 120 Ga. 846, 48 S. E. 324 (whether a weapon was one likely to produce death, the weapon being in court, excluded).
Ill.: 1904, Illinois C. R. Co. *v.* Smith, 208 Ill. 608, 70 N. E. 628 (to a physician, whether the twisting of the plaintiff's foot had been caused by an even or an uneven surface, held improper, chiefly on the ground that it asked what "did cause," not what "might have caused"; this is a good example of that legal quibbling which creates for the law of trials a disrespect in the minds of competent physicians). 1907, Chicago *v.* Didier, — Ill. — , 81 N. E. 698 (whether the injury was produced by the alleged cause, and not merely could or might have been, allowed; cases reviewed). 1907, Chicago Union T. Co. *v.* Ertrachter, — Ill. — , 81 N. E. 816 (Chicago *v.* Didier followed).
Ia.: 1905, Rietveld *v.* Wabash R. Co., 129 Ia. 249, 105 N. W. 515 (whether a railroad track could be seen, allowed). 1906, Martin *v.* Des Moines E. L. Co., — Ia. — , 106 N. W. 359 (death of an employee in an electric light plant; the defendant claimed that heart disease caused death; a question to an expert, whether the deceased "received an electrical shock before he fell" was held improper; this ruling reaches an extreme of artificial aridity of law; such decisions show the need of a spiritual irrigation-law, for re-distributing the fountains of Justice). 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (State *v.* Peterson, *supra*, followed; whether conception would be probable upon first intercourse, excluded).
Kan.: 1905, Sun Ins. Office *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (whether wet wool was capable of spontaneous combustion, allowed).
Mass.: 1904, Baxter *v.* Gormley, 186 Mass. 168, 71 N. E. 575 (by a complainant in bastardy, that the defendant was the father of her child, allowed). 1905, Gomes *v.* New Bedford Co., 187 Mass. 124, 72 N. E. 840 (whether one's hand could be caught in a gear, if covered, allowed). 1906, Erickson *v.* American S. & W. Co., — Mass. — , 78 N. E. 761 (cause of bursting of a steam-pipe, allowed).
Mich.: 1885, Geveke *v.* G. R. & I. R. Co., 57 Mich. 277, 24 N. W. 675 (what caused a horse's fright, allowed). 1894, McCullough *v.* R. Co., 101 Mich. 234, 59 N. W. 618 (same). 1905, Foster *v.* East Jordan L. Co., 141 Mich. 316, 104 N. W. 617 (what caused a horse's fright, allowed).
Mo.: 1904, Wood *v.* Metropolitan St. R. Co., 181 Mo. 433, 81 S. W. 152 (whether an injury was the cause of a disease, allowed; good opinion by Gantt, P. J.). 1904, Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26 (similar). 1905, Taylor *v.* Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873 (whether certain injuries "might, could, or would result in paralysis," allowed, but not whether, in the particular patient as examined by the physician, the injuries *were* the cause of paralysis; this quibble is justified by the following refined distinction: "To the trained legal mind there is a very essential difference between permitting an expert to give an opinion and permitting him to draw a conclusion"; to which it may be said that if the "trained legal mind" signifies one which has been infected by the rabies of such quibbling, then the community now urgently needs a Pasteur process which shall stay the ravages of such an affliction in the profession). 1905, Glasgow *v.* Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915 (corporal injury; "it was competent for the learned witnesses to state what cause or causes *might* produce such a result, . . . but it was incompetent for them to say that in this case the plaintiff's condition *was* in their opinion the result of the alleged fall," and then a long critique on the tweedledum and tweedledee of this distinction; it is singular that learned judges become so absorbed in the wild fancies of the Opinion rule that their common sense is buried for the purposes of justice; such doctrines are as remote from the practical ends of a rational system of present-day trials as the howl of the Athabasca wolves from the clang of the St. Louis street-cars).
Nebr.: 1905, Horst *v.* Lewis, 71 Nebr. 365, 103 N. W. 460 (whether wounds were sufficient to cause death, allowed).
N. Mex.: 1905, Miera *v.* Terr., — N. M. — , 81 Pac. 586 (that a wound was not self-inflicted, allowed).
N. D.: 1904, Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183 (cause of a coupling's breaking, not allowed).
N. Y.: 1905, Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491 (cause of a derailment, excluded; whether a car could leave the track if properly laid, etc., not allowed).

[*Note* 1 — *continued.*]

Or.: 1906, State *v.* White, — Or. — , 87 Pac. 137 (what caused an injured man's condition, allowed).
S. C.: 1903, Riser *v.* Southern R. Co., 67 S. C. 419, 46 S. E. 47 (whether a certain shock produced a certain injury, excluded). 1905, Biggers *v.* Catawba P. Co., 72 S. C. 264, 51 S. E. 882 (whether the danger could have been avoided, etc., allowed). 1906, Nickles *v.* Seaboard A. L. R. Co., 74 S. C. 102, 54 S. E. 254, 255 (cause of a derailment, excluded). 1906, Fitzgerald *v.* Langley Mfg. Co., 74 S. C. 232, 54 S. E. 373 (cause of the shifting of a pulley-belt, excluded).
S. D.: 1905, Klingaman *v.* Fish & H. Co., — S. D. — , 102 N. W. 601 (how long an injured condition would continue, allowed).
Va.: 1904, Norfolk R. & L. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502 (probable effect of a corporal injury, allowed).
Wis.: 1904, Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311 (cause of a disease, allowed). 1904, Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051 (that injuries "were liable to be permanent," allowed).

§ 1977. Distance, Time, Speed, Size, Weight, Direction, Form, Identity, etc.

[*Note* 2; *add,* under *Distance and Size:*]

1905, State *v.* Voorhies, 115 La. 200, 38 So. 964 (how far the gun was from the deceased, allowed).
1905, Turley *v.* State, — Nebr. — , 104 N. W. 934 (comparative size of boot-tracks, allowed).

[*Note* 2; *add,* under *Speed:*]

1903, Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166 ("it looked very fast," allowed).
1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (of a street car, allowed). 1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (that a horse "ran fast and was wild," allowed). 1906, Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577 (that a car was going "at full speed," allowed).
1906, Cook *v.* Stimson M. Co., 41 Wash. 314, 83 Pac. 419 (speed of a train, excluded).

[*Note* 2; *add,* under *Direction:*]

1904, Wilson *v.* U. S., 5 Ind. Terr. 610, 82 S. W. 924 (position of an arm when wounded, excluded).
1905, Miera *v.* Terr., — N. M. — , 81 Pac. 586 (that the victim shot must have been sitting down, allowed).

[*Note* 2; *add,* under *Identity.*]

1906, DuBose *v.* State, — Ala. — , 42 So. 862 (that certain tracks were the defendant's, excluded).
1906, People *v.* Gray, 148 Cal. 507, 83 Pac. 707 (that a person's description tallied, excluded on the facts).
1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (buggy-tracks). 1905, Jordan *v.* State, 50 Fla. 94, 39 So. 155 (person).
1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (shoes). 1906, State *v.* Graham, 116 La. 779, 41 So. 90 (of shoe-tracks).
1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (spots on clothing).
1905, State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123 (police officer's identification of defendants from a description by the person robbed, excluded).
1905, Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113 (accused).

In *Texas* there is a pretty body of law about testimony *identifying by foot-tracks;* it is as curious and as interesting as some of the quaint rituals of the Aztec priesthood; the following opinions collect some of the cases:
1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (similarity of boot-tracks, excluded, but here because the witness had not sufficiently observed, on the principle of § 660, *ante*).
1906, Porch *v.* State, — Tex. Cr. — , 99 S. W. 102.

§ 1978. Miscellaneous Topics of Testimony.

[*Note* 1; *add:*]

1905, Baker *v.* Cotney, 142 Ala. 566, 38 So. 130 (how much cotton a tract produced, allowed).
1905, Atchison, T. & S. F. R. Co. *v.* Watson, 71 Kan. 696, 81 Pac. 499 (usual shrinkage of cattle-weight in transit, allowed).
1905, State *v.* Olson, 95 Minn. 104, 103 N. W. 727 (whether a liquor was intoxicating, allowed).
1905, Earp *v.* State, — Miss. — , 38 So. 288 (that the insane do not kill for money, not allowed).
1904, Willis *v.* W. U. Tel. Co., — N. C. — , 48 S. E. 538 (how much anguish, etc., he suffered from non-receipt of a telegram, not allowed).
1904, Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886 (whether a colt was sired by a particular horse, allowed).
1906, Leatherman *v.* State, — Tex. Cr. — , 95 S. W. 504 (indictment for vagrancy as a professional gambler; whether he was a professional gambler, excluded).

§ 1983. Opinion as to Moral Character of Accused, etc.

[*Note* 1, par. 1, *add:*]

1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (People *v.* Wade approved).
1905, People *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005 (disbarment; a statement signed by numerous judges that the respondent "was never fined, rebuked, or censured" by any of them, and that his "professional

[*Note* 1 — *continued.*]

character was never assailed to their knowledge," held to relate only to the "personal knowledge or personal belief of the signers," and to be therefore inadmissible.
1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (State *v.* Sterrett, followed).
1906, State *v.* Simmons, — Kan. — , 88 Pac. 57 (personal opinion inadmissible; certain forms of expression passed upon).
1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (personal knowledge, excluded; People *v.* Turney not cited).

[*Note* 1; *add,* at the *end:*]

The question, "Do you believe that the defendant (or, a man of his character) would be likely to commit an act of the kind here charged?", which was usual in the early orthodox English practice (as seen *ante,* § 1981, par. *b,* n. 3, and § 59, n. 2), would be equally forbidden by the American opinion rule as above accepted; a few cases showing this are cited *ante,* § 59, n. 3.

§ 1984. Character for Care, Competence, etc.

[*Note* 3; *add:*]

1905, First Nat'l Bank *v.* Chandler, 144 Ala. 286, 39 So. 822 (whether an employee was "a wide-awake, attentive boy," allowed).
1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 277, 68 C. C. A. 26, *semble* (fellow-servant's character, admissible).
1905, Purkey *v.* Southern C. & T. Co., 57 W. Va. 595, 50 S. E. 755 (opinion as to the competency of a mine-boss, excluded).

[*Note* 4, par. 1; *add:*]

1905, Cleveland *v.* Martin, 218 Ill. 73, 75 N. E. 772 (injunction by medical author to restrain the publication of a book as not equal to contract and as likely to damage the plaintiff's repute; the opinions of medical men as to the probable or actual injury to repute by the publication were admitted).

§ 1985. Witness' Moral Character.

[*Note* 1; *add:*]

1907, Mitchell *v.* State, — Ala. — , 42 So. 1014 (like Crawford *v.* State).
1906, Maloy *v.* State, — Fla. — , 41 So. 791 (personal opinion, excluded).
1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (belief on oath, not founded on a knowledge of general character, excluded).
1907, State *v.* Blackburn, — Ia. — , 110 N. W. 275 (rape under age; "Do you know her general moral character in the neighborhood?", referring to the prosecuting witness, held an improper form of question).

§ 2004. Lay Testimony to Handwriting Specimens, etc.; Excluded in general, etc.

[*Note* 1; *add:*]

1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65.

§ 2008. Expert Testimony; Whether Admissible, etc.

[*Note* 1; *add:*]

Ala.: 1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (Gibson *v.* Trowbridge F. Co. followed).
Ga.: 1906, Patton *v.* Bank, 124 Ga. 965, 53 S. E. 664 (note; comparison with other signatures admitted genuine and in evidence, allowed).
Ky.: 1907, Pulliam *v.* Sells, — Ky. — , 99 S. W. 289 (comparison allowed with signatures admitted by opponent on the stand to be genuine).
S. Dak.: 1906, McClellan's Estate, — S. D. — , 107 N. W. 681 (expert comparison of photographic reproductions of certain papers with "proved signatures," held not improper on the facts).
U. S.: 1904, Withaup *v.* U. S., 127 Fed. 530, 535, 62 C. C. A. 328 (comparison allowable "if a paper is in evidence in the case for some other purpose, and is admitted or satisfactorily proven to be" genuine, or if a paper is filed by a party and is part of the record of which the Court takes judicial notice; this is said to be "clearly established" (?) as the "common-law rule"; here, four papers in a former case were excluded, and two recognizances in the case at bar were admitted).

§ 2012. Qualifications of the Expert as to Skill.

[*Note* 3; *add:*]

1904, State *v.* Burns, 27 Nev. 289, 74 Pac. 983 (bank teller).
1905, Abernethy *v.* Yount, 138 N. C. 337, 50 S. E. 696 (clerk of court).

§ 2015. Modes of Testing the Opinion on Cross-Examination.

[*Note* 2; *add:*]

1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (a witness to handwriting, not an expert, not allowed to be tested by other specimens; apparently an over-strict ruling; no authority cited).
1905, Jacobs *v.* Boston El. R. Co., 188 Mass. 245, 74 N. E. 349 (a witness allowed to be asked on cross-examination to make a sample signature; the precise point of the ruling is however not ascertainable from the opinion).
1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (showing a signature only; the witness' insistence on seeing the whole of the document, held proper).
1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843 (testing an expert by proof of his mistakes as to selected signatures; Hoag *v.* Wright approved; but the trial Court's refusal here to allow the tests was held distinguishable, and in any event harmless error).
1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (alleged forgery of a note; non-expert witnesses testifying from knowledge of the handwriting, allowed to be tested by signatures shown through slits in envelopes and the witnesses' mistakes allowed to be proved; on the facts, the showing of the signature alone was held proper).
1904, Wilmington S. Bank *v.* Waste, 76 Vt. 331, 57 Atl. 241 (cross-examination by testing with specimens "conceded or proved to be genuine," allowable).

§ 2016. Jury's Perusal of Specimens; Whether allowable, etc.

[*Note* 1; *add:*]

Yukon St. 1904, c. 5, § 33 (like Eng. St. 1854, c. 125, § 27).
Ala.: 1905, Washington *v.* State, 143 Ala. 62, 39 So. 388. 1906, Bolton *v.* State, — Ala. — , 40 So. 409 (forgery of a check; other specimens, not otherwise in the case and not shown genuine, excluded).
Cal.: 1906, Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. 244 (breach of contract assigned to plaintiff; plea, release; the assignment offered by the plaintiff was allowed to be used by the defendant for the jury's inspection in determining the genuineness of the release, without any further evidence; Cooper, J., diss.).
Fla.: 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (forging of school warrants; Rev. St. 1892, § 1121, held applicable to criminal cases; under this statute, specimens of the forger's writing, and not merely of that of the person whose name is forged, are admissible; repudiating the doctrine of Peck *v.* Callaghan, N. Y.).
Ga.: 1904, Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348 (other specimens, including that of an affidavit to the plea, admitted).
Ida.: 1905, State *v.* Seymour, 10 Ida. 699, 79 Pac. 825 (Bane *v.* Gwinn followed).
Kan., 1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (State *v.* Stegman followed).
Ky.: 1907, Howard *v.* Creech, — Ky. — , 101 S. W. 974 (statute applied).
Mich.: 1906, People *v.* Tollefson, 145 Mich. 449, 108 N. W. 751 (forgery; hotel register, admitted for comparing accused's signature, no proper objection being made).
Mo.: 1907, State *v.* Stark, — Mo. — , 100 S. W. 642 (Rev. St. 1899, § 4679 applied, on an issue of a forged deed).
N. C.: 1906, Shelton's Will, — N. C. — , 55 S. E. 705 (Fuller *v.* Fox followed).
Pa.: 1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (statute applied, to allow comparisons for jury and experts).
S. D.: 1904, State *v.* Coleman, 17 S. D. 594, 98 N. W. 175 (whether writings proved or admitted genuine may be used, though not otherwise evidence in the case; not decided). 1905, Mississippi L. & C. Co. *v.* Kelly, — S. D. — , 104 N. W. 265 (a writing "admitted or proved" genuine is admissible, though not otherwise in the case).
Tex.: 1904, Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28 (perjury in an affidavit; to identify the defendant as the signer, an application for witness-process, signed by him, was admitted for the jury's inspection, without calling experts; loose opinion, citing only two of the above cases).
U. S.: 1904, Withaup *v.* U. S., 127 Fed. 530, 535, 62 C. C. A. 328 ("where a comparison is permissible, it may be made by the Court and jury, with or without the aid of expert witnesses"; cited more fully *post*, § 2016).
Ut.: 1906, State *v.* McBride, 30 Utah 422, 85 Pac. 440 (rule of Tucker *v.* Kellogg accepted).
Va.: 1904, Johnson *v.* Com., 102 Va. 927, 46 S. E. 789 (forgery of wife's will; specimens of defendant's and wife's writing, proved to be genuine, admitted).

§ 2017. Ancient Documents.

[*Note* 1; *add:*]

1822, Cantey *v.* Platt, 2 McCord 260.
1906, McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978 (an ancient letter; comparison with ancient official records by the same alleged author, admitted).

§ 2018. Unfair Selection of Specimens.

[*Note* 5; *add:*]

1906, Greenwald *v.* Ford, — S. D. — , 109 N. W. 516 (checks; a signature made since the time of the signature in dispute is not thereby inadmissible, unless "manufactured since the controversy arose, for the purpose of comparison, by one having a motive to fabricate").

§ 2020. Specimens "Proved" Genuine; Mode of Proof.

[*Note* 3, par. 1; *add:*]

1906, State *v.* McBride, 30 Utah 422, 85 Pac. 440 (testimony of the prosecutrix based only on the defendant's oral admissions of authorship, without other evidence, held insufficient; Straup, J., diss., and correctly, because the present question was strictly not involved, but that of § 699, *ante*).

[*Note* 3, par. 2; *add:*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (the "equivalent evidence" which may serve instead of "direct evidence" may be circumstantial, and must merely not be opinion testimony resting solely on "comparison with another standard or with an exemplar in his own mind"; here, certain sale-slips were held sufficiently proved).

In Massachusetts it is now also further maintained, in accordance with the heterodox views of that Court in analogous questions (*ante*, § 861, *post*, § 2550), that the trial Court's ruling admitting proved specimens is *provisional only*, and that the jury may in criminal cases further reconsider and may reject the specimens as not genuine: 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.

§ 2021. Specimens "Admitted" to be Genuine.

[*Note* 1; *add:*]

1906, Stark *v.* Burke, — Ia. — , 109 N. W. 206 (the witness' "admission" of genuineness is not the party's, so as to entitle the document to be treated as one conceded to be genuine).

[*Note* 2; *add:*]

1905, Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358 (defendant's own signed answer in the cause, admitted, since a statute required every pleading to be signed by himself or his attorney).
Contra: 1906, State *v.* Branton, — Or. — , 87 Pac. 535 (letters orally admitted by the defendant to be his, in conversation with a witness, were apparently held admissible, under a statute receiving writings "admitted or treated as genuine").

§ 2024. Expert Testimony to Ink, Paper, Spelling, etc.

[*Note* 2; *add:*]

1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (marks left by a defective typewriter).

[*Note* 3; *add:*]

1886, Scott *v.* Crerar, 11 Ont. 541, 14 Ont. App. 152 (cited more fully *ante*, § 87).
1840, Brown *v.* Kimball, 25 Wend. 259, 261, 272 (a deed dated 1770, on a printed form ending "Commonwealth aforesaid," the land being in Massachusetts; evidence that Massachusetts was always described in deeds up to 1780 as a "Province" or "State," but not a "Commonwealth," used to show that the deed was a later forgery).
On all the above points, compare also the citations *ante*, § 570.

§ 2026. Imitations, Forgeries.

[*Note* 3, par. 1; *add:*]

1905, McGarry *v.* Healey, 78 Conn. 365, 62 Atl. 671 (whether a disguised hand would show the original characteristics, etc.).
Ind. St. 1905, p. 584, § 238 (Rev. St. 1697, § 1892, re-enacted).
1907, Rinker *v.* U. S., 151 Fed. 755, 760, C. C. A. (whether the hand was genuine or disguised).
1905, Colbert *v.* State, 125 Wis. 423, 104 N. W. 61 (whether a specimen is in normal handwriting).

§ 2032. History of Rules of Number.

[*Note* 22, par. 2, p. 2702; *add:*]

1672, Conn. Revision, p. 69 ("It is ordered by this Court that no person for any fact committed shall be put to death without the testimony of two or three witnesses, or that which is equivalent thereunto"; this is still the law in Connecticut; *post*, § 2044, n. 1).

§ 2034. General Principle; One Witness may Suffice, etc.

[*Note* 1, par. 1; *add:*]

Okl. Stats. 1903, § 68, art. 10.
The same language is sometimes expressly used by Courts:
1904, St. Louis & O. R. Co. *v.* Union T. & S. Bank, 209 Ill. 457, 70 N. E. 651.
1904, Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571 ("The preponderance of evidence does not depend upon the number of witnesses"; citing cases).
There is a peculiar and absurd quibble in Wisconsin, which hangs mediæval cobwebs once more over the jury's mind in instructing them as to the preponderance of proof (*post*, § 2498): 1905, Garske *v.* Ridgeville,

[*Note* 1 — *continued.*]

123 Wis. 503, 102 N. W. 22 (the trial Court charged that the preponderance "is not to be determined by the number of witnesses on either side, or by the number of witnesses on any particular material point"; this is held erroneous, by weird logic, not worth here repeating).

[*Note* 2, l. 2; *add:*]

1904, Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 689.
1906, Alexander *v.* Blackman, 26 D. C. App. 541, 544.
1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416.
1905, Chicago Union T. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341 (there is no presumption "that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses").

This loose and futile but not uncommon heresy that an unimpeached or uncontradicted witness must be believed is illustrated in the following opinions:
1905, Keene *v.* Behan, 40 Wash. 505, 82 Pac. 884.

§ 2036. Treason; History of the Rule.

[*Note* 20, p. 2716, l. 7; *insert:*]

now reprinted in "Select Essays in Anglo-American Legal History," vol. I (1907; Ass'n of American Law Schools).

[*Note* 20, at the end; *add:*]

Similar evidence will be found in the learned essay of Professor Edward Jenks, The Constitutional Experiments of the Commonwealth (1890), pp. 54, 82.

§ 2039. Same: Constitutional Sanctions.

[*Note* 2; *add:*]

Ind. St. 1905, p. 584, § 247.

§ 2042. Perjury: (*c*) A Single Witness, if Corroborated, Suffices.

[*Note* 4; *add:*]

Cal. St. 1903, c. 532 (adds a new P. C. § 1103*a*, like the last clause of C. C. P. 1872, § 1968, *supra*).
1906, Cleveland *v.* State, — Tex. Cr. — , 95 S. W. 521 (the witness must be a "credible" one).

[*Note* 5; *add:*]

1906, People *v.* Chadwick, — Cal. App. — , 87 Pac. 384 (instruction construed).
1905, Cook *v.* U. S., 26 D. C. App. 427.
1892, Com. *v.* Davies, 92 Ky. 460, 18 S. W. 10 (rule applied).
1905, Goslin *v.* Com., — Ky. — , 90 S. W. 223 (rule applied).
1907, Stamper *v.* Com., — Ky. — , 100 S. W. 286 (rule applied).
1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955 (State *v.* Heed followed).
1905, State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123 (the corroboration need not be "of equal weight" to another witness).

It has very sensibly been held that if the *defendant himself* takes the stand, his manner as a witness may sufficiently supply the corroboration, of which the jury alone judges; so that the rule virtually falls away:
1884, State *v.* Miller, 24 W. Va. 802, 807.

[*Note* 6; *add:*]

Accord: 1887, U. S. *v.* Thompson, 31 Fed. 331, C. C. (subornation of perjury; the perjurer's testimony need not be corroborated).
1906, Boren *v.* U. S., 144 Fed. 801, 805, C. C. A., *semble* (subornation of perjury; the rule does not apply).
Contra: 1869, People *v.* Evans, 40 N. Y. 1 (subornation of perjury; the testimony of the perjurer, testifying to both perjury and subornation, required to be corroborated; the opinion proceeds upon the rule as to accomplices, *post*, § 2056).

[*Text*, p. 2725; *add* a new paragraph (5)]:

(5) The rule should not apply necessarily to a charge of *subornation of perjury*, because the act of subornation does not involve the theory of oath against oath, and the perjury may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution.[10]

[10] Cases cited *supra*, n. 6, and *post*, § 2060, n. 1 (rule for accomplices).

§ 2043. Same: (*d*) Exception for Contradictory Oaths.

[*Note* 2; *add,* under *Contra:*]

1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955.
1889, State *v.* Buckley, 18 Or. 228, 22 Pac. 838.

[*Note* 3, par. 1; *add,* under *Contra:*]

1906, Billingsley *v.* State, — Tex. Cr. — , 95 S. W. 520 (there must be other evidence than the contradictory oath).
1876, Schwartz *v.* Com., 27 Gratt. 1025 (leading opinion, by Staples, J.).

§ 2044. Sundry Crimes, under Statutes.

[*Note* 1; *add:*]

Ont.: 1906, R. *v.* Daun, 12 Ont. L. R. 227, 231 (rule of Dom. Crim. Code, § 684, *supra,* applied, in a charge of seduction).
Cal. St. 1905, c. 532 (amends P. C. 1872, § 1110, as to the crimes covered).
1905, State *v.* Marx, 78 Conn. 18, 60 Atl. 690 (the trial Court need not define the meaning of "equivalent thereto," under the above statute).
Ind. St. 1905, p. 584, § 238 (phraseology of Rev. St. 1897, § 1892, amended; larceny is an exception).

§ 2046. Divorce Charge denied.

[*Note* 4; *add:*]

1904, Lenoir *v.* Lenoir, 24 D. C. App. 160, 165 (cited *post,* § 2067, n. 10).
1904, Cotter *v.* Cotter, — N. J. Eq. — , 58 Atl. 73.
1905, Wood *v.* Wood, — N. J. Eq. — , 62 Atl. 429.
1905, Sabin *v.* Sabin, — N. J. Eq. — , 59 Atl. 627.
1905, Hunt *v.* Hunt, — N. J. Eq. — , 59 Atl. 642.

[*Note* 6, par. 2; *add:*]

1898, Andrews *v.* Andrews, 120 Cal. 186, 52 Pac. 208 (nature of corroboration, defined).
1905, Avery *v.* Avery, 148 Cal. 239, 82 Pac. 967 (similar).

§ 2047. Chancery Bill denied by Defendant's Oath.

[*Note* 4, par. 1; *add* under *Rule Applied:*]

1906, Northwest E. I. Co. *v.* Campbell, 28 D. C. App. 483, 493.
1904, Parken *v.* Safford, — Fla. — , 37 So. 567.
1904, Evans *v.* Evans, — N. J. Eq. — , 59 Atl. 564.
1904, McGary *v.* McDermott, 207 Pa. 620, 57 Atl. 46.
1881, Vigel *v.* Hopp, 104 U. S. 441. 1885, Conly *v.* Nailor, 118 U. S. 127, 6 Sup. 1001. 1892, Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 Sup. 217. 1903, Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598.
1906, Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941 (but here the rule is emasculated by declaring that "circumstantial evidence may take the place of the testimony of one *or both* witnesses, if of equal weight and credibility").

[*Note* 4, par. 1; *add,* under *Repudiated:*]

1904, Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 So. 800 (apparently qualifying Rush *v.* Landers).

§ 2048. Wills, etc., in Pennsylvania.

[*Note* 8; *add:*]

1884, Combs' Appeal, 105 Pa. 155.
1893, Simrell's Estate, 154 Pa. 604, 26 Atl. 599.
1899, McKenna *v.* McMichael, 189 Pa. 440, 42 Atl. 14.
1906, Michell *v.* Low, 213 Pa. 526, 63 Atl. 246.
1906, Fallon's Estate, 214 Pa. 584, 63 Atl. 889.

§ 2050. Nuncupative Wills.

[*Note* 5; *add:*]

1905, Godfrey *v.* Smith, — Nebr. — , 103 N. W. 450 (statute applied).

[*Note* 5; *add:*]

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148).

§ 2051. Holographic Wills, etc.

[*Note* 2; *add:*]

N. C. Rev. 1905, §§ 3113, 3115, 3127 (like Code 1883, §§ 2136, 2176).

§ 2052. Contents of a Lost Will.

[*Note* 3; *add:*]

1906, Inlow *v.* Hughes, — Ind. App. — , 76 N. E. 763 (all the provisions to be established must be proved by two witnesses, in the absence of a written copy proved).

Compare the rules for *restoring the record of lost documents*, including wills (*ante*, § 1660).

§ 2053. Usage or Custom.

[*Note* 2; *add:*]

1906, Biggs *v.* Langhammer, 103 Md. 94, 63 Atl. 198, *semble* (marine charter).
1906, McDonough *v.* Boston El. R. Co., 191 Mass. 509, 78 N. E. 141.
1905, Penland *v* Ingle, 138 N. C. 456, 50 S. E. 850 (brokerage custom).

[*Note* 3, par. 2; *add:*]

and what *degree of certainty* must be reached in the proof (*post*, § 2498).

§ 2054. Local Rules in Miscellaneous Civil Cases.

[*Note* 1; *add:*]

1904, Pioso *v.* Bitzer, 209 Pa. 503, 58 Atl. 891 (rule applied).

[*Note* 4, par. 1; *add:*]

Perhaps also in *New Jersey:* 1905, Wilson *v.* Terry, — N. J. Eq. —, 62 Atl. 310 (apparently approving this rule for a deed absolute intended as a mortgage).

Compare the cases cited *post*, § 2498, n. 17 (proof beyond a reasonable doubt).

[*Text*, par. (2), at the end; *add:*]

It has been held in a few jurisdictions that a *claim against a decedent's estate* cannot be sufficiently established by the decedent's *oral admissions* alone.[4a]

[4a] 1906, Clarke *v.* Roberts' Estate, — Colo. — , 87 Pac. 1077.
1855, Wilder *v.* Franklin's Ex'r, 10 La. An. 279.
1883, Bodenheimer *v.* Bodenheimer's Ex'r, 35 La. An. 1005.
1855, Portis *v.* Hill, 14 Tex. 69.
Compare the rule for *corroboration of a survivor* (*post*, § 2065).

In *Arkansas*, by an analogous rule, a *wife's testimony* to the consideration of a parol consideration for a *conveyance* to her from the *insolvent husband* must be corroborated in chancery.[4b]

[4b] 1905, Davis *v.* Yonge, — Ark. — , 85 S. W. 90, *semble*. 1905, Waters *v.* Merrit P. Co., — Ark. — , 88 S. W. 878 ("by some other evidence of the existence of a valid debt").

[*Note* 5; *add:*]

Cal. St. 1903, c. 364 (substituting a new chapter in the Political Code, for a lunacy commission; § 2169 provides that on a proceeding to commit, the judge "must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge").
La.: 1904, Hannay *v.* New Orleans C. Exchange, 112 La. 998, 36 So. 831 (Code rule applied). 1905, Morris *v.* Pratt, 114 La. 98, 38 So. 70.

§ 2056. Uncorroborated Accomplice; History and Present State of the Law.

[*Note* 6; *add:*]

1904, State *v.* Carey, 76 Conn. 342, 56 Atl. 632 (leading opinion, by Hamersley, J.).
1905, Caldwell *v.* State, 50 Fla. 4, 39 So. 188 (murder).
1904, Tong Kai *v.* Terr., 15 Haw. 612 (bribery).
1906, Juretich *v.* People, 223 Ill. 484, 79 N. E. 181 (false pretences).
1904, State *v.* Hauser, 112 La. 313, 36 So. 396.

[*Note* 6 — *continued.*]

1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560. 1906, Com. *v.* Phelps, — Mass. — , 78 N. E. 741.
1904, State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398 (murder). 1904, State *v.* Simon, 71 N. J. L. 142, 58 Atl. 109.
1903, State *v.* Register, 133 N. C. 746, 46 S. E. 21.
1887, U. S. *v.* Thompson, 31 Fed. 331, C. C. 1905, Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law).
1901, State *v.* Harras, 25 Wash. 416, 65 Pac. 774 (State *v.* Coates followed). 1905, State *v.* Pearson, 37 id. 405, 79 Pac. 985 (refusal to give a long instruction requiring corroboration under certain circumstances, held error; the opinion barks back to Edwards *v.* State, throws doubt on the intervening rulings, and then culpably declines to lay down any rule; a good example of the kind of cobwebby judicial opinion often spun out by Courts who apparently are thinking more of arachnidial athletics than of the demands of plain certainty in criminal justice).
1894, State *v.* Juneau, 88 Wis. 180, 59 N. W. 580. 1905, Murpby *v.* State, 124 Wis. 635, 102 N. W. 1087.
1905, Means *v.* State, 125 Wis. 650, 104 N. W. 815.
1906, Clay *v.* State, — Wyo. — , 86 Pac. 17 "[The question] was discussed by this Court in Smith *v.* State, but was not decided"; here again left undecided).

[*Note* 11; *add:*]

But in *California*, even under C. C. P. § 2061 (quoted *supra*, n. 10), the instruction is not demandable; though the repeated dissent of some of the judges leaves the matter still partly in controversy; 1903, People *v.* Wardrip, 141 Cal. 229, 74 Pac. 744. 1904, People *v.* Buckley, 143 id. 375, 77 Pac. 169. 1904, People *v.* Moran, 144 id. 48, 77 Pac. 77. 1904, People *v.* Ruiz, 144 id. 251, 77 Pac. 907.

§ 2057. Same: Policy of the Rule.

[*Note* 1; *add:*]

1904, Hamersley, J., in State *v.* Carey, 76 Conn. 342, 56 Atl. 632 (best opinion, analyzing the development in history and policy).

§ 2059. Same: Nature of Corroborative Evidence required.

1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807 (Massachusetts rule approved).
1906, Clay *v.* State, — Wyo. — , 86 Pac. 17.

[*Note* 13; *add:*]

1905, Chancellor *v.* State, 76 Ark. 215, 88 S. W. 880.
1904, People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017.
1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1.
1906, State *v.* Bond, — Ida. — , 86 Pac. 47 (murder).
1904, Mann *v.* Com., — Ky. — , 79 S. W. 230 (felonious assault).
1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (manslaughter).
Okl.: 1905, Hill *v.* Terr., 15 Okl. 212, 79 Pac. 757. 1906, Barbe *v.* Terr., 16 Okl. 562, 86 Pac. 61. 1906, Fisher *v.* Terr., — Okl. — , 87 Pac. 301 (here the instruction omitted the words of the statute "or the circumstances thereof," though it added other words requiring corroboration of the circumstances connecting the defendant; for this reason alone a new trial was ordered; which demonstrates that freedom from bigoted traditions of antiquated technicality is not necessarily to be looked for in the Courts of a new and advanced community).
1907, State *v.* Kelliher, — Or. — , 88 Pac. 867 (forgery).
1905, Wright *v.* State, — Tex. Cr. — , 84 S. W. 593. 1905, Crenshaw *v.* State, — Tex. Cr. — , 85 S. W. 1147 (this Court appears disposed to enter upon some questionable quibblings in the wording of charges).
1906, State *v.* Thompson, — Utah — , 87 Pac. 709 (adultery).

[*Note* 15, par. 2, l. 4 from the end; *add:*]

and continued in Com. *v.* Phelps, — Mass. — , 78 N. E. 741 (1906).

[*Note* 15, par. 3; *add:*]

1896, People *v.* Mayhew, N. Y. (cited *infra*, n. 18).
1905, People *v.* Patrick, N. Y. (cited *infra*, n. 18).

[*Note* 17; *add:*]

In *Idaho* these two phrasings are combined: 1905, State *v.* Knudtson, 11 Ida. 524, 83 Pac. 226 (interpreting Rev. St. 1887, § 7871, quoted *ante*, § 2056).

[*Note* 18; *add:*]

1906, Hargrove *v.* State, 125 Ga. 270, 54 S. E. 164 (murder).
1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843.

§ 2060. Same: Who is an Accomplice?

[*Note* 1, par. 1; *add:*]

1903, Porter *v.* People, 31 Colo. 508, 74 Pac. 879 (larceny).
1906, Hargrove *v.* State, 125 Ga. 270, 54 S. E. 164 (murder).
1904, State *v.* Phillips, 18 S. D. 1, 98 N. W. 171 (larceny).

[*Note* 1, par. 3; *add:*]

Accord: 1887, U. S. *v.* Thompson, 31 Fed. 331, C. C. (subornation of perjury).

[*Note* 3; *add,* under *Contra:*]

1905, State *v.* Rennick, 127 Ia. 294, 103 N. W. 159 (here the intercourse was by force).

[*Note* 3; *add,* under *Accord:*]

1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (like Porath *v.* State, Wis., *infra*).
1905, Whidby *v.* State, 121 Ga. 588, 49 S. E. 811.
1906, State *v.* Mungeon, — S. D. — , 108 N. W. 552.
1903, Tate *v.* State, — Tex. Cr. — , 77 S. W. 793 (if she consents).
1904, Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 (for one who "did not oppose the act").

The real futility of this accomplice rule is well seen in the opinions on this question whether the woman in incest is an accomplice; it is obviously a matter of the individual case, and will not submit to a rigid rule; the language of the Supreme Courts on this subject is solemn gabble.

[*Note* 6, par. 1; *add:*]

1905, Washington *v.* State, 124 Ga. 423, 52 S. E. 910 (reviewing and approving Keller *v.* State, *supra.*)

[*Note* 7; *add:*]

1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586.
1904, State *v.* Carey, 76 Conn. 342, 56 Atl. 632 (best opinion, by Hamersley, J.).

[*Note* 9; *add:*]

1905, Maraner *v.* State, — Tex. Cr. — , 84 S. W. 830 (liquor offence; here by express statute).

§ 2061. Uncorroborated Complainant in Rape, etc.

[*Note* 1; *add,* under *Accord:*]

(1) *Rape:* 1904, People *v.* Keith, 141 Cal. 686, 75 Pac. 304.
1904, Peckham *v.* People, 32 Colo. 140, 75 Pac. 422 (rape under age).
1905, State *v.* Dilts, 191 Mo. 665, 90 S. W. 782. 1905, State *v.* Welch, 191 Mo. 179, 89 S. W. 945 (following State *v.* Marcks).
1904, Brenton *v.* Terr., 15 Okl. 6, 78 Pac. 83 (repudiating Sowers *v.* Terr., *infra*, which purported to go upon a statute; "this Territory has no statute" applicable to rape).
1905, Wallace *v.* State, — Tex. Cr. — , 89 S. W. 827 (rape under age).
1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (rape under age).
1905, State *v.* Patchen, 37 Wash. 24, 79 Pac. 479 (rape under age). 1906, State *v.* Mobley, — Wash. — , 87 Pac. 815 (rape under age).
(2) *Seduction:* 1906, Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. 401 (breach of promise).
(3) *Bastardy:* 1874, McFarland *v.* People, 72 Ill. 368, *semble.*
1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244.
1881, State *v.* McGlothlen, 56 Ia. 544, 9 N. W. 893.

[*Note* 1, par. 2; *add,* under *Contra:*]

(1) *Rape:* 1906, Livinghouse *v.* State, — Nebr. — , 107 N. W. 854 (rape under age).
(2) *Bastardy:* see the early English cases for married women's filiation proceedings, *post,* § 2063.

[*Note* 2; *add,* under *England:*]

(2) *Bastardy:* 1852, R. *v.* Pearcy, 17 Q. B. 902 (corroboration found, under the statute).
1877, Cole *v.* Manning, L. R. 2 Q. B. D. 611 (under St. 35 & 36 Vict. c. 65, § 4, acts of familiarity held a corroboration on the facts of the case).
(4) *Cruelty:* 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*).

[*Note* 2; *add,* under CANADA:]

Dom. Crim. Code 1892, § 684 (quoted *ante,* § 2036, n. 22; the rule for treason is made applicable to fraudulent marriage and seduction; but note that it is not of the present type of rule, which requires corroboration for the prosecutrix, but of the former type, *ante,* § 2044, which requires corroboration for a single witness of any sort).
Man.: 1903, Cockerill *v.* Harrison, 14 Man. 366 (English statute for breach of promise, held in force, and applied).
Ont.: 1906, R. *v.* Daun, 12 Ont. L. R. 227, 231 (Dom. Crim. Code 1892, § 684, cited *supra*, applied, on a charge of seduction).

[*Note* 2; *add,* under UNITED STATES:]

1905, Weaver *v.* State, 142 Ala. 33, 39 So. 341 (corroboration as to "either of the material facts, so as to satisfy the jury that prosecutrix was worthy of credit" suffices).
Ark. Stats. 1894, § 1900 (no person shall be convicted of seduction under marriage-promise "upon the testimony of the female, unless the same be corroborated by other evidence").
Cal. St. 1905, c. 532 (amends P. C. 1872, § 1108, as to the crimes named).
1874, McFarland *v.* People, 72 Ill. 368, *semble* (bastardy; no rule of corroboration exists).

[*Note* 2 — *continued.*]

Ind. St. 1905, p. 584, § 244 (after "female," substitute, "must be supported by at least one other witness, or by strong corroborating circumstances as to every material point necessary to the commission of the offence"). 1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244 (in bastardy, no corroboration for the mother is necessary). 1905, Evans *v.* State, 165 Ind. 369, 75 N. E. 651 (under Rev. St. 1897, §§ 1004, 1008, quoted *ante*, §§ 488, 1326, 1387, 1413, in bastardy no corroboration of the mother is required as a rule of law; here a married mother).
1881, State *v.* McGlothlen, 56 Ia. 544, 9 N. W. 893 (bastardy; corroboration is not required).
1907, State *v.* Waterman, — Kan. — , 88 Pac. 1074 (seduction under promise of marriage; rule applied).
N. C. Rev. 1905, § 3360 (criminal elopement with a married woman; "no conviction shall be had upon the unsupported testimony of any such married woman"). 1906, State *v.* Connor, 142 N. C. 700, 55 S. E. 787 (statute applied).

For the admissibility of *pregnancy* or *birth of a child*, as corroborating evidence, see *ante*, § 168.

§ 2062. Same: Nature of Corroborative Evidence.

[*Note* 3; *add*, under RAPE:]

Ia.: 1904, State *v.* Carpenter, 124 Ia. 5, 98 N. W. 775. 1904, State *v.* Egbert, 125 Ia. 443, 101 N. W. 191. 1905, State *v.* Norris, 127 Ia. 683, 104 N. W. 282. 1906, State *v.* Crouch, 130 Ia. 478, 107 N. W. 173. 1907, State *v.* Blackburn, — Ia. — , 110 N. W. 275 (rape under age). 1907, State *v.* Johnson, — Ia. — , 110 N. W. 170. 1907, State *v.* Stevens, — Ia. — , 110 N. W. 1037 (rape under age).
Nebr.: 1907, McConnell *v.* State, — Nebr. — , 110 N. W. 666 (assault with intent). 1907, Fitzgerald *v.* State, — Nebr. — , 110 N. W. 676.

[*Note* 3; *add* under SEDUCTION:]

Ark.: 1904, Keaton *v.* State, 73 Ark. 265, 83 S. W. 911. 1905, Carrens *v.* State, — Ark. — , 91 S. W. 30. 1905, Burnett *v.* State, 76 Ark. 295, 88 S. W. 956. 1906, Lasater *v.* State, 77 Ark. 468, 94 S. W. 59.
Mo.: 1904, State *v.* Phillips, 185 Mo. 185, 83 S. W. 1080. 1905, State *v.* Sublett, 191 Mo. 163, 90 S. W. 374 (defendant's admission may suffice).
Nebr.: 1907, Russell *v.* State, — Nebr. — , 110 N. W. 380.

§ 2063. Parent's Bastardizing of Issue, by Testimony to Non-Access.

[*Note* 11; *add:*]

1879, Nottingham Guardians *v.* Tomkinson, L. R. 4 C. P. D. 343 (ruling in Yearwood's Trusts doubted).
1889, Burnaby *v.* Baillie, L. R. 42 Ch. D. 282, 294 (similar).

[*Note* 14, par. 1; *add:*]

Ga.: 1854, Wright *v.* Hicks, 15 Ga. 160, 172 (adulterine bastardy; the declarations of the parents, were they alive, were said to be not admissible, "but being dead, they are competent testimony").
Haw.: 1906, Godfrey *v.* Rowland, 17 Haw. 577, 583 (rule followed).
Ind.: 1868, Dean *v.* State, 29 Ind. 483 (bastardy suit by a married woman whose husband had been absent in the army; the mother admitted as a witness). 1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244 (bastardy; the married mother's testimony to non-access of her husband is admissible).
1905, Evans *v.* State, 165 Ind. 369, 75 N. E. 651 (the married mother, on a bastardy charge, may testify to non-access; repudiating the policy of the above rule, but reaching the result under Rev. St. 1897, §§ 1004, 1008, quoted *ante*, §§ 488, 1326, 1387, 1413, by refusing to imply the rule into the statute as a qualification; refusing also to require corroboration as a rule of law).

[*Note* 14, par 4; *add:*]

Compare the rulings on *corroboration in bastardy* (*ante*, § 2061).

§ 2065. Surviving Claimant's Testimony against Deceased.

[*Note* 2; *add:*]

Man.: 1906, Doidge *v.* Mimms, 13 Man. 48, 54 ("There is no distinct law against it; the rule is one of prudence only"; but here it was applied).
N. W. Terr.: 1901, Blank Estate, 5 Terr. L. R. 230 (the rule of corroboration held not applicable in passing an administrator's account, but only where a claim is contested in court; *Re* Garnett and *Re* Hodgson approved).

[*Note* 4, l. 11; *add:*]

1903, McDonald *v.* McDonald, 33 Can. Sup. 145 (applying the Nova Scotia statute).
1903, Thompson *v.* Coulter, 34 Can. Sup. 261 (applying the Ontario statute).
1904, Blacquiere *v.* Corr, 10 Br. C. 448.
Yukon St. 1904, c. 5, § 35 (like N. Sc. Rev. St. 1900, c. 163, § 35).

