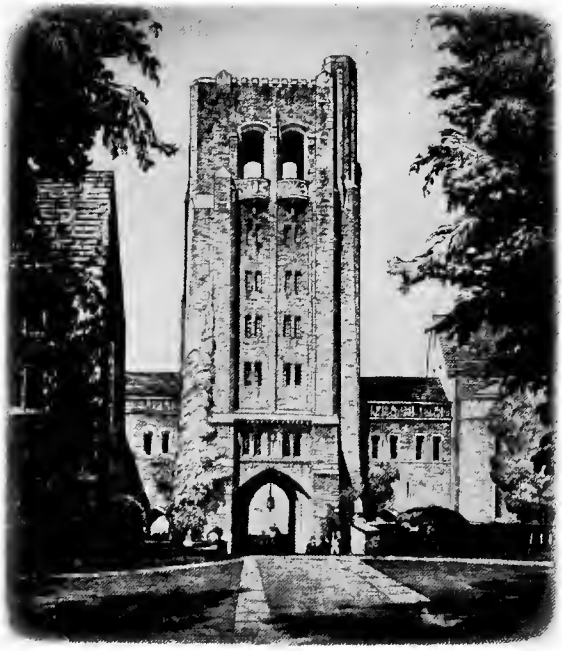

A COMMENTARY

ON THE

LAW OF EVIDENCE

IN CIVIL ISSUES.

BY

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BOOK II.

MODE OF RECEIVING PROOF.

(CONTINUED.)

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I. GENERAL CONSIDERATIONS.

Statutory assignments of probative force to evidence.

§ 850. The Schoolmen, as we have already seen, indulged in a profusion of speculations as to the probative force of evidence; declaring that certain kinds of evidence were to be treated as half proof, other kinds as whole proof, while other kinds were to be accepted with certain qualifications arbitrarily preassigned, without regard to what might be the actual truth. Similar rules with respect to the force to be assigned to certain forms of evidence have been adopted by some of our legislatures; and no doubt this is within their constitutional power.[1] But when such statutes are based

[1] See infra, § 1238; Holmes v. Hunt, 122 Mass. 125; Hand v. Ballou, 12 N. Y. 541; Howard v. Moot, 64 N. Y. 262; Francis v. Baker, 11 R. I. 103.

upon distinctions philosophically absurd, — as when they enact that there shall be no conviction of certain offences on circumstantial evidence, in defiance of the truth that all evidence is circumstantial, or when they assign *a priori* valuations to various grades of admissible evidence, — they are open to the objection of sacrificing the substance of truth to an illogical form.

Error in this respect of the scholastic jurists.

§ 851. The error of the scholastic jurists, in this respect, may be readily explained. It should be remembered that jurisprudence, on its revival at the close of the Middle Ages, was speculative rather than practical; and that the subtle intellects of the then great juridical thinkers were employed in constructing multitudes of imaginary cases, and in settling for each arbitrary decisions in advance. The judges by whom these rules were to be applied were usually plain men, not versed in juridical distinctions; and it was better for the cause of public justice, so it was argued, that decisions, thus announced before the hearing of the case, should be treated as absolute. The reasoning thus adopted was that of demonstration based on the simplest form of Aristotle: "All A. is B.; C. is A.; therefore C. is B.;" or, "All killing is malicious; this is killing; therefore this is malicious." Or, "No sensible father can disinherit a child; A. is a sensible father; therefore he cannot disinherit a child." It is scarcely necessary to exhibit the fallacy of such arguments. Either the major or the minor premise must be false. In the illustrations before us, for instance, it is neither true that all killing is malicious, as there are innumerable instances of non-malicious killing; nor that no sensible parent disinherits a child, for there are at least some cases in which disinheritance is a wise parental act. The major premises of such syllogisms, therefore, should be changed from universal to particular, as follows: "Some killings are malicious;" "some sensible parents will not disinherit." It is obvious, however, that by such a process only a probable conclusion will be reached; a conclusion varying in probability with the extent of the major premise. If we were able to say, "Nine cases out of ten of killing are malicious," then we could conclude, supposing that we had a purely abstract case before us, that it is nine to one that the particular killing is malicious. Or if we could say, "In only one case in ten does a parent intend to disinherit

a child;" then we could conclude that it is nine to one that in the present case the parent did not intend to disinherit the child.

Intensity of proof cannot be arbitrarily fixed.

§ 852. But the idea that we can ever have an abstract case before us is a scholastic fiction, the product of acute but purely speculative minds dealing with an unreal object. There can be no abstract killing proved in a court of justice to which the predicate of abstract malice can be arbitrarily attached. All killing proved is killing in the concrete; killing of a particular person, attracting certain animosities peculiarly to himself, killing by a particular person, under particular circumstances. There is no killing proved which is identical in its surroundings with any other prior killing on record; there is no killing proved that does not present *differentia* distinguishing it from the abstract killing of the Schoolmen. So with regard to the disinheriting parent. No two cases of disinheritance are alike. No one case exists which does not give the disinheriting act a tint which may remove it from the category of the scholastic abstract disinheritance. So, to return again to a trial which has been already frequently resorted to for illustrations, we may apply the scholastic axiom, that memory weakens with time, to the claimant in the Tichborne case. Could any statute, without flagrant injustice, compel a jury to say that Roger Tichborne had in twenty years forgotten his French tutors, his French surroundings, and even the French language which was his boyhood's vernacular? Or, without equal injustice, could Lady Tichborne's recognition of the claimant be treated as conclusive, because a statute, based on the scholastic maxim, should enact that parental recognition should be irrebuttable?[1] Must we not hold, to go from the illustration to the principle, that a statute providing that certain evidence is to have a fixed and absolute valuation can do no good, even in cases to which its principle is applicable, and in other cases may do irretrievable harm?[2]

Relations in this respect of the

§ 853. To the statute of frauds the objections which have been just noticed do not apply. That famous enactment goes on a principle directly the reverse of the

[1] See supra, § 9.

[2] See Smith *v.* Croom, 7 Fla. 81; Gardner *v.* O'Connell, 5 La. An. 353; Johnson *v.* Brock, 23 Ark. 282.

scholastic rules. By those rules admissible evidence was divided into certain classes; and to one class was assigned the quality of whole proof, to another of half proof, to another of quarter proof. The statute of frauds, on the other hand, deals not with credibility, but with competency.[1] It says: "Now that important business is transacted largely in writing; now that every business man can write, and has by him the means of writing; now that the temptation to perjury in fabrication of claims resting only on oral evidence grows in proportion to the growth of wealth exposed to litigation, it is essential to impose a standard which shall require written proof for the legal establishment of all important claims."[2] For this purpose the statute adopted in the reign of Charles II., at the motion of Lord Chancellor Nottingham, prescribed a series of important limitations, which, more or less modified, have been enacted throughout the United States, and of which each day's experience adds to the value. Beneficial as this statute has been in its past workings, it has become still more important in the present condition of our jurisprudence; and we can fully accept the opinion of a learned Pennsylvania judge,[3] that the statute "allowing the parties in a controversy to be examined as witnesses on their own behalf admonishes us that it would be unwise to relax any of the rules of law arising out of the statutes of limitations, and of frauds and perjuries."

statute of frauds.

II. TRANSFER OF LANDS.

§ 854. By the statute as originally passed, all leases, estates, and interest in lands, whether of freehold or for terms of years, which have been created by parol, and not put in writing, and signed by the parties or an agent authorized in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from making thereof, whereon the rent reserved shall amount to two thirds of the improved value. In the United States there is much diversity in the enactments by which this clause is now represented. "It is believed that they all, with the

By statute parol evidence cannot prove lease of over three years.

[1] See Barrell *v.* Trussell, 4 Taunton, 121; Rann *v.* Hughes, 7 T. R. 350, n.

[2] See Rob. on Frauds, Pref.

[3] Paxson, J., 78 Penn. St. 49.

exception of New York, agree in this, that if the agreement to let be executory, and not consummated by the lessee's taking possession, it cannot be enforced; if it be by parol, the statute prohibits any action upon such a contract.[1] If the lessee takes possession, the question arises whether by the statute the lease is binding as an agreement at common law, or the tenancy under it is a mere tenancy at will, or the lease, as such, is to be deemed void."[2] A lease which does not exceed three years from the time of making is, under the English statute, valid, although parol.[3] The same limitation obtains in "Georgia, Indiana, Maryland, North Carolina, Pennsylvania, New Jersey, and South Carolina. This term in Florida is two, and in the following states one year, namely: Alabama, Arkansas, California, Connecticut, Delaware, Iowa, Kentucky, Michigan, Mississippi, New York, Nevada, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. In Maine, Massachusetts, New Hampshire, Ohio, and Vermont, all such leases create tenancies at will only."[4]

§ 855. "Estates at will," under the statute, are to be treated, so it has been argued, as tenancies from year to year;[5] though more correctly, a party who, under the statute, is a tenant at will for the first year, from the fact that his lease is void, becomes a tenant from year to year as soon as his yearly rent is received.[6] As tenant, he is liable on any covenants of the lease which do not relate to the question of the length of the term avoided by the statute; and the landlord is reciprocally liable upon such covenants.[7] A term of three years, to commence at a future date, does not meet the requisitions of the statute; the

[1] 1 Washburn's Real Prop. (4th ed.) 614; citing Browne Stat. Frauds, § 37; Edge *v.* Strafford, 1 Tyrw. 293; Larkin *v.* Avery, 23 Conn. 304; Delano *v.* Montague, 4 Cush. 42; Young *v.* Dake, 1 Seld. 463.

[2] Ibid.

[3] Rawlins *v.* Turner, 1 Ld. Ray. 736; Bolton *v.* Tomlin, 5 A. & E. 856; Morrill *v.* Mackman, 24 Mich. 286.

[4] 1 Washburn's Real Prop. (4th ed.) 614. See Birckhead *v.* Cummings, 4 Vroom, 44; Mayberry *v.* Johnson, 3 Green, 116; Adams *v.* McKesson, 53 Penn. St. 83; Morrill *v.* Mackman, 24 Mich. 283. As to New York, see Beardsley *v.* Duntley, 69 N. Y. 577.

[5] Clayton *v.* Blakey, 8 T. R. 3; *S. C.* 2 Smith's L. C. 97; Berrey *v.* Lindley, 3 M. & Gr. 512.

[6] Richardson *v.* Gifford, 1 A. & E. 56; *S. C.* 3 M. & Gr. 512.

[7] Richardson *v.* Gifford, 1 A. & E. 56; *S. C.* 3 M. & Gr. 512; Arden *v.* Sullivan, 14 Q. B. 832; Beale *v.* Sanders, 3 Bing. N. C. 850; Tooker *v.* Smith, 1 H. & N. 732.

three years, to be within the meaning of the statute, must begin with the date of the lease.[1] Where a parol lease is void under the statute, the tenant, who holds during the whole term, may quit without notice at the expiration of the term.[2]

§ 856. The third section of the statute of frauds virtually provides that no estates of lands, whatever be the character of such estates, shall be "assigned, granted, or surrendered," except by a writing signed by the party, or by his agent duly authorized in writing, unless by act and operation of law. This section "has been followed, more or less exactly, by the statutes of the several United States, all of which require an instrument in writing in order to the conveyance of lands or other interests therein," which writing must be exact in its terms and description.[3] "And, with the exception of three or four states, a deed under the hand and seal of the grantor is necessary, if the interest to be transferred is a freehold one."[4] Where, however, acts are done by the parties which are a part performance of the contract, a court of equity will compel a specific performance of the contract, wherever a fraud would be worked by vacating the contract.[5]

Estates in land can be assigned only by writing.

§ 857. It should be observed that the effect of the statute, in this section, is not to dispense with deeds when required by common law, but to require written instruments of transfer in cases which the common law did not cover; *e. g.* lands and tenements

[1] Rawlins *v.* Turner, 1 Ld. Ray. 736.

[2] Taylor's Ev. 916; Berrey *v.* Lindley, 3 M. & Gr. 498; Doe *v.* Stratton, 4 Bing. 446; Doe *v.* Moffatt, 15 Q. B. 257; Tress *v.* Savage, 4 E. & B. 36; Beardsley *v.* Duntley, 69 N. Y. 577.

[3] Odell *v.* Montross, 68 N. Y. 499.

[4] 3 Wash. Real Prop. 235; Stewart *v.* Clark, 13 Met. 79; Colvin *v.* Warford, 20 Md. 396; Underwood *v.* Campbell, 14 N. H. 396. See, also, Jellison *v.* Jordan, 68 Me. 373; Wilson *v.* Black, 104 Mass. 406.

[5] Fonbl. Eq. Laussat's ed. 150; Neale *v.* Neale, 9 Wall. 1; Glass *v.* Hulbert, 102 Mass. 24; Phillips *v.* Thompson, 1 Johns. Ch. 131; Parkhurst *v.* Van Cortland, 14 Johns. R. 15; *S. C.* 1 Johns. Ch. 284; Ryan *v.* Dox, 34 N. Y. 312; Freeman *v.* Freeman, 43 N. Y. 34; Weir *v.* Hill, 2 Lans. 278; Syler *v.* Eckhart, 1 Binney, 378; Hill *v.* Myers, 43 Penn. St. 170; Riesz's Appeal, 73 Penn. St. 485; De Wolf *v.* Pratt, 42 Ill. 207; Armstrong *v.* Kattenhorn, 11 Ohio, 265; Peters *v.* Jones, 35 Iowa, 512; Townsend *v.* Sharp, 2 Overton, 192. See Thompson *v.* Gould, 20 Pick. 134; Wells *v.* Calnan, 107 Mass. 514; Com. *v.* Kreager, 78 Penn. St. 477; and see particularly infra, §§ 904, 909.

in possession.[1] It even precludes parol assignments and surrenders of leases for terms less than three years.[2]

Surrender by operation of law excepted.

§ 858. The exception "act and operation of law," to the section above noticed, has been much discussed. The surrender, to be within the exception, so has it been held,[3] must be the act of the law, as distinguished from that of the parties whose intent may be thereby overridden. A first lease, for a greater term, is surrendered by accepting a second lease, for a shorter term.[4]

§ 859. At the same time it is now held that nothing short of an express demise will operate as a surrender of an existing lease.[5] But it is argued that if a lessee were to accept, *in accord-*

[1] Rob. on Frauds, 248; Lyon *v.* Reed, 13 M. & W. 303; Rowan *v.* Lytle, 11 Wend. 616; McKinney *v.* Reader, 7 Watts, 123.

[2] Mallett *v.* Brayne, 2 Camp. 103; Thomson *v.* Wilson, 2 Stark. R. 379; Rowan *v.* Lytle, 11 Wend. 616; Logan *v.* Barr, 4 Harr. 546. See, however, *contra*, McKinney *v.* Reader, 7 Watts, 123; Greider's App. 5 Barr, 422. See, however, as to how far an invalid assignment can operate as an underlease, Pollock *v.* Stacy, 9 Q. B. 1033; Beardman *v.* Wilson, L. R. 4 C. P. 57. As to surrender by act and operation of law, see Hamerton *v.* Stead, 3 B. & C. 482; Parmenter *v.* Reed, 13 M. & W. 306; Foquet *v.* Moor, 7 Ex. R. 870; Lynch *v.* Lynch, 8 Ir. Law R. 142. Infra, §§ 858 *et seq.*

[3] Lyon *v.* Reed, 3 M. & W. 306.

[4] See 1 Wms. Saunders, 236, *c*; Hamerton *v.* Stead, 3 B. & C. 482; Lynch *v.* Lynch, 6 Irish L. R. 142. The exception applies primarily "to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor." Lyon *v.* Reed, 13 M. & W. 306, per Parke, B. See, to same effect, Schieffelin *v.* Carpenter, 15 Wend. 400; Smith *v.* Niver, 2 Barb. 180.

[5] Foquet *v.* Moor, 7 Ex. R. 870; Crowley *v.* Vitty, Ibid. 319.

ance with his contract, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass *ab initio* the actual interest contracted for, though that interest would be liable to be defeated at some future period.[1] But a lease will not, under the exception, be held to be surrendered by the acceptance of a *void* lease, which creates no new estate whatever,[2] or even the acceptance of a *voidable* lease, which being afterwards made void, *contrary to the intention* of the parties, does not pass an interest *according to the contract*.[3] Nor is a surrender worked by the single circumstance of a tenant entering into an agreement to purchase the leased estate;[4] though this may of course be done by written limitations, express or implied.[5] But where a tenant, in pursuance of a license to quit, gives up possession, which is resumed by the landlord, this will be deemed a surrender by operation of law, which will preclude the landlord from recovering rent falling due after his resumption of possession.[6]

§ 860. An important extension of the old construction of "operation of law" has taken place in late years. Suppose the landlord, with the tenant's assent, followed by the tenant's surrender of the estate, conveys the leased estate to a stranger; is the tenant, in the teeth

Surrender by operation of law now held to include acts done by land-

[1] Taylor's Ev. § 920; citing Roe *v.* Abp. of York, 6 East, 102; Doe *v.* Bridges, 1 B. & Ad. 847, 856; Doe *v.* Poole, 11 Q. B. 716, 723; Fulmerston *v.* Steward, Plowd. 107 *a*, per Bromley, C. J.; Co. Lit. 45 *a*; Lloyd *v.* Gregory, Cro. Car. 501; Whitley *v.* Gough, Dyer, 140–146. See Jackson *v.* Butler, 8 Johns. 394; Rowan *v.* Lytle, 11 Wend. 616.

[2] Roe *v.* Abp. of York, 6 East, 86, explained by Abbott, C. J., in Hamerton *v.* Stead, 3 B. & C. 481, 482; Lynch *v.* Lynch, 6 Ir. Law R. 142, per Lefroy, B.; Wilson *v.* Sewell, 4 Burr. 1980; Davison *v.* Stanley, Ibid. 2213, per Ld. Mansfield.

[3] Doe *v.* Poole, 11 Q. B. 713; Doe *v.* Courtenay, 11 Q. B. 702–722; overruling Doe *v.* Forwood, 3 Q. B. 627.

[4] Doe *v.* Stanton, 1 M. & W. 695, 701; Tarte *v.* Darby, 5 M. & W. 601.

[5] Ibid. See Donellan *v.* Read, 3 B. & Ad. 905; Lambert *v.* Norris, 2 M. & W. 335.

[6] Grimman *v.* Legge, 8 B. & C. 324; 2 M. & R. 438, *S. C.*; Dodd *v.* Acklom, 6 M. & Gr. 672; Phené *v.* Popplewell, 31 L. J. C. P. 235; 12 Com. B. N. S. 334, *S. C.*; Whitehead *v.* Clifford, 5 Taunt. 518. See Cannan *v.* Hartley, 19 L. J. C. P. 323; 9 Com. B. 634, *S. C.*; McKinney *v.* Reader, 7 Watts, 123; Lamar *v.* McNamee, 10 Gill & J. 116; Browne on Frauds, § 55. See Lounsberry *v.* Snyder, 31 N. Y. 514.

Lord and tenant inconsistent with tenant's interest.

of such a conveyance, in which he himself participated, to continue in the enjoyment of his lease? In equity, unquestionably, he would be precluded from further intermeddling with the estate.[1] Nor, such is now the better opinion, can he at law be held to have retained his rights. The lease is surrendered by operation of law.[2]

Mere cancellation of deed does not revest estate.

§ 861. However it may be in equity,[3] it is settled that at law the cancellation of a deed, even though accompanied by a surrender of the land, cannot, under the statute of frauds, operate to revest, even by agreement of parties, the estate, unless the solemnities prescribed by the statute be adopted.[4] Nor can we infer surrender merely from the deed being found cancelled in the possession of the lessor.[4] But where a deed has not been recorded, and the grantee, wishing to sell the estate, delivers it up and cancels it, and the grantor executes a new deed to the purchaser, the title of the latter is good.[5]

§ 862. Assignments, as well as surrenders, may take place by operation of law, and thus be excepted from the statute. A lessor,

[1] McDonnell *v.* Pope, 9 Hare, 705.

[2] Thomas *v.* Cook, 2 Stark. R. 408; *S. C.* 2 B. & A. 119; Dodd *v.* Acklom, 6 M. & Gr. 672; Walker *v.* Richardson, 2 M. & W. 882; Grimman *v.* Legge, 8 B. & C. 324; Davison *v.* Gent, 1 H. & N. 744; Beese *v.* Williams, 2 C., M. & R. 581; Reeve *v.* Bird, 4 Tyr. 612; Nickells *v.* Atherston, 10 Q. B. 944, Lynch *v.* Lynch, 6 Irish L. R. 131; Hesseltine *v.* Seavey, 16 Me. 212; Randall *v.* Rich, 11 Mass. 494; Lounsberry *v.* Snyder, 31 N. Y. 514; Smith *v.* Niver, 2 Barb. 180; McKinney *v.* Reader, 7 Watts, 123; Lamar *v.* McNamee, 10 Gill & J. 116. See qualifying remarks of Lord Wensleydale, in Lyon *v.* Reed, 13 M. & W. 309, and comments thereon in Taylor's Ev. § 926.

[3] See Magennis *v.* MacCullough, Gilb. Eq. R. 236; Roe *v.* Abp. of York, 6 East, 86, 101; Wootley *v.* Gregory, 2 Y. & J. 536; Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Doe *v.* Thomas, 9 B. & C. 288; 4 M. & R. 218, *S. C.*; Walker *v.* Richardson, 2 M. & W. 382; Natchbolt *v.* Porter, 2 Vern. 112; Rob. on Frauds, 251, 252; Ibid. 248, 249; Browne on Frauds, §§ 41, 214; Butler *v.* Gardner, 8 Johns. R. 394; Anderson *v.* Anderson, 4 Wend. 474; Hunter *v.* Page, 4 Wend. 585; Rowan *v.* Lytle, 11 Wend. 616.

[4] See Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Walker *v.* Richardson, 2 M. & W. 892; Ward *v.* Lumley, 5 H. & N. 87.

[5] Browne on Frauds, § 60; citing Holbrook *v.* Tirrell, 9 Pick. 105; Nason *v.* Grant, 21 Me. 160; Mussey *v.* Holt, 4 Fost. 248; Farrar *v.* Farrar, 4 N. H. 191; Dodge *v.* Dodge, 33 N. H. 487; Faulks *v.* Burns, 1 Green Ch. (N. J.) 250; Mallory *v.* Stodder, 6 Ala. 801; Holmes *v.* Trout, 7 Peters, 171. *Contra*, Gilbert *v.* Bulkley, 5 Conn. 262; Raynor *v.* Wilson, 6 Hill, 469.

for instance, dies intestate, in which case the reversion vests in his heir at law; or a lessee dies intestate, and the lease vests in his administrator, by operation of law. Even an executor *de son tort*, so far as concerns himself, may be treated as the assignee of a lease; and in cases of this class, when an action is brought against the heir, or administrator, or executor *de son tort*, it has been held enough to charge in the declaration that the reversion or lease respectively came to the defendant "by assignment thereof then made."[1] A similar assignment, by operation of law, passes, on a woman's marriage, her chattels real to her husband. So when any person is adjudged a bankrupt, his property, whether real or personal, present or future, vested or contingent,[2] becomes vested, without any deed of assignment or conveyance, in the statutory assignees. It is, however, settled, that a parol assignment by a sheriff of leasehold premises, taken in execution under a *fieri facias*, is void at law, though the assignee has entered and paid rent to the head landlord.[3]

Assignments by operation of law excepted by statute.

§ 863. By the fourth section of the statute certain solemnities of writing are necessary to the transfer of an "interest in lands;" and multitudinous are the adjudications as to what this term includes.[4] The statute has been held to include contracts to abate a tenant's rent;[5] to assign rent;[6] to submit to arbitration the question whether a lease shall be granted;[7] to assign an equitable interest;[8] to assign "squatter's rights;"[9] to exchange land for labor;[10] to relinquish a tenancy, and let another party party into

In other respects writing is essential to transfer interest in lands.

[1] Paull *v.* Simpson, 9 Q. B. 365; Derisley *v.* Custance, 4 T. R. 75.

[2] See Stanton *v.* Collier, 3 E. & B. 274; Beckham *v.* Drake, 2 H. of L. Cas. 579; Rogers *v.* Spence, 12 Cl. & Fin. 700; Herbert *v.* Sayer, 5 Q. B. 965; Jackson *v.* Burnham, 8 Ex. R. 173.

[3] Doe *v.* Jones, 9 M. & W. 265; *S. C.* 1 Dowl. N. S. 352.

[4] See White *v.* White, 1 Harr. (N. J.) 202; Keeler *v.* Tatnell, 3 Zabr. 62; Hall *v.* Hall, 2 McC. Ch. 269; Madigan *v.* Walsh, 22 Wis. 501.

[5] O'Connor *v.* Spaight, 1 Sch. & Lef. 306. See Taylor's Ev. § 948.

[6] Whitting, in re, 27 W. R. 385.

[7] Walters *v.* Morgan, 2 Cox Ch. R. 369.

[8] Smith *v.* Burnham, 3 Sumn. 435; Richards *v.* Richards, 9 Gray, 313; Simms *v.* Kilian, 12 Iredell, 252. And so as to equity of redemption. Odell *v.* Montross, 68 N. Y. 499; Cowles *v.* Marble, 37 Mich. 158.

[9] Hayes *v.* Skidmore, 27 Ohio St. 331.

[10] Dowling *v.* McKenney, 124 Mass. 478.

possession for the residue of a term ;[1] to permit the profits of a clergyman's living to be received by a trustee ;[2] to become a partner in a colliery, which was to be demised by the partnership upon royalties ;[3] to transfer an easement ;[4] to take furnished lodgings ;[5] to sell a pew in a church for an unlimited period ;[6] to reserve a shed from the operation of a deed ;[7] to sell brick being part of a burned house ;[8] to grant,[9] or otherwise to transfer to another a mortgagor's equity of redemption ;[10] to reconvey if purchase money is not paid, or on other contingencies ;[11] to procure, as a broker, the sale of a lease.[12] But, as we shall see more fully hereafter, the statute has been held not to include an equitable mortgage by the deposit of title-deeds ;[13] or a subsequent collateral agreement, modifying terms of payment or identifying property, after the title has vested in the

[1] Buttemere *v.* Hayes, 5 M. & W. 456 ; 7 Dowl. 489, *S. C.;* Smith *v.* Tombs, 3 Jur. 72, Q. B. ; Cocking *v.* Ward, 1 Com. B. 858 ; Kelly *v.* Webster, 12 Com. B. 283 ; Smart *v.* Harding, 15 Com. B. 652 ; Hodgson *v.* Johnson, 28 L. J. Q. B. 88 ; E., B. & E. 685, *S. C.*

[2] Alchin *v.* Hopkins, 1 Bing. N. C. 102; 4 M. & Sc. 615. *S. C.* But not, it seems, an expectancy in a parent's estate. Galbraith *v.* McLain, 84 Ill. 379.

[3] Caddick *v.* Skidmore, 2 De Gex & J. 52, per Lord Cranworth, Ch.; 27 L. J. Ch. 153, *S. C.*

[4] R. *v.* Salisbury, 8 A. & E. 716; Cook *v.* Stearns, 11 Mass. 533. See Morse *v.* Copeland, 2 Gray, 302 ; Foot *v.* Northampton Co. 23 Conn. 223; Selden *v.* Canal Co. 29 N. Y. 639.

[5] Edge *v.* Strafford, 1 C. & J. 391; 1 Tyr. 293, *S. C.;* Inman *v.* Stamp, 1 Stark. R. 12, per Ld. Ellenborough; Mechelen *v.* Wallace, 7 A. & E. 49 ; 2 N. & P. 224, *S. C.;* Vaughan *v.* Hancock, 3 Com. B. 766.

[6] Baptist Ch. *v.* Bigelow, 16 Wend. 28.

[7] Detroit R. R. *v.* Forbes, 30 Mich. 165.

[8] Meyers *v.* Schemp, 67 Ill. 469.

[9] Massey *v.* Johnson, 1 Ex. R. 255, per Rolfe, B. See Toppin *v.* Lomas, 16 Com. B. 145.

[10] Scott *v.* McFarland, 13 Mass. 309; Marble *v.* Marble, 5 N. H. 374; Kelley *v.* Stanberry, 13 Ohio, 408. See, however, Pomeroy *v.* Winship, 12 Mass. 514.

[11] Gallagher *v.* Mars, 50 Cal. 23. See Wilson *v.* McDowell, 78 Ill. 514; Grover *v.* Buck, 34 Mich. 319 ; Richardson *v.* Johnson, 41 Wis. 100.

[12] Horsey *v.* Graham, L. R. 5 C. P. 9 ; 39 L. J. C. P. 58, *S. C.*

[13] Russell *v.* Russell, 1 Br. C. C. 269; 12 Ves. 197 ; Hall *v.* McDuff, 24 Me. 311 ; Hackett *v.* Reynolds, 4 R. I. 512; Welsh *v.* Usher, 2 Hill Ch. 166; Chase *v.* Peck, 21 N. Y. 584; Keith *v.* Horner, 32 Ill. 526 ; Wilson *v.* Lyon, 51 Ill. 530; Gothard *v.* Flynn, 25 Miss. 58; Jarvis *v.* Dutcher, 16 Wis. 307. But see Bowers *v.* Oyster, 3 Penn. R. 239; Hale *v.* Henrie, 2 Watts, 143; Strauss's Appeal, 49 Penn. St. 358 ; Vanmeter *v.* McFaddin, 8 B. Mon. 435.

vendee;[1] or a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises;[2] or a contract relating to the investigation of a title to land;[3] or an agreement for board and lodging, no particular rooms being demised;[4] or an irrevocable executed license for the enjoyment of an easement;[5] or an agreement for the moving of a watercourse;[6] or an agreement, between two contiguous owners, to adjust an ambiguous boundary line;[7] or an agreement between a landlord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house;[8] or an agreement to take a family of boarders and lodgers;[9] or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands.[10]

§ 864. The statute has been held, in England, not to cover shares in a company possessed of real estate, if the company be *incorporated* by statute or by charter, and the real property be vested in the corporation, who are to have the sole management of it. In such case, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company.[11]

[1] Negley *v.* Jeffers, 28 Ohio St. 90; McConnell *v.* Brayner, 63 Mo. 461. Infra, § 1026.

[2] Hoby *v.* Roebuck, 7 Taunt. 157. See Scott *v.* White, 71 Ill. 289; Gafford *v.* Stearns, 51 Ala. 434.

[3] Jeakes *v.* White, 6 Ex. R. 873.

[4] Wright *v.* Stavert, 29 L. J. Q. B. 161; 2 E. & E. 721, *S. C.*

[5] 1 Washburn's Real Prop. 4th ed. 639; Angell on Watercourses, § 168; Browne on Frauds, § 232.

[6] Hamilton &c. Co. *v.* R. R. 29 Ohio St. 341.

[7] Taylor *v.* Zepp, 14 Mo. 482; Turner *v.* Baker, 64 Mo. 218. See Boyd *v.* Graves, 4 Wheat. 513.

[8] Hallen *v.* Runder, 1 C., M. & R. 266; 3 Tyr. 959, *S. C.*

[9] White *v.* Maynard, 111 Mass. 250.

[10] Gillanders *v.* Ld. Rossmore, Jones Ex. R. 504; Griffiths *v.* Jenkins, 3 New R. 489, per Crompton & Shee, JJ., in Bail Ct. For the English references above, see Taylor, § 948.

[11] Taylor's Ev. § 949; Bligh *v.* Brent, 2 Y. & C. Ex. R. 268; Bradley *v.* Holdsworth, 3 M. & W. 422; Hibblewhite *v.* M'Morine, 6 N. & W. 214, per Parke, B.; 2 Rail. Ca. 67, *S. C.;* Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail. Ca. 70, *S. C.;* Baxter *v.* Brown, 7 M. & Gr. 216, per Tindal, C. J.; Hilton *v.* Geraud, 1 De Gex & Sm. 187; Watson *v.* Spratley, 10 Ex. R. 237, per Martin B., 244, per Parke, B.; Bulmer *v.* Norris, 9 Com. B. N. S. 19. See Edwards *v.* Hall, 25 L. J. Ch. 82; 6 De Gex, M. & G. 74, *S. C.;* overruling Ware *v.* Cumberledge, 20 Beav. 503; Holdsworth *v.* Davenport, L. R. 3 Ch. D. 185; and see, also, Powell *v.* Jessopp, 18 Com. B.

In this country the same distinction is maintained.[1] It has been further ruled that the statute does not extend to the transfer of interests in unincorporated companies, in any cases where trustees are seised of the real estate in trust to use it for the benefit of the shareholders, and to make profits out of it (to the enjoyment of which the rights of the stockholders are restricted),[2] as part of the stock in trade. On the other hand, if the trustees hold the real estate in trust for themselves, and for co-adventurers, present and future, in proportion to their number of shares, then transfers of shares in such trust cannot be made without writing.[3] It has been further ruled that the question, under which of these two species of trusts the lands of any particular company may be held, is one of fact, to be determined in each case by the jury.[4] But though land acquired by a partnership for partnership purposes passes as personalty, so far as concerns parties and privies, the mere agreement to form a partnership to deal in land cannot be enforced, or damages recovered for its infringement, unless it be in writing.[5] We may, in addition, notice, that *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, *are not* "*goods, wares, and merchandise*," within the seventeenth section of the act.[6]

336, and Taylor *v.* Linley, 2 De Gex, F. & J. 84.

[1] Tippets *v.* Walker, 4 Mass. 595; Smith *v.* Tarlton, 2 Barb. Ch. 336; Chester *v.* Dickerson, 54 N. Y. 1; *S. C.* 52 Barb. 349; Fraser *v.* Child, 4 E. D. Smith, 153. See Vaupell *v.* Woodward, 2 Sandf. Ch. 143.

[2] Watson *v.* Spratley, 10 Ex. R. 222. See Myers *v.* Perigal, 2 De Gex, M. & G. 599; Walker *v.* Bartlett, 18 Com. B. 845; Hayter *v.* Tucker, 4 Kay & J. 243; Bennett *v.* Blain, 15 Com. B. N. R. 518, *S. C.*; Freeman *v.* Gainsford, 34 L. J. C. P. 95; Entwistle *v.* Davis, 36 L. J. Ch. 825; Law Rep. 4 Eq. 272, *S. C.*

[3] Ibid; Baxter *v.* Brown, 7 M. & Gr. 198; Boyce *v.* Green, Batty, 608. See Morris *v.* Glynn, 27 Beav. 218; Black *v.* Black, 15 Ga. 445.

[4] Watson *v.* Spratley, 10 Ex. R. 222, per Parke & Alderson, BB.

[5] Smith *v.* Burnham, 3 Sumn. 460. See Linscott *v.* McIntire, 15 Maine, 201.

[6] Humble *v.* Mitchell, 11 A. & E. 205; 2 Rail Ca. 70, *S. C.*; Hibblewhite *v.* McMorine, 6 M. & W. 214, per Parke, B.; Knight *v.* Barber, 16 M. & W. 66; Tempest *v.* Kilner, 3 Com. B. 249; Bowlby *v.* Ball, Ibid. 284; Duncuft *v.* Albrecht, 12 Sim. 189; Watson *v.* Spratley, 10 Ex. R. 222.

Distinctive Legislation in Pennsylvania.

The following note of the law of Pennsylvania on the Statute of Frauds is taken from Reed's Leading Cases on the Statute of Frauds, now in preparation: —

"In Pennsylvania, owing to the dif-

§ 865. So far as concerns terms for years, the better opin-

Distinctive Legislation in Pennsylvania. (Continued.)

ferences between the statute of that state and 29 Car. II. c. 3, there has arisen a peculiar condition of law, which, as it necessitated a discussion of the precise import of each section of the Statute of Frauds (some sections being in force in Pennsylvania, and some not), has a general importance for the profession, even beyond the limits of that state; our space being brief, a mere reference to the cases will be all that can be given. Prior to 1772, the Statute of Frauds was not in force in Pennsylvania. See Anon. 1 Dall. 1, with note. See, as to the application to the colonies of British statutes, 1 Shars. Black. Com. 108 n.; Kent Com. i. p. 535, and n. (p. *473), 10th ed. In 1772 (see 1 Sm. L. 389) the first three sections of 29 Car. II. c. 3, were adopted. See Murphy *v.* Hubert, 7 Pa. St. 423; McDowell *v.* Oyer, 21 Pa. St. 421; Bowser *v.* Cessna, 62 Pa. St. 149, to the effect that the omission of the fourth, seventh, eighth, and seventeenth sections (the only others, except the provisions as to wills, which relate to the necessity of written evidence) had been made deliberately and skilfully. See Rawle's Smith on Contract, p. 118 (p. *47 n.), and 1 Smith's Lead. Cases (5th Am. ed.), 389, for an expression of the opinion that the omission of so much of the fourth section as related to guarantees was an advantage rather than otherwise. See, however, Sidwell *v.* Evans, 1 Pa. Rep. (P. & W.) 385, and more than one decision since 1855, taking the opposite tone. In Pugh *v.* Good, 3 W. & S. 57, Judge Gibson seemed to have thought that the provisions of the fourth section, relating to the sale of land, should have been decided to be in force. See Jones *v.* Peterman, 3 S. & R. 543, and

Distinctive Legislation in Pennsylvania. (Continued.)

Pugh *v.* Good, 3 W. & S. 58, as holding that English decisions made prior to the Revolution, in regard to the first three sections of 29 Car. II., were binding in Pennsylvania. See, also, Reed *v.* Reed, 12 Penn. St. 120, and Farley *v.* Stokes, 1 Pars. E. 422.

"In 1855 (P. L. 308.), so much of the Fourth section as relates to guarantees and to promises by executors to answer out of their own estates was substantially reënacted.

"In 1856 (P. L. 533), the seventh and eighth sections, relating to trusts, were reënacted almost verbatim.

"The first consequence of the omission of the fourth section, and the adoption of the first, second, and third of 29 Car. II. c. 3, was, that though by the latter no estate could be *transferred* by parol, parol contracts for the sale of land were not necessarily invalid; but that an action of damages for their breach would lie, provided that the damages allowed were not such as to give what was equivalent to specific performance. Belle *v.* Andrews, 4 Dall. 152; Ewing *v.* Tees, 1 Binn. 450; Whitehead *v.* Carr, 5 Watts, 368; George *v.* Bartoner, 7 Watts, 532; Pattison *v.* Horn, 1 Grant's Cases, 302; Bender *v.* Bender, 37 Pa. St. 419; Moore *v.* Small, 19 Pa. St. 461; Kurtz *v.* Cummings, 24 Pa. St. 35. In Pugh *v.* Good, Judge Gibson having said that he thought that the fourth section ought to have been held to be in force in Pennsylvania, added, that he doubted whether the prohibition of a parol contract for the sale of land, so far as such a contract had been prohibited, could well rest merely on the first section as adopted. Though this doctrine allowing an action of damages for the breach

Under statute seal is not necessary.

ion is, that a writing without seal is sufficient for transfer.[1] This is clearly the case with transfers of

Distinctive Legislation in Pennsylvania. (Continued.)

of a parol contract within the Statute of Frauds is considered to be peculiar to Pennsylvania, see Welch *v.* Lawson, 32 Miss. 170, for a ruling closely analogous. See the cases cited in Welch *v.* Lawson, and see Couch *v.* Meeker, 2 Conn. 202, and Montague *v.* Garnett, 3 Bush (Ky.), 397. (In these states the fourth section is in force.) See Pugh *v.* Good, supra; Browne on St. of Fr. §§ 118 *et seq.*, and Agnew on St. of Fr. pp. 118, 156–8, 229, and Am. Law Reg., June, 1877, for cases showing that in equity compensation will be allowed for acts done in part performance, &c., of a contract invalid under Statute of Frauds. The Pennsylvania doctrine has been repeatedly denied both expressly and by implication in these states where the fourth section is in force. See, for example, Ballard *v.* Bond, 32 Vt. 355. See, as to the nature of the action to be brought, the proper mode of pleading, the degree of evidence required, the proper time for bringing this action, the effect of a previous failure to have contract decreed to be specifically enforced, and the operation of the Statute of Limitations, Postlethwait *v.* Frease, 31 Pa. St. 472; Gangwer *v.* Fry, 17 Pa. St. 495; Poorman *v.* Kilgore, 37 Pa. St. 311; Thurston *v.* Franklin College, 16 Pa. St. 154; Meason *v.* Kaine, 67 Pa. St. 131, and Ewing *v.* Tees, 1 Binn. 450, respectively. The most important consideration arising under this doctrine is that of the measure of damages.

Distinctive Legislation in Pennsylvania. (Continued.)

In Irvine *v.* Bull, 4 Watts, 289, an attempt in an action for breach of a parol contract of sale of land, to obtain a conditional verdict for a large amount to be released upon the defendant's conveying the land to the plaintiff, was overruled as being equivalent to a decree for specific performance. [These conditional verdicts were the substitutes formerly used in Pennsylvania, in default of a Court of Chancery, to answer the purpose of the proper machinery of equity.]

"The purchase money fixed in a parol contract for the breach of which an action is brought is not the measure of damages, for that would be equivalent to specific performance. Ellet *v.* Paxson, 2 W. & S. 433; 1 Sm. Laws of Penn. 397, note; Meason *v.* Kaine, 67 Pa. St. 131, and other cases too numerous to give.

"The loss of the bargain, except in two instances, cannot form an element of damage. Dumars *v.* Miller, 34 Pa. St. 323; Bender *v.* Bender, 37 Pa. St. 419; Ewing *v.* Thompson, 66 Pa. St. 383; Harris *v.* Harris, 70 Pa. St. 174. *Semble, contra*, Ellet *v.* Paxson, 2 W. & S. 433, and Sedam *v.* Shaffer, 5 W. & S. 529. See Bowser *v.* Cessna, 62 Pa. St. 148. The exceptional cases are those where the defendant's default is not complying with his bid made at a public sale; Bowser *v.* Cessna, 62 Pa. St. 149, with cases cited; and where the defendant has been guilty of actual fraud. Rohr *v.* Kindt,

[1] Maule, J., Aveline *v.* Whisson, 4 M. & G. 80; Mayberry *v.* Johnson, 3 Green (N. J.), 116; 4 Greenl. Cruise, 34; Roberts on Frauds, 249; Browne on Frauds, § 7.

In Pennsylvania a seal has been held not to be necessary to a lease of land under ground rent. Cadwalader *v.* App., 81 Penn. St. 194.

existing leases.[1] And the better opinion is, that if a writing is sealed it will operate as a lease, though not signed.[2]

sary for transfer of term for years; but writing is.

Distinctive Legislation in Pennsylvania. (Continued.)

3 W. & S. 563; Bitner *v.* Brough, 11 Penn. St. 139; Hoy *v.* Gronoble, 10 Casey, 11; McClowry *v.* Croghan, 31 Pa. St. 22; McNair *v.* Compton, 11 Casey, 28; Meason *v.* Kaine, 63 Pa. St. 339; Meason *v.* Kaine, 67 Pa. St. 131. These exceptions depend not upon the Statute of Frauds, but upon the general law of damages. As to the bid at a public sale, see Am. Law Reg., June, 1877. As to the case of fraud, see the same place, and Bowser *v.* Cessna, supra, and Field on Damages, §§ 479 *et seq.*, §§ 484 *et seq.*

"The fraud must be actual fraud in the original contract, and not a mere failure to comply with the contract. Harris *v.* Harris, 70 Pa. St. 174; though see Rohr *v.* Kindt, Bitner *v.* Brough, Hoy *v.* Gronoble, McClowry *v.* Croghan, Bowser *v.* Cessna, all supra, in which, as opposed to the case of an innocent inability to comply with his contract, the defendant's wilful default is collocated with his actual fraud, so as in either case to justify the court in allowing damages for the loss of the bargain. Where damages are given for the loss of the bargain, the measure is to be found in the difference between the value of the land at the time of the breach of the contract and the price fixed in the contract. See Meason *v.* Kaine, 67 Pa. St. 131, and the cases cited just above.

"A controversy for a long time occupied the bar of Pennsylvania upon the question whether, in an action for the breach of a parol contract to convey land to the plaintiff, in consideration of services by the latter, the measure of the damages was the actual value of the services, or the value of the land. In Jack *v.* McKee, 9 Pa. St. 235 (and in a series of cases to be found cited in Malaun, Adm., *v* Ammon, 1 Grant, 131, and in Hertzog *v.* Hertzog, 34 Pa. St. 419), it was held, Rogers, J., Gibson, J., and Black, C. J., arguing therefor strenuously, that the value of the land was the standard. In Hertzog *v.* Hertzog, supra, and in the authorities therein cited, and in those cited in Judge Woodward's dissenting opinion in Malaun *v.* Ammon, it was held by a unanimous court, overruling Jack *v.* McKee, that the former rule was an evasion of the statute, that most unjust results followed it, and that the earlier doctrine now reiterated was law, viz., that the measure of the damages was the value of the services. Hertzog *v.* Hertzog was followed in Graham *v.* Graham, 34 Pa. St. 482; McNair *v.* Compton, 35 Pa. St. 28; Ewing *v.* Thompson, 66 Pa. St. 383; Harris *v.* Harris, 70 Pa. St. 174; Poorman *v.* Kilgore, 37 Pa. St. 311. See Browne on St. of Fr. § 271. See, as apparently favoring Jack *v.* McKee, to a greater or less degree, Basford *v.*

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[1] Farmer *v.* Rogers, 2 Wils. 26; Beck *v.* Phillips, 5 Burr. 2827; Courtail *v.* Thomas, 9 B. & C. 288; Holliday *v.* Marshall, 7 Johns. R. 211; Allen *v.* Jaquish, 21 Wend. 628.

[2] Aveline *v.* Whisson, 4 Man. & Gr. 801; Cherry *v.* Hemming, 4 W., H. & G. 631; Cooch *v.* Goodman, 2 A. & E. (N. S.) 580. See Wood *v.* Goodridge, 6 Cush. 117; Gardner *v.* Gardner, 5 Cush. 483. As to general rules in respect to seals, see supra, §§ 692–3.

§ 866. Much discussion has arisen as to what products of the

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Pearson, 9 Allen, 390; Ham *v.* Goodrich, 37 N. H. 185; Thomas *v.* Dickinson, 14 Barb. 90; Nones *v.* Homer, 2 Hilt. 116; King *v.* Brown, 2 Hill, 485; Clark *v.* Terry, 25 Conn. R. 395. See, however, Browne on St. of Fr. § 125; Lisk *v.* Sherman, 25 Barb. 433; Erben *v.* Lorillard, 19 N. Y. 299; Emery *v.* Smith, 46 N. H. 151; Fuller *v.* Reed, 38 Cal. 99. See, as supporting Hertzog *v.* Hertzog, on the general principles of the law of damages, Burr *v.* Todd, 41 Pa. St. 212.

"According to Browne on the Statute of Frauds, § 46, Pennsylvania, with the exception, perhaps, of Connecticut, stands alone in denying the English rule, which requires the surrender, assignment, &c., of leases, even under three years, to be in writing. See, as to the English rule, the cases cited in McKinney *v.* Reader, infra, and Browne on St. of Fr. § 46. As to the Pennsylvamia rule, see McKinney *v.* Reader, 7 Watts, 123; Greider's Appeal, 5 Pa. St. 422; Kline's Appeal, 39 Pa. St. 468; Adams *v.* McKesson, 53 Pa. St. 83; Shoofstall *v.* Adams, 2 Grant, 209; Tate *v.* Reynolds, 8 W. & S. 91. See 2 Sm. Lead. Cases (Am. ed.) p. *184. See, also, Briles *v.* Pace, 13 Ired. 279; Holliday *v.* Marshal, 7 Johns. 211.

"Under the peculiar provisions of the Pennsylvania Act of 1772, it was held that equitable estates, though they could be created by parol, could not be so transferred. McKinney *v.* Reader, supra. As to the validity of a parol waiver of right arising under the Statute of Frauds, so as to be a good defence in equity, &c., &c., see Am. Law Reg., June, 1877.

"See Parrish *v.* Koons, 1 Pars. Eq. 79, with a full citation of cases, both

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English and American, for the ruling, that owing to the wording of the Act of 1772, as distinguished from 29 Car. II. c. 3, an agent in Pennsylvania, who contracts for the sale of land, must be authorized by writing, though in England he need not be.

"In Wilson *v.* Clarke, 1 W. & S. 555, Judge Gibson said, that the ordinary equitable doctrine of mutuality of remedy ought, in Pennsylvania, to be applied to cases arising under the Statute of Frauds, — the only reason for its not having been so applied in England being the language of the fourth section of 29 Car. II. c. 3, not in force in Pennsylvania, referring to the *party to be charged*. Parrish *v.* Koons, supra, adopted the dictum of Wilson *v.* Clarke, and decided a case thereon; and in Meason *v.* Kaine, 67 Pa. St. 136, Judge Gibson's opinion is referred to as if it were received law. See, however, Tripp *v.* Bishop, 56 Pa. St. 423, in which Judge Strong said: 'If a contract is not within the Statute of Frauds, or if the contracting parties have done all that the statute requires, there is no reason why a purchaser' (of land) 'should not be held to pay what he promised.' That under the Pennsylvania statute the vendor only need sign, Lowry *v.* Mehaffy, infra, being cited. That where the vendor has signed, the contract becomes mutually obligatory, and nothing remains but to pay the purchase money, and the promise to do that need not be in writing. See, also, Lowry *v.* Mehaffy, 10 Watts, 387; Johnston *v.* Cowan, 59 Pa. St. 275; Colt *v.* Selden, 5 Watts, 528; M'Farson's Appeal, 11 Pa. St. 510; Van Horne *v.* Frick, 6 S. & R. 92; Browne on St. of Fr. § 366; Am. Law Reg., June, 1877.

"In Pugh *v.* Good, 3 W. & S. 57, it

soil are included, when on the soil, under the term "interest in lands," and what are not. It is conceded on all sides that the term does not include fruits, which from the nature of things are perishable, and which, if not removed immediately, are valueless. Hence it is that a contract for the sale of such fruit is not a contract for any interest in lands, though the fruits are to be removed from the soil by the purchaser.[1] The same distinction is applicable to all ephemeral and transitory produce of the earth, reared annually by labor and expense, and

"Interest in lands" does not include ripe though ungathered fruit, or crops annually removed; but otherwise as to such produce of the soil as is capable of

Distinctive Legislation in Pennsylvania. (Continued.)

was held that the doctrine of part performance extended to Pennsylvania, notwithstanding the fact, that owing to the omission of the fourth section of 29 Car. II. c. 3, compensation could be obtained in an action for the breach of the parol contract. See, on this point, Allen's Estate, 1 W. & S. 386; Browne on St. of Fr. § 467; Am. Law Reg., Oct. and Nov. 1877; 16 Am. Law Reg. 577, 641."

"The case of Tripp *v.* Bishop has been followed by that of Sands *v.* Arthur, 84 Penn. St. 479, in which a ruling directly opposite to that of the former was rested baldly on the doctrine of mutuality. Wilson *v.* Clark, Meason *v.* Kaine, being cited.

"The only difference between the facts of the two cases consists in this: that in Tripp *v.* Bishop, the vendor suing for purchase money of land sold had tendered a conveyance which the vendee had accepted; while in Sands *v.* Arthur, the vendee had refused a deed tendered by the plaintiff; on this point no stress was laid in either of the decisions. However, it may indeed be argued that a mere tender of a writing signed is in Pennsylvania a full compliance with the first section of the Statute of Frauds, the fourth section not being in force, and it having been there decided always that

Distinctive Legislation in Pennsylvania. (Continued.)

the first section does not call for a deed, which must be delivered and accepted to have validity. So that it is doubtful whether Sands *v.* Arthur must not be regarded as overruling Tripp *v.* Bishop, and establishing the application of the doctrine of mutuality of remedy to cases under the Statute of Frauds.

"In Sausser *v.* Steinmetz, a case also in the Supreme Court of Pennsylvania, but not yet reported, it is assumed that the vendee of land can set up the Statute of Frauds just as the vendor can, which, in the absence of the fourth section, seems very questionable when the vendor has done all his part under the first section. In both Sands *v.* Arthur and Sausser *v.* Steinmetz there was a dispute on the facts as to whether the deed tendered was in accordance with the previous contract of sale, but the decision did not in error turn on this point. For an extended discussion of the question raised by these cases, see American Law Register for June, 1879, and 16 American Law Register, *supra*. See, also, Leading Cases in Equity (4th Am. ed.), volume 2, part 2, pages 1077 & 1091 to 1100."

[1] Thayer *v.* Rock, 13 Wend. 53. See Browne on St of Frauds, § 241; Parker *v.* Staniland, 11 East, 362.

permanent attachment to it.

in actual mature existence at the time of the contract, — as, for instance, a growing crop of corn,[1] or hops,[2] or potatoes,[3] or peaches,[4] or turnips,[5] — though the purchaser is to harvest or dig them.[6] On the other hand, when the produce to be sold is not, from its perishable condition while on the soil, in a state which requires its immediate removal, if it is to be of value; then, under the statute, it is an interest in lands.[7] Hence the statute has been held to cover agreements respecting the sale of growing trees,[8] or grass,[9] or standing though growing underwood,[10] or growing poles.[11]

[1] Jones *v.* Flint, 10 A. & E. 753; 2 P. & D. 594, *S. C.*

[2] Per Parke, B., in Rodwell *v.* Phillips, 9 M. & W. 503, questioning Waddington *v.* Bristow, 2 B. & P. 452. See, also, Graves *v.* Weld, 5 B. & Ad. 119, 120.

[3] Sainsbury *v.* Matthews, 4 M. & W. 343; 7 Dowl. 23, *S. C.;* Evans *v.* Roberts, 5 B. & C. 829; 8 D. & R. 611, *S. C.;* Warwick *v.* Bruce, 2 M. & Sel. 205.

[4] Purner *v.* Piercy, 40 Md. 212.

[5] Dunne *v.* Ferguson, Hayes, 540; Emmerson *v.* Heelis, 2 Taunt. 38, *contra*, must be considered as overruled by Evans *v.* Roberts, 5 B. & C. 833, 834, and by Jones *v.* Flint, 10 A. & E. 759.

[6] Mr. Taylor questions whether the same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labor by which they are produced *within the year* in which that labor is bestowed, and consequently, as it seems, do not fall within the law of emblements. Taylor's Ev. § 952; citing Graves *v.* Weld, 5 B. & Ad. 105, 118–120; 1 Sug. V. & P. 156.

[7] See Bostwick *v.* Leach, 3 Day, 476; Brown *v.* Sanborn, 21 Minn. 402.

It is true, that the distinction in the text is apparently overridden in Warwick *v.* Bruce, supra; but in that case it did not appear but that the potatoes could be at once harvested. See Bryant *v.* Crosby, 40 Me. 9; Sherry *v.* Picken, 10 Ind. 375; Bull *v.* Griswold, 19 Ill. 631; Marshall *v.* Ferguson, 23 Cal. 65; Claflin *v.* Carpenter, 4 Met. (Mass.) 580. But, as sustaining the text, may be noticed, Green *v.* Armstrong, 1 Denio, 550; Bank *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613; Bishop *v.* Bishop, 1 Kernan, 123; Bennett *v.* Scutt, 18 Barb. 347; Westhook *v.* Eager, 1 Harr. (N. J.) 81. See Buck *v.* Pickwell, 1 Williams (Vt.), 157.

[8] Rodwell *v.* Phillips, 9 M. & W. 501, resolving a doubt suggested by Littledale, J., in Graves *v.* Weld, 5 B. & Ad. 116; Smith *v.* R. R. 4 Keyes, 180; Owens *v.* Lewis, 46 Ind. 489; Daniels *v.* Bailey, 43 Wis. 566.

[9] Crosby *v.* Wadsworth, 6 East, 602; Carrington *v.* Roots, 2 M. &. W. 248; Gilmore *v.* Wilbur, 12 Pick. 120; Powell *v.* Rich, 41 Ill. 566; Powers *v.* Clarkson, 17 Kans. 218.

[10] Scorell *v.* Boxall, 1 Y. & J. 396.

[11] Teal *v.* Auty, 2 B. & B. 99; 4 Moore, 542, *S. C.;* Bishop *v.* Bishop, 1 Kernan, 123. See, however, Comments in Browne on Frauds, § 25.

When a vendor has contracted to sell timber at so much per foot, this was held not to pass an interest in

§ 867. It has been sometimes said that where there is a license to the vendee to enter and carry off the crop, then the crop is personalty, but when there is no such license, then the crop is realty. But this distinction cannot be sustained. If a vendee should be licensed to enter a grove a year or two hence, and cut down and carry off a load of saplings, the contract would concern realty, because, between the contract and the performance, the soil would pass into the trees. On the other hand, if the vendor should say, "I will now cut down and stack these trees, and sell them to you at so much a cord," then the contract would be for personalty, though there was no license to the vendee. The question is, is the strength of the soil to go into the crop before it is cut, or is it not? If it does, then what is sold is "an interest in land."[1] If, however, what is sold is the crop, ripe, and to be cut before it draws materially from the soil, then the crop is not "an interest in land."[2] It may be added, *a fortiori*, that where land is to be contracted to be sold or let, and the vendee or tenant agrees to buy the growing crops, the crops are regarded as still drawing from the soil, and as therefore under the fourth section of the statute, which requires contracts to be in writing.[3] But when the essence of the thing sold is labor, not land, the statute does not apply.[4]

§ 868. When the statute requires simply a memorandum in writing as a constituent of a contract, a writing by an agent is sufficient, without a written authority to the

Agent's authority need not be

lands. The court regarded the contract in the same light as if it had related to the sale of timber already felled. Smith *v.* Surman, 9 C. & P. 501; *S. C.* M. & R. 455, as explained by Ld. Abinger, in Rodwell *v.* Phillips, 9 M. & W. 505.

[1] Knox *v.* Haralson, 2 Tenn. Ch. 232; though see Green *v.* R. R. 73 N. C. 524. That the question does not hang upon the purchaser's right to enter and gather, appears by Lord Ellenborough's remarks in Parker *v.* Staniland, 11 East, 362. See Jones *v.* Flint, 10 Ad. & El. 753; Nettleton *v.* Sikes, 8 Met. (Mass.) 34; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Claflin *v.* Carpenter, 4 Met. (Mass.) 583.

[2] Anon. 1 Ld. Raym. 182; Mayfield *v.* Wadsley, 3 B. & Cr. 357; Smith *v.* Surman, 9 B. & C. 561; Rodwell *v.* Phillips, 9 M. & W. 505; Marshall *v.* Green, L. R. 1 C. P. D. 35; Safford *v.* Annis, 7 Me. 168; Cutler *v.* Pope, 13 Me. 377; Whitmarsh *v.* Walker, 1 Met. (Mass.) 313; Claflin *v.* Carpenter, 4 Met. (Mass.) 580; Kilmore *v.* Howlett, 48 N. Y. 569; Smith *v.* Bryan, 5 Md. 141; Cain *v.* McGuire, 13 B. Mon. 340.

[3] Falmouth *v.* Thomas, 1 C., M. & R. 19; Mayfield *v.* Wadsley, 3 B. & C. 361.

[4] Pitkin *v.* Noyes, 48 N. H. 294.

in writing, unless required by statute.

agent. Authority to execute a *deed*, by the first section of the statute, must be in writing, because this is specifically required; but it is otherwise as to an agreement to convey, the authority to execute which, on the part of the agent, may be by parol.[1] For the sale of goods, under the statute of frauds, a parol authority is adequate.[2] An auctioneer's memorandum or entry, signed by him, whether as to real or personal estate, binds both parties.[3]

III. SALES OF GOODS.

Sales of goods must be evidenced by writings unless there be part payment, or earnest, or delivery; and consideration must appear.

§ 869. By the seventeenth section no contract for the sale of goods, wares, or merchandise, for the *price* of ten pounds or upwards, shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless "some note or memorandum in writing of the said *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."[4] One party cannot sign as the other's agent;[5] but there may be a

[1] Emmerson *v.* Heelis, 2 Taunt. 38; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Kenneys *v.* Proctor, 1 Jac. & W. 350; Higgins *v.* Senior, 8 Mees. & W. 844; Mortimer *v.* Cornwell, 1 Hoff. Chan. 351; Moody *v.* Smith, 70 N. Y. 598; Long *v.* Hartwell, 34 N. J. 116; Riley *v.* Minor, 29 Mo. 439; Broun *v.* Eaton, 21 Minn. 409; Rottman *v.* Wasson, 5 Kans. 552.

[2] See cases as to brokers, collected in Wharton on Agency, §§ 720 *et seq.*

[3] Hinde *v.* Whitehouse, 7 East, 258; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kenworthy *v.* Schofield, 2 B. & C. 945; Farebrother *v.* Simmons, 1 B. & Ald. 333; Cleaves *v.* Foss, 4 Greenl. 1; Pike *v.* Balch, 38 Me. 302; Smith *v.* Arnold, 5 Mason, 414; Bent *v.* Cobb, 9 Gray, 397; Morton *v.* Dean, 13 Met. 388; McComb *v.* Wright, 4 Johns. Ch. 659; Johnson *v.* Buck, 6 Vroom, 338; Pugh *v.* Chesseldine, 11 Ohio, 109; Hart *v.* Wood, 7 Blackf. 568; Burke *v.* Haley, 7 Ill. 614; Cherry *v.* Long, Phill. (N. C.) 466; Gordon *v.* Saunders, 2 McCord Ch. 164; Episc. Church *v.* Leroy, Riley (S. C.), Ch. 156; White *v.* Crew, 16 Ga. 416; Adams *v.* McMillan, 7 Port. 73; Jelks *v.* Barrett, 52 Miss. 315.

[4] By Lord Tenterden's Act, which has been transferred to the codes of several of the United States, "all contracts for the sale of goods, of the *value* of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided; or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

[5] Sharman *v.* Brandt, L. R. 6 Q. B. 720. See Murphy *v.* Boese, L. R. 10 Ex. 126.

common agent for both parties.[1] The language in the fourth section is in this respect substantially the same as that of the seventeenth ;[2] and in order to satisfy either, it has been held that the *consideration* for the *agreement* in the one case, and for the *bargain*[3] in the other, must appear expressly or impliedly in the writing signed by the party to be charged. This rule applies, according to the English construction,[4] not only to bargains for the sale of goods, but to agreements upon consideration of marriage,[5] to contracts for the sale of lands, and to agreements not to be performed within a year,[6] and also to special promises made by executors or administrators to answer damages out of their own estate. In the United States, the same rule has been adopted in New Hampshire,[7] New York,[8] New Jersey,[9] Maryland,[10] South Carolina,[11] Georgia,[12] Michigan,[13] Indiana,[14] and Wisconsin.[15] It has been rejected in Maine,[16] Vermont,[17] Massa-

[1] See Wharton on Agency, §§ 644, 718, and cases cited supra, § 868.

[2] Taylor's Evidence, § 933, citing Kenworthy *v.* Schofield, 2 B. & C. 947, per Bayley, J.

[3] In Egerton *v.* Mathews, 6 East, 307, the bargain imported consideration on the face of it. See per Parke, J., in Jenkins *v.* Reynolds, 3 B. & B. 21; and see Mahon *v.* U. S. 16 Wall. 143; Norris *v.* Blair, 39 Ind. 90; Calkins *v.* Falk, 1 Abb. (N. Y.) App. 291.

[4] Taylor's Evidence, § 933. See Browne on Statute of Frauds, § 388.

[5] See Saunders *v.* Cramer, 3 Dru. & War. 87.

[6] Lees *v.* Whitcomb, 5 Bing. 34; 2 M. & P. 86, *S. C.* ; Sykes *v.* Dixon, 9 A. & E. 693; 1 P. & D. 463, *S. C.*; Sweet *v.* Lee, 3 M. & Gr. 466.

[7] Underwood *v.* Campbell, 14 N. H. 393.

[8] Kerr *v.* Shaw, 13 Johns. 236.

So by subsequent statutes; Sackett *v.* Palmer, 25 Barb. 179; Marquand *v.* Hipper, 12 Wend. 520; Smith *v.* Ives, 15 Wend. 182 ; Bennett *v.* Pratt, 4 Denio, 275; Newberg *v.* Wall, 65 N. Y. 484; Stone *v.* Browning, 68 N. Y. 598.

So of a guarantee indorsed on a promissory note. Hunt *v.* Brown, 5 Hill, 145; Hall *v.* Farmer, 5 Denio, 484; Brewster *v.* Silence, 8 N. Y. 207; Draper *v.* Snow, 20 N. Y. 331.

But since the Act of 1863 a guarantee need no longer express consideration. Speyers *v.* Lambert, 1 Sweeny (N. Y.), 335.

[9] Buckley *v.* Beardslee, 2 South. 572.

[10] Sloan *v.* Wilson, 4 Har. & J. 322; Hutton *v.* Padgett, 26 Md. 228.

[11] Stephens *v.* Winn, 2 Nott & McC. 372; though see Lecat *v.* Tavel, 3 McC. 158.

[12] Hargroves *v.* Cooke, 15 Ga. 321.

[13] Jones *v.* Palmer, 1 Doug. 379. See James *v.* Muir, 33 Mich. 223; McElroy *v.* Buck, 35 Mich. 434.

[14] Gregory *v.* Logan, 7 Blackf. 112.

[15] Taylor *v.* Pratt, 3 Wis. 674.

[16] Levy *v.* Merrill, 4 Greenl. 189; Gilligan *v.* Boardman, 29 Me. 81.

[17] Patchin *v.* Swift, 21 Vt. 297.

chusetts,[1] Pennsylvania,[2] Ohio,[3] North Carolina,[4] and Missouri.[5] A covenant under seal, however, need not, it is said, express the consideration.[6] It is not necessary, in any case, that the consideration should be stated on the face of the written memorandum in express terms. It is sufficient if it can be collected, not indeed by mere conjecture, however plausible,[7] but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.[8] Even, however, under the strict rule adopted by the English courts, any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or disadvantage sustained by the plaintiff, however small may be the benefit on the one hand, or the inconvenience on the other, is a sufficient consideration, if such act be performed or such inconvenience be suffered by the plaintiff, with the consent, express or implied, of the defendant, or, in the language of pleading, at his special instance and request.[9]

§ 870. The contract, under the statute, must contain the names of the parties, and the general terms of the bargain,[10] and

[1] Packard *v.* Richardson, 17 Mass. 122. But see Oakman *v.* Rogers, 120 Mass. 214, to the effect that letters arranging the sale of fruit jars, stating the price, but not the number or mode of delivery, did not satisfy the statute.

[2] Paul *v.* Stackhouse, 38 Penn. St. 302; Bowser *v.* Cravener, 56 Penn. St. 132.

[3] Reed *v.* Evans, 17 Ohio, 128.

[4] Ashford *v.* Robinson, 8 Ired. 114.

[5] Halsa *v.* Halsa, 8 Mo. 305. See Browne on Frauds, § 389.

[6] Douglass *v.* Howland, 24 Wend. 35; Rosenbaum *v.* Gunter, 2 E. D. Smith, 415.