[*Note* 5, par. 1; *add:*]

La. St. 1906, No. 207 (no debt or liability of a "party deceased" shall be proved by parol evidence except on the "testimony of at least one credible witness of good moral character besides the plaintiff," unless there is a written acknowledgment or unless action is brought within twelve months after decease).
Or. Codes & Gen. L. 1892, § 1134, B. & C.'s ed. 1901, § 1161 (no claim against an executor or administrator, if rejected by him, shall be allowed "except upon some competent or satisfactory evidence other

[*Note 5 — continued.*]

than the testimony of the claimant"). 1904, Goltra *v.* Pentland, 45 Or. 254, 77 Pac. 129 (nature of the corroboration, defined).

In *Maryland*, an analogous rule requires a claim of contract against a deceased person to be established by "clear and satisfactory proof from disinterested sources": 1903, Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490 (citing the prior cases, and ruling also as to the use of the deceased's admissions).

Compare the rule in some jurisdictions for the sufficiency of proof of such claims by the *decedent's oral admissions* alone (*ante*, § 2054, n. 4).

§ 2066. Miscellaneous Witnesses requiring Corroboration.

[*Note* 1; *add:*]

Eng.: 1889, St. 52 & 53 Vict. c. 44, § 8 (offences of cruelty to children; cited *ante*, § 2061, n. 2). 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to the preceding act).
N. Y.: C. Cr. P. § 392, quoted in full, *ante*, § 1828, n. 1.

[*Note* 2; *add:*]

1904, U. S. *v.* Louie Juen, 128 Fed. 522, D. C. (Chinese witnesses suffice to prove presence as a merchant before the passage of St. 1892).

[*Note* 3; *add*, at the end:]

For the *exclusion* of Chinese witnesses in similar cases, see *ante*, § 516.

[*Note* 4; *add:*]

For statutes requiring *citizens'* testimony in naturalization cases, see *ante*, § 516, n. 7.

[*Note* 6; *add:*]

Wash.: 1894, Quinn *v.* Parke & L. M. Co., 9 Wash. 136, 37 Pac. 288 (oral rescission of a written contract; the uncorroborated testimony of a party, held not sufficient). 1903, Western L. & S. Co. *v.* Waisman, 32 Wash. 644, 73 Pac. 703 (mortgagors' uncorroborated testimony, not allowed to overthrow a certificate of acknowledgment). 1904, Cooke *v.* Cain, 35 id. 353, 77 Pac. 682 (oral rescission; Quinn *v.* P. & L. M. Co., *supra*, held not to establish a general rule).

Compare the rule for the measure of *proof beyond a reasonable doubt* in civil cases (*post*, § 2498).

§ 2067. Uncorroborated Confession of Respondent in Divorce.

[*Note* 10; *add:*]

Cal.: 1905, Berry *v.* Berry, 145 Cal. 784, 79 Pac. 531.
D. C.: Code 1901, § 964 (similar to Comp. St. 1894, c. 30, § 33). 1904, Lenoir *v.* Lenoir, 24 D. C. App. 160, 165 (rule applied in a proceeding for annulment, where on a default the plaintiff testified by deposition). 1905, Michalowicz *v.* Michalowicz, 25 D. C. App. 484 (corroboration held not sufficient on the facts).
Kan.: 1905, May *v.* May, 71 Kan. 317, 80 Pac. 567 (statutes applied).
N. C. Rev. 1905, § 1564 (like Code 1883, § 1288).
Va. Code 1887, § 2260 (in suits for divorce, "the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise").
W. Va. Code 1899, c. 64, § 8 (like Va. Code 1887, § 2260, *supra*). 1906, Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630 (statute applied).

Compare the cases cited *ante*, § 2046 (corroboration of divorce complainant).

§ 2069. Same: Scope of the Rule.

[*Note* 5; *add:*]

1905, Michalowicz *v.* Michalowicz, 25 D. C. App. 484.

[*Note* 8; *add:*]

1890, Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340 (excluded, under the statute quoted *ante*, § 2067, n. 10; displacing Bailey *v.* Bailey, 21 Gratt. 43).
1906, Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630 (excluded, under the statute quoted *ante*, § 2067, n. 10).

§ 2071. Uncorroborated Confession of Accused; Rule in the United States.

[*Note* 3; *add:*]

Ind. St. 1905, p. 584, § 239 (substituting "evidence" for "testimony," in Rev. St. 1897, § 1893, re-enacted).
1904, State *v.* Rogoway, 45 Or. 601, 78 Pac. 987, 81 Pac. 234 (rule in U. S. *v.* Williams approved).
1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794 (larceny).

[*Note* 4; *add:*]

Ark.: 1905, Misenheimer *v.* State, 73 Ark. 407, 84 S. W. 494 (rape; New York rule followed). 1905, Hubbard *v.* State, 77 Ark. 126, 91 S. W. 11 (murder; foregoing case approved).
Ga.: 1904, Joiner *v.* State, 119 Ga. 315, 46 S. E. 412 (wife-beating; corroboration found). 1904, Owen *v.* State, 119 Ga. 304, 46 S. E. 433 (larceny); 1904, Morgan *v.* State, 120 Ga. 499, 48 S. E. 238 (arson).
Ind.: 1904, Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563 (corroboration defined).
Ind. Terr.: 1906, Leftridge *v.* U. S., — Ind. T. — , 97 S. W. 1018 (homicide; some evidence of the *corpus delicti* is needed).
Ia.: 1905, State *v.* Westcott, 130 Ia. 1, 104 N. W. 341 (murder; rule of the statute applied and developed).
Mo.: 1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083 (embezzlement).
Nebr.: 1905, Blacker *v.* State, — Nebr. — , 105 N. W. 302 (forgery).
Nev.: 1905, *Re* Kelly, 28 Nev. 491, 83 Pac. 223 (rape).
Wash.: 1906, State *v.* Marselle, — Wash. — , 86 Pac. 586 (rape; here the rule is pedantically applied).

[*Text*, p. 2780, l. 5 of the quotation from Bergen *v.* People:]

After "had" insert "not."

§ 2072. Same: Definition of Corpus Delicti.

[*Note* 3; *add:*]

1904, State *v.* Knapp, 70 Oh. 380, 71 N. E. 705 (the term does not include the precise mode of death as charged, — here, by strangulation).

[*Note* 5, par. 1; *add*, under *contra:*]

1904, Johnson *v.* State, 142 Ala. 1, 37 So. 937 (false pretences; the falsity of the pretence is part of the *corpus delicti*, under the present rule).

[*Note* 5; *add*, after par. 1:]

Other crimes: 1904, Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748 (rape; the age of the defendant, being part of the *corpus delicti*, cannot be evidenced by the confession alone).
1901, Brown *v.* State, 85 Miss. 27, 37 So. 497 (breaking and entering with intent).

§ 2073. Same: Order and Sufficiency of Evidence, etc.

[*Note* 2, par. 1; *add*, under *Accord:*]

1904, Scott *v.* State, 141 Ala. 1, 37 So. 357 (homicide by poisoning; one judge diss.).
1905, Williams *v.* State, 123 Ga. 138, 51 S. E. 322 (murder).
1905, State *v.* Kesner, 72 Kan. 87, 82 Pac. 720.

[*Note* 3; *add:*]

1905, People *v.* Ward, 145 Cal. 736, 79 Pac. 448 (he must "advise" them to acquit; prior cases in this State reconciled).

§ 2079. In Criminal Cases, All Eye-Witnesses, etc., must be Produced.

[*Note* 1, at the end; *add:*]

By St. 1894, 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children), providing for using the child's deposition when its evidence was not "essential," some question arose whether the cause could be proceeded with at all for lack of the child's testimony; but a statute of 1904, 4 Edw. VII, omitted the doubtful clause; the citations are given *ante*, § 1411, n. 1.

[*Note* 2; *add:*]

1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754 (like People *v.* Wolcott, *supra*).

[*Note* 3; *add:*]

Ind.: St. 1905, p. 584, § 76 (re-enacts Rev. St. 1897, § 1730).
La.: 1878, State *v.* Williams, 30 La. Ann. 842 (murder; the calling of certain witnesses not required; Michigan rule repudiated; but the State's attorney's unfair conduct may be ground for a new trial). 1906, State *v.* Goodson, 116 La. 388, 40 So. 776 (State *v.* Gosey approved). 1906, State *v.* Stewart, 117 La. 476, 41 So. 798 (assault with intent to kill; an exception to the judge's refusal "to require the district attorney to call the witnesses to the *res gestæ* and to place them upon the stand for examination" was overruled, following State *v.* Williams; the professional duty of the State officer to elicit all the truth "is other and very different from a right in the accused to require that the district attorney" should produce all the eye-witnesses; "it may be that some special case might justify special relief").
Minn.: 1907 State *v.* Sheltrey, — Minn. — , 110 N. W. 353 (the prosecution held not bound to call all eye-witnesses or indorsed witnesses; but either party may comment on the failure of the other to call, on the principles of § 285, *ante*).
S. D.: 1906, State *v.* Kapelino, — S. D. — , 108 N. W. 335 (assault with intent; Michigan rule repudiated).
Tex.: 1901, McCandless *v.* State, 42 Tex. Cr. 655, 62 S. W. 745. 1903, Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14 (this and the preceding case leave the rule still unsettled). 1905, Thompson *v.* State, — Tex.

[*Note* 3 — *continued.*]

Cr. — , 89 S. W. 1081 (assault; one eye-witness having testified, the rule that the others must be called was held not applicable; "it seems that the later authorities have drifted away from that proposition; but it is not necessary to discuss it"; presumably because certainty in the law of trials is not an esteemed object of Justice and "drifting away" is a process to be viewed with equanimity). 1906, McCrear *v.* State, — Tex. Cr. — , 94 S. W. 899 (assault on defendant's wife; the State not required to call the wife).

§ 2081. Corpus Delicti must be proved by Eye-Witnesses, etc.

[*Note* 4, at the *end*; *add:*]

In 12 American Criminal Reports 213 (1905), the editor, Mr. John F. Geeting, has a valuable note collecting cases, including some not elsewhere noticed.

[*Note* 8; *add:*]

1904, Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591 (divorce). 1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 (murder).
1906, Leftridge *v.* U. S., — Ind. T. — , 97 S. W. 1018 (homicide).
1905, State *v.* Henderson, 186 Mo. 473, 85 S. W. 1576 (murder). 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (murder).
1905, State *v.* Williams, 46 Or. 287, 80 Pac. 655 (murder). 1906, State *v.* Barnes, 47 Or. 592, 85 Pac. 998 (murder).
1905, Winsky *v.* State, 126 Wis. 99, 105 N. W. 480 (burglary).

[*Note* 9; *add:*]

1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843 (statute applied).

§ 2082. Proof of a "Marriage in Fact," etc.

[*Note* 3; *add:*]

1905, Reaves *v.* Reaves, 15 Okl. 240, 82 Pac. 490 (summarizing the history).

[*Text*, p. 2800, l. 4 from the end; *add* a new note 6.]

[6] An example of the efficacy of the cohabitation evidence in leading to the inference even of a ceremonial marriage is seen in *Re* Shephard, 1904, 1 Ch. 456. An example of the occasional violence of this inference, based on habit and repute only, is found in Travers *v.* Reinhardt, — U. S. — , 27 Sup. 563.

§ 2083. Same: Habit and Repute as the Ordinary Evidence.

[*Note* 1; *add:*]

Del.: 1902, State *v.* Miller, 3 Pennew. 518, 52 Atl. 262 (information for failure to support children).
Ia.: 1906, Smith *v.* Fuller, — Ia. — , 108 N. W. 765 (dower).
U. S.: 1907, Travers *v.* Reinhardt, — U. S. — , 27 Sup. 563.

[*Note* 3, par. 1; *add:*]

Accord: 1906, Ward *v.* Merriam, — Mass. — , 78 N. E. 745 (slander).

§ 2085. Same: Eye-Witness required for Criminal Conversation and Bigamy.

[*Note* 1, par. 1; *add:*]

1905, Snowman *v.* Mason, 99 Me. 490, 59 Atl. 1019.

[*Note* 3; *add:*]

Ind. St. 1905, p. 584, § 455 (re-enacts Rev. St. 1897, c. 96, § 60).

[*Note* 4; *add:*]

1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738, *semble.*

[*Note* 6; *add:*]

D. C. St. 1906, Mar. 23, § 2, c. 1131, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "no other evidence shall be required" to prove marriage or parentage than in civil actions).
1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; marriage of one co-defendant to the deceased).

[*Note* 7; *add:*]

1903, State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181 (crime of non-support; rule assumed to apply to all criminal cases, without citing authority, and in an ill-considered opinion).
Note also the following: 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 ("a witness cannot be impeached by showing by parol evidence that he has committed bigamy"; no authority is cited for this confused statement).

§ 2086. Same: Eye-Witness not required when Proof is by Admissions.

[*Note* 4; *add:*]

Contra: 1876, R. *v.* Savage, 13 Cox Cr. 178.
1890, R. *v.* Ray, 20 Ont. 209 (bigamy; defendant's confession of the first marriage, not sufficient; "We must follow the latest English case, R. *v.* Savage").
1904, McSein *v.* State, 120 Ga. 175, 47 S. E. 544 ("the defendant's uncorroborated admissions are sufficient to establish the first marriage").

[*Note* 6, par. 1; *add:*]

1905, Murphy *v.* State, 122 Ga. 149, 50 S. E. 48.

[*Note* 7; *add:*]

1902, Terr. *v.* Castro, 14 Haw. 131 (adultery).
1906, State *v.* Thompson, — Utah — , 87 Pac. 709.

[*Note* 11, par. 1; *add,* under *Accord:*]

1902, State *v.* Miller, 3 Pennew. Del. 518, 52 Atl. 262 (information for failure to support children).

[*Note* 12; *add,* under *Contra:*]

1905, Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (to prove identity; the opinion is full of loose law).

§ 2088. Same: Celebrant's Certificate, etc., not Preferred.

[*Note* 4; *add:*]

1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317.

[*Note* 5; *add:*]

1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.

[*Note* 6; *add:*]

1903, State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181, *semble* (non-support).

[*Note* 7; *add:*]

1906, Hill *v.* Pomelear, 72 N. J. L. 528, 63 Atl. 269.

[*Note* 9, par. 1; *add:*]

1906, Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911 (death by wrongful act). 1907, Sellers *v.* Page, — Ga. — , 56 S. E. 1011 (foreclosure).
1906, Smith *v.* Fuller, — Ia. — , 108 N. W. 765 (dower).
1905, Hardin *v.* Hardin, — Ky. — , 87 S. W. 284 (negro marriage).

§ 2089. Owner's Testimony to Non-Consent, in Larceny.

[*Note* 5; *add:*]

1905, Jones *v.* People, 33 Colo. 161, 79 Pac. 1013 (rule apparently approved, citing only Wisconsin cases; but here it was proved impossible to find the owner).

[*Note* 6; *add:*]

1893, People *v.* Davis, 97 Cal. 194, 31 Pac. 1109 (larceny of a pocket-book; rule not applied).
1906, Hurst *v.* Terr., 16 Okl. 600, 86 Pac. 280 (larceny of cattle; rule repudiated).

§ 2094. General Principle: Verbal Utterances must be taken as a Whole.

[*Note* 4; *add:*]

As to the *giving of an instruction* on this point, there is much useless learning:
1903, People *v.* Wardrip, 141 Cal. 233, 74 Pac. 744 (under C. C. P. § 2061). 1904, People *v.* Buckley, 143 id. 375, 77 Pac. 169. 1904, People *v.* Moran, 144 id. 48, 77 Pac. 777. 1904, People *v.* Ruiz, 144 id. 251, 77 Pac. 907.
1905, Castner *v.* Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499.
1905, Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200.
1904, Thompson *v.* Purdy, 45 Or. 197, 77 Pac. 113, 83 Pac. 139.
1906, State *v.* Hutchings, 30 Utah 319, 84 Pac. 893.
1905, Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

§ 2097. Verbal Precision; General Principle, etc.

[*Note* 1; *add:*]

1904, McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407 (conversations and terms of a lost letter, involving a contract to bequeath, held not sufficiently proved).
1905, Busch *v.* Robinson, 46 Or. 539, 81 Pac. 237, *semble.*

[*Note* 2; *add:*]

1904, State *v.* Brinte, 4 Del. 551, 58 Atl. 258 (the questions, to which the confession made answer, need not be included).

§ 2098. Same: Application to Testimony at a Former Trial.

[*Note* 4, par. 1; *add:*]

1905, Petty *v.* State, 76 Ark. 515, 89 S. W. 465 (substance).
1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252 (usually the questions, and not only the answers, must be read).
1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (substance suffices; preceding cases not cited, though cases from seven other jurisdictions are cited); but a stricter rule is laid down in Kan. St. 1905, c. 494, § 1, making a court stenographer's transcript of "all the evidence of any witness," admissible; cited more fully *ante*, § 1669.
1906, State *v.* Herlihy, — Me. — , 66 Atl. 643 ("it is sufficient to prove the substance of the whole testimony").
Compare also the cases cited *ante*, § 1045, n. 3 (witness' self-contradictions).

[*Note* 7; after Southern L. & T. Co. *v.* Benbow, N. C., *add:*]

Compare the second ruling in this case, cited *post*, § 2099, n. 1.

§ 2099. Entirety of Parts: General Principle, etc.

[*Note* 1, par. 1; *add:*]

1906, State *v.* Freddy, 117 La. 121, 41 So. 436 (conversation only partly heard, admitted).

[*Note* 1, par. 2, l. 4; *add:*]

1849, O'Brien *v.* Cheney, 5 Cush. 148, 152 (admission as to a bond; "the admission in full" must be taken; here, however, a judicial admission was concerned).
1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (memorandum of admissions in a conversation, not containing the exact words nor the entire substance, but only the effect of isolated parts, excluded; the opinion confuses the principles involved, and while citing inappropriate cases on former testimony, fails to cite either the N. C. cases *supra*, or that cited *ante*, § 2097, n. 1, or even the prior ruling on the similar point at the former trial of the same case cited *ante*, § 2098, n. 7).

§ 2100. Same: Application to Accused's Confessions.

[*Note* 1, par. 1; *add:*]

1904, Green *v.* Com., — Ky. — , 83 S. W. 638 (here the substance is required).
1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 ("in the main, all that was said" suffices).
1906, State *v.* Lu Sing, — Mont. — , 85 Pac. 521 (confession of a Chinese, speaking broken English, and understood in part only, admitted; the above rule confirmed).

[*Note* 3, par. 1; *add:*]

1904, Risdon *v.* Yates, 145 Cal. 210, 78 Pac. 641 (the defendant's plea of guilty before a justice having been introduced, the Court allowed the entire statement made at the time by the defendant to be used in explanation).
1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083. 1905, State *v.* Merkel, 189 Mo. 315, 87 S. W. 1186.
1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (for the prosecution).
1906, Clay *v.* State, — Wyo. — , 86 Pac. 17.

[*Note* 5, par. 1, col. 2, l. 5; *add:*]

Can.: 1905, R. *v.* Martin, 9 Ont. L. R. 218 (the whole is read, but the judge instructs the jury "not to pay the slightest attention to it except so far as it goes to affect such person" confessing).

[*Note* 5, par. 1, col. 2, l. 6; *add:*]

1904, Howson *v.* State, 73 Ark. 146, 83 S. W. 933.
1904, State *v.* Brinte, 4 Del. 551, 58 Atl. 258.
1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561.

[*Note* 5, par. 1, l. 6 from the end; *add:*]

1907, McCann *v.* People, 226 Ill. 562, 80 N. E. 1061 (here two judges dissented because of this principle).

[*Text*, p. 2841, at the end of the section, *add*, as a new paragraph 4:]

Of course, the *prosecution* may desire here to invoke the rule (*post*, § 2115) *allowing* the whole to be put in. This is usually the case where the confession contains a mention of *another crime* committed by the accused. On the usual principles (*ante*, §§ 194, 300–367), this additional crime would ordinarily not be provable for its own sake; yet under the present principle and that of § 2115, *post*, the accused's allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar.[6]

[6] There is usually an unnecessary scrupulosity on this point:
1896, Gore *v.* People, 162 Ill. 259, 266, 44 N. E. 500 (murder).
1905, Wistrand *v.* People, 218 Ill. 323, 75 N. E. 891 (rape; the whole may be read, under proper instructions).
1854, Lord *v.* Moore, 37 Me. 208, 217 (civil action for arson; in the defendant's admissions, a part which mentioned another similar act of his was received as being inseparable from the whole).
1904, People *v.* Loomis, 178 N. Y. 400, 70 N. E. 919 (a confession of another crime, made at the same time as the confession of the crime charged, is not admissible, unless the latter "necessarily relates to another crime" or " is so essentially interwoven with every other part" of the statement that the whole must be listened to).
1904, State *v.* Knapp, 70 Oh. 380, 71 N. E. 705 (wife-murder; defence, insanity; a written confession, recounting also the killing of four other women, held properly admitted, under cautionary instructions).
1907, Barnett *v.* State, — Tex. Cr. — , 99 S. W. 556 (burglary).
1906, State *v.* Dalton, — Wash. — , 86 Pac. 590 (murder at a burglary; a confession mentioning former crimes, admitted).

§ 2102. Document Produced in Court, etc.

[*Note* 1, par. 1; *add*:]

1904, Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790 (defendant's book-entry admitting payment, received against him, without offering the entire book).

§ 2103. Same: Depositions and Former Testimony.

[*Note* 3, par. 1; *add*:]

Contra: 1876, Fountain's Adm'r *v.* Ware, 56 Ala. 558, *semble*.
Accord: 1904, Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898 (First N. Bank *v.* M. & N. E. Co. approved; but here the cross-examiner's offer of three answers of the cross-examination only was held insufficient).
Compare the cases cited *post*, § 2115, n. 3, and *ante*, § 1045, n. 3.

§ 2104. Same: Separate Writings referred to, etc.

[*Note* 1, *add*:]

1906, Merchant's L. & T. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800 (memorandum referred to in a conversation; the trial Court's discretion controls).

§ 2105. Document Lost or Destroyed; (1) Deeds, etc.

[*Note* 1, par. 1; *add*:]

1905, Carpenter *v.* Jones, 76 Ark. 163, 88 S. W. 871 (lost deed; instructions passed upon; foregoing cases not cited).
1906, Ivey *v.* Bessemer C. C. Mills, — N. C. — , 55 S. E. 613 (a "substantial copy of the greater part of a letter," excluded, on the facts).
1904, Capell *v.* Fagan, 29 Mont. 507, 77 Pac. 55 (deed's terms not sufficiently shown).
1904, Simpson *v.* Weise, 34 Wash. 360, 75 Pac. 973 (a memorandum of a contract detained by the opponent may suffice).

[*Note* 1, par. 5, p. 2848, under *Recital of a Seal; add*:]

1904, Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409.

§ 2106. Same: (2) Wills.

[*Note* 1, par. 1; *add*:]

1907, Bradshaw *v.* Butler, — Ky. — , 100 S. W. 837 (Steele *v.* Price followed).
1906, Michell *v.* Low, 213 Pa. 526, 63 Atl. 246.

§ 2109. Public Records; Application to Sundry Public Records.

[*Note* 1; *add*, at the end:]

Compare also, on all the kinds of documents in this section, the cases cited *ante*, § 1678 (certificate of effect of a record).

§ 2110. Same: Application to Judicial Records.

[*Note* 2; *add*:]

1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175.
1905, Chicago & S. E. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265 (eminent domain; transcript held sufficient).
1903, Tompkins *v.* Com., 117 Ky. 138, 77 S. W. 712 (competency of a divorced wife; record of divorce not required).
Compare the citations *ante* § 1678 (certificate of effect of a record).

§ 2113. General Principle; the Whole, etc., May be put in.

[*Note* 3; *add*:]

The propriety of the distinction taken in the Queen's Case has been well defended by Spear, J., in Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903 (1903).

[*Note* 6; *add*:]

Accord: 1841, Storer *v.* Gowen, 18 Me. 174 ("Both are equally evidence to the jury").
Contra: 1894, Carter *v.* Carter, 152 Ill. 434, 449, 28 N. E. 948 (letters referred to in a conversation). 1906, Merchant's L. & T. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800.

§ 2115. Principle's Application; (1) Oral Admissions, etc.

[*Note* 1, par. 1; *add*:]

1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (all said upon the same subject).
1904, Risdon *v.* Yates, 145 Cal. 210, 78 Pac. 641 (general principle stated).
1904, Brown *v.* State, 119 Ga. 572, 46 S. E. 833 (only the explanatory parts).
1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (remainder of a conversation forming part of a negotiation of compromise, admitted).
1904, Pettis *v.* Green Riv. A. Co., — Ia. — , 99 N. W. 235 (Code rule applied).
1841, Storer *v.* Gowen, 18 Me. 174 (party's oral admissions; the whole "must be taken together").
1903, Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903 (party's letter; the whole admitted).
1904, Flowers *v.* State, 85 Miss. 591, 37 So. 814 (statement of the deceased).
1905, Stats *v.* Bean, 77 Vt. 384, 60 Atl. 807 ("all that he said upon the subject at the same time must be received").
1906, Smith *v.* Milwaukee E. R. & L. Co., 127 Wis. 253, 106 N. W. 829 (whole of a conversation affecting contributory negligence).
Compare the citations *ante*, § 1045, n. 1 (witness' self-contradictions).

[*Note* 2; *add*:]

Compare also the citations *ante*, § 2100.

[*Note* 3; *add*:]

1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (former testimony used as admissions; the remainder may be offered "which tended to explain, qualify, correct, or in any manner throw light on the matters touched upon by the questions and answers which were proven").
1904, Culver *v.* South H. & E. R. Co., 126 Mich. 443, 101 N. W. 663 (whole of former testimony, inadmissible). 1857, State *v.* Phillips, 24 Mo. 475, 485 (deposition). 1875, Prewitt *v.* Martin, 59 Mo. 325, 334 (deposition). 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (foregoing cases approved).
1904, Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12 (there is no "hard and fast rule that will fit every case alike"; "in no event, however, should the writing, or any part thereof, be read until it has been marked in evidence"; here a general objection, not specifying the parts objected to as not strictly contradictory, was held not sufficient). 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (other parts of the opponent's former testimony, allowed to be read, so far as explanatory).
1904, Flohr *v.* Terr., 14 Okl. 477, 78 Pac. 565.
1907, Corpus *v.* State, — Tex. Cr. — , 102 S. W. 1152 (so much as is pertinent and explanatory of a contradictory statement offered in impeachment may be used; otherwise, the whole; here applied to former testimony).
Compare also the cases cited *ante*, § 1045, n. 3.
Such offers, however, may also involve the distinct question whether, in showing the rest of the utterances, the *magistrate's report of testimony* may be contradicted or added to (*ante*, § 1349).

§ 2116. Same: (2) Sundry Writings.

[*Note* 1; *add:*]

1905, McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95 (a deed offered by a grantee's administrator; the grantor allowed to use, on this principle, the grantee's indorsement on the deed showing a usurious mortgage; properly, however, the principles governing were those of § 2132, *post*, and § 1082, *ante*, and not the present one at all).

§ 2118. Same: (4) Account-Books.

[*Note* 1; *add*, under *Accord:*]

1907, Page *v.* Hazelton, — N. H. — , 66 Atl. 1049 (other items in an account-book, admitted).
1904, Simpson *v.* First Nat'l Bank, 129 Fed. 257, 264, C. C. A. (banking account).

[*Note* 1; *add*, at the end:]

Where an entry in a book of entries is offered under the principle of § 1551, *ante* (regular entries), the jury may examine *the whole* of the book in order to determine *from its appearance* whether it is what it purports to be: 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416 (hotel-register).

§ 2119. Separate Utterances excluded; (1) Conversations, etc.

[*Note* 1, par. 1, l. 5; *add:*]

1904, State *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140 (prior statement, excluded).
1906, State *v.* Thompson, 116 La. 829, 41 So. 107 (accused).
1906, State *v.* Kapelino, — S. D. — , 108 N. W. 335 (assault with intent; conversations between other persons, at a prior time, the defendant and the injured person being present, excluded).

§ 2120. Same: (2) Utterances incorporated by Reference, etc.

[*Note* 2, par. 1; *add:*]

1906, Proctor *v.* Cable Co., 145 Mich. 503, 108 N. W. 992 (salary contract; series of letters, admitted).
1904, Gosnell *v.* Webster, 70 Nebr. 705, 97 N. W. 1060 (rest of a correspondence, admitted).

[*Note* 3; *add*, under *Contra:*]

1905, Hoggson & P. Mfg. Co. *v.* Sears, 77 Conn. 587, 60 Atl. 133 (plaintiff's reply-letter admitted for him, on the facts).
1904, Robertson *v.* Vasey, 125 Ia. 526, 101 N. W. 271.

§ 2122. Chancery Answer: (2) Used in Chancery as a Pleading, etc.

[*Note* 5; *add:*]

1904, Stewart *v.* N. C. R. Co., 136 N. C. 385, 48 S. E. 793; Hedrick *v.* Southern R. Co., ib. 510, 48 S. E. 830.
1905, Reager's Adm'r *v.* Chappelear, 104 Va. 14, 51 S. E. 170 (administrator's answer).

§ 2123. Same: (3) Anomalous New York Rule.

[*Note* 13, par. 1; *add*, under *Accord:*]

Fla.: 1906, Mayo *v.* Hughes, — Fla. — , 40 So. 499 (failure of consideration): 1906, Southern Lumber & S. Co. *v.* Verdier, — Fla. — , 40 So. 676 (creditor's bill to set aside a voluntary conveyance; an answer upon facts "inseparably connected . . . is responsive to the bill as well when it discharges as when it charges the defendant").

[*Note* 16; *add:*]

1905, Ocala F. & M. W. *v.* Lester, — Fla. — , 38 So. 56.

§ 2124. Same: (4) Party's Answer to Statutory Interrogatories.

[*Note* 2; par. 1; *add:*]

1904, Garrison *v.* Glass, 139 Ala. 512, 36 So. 725 (a defendant's answers not responsive may be struck out).

[*Note* 3; *add:*]

Man.: St. 1906, 5 & 6 Edw. VII, c. 17, § 1 (amends Rev. St. 1902, c. 40, by adding Rule 407 B, of which par. (10) provides as in Eng. Rules of Court, Ord. XXXI, rule 24, *supra*).
Newf. St. 1904, c. 3, Rules of Court 28, par. 27 (like Eng. Ord. XXXI, Rule 24).
Yukon Consol. Ord. 1902, c. 17, Ord. XXI, R. 223 (like Ont. Rule 461, par. 1).
N. C.: 1897, Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33 (part of an answer admitting the first five allegations of a complaint, admitted, without reading the remainder setting up a counterclaim).

§ 2130. General Principle of Authentication, etc.

[*Note* 1; *add:*]

1905, State *v.* Seery, 129 La. 259, 105 N. W. 511 (weapon).
1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (pistol). 1905, State *v.* Gordon, 115 La. 571, 39 So. 625 (pistol).

[*Note* 3; *add:*]

Compare the authorities cited in § 2134, n. 1, *post.*

§ 2131. Modes of Authenticating Documents.

[*Note* 5; *add:*]

1904, Bauer *v.* State, 144 Cal. 740, 78 Pac. 280 (testimony by one who had not seen the actual signing of the document, held sufficient on the facts).

§ 2132. Authentication not necessary when not in Issue, etc.

[*Note* 1; *add:*]

1905, State *v.* Waldrop, 73 S. C. 60, 52 S. E. 793 (murder; a rent-contract in the deceased's pocket; "formal proof of the execution" not required).

[*Note* 2, par. 1; *add:*]

1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (deed not acknowledged nor attested nor recorded, admitted). 1905, Brannan *v.* Henry, 142 Ala. 698, 39 So. 92.
1905, Leavitt *v.* Shook, 47 Or. 239, 83 Pac. 391 (bill of sale of a mare, used to show the circumstances of obtaining possession).

[*Text*, par. 2, p. 2894; at the end, *add:*]

When the opponent *fails to object* to the admission of the document, this is, of course, on general principles (*ante*, § 18) a waiver as to the need of any evidence authenticating its genuineness; and this waiver is commonly held to extend to the fact of *authority of an agent* purporting to sign the document for a principal, but not as to the *legal sufficiency* of the instrument for any purpose.[6a]

[6a] 1860, Lowe *v.* Bliss, 24 Ill. 168 (note not objected to; its execution held to be admitted, but not its validity).
1822, Birney *v.* Haim, 2 Litt. 262, 268 (deed purporting to be by town trustees).
1880, Bartlett *v.* O'Donoghue, 72 Mo. 263 (unacknowledged deed not objected to; execution held to be admitted, but not its legal effect as a conveyance).
1905, McClung *v.* McPherson, 47 Or. 73, 82 Pac. 13 (notice of termination of tenancy, not objected to; the attorney's authority to sign, held to be admitted, but not the legal sufficiency of the notice).
Compare the doctrine for *ancient documents* (*post*, § 2144).

§ 2134. Authentication as involving either Signature or Contents.

[*Note* 1; *add:*]

1886, Chamberlain *v.* Chamberlain, 116 Ill. 480, 484 (an indorsement of payment on a note is presumed to have been made by the payee or on his authority, when the note is produced from his custody of the party entitled under him; otherwise, when produced by the obligor).
1827, Stocking *v.* Fairchild, 5 Pick. 181 (action on a mortgage-title; a condition of mortgage, written on the back of the deed, presumed to be "a part of the original contract").
Compare the following: 1881, Bailey *v.* Danforth, 53 Vt. 504 (promissory note given by the deceased payee to the plaintiff, and bearing an indorsement of payment of date before the statute had run; *semble*, the indorsement presumed to be in the payee's hand and of the purporting date).
Upon proof of the signature of an *agent*, no presumption as to his *authority* arises (*post*, § 2521, par. *b*); otherwise, for ancient documents (*post*, § 2144). As to the effect in this respect of an *admission*, see *ante*, § 2132, par. (2).

§ 2138. Authentication by Age; Thirty Years, etc.

[*Note* 7; *add:*]

1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (map dated 1859, but not shown to exist till later).

§ 2139. Natural Custody.

[*Note* 3; *add:*]

1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (the proper custody will be presumed, in favor of the ruling below).

[*Note* 6; *add:*]

1904, *Re* Butrick, 185 Mass. 107, 69 N. E. 1044 (possession of a grantee's heir, held sufficient).
1905, McGuire *v.* Blount, 199 U. S. 142, 26 Sup. 1 (certain probate records of Spanish Florida, in the custody of the U. S. Surveyor-General, received).

§ 2140. Unsuspicious Appearance.

[*Note* 1; *add:*]

1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (rule applied).

§ 2141. Possession of the Land, for Deeds and Wills.

[*Note* 4; *add:*]

1890, Havens *v.* Sea Shore L. Co., 47 N. J. Eq. 365, 379, 20 Atl. 497 (possession not required, on the facts).

§ 2143. Old Recorded Deeds and Old Copies.

[*Note* 2, par. 1; *add:*]

1904, Carter *v.* Wood, 103 Va. 68, 48 S. E. 553 (a county-court entry of a deed in 1859, and a copy of the deed made in 1866-72 by one who knew nothing of its genuineness, excluded).

[*Note* 4; *add:*]

1904, Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326 (certified copy of official record, made in 1885, of a purporting original land-patent certificate of 1860 not entitled to record, excluded; preceding case not cited).
1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645 (a certified copy of the record, insufficient here under § 1651, *ante;* the record-book itself lost, and the record purporting to be of a deed of 1846; these facts were held insufficient to authenticate).
1907, Ball *v.* Loughridge, — Ky. — , 100 S. W. 275 (record of 1853 of unlawfully recorded power of attorney, not admitted; "this rule has never [!] been applied to a copy").
1906, Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493 (bill for accounting for pension moneys; exemplified copies of pension vouchers of about 1873, admitted under U. S. Rev. St. § 882, quoted *ante,* § 1680, held to admit the originals purporting to be signed by the party charged, without proof of the signatures on the latter; it is difficult to see why the exemplified copy was not sufficient, on the principle of § 1680, *ante,* without the aid of the ancient-document rule).
1905, Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139 (deed of 1864, not legally recorded, and now lost; the record, sworn to by the transcribing clerk on the stand, was admitted to prove contents and apparently execution also).

[*Note* 5; *add:*]

Fla. St. 1903, c. 5162, p. 97 (certified copy of a lost or destroyed deed defectively recorded for twenty years, admissible in proceedings to re-establish). 1907, Campbell *v.* Skinner, — Fla. — , 43 So. 875 (statute held constitutional).

§ 2145. Kinds of Documents covered by the Rule.

[*Note* 2; *add:*]

1906, McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978 (letter found among the papers of the addressee).
1905, McGuire *v.* Blount, 199 U. S. 142, 26 Sup. 1 (Spanish probate proceedings).

[*Note* 2; *add,* at the end:]

Of course, the doctrine cannot avail to introduce a document which would *not be valid,* even if genuine:
1904, O'Neal *v.* Tennessee C. D. & R. Co., 140 Ala. 378, 37 So. 275 (deed without acknowledgment or witnesses, and purporting to be signed by mark; the statute at that time requiring either attestation or acknowledgment for validity of a deed, the document was rejected).

§ 2146. Presumption created; Statutory Denial of Genuineness.

[*Note* 2; *add:*]

1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645 (cited *ante,* § 2143, n. 4). 1907, Chatman *v.* Hodnett, — Ga. — , 56 S. E. 439.

§ 2148. Authentication by Contents; in general.

[*Note* 2, l. 2; *add:*]

So also the cases cited *ante*, § 2130, n. 3.

[*Note* 2, at the end; *add:*]

1906, International Harv. Co. *v.* Campbell, — Tex. Civ. App. — , 96 S. W. 92 (letter admitted, on the above principle).

Compare also the cases cited *ante*, §§ 87, 270, 2024, 2148, 2149.

But the *marks of cancellation on a will* found in the testator's custody may be presumed genuine: 1906, Wikman's Estate, 148 Cal. 642, 84 Pac. 212.

§ 2149. Illiterate's Letter; Typewriting.

[*Note* 1, l. 5; *add:*]

1906, Sprinkle *v.* U. S., — C. C. A. — , 150 Fed. 56, 59 (typewritten letter signed with a stamp or stencil, held not sufficiently authenticated on the facts; an example of over-strict ruling).
1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (typewritten letters, sufficiently evidenced by contents, etc.; Singleton *v.* Bremer, *supra*, approved).

Compare also the cases cited *ante*, §§ 87, 270, 2024, 2148, 2149.

§ 2152. Postmark; Brand.

[*Note* 1; *add:*]

1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (postmark in another State presumed genuine).

[*Note* 3; *add*; under *Accord:*]

1906, Beeman *v.* Supreme Lodge, — Pa. — , 64 Atl. 792 (postmark, used to show the time of arrival at a post-office).

[*Note* 4, l. 4; *add:*]

1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (postmark in Florida, admitted to show that the witness was there).

§ 2153. Reply-Letter received by Mail.

[*Note* 1, par. 1; *add:*]

1904, Burton *v.* State, 141 Ala. 32, 37 So. 435 (letter not shown to have been received in reply, excluded).
1905, Dorr Cattle Co. *v.* Chicago & G. W. R. Co., 128 Ia. 359, 103 N. W. 1003 (notice of quarantined cattle, received by mail, not presumed genuine).
1907, American Bonding Co. *v.* Ensey, — Md. — , 65 Atl. 921 (letter received in reply, and purporting to be signed by the C. H. T. Co., admitted as genuine and duly authorized).
1906, Taylor *v.* State, — Tex. Cr. — , 97 S. W. 474 (letter received by mail, but not a reply, excluded).
1906, Leesville Mfg. Co. *v.* Morgan W. & I. Wks., — S. C. — , 55 S. E. 768 (reply-letter presumed genuine).
1906, Loverin & D. Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000 (reply-letters admitted without proof of handwriting).

§ 2154. Reply-Telegram.

[*Note* 2; *add:*]

Accord: 1905, Cobb *v.* Glenn B. & L. Co., 57 W. Va. 49, 9 S. E. 1005 (certain reply-telegrams not assumed genuine).
Contra: 1903, Yeiser *v.* Cathers, — Nebr. — , 97 N. W. 840, *semble*.

§ 2155. Reply-Telephone.

[*Note* 3; *add:*]

1907, State *v.* Usher, — Ia. — , 111 N. W. 811 (conversation by telephone with the defendant, identified by his voice, admitted).

[*Note* 5, par. 1; *add:*]

1907, General Hospital Soc'y *v.* New Haven R. Co., — Conn. — , 65 Atl. 1065 (the failure to identify the voice does not necessarily exclude).
1907, Kansas City S. Co. *v.* Standard W. Co., — Mo. App. — , 99 S. W. 764 (admissions heard over the telephone from one representing himself as defendant's agent, received).
1906, Dunham *v.* McMichael, 214 Pa. 485, 63 Atl. 1007 (telephone conversation alleged to be with the defendant, excluded, because neither the witness knew defendant's voice nor did defendant's admissions identify her; no authority cited).

[*Note* 6, par. 1; *add:*]

1907, General Hospital Soc'y *v.* New Haven R. Co., — Conn. — , 65 Atl. 1065 (on the facts, a conversation from an unidentified person in the office, apparently having charge, was admitted).
1907, Godair *v.* Ham Nat'l Bank, 225 Ill. 572, 80 N. E. 407 (conversation by telephone, purporting to come from G. in his office, received, though the voice was not identified).
1906, St. Louis S. W. R. Co. *v.* Kennedy, — Tex. Civ. App. — , 96 S. W. 653 (testimony of an offer of wages received by telephone, excluded).

[*Note* 7, par. 1; *add:*]

1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (certain telephone inquiries of the opponent's agent, admitted as part of the *res gestæ*, on the principle of § 1777, *ante*).
1906, Harrison G. Co. *v.* Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081 (conversations by telephone, admitted, the identity and the authority of the speakers being otherwise shown).

§ 2158. Official Custody; General Principles, etc.

[*Note* 2; *add*, under *Inadmissible:*]

1905, Junior *v.* State, 76 Ark. 483, 89 S. W. 467 (magistrate's record of conviction, one witness having received it from the magistrate's successor, and another identifying the handwriting, excluded; no authority cited; McCulloch, J., diss.; the ruling is unsound).

[*Note* 3, l. 9; *add:*]

1906, State *v.* Schaeffer, — Kan. — , 86 Pac. 477 (Federal revenue collector's records, proved by an examined copy).
1906, Smithers *v.* Lowrance, — Tex. — , 93 S. W. 1064 (examined copy of land-office records, made by one to whom the land-commissioner pointed out the records in his office, admitted).
Compare the citations *ante*, § 1273 (examined copies).

§ 2159. Same: Application to Sundry Official Records.

[*Note* 3, par. 3, *add:*]

1905, Lowry Nat'l Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 395; and cases cited *post*, § 2169.

§ 2162. Official Seal; Mode of Authenticating, etc.

[*Note* 2; *add:*]

Eng. St. 1905, 5 Edw. VII, c. 15, § 52 (trade-marks; documents purporting to be orders of the Board of Trade and to be under Board seal or to be signed by its secretary etc., admissible without further proof).
Ont. St. 1906, 6 Edw. VII, c. 31, § 27 (certified copy, by the secretary of the railway and municipal board, under seal of the board, of any document in custody or of record with the board, is admissible without proof of signature).
Newf. St. 1904, c. 3, Rules of Court 34, par. 6 (similar to Rules of 1892).
Yukon St. 1904, c. 5, § 18 (like Eng. St. 14 & 15 Vict. c. 99, § 11, omitting "Wales"); ib. § 46 (like N. Sc. Rev. St. 1900, c. 163, § 48).

§ 2164. Seal of Court, etc.

[*Note* 5:]

Transfer Adams *v.* Way, Conn., to Note 4; and for "another State Court" read "a Federal Court").

§ 2165. Seal of Notary.

[*Note* 3, par. 1; *add:*]

1888, Pape *v.* Wright, 116 Ind. 508, 19 N. E. 462 (New York notary's jurat to a deposition, lacking seal, authenticated by certificate of the county clerk under seal).
1906, Gharst *v.* St. Louis T. Co., 115 Mo. App. 403, 91 S. W. 453 (Michigan notary's jurat to a deposition, lacking a seal, authenticated by certificate of the circuit court clerk under seal).

[*Note* 6; *add:*]

1904, Kinkade *v.* Howard, 18 S. D. 60, 99 N. W. 91 (lack of a notary's seal to a certificate of deposition does not exclude it, "if the authority of the officer is otherwise sufficiently shown," and if no express statutory requirement prescribes the contrary).
also Ashcraft *v.* Chapman, Conn., Pape *v.* Wright, Ind., Gharst *v.* St. Louis T. Co., Mo., cited *supra*, n. 3.

[*Note* 7; *add:*]

1907, Washburn L. Co. *v.* Swanby, — Wis. — , 110 N. W. 806 (notary's certificate under seal to a deed without the State; additional evidence not required, under statute).

[*Note* 8; *add:*]

1906, Pardee *v.* Schanzlin, — Cal. App. — , 86 Pac. 812 (notary's certificate of jurat of affidavit, under seal, presumed genuine).

[*Note* 9; *add:*]

1906, Williams *v.* Williams, 221 Ill. 541, 77 N. E. 928 (Virginia justice's jurat, with clerk of circuit court's certificate of justice's authority, admitted).
1907, Bishop *v.* Hilliard, — Ill. — , 81 N. E. 403.

§ 2166. Sundry Official Seals.

[*Note* 1, at the end; *add:*]

A *tax-receipt* must be authenticated under general rules: 1904, Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799.

§ 2167. Official Signatures.

[*Note* 4; *add:*]

Can. Dom. St. 1903, 3 Edw. VII, c. 58, §§ 26, 27 (railway act; similar to Ont. St. 1906, c. 31, cited *infra*, except that under § 26 copies by the minister or inspecting engineer are also included).
Ont. St. 1904, 4 Edw. VII, c. 23, § 67 (copy of an assessment roll, certified by the clerk under seal of the municipal corporation, shall be received, without proof of the seal or signature"). St. 1906, 6 Edw. VII, c. 31, § 26 (documents purporting to be signed by the chairman or secretary of the railway and municipal board are evidence "without proof of any such signature"); ib. § 27 (similar, for certified copies, by the secretary, of a document deposited with the board).
Yukon St. 1904, c. 5, § 7 (like Dom. St. 1893, c. 31, § 15); ib. § 8 (similar, for orders of the Yukon Territorial Secretary).
Minn. St. 1905, c. 305, § 38 (registration of title; owner's attested or acknowledged receipt for a duplicate in place of a lost original certificate; the signature shall be presumed genuine).