[7] Hawes *v.* Armstrong, 1 Bing. (N. C.) 765, 766, per Tindal, C. J.; James *v.* Williams, 5 B. & Ad. 1109, per Patterson, J.; Raikes *v.* Todd, 8 A. & E. 855, 856, per Ld. Denman.

[8] Joint *v.* Mortyn, 2 Fox & Sm. 4; Saunders *v.* Cramer, 3 Dru. & War. 87; Price *v.* Richardson, 15 M. & W. 540; Caballero *v.* Slater, 14 Com. B. 300. See Neelson *v.* Sanborne, 2 N. H. 413; Simons *v.* Steele, 36 N. H. 73; Adams *v.* Bean, 12 Mass. 139; Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburgh, 8 Johns. 29; Rogers *v.* Kneeland, 10 Wend. 252; Marquand *v.* Hipper, 12 Wend. 520; Parker *v.* Wilson, 15 Wend, 346; Gates *v.* McKee, 3 Kern. 232; Church *v.* Brown, 21 N. Y. 315; Weed *v.* Clark, 4 Sandf. 31; Dugan *v.* Gittings, 3 Gill, 138; Williams *v.* Ketcham, 19 Wis. 231; Lecat *v.* Tavel, 3 McCord, 158; Otis *v.* Hazeltine, 27 Cal. 80. See Taylor's Ev. § 934.

[9] Taylor's Evidence, § 935, and cases there cited; 1 Selw. N. P. 43 *et seq.*; 2 Wms. Saund. 137 *g*, 137 *k*, and cases there collected.

[10] Archer *v.* Baynes, 5 Ex. R. 625; Wood *v.* Midgley, 5 De Gex, M. & G. 41; Holmes *v.* Mitchell, 6 Com. B. (N. S.) 361; Laythoarp *v.* Bryant, 2

the promise,[1] either directly or by reference;[2] but any memorandum will suffice, which contains all that leads to future certainty.[3] It is sufficient, for instance, for the vendor to undertake in writing to purchase a particular article at a named price, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.[4] It has also been held, that if a party agrees to pay rent for a certain farm at a specified sum per acre, the number of acres need not be specified;[5] nor need there be a specification of the quantity of goods in a contract, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month.[6] Nor is it necessary that the writing should specify, when this is not practicable, the particular mode,[7] or time of payment, or even the specific price in figures.[8] Hence a written order for goods "on moderate terms" is sufficient,[9] though, if a definite price be agreed upon, it should be stated in the contract.[10]

Other material averments must be in writing.

§ 871. As to parties, greater particularity is requisite; and either expressly or inferentially their names must be collected from the memorandum.[11] The statute was held to be satisfied in

Bing N. C. 742; Remick *v.* Sandford, 118 Mass. 102; aff. *S. C.* 120 Mass. 315.

[1] Carroll *v.* Cowell, 1 Jebb & Sy. 43; Morgan *v.* Sykes, cited in argument in Coats *v.* Chaplin, 3 Q. B. 486. See Salmon Falls Co. *v.* Goddard, 14 How. 446; Smith *v.* Arnold, 5 Mason, 416; Ide *v.* Stanton, 15 Vt. 691; Ives *v.* Hazard, 4 R. I. 14; McFarson's Appeal, 11 Penn. St. 503; Soles *v.* Hickman, 20 Penn. St. 180; Kinlock *v.* Savage, 1 Speers Eq. 470; Farwell *v.* Lowther, 18 Ill. 252.

[2] Riley *v.* Farnsworth, 116 Mass. 223.

[3] Taylor's Evidence, § 936; Slater *v.* Smith, 117 Mass. 96.

[4] Sarl *v.* Bourdillon, 1 Com. B. N. S. 188.

[5] Shannon *v.* Bradstreet, 1 Sch. & Lef. 73, per Ld. Redesdale.

[6] Bateman *v.* Phillips, 15 East, 272; Shortrede *v.* Cheek, 1 A. & E. 57, 58, 60; Bleakley *v.* Smith, 11 Sim. 150. See, to same effect, Shelton *v.* Braithwaite, 7 M. & W. 437, 438; Dobell *v.* Hutchinson, 3 A. & E. 371; Powell *v.* Dillon, 2 Ball & B. 420; Spickernell *v.* Hotham, 1 Kay, 669; Rabaud *v.* D'Wolff, 1 Peters, 499.

[7] Sarl *v.* Bourdillon, 1 Com. B. (N. S.) 188.

[8] Valpy *v.* Gibson, 4 Com. B. 864, per Wilde, C. J.

[9] Ashcroft *v.* Morrin, 4 M. & Gr. 450.

[10] Elmore *v.* Kingscote, 5 B. & C. 583; 8 D. & R. 343, *S. C.*; Goodman *v.* Griffiths, 1 H. & N. 574.

[11] Champion *v.* Plummer, 1 Bos. & P. (N. R.) 252; Vandenbergh *v.* Spooner, Law Rep. 1 Ex. 316; and 4 H. & C. 519, *S. C.*; Williams *v.* Byrnes, 2 New R. 47, per Pr. C.; 1 Moo. P. C. (N. S.) 154, *S. C.*;

this respect where the defendant, having purchased various articles in the plaintiff's shop, signed his name and address in the "Order-book," at the head of an entry which specified the articles and the prices; as the plaintiff's name was printed on the fly-leaf of the book, and the defendant might have seen it had he thought fit to look for it.[1] But, under the statute, no substantial part of the contract can be by parol.[2]

But may be inferred from several documents.

§ 872. It is enough, in order to meet the requirements of the statute, if the substance of the contract is to be inferred from writing, either by the parties or by their agent, though these writings are made up of disjointed memoranda, or of a protracted correspondence.[3] For this purpose it will be enough to produce a letter or memorandum signed by the party or his agent, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognizes any writing which does contain them;[4] and

Warner *v.* Willington, 3 Drew. 523; Wheeler *v.* Collier, M. &. M. 125, per Ld. Tenterden; Skelton *v.* Cole, 4 De Gex & J. 587; Williams *v.* Lake, 2 E. & E. 349; Newell *v.* Radford, L. R. 3 C. P. 52; Sherborne *v.* Shaw, 1 N. H. 159; Nichols *v.* Johnson, 10 Conn. 198; Osborne *v.* Phelps, 19 Conn. 73; Bailey *v.* Ogden, 3 Johns. R. 399.

[1] Sarl *v.* Bourdillon, 1 C. B. N. S. 188.

[2] Whelan *v.* Sullivan, 102 Mass. 204; Thayer *v.* Rock, 13 Wend. 53; Wright *v.* Weeks, 25 N. Y. 153.

[3] Supra, § 617; Allen *v.* Bennet, 3 Taunt. 169; Jackson *v.* Lowe, 1 Bing. 9; Phillimore *v.* Barry, 1 Camp. 513, per Ld. Ellenborough; Warner *v.* Willington, 3 Drew. 523; Skelton *v.* Cole, 4 De Gex & J. 587; Marshall *v.* R. R. 16 How. U. S. 314; Dodge *v.* Van Lear, 5 Cranch C. C. 278; Pettibone *v.* Derringer, 4 Wash. C. C. 215; Beckwith *v.* Talbot, 95 U. S. 289; North Berwick Co. *v.* Ins. Co. 52 Me. 336; Abbott *v.* Shepard, 48 N. H. 14; Connecticut *v.* Bradish, 14 Mass. 296; Beers *v.* Jackman, 103 Mass. 192; Short Mountain Co. *v.* Hardy, 114 Mass. 197; Cossitt *v.* Hobbs, 56 Ill. 231; Union Canal *v.* Loyd, 4 Watts & S. 394; Douglass *v.* Mitchell, 35 Penn. St. 440; Downer *v.* Morrison, 2 Grat. 250. See Passaic Co. *v.* Hoffman, 3 Daly, 495.

[4] Dobell *v.* Hutchinson, 3 A. & E. 355, 371; 5 N. & M. 251, 260, *S. C.;* Llewellyn *v.* Ld. Jersey, 11 M. & W. 189; Gibson *v.* Holland, 1 H. & R. 1; Law Rep. C. P. 1; Macrory *v.* Scott, 5 Ex. R. 907; Kenworthy *v.* Schofield, 2 B. & C. 945; Ridgway *v.* Wharton, 3 De Gex, M. & G. 677; 6 H. of L. Cas. 238, *S. C.;* 1 Sug. V. & P. 171; Bauman *v.* James, Law Rep. 3 Ch. Ap. 508; Crane *v.* Powell, Law Rep. 4 C. P. 123, *S. C.;* Reuss *v.* Pickley, L. R. 1 Exc. 342; Nesham *v.* Selby, L. R. 13 Eq. 19; O'Donnell *v.* Leeman, 43 Me. 158; Morton *v.* Dean, 13 Met. 385; Talman *v.* Franklin, 14 N. Y. 584; Moore *v.* Mountcastle, 61 Mo. 424. See Stanley *v.* Dowdesdell, L. R. 10 C. P. 102; Parkman *v.* Rogers, 120 Mass. 264.

a memorandum by the common agent of both parties will be sufficient for the purpose.[1] A letter, however, to be so received, must ratify the written but unsigned contract relied on.[2] It is sufficient, however, if the letter enumerates all the essential terms of the bargain, although it include excuses for the non-acceptance of the goods, which form the subject matter of the contract.[3] Telegrams[4] may form part of the material from which a contract may be inferred; if so, the original signature of the party or his agent must be produced,[5] and the terms be adequately expressed.[6] Nor is it necessary, as will also be hereafter shown more fully, that the contract should be technically *inter partes*. Liability under the statute may be imposed by a letter addressed to a third party,[7] or by an answer to a bill in chancery, or by an affidavit in any legal proceeding;[8] or by an auctioneer's memorandum;[9] or by a broker's entries;[10] or by any other written engagement, though signed solely by the party charged or his agent.[11] But a written memorandum, made after

[1] Butler *v.* Thomson, 92 U. S. 412. Supra, § 869; Wharton on Ag. § 644.

[2] Taylor's Ev. § 937, citing Archer *v.* Baynes, 5 Ex. R. 625; Richards *v.* Porter 6 B. *v.* C. 437; Cooper *v.* Smith, 15 East, 103. See Goodman *v.* Griffiths, 1 H. & N. 574; Jackson *v.* Oglander, 2 Hem. & M. 465.

[3] Taylor's Ev. § 937; Bailey *v.* Sweeting, 9 Com. B. N. S. 843; Wilkinson *v.* Evans, Law Rep. 1 C. P. 407; and 1 H. & R. 552, *S. C.;* Buxton *v.* Rust, Law Rep. 7 Ex. 1. See, also, Leather Cloth *v.* Hieronomus, L. R. 10 Q. B. 140.

[4] Supra, § 617; infra, § 1128.

[5] Copeland *v.* Arrowsmith, 18 L. T. (N. S.) 755; Godwin *v.* Francis, L. R. 5 C. P. 293; Dunning *v.* Robert, 35 Barb. 463; Unthank *v.* Ins. Co. 4 Biss. 357; Crane *v.* Malony, 39 Iowa, 39; Wells *v.* Milwaukee R. R. 30 Wis. 605. See supra, § 617.

[6] McElroy *v.* Buck, 35 Mich. 434.

[7] Moore *v.* Hart, 1 Verm. 110; Longfellow *v.* Williams, Pea. Add. Cas. 225, per Lawrence, J.; Rose *v.* Cunynghame, 11 Ves. 550, per Ld. Hardwicke; Atk. 503; 1 Smith L. C. 272; Gibson *v.* Holland, 1 H. & R. 1; *S. C.* Law Rep. 1 C. P. 1; Wilkins *v.* Burton, 5 Vt. 76; Betts *v.* Loan Co. 21 Wis. 80; Robertson *v.* Ephraim, 18 Tex. 118. See Clark *v.* Tucker, 2 Sandf. 157; Kinloch *v.* Savage, 1 Speers, 143.

[8] See fully infra, § 912; and see Doe *v.* Steel, 3 Camp. 115; Barkworth *v.* Young, 26 L. J. Ch. 153, 158, per Kindersley, V. C.; Knowlton *v.* Mosely, 105 Mass. 136; Forrest *v.* Forrest, 6 Duer, 102; Cook *v.* Barr, 44 N. Y. 158; Bowen *v.* De Lattre, 6 Whart. R. 430; Fulton *v.* Gracey, 15 Grat. 314.

[9] Wharton on Agency, § 655. Supra, § 868.

[10] Wharton on Agency, § 718.

[11] See cases cited in succeeding sections; Vassault *v.* Edwards, 43 Cal. 458; Rutenberg *v.* Main, 47 Cal. 213.

the action is brought, will not satisfy the statute.[1] And the writings, when several are depended on, cannot, in material matters, be pieced out by parol.[2]

Place of signature immaterial, and initials will suffice if identified.

§ 873. As the statute does not require that the writing should be *subscribed* by the party to be charged, but merely that it should be signed, it makes no difference, in this respect, whether the party charged inserts his name at the beginning, or in the body, or at the foot or end of a document.[3] But, as a question of fact, it will be for the jury to determine whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.[4] On the one hand, it has been held to be sufficient, where a party signed as witness to a deed reciting the agreement to be proved, the knowledge of the recital being brought home to the party.[5] On the other hand, where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded, "As witness our hands," and no signatures were subscribed, the court held that the statute was not satisfied, as it was clearly intended that the agreement should not be perfect till the names were added at the foot.[6] In New York, under the Revised Statutes, the memorandum was to be signed at the end by the party charged.[7] While the party's christian name may be given by

[1] Bill *v.* Bament, 9 M. & W. 36.

[2] Nesham *v.* Selby, L. R. 13 Eq. 191; L. R. 7 Ch. Ap. 406; Pierce *v.* Carff, L. R. 6 Q. B. 210.

[3] Taylor's Ev. § 939; Caton *v.* Caton, 2 Law Rep. H. L. 127; Lobb *v.* Stanley, 5 Q. B. 574, 583; Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Durrell *v.* Evans, 1 H. & C. 174; Knight *v.* Crockford, 1 Esp. 190, 193, per Eyre, C. J.; Ogilvie *v.* Foljambe, 3 Mer. 53; Saunderson *v.* Jackson, 2 B. & P. 238, per Ld. Eldon; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 63, per Ld. Cottenham; Holmes *v.* Mackrell, 3 Com. B. N. S. 789; Bleakley *v.* Smith, 11 Sim. 150; Ulen *v.* Kittredge, 7 Mass. 235; Penniman *v.* Hartshorn, 13 Mass. 87; Parks *v.* Brinkerhoff, 2 Hill (N. Y.), 663; Hill *v.* Johnson, 3 Ired. Eq. 432; Evans *v.* Ashley, 8 Mo. 177. See, as giving a stricter rule, Hodgkins *v.* Bond, 1 N. H. 284; Jackson *v.* Titus, 2 Johns. R. 432.

[4] Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Taylor, § 939; Beckwith *v.* Talbot, 95 U. S. 288.

[5] Welford *v.* Beezley, 1 Ves. Sen. 6.

[6] Hubert *v.* Treherne, 3 M. & Gr. 743; 4 Scott N. R. 486, *S. C.*

[7] Davis *v.* Shields, 26 Wend. 341; reversing *S. C.* 24 Wend. 322; James *v.* Patten, 6 N. Y. 9; reversing *S. C.* 8 Barb. 344.

initials, or omitted altogether,[1] the surname must be substantially exact. Hence it has been held that if a letter be signed by the mere initials of the party, if such initials cannot be identified by parol,[2] or if it be subscribed, without signature, "by your affectionate mother,"[3] or the like, it will not suffice. A *printed* signature has been accepted as adequate where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name.[4] All that is required, to satisfy the statute, is that the agreement or memorandum should be signed "by the party to be charged therewith," that is, by the party whether plaintiff or defendant against whom the claim is made.[5] An oral acceptance of a written and signed proposal in its entirety is sufficient.[6]

[1] Lobb *v.* Stanley, 5 Q. B. 574, 581; Ogilvie *v.* Foljambe, 3 Mer. 53.

[2] Hubert *v.* Moreau, 2 C. & P. 528; 12 Moore, 216, *S. C.;* Sweet *v.* Lee, 3 M. & Gr. 452, 460. To the effect that parol evidence is admissible to explain initials, see Phillimore *v.* Barry, 1 Camp. 513; Salmon Falls Co. *v.* Goddard, 14 How. 447; Barry *v.* Coombe, 1 Peters, 640; Sanborn *v.* Flagler, 9 Allen, 474. Infra, § 939.

[3] Selby *v.* Selby, 3 Mer. 2, per Sir W. Grant.

[4] Schneider *v.* Norris, 2 M. & Sel. 286; Saunderson *v.* Jackson, 2 B. & P. 238. See Penniman *v.* Hartshorn, 13 Mass. 87. In New York, a printed signature, under the Revised Statutes, is insufficient. Davis *v.* Shields, 26 Wend. 351.

[5] Taylor's Ev. § 940; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; 8 Scott, 238, *S. C.;* Liverpool Borough Bk. *v.* Eccles, 4 H. & N. 139; Seton *v.* Slade, 7 Ves. 275, per Ld. Eldon; Edgerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169. The last two cases were decisions on § 17, which uses the word *parties.* These cases, Mr. Taylor holds, overrule the dicta of Ld. Redesdale and Sir T. Plumer, in Lawrenson *v.* Butler, 1 Sch. & Lef. 13; and O'Rourke *v.* Perceval, 2 Ball & B. 58. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, Mr. Taylor refers to Wetherell *v.* Langston, 1 Ex. R. 634; Pitman *v.* Woodbury, 3 Ex. R. 4; Brit. Emp. Ass. Co. *v.* Browne, 12 Com. B. 723; Morgan *v.* Pike, 14 Com. B. 473; Swatman *v.* Ambler, 8 Ex. R. 72. In New York, under the statute, the contract may be signed only by the party chargeable. McCrea *v.* Purmort, 16 Wend. 460; Edwards *v.* Ins. Co. 21 Wend. 467; Worrall *v.* Munn, 5 N. Y. 229; Nat. Ins. Co. *v.* Loomis, 11 Paige, 431; Dykers *v.* Townsend, 24 N. Y. 57; Burrell *v.* Root, 40 N. Y. 496; Justice *v.* Lang, 42 N. Y. 493; *S. C.* 52 N. Y. 323; and so generally, Marqueze *v.* Caldwell, 48 Miss. 23; Vassault *v.* Edwards, 43 Cal. 458; Rutenberg *v.* Main, 47 Cal. 213.

[6] Taylor's Ev. § 940; citing Cresswell, J., in Ashcroft *v.* Morrin, 4 M. & Gr. 451; Watts *v.* Ainsworth, 3 Fost. & Fin. 12; 1 H. & C. 83, *S. C.;* Smith *v.* Neale, 2 Com. B. N. S. 67, 88; Peek *v.* N. Staffords. Ry. Co. 29 L. J. Q. B. 97, in Ex. Ch.; Warner *v.* Willington, 3 Drew. 532; Reuss *v.* Picksley, Law Rep. 1 Ex. 342; 4 H. & C. 588, *S. C.*

§ 874. When the object of the contract is the sale of goods of the price or value of £10 or upwards, or whatever may be the limit, the contract falls within the seventeenth section, though it includes other matters, as, for instance, the agistment of cattle, to which the statute does not apply.[1] Contracts for work and labor are not included in the statute; and hence, if a contract is substantially for labor, though it incidentially involves the transfer of goods, it need not be in writing.[2] Still, if the main object be the delivery of goods, the contract must be written; and hence, a contract to make a set of teeth to fit the employer's mouth has been held to be within the statute.[3] Fixtures, also, when chattels, are not within the fourth section, so that a contract concerning them must be in writing.[4] With respect to the price, when several articles are bought at one time, the transaction will be regarded as one entire contract, though the prices are distinct; and, consequently, if the whole purchase money amounts to the minimum fixed by the statute, the case will be covered by the statute, though neither of the articles taken separately may be of that value.[5] A mere agreement to give credit, on account of a precedent debt, does not validate the sale.[6]

When main object of contract is sale of goods, contract must be in writing.

§ 875. To take a case out of the seventeenth section, on the ground that the goods have been accepted and received, so as to come within the exception to the section, a compliance with both requisites is necessary.[7] An acceptance and receipt of a substantial part of the goods,

Acceptance and receipt of goods take case out of statute.

See Forster *v.* Rowland, 7 H. & N. 103; Penniman *v.* Hartshorn, 13 Mass. 87; Bent *v.* Cobb, 9 Gray, 397; McComb *v.* Wright, 4 Johns. C. 659.

[1] Harman *v.* Reeve, 25 L. J. C. P. 257. In New York the limit is $50; "gold," when treated as a staple, is within the statute. Peabody *v.* Speyers, 56 N. Y. 230.

[2] Clay *v.* Yates, 1 H. & N. 73.

[3] Lee *v.* Griffin, 1 B. & S. 272.

[4] Browne on St. of Frauds, § 234.

[5] Taylor's Ev. § 956; Baldey *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, *S. C.;* Allard *v.* Greasart, 61 N. Y. 1. See, also, Elliott *v.* Thomas, 3 M. & W. 170; Bigg *v.* Whisking, 14 Com. B. 195; Mills *v.* Hunt, 17 Wend. 333; 20 Wend. 431; Gilman *v.* Hill, 36 N. H. 311; Sbindler *v.* Houston, 1 Comst. (N. Y.) 261.

[6] Brabin *v.* Hyde, 32 N. Y. 519; Mattice *v.* Allen, 3 Keyes, 492; Teed *v.* Teed, 44 Barb. 96.

[7] Cusack *v.* Robinson, 1 B. & S. 299; Cross *v.* O'Donnell, 44 N. Y. 661; Caulkins *v.* Hellman, 47 N. Y. 449; Hicks *v.* Cleveland, 48 N. Y. 84; Brewster *v.* Taylor, 63 N. Y. 587.

however, will be as operative as an acceptance and receipt of the whole.[1] The acceptance may either precede or follow the receiving of the article, or may accompany such receiving.[2] The authorization of an agent to receive does not imply authorization to accept.[3] The receipt must be of a character to preclude the vendor from retaining any lien on the goods.[4] As long as a seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.[5] A sale in which the seller refuses to permit the buyer to take possession or control of the goods, but claims and asserts his lien as vendor, does not exhibit an acceptance under the statute.[6] The acceptance must be absolute and final.[7] It must

[1] Morton *v.* Tibbett, 15 Q. B. 434, per Ld. Campbell; Kershaw *v.* Ogden, 34 L. J. Ex. 159; 3 H. & C. 717, *S. C.;* Gardner *v.* Grout, 2 C. B. (N. S.) 340; Danforth *v.* Walker, 40 Vt. 257; Atwood *v.* Lucas, 53 Me. 508; Davis *v.* Eastman, 1 Allen, 422; Carver *v.* Lane, 4 E. D. Smith, 168; Dows *v.* Montgomery, 5 Rob. (N. Y.) 445; Rickey *v.* Tenbroeck, 63 Mo. 563. See Garfield *v.* Paris, 96 U. S. 557.

A rescission, followed by an exchange of goods, is not within the statute. Norton *v.* Simonds, 124 Mass. 19; citing Townsend *v.* Hargraves, 118 Mass. 325.

[2] Cusack *v.* Robinson, 1 B. & S. 299; Morton *v.* Tibbett, 15 Q. B. 434. See Atwood *v.* Lucas, 53 Me. 508; Danforth *v.* Walker, 40 Vt. 257; Dugan *v.* Nichols, 125 Mass. 43; Bass *v.* Walsh, 39 Mo. 192; Southwest Co. *v.* Stanard, 44 Mo. 71.

[3] Nicholson *v.* Bower, 1 E. & E. 172; Hansom *v.* Armitage, 5 B. & A. 557; Norman *v.* Phillips, 14 M. & W. 276; Barney *v.* Brown 2 Vt. 374; Snow *v.* Warner, 10 Met. (Mass.) 133; Outwater *v.* Dodge. 6 Wend. 400.

[4] Baldey *v.* Parker, 2 B. & C. 37, 44; 3 D. & R. 220, *S. C.;* Maberley *v.* Sheppard, 10 Bing. 101, 102, per Tindal, C. J.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, *S. C.;* Tempest *v.* Fitzgerald, 3 B. & A. 680, 684, per Holroyd, J.; Carter *v.* Toussaint, 5 B. & A. 859, per Bayley, J.; Holmes *v.* Hoskins, 9 Ex. R. 753; Cusack *v.* Robinson, 1 B. & S. 308, per Blackburn, J.; Gilman *v.* Hill, 36 N. H. 311; Green *v.* Merriam, 28 Vt. 801; Shindler *v.* Houston, 1 Comst. 261; Leven *v.* Smith, 1 Denio, 571; Ralph *v.* Stuart, 4 E. D. Smith, 627; Vincent *v.* Germond, 11 Johns. 283; Ward *v.* Shaw, 7 Wend. 404; Southwest Co. *v.* Stanard, 44 Mo. 71.

[5] Benjamin on Sales, Am. ed. 151; Browne on St. of Frauds, §§ 317 *et seq.;* Baldey *v.* Turner, 2 B. & C. 37; Safford *v.* McDonough, 120 Mass. 290.

[6] Safford *v.* McDonough, 120 Mass. 290.

[7] Norman *v.* Phillips, 14 M. & W. 283, per Alderson, B.; Smith *v.* Surman, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, *S. C.;* Howe *v.* Palmer, 3 B. & A. 321, 325, per Holroyd, J.; Hansom *v.* Armitage, 5 B. & A. 559, per Abbott, C. J.; Acebal *v.* Levy, 10 Bing. 384, per Tindal, C. J.; Stone *v.* Browning, 68 N. Y. 598;

be clearly and substantively proved;[1] but it may take place subsequently to the making of the verbal agreement.[2] Merely picking out and marking goods by the vendee[3] in the vendor's shop does not, so it is said, deprive the vendor, even when he assents to it, of his right of lien.[4] The question of acceptance and receipt is for the jury, to be determined by the circumstances of the particular case.[5] But ordinarily there is no delivery until the goods are under the dominion and exclusive control of the purchaser.[6]

Bacon *v.* Eccles, 43 Wis. 227. See, as denying proposition in text, Morton *v.* Tibbett, 15 Q. B. 428. See, also, Parker *v.* Wallis, 5 E. & B. 21; and Currie *v.* Anderson, 29 L. J. Q. B. 90, per Crompton, J.; 2 E. & E. 600, *S. C.*

[1] Carver *v.* Lane, 4 E. D. Smith, 168; Stone *v.* Browning, 51 N. Y. 211; Clark *v.* Tucker, 2 Sandf. 157; Knight *v.* Mann, 120 Mass. 219.

[2] Walker *v.* Mussey, 16 Mees. & W. 302; Davis *v.* Moore, 13 Me. 427; Sprague *v.* Blake, 20 Wend. 61; McKnight *v.* Dunlop, 1 Seld. 542; Field *v.* Runk, 22 N. J. 525.

[3] Cusack *v.* Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261, *S. C.* See Spencer *v.* Hale, 30 Vt. 314.

[4] Baldy *v.* Parker, 2 B. & C. 37; 3 D. & R. 220, *S. C.;* Bill *v.* Bament, 9 M. & W. 36; Proctor *v.* Jones, 2 C. & P. 532; Kealy *v.* Tenant, 13 Ir. Law R. N. S. 394; said by Mr. Taylor to overrule Hodgson *v.* Le Bret, 1 Camp. 233; and Anderson *v.* Scott, Ibid. 235, n. See Saunders *v.* Topp, 4 Ex. R. 390; and Acraman *v.* Morrice, 8 Com. B. 449; Ward *v.* Shaw, 7 Wend. 404; and see *contra*, Browne on Frauds, § 325.

[5] Morton *v.* Tibbett, 15 Q. B. 441; Dodsley *v.* Varley, 12 A. & E. 632; 2 P. & D. 448, *S. C.;* Langton *v.* Higgins, 4 H. & N. 402; Aldridge *v.* Johnson, 7 E. & B. 885; Kershaw *v.* Ogden, 34 L. J. Eq. 159; 3 H. & C. 717, *S. C.;* Elmore *v.* Stone, 1 Taunt. 458; Smith *v.* Surman, 9 B. & C. 570; Castle *v.* Sworder, 6 H. & N. 828, reversing a decision in Ex., reported 5 H. &. N. 281; Carter *v.* Toussaint, 5 B. & A. 855; 1 D. & R. 515, *S. C.;* Beaumont *v.* Brengeri, 5 Com. B. 301; Holmes *v.* Hoskins, 9 Ex. R. 753; Marvin *v.* Wallace, 6 E. & B. 726; Taylor *v.* Wakefield, 6 E. & B. 765; Edan *v.* Dudfield, 1 Q. B. 302; 4 P. & D. 656, *S. C.;* Lillywhite *v.* Devereux, 15 M. & W. 289, 291. See Boynton *v.* Veazie, 24 Me. 286; Green *v.* Merriam, 28 Vt. 801; Wilkes *v.* Ferris, 5 Johns. R. 344; Benford *v.* Schell, 55 Penn. St. 393; Phillips *v.* Hunnewell, 4 Greenl. 376; Gilman *v.* Hill, 36 N. H. 311; Ely *v.* Ormsby, 12 Barb. 570; Baily *v.* Ogden, 3 Johns. R. 420; Simmonds *v.* Humble, 13 Com. B. N. S. 258. As to the effect of handing over a sample of the goods, see Gardner *v.* Grout, 2 Com. B. N. S. 340.

In Marshall *v.* Green, L. R. 1 C. P. D. 35, it was held that where the vendee, a timber merchant, who bought some growing trees by verbal contract, cut down six of them and sold the lops and tops, the vendor was too late in attempting to countermand the sale.

[6] Outwater *v.* Dodge, 7 Cow. 85; Marsh *v.* Rouse, 44 N. Y. 643; Safford *v.* McDonough, 120 Mass. 290.

Where the goods are ponderous or inaccessible, a constructive delivery will suffice;[1] such, for example, as the giving up the key of the warehouse in which they are deposited, or the warehouseman making an entry of transfer in his books, or the delivery of other indicia of property.[2] Such acts, however, must be unequivocal.[3] Hence, it has been held that the mere acceptance and retainer, by the purchaser, of the delivery order of goods deposited with a warehouseman as agent of the vendor will not amount to an actual receipt of the goods, so as to bind the bargain.[4] To work a transfer, the delivery order must be lodged by the purchaser with the warehouseman, who must agree to become the agent of the vendee.[5]

§ 876. It was at one time supposed that where goods, orally purchased, are delivered to a carrier or wharfinger named by the vendee, such delivery was sufficient to satisfy the statute.[6] The better opinion, however, now is, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by the purchaser, unless he be authorized by him to accept,[7] but when so authorized the delivery is sufficient.[8]

Acceptance by carrier or expressman is not acceptance by vendee.

[1] See Townsend *v.* Hargraves, 118 Mass. 325; Parker *v.* Jervis, 3 Keyes, 271; Phillips *v.* Mills, 55 Ga. 325.

[2] Chaplin *v.* Rogers, 1 East, 195, per Ld. Kenyon; Brinley *v.* Spring, 7 Greene, 241; Chappel *v.* Marvin, 2 Aik. 79; Leonard *v.* Davis, 1 Black (U. S.), 476; Badlam *v.* Tucker, 1 Pick. 389; Higgins *v.* Cheesman, 9 Pick. 6; Turner *v.* Coolidge, 2 Met. (Mass.) 350; Jewett *v.* Warren, 12 Mass. 300; Wilkes *v.* Ferris, 5 Johns. R. 344; Calkins *v.* Lockwood, 17 Conn. 174; Benford *v.* Schell, 55 Penn. St. 393; Harvey *v.* Butchers, 39 Mo. 211; Sharon *v.* Shaw, 2 Nev. 289.

[3] Nicholle *v.* Plume, 1 C. & P. 272, per Best, C. J.; Edan *v.* Dudfield, 1 Q. B. 307. See Boardman *v.* Spooner, 13 Allen, 353; Cushing *v.* Breed, 14 Allen, 376; Remick *v.* Sanford, 120 Mass. 309; Wilkes *v.* Ferris, 5 Johns. R. 335; Stanton *v.* Small, 3 Sandf. 230.

[4] M'Ewan *v.* Smith, 2 H. of L. Cas. 309.

[5] Farina *v.* Home, 16 M. & W. 119, 123, per Parke, B.; Bentall *v.* Burn, 3 B. & C. 423; 5 D. & R. 284, *S. C.* See, to same effect, Cushing *v.* Breed, 14 Allen, 376; Stanton *v.* Small, 3 Sandf. 230; Franklin *v.* Long, 7 Gill & J. 407; Williams *v.* Evans, 39 Mo. 201. See Hankins *v.* Baker, 46 N. Y. 666.

[6] Hart *v.* Sattley, 3 Camp. 528, per Chambre, J. See Dawes *v.* Peck, 8 T. R. 330, and Dutton *v.* Solomonson, 3 B. & P. 582.

[7] Johnson *v.* Dodgson, 2 M. & W. 656, per Parke, B.; Frosthurg *v.*

[6] Wilcox Co. *v.* Green, 72 N. Y. 17.

Acceptance by the customary carrier, or expressman, is not *per se* sufficient.[1] The carrier's authority from the vendee, however, is a question of fact.[2] It must also be remembered, that a vendee may be bound by the retention for an unreasonable time, by his general agent, of goods, when the latter has been authorized by the former to examine their quality.[3]

Partial payment may take case out of statute.

§ 877. By the statute of frauds, as well as by the Code of New York, and those of several other states, payment of part will take a parol sale out of the statute,[4] and it is sufficient if this payment be made subsequent to the sale, if the object be to validate the sale.[5] A *tender*, unaccepted, is insufficient.[6] And the payment must be *actual*.[7] A mere *agreement* to pay, without corresponding credit, or some equivalent act of acceptance taking place, is not by itself enough.[8]

IV. GUARANTEES.

Guarantees must be in writing.

§ 878. The fourth section of the statute of frauds, which has been held to be inapplicable to deeds,[9] enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promises to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of

Mining Co. 9 Cush. 117; Atherton *v.* Newhall, 123 Mass. 141; Rodgers *v.* Phillips, 40 N. Y. 519. See Thompson *v.* Menck, 2 Keyes, 82; Acebal *v.* Levy, 10 Bing. 376; 4 M. & Sc. 217, *S. C.*; Coats *v.* Chaplin, 3 Q. B. 483; Nicholson *v.* Bower, 1 E. & E. 172; Norman *v.* Phillips, 14 M. & W. 277; Meredith *v.* Meigh, 2 E. & B. 364; Hunt *v.* Hecht, 8 Ex. R. 814; Hart *v.* Bush, E., B. & E. 494; Coombs *v.* Bristol & Ex. Ry. Co. 27 L. J. Ex. 401; Smith *v.* Hudson, 6 B. & S. 431; Allard *v.* Greasart, 61 N. Y. 1, and cases cited to note 5, § 875.

[1] Frostburg *v.* Mining Co. 9 Cush. 117. See Meredith *v.* Meigh, 2 E. & B. 364.

[2] Snow *v.* Warner, 10 Met. 132; Hawley *v.* Keeler, 53 N. Y. 114.

[3] Norman *v.* Phillips, 14 M. & W. 283.

[4] Langfort *v.* Tyler, 1 Salk. 113; Blenkinsop *v.* Clayton, 7 Taunt. 597.

[5] Bissell *v.* Balcom, 39 N. Y. 278; reversing *S. C.* 40 Barb. 98; Allis *v.* Read, 45 N. Y. 142; Webster *v.* Zielly, 52 Barb. 482; Hunter *v.* Wetsell, 57 N. Y. 375. See Organ *v.* Stewart, 60 N. Y. 413.

[6] Edgerton *v.* Hodge, 41 Vt. 676.

[7] Artcher *v.* Zeh, 5 Hill, 200; Mattice *v.* Allen, 33 Barb. 543. See Ireland *v.* Johnson, 28 How. Pr. 463.

[8] Walker *v.* Mussey, 16 M. & W. 302; Ely *v.* Ormsby, 12 Barb. 570; Brand *v.* Brand, 49 Barb. 346; Walrath *v.* Ingles, 64 Barb. 265; Brabin *v.* Hyde, 32 N. Y. 519.

[9] Cherry *v.* Heming, 4 Ex. R. 631.

another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[1] An oral guarantee of the note of a third person, given in payment of a debt of the guarantor, is within the statute,[2] and so is a promise to sign a certain bond as security conditionally,[3] and a promise by a railway company to pay on account of a contractor, to whom it was indebted, the sum due by the contractor to a subcontractor.[4] Some consideration must be inferrible from the writing, or it will not hold.[5]

The statutory restriction as to guarantees relates to collateral, not original, promises.

§ 879. An important distinction exists between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default. An *original* promise, as above stated, need not be in writing, under the statute; a *collateral* promise has to be in writing.[6] In the application of this distinction, it has

[1] As to meaning of words "lawfully authorized," see Norris *v.* Cooke, 30 L. T. 224; and see generally as to application of statute, Mahan *v.* U. S. 16 Wall. 143; Durant *v.* Allen, 48 Vt. 58; Calkins *v.* Falk, 1 Abb. (N. Y.) App. 291; Norris *v.* Blair, 39 Ind. 90; Miller *v.* Neihaus, 51 Ind. 401; First Nat. Bk. *v.* Bennett, 33 Mich. 520.

[2] Gill *v.* Herrick, 111 Mass. 501; Dows *v.* Swett, 120 Mass. 322; Hauer *v.* Patterson, 84 Penn. St. 274.

[3] Haynes *v.* Burkam, 51 Ind. 130.

[4] Laidlow *v.* Hatch, 75 Ill. 11.

[5] Browne on Stat. of Frauds, § 190-2; Wain *v.* Warlters, 5 East, 10; Deutsch *v.* Kanders, 46 Md. 164. Otherwise under 19 & 20 Vict. Agnew on Stat. of Frauds, 79.

[6] Taylor's Ev. § 941 *a*, citing Birkmyr *v.* Darnell, Salk. 27; 1 Smith L. C. 262, *S. C.;* Forth *v.* Stanton, 1 Wms. Saund. 211 *a*–211 *e;* Barrett *v.* Hyndman, 3 Ir. Law R. 109; Fitzgerald *v.* Dressler, 29 L. J. C. P. 113; 7 Com. B. N. S. 374, *S. C.;* Mallett *v.* Bateman, 16 Com. B. N. S. 530; 35 L. J. C. P. 40, in Ex. Ch; 1 Law Rep. C. P. 163; and 1 H. & R. 109, *S. C.* See Orrell *v.* Coppock, 26 L. J. Ch. 269; Morse *v.* Nat. Bk. 1 Holmes, 209; Hunter *v.* Randall, 62 Me. 423; Alger *v.* Scoville, 1 Gray, 391; Jepherson *v.* Hunt, 2 Allen, 423; Wills *v.* Brown, 118 Mass. 137;

been held that agreements by factors to sell upon *del credere* commission do not fall within the fourth section of the statute of frauds, and, consequently, need not be in writing.[1] But with this exception cases of this kind must be determined on the concrete facts, as to whether the evidence shows an original or a collateral promise.[2] It is plain that an agreement, upon a new and sufficient consideration to pay another's debt, is not within the statute.[3]

To constitute a guarantee under the statute, the indebtedness of the person

§ 880. The statute, it will be remembered, limits the guarantees, which it requires to be in writing, to promises "to answer for the debt, default, or miscarriage of another."[4] It has been consequently held, that to bring the case within the statute, the liability of that other must continue, notwithstanding the promise.[5] Thus

Walker *v.* Hill, 119 Mass. 249; Dows *v.* Swett, 120 Mass. 414; Kingsley *v.* Balcome, 4 Barb. 131; Larson *v.* Wyman, 14 Wend. 246; Mallory *v.* Gillett, 21 N. Y. 412; Duffy *v.* Wunsch, 42 N. Y. 243; Booth *v.* Eighmie, 60 N. Y. 238; Merriman *v.* Liggett, 1 Weekly Notes, 379; Jefferson *v.* Slagle, 66 Penn. St. 202; Townsend *v.* Long, 77 Penn. St. 143; Huyler *v.* Atwood, 26 N. J. Eq. 504; Clifford *v.* Luhring, 69 Ill. 401; Bunting *v.* Darbyshire, 75 Ill. 408; Patmor *v.* Haggard, 78 Ill. 607; Hall *v.* Woodin, 35 Mich. 67; Chamberlin *v.* Ingalls, 38 Iowa, 300; Lester *v.* Bowman, 39 Iowa, 611; Dickenson *v.* Colter, 45 Ind. 445; Horn *v.* Bray, 51 Ind. 555; Pettit *v.* Braden, 55 Ind. 201; Hamilton *v.* Hodges, 30 La. An. 1290; Broom *v.* McGrath, 53 Miss. 243.

[1] Couturier *v.* Hastie, 8 Ex. R. 40; Wickham *v.* Wickham, 2 K. & J. 478, per Wood, V. C.; Wolff *v.* Koppel, 5 Hill, 458; *S. C.* 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 720; Swan *v.* Nesmith, 7 Pick 220.

[2] 1 Wms. Saund. 211 *b*; 1 Smith L. C. 262. See Mountstephen *v.* Lakeman, Law Rep. 5 Q. B. 613; *S. C.* L. R. 7 Q. B. 196; *S. C.* L. R. 7 H. L 17; Richardson *v.* Robbins, 124 Mass. 105; Rodocanachi *v.* Buttrick, 125 Mass. 134; Crim *v.* Fitch, 53 Ind. 214; Hayward *v.* Gunn, 82 Ill. 385; Hardman *v.* Bradley, 85 Ill. 162; Barden *v.* Briscoe, 36 Mich. 254; Comstock *v.* Newton, 36 Mich. 277.

[3] Glidden *v.* Child, 122 Mass. 433; Gold *v.* Phillips, 10 Johns. R. 412; Myers *v.* Morse, 15 Johns. R. 425; Farley *v* Cleveland, 9 Cow. 639; Union Bk. *v.* Coster, 3 N. Y. 203; Sanders *v.* Gillespie, 64 Barb. 628; Tallman *v.* Bresler, 65 Barb. 369; Griffin *v.* Keith, 1 Hilt. 58; Neal *v.* Bellamy, 73 N. C. 384; Threadgill *v.* Lendon, 76 N. C. 24; Mobile R. R. *v.* Jones, 57 Ga. 198; Bissig *v.* Britton, 59 Mo. 204; Gridley *v.* Capen, 72 Ill. 11. See Green *v.* Disbrow, 59 N. Y. 334. As to the Pennsylvania rule, see Maule *v.* Bucknell, 50 Penn. St. 39, qualifying in part Leonard *v.* Vredenburgh, 8 Johns. R. 29.

[4] See Macrory *v.* Scott, 5 Ex. R. 907.

[5] See Gull *v.* Lindsay, 4 Ex. R. 45, 52; Butcher *v.* Steuart, 11 M. & W. 857, 873; Lane *v.* Burghart, 1 Q. B. 933, 937, 938; 1 G. & D. 312, *S. C.* See Reader *v.* Kingham, 13 Com. B.

guaranteed must be continuous.

where the defendant, in consideration that the plaintiff would discharge out of custody his debtor taken on a *ca. sa.*, promised to pay the debt, it was held not to be necessary that this promise should be in writing, the reason being that the debtor's liability is at an end when he is discharged, and the promise of the defendant cannot take effect till after the discharge.[1] It has, however, been held, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, that as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and as such, was a promise within the meaning of the statute.[2] It is said, also, to make no difference whether the goods were delivered to the third party,[3] or the debt incurred, or the default committed by him, before or after the promise by the defendant; for a promise to indemnify is substantially within the statute.[4] But an undertaking to indemnify another against all liability, if he would enter into recognizances for the appearance of a defendant in a criminal trial, is held not to fall within the meaning of the statute, as relating to a *criminal* proceeding.[5] It must be noticed, however, that the statute covers

N. S. 344; Anderson *v.* Davis, 9 Vt. 136; Watson *v.* Jacobs, 29 Vt. 169; Stone *v.* Symmes, 18 Pick. 467; Curtis *v.* Brown, 5 Cush. 492; Wood *v.* Corcoran, 1 Allen, 405; Watson *v.* Randall, 20 Wend. 201; Meriden Co. *v.* Zingsen, 48 N. Y. 247; Allshouse *v.* Ramsay, 7 Whart. R. 331; Andre *v.* Bodman, 13 Md. 241; Draughan *v.* Bunting, 9 Ired. L. 10; Click *v.* McAfee, 7 Port. 62; Eddy *v.* Roberts, 17 Ill. 505; Welch *v.* Marvin, 36 Mich. 59.

[1] Bird *v.* Gammon, 3 Bing. N. C. 883; 5 Scott, 213; Goodman *v.* Chase, 1 B. & A. 297.

[2] Lane *v.* Burghart, 3 M. & Gr. 597. See Cooper *v.* Chambers, 4 Dev. (N. C.) 261.

[3] Matson *v.* Wharam, 2 T. R. 80; Anderson *v.* Hayman, 1 H. Bl. 120; Mountstephen *v.* Lakeman, 5 Law Rep. Q. B. 613; *S. C.* judgment reversed, but on another ground, L. R. 7 Q. B. 196.

[4] Green *v.* Cresswell, 10 A. & E. 453, 458; 2 P. & D. 430, *S. C.*, overruling the dicta of Bayley and Parke, JJ., in Thomas *v.* Cook, 8 B. & C. 728; 3 M. & R. 444, *S. C.*; and explaining Adams *v.* Dansey, 6 Bing. 506.

[5] Cripps *v.* Hartnoll, 4 B. & S. 414, per Ex. Ch., overruling *S. C.* 2 B. & S. 697. See Kelsey *v.* Hibbs, 13 Ohio St. 340.

cases of promises to make good the *tortious* as well as the *contractual* defaults of another.[1]

To escape statute, original undertaking must be specifically and fully proved.

§ 881. When the undertaking is to pay another's debt, the burden is on the party who seeks to prove that the undertaking is an original and independent contract, so as to escape the statute. "The evidence, to change an existing contract relation between the plaintiff and a third party, and to prove a promise by the defendant to pay the debt of another, as a new and original undertaking, and not a contract of suretyship, must be clear and satisfactory; otherwise the case will fall within the operation of the statute of frauds, requiring the promise to be in writing."[2]

V. MARRIAGE SETTLEMENTS.

Marriage settlements must be in writing.

§ 882. The statute further makes writing an essential to "agreements made in consideration of marriage." These words, it has been held, do not embrace mutual promises to marry; and therefore, notwithstanding the act, such promises may be verbally made.[3] It should also be ob-

[1] Kirkham *v.* Marter, 2 B. & A. 613; Turner *v.* Hubbell, 2 Day, 457; Richardson *v.* Crandall, 48 N. Y. 348.

[2] Eshleman *v.* Harnish, 76 Penn. St. 97; affirmed in Haverly *v.* Mercur, 78 Penn. St. 263.

How far irregular indorsement is a guarantee. — "The interesting question, how far a defendant can be held who has irregularly indorsed a note, — as, for example, above the signature of the person to whose order the note is made; or where the plaintiff, himself first indorser, seems to hold the alleged guarantor, who is a later indorser, — has been much discussed in Pennsylvania, and it has been decided that the indorser is liable neither on the paper under the law-merchant, nor on his indorsement as a sufficient memorandum under the statute of frauds, nor on the parol guarantee which the note irregularly executed was intended to evidence. Jack *v.* Morrison, 48 Penn. St. 113; Schafer *v.* The Bank, 59 Penn. St. 144; Alter *v.* Langebartel, 5 Phila. 151; Murray *v.* McKee, 60 Penn. St. 35. See Barto *v.* Schmeck, 28 Penn. St. 447; Slack *v.* Kirk, 67 Penn. St. 384; Wilson *v.* Martin, 74 Penn. St. 159; Martin *v.* Duffey, 4 Phila. 75; Robinson *v.* Rebel, 1 Week. Notes, Phila. 49; Fuller *v.* Scott, 8 Kans. 32; Underwood *v.* Hossack, 38 Ill. 214; Hodgkins *v.* Bond, 1 N. H. 284; Turrell *v.* Morgan, 7 Minn. 368. In Eibert *v.* Finkbeiner, 68 Penn. St. 243, it was held, that while before 1855 an irregular indorsement could be shown by parol (cases being cited) to be intended to be a guarantee, since 1855 the same end could be accomplished by writings properly signed so as to comply with the statute of frauds." Reed's Cases, *ut supra*.

[3] Taylor's Ev. § 945; B. N. P. 280 *c.*; Short *v.* Stotts, 58 Ind. 29; Blackburn *v.* Mann, 85 Ill. 222.

served that though there may be, in other respects, such a part performance of marriage contracts as to take the case out of the statute,[1] yet that the marriage *per se* is not a part performance within this rule.[2] Hence if a suitor orally promises to settle property on his intended wife, and the woman, relying on his honor, marries him, she cannot compel the performance of the settlement.[3] But it is now ruled in England, that an oral agreement made before marriage will be enforced in equity, if, subsequently to the marriage, it has been recognized and adopted in writing;[4] though there will be no interference, unless it appear

[1] Thynne *v.* Glengall, 2 H. of L. Cas. 131; Clinan *v.* Cooke, 1 Sch. & Lef. 41; Kine *v.* Balfe, 2 Ball & B. 347, 348; Surcome *v.* Pinniger, 3 De Gex, M. & G. 571; Taylor *v.* Beech, 1 Ves. Sen. 297; Clark *v.* Pendleton, 20 Conn. 508; Dugan *v.* Gittings, 3 Gill, 138; Dunn *v.* Tharp, 4 Ired. Eq. 7.

[2] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Lord Cottenham; Redding *v.* Wilks, 3 Br. C. C. 401; Lassence *v.* Tierney, 1 M. & Gord. 571, 572, per Ld. Cottenham; 2 Hall & T. 115, 134, 135, *S. C.;* Warden *v.* Jones, 23 Beav. 487; aff. on app. 2 De Gex & J. 76, 84; Finch *v.* Finch, 10 Ohio St. 501. See expressions in Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

[3] Montacute *v.* Maxwell, 1 P. Wms. 619; Caton *v.* Caton, Law Rep. 1 Ch. Ap. 137; 2 Law Rep. H. L. 127. See, for converse, Goldicutt *v.* Townsend, 28 Beav. 445.

In Newman *v.* Piercey, High Court Chancery Division, 25 W. R. 36, a father, before the marriage of his daughter, told her and her intended husband that he had given her a leasehold house on her marriage. Immediately after the marriage, the daughter and her husband took possession of the house, paid the ground-rent, and exercised acts of ownership. The father, after the marriage, refused to complete the gift by assignment. He continued to pay instalments of the purchase money to the building society through which he had purchased it, but a sum of £110 was due to the society at the time of his death, which took place four years after the marriage. Held: (1.) That the possession following the verbal gift was a sufficient part performance to take the case out of the statute of frauds; and (2.) That the £110 must be paid out of the intestate's general assets.

See, however, as to redress in cases of fraud, Baron de Biel *v.* Hammersley, 3 Beav. 469, 475, 476, per Ld. Langdale; 12 Cl. & Fin. 45, 64; Williams *v.* Williams, 37 L. J. Ch. 854, per Stuart, V. C. See, also, Maunsell *v.* White, 4 H. of L. Cas. 1039; Bold *v.* Hutchinson, 20 Beav. 250; 5 De Gex, M. & G. 558, *S. C.;* Jameson *v.* Stein, 21 Beav. 5; Kay *v.* Crook, 3 Sm. & Giff. 407.

[4] Taylor's Ev. § 945, relying on Barkworth *v.* Young, 26 L. J. Ch. 153, 157, per Kindersley, V. C.; Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 64, per Ld. Cottenham, citing Hodgson *v.* Hutchinson, 5 Vin. Abr. 522; Taylor *v.* Beech, 1 Ves. Sen. 297; and Montacute *v.* Maxwell, 1 Str. 236; and questioning Randall *v.* Morgan, 12 Ves. 73, where Sir W. Grant expressed serious doubt upon the subject. See 12 Cl. & Fin. 86, per Ld.

that the marriage was contracted on the faith of the agreement.[1] It has also been held that if there has been a part performance of a parol agreement by the entry on and enjoyment by a married couple of the property agreed to be given to them, they assuming the burdens on such property, this takes the case out of the statutes.[2]

VI. AGREEMENTS IN FUTURO.

Agreements not to be performed within a year must be in writing.

§ 883. The statutory prescription, that an agreement *not to be performed within a year* from the making thereof must be in writing, has been held not to operate where the contract is capable of being performed on the one side or on the other within a year.[3] It has also been held not to extend to an agreement made by a contractor to allow a stranger to share in the profits of a contract that is incapable of being completed within a year, because such an agreement amounts to nothing more than the sale of a right which is transferred entire on the bargain being struck.[4] It is further held that the statute is inapplicable in any case where the action is brought upon an *executed* consideration.[5] A *part*

Brougham; and 3 Beav. 475, 476, per Ld. Langdale. Also Caton *v.* Caton, 1 Law Rep. Ch. Ap. 137; 35 L. J. Ch. 292, *S. C.*, overruling *S. C.* as decided by Stuart, V. C. 34 L. J. Ch. 564.

[1] Ayliffe *v.* Tracy, 2 P. Wms. 65.

[2] Ungley *v.* Ungley, L. R. 4 Ch. D. 73; 35 L. T. R. 619; L. R. 5 Ch. D. 887.

[3] Cherry *v.* Heming, 4 Ex. R. 631; and Smith *v.* Neale, 2 Com. B. N. S. 67; both recognizing Donellan *v.* Read, 3 B. & Ad. 899. See Taylor's Ev. § 946; S. P., Holbrook *v.* Armstrong, 10 Me. 31; Cabot *v.* Haskins, 3 Pick. 83; Greene *v.* Harris, 9 R. I. 401; Hodges *v.* Man. Co. 9 R. I. 482; Hardesty *v.* Jones, 10 Gill & J. 404; Bates *v.* Moore, 2 Bailey, 614; Compton *v.* Martin, 5 Richards. 14; Johnson *v.* Watson, 1 Ga. 348; Rake *v.* Pope, 7 Ala. 161; Dickson *v.* Frisbee, 52 Ala. 165; Suggett *v.* Cason, 26 Mo. 221; Haugh *v.* Blythe, 20 Ind. 24; Marley *v.* Noblett, 42 Ind. 85; Curtis *v.* Sage, 35 Ill. 22; Larrimer *v.* Kelley, 10 Kans. 298; Blair *v.* Walker, 39 Iowa, 406. See Riddle v. Backus, 38 Iowa, 81. But the doctrine of Donellan *v.* Reed has been emphatically repudiated in Frary *v.* Sterling, 99 Mass. 461; Broadwell *v.* Getman, 2 Denio, 87; Pierce *v.* Paine, 28 Vt. 34; Emery *v.* Smith, 46 N. H. 151; 1 Smith's Leading Cas. 145, Am. ed.; Browne on Frauds, §§ 289–90. That the writings may be helped out by collateral papers, see Beckwith *v.* Talbot, 95 U. S. 289.

[4] M'Kay *v.* Rutherford, 6 Moo. P. C. R. 413, 429.

[5] Knowlman *v.* Bluett, L. R. 9 Ex. 307. See Taylor's Ev. §§ 893, 900–2, 953–4; Souch *v.* Strawbridge, 2 Com. B. 814, per Tindal, C. J.; Barkley *v.* R. R. 71 N. Y. 205. See Re Pentreguinea Coal Co. 4 De Gex, F. & J. 541.

performance, however, is not of itself sufficient to take the case out of the statute; but whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be *completed* on either side within the year, written proof of the agreement must be given.[1] A part performance during the year will not be sufficient in such case.[2] Thus, where a servant is orally hired for a year's service, the service to begin at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year.[3] It should be added, that the mere fact that the contract may be determined by the parties within the year will not take the case out of the statute, if by its terms it purports to be an agreement which is not to be completely performed till after the expiration of that period.[4] It is otherwise if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which is probable, but which may or may not happen within the year;[5] or when the gist of the agreement is that either party may rescind the contract within a year.[6] But a

[1] Boydell *v.* Drummond, 11 East, 142, 156, 159; Reinheimer *v.* Carter, 31 Obio St. 579.

[2] Lockwood *v.* Barnes, 3 Hill, 128; Wilson *v.* Martin, 1 Den. 602; Day *v.* R. R. 31 Barb. 548.

[3] Bracegirdle *v.* Heald, 1 B. & A. 722; Snelling *v.* Huntingfield, 1 C., M. & R. 20; 4 Tyr. 606, *S. C.;* Giraud *v.* Richmond, 2 Com. B. 835. See Cawthorne *v.* Cordrey, 13 Com. B. N. S. 406; Banks *v.* Crossland, L. R. 10 Q. B. 97; Nones *v.* Homer, 2 Hilton, 116; Sheehy *v.* Adarene, 41 Vt. 541; Kelly *v.* Terrell, 26 Ga. 551; Shipley *v.* Patton, 21 Ind. 169.

[4] Birch *v.* Ld. Liverpool, 9 B. & C. 392, 395; 4 M. & R. 380, *S. C.;* Roberts *v.* Tucker, 3 Ex. R. 632; Dobson *v.* Collis, 1 H. & N. 81; Pentreguinea Coal Co. re, 4 De Gex, F. & J. 541; R. *v.* Herstmonceaux, 7 B. & C. 555, per Bailey, J.; Parks *v.* Francis, 50 Vt. 626.

[5] Taylor's Ev. § 947; Souch *v.* Strawbridge, 2 Com. B. 808; Ridley *v.* Ridley, 462, per Romilly, M. R.; 34 Beav. 478; Wells *v.* Horton, 4 Bing. 40; 12 Moore, 177, *S. C.;* Gilbert *v.* Sykes, 16 East, 154; Peter *v.* Compton, Skin. 353; 1 Smith L. C. 283, *S. C.;* Fenton *v.* Emblers, 3 Burr. 1278; 1 W. Bl. 353, *S. C.* See Mayor *v.* Payne, 3 Bing. 285; 11 Moore, 2 *S. C.;* Murphy *v.* Sullivan, 11 Ir. Jur. N. S. 111; Farrington *v.* Donohue, 1 I. R. C. L. 675; Linscott *v.* McIntire, 15 Me. 201; Kent *v.* Kent, 18 Pick. 569; Lapham *v.* Whipple, 8 Met. 59; Plimpton *v.* Curtis, 15 Wend. 336; Artcher *v.* Zeh, 5 Hill, 200; Blakeney *v.* Goode, 30 Ohio St. 350.

[6] Birch *v.* Liverpool, *ut supra;* McPherson *v.* Cox, 96 U. S. 404; Walker *v.* Johnson, 94 U. S. 424; Sherman *v.* Trans. Co. 31 Vt. 162; Somerby *v.* Buntin, 118 Mass. 279; Trustees *v.* Ins. Co. 19 N. Y. 305; Weir *v.* Hill, 2 Lans. 278; Argus Co. *v.* Albany, 7 Lansing, 264; 55 N. Y. 498; Kent *v.* Kent, 62 N. Y. 560; Harris *v.* Porter, 2 Harr. (Del.) 27; Southwell *v.* Bees-

party who refuses to go on with such an agreement, after deriving a benefit from part performance, must pay for what he has received.[1]

The statute has been held as applicable to contracts for the sale of lands.[2]

VII. WILLS.

Will must be executed in conformity with statute. English Will Act of 1838.

§ 884. It is beyond the compass of the present treatise to analyze the statutory provisions, adopted in the several states of the American Union, to regulate the execution and proof of wills. In several jurisdictions we find reproduced the English Will Act, which, in order to show how far we may avail ourselves in this relation of the English adjudications, it may be expedient here to give complete. By that statute,[3] the corresponding section of the statute of frauds is repealed; and it is enacted by section 9, that "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say); it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In carrying out the provisions of this enactment, many wills, just and regular in all other respects, were rendered inoperative for inadvertent non-compliance with the forms which it prescribes. To remedy this was passed the 15 & 16 Vict. c. 24, s. 1, which, after reciting section 9 of the previous act, enacts, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the

ley, 5 Oreg. 143; Frost *v.* Tarr, 53 Ind. 390.

[1] Day *v.* R. R. 51 N. Y. 583.

[2] Fall *v.* Hazelrigg, 45 Ind. 576; citing Boydell *v.* Drummond, 11 East, 142; Bracegirdle *v.* Heald, 1 B. & Ald. 723; Sobey *v.* Brisbee, 20 Iowa, 105; Young *v.* Dake, 1 Seld. 463; Wilson *v.* Martin, 1 Denio, 602. *Contra*, Browne on Statute of Frauds, § 272.

[3] 7 Will. 4 and 1 Vict. c. 26.

testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act, or this act, shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." Under this statute no other publication than that prescribed is necessary;[1] and a testamentary appointment is good, if in conformity with the act, though the instrument establishing it specifies additional solemnities.[2]

Provisions in this respect of the statute of frauds.

§ 885. The statute of frauds,[3] which we must revert to as the basis of testamentary legislation in the United States as well as in England, relates exclusively, in its original text, to devises disposing of freehold realty, while the will act, just noticed, embraces personal estate. Another important distinction is, that two attesting witnesses are sufficient and necessary by the will act in all cases, while the statute of frauds requires the signature of at least three to all

[1] Vincent *v.* Bp. of Soder & Man, 4 De Gex & Sm. 294.

[2] See as to this, Buckell *v.* Bleakhorn, 5 Hare, 131; Collard *v.* Simpson, 16 Beav. 543; *S. C.* 4 De Gex, M. & G. 224; West *v.* Ray, 1 Kay, 385.

[3] 29 Car. 2, c. 3, § 5.

devises of freehold realty, but is silent as to other wills. By the will act, also, the testator must make or acknowledge his signature in the *actual contemporaneous presence* of these witnesses, though this is not necessary under the statute of frauds. Once more, by the will act, the will must be signed "at the foot or end thereof," whereas, under the statute of frauds, the signature is valid, if it appears on any part of the instrument.[1]

Distinctive adjudications under statutes.

§ 886. Under the terms of the will act it has been ruled that both the attesting witnesses must subscribe the will at the same time, and in each other's presence. Hence, where a will was signed in the presence of a single witness who then attested it, the second witness signing only when the testator afterwards acknowledged his signature, this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not rewritten, his own signature.[2] The same conclusion has been reached where one of the witnesses to a will, on the occasion of its being reëxecuted in his presence, retraced his signature with a dry pen,[3] and where another witness, under similar circumstances, corrected an error in his name as previously written, and added the date.[4] Some act must be done on the face of the instrument to indicate a subscription.[5] So under a statute requiring two witnesess to a will, a will altered after one witness has signed is not duly proved.[6] As the word "presence," mentioned in the will act (as distinguished from the statute of frauds), means not only a bodily but a men-

[1] Much difficulty arose under this provision of the will act, which was obviated by an act passed in 1852, under the auspices of Lord St. Leonards, which provides that a signature is good which is at the end of a will, though there be an intervening space, or though attesting clauses intervene. See Taylor's Evidence, § 971.

[2] Taylor's Evidence, § 966, 7th ed. § 1052-3; Casement *v.* Fulton, 5 Moo. P. C. R. 139; Moore *v.* King, 3 Curt. 243; In re Simmonds, Ibid. 79; In re Allen, 2 Curt. 331; Slack *v.* Rusteed, 6 Ir. Eq. R. (N. S.) 1. But in Faulds *v.* Jackson, 6 Ec. & Mar. Cas. Supp. i.; and In re Webb, 1 Deane Ec. R. 1, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in Chodwick *v.* Palmer, held that the witnesses need not subscribe the will in the presence of each other. Under the statute of frauds this was clearly unnecessary. Jones *v.* Lake, 2 Atk. 177.

See, as to practice at common law, supra, § 739.

[3] Playne *v.* Scriven, 7 Ec. & Mar. Cas 122, per Sir H. Fust; 1 Roberts. 772, *S. C.* See Duffie *v.* Corridon, 40 Ga. 122.

[4] Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160.

[5] Guyon, in re, L. R. 3 P. & D. 92.

[6] Charles *v.* Huber, 78 Penn. St. 448.

tal presence, the act, so has it been held, will not be satisfied if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind or inattentive, at the time when the will is signed or acknowledged.[1] Under the New York statute, when witnesses to a will saw no act of signing it by the testator until after they had signed their own names to it, this was held not a sufficient attestation of the will.[2] And where the name of the testator (it not being proved by whom written) was entered in the middle of a sentence in the will, it appearing that he told the witnesses, before signing, that he had "drawed up" the paper, and he afterwards wrote his name in another form in another part of the instrument, this was held not a sufficient authentication of the previous signature.[3] Under the English Will Act, where the testator acknowledged a paper to be his will in the presence of witnesses, but these persons had neither seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature.[4] So far as concerns the signatures of the witnesses, it has been held that if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have seen them write.[5] On the other hand, where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate.[6] The witnesses, so has this distinction been explained, are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the pur-

[1] Hudson *v.* Parker, 1 Roberts. 24, per Dr Lushington.

[2] Sisters of Charity of St. Vincent de Paul *v.* Kelly. Opinion by Folger, J., 67 N. Y. 409.

[3] Ibid.

[4] Hudson *v.* Parker, 1 Roberts. 14, per Dr. Lushington. But see Smith *v.* Smith, 35 L. J. Pr. & Mat. 65; L. R. 1 P. & D. 143, *S. C.*

[5] Norton *v.* Barett, Deane Ec. R. 259.

[6] Newton *v.* Clarke, 2 Curt. 320. But see Tribe *v.* Tribe, 7 Ec. & Mar. Cas. 132; 1 Roberts. 775, *S. C.*; In re Kellick, 34 L. J. Pr. & Mat. 2; *S. C. nom.* In re Killick, 3 Swab. & Trist. 578. See Hayes *v.* West, 37 Ind. 21; and infra, § 939.

pose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.[1]

§ 887. Under the statute of frauds (in its original terms), it is not necessary for the witness to have seen the testator sign, if he acknowledges his signature, directly or inferentially, in their presence, and declares that the instrument is his will.[2] The testator need not be in the same room, if near enough to hear, or to see the will when signed by the witnesses, if he wish.[3]

§ 888. In making the acknowledgment,[4] it is not necessary that the testator should actually point out to the witness his name and say this is my name or my handwriting; but if he states that the whole instrument was written by himself,[5] or if he requests the witnesses to put their names *underneath his*,[6] or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,[7] or even, it seems, if he desires them to sign without stating that the paper is his will,[8] this will be a sufficient acknowledgment of his signature, provided it appears that the signature was affixed, and was seen by the witnesses when they signed at the testator's request. As the statute requires, not that the *will*, but that the *signature*, should be

[1] Hudson *v.* Parker, 1 Roberts. 35, 36, per Dr. Lushington; Colman, in re, 3 Curt. 118; Neil *v.* Neil, 1 Leigh, 6.