[*Note* 5; *add:*]

1906, State *v.* Hopkins, 118 La. — , 42 So. 660 (deputy coroner's signature, judicially noticed).

§ 2168. Official Character and Title to Office.

[*Note* 4, par. 1; *add:*]

1904, Leech *v.* Karthaus, 141 Ala. 509, 37 So. 696 (certificate of acknowledgment by "W. S. Wells, Jr., N. P.," held sufficient).
1905, Old Wayne M. L. Ass'n *v.* McDonough, 164 Ind. 321, 73 N. E. 703 (a certified transcript signed with initials only of the judge's and clerk's Christian names suffices).

§ 2169. Corporate Seal.

[*Note* 2; *add:*]

1905, Collier *v.* Alexander, 142 Ala. 422, 38 So. 244.
1906, Bliss *v.* Harrie, — Colo. — , 87 Pac. 1076 (corporate seal is presumed genuine, and the secretary's authority is presumed).
1903, Quackenboss *v.* Globe & R. F. Ins. Co., 177 N. Y. 71, 69 N. E. 223.
1906, Deepwater Council *v.* Renick, 59 W. Va. 343, 53 S. E. 552 (deed under seal, signed by the chief officers: authority presumed).

§ 2183. Illegality; Documents, Chattels, etc.

[*Note* 1, par. 1; *add:*]

Ga.: 1899, Dozier *v.* State, 107 Ga. 708, 33 S. E. 418 (cited *post*, § 2264). 1904, Springer *v.* State, 121 id. 155, 48 S. E. 907 (pistol taken from the accused; this line of cases in Georgia does not carefully distinguish the present principle and that of § 2264, *post*). 1906, Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814 (like Williams *v.* State).
Haw.: 1903, Terr. *v.* Sing Kee, 14 Haw. 586, 588 (liquor obtained by unlawful search is admissible).
Ida.: 1906, State *v.* Bond, — Ida. — , 86 Pac. 43 (letter of the accused; mode of obtaining it, held immaterial).
Kan.: 1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (bottles of liquor seized without a warrant, admitted).
Md.: 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud; certain shares of stock, taken by the police from a satchel at the defendant's hotel or from the defendant's person under arrest, admitted, regardless of the illegality of procuring them).
Mass.: 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (officers obtaining a knife, by a trespass and search in the defendant's house; admitted).
Minn.: 1905, State *v.* Strait, 94 Minn. 384, 102 N. W. 913 (bank books). 1906, State *v.* Hoyle, 98 Minn. 254, 107 N. W. 1130 (gambling apparatus obtained by officers' unlawful entrance, admissible).

[*Note* 1 — *continued.*]

Mont.: 1906, State *v.* Fuller, — Mont. — , 85 Pac. 369 (defendant's shoes compared with footprints).
N. Y.: People *v.* Adams, *supra*, affirmed on writ of error in Adams *v.* N. Y., U. S. cited *infra*.
Vt.: 1906, State *v.* Suitor, 78 Vt. 391, 63 Atl. 182 (liquor offence; liquor, etc., obtained on a search-warrant, admitted, irrespective of the legality of the search).
Wash.: 1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268 (articles obtained by illegal search of the person are admissible).

[*Note* 1, par. 2; *add:*]

But Boyd *v.* U. S., *supra*, is practically overruled by later cases: 1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (seizure of papers under a search-warrant; Boyd *v.* U. S. is mentioned with respect, but Com. *v.* Dana, Mass., and the above line of cases, are expressly approved, and it is said that the Amendment is intended to "give remedy against such usurpations when attempted" and "to render invalid legislation or judicial procedure having such effect," but not to "exclude testimony which has been obtained by such means, if it is otherwise competent"). Hale *v.* Henkel, U. S. (cited *post*, § 2264).

[*Note* 1, par. 3; *add:*]

Compare the cases cited *post*, §§ 2264, 2265 (articles obtained by violation of the *privilege against self-crimination*).

§ 2184. Same: Documents Violating Stamp-Tax Laws.

[*Note* 6; *add:*]

1905, Thompson *v.* Calhoun, 216 Ill. 161, 74 N. E. 775.
190[3], Phillips *v.* Hazen, — Ia. — , 109 N. W. 1006.
1906, Amos-Richia *v.* Northwestern M. L. Ins. Co., 143 Mich. 684, 107 N. W. 707.
1906, King *v.* Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892.
But the Federal powers of legislation do extend to the *Territories*, and hence the tax-stamp laws are there enforced: 1903, Makainai *v.* Goo Wan Hoy, 14 Haw. 607, on rehearing, 683.

§ 2190. History of Testimonial Compulsion.

[*Note* 28; *add:*]

Mr. Kerly, in his Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (1890, p. 45), has pointed out that the tradition as to the invention of the *subpœna* form is unfounded; it existed much earlier in other processes.

§ 2191. Constitutional Guaranty of Compulsory Process.

[*Note* 2, par. 1, l. 2; *add:*]

1906, State *v.* Stewart, 117 La. 476, 41 So. 798 (testimony of a proposed witness admitted to prevent a continuance; the constitutional right covers merely the right to process by subpœna, and not the further discretionary power of the Court to attach a desired witness for failure to obey the subpœna).

[*Note* 2, par. 2, at the end; *add:*]

The right to process does not include a *right of consultation* with the witness before trial: 1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (defendants not allowed to obtain information from a co-indictee in jail).
The constitutional principle does not prevent the *limitation of number of witnesses*, wherever that is otherwise allowable (*ante*, § 1907).

§ 2192. Duty to Give Testimony; General Principle.

[*Text*, p. 2967, l. 2; *add*, as a note to Israel *v.* State:]

Accord: 1906, Washington Nat'l Bank *v.* Daily, — Ind. — , 77 N. E. 53 (cited *post*, § 2193, n. 3; good opinion by Hadley, J.).

[*Note* 1; *add:*]

1906, Clark, C. J., in State *v.* Wheeler, — N. C. — , 53 S. E. 358.

§ 2193. Testimonial Duty applied to Production of Documents.

[*Note* 3; *add:*]

1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (U. S. *v.* Tilden followed). 1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241 C. C. (following the rule of U. S. *v.* Tilden, on authority).

[*Note* 3; *add*, at the end:]

A statute may therefore create *new forms of process:* 1906, Washington Nat'l Bank *v.* Daily, — Ind. — , 77 N. E. 53 (a statute empowering an assessor to obtain a writ of inspection of documents in possession of any person containing evidence of the unlawful omission of a third person from the taxable-property list is constitutional, the process being analogous to a subpœna *duces tecum*).

§ 2194. Testimonial Duty applied to Premises, Chattels, etc.

[*Note* 6, l. 11; *add:*]

Contra: 1904, McKnight *v.* Detroit & M. R. R. Co., 135 Mich. 307, 97 N. W. 772 (physician's action for services to injured passengers at the defendant's request; one of these passengers, having testified for the defendant, was asked by the defendant to exhibit his leg to the jury, but declined; held privileged; no authority cited in support).

§ 2195. Officers possessing Power to Compel Testimony, etc.

[*Note* 1; *add:*]

1906, *Ex parte* Parker, 74 S. C. 466, 55 S. E. 122.

[*Note* 2; *add:*]

1907, McIntyre *v.* People, — Ill. — , 81 N. E. 33.
1906, *Re* Butler, — Nebr. — , 107 N. W. 572.
1906, *Ex parte* Schoepf, 74 Oh. 1, 77 N. E. 276, 279.
1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (subpœna *duces tecum*).

[*Note* 3, par. 1; *add:*]

1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415 (county judge).
1906, Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, C. C. A. (master; collecting the cases).

[*Note* 3, par. 2, *add:*]

1894, *Re* Sims, 54 Kan. 1, 37 Pac. 135. 1906, State *v.* Carter, — Kan. — , 86 Pac. 138 (holding St. 1901, c. 233, to be void).
1904, Lawson *v.* Rowley, 185 Mass. 171, 69 N. E. 1082 (justice of the peace).
1906, State *v.* Standard Oil Co., 194 Mo. 124, 91 S. W. 1062 (commissioner).
1906, Bank *v.* Johnson, 143 Fed. 463, 466, C. C. A. (referee in bankruptcy).

§ 2199. Notice and Summons; Subpœna.

[*Note* 3; *add:*]

The service cannot be made on the witness *by attorney:* 1906, *Re* Depue, 185 N. Y. 60, 77 N. E. 798.

[*Note* 4; *add:*]

1906, *Ex parte* Terrell, — Tex. Cr. — , 95 S. W. 536 (reading over the telephone does not suffice).

[*Note* 5, l. 2; *add:*]

1859, Goodpaster *v.* Voris, 8 Ia. 334 ("The object of the summons is only to give notice and to call the witness in, and if he is already in court, he requires no further notice").
1836, Leckie *v.* Scott, 10 La. 412, 417 ("Any person within the verge of the court during the trial may be called upon to disclose the truth").
1831, Farmer *v.* Storer, 11 Pick. 241 (taxation of costs).
1886, U. S. *v.* Sanborn, 28 Fed. 299 (collecting the cases as to the right to fees). 1889, Eastman *v.* Sherry, 37 Fed. 844 (right to fees).

[*Note* 6; *add:*]

That a *judicial order*, apart from a subpœna, is a proper mode of compelling attendance, is sometimes denied: 1906, *Re* Depue, 185 N. Y. 60, 77 N. E. 798.

Whether a particular *officer* has *power to compel* testimony is often a question (*ante*, § 2195).

§ 2200. Subpœna duces tecum for Documents.

[*Note* 6; *add:*]

1866, Lee *v.* Angus, L. R. 2 Eq. 59 (a subpœna *d. t.*, in a suit concerning a mortgage, to produce accounts relating to rents, etc., "and all other books, accounts, letters, papers, and documents in your possession or power, in any wise relating to the affairs and concerns of the said plaintiffs, or either of them, or [illegible] H. L., and all books, accounts, letters, papers, and documents received by you from H. E. S. as [illegible] M. C.," held too broad; Page-Wood, V. C.: "He must speak the truth within his knowledge; but he is not bound to make this burdensome search for evidence at his own expense").
1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, 762, C. C. (an application for "all books of account, minutes" etc., etc., of the G. S. M. Co., and a long list of other documents named generally, held too broad on the facts).
1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (a call for all the correspondence, etc., between the defendant's corporation and six others, all correspondence since its date of organization between itself and thirteen others, etc., held to be unreasonably broad; McKenna, J., diss.). 1906, McAlister *v.* Henkel, ib. 90, 26 Sup. 385 (here the subpœna was held specific enough).
1906, U. S. *v.* American Tobacco Co., 146 Fed. 557, C. C. (a subpœna calling for the minute-books of a corporation for a period of three years and the copy-letter-books for a period of three and a half months, held not too broad).

[*Note* 6 — *continued.*]

1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (an order under St. 1906, No. 75, p. 79, directing a corporation to produce before the grand jury certain described classes of documents, held proper and not a violation of the constitutional provision against unreasonable searches).

[*Note* 8, l. 5; *add:*]

1807, Burr's Trial, Robertson's Rep., I, 136, 137, 182, 183, 184 (conceded by the parties, and agreed by Marshall, C. J., that the process of subpœna *d. t.* is "not a process of right," but "a motion to the discretion of the Court"). 1890, Edison El. L. Co. *v.* U. S. El. L. Co., 44 Fed. 294, 45 id. 55, C. C. (the Court will not finally determine the materiality of the documents called for upon the refusal of the witness to produce, but will inspect and determine for itself). 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (on a deposition *de bene* under U. S. Rev. St. § 863, a subpœna *duces tecum* does not issue from the clerk as a matter of course, but the application "is addressed to the discretion of the Court," and "before compelling the production . . . it will sufficiently inquire into the matter to determine if the evidence appears to be material"). 1906, Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, C. C. A. (collecting the cases). 1906, Fairfield *v.* U. S., 146 Fed. 508, C. C. A. ("The duty of a witness to obey a subpœna is not conditioned by his own or by his counsel's opinion of the materiality of his testimony").
1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790.

Here compare the general rule that *irrelevancy* is not a ground for a witness' claim of privilege (*post*, § 2210).

[*Note* 9; *add:*]

1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, 762, C. C. (the Court may require preliminary proof of the witness' possession before issuing process).
1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (foreign corporation, already admitted to do business in the State, and subpœnaed *d. t.* before a grand jury; its removal of the books out of the State, in anticipation of the inquiry, held no excuse).

[*Note* 10, par. 1; *add:*]

1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358 (corporate officers having custody of documents of the corporation are the proper persons to produce).
1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (the Court noticed a claim by a corporation-officer that he could not "collect the documents within the time allowed," and held that this merely would entitle him to demand further time). 1906, U. S. *v.* American Tobacco Co., 146 Fed. 557, C. C. (a secretary held not liable to produce certain documents in the exclusive custody of the president of the corporation).

But of course a member of a *partnership* has a control over documents of the firm: 1906, U. S. *v.* Collins, 145 Fed. 709, D. C.

Whether under U. S. Rev. St. 1878, § 724 (quoted *ante*, § 1859, n. 6), authorizing an order, on motion, to "parties" to produce, the *officers of a corporation-party* are subject to such a process is an interesting question: 1907, Cassatt *v.* Mitchell C. & C. Co., — C. C. A. — , 150 Fed. 32, 38 (order denied). Compare the reverse question *post*, § 2219, n. 8 (whether a subpœna *d. t.* is appropriate for a party).

[*Text*, p. 2980, par. 4, at the end; *add:*]

It seems highly desirable that Courts should for this purpose recognize a form of subpœna *ordering a court-official to go and fetch the corporation-documents*, and *forbidding the custodian to hinder*, but permitting the custodian to attend voluntarily with the books if he so prefers. The reason is this: Under the privilege of self-crimination, the custodian (clerk, secretary) may refuse to produce if the books tend to criminate himself as well as the corporation (*post*, §§ 2259, 2264), which will sometimes be the case; yet the corporation itself may not have the privilege (*post*, § 2259), or the prosecution may be willing to give immunity (*post*, § 2281) to the corporation but not to its officer; hence, so long as the subpœna has to be directed to the custodian when the object is merely to get the corporation-books, that object is likely to be defeated. A form of process should therefore be sanctioned which will obtain the corporation-books without involving process against the custodian-agent of the corporation.

§ 2201. Indemnity for Expenses; Tender in Advance.

[*Note* 6; *add:*]

Canada; Yukon St. 1904, c. 5, § 39 (no person is compellable to attend in court, etc., unless on tender of fees "for such attendance and necessary travel").
United States: Fla. Rev. St. 1892, §§ 2867, 2875; St. 1893, c. 4120; St. 1903, c. 5132; 1906, Pittman *v.*

[*Note* 6 — *continued.*]

State, — Fla. — , 41 So. 385 (foregoing statutes construed, as to the necessity of tender of costs by the accused).
Ida.: 1906, Anderson *v.* Ferguson B. S. Co., — Ida. — , 86 Pac. 41 (right to compensation, considered).
N. Y.: 1906, *Re* Depue, 185 N. Y. 60, 77 N. E. 798 (statute applied).
N. C. Rev. 1905, § 1298 (like Code 1883, § 1368).
Vt.: 1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (in a grand jury inquiry, the State need not tender the fees and expenses of producing documents to a witness, here a corporation; in a criminal case, "a witness has no right to refuse to attend because his fees are not tendered").

[*Note* 11; *add:*]

1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (applied to a subpœna *d. t.* to a corporation to produce documents; West *v.* State, Wis., approved).

§ 2203. Same: Expert's Fees.

[*Note* 1; *add:*]

Can.: 1905, Butler *v.* Toronto Mutoscope Co., 11 Ont. L. R. 12 (medico-electric experts, called to give an opinion as to the capability of a machine to cause an injury, held not privileged to require extra fees before testifying).
Mich.: St. 1905, No. 175 (forbids the payment of special fees even by the parties; cited more fully *ante*, § 562, n. 1).
The *Scotch* law appears to justify the privilege of an extra fee: 1903, Turnbull *v.* North British R. Co., 5 Ct. Sess. Cas. 5th ser. 944.

[*Note* 2; *add:*]

1907, Stevens *v.* Worcester, — Mass. — , 81 N. E. 907 (an expert on mill rights, who had formed an opinion and recorded it in a memorandum, held compellable to examine and read the paper, though not to labor for forming an opinion).

[*Note* 5, par. 1; *add:*]

N. C. Rev. 1905, § 2803 (like Code 1883, § 3756; adding that physicians in criminal actions in Iredell Co. shall be allowed five dollars per diem).
S. C.: St. 1905, No. 457 ("physicians and surgeons bound over or summoned by the State to testify as experts in any case in the Court of General Sessions, or actually bound over at the instance of the defendant to testify as experts in any case of felony" in that Court, shall receive five dollars besides the usual witness fees; provided the judge certify the testimony to be material).

§ 2204. Inability to Attend; in general.

[*Note* 1, at the end; *add:*]

It would seem absurd to suppose that precisely the contrary objection should be raised, *i. e.*, that the witness was entitled *not to be examined at his home*, on account of disturbance to his family, etc.; but such an objection was sustained in McSwane *v.* Foreman, — Ind. — , 78 N. E. 630 (1906).

§ 2207. Same: Distance from Place of Trial.

[*Note* 1; *add:*]

1902, *Re* Hemstreet, 117 Fed. 568, D. C. (bankruptcy; the effect of Bankruptcy Act, § 41, and Rev. St. § 876, determined; a witness need not leave his State to attend before a referee). 1906, *Re* Cole, 133 Fed. 414, D. C. (similar).

§ 2210. Privilege; Irrelevant Matters.

[*Note* 1, par. 1; *add:*]

1906, Anin's Petition, 17 Haw. 338 (before the grand jury).
1906, *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552 (*Ex parte* McKee followed).
1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241, 244 C. C. ("It seems to be settled that, ordinarily at least," no such privilege exists). 1906, Dowagiac Mfg. Co. *v.* Lochreo, 143 Fed. 211, C. C. A. (collecting the authorities). 1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358, and cases cited *ante*, § 2200, n. 8 (documents).

[*Note* 1, par. 3, l. 6; *add:*]

1905, Perry *v.* Rubber T. W. Co., 138 Fed. 836, C. C. (depositions; "the general rule is that the witness should be required to answer all questions which may possibly be material").

[*Note* 1, par. 3, at the end; *add:*]

Distinguish also the judge's *power to disallow* any irrelevant question, under the modern English and Canadian practice (*ante*, § 986, n. 11).

[*Note* 2; *add:*]

1904, Rogers *v.* Superior Court, 145 Cal. 88, 78 Pac. 344 (grand jury; privilege exists for matters not pertinent).
1905, Fenn *v.* Georgia R. & E. Co., 122 Ga. 280, 50 S. E. 103 (refusal to answer irrelevant questions before a commissioner, privileged).

§ 2212. Trade Secrets and Customers' Names.

[*Note* 1, par. 1; *add:*]

Ont. St. 1905, 5 Edw. VII, c. 13, § 30 (factory-inspectors; quoted *post*, § 2374, n. 5); St. 1906, 6 Edw. VII, c. 11, § 78 (mining-inspectors, etc.; quoted *post*, § 2374, n. 5); St. 1906, 6 Edw. VII, c. 30, § 231 (railway board; quoted *post*, § 2374, n. 5).
U. S.: 1904, Herreshoff *v.* Knietsch, 127 Fed. 492, C. C. (rule for cross-examining to a secret invention in an interference case, considered). 1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241, 245, C. C. (Cochran, J.: "It should be accepted, therefore, as correct law, that a witness should not be compelled to disclose trade secrets embedded in his head or in documents in his possession, when their disclosure will be prejudicial to him or his company, and they are not relevant to the controversy in the suit or action in which he is a witness, or otherwise admissible in evidence therein"; applied to a claim made on subpœna *d. t.* in a suit on a contract for exchange of shares of stock).
Va.: 1905, Worrell *v.* Kinnear, 103 Va. 719, 49 S. E. 988 (damages for breach of contract ordering the making of certain steel doors; the cost of manufacture being in issue, questions as to the plaintiff's amount of business, fixed charges, etc., were held privileged, as "unduly prying," on the suggestion that the sole business competitor of the plaintiff was in collusion with the defendant).

[*Note* 1, par. 4, l. 2; *add:*]

For the privilege as to information acquired by a *factory-inspector*, *mine inspector*, or *railway-commission*, see *post*, § 2374.
For the question of privilege as to *bankers*, *telegraphers*, *trustees*, *journalists*, etc., see *post*, § 2286.

§ 2215. Political Votes.

[*Note* 2; *add:*]

Br. C. St. 1903–4, 3 & 4 Edw. VII, c. 17, § 99 (like Rev. St. 1897, c. 67, § 102); ib. § 160 (in proceedings where the scrutiny of ballots becomes necessary, "the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid").

[*Note* 3; *add:*]

N. C. Rev. 1905, § 4407 (in election contests, "no witness . . . shall be excused from discovering whether he voted at such election, . . . and if he was not a qualified voter, he shall be compelled to discover for whom he voted").

[*Note* 5; *add:*]

Br. C. St. 1903–4, § 160 (quoted *supra*, n. 2).
For statutes designed to take away this privilege by granting immunity, see *post*, § 2281.

[*Note* 6; *add*, under *Accord:*]

1906, State *v.* Matlack, — Del. — , 64 Atl. 259 (misconduct of election officers in misreading ballots at a primary election; waiver allowed).
1904, Lane *v.* Bailey, 29 Mont. 548, 75 Pac. 191 (good opinion by Callaway, C.).

§ 2218. Party-Opponent: (*a*) Testimony on the Stand, etc.

[*Note* 3; *add:*]

Man. St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding further details as Rules 402 A, 402 B, 407 B; and by adding Rule 460 H, quoted *ante*, § 1890, n. 3).
Newf. St. 1904, c. 3, Rules of Court 28.
Yukon Consol. Ord. 1902, c. 17 (Judicature), Ord. XXI, RR. 200–224; St. 1904, c. 5, § 35.
Conn. Gen. St. 1902, §§ 710, 732–737 (reproduces Gen. St. 1888, §§ 1099, 1060–1062, omitting the proviso that if discovery is obtained, testimony on the trial cannot be demanded).
Ill. St. 1905, May 18 (Municipal Court), §§ 32, 33.
Ia. Code 1897, §§ 3610, 3611.
N. C. Rev. 1905, §§ 865, 1351 (like Code 1883, §§ 580, 1630).
Okl.: 1906, *Re* Wogan, 103 Mo. App. 146, 77 S. W. 490 (a party held compellable to depose, under the Oklahoma statutes).

[*Note* 6; *add* a new paragraph 3:]

The statutes often provide that *judgment may be taken* against a party improperly refusing to answer such interrogatories; the validity of this provision has recently been doubted, but without good ground, in Lawson *v.* Black Diamond C. M. Co., — Wash. — , 86 Pac. 1120 (1906). Compare the similar rule for *refusal to produce documents* (*ante*, § 1210, n. 2).

§ 2219. Same: (*b*) Production of Documents.

[*Note* 6, par. 1; *add:*]

Man. St. 1906, 5 & 6 Edw. VII, c. 17, § 4 (amends Rev. St. 1902, c. 40, Rule 392, as to mode of service, and Rule 421, as to penalty for refusal to produce).
Newf. St. 1904, c. 3, Rules of Court 28.
Yukon Consol. Ord. 1902, c. 17 (judicature), Ord. XX, RR. 190–199.
Conn. St. 1889, c. 22, Gen. St. 1902, §§ 732–737.
Ga.: 1904, Carrington *v.* Brooks, 121 Ga. 250, 48 S. E. 970 (Code applied). 1905, Macon *v.* Humphries, 122 Ga. 800, 50 S. E. 986 (a production under order is a waiver of the right to object to an improper order).
N. C. Rev. 1905, § 1656 (like Code 1883, § 578); Code 1883, § 1373, Rev. 1905, § 1657 (production on trial). 1906, Whitten *v.* Western U. Tel. Co., 141 N. C. 361, 54 S. E. 289 (telegram in possession of counsel on trial, compelled to be produced without prior notice, under Code 1883, § 1373, Rev. 1905, § 1657).

[*Note* 8, l. 1; *add:*]

1906, Banks *v.* Connecticut R. & L. Co., — Conn. — , 64 Atl. 14 (under Gen. St. 1902, § 710, Gen. St. 1888, § 1099, cited *ante*, § 2218, n. 3, making an opponent compellable "as other witnesses," production of documents at the trial on motion is included; and such production at the trial is not "set about by the same limitations" as discovery of documents before trial under Gen. St. 1902, § 732, Gen. St. 1888, § 1062, allowing discovery, in its original phrasing, "as a court of equity might order"; such production may be obtained either by subpœna *duces tecum* or by motion for an order during trial; good opinion by Prentice, J.).

[*Note* 8, at the end; *add:*]

Compare the reverse question, *ante*, § 2200, n. 10 (whether an order to produce on motion is appropriate for a third person).

§ 2220. Same: (*c*) Corporal Exhibition.

[*Note* 3; *add*, under *England:*]

1905, W. *v.* S., Prob. 231 (order of inspection made, but not obeyed).
For further details, see an article by Mr. D. M. Cloud, "Physical Examination in Divorce," 35 Amer. Law Rev. 698 (1901).

[*Note* 5, par. 1; *add:*]

1906, Seaboard Air Line R. Co. *v.* Scarborough, — Fla. — , 42 So. 706 (ejection from a train; a witness for the defendant having testified that he saw a passenger ejected at the time and place in question, the defendant requested that the plaintiff be produced in court for identification, and the trial Court refused; held, that though the trial Court might have discretionary power to do this, the defendant could have attained his purpose by process of subpœna, and was not injured).

[*Note* 9; *add:*]

Can.: Manit., St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (similar to Ont. St. 1891, c. 11; amends Rev. St. 1902, c. 40, by adding Rule 407 A).
U. S.: Cal.: 1907, Johnston *v.* Southern P. Co., — Cal. — , 89 Pac. 348 (personal injuries; power to order physical examination, affirmed).
Hawaii: 1904, Fuller *v.* Rapid Transit Co., 16 Haw. 1, 12 (personal injuries; question not decided; but in any case the Court has discretion, and the request must be made before trial).
Ill.: 1879, Freeport *v.* Isbell, 93 Ill. 381, 385 (personal injury; the plaintiff was allowed to be asked whether he would furnish some of his urine for chemical examination as to his alleged kidney disease caused by the fall in question; "it was his duty" to produce this "best evidence attainable," and his refusal was evidence against him). 1906, Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583 (personal injury; the Court "has no power" to compel the plaintiff to submit to a medical examination). 1907, Chicago *v.* McNally, — Ill. — , 81 N. E. 23 (similar; nor can the question be asked, whether the plaintiff is willing to submit to a physical examination).
Kan.: 1904, Atchison, T. & S. F. R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509 (injury to the eyes; expert examination ordered). 1906, Dickinson *v.* Kansas C. E. R. Co., — Kan. — , 86 Pac. 150 (Ottawa *v.* Gilliland followed).
Ky.: 1901, Louisville & N. R. Co. *v.* Simpson, 111 Ky. 754, 64 S. W. 733 (following Belt E. L. Co. *v.* Allen).
Mont.: 1905, May *v.* Northern P. R. Co., 32 Mont. 522, 81 Pac. 328 (personal injury; order compelling the plaintiff to submit to an examination by physicians appointed by the Court, held properly denied, mainly on the ground of lack of judicial power, following the Massachusetts Court; full review of the cases and arguments in a careful opinion by Holloway, J.).
Okl.: 1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (personal injury; plaintiff held not compellable to submit before trial to an examination; U. P. R. Co. *v.* Botsford, U. S., followed as binding on the Territorial Court).
Tex.: Austin & N. W. R. Co. *v.* Cluck, *supra*, affirmed on appeal in — Tex. Sup. — , 77 S. W. 403. 1905, Houston & T. C. R. Co. *v.* Anglin, — Tex. — , 89 S. W. 966 (like C. R. I. & T. R. Co. *v.* Langston).
U. S.: 1905, Denver C. T. Co. *v.* Norton, 141 Fed. 599, 609 (personal injuries; the inspection cannot be ordered, but the defendant may make the request and on refusal may comment thereon).
Wash.: 1905, Helbig *v.* Grays' Harbor E. Co., 37 Wash. 130, 79 Pac. 612 (further examination by a third physician, held not improperly refused).

[*Note* 9 — *continued.*]

In the Federal Congress (59th Cong., 2d Sess., 1907) a bill was reported by the House of Representatives' Committee on Judiciary (H. R. 10, Report No. 7587, Feb. 9) "to authorize the courts of the United States to require a party to submit to a personal physical examination in certain cases"; but was not passed.

§ 2223. Facts involving a Civil Liability, etc.

[*Note* 7, par. 2; *add:*]

Ont. St. 1904, 4 Edw. VII, c. 10, § 21 (similar; quoted *post*, § 2281).

§ 2230. Husband or Wife; Paramour; Void Marriage.

[*Note* 1, last line; *add:*]

1905, State *v.* Hancock, 28 Nev. 300, 82 Pac. 95.

[*Note* 2, par. 1; *add:*]

1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; defendant being already married, the woman now living with him as wife was admitted against him).

§ 2231. Bigamous Marriage; Disputed Marriage.

[*Note* 2; *add:*]

1905, Murphy *v.* State, 122 Ga. 149, 50 S. E. 48.

[*Note* 3; *add:*]

1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 ("If the first marriage is admitted or is clearly proved, the alleged second wife is competent," except as to the first marriage).

[*Note* 4; *add:*]

1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; a woman living with defendant as his wife, admitted against him, after evidence of his and of her former marriage to another).

§ 2232. Extrajudicial Admissions of Wife or Husband.

[*Note* 1; *add:*]

Accord: 1904, Halbert *v.* Pranke, 91 Minn. 204, 97 N. W. 976 (husband's petition in bankruptcy, excluded).
1903, Baker *v.* State, 120 Wis. 135, 97 N. W. 566 (false pretences; defendant's husband's admissions, excluded).
Contra: 1886, Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749 (wife's acts and utterances as a joint principal, admitted).
1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561 (arson by a husband as accessory to the wife; the wife's confessions as principal, admitted against the husband).

[*Note* 4; *add,* under *Accord:*]

1904, Joiner *v.* State, 119 Ga. 315, 46 S. E. 412 (wife's statements of husband's cruelty, to a third person in defendant's presence, admitted).
1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754.

[*Note* 5; *add:*]

The privilege is here to be claimed when answer is *offered*, and not when the discovery is first sought, if it is then demandable as from a party: 1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415.

§ 2233. Hearsay; Production of Documents.

[*Note* 1; *add:*]

But testimony obtained by *information gained from the wife* would not be privileged: 1905, Com. *v.* Johnson, 213 Pa. 432, 62 Atl. 1064. Compare §§ 2261, 2325, *post.*

[*Note* 2; *add:*]

1906, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (spontaneous declarations).
Distinguish the following: 1906, People *v.* Chadwick, — Cal. — , 87 Pac. 384, 389 (perjury; the wife's testimony at the former trial, admitted on the issue of materiality).

§ 2235. Husband or Wife not a Party; Sundry Applications of the Rule.

[*Note* 1; *add:*]

But otherwise where the proceeding is a bill *against the wife herself*, to set aside a conveyance from the husband: 1899, *Re* Fowler, 93 Fed. 417.
1905, Wiley *v.* McBride, 74 Ark. 34, 85 S. W. 84.

[*Note* 3; *add*, under *Not Privileged:*]

1904, Pruett *v.* State, 141 Ala. 69, 37 So. 343 (adultery; husband of the woman with whom it was charged, admitted).
1906, Hill *v.* Pomelear, 72 N. J. L. 528, 63 Atl. 269 (criminal conversation; plaintiff admitted to prove the marriage, under Rev. Pub. L. 1900, p. 363, § 5).
1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721 (adultery of N. with S.; the husband of S. admitted against N. for the State).

[*Note* 6; *add:*]

1905, Weckerly *v.* Taylor, — Nebr. — , 105 N. W. 254 (creditor's bill against the debtor, his wife as assignee, and an insurer, to reach the proceeds of an accident policy; the husband not admitted for the plaintiff).
1893, Norbeck *v.* Davis, 157 Pa. 399, 405, 27 Atl. 712 (under St. 1887, P. L. 158, § 2 *b*, P. & L. Dig. Witnesses, § 11, the wife is competent in interpleader proceedings as claimant against a creditor).
1904, *Re* Domenig, 128 Fed. 146, D. C. (under Pa. St. 1887, *supra*, the wife is competent in bankruptcy proceedings to prove her claim as creditor).

§ 2236. Same: Co-Indictees and Co-Defendants.

[*Note* 2; *add:*]

1904, Graff *v.* People, 208 Ill. 312, 70 N. E. 299 (the wife of a co-indictee who had pleaded guilty before trial, admitted against the defendant).

§ 2237. Testimony against Husband or Wife Deceased or Divorced.

[*Note* 4; *add:*]

1906, State *v.* Mathews, — Ia. — , 109 N. W. 616 (wife at the time of the homicide, but divorced before trial; not privileged).
1903, Tompkins *v.* Com., 117 Ky. 138, 77 S. W. 712 (for occurrences subsequent to divorce; but this limitation is unsound).
1905, Cole *v.* State, — Tex. Cr. — , 88 S. W. 341.
1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.
1905, Hartley *v.* Hartley, 27 R. I. 176, 61 Atl. 144 (wife's bill for account against a divorced husband; plaintiff not allowed to testify to a property agreement made during marriage; erroneously following Robinson *v.* Robinson, R. I., *post*, § 2341, as authority).

§ 2239. Testimony admitted Exceptionally; At Common Law, by Necessity.

[*Note* 4; *add:*]

1907, Williams *v.* State, — Ala. — , 43 So. 720 (assault by a woman on her former husband; husband admitted).
1904, State *v.* Harris, — Del. — , 58 Atl. 1042 (husband admitted against his wife, on a charge of assaulting him).
1907, Miller *v.* State, — Nebr. — , 111 Nebr. 637 (wife admitted on a charge of husband's assault on herself and two others).
1905, State *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545 (murder of defendant's baby, the shot passing through the baby's head and wounding the mother who was holding it in her arms; the mother excluded; a singular decision; Poffenbarger and Sanders, JJ., diss.).

[*Note* 9, l. 5; *add:*]

1905, Frazier *v.* State, — Tex. Cr. — , 86 S. W. 754 (useless opinion).

[*Note* 9, l. 9; *add:*]

1904, State *v.* McKay, 122 Ia. 658, 98 N. W. 510 ("this is so plain that no amount of reasoning can make it any clearer").

[*Note* 12; *add:*]

Ala. St. 1903, No. 9, p. 32 (husband charged with abandonment; "the wife shall be a competent witness against her husband").
1905, Wester *v.* State, 142 Ala. 56, 38 So. 1010 (abandonment of family; the wife allowed to testify for the State, under St. 1903, No. 9).
1902, State *v.* Miller, 3 Pennew. Del. 518, 52 Atl. 262 (under St. 1887, c. 230, 18 Laws, p. 447, quoted *ante*, § 488, a wife is admissible on a complaint against the husband for failure to support minors even when not under the age of ten).

[*Note* 12 — *continued.*]

1904, State *v.* Bean, 104 Mo. App. 255, 78 S. W. 640 (wife-abandonment; the wife admitted against the husband). 1869, State *v.* Newberry, 43 Mo. 429 (wife-abandonment; the wife's affidavit to an information, admitted).
1905, Morgenroth *v.* Spencer, 124 Wis. 564, 102 N. W. 1086 (Bach *v.* Parmely followed).

[*Note* 14; *add:*]

Not decided: 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.

[*Note* 16; *add:*]

Accord: La. St. 1904, No. 41. 1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317 (but under a broad statute, Pub. Gen. L. 1904, art. 35, § 4).
Contra: 1906, State *v.* Kniffen, — Wash. — , 87 Pac. 837.

[*Note* 20; *add:*]

Not admissible: 1905, Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (divorce for adultery; under Code, § 5272, and testimony to adultery in a proceeding for alimony pending suit).
Admissible: 1904, Schaab *v.* Schaab, 66 N. J. Eq. 334, 57 Atl. 1090 (under St. 1900, c. 150, §§ 2, 5, a wife may testify for her husband in an action for divorce for adultery, but is not compellable).
Compare the cases on divorce cited *post*, § 2245, n. 5.

§ 2240. Same: Under Statutory Exceptions.

[*Note* 2; *add:*]

1906, Heckman *v.* Heckman, — Pa. — , 64 Atl. 425 (neither is competent under Pa. St. 1893, P. L. 345, in a suit in equity for reconveyance of the wife's separate estate).

[*Note* 3; *add:*]

1904, First Nat'l Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686.

§ 2241. Whose is the Privilege.

[*Note* 3; *add:*]

1904, Com. *v.* Barker, 185 Mass. 324, 70 N. E. 203 (under Rev. L. 1902, c. 175, § 20, the wife may voluntarily testify against the husband in a criminal case).

§ 2242. Waiver of the Privilege.

[*Note* 1; *add:*]

1903, Davis *v.* State, 45 Tex. Cr. 292, 77 S. W. 451.

[*Note* 5; *add:*]

1906, People *v.* Chadwick, — Cal. App. — , — Cal. — , 87 Pac. 384, 389 (but a failure to object at a former trial is not a waiver for a subsequent trial).

[*Note* 8, par. 1; *add:*]

1907, Jones *v.* State, — Tex. Cr. — , 101 S. W. 993 (Hoover *v.* State followed).

§ 2243. Inference from Exercise of the Privilege.

[*Note* 1; *add,* under *Accord:*]

1903, R. *v.* Hill, 36 N. Sc. 253 (following R. *v.* Corby, *supra*, even where the defendant's counsel had already introduced the subject by explaining the wife's absence).
1906, Mash *v.* People, 220 Ill. 86, 77 N. E. 92 (prosecuting counsel's argument drawing an inference from the wife's claim, held to have been here excused by the defendant's counsel's prior similar impropriety).
1905, State *v.* Shouse, 188 Mo. 473, 87 S. W. 480.
1905, State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247 (like Johnson *v.* State, Miss.).

[*Note* 1; *add,* under *Contra:*]

1906, McMichael *v.* State, — Tex. Cr. — , 93 S. W. 723 (wife an eye-witness).
The following ruling seems correct: 1907, State *v.* Brown, 118 La. — , 42 So. 969 (statement by the prosecuting attorney that the defendant's wife could testify neither for nor against the accused, held not improper).

§ 2245. Statutory Abolition, Express or Implied.

[*Note* 4; *add:*]

1904, Chaslavka *v.* Mechalak, 124 Ia. 69, 99 N. W. 154 (rule of Richards *v.* Burden applied to a wife's and a husband's admissions).
Contra: 1904, Lenoir *v.* Lenoir, 24 D. C. App. 160, 165 (said *obiter* that Code 1901, § 1068, quoted *ante*, § 488,

[*Note* 4 — *continued.*]

does not make the parties competent in a divorce case, thus preserving the rule of Burdette *v.* Burdette, 13 D. C. 469, *infra*, n. 7, and Bergheimer *v.* Bergheimer, 17 D. C. App. 381, in spite of the subsequent broad language of Code 1901; this result is unsound also as a matter of legal reasoning, for the Court mistakes the rule of Code 1901, § 964, quoted *ante*, § 2067, n. 10, to have some effect in disqualifying the parties, instead of merely requiring corroboration).

1905, Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (divorce for adultery, and testimony to adultery in a proceeding for alimony pending suit for divorce for desertion).

[*Note* 10; *add:*]

1903, Gosselin *v.* King, 33 Can. Sup. 255, 263 (under Can. Evidence Act 1893, c. 31, § 4, the husband or wife of the accused is both admissible and compellable to testify for the prosecution against the accused; Mills, J., diss.).

1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317 (under Pub. Gen. L. 1904, art. 35, § 4, the husband or wife is admissible for the prosecution, though not compellable).

[*Note* 11, *add:*]

1904, Reed *v.* Reed, 70 Nebr. 775, 98 N. W. 76 (property rights).

§ 2250. Self-Crimination; History of the Privilege.

[*Text*, p. 3070, l. 2 from below:]

For "*obstante*," read "*obtenta*," as in l. 9 of note 18, *infra*. This correction is due to the courtesy of Mr. Justice Holmes.

[*Note* 43, par. 2, p. 3078; *add:*]

It should be added that the peculiar stronghold of Chancery practice, its personal examination on oath to make discovery, is found established as early as the first part of the 1400s, and that the opposition which went on during that century and the 1500s to the increasing spread of the Chancellor's powers was probably due in part to this feature of its procedure, in which "the Chancery was naturally identified with the Church" and its methods with those of the Ecclesiastical and Star Chamber courts (1890, Kerly, Historical Sketch of the Equitable Jurisdiction of the Court of Chancery, pp. 43–45).

§ 2251. Policy of the Privilege.

[*Note* 1, *add:*]

Professor Henry T. Terry's article in the Yale Law Journal, XV, 127 (1906), "Constitutional Provisions against Forcing Self-Incrimination."

[*Note* 16, *add:*]

The correct moral attitude toward the privilege has been well illustrated in a courageous and clear-thinking opinion, rendered in a case where outrageous fraud had been used at an election:

1907, Lassing, J., in Scholl *v.* Bell, — Ky. — , 102 S. W. 248: "The testimony shows many outrages and crimes done by the police, and yet, when these men were placed on the witness stand and interrogated as to what they knew, they invariably sheltered under the law forbidding self-incrimination; and, when the question as to whether the witness should or not be compelled to answer was certified to the chancellors, the witnesses were always protected by the ruling. Assuming the ruling to be correct, the conclusion which seems to have been drawn as to the innocence of the officers is not justified. The principle under discussion is a rule of evidence, to protect the witness from criminal prosecution or public exposure to shame because of his own testimony. It is a rule of necessity, beyond which it should not be extended. Its use should not be considered as affording the witness a certificate of good character. Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him? Suppose a bank had been robbed, and the bookkeeper, the teller, and cashier, when interrogated, should say, 'I decline to answer under advice of counsel.' What would be thought of a board of directors who would afterwards leave the bank in the hands of such men? This is precisely the situation here. Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence."

§ 2252. Constitutional and Statutory Phrasings, etc.

[*Note* 3; *add:*]

Eng. St. 1904, 4 Edw. VII, c. 15, § 12 (cruelty to children; quoted *ante*, § 488).

Ont. St. 1904, 4 Edw. VII, c. 10, § 21 (amends Rev. St. 1897, c. 73, § 5; *quoted post*, **§ 2281**).

Yukon St. 1904, c. 5, § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37).

[*Note* 3 — *continued.*]

N. J.: 1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (State *v.* Zdanowicz approved).
N. C. Rev. 1905, § 1635 (like Code 1883, § 1354).

The statutes carrying out these provisions usually occur in connection with clauses qualifying the accused to testify, and will be found *ante*, § 488

The *Federal Amendment* of course applies in Federal trials only; 1905, *Ex parte* Munn, 140 Fed. 782 (the Federal Fifth Amendment cannot be invoked by one committed by a State court for refusal to answer).

[*Note* 11, par. 1; *add:*]

1905, *Re* Hale, 139 Fed. 496, 500, C. C. 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370.

§ 2254. Kinds of Facts protected; Civil Liability.

[*Note* 2; *add:*]

For the peculiar statutes in *Canada* (Dominion and Ontario), abolishing the privilege as to civil liability in certain cases, see *ante*, § 2223, n. 7.

§ 2256. Criminal Liability; (*a*) Forfeiture.

[*Note* 8; *add:*]

Whether *deportation* proceedings are criminal has not yet been finally settled: 1903, U. S. *v.* Hung Chang, 126 Fed. 400, 405 (deportation of a Chinese; the person arrested for deportation is not compellable to testify). 1904, Ark Foo *v.* U. S., 128 Fed. 697, 63 C. C. A. 249, *semble* (similar). 1904 U. S. *v.* Hung Chang, 134 Fed. 19, 25, 67 C. C. A. 93 (deportation of aliens is not a criminal proceeding; the respondent alien's refusal to testify may be the subject of inference against him). 1906, Low Foon Yin *v.* U. S., 145 Fed. 791, C. C. A. (proceedings for deportation of an alien are not criminal, so as to privilege the defendant). 1906, Low Chin Woon *v.* U. S., 147 Fed. 727, C. C. A. (Low Foon Yin *v.* U. S. followed).

[*Note* 10; *add:*]

1904, Attorney-General *v.* Toronto J. R. Club, 7 Ont. L. R. 248 (proceeding to revoke a club's charter and enjoin its continuance, for maintaining a betting-house; discovery refused, a forfeiture being involved).

[*Note* 11; *add:*]

1897, Earl of Mexborough *v.* Whitwood U. D. Council, 2 Q. B. 111 (privilege applied, in an action for forfeiture of a lease by breach of covenant against underletting; Pye *v.* Butterfield followed).
1904, Miller *v.* Commissioners, L. R. 2 Ire. 421 (conditional limitation, and forfeiture, distinguished).

§ 2257. Same: (*b*) Penalty.

[*Note* 3; *add:*]

1892, Boyle *v* Smithman, 146 Pa. 255, 274, 23 Atl. 397 (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" one thousand dollars for each act; privilege applied).

[*Note* 8; *add:*]

1881, Horstman *v.* Kaufman, 97 Pa. 147 (discovery by a plaintiff in execution against a defendant for fraudulent concealment of property, refused, the conduct being a misdemeanor).