[2] See Redfield on Wills, 1, 218–220; and see, to same effect, Roberts *v.* Welch, 46 Vt. 164; Bagley *v.* Blackman, 2 Lans. 41; Smith *v.* Smith, 2 Lans. 266; Alpaugh's Will, 23 N. J. Eq. 507; Ela *v.* Edwards, 16 Gray, 91; Holloway *v.* Galloway, 51 Ill. 159. See Sprague *v.* Luther, 8 R. I. 252. For other rulings as to attesting witnesses, see supra, §§ 723–9.

[3] Right *v.* Price, Dougl. 241; McElfresh *v.* Guard, 32 Ind. 408; Rudden *v.* McDonald, 1 Bradf. 352; Moore *v.* Moore, 8 Grat. 307; Sturdivant *v.* Brichett, 10 Grat. 67; Brooks *v.* Duffield, 23 Ga. 441; 1 Redfield on Wills, 246.

[4] The acknowledgment *may* be made by a blind testator. In re Mullen, 5 I. R. Eq. 309.

[5] Blake *v.* Knight, 3 Curt. 563; In re Cornelius Ryan, 1 Curt. 908, recognized in Ilott *v.* Genge, 3 Curt. 174.

[6] Gaze *v.* Gaze, 3 Curt. 451.

[7] In re Davies, 2 Roberts. 377.

[8] Turner *v.* Cook, 36 Ind. 129; Keigwin *v.* Keigwin, 3 Curt. 607; In re Ashmore, Ibid. 758, per Sir H. Fust; In re Bosanquet, 2 Roberts. 577; In re Dinmore, Ibid. 641; In re Jones, Deane Ec. R. 3. See Faulds *v.* Jackson, 6 Ec. & Mar. Cas. Supp. x. per Ld. Brougham; and see, fully, Taylor's Evidence, §§ 967–9.

attested,[1] it follows that if the witnesses sign before the testator the will is void, though the testator immediately afterwards affixes his signature in their presence.[2] It is not, however, essential that positive affirmative evidence should be given by the subscribing witnesses that the testator either signed the will, or acknowledged his signature to it, in their presence, since the court may presume due execution under the circumstances.[3] The same presumption applies in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution.[4]

§ 889. Under the statute of frauds, which in this respect is not altered by the Will Act of 1838, the testator may have his hand guided by another person,[5] or he may sign by his mark only,[6] though his name does not

Testator may sign by a mark, or have

[1] Hudson *v.* Parker, 1 Roberts. 14; Ilott *v.* Genge, 3 Curt. 175, 181; Countess de Zichy Ferraris *v.* M. of Hertford, 3 Curt. 479; In re Summers, 7 Ec. & Mar. Cas. 562; 2 Roberts. 295, *S. C.;* In re Pearsons, 33 L. J. Pr. & Mat. 177; Fischer *v.* Popham, L. R. 3 P. & D. 246. The text is reduced from Taylor on Evidence, §§ 967 *et seq.;* Ibid. 7th ed. § 1055.

[2] In re Byrd, 3 Curt. 117; In re Olding, 2 Ibid. 865; Cooper *v.* Bockett, 3 Ibid. 648; 4 Moo. P. C. R. 419, *S. C.;* Burke *v.* Moore, Ir. R. 9 Eq. 609, and cases cited supra.

[3] See Doe *v.* Davies, 9 Q. B. 650, per Ld. Denman; Blake *v.* Knight, 3 Curt. 547, 562. See, also, Beckett *v.* Howe, 39 L. J. Pr. & Mat. 1; 2 L. R. P. & D. 1, *S. C.;* Olver *v.* Johns, 39 L. J. Pr. & Mat. 7; Kelly *v.* Keatinge, 5 I. R. Eq. 174: and see, as to presumption of regularity, infra, § 1313.

[4] Taylor's Evidence, § 970; Ibid. 7th ed. § 1056; supra, §§ 727, 737; Sandilands, in re, L. R. 6 C. P. 411; Burgoyne *v.* Showler, 1 Roberts. 5, per Dr. Lushington; Hitch *v.* Wells, 20 Beav. 84; In re Leach, 6 Ec. & Mar. Cas. 92, per Sir H. Fust; Leech *v.* Bates, 1 Roberts. 714; In re Rees, 34 L. J. Pr. & Mat. 56; Brenchley *v.* Still, 2 Roberts. 162, 175–177; Thomson *v.* Hall, 2 Ibid. 426; In re Holgate, 1 Swab. & Trist. 261; Lloyd *v.* Roberts, 12 Moo. P. C. R. 158; Foot *v.* Stanton, Deane, Ec. R. 19; Reeves *v.* Lindsay, 3 I. R. Eq. 509; Vinnicombe *v.* Butler, 3 Swab. & Trist. 580; Smith *v.* Smith, L. R. 1 P. & D. 143. See Croft *v.* Croft, 4 Swab. & Trist. 10; and Wright *v.* Rogers, L. R. 1 P. & D. 678; In re Thomas, 1 Swab. & Trist. 255, per Sir C. Cresswell; Gwillim *v.* Gwillim, 3 Swab. & Trist. 200; Trott *v.* Skidmore, 2 Swab. & Trist. 12; In re Huckvale, 36 L. J. Pr. & Mat. 84; 1 L. R. P. & D. 375, *S. C.;* Neely *v.* Neely, 17 Penn. St. 227. But see Pearson *v.* Pearson, 40 L. J. Pr. & Mat. 53.

[5] Wilson *v.* Beddard, 12 Sim. 28.

[6] Baker *v.* Dening, 8 A. & E. 94; 3 N. & P. 228, *S. C.* See, to same effect, Palmer *v.* Stephens, 1 Denio, 471; supra, § 696. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; Ibid.; and no proof is required that the will was read over to him. Clarke *v.*

his hand guided; and witnesses may sign by initials and without additions.

appear, or though a wrong name does by mistake appear,[1] in the body of the will;[2] and the attesting witnesses, whether they can write or not, may also sign as marksmen;[3] and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.[4] It has even been held sufficient for witnesses to subscribe the will by their initials.[5] Under the statute of frauds, as well as by the will act, it has been held sufficient if any person, even though he be one of the two attesting witnesses, write,[6] or even stamp,[7] the testator's signature by his direction.[8] The *witnesses*, however, must attest the will, either by their own signatures or their marks.[9] In what way they are to sign, under the will act, has been already noticed.[10]

§ 890. A will, as is the case with other documents under the

Clarke, 2 I. R. C. L. 395. Sealing a will is not a sufficient signing. Smith *v.* Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. Sen. 459. As to proof of mark generally, see supra, § 696. So as to text, Taylor, § 974.

[1] In re Douce, 2 Swab. & Trist. 593; In re Clarke, 1 Swab. & Trist. 22.

[2] In re Bryce, 2 Curt. 325.

[3] In re Amiss, 2 Roberts. 116. But an attesting witness cannot subscribe a will in another person's name. Pryor *v.* Pryor, 29 L. J. Pr. & Mat. 114.

[4] Harrison *v.* Elvin, 3 Q. B. 117; In re Lewis, 31 L. J. Pr. & Mat. 153; In re Frith, 1 Swab. & Trist. 8; Lewis *v.* Lewis, 2 Swab. & Trist. 153; Roberts *v.* Phillips, 4 E. & B. 450.

[5] Taylor, § 974 (7th ed. § 1060); In re Christian, 7 Ec. & Mar. Cas. 265, per Sir H. Fust; 2 Roberts. 110, *S. C.* See In re Trevanion, 2 Roberts. 311; Charlton *v.* Hindmarsh, 1 Swab. & Trist. 433; *S. C.* 28 L. J. Pr. & Mat. 132; *S. C.* at Nisi Prius, 1 Fost. & Fin. 540; *S. C. nom.* Hindmarsh *v.* Charlton, 8 H. of L. Cas. 160. See, too, In re Sperling, 33 L. J. Pr. & Mat. 25, where a witness, instead of signing his name, wrote "servant to M. S.," and this was held sufficient. 3 Swab. & Trist. 272, *S. C.*

A signature, however, was held insufficient, where an infirm witness, beginning to write his name, wrote "Sam'l," and then stopped. Maddock, in re, L. R. 2 P. & D. 169.

But a mere subscription of name will satisfy the statute, though there be no memorandum to indicate that the parties subscribing signed as witnesses. Bryan *v.* White, 2 Roberts. 315; Griffiths *v.* Griffiths, L. R. 2 P. & D. 306.

[6] Smith *v.* Harris, 1 Roberts. 272; In re Bailey, 1 Curt. 914.

[7] Jenkins *v.* Gaisford, 32 L. J. Pr. & Mat. 122; 3 Swab. & Trist. 93, *S. C.* See Bennett *v.* Brumfitt, 37 L. J. C. P. 25; 2 Law Rep. C. P. 28, *S. C.*

[8] It has been even held sufficient where the scrivener, at the testator's request to sign for him, signed his own name instead of the testator's. In re Clark, 2 Curt. 329. See, also, In re Blair, 6 Ec. & Mar. Cas. 528.

[9] In re Cope, 2 Roberts. 335; In re Duggins, 39 L. J. Pr. & Mat. 24; Taylor, 7th ed. § 1054.

[10] Supra, § 886.

statute of frauds, when imperfect in itself, may, by clear reference to it as an existing document,[1] be so identified with an instrument validly executed as to form part of it; and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.[2] Hence unattested wills and codicils have been confirmed by subsequent attested codicils.[3] Parol evidence may be received to explain irregularities as to attestation.[4]

Imperfect will may be completed by reference to existing document.

§ 891. To set forth the statutes and adjudications of the several United States, in relation to the revocation of wills, belongs more properly to treatises on wills. As bearing, however, upon the general question of statutory limitations of proof, it may be proper here to notice the provisions of the statute of frauds in respect to testamentary revocations, together with the leading rulings under that statute both in England and in the United States. By the statute of frauds (as amended by the English Will Act of 1838), "No will shall be revoked by any presumption of an in-

Revocation cannot ordinarily be proved by parol.

[1] Dickinson *v.* Stidolph, 11 Com. B. N. S. 341; Van Straubenzee *v.* Monck, 3 Swab. & Trist. 6; In re Greves, 1 Swab. & Trist. 250; Allen *v.* Maddock, 11 Moo. P. C. R. 427; In re Almosnino, 1 Swab. & Trist. 508; In re Brewis, 3 Swab. & Trist. 473; In re Luke, 34 L. J. Pr. & Mat. 105; In re Lady Truro, 35 L. J. Pr. & Mat. 89; L. Rep. 1 P. & D. 201, *S. C.;* In re Sunderland, 35 L. J. Pr. & Mat. 82; Law Rep. P. & D. 198, *S. C.;* In re Watkins, 35 L. J. Pr. & Mat. 14; Law Rep. 1 P. & D. 19, *S. C.;* In re Dallow, 35 L. J. Pr. & Mat. 81; Law Rep. 1 P. & D. 189, *S. C.;* Taylor, §§ 975, 1083; and as to cases of such incorporation, see supra, § 872.

[2] Countess de Zichy Ferraris *v.* M. of Hertford, 3 Curt. 493, per Sir H. Fust; In re Lady Durham, Ibid. 57; In re Dickins, Ibid. 60; In re Willerford, Ibid. 77; Habergham *v.* Vincent, 2 Ves. 204; In re Edwards, 6 Ec. & Mar. Cas. 306; In re Ash, Deane Ec. R. 181; In re Lady Pembroke, Ibid. 182; In re Stewart, 3 Swab. & Trist. 192; 4 Swab. & Trist. 211; Wikoff's App. 15 Penn. St. 281.

The testator's declarations are admissible on the question whether a documentary instrument is duplicate or distinct. Hubbard *v.* Hubbard (Ch. Div. 1876.), 24 W. R. 1058.

[3] Aaron *v.* Aaron, 3 De Gex & Sm. 475; Utterton *v.* Robins, 1 A. & E. 423; Gordon *v.* Ld. Reay, 5 Sim. 274; Doe *v.* Evans, 1 C. & M. 42; 3 Tyr. 56, *S. C.;* Allen *v.* Maddock, 11 Moo. P. C. R. 427. See In re Allnutt, 33 L. J. Pr. & Mat. 86; also Burton *v.* Newbery, L. R. 1 Ch. D. 234; Anderson *v.* Anderson, L. R. 13 Eq. 381. See supra, § 872.

[4] Devecmon *v.* Devecmon, 43 Md. 335.

tention, on the ground of an alteration in circumstances;" and "No will, or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (by marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same,[1] and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." By the statute of frauds, revocation is to be exclusively proved by a subsequent inconsistent will or codicil, or by a written revocation in the presence of three witnesses, or by burning, tearing, cancelling, or obliterating by the testator, or in his presence, and by his direction and consent. We may therefore cite the rulings under the will act, so far as concerns a common subject matter of interpretation, in connection with the rulings under the statute of frauds.[2]

Revocation by subsequent will.

§ 892. No revocation clause is needed to revoke a former will by a later one. Hence a will duly executed, by which the testator disposes of his *whole* property, revokes all previous wills. A revocation has been held to be worked by a paper containing no appointment of executors,[3] even where such paper had to be proved by parol.[4] It must, however, be kept in mind, as a fundamental principle, that a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together.[5]

[1] See De Pontès *v.* Kendall, 31 L. J. Ch. 185, per Romilly, M. R. See Hicks, re, 65; 1 Law Rep. P. & D. 683, *S. C.;* Fraser, re, 2 Law Rep. P. & D. 40; Durance, in re, L. R. 2 P. & D. 406.

[2] Taylor, § 981, citing In re Cunningham, 4 Swab. & Trist. 194.

[3] Henfrey *v.* Henfrey, 4 Moo. P. C. R. 29; 2 Curt. 468, *S. C.*, in court below. See, as sustaining a revocation by a subsequent will only partially inconsistent, Plenty *v.* West, 1 Roberts. 264; *S. C.* in Ch. before Romilly, M. R. 22 L. J. Ch. 185.

[4] Havard *v.* Davis, 2 Binn. 406. But otherwise as to land under Act of 1833. Clark *v.* Morrison, 25 Penn. St. 453; Jones *v.* Murphy, 8 Watts & S. 275; Day *v.* Day, 2 Green Ch. (N. J.) 549; Legare *v.* Ashe, 1 Bay, 464.

[5] Taylor's Evidence, § 981; Stoddart *v.* Grant, 1 Macq. Sc. Cas. H. of L. 163. See In re Graham, 3 Swab. & Trist. 69; Lemage *v.* Goodban, 1 Law Rep. P. & D. 57; In re Fenwick, 1 Law Rep. P. & D. 319; Dempsey *v.* Lawson, L. R. 2 P. D. 98; Geaves *v.* Price, 3 Swab. & Trist. 71; Birks *v.* Birks, 4 Swab. & Trist. 23.

§ 893. When the contention is that the testator directed his will to be destroyed by another, it is essential to the admissibility of proof of destruction, under the statute, that it should be of a destruction in the testator's presence; and it follows, therefore, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.[1]

Proof inadmissible to show destruction out of testator's presence.

§ 894. Revocation will not be complete unless the act of spoliation be deliberately effected on the document, *animo revocandi*.[2] This is expressly rendered necessary by the will act,[3] and is impliedly required by the statute of frauds.[4] It is further clear, that the burden of showing that a once valid will has been revoked by mutilation will lie upon the party who undertakes to prove the revocation.[5]

To revocation intention is requisite, and burden is on contestant.

§ 895. Declarations of the testator, accompanying the act of spoliation (though not such as are subsequently made),[6] will be admissible to explain his intent.[7]

Contemporaneous declarations admissible.

§ 896. In a leading case under the statute of frauds, the testator, having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, when a by-stander saved it without his knowledge, before, as it seems, it was at all burnt, the court held the revocation was complete.[8] But where a testator, being angry with the

Testator's act must go to indicate finality of intention.

[1] Stockwell *v.* Ritherdon, 6 Ec. & Mar. Cas. 409, 414, per Sir H. Fust.

[2] See In re Cockayne, Deane Ec. R. 177; Clark *v.* Smith, 34 Barb. 140; Griswold, ex parte, 15 Abb. Pr. 299.

[3] Taylor's Evid. § 980.

[4] Bibb *v.* Thomas, 2 W. Bl. 1044.

[5] Harris *v.* Berrall, 1 Swab. & Trist. 153; Benson *v.* Benson, Law Rep. 2 P. & D. 172. See Spoonemore *v.* Cables, 66 Mo. 579.

[6] Staines *v.* Stewart, 2 Swab. & Trist. 320; Jackson *v.* Kniffen, 2 Johns. 31; Waterman *v.* Whitney, 1 Kern. 157; Forman's Will, 54 Barb. 274; Kirkpatrick, in re, 22 N. J. Eq. 463; Boudinot *v.* Bradford, 2 Yeates, 170; Smith *v.* Dolby, 4 Harring. 350; Dawson *v.* Smith, 3 Houst. 335; Devecmon *v.* Devecmon, 43 Md. 335; Beaumont *v.* Keim, 50 Mo. 28. See, however, Card *v.* Grinman, 5 Conn. 164; Wolf *v.* Bollinger, 62 Ill. 368; White *v.* Casten, 1 Jones L. (N. C.) 197; Youse *v.* Forman, 5 Bush, 337; Rodgers *v.* Rodgers, 6 Heisk. 489. Infra, § 899.

[7] Clarke *v.* Scripps, 2 Roberts. 568; Richards *v.* Mumford, 2 Phillimore, 23; Card *v.* Grinman, 5 Conn. 164.

[8] Bibb *v.* Thomas, 2 W. Bl. 1043. See Doe *v.* Harris, 6 A. & E. 215, for

devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together, and put by the several pieces, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found that the act of cancellation was incomplete, as the testator, had it been otherwise, would have gone further in the process of destruction.[1] The *cutting* out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same."[2] The erasure by the testator of his own signature, or that of the witnesses, has the same effect, if shown to have been done *animo revocandi*.[3] Even the act of tearing off the *seal* from a will, which had needlessly been executed as a sealed instrument, has been deemed a revocation.[4] Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, held, in the absence of any extrinsic evidence, that the instrument was not revoked.[5]

So of cancellation and of obliteration.

§ 897. The will act omits the term cancellation in its enumeration of the modes of destroying wills,[6] but under the statute, as well as at common law, any effective, intentional cancellation by the testator, destroys the efficiency of a will. Under the statute if a testator intentionally obliterate a part of the will, this revokes such part,[7] and such

questioning comments by Ld. Denman. And see Card *v.* Grinman, 5 Conn. 164; White *v.* Casten, 1 Jones L. 197; Pryor *v.* Coggin, 17 Ga. 444; Mundy *v.* Mundy, 15 N. J. Eq. 290.

[1] Doe *v.* Perkes, 3 B. & A. 489. See Elms *v.* Elms, 1 Swab. & Trist. 155; Youse *v.* Forman, 5 Bush, 337. Infra, § 900.

[2] Hobbs *v.* Knight, 1 Curt. 768.

[3] Hobbs *v.* Knight, 1 Curt. 780; Evans *v.* Dallow, 31 L. J. P. & M. 128; Harris, in re, 13 Sw. & Tr. 485.

[4] Price *v.* Powell, 3 H. & N. 341; *S. C. nom.* Price *v.* Price, 27 L. J. Ex. 409. See, also, Williams *v.* Tyley, 1 V. John. 530; In re Harris, 33 L. J. Pr. & Mat. 181; 3 Swab. & Trist. 485, *S. C.*

[5] Clarke *v.* Scripps, 2 Roberts. 563, per Sir J. Dodson; In re Woodward, 2 Law Rep. P. & D. 206; 40 L. J. Pr. & Mat. 17, *S. C.*

[6] Taylor, § 984. See In re Brewster, 29 L. J. Pr. & Mat. 69.

[7] See supra, § 630; Townley *v.* Watson, 3 Curt. 761, 764, 768, 769; 3 Ec. & Mar. Cas. 17, *S. C.*; McCabe, in re, P. R. 3 P. & D. 94.

The statute of Massachusetts provides that "no will shall be revoked unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it by the testator,

obliteration may be by pasting a piece of paper over the portion of the will the testator intended to revoke; in which case probate may be granted of the will with the covered part in blank. If, however, the legatee's name was untouched, and only the amount of the legacy was covered, the court would consider the case to be one of a dependent relative revocation, and remove the upper part in order to discover the amount originally bequeathed.[1] It has been already seen, that in the absence of any direct evidence the law will presume that any alteration or erasure in a will was made after its execution.[2]

§ 898. Under the will act, as well as under the statute of frauds, the *animus revocandi* is indispensable. Hence, where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, the court decreed probate of the will in its original form, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.[3]

§ 899. When doubt exists as to whether a will which is not to be found was destroyed, it is admissible to introduce declarations of the testator to show that the destruction was intended by him.[4] So such evidence has been received to show that a will, produced as a testator's last will, had been fraudulently secreted by parties

Parol evidence admissible to show that the destruction of will was intentional,

&c., or by some other will, codicil, or writing," duly executed. In Bigelow *v.* Gillott, 123 Mass. 102, where the testator, after making his will, drew ink lines across all the words in several clauses, with the intention of revoking those clauses, this was ruled to be a valid revocation of those clauses but not of the whole will. Interlineations made after execution and attestation have, however, been held inoperative, under similar statutes, without reëxecution. Wolf *v.* Ballenger, 62 Ill. 368; Penniman's Will, 20 Minn. 245. See Quinn *v.* Quinn, 1 T. & C. 437; and see supra, § 630.

[1] Hobbs *v.* Knight, 1 Curt. 780; Horsford, in re, L. R. 3 P. & D. 211.

[2] Supra, § 630; Cooper *v.* Bockett, 4 Moo. P. C. R. 419; 4 Ec. & Mar. Cas. 685, *S. C.;* Greville *v.* Tylee, 7 Moo. P. C. R. 320.

[3] Brooke *v.* Kent, 3 Moo. P. C. R. 334, 349, 350; Burtenshaw *v.* Gilbert, 1 Cowp. 52, per Ld. Mansfield; Onions *v.* Tyrer, 1 P. Wms. 343; In re Cockayne, Deane Ec. R. 177; In re Parr, 29 L. J. Pr. & Mat. 70; In re Harris, Ibid. 79; 1 Swab. & Trist. 536, *S. C.*, In re Middleton, 34 L. J. Pr. & Mat. 16; 3 Swab. & Trist. 583, *S. C.* See Taylor's Ev. § 985. Rawlins *v.* Rickards, 28 Beav. 370; Ibbott *v.* Bell, 34 Beav. 395; Quinn *v.* Butler, 6 Law Rep. Eq. 225.

[4] Laxley *v.* Jackson, 3 Phillips Ec. 128; Richards *v.* Mumford, 2 Phillimore, 23; Dan *v.* Brown, 4 Cow. 490.

or that its destruction was believed by testator.

interested, after he had believed it to have been destroyed.[1] But ordinarily a will, proved to have once existed, but not found at the testator's death, is presumed to have been destroyed by him.[2]

Parol evidence admissible to explain cancellation.

§ 900. The cancellation of a will does not necessarily involve its revocation. "The cancelling itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. A will, therefore, cancelled through accident or mistake, is not revoked."[3] It has accordingly been held that parol evidence is admissible to show that the tearing of a will in pieces by a testator was not meant by him as a revocation.[4] Even where a testator, under the false impression that his will was invalid, tore it up, but afterwards collected the pieces, and placed them among his valuable papers, it was held, that as the tearing was not done with the intention of revoking a valid will, the will, as thus restored, was to be admitted to probate.[5] So when a testator was shown to have torn a will to pieces in an attack of *delirium tremens*, evidence was admitted to show that he afterwards declared that the will was torn when he was mad; and the will was consequently admitted to probate.[6] To the same general effect is a ruling of Appleton, C. J., Kent, Barrows, and

[1] Card *v.* Grinman, 5 Conn. 164. See Bill *v.* Thomas, 2 W. Bl. 1043.

[2] Newell *v.* Homer, 120 Mass. 277; citing Davis *v.* Sigourney, 8 Met. 487; Brown *v.* Brown, 8 E. & B. 876; Eekersly *v.* Platt, L. R. 1 P. & D. 281; Finch *v.* Finch. L. R. 1 P. & D. 371; S. P., Betts *v.* Brown, 6 Wend. 173; Bulkley *v.* Redmond, 2 Brad. Sur. 281.

[3] Nichol, J., in Thynne *v.* Stanhope, 1 Addams, 52; citing Lord Mansfield, in Burtenshaw *v.* Gilbert, Cowp. 52.

[4] Doe *v.* Perkes, 3 B. & A. 489; Colberg, in re, 2 Curteis, 832; Clarke *v.* Scripps, 2 Roberts. Ecc. R. 563; *S. C.* 22 Eng. L. & Eq. 627; Elms *v.* Elms, 1 Sw. & Tr. 155; Benson *v.* Bensoo, 2 Prob. & D. 172; Giles *v.* Warren, 2 Prob. & D. 401; Wolf *v.* Bollinger, 62 Ill. 368; Beaumont *v.* Keim, 50 Mo. 28; Dawson *v.* Smith, 3 Houst. (Del.) 335. See Swinton *v.* Bailey, L. R. 1 Ex. D. 110 (1876). So a destruction under duress will be void. Batton *v.* Watson, 13 Ga. 63.

[5] Giles *v.* Warren, 2 Prob. & D. 401 (1872). And a copy of a first will has been admitted to probate when it was destroyed by a testator under the erroneous impression that he had substituted for it another valid will. Scott *v.* Scott, 1 Sw. & Tr. 258; Clarkson *v.* Clarkson; 2 Sw. & Tr. 497; Daneer *v.* Crabb, L. R. 3 P. & D. 98. See Weston, in re, L. R. 1 P. & D. 633.

[6] Brunt *v.* Brunt, 3 Prob. & D. 37 (1873). See Sprigge *v.* Sprigge, 1 Prob. & D. 608; Forman's Will, 54 Barb. 274; *S. C.* 1 Tuck. N. Y. 205; Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564.

Tapley, JJ., in Maine, in 1870, as against Cutting, Walton, Dickerson, and Danforth, JJ., that where a will made in 1854, and presented for probate soon after the testator's death in 1863, appeared to have been torn in fragments and then pasted together, parol evidence was admissible to show that the pasting together was done by himself for the purpose of establishing the will as his own.[1] So the declarations of a testator have been admitted to show that the mutilation of a will was not by his act; or was recalled by him.[2] But the proof of the intent to restore and finally to adopt the will must be clear.[3] So far as concerns the revival of a will already solemnly and effectively revoked, proof of reëxecution is now necessary in England by the will act.[4]

VIII. EQUITABLE MODIFICATIONS OF STATUTE.

§ 901. As we shall hereafter have occasion to see more fully, while parol evidence is admissible to clear ambiguities in written contracts, so as to explain what they really are, it cannot be received, as between the parties to such contracts, to vary their terms.[5] The rule is common to all jurisprudences, nor is it in any sense extended by the statute of frauds. That statute does not, on the one hand, preclude the admission of parol evidence to explain the meaning of a doubtful document; and, indeed, until we know what a writing is, there is nothing on which the statute can operate. On the other hand, the statute adds nothing to the common law rule directing the exclusion of evidence varying the

Parol evidence not admissible to vary written contract under statute.

[1] Colagan *v.* Burns, 57 Me. 449. As against the admissibility of the evidence were cited Shailer *v.* Bumstead, 99 Mass. 112; Comstock *v.* Hadlyme, 8 Conn. 254; Waterman *v.* Whitney, 11 N. Y. 157; Durant *v.* Ashmore, 2 Richards. 184.

[2] Whiteley *v.* King, 17 C. B. N. S. 756; 10 Jur. N. S. 1079; Bulkley *v.* Redmond, 2 Brad. Sur. 284; Smock *v.* Smock, 3 Stockt. 157; Youndt *v.* Youndt, 3 Grant (Penn.), 140; Lawyer *v.* Smith, 8 Mich. 412; Steele *v.* Price, 5 B. Mon. 58; Tynan *v.* Paschal, 27 Tex. 286, and cases cited supra, § 896.

[3] Usticke *v.* Rawden, 2 Add. 125; James *v.* Cohen, 3 Curt. 782; Bell *v.* Fothergill, L. R. 2 Pr. & Div. 148; White, in re, 25 N. J. Eq. 501; Havard *v.* Davis, 2 Binn. 406; Jones *v.* Hartley, 2 Whart. 103; Wallace *v.* Blair, 1 Grant (Penn.), 75.

[4] Taylor's Ev. § 986; citing Harker, in re, 7 Ec. & Mar. Cas. 44; Roberts *v.* Roberts, 2 Sw. & Tr. 337; Rogers *v.* Goodenough, 2 Sw. & Tr. 342; Steel & May, in re, L. R. 1 P. & D. 575; Noble *v.* Phelps, L. R. 2 P. & D. 276.

[5] Infra, §§ 920 *et seq.*

contents of written instruments. At the same time, while the rule is not derived from the statute, the statute gives an additional reason why the rule should be honestly enforced. To vary by parol the terms of a document may often be a fraud on the parties. To empty a document, sheltered by the statute, of its substance, and to insert other conditions not sanctioned by the law, would always be a fraud on the state. Hence it is that the courts, in all cases in which the relations of the statute to parol evidence have come up, have united in holding that when a contract has been executed in conformity with the statute, such contract cannot be varied, as to its substance, by parol.[1] Where, for instance, a written contract contains a series of conditions, some in conformity with the statute, and others not, an oral agreement to vary the latter in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been sustained on mere oral proof.[2] Where a master, to take another English illustration, contracted by letter to pay his clerk a *yearly* salary, and the contract was necessarily in writing, being one which would

[1] Noble *v.* Ward, 35 L. J. Ex. 81; L. R. 1 Ex. 117; and 4 H. & C. 149, *S. C.;* 36 L. J. Ex. 91, *S. C.* in Ex. Ch.; L. R. 2 Ex. 135, *S. C.;* Evans *v.* Roe, L. R. 7 C. P. 138; Boydell *v.* Drummond, 11 East, 142; *S. C.* 2 Camp. 163; Cox *v.* Middleton, 2 Drew. 209; Caddick *v.* Skedmore, 2 De Gex & J. 56; Ridgway *v.* Wharton, 3 De Gex, M. & G. 677; Chinnock *v.* Ely, 2 Hem. & M. 220; Fitzmaurice *v.* Bayley, 8 E. & B. 664; Clarke *v.* Fuller, 16 C. B. N. S. 24; Dolling *v.* Evans, 36 L. J. Ch. 474; Nesham *v.* Selby, L. R. 13 Eq. 191; Miles *v.* Roberts, 34 N. H. 245; Lang *v.* Henry, 54 N. H. 57; Dana *v.* Hancock, 30 Vt. 616; Cummings *v.* Arnold, 3 Met. (Mass.) 486; Morton *v.* Deane, 13 Met. (Mass.) 385; Ryan *v.* Hall, 13 Met. (Mass.) 520; Lerned *v.* Wannemacher, 9 Allen, 418; Whittier *v.* Dana, 10 Allen, 326; Riley *v.* Farnsworth, 116 Mass. 223; Abeel *v.* Radcliff, 13 Johns. 297; Blood *v.* Goodrich, 9 Wendell, 68; Thayer *v.* Rock, 13 Wend. 53; Northrup *v.* Jackson, 13 Wend. 85; Coles *v.* Bowne, 10 Paige, 526; Dow *v.* Way, 64 Barb. 255; Dung *v.* Parker, 52 N. Y. 494 (reversing *S. C.* 3 Daly, 89); Baltzen *v.* Nicolay, 53 N. Y. 467; Reed *v.* Manley, 66 N. Y. 82, overruling *S. C.* 2 Hun, 492 (and sustaining Benton *v.* Pratt, 2 Wend. 385); O'Donnell *v.* Brehen, 36 N. J. L. 267; Musselman *v.* Stoner, 31 Penn. St. 265; Com. *v.* Kreager, 78 Penn. St. 477; Robinson *v.* McNeill, 51 Ill. 225; Frank *v.* Miller, 38 Md. 450; Lecroy *v.* Wiggins, 31 Ala. 13; McGuire *v.* Stevens, 42 Miss. 724; Delventhal *v.* Jones, 53 Mo. 460; Johnson *v.* Kellogg, 7 Heisk. 262.

[2] Harvey *v.* Grabham, 5 A. & E. 61, 74; 6 N. & M. 164.

not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous or a subsequent oral agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made.[1] And in the leading case on this topic, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the court held that, in an action for the purchase money, the vendor was not at liberty to show an oral waiver by the purchaser of his right to a good title as to one lot.[2] The parties may be identified by parol;[3] the property described may be so explained;[4] other ambiguities may be cleared by parol;[5] dates may be fixed by parol;[6] plans or schedules may be attached to the contract by parol;[7] the relations of the parties may be explained by parol;[8] ordinary formal incidents may be attached;[9] the time of execution may be extended;[10] but parol proof cannot be received to alter the terms of which the contract consists.

§ 902. It is here that we strike at the distinctive effect, already incidentally noticed, of the statute of frauds, in this particular relation. Aside from the statute, one

Parol contract cannot be sub-

[1] Giraud *v.* Richmond, 4 C. B. 835. See, also, Evans *v.* Roe, L. R. 7 C. P. 138.

[2] Goss *v.* Nugent, 5 B. & Ad. 58; 2 N. & M. 28.

[3] See cases cited § 949; and see Slater *v.* Smith, 117 Mass. 96.

[4] Infra, § 942. Thus parol evidence was received to explain the words "a house in Church Street." Meed *v.* Parker, 115 Mass. 413.