[*Note* 10, par. 1; *add:*]

1906, Patterson *v.* Wyoming Valley District Council, Pa. Super. Ct. (appeal dismissed without an opinion, confirming the decision of Head, J., published in advance sheets of 78 N. E. Rep., Oct. 19; in an attachment for contempt in the violation of an injunction against a boycott by a labor union, the production of the defendant's books was held not within the privilege).
1907, Cassatt *v.* Mitchell C. C. Co., — C. C. A. — , 150 Fed. 32, 44 (whether in a civil action against a carrier for damages under U. S. St. 1887, c. 104, Feb. 4, § 8, the criminality of the same conduct under ib. § 10 allows the privilege to operate; not decided).

§ 2258. Crime under Foreign Sovereignty.

[*Note* 4; *add:*]

1903, People *v.* Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349 (cited *post*, § 2281, n. 11).
1904, State *v.* Jack, 69 Kan. 387, 76 Pac. 911 (Kansas anti-trust law; the witness claiming that his business involved also interstate commerce, it was held that "the possibility that his answers might disclose violations of the Federal anti-trust law" was not a "real and probable danger," following Brown *v.* Walker, U. S.).

The doctrine of Brown *v.* Walker, that there must be a "real and probable danger" has since been thus developed: 1905, Jack *v.* Kansas, 179 U. S. 372, 26 Sup. 73 (information under the Kansas anti-trust act, in the Kansas District Court; held that the possibility that answers might be given which might also incriminate him under the Federal anti-trust act was too remote, the Kansas Court having ruled that matters constituting a violation of the Federal act would be immaterial in the proceeding in question; two judges dissenting; in this case, however, it would seem that the Federal Court erred in assuming, as it did, that under the U. S. 14th Amendment the witness should be protected from the Kansas Court even if there was

[*Note* 4 — *continued.*]

a "real danger" of Federal prosecution). 1905, Ballmann *v.* Fagin, 200 U. S. 186, 26 Sup. 212 (a witness in a Federal Court refused to produce a book, and made the claim that it would criminate him either under the Federal bucket-shop act, Rev. St. § 5209, or under the Ohio bucket-shop act, alleging that several charges under the latter act were pending; held privileged, on the authority of Jack *v.* Kansas, *supra;* two judges dissenting). 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (anti-trust law; that a Federal immunity-statute would not protect a witness from possible prosecution under a State law in a State court is immaterial; approving King of Sicilies *v.* Wilcox, *supra*, n. 3, and distinguishing U. S. *v.* Saline Bank, *supra*, n. 3).

§ 2259. Crime of a Third Person; Officers of a Corporation and Public Officials.

[*Note* 1; *add:*]

1906, Washington Nat'l Bank *v.* Daily, — Ind. — , 77 N. E. 53, *semble* (cited *ante*, § 2193, n. 3).

Distinguish the rule that the witness alone, *not the party* to the trial, can claim the privilege (*post*, § 2270).

[*Note* 2; *add:*]

Contra, semble: 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (on subpœna to the secretary-treasurer of a New Jersey corporation to produce corporate documents before a grand-jury investigating offences against the Federal anti-trust law, it was held, Brewer, J., and Fuller, C. J., diss., that conceding the officer to be "entitled to assert the rights of the corporation, . . . there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State; . . . the corporation is a creature of the State, it receives certain special privileges and franchises, . . . [and may therefore not refuse to answer criminating questions] when charged with an abuse of such privileges"). 1907, Cassatt *v.* Mitchell C. & C. Co., — C. C. A. — , 150 Fed. 32, 45 (whether a corporation is a "person" under either constitutional amendment; the "varying expressions of opinion" in Hale *v.* Henkel pointed out). 1907, International Coal M. Co. *v.* Pennsylvania R. Co., 152 Fed. 557, C. C. (a corporation has not a privilege to refuse to disclose books in a proceeding to recover a penalty; following Hale *v.* Henkel).

Undecided: 1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (foreign corporation subpœnaed *d. t.* before a grand jury; not decided).

The decision in Hale *v.* Henkel, *supra*, may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one; or on the ground that the power to create involves the power to forfeit. But the opinion does not face the argument *contra* based on the criminal capacity of a corporation. Moreover, the Court's opinion has left a vital point still unnoticed. That point is this: The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration; did the Supreme Court, then, mean to say that a corporation was and is not within the privilege at common law? or did they mean to say merely that the Constitutional guarantee of it to all "persons" does not include corporations? If they meant the former, then no immunity needs to be given to, nor can be claimed by, a corporation; and Courts are free to exact everything from a corporation. But if they meant the latter, then the privilege stands, for corporations, until abolished by the Legislature; hence, if the Legislature has not abolished it, the corporation may still claim it. Hence also, if the Legislature in abolishing it has chosen (unnecessarily, to be sure) to grant immunity as an inseparable gift annexed therewith, the corporation will get the immunity when forced to relinquish the privilege. The importance of this distinction in the current attempts to investigate corporate conduct is obvious. But no certain light upon it is to be found in Hale *v.* Henkel.

The privilege has been *legislatively abolished* for corporations in certain offences under *Federal* laws, since the decision in Hale *v.* Henkel, *supra:* U. S. St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798 (under the acts of Feb. 11, 1893, Feb. 14, 1903, Feb. 19, 1903, and Feb. 25, 1903, quoted *post*, § 2281, "immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath"). In *Wisconsin*, the privilege is abolished for railroad corporations, in certain cases, by St. 1905, c. 447, § 1 (quoted *post*, § 2281, n. 5).

The corporation must of course *make its claim through its officer or counsel*, when called upon as an ordinary witness (*post*, § 2270, n. 1); but when the corporation is a party, and its officer is summoned as a witness, the claim by the corporation or its counsel, on its own behalf, must be distinguished from the officer's personal claim, — as in Hale *v.* Henkel, McAlister *v.* Henkel, *infra*, n. 3; compare § 2200, par. (4), *ante*, Supplement.

[*Note* 3, par. 1; *add:*]

Mich.: 1904, *Re* Moser, 138 Mich. 302, 101 N. W. 588 (the president of a corporation held bound to produce the corporate books for a period ante-dating his interest in the corporation; since he had "no right to attempt to avert real danger from others, no matter how closely he may be associated with them"; moreover, "when as agent for another he chooses to make entries on the books of that other," the books may be produced from the other's possession).

U. S.: 1890, *Re* Peasley, 44 Fed. 271, 275, C. C. (the treasurer of a corporation, held not privileged to withhold the corporate books on the ground that their contents might criminate the corporation). 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (the constitutional privilege "is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation"; here the witness was subpœnaed personally before a grand jury investigating by presentment against the corporation). 1906, McAlister *v.* Henkel, 201 U. S. 90, 26 Sup. 385 (similar to Hale *v.* Henkel; here the witness was subpœnaed before the grand jury on a charge and complaint against the corporation).

[*Note* 3, par. 2, l. 3:]

For "§ 2193," read "§ 2200, n. 10."

[*Note* 4, at the end; *add:*]

For this reason, Courts ought to recognize a form of subpœna which will obtain the corporate books *without summoning the corporation-custodian;* as more fully noticed *ante*, § 2200, par. 4 (Suppl. 1907).

Of course, the privilege may here, as elsewhere, be *taken away* by grant of immunity; *e. g.* as in Wis. St. 1905, c. 447, § 2 (quoted *post*, § 2281, n. 5; abolishes the privilege for officers, etc., of railroad corporations in certain cases).

[*Note* 5; *add:*]

Whether a *report required by law to be filed* is within the privilege from another point of view, is noticed *post*, § 2264, note 12*a*.

§ 2260. Facts "tending to criminate."

[*Note* 7; *add:*]

1905, *Ex parte* Conrades, 112 Mo. App. 21, 85 S. W. 150 (ordinance to investigate mercantile books in order to discover possible assets evading taxation; privilege held not applicable to the defendant's books at large without a specific claim as to incriminating facts).
1906, Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 787 (bill of discovery against the publisher of a libel, which was also a criminal one; the defendant held privileged not to produce the original manuscript nor to disclose the name of the author).
1906, *Ex parte* Merrell, — Tex. Cr. — , 95 S. W. 1047 (liquor sales).
1906, Rudolph *v.* State, 128 Wis. 222, 107 N. W. 466 (bribery; cited more fully *post*, § 2281 *a*, n. 15).

§ 2261. Facts furnishing a Clue to the Discovery of Criminal Facts.

[*Note* 4; *add*, under *Accord:*]

1906, *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552, *semble.*
1904, *Re* Briggs, 135 N. C. 118, 47 S. E. 403 (question No. 3 here put was similar to that considered in Ward *v.* State, Mo., *supra;* the opinion of Clark, C. J., for the Court, overruling the claim of privilege, does not allude to this question; but Walker, J., specially concurring, says: "We all agree, as I understand, that the first three questions did not tend to criminate the witness," citing Ward *v.* State).

§ 2264. Production or Inspection of Documents and Chattels.

[*Note* 1; *add:*]

1906, Hale *v.* Henkel, 201 id. 43, 26 Sup. 370 (cited more fully *infra*, note 11*a*).

But it seems clear that the witness must at least answer the preliminary question whether he *has possession* of the book asked for; this may be inferred from the principle of § 2271, *post*, and from the analogy of the civil party's privilege against discovery (*ante*, § 1859, n. 14, § 2200, nn. 7, 8, § 2219), and the rule of § 2260, *ante*, can seldom avail to override this result: *Contra, semble*, per Holmes, J., in Ballmann *v.* Fagin, 200 U. S. 186, 26 Sup. 212 (1905).

[*Note* 2, par. 1; *add:*]

Ga.: 1906, Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814 (liquor seized by unlawful search; Williams *v.* State followed).
Ill.: 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (here the privilege was held not violated by an order which merely authorized inspection of the books by the applicant-party while in the defendant's possession).
Kan.: 1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (bottles of liquor, seized from the defendant's possession by an officer without a warrant, admitted).
La.: 1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (clothing taken from defendant in jail, exhibited).
Md.: 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (documents taken by the police from the defendant's satchel or from his person under arrest, admitted; Boyd *v.* U. S. not followed as to its *obiter* statements, but Adams *v.* New York, U. S., *infra*, n. 11*a*, followed; Blum *v.* State, Md., *infra*, n. 11, distinguished, as involving "virtually compulsory process for the production of evidence in the immediate proceeding in which it was offered").
Minn.: 1905, State *v.* Strait, 94 Minn. 384, 102 N. W. 913 (defendants were bankers in partnership, and on voluntary assignment in bankruptcy a trustee took possession of the banking books; held that the defendants were not entitled to claim the privilege to prevent the use of the books before the grand jury on subpœna to the trustee; Boyd *v.* U. S. distinguished).
Mont.: 1906, State *v.* Fuller, — Mont. — , 85 Pac. 369 (the majority opinion in Boyd *v.* U. S., disapproved).
N. Y.: People *v.* Adams, *supra*, affirmed on writ of error in Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (1904), (stated *infra*, n. 11*a*).
Vt.: 1905, State *v.* Krinski, 78 Vt. — , 62 Atl. 37 (illegal keeping of liquors; articles seized under an illegal warrant, admitted; distinguishing State *v.* Slamon, Vt., *infra*, n. 11, and approving Adams *v.* U. S., U. S., *infra*, n. 11*a*). 1905, State *v.* Barr, 78 Vt. 97, 62 Atl. 43 (like State *v.* Krinski, *supra*).
Wash.: 1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268 (burglary; a pawn ticket taken from the defendant's person on search by the arresting officers, admitted; Gindrat *v.* People, Ill., followed).

[*Note 2 — continued.*]

Distinguish also the rule that a subpœna for documents must be ***reasonably specific*** in its terms, in order to be entitled to obedience (cases cited *ante*, § 2200, n. 6).

Compare the rule admitting documents *obtained by illegal search* (*ante*, 2183); that rule and the present one are often involved in the same case.

[*Text*, p. 3127, last line; *add:*]

That case, however (Boyd *v.* U. S.), in later Federal opinions, has in effect been pared down, and for practical purposes repudiated (in respect to the *obiter* statements in the majority opinion, above noted), by rulings which hold decisively (1) that the Fourth Amendment does not prevent the use of documents and chattels obtained by search-warrant, and (2) that furthermore the use of documents produced under compulsion of subpœna, for which the privilege under the Fifth Amendment has been taken away by an immunity-statute, cannot be objected to on the ground of the Fourth Amendment.[11a]

[11a] 1893, Tucker *v.* U. S., 151 U. S. 164, 168, — Sup. — (defendant's affidavit, voluntarily filed, for the summoning of witnesses in his behalf, admitted to contradict him, and held not to be a violation of the privilege nor of U. S. Rev. St. 1878, § 860, quoted *post*, § 2281).

1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (facts stated *supra*, n. 2, in People *v.* Adams, N. Y., brought here on writ of error; the Federal Court referred to the opinion of the majority in Boyd *v.* U. S. with apparent approval of its statement as to the history of the two Amendments; but held that here there was no violation of either Amendment, — not of the Fifth, because "he was not compelled to testify concerning the papers or make any admission about them," nor of the Fourth, because the search was not wrongful; and that in any event the effect of the Fourth does not "extend to excluding testimony which has been obtained by such means, if it is otherwise competent"; thus practically drawing the fangs of the erroneous *obiter dictum* in the majority opinion of Boyd *v.* U. S.).

1904, Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 24 Sup. 563 (order to an officer of a defendant corporation to testify and produce certain contracts of the corporation before the Commission; the privilege of the Fifth Amendment being obviated by the immunity of St. 1893, under § 2281, *post*, the Court held that the Fourth Amendment did not stand in the way; "testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure"; this squarely contradicts in effect the *obiter dictum* of the majority opinion in Boyd *v.* U. S.).

1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (similar, for corporation documents produced upon subpœna before a grand jury, by an officer entitled to the immunity-clause of St. 1903, Fed. 25, quoted *post*, § 2281; of the Boyd case, it is said that "subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing different functions"; this seems to signify plainly that the *obiter* statements of the majority opinion in the Boyd case are no longer approved by the Federal Supreme Court; Harlan and McKenna, JJ., concurring, emphasize the fact that a corporation may not be within the Fourth Amendment at all).

[*Text*, p. 3128, par. (*a*), at the end; *add:*]

An interesting question is here presented by those laws which require, from persons in a particular *business*, the *filing of a report* or schedule in the hands of some public officer. Are we to say that this is a compulsory testimonial disclosure, and that therefore the report need not be prepared and filed at all, so far as concerns matters tending to criminate? Or are we to say that if the purpose of the report is primarily to assist in the public administration, it must be prepared and filed, and that then its use in a criminal prosecution, if attempted, can be barred by the privilege? The latter seems the more sensible and practical view. But the cases have thus far been decided on individual grounds, usually either that of waiver or that of official duty.[12a]

[12a] Compare the statutes cited *post*, § 2281, and the following cases: 1903, People *v.* Butler S. F. & I. Co., Ill., cited *post*, § 2281, n. 11 (trusts).

1888, State *v.* Smith, Ia., cited *ante*, § 2259, n. 5 (pharmacist). 1888, State *v.* Cummins, Ia., cited *ante*, § 2259, n. 5 (pharmacist).

1900, People *v.* Henwood, 123 Mich. 317, 82 N. W. 70 (St. 1899, No. 183, § 25, requiring druggists to file with the prosecuting attorney a sworn report of liquors sold, held not to violate the privilege, in so far as a failure to file a report was charged as the offence of the druggist). 1904, People *v.* Robinson, 135 Mich. 511, 98 N. W. 12 (druggist; a report voluntarily filed was held admissible).

1901, State *v.* Donovan, N. D., cited *ante*, § 2259, n. 1 (druggist).

§ 2265. Bodily Exhibition.

[*Note* 2; *add:*]

1906, State *v.* Church, — Mo. — , 98 S. W. 16 (examination of defendant in jail by physicians, without objection by defendant, held not to violate the privilege).
1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (defendant called upon by officers to place his hand upon a bloody mark, for comparison; allowed, the accused having voluntarily complied).

[*Note* 3; *add:*]

1906, Moss *v.* State, — Ala. — , 40 So. 340 (shoes taken off voluntarily by the accused in prison, at an officer's request, and handed to him; admitted).
1904, Shaffer *v.* U. S., 24 D. C. App. 417, 425 (accused allowed to be identified by a photograph of him taken while under arrest).
1905, State *v.* Arthur, 129 Ia. 235, 105 N. W. 422 (burglary; shoe measurements admitted, made with shoes given up by the defendant to the sheriff at his direction; State *v.* Height distinguished, because the defendant's voluntary surrender of the shoes was a waiver).
1906, State *v.* Graham, 116 La. 779, 44 So. 90 (sheriff's measurements of shoe-tracks, by putting the accused's feet in them, without resistance by him, admitted).
1906, State *v.* Ruck, 194 Mo. 416, 92 S. W. 706 (accused compellable to stand up for identification by a witness).
1906, State *v.* Fuller, — Mont. — , 85 Pac. 369 (shoes of defendant, compared by the sheriff with footprints; privilege not violated; here the defendant voluntarily gave them to the officer, but the opinion expressly declares this immaterial).
1905, Kreens *v.* State, — Nebr. — , 106 N. W. 27 (testimony to comparisons of shoe-tracks, made with shoes taken from the accused, allowed).
1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (doctor's testimony to wounds on the accused's hands, observed after the accused's clothes were taken off in jail, admitted; here it did not appear that the exhibition was not voluntary, but the Court laid down the same rule for a forcible stripping).
1879, State *v.* Ah Chuey, 14 Nev. 79 (the defendant was compelled "to exhibit his arm so as to show certain tattoo marks"; held, not a violation of privilege; "no evidence of physical facts can be held" to be within the privilege; best opinion, by Hawley, J.; Leonard, J., diss.).
1907, People *v.* Furlong, — N. Y. — , 79 N. E. 978 (People *v.* Truck followed).
1906, State *v.* Sanders, — S. C. — , 56 S. E. 35 (placing defendant's foot in a track, with his consent, held not a violation of the privilege).
1906, Turman *v.* State, — Tex. Cr. — , 95 S. W. 533 (rape; held improper "for the State to require appellant to place the cap on his head for the purpose of identification by the prosecutrix," although he had voluntarily taken the stand; Benson *v.* State ignored; this Court seems disposed to make it hard for an accused not to be acquitted). 1907, Powell *v.* State, — Tex. Cr. — , 99 S. W. 1005 (photographs of defendant's hand, taken with his consent and after warning, admitted).

§ 2268. Criminating Questions not forbidden.

[*Note* 2; *add:*]

1905, *Re* Knickerbocker Steamboat Co., 139 Fed. 713, C. C. (the party claiming privilege "must say so in unmistakable language and give the reasons for shielding himself").
1907, *Re* Consolidated Rendering Co., — Vt. — , 66 Atl. 790 (the witness must appear and make claim; he cannot refuse to obey a subpœna *d. t.* and also claim privilege).

[*Note* 3, col. 2, l. 8 from the top; *add:*]

Contra: 1897, Earl of Mexborough *v.* Whitwood U. D. Council, 2 Q. B. 111 (forfeiture of lease; leave to administer interrogatories, denied; foregoing cases not cited).

[*Note* 3; *add*, at the end:]

For a consideration of the effect of this doctrine on the *immunity-statutes*, see *post*, § 2281 *a*.

[*Note* 5; *add*, in accord with the Text:]

1900, *Re* Green, 86 Mo. App. 216 (cited *infra*, n. 6).
1904, *Ex parte* Sauls, 46 Tex. Cr. 209, 78 S. W. 1073 (*habeas corpus;* the relators were arrested under a search-warrant for liquor illegally kept, and on arraignment before the justice they objected to being sworn at all; held that "they could refuse to be sworn as well as to testify"; "there might be a different question raised if the parties were testifying in a case other than their own").

[*Note* 6; *add:*]

Contra: 1900, *Re* Green, 86 Mo. App. 216 (citation under statute against a former administrator, with interrogatories charging concealment, embezzlement, etc.; the defendant's situation being "analogous to that of a defendant in a criminal suit," "he cannot be called by the opposite party as a witness").

[*Note* 7; *add:*]

1903, *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552 (interrogatories to a witness in a proceeding against E. for discovery of property embezzled from an estate; interrogatories allowed; distinguishing *Re* Green, n. 6, *supra*).

So too before a *grand jury:* 1902, U. S. *v.* Kimball, 117 Fed. 156, 163.

§ 2269. Judge's Warning to the Witness.

[*Note* 3; *add:*]

1904, Ivy *v.* State, 84 Miss. 264, 36 So. 265 ("the better practice" requires a warning).
1906, State *v.* Mungeon, — S. D. —, 108 N. W. 552 (incest; the prosecutrix being unwilling to testify, the Court's refusal to advise her of the privilege, on demand of defendant's counsel, was held not improper).

§ 2270. Who may Claim the Privilege, etc.

[*Note* 1, par. 1; *add:*]

1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99.
1906, McAlister *v.* Henkel, 201 U. S. 90, 26 Sup. 385 (a corporation cannot claim for its officer as witness).
Compare the cases cited *ante*, § 2196.

[*Note* 1, par. 2; *add:*]

1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370, *semble.*

[*Note* 2, par. 1; *add,* under *Accord:*]

Accord: 1906, State *v.* Mungeon, — S. D. —, 108 N. W. 552 (cited *ante*, § 2269, n. 3).
Contra: 1906, State *v.* Barker, — Wash. —, 86 Pac. 387 (said *obiter*, without citing authority, that an attorney, who was signalling a witness to claim privilege, might "interpose suitable and timely objections" to the questions).

[*Note* 3; *add,* under *Accord:*]

1907, Beauvoir Club *v.* State, — Ala. —, 42 So. 1040 ("the party cannot review the action of the Court here").
1890, State *v.* Van Winkle, 80 Ia. 15, 45 N. W. 388. 1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99.
1907, Taylor *v.* U. S., 152 Fed. 1, 7, C. C. A. (Morgan *v.* Halberstadt followed).
Compare the cases cited *ante*, § 2196.

[*Note* 5; *add:*]

Contra: 1878, People *v.* Brown, 72 N. Y. 571, 573.
1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (the reasoning in this opinion is fallacious; Bartch, C. J., diss.).

[*Note* 6, par. 3; *add:*]

1885, Mackin *v.* People, 115 Ill. 312, 3 N. E. 222.
1903, Lindsey *v.* State, 69 Oh. 215, 69 N. E. 126 (good opinion by Spear, J.); and the cases cited *ante*, § 2252, n. 11, par. 2.

[*Note* 6, par. 4; *add:*]

1905, State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967.

[*Note* 6; *add,* as par. 5:]

How far a judicial order overruling a claim is *interlocutory* only and therefore not *subject to appeal*, is considered in Alexander *v.* U. S., 201 U. S. 117, 26 Sup. 356 (1906).

For the course of proceeding in a *prosecution for the offence* of wilful refusal to testify, see U. S. *v.* Praeger, — C. C. A. —, 149 Fed. 474, 484 (1907; court-martial).

§ 2271. Who may Determine the Claim; Judge and Witness.

[*Note* 3; *add:*]

1899, Kelly *v.* Colhoun, L. R. 2 Ire. 199 (libel).

[*Note* 4; *add:*]

1905, Wilson *v.* Ohio F. Ins. Co., 164 Ind. 462, 73 N. E. 893 (rule in U. S. *v.* Burr applied to a claim by the principal of a bond in an action against the surety).
1904, *Re* Moser, 138 Mich. 302, 101 N. W. 588 (rule of U. S. *v.* Burr approved; Moore, C. J., diss.). 1906. *Re* Mark, — Mich. —, 110 N. W. 61 (rule in U. S. *v.* Burr applied).
1907, *Ex parte* Andrews, — Tex. Cr. —, 100 S. W. 376.
1904, *Re* Hess, 134 Fed. 109, D. C. (a bankrupt pleading the privilege for his books "should be required to bring the books and papers . . . before either the Court or the referee," the Court to "pass upon the probability of danger"). 1906, U. S. *v.* Collins, 145 Fed. 709, D. C. (witness' claim held not sufficient on the facts). 1906, U. S. *v.* Collins, 146 Fed. 553, D. C. (rule applied to a party summoned to produce documents before a grand jury).
1907, *Re* Consolidated Rendering Co., — Vt. —, 66 Atl. 790 (rule of State *v.* Thaden, Minn., approved).

§ 2272. Effect of Making Claim, as to Inferences, etc.

[*Note* 1; *add:*]

1894, Kops *v.* Reg., App. Cas. 650 (under N. S. Wales St. 1892, 55 Vict. No. 5, § 6, the judge may comment on the accused's failure to explain by his own testimony the evidence against him; and the provision against being "compellable" to testify does not forbid the drawing of inferences).
1904, R. *v.* Maguire, 35 N. Br. 609 (the judge's comment on the accused's failure to show an alibi, held on the facts a comment violating Dom. St. 1893, c. 31, § 4, *supra*).

[*Note* 2; *add:*]

Ind. St. 1905, p. 584, § 235 (re-enacts Rev. St. 1897, § 1889).
N. C. Rev. 1905, § 1634 (like Code 1883, § 1353).

[*Note* 3; *add:*]

1906, State *v.* Banusik, — N. J. L. — , 64 Atl. 994 (comment by the judge). 1906, State *v.* Twining, — N. J. L. — , 64 Atl. 1073, 1135 (comment by the judge).

[*Note* 5; *add:*]

1904, O'Dell *v.* State, 120 Ga. 152, 47 S. E. 577. 1904, Minor *v.* State, 120 Ga. 490, 48 S. E. 198.
1904, State *v.* Rambo, 69 Kan. 777, 77 Pac. 563.
1904, State *v.* Robinson, 112 La. 939, 36 So. 811.
1907, People *v.* Cahill, — Mich. — , 110 N. W. 520.
1907, State *v.* Kelleher, — Mo. — , 100 S. W. 470.
1905, State *v.* Williams, 28 Nev. 395, 82 Pac. 353.
1892, Wilson *v.* U. S., 149 U. S. 68, 13 Sup. 765.
1892, State *v.* Chisnell, 36 W. Va. 667, 15 S. E. 412.

[*Note* 6, col. 1; *add:*]

1904, Thomas *v.* State, 139 Ala. 80, 36 So. 734.
1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227 (sensible opinion by Sullivan, C. J.).
1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (Court comment forbidden).
1905, State *v.* Seery, 129 Ia. 259, 105 N. W. 511.
1906, People *v.* Provost, 144 Mich. 17, 107 N. W. 716 (careful opinion, by McAlvay, J., reviewing the various rules).
1906, People *v.* Murphy, 145 Mich. 524, 108 N. W. 1009.
1905, State *v.* DeWitt, 186 Mo. 61, 84 S. W. 956 (revising State *v.* Robinson).
1904, State *v.* Deatherage, 35 Wash. 326, 77 Pac. 504.

[*Note* 6, last line; *add:*]

to which add another State:
Kan. C. C. P. § 215 (Gen. St. 1897, c. 102, § 218), quoted *ante*, § 488. 1904, State *v.* Rambo, 69 Kan. 777, 77 Pac. 563 (here the Court with fervid scholastic zeal applied this intellectual thumbscrew, and set aside the verdict because the jurors in their deliberations were unable to fetter their native reasoning powers to suit the statute). 1906, State *v.* Brooks, — Kan. — , 85 Pac. 1013 (discusses the meaning of the term "considered" in the statute, and finds no violation of it in this case).

The actual effect, in experience, on the minds of jurymen, of forbidding the inference, may be gathered from Mr. (Assistant District Attorney) Arthur Train's useful book, "The Prisoner at the Bar" (1906), pp. 160–164.

[*Note* 7; *add:*]

1905, Powers *v.* State, — Nebr. — , 106 N. W. 332 (adultery with the wife of C.; the wife's claim of privilege, when called by the prosecution to prove the adultery, held to permit no inference as to the defendant's guilt; no authority cited).

[*Note* 8; *add:*]

1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (by a majority).

[*Note* 9; *add:*]

Moreover, his *testimony at a prior trial* may also be now offered against him, as an admission, even though he does not on this trial take the stand, — on the principle of § 1051, *ante:* 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (three judges dissenting, but without ground, and citing no authority).

§ 2273. Same: Inference from not Producing Evidence, distinguished.

[*Note* 1; *add:*]

1904, R. *v.* Aho, 11 Br. C. 114 (a statement in the charge that the onus is on the accused to account for his presence at the place, etc., the accused not taking the stand, is proper).
1906, R. *v.* Burdell, 11 Ont. L. R. 440 (failure to account for possession of stolen goods).
1907, Lipsey *v.* People, — Ill. — , 81 N. E. 348.
1904, Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563 (larceny).
1906, Perkins *v.* Terr., — Okl. — , 87 Pac. 537 (larceny, but here the opinion so perversely construes the principle as practically to shut the mouth of the prosecution in discussing the accused's failure to produce evidence in general).
1905, State *v.* Smokalem, 37 Wash. 91, 79 Pac. 603.

[*Note* 3, l. 14; *add:*]

1906, Grunberg *v.* U. S., 145 Fed. 81, 89, C. C. A. (failure to produce invoices, etc.).

[*Note* 4; *add:*]

1906, R. *v.* Blais, 11 Ont. L. R. 345 (the judge's comment on the accused's failure to call F., jointly indicted but separately tried, and competent for either party, held not a violation of Can. St. 1893, c. 31, § 4, quoted *ante*, § 488).
1906, State *v.* Drake, — Or. — , 87 Pac. 137 (conspiracy to kidnap; failure to call an incompetent co-defendant not on trial; the Court need not instruct the jury not to draw inference).

[*Note* 5; *add,* under *Accord:*]

1905, Powers *v.* State, — Nebr. — , 106 N. W. 332. 1907, Russell *v.* State, — Nebr. — , 110 N. W. 380 (but the inference does not necessarily apply to every fact not explicitly denied by a party taking the stand).
1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (the principle is conceded, but here the trial judge's language in the instruction was held too broad).

[*Note* 5; *add,* under *Contra:*]

1906, State *v.* Miles, — Mo. — , 98 S. W. 25 (rule of State *v.* Graves followed, but here held not applicable). It should be understood in other States that the foregoing Missouri rule is thoroughly bad, both in principle and in policy.

[*Note* 6; *add:*]

1903, Tines *v.* Com., — Ky. — , 77 S. W. 363.

[*Note* 8, par. 1; *add,* under *Contra:*]

1905, Newman *v.* Com., — Ky. — , 88 S. W. 1089 (failure to testify on application for bail; no authority cited; could not the Court at least notice its own opposed ruling in Taylor *v.* Com., *supra*?).

§ 2275. Waiver; (*a*) by Contract.

[*Note* 2; *add:*]

1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (a contract between a liability insurance company and the insured, giving to the former the right of inspection of the latter's books, is a waiver of the constitutional guarantee against unreasonable searches and seizures).

§ 2276. Same: (*b*) by Volunteering Testimony on the Stand.

[*Note* 2; *add:*]

1906, State *v.* Bond, — Ida. — , 86 Pac. 43 (murder of B.; the wife of B., defendant's paramour, was also indicted but separately tried; the wife held privileged, when called by the State, not to answer as to her complicity).

[*Note* 5; *add:*]

Eng.: 1904, R. *v.* Rouse, 1 K. B. 184, 20 Cox Cr. 592 (false pretences; the accused, on cross-examination answered alleging the prosecutor to be a liar; further cross-questions as to the accused being convicted of drunkenness, etc., were held improper, under s. 1, sub-sect. (*f*) (ii) of St. 1898, *supra;* but the Chief Justice added that "we are not laying down any general rule"). 1905, R. *v.* Bridgwater, 1 K. B. 131, 20 Cox Cr. 737 (under St. 1898, c. 36, s. 1, sub-sect. (*f*), (ii), on a charge of stealing, cross-examination to a prior conviction was held not justified, on the facts, by the clause as to "imputations on the character of the witnesses for the prosecution").
Can.: 1904, R. *v.* Grinder, 11 Br. C. 370 (larceny; after cross-examination of the accused, the trial judge asked him to write a specimen of his handwriting, to compare with a memorandum in evidence; held inadmissible).
Ala.: 1906, Miller *v.* State, — Ala. — , 40 So. 342 (Smith *v.* State followed). 1906, Davis *v.* State, — Ala. — , 40 So. 663 (liquor-selling).
Fla.: 1906, Pittman *v.* State, — Fla. — , 41 So. 385 (the rules for cross-examination to motives, etc., apply to an accused as to other witnesses).
Ida.: 1897, State *v.* Larkins, 5 Ida. 200, 47 Pac. 945 (cited *ante*, § 1890, n. 2).
Mich.: 1904, People *v.* Gray, 135 Mich. 542, 98 N. W. 261 (cross-examination to the defendant's false swearing as surety on a bond, allowed to affect credibility).
Mont.: 1904, State *v.* Rogers, 31 Mont. 1, 77 Pac. 293.
Nev.: 1905, State *v.* Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felonies to affect credibility, allowed).
N. C. Rev. 1905, § 1634 (like Code 1883, § 1353).
U. S.: 1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (Fitzpatrick *v.* U. S. followed). 1906, Sawyer *v.* U. S., 202 U. S. 150, 26 Sup. 575 (murder on a vessel; cross-examination allowable "with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime").
Ut.: 1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (murder in robbery; cross-examination as to other crimes, held improper; the ruling really proceeds on the principle of § 1810, *ante*, for the claim of privileg-

[*Note 5 — continued.*]

was conceded on all the questions but one; Bartch, J., dissenting, points out that Utah Rev. St. § 5015 is practically ignored by the majority; the decision makes confusion in the law, and helped to set free a confessed villain).

[*Note* 6; *add:*]

1907, Hays *v.* State, — Tex. Cr. — , 100 S. W. 926 (defendant may be recalled for questions preliminary to impeachment by self-contradiction).

[*Note* 6; *add,* at the end:]

The practical fairness and utility of construing the waiver liberally against the accused is noted, from the standpoint of experience, in Mr. (Assistant District Attorney) Arthur Train's important book, "The Prisoner at the Bar" (1906), pp. 163, 164.

[*Note* 7; *add:*]

1906, *Re* Mark, — Mich. — , 110 N. W. 61 (testimony at an *ex parte* complaint as witness, held not a waiver on subsequent trial of the accused before the committing magistrate).

But of course his voluntary testimony on the former occasion may *itself be used* (subject to the rule for confessions, *ante,* § 852) on the subsequent occasion: cases cited *infra,* n. 10.

Compare the rule for using an inference from *former failure to testify* (*ante,* § 2270).

[*Note* 10, par. 2; *add:*]

1907, Weaver *v.* State, — Ark. — , 102 S. W. 713 (affidavit for continuance).
1907, People *v.* Willard, — Cal. — , 89 Pac. 124 (petition for *habeas corpus,* and testimony of the defendant on the hearing, admitted.
1907, State *v.* Taylor, — Mo. — , 100 S. W. 41; and instances cited *ante,* § 278, n. 3.

The principle of waiver has also been invoked by some Courts to admit facts obtained by the accused's *voluntary surrender of chattels* or *submission to bodily inspection* (*ante,* §§ 2264, 2265).

§ 2277. Waiver: Cross-examination to Accused's Character, distinguished.

[*Note* 1; *add:*]

Ark.: 1905, Smith *v.* State, 74 Ark. 397, 85 S. W. 1123 ("subject to impeachment like any other witness").
1905, Carothers *v.* State, 75 Ark. 574, 88 S. W. 585 (cross-examination to subornation of a witness).
Ind. Terr.: 1906, McCoy *v.* U. S., — Ind. Terr. — , 98 S. W. 144 (a defendant "is subjected to the same rules governing as to [*sic?*] other witnesses").
Ky.: 1906, Henderson *v.* Com., — Ky. — , 91 S. W. 1141 (cross-examination to conviction for felony, allowed).
Md.: 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (rule of Guy *v.* State applied).
Mich.: 1906, People *v.* DeCamp, — Mich. — , 109 N. W. 1047 (record of conviction).
Miss.: 1905, Williams *v.* State, 87 Miss. 373, 39 So. 1006 (cross-examination to prior conviction).
Mo.: In line 8, col. 2, p. 3160, "is forbidden," *should read,* "was forbidden until the statute of 1895."

After State *v.* Smith, 125 Mo., *insert:* St. 1895, p. 284, Rev. St. 1899, § 4680 (quoted *ante,* § 488; allows a witness' conviction of crime to be proved by cross-examination).

After State *v.* Dyer, 139 Mo., *add:* 1903, State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027 (defendant may be cross-examined to prior convictions). 1903, State *v.* Thornhill, 174 id. 364, 74 S. W. 832 (similar; compare the rule of §§ 987, 1270, *ante*). 1905, State *v.* Spivey, 191 id. 87, 90 S. W. 81 (similar; but the question should ask directly for the conviction, and not merely as to being in the penitentiary, etc.). 1905, State *v.* Woodward, ib. 617, 90 S. W. 90 (compare the rule of § 1270, *ante;* general moral character may be used). 1906, State *v.* Beckner, 194 id. 281, 91 S. W. 892 (general moral character may be used). 1907, State *v.* Barnett, — Mo. — , 102 S. W. 506 (State *v.* Beckner followed).
Nebr.: 1905, Nickolizack *v.* State, — Nebr. — , 105 N. W. 895 (rape under age; cross-examination to improper conduct with another child excluded; the opinion shows no clear perception of the questions involved).
Nev.: 1905, State *v.* Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felony, allowed; "the defendant was in a double capacity, that of defendant and that of witness"; State *v.* Cohn not cited).
Okl.: 1907, Harrold *v.* Terr., — Okl. — , 89 Pac. 202 (he is "subject to be cross-examined the same as any other witness").
Or.: 1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (the cross-examination is restricted to "matters concerning which he has testified in the first instance").

§ 2281. Expurgation of Criminality by Statutory Amnesty or Indemnity; (1) Statutes forbidding Prosecution, etc.

[*Note* 5; *add:*]

England: St. 1905, 5 Edw. VII, c. 7, § 2 (investigation into corrupt transactions by war-contractors in South Africa; immunity clause similar to that of St. 1863 for a person making "a full and true disclosure," etc.).
CANADA: *British Columbia:* St. 1903–4, 3 & 4 Edw. VII. c. 17, § 231 (election petitions; substantially like Rev. St. 1897, c. 67, § 228; but the certificate is to state merely that the witness "had answered all such questions or such question"); ib. §§ 292, 293 (corrupt practices at elections; substantially like Dom.

[*Note 5 — continued.*]

Rev. St. 1886, c. 158, §§ 9, 10). St. 1906, 6 Edw. VII, c. 23, § 155 (fraud in registration of land-title; no person shall be privileged by this act from discovery in any civil proceeding, "but no such affidavit shall be admissible against any such person in evidence in any penal proceeding").

New Brunswick: St. 1905, c. 7, § 41 (offences under the factory act; defendant's privilege abolished; quoted *ante*, § 488).

Ontario: 1904, St. 1904, 4 Edw. VII, c. 10, § 21 (amends Rev. St. 1897, c. 73, § 5, quoted *ante*, § 2252, n. 3, by enacting as in Dom. St. 1893, c. 31, § 5, unamended, *supra*, identically down to the proviso, except by omitting the word "other;" then continuing: "provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him on the trial of any proceeding under any act of the Legislature of Ontario"). St. 1906, 6 Edw. VII, c. 47, § 18 (in trials for liquor offences, where a witness was violating the law, the judge may on certain conditions "by certificate in that behalf exempt such witness from prosecution for such unlawful act"). 1904, Attorney-General *v.* Toronto J. R. Club, 7 Ont. L. R. 248 (using premises as a betting-house; on motion for production of documents by the defendant's president, held that the privilege applied, under Ont. Rev. St. 1897, c. 73, § 5, quoted *ante*, § 2252, and that Can. Dom. St. 1893, c. 31, § 5, as amended in 1898 and 1901, quoted *supra* in this note, was not applicable in Ontario). 1906, Chambers *v.* Jaffray, 12 Ont. L. R. 377 (claim of privilege by a defendant in libel resisting discovery; the above statute 1904, c. 10, § 21, held to apply to parties in such situation, and not only to ordinary witnesses, so as to take away the privilege).

Yukon Consol. Ord. 1902, c. 76, § 110 (liquor offences; like Man. Rev. St. 1902, c. 101, § 202); ib. § 115 (liquor offences; provision similar to Can. Rev. St. 1886, c. 158, §§ 9, 10).

UNITED STATES: *California:* St. 1905, Mar. 10, c. 95 (amending St. 1893, Feb. 23, § 32, *supra*, by substituting the following: "If such person demands that he be excused from testifying on the ground that his testimony may incriminate himself, he shall not be excused, but in that case the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony, and he shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offence with reference to which his testimony was given. No person shall be exempt from indictment, presentment by information, prosecution or punishment for the offence with reference to which he may have testified as aforesaid, when such person so testifying fails to ask to be excused from testifying on the ground that his testimony may incriminate himself, but [*sic*? and] in all such cases the testimony so given may be used in any prosecution or proceeding, civil or criminal, against the person so testifying. Any person shall be deemed to have asked to be excused from testifying under this section, unless, before any testimony is given by such witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation shall distinctly read this section to such witness, and the form of the objection by the witness shall be immaterial if he in substance makes objection that his testimony may criminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect the witness from prosecution for any offence concerning which he may testify upon such trial, hearing, proceeding or investigation").

Florida: St. 1905, No. 45, § 2 (bribery of officials; privilege abolished for the briber; "but if he does testify, nothing said by him in his testimony shall be admissible in evidence in any civil or criminal action against him"). St. 1905, No. 29 (bribery, gaming, and liquor offences; privilege abolished, but "no person shall be prosecuted or subjected to any penalty or forfeiture for or [on] account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced or given [*sic*? omit] shall be received against him upon any criminal investigation or proceeding").

Georgia: St. 1906, c. 451, § 1, amending Cr. C. 1895, § 629 (in election offences, any offender not on trial shall be competent and compellable; "and nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution" except for perjury therein); St. 1906, c. 450, § 3 (stock gambling offences; "no person shall be excused" from testifying to an offence hereunder, "but any discovery made by a witness upon such examination shall not be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offence so done or participated in by him").

Idaho: St. 1905, Mar. 7, p. 416 (bribery; no person testifying for the State is to be excused, but "no person shall be prosecuted or punished on account of any transaction, manner, or thing concerning which he may be so required to testify or produce evidence," except for perjury therein).

Indiana: St. 1905, c. 53, § 12 (privilege abolished for witnesses before the railroad commission"; the claim that any such testimony may tend to criminate the person giving it shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"). St. 1905, c. 129, § 54 (privilege abolished for witnesses before investigations by common councils, for offences under this act or ordinances thereunder; "but such testimony shall not be used against such witness in any criminal prosecution"). St. 1905, p. 481, § 3 (bribery at elections; a guilty person is compellable, "but such evidence shall not be used against him in any prosecution for such or any other offence growing out of the matters about which he testifies, and he shall not be liable to trial by indictment or information or punished for such offence"). St. 1905, p. 584, Criminal Code, §§ 236, 237, 250 (re-enact Rev. St. 1897, §§ 1890, 1891, 1904, *supra*). St. 1905, p. 584, Criminal Code, § 253 (substitutes for "discovery . . . under oath" the word "evidence," in re-enacting Rev. St. 1897, § 1907, *supra*).

Kansas: St. 1897, c. 265, § 10 (anti-trust law; "any person subpœnaed or examined shall not be liable to criminal prosecution for any violation of this act about which he may testify; neither shall the evidence of such witness be used against him in any criminal proceeding"). St. 1905, c. 209 (gambling offences; phrasing of above statute changed, and a proviso added negativing exemption from perjury-penalty). St. 1905, c. 340, § 10 (railroad rate inquiries by the Railroad Commissioners; the claim of privilege shall not be allowed, but the testimony "shall not be used against such person" in criminal trials, "nor shall he be liable to criminal prosecution for or on account of any transaction, matter, or thing concerning which he may so testify").

Minnesota: St. 1905, c. 192 (illegal sale of liquor; on examination of witnesses before a justice, "no

[*Note 5 — continued.*]

testimony given upon such a hearing shall be in any manner used to the prejudice of the witness giving the same").

Nebraska: St. 1905, c. 162, § 21 (trusts and monopolies; in proceedings under this act, no person shall be excused on the present grounds); ib. § 22 (immunity clause similar to that of Comp. St. § 5343 *d*, *supra*).

New Jersey: St. 1906, c. 206, § 6 (bribery, etc., at elections; privilege abolished, but "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise," and the testimony is not to be used against him in a criminal proceeding). St. 1906, c. 208, § 5 (bribery in general; privilege abolished; but "no person called to testify in any proceedings under this act shall be liable to a criminal prosecution, either under this act or otherwise, for any matters or causes in respect to which he shall be examined or to which his testimony shall relate, except to a prosecution for bribery committed in such testimony").

North Carolina: Rev. 1905, § 2459 (like St. 1897, p. 85, c. 35; the other statutes of 1895 and 1897, *supra*, cannot be traced in Rev. 1905; but the rule of St. 1895, c. 159, is covered by Rev. 1905, § 4407, *infra*) Rev. 1905, § 1688, Code 1883, § 2843 (in gaming offences, the privilege ceases: but the testimony "shall not be used against him in any criminal prosecution" therefor). Rev. 1905, § 1637 (like Code 1883, § 1215). Rev. 1905, § 1638, St. 1893, c. 461, § 5 (in lynching investigations the privilege ceases, "but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall when so examined as a witness for the State be altogether pardoned of any and all participation in any crime of lynching concerning which he is required to testify"). Rev. 1905, § 3201, repeats this, the last clause being slightly broader). Rev. 1905, § 1620 (like Code 1883, § 1349). Rev. 1905, § 4280, Code 1883, § 2646 (privilege abolished for offences concerning unlawful sale of liquor, keeping of games of chance, giving of entertainments, etc., near the State University; but the testimony "shall not be used against him in any criminal prosecution on account of such participation"). Rev. 1905, § 4407 (privilege ceases for a voter not qualified, on inquiry as to his vote; but "any witness making such discovery shall not be subject to criminal or penal prosecution for having voted at such election"). 1904, *Re* Briggs, 135 N. C. 118, 47 S. E. 403 (Cr. Code, § 1215, applied).