[5] See fully § 937; and see Waldron *v.* Jacob, Irish R. 5 Eq. 131, where parol evidence was admitted to show the meaning of the words "this place."

[6] See infra, § 977; and see, also, Edmunds *v.* Downs, 2 C. & M. 457; Hartley *v.* Wharton, 11 A. & E. 934; Lobb *v.* Stanley, 5 Q. B. 574.

[7] Horsfall *v.* Hodges, 2 Coop. 114.

[8] Infra, §§ 949–955; Salmon Falls Co. *v.* Goddard, 14 How. 446; Peabody *v.* Speyers, 56 N. Y. 230; and see Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.; though see Grant *v.* Naylor, 4 Cranch, 224.

[9] Barry *v.* Coombe, 1 Peters, 650.

[10] Infra, § 1026. Stearns *v.* Hall, 9 Cush. 31; Stone *v.* Sprague, 20 Barb. 509. In England, however, it has been held inadmissible to vary the contract orally by substituting another day of performance. Stowell *v.* Robinson, 3 Bing. N. C. 928; Marshall *v.* Lynn, 6 M. & W. 109; Stead *v.* Dawber, 10 A. & E. 57; 2 P. & D. 447, *S. C.*; overruling Cuff *v.* Pen, 1 M. & Sel. 21; Warren *v.* Stagg, cited in Littler *v.* Holland, 3 T. R. 591, and Thresh *v.* Rake, 1 Esp. 53. See Ogle *v.* Ld. Vane, L. R. 2 Q. B. 275; 7 B. & S. 855, *C. S.*; aff'd in Ex. Ch.; L. R. 3 Q. B. 272.

stituted for written, under statute.

parol agreement can be substituted for another by consent, and parol is admissible to prove such substitution.[1] When, however, a statute says, "Such a contract shall be executed in a particular way, or it shall not have force," then it is a fraud on the state, as well as a possible fraud upon the parties, to use the form of a contract so sanctioned to cover an agreement the statute prohibits. Hence it has been held, under the statute, that no action can be sustained on a case in which the plaintiff declares specifically on an alleged parol variation of a written agreement.[2] It is not necessary, indeed, that all the details of a contract should be written; and many matters of indifference may be supplied by parol. But ordinarily, if a stipulation is important enough to the parties to be put in writing, it is important enough to be brought under the operation of the rule announced.[3] It has also been held that where a defendant is shown to have orally agreed to do two or more things, one of which is without and the other of which is within the statute of frauds, the plaintiff cannot recover upon the whole engagement, if his declaration has been framed on the whole, on the hypothesis of the several conditions embraced in the agreement being inter-dependent.[4] It should at the same time be kept in mind, that were the conditions independent and severable, then the fact that one is by the statute put out of court does not preclude suit from being brought on the other.[5] The same conclu-

[1] See infra, § 1017.

[2] Goss *v.* Nugent, 2 Nev. & M. 33; 5 B. & A. 65; Harvey *v.* Grabham, 5 Ad. & E. 61; Stead *v.* Dawber, 10 Ad. & E. 57; Marshall *v.* Lynn, 6 M. & W. 109; Noble *v.* Ward, L. R. 1 Exch. 117; Ogle *v.* Lord Vane, L. R. 3 Q. B. 272; Dana *v.* Hancock, 30 Vt. 618; Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cush. 35; Whittier *v.* Dana, 10 Allen, 326; Blood *v.* Goodrich, 9 Wend. 68; Bryan *v.* Hunt, 4 Sneed, 543. Cuff *v.* Penn, 1 Maule & S. 21, is virtually overruled by subsequent English cases.

[3] See observations of Parke, B., in Marshall *v.* Lynn, 6 M. & W. 109. As giving a looser view, see Stewart *v.* Eddowes, L. R. 9 C. P. 311.

[4] Browne on Frauds, § 420; Cooke, *v.* Tombs, 2 Anst. 420; Biddell *v.* Leeder, 1 B. & C. 327; Thomas *v.* Williams, 10 B. & C. 664; Wood *v.* Benson, 12 Cro. & J. 94; Mechelen *v.* Wallace, 7 A. & E. 49; Vaughan *v.* Hancock, 3 M., Gr. & S. 766; Irvine *v.* Stone, 6 Cush. 508; Rand *v.* Mather, 11 Cush. 1; Crawford *v.* Morrell, 8 Johns. 253; Duncan *v.* Blair, 5 Denio, 196; Dock *v.* Hart, 7 Watts & S. 172; Alexander *v.* Ghiselin, 5 Gill, 138; Noyes *v.* Humphreys, 11 Grat. 636.

[5] Mayfield *v.* Wadsly, 3 B. & C.

sion results where one of the conditions is severed from the other by being part performed.[1]

§ 903. Hereafter it will be more fully seen that it is competent to prove by parol that a conveyance, on its face absolute, is virtually in trust either for the grantor or for a third party;[2] that a resulting trust can be so proved;[3] and that a conveyance in fee simple is really but a mortgage.[4] It may be here added that it is now conceded that such a trust may be decreed in the teeth of a sworn answer of the trustee denying the trust.[5] On the other hand, parol evidence is admissible to repel the implication of a trust from letters and other written proof.[6] Even putting aside the position that the statute of frauds is not to be used to perpetrate fraud, the statute expressly excludes from its effect terms of this class.[7]

Conveyance may be shown by parol to be in trust or in mortgage.

In Pennsylvania, it should be added, prior to 1856, parol express trusts were valid.[8] The rule[9] is the same in North Carolina, Virginia, Texas, and was so in Mississippi prior to the Revised Code. In Pennsylvania, since 1856, parol express trusts are invalid.[10] Trusts *ex maleficio* and implied trusts are not within the Act of 1856.[11]

357; Wood *v.* Benson, 2 Tyrw. 93; Pierce *v.* Woodward, 6 Pick. 206; Mobile Ins. Co. *v.* McMillan, 31 Ala. 720.

[1] Page *v.* Monks, 5 Gray, 492; Trowbridge *v.* Wetherbee, 11 Allen, 364; Hess *v.* Fox, 10 Wend. 436; Dock *v.* Hart, 7 Watts & S. 172.

[2] Infra, §§ 1033-1035.

[3] Infra, § 1035.

[4] Infra, §§ 1031, 1034.

[5] Baker *v.* Vining, 30 Me. 121; Page *v.* Page, 8 N. H. 187; Boyd *v.* McLean, 1 Johns. Ch. 582; Faringer *v.* Ramsay, 2 Md. 365; Larkins *v.* Rhodes, 5 Port. 195.

[6] Steere *v.* Steere, 5 Johns. Ch. 1.

[7] See authorities infra, § 1034; Norton *v.* Mallory, 63 N. Y. 434.

[8] Murphy *v.* Hubert, 7 Penn. St. 420; Freeman *v.* Freeman, 2 Pars. Eq. 85; Williard *v.* Williard, 56 Penn. St. 124. See, however, Wither's Appeal, 14 S. & R. 185, and Meason *v.* Kaine, 63 Penn. St. 339.

[9] See Reed's Cases on Statute of Frauds.

[10] Barnet *v.* Dougherty, 32 Penn. St. 371.

[11] Church *v.* Ruland, 64 Penn. St. 442. As to the construction of the 6th section of Act of 22d April, 1856, limiting the time in which trusts implied, &c., can be asserted, see Clark *v.* Trindle, 52 Penn. St. 495; Best *v.* Campbell, 62 Penn. St. 478; Williard *v.* Williard, supra; Church *v.* Ruland, supra.

Equitable mortgages, by deposit of title deeds, have never been countenanced in Pennsylvania. Rickert *v.* Madeira, 1 Rawle, 325; Shitz *v.* Dieffenbach, 3 Penn. St. 233; Bowers *v.* Oyster, 3 Penn. Rep. (P. & W.) 239.

§ 904. It does not follow that because no action can be specifically maintained, under the statute of frauds, on a written contract materially amended by parol, a party who has performed, or is in readiness to perform his part of the amended contract, is without his remedy. He cannot sue upon the amended contract, because, on such contract, under the statute of frauds, no action can be maintained. But he may make out such a case in equity as will induce a chancellor to grant relief on the terms hereafter stated.[1] Or where the opposing party sues at common law on the original contract, he may be met by proof to the effect that the parties had agreed between themselves by parol that the contract should be executed in a particular way, and that it had either been so executed, or that the defendant was ready to execute it.[2] If, on the other hand, in case of the aggrieved party in such case bringing suit, the defendant should set up performance according to the terms of the written contract, then the converse of the rule applies, and the plaintiff is at liberty to prove that by parol the parties had agreed to a new mode of performance with which the defendant had not complied; the plaintiff also averring that he was ready to have performed the written contract according to its terms, but that this was dispensed with by the oral agreement.[3] So it may in like manner be proved that damages for non-performance were waived or remitted.[4]

Performance, or readiness to perform a contract as amended, may be proved by way of accord and satisfaction.

§ 905. We will hereafter examine at large the circumstances under which equity will order a contract to be reformed so as to express the true understanding of the parties.[5]

Contract may be reformed on

[1] See supra for other cases, § 856; and see, particularly, infra, §§ 1019, 1033. See Weir *v.* Hill, 3 Lans. 278; Ingles *v.* Patterson, 36 Wis. 373.

[2] Cummings *v.* Arnold, 3 Met. 489; Lerned *v.* Wannemacher, 9 Allen, 418; Whittier *v.* Dana, 10 Allen, 326; Thomas *v.* Wright, 9 S. & R. 87; Hughes *v.* Davis, 40 Cal. 117. See, however, Stowell *v.* Robinson, 1 Bing. N. R. 928; 5 Scott, 196, and criticism on that case in Browne on Frauds, § 428. See, also, infra, § 1033.

[3] Infra, § 909; Thresh *v.* Rake, 1 Esp. 53. See Browne on Frauds, § 425; citing, also, Warren *v.* Stagg, 3 T. R. 591; Emerson *v.* Slater, 22 How. 42; Miles *v.* Roberts, 34 N. H. 245; and see Benj. on Sales, 151.

[4] Infra, § 909; Jones *v.* Barkley, 2 Doug. 684; Clement *v.* Durgin, 5 Greenl. 9; Fleming *v.* Gilbert, 3 Johns. R. 530; Dearborn *v.* Cross, 7 Cow. 50.

[5] Infra, § 1019. See, also, McLennan *v.* Johnston, 60 Ill. 306.

At present it is sufficient to say that when the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the terms sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defence.[1]

above conditions.

§ 906. We shall have hereafter occasion to cite numerous authorities to establish a principle so familiar that it would appear to be a truism, viz., that parties can before performance, by consent, rescind that which they had consented to perform.[2] The real difficulties in cases of this class are when particular solemnities are required to constitute a binding contract. When the parties have bound themselves by such solemnities to such a contract, can they without such solemnities unbind themselves? Does the rescinding of a contract require the same guards and formalities as are necessary to constitute the contract? No doubt we have high authority to the effect that it does, and that to loose parties from a contract the statutory solemnities are as necessary as to bind them to such contract.[3] Yet it must always have been felt to be grossly inequitable to permit one party to enforce a contract which both parties have agreed, for a good consideration, though only by parol, to rescind and vacate; and hence it was at an early period held that a parol discharge could be set up, in equity, to defeat a bill for the specific execution of a written contract.[4] Strong proof, indeed, of waiver was expected; but when strong proof was given, then the contract would be decreed to be waived. Whoever asks equity to aid him cannot recover, if it be shown, even though he make out a paper title, that he has no equitable grounds for relief.[5] Subsequently it was held by the Court of

Waiver and discharge of contract under statute can be proved by parol.

[1] Glass *v.* Hulbert, 102 Mass. 31; Kidd *v.* Carson, 33 Md. 37; Billingslea *v.* Ward, 33 Md. 48. See Brightman *v.* Hicks, 108 Mass. 246. And see infra, § 1148.

[2] See infra, § 1017.

[3] See Bell *v.* Howard, 9 Mod. 302.

[4] Bell *v.* Howard, 9 Mod. 302; Buckhouse *v.* Crosly; 2 Eq. Cas. Abr. 32.

[5] Sugd. V. & P. 173.

Queen's Bench,[1] that the same rule will be applied in courts of law. The statute of frauds, so it was argued by the court, does not say that all contracts shall be in writing, but only that no action shall be brought on a contract of a particular class unless it be in writing. As the statute does not require that the dissolution of contracts of this class should be in writing, such dissolution may be proved so as to defeat an action on the contract.[2]

[1] Goss *v.* Nugent, 5 B. & Ad. 65; 2 Nev. & M. 34. See Price *v.* Dyer, 17 Ves. 356. Boulter, in re, 25 W. R. 101.

[2] The topic in the text will be noticed more fully in succeeding sections, in which will be found copious citations of American cases, in many of which it will be found that equity doctrines have been adopted under common law forms. See infra, §§ 1017–30.

In Goss *v.* Nugent, 5 B. & Ad. 58, where the point arose, although it was not necessary to decide it, Lord Denman, in commenting on the 3d section of the statute of frauds, said: "As there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing." Afterwards, however, he appears to have doubted the accuracy of his earlier opinion; Harvey *v.* Grabham, 5 A. & E. 74; and in a case still later, in the Common Pleas, Tindal, C. J., showed a disposition to adopt, to its full extent, the reasoning of Lord Hardwicke. Stowell *v.* Robinson, 3 Bing. N. C. 937. It must be remembered that Lord Denman himself is reported to have further qualified his opinion expressed in Goss *v.* Nugent. In Stead *v.* Dawber, 10 A. & E. 57, the case last referred to, the action was on a contract for the sale of goods within the 17th section of the statute of frauds, and the plaintiff declared on a written agreement, by which the goods were to be delivered on a day certain, and then went on to aver an oral agreement that the delivery should be postponed to a later day, and breach the non-delivery on such later day. The defendant pleaded the want of a written agreement; and the point for the court was, whether the oral agreement was to be regarded as a variation of the written agreement, or as the introduction of an immaterial term. The court gave judgment for the defendant, on the ground that time was of the essence of the contract, and therefore could not be varied by parol; but it seems also to have been understood that neither could the original contract have been waived by parol. Lord Denman said: "Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreement; and in contemplation of law, such a contract so altered subsists between these parties; *but the statute intervenes, and, in the case of such a contract, takes away the remedy by action.*" This case has been cited with approbation by Parke, B., Marshall *v.* Lynn, 6 M. & W. 109. The Court of Exchequer Chamber afterwards held that a subsequent oral agreement cannot be "allowed to be good," within the 17th section, for any purpose whatever. Noble *v.* Ward, L. R. 1 Ex.

Or, as the reason is elsewhere given, such waiver may be proved, even in a court of law, for the reason that he who prevents the performance of a contract cannot afterwards require the contract to be performed. To this effect we have numerous American adjudications.[1] Hence it has been held, that a parol contract for rescission of a written sale of land, when the purchase money has not been paid, will be sustained, when possession has not been transferred finally to the vendee.[2]

§ 907. Courts of equity, no doubt, will give relief in cases of fraud; but fraud, to entitle such relief to be given, must be something more than that involved in setting up the statute as a defence to a suit upon a parol agreement which the statute requires to be in writing. For a party to put in such a defence, however dishonorable it may be, cannot be such a fraud, in cases of unexecuted agreements, that equity can be called upon to interfere to sweep away the defence. Such interference would be the abrogation of a statute which is not only binding, but on the main wise and beneficial.[3]

Equity will relieve in cases of fraud, but not when the fraud consists simply in pleading the statute.

§ 908. What has been said applies to cases where a party

117; 4 H. & C. 149; cf. Moore *v.* Campbell, 10 Exch. 233. Powell's Evidence, 4th ed. 402. See Musselman *v.* Stoner, 31 Penn. St. 265. As concurring with Goss *v.* Nugent, see Greenleaf Ev. § 302; 2 Phill. Ev. 363 (Am. ed.). As dissenting, Sugden, V. & P. 171.

Sir J. Stephen, Ev. 159 (1876), after noticing Goss *v.* Nugent, adds: "It seems the better opinion, that a verbal rescission of a contract, good under the statute of frauds, would be good." To this he cites Noble *v.* Ward, L. R. 2 Ex. 135; Pollock on Contracts, 411, note 6. He reminds us, however, as a solution of the apparent inconsistencies in the rulings, that "a contract by deed can only be released by deed."

[1] Marshall *v.* Baker, 19 Me. 402; Medomac Bk. *v.* Curtis, 24 Me. 36. See Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. H. 196; Marrahan *v.* Noyes, 52 N. H. 232; Flanders *v.* Fay, 40 Vt. 316; Cummings *v.* Arnold, 3 Met. (Mass.) 494; Bissell *v.* Barry, 115 Mass. 300; Cutter *v.* Cochrane, 116 Mass. 408; Connelly *v.* Devoe, 37 Conn. 570; Fleming *v.* Gilbert, 3 Johns. R. 531; Parker *v.* Syracuse, 31 N. Y. 376; Murray *v.* Harway, 56 N. Y. 337; Murphy *v.* Dunning, 30 Wis. 296; Bailey *v.* Smock, 61 Mo. 213; Paris *v.* Haley, 61 Mo. 453; Johnston *v.* Worthy, 17 Ga. 420; Browne on Frauds, § 436.

[2] Arrington *v.* Porter, 47 Ala. 714.

[3] See Montacute *v.* Maxwell, 1 P. Wms. 618; *S. C.* 1 Stra. 618; Whitridge *v.* Parkhurst, 20 Md. 62; Schmidt *v.* Gatewood, 2 Rich. Eq. 162; Browne on Frauds, § 439; Bispham's Eq. § 386; Story's Eq. § 768.

makes a contract in parol, and then sets up the statute as a defence to a suit to compel the execution of the contract. Suppose, however, that A., designing to defraud B., should induce B. to enter into an oral contract, of the class covered by the statute, and then, after B. has performed his part of the contract, that A., to a suit to compel the performance of his part of the contract, should set up the statute. In such a case a Court of Equity, if appealed to, would refuse to become a party to the enforcement of the fraud. And if A. should, by a parol collateral agreement, fraudulently induce B. to execute a written contract, a chancellor would compel A. to perform his parol collateral agreement, though of the class contemplated by the statute.[1]

But equity will relieve where statute is used to perpetrate fraud.

§ 909. *A fortiori* is this the case where B., on the faith of the parol agreement, has done, in performance of the same, certain acts which can only be made good by the performance of the contract on the part of A.[2] In Massa-

So in cases of part performance.

[1] See Maxwell's case, 1 Bro. C. C. 408; Babcock *v.* Wyman, 19 How. 289; Walker *v.* Walker, 2 Atk. 99; Cookes *v.* Mascall, 2 Vern. 200; Hunt *v.* Roberts, 40 Me. 187; Buel *v.* Miller, 4 N. H. 196; Crocker *v.* Higgins, 7 Conn. 242; Hodges *v.* Howard, 5 R. I. 149; McBurney *v.* Wellman, 42 Barb. 390; Frazer *v.* Child, 4 E. D. Smith, 153; Arnold *v.* Cord, 16 Ind. 177; Coyle *v.* Davis, 20 Wis. 504; Cousins *v.* Wall, 3 Jones Eq. (N. C.) 43; Cameron *v.* Ward, 8 Ga. 245; Jones *v.* McDougal, 32 Miss. 179; Hidden *v.* Jordan, 21 Cal. 92; Browne on Frauds, § 447.

[2] Savage *v.* Foster, 9 Mod. 37; Kine *v.* Balfe, 2 Ball & B. 314; Dale *v.* Hamilton, 5 Hare, 369; Morphett *v.* Jones, 1 Swanst. 172; Clinan *v.* Locke, 1 Sch. & Lef. 22; Nunn *v.* Fabian, L. R. 1 Ch. App. 35; Caton *v.* Caton, L. R. 1 Ch. App. 137; Purcell *v.* Miner, 4 Wall. 513; Newton *v.* Swazey, 8 N. H. 9; Adams *v.* Fullam, 43 Vt. 592; Annan *v.* Merritt, 13 Conn. 478; Parkhurst *v.* Van Cortland, 14 Johns. 15; Cagger *v.* Lansing, 43 N. Y. 550; Freeman *v.* Freeman, 43 N. Y. 34; Burdick *v.* Johnson, 14 N. Y. Sup. Ct. 488; Eyre *v.* Eyre, 4 C. E. Green N. J. 102; Allen's Est. 1 Watts & S. 383; Moore *v.* Small, 19 Penn. St. 461; Greenlee *v.* Greenlee, 22 Penn. St. 225; Moss *v.* Culver, 64 Penn. St. 414; Sackett *v.* Spencer, 65 Penn. St. 89; Milliken *v.* Dravo, 67 Penn. St. 230; Hart *v.* Carroll, 85 Penn. St. 508; Hamilton *v.* Jones, 3 Gill & J. 127; Gough *v.* Crane, 3 Md. Ch. 119; Anthony *v.* Leftwich, 3 Rand. 255; Wright *v.* Puckett, 22 Grat. 374; Thayer *v.* Luce, 22 Ohio St. 62; Wheeler *v.* Frankenthal, 78 Ill. 124 (in equity); Thayer *v.* Reeder, 45 Iowa, 272; Printup *v.* Mitchell, 17 Ga. 558; Ford *v.* Finney, 35 Ga. 358; Rawson *v.* Bell, 46 Ga. 19; Rosser *v.* Harris, 48 Ga. 512; Wimberly *v.* Bryan, 55 Ga. 198; Parke *v.* Leewright, 20 Mo. 85; Tatum *v.* Brooker, 51 Mo. 148; Ottenhouse *v.* Burleson, 11 Tex. 87; Arguello *v.* Edinger, 10 Cal. 150; Hoff-

chusetts, however, this exception is not admitted,[1] nor is it in North Carolina,[2] Mississippi,[3] Tennessee,[4] or Maine.[5] In those states in which the exception is recognized, the parol agreement to be sustained must be definite; the proof must be strong, the acts claimed to be part performance must refer to and result from the agreement, and the performance must also be of such a character that execution on the other side would be the only mode by which the complainant could be put right.[6] Going into possession of land under a parol contract, and making *bonâ fide* permanent improvements, have been held to be part performance in this sense.[7] Even possession taken, as an incident

man *v.* Felt, 39 Cal. 109; Reedy *v.* Smith, 42 Cal. 245.

[1] Jacobs *v.* R. R. 8 Cush. 224; Parker *v.* Parker, 1 Gray, 409.

[2] Albea *v.* Griffin, 2 Dev. & Bat. Eq. 9.

[3] Beaman *v.* Buck, 9 Sm. & M. 210.

[4] Ridley *v.* McNairy, 2 Humph. 174.

[5] Stearns *v.* Hubbard, 8 Greenl. 320.

Before the recent judicature statutes, the only relaxations of the statute which English judges at common law would allow were, first, if a parol agreement respecting lands had been *entirely executed by both parties*, the contract could not afterwards be called in question, should it be necessary to refer to it for any collateral purpose; Griffith *v.* Young, 12 East, 513; Seaman *v.* Price, 2 Bing. 437; 10 Moore, 38, *S. C.;* Green *v.* Saddington, 7 E. & B. 503; see Hodgson *v.* Johnson, E., B. & E. 685, 689, per Ld. Campbell; and, next, if it had been *executed by one party*, and the transaction were of such a nature as to admit of an action for use and occupation, or in *indebitatus assumpsit*, the other party, it was intimated, would not be permitted to defeat his action by setting up the statute. See Lavery *v.* Turley, 6 H. & N. 239; Savage *v.* Canning, 1 I. R. C. L. 434, per C. P.; Ld. Bolton *v.* Tomlin, 5 A. & E. 856; 1 N. & P. 247, *S. C.;* Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 C. B. 283. This, under the old practice, was the limit to which the courts of common law could go. Under the new English practice, enabling equitable defences to be pleaded in common law courts, we have as yet no adjudications. But in the United States there are few jurisdictions in which the more liberal practice is not adopted by the common law courts. See fully infra, §§ 1019 *et seq.*

[6] See 1 Sugd. V. & P. 8th Am. ed. 226; Lacon *v.* Mertins, 3 Atk. 3; Phillips *v.* Thompson, 1 Johns. Ch. 131; Lester *v.* Kinne, 37 Conn. 9; Cole *v.* Potts, 2 Stockt. N. J. 67; Robertson *v.* Robertson, 9 Watts, 32; Frye *v.* Shepler, 7 Barr, 91; Shellhammer *v.* Asbaugh, 83 Penn. St. 24; Hart *v.* Carroll, 85 Penn. St. 508; Wright *v.* Puckett, 22 Grat. 374; Worth *v.* Worth, 84 Ill. 462; Langston *v.* Bates, 84 Ill. 524; Colgrave *v.* Solomon, 34 Mich. 494; Long *v.* Duncan, 10 Kans. 294.

[7] Savage *v.* Carroll, 1 Ball & B. 119; Sutherland *v.* Briggs, 1 Hare Ch. 27; Dowell *v.* Dew, 1 Yo. & Col. 345; Wilton *v.* Harwood, 23 Me. 133; Miller *v.* Tobie, 41 N. H. 84; Davenport *v.* Mason, 15 Mass. 92; Peckham *v.* Barker, 8 Rh. I. 17; Adams *v.* Rockwell, 16 Wend. 285; Freeman *v.*

of a *bonâ fide* removal, so as to commit the party to the new residence, has, when in direct performance of the contract, been deemed enough.[1] Such possession, it should be remembered, must be actual, not merely technical and constructive;[2] must be exclusive;[3] must be subsequent to the agreement;[4] must be with the vendor's knowledge and consent, and not surreptitious or adverse;[5] must be permanent,[6] and must be of a character the loss of which could not be compensated for in damages.[7]

Freeman, 43 N. Y. 34; Richmond *v.* Foote, 3 Lans. 244; Lobdell *v.* Lobdell, 36 N. Y. 327; Casler *v.* Thompson, 3 Green Ch. 59; Wack *v.* Sorber, 2 Whart. 387; Gangwer *v.* Fry, 17 Penn. St. 491; Van Loon *v.* Davenport, 2 Weekly Notes, 320; Perkins *v.* Hadsell, 50 Ill. 216; Laird *v.* Allen, 82 Ill. 43; Smith *v.* Smith, 1 Rich. Eq. 130; Cummings *v.* Gill, 6 Ala. 562; Byrd *v.* Odem, 9 Ala. 755; Ridley *v.* McNairy, 2 Humph. 174.

[1] Butcher *v.* Staply, 1 Vern. 363; Lacon *v.* Mertins, 3 Atk. 3; Eaton *v.* Whitaker, 18 Conn. 229; Smith *v.* Underdunck, 1 Sandf. Ch. 579; Harris *v.* Knickerbocker, 5 Wend. 638; Brown *v.* Jones, 46 Barb. 400; Morrill *v.* Cooper, 65 Barb. 512; Pugh *v.* Good, 3 Watts & S. 56; Moale *v.* Buchanan, 11 Gill & J. 314; Harris *v.* Crenshaw, 3 Rand. 14; Anderson *v.* Chick, 1 Bailey Ch. 118; Palmer *v.* Richardson, 3 Strobh. Eq. 16; Brock *v.* Cook, 3 Porter, 464.

[2] Brawdy *v.* Brawdy, 7 Barr, 157; Moore *v.* Small, 19 Penn. St. 461; Bush *v.* Oil Co. 1 Weekly Notes, 320; Com. *v.* Kreager, 78 Penn. St. 477.

[3] Frye *v.* Shepler, 7 Barr, 91.

[4] Gregory *v.* Mighell, 18 Ves. 328; Eckert *v.* Eckert, 3 Penn. R. 332; Atkins *v.* Young, 12 Penn. St. 24; Blakeslee *v.* Blakeslee, 22 Penn. St. 237; Christy *v.* Barnhart, 14 Penn. St. 260; Reynolds *v.* Hewett, 27 Penn. St. 176; Myers *v.* Byerly, 45 Penn. St. 368; Haines *v.* Haines, 6 Md. 435; Mahana *v.* Blunt, 20 Iowa, 142; Anderson *v.* Simpson, 21 Iowa, 399.

[5] Gregory *v.* Mighell, 18 Ves. 328; Purcell *v.* Miner, 4 Wall. 513; Goucher *v.* Martin, 9 Watts, 106; Gratz *v.* Gratz, 4 Rawle, 411; Johnston *v.* Glancy, 4 Blackf. 94; Thomson *v.* Scott, 1 McCord Ch. 32.

[6] Rankin *v.* Simpson, 19 Penn. St. 471; Dougan *v.* Blocher, 24 Penn. St. 28.

[7] "The rule is well settled, that to take a parol contract for the sale of land out of the operation of the statute of frauds and perjuries, the contract must be distinctly proved; the land must be clearly designated, and open, notorious, and exclusive possession must be taken and maintained under and in pursuance of the contract. Moore *v.* Small, 7 Harr. 469; Frye *v.* Shepler, 7 Barr, 91; Hill *v.* Meyers, 7 Wright, 172. Every parol contract is within the statute of frauds, except where there has been such part performance as cannot be compensated in damages. Moore *v.* Small, 7 Harris, 469. If the circumstances of the case are not such as to render reasonable compensation for what has been paid or done impossible, then compensation, instead of execution of the contract, is the duty which the law will enforce. Postlethwait *v.* Frease, 7 Casey, 472. A court of equity enforces such a contract only where it has been so far executed that it would be unjust to rescind it. No matter how clear the

And "the evidence must define the boundaries and indicate the quantity of the land."[1]

§ 910. Mere payment of purchase money, however, is not sufficient part performance to compel the execution of such a parol contract;[2] unless the condition of the vendee is such that he could not be restored to his former situation by resort to a suit for repayment.[3] Nor, as we have seen,[4] is marriage considered to be such part performance of a parol marriage settlement as will make such settlement operative.[5] It is also to be remembered that the exception of part

But payment of purchase money is not enough.

proof of such contract may be, specific performance thereof will not be decreed where adequate compensation may be made in damages. McKowen *v.* McDonald, 7 Wright, 441. These principles are too familiar to need illustration.

"Whether the evidence is sufficient to take such a contract out of the operation of the statute is a question of law for the court. Irwin *v.* Irwin, 10 C. 525." Woodward, J., Overmyer *v.* Koerner, 2 Weekly Notes, 6.

The sufficiency of possession taken of land under a contract, to be of itself such part performance as to take the contract out of the statute of frauds, has been frequently asserted in Pennsylvania. See Ackerman *v.* Fisher, 57 Penn. St. 457, and other cases cited supra. See, also, as somewhat tempering the positiveness of this doctrine, Farley *v.* Stokes, 1 Pars. Eq. Cases, 422; Bassler *v.* Niesly, 2 S. & R. 352; Workman *v.* Guthrie, 29 Penn. St. 495; Van Loon *v.* Davenport, 2 Weekly Notes, 320.

[1] Woodward, J., Hart *v.* Carroll, 85 Penn. St. 510.

[2] Buckmaster *v.* Harrop, 7 Ves. 341; Clinan *v.* Cooke, 1 Sch. & L. 40; Hughes *v.* Morris, 2 De G., M. & G. 356; Purcell *v.* Miner, 4 Wall. 513; Kidder *v.* Barr, 39 N. H. 235; Glass *v.* Hulbert, 102 Mass. 21; Cogger *v.* Lansing, 43 N. Y. 550; Eaton *v.* Whitaker, 18 Conn. 222; Cole *v.* Potts, 2 Stockt. 67; McKee *v.* Phillips, 9 Watts, 85; Parker *v.* Wells, 6 Whart. 153; Allen's Est. 1 Watts & S. 283; Gangwer *v.* Fry, 17 Penn. St. 491; Townsend *v.* Houston, 1 Har. (Del.) 532; Letcher *v.* Crosby, 2 A. K. Marsh. 106; Lefferson *v.* Dallas, 20 Ohio St. 74; Parke *v.* Leewright, 20 Mo. 85; Johnston *v.* Glancy, 4 Blackf. 94; Mather *v.* Scoles, 35 Ind. 5; Mialhi *v.* Lassabe, 4 Ala. 712; Hunt *v.* McClellan, 41 Ala. 451; Church *v.* Farrow, 7 Rich. Eq. 378; Hyde *v.* Cooper, 13 So. Car. Eq. 250; Wood *v.* Jones, 35 Tex. 64. See, *aliter*, Fairbrother *v.* Shaw, 4 Iowa, 570; Johnston *v.* Glancy, 4 Blackf. 94.

[3] Bispham's Eq. § 385; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Malins *v.* Brown, 4 Comst. 403; Johnson *v.* Hubbell, 2 Stockt. 332; Dugan *v.* Gittings, 3 Gill, 138; Everts *v.* Agnes, 4 Wis. 343; Morrill *v.* Cooper, 65 Barb. 512. See Lacon *v.* Mertins, 3 Atk. 4; Hales *v.* Bercham, 3 Vern. 618; Main *v.* Melborn, 4 Ves. 724; Jones *v.* Peterman, 3 S. & R. 543; Frieze *v.* Glenn, 2 Md. Ch. 361.

[4] Supra, § 882.

[5] Montacute *v.* Maxwell, 1 P. Wms. 618; Dundas *v.* Dutens, 1 Ves. Jun. 196; 2 Cox, 235; Caton *v.* Caton, L. R. 1 Ch. App. 147; Hammersly *v.* De Biel, 12 Cl. & F. 65; Finch *v.* Finch, 10 Ohio St. 501; Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

performance, as a ground for taking a parol contract out of the statute, is cognizable in equity only on ground of the fraud that would be perpetrated if specific redress were not given, and is not technically cognizable in law, though cognizable in those systems of jurisprudence which permit equitable remedies to be administered under common law forms.[1]

Where written contract in conformity with statute is prevented by fraud, equity will relieve.