Ohio: St. 1904, Apr. 23, p. 332 (liquor offences; Rev. St. § 7285, *supra*, repealed; instead, "if a person called to testify" in such a case "disclose any fact tending to criminate himself in any manner punishable by said sections or act, he shall thereafter be discharged from all liability to prosecution or punishment for such matter of offence"; this seems to be the best formula yet invented for the purpose). St. 1906, Apr. 2, p. 313 (amending St. 1898, Apr. 19, the anti-trust law, by adding § 6 *a*; the privilege is abolished, "but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise").

Tennessee: St. 1897, c. 14, § 6 (election offences; an offender may be compelled to testify at any trial, etc., but the testimony shall not be used, etc., and "a person so testifying shall not thereafter be liable . . for the offence with reference to which his testimony was given, and may plead or prove" the giving of it in bar). 1904, Lindsay *v.* Allen, 113 Tenn. 517, 82 S. W. 648 (St. 1897, c. 14, § 6, in its compulsory clause, does not apply to a commissioner's examination in a contested election proceeding).

Texas: St. 1903, Mar. 31, c. 94, § 15, p. 119 (anti-trust law; a witness is compellable to testify and "shall not be liable for prosecution"). 1907, *Ex parte* Andrews, — Tex. Cr. — , 100 S. W. 376 (foregoing statute held applicable by its terms to an examination before a justice only, not before a grand jury).

United States: St. 1903, Fed. 25, c. 755 (Appropriation Act), 32 Stat. 904 (similar to St. 1893, *supra*, for "any proceeding, suit, or prosecution" under certain enumerated acts, including the Anti-Trust law). St. 1906, Mar. 21, Joint Res. 11, Stat. L. vol. 34, p. 824 (Joint Res. 8, ib. p. 823, amended; in the Interstate Commerce Commission's investigations into railroad discriminations and monopolies, all the immunities, etc., conferred by the act of Feb. 11, 1893, "shall also apply to all persons who may be subpœnaed to testify as witnesses or to produce documentary evidence" under the authority conferred). St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798 (quoted *ante*, § 2259; abolishing the privilege for corporations).

Virginia: St. 1902, Extra, c. 22 (bribery offences; "nor shall any witness called by the Court or Commonwealth's attorney and giving evidence for the prosecution, either before the grand jury or the court in such prosecution, be ever proceeded against for any offence of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify").

Wisconsin: St. 1905, c. 149 (in prosecutions under Stats. 1898, §§ 4352, 4583, the privilege is abolished, "when so ordered to testify by a court of record or any judge thereof; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such person may so testify or produce evidence," except for perjury therein). St. 1905, c. 447, § 1 (no railroad corporation shall be excused from producing documents, etc., in any civil action for penalties, etc., on the ground that the document, etc. "may subject it to a penalty or forfeiture," or be excused "from making a true answer under oath by and through its properly authorized officer or agent" on such a ground); ib. § 2 (no officer or employee of any railroad corporation shall be excused from testifying or producing documents, etc., on the above ground; but no such person shall be prosecuted, etc.; immunity clause as in St. 1905, c. 149, *supra*).

[*Note* 10, p. 3178; *add:*]

and in the opinion of Brown, J., in Hale *v.* Henkel, 201 U. S., 43, cited *infra*, note 11.

[*Note* 11; *add:*]

1904, State *v.* Jack, 69 Kan. 387, 76 Pac. 911 (St. 1897, quoted *supra*, n. 5, exempting from prosecution for offences against the anti-trust law, effectually annuls the privilege).

1904, *Re* Briggs, 135 N. C. 118, 47 S. E. 403 (Brown *v.* Walker followed, sanctioning the effectiveness of Cr. Code, § 1215; Douglas, J., specially concurring with hesitation, and Walker, J., also specially concurring).

1904, Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 24 Sup. 563 (order of the Circuit Court requir-

[*Note* 11 — *continued.*]

ing production of certain contracts, etc., at the petition of the Commission in a complaint by the district attorney alleging violations of St. 1887, Feb. 4, as amended by St. 1893, Feb. 11, as to discriminations, etc., and asking for the enforcement of the statute by injunction to desist from the violations; the witness, an official of a defendant corporation, was ordered to produce, since the immunity of the statute would annul the privilege; Brown *v.* Walker followed). 1905, Jack *v.* Kansas, 199 U. S. 372, 26 Sup. 73 (following Brown *v.* Walker; accepting a decision of the Kansas Court which held sufficient the immunity of Kan. St. 1897, c. 265, § 10). 1905, *Re* Hale, 139 Fed. 496, 501, C. C. (under U. S. St. 1903, Feb. 19, the immunity produced by testimony "in any proceeding," etc., applies to testimony before a grand jury). 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (Brown *v.* Walker, *supra*, approved and followed without dissent; here applying the rule to testimony and documents obtained under the immunity-clause of U. S. St. 1903, Feb. 25, *supra*, n. 5).

1905, Murphy *v.* State, 124 Wis. 635, 102 N. W. 1087 (Brown *v.* Walker followed, applying Stats. 1898, § 4078, amended by St. 1901, c. 85, cited *supra*, n. 5).

[*Text*, p. 3178, at the end of first paragraph; *add:*]

It may also be noted that, as a necessary deduction from the principle of § 2259, *ante*, an immunity granted to a person who testifies or produces documents is sufficient to destroy the privilege for him, even though the facts obtained from him serve to incriminate a *third person*, — in particular, a *corporation* whose agent or officer the witness is.[12a]

[12a] 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370.

[*Note* 13, par. 1; *add:*]

1902, U. S. *v.* Kimball, 117 Fed. 156, 163 (nature of compulsion, considered).

[*Note* 14, *add:*]

Accord: 1906, Edelstein *v.* U. S., — C. C. A. — , 149 Fed. 636, 642 (good opinion by Adams, J.; Philips, J., diss).

Contra: 1906, U. S. *v.* Simon, 146 Fed. 89, 92, D. C. (for a bankrupt; cited *post*, § 2282, n. 5).

[*Text*, p. 3179; *add*, at the end of the section, a new paragraph, and a new note 15:]

The question will also arise, under these statutes, whether the witness has, in the *subject of his testimony, made a disclosure such as entitles him to the immunity.* This may depend somewhat upon the phrasing of the particular statute. But, so far as the general principle is not affected by particular statutory wordings, it should be necessary and sufficient (*a*) that the witness *states something*, not merely denies knowledge of any facts; (*b*) that his statement is of facts asked for by the opponent, not of facts volunteered or irrelevantly interjected; and (*c*) that the facts concern a matter about which the answer might by reasonable possibility have criminated him; for, while on the one hand it is immaterial whether the answer actually given is an incriminating one, yet, on the other hand, there is no privilege which he can exchange for the immunity unless (*ante*, § 2260) the matter is one on which his answer might conceivably criminate him.[15]

[15] The cases do not cover all the points above noted: 1859, R. *v.* Skeen, 8 Cox Cr. 143 (cited *supra*, n. 13). 1896, People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198 (cited *supra*, n. 13).

1906, Rudolph *v.* State, 128 Wis. 222, 107 N. W. 466 (indictment for soliciting a bribe as alderman; plea, that under St. 1901, c. 85, quoted *ante*, § 2281, n. 5, he was immune from prosecution by reason of having testified on the subject before the grand jury; his testimony there merely stated that he was alderman, and knew of no bribery; held, that the testimony to his being alderman was not upon an incriminating fact, on the principle of § 2260, *ante*, so as to secure immunity). 1906, State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (similar; the defendant's testimony that he "did not know of any alderman demanding or receiving money," etc., was held not to secure immunity; as to point (*a*), *supra*, in the text, it is held that whether the witness gives testimony adverse to himself or not, and whether he testifies truthfully or not, are immaterial, but the question is under the statute "whether the defendant did, in any reasonable sense, testify concerning the transaction, matter, or thing for or concerning which he is prosecuted," and therefore "we should but travesty the statute should we hold that a declaration that he could give no evidence of any transactions within a general class constituted testimony concerning one"; lucid opinion by Dodge, J.,

[*Note* 15 — *continued.*]

concurred in on this point by the others; as to point (c), *supra*, in the text, Dodge, J., declares that the immunity granted may be broader than the privilege yielded, in respect to the scope of facts, if the Legisture clearly so intends; but from this view, *i. e.* that the immunity from the crim e could be supposed to be given in exchange for "disclosures which but for moral turpitude he could be compelled to make any way, disclosures of mere circumstances so remote as not to fall within the scope of self-criminatory evidence," Marshall, J., dissents "as emphatically as practicable," because the immunity and privilege are equivalents, "the one being exchanged by force of the law for the other," and the statutory phrase "transaction, matter, or thing" signifies "an event of a criminal character"; with him agree Kerwin and Winslow, JJ., thus forming a majority on this point c).

1906, Edelstein *v.* U. S., — C. C. A. — , 149 Fed. 636, 642 (under U. S. Bankruptcy Act 1898, § 7, subdiv. 9, the grant of immunity for "any criminal proceeding" is restricted to "such as might arise out of the conduct of his business . . . about which alone the statute authorized the examination in question to be made").

[*Text*, p. 3178; *after* the paragraph ending "single jurisdiction," *add* the following, as a new section:]

§ 2281 *a*. **Same: Mode of Obtaining Immunity in return for Self-Criminating Evidence.** There has been a rapid increase in the number and scope of statutes thus granting immunity in order to enable the State prosecutors to obtain evidence which would have been protected by the privilege. Owing to this increase, a most important question arises as to the procedure of the disclosure which is to obtain immunity.

(*a*) Where the disclosure takes place in the course of testimony at an *ordinary trial*, whether before a judge, master-in-chancery, or other judicial officer, it can hardly be doubted that the usual requirements established in principle must be followed; *i. e.*, there must be a *claim* of privilege [1] and a *ruling of the judge* overriding the claim and directing an answer.[2] The reason

[1] The general principle is amply shown in the authorities cited *ante*, § 2268. The following apply it to the present situation:

1902, U. S. *v.* Kimball, 117 Fed. 156, 163, C. C. ("The constitutional privilege cannot be violated before it can be invoked for his protection, . . Compulsion can only exist where there is something to be overcome, as for instance refusal, objection, or an unwillingness of which the jury is apprised. Hence that refusal, objection, or unwillingness must affirmatively appear before compulsion is possible. . . . He must express his unwillingness in some form, and bring himself within the rule that he who would have the benefit of an exemption or privilege must claim it").

1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787, *semble* (a witness answering voluntarily and without claim of privilege on a bankruptcy citation cannot obtain the benefit of the Bankruptcy Act's prohibition of the subsequent use of the testimony against him).

1906, State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (the defendant had testified under subpœna before the grand jury; his testimony cousisted wholly of denials of any knowledge on the matters involved, and it did not appear that he claimed any privilege or offered any objection; Marshall, J., held that "for the statute to operate, there must be evidence under a real compulsion, not mere right of compulsion," so that an express claim of privilege would be unnecessary only where the situation was such that on refusal to answer "he would be liable to punishment as standing in defiance of the Court"; Kerwin, J., concurred; Winslow, J., concurred; "I do not think that compelling a person to appear by subpœna can properly be considered as compelling him to testify; . A person might be compelled by subpœna to attend, but might testify voluntarily when so in attendance and thus waive his privilege; in like manner I think he may waive his immunity; I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the Court," which he did not here do; Dodge, J., dissenting, on this point). *Contra:* 1887, People *v.* Sharp, 107 N. Y. 427, 445 ("He could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless").

[2] Authorities *ante*, § 2270, n. 6; § 2271, for the general principle; and the following: 1907, *Ex parte* Andrews, — Tex. Cr. — , 100 S. W. 376 (a witness refused to answer, claiming the privilege; on *habeas corpus*, an immunity statute being cited, it was held that "inasmuch as he was offered no immunity," the privilege remained).

The proper *statutory form*, for making clear the necessity of an express claim of privilege in order to obtain the immunity, is found in the statutes of the Dominion and Ontario, quoted *ante*, § 2281, n. 5. The California statute of 1905 (quoted *ante*, § 2281, *n.* 5), ante-dating by a year the ruling in U. S. *v.* Armour, is a well-worded statement offering a fair and correct solution of the problem. It does not vary from what might well be the judicial construction of the privilege, except in its liberality in presuming a claim of privilege in the absence of a reading aloud of the statute to the witness. The statute, however, has omitted to provide (as it ought to) that the oath may be impliedly waived, and that a voluntary attendance of the witness at a hearing shall be equivalent to a summons by subpœna, for the purpose of entitling to immunity.

is that the anticipatory legislative pardon or immunity is not given absolutely, but only conditionally upon and in exchange for the deprivation of the privilege. The Legislature did not intend to give something for nothing, *i. e.*, to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege.[3] The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome. On the one hand, it is plain, the judge, upon such a claim of privilege being made, could if he chose respect it, and thus refrain from exercising the immunity-power. Conversely, therefore, the immunity operates as soon as — and not until — he overrides the claim, by some form of ruling. It is not to be argued, in opposition, that the criminality of the act disappears by operation of law as soon as the witness speaks, and that therefore no claim of privilege is necessary. This argument, in the first place, equally ignores the above-mentioned essential feature of the legislative intention (namely, to give the immunity solely as a means of removing the obstacle of the claim). But furthermore, it involves somewhat of a logical absurdity; for by this theory, before the witness has testified, his act is still criminal, and therefore within the privilege, and yet he can be compelled to speak and thus do something to remove its criminality; in other words, being as yet non-compellable, he is compelled to become compellable! No such logical feat is required in applying the other view above set forth.

(*b*) Where the testimonial disclosure is made before an *administrative officer*, having the auxiliary power to subpœna witnesses and to obtain judicial aid to enforce his testimonial powers,[4] the question is more complicated in certain details, though not different in principle. (1) In the first place, no *service of subpœna* is necessary, in order to bring into play the testimonial function, either of officer or of witness. Just as a witness may voluntarily take the stand in court without a subpœna, and still be subject to a witness' duties of disclosure and entitled to a witness' privileges; so too for the informal and less dramatic proceedings of an administrative officer, no subpœna is essential in law; the situation merely presents greater difficulty of interpreting the circumstances and of determining whether the person spoke as a witness in a given case.[5] Nor is an *oath*, it would seem, any more necessary; whether

[3] This appears, *e. g.*, in the U. S. St. 1887 (Interstate Commerce Commission), §§ 9, 12, and its successors, (*ante*, § 2281, n. 5), where it is said that "the *claim* . . . shall not excuse," and "no person shall be *excused* . . . *on the ground* that, etc.," "but no person shall be prosecuted for" anything so testi6ed about.

This general principle that there must inherently be an *exchange* of privilege for immunity is well stated in the following opinions: 1884, Turney, J., in State *v.* Warner, 13 Lea 52, 62–66.

1906, Marshall, J., in State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (quoted *infra*, § 2281, n. 15).

[4] *E. g.*, the Commissioner of Corporations, under U. S. St. 1903, *supra*, § 2281, n. 5.

[5] Authority cited for the general principle as to subpœna, *ante*, § 2199, n. 5; and the following: 1906, U. S. *v.* Armour Co., 142 Fed. 808, N. D. Ill., Humphrey, J. (a plea of immunity from prosecution, by the defendants, officers of meat-packing companies, was sustained, on the ground that the defendants had as witnesses obtained immunity, under U. S. St. 1903, Feb. 14 and 25, cited *supra*, n. 5, § 2281, by producing documents and giving information to the Federal Commissioner of Corporations; "the subpœna is a useless and superfluous thing after the parties are together").

By a Federal statute, passed since the above ruling in U. S. *v.* Armour, it has been attempted to confine the grant of immunity to persons who testify or produce "in obedience to a subpœna . . . under oath"

perjury could be committed without an oath is immaterial, for the law of crimes and of evidence are not inherently coextensive; the imposition of an oath is a safeguard of trustworthiness only, and if the officer waives it, both his testimonial powers and the witness' testimonial duties remain unaffected in essence.[6] (2) But a *claim of privilege against self-incrimination*, explicitly made, and an explicit overriding of it by the officer, are essential.[7] This is not only equally true as for the case of testimony in a judicial trial (*supra*, (*a*)), but the explicitness is here even more essential, and particularly where the administrative officer makes a general demand for documents or testimony upon a broad class of topics. The reason is clear. The officer has testimonial powers to extract a general mass of facts, of which some, many, or most will certainly be innocent and unprivileged, some may be privileged communications (*e. g.*, between attorney and client) whose privilege remains unaffected by the statute defining his powers, and some may be privileged as self-criminating but liable to become demandable by overriding this privilege with a grant of immunity. Among this mass of facts, then, the officer will seek those which are relevant to his administrative inquiry; he cannot know which of them fall within one or another privilege, in particular, which of them tend to criminate at all, or to criminate a particular person; if such facts are there, he may not desire or be authorized to exercise the option of granting immunity so as to obtain them; his primary function and power is to obtain the relevant facts at large, and his power to obtain a special and limited class of facts by grant of immunity is only a secondary one, and one which he will not exercise till a cause arises, if even then. For these reasons of practical sense, then, as well as for the inherent requirements of principle already noticed for judicial officers, it is particularly true for an inquiry by an administrative officer that the witness must explicitly claim his privilege, and specifically *the* privilege against self-incrimination, and must then be overridden in that claim, before immunity can take effect. The contrary view[8] can only be fallen into by forgetting the contrast between the broad class of innocent facts which are the normal object of the officer's inquiry, and the special and limited class of criminal facts which may form scattered parts of the mass. The analogy is seen in judicial trials, where it is settled that though an accused in a criminal trial need make no claim, yet a party in a civil trial or a witness in any trial *must* make his claim,[9] because out of the whole mass of innocent facts subject to inquiry it cannot be known beforehand by the tribunal what particular facts asked for will tend to criminate nor whether he will voluntarily choose to disclose them. So, here, it is especially necessary that the claim of the particular privilege against self-incrimination should be explicitly put forward by the witness to segregate and mark

(U. S. St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798; *quoted ante*, § 2259). But of course it still remains for the Court to determine whether such a statute infringes on the constitutional lines of the privilege.

[6] U. S. *v.* Armour, *supra*, and authorities cited *ante*, § 1819. *Contra:* 1884, State *v.* Warner, 13 Lea 52, 57.

[7] *Contra*, in U. S. *v.* Armour, *supra*.

[8] Laid down in U. S. *v.* Armour, *supra*.

[9] *Ante*, § 2268.

the specific facts which he knows or believes to have that quality; then, and then only, is the officer placed in a position when he can consciously exercise the option which the immunity-statute gives him. This option he can certainly not be deemed to exercise unwittingly and in gross by the mere circumstance of pursuing his normal course of duty and power for relevant facts at large. It is indeed astonishing to suppose that a witness by surreptitiously including criminal with non-criminal facts could obtain from such an officer a wholesale immunity, without having done anything to notify either whether particular facts are criminating or whether he waives his privilege voluntarily and without immunity. (3) The *formalities* of claim and immunity-grant, before an administrative officer, are the only really doubtful and difficult aspects of the problem. In the first place, it is doubtful whether a statutory requirement of *writing* for the validity of the witness' claim would be constitutional. A writing is not necessary for such a claim in court; nor would the claim necessarily there become part of the record. But the statute, as a matter of policy, ought at least to require the officer to file his questions in writing, and to note a claim of privilege in writing; so that the Government, on its part, could at least insure itself and the witness against the enormous expense of time and money that might be involved in a trial of the plea of immunity.[10] In the next place, if writing is not requirable nor in fact employed, the claim and its overriding must at least be *explicit;* by which is meant, not a form of words, nor any formality of conduct, but an expressed and understood claim of the right not to disclose on the specific ground of facts tending to criminate; and an explicit overriding of the claim and a grant of immunity.[11] Furthermore, in the case of an inquiry into acts of a *corporation,* where the Government demands production of corporate books from the agents of the corporation, the agent producing the books must claim the personal privilege for himself, if that is what he desires; first, because it cannot be known, until he says so, that the corporate books contain facts tending to criminate *him;* and, secondly, because, even though they do, it cannot be known which of the privileges — his own, or that of the corporation, or both — the officer will choose to override; for, in spite of Hale *v.* Henkel (*ante,* § 2259, n. 2), a question may still remain as to the privilege of the corporation.[12] Finally, the claim may well be *in gross, i. e.,* for a particular mass of documents the claim may be made as to all criminating facts therein, and need not be more specifically made nor more frequently renewed than will suffice to avoid misunderstanding. The essential thing is that no formality is required, on the one hand, and, on the other, that the witness, since he is the one to be explicit, must be explicit enough to serve his purpose. — These are not all the applicable considerations, either of general principle or of detail; the entire question will doubtless not be

[10] As in U. S. *v.* Armour, *supra.*

[11] Whether the claim was explicitly made in fact in U. S. *v.* Armour, *supra,* is perhaps open to question, as to some of the witnesses, upon some of the testimony. But it is fairly clear that the witnesses' counsel were amply aware of the applicability of the privilege, and could have been explicit enough had they chosen. The natural query is, why did they not all explicitly and in writing claim both privilege and immunity?

[12] This distinction seems not to have been noticed in U. S. *v.* Armour, *supra.*

thoroughly worked out in our judicial decisions for many years to come. But the foregoing aspects are those which will first claim the judicial labors for their early settlement by courts of last resort.

It remains to notice a misunderstanding which should not obscure the effect of the rule in question. It was said, for example, at the time of U. S. *v.* Armour, above cited, that "the Department of Commerce and Labor, created with power to investigate the trusts and combinations in restraint of trade, it is declared, is absolutely useless if the results of its investigations cannot furnish any basis on which to bring offenders to punishment." Now the profession ought to understand that no administrative Department has a function to procure self-criminating evidence "on which to bring offenders to punishment." That is precisely what the Constitution protects us against. It is just because no officer has inquisitorial powers to force self-crimination that the immunity-statutes were passed; so that only by abnegating the judicial inquisitorial attitude could the Department obtain the information necessary for its administrative purposes. The real inconvenience of the above-cited ruling in U. S. *v.* Armour was that it hampered the Department of Justice, by making the Department of Commerce the unwitting instrument of stopping the prosecutions of the former. Even this is not an insuperable obstacle. If U. S. *v.* Armour should ever become the final law, it would mean simply this, that an administrative officer, in obtaining testimony for the purposes of his department, has the burden of making and proving an explicit and specific disavowal of any intention to grant immunity from prosecution, otherwise the immunity obtains. This leaves the situation temporarily annoying for the Government; but it leaves them with ample power of self-protection for the future.

§ 2282. Same: (2) Statutes forbidding the Use of Testimony.

[*Note* 4; *add:*]

1904, *Re* Briggs, 135 N. C. 118, 47 S. E. 403 (La Fontaine *v.* Underwriters cited with approval).

[*Note* 5, par. 2; *add:*]

1904, U. S. *v.* Goldstein, 132 Fed. 789, D. C. (privilege held not annulled, under § 7 of the Act; the voluntary filing of a petition is not a waiver).
1904, *Re* Hess, 134 Fed. 109, D. C. (the Bankruptcy Act, § 7 does not abolish the privilege; but the decision proceeds in part upon the erroneous ground — *ante*, § 2258 — that the statute gives no protection against use of the evidence in State courts).
1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787 (State *v.* Burrell, Mont., *supra*, affirmed).
1906, U. S. *v.* Simon, 146 Fed. 89, 92, D. C. (applying Burrell *v.* Montana, *supra;* and also holding that a bankrupt cannot be charged with perjury committed in bankruptcy proceedings because the statute, forbidding the use of his testimony "in any criminal proceeding," omits the usual exception for perjury committed therein; collecting the prior rulings on this point).
1906, Edelstein *v.* U. S., — C. C. A. — , 149 Fed. 636, 642 (privilege held not annulled).

§ 2286. Sundry Confidential Communications not privileged.

[*Note* 2; *add:*]

1906, Rogers *v.* State, — Miss. — , 40 So. 744 (good opinion by Calhoon, J.; a "solemn promise of secrecy" as to the name of a person returning stolen goods, held not to give a privilege).

[*Note* 6; *add:*]

1904, *Re* Davies, 68 Kan. 791, 75 Pac. 1048 (perjury of B. in returning personalty for taxation; a banker held not privileged as to the amount of money held on deposit by him for B.; good opinion by Smith, J.).

§ 2292. Attorney and Client; Privileged Communications.

[*Note* 1; *add:*]

N. C. Rev. 1905, § 1620 (like Code 1883, § 1349).

§ 2296. Advice sought for Sundry Non-Legal Purposes, etc.

[*Note* 2; *add:*]

1905, Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969 (statements to an attorney employed to obtain a loan, not privileged).

[*Note* 3; *add:*]

1903, Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276 (defendant's consultation with district-attorney, not privileged).

§ 2297. Advice in Conveyancing.

[*Note* 5; *add:*]

1906, Fox *v.* Spears, — Ark. — , 93 S. W. 560 (statements made while consulting over the drafting of a deed, excluded).
1906, Mueller *v.* Batcheler, — Ia. — , 109 N. W. 186 (conversations between parties consulting an attorney merely "as a scrivener or conveyancer," admitted).

§ 2300. Persons having Legal Knowledge, but not admitted, etc.

[*Note* 1; *add:*]

Accord: 1905, State *v.* Smith, 138 N. C. 700, 50 S. E. 859 (communications to an "attorney in fact," not being an attorney at law, not privileged).
Contra: 1906, English *v.* Ricks, — Tenn. — , 95 S. W. 189 (a licensee to practise before justices of the peace only; privilege applied; no authority cited).

§ 2303. Consultation in Attorney's Capacity.

[*Note* 1; *add:*]

1903, Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245.
1904, Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631.
The *value* of such communications is quite another matter: King Lear, I, 4; "*Fool.* Then 't is like the breath of an unfee'd lawyer, — you gave me nothing for it."

[*Note* 2; *add:*]

1889, Skellie *v.* James, 81 Ga. 419, 8 S. E. 607 (knowledge not acquired as attorney; statute held not applicable).
1904, Union P. R. Co. *v.* Day, 68 Kan. 726, 75 Pac. 1021 (consultation with a poormaster, who was also a lawyer, held not privileged on the facts).

§ 2304. Time of Consultation, etc.

[*Note* 1; *add:*]

1904, Eckhout *v.* Cole, 135 N. C. 583, 47 S. E. 655.

§ 2306. Communications, distinguished from Acts, etc.

[*Note* 2, par. 1; *add:*]

1903, Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245 (attorney not allowed to testify as to insanity learned solely in professional consultation).

§ 2307. Same: Production of the Client's Documents.

[*Note* 2, par. 1; *add:*]

1890, Edison El. L. Co. *v.* U. S. El. L. Co., 44 Fed. 294, 297, 45 id. 55, C. C. ("If documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel").

§ 2309. Same: Testimony to Possession, etc., of Documents.

[*Note* 1, par. 1; *add:*]

1903, *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552 (where he last saw certain bonds of the client, allowed).

§ 2310. Relevancy or Necessity of the Communication.

[*Note* 1, par. 1; *add:*]

1903, Denunzio's Receiver *v.* Scholtz, 117 Ky. 182, 77 S. W. 715 (a communication "not in regard to the subject matter of the employment is not privileged").

§ 2311. Communications must be Confidential, etc.

[*Note* 4, par. 1; *add:*]

1905, Mackel *v.* Bartlett, 33 Mont. 123, 82 Pac. 795.

[*Note* 5; *add:*]

1906, Temple *v.* Phelps, — Mass. — , 79 N. E. 482 (communications made concerning a third person's public testimony, not privileged).

[*Note* 6; *add:*]

1906, Denunzio's Receiver *v.* Scholtz, 117 Ky. 182, 77 S. W. 715 (presence of a third person; privilege denied).

§ 2312. Communications to Opponent or his Attorney, etc.

[*Note* 3; *add:*]

1904, Scott *v.* Aultman Co., 211 Ill. 612, 71 N. E. 1112 (divorce; communications in the presence of the opposing attorney at a consultation, not privileged).
1904, List's Ex'x *v.* List, — Ky. — , 82 S. W. 446 (message sent by the party through his attorney to the opponent, not privileged).
1905, Brown *v.* Moosic M. C. Co., 211 Pa. 579, 61 Atl. 76 (communications with a joint attorney, not privileged).
1884, Moffatt *v.* Hardin, 22 S. C. 9, 12 (apparently by one party to the attorney in the opponent's presence; not privileged). 1905, Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 79 (mutual wills by sisters, the same attorney drafting for both; privilege held not applicable to the instructions for drafting the wills, "as between them or those claiming under them").

§ 2313. Identity of Client or Purpose of Suit.

[*Note* 1; *add:*]

1904, Elliott *v.* U. S., 23 D. C. App. 456, 467 (the attorney-witness, having related a conversation with the testator in which the former had said that he was preparing memoranda for the will of another person, the name of that other person was held to be within the privilege; Chirac *v.* Reinicker, U. S., *infra;* distinguished; Shepard, J., diss.).
1906, Strickland *v.* Capital C. Mills, 74 S. C. 16, 54 S. E. 220 (the attorney's contract for fee and the assignment of an interest in a judgment are not privileged).

§ 2314. Execution of a Will or Deed, etc.

[*Note* 2, par. 1; *add:*]

1906, Shapter's Estate, — Colo. — , 85 Pac. 688 (Doherty *v.* O'Callaghan, Mass., followed).

§ 2315. Same: Attorney as Attesting Witness.

[*Note* 1; *add:*]

1906, Strickland *v.* Capital C. Mills, 74 S. C. 16, 54 S. E. 220 (assignment).

[*Note* 2; *add:*]

1906, Inlow *v.* Hughes, — Ind. App. — , 76 N. E. 763 (like Kern *v.* Kern, *supra*).
1906, Brown *v.* Brown, — Nebr. — , 108 N. W. 180 ("the testator, by permitting his attorney to become a witness to the will, thereby consented" to his testifying to the circumstances of execution).

§ 2317. Privilege not applicable to Knowledge acquired from Third Persons.

[*Note* 1, par. 1; *add,* under *Accord:*]

1904, King *v.* Ashley, 179 N. Y. 281, 72 N. E. 106.

§ 2319. Documents of the Client, etc.; Conflict of Principles illustrated.

[*Note* 1, p. 3245, col. 2:]

In line 19 from below, *insert* "not" before "privileged"; in line 15 from below, omit "on the first point this ruling is unsound."

[*Note* 1; *add:*]

Ireland: 1905, Kerry Co. C. *v.* Liverpool S. Ass'n, L. R. 2 Ire. 38 (action for stranding a wrecked vessel; documents obtained by the defendant as agent of an insurance company with reference to the ship-owner's claim and the circumstances of the loss, held not privileged). 1905, Tobakin *v.* Dublin S. D. T. Co., L. R. 2 Ire. 58 (a statement of injury by the plaintiff, furnished to the defendant's agent at the latter's request after the injury, held not privileged in the defendant's hands).
Canada: Br. C.: 1904, Leadbetter *v.* Crow's Nest, 10 Br. C. 206 (general principle applied).
Ont.: 1904, Elmsley *v.* Miller, 10 Ont. L. R. 343 (establishment of a highway; solicitors, employed by the plaintiff town to investigate its right to use the road, secured written evidence favorable to the claim, and action was begun; these documents were held privileged, though no litigation was resolved on at the time of the solicitor's investigations; Wheeler *v.* Le Marchant followed). 1906, Thomson *v.* Maryland Gas Co., 11 Ont. L. R. 44 (letters between the defendant's agent and its main office, concerning matters which the latter might refer to solicitors for legal advice, held not privileged, following the rule of Southwark & V. W. Co. *v.* Quick, cited *ante*, § 2318, n. 1).

[*Note* 5; *add:*]

1889, Carroll *v.* East Tenn. V. & Ga. R. Co., 82 Ga. 452, 473, 10 S. E. 163 (personal injury; reports to the defendant by its employees, concerning the circumstances, held not receivable in evidence as admissions; the present question not passed upon).
1906, *Ex parte* Schoepf, 74 Oh. 1, 77 N. E. 276 (personal injury on a street railroad; the conductor's and motorman's reports of the accident, made to the claim-agent of the defendant, under its rule requiring such reports on matters from which a claim might arise and for submission to counsel if necessary, held privileged).
1895, Davenport Co. *v.* Pennsylvania R. Co., 166 Pa. 480, 31 Atl. 245 (loss of a shipper's goods; a report to the defendant by its agent, concerning the loss, held privileged, because made "after the plaintiff's claim for damages was made" and "in effect made to counsel, for they were made for the use of counsel in resisting this particular claim").
1890, Edison El. L. Co. *v.* U. S. El. L. Co., 44 Fed. 294, 298, 45 id. 55 (English cases considered, and the doctrine stated).
1907, Virginia-Carolina C. Co. *v.* Knight, — Va. — , 56 S. E. 725 (report of an accident, made by agent to principal, in the routine of business, before action brought or threatened, one copy being filed, another sent to the manufacturing department, and another to the attorneys, the last copy being offered; held not privileged).
1904, Cully *v.* Northern Pacific R. Co., 35 Wash. 241, 77 Pac. 202 (personal injury; reports of unspecified persons to the defendant concerning the circumstances of the injury, held privileged, and not demandable on answer to interrogatories under Ballinger's Code, § 6009, cited *ante*, § 1856; not distinguishing between the present principle and that of § 1856, *ante*, and somewhat inconsistently intimating that inspection of the documents could be obtained under Ballinger's Code, § 6047, quoted *ante*, § 1859).
Compare the cases cited *ante*, § 1856, n. 8, 9 (discovery of *names of witnesses*).

§ 2325. Indirect Disclosure by the Attorney.

[*Note* 1; *add:*]

1904, Jones *v.* Nantahala M. & T. Co., 137 N. C. 237, 49 S. E. 94 (letter sent by the attorney to a third person, excluded).

§ 2326. Third Persons Overhearing.

[*Note* 2; *add:*]

1906, State *v.* Falsetta, — Wash. — , 86 Pac. 168 (policemen overhearing the conversation).

§ 2327. Waiver, in general; Voluntary Testimony as a Waiver.

[*Note* 1, l. 3; *add:*]

1905, Wood *v.* Etiwanda W. Co., 147 Cal. 228, 81 Pac. 512.

[*Note* 3; *add:*]

1905, Wilson *v.* Ohio F. Ins. Co., 164 Ind. 462, 73 N. E. 892 (action against a surety; the plaintiff's attorney's testimony on the trial of the principal for embezzlement, held not a waiver of privilege for this trial; no authority cited).
1906, *Re* Burnette, — Kan. — , 85 Pac. 547 (certain prior publication, held a waiver).
1903, State *v.* Nelson, 91 Minn. 143, 97 N. W. 652 (whether the client's testimony given generally is a waiver; not decided).
1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843 (a co-principal's voluntary testimony held, under the statute, "equivalent to an express waiver in open court" of his privilege).
1904, Jones *v.* Nantahala M. & T. Co., 137 N. C. 237, 49 S. E. 94 (calling the attorney as a witness is a waiver as to prior inconsistent statements by the attorney).

§ 2328. Waiver by Joint Clients, Agents, Assignees.

[*Note* 3; *add:*]

1904, Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. 628 (wife as agent).

§ 2329. Waiver by a Deceased Client's Representatives.

[*Note* 1; *add:*]

1903, Stewart *v.* Walker, 6 Ont. L. R. 495 (Russell *v.* Jackson, Eng., followed, in an issue of *devisavit vel non*). 1903, *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552 (privilege allowed to be waived by the executor, here seeking discovery against the attorney; following the analogy of Thompson *v.* Ish, Mo., cited *post*, § 2391, as to physician's privilege). *Undecided:* 1906, Brown *v.* Brown, — Nebr. — , 108 N. W. 180.

[*Text*, l. 3, after "later trial"; *add* a new note 1*a*:]

1a *Accord:* 1906, Elliott *v.* Kansas City, 198 Mo. 593, 96 S. W. 1023 (approving the principle of Green *v.* Mass., *supra*, n. 1).

§ 2334. Marital Communications; Marital Disqualification and Anti-Marital Privilege, distinguished.

[*Note* 1; *add*, under *Accord:*]

1904, Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704 (husband a witness only).

[*Note* 3; *add:*]

1905, Marshall *v.* Marshall, 71 Kan. 313, 80 Pac. 629 (removal of general marital disability for or against the other does not affect the privilege for communications).

§ 2336. Knowledge obtained in Confidence, etc.

[*Note* 1; *add:*]

1906, Caldwell *v.* State, — Ala. — , 41 So. 473 (letters not "of a private or confidential nature," admitted). 1905, Hannaford *v.* Dowdle, 75 Ark. 127, 86 S. W. 818 (husband testifying to business transactions with his wife; allowed). 1905, Hight *v.* Klingensmith, 75 Ark. 218, 87 S. W. 138 (wife's declarations in a third person's presence, admitted).
1905, Sexton *v.* Sexton, 129 Ia. 487, 105 N. W. 316 (alienation of husband's affections; the wife allowed to testify to acts and conversations of the husband exhibiting his former affection and his subsequent loss thereof; the opinion is not entirely plain in stating whether it proceeds exclusively on the ground that such matters are not confidential, or in part also on the ground of an exception under § 2338, *post;* but the broad statements of Hertrich *v.* Hertrich, *supra*, are qualified). 1906, Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639 (loss of consortium; Sexton *v.* Sexton followed).
1905, Shepherd *v.* Com., 119 Ky. 931, 85 S. W. 191 (murder; the wife's communication to the defendant of threats by the deceased, admitted; but the opinion lacks appreciation of the proper reasoning). 1905, Bright *v.* Com., — Ky. — , 86 S. W. 527 (Arnett *v.* Com., *supra*, followed).
1905, Cole *v.* State, — Tex. Cr. — , 88 S. W. 341 (statements of accused in the presence of his wife and her mother, admitted).

§ 2337. Communications, not Acts.

[*Note* 2; *add:*]

Can.: 1903, Gosselin *v.* King, 33 Can. Sup. 256, 263 (questions to a wife as to intercourse, with a view to contradicting her husband, held not communications; Girouard, J., diss.).
Ark.: 1905, Wiley *v.* McBride, 74 Ark. 34, 85 S. W. 84 (bill to set aside a fraudulent conveyance to a wife; discovery as to the gift, held not privileged).
Ga.: 1905, Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569 (a wife allowed to testify to her husband's personal injuries observed by her).
Tenn.: 1906, English *v.* Ricks, — Tenn. — , 95 S. W. 189 (probate contest, over a will bequeathing chiefly to a wife; to show the testator's marital unhappiness, his declarations that he was "living in hell," excluded; this seems erroneous).
Wis.: 1905, Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234 (widow allowed to testify to the deceased husband's mental incapacity based on acts observed by her without participation or influence on her part).

§ 2338. Exceptions and Distinctions.

[*Note* 2; *add:*]

1905, Sexton *v.* Sexton, 129 Ia. 487, 105 N. W. 315 (cited *ante*, § 2336, n. 1).

§ 2339. Third Persons Overhearing, etc.

[*Note* 1; *add:*]

1906, Com. *v.* Everson, — Ky. — , 96 S. W. 460 (by an eavesdropper).

[*Note* 2; *add:*]

1905, De Leon *v.* Terr., — Ariz. — , 80 Pac. 348 (letter by the defendant to his wife, written with knowledge that by jail rules it would be opened and read by the jailer; the jailer allowed to testify to its contents).

[*Note* 2 — *continued.*]

1905, Hammons *v.* State, 73 Ark. — , 84 S. W. 718 (defendant in jail gave to a messenger a letter for the wife; the messenger delivered it to the wife's father, who handed it to a relative of the injured party; admitted; McCulloch and Battle, JJ., diss.).
1906, Connella *v.* Terr., 16 Okl. 365, 85 Pac. 72 (forgery; letter sent by defendant to his wife, not reaching her, but falling into the sheriff's possession, admitted).
1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721 (adultery of N. with S.; S.'s letter to her husband, offered to impeach her as a witness for the defendant N., admitted, because "produced by the officers of the State").

§ 2340. Who may Claim the Privilege; Waiver.

[*Note* 4, l. 2; *add:*]

1904, Com. *v.* Cronin, 185 Mass. 96, 69 N. E. 1055 (defendant's wife's testimony to her husband's private declarations to her, offered by him, excluded; erroneous).

§ 2341. Death, Divorce, etc.

[*Note* 1, par. 1; *add:*]

1905, Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234.

[*Note* 2; *add:*]

1904, German-American Ins. Co. *v.* Paul, 5 Ind. Terr. 703, 83 S. W. 60.
1903, Davis *v.* State, 45 Tex. Cr. 292, 77 S. W. 451.

§ 2346. Juror's Privileged Communications; Scope of the Principle.

[*Note* 2; *add,* at the end:]

But the rule does not prevent a juror from testifying at a subsequent trial to *knowledge obtained by a view of premises* at a former trial: 1875, Cramer *v.* Burlington, 42 Ia. 315 (juror who had examined a sidewalk at a view on a former trial, admitted). 1906, Hughes *v.* Chicago, St. P. M. & O. R. Co., 126 Wis. 525, 106 N. W. 526 (similar). Compare § 1168, *ante.*

§ 2349. Impeaching a Verdict; Jurors' Motives, Beliefs, etc.

[*Note* 2; *add:*]

Cal.: see the later cases cited *infra,* n. 3.
1905, State *v.* Ferguson, 114 La. 70, 38 So. 23 (jurors' affidavits that they considered the defendant's previous record, excluded). 1906, State *v.* Barrett, 117 La. 1086, 42 So. 513 (juror's statement after verdict that he had a fixed opinion when selected, excluded).
1906, State *v.* Beeskove, — Mont. — , 85 Pac. 376 (misunderstanding of the instructions; excluded).
1905, State *v.* Forrester, — N. D. — , 103 N. W. 625 (jurors' affidavits as to misunderstanding the instructions, excluded).
1904, Bearden *v.* State, — Tex. Cr. — , 83 S. W. 808 (jurors' affidavits that they assented on agreement to petition for pardon, excluded).
1905, Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19 (jurors' affidavits that they misunderstood the instructions, excluded).
1905, State *v.* Strodemier, 41 Wash. 159, 83 Pac. 22 (that misconduct did not influence the verdict; excluded).

[*Note* 3; *add,* under *California:*]

1905, People *v.* Chin Non, 146 Cal. 561, 80 Pac. 681 (jurors' affidavits that the reading of certain newspapers did not influence them, excluded).

§ 2351. Issues of the Trial, as Material, etc.

[*Note* 2; *add:*]

1882, Hewett *v.* Chapman, 49 Mich. 4, 12 N. W. 888 (trover for timber; to show that the jury in a former trial had allowed for this claim, a juror's testimony was excluded).

§ 2354. Irregularities and Misconduct; State of the Law, etc.

[*Note* 2; *add:*]

1906, Birmingham R. L. & P. Co. *v.* Moore, — Ala. — , 42 So. 1024 (juror's affidavit, not admitted to show a quotient verdict).
1905, People *v.* Chin Non, 146 Cal. 561, 80 Pac. 681 (jurors' affidavits to show improper reading of newspapers, admitted, because offered by the prosecution; no authority cited).
1904, Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550 (*contra* to Bingham *v.* Foster, *supra,* but not noticing it).
1904, State *v.* Rambo, 69 Kan. 777, 77 Pac. 563 (juror's testimony received as to the juror's allusion to the defendant's failure to testify).

[*Note* 2 — *continued.*]

1901, Wixom *v.* Bixby, 127 Mich. 486, 86 N. W. 1001 (rule applied to exclude a juror's affidavit as to a quotient verdict of damages). 1905, Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005 (rule applied to exclude jurors' affidavits as to an average verdict of damages).
1905, Brister *v.* State, 86 Miss. 461, 38 So. 678 (juror's affidavit as to reading law-books, excluded).

[*Note* 9; *add:*]

1905, Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 So. 590 (jurors' affidavits that an improper document was not read by them, admitted). 1906, Birmingham R. L. & P. Co. *v.* Moore, — Ala. — , 42 So. 1024.
1905, State *v.* West, 11 Ida. 157, 81 Pac. 107 (juror's affidavit, admissible to explain his separation from the jury during retirement; but uncorroborated it is insufficient).
1903, Groves & S. R. R. Co. *v.* Herman, 206 Ill. 34, 69 N. E. 36, *semble* (chance-verdict).

[*Note* 15, par. 1, l. 2; *add:*]

1905, People *v.* Murphy, 146 Cal. 502, 80 Pac. 709.

[*Note* 15, par. 1, l. 7; *add:*]

1906, Goodwin *v.* Blanchard, 73 N. H. 550, 64 Atl. 22 (collecting authorities).

§ 2355. Mistake in Announcing or Recording the Verdict.

[*Note* 2; *add:*]

1904, McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 (a juror, on being asked by the clerk whether he assented, answered, "Under protest"; the verdict was held properly recorded as unanimous).

[*Note* 4, par. 1, *add:*]

1904, Gillespie *v.* Ashford, 125 Ia. 729, 101 N. W. 649 (like Capen *v.* Stoughton, Mass.).

§ 2356. Same: Explaining the Verdict's Meaning, etc.

[*Note* 1; *add:*]

1906, R. *v.* Burdell, 11 Ont. L. R. 440.
1905, Denham *v.* Com., 119 Ky. 508, 84 S. W. 538 (mistake in the wording).
1906, State *v.* Miles, — Mo. — , 98 S. W. 25.
1905, State *v.* Godwin, 138 N. C. 582, 50 S. E. 277 (here the judge refused to accept a verdict of "Guilty, but innocently").

[*Text*, p. 3303, last line; *add* a note 1*a*:]

[1a] That the trial judge may properly ask the jury, when they *cannot reach a verdict, how their votes divide* (without asking which way the majority stands), seems harmless enough, especially as these facts and more are shortly afterwards told freely out of court; but a finical spirit has recently rebuked such questions, and has even not scrupled to delay the course of justice for this petty cause:
1906, Burton *v.* U. S., 196 U. S. 283, 25 Sup. 243.
1906, McCoy *v.* U. S., — Ind. Terr. — , 98 S. W. 144.

[*Note* 2; *add:*]

1906, Koch *v.* State, 126 Wis. 470, 106 N. W. 531 (correction of a sealed verdict after discharge, not allowed on the facts).

§ 2358. Arbitrators' Awards; Foregoing Principles Applied.

[*Note* 1, at the end; *add:*]

Upon the distinction between *general* and *special submissions* to award, for which the rule differs somewhat, see the lengthy opinions in the following case: 1906, White Star Mining Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. 327 (two judges dissenting).

[*Note* 2; *add:*]

1903, Jensen *v.* Deep Creek F. & L. S. Co., 27 Utah 66, 74 Pac. 427 (arbitrator's testimony may be received to show that "all matters included in the submission were considered and adjudicated").

[*Note* 5; *add:*]

1907, Chicago, B. & Q. R. Co. *v.* Babcock, — U. S. — , 27 Sup. 326 (assessment of a railroad by a State board of equalization, alleged to be invalid by reason of the board's improper method of calculating valuations and taxable amounts; the "operation of their [the board's] minds in valuing and taxing the roads," held to be immaterial; "all the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law").
Contra to the foregoing: 1877, Schettler *v.* Fort Howard, 43 Wis. 48 (assessors). 1879, Plumer *v.* Board, 46 Wis. 163, 174, 50 N. W. 416 (assessors).

§ 2360. Grand Jurors' Communications; History, etc.

[*Note* 4; *add:*]

Ind. St. 1905, p. 584, § 103 (re-enacts Rev. St. 1897, § 1754).

[*Note* 5; *add:*]

and the opinion of Boyd, J., in *Re* Atwell, 140 Fed. 368, D. C. (1905).

§ 2363. Privilege of Witnesses before the Grand Jury; Instances, etc.

[*Note* 1, par. 1; *add:*]

1905, State *v.* Brown, 128 Ia. 24, 102 N. W. 799 (wife of defendant).

[*Note* 2, par. 1; *add:*]

1906, State *v.* Campbell, — Kan. — , 85 Pac. 784 (accused's testimony; repudiating the construction by the Missouri Court, in Tindal *v.* Nichols, *infra*, of the statute on which the Kansas statute was founded).

[*Text*, p. 3316, at the end of par. (3); *add* a note 2*a*:]

[2a] *Accord:* 1906, State *v.* Campbell, — Kan. — , 85 Pac. 784 (good opinion by Porter, J.).
1905, Murphy *v.* State, 124 Wis. 635, 102 N. W. 1087; and Jenkins *v.* State, Fla., Hinshaw *v.* State, Ind., cited *supra*, n. 2.

[*Note* 3, at the end; *add:*]

So also the testimony may be used, as of course, for establishing an *immunity from prosecution* (*ante*, § 2281), obtained in return for the giving of testimony:
1905, Murphy *v.* State, 124 Wis. 635, 102 N. W. 1087; 1905, Havenor *v.* State, 125 id. 444, 104 N. W. 116.

[*Note* 5, at the end; *add:*]

Compare the statutes giving the right to a *list of witnesses* before trial (*ante*, §§ 1850–1854).

§ 2364. Grounds for Indictment; Illegal Evidence, etc.

[*Note* 1, par. 1; *add:*]

1906, State *v.* Hopkins, 115 La. 786, 40 So. 166 (motion to quash the indictment; a grand juror's testimony, and the district attorney's, as to the attorney's advice regarding the jurors' action, excluded).

[*Note* 3; *add:*]

1905, Taylor *v.* State, 49 Fla. 69, 38 So. 380 (collecting many cases).
1905, State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967.
1907, People *v.* Sexton, — N. Y. — , 80 N. E. 396.
1904, U. S. *v.* Cobban, 127 Fed. 713, C. C. 1905, Chadwick *v.* U. S., 141 Fed. 225, 234, C. C. A.

[*Note* 7; *add:*]

1904, Nash *v.* State, 73 Ark. 399, 84 S. W. 497 (here the Court misapplies the secrecy principle).
1855, State *v.* Baker, 20 Mo. 339.

§ 2373. Irremovability of Official Records.

[*Note* 2; *add:*]

U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (land-office applications, etc., to be produced; cited more fully *ante*, § 1676, n. 11).

[*Text*, p. 3331; at the end, *add* a new paragraph (4):]

(4) The right of a citizen or taxpayer to *inspect official records* in their place of custody (*ante*, § 1858, n. 2).

§ 2374. Privilege for Communications by Informers, etc.

[*Note* 1; *add:*]

1906, Schultz *v.* Strauss, 127 Wis. 325, 106 N. W. 1066 (defendant held privileged from disclosing, on interrogatories of discovery by the plaintiff, his testimony before the grand jury and district attorney, on which the plaintiff desired to found an action for defamation and malicious prosecution; the opinion properly places the ruling on grounds of substantive law).

[*Note* 4; *add:*]

1906, Rogers *v.* State, — Miss. — , 40 So. 744 (larceny of a package; R. having been summoned before the grand jury, and testifying that the package was brought back and given to him for the owner, by a woman to whom he promised secrecy, he was held not privileged not to disclose her name).

[*Note* 5, col. 2, l. 1; *add:*]

Ont. St. 1904, 4 Edw. VII, c. 23, § 20 (no assessor shall disclose information acquired concerning assessments, etc., "except when examined as a witness before any court").

[*Note* 5, at the end; *add:*]

So also the following statutes, for *factory-inspectors*, *mine-inspectors*, and *railway-commissions:*
Ont. St. 1905, 5 Edw. VII, c. 13, § 30 (a factory-inspector, when called as a witness, "shall be entitled acting herein by the direction and on behalf of the attorney-general or a member of the Executive Council to object to giving evidence as to any factory inspected by him in the course of his official duty"). St. 1906, 6 Edw. VII, c. 11, § 78 (no mining officer "shall be compellable in any court to disclose information acquired by him in his official position"). St. 1906, 6 Edw. VII, c. 30, § 231 ("All such returns [by railway companies to the railway board] of accidents made in pursuance of the provisions of this act shall be privileged communications, and shall not be evidence in any court whatsoever" except in enforcing penalty for failure to make returns).

[*Note* 6:]

In line 1, add: "and Rev. St. § 4908."
In line 6, add: "and 44 Fed. 294, 299."

[*Note* 6, at the end; *add:*]

For the *citizen's right to inspect public records*, see *ante*, § 1858, n. 2.

§ 2375. Privilege for Secrets of State.

[*Note* 3; *add:*]

Accord: 1906, Davis *v.* State,— Ala.— , 40 So. 663 (under Code 1897, § 5086, providing that a U. S. revenue liquor-license may be proved orally, the defendant was allowed to be asked if he had one).
1906, Meyer *v.* Home Ins. Co., 127 Wis. 293, 106 N. W. 1087 (tobacco lost by fire; records of the U. S. internal-revenue department at Milwaukee showing the amount of goods, held privileged, on demand of the deputy collector; following Boske *v.* Comingore, U. S.).
Contra: 1906, State *v.* Nippert, — Kan. — , 86 Pac. 478 (illegal liquor sales; the Federal revenue collector having refused to produce the record of liquor tax-lists or to furnish a copy, under the rule in *Re* Weeks, *infra*, an examined copy was admitted; the present principle not considered). 1906, State *v.* Schaeffer, — Kan. — , 86 Pac. 477 (similar).

[*Note* 4; *add:*]

1904, Mercer *v.* Denne, 2 Ch. 535, 544 (ancient plans and maps of seashore boundaries prepared for the War Office in 1641–47 were excluded, by Farwell, J., because "it would be most dangerous to admit confidential reports, made to the War Office"; the ruling is absurd, first, because the War Office made no claim of privilege, and secondly, because the offering counsel had become fully conversant with the "confidential" documents, and thirdly, because the lapse of time had made the secret of no consequence; no authority at all is cited). 1905, Mercer *v.* Denne, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal; Vaughan Williams, J.: "I agree, although not perhaps exactly on the same grounds").

[*Note* 8; *add*, at the end:]

Distinguish of course the question how far a *citizen may claim access to* and inspection of *judicial* or similar *records* (*ante*, § 1858, n. 2).

§ 2380. Physician and Patient; History of the Privilege, etc.

[*Note* 3; *add:*]

1904, Banigan *v.* Banigan, 26 R. I. 454, 59 Atl. 313.

[*Note* 5; *add:*]

Mich.: 1904, Dick *v.* Supreme Body, 138 Mich. 372, 101 N. W. 564 (statute applied to a hearing before a fraternal insurance board). St. 1905, No. 136 (in prosecutions for illegal marriage of persons sexually diseased, "any physician who has attended or prescribed for any husband or wife for either of the diseases above mentioned shall be compelled to testify to any facts found by him from such attendance").
N. Y. St. 1905, c. 331 (amends C. C. P. 1877, § 834, by inserting after "surgery" the words "or a professional or registered nurse," and by adding, at the end, the following: "unless where the patient is a child under the age of sixteen the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify," etc., when the crime is the subject of the inquiry; this proviso is a poor sop to the demands of justice and does not palliate the atrocity of closing the physician's mouth where the victim was an adult).
N. C. Rev. 1905, § 1621 (like St. 1885, c. 159).

[*Note* 6; *add:*]

A careful discussion of the scope and policy of the privilege will also be found in Professor H. B. Hutchins' article in the Michigan Law Review, II, 687 (1904), "The Physician as an Expert."

[*Text*, p. 3351, at the end of the second paragraph; *add* a note 6*a*:]

[6a] A recent Michigan statute (cited *supra*, n. 5) commits the absurdity of abolishing the privilege for sexual disease in certain cases, while retaining it on other facts.

[*Note* 8; *add*:]

and Mr. Wm. A. Purrington in the Columbia Law Review, VI, 388 (1906), "An Abused Privilege."

§ 2381. Confidentiality of Communications, etc.

[*Note* 1; *add*:]

1905, Murphy *v.* Board, 2 Cal. App. 468, 83 Pac. 577.

§ 2382. Professional Character of the Consultation.

[*Note* 2; *add*:]

1904, Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535.

[*Note* 3; *add*:]

For a *nurse*, see N. Y. St. 1905, c. 331, quoted *ante*, § 2380.

[*Note* 4; *add*:]

1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (a coroner-physician, visiting the accused at a charity-hospital after the affray, held not within the privilege).
1905, Arnold *v.* Maryville, 110 Mo. App. 254, 85 S. W. 107 (a consultation "only with a view of qualifying them to testify in the cause," not privileged). 1906, Obermeyer *v.* Lageman C. M. Co., 120 Mo. App. 59, 96 S. W. 673 (statements at an interview with the opponent's physician in which the latter was partly trying to cure and partly trying to get evidence, held entirely privileged).

[*Note* 5; *add*:]

1905, Smoot *v.* Kansas City, 194 Mo. 513, 92 S. W. 363.
A *hypothetical question* to a physician who has had professional relations with the patient is of course not privileged: 1904, Crago *v.* Cedar Rapids, 123 Ia. 48, 98 N. W. 354.

[*Note* 7; *add*:]

Contra: 1905, McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209 (privilege applied to the surgeon of defendant's hospital, treating an injured employee).
1904, Battis *v.* Chicago, R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543 (railway company's surgeon sent to examine plaintiff after the injury, and treating him; privilege held applicable).
1904, Meyer *v.* Supreme Lodge, 178 N. Y. 63, 70 N. E. 111 (a physician called by strangers to save a would-be suicide, and prescribing for the purpose, is within the privilege, even though the patient repels his services; Gray, J., and Parker, C. J., diss.).
Accord: 1907, People *v.* Furlong, — N. Y. — , 79 N. E. 978 (People *v.* Hoch followed).

§ 2383. Communications Necessary for Prescription.

[*Note* 1; *add*:]

1905, McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209 (details of the cause of the injury, held privileged).
1904, Battis *v.* Chicago, R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543.
1905, James *v.* State, 124 Wis. 130, 102 N. W. 320 (examination of a raped child, merely to determine the existence of venereal disease, not privileged).

[*Note* 2, par. 2; *add*:]

Contra: 1905, McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209 ("The physician must commonly be regarded as the sole judge").

§ 2384. Information, Active and Passive.

[*Note* 2; *add*:]

1904, Towles *v.* McCurdy, 163 Ind. 12, 71 N. E. 129 ("all that the physician sees or observes" is privileged; here, the facts as to a testator's sanity).
1904, Battis *v.* Chicago, R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543 (like Prader *v.* Ass'n).
1906, Smoot *v.* Kansas City, 194 Mo. 513, 92 S. W. 363 (Gartside *v.* Ins. Co. followed).
1905, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (insanity; privileged).

[*Note* 3, par. 1; *add*:]

1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592 (fact of professional attendance just before the making of the policy, admitted).

§ 2385. Criminal Cases, Malpractice.

[*Note* 1; *add*:]

1905, People *v.* Griffith, 146 Cal. 339, 80 Pac. 68.

[*Note* 2; *add:*]

1905, McKenzie *v.* Banks, 94 Minn. 496, 103 N. W. 497 (communications for the purpose of securing the physician's service for a criminal abortion are not privileged).
N. Y. St. 1905, c. 331 (quoted *ante*, § 2380, n. 5).

§ 2386. Whose is the Privilege; Claim, etc.

[*Note* 1; *add*, at the end:]

Of course the privilege is that of the patient as such, and applies equally for patients *not parties* to the case; this is everywhere assumed and conceded:
1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (members of the testatrix' family).

[*Note* 4, par. 1; *add:*]

1905, Arnold *v.* Maryville, 110 Mo. App. 254, 85 S. W. 107.
1906, Pennsylvania R. Co. *v.* Durkee, 147 Fed. 99, C. C. A. (applying the N. Y. Code).
But the opponent may at least *call the physician* and force the patient-party to object and make claim:
1903, State *v.* Booth, 121 Ia. 710, 97 N. W. 74; this is on the principle of § 2268, *ante.*

§ 2388. Waiver, in general.

[*Note* 3; *add:*]

1906, Roche *v.* Nason, 185 N. Y. 128, 77 N. E. 1007 (the trial Court's ignoring of an express waiver, here held harmless).

[*Note* 5; *add:*]

but it was recognized in the following: 1906, Williams *v.* Spokane F. & N. R. Co., 42 Wash. 597, 84 Pac. 1129.

[*Note* 6; *add:*]

Accord: 1906, Trull *v.* Modern Woodmen, — Ida. — , 85 Pac. 1081.
1905, Western Travelers' Acc. Ass'n *v.* Munson, — Nebr. — , 103 N. W. 688 (waiver in the constitution of a benefit association, held valid).
Contra, under statute: 1904, Meyer *v.* Supreme Lodge, 178 N. Y. 63, 70 N. E. 111 (a waiver of the privilege in an insurance contract is not effective under C. C. P. § 836 as amended in 1891; and the Federal Constitution cannot be invoked to protect a New York contract).
1905, Supreme Lodge *v.* Meyer, 198 U. S. 508, 25 Sup. 754 (Holden *v.* Ins. Co., N. Y., followed, in construing a New York contract).

§ 2389. Waiver by Bringing Suit, etc.

[*Note* 4; *add*, under *Contra:*]

1905, Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242 (personal injury; ruling in Williams *v.* Johnson approved).
1904, Battis *v.* Chicago, R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543.
1904, Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89 (like Burgess *v.* Sims D. Co., Ia., *supra;* but a voluntary testimony by the party to the circumstances of a physician's examination is a waiver of the privilege).
1905, May *v.* Northern P. R. Co., 32 Mont. 522, 81 Pac. 328 (plaintiff's testimony to her injury and its treatment by two physicians, held not a waiver as to the testimony of a third).

[*Note* 7; *add:*]

1906, Elliott *v.* Kansas City, 198 Mo. 593, 96 S. W. 1023 (failure to claim privilege for testimony of the same physician to substantially the same facts at a prior trial of the same cause is a waiver of the privilege for the subsequent trial also; following McKinney *v.* R. Co., N. Y.).

§ 2390. Waiver by Calling the Physician.

[*Note* 2; *add:*]

1905, Nugent *v.* Cudahy P. Co., 126 Ia. 517, 102 N. W. 442 (cross-examination, held no waiver on the facts).

[*Note* 4, par. 2; *add:*]

Contra: 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (physician's certificate of death filed as required by law, and admissible under Comp. L. § 4617, cited *ante*, § 1644, held admissible; the former statute not to be overriden by the present privilege).

§ 2391. Waiver by Deceased Patient's Representative.

[*Note* 1; *add:*]

N. Y.: the amendments of 1891–1899, cited *ante*, § 2380, n. 5, have modified the rule.
Wis.: 1904, Hunt's Will, 122 Wis. 460, 100 N. W. 874 (will contest; the contestants may not waive the privilege; "no one, save the patient himself," can do so).

[*Note* 2; *add:*]

Colo.: 1906, Shapter's Estate, — Colo. — , 85 Pac. 688 (Thompson *v.* Ish, Mo., followed).
Ind.: the later cases look the other way: 1901, Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303 (see the next case). 1904, Towles *v.* McCurdy, 163 id. 12, 71 N. E. 129 ("This Court in Brackney *v.* Fogle expressly decided that the rule announced in Kern *v.* Kern [*ante*, § 2315, n. 2, denying the privilege to an attorney attesting a will] did not apply to the testimony of physicians, . . . even where the controversy was confined to the heirs and devisees of the decedent"). 1906, Heaston *v.* Kreig, — Ind. — , 77 N. E. 805 (on the facts, held that the privilege could be waived only by the executor who is seeking to support a will *prima facie* valid).
Ia.: 1906, Long *v.* Garey Inv. Co., — Ia. — , 110 N. W. 26 (action by creditors to reach property transferred by the deceased, fraud of creditors and mental incapacity being the grounds of the action; held that the administrator could waive the privilege, so far as the issue of incapacity was concerned).
Minn.: 1907, Olson *v.* Court of Honor, — Minn. — , 110 N. W. 374 (defence of suicide, in an action on an insurance policy; the deceased representative allowed to call the physician; "the purpose of the statute is to protect the patient, and not his adversary; . . . as a general rule, those who represent him after his death may also waive the privilege, for the protection of interests which they claim under him"; good opinion by Start, C. J.).

§ 2394. Priest and Penitent; Privileged Communications; History, etc.

[*Note* 3, last line; *add:*]

Mr. Badeley's arguments are criticised in a note in 6 Jurist, N. S., pt. 2, p. 319 (1860).

[*Note* 6; *add:*]

and the instances cited in L. C. J. Coleridge's letter quoted *supra* in the text.

[*Text*, p. 3363, at the end; *add:*]

1890, L. C. J. *Coleridge*, Letter to Mr. Gladstone (Life and Correspondence, 1904, II, 364): "I should not bore you, but I think perhaps it may interest you to know what Willes (Sir *James*) once told me he thought as to confession. He was, on the whole, the greatest and *largest* lawyer I ever knew, and I knew Jessel, Cairns and Campbell. I defended Constance Kent, John Karslake prosecuted her, and Willes tried her at Salisbury. Wagner was to have been a witness, and Willes had made up his mind that he should have to *hold* one way or the other as to the sanctity of confession. He took infinite pains to be right and he was much interested, because the point, since the Reformation, had never been decided. There were strong dicta of strong Judges — Lord Ellenborough, Lord Wynford and Alderson — that they would never allow Counsel to ask a clergyman the question. On the other hand, Hill, a great lawyer and good man, *but* a strong Ulster Protestant, had said there was no *legal* privilege in a clergyman. The thing did not come to a decision, for Constance Kent pleaded guilty; and Karslake told me he should never have thought of putting the question to Wagner; and I had resolved *if* he did (but I knew he was a gentleman) that as an advocate I would not object, but use it in my speech. Willes, however, I suppose did not know us quite so well as we knew each other; and he had prepared himself to *uphold* my objection if I made it. He said he had satisfied himself that there was a *legal* privilege in a priest to withhold what passed in confession. Confession, he said, is made for the purpose of absolution. Absolution is a judicial act. The priest in absolving acts as a Judge, and no Judge is ever obliged to state his reasons for his judicial determination. This, you see, puts it on grounds of general law, and would be as applicable to Manton, Oliver Cromwell's chaplain, who, most certainly, heard confessions and absolved, as to the Pope himself. Whether the English Judges would have upheld Willes's *law* I own I doubt, but I thought it might interest you to know the opinion, and the grounds of it, of so great a lawyer and so really considerable a man. Practically, while Barristers and Judges are gentlemen the question can never arise. I am told it never *has* arisen in Ireland in the worst times."

§ 2395. Statutes recognizing the Privilege.

[*Note* 1; *add:*]

Nev. St. 1905, c. 113 (amending St. 1869, § 383, being Gen. St. 1885, § 3405, *supra*, by changing "cannot" to "shall not," and omitting the words after "character").

[*Note* 2; *add:*]

1906, State *v.* Morgan, 196 Mo. 177, 95 S. W. 402 (communication to a minister not professionally admitted).
1905, Colbert *v.* State, 125 Wis. 423, 104 N. W. 61 (interview between a priest and a parishioner, held not a confession to him professionally).

§ 2396. Policy of the Privilege.

[*Note* 1; *add:*]

The pith of the matter can also be seen in L. C. J. Coleridge's letter, quoted *ante*, § 2394.

§ 2406. Parol Evidence Rules; I. Creation of Legal Acts; Subject must concern Legal Relations.

[*Note* 6, par. 1, *add:*]

1904, Fleming *v.* Morrison, 187 Mass. 120, 72 N. E. 499 (the testator's declaration to the attesting witness, after the attestation, that "it was a fake, made for a purpose," admitted, and the document held void).

[*Note* 7; *add:*]

1904, Humphrey *v.* Timken C. Co., — Kan. — , 75 Pac. 528 (order of purchase signed by H.; H. allowed to show an understanding that he was nominal purchaser only, B. being the real purchaser but insolvent, and the seller being desirous to evade proceedings by B.'s creditors; this is apparently unsound).

[*Text*, p. 3381, line 4 from end of section; *add* a note 8:]

[8] Of course, the facts constituting the real transaction, and making it void for illegality, may here always be shown: 1903, Wheeler *v.* Metrop. Stock Exchange, 72 N. H. 315, 56 Atl. 754 (wagering contract).

§ 2408. Act must be Final; Delivery, as applied to Deeds, etc.

[*Note* 2; *add:*]

1905, Grilley *v.* Atkins, 78 Conn. 380, 62 Atl. 337.

[*Note* 3; *add:*]

1905, Spacy *v.* Ritter, 214 Ill. 266, 73 N. E. 447. 1904, Van der Aa *v.* Van Drunen, 208 Ill. 108, 70 N. E. 33 (a deed held on the facts not delivered). 1905, Coleman *v.* Coleman, 216 Ill. 261, 74 N. E. 701 (delivery to a third person for the grantor's children; "the test is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done"). 1906, Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68. 1906, Phelps *v.* Pratt, 225 Ill. 85, 80 N. E. 69.
1904, Emmons *v.* Harding, 162 Ind. 154, 70 N. E. 142 (elements of delivery considered).
1906, Foreman *v.* Archer, 130 Ia. 49, 106 N. W. 372.
1904, Roup *v.* Roup, 136 Mich. 385, 99 N. W. 389.
1905, Rausch *v.* Michel, 192 Mo. 293, 91 S. W. 99.
1904, Powers *v.* Rude, 14 Okl. 381, 79 Pac. 89 (escrow).
1904, Kittoe *v.* Willey, 121 Wis. 548, 99 N. W. 337.

[*Note* 4, par. 1; *add:*]

1906, Interstate Inv. Co. *v.* Bailey, — Ky. — , 93 S. W. 578.
1904, Chastek *v.* Souba, 93 Minn. 418, 101 N. W. 618.
1905, Wheaton *v.* Liverpool & L. & G. Ins. Co., — S. D. — , 104 N. W. 850 (insurance policy).

[*Note* 6, l. 1; *add:*]

1906, Craddock *v.* Barnes, 142 N. C. 89, 54 S. E. 1003 (good opinion by Walker, J.).

[*Note* 6, l. 4; *add:*]

1905, Grilley *v.* Atkins, 78 Conn. 380, 62 Atl. 337.
1907, McIntyre *v.* McIntyre, — Mich. — , 110 N. W. 960.

[*Note* 10; *add:*]

1905, Bieber *v.* Gans, 24 D. C. App. 517 (bond; distinguishing Burke *v.* Dulaney, U. S., *post*, § 2409, n. 6, and confining the rule to sealed instruments).
1905, Whitney *v.* Dewey, 10 Ida. 633, 80 Pac. 1117 (the opinion calls it a "well-settled principle of law," and cites the early English authorities, ignoring the later ones).
1905, Richmond *v.* Caruthers, 103 Va. 774, 50 S. E. 265 (maintaining the old-fashioned distinction between sealed and unsealed instruments).

[*Note* 11, l. 1; *add:*]

1905, Graham *v.* Remmel, 76 Ark. 140, 88 S. W. 899 (explaining the escrow rule as involving a condition subsequent only).
1906, Anderson *v.* Goodwin, 125 Ga. 663, 54 S. E. 679 (deed delivered by the agent contrary to condition).
1906, Elliott *v.* Murray, 225 Ill. 107, 80 N. E. 77 (good example; prior cases collected). 1906, Oswald *v.* Caldwell, 225 Ill. 224, 80 N. E. 131.

[*Note* 14; *add:*]

1904, Erler *v.* Erler, 124 Ia. 726, 100 N. W. 856 (recording of a deed in the name of a son, instead of the father).
1906, Whiting *v.* Hoglund, 127 Wis. 135, 106 N. W. 391.

[*Note* 15, at the end; *add:*]

Compare the following examples: 1906, Griswold *v.* Griswold, — Ala. — , 42 So. 554.
1905, Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244.
1904, Wilenou *v.* Handlon, 207 Ill. 104, 69 N. E. 892.
1906, Leonard *v.* Leonard, 145 Mich. 563, 108 N. W. 985.
1905, Schlicher *v.* Keeler, — N. J. L. — , 61 Atl. 434.

For the *presumption of delivery*, arising from various circumstances, see *post*, § 2520.

§ 2409. Same: Delivery, as applied to Negotiable Instruments.

[*Note* 6; *add:*]

1905, Graham *v.* Remmel, 76 Ark. 140, 88 S. W. 899 (note for an insurance policy; collecting prior cases).
1904, Mendenhall *v.* Ulrich, 94 Minn. 100, 101 N. W. 1057 (note to be operative only on subsequent acceptance of a policy).
1907, Hodge *v.* Smith, — Wis. — , 110 N. W. 192 (here the question also was involved whether the transferee acquired it in due course).

§ 2410. Same: Delivery as applied to Contracts in general.

[*Note* 3, par. 1; *add:*]

1906, Barton P. M. Co. *v.* Taylor, — Ark. — , 94 S. W. 713 (contract-memorandum, not to be binding till corrected; query, does this overrule Findley *v.* Means, *infra*, par. 2?).
1904, Elastic Tip Co. *v.* Graham, 185 Mass. 597, 71 N. E. 117 (defendant was allowed to nullify a creditor's agreement, signed by him and handed to the plaintiff's agent on condition that it should not be valid till signed by a certain proportion of other creditors, though this condition did not come to the plaintiff's own knowledge).
1905, Dodd *v.* Kemnitz, — Nebr. — , 104 N. W. 1069 (contract of sale, delivered subject to a third person's approval).
1904, O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643 (condition that a contract of sale should not have effect unless a corporation was organized, allowed to invalidate the instrument).
1904, State *v.* Chamber of Commerce, 121 Wis. 110, 98 N. W. 930 (sale of a certificate of stock on a condition precedent as to the authority of L.).

[*Note* 6, l. 5; *add:*]

1907, Hall *v.* Kary, — Ia. — , 110 N. W. 930.

[*Note* 6, at the end; *add:*]

Whether the *authority* to fill the blank may be in parol or must be under *seal*, is a separate question; the authorities are noticed in Carr *v.* McColgan, 100 Md. 462, 60 Atl. 606 (1905).

§ 2415. Intent and Mistake; (*B*) Terms of an Act; (*a*) Signing by Mistake; (1) Individual Mistake.

[*Note* 1; *add:*]

1905, Main *v.* Radney, — Ala. — , 39 So. 981 (order of purchase; signature held conclusive).
1906, Toledo C. S. Co. *v.* Garrison, 28 D. C. App. 243, 248 (contract).
1904, Bradley *v.* Basta, 71 Nebr. 169, 98 N. W. 697 (sale of an engine).
1875, Upton *v.* Tribilcock, 91 U. S. 45, 50 (subscription to stock). 1899, Chesapeake & O. R. Co. *v.* Howard, 14 D. C. App. 262, 294, 178 U. S. 153, 167, 20 Sup. 880.
1904, Standard Mfg. Co. *v.* Slot, 121 Wis. 14, 98 N. W. 923 (commission contract). 1905, Kruse *v.* Koelzer, 124 Wis. 536, 102 N. W. 1072 (deed).

For *bills of lading*, the peculiar rule in Illinois is different: *infra*, n. 5.

[*Note* 2; *add:*]

1904, Continental F. Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119.

Compare the question arising when the insured signs a document containing *answers erroneously transcribed by the insurer's agent* (*post*, § 2416, n. 6, § 2418, n. 2, § 2434, n. 4).

[*Note* 3; *add:*]

1904, Letourneau *v.* Carbonneau, 35 Can. Sup. 110 (an illiterate's signature is ineffective "where there is either (*a*) a request that the document shall be read by the party putting it forward, which is refused, or (*b*) where it is misread, or (*c*) where the contents are misrepresented").
1905, Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619 (an illiterate held not bound by obligations signed not negligently through the fraud of the beneficiary for amounts in excess of agreement; the fact that the obligor did not ask the assistance of a third person held not negligence in law on the facts).
1904, Stoner *v.* Zachary, 122 Ia. 287, 97 N. W. 1098 (signing a draft without reading, for lack of spectacles; issue of negligence allowed).
1904, Wilson, Close & Co. *v.* Pritchett, 99 Md. 583, 58 Atl. 360 (rule for illiterates, considered).
1904, Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 Sup. 342 (contract or treaty between the Cherokee Nation and the Delaware tribe; an understanding of the latter as to the nature of the title conveyed, not considered, the treaty having been read over repeatedly to both parties).

[*Note* 4; *add:*]

1905, Atlantic Coast L. R. Co. *v.* Dexter, 50 Fla. 180, 39 So. 634 (bill of lading signed).
1906, Tewes *v.* North German L. S. S. Co., 186 N. Y. 151, 78 N. E. 864.
Contra: 1905, Hayes *v.* Adams Exp. Co., — N. J. L. — , 62 Atl. 284.

[*Note* 5; *add:*]

1906, Wabash R. Co. *v.* Thomas, 222 Ill. 337, 78 N. E. 777 (even the signature by the shipper is not conclusive).

§ 2416. Same: (2) Individual Mistake known to or induced by the Second Party.

[*Note* 1; *add:*]

1902, Jones Stacker Co. *v.* Green, 14 Man. 61 (contract for a stacker, not read by the party signing; held void for misrepresentations, not fraudulent, as to the contents).
1904, Central of Ga. R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641 (release signed without reading, on fraudulent representations, held not binding).
1906, Deming Inv. Co. *v.* Wallace, — Kan. — , 85 Pac. 139.
1906, Hulett *v.* Marine S. Bank, 143 Mich. 219, 106 N. W. 879 (notes signed under false representations as to the tenor).
1905, Eggleston *v.* Advance T. Co., 96 Minn. 241, 104 N. W. 891 (sale of farm implements).
1906, Stone *v.* Moody, 41 Wash. 680, 84 Pac. 617 (admirable opinion by Root, J.).

[*Note* 4; *add:*]

1905, Home Nat'l Bank *v.* Hill, 165 Ind. 226, 74 N. E. 1086 (a note inserted by trick between the folds of another paper presented to the defendant for his signature; not liable, because not negligent on the facts).
1905, Brown *v.* Feldwert, 46 Or. 363, 80 Pac. 414 (promissory note signed without reading, held binding; placed on the ground of negligence).

[*Note* 5; *add:*]

1905, Daly *v.* Simonson, 126 Ia. 716, 102 N. W. 780 (lease by the plaintiff, omitting a clause giving to the defendant, the lessee and illiterate, the right to remove fixtures; reformation allowed).

[*Note* 6; *add:*]

1903, Wirsching *v.* Grand Lodge, 67 N. J. Eq. 711, 56 Atl. 713 (deed of transfer signed by a foreigner, under peculiar circumstances; rescission allowed; the other party being under mistake as to another fact, but not knowing of the grantor's mistake).
1904, Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740 (here the defendant drew the contract, and by mistake inserted the wrong price, and the plaintiff was illiterate; reformation allowed).
1904, Medley *v.* German A. Ins. Co., 55 W. Va. 342, 47 S. E. 101 (insurance policy written by the agent of the insurer, and mistakenly reciting the title, etc., of the property, the insured not having read it; reformation allowed; Brannon, J., diss.).
Compare the insurance cases cited *post*, § 2434, n. 4.

§ 2418. Same: (3) Mutual Mistake, as affecting Bona Fide Holders.

[*Note* 1; *add:*]

1905, Shields *v.* Mongollon Explor. Co., 137 Fed. 539, 549, C. C. A., *semble* ("There is no hard-and-fast rule that one who fails to read a deed before signing it may not seek its reformation in equity in a case where there has been a mutual mistake").

[*Note* 2; *add:*]

Whether reformation can be afforded *at law*, under code procedure, is an interesting question: 1905, Ætna Ins. Co. *v.* Brannon, — Tex. — , 89 S. W. 1057 (misdescription by mutual mistake in an insurance policy; whether after a fire the contract can be treated as having been reformed, for the purpose of allowing recovery).
1905, Phoenix Assur. Co. *v.* Boyette, 77 Ark. 41, 90 S. W. 284 (similar).

§ 2420. Same: (*C*) Delivery of a Document, etc., Contrary to Intent of Maker.

[*Note* 4; *add:*]

1905, Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583; 1906, Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68.

[*Note* 7; *add:*]

1905, Franklin *v.* Killilea, 126 Wis. 88, 104 N. W. 993 (release). In 2 Illinois Law Rev. 110 (1907) Professor A. M. Kales has a valuable note critically analyzing the theories.

§ 2421. Unilateral Acts: Foregoing Principles applied to Wills, etc.

[*Note* 1, par. 1; *add:*]

1894, Beamish *v.* Beamish, L. R. 1 Ire. 7 (Warren, P. J., "ventured to state the following propositions: 1. Knowledge and approval of a will is necessary, and must be proved; 2. The execution of a will by a

[*Note* 1 — *continued.*]

competent testator is presumptive and *prima facie* evidence of the fact; 3. If the competent testator has read the will or heard it read, the presumption is strong and conclusive, unless there are special circumstances attending the execution of the will; 4. Among such special circumstances are fraud, . . . ; 5. Whether read or not, if in any way the contents of the will have been brought to the notice of the testator, the effect is the same; 6. Even where there has been a reading of the will, but the state of the testator was such that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been *bona fide* used by a person whom he trusts to draw it up for him").

1906, Lipphard *v.* Humphrey, 28 D. C. App. 355, 360 (knowledge of contents is presumed for illiterates also).
1906, Todd *v.* Todd, 221 Ill. 410, 77 N. E. 680 (Sheer *v.* Sheer, *supra*, approved).
Compare the following: 1905, Reems' Succession, 115 La. 102, 38 So. 930.
1905, Masseth's Estate, 213 Pa. 136, 62 Atl. 640.

[*Note* 1, par. 2; *add:*]

1904, Boston Safe D. & T. Co. *v.* Buffum, 186 Mass. 242, 71 N. E. 549 (missing words can be supplied only where the words used show by necessary implication the words that are lacking).

The following seem sound: 1870, Hubbard *v.* Alexander, L. R. 3 Ch. D. 738 (testator's declaration, at the time of signing a codicil, that it was a duplicate, admitted). 1875, Hunt's Goods, L. R. 3 P. & D. 250 (two sisters, each executing by mistake the will prepared for the other).
Compare the cases cited *ante*, § 2411.

[*Note* 3; *add:*]

and the intent not to sign it *as a testamentary* paper (*ante*, §§ 2406, 2411).

§ 2423. Motive as making an Act Voidable.

[*Note* 4; *add:*]

1905, Rockwell *v.* Capital T. Co., 25 D. C. App. 98, 112 (fraud; release under seal).

§ 2425. Integration; General Theory, etc.

[*Note* 5; *add:*]

1906, International Harv. Co. *v.* Campbell, — Tex. Civ. App. — , 96 S. W. 92 (collecting other cases).

§ 2429. No Integration at all; Casual Memoranda.

[*Note* 1; *add:*]

1906, Wright *v.* Anderson, 191 Mass. 148, 77 N. E. 704 (agreement for dismissing a suit, etc., held a mere memorandum).
1906, Ivey *v.* Bessemer C. C. Mills, — N. C. — , 55 S. E. 613 (letter).

§ 2432. Receipts and Releases; Bills of Lading.

[*Note* 1, par. 1; *add:*]

1905, Stegall *v.* Wright, 143 Ala. 204, 38 So. 844 (receipt in full allowed to be contradicted, on the facts).
1905, Devencenzi *v.* Cassinelli, 28 Nev. 222, 81 Pac. 41.

[*Note* 2, par. 1; *add:*]

1906, Murphy *v.* Black, — Ala. — , 41 So. 877 (a receipt containing a release, held to "import a contract").
1877, Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590 (bill of sale).
1905, Lanham *v.* Louisville & N. R. Co., — Ky. — , 86 S. W. 680.
1905, Interurban C. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927.
1904, Hennessy *v.* Kennedy F. Co., 30 Mont. 264, 76 Pac. 291 (Ramsdell *v.* Clark, supra, followed).

[*Note* 2, par. 2; under *Bill of Lading, add:*]

1905, Atlantic Coast L. R. Co. *v.* Dexter, 50 Fla. 180, 39 So. 634.
1903, Lake Erie & W. R. Co. *v.* Holland, 162 Ind. 406, 69 N. E. 138 (a recital of a reduction from the usual freight rate may be contradicted).

[*Note* 2, par. 2, under *Ticket; add:*]

1904, Coine *v.* Chicago & N. W. R. Co., 123 Ia. 458, 99 N. W. 134.
1907, McCollum *v.* Southern P. R. Co., — Utah — , 88 Pac. 663.

The application to an *indorsement of payment* on *commercial paper* may be seen *post*, § 2445, n. 6.

§ 2433. Recital of Consideration in a Deed.

[*Note* 1; *add:*]

1906, Gibbons *v.* Jos. Gibbons C. M. & M. Co., — Colo. — , 86 Pac. 94 (bill of sale of mining stock).
1904, Brosseau *v.* Lawy, 209 Ill. 405, 70 N. E. 901 (amount of incumbrance assumed by grantee).

[*Note* 1 — *continued.*]

Ky. St. 1903, §§ 470, 472; 1905, Continental Casualty Co. *v.* Jasper, — Ky. — , 88 S. W. 1078 (applied to an insurance policy).
1904, Johnson *v.* McClure, 92 Minn. 257, 99 N. W. 893.
1905, Fowlkes *v.* Lea, 84 Miss. 509, 36 So. 1036 (recital of receipt of consideration, allowed to be contradicted, in an action for non-payment; Truly, J., diss.).
1905, Perkins *v.* Trinity R. Co., — N. J. Eq. — , 61 Atl. 167.
1904, Medical College Laboratory *v.* N. Y. University, 178 N. Y. 153, 70 N. E. 467 (bill for reconveyance for non-performance of oral promises).
1904, McGary *v.* McDermott, 207 Pa. 620, 57 Atl. 46.
1904, Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 557.
1905, Windsor *v.* St. Paul M. & M. R. Co., 37 Wash. 156, 79 Pac. 613.
1904, Lathrop *v.* Humble, 120 Wis. 331, 97 N. W. 905. 1903, Halvorsen *v.* Halvorsen, 120 Wis. 52, 97 N. W. 494. 1905, Mueller *v.* Cook, 126 Wis. 504, 105 N. W. 1054.
So also for the real object to be secured by a *mortgage:* 1905, Campbell *v.* Perth Amboy S. & E. Co., — N. J. Eq. — , 62 Atl. 319.

[*Note* 2, par. 1; *add:*]

1907, Farquhar *v.* Farquhar, — Mass.— , 80 N. E. 654.
1904, Butt *v.* Smith, 121 Wis. 566, 99 N. W. 328 (alleged overpayment on a deed describing the land; an extrinsic agreement as to its area and price per acre, not given effect).
1904, Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

[*Note* 2, *add,* at the end of par. 2:]

Distinguish also cases in which the recital of consideration is said to be not disputable for the purpose of *invalidating the deed;* this seems often to mean merely that the deed or contract is valid regardless of consideration: 1865, Illinois C. Ins. Co. *v.* Wolf, 37 Ill. 354 (insurance policy). 1906, Stannard *v.* Aurora E. & C. R. Co., 220 Ill. 469, 77 N. E. 254.

§ 2434. Warranty in a Sale; Insurance Warranties.

[*Note* 1, par. 1; *add:*]

1905, Gardiner *v.* McDonough, 147 Cal. 313, 81 Pac. 964 (sale of beans, etc., by memorandum; oral agreement to equal sample, excluded; Shaw, J., diss.; prior cases considered.
1904, Telluride P. T. Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319 (warranty of pipe, excluded).
1904, Neale *v.* American E. V. Co., 186 Mass. 303, 71 N. E. 566 (excluded). 1906, Scholl *v.* Killorin, 190 Mass. 493, 77 N. E. 382 (oral warranty as to a steam roller, excluded).
1905, Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

[*Note* 2; *add:*]

1906, Cooper *v.* Payne, 186 N. Y. 334, 78 N. E. 1076 (sale of a knitting machine; foregoing cases followed; a passage from Thomas *v.* Scutt, *post,* § 2437, n. 3, cited as "a compendium of the law applicable to this case").

[*Note* 4; *add:*]

1906, Deming Inv. Co. *v.* Shawnee F. Ins. Co., 16 Okl. 1, 83 Pac. 918.
This troublesome question of theory and policy is usually raised by the *erroneous transcription,* by the insurer's agent, of the *insured's representations as to material facts,* the insured then ignorantly signing the transcript: 1906, Lyon *v.* United Moderns, — Cal. — , 83 Pac. 804 (collecting cases).
1906, Prudential Ins. Co. *v.* Hummer, — Colo. — , 84 Pac. 61; and other cases cited, *ante,* § 2415, n. 2, § 2416, n. 6, § 2418, n. 2.

§ 2437. Agreement to hold a Deed Absolute as Security; Agreement to hold in Trust.

[*Note* 1; *add:*]

1906, Wadleigh *v.* Phelps, — Cal. — , 87 Pac. 93.
1906, Gibbons *v.* Jos. Gibbons C. M. & M. Co., — Colo. — , 86 Pac. 94.
1904, Gannon *v.* Moles, 209 Ill. 180, 70 N. E. 689. 1904, Merriman *v.* Schmitt, 211 Ill. 263, 71 N. E. 986.
1907, Krebs *v.* Lauser, — Ia. — , 110 N. W. 443.
1905, Stitt *v.* Rat Portage L. Co., 98 Minn. 52, 104 N. W. 561.
1906, Gardner *v.* Welch, — S. D. — , 110 N. W. 110 (interesting example).
1904, Hursey *v.* Hursey, 56 W. Va. 148, 49 S. E. 367.
Compare the alleged rule that such an agreement is not sufficiently proved by the *grantee's uncorroborated admissions* (*ante,* § 2054).

[*Note* 12; *add:*]

Professor J. B. Ames, "Constructive Trusts, etc.," Harvard Law Review, XX, 549 (1907).
1904, Ostenson *v.* Severson, 126 Ia. 197, 101 N. W. 789.
See also an article by Mr. H. F. Stone, entitled "Resulting Trusts and the Statute of Frauds," Columbia Law Review, VI, 326 (1906).

§ 2438. Agreement to hold as Surety or Agent only.

[*Note* 3; *add:*]

1905, Russell *v.* Broadus C. Mills, — Ala. — , 39 So. 712.
1905, Raleigh & G. R. Co. *v.* Pullman Co., 122 Ga. 700, 50 S. E. 1008.
1904, Reed *v.* Fleming, 209 Ill. 390, 70 N. E. 667.
1904, Western W. S. Co. *v.* McMillen, 71 Nebr. 686, 99 N. W. 512.

[*Note* 5; *add:*]

Compare the following: 1905, Usher *v.* Daniels, — N. H. — , 60 Atl. 746 (citing cases).

[*Note* 6, l. 2; *add:*]

1903, Curran *v.* Holland, 141 Cal. 437, 75 Pac. 46.
1906, Buffington *v.* McNally, — Mass. — , 78 N. E. 309.
1906, Schriner *v.* Dickinson, — S. D. — , 107 N. W. 536.

§ 2439. Fraud.

[*Note* 1; *add:*]

1904, McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341.
1904, Wilson, Close & Co. *v.* Pritchett, 99 Md. 583, 58 Atl. 360.
1905, Patten-W. D. Co. *v.* Planters' M. Co., 86 Miss. 423, 38 So. 209 (sale-contract).

§ 2440. Trade Usage and Custom.

[*Note* 1, par. 1; *add:*]

1906, Garfield *v.* Peerless M. C. Co., 189 Mass. 395, 75 N. E. 695 (commission on a sale of an automobile; trade usage admitted, on the facts). 1906, Shute *v.* Bills, 191 Mass. 433, 78 N. E. 96 (lease; usage as to repairs and control of gutters, etc.).
1904, Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88 (custom as to the mode of payment for cotton).
1904, Portland F. M. Co. *v.* British & F. M. Ins. Co., 130 Fed. 860, 65 C. C. A. 344 (usage as to collection of freight charges from the person named in the bill of lading as the one to be notified, excluded).