§ 911. Parol evidence is also admissible to prove that the party aggrieved was ready to execute a written instrument in conformity with the statute, but was prevented by the fraud of the other party; and in such case, a parol contract, the formal execution of which was thus prevented, will be enforced.[2]

When parol contract is admitted in answer, it may be equitably enforced.

§ 912. Where a parol contract, in a suit for its specific performance, is admitted by the defendant, and the defence of the statute is waived by him, the parol contract is held to be taken out of the statute, and may be enforced by a chancellor, or a court administering equity remedies.[3] The same effect has been assigned to a *pro confesso* decree.[4] But against strangers and creditors coming in to resist a decree for specific execution, even such an admission and refusal to set up the statutes cannot take a parol agreement out of the statute.[5]

Whether title to lands can be transferred by estoppel under the statute is hereafter discussed.[6]

[1] O'Herlihy *v.* Hedges, 1 Sch. & L. 123; Kelley *v.* Webster, 12 C. B. 383; Lane *v.* Shackford, 5 N. H. 132; Pike *v.* Morey, 32 Vt. 37; Norton *v.* Preston, 15 Me. 16; Adams *v.* Townsend, 1 Met. (Mass.) 485; Eaton *v.* Whitaker, 18 Conn. 231; Jackson *v.* Pierce, 2 Johns. R. 223; Abbott *v.* Draper, 4 Denio, 52; Wentworth *v.* Buhler, 3 E. D. Smith, 305; Walter *v.* Walter, 1 Whart. 292; Henderson *v.* Hays, 2 Watts & S. 148; Hunt *v.* Coe, 15 Iowa, 197; Johnson *v.* Hanson, 6 Ala. 351; Davis *v.* Moore, 9 Rich. S. C. 215.

[2] See Story's Eq. Juris. § 768; Bispham's Eq. § 386; Montacute *v.* Maxwell, 1 P. Wms. 618.

[3] Smith's Manual of Eq. 252; Browne's Frauds, § 476; Gunter *v.* Halsey, Ambl. 586; Whitechurch *v.* Bevis. 2 Browne Ch. 566; Atty. Gen. *v.* Sitwell, 1 Yo. & Col. 583; Harris *v.* Knickerbocker, 5 Wend. 638; Artz *v.* Grove, 21 Md. 456; Argenbright *v.* Campbell, 3 Hen. & Mun. 144; Ellis *v.* Ellis, 1 Dev. Eq. 341; Hollingshead *v.* McKenzie, 8 Ga. 467; McGowen *v.* West, 7 Mo. 569.

[4] Newton *v.* Swazey, 8 N. H. 9; Whiting *v.* Goult, 2 Wis. 552; Esmay *v.* Groton, 18 Ill. 483.

[5] Winn *v.* Albert, 2 Md. Ch. 169; Albert *v.* Winn, 2 Md. 66.

[6] Infra, § 1148.

APTER XII.

DOCUMENTS MODIFIED BY PAROL.

I. General Rules.

Parol evidence not admissible to vary documents as between parties, § 920.

New ingredients cannot be thus added, § 921.

Auctioneers' memoranda, § 922.

Dispositive documents may be varied by parol as to strangers, § 923.

Whole document must be taken together, § 924.

Distinction between "primary" and "technical" untenable, § 924.

Written entries are of more weight than printed, § 925.

Informal memoranda are excepted from rule, § 926.

Parol evidence admissible to show that document was not executed, or was only conditional, § 927.

And so to show that it was conditioned on a non-performed contingency, § 928.

But plain conditions cannot be varied except on proof of fraudulent imposition, § 929.

Want of due delivery, or delivery as an escrow, may be proved by parol, § 930.

Fraud or duress in execution may be shown by parol, and so of insanity, § 931.

But complainant must have a strong case, § 932.

So as to concurrent mistake, § 933.

But not mistake of one party, § 934.

So of illegality, § 935.

Between parties, intent cannot be proved to affect written meaning, § 936.

Otherwise as to ambiguous terms, § 937.

Declarations of intent need not have been contemporaneous, § 938.

Evidence admissible to bring out true meaning, § 939.

For this purpose extrinsic circumstances may be shown, § 940.

Acts admissible for the same purpose, § 941.

Ambiguous descriptions of property may be explained, § 942.

General designation of property may be thus particularized, § 943.

Parol evidence admissible to distinguish objects, § 944.

Erroneous particulars may be rejected as surplusage, § 945.

Ambiguity as to objects may be so explained, § 946.

Ambiguous measurements and numbers may be thus explained, § 947.

Parol evidence admissible to prove "dollar" means Confederate dollar, § 948.

Parol evidence admissible to identify parties, § 949.

To enable undisclosed principal to sue or be sued, he may be proved by parol, § 950.

But person signing as principal cannot set up that he was agent, § 951.

Suretyship on writing may be shown by parol, § 952.

Other cases of distinction and identification, § 953.

Evidence of writer's use of language admissible to solve ambiguities, § 954.

Party may be examined as to intent or understanding, § 955.

Patent ambiguities cannot be explained by parol, § 956.

"Patent" is "subjective," and "latent" "objective," § 957.

Usage cannot be proved to vary dispositive writings, § 958.
Parties may override usage by consent, § 959.
Proof of submission to a conflicting usage is inadmissible, § 960.
Otherwise in case of ambiguities, § 961.
Usage is to be brought home to the party to whom it is imputed, § 962.
When usage is that of a class, party must be proved to belong to the class, § 963.
Usage may be proved by one witness, § 964.
Usage is to be proved to the jury, and must be reasonable and not conflicting with *lex fori*, § 965.
When no proof exists of usage, meaning is for court, § 966.
Power of agent may be construed by usage, § 967.
Usage received to explain broker's memoranda, § 968.
Customary incidents may be annexed to contract, § 969.
But not when conflicting with writing, § 970.
Course of business admissible in ambiguous cases, § 971.
Opinion of expert inadmissible as to construction of document; but otherwise to decipher and interpret, § 972.
Parol evidence admissible to rebut an equity, § 973.
And so to rebut a rebuttable presumption, § 974.
Opinion of witnesses as to libel admissible, § 975.
Dates not necessarily part of document, § 976.
Dates presumed to be true, but may be varied by parol, § 977.
Exception to this rule, § 978,
Time may be inferred from circumstances, § 979.

II. Special Rules as to Records, Statutes, and Charters.
Records cannot be varied by parol, § 980.
And so of statutes and charters, § 980 *a*.
Otherwise as to acknowledgment of sheriffs' deeds, § 981.
Record imports verity, § 982.
But on application to court, record may be corrected by parol, § 983.
For relief, petition should be specific, § 984.
Fraudulent record may be collaterally impeached, § 985.
When silent or ambiguous, record may be explained by parol, § 986.
Town records subject to same rules, § 987.
Former judgment may be shown to relate to a particular case, § 988.
Nature of cause of action may be proved, § 989.
So of hour of legal procedure, § 990.
So of collateral incidents of records, § 991.

III. Special Rules as to Wills.
Wills cannot be varied by parol. Intent must be drawn from writing, § 992.
Proof of intent inadmissible to explain patent ambiguities, § 993.
Evidence inadmissible to modify obvious meaning as to devisee, § 994.
And so are declarations qualifying terms, § 995.
When primary meaning is inapplicable to any ascertainable object evidence of secondary meaning is admissible, § 996.
When terms are applicable to several objects, evidence admissible to distinguish, § 997.
In ambiguities, all the surroundings, family, and habits of the testator may be proved, § 998.
All the extrinsic facts are to be considered, § 999.
When description is only partly applicable to each of several objects, then declarations of intent are inadmissible, § 1001.
Evidence admissible as to other ambiguities, § 1002.
Abbreviations may be explained, § 1003.
Testater's own writings admissible among extrinsic facts, § 1003.
Erroneous surplusage may be rejected, § 1004.
Otherwise as to words of limitation or description, § 1005.

Patent ambiguities cannot be resolved by parol, § 1006.
Ademption of legacy may be proved by parol, § 1007.
Parol proof of mistake of testator inadmissible, § 1008.
Fraud and undue influence may be so proved, § 1009.
Testator's declarations primarily inadmissible to prove fraud or compulsion, § 1010.
But admissible to prove mental condition, § 1011.
Parol evidence inadmissible to sustain will when attacked, § 1012.
Probate of will only *primâ facie* proof, § 1013.

IV. Special Rules as to Contracts.
Prior conference merged in written contract, § 1014.
Parol may prove contract partly oral, § 1015.
Oral acceptance of written contract may be so proved, § 1016.
Rescission of one contract and substitution of another may be so proved, § 1017.
Exception at law as to writings under seal, § 1018.
Parol evidence admissible to reform a contract on ground of fraud, § 1019.
Deeds may be so reformed, § 1020.
Reformation granted in cases of concurrent mistake, § 1021.
Parol evidence not admissible to contradict document, § 1022.
Reformation must be specially asked, § 1023.
Under statute of frauds parol contract cannot be substituted for written, § 1025.
Extension of contract may be proved by parol, § 1026.
Parol evidence inadmisible to prove unilateral mistake of fact, § 1028.
And so of mistake of law, § 1029.
Obvious mistake of form may be proved by parol, § 1030.
Conveyance in fee may be shown to be in trust, § 1031.
Or a mortgage, § 1032.
But evidence must be plain and strong, § 1033.
Admission of such evidence does not conflict with statute of frauds, § 1034.
Resulting trust may be proved by parol, § 1035.
Caution when alleged trustee is deceased, § 1037.
Person fraudulently obtaining or retaining title may be treated as trustee, § 1038.
Particular recitals may estop, § 1039.
Otherwise as to general recitals, § 1040.
Recitals do not bind third parties, § 1041.
Recitals of purchase money open to dispute, § 1042.
Not admissible against strangers, § 1043.
Consideration may be proved or disproved by parol, § 1044.
Seal imports consideration, but may be impeached on proof of fraud or mistake, § 1045.
Consideration in contract cannot *primâ facie* be disputed by those claiming under it, though other considerations may be proved in rebuttal of fraud, § 1046.
When fraud is alleged, stranger may disprove consideration, § 1047.
To disprove fraud *bona fides* is admissible, § 1048.
Bonâ fide purchasers and judgment vendees may assail consideration, § 1049.

V. Special Rules as to Deeds.
Deeds not open to variation by parol proof, § 1050.
Party or privy cannot contradict averments, § 1051.
Acknowledgment may be disputed by parol, § 1052.
Defective acknowledgment may be explained by parol, § 1053.
Between parties, deeds may be varied on proof of ambiguity and fraud, § 1054.
Deeds may be attached by *bonâ fide* purchasers and judgment vendees, § 1055.
And so as to mortgages, § 1056.
Deed may be shown to be in trust, § 1057.
(As to recitals, see §§ 1036–1042.)

VI. Special Rules as to Negotiable Paper.
Negotiable paper not susceptible of parol variations, § 1058.
Blank indorsement may be explained, § 1059.
Relations of parties with notice may be varied by parol, and so may consideration, § 1060.
Real parties may be brought out by parol, § 1061.
Ambiguities in such paper may be explained, § 1062.
VII. Special Rules as to other Instruments.
Releases cannot bs contradicted by parol, § 1063.
Receipts can be so contradicted, § 1064.
Exception as to insurance receipts, § 1065.
Receipts may be estoppels as to third parties, § 1066.
Bonds may be shown to be conditioned on contingencies, § 1067.
Subscriptions cannot be modified as to third parties by parol, § 1068.
Fraud may be a defence, § 1069.
Bills of lading are open to explanation, § 1070.
Insurance applications may be explained by parol, § 1071.

I. GENERAL RULES.

Parol evidence generally not admissible to vary documents between parties.

§ 920. Parol evidence, in obedience to a rule which has been already frequently stated, cannot be received to vary the terms of a document. It is important, however, in determining the force of this rule, to distinguish between documents which are uttered dispositively, *i. e.* for the purpose of disposing of rights; and those uttered non-dispositively, *i. e.* not for the purpose of disposing of rights.[1] A non-dispositive, or, to adopt Mr. Bentham's term, a "casual" document, is more open to parol variation than is a document which is dispositive, or, as Mr. Bentham calls it, "predetermined." A casual or non-dispositive document (*e. g.* a letter or memorandum thrown off hurriedly in the ease and carelessness of familiar intercourse, without intending to institute a contract, and which is offered, not to prove a contract, but to establish a non-contractual incident)[2] is peculiarly dependent upon extraneous circumstances; is often inexplicable unless such circumstances are put in evidence; and employs language, which, so far from being made up of phrases selected for their conventional business and legal limitations, is marked by the writer's idiosyncrasies, and sometimes comprises words peculiar to himself. But whether such documents are informally or formally constituted, they agree in this, that, so far as concerns

[1] See infra, §§ 1078, 1083.

[2] See McCrea *v.* Purmort, 16 Wend. 460; Sourse *v.* Marshall, 23 Ind. 194; Stone *v.* Wilson, 3 Brev. (S. C.) 228. As to letters and other documents receivable to prove non-contractual incidents, see infra, §§ 1122 *et seq.*

the parties to the case in which they are offered, they were not prepared for the purpose of disposing of the rights of the party from whom they emanate. *Dispositive* documents, on the other hand, are deliberately prepared, and are usually couched in words which are selected for the purpose, because they have a settled legal or business meaning. Such documents are meant to bind the party uttering them in both his statements of fact and his engagements of future action; and they are usually accepted by the other contracting party (or in case of wills, by parties interested), not in any occult sense, requiring explanation or correction, but according to the legal and business meaning of the terms.[1] It stands to reason, therefore, that parol evidence is not as a rule to be received to vary the terms of documents so prepared and so accepted, though it is otherwise when such documents are offered, not dispositively, between the parties, but non-contractually, by or against strangers. So far as concerns the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol.[2]

[1] The distinction between dispositive and non-dispositive (or casual) documents is recognized by Sir J. Stephen in substance, though not in terms, when he tells us that "oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, *if such memorandum was not intended to have legal effect as a contract or other disposition of property.*" Steph. Ev. art. 90.

[2] Preston *v.* Merceau, 2 W. Bl. 1249; Goss *v.* Nugent, 5 B. & Ad. 64; Adams *v.* Wordley, 1 M. & W. 374; Van Ness *v.* Washington, 4 Pet. 232; Shankland *v.* Washington, 5 Pet. 390; Hunt *v.* Rousmanier, 8 Wheat. 174; Van Buren *v.* Digges, 11 How. 461; Partridge *v.* Ins. Co. 15 Wall. 593; Bailey *v.* R. R. 17 Wall. 96; Gavinzel *v.* Crump, 22 Wall. 308; Moran *v.* Prather, 23 Wall. 499; Brown *v.* Spofford, 95 U. S. 474; Eveleth *v.* Wilson, 15 Me. 109; Peterson *v.* Grover, 20 Me. 363; Ticonic Bk. *v.* Johnson, 21 Me. 426; Whitney *v.* Lowell, 33 Me. 318; Whitney *v.* Slayton, 40 Me. 224; Bell *v.* Woodman, 60 Me. 465; Bromley *v.* Elliot, 38 N. H. 287; Smith *v.* Gibbs, 48 N. H. 335; Bradley *v.* Bentley, 8 Vt. 243; Bond *v.* Clark, 35 Vt. 577; Brandon *v.* Morse, 48 Vt. 322; Joseph *v.* Bigelow, 4 Cush. 82; Myrick *v.* Dame, 9 Cush. 248; Finney *v.* Ins. Co. 8 Met. 348; Cook *v.* Shearman, 103 Mass. 21; Colt *v.* Cone, 107 Mass. 285; McFarland *v.* R. R. 115 Mass. 103; Barnstable Bk. *v.* Ballou, 119 Mass. 487; Black *v.* Bachelder, 120 Mass. 171; Ward *v.* Commis, 122 Mass. 394; Fay *v.* Gray, 124 Mass. 509; Beckley *v.* Munson, 13 Conn. 299; Glendale Woollen Co. *v.* Ins. Co. 21 Conn. 19; La Farge *v.* Rickert, 5 Wend. 187; Spencer *v.* Tilden, 5 Cow. 144; Hull *v.* Adams, 1 Hill N. Y. 601; Baker *v.* Higgins, 21 N Y. 397; Clark *v.* Ins. Co. 7 Lans. 323; Long *v.* R. R. 50 N. Y. 76; Col-

§ 921. In respect to documents prepared by parties for the purpose of expressing in writing terms on which they have reciprocally agreed, the rule which has been stated has an additional sanction. Hence comes the conclusion that new ingredients cannot be by parol added to such documents.[1] Thus articles of property cannot be added by parol

New ingredients cannot be added.

lender *v.* Dinsmore, 55 N. Y. 200; Mott *v.* Richtmyer, 57 N. Y. 49; Van Bokkelen *v.* Taylor, 62 N. Y. 105; Heilner *v.* Imbrie, 6 Serg. & R. 401; Albert *v.* Ziegler, 29 Penn. St. 50; Collins *v.* Baumgardner, 52 Penn. St. 461; Kirk *v.* Hartman, 63 Penn. St. 97; Hagey *v.* Hill, 75 Penn. St. 108; Penns. Canal Co. *v.* Betts, 1 Weekly Notes, 368; Woodruff *v.* Frost, 2 N. J. L. 342; Perrine *v.* Cheeseman, 11 N. J. L. 174; Rogers *v.* Colt, 21 N. J. L. 704; Young *v.* Frost, 5 Gill, 287; Batturs *v.* Sellers, 6 Har. & J. 249; Criss *v.* Withers, 26 Md. 553; Hays *v.* Ins. Co. 36 Md. 398; Hill *v.* Peyton, 21 Grat. 386; McLean *v.* Ins. Co. 29 Grat. 361; Little Kanawha *v.* Rice, 9 W. Va. 190; Serviss *v.* Stockstill, 30 Ohio St. 418; Irwin *v.* Ivers, 7 Ind. 308; McClure *v.* Jeffrey, 8 Ind. 79; Fankboner *v.* Fankboner, 20 Ind. 62; Abrams *v.* Pomeroy, 13 Ill. 133; Harlow *v.* Boswell, 15 Ill. 56; Robinson *v.* Magarity, 28 Ill. 423; Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516; Johnson *v.* Pollock, 58 Ill. 181; McCormick *v.* Huse, 66 Ill. 515; Mann *v.* Smyser, 76 Ill. 365; Cease *v.* Cockle, 75 Ill. 484; Conwell *v.* R. R. 81 Ill. 232; Warren *v.* Crew, 22 Iowa, 315; Atkinson *v.* Blair, 38 Iowa, 266; Irish *v.* Dean, 39 Wis. 562; Lennard *v.* Vischer, 2 Cal. 37; Ruiz *v.* Norton, 4 Cal. 359; Lemaster *v.* Burckhart, 2 Bibb, 25; Ward *v.* Ledbetter, 1 Dev. & B. Eq. 496; Chamness *v.* Crutchfield, 2 Ired. Eq. 148; Etheridge *v.* Palin, 72 N. C. 213; Mayer *v.* Adrian, 77 N. C. 83; Falkoner *v.* Garrison, 1 McCord, 209; Wynn *v.* Cox, 5 Ga. 373; Davis *v.* Moody, 15 Ga. 175; Freeman *v.* Bass, 34 Ga. 355; Whitehead *v.* Park, 53 Ga. 575; Duff *v.* Ivy, 3 Stew. 140; Kennedy *v.* Kennedy, 2 Ala. 571; Adams *v.* Garrett, 12 Ala. 229; West *v.* Kelly, 19 Ala. 253; Elliott *v.* Connell, 13 Miss. 91; Dabadie *v.* Poydras, 3 La. An. 153; Laycock *v.* Davidson, 11 La. An. 328; Barthet *v.* Estebene, 5 La. An. 315; Boner *v.* Mahle, 3 La. An. 600; Ferguson *v.* Glaze, 12 La. An. 767; Shreveport *v.* Le Rosen, 18 La. An. 577; Singleton *v.* Fore, 7 Mo. 515; Peers *v.* Davis, 29 Mo. 184; Bunce *v.* Beck, 43 Mo. 266; Helmrichs *v.* Gehrke, 56 Mo. 79; Huse *v.* McQuade, 52 Mo. 388; Baker *v.* Ferris, 61 Mo. 389; Koehring *v.* Muemminghoff, 61 Mo. 403; Richardson *v.* Comstock, 21 Ark. 69; Trammell *v.* Pilgrim, 20 Tex. 158; Donley *v.* Bush, 44 Tex. 1. For the argument for excluding proof of intent, see infra, § 936. On the general topic of interpretation, see Liebers's Legal and Political Hermeneutics.

[1] Infra, §§ 1014 *et seq.*; Hale *v.* Handy, 26 N. H. 206; Kimball *v.* Bradford, 9 Gray, 243; Frost *v.* Blanchard, 97 Mass. 155; Dudley *v.* Vose, 114 Mass. 34; Galpin *v.* Atwater, 29 Conn. 93; La Farge *v.* Rickert, 5 Wend. 187; Lyon *v.* Miller, 24 Penn. St. 392; Howard *v.* Thomas, 12 Ohio St. 201; Johnson *v.* Pierce, 16 Ohio St. 472; Snyder *v.* Koons, 20 Ind. 389; Freeman *v.* Bass, 34 Ga. 355; Drake *v.* Dodworth, 4 Kans. 159.

to those specified in a bill of sale[1] or in a deed.[2] So, as an additional consideration to a written contract for the grant of a right of way to a railroad company, it cannot be proved by parol that the company agreed to fill up a sluice upon the land.[3] In a suit, also, on a written agreement for the sale of "25,000 pale brick for three dollars per *m*, and 50,000 hard brick for four dollars per *m* cash," parol evidence is inadmissible to show that the parties intended the delivery to be in parcels, payment for each parcel to be due on its delivery;[4] nor can a written agreement to deliver wood be modified by parol proof that the wood was to be paid for as delivered in parcels.[5] It is inadmissible, to take another illustration, in a suit on a lease for water-works, conveying, with two exceptions, the entire control of the water, to prove by parol that it was intended to have introduced another exception in favor of another party.[6] So where a shipper of goods takes from the carrier a bill of lading or other voucher giving the terms of transportation, the writing, in the absence of fraud or concurrent mistake, must be regarded as the final expression of the will of the parties, not open to variation by parol.[7]

So as to auctioneer's conditions of sale.

§ 922. Auctioneer's conditions of sale may be taken as affording another illustration of the rule before us. Where the printed conditions of sale at an auction, signed by the auctioneer, described the time and place of sale, and the number and kind of timber sold, but said nothing about the weight, evidence of the auctioneer's statements at the sale was held inadmissible to prove that a certain weight had been warranted. "There is no doubt," said Lord Ellenborough, C. J., "that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no

[1] Osborn *v.* Hendrickson, 7 Cal. 282; Angomar *v.* Wilson, 12 La. An. 857.

[2] Teller *v.* Eckert, 4 How. U. S. 289; Bond *v.* Fay, 12 Allen, 86; Wood *v.* Commis, 122 Mass. 394.

[3] Purinton *v.* R. R. 46 Ill. 297.

[4] Baker *v.* Higgins, 21 N. Y. 397.

[5] Brandon *v.* Morse, 48 Vt. 322.

[6] Hovey *v.* Newton, 7 Pick. 29.

[7] Long *v.* R. R. 50 N. Y. 76. See fully §§ 1014 *et seq.*

effect. There is no doubt that the warranty as to the quantity of the timber would vary the agreement contained in the written conditions of sale."[1] On the other hand, *unsigned* conditions of sale are only in the nature of a personal memorandum, which may be varied at any time before the sale by an express notice to a purchaser.[2] And informal catalogue descriptions of articles whose price is below the limit of the statute of frauds may be amended by parol at the sale.[3]

Dispositive documents may be varied as to strangers by parol.

§ 923. In a dispositive document, so far as concerns the parties to it, the settled terms, as we have seen, cannot be varied by parol, because these terms were mutually accepted for the purpose of disposing of rights in certain relations. It may happen, however, that a document may be dispositive as to the parties, and non-dispositive as to all other persons. The party uttering a document (*e. g.* a power of attorney or a promissory note) prepares it deliberately in respect to all persons who through it may enter into business relations to him; but other persons are not contemplated by him, nor is the writing prepared to bind him as to such persons who would in no way be bound to him. In respect to strangers, therefore, documents have usually no binding force; and hence it has been held that a stranger, against whom a deed or other writing is brought to bear on trial, may show by parol evidence mistakes in such writing. The rule forbidding the variation of writings by parol applies only to parties and privies; and nothing in the rule protects writings, not records, or public documents, from attack by strangers.[4] Even a party executing such

[1] Powell *v.* Edmunds, 12 East, 6.

[2] Eden *v.* Blake, 13 M. & W. 614.

[3] Infra, § 926.

[4] Supra, § 176; infra, §§ 1078, 1155; R. *v.* Cheedle, 3 B. & Ad. 838; R. *v.* Olney, 1 M. & Sel. 387; R. *v.* Wickham, 3 A. & E. 517; Barreda *v.* Silsbee, 21 How. 146; Woodman *v.* Eastman, 10 N. H. 359; Edgerly *v.* Emerson, 23 N. H. 555; Furbush *v.* Goodwin, 25 N. H. 425; Badger *v.* Jones, 12 Pick. 371; Spaulding *v.* Knight, 116 Mass. 148; Rose *v.* Taunton, 119 Mass. 99; New Berlin *v.* Norwich, 10 Johns. R. 229; Thomas *v.* Truscott, 53 Barb. 200; McMasters *v.* Ins. Co. 55 N. Y. 233; Dempsey *v.* Kipp, 61 N. Y. 471; Krider *v.* Lafferty, 1 Wharton R. 314; Sourse *v.* Marshall, 23 Ind. 194; McDill *v.* Dunn, 43 Ind. 315; Stowell *v.* Eldred, 39 Wis. 614; Clifford *v.* Baessman, 40 Wis. 597; Reynolds *v.* Magness, 2 Ired. L. 26; Smith *v.* Conrad, 15 La. An. 579; Blake *v.* Hall, 19 La. An. 49; Smith *v.* Moynihan, 44 Cal. 54; People *v.* Anderson, 44 Cal. 65; Hussman *v.* Wilke, 50 Cal. 250.

a writing may prove by parol its mistakes, when the issue is with a third person.[1]

§ 924. Before the question of variation by parol comes up, the whole context of the document in litigation must be considered.[2] If a word in one place be ambiguous, the ambiguity may be solved by recurrence to another part of the document in which the word is substantially defined.[3] For instance, if the word "close" be in dispute, in construing a will, evidence may be received, if the word was only used once, to show that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be rejected, as the court would then see that the testator had used the word in its ordinary sense, as denoting an inclosure.[4] Or, to borrow another illustration, the word "month," which denotes at law a lunar month, may be shown by its use in other portions of the same document to mean a calendar month.[5] It has also, in application of the same rule, been held that in aid of ambiguities in the disposing parts of a deed, the recitals may furnish a test for discovering the real intention of the parties, and for the determining the true meaning of the language employed.[6]

Whole document must be considered.

It has sometimes been said that words are to be determined in their primary sense,[7] unless it appear that they are used in a

See, for other cases, infra, §§ 1041, 1043, 1047–48, 1078, 1155.

[1] Van Eman *v.* Stanchfield, 10 Minn. 255; Strader *v.* Lambeth, 7 B. Mon. 589.

"It has been held that a comptroller's deed for the non-payment of a tax due the state is not even *primâ facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell; but they are not established by the deed. They must be made out by independent proof. Tallman *v.* White, 2 N. Y. 66; Williams *v.* Payton, 4 Wheat. 77; Beekman *v.* Bigham, 5 N. Y. 366." Hunt, J., Mutual Ins. Co. *v.* Tisdale, 91 U. S. (1 Otto) 245. See supra, § 176.

[2] Supra, § 619; infra, § 1103.

[3] Bateman *v.* Roden, 1 Jones & L. 356.

[4] Taylor's Ev. § 1032; Richardson *v.* Watson, 4 B. & Ad. 787, 799, per Parke, J.; 1 N. & M. 575, *S. C.*

[5] Lang *v.* Gale, 1 M. & Sel. 111; R. *v.* Chawton, 1 Q. B. 247.

[6] Lee *v.* Pain, 4 Hare, 218.

[7] Mallan *v.* May, 13 M. & W. 517; Robertson *v.* French, 4 East, 135; Ford *v.* Ford, 6 Hare, 490; Gray *v.* Pearson, 6 H. of Lords Cas. 106

technical sense, in which case the latter sense is to control.[1] But as most difficulties of construction arise from words having several senses, it is a *petitio principii* to say that a particular sense is primary, and is therefore to prevail. The only course is to collect the sense from the whole document, and if this cannot be done, to resort to parol proof, in the mode hereafter prescribed.

Distinction between "primary" and "technical" untenable.

§ 925. It often happens that a conflict may exist between the written and the printed conditions of a contract executed on a printed form, in which the blanks are filled up in writing. If so, it is not to be forgotten that parties using a printed form are often careless as to its terms, signing it as a matter of course; and, independently of this, it is to be supposed that written conditions, specially introduced by them, would peculiarly exhibit their intention.[2] "If," said Lord Ellenborough, "the instrument consists partly of a printed formula and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the written words are entitled to have greater weight than those which are printed."[2] To this, however, Crompton, J., in 1864,[3] adds: "I do not find it anywhere laid down that, unless we can see some inconsistency, we can reject the printed words because there are lines filling up the blanks." And Blackburn, J., says further: "When there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think that when one is to overpower the other and have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary, and consequently the written terms would be more considered by him; and if they conflict and cannot be reconciled, then the written terms, those mere special terms thought of by himself, may be considered to

Written entries of more weight than printed.

Abbott *v.* Middleton, 7 H. of L. Cas. 68; Gordon *v.* Gordon. L. R. 5 H. L. 254.

[1] Shore *v.* Wilson, 9 Cl. & F. 525; Doe *v.* Perratt, 6 M. & Gr. 342.

[2] Robertson *v.* French, 4 East, 136; per Ellenborough, C. J., Young *v.* Grote, 4 Bing. 253.

[3] Gumm *v.* Tyrie, 33 L. J. N. S. Q. B. 108, 111; Jessell *v.* Bath, L. R. 2 Ex. 267.

be more thought of, and consequently to have more weight by him."[1]

§ 926. We shall hereafter see that receipts,[2] bills of lading,[3] and subscription papers,[4] are, as between the parties, withdrawn from the operation of the rule; such writings being memoranda, hastily given, and by business usage treated as provisional. That they may be explained and contradicted by parol proof is hereafter abundantly shown; and the same liberty exists as to informal, shorthand memoranda.[5] Thus in selling a chattel whose value is under the minimum of the statute of frauds, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement.[6] Again, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "Six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence an additional term of the contract, namely, that all accidents occasioned by the shying of the horse should be at the risk of the hirer.[7] The occupation and payment of rent of a tenement, also, may be proved orally on an issue of settlement (the fact there being whether the tenant paid rent), although there was a written lease giving other terms.[8] And the meaning of the words "in trust," in a bank book, may be in like manner explained.[9]

Informal memoranda excluded from operation of rule.

§ 927. The first question to determine, as to construing a document, is whether there is a document to construe. Hence it is always admissible to show by parol that a document was conditioned on an event that never occurred.[10] Parol evidence is not admissible to vary the

Parol evidence admissible to show document was not exe-

[1] See, also, Alsager *v.* Dock Co. 14 M. & W. 799.

[2] Infra, § 1064.

[3] Infra, § 1070.

[4] Infra, § 1068.

[5] Lockett *v.* Necklin, 2 Ex. R. 93; Amonett *v.* Montague, 63 Mo. 201; Walters *v.* Vanderveer, 17 Kans. 425.

[6] Eden *v.* Blake, 13 M. & W. 614. See supra, § 922.

[7] Jeffrey *v.* Walton, 1 Stark. R. 267.

[8] R. *v.* Hull, 7 B. & C. 611.

[9] Powers *v.* Prov. Inst. 124 Mass. 377. See infra, § 937.

[10] Davis *v.* Jones, 17 C. B. 625;

cuted, or was only conditional.

terms of a written contract, but it is to show that no contract ever existed of which they were the terms.[1] Parol evidence is admissible, therefore, to adopt one of Sir J. Stephen's exceptions,[2] to prove "the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any contract, grant, or disposition of property."[3] But a condition subsequent, contradicting the writing, cannot be so proved.[4]

Parol evidence admissible to prove that document was conditional.

§ 928. If a document be signed by one party, in consequence of a parol agreement by the other party, which parol agreement is not performed, then it follows, from what has been said, that the party so signing may set up, as against the other party, the non-performance of the

Lindlay *v.* Lacy, 17 C. B. (N. S.) 587; Pym *v.* Campbell, 6 E. & B. 370; Gudgen *v.* Besset, 6 E. & B. 986; Lister *v.* Smith, 3 Sw. & T. 282; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222; Stanton *v.* Miller, 65 Barb. 58; Barker *v.* Prentiss, 6 Mass. 434; Rennell *v.* Kimball, 5 Allen, 356; Hildreth *v.* O'Brien, 10 Allen, 104; Robertson *v.* Evans, 3 S. C. 330; Greenawalt *v.* Kohne, 85 Penn. St. 369; Butler *v.* Smith, 35 Miss. 457; Treadwell *v.* Reynolds, 47 Cal. 171. Infra, § 934.

"Parol evidence," argues Archibald, J., in a case determined in the High Court of Justice in November, 1875 (Clever *v.* Kirkman, 24 W. R. 159; 33 L. T. 672), "is not admissible to qualify or vary a written document, but it is to establish a contemporaneous agreement, postponing the date of the operation of a written agreement, which is in its terms apparently absolute. Surely, then, parol evidence is admissible to show that the document was never intended to operate as an agreement at all; that the parties never accepted the document as the record of any contract. No doubt such evidence must be looked at most scrupulously, and the jury must be perfectly satisfied that what on the face of it is a valid, binding contract, was never so intended by the man who drew it up. . . . . Parol evidence is admissible to show that there never was, in fact, any agreement at all. This is what Chief Justice Erle says in Pym *v.* Campbell, 6 E. & B. 370: 'The distinction is between admitting parol evidence to vary an agreement, and to show that what purports to be an agreement has in truth never become so.' Rogers *v.* Hadley, 2 H. & C. 227, is not so strong in its facts, but the same doctrine is as clearly laid down. So again in Wake *v.* Harrop, 6 H. & N. 768, the same law is laid down; while Mackinnon's case, L. R. 4 C. P. 784, is stronger than any."

[1] See to same effect, Leppoc *v.* Bank, 32 Md. 136; Blake *v.* Coleman, 22 Wis. 415. See, however, Wemple *v.* Knopf, 15 Minn. 440. More fully infra, § 1067.

[2] Evidence, art. 90.

[3] To this he cites Pym *v.* Campbell, 6 E. & B. 370; Wallis *v.* Littell, 11 C. B. (N. S.) 369; S. P., Clarke *v.* Adams, 83 Penn. St. 309.

[4] Supra, § 920; Miller *v.* Fletcher, 27 Grat. 403. See infra, § 929.

parol agreement.[1] So it is admissible, in an action against a landlord for breach of contract, for the tenant to prove that he had been induced to sign the lease in consideration of the landlord's verbal promise that a barn should be built upon the land before harvest.[2] And parol proof has been received to show that a sale under a written instrument was to be by sample;[3] and to establish a condition, attached to a sale, that the vendor would not ply his trade in the same neighborhood.[4]

tioned on a non-performed condition.

§ 929. It is true that this exception must be strictly guarded. It is inadmissible, for instance, for a party, sued on a writing for the payment of money on a particular day, to prove a parol contemporaneous agreement that the time of payment should be extended to a subsequent day, unless there be in this respect a fraudulent imposition by the creditor on the debtor, or a mutual mistake.[5] So it is inadmissible, in a suit on a policy of insurance, where the limits of the voyage are specifically expressed, for the insurer to put in evidence a parol agreement that the risk was not to commence until the vessel reached an intermediate port.[6] Again, where the lease of a mine settles a price for the coal mined, it is inadmissible to prove by parol that the lessee agreed

But plain written conditions cannot be varied, unless on proof of fraudulent imposition.

[1] See authorities cited, §§ 908, 931.

[2] Shughart *v.* Moore, 78 Penn. St. 469. In this case the court said: —

"The cases of Weaver *v.* Wood, 9 Barr, 220, and Powelton Coal Co. *v.* McShain, 25 P. F. Smith, 238, are full to the point that the offer in evidence complained of in the first assignment of error ought to have been received. These cases settle, beyond all question, that, when a promise is made by one party in consideration of the execution of a written instrument by the other, it may be shown by parol evidence. It is no answer to this to say that the jury may have found for the defendant on the evidence, upon the ground that the plaintiff had prevented the defendant from fulfilling his contract to build the barn. How can we say that this was the point upon which the verdict was rendered, when both points were distinctly submitted, and when a very material part of the plaintiff's evidence upon one of them was excluded from the consideration of the jury?"

[3] Pike *v.* Fay, 101 Mass. 134.

[4] Pierce *v.* Woodward, 6 Pick. 206.

[5] Spartali *v.* Benecke, 10 C. B. 212; Field *v.* Lelean, 6 H. & N. 627; Spring *v.* Lovett, 11 Pick. 417; Allen *v.* Furbish, 4 Gray, 504; Coughenour *v.* Suhre, 71 Penn. St. 464. See, as to promissory notes, infra, §§ 1059–1062.

[6] Leslie *v.* De la Torre, 12 East, 583. See Weston *v.* Emes, 1 Taunt. 115; Ins. Co. *v.* Mowry, 96 U. S. 547. Infra, § 1177.

to mine all that he could, the lease containing no such provision, and fraud or mutual mistake not being set up.[1]

But the interposition of fraud, actual or constructive, makes such proof legitimate. If it be adequately established that a party was induced to sign a contract by fraudulent parol representations that the contract was only to be contingently operative, then, upon such party himself doing equity, he will be protected from the enforcement of such contract. And the relief that would be given in this respect by a chancellor will be given by a common law court administering equitable remedies.[2] In fact, the qualification, "unless there be fraud," is usually introduced into the statement of the rule, that parol evidence is inadmissible to prove that a written instrument cannot be made dependent on an unwritten condition.[3]

Want of due delivery may be proved by parol, or delivery as an escrow.

§ 930. It may be proved by parol that the document, if meant to operate *inter vivos*, was never duly delivered, for this lies at the root of the question as to whether the document, in such case, is operative. Hence it may be shown by parol that a writing was not delivered, remaining an escrow;[4] or, as has been seen, that it was not to go into effect until an event which never happened.[5] A party, however, who acknowledges delivery cannot, without proof of fraud, contradict the acknowledgment, on the ground that the instrument was but an escrow,[6] though the averment of time of delivery may be varied by parol.[7] Waiver by consent of specific prerequisites may also be proved by parol.[8]

[1] Lyon *v.* Miller, 24 Penn. St. 392.

[2] See infra, §§ 931, 1019; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wal. 222. But see Ins. Co. *v.* Mowry, 96 U. S. 544.

[3] Pickering *v.* Dowson, 4 Taunt. 779; Faucett *v.* Currier, 115 Mass. 20; Wharton *v.* Douglass, 76 Penn. St. 276.

[4] Murray *v.* Stair, 2 B. & C. 82; *S. C.* 3 D. & R. 278; Stanton *v.* Miller, 65 Barb. 58; Beall *v.* Poole, 27 Md. 645. See Ford *v.* James, 2 Abb. N. Y. App. 159; Demesmey *v.* Gravelin, 56 Ill. 93; Roberts *v.* Mullenix, 10 Kans. 22.

[5] See supra, §§ 927–28; infra, §§ 1019, 1067; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222. See Morrison *v.* Lovejoy, 6 Minn. 319; and see infra, § 1067. As indicating the limits to which common law courts will go, see Abrey *v.* Crux, L. R. 5 C. P. 37; Adams *v.* Wordley, 1 M. & W. 374; Foster *v.* Jolly, 1 C., M. & R. 703; Woodbridge *v.* Spooner, 3 B. & Ald. 233.

[6] Cocks *v.* Barker, 49 N. Y. 107.

[7] Johnston *v.* McRary, 5 Jones (N. C.) L. 369; Treadwell *v.* Reynolds, 47 Cal. 171. Infra, § 976.

[8] Pechner *v.* Ins. Co. 65 N. Y. 195; Infra, § 1017, and cases cited infra, § 931.

Negotiable paper, however, cannot be qualified by evidence of this class, so as to affect innocent third parties,[1] nor bonds, when the proof contradicts the averments of the instrument, unless there be proof of fraud or concurrent mistake.[2] Possession of a deed, it may be added, is presumptive proof of delivery.[3]

Fraud or duress may be shown by parol, and so as to insanity.

§ 931. It is also always admissible for a party to show that his execution of the contract was induced by fraud or compulsion. Before the rules excluding parol testimony to vary documents can be applied, we must determine whether a document legally exists. That it exists must ordinarily be shown by parol, and the proof of such existence may be attacked by proof that the execution of the document was a nullity, having been coerced by duress,[4] or elicited by fraud,[5] or that, through the other party's fraud, mate-

[1] See infra, § 1058.

[2] Infra, § 1067; Black *v.* Shreve, 13 N. J. Eq. (2 Beas.) 455; Fulton *v.* Hood, 34 Penn. St. 365; Geddy *v.* Stainback, 1 Dev. & B. Eq. 475.

[3] Gilbert *v.* Bulkley, 5 Conn. 262; Philadelphia R. R. *v.* Howard, 13 Howard, 307; Warren *v.* Miller, 38 Me. 108; Reed *v.* Douthit, 62 Ill. 348. Infra, § 1313.

[4] 2 Inst. 482; Bull. N. P. 172; Collins *v.* Blantern, 2 Wils. 341; *S. C.* 1 Smith's L. C. 310; Paxton *v.* Popham, 9 East, 421; Hibbard *v.* Mills, 46 Vt. 243; Knapp *v.* Hyde, 60 Barb. 80; Miller *v.* Miller, 68 Penn. St. 486; Feller *v.* Green, 26 Mich. 70; Seiber *v.* Price, 26 Mich. 518; Cadwallader *v.* West, 48 Mo. 483; Davis *v.* Fox, 59 Mo. 125; Davis *v.* Luster, 64 Mo. 43; Moore *v.* Rush, 30 La. An. 1157; Bane *v.* Detrick, 52 Ill. 19; Thurman *v.* Burt, 53 Ill. 129; Spaids *v.* Barrett, 57 Ill. 289; Bosley *v.* Shanner, 26 Ark. 280; Diller *v.* Johnson, 37 Tex. 47; Cook *v.* Moore, 39 Tex. 255; Olivari *v.* Menger, 39 Tex. 76.

[5] Kain *v.* Old, 2 B. & C. 634; Filmer *v.* Gott, 4 Bro. P. C. 230; Robinson *v.* Vernon, 7 C. B. N. S. 231; Rogers *v.* Hadley, 2 H. & C. 227; Dobell *v.* Stephens, 3 B. & C. 623; Hotson *v.* Browne, 9 C. B. N. S. 442; Haigh *v.* Kaye, L. R. 7 Ch. 469; Barwick *v.* English Joint Stock Bk. L. R. 2 Ex. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; Selden *v.* Myers, 20 How. 506; Prentiss *v.* Russ, 16 Me. 30; Lull *v.* Cass, 43 N. H. 62; Montgomery *v.* Pickering, 116 Mass. 227; Franchot *v.* Leach, 5 Cow. 508; Koop *v.* Handy, 41 Barb. 454; Cobb *v.* Hatfield, 46 N. Y. 533; Kinney *v.* Kiernan, 49 N. Y. 164; Meyer *v.* Huneke, 55 N. Y. 412; Christ *v.* Diffenbach, 1 Serg. & R. 464; Campbell *v.* McClenachan, 6 Serg. & R. 171; Maute *v.* Gross, 56 Penn. St. 250; Horn *v.* Brooks, 61 Penn. St. 407; Wharton *v.* Douglass, 76 Penn. St. 273; Burtners *v.* Keran, 24 Grat. 42; Van Buskirk *v.* Day, 32 Ill. 260; Mitchell *v.* McDougall, 62 Ill. 498; Gage *v.* Lewis, 68 Ill. 613; Wray *v.* Wray, 32 Ind. 126; Woodruff *v.* Garner, 39 Ind. 246; McLean *v.* Clark, 47 Ga. 24; Turner *v.* Turner, 44 Mo. 535; Jamison *v.* Ludlow, 3 La. An. 492; Thomas *v.* Kennedy, 24 La. An. 209; Plant *v.*

rial parts of the contract were omitted or altered.[1] For it is a settled principle of equity, — a principle absorbed in the common law of many jurisdictions, — that where one party is drawn into a contract by the other's fraud, he has his option of avoiding or enforcing the contract. Not only the parties to the agreement are thus affected, but the taint reaches all who are concerned in the fraud, and applies not only where statements are made which are false in fact, but where, although false in fact, they are believed to be true by the person making them, if such person, in the due discharge of his duty, ought to have known, or formerly knew and ought to have remembered, that they were false.[2] It

Condit, 22 Ark. 454; Grider *v.* Clopton, 27 Ark. 244; Cook *v.* Moore, 39 Tex. 255.

[1] Buck *v.* Appleton, 14 Me. 284; Phyfe *v.* Wardell, 2 Edw. N. Y. 47; Partridge *v.* Clarke, 4 Penn. St. 166; Fisher *v.* Deibert, 54 Penn. St. 460; Powelton *v.* McShain, 75 Penn. St. 245; Chetwood *v.* Brittain, 1 Green Ch. N. J. 438; Shotwell *v.* Shotwell, 24 N. J. Eq. 378; Wesley *v.* Thomas, 6 Har. & J. 24; Rohrabacher *v.* Ware, 37 Iowa, 85; Wade *v.* Saunders, 70 N. C. 270; Kennedy *v.* Kennedy, 2 Ala. 571; Blanchard *v.* Moore, 4 J. J. Marsh. 471.

In Jackson *v.* Morter, 82 Penn. St. 291, it was held that fraudulent representations made by a purchaser at sheriff's sale, whereby others are dissuaded from bidding, constitute sufficient ground for setting the sale aside, even after the acknowledgment of the sheriff's deed, provided the application is made in time.

[2] "With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative; that it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman law (much commented upon in the argument before me), it must be a representation *dans locum contractui;* that is, a representation giving occasion to the contract, the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which, it is reasonable to infer, that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether." Lord Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 95. Cf. Smith *v.* Kay, 7 H. L. Cas. 750.

"It is certainly permissible to give evidence of a verbal promise made by one of the parties, at the time of the making of a written contract, where such promise was used as an inducement to obtain the execution thereof. Campbell *v.* McClenachan, 6 S. & R. 171. This rule is put upon the ground that the attempt afterwards to take advantage of the omission from the contract of such promise is a fraud upon the party who was induced to execute it upon such promise, and hence he will be permitted to show the truth of the matter. Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Barr, 117; Dutton *v.* Tilden,

is scarcely necessary to add that proof of imbecility, or of drunkenness of one of the contracting parties, may be received as tending to show fraud in the other party.[1]

§ 932. The party seeking to avoid a contract on ground of fraud must himself be free from all suspicion of fraud, must have

1 Harris, 49." Gordon, J., Powelton C. Co. *v.* McShain, 75 Penn. St. 245.

" The rule at common law was that fraud could not be pleaded or given in evidence as a defence to an action on a specialty, unless it vitiated the execution of the instrument, and that the defendant, in such an action, was not allowed to show that he was induced to execute it by fraudulent representation as to the nature or value of the consideration. This rule, however, is materially modified by our statute relating to negotiable instruments, by which it is provided that in actions upon bonds for the payment of money or the performance of covenants, as well as upon bills and notes, it may be set up as a defence that the instrument was executed without any good or valuable consideration, or that the consideration has failed in whole or in part.

" Under this statute it is competent to show that the defendant was induced to execute the instrument by false and fraudulent representations, as that is one mode of showing a failure of consideration. White *v.* Watkins, 23 Ill. 482; Greathouse *v.* Dunlap, 3 McLean, 304; Case *v.* Bangton, 11 Wend. 108; Leonard *v.* Bates, 1 Blackford, 172; Fitzgerald *v.* Smith, 1 Ind. 310; Chambers *v.* Gaines, 2 Greene, 320. And, for this purpose, it may be shown that the consideration expressed in the instrument is not the real consideration which induced its execution, but that it was, in fact, entirely different. G. W. Ins. Co. *v.* Rees, 29 Ill. 272. In that case, speaking of the statute referred to, and admitting parol evidence to explain the consideration, it was said: 'It is impossible that this statute can be made effective in any other way than by receiving such proofs; and in receiving them, the old rule, that written contracts cannot be varied by parol, becomes, in all such cases, ineffective.

" 'The ruling of this court, therefore, in Lane *v.* Sharpe, 3 Scam. 566, and in all subsequent cases founded upon that, is to be considered as having no application to a case where no consideration, or a partial or total failure of consideration, is properly pleaded in an action brought upon an instrument of writing for the payment of money or property, or the performance of covenants, or conditions to an obligee or payee.'

" No necessity is now perceived to overrule that case, or modify the rule there announced." Scholfield, J., Gage *v.* Lewis, 68 Ill. 613.

[1] Affleck *v.* Affleck, 3 Sm. & G. 394; Molton *v.* Camroux, 4 Excheq. 17; Rhodes *v.* Bate, L. R. 1 Ch. 252; Hovey *v.* Chase, 52 Me. 305; Staples *v.* Wellington, 58 Me. 453; Farnam *v.* Brooks, 9 Pick. 220; Bond *v.* Bond, 7 Allen, 1; Warnock *v.* Campbell, 25 N. J. Eq. 485; La Rue *v.* Gilkyson, 4 Barr, 375; Beals *v.* See, 10 Barr, 56; Case *v.* Case, 26 Mich. 484; Baldwin *v.* Dunton, 40 Ill. 188; Wiley *v.* Ewalt, 66 Ill. 26; Phelan *v.* Gardner, 43 Cal. 306; Parker *v.* Davis, 8 Jones N. C. 460. See Chitty on Cont. 112; Story on Contracts, § 27; and for details of cases, 1 Wh. & St. Med. Jur. (1873) §§ 9–11.

been reasonably free from negligence, must act promptly, and must return or offer to return any advantages he may have secured from the contract.[1] Thus where a party signs a paper without either reading it, or, if he cannot read, asking to have it read to him, he cannot obtain relief.[2] The evidence of fraud, in order to vacate a solemnly executed instrument, must be, it need scarcely be added, clear and strong;[3] and this rule is the more important since the passage of the statute enabling parties to testify in their own cases.[4]

But in such case complainant must do equity and have a strong case.

§ 933. We have just seen that parol evidence of fraud, duress, and insanity is admissible to invalidate a writing, on a case being clearly shown. In the same light may be viewed contracts based on concurrent mistake. In fact, for a party to seek to take advantage of a contract based on a concurrent mistake is itself a fraud, which equity will correct.[5]

Concurrent mistake may be proved to invalidate document.

§ 934. Mistake by one party alone, however, unless there be

[1] Infra, § 1019; Sanborn *v.* Batchelder, 51 N. H. 426; Manahan *v.* Noyes, 52 N. H. 232; Bruce *v.* Davenport, 1 Abb. (N. Y.) App. 233; Spurgin *v.* Traub, 65 Ill. 170; Lane *v.* Latimer, 41 Ga. 171.

When an educated person, who, by very simple means, might have ascertained what are the contents of a deed, is induced to execute it by a false representation of such contents, it is doubtful whether he may not, by executing it negligently, be estopped between himself and a person who innocently acted upon the faith of the deed being a valid one. Per Mellish, L. J., Hunter *v.* Walters, L. R. 7 Ch. 75. See Androscoggin Bank *v.* Kimball, 10 Cush. 373, quoted infra, § 1243.

[2] Hallenbeck *v.* De Witt, 2 Johns. R. 404; Greenfield's Est. 14 Penn. St. 489; Weisenberger *v.* Ins. Co. 56 Penn. St. 442; 2 Kent's Com. 646; 1 Story's Eq. § 200 *a*. Infra, § 1243.

[3] See infra, § 1019.

[4] Faucett *v.* Currier, 109 Mass. 79; *S. C.* 115 Mass. 27; Martin *v.* Berens, 67 Penn. St. 459. In Penns. R. R. *v.* Shay, 82 Penn. St. 198, Sharswood, J., said: "It has more than once been held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable, otherwise it should be withdrawn from the jury. Stine *v.* Sherk, 1 W. & S. 195; Irwin *v.* Shoemaker, 8 W. & S. 75; Dean *v.* Fuller, 4 Wright, 474. Since parties are allowed to testify on their own behalf, it has become still more necessary that this important rule should be strictly adhered to and enforced."

[5] See fully infra, § 1021; Brioso *v.* Ins. Co. 4 Daly (N. Y.), 246; Bryce *v.* Ins. Co. 55 N. Y. 240; Nelson *v.* Davis, 40 Ind. 366; Hearst *v.* Pujol, 44 Cal. 230; Bridwell *v.* Brown, 48 Ga. 179; Miller *v.* Davis, 10 Kans. 541.

fraud, is no ground for rescission;[1] and even where the mistake is concurrent, the complainant must have a strong case and be ready to do equity.[2] And in all cases of this class, the fraud or concurrent mistake must be clearly shown.[3]

But not mistake of one party.

§ 935. On the same reasoning it may be proved that the contract embodied by the writing is illegal and therefore void. If void, it is not a contract; to exclude parol evidence because it is a contract is to assume the very point in litigation.[4] Nor can any form of instrument of indebtedness preclude a debtor from setting up usury.[5] But the implication of usury may be rebutted by showing that the reservation of excess was a mistake in fact.[6]

Illegality of document may be proved by parol.

§ 936. Intention declared orally is not necessarily that which controls a party in executing an instrument. Many persons are chary in expressing their real intentions. Others like to hint at tentatory schemes, which they have no fixed purpose of realizing; others may wish to mislead, sometimes from policy, sometimes from crookedness. Old and childless persons, who have wills to make, for instance, are apt to throw out expressions of intended bounty which they are so far from effectuating that it is a common observation that the will that is promised is not the will that is made. Then, again, my intention a moment ago, and that which I declared as my intention, may not be my intention now. The mind changes rapidly; caprice, or a new though sudden light, may bring about an immediate and real change of my purposes. Or, supposing my mind remains unchanged, to permit my pri-

Intent cannot be proved to affect written meaning.

[1] Infra, § 1028.

[2] See infra, §§ 1019 *et seq.*

[3] Supra, § 933; infra, § 1022.

[4] Collins *v.* Blantern, 2 Wils. 341; 1 Smith's L. C. 310; Benyon *v.* Littlefold, 3 M. & Gord. 94; Doe *v.* Ford, 3 A. & E. 649; Totten *v.* U. S. 92 U. S. 105; Shackford *v.* Newington, 46 N. H. 415; Wyman *v.* Fiske, 3 Allen, 238; Pratt *v.* Langdon, 97 Mass. 97; Martin *v.* Clarke, 8 R. I. 389; Leppoc *v.* Bank, 32 Md. 136; Bowman *v.* Torr, 3 Iowa, 571; Williams *v.* Donaldson, 8 Iowa, 109; Corbin *v.* Sistrunk, 19 Ala. 203; Fletcher's Succession, 11 La An. 59; Lazare *v.* Jacques, 15 La. An. 598; Newsom *v.* Thighen, 30 Miss. 414. Hence it is admissible to prove that a written contract in form of a sale was really the security for a usurious loan. Ferguson *v.* Sutphen, 8 Ill. 547.

[5] Chamberlain *v.* McClurg, 8 Watts & S. 31.

[6] Griffin *v.* N. J. Co. 11 N. J. Eq. (3 Stock.) 49.

vate intention to overrule the natural and obvious meaning of my written engagement, would be to give to secret mental reservations an ascendency destructive of fair business dealing. And even supposing there be no such taint possible, to permit the treacherous medium of memory as to conversation to supersede the more exact medium of a written statement would be to subordinate the superior to the inferior mode of proof. For these and other reasons the courts have united, with limitations to be hereafter expressed, in holding that the obvious meaning of a dispositive document cannot be varied by proof of the writer's intent.[1]

Otherwise as to ambiguous terms.

§ 937. Yet, where a description in a document is equally applicable to two or more objects, the declarations of the author may be received to explain to which of these objects the description refers. Intention, thus proved, is subject to the drawbacks mentioned in the last section. It may have changed since its last expression; it may not have been sincere; yet it is to be considered in determining what the language in controversy really means. This, it should be remembered, is

[1] Shore *v.* Wilson, 9 Cl. & F. 525, 556, 565; Peel, in re, L. R. 2 P. & D. 46; Hunt *v.* Rousmanier, 8 Wheat. 174; Shankland *v.* Washington, 5 Pet. 390; Elder *v.* Elder, 10 Me. 80; Eveleth *v.* Wilson, 15 Me. 109; Wiggin *v.* Goodwin, 63 Me. 389; Fitts *v.* Brown, 20 N. H. 393; Delano *v.* Goodwin, 48 N. H. 203; Ripley *v.* Paige, 12 Vt. 353; Fitzgerald *v.* Clark, 6 Gray, 393; Perkins *v.* Young, 16 Gray, 389; Fitchburg *v.* Lunenburg, 102 Mass. 358; Cook *v.* Shearman, 103 Mass. 21; Elliott *v.* Weed, 44 Conn. 19; Sayre *v.* Peck, 1 Barb. 464; Spencer *v.* Tilden, 5 Cow. 144; Long *v.* R. R. 50 N. Y. 76; Perrine *v.* Cheeseman, 6 Halst. 174; Huffman *v.* Hummer, 2 C. E. Green N. J. 269; Heilner *v.* Imbrie, 6 Serg. & R. 401; Ellmaker *v.* Ins. Co. 5 Penn. St. 183; Wier *v.* Dougherty, 27 Penn. St. 182; Albert *v.* Ziegler, 29 Penn. St. 50; Lloyd *v.* Farrell, 48 Penn. St. 73; Kirk *v.* Hartman, 63 Penn. St. 97; Wesley *v.* Thomas, 6 Har. & J. 24; McClernan *v.* Hall, 33 Md. 293; Stevens *v.* Hay, 8 Ind. 277; Oiler *v.* Bodkey, 17 Ind. 600; Woodall *v.* Greater, 51 Ind. 539; Abrams *v.* Pomeroy, 13 Ill. 133; Robinson *v.* Magarity, 28 Ill. 423; McCloskey *v.* McCormick, 37 Ill. 66; McCormick *v.* Huse, 66 Ill. 315; Hartford Ins. Co. *v.* Webster, 69 Ill. 392; Pilmer *v.* Branch Bank, 16 Iowa, 321; Ward *v.* Ledbetter, 1 Dev. & B. Eq. 496; Delaney *v.* Anderson, 54 Ga. 586; Turner *v.* Wilcox, 54 Ga. 593; Kennedy *v.* Kennedy, 2 Ala. 571; Sanford *v.* Howard, 29 Ala. 684; Selby *v.* Friedlander, 22 La. An. 281; Herndon *v.* Henderson, 41 Miss. 584; Cocke *v.* Bailey, 42 Miss. 81; Peers *v.* Davis, 29 Mo. 184; Joliffe *v.* Collins, 21 Mo. 338; State *v.* Lefaivre, 53 Mo. 470; Ruiz *v.* Norton, 4 Cal. 359; Price *v.* Allen, 9 Humph. 703; Harrell *v.* Durrance, 9 Fla. 490.

the issue. The issue is not the real meaning of the parties. That is something which we have no means of determining, and which is so complex, and often so volatile, even if conceivable, that we would have no means of executing it could it be ascertained. We are restricted, therefore, to the interpretation of the language; and proof of intention is only admissible when, in cases of ambiguity, intention is useful in enabling us to discover what the language means.[1] "You cannot vary the terms of a written instrument by parol evidence; that is a regular rule: but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so."[2] Thus where on the face of a document it is doubtful whether a memorandum at its foot is part of it, evidence of the intention of the parties is admissible to solve the doubt.[3] An omitted inventory, also, referred to in a deed, may be supplied by extrinsic proof;[4] and a short-hand memorandum may be by parol expanded.[5] So where, on the face of a writing, it is doubtful whether a principal or an agent is

[1] Doe *v.* Hiscocks, 5 M. & W. 363; Chicago *v.* Sheldon, 9 Wall. 50; Atlantic R. R. Co. *v.* Bank, 19 Wall. 548; Gray *v.* Harper, 1 Story R. 574; Reed *v.* Ins. Co. 95 U. S. 23; Fenderson *v.* Owen, 54 Me. 374; Stone *v.* Aldrich, 43 N. H. 52; Lowry *v.* Adams, 22 Vt. 160; Farmers' Bk. *v.* Whinfield, 24 Wend. 419; Howlett *v.* Howlett, 56 Barb. 467; Gage *v.* Jaqueth, 1 Lans. 207; Dent *v.* Ins. Co. 49 N. Y. 390; Von Keller *v.* Schulting, 50 N. Y. 108; Stapenhorst *v.* Wolff, 35 N. Y. Sup. Ct. 25; Collender *v.* Dinsmore, 55 N. Y. 200; Conover *v.* Wardell, 20 N. J. Eq. 266; Havens *v.* Thompson, 26 N. J. Eq. 383; Armstrong *v.* Burrows, 6 Watts, 266; Helme *v.* Ins. Co. 61 Penn. St. 107; Caley *v.* R. R. 80 Penn. St. 363; Fryer *v.* Patrick, 42 Md. 51; Davis *v.* Shaw, 42 Md. 410; Ins. Co. *v.* Troop, 22 Mich. 146; Am. Ex. Co. *v.* Schier, 55 Ill. 140; West. R. R. *v.* Smith, 75 Ill. 597; Greene *v.* Day, 34 Iowa, 328; Poindexter *v.* Cannon, 1 Dev. Eq. 373; Terrell *v.* Walker, 69 N. C. 244; Jenkins *v.* Cooper, 50 Ala. 419; Baldwin *v.* Winslow, 2 Minn. 213; Wood *v.* Augustine, 61 Mo. 46; Simpson *v.* Kimberlin, 12 Kans. 579; Waymack *v.* Heilman, 26 Ark. 449; Goodrich *v.* McClary, 3 Neb. 123.

[2] Goldshede *v.* Swan, 1 Ex. 158, Parke, B.; Shovington *v.* Smith, 8 Wal. 1.

[3] Verzan *v.* McGregor, 23 Cal. 339.

[4] England *v.* Downs, 2 Beav. 523.

[5] Kinney *v.* Flynn, 2 R. I. 319. See infra, § 972.

"Spitting of blood," in application for a life insurance, can be explained by parol. Singleton *v.* Ins. Co. 66 Mo. 63.

An entry in a bank book of a deposit, "in trust," may be shown, as to third parties, to have been for the depositor's own use. Powers *v.* Prov. Inst. 124 Mass. 377; citing Brabrock *v.* Savings Bk. 104 Mass. 228; Clark *v.* Clark, 108 Mass. 522.

primarily liable, parol proof may be received to settle the doubt.[1] So where the issue is whether a bequest of stock is specific or pecuniary, evidence may be received of the state of the testator's funded property.[2] Where, also, the defendant agreed to pay "$1700 lawful money of the United States, *and* $500 *in an order on W. and T.*," it was held that it was admissible to prove that the order for $500 was for sashes, blinds, &c., in which W. and T. dealt.[3] As we shall hereafter see,[4] the rule before us is eminently applicable where signs or terms of art are employed.[5] "Where characters, marks, or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract."[6]

Declarations of intention need not be contemporaneous.

§ 938. When declarations of intention are admissible, under the restrictions above stated, it is not necessary that they should be contemporaneous.[7] It is elsewhere shown that declarations of a deceased predecessor in title are admissible to affect his successors,[8] and that declarations of deceased relatives are admissible in questions of pedigree.[9] But independently of these limitations, it is the better opinion that the declarations of a deceased person, subsequent to the execution of a document, signed by him, are admissible, in aid of construction, in all cases in which contemporaneous declarations

[1] Higgins *v.* Senior, 8 M. & W. 834; Trueman *v.* Loder, 11 A. & E. 589; Beckman *v.* Drake, 9 M. & W. 79; Lerned *v.* Johns, 9 Allen, 419; Ohio R. R. *v.* Middleton, 20 Ill. 629; and other cases cited infra, §§ 949 *et seq.*

[2] Atty. Gen. *v.* Grote, 2 Russ. & Myl. 699, per Lord Eldon; Wigr. Wills, 201, *S. C.;* Boys *v.* Williams, 2 Russ. & Myl. 689, per Ld. Brougham; Horwood *v.* Griffith, 23 L. J. Ch. 465; 4 De Gex, M. & G. 709, *S. C.;* Taylor, § 1083.

[3] Hinnemann *v.* Rosenback, 39 N. Y. 98.

[4] Infra, § 972.

[5] Infra, §§ 938, 953, 961, 972.

[6] Allen, J., Collender *v.* Dinsmore, 55 N. Y. 206; citing Dana *v.* Fiedler, 2 Ker. 40; Barnard *v.* Kellogg, 10 Wallace, 383; Robinson *v.* U. S. 13 Ibid. 363; Wails *v.* Bailey, 49 N. Y. 464; Attorney General *v.* Shore, 11 Simons, 616. See, to same effect, Sweet *v.* Lee, 3 Man. & Gr. 452; Webster *v.* Hodgkins, 5 Fost. 128; Farmers' Bk. *v.* Day, 13 Vt. 36; Stone *v.* Hubbard, 7 Cush. 595; Keller *v.* Webb, 125 Mass. 88; Colwell *v.* Lawrence, 38 Barb. 643; Hite *v.* State, 9 Yerg. 357. Infra, § 972.

[7] Though see Thomas *v.* Thomas, 6 T. R. 671.

[8] Infra, § 1156.

[9] Supra, § 201.

would be received;[1] and so, also, has it been held as to previous declarations.[2] But such declarations must relate to the specific writing in dispute.[3]

Evidence admissible to bring out true meaning of writings.

§ 939. To explain the meaning of a writing in the true sense, and with this limit, is simply to develop the real meaning of the document. In ordinary cases, this office is performed by the attaching to words their proper meaning.[4] Hence punctuation may be supplied by aid of parol evidence as to intent;[5] words that are blurred or defaced may be deciphered by aid of the same evidence;[6] foreign words may be translated by interpreters,[7] abbreviations expanded by persons familiar with the objects described,[8] and terms of art defined by experts.[9] It is in accordance with the same principle that ambiguities, in reference either to the persons affected by the document or to the thing passed by it, may be explained by parol evidence.[10]

[1] Doe *v.* Allen, 12 A. & E. 455.

[2] Doe *v.* Hiscocks, 5 M. & W. 