§ 2441. Novation, Alteration, and Waiver, etc.

[*Note* 1; *add:*]

1904, Strahl *v.* Western G. Co., — Nebr. — , 98 N. W. 1043 (services).
1904, Putnam F. & M. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033 (contract for steam-heating).

§ 2442. Miscellaneous Applications of the Rule, etc.

[*Note* 1; *add:*]

1904, Guiou *v.* Thibeau, 36 N. Sc. 542 (agreement to maintain for life). 1904, Meisner *v.* Meisner, 37 N. Sc. 23 (lease of a farm, and agreement as to maintenance, etc.).
1905, Pearson *v.* Dancer, 144 Ala. 427, 39 So. 474 (mortgage notes). 1905, Weir *v.* Long, — Ala. — , 39 So. 974 (contract of sale of goods).
1906, Thomas *v.* Johnson, — Ark. — , 95 S. W. 468 (whether an agreement was a lease or a sale of land).
1904, Hartford *v.* Maslen, — Conn. — , 57 Atl. 740 (whether land was tendered to the State in lieu of other land; the understanding of citizens at a mass-meeting, excluded). 1906, Brosty *v.* Thompson, — Conn. — , 64 Atl. 1 (sale of a farm and of personalty used thereon).
1904, Davis *v.* Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359 (appointment of an agent). 1904, Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19 (oral agreement to dedicate for a street the land adjacent to land contracted for sale, excluded). 1904, Osgood *v.* Skinner, 211 Ill. 229, 71 N. E. 869 (contract to repurchase stock).
1904, Ingram *v.* Dailey, 123 Ia. 188, 98 N. W. 627 (labor and rent). 1904, Sutton *v.* Weber, 127 Ia. 361, 101 N. W. 775 (sale of goods by an agent, with condition of return).
1905, Davies *v.* Bierce, 114 La. 663, 38 So. 488 (contract for stock and notes).
1904, Hightower *v.* Henry, 85 Miss. 476, 37 So. 745 (contract of rent; oral contract to build a fence, excluded).
1904, Hallenbeck *v.* Chapman, 71 N. J. L. 477, 58 Atl. 1096 (repairs). 1905, Grueber Eng. Co. *v.* Waldron, 71 N. J. L. 597, 60 Atl. 386 (building contract).
1905, Orion K. Mills *v.* U. S. F. & G. Co., 137 N. C. 565, 50 S. E. 304 (surety bond).
1906, Alsterberg *v.* Bennett, — N. D. — , 106 N. W. 49 (oral covenant with quitclaim deed).
1905, Bowen *v.* Mutual Life Ins. Co., — S. D. — , 104 N. W. 1040 (insurance premium receipt).
1906, Hubenthal *v.* Spokane & I. R. Co., — Wash. — , 86 Pac. 955 (reservation of a right of way).
1904, Fosha *v.* Prosser, 120 Wis. 336, 97 N. W. 924 (sale of a business).

§ 2444. Negotiable Instruments; Agreements affecting the Express Terms.

[*Note* 1; *add:*]

Contra: 1906, Evans *v.* Freeman, 142 N. C. 61, 54 S. E. 847 (note for $50, given for a machine; agreement that it should be paid out of proceeds of sales, admitted).

[*Note* 6, par. 1; *add:*]

Accord: 1904, McNeil *v.* Cullen, 37 N. Sc. 18 (demand note; agreement not to demand payment unless on the death of children, etc., excluded).
1906, Hill *v.* Hall, 191 Mass. 253, 77 N. E. 831 (peculiar facts).
Contra: 1905, O'Brien *v.* Paterson B. & M. Co., — N. J. Eq. — , 61 Atl. 436 (note given on the agreement that it should not be enforced so long as the maker bought beer of the payee; agreement given effect, on the theory that the whole transaction was virtually a mortgage).

[*Note* 7; *add:*]

1905, Western Carolina Bank *v.* Moore, 138 N. C. 529, 51 S. E. 79 (note given for bank-stock, etc.; agreement that the maker should not be liable, excluded).
1904, Schmidt *v.* Schmidt's Estate, 123 Wis. 295, 101 N. W. 678 (father's action on the son's promissory note; agreement to consider it only as evidence of an advancement, excluded, under Stats. 1898, § 3959, requiring advancements to be in writing in some form).

[*Note* 8; *add:*]

1905, People's Nat'l Bank *v.* Schopflin, — N. J. L. — , 62 Atl. 333. 1905, Morgan *v.* Thompson, 72 N. J. L. 244, 62 Atl. 410.

[*Note* 10; *add,* under *Accord:*]

1905, Trammell *v.* Swift F. Wks., 121 Ga. 778, 49 S. E. 739.
1906, Kaufman *v.* Barbour, 98 Minn. 158, 107 N. W. 1128.

[*Note* 10; *add,* at the end:]

So, too, the question whether an agreement between *maker and indorser*, that the former shall be *surety* only, is enforceable, seems to rest on the same considerations; compare the following: 1813, Fentum *v.* Pocock, 5 Taunt. 192; 1857, Pooley *v.* Harradine, 7 E. & B. 431; 1905, Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214.

Distinguish the following question: 1906, City Deposit Bank *v.* Green, 130 Ia. 384, 106 N. W. 942 (joint and several note; agreement for several liability only, excluded).

§ 2445. Same: Agreements affecting the Implied Terms.

[*Text,* p. 3451, end of par. (4):]

omit: "and this is generally conceded"; and *insert:* "but Courts differ upon this point."

[*Note* 6; *add:*]

1905, Harnett *v.* Holdredge, — Nebr. — , 97 N. W. 443; — id. — , 103 N. W. 277.

An *indorsement of payment* is subject to the usual rule for receipts (*ante*, § 2432), and may therefore be contradicted: 1905, McCaffrey *v.* Burkhardt, 97 Minn. 1, 105 N. W. 971.

§ 2446. Rule binding upon the Parties to the Document only.

[*Note* 3; *add:*]

1906, State *v.* Davison, — N. H. — , 64 Atl. 761 (embezzlement of corporate funds; the intent of the defendant, expressed in their oral statements, allowed to be shown, in spite of a written bill of sale).

[*Note* 5; *add:*]

1905, Wilson *v.* State, — Ala. — , 39 So. 776 (charge of removing corn with intent to defraud creditors, viz. one Mrs. J. having a claim for advances; "the written contract determines the relation that existed between Mrs. J. and the defendant," and proof by parol was excluded).
1904, Wilson *v.* Mulloney, 185 Mass. 430, 70 N. E. 448 (assignment of a mortgage, etc.). 1905, Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730 (joint tortfeasors; a release of claims to one tortfeasor, held not variable by parol evidence).
1903, First Nat'l Bank *v.* Tolerton, — Nebr. — , 97 N. W. 248 (chattel mortgage).
1906, Shreve *v.* Crosby, 72 N. J. L. 491, 63 Atl. 333 (stock transactions).

[*Text,* p. 3455, after § 2447; *add* a new 2448:]

§ 2448. **Loss of the Instrument; Oral Transaction is still Immaterial.** It follows, from the theory of the present rule (*ante*, § 2425), that if the instrument is *lost*, it is nevertheless the *factum probandum*, being the embodiment of the transaction. The superseded oral transactions do not therefore become the object of proof.[1] Nevertheless, so far as the parties'

[1] 1904, Capell *v.* Fagan, 29 Mont. 507, 77 Pac. 55 (misusing the word "evidence"); and cases cited *ante*, § 2427, n. 11.

intentions, or other conduct, would ordinarily be evidence of an act done, so here such circumstances may be evidentially offered to show by probability the contents of the lost instrument as consummated.[2]

[2] *Ante*, §§ 1735, 1737; § 112; § 392, n. 1, n. 10; § 273, n. 1; § 377, n. 4, 5.
Contra: 1891, Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1101 (deed). 1899, Nicholson *v.* Tarpey, 124 Cal. 442, 57 Pac. 457 (similar).
The opinion in Tayloe *v.* Riggs, 1 Pet. 591, 599 (1828), sometimes cited *contra*, is based in reality upon the principle of § 2105, *ante*.

§ 2450. Integration required by Law; (1) Judicial Records.

[*Note* 4; *add:*]

1905, Holford *v.* James, 136 Fed. 553, C. C.A. (lost pleadings; parol evidence received).

[*Note* 5; *add:*]

1906, Boonville Nat'l Bank *v.* Blakey, — Ind. — , 76 N. E. 529.
1905, Hofacre *v* Monticello, 128 Ia. 239, 103 N. W. 488.
1904, Fort Worth & D. C. R. Co. *v.* Roberts, 98 Tex. 42, 81 S. W. 25 (entry *nunc pro tunc* where no minute was made).

[*Note* 7, par. 1; *add:*]

1905, Gibson *v.* Holmes, 78 Vt. 110, 62 Atl. 11 (certified copy of docket entries in a Massachusetts court, excluded, "as those entries were no record, but only minutes from which to make a record").

[*Note* 14; *add:*]

1905, Baker Co. *v.* Huntington, 46 Or. 275, 79 Pac. 187 (acceptance of a sheriff's bond may be shown orally, if no court record exists).

§ 2451. Same: (2) Corporate Acts and Records, etc.

[*Note* 3; *add:*]

1904, Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603 (city council).

[*Note* 4; *add:*]

1905, Denver *v.* Spencer, 34 Colo. 270, 82 Pac. 590 (park commission; authorities collected in an opinion by Campbell, J.).
1904, Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73 (county board).

[*Note* 5; *add:*]

1905, State *v.* Farrier, 114 La. 579, 38 So. 460 (lodge of Masons).
1905, Norwich Ins. Co. *v.* Oregon R. Co., 46 Or. 123, 78 Pac. 1025 (master mechanics' association).
Contra: 1906, Rose *v.* Indept. C. Kadisho, — Pa. — , 64 Atl. 401.
For the *admissibility* of such records in general, see *ante*, §§ 1074, 1661.

§ 2452. Under Statutes; Wills, Ballots, Insurance Policies.

[*Note* 3; *add:*]

1896, White's Goods, L. R. 1 Ire. 269 (words added below the signature).
1905, O'Carroll *v.* Hastings, L. R. 2 Ire. 612.
1906, Whitney *v.* Hannington, — Colo. — , 85 Pac. 84.
1904, Bryan's Appeal, 77 Conn. 240, 58 Atl. 748 (doctrine of "incorporation by reference" applied).

[*Note* 6; *add:*]

Pa. St. 1881, May 11, Pub. L. 20 (similar, and including by-laws of the insurer).

[*Note* 7; *add:*]

1904, Hunziker *v.* Supreme Lodge, 117 Ky. 418, 78 S. W. 201.
1906, Holden *v.* Prudential L. Ins. Co., 19 Mass. 153, 77 N. E. 309 (where the policy does not refer to the application, the latter may be used to show fraudulent misrepresentations; this seems unsound). 1906, Paquette *v.* Prudential Ins. Co., — Mass. — , 79 N. E. 250. 1907, Langdeau *v.* John Hancock M. L. Ins. Co., — Mass. — , 80 N. E. 452.
1905, Custer *v.* Fidelity M. A. Ass'n, 211 Pa. 257, 60 Atl. 776 (citing prior cases).
1904, Manhattan L. Ins. Co. *v.* Albro, 127 Fed. 281, 62 C. C. A. 213 (Massachusetts statute construed).

§ 2453. Conclusive Certificates, distinguished.

[*Text*, p. 3463, last line; add a note 1:]

[1] Compare Mr. Gulson's analysis, in his treatise cited *ante*, § 1349.

§ 2454. Writing as a Formality; Statute of Frauds.

[*Note* 16; *add:*]

1904, Halsell *v.* Renfrow, 14 Okl. 674, 78 Pac. 118.

§ 2455. Same: Discharge and Alteration of Specialties, etc.

[*Note* 6; *add:*]

1906, Beld *v.* Darst, — Mich. — , 109 N. W. 275 (per Hooker, J., diss.; the majority refusing to consider the point on appeal).

[*Note* 7; *add:*]

1904, Vezey *v.* Rashleigh, 1 Ch. 634 (distinguishing between an alteration and a novation).
1904, Putnam F. & M. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033.

§ 2461. Standard of Interpretation; General Principle.

[*Note* 1; *add:*]

Compare also the learned and enlightening article by Professor Roscoe Pound, "Spurious Interpretation," Columbia Law Review, VII, 379 (1907).

§ 2462. Rule against Disturbing a Clear Meaning.

[*Note* 8; *add:*]

The state of opinion at this epoch is well illustrated in the opinions on the rule in Shelley's Case, in the great decision of Perrin *v.* Blake, in 1770 (4 Burr. 2579). Even the rational Blackstone stands by the then orthodox principle, while Mansfield, with an illumined insight a century beyond his time, as usual, is found advancing the modern theory.

[*Note* 17; *add:*]

1902, Marshall, J., in Utter *v.* Sidman, 170 Mo. 284, 294, 70 S. W. 705 (good opinion).

§ 2463. Same: Application of the Rule to Wills, Deeds, etc.

[*Note* 3; *add:*]

England: 1906, *Re* Corsellis, 2 Ch. 316 (bequest to "all my nephews and nieces then living," applied to children of a deceased illegitimate sister; following *Re* Jodrell and Hill *v.* Crook). 1906, *Re* Glassington, 2 Ch. 305 (devise of "real estate"; to apply the term to a certain freehold interest which was in law personalty, the testatrix' instructions stating that her only real estate consisted in this freehold interest were not held admissible, but on the facts the term "real estate" was nevertheless applied to the personalty interest in the freehold). 1906, *Re* Loveland, P. 542, 1 Ch. 542 (the testator formally married his niece W. in Scotland, but by Scotch law the marriage was invalid; after the marriage-ceremony he executed a will making a residuary devise to W. and to "all her children living at my decease, etc."; there was one such child; Swinfen Eady, J.: "I am satisfied, as matter of construction, that the word 'children' is used by the testator as including illegitimate children"; by this ruling it would seem that the unjust doctrine of Dorin *v.* Dorin comes to be finally outlawed).
Ireland: 1902, Flood *v.* Flood, L. R. 1 Ire. 538 (bequest of "all the preference stock or shares in the D. W. & W. R. Co. of which I may at the time of my death be possessed"; the testatrix never had any such shares; stock in the D. & K. R. Co. held to be signified).

[*Note* 6; *add:*]

1900, Northeastern R. Co. *v.* Hastings, App. Cas. 260 (railway lease; Halsbury, L. C.: "No amount of acting by the parties can alter or qualify words which are plain and unambiguous").
1904, Union Selling Co. *v.* Jones, 128 Fed. 672 (contract for binder twine, etc.; prior negotiations excluded; illustrating the difficulty of drawing the line between this principle and that of § 2465, n. 5, *post*).

[*Note* 8; *add:*]

1905, Gardiner *v.* McDonough, 147 Cal. 313, 81 Pac. 964 (sale of "peas" and "pinks," interpreted by usage to mean "white beans" and "pink beans," and "per 100" to mean "per 100 pounds").
1905, Rochester German Ins. Co. *v.* Peaslee G. Co., — Ky. — , 87 S. W. 1115 ("noon" may be shown by custom to signify standard, not solar time).
1904, Barker *v.* Citizens' M. F. Ins.Co., 136 Mich. 626, 99 N. W. 866 ("winter season" in the logging season).

[*Note* 9; *add:*]

Contra: 1904, Vogt *v.* Shienebeck, — Mich. — , 100 N. W. 820 (the meaning of "f. o. b." "is so plain that it was not permissible to explain it by custom or otherwise").

[*Note* 11; *add:*]

1904, Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499 (parties' private meaning for the words "on contract" in certain books of entry, admitted.

§ 2464. Usage of Trade or Locality, etc.

[*Note* 2; *add:*]

1904, Tower Co. *v.* Southern Pac. Co., 184 Mass. 472, 69 N. E. 348 (a usage to class oil-clothing as "inflammable goods" for stowage purposes, admitted; "when a custom is general as applied to a particular transaction," actual knowledge by the other party need not be proved; yet the presumption is "not one of law for the Court").

[*Note* 3; *add:*]

1891, Dashwood *v.* Magniac, 3 Ch. 306, 354, 366 (a will empowering trustees to fell timber; usage admitted to interpret).
1904, Soper *v.* Tyler, 77 Conn. 104, 58 Atl. 699 (contract with a Boston grain dealer is subject to the Boston usage in the grain trade).
1906, People *v.* Wiemers, 225 Ill. 17, 80 N. E. 45 ("crushed cobble" in an ordinance).
1904, Stoner *v.* Zachary, 122 Ia. 287, 97 N. W. 1098 (meaning of "Nfy." on a bill of lading, among carriers).
1905, Citizens' State Bank *v.* Chambers, 129 Ia. 414, 105 N. W. 692 (interest and commissions). 1906, Tubbs *v.* Mechanics' Ins. Co., — Ia. — , 108 N. W. 324 (usage as to "machinery" in a fire insurance policy, excluded).
1905, Home Ins. Co. *v.* Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65 ("usage and object of underwriters in inserting the 'pro rata' clause in policies of reinsurance," excluded).
1904, O'Brien Lumber Co. *v.* Wilkinson, 123 Wis. 272, 101 N. W. 1050 (custom of loading cars).
Compare the rulings as to *expert testimony* to meanings of words (*ante*, § 1955).

§ 2465. Parties' Mutual Understanding; Identifying a Description.

[*Note* 1, par. 1; *add:*]

1906, Grout *v.* Moulton, — Vt. — , 64 Atl. 453 ("satisfactory demonstration" of an automobile; the vendor's statements at the time of sale, not admitted to explain the term).

[*Note* 1, par. 2; *add:*]

1907, Inman Mfg. Co. *v.* American Cereal Co., — Ia. — , 110 N. W. 287.

[*Note* 3; *add:*]

1906, Van Diemen's Land Co. *v.* Marine Board, — App. Cas. 92 (the propriety of resorting to user of the parties, to explain a grant, considered).
1903, Bell *v.* Staacke, 141 Cal. 186, 74 Pac. 774 (conveyance construed by the parties' acts under it).
1905, Mayberry *v.* Beck, 71 Kan. 609, 81 Pac. 191 ("except one acre, etc., deeded to Moore's Branch Church").
1904, Graves *v.* Broughton, 185 Mass. 174, 69 N. E. 1083 ("one undivided moiety" in a deed of partition, construed by subsequent conveyances, etc., to mean an estate in severalty).
1906, Shenandoah L. & A. C. Co. *v.* Clarke, — Va. — , 55 S. E. 561 (parties' acts under a deed, considered).

[*Note* 5; *add:*]

1906, Buffington *v.* McNally, — Mass. — , 78 N. E. 309 (Stoops *v.* Smith, Mass., *supra*, in the text, followed).

[*Note* 6, par. 1; *add:*]

1905, Phoenix Assur. Co. *v.* Boyette, 77 Ark. 41, 90 S. W. 284 ("$2000. on cotton in bales").
1906, Mitau *v.* Roddan, — Cal. — , 84 Pac. 145 (inspection of crops).
1905, Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436 ("Miss Lowe Wellmaker's place" identified by parol).
1904, Gage *v.* Cameron, 212 Ill. 146, 72 N. E. 204 (contract to assume "existing mortgages," etc.; the mortgages, etc., identified by the circumstances).
1905, Warner *v.* Marshall, — Ind. — , 75 N. E. 582 (contract by letter to deed "the lots"; the correspondence and circumstances considered, to interpret the words). 1906, Howard *v.* Adkins, — Ind. — , 78 N. E. 665 ("120 acres of land").
1904, Hebb *v.* Welch, 185 Mass. 335, 70 N. E. 440 ("all plumbing" interpreted by the parties' conversations, etc.). 1907, Smith *v.* Vose & S. P. Co. — Mass. — , 80 N. E. 527 (contract to drive a well "to procure water"; the parties' prior conversations, admitted to show that "water" meant drinkable water, of a quality equal to that procured for another person; the ruling seems erroneous as to the last part).
1906, Wolverine L. Co. *v.* Phoenix Ins. Co., 145 Mich. 558, 108 N. W. 1088 ("mill buildings," etc., applied by the circumstances).
1905, Ward *v.* Gay, 137 N. C. 397, 49 S. E. 884 (sale of "all the pine, poplar, and cypress trees now standing, etc."; the circumstances admitted, to apply the terms of description).
1907, Watson *v.* Lamb, 75 Oh. 481, 79 N. E. 1075 (a contract to sell "my hogs"; an oral specification of eighty and sixty-five hogs, excluded, but the circumstances were considered to ascertain what hogs were referred to by "my hogs").
1904, American S. F. Co. *v.* Gerrer's Bakery, 14 Okl. 258, 78 Pac. 115 (meaning of "consignee" in a sale-contract).
1906, Morrison *v.* Hazzard, — Tex. — , 92 S. W. 33 ("25 feet" in a lot).
1906, Fayter *v.* North, 30 Utah 156, 83 Pac. 742 (deed of land, with "all tenements, hereditaments, privileges, and appurtenances thereunto belonging, or therewith used and enjoyed"; a valuable irrigation ditch was on the land; conversations between vendor and vendee at the time of the sale, concerning the use of the ditch, were admitted "to show how the parties themselves construed and applied the contract to the subject matter").

[*Note* 6 — *continued.*]

1905, Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890 (corporate records). 1906, Armstrong *v.* Ross, — W. Va. — , 55 S. E. 895 (contract for coal lands).
1903, Newell *v.* New Holstein C. Co., 119 Wis. 635, 97 N. W. 487 (contract of sale). 1905, Corbett *v.* Joannes, 125 Wis. 370, 104 N. W. 69 (compromise of claims; "in such cases the contract may be read very differently from the literal sense thereof").

§ 2466. Individual Party's Meaning; (1) Deeds and Contracts.

[*Note* 1; *add:*]

1905, Warner *v.* Marshall, — Ind. — , 75 N. E. 582 (contract by letters to deed property; the promisor's will, not admitted to interpret the description in the letters).
1904, Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416 (alteration of a bond).

[*Note* 5; *add:*]

1907, Inman Mfg. Co. *v.* American Cereal Co., — Ia. — , 110 N. W. 287 (the general principle considered).

§ 2467. Same: (2) Wills.

[*Note* 1; *add:*]

1903, Travers *v.* Casey, 35 N. Br. 229, 233 ("all property," etc., construed by the testator's circumstances and prior actions).

[*Note* 2; *add:*]

1906, Shipley *v.* Merc. T. & D. Co., 102 Md. 649, 62 Atl. 814 (meaning of the term "dower and thirds"; the testator's declarations as to how he had provided for his wife, excluded).
1905, Ackerman *v.* Crouter, 68 N. J. Eq. 49, 59 Atl. 574 (devise of "the farm I own at W. and known as the David D. A. W. farm"; that the testator "habitually spoke" of a certain three tracts as the "W. farm," admitted).

§ 2471. Exception for Declarations of Intention.

[*Note* 2; *add:*]

1903, Brown *v.* Quintard, 177 N. Y. 75, 69 N. E. 225 (former revoked will, offered to aid in interpretation, excluded).

[*Note* 6; *add:*]

1905, Holt's Estate, 146 Cal. 77, 79 Pac. 585 (plaintiff was a daughter by a former marriage of the wife of the testatrix' brother; under a bequest to "my nieces," *semble*, the testatrix' declarations were admissible to show that she had "considered appellant as her niece").

[*Note* 6; *add:*]

1906, Gilmore *v.* Jenkins, 129 Ia. 686, 106 N. W. 193 ("to my five daughters, the undivided one fifth of etc."; the testator's intent to give each of them one fifth, excluded).
1905, Best *v.* Berry, 189 Mass. 510, 75 N. E. 743 (bequest to C. and B. to be divided equally; C. having died before the testatrix, a memorandum of the testatrix' intention was not admitted to show her intent as to the share undisposed of in the will).
1906, App *v.* App, — Va. — , 55 S. E. 673 (meaning of the will).

§ 2472. Same: (1) Exception for Equivocation, etc.

[*Note* 2; *add:*]

1905, Hubbuck's Estate, Prob. 129 (cited *post*, § 2473, n. 1).

[*Note* 3; *add:*]

1905, Baker Co. *v.* Huntington, 46 Or. 275, 79 Pac. 187 (sheriff's bond to perform "the duties of such office"; intention of the parties to apply it to his office as sheriff or as tax-collector also, admitted).

§ 2473. Same: Blanks and Latent Ambiguities.

[*Note* 1, par. 1; *add:*]

1905, Hubbuck's Estate, Prob. 129 (a bequest "unto my grand-daughter all my real and personal etc."; there were three granddaughters, and a son claimed against them on the ground that the bequest was void; held not void, and evidence of declarations of intention admitted; "the distinction is that, in this case, it is not a total blank").
1905, Henderson *v.* Henderson, L. R. 1 Ire. 353 (bequest to "my grandsons, R. W. H. and J. B. H."; testator had two grandsons who were brothers, W. R. H. and J. B. H., and a third grandson, R. W. H.; the testator's instructions to the scrivener, etc., admitted; but the case is erroneously referred to in the opinion as one of "latent ambiguity").

[*Note* 1 — *continued.*]

1905, Crawford *v.* Verner, 122 Ga. 814, 50 S. E. 958 (deed held void for uncertainty of description).
1905, Harman *v.* People, 214 Ill. 454, 73 N. E. 760 (tax judgment held not void for ambiguity, the evidence not showing that the property described could not be located).
1903, La Vie *v.* Tooze, 43 Or. 590, 74 Pac. 210 (power of attorney to "Conrad Krebs and —— Krebs, composing the firm of Krebs Brothers"; the blank allowed to be applied by parol to Leonard and M. W. Krebs).

§ 2474. Same: (2) Exception for Erroneous Description.

[*Note* 6; *add:*]

1905, Oliver *v.* Henderson, 121 Ga. 836, 49 S. E. 743 (the facts are stated in the citation *post*, § 2477, n. 7; an allegation that the scrivener was instructed to write "78" and wrote "68" by mistake, was held immaterial).
1904, Wheaton *v.* Pope, 91 Minn. 299, 97 N. W. 1046 (devise to S. of "South west quarter of N. E. ¼ section one in township, etc., running West 160 rods," making a tract of land whose "location would be in the S. W. quarter of section one, and such tract was never owned by the testator"; on evidence that the testator had described a particular tract to the scrivener as intended to be devised to this devisee, and that the scrivener had erroneously copied it, the devise thus interpreted was given effect).

§ 2475. Same: (3) Exception for Rebutting an Equity, etc.

[*Note* 4; *add:*]

1906, Bromley *v.* Atwood, — Ark. — , 96 S. W. 356 (intent of a bequest to forgive a debt; testatrix' statements admitted).

[*Note* 5; *add:*]

and in Wisconsin: 1904, Sandon *v.* Sandon, 123 Wis. 603, 101 N. W. 1089.

[*Note* 6, par. 1; *add*, under *Accord:*]

1904, Brown *v.* Brown, 71 Nebr. 200, 98 N. W. 718 (collecting the cases).
1906, Brown *v.* Brown, — Nebr. — , 108 N. W. 180 (no authority cited).

§ 2477. Falsa Demonstratio; Application to Deeds and Wills.

[*Note* 1; *add:*]

1905, Garnier's Estate, 147 Cal. 457, 82 Pac. 68.
1904, Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. 591.
1906, Kerr *v.* De Lancy, — Ky. — , 91 S. W. 286 (extreme illustration).
1819, Cherry *v.* Slade, 3 Murph. N. C. 82 (leading opinion, by Taylor, C, J.). 1905, Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273.
1904, Resurrection G. M. Co. *v.* Fortune G. M. Co., 128 Fed. 668, C. C. A. (mining claim).
1905, Clayton *v.* Gilmer Co. Ct., 58 W. Va. 253, 52 S. E. 103.
This rule has been applied even to a description in a *statute:* 1904, Zimmerman *v.* Brooks, 118 Ky. 85, 80 S. W. 443.

[*Note* 3; *add:*]

1905, Warner *v.* Marshall, — Ind. — , 75 N. E. 582 (contract by letter to deed certain lots; an inconsistent clause stating the value as $10,000, held non-essential and rejectible).

[*Note* 5; *add:*]

1894, Re Seal, 1 Ch. 316, 321 (rule of *falsa demonstratio* considered).

[*Note* 7; *add:*]

Ga.: 1905, Oliver *v.* Henderson, 121 Ga. 836, 49 S. E. 743 (devise of a "lot of land (78) in the Second District of Dooly County"; the testator did not own lot 78, but lot 68; "it should have been alleged also that the testator owned only one lot in the Second District of D. Co., which lot was No. 68," and then the Court "might well have" given effect to the devise).
Ill.: 1905, Lomax *v.* Lomax, 218 Ill. 629, 75 N. E. 1076 (a will devised "the S. W. fractional quarter of Section 24, T. 40, R. 12, E. of the 3d P. M., containing about 55.87 acres more or less," and also devised "the rest, residue, and remainder of my estate"; the testator owned in S. 14, but not in S. 24; it was offered to show that "a mistake was made by the scrivener in drawing the will," in writing "24" for "14"; it appeared that no other quarter section in T. 40 contained approximately 55.87 acres, except the S. W. ¼ in S. 14; the offer as made was rejected, and correctly, on the authority of Kurtz *v.* Hibner; but the Court was clearly wrong in not going further and applying the words "my estate" and "55.87 acres" to the S. W. ¼ of S. 14, as done in Bowen *v.* Allen, Decker *v.* Decker, *supra*, regardless of the erroneous form of the offer).

§ 2478. Sundry Rules; Interpretation of Statutes.

[*Note* 1; *add:*]

1905, Nye *v.* Foreman, 215 Ill. 285, 74 N. E. 140.
1905, State *v.* Kelly, 71 Kan. 811, 81 Pac. 450 (opinion by Greene, J., collecting authorities).
1905, Chesapeake & O. R. Co. *v.* Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

§ 2484. Evidence sought by the Judge ex mero motu.

[*Note* 1; *add:*]

The *appointment of expert witnesses* by the Court is one of the expedients proposed for reforming the shortcomings of the present system; see the articles cited *ante*, § 562, n. 1, and the statutes there quoted.

§ 2486. Burden of Proof; First Meaning; Test for this Burden.

[*Note* 3; *add:*]

1906, Kettles *v.* People, 221 Ill. 221, 77 N. E. 472 (practising dentistry without a license; the defendant has the burden of proving a license).

§ 2487. Same: Second Meaning; Duty of Producing Evidence.

[*Note* 8; *add:*]

1906, Woodward *v.* Chicago M. & St. P. R. Co., 145 Fed. 577, 580, C. C. A.
1904, Olmstead *v.* Oregon S. L. R. Co., 27 Utah 515, 76 Pac. 557.
The best example of this application of the theory is now found in the able opinion of Jaggard, J., in Continental Ins. Co. *v.* Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548 (1906).

§ 2491. Presumptions of Law and of Fact.

[*Note* 4; *add:*]

Compare the discussion about the Coffin case, U. S., *post*, § 2511, n. 3.

[*Note* 6; *add:*]

Accord: 1904, Vincent *v.* Mutual R. F. L. Ass'n, 77 Conn. 281, 58 Atl. 963, per Prentice, J.

§ 2494. Prima Facie Evidence; Sufficient Evidence, etc.

[*Note* 12; *add:*]

1905, Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201.
1904, Hehir *v.* Rhode Island Co., 26 R. I. 30, 58 Atl. 246 (good opinion by Tillinghast, J.).

[*Note* 13; *add:*]

1904, Vogeler *v.* Devries, 98 Md. 302, 56 Atl. 782.
1903, Lamkin *v.* Johnson, 72 N. H. 344, 56 Atl. 750.
1906, Chybowski *v.* Bucyrus Co., 127 Wis. 332, 106 N. W. 833.

[*Note* 14; *add:*]

1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592.
1905, Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089.

[*Note* 17, par. 2; *add:*]

1905, Morey's Estate, 147 Cal. 495, 82 Pac. 57.
1903, Pittsburg, C. C. & St. Louis R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499.
1904, Craft *v.* Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 719.
1906, Woodward *v.* Chicago, M. & St. P. R. Co., 145 Fed. 577, C. C. A.

§ 2495. Same: Direction of a Verdict, etc.

[*Note* 4; *add:*]

A careful opinion, full of research, is that of Blodgett, J., in Gunn *v.* Union R. Co., 27 R. I. 320, 62 Atl. 118 (1905).

[*Note* 6; *add:*]

1905, Van Cott *v.* North J. St. R. Co., — N. J. L. — , 62 Atl. 407.
Compare the rule of § 2496, n. 3, *post*.

[*Note* 7; *add:*]

The ruling in Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608 (1905), is probably not *contra*.

[*Note* 8; *add:*]

Accord: 1905, Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253.
Contra: 1905, Sperl's Estate, — Minn. — , 103 N. W. 502 (for wills).

[*Note* 10; *add:*]

Compare the treatment of this question in the following: 1891, People *v.* Neumann, 85 Mich. 98, 48 N. W. 290. 1904, People *v.* Remus, 135 Mich. 629, 98 N. W. 397.

§ 2496. Same: Waiver of Motion, etc.

[*Note* 1; *add:*]

1906, State *v.* Banusik, — N. J. L. — , 64 Atl. 994, *semble.*

[*Note* 2, par. 1; *add:*]

1905, Sorensen *v.* Sorensen, — Nebr. — , 103 N. W. 455.

[*Note* 3, par. 1; *add* under *Accord:*]

1906, Lyon *v.* United Moderns, 148 Cal. 470, 83 Pac. 804.
1906, Shields *v.* Johnson, — Ida. — , 85 Pac. 972.
1905, Streator I. Tel. Co. *v.* Continental T. C. Co., 217 Ill. 577, 75 N. E. 646. 1905, Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 378.
1904, Esler *v.* Camden & S. R. Co., 71 N. J. L. 180, 58 Atl. 113 (nonsuit).
1907, Spencer *v.* State, — N. Y. — , 80 N. E. 375 (applied to Court of Claims).
1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86.
1905, Columbia N. & L. R. Co. *v.* Means, 136 Fed. 83, C. C. A.
1906, Gardner *v.* Porter, — Wash. — , 88 Pac. 121.

[*Note* 3, par. 1, at the end, under *Contra; add:*]

But in North Carolina the rule was changed by St. 1899, c. 131, amending St. 1897, c. 109: 1900, Means *v.* Carolina C. R. Co., 126 N. C. 424, 35 S. E. 813. 1902, Ratliff *v.* Ratliff, 131 N. C. 428, 42 S. E. 887; 1904, Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740. 1904, Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49 (failure to renew the motion). 1904, Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88 (same). The final result of the statutes of 1897, 1899, and 1901, is now phrased as follows: Rev. 1905, § 539: "Demurrer to Evidence. When . . . the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment, as in case of nonsuit. If the motion is allowed, the plaintiff may except and appeal to the Supreme Court. If the motion is refused, the defendant may except, and if the defendant introduces no evidence, the jury shall pass upon the issues in the case, and the defendant shall have the benefit of his exception on appeal to the Supreme Court. But after the motion is refused, he may waive his exception and then introduce his evidence just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except; and after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the Supreme Court." This seems to be a fair solution, straightforwardly expressed, and should serve as a model statute in States where similar doubts have arisen.

§ 2497. Measure of Persuasion; Proof beyond a Reasonable Doubt.

[*Note* 4; *add:*]

1904, People *v.* Perry, 144 Cal. 748, 78 Pac. 284.
1904, State *v.* Newman, 93 Minn. 393, 101 N. W. 499.
1905, State *v.* Overson, 30 Utah 22, 83 Pac. 562 (as to circumstantial evidence).
1903, Baker *v.* State, 120 Wis. 135, 97 N. W. 566.

[*Note* 5; *add:*]

So also Burgess, J., in State *v.* Bond, 191 Mo. 555, 90 S. W. 830: "Definitions of it tend to confuse rather than to enlighten."
The best exposure of the doctrine's vagaries is found in an article by Professor Wm. Trickett, of the Dickinson School of Law, "Preponderance of Evidence and Reasonable Doubt," The Forum (Carlisle, Pa.), X, 75 (1906).

[*Note* 6; *add:*]

Accord.: 1904, State *v.* Blay, 77 Vt. 66, 58 Atl. 794 ("No definition of the term need be given").
1903, Meehan *v.* State, 119 Wis. 621, 97 N. W. 173.

[*Note* 12; *add,* under *Accord:*]

1904, Delahoyde *v.* People, 212 Ill. 554, 72 N. E. 732.

[*Note* 12; *add:*]

Accord: 1906, Dunn *v.* State, — Ind. — , 78 N. E. 198, *semble* (this opinion illustrates the inherently quibbling nature of the question).
Contra: 1905, State *v.* Johnson, — N. D. — , 103 N. W. 565.

§ 2498. Same: Proof by Preponderance of Evidence.

[*Note* 1; *add:*]

1906, Sonnemann *v.* Mertz, 221 Ill. 362, 77 N. E. 550 (where a preponderance suffices, it is incorrect to charge that the jury must be "satisfied").
1905, Devencenzi *v.* Cassinelli, 28 Nev. 222, 81 Pac. 41.
1904, Chaffin *v.* Fries M. & P. Co., 135 N. C. 95, 47 S. E. 226.
1905, Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551. 1906, Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077 (a wondrous cobweb of pedantry is here woven to ensnare the jury's simple mind and the trial judge's tongue).

[*Note* 3; *add:*]

1904, Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. 1047 (assault and battery).
1904, Kurz *v.* Doerr, 180 N. Y. 88, 72 N. E. 926 (assault by discharging a firearm).

[*Note* 8; *add:*]

So in other actions for loss of support: 1904, Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068 (action for loss of support, under the dramshop act).

[*Note* 10; *add:*]

1904, Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591.

[*Note* 13; *add:*]

1906, Bowe *v.* Gage, 127 Wis. 245, 106 N. W. 1074 (fraud in a sale).

[*Note* 15; *add:*]

1904, McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407. 1905, Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134.

[*Note* 17; *add:*]

1904, Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627 (impeaching a notary's certificate of acknowledgment).
1904, McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407 (specific performance).
1905, Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850 (a custom must be proved "clearly and convincingly").
1905, Swiger *v.* Swiger, 58 W. Va. 119, 52 S. E. 23 (impeaching a certificate of acknowledgment).
So also for showing a *deed absolute* to be a *mortgage* only (under § 2437, *ante*): 1906, Betts *v.* Betts, — Ia. — , 106 N. W. 928.
1905, Stitt *v.* Rat Portage L. Co., 98 Minn. 52, 104 N. W. 561, *semble.*
1904, Smyth *v.* Reed, 28 Utah 262, 78 Pac. 478.
Compare the rule for proving the *precise terms* of an oral contract or lost will or deed (*ante*, §§ 2097–2106).

[*Note* 18; *add:*]

1906, Dupuis *v.* Saginaw V. T. Co., — Mich. — , 109 N. W. 413 (a quibbling opinion).
Contra: 1905, McNeill *v.* Stitt, — Cal. — , 82 Pac. 1121.
1905, McClelland *v.* Bullis, 34 Colo. 69, 81 Pac. 771.
1905, Heald *v.* W. U. Tel. Co., 129 Ia. 326, 105 N. W. 588; and statutes cited *ante*, § 2034, n. 1.

§ 2500. Sanity; (1) Testamentary and Other Civil Causes.

[*Note* 2; *add:*]

1903, Latour's Estate, 140 Cal. 414, 74 Pac. 441. 1904, McKenna's Estate, 143 Cal. 580, 77 Pac. 461.
1905, Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628.
1906, Todd *v.* Todd, 221 Ill. 410, 77 N. E. 680. 1906, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1.
1904, Branstrator *v.* Crow, 162 Ind. 362, 69 N. E. 668.
1906, Dunahugh's Will, 130 Ia. 692, 107 N. W. 925.
1904, Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135.
1905, Gesell *v.* Baugher, 100 Md. 677, 60 Atl. 481.
1904, Hunt *v.* Phillips, 34 Wash. 362, 75 Pac. 970.
Compare also the cases cited under other rules for proof of insanity, *ante*, § 233 (prior and subsequent insanity), § 1671 (inquisition of lunacy), *post*, § 2531 (presumption of continuance).

§ 2501. Same: (2) Criminal Causes.

[*Note* 1, in par. (3), *Third View; add:*]

1904, People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.
1907, State *v.* Johnston, 118 La. — , 42 So. 935.
1905, State *v.* Austin, 71 Oh. 317, 73 N. E. 218.
1904, State *v.* Quigley, 26 R. I. 263, 58 Atl. 905 (good opinion by Douglas, J.).
1904, State *v.* Clark, 34 Wash. 485, 76 Pac. 98 (good opinion by Mount, J., with a full collection of cases from other jurisdictions).

[*Note* 1, last par.; *add:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012. 1904, Talbert *v.* State, 140 Ala. 96, 37 So. 78.
1905, Allams *v.* State, 123 Ga. 500, 51 S. E. 506.
1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (reconsidering prior cases).

§ 2502. Undue Influence and Fraud; (1) Testamentary Execution.

[*Note* 1; *add:*]

1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678.
1905, Cowdry's Will, 77 Vt. 359, 60 Atl. 141.
1905, Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

§ 2503. Same: (2) Confidential Relations, etc.

[*Note* 1; *add:*]

Eng.: 1875, Fulton *v.* Andrew, L. R. 7 H. L. 448, 471 (beneficiary drafting or framing a will).
Am.: 1903, Stewart *v.* Walker, 6 Ont. L. R. 495, 510 (solicitor drawing a will and receiving benefits under it).
U. S.: 1905, Morey's Estate, 147 Cal. 495, 82 Pac. 57 (will).
1905, *Re* Birdseye, 77 Conn. 623, 60 Atl. 111 (will).
1904, Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908 (beneficiary of a will). 1906, Compher *v.* Browning 219 Ill. 429, 76 N. E. 768 (testator and beneficiary).
1905, Kennedy *v.* McCann, 101 Md. 643, 61 Atl. 625 (gift).
1906, Hill *v.* Hall, 191 Mass. 253, 77 N. E. 831 (attorney).
1905, Sperl's Estate, — Minn. — , 103 N. W. 502.

§ 2504. Same: Fraudulent Conveyances against Creditors.

[*Note* 1; *add:*]

1905, Thompson *v.* Williams, 100 Md. 195, 60 Atl. 26.

§ 2505. Marriage; (1) Consent from Cohabitation, etc.

[*Note* 1; *add:*]

1904, *Re* Shephard, 1 Ch. 456.
1904, Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241.

[*Note* 2; *add:*]

1906, Smith *v.* Fuller, — Ia. — , 108 N. W. 765.
1903, Shank *v.* Wilson, 33 Wash. 612, 74 Pac. 812.

[*Note* 3, par. 1; *add:*]

1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738 (adultery; marriage by a justice).

§ 2506. Same: (2) Capacity, as affected by Intervening Divorce, etc.

[*Note* 1; *add:*]

1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 (wife-murder).
1904, Scott's Adm'r *v.* Scott, Ky., 77 S. W. 1122 (first and second wives claiming insurance benefits).
1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; defendant's wife as witness). 1906, Smith *v.* Fuller, — Ia. — , 108 N. W. 765 (dower; plaintiff was married in 1872 to S., who disappeared in three months, and in 1875 she was married to the intestate; the second marriage presumed legal).
1905, Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (collecting prior cases in this State).

§ 2507. Negligence and Accident; (1) Contributory Negligence.

[*Note* 1; *add:*]

1906, Diamond B. C. Co. *v.* Cuthbertson, — Ind. — , 76 N. E. 1060.
1905, Simms *v.* Forbes, 86 Miss. 412, 38 So. 546.
1904, Rapp *v.* Sarpy Co., 71 Nebr. 382, 98 N. W. 1042, 102 N. W. 242.

§ 2508. Same: (2) Loss by Bailee.

[*Note* 1; *add:*]

1904, Dieterle *v.* Bekin, 143 Cal. 683, 77 Pac. 664 (warehouseman of goods destroyed by fire).

[*Note* 2; *add:*]

Miss.: 1904, Yazoo & M. V. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154 (injury to passenger; applying Rev. Code 1892, § 1808).
1903, Jones *v.* Kansas C. F. S. & M. R. Co., 178 Mo. 528, 77 S. W. 890 (employee).
1903, East Tennessee & W. N. C. R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99 (employee).

§ 2509. Same: (3) Defective Machines, Vehicles, and Apparatus.

[*Note* 2; *add:*]

1905, Denver *v.* Spencer, — Colo. — , 82 Pac. 590 (falling of a park stand).
1906, Wood *v.* Wilmington C. R. Co., — Del. — , 64 Atl. 246 (electric shock on a car-track).
1905, Central of Ga. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780 (killing of animals by a train).
1904, Illinois C. R. Co. *v.* Swift, 213 Ill. 307, 72 N. E. 737 (pile-driving machinery). 1905, Elgin A. & S. Traction Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436 (rule applied to a collision between two cars of the defendant).
1904, Fitch *v.* M. C. & C. L. Traction Co., 124 Ia. 665, 100 N. W. 618 (passenger). 1906, Huggard *v.* Glucose S. R. Co., — Ia. — , 109 N. W. 475 (falling of an iron pipe). 1906, Croft *v.* Chicago R. I. & P. R. Co., — Ia. — , 109 N. W. 723 (derailment).
1904, Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360, 71 N. E. 201 ("When an accident happens to a passenger, a presumption of negligence on the part of the carrier arises").
1905, State *v.* U. S. Railways & El. Co., 101 Md. 183, 60 Atl. 249 (passenger).
1904, Hofnauer *v.* White Co., 186 Mass. 47, 70 N. E. 1038 (rule not applied to the fall of a box from a shelf). 1904, Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547 (elevator accident; the accident held not sufficient evidence *per se* of negligence). 1904, Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 980 (rule not applied to let the plaintiff go to the jury on an issue of employee's negligence, from the mere fact of a railroad torpedo being found at a crossing). 1906, Byrne *v.* Boston W. H. & R. Co., 191 Mass. 40, 77 N. E. 696 (injury at a printing machine).
1891, Barnowski *v.* Helson, 89 Mich. 523, 50 N. W. 989, with note in 15 L. R. A. 33.
1907, Waller *v.* Ross, — Minn. — , 110 N. W. 252 (fall of an awning; good opinion by Jaggard, J.).
1904, Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26 (passenger). 1904, Allen *v.* St. Louis T. Co., 183 Mo. 411, 81 S. W. 1142 (passenger).
1905, Omaha St. R. Co. *v.* Boesen, — Nebr. — , 105 N. W. 303 (derailment).
1906, Duhme *v.* Hamburg-Amer. Packet Co., 184 N. Y. 404, 77 N. E. 386 (breaking of a hawser).
1904, Womble *v.* Merchants' G. Co., 135 N. C. 474, 47 S. E. 493 (elevator accident). 1905, Stewart *v.* Van D. C. Co., 138 N. C. 60, 50 S. E. 562 (elevator injury). 1905, Ross *v.* Double S. C. Mills, 140 N. C. 115, 52 S. E. 121 (mill machinery; good opinion by Connor, J.). 1905, Lyles *v.* Brannon C. Co., 140 N. C. 25, 52 S. E. 233 (soda-water tank explosion).
1905, Venbuve *v.* Lafayette W. Mills, 27 R. I. 89, 60 Atl. 770 (oily factory floor). 1905, Wilbur *v.* Rhode Island Co., 27 R. I. 205, 61 Atl. 601 (passenger). 1905, Edwards *v.* Manufacturers' B. Co., 27 R. I. 248, 61 Atl. 646 (elevator).
1891, Gleeson *v.* Virginia M. R. Co., 140 U. S. 435, 441, 11 Sup. 859 (landslide on a railway track). 1905, Cincinnati, N. O. & T. P. R. Co. *v.* South F. C. Co., 139 Fed. 528, 533 (fire started by a railroad collision). 1906, North Jersey St. R. Co. *v.* Purdy, 142 Fed. 955, C. C. A. (passenger). 1906, Southern P. Co. *v.* Cavin, 144 Fed. 348, C. C. A. (passenger).
1904, Wells *v.* Utah C. Co., 27 Utah 524, 76 Pac. 560.
1904, Norfolk R. & L. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502 (electric wire). 1904, Moore Lime Co. *v.* Johnston's Adm'r, 103 Va. 84, 48 S. E. 557 (stationary engine).
1903, Towle *v.* Stimson M. Co., 33 Wash. 305, 74 Pac. 471 (sawmill). 1904, Allen *v.* Northern P. R. Co., 35 Wash. 221, 77 Pac. 204 (railroad passenger getting on the car). 1905, Williams *v.* Spokane F. & N. R. Co., 39 Wash. 77, 80 Pac. 1100 (passengers in a collision). 1905, Firebaugh *v.* Seattle El. Co., 40 Wash. 658, 82 Pac. 995 (passenger on a street-car).
1905, Tiborsky *v.* Chicago, M. & St. P. R. Co., 124 Wis. 243, 102 N. W. 549 (railroad obstructing the sidewalk).

[*Note* 4; *add:*]

1904, Atchison, T. & S. F. R. Co. *v.* Geiser, 68 Kan. 281, 75 Pac. 68.
1904, Dyer *v.* Maine C. R. Co., 99 Me. 195, 58 Atl. 994.
1906, Continental Ins. Co. *v.* Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548 (best opinion, by Jaggard, J., under the rule of *prima facie* negligence).
1904, Anderson *v.* Oregon R. Co., 45 Or. 211, 77 Pac. 119.

[*Note* 5, par. 1; *add:*]

1906, Illinois C. R. Co. *v.* Stanley, — Ky. — , 96 S. W. 846.
N. C. Rev. 1905, § 2645 (like Code 1883, § 2326).

[*Note* 5, par. 2; *add:*]

1906, Williams *v.* Sleepy H. M. Co., — Colo. — , 86 Pac. 337 (employee's knowledge of danger).
1907, Curtin *v.* Boston Elev. R. Co., — Mass. — , 80 N. E. 522.
1906, Fearington *v.* Blackwell D. T. Co., 141 N. C. 80, 53 S. E. 662 (elevator). 1906, Fitzgerald *v.* Southern R. Co., 141 N. C. 530, 54 S. E. 391 (loading coal).
1905, Northern Pacific R. Co. *v.* Dixon, 139 Fed. 737, C. C. A. (collision). 1905, Shandrew *v.* Chicago St. P. M. & O. R. Co., 142 Fed. 320, 323, C. C. A.

§ 2510. Same: (4) Death by Violence.

[*Note* 1; *add:*]

1903, Pomfret *v.* Lancashire & Y. R. Co., 2 K. B. 718.
1904, Billing *v.* Semmens, 7 Ont. L. R. 340 (factory machine).
1906, Little Rock R. & E. Co. *v.* Green, — Ark. — , 93 S. W. 752.
1906, Chicago & A. R. Co. *v.* Wilson, — Ill. — , 80 N. E. 56.
1905, Rietveld *v.* Wabash R. Co., 129 Ia. 249, 105 N. W. 515. 1906, Christopherson *v.* Chicago, M. & St. P. R. Co., — Ia. — , 109 N. W. 1077. 1906, Ellis *v.* Republic Oil Co., — Ia. — , 110 N. W. 20 (oil explosion).
1904, Kansas C. L. R. Co. *v.* Gallagher, 68 Kan. 424, 75 Pac. 469. 1906, Atchison T. & S. F. R. Co. *v.* Baumgartner, — Kan. — , 85 Pac. 822.
1905, Stevens *v.* United G. & E. Co., 73 N. H. 159, 60 Atl. 848.
1904, Newport N. P. Co. *v.* Beaumeister, 102 Va. 677, 47 S. E. 821.

[*Note* 2; *add:*]

1906, Grand Lodge *v.* Banister, — Ark.— , 96 S. W. 742.
1905, Preferred Acc. Ins. Co. *v.* Fielding, — Colo. — , 83 Pac. 1013.
1907, Lindahl *v.* Supreme Court, — Minn. — , 110 N. W. 359 (suicide).
1903, Stevens *v.* Continental C. Co., 12 N. D. 463, 97 N. W. 862.
1906, Starr *v.* Aetna L. Ins. Co., 41 Wash. 199, 83 Pac. 113 (accident).

§ 2511. Crimes: (1) Innocence, Malice, Intent, etc.

[*Note* 1; *add:*]

This little bundle of humor (Scintillae Juris) is now known to be of Mr. Justice Darling's authorship, and has reached its fifth edition.

[*Note* 3, par. 2, l. 2; *add:*]

1906, Williams *v.* State, 144 Ala. 14, 40 So. 205.
1904, People *v.* Moran, 144 Cal. 48, 77 Pac. 777.
1904, State *v.* Quigley, 26 R. I. 263, 58 Atl. 905 ("when the evidence works conviction beyond a reasonable doubt, the presumption of innocence withdraws its protection").

[*Note* 3, par. 2; at the end, *add:*]

1905, Everett *v.* People, 216 Ill. 478, 75 N. E. 188 (Coffin *v.* U. S. approved). 1906, Flynn *v.* People, 222 Ill. 303, 78 N. E. 617 (a fine word-juggle).
1903, State *v.* Brady, 121 Ia. 561, 97 N. W. 62. 1903, State *v.* Linhoff, 121 Ia. 632, 97 N. W. 77.
1904, U. S. *v.* Griego, 12 N. M. 84, 75 Pac. 30.
1905, Cowdry's Will, 77 Vt. 359, 60 Atl. 141 (where Rowell, C. J., even after referring to Professor Thayer's criticism of the Coffin Case, seems unable to make up his mind on the subject and decides to let the criticised rule remain, "as it is so embedded in our law" (?) and "works well enough in practice").
1906, State *v.* Mayo, 42 Wash. 540, 85 Pac. 251.

[*Note* 4, par. 2; *add:*]

1904, State *v.* Poe, 123 Ia. 118, 98 N. W. 587.

§ 2512. Same: (2) Self-Defence, Alibi, etc.

[*Note* 2; *add:*]

1904, Anderson *v.* Terr., — Ariz. — , 76 Pac. 636.
1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018 (prosecution has the burden entirely).
1905, State *v.* Morris, 128 Ia. 717, 105 N. W. 213.
1904, State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384.

[*Note* 3; *add:*]

1906, Barton *v.* Terr., — Ariz. — , 85 Pac. 730.
1905, Flanagan *v.* People, 214 Ill. 170, 73 N. E. 347. 1905, Briggs *v.* People, 219 Ill. 330, 76 N. E. 499 (phrasing of instruction considered).
1904, State *v.* Worthen, 124 Ia. 408, 100 N. W. 330 (peculiar rule).
1903, Legere *v.* State, 111 Tenn. 368, 77 S. W. 1059.

§ 2513. Same: (3) Possession of Stolen Goods.

[*Note* 3; *add:*]

1904, R. *v.* Theriault, 11 Br. C. 117.
1905, People *v.* Davis, 147 Cal. 346, 81 Pac. 718.
1904, State *v.* Carr, 4 Del. 523, 57 Atl. 370.
1904, State *v.* Raphael, 123 Ia. 452, 99 N. W. 151.
1906, Terr. *v.* Livingston, — N. M. — , 84 Pac. 1021.
1904, State *v.* Lax, 71 N. J. L. 386, 59 Atl. 18.
1904, State *v.* Drew, 179 Mo. 315, 78 S. W. 594. 1906, State *v.* Wright, — Mo. — , 97 S. W. 874.

[*Note* 7; *add:*]

1905, State *v.* Richmond, 186 Mo. 71, 84 S. W. 880 (declaring both the Guild and the Bulla cases to be correct!).

[*Note* 8; *add:*]

1906, Gunter *v.* State, — Ark. — , 96 S. W. 181 (burglary).
1904, People *v.* Lang, 142 Cal. 482, 76 Pac. 232.
1903, State *v.* Brady, 121 Ia. 561, 97 N. W. 62.
1905, Winsky *v.* State, 126 Wis. 99, 105 N. W. 480.

The same question arises as to a presumption of *fabrication* or of *knowledge*, from the *utterance or possession of a forged* instrument:
1907, State *v.* Waterbury, — Ia. — , 110 N. W. 328.
1903, State *v.* Psycher, 179 Mo. 140, 77 S. W. 836.

§ 2514. Same: (4) Capacity (Infancy, etc.).

[*Note* 3; *add:*]

1906, State *v.* Fisk, — N. D. — , 108 N. W. 484 (rape; under the statute, the State must show criminal intent, for a child between 7 and 14; collecting the authorities at common law).

[*Note* 5; *add:*]

Contra: 1904, State *v.* Corrivau, 93 Minn. 38, 100 N. W. 638.

[*Note* 6; *add:*]

1906, State *v.* Harvey, 130 Ia. 394, 106 N. W. 938 (arson).
1904, Com. *v.* Adams, 186 Mass. 101, 71 N. E. 78.

§ 2515. Ownership; (1) Possession of Land, etc.

[*Note* 2; *add:*]

1906, Glos *v.* Ault, 221 Ill. 562, 77 N. E. 939 (possession under claim of ownership being *prima facie* evidence of ownership, a deed from such a possessor may be *prima facie* evidence of ownership).

[*Note* 4, par. 1; *add:*]

1906, Roberts *v.* Ringemann, Ala., 40 So. 81 (personalty levied on).
1905, Vinson *v.* Knight, 137 N. C. 408, 49 S. E. 891 (trover).

It seems practical to hold, as Courts are more inclined to do, that the *operation of railroad premises* may be sufficient evidence of ownership or control of the rolling stock: 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.
1904, Spink *v.* N. Y. N. H. & H. R. Co., 26 R. I. 115, 58 Atl. 499 (operation of locomotives raises a presumption of ownership or at least control). Compare the admissibility of *reputation* for this purpose (*ante* § 1587).

§ 2516. Same: (2) Possession of Negotiable Instrument.

[*Note* 1; *add:*]

1904, Huntley *v.* Hutchinson, 91 Minn. 244, 97 N. W. 971.
1905, Cuyler *v.* Wallace, 183 N. Y. 291, 76 N. E. 1 (insurance policy).
1905, Tyson *v.* Joyner, 139 N. C. 69, 51 S. E. 803 (indorsed in blank).

§ 2517. Payment; (1) Lapse of Time.

[*Note* 1; *add:*]

1905, Ayres *v.* Ayres, — N. J. Eq. — , 60 Atl. 422 (note).
1905, Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (legacy).
1905, Allison's Ex'r *v.* Wood, 104 Va. 765, 52 S. E. 559 (bond).

§ 2518. Same: (2) Possession of Instrument or Receipt.

[*Note* 2; *add:*]

1904, Sarraille *v.* Calmon, 142 Cal. 651, 76 Pac. 497 (note).

§ 2520. Execution of Deeds (Delivery, etc.).

[*Note* 3; *add,* under *Accord:*]

1905, Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244 (here considering the contrary presumption of non-delivery from grantor's possession after death).
1906, Shetler *v.* Stewart, — Ia. — , 107 N. W. 310 (deed; contrary presumption from grantor's possession, considered).

[*Note* 3 — *continued.*]

1906, Amos-Richia *v.* Northwestern M. L. Ins. Co., 143 Mich. 684, 107 N. W. 707 (insurance policy; presumption not raised on the facts).
1906, Pierson *v.* Fisher, — Or. — , 85 Pac. 621.
1906, Webb *v.* Ritter, — W. Va. — , 54 S. E. 484 (deed).

[*Note* 3; *add*, at the end:]

For the rule as to the presumption of delivery to aid a *voluntary deed* between *family members* or confidential parties, see the following: 1905, Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126 (deed found in the grantor's custody after death).
1905, Coleman *v.* Coleman, 216 Ill. 261, 74 N. E. 701 ("The law presumes more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale").
1905, Thompson *v.* Calhoun, 216 Ill. 161, 74 N. E. 775 (similar; here a deed to an adult son).

[*Note* 4, par. 1; *add:*]

1906, Hanchett *v.* Haas, 219 Ill. 546, 76 N. E. 845. 1906, Calkins *v.* Calkins, 220 Ill. 111, 77 N. E. 102.
1905, Webb *v.* Webb, 130 Ia. 457, 104 N. W. 438.
1907, Pentico *v.* Hays, — Kan. — , 88 Pac. 738.
1906, Collings *v.* Collings, — Ky.,— , 92 S. W. 577.
1904, Peters *v.* Berkemeier, 184 Mo. 393, 83 S. W. 747.
For the burden of proof under statutes requiring a *sworn denial* of execution, see *post*, § 2596, *ante*, § 2146.

[*Note* 5; *add:*]

1905, Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308.

[*Text*, p. 3567, par. (*b*); *add:*]

The *authority of an agent*, purporting to execute for his principal, is not presumed.[6a]

[6a] 1888, Fadner *v.* Hibler, 26 Ill. App. 639. 1890, Darst *v.* Doom, 38 Ill. App. 397.
1877, Swaine *v.* Marriott, 28 N. J. Eq. 589.
1905, McClung *v.* McPherson, 47 Or. 73, 82 Pac. 13. Otherwise for an *ancient document* (*ante*, § 2144).
Compare the effect of an *admission* in such cases (*ante*, § 2134).

§ 2522. Same: (4) Lost Grant, etc.

[*Note* 2; *add:*]

1903, Flanagan *v.* Mathieson, 70 Nebr. 223, 97 N. W. 287.
1905, Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398 (land).

§ 2523. Same: (5) Will (Execution and Revocation).

[*Note* 1; *add:*]

The presumption of genuineness from the *age* and *custody* of an *ancient document* may also apply to wills (*ante*, § 2145).

[*Note* 2; *add:*]

1904, Colbert's Estate, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248.
1905, Williams *v.* Miles, — Nebr. — , 102 N. W. 482.
1903, Stevens *v.* Stevens, 72 N. H. 360, 56 Atl. 916.
1904, Gfeller *v.* Lappe, 208 Pa. 48, 57 Atl. 59.

[*Note* 3; *add:*]

For the burden of proof under the Ohio statute as to *lost wills probated by an established copy*, see the following:
1905, Hutson *v.* Hartley, 72 Oh. 262, 74 N. E. 197.

§ 2525. Same: (7) Alteration of Documents.

[*Note* 1; *add:*]

1905, Crediton *v.* Exeter, L. R. 2 Ch. 455, 458.
1903, Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 (lease). 1905, Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066 (note). 1906, Gage *v.* Chicago, — Ill. — , 80 N. E. 127 (certified copy of an ordinance).
1905, Thomas *v.* Thomas, 129 Ia. 159, 105 N. W. 403.
1904, Wheadon *v.* Turregano, 112 La. 931, 36 So. 808 (lease).
1904, Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416 (bond).
1905, Philip Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515 (contract).

§ 2526. Gifts and Trusts, etc.

[*Note* 2; *add:*]

1905, Hoon *v.* Hoon, 126 Ia. 391, 102 N. W. 105 (conveyance).

§ 2527. Legitimacy.

[*Note* 3, par. 1; *add:*]

1904, Canaan *v.* Avery, — Conn. — , 58 Atl. 509 (the wife's adultery during the gestation-period cannot be shown).
1905, Godfrey *v.* Rowland, 16 Haw. 377, 502.
1906, Breidenstein *v.* Bertram, 198 Mo. 328, 95 S. W. 828 (Rev. St. 1899, § 2917, providing that subsequent marriage and the recognition of the child legitimates it, *semble*, does not make such recognition conclusive).
1904, Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719 (legitimacy of a son born 11 months after marriage; unchaste conduct with other men before marriage and after birth, excluded).

§ 2528. Chastity; Child Bearing.

[*Note* 1; *add*, under *Accord:*]

1904, Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929 (seduction). 1905, Rucker *v.* State, — id. —, 90 S. W. 151 (seduction).

§ 2529. Identity of Person, etc.

[*Note* 3; *add:*]

1905, State *v.* Loser, — Ia. — , 104 N. W. 337 (conviction of "William S. B.," admitted to impeach William B.). 1906, State *v.* Smith, 129 Ia. 709, 106 N. W. 187 (former conviction of "John A. Smith," not admitted against John Smith with other evidence of identity; Deemer, J., diss.).
1905, Colbert *v.* State, 125 Wis. 423, 104 N. W. 61 (former conviction; identity of name suffices).

[*Note* 4; *add:*]

1905, Snowman *v.* Mason, 99 Me. 490, 59 Atl. 1019 (Wedgwood's Case followed, in a suit for criminal conversation).
1905, Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (marriage certificate; evidence of identity held insufficient; Pearce, J., dissenting, and properly, from the extraordinary opinion of the majority).
1906, State *v.* Thompson, — Utah — , 87 Pac. 709 (adultery; some evidence of identity required).

[*Note* 5; *add:*]

1906, People *v.* Wong Sang Lung, — Cal. App. — , 84 Pac. 843 (not presumed where there are other persons of the same name in the neighborhood).
1904, Martin *v.* Brand, 182 Mo. 116, 81 S. W. 443 (land-patent entry).
1905, Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209 (parties to a judgment). 1906, McInerney *v.* U. S., 145 Fed. 729, 739, C. C. A. (immigrant).

§ 2530. Continuity: (1) In general (Ownership, etc.).

[*Note* 2; *add*, under *Insanity:*]

1904, Branstrator *v.* Crow, 162 Ind. 362, 69 N. E. 668.
1905, State *v.* Austin, 71 Oh. 317, 73 N. E. 218.

Note 2, last paragraph; *add:*]

1905, Friend *v.* Yahr, 126 Wis. 291, 104 N. W. 997 (possession of documents, presumed to continue).

§ 2531. Same: (2) Life and Death.

[*Note* 1; *add:*]

1905, *Re* Aldersey, 2 Ch. 181 (Kekewich, J.: "Phene's Trusts is not precisely this case, though it is not very far from it").

[*Note* 3; *add:*]

1905, Modern Woodmen *v.* Gerdom, 72 Kan. 391, 82 Pac. 1100 (interesting opinion by Burch, J., emphasizing the necessity of inquiry and of consequent lack of news).
1905, Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924 (statute applied).

But the rule in *Louisiana* is of different tenor: 1906, Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. 682 (disappearance for seven years, not sufficient on the facts, under the peculiar language of the Louisiana Civil Code, art. 70; the opinion ignores the reasoning of the common-law rule).

[*Note* 4, par. 1; *add*:]

1833, Doe *v.* Nepean, 5 B. & Ad. 86.
1905, *Re* Aldersey, 2 Ch. 181, 185 (rule of Nepean *v.* Knight applied).
1906, Spahr *v.* Mutual L. Ins. Co., 98 Minn. 471, 108 N. W. 4 (the defendant's policy on S.'s life lapsed on June 1, 1898; on April 4, 1898, S. left his home, and was never again seen or heard of; on July 7, 1905, this action was begun; held that S. was presumed to be dead, but not to have died at any particular time before or after June 1, 1898).

§ 2534. Regularity; (1) Performance of Official Duty, etc.

[*Note* 1, par. 1; *add*:]

1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (assault by an officer serving process; presumption applied).
1904, Marchant's Estate, 121 Wis. 526, 99 N. W. 320 (statutory proceedings).

§ 2535. Same: (2) Appointment and Authority of Officers.

[*Note* 3; *add*:]

1906, Barry *v.* Smith, 191 Mass. 78, 77 N. E. 1099 (board of health).

§ 2536. Similarity of Foreign Law.

[*Text*, p. 3585, paragraphs (1) and (2):]

For these rules, substitute those set forth by Professor Albert M. Kales, in his article "Presumption of Foreign Law," Harvard Law Review, XIX, 401 (1906), where the cases are exhaustively collected. His conclusions merit acceptance. To the cases cited by him, add the following more recent ones:
1903, Merritt *v.* Copper Crown Co., 36 N. Sc. 383, 393 (rules of construction by West Virginia law, presumed the same).
1906, Southern Express Co. *v.* Owens, — Ala. — , 41 So. 752 (common carrier's contract; common law of South Carolina presumed the same).
1904, Rooney *v.* Southern B. & L. Ass'n, 119 Ga. 941, 47 S. E. 345 (Alabama contract; common law as to usury presumed). 1904, Savannah F. & W. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308 (statute of Florida as to signals at crossings, not noticed). 1906, Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77 (Alabama law as to usury; the common law presumed to obtain there, bu the Alabama judicial rulings were not to control in its interpretation). 1906, Ellington *v.* Harris, — Ga. — , 56 S. E. 134 (marriage).
1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (marriage in Turkey). 1905, Scholten *v.* Barber, 217 Ill. 148, 75 N. E. 460 (extension of time to a surety on a note made in Missouri; common law assumed to be the same). 1905, Leathe *v.* Thomas, 218 Ill. 246, 75 N. E. 810 (action on a Missouri judgment; the Missouri statute upon set-off, not noticed).
1903, Baltimore & O. S. W. R. Co. *v.* Hollenbeck, 161 Ind. 452, 69 N. E. 136 (wage-claim, already paid under garnishment in Kentucky; the Indiana statute of exemptions not presumed to be adopted by statute in Kentucky).
1904, Banco de Sonora *v.* Bankers' M. C. Co., 124 Ia. 576, 100 N. W. 532 (law of Mexico as to age of majority, not presumed to be the same). 1906, Westheimer *v.* Habinck, — Ia. — , 109 N. W. 189 (shipment of liquor; presumption of similarity for Missouri law, not enforced "if the assumption would impose a penalty or work a forfeiture").
1904, First Nat'l Bank *v.* Nordstrom, 70 Kan. 485, 78 Pac. 804 (note payable in Iowa; law of Iowa presumed the same). 1906, St. Louis & S. F. R. Co. *v.* Johnson, — Kan. — , 86 Pac. 156 (death in Indian Territory; common law presumed the same).
1904, Klenke *v.* Noonan, 118 Ky. 436, 81 S. W. 241 (common law as to marriage, presumed to obtain in Ohio).
1904, State *v.* Allen, 113 La. 705, 37 So. 614 (bigamy; the Indiana law of validity of a marriage presumed to be the same as in Louisiana).
1904, Callender, M. & T. Co. *v.* Flint, 187 Mass. 104, 72 N. E. 345 (guaranty; Rhode Island). 1904, Cherry *v.* Sprague, 187 Mass. 113, 72 N. E. 456 (note; South Dakota). 1906, Farmers' Nat'l Bank *v.* Venner, — Mass. — , 78 N. E. 540 (default of a N. Y. note; the law of N. Y. presumed the same). 1907, Demelman *v.* Brazier, — Mass. — , 79 N. E. 812 (days of grace in New York law).
1905, McKnight *v.* Oregon S. L. R. Co., 33 Mont. 40, 82 Pac. 661 (injury to personalty in Idaho; the statute of Idaho not noticed).
1906, Robb *v.* Washington & J. College, 185 N. Y. 485, 78 N. E. 359 (restraint on alienation; Pennsylvania not presumed to have a statute like New York).
1904, Columbian B. & L. Ass'n *v.* Rice, — N. C. — , 47 S. E. 63 (Virginia contract; common law as to usury presumed, and the statute not presumed to be the same as in N. C.). 1904, Lassiter *v.* Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642 (Virginia statute as to death by wrongful act; subject discussed in two opinions).
1904, Linton *v.* Moorhead, 209 Pa. 646, 59 Atl. 264 (married woman's power of attorney in England; law of England presumed the same, for lack of proof).
1904, Baird *v.* Vines, 18 S. D. 52, 99 N. W. 89 (non-negotiable note; law of Montana presumed the same).
1905, Iowa L. & T. Co. *v.* Schnose, — S. D. — , 103 N. W. 22 (mortgage in Iowa; law of Iowa presumed the same).
1904, *Ex parte* Latham, — Tex. Cr. — , 82 S. W. 1046 (community property in Oklahoma; law of Oklahoma presumed the same).

[*Text*, p. 3585 — *continued.*]

1904, The Matterhorn, 128 Fed. 863, 63 C. C. A. 331 (maritime law of another country; its difference must be proved).
1905, Frank *v.* Gump, 123 Va. 205, 51 S. E. 358 (Maryland contract; common law presumed the same).
1907, Norfolk & W. R. Co. *v.* Denny's Adm'r, — W. Va. — , 56 S. E. 321 (statutory action for death).
1905, Edleman *v.* Edleman, 125 Wis. 270, 104 N. W. 56 (alimony in divorce; Tennessee property law presumed the same).

§ 2537. Contracts.

[*Note* 1; *add*, under *Warranties:*]

1904, Vincent *v.* Mutual R. F. L. Ass'n, 77 Conn. 281, 58 Atl. 963 (age).

[*Note* 1, at the end; *add:*]

Conditions in a bond or mortgage: 1906, Temple *v.* Phelps, — Mass. — , 79 N. E. 482.
Payment of the premium of an insurance policy: 1904, Thomas *v.* Northwestern M. L. Ins. Co., 142 Cal. 79, 75 Pac. 665.
For *accident insurance*, see *ante*, § 2510.

§ 2538. Statute of Limitations.

[*Note* 3; *add:*]

1906, Schell *v.* Weaver, 225 Ill. 159, 80 N. E. 95.

§ 2540. Sundry Burdens and Presumptions.

[*Note* 1; *add:*]

1905, Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273 (statutory proceeding to establish a boundary).

§ 2550. Judge and Jury; Admissibility of Evidence.

[*Note* 1; *add:*]

1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (expert's competency).
1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 (the Court decides upon the facts making a second wife competent).
1905, State *v.* Hancock, 28 Nev. 300, 82 Pac. 95 (wife as witness).
1906, State *v.* Monich, — N. J. L. — , 64 Atl. 1016 (confessions, expertness, dying declarations; good opinion by Pitney, J.).
1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569 (producing original documents).

[*Note* 3; *add:*]

1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 ("If in a criminal case the decision is against the defendant, he has another chance before the jury, so far as it depends upon a question of fact").
1904, King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085 (privileged letter, whose authenticity was denied; the letter left to the jury to decide upon).

[*Note* 6, par. 1; *add*, at the end:]

The more recent doctrine in Massachusetts seems to have abandoned this pristine attitude:
1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (not citing Com. *v.* Robinson).

§ 2551. Sufficiency of Evidence.

[*Note* 2; *add:*]

Some practical comments on the operation of this rule in experience will be found in Mr. (Assistant District Attorney) Arthur Train's valuable book, "The Prisoner at the Bar" (1906), pp. 180–189.

[*Note* 6; *add:*]

1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865. 1905, Chicago City R. Co. *v.* Nelson, 215 Ill. 436, 74 N. E. 458.
1905, Buehner Chair Co. *v.* Feulner, 164 Ind. 368, 73 N. E. 816. 1905, Diamond B. C. Co. *v.* Cuthbertson, — Ind. — , 73 N. E. 818.

§ 2555. Facts Judicially Noticed; Trial by Inspection, etc.

[*Note* 5, par. 2; *add*, under *Accord:*]

1905, Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556.

§ 2556. Construction of Documents.

[*Note* 1; *add:*]

1906, Turner *v.* Osgood A. C. Co., 223 Ill. 629, 79 N. E. 306.
1903, Smith *v.* Sovereign Camp, 179 Mo. 119, 77 S. W. 862 (insurance policy).
1905, Senterfeit *v.* Shealy, 71 S. C. 259, 51 S. E. 142 (the judge may instruct as to the legal effect of a deed).

[*Note* 2; *add:*]

1905, Locke *v.* Lyon M. Co., — Ky. — , 84 S. W. 307.

[*Note* 4, par. 1; *add:*]

1905, Ellis *v.* Block, 187 Mass. 408, 73 N. E. 475 (function of the jury construed, in an opinion not clear).

§ 2558. Foreign Law.

[*Note* 1; *add:*]

1906, Christiansen *v.* Graver T. Works, 223 Ill. 142, 79 N. E. 97 (cause of action in Indiana; the statutes and decisions of Indiana held to have been properly introduced and read "before the Court and out of the presence of the jury").
1905, Mercantile Guaranty Co. *v.* Hilton, 191 Mass. 141, 77 N. E. 312 (here the Court went to the pedantic length of refusing to consider New York decisions, cited in argument but not offered at the trial, upon the interpretation of a New York statute; because "this is here a question of fact").

§ 2570. Judicial Notice by the Jury's Own Knowledge.

[*Note* 9, par. 1; *add:*]

1905, Ward *v.* State, — Ala. — , 39 So. 923 (default of duty as road overseer; common knowledge as to the condition of the county roads, not available).
1906, Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211 (the jury may weigh the evidence "in the light of their common observation and experience").

§ 2572. Laws Judicially Noticed; (1) Domestic Statutes, etc.

[*Note* 6: *add:*]

So also for sundry kinds of laws: 1904, Davis *v.* State, 141 Ala. 84, 37 So. 454 (local stock-law, noticed).

[*Note* 9; *add:*]

1905, Atlanta & W. P. R. Co. *v.* Atlanta B. & A. R. Co., 124 Ga. 125, 52 S. E. 320 (railroad charter granted by the Secretary of State under a general law, noticed).

[*Note* 10, par. 1; *add,* under *Contra:*]

1904, Chesapeake & O. C. Co. *v.* Western Md. R. Co., 99 Md. 570, 58 Atl. 34 (St. 1904, c. 56, affecting a specific railroad company, noticed).

[*Note* 11; *add:*]

1905, Foley *v.* Ray, 27 R. I. 127, 61 Atl. 50.

[*Note* 14; *add:*]

1905, New York, N. H. & H. R. Co. *v.* Offield, 78 Conn. 1, 60 Atl. 740.

[*Note* 15, l. 1; *add:*]

1904, O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350 (city).

[*Note* 15, at the end; *add:*]

1906, Hill *v.* Atlanta, 125 Ga. 697, 54 S. E. 354.
Ill. St. 1905, May 18, § 54 (the Municipal Court of Chicago shall notice general ordinances of Chicago and municipal bodies included therein, and public laws of a U. S. State or Territory); St. 1905, May 18 (Primary Elections), § 119 (this act to be noticed in any municipality to which it applies).
1904, Portland *v.* Yick, 44 Or. 439, 75 Pac. 706 (and on appeal the Circuit Court will do the same; and will also notice the municipal council's journals).

[*Note* 16; *add:*]

1905, Carr *v.* First National Bank, 35 Ind. App. 216, 73 N. E. 947 (U. S. Post-Office departmental regulations, noticed).
1881, Low *v.* Hanson, 72 Me. 105 ("rules and regulations of one of the departments established in accordance with the statute" are noticed).
1906, State *v.* Southern R. Co., 141 N. C. 846, 54 S. E. 294 (Federal quarantine regulations of Department of Agriculture, noticed).
1905, Sprinkle *v.* U. S., 141 Fed. 811, 819, C. C. A. (regulations of the commissioner of internal revenue, noticed).

[*Note* 16 — *continued.*]

1906, Nagle *v.* U. S., 145 Fed. 302, C. C. A. (post-office regulations not noticed; "it is a hopeless task for an appellate court to determine what such regulations were at any particular time [without formal pleading and evidence]; it must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended").

§ 2573. Same: (2) Foreign Law.

[*Note* 2, par. 1; *add:*]

1896, Union C. Ins. Co, *v.* Pollard, 94 Va. 146, 152, 26 S. E. 421. 1896, App *v.* App, — Va. — , 55 S. E. 673 (Pennsylvania probate law).

[*Note* 3; *add:*]

1904, Metropolitan Stock Exchange *v.* Lyndonville N. Bank, 76 Vt. 303, 57 Atl. 101.

[*Note* 4; *add:*]

1904, La Rue *v.* Kansas M. L. Ins. Co., 68 Kan. 539, 75 Pac, 494 (Spanish treaty of the Philippines).
1906, Peano *v.* Brennan, — S. D. — , 106 N. W. 409 (Indian treaty).

§ 2574. Political Facts; (1) International Affairs, etc.

[*Note* 1; *add:*]

and this includes a *civil war*, as well as *insurrection* in some forms: 1862, Prize Cases, 2 Black 635, 667 (civil war with the Southern Confederacy).
1904, LaRue *v.* Kansas M. L. Ins. Co., 68 Kan. 539, 75 Pac. 494 (insurrection in the Philippines before 1901).

§ 2575. Same: (2) Domestic Political Organization, etc.

[*Note* 1, par. 1; *add:*]

1906, Topeka *v.* Cook, 72 Kan. 595, 84 Pac. 376 (location of an alley within city limits, not noticed). 1906, State *v.* Ricksecker, — Kan. — , 85 Pac. 547 (that C. was a city of the second class, noticed). 1906, Worden *v.* Cole, — Kan. — , 86 Pac. 464 (location of a railroad company as to a section of public land, under a Federal statute, noticed).
1904, Stealey *v.* Kansas City, 179 Mo. 400, 78 S. W. 599 (that a certain avenue was within five miles of the city limits, not noticed).
1904, Baker *v.* State, — Tex. Cr. — , 83 S. W. 1122 (Government ownership of a Federal fort on a city line noticed, but not the precise boundary on the ground).
1905, West Seattle *v.* W. S. L. & I. Co., 38 Wash. 359, 80 Pac. 549 (location of land within a city two-mile limit, not noticed).

§ 2577. Same: (4) Official Acts, Elections, etc.

[*Note* 3; *add:*]

Ill. St. 1905, May 18 (Primary Elections), § 119 (the holding of any election under this act on a primary election day, to be noticed in any municipality to which the act applies).
1904, State *v.* Scampini, 77 Vt. 92, 59 Atl. 201 (time and result of an election noticed, when it determines the time of taking effect of a public statute).

[*Note* 4; *add:*]

1906, Ferrell *v.* Ellis, 129 Ia. 614, 105 N. W. 993 (population of towns, by the Federal census, noticed).
1906, Page *v.* McClure, — Vt. — , 64 Atl. 451 (town population, noticed by the Federal census to be under 4,000).

[*Note* 5; *add:*]

Accord: 1904, Portland *v.* Yick, 44 Or. 439, 75 Pac. 706.
Contra: 1904, Peckham *v.* People, 32 Colo. 140, 75 Pac. 422.

§ 2578. Judicial Proceedings; (1) Officers and Rules of Court.

[*Note* 1; *add:*]

1904, Fisher *v.* Chicago, 213 Ill. 268, 72 N. E. 680 (county judge, noticed).

§ 2579. Same: (2) Records of Proceedings.

[*Note* 2; *add:*]

1905, Gay *v.* Gay, 146 Cal. 237, 79 Pac. 885 (prior proceedings in the same litigation, noticed).
1906, Southern P. R. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445 (U. S. land commissioner's letter relating to the litigation, noticed).

[*Note* 2 — *continued.*]

1907, Winn *v.* Coggins, — Fla. — , 42 So. 897 (decree of a court in another county and another cause, not noticed).
1906, Cumberland T. & T. Co. *v.* St. Louis, I. M. & S. R. Co., 117 La. 199, 41 So. 492 (that the plaintiff was a corporation duly organized under Kentucky statutes, this fact having been proved in another suit in another parish between the plaintiff and another defendant, not noticed; prior rulings repudiated).

§ 2580. Notorious Miscellaneous Facts; (1) Commerce, Industry, etc.

[*Note* 1; *add:*]

1906, Malone *v.* LaCroix, 144 Ala. 648, 41 So. 724 (territorial division of the Methodist Episcopal Church in two bodies, noticed).
1904, State *v.* Indianapolis Gas Co., 163 Ind. 48, 71 N. E. 139 (that natural gas no longer exists in quantities sufficient for heating purposes in Indianapolis, etc., noticed).
1905, Dorr Cattle Co. *v.* Chicago & G. W. R. Co., 128 Ia. 359, 103 N. W. 1003 (that Texas cattle fever is contagious, noticed).
1905, State *v.* Kelly, 71 Kan. 811, 81 Pac. 450 (economic and political history of a statute, noticed). 1905, Sun Ins. Office *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (sundry facts about the burning of wool, noticed).
1904, Viemeister *v.* White, 179 N. Y. 235, 72 N. E. 97 (common belief that vaccination is effective, noticed).
1904, Burwell *v.* Brodie, 134 N. C. 540, 47 S. E. 47 (season for planting cotton seed, noticed).
1906, New Mexico *v.* Denver & R. G. R. Co., — U. S. — , 27 Sup. 1 (law and custom of New Mexico as to the necessity of branding cattle, noticed).
1906, Lewis, Hubbard & Co. *v.* Montgomery S. Co., 59 W. Va. 75, 52 S. E. 1017 (reasonable time for forwarding a check, etc.; customary hours of opening banks in Charleston, not before 9 A. M., noticed).

§ 2581. Same: (2) Times and Distances.

[*Note* 1; *add:*]

1905, Com. *v.* Bond, 188 Mass. 91, 74 N. E. 293 (that the date of a forged check was Sunday, not noticed).
1905, Orvik *v.* Casselman, — N. D. — , 105 N. W. 1105 (adoption of standard time at a county-seat, noticed).

§ 2582. Same: (3) Meaning of Words; Intoxicating Liquors.

[*Note* 2, par. 1; *add:*]

1905, Barddell *v.* State, 144 Ala. 54, 39 So. 975 (nickels, noticed to be U. S. coins).
1906, State *v.* Nippert, — Kan. — , 86 Pac. 478 ("R. L. D." in a Federal revenue record, noticed to mean "retail liquor-dealer").

[*Note* 2, par. 2; *add:*]

and about the *signatures of officers* on documents (*ante*, § 2168, n. 4).

[*Note* 3; *add:*]

So also: 1904, The Kawailani, 128 Fed. 879, 63 C. C. A. 347 ("okolehoa," in Hawaii, noticed to be intoxicating).

[*Note* 7; *add:*]

1906, Potts *v.* State, — Tex. Cr. — , 97 S. W. 477 (that beer means an intoxicating liquor, not noticed).

§ 2590. Effect of Judicial Admissions; (1) Conclusive, etc.

[*Note* 1; *add:*]

1905, State *v.* Marx, 78 Conn. 18, 60 Atl. 690 (Oscanyon *v.* Arms Co., U. S., approved).

§ 2591. Same: (2) Exclusive of Evidence, etc.

[*Note* 1, par. 1; *add,* under *Contra:*]

1905, State *v.* Powell, — Del. — , 61 Atl. 966 (photographs of wounds on the deceased, shown, though the defendant admitted the location and character of the wounds).
1898, Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318.
1903, Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

§ 2592. Same: (3) Validity as a Waiver of Unconstitutionality, etc.

[*Note* 5, par. 1; *add,* under *Contra:*]

1904, Peckham *v.* People, 32 Colo. 140, 75 Pac. 422 (like Happel *v.* Brethauer, Ill., *infra*). 1906, Anderson *v.* Grand V. I. D., — Colo. — , 85 Pac. 313.
1904, State *v.* Armour Packing Co., — N. C. — , 47 S. E. 411 (agreed statement of facts cannot be used to overthrow an enrolled statute, if otherwise it is unimpeachable).

[*Note* 5, par. 2, l. 4; *add:*]

1905, State *v.* Marx, 78 Conn. 18, 60 Atl. 690.

§ 2593. Same: (4) Effect on Subsequent Trials.

[*Note* 1, par. 1; *add:*]

1906, Moynahan *v.* Perkins, — Colo. — , 85 Pac. 1132 (admission at a former trial, received; but with the wholly erroneous addition that it may be left to the jury to determine its effect).
1905, Mugge *v.* Jackson, 50 Fla. 235, 39 So. 157 (admissible, when "not limited to a particular occasion or temporary object").
1882, Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394 (the former admission held binding, if so intended, for the second trial; but the jury are erroneously allowed to determine what the intention was).
1905, Wells & M. Council *v.* Littleton, 100 Md. 416, 60 Atl. 22 (an admission at a former trial is irrevocable, except for mistake, etc.; here, of by-laws).
1904, Stemmler *v.* New York, 179 N. Y. 473, 72 N. E. 581 (binding, when not expressly limited to the first trial).
1904, Brown *v.* Arnold, 131 Fed. 723, C. C. A. (stipulation held to be in force after judgment rendered).

§ 2595. Avoiding a Continuance by Judicial Admission, etc.

[*Note* 1, par. 1; *add:*]

Kan.: St. 1905, c. 338, § 2 (amending Gen. St. 1901, § 5401).

[*Note* 2; *add:*]

1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259 (impeachment of general character, allowed).

So also the right remains to *exclude specific inadmissible parts* of the testimony: 1904, State *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140.

In any event the opponent ought to be allowed to show that the applicant's sworn statements as to the *grounds for using* the absent witness' testimony are false; compare § 278, n. 3, *ante*.

[*Note* 7, par. 1; *add:*]

1904, Davis *v.* Com., — Ky. — , 77 S. W. 1101.
1906, State *v.* Stewart, 117 La. 476, 41 So. 798 (good opinion by Nicholls, J.).

§ 2596. Admissions of the Genuineness of a Document.

[*Note* 5; *add:*]

Ind. St. 1905, p. 584, § 218 (re-enacts the foregoing statute). 1904, Penn. Mut. L. I. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132 (insurance policy). 1904, Fudge *v.* Marquell, 164 id. 447, 72 N. E. 565 (note). 1905, Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108 (burden of proof stated).
Md. Pub. Gen. L. 1888, art. 75, § 23, subsec. 108. 1906, Fifer *v.* Clearfield & C. C. Co., 103 Md. 1, 62 Atl. 1122.
Miss.: 1906, Elmslie *v.* Thurman, 87 Miss. 537, 40 So. 67 (the rule applies equally where a plaintiff in a bill in chancery waives answer under oath).
N. C. Rev. 1905, § 1658 (similar to N. Y. C. C. P. § 735).
Wash.: 1904, Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052 (statute construed).

TABLE OF STATUTES CITED

TABLE OF STATUTES CITED

WEST VIRGINIA.

Code 1899.

	Section
c. 64, § 8	2067

Session Laws.

	Section
1905, c. 36	150

WISCONSIN.

Statutes 1898.

	Section
	§ 1436
	§ 3959
	§ 4078
	§ 4102
	§ 4141
	§ 4352
	§ 4583

Session Laws.

	Section
§§ 1024, 1024 *a*	1680
1901, c. 85	2281, 2281*a*
1903, c. 426	569
1905, c. 131	488
c. 149	2281
c. 237	1382
c. 447, § 1	2259, 2281
§ 2	2259, 2281

	Section
	569
	2444
	2281
	1382
	1330
	2281
	2281

TABLE OF CASES

TABLE OF CASES

INDEX OF TOPICS

INDEX OF TOPICS

BY HARVEY C. VOORHEES, ESQ., OF THE BOSTON BAR

Refer also to complete table of contents, volume one, page xiii, or part thereof at beginning of each volume, or at head of each chapter.

SCOPE NOTE. — The fact that in the older works on Evidence, such as those of Starkie and Greenleaf, extra volumes were added to cover numerous points of substantive law and procedure arising at trials in the shape of offers of evidence, should not lead the practitioner to consult this work for such **extraneous subjects**. The bulk of the modern law of Evidence, in the strict sense, makes their inclusion nowadays impossible. In § 2 of this work will be found a further explanation of its scope. For example, the question whether in burglary there must be "evidence" of an entering of a dwelling house at night time is a question of the substantive criminal law.

EXPLANATORY NOTE. — Indexed section numbers in **plain figures**, thus: 1678, mean that the matter referred to will be found in the main treatise only. If **preceded by letter "s,"** thus: s 1678, the matter referred to will be found in both main treatise and supplemental volume. If in **italic figures**, thus: *1678*, the matter will be found in the supplemental volume only.

A

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[Examine analyses of "By Cross-examination," Vol. II, p. 1697; and "Testimonial Narration or Communication," Vol. I, p. 858.]

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Marital Relationship

I. *Disqualification of husband or wife as witness for the other*
II. *Privilege not to be witness against the other*
III. *Privilege for communications*

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[Examine analysis of "Testimonial Narration or Communication," Vol. I, p. 858.]

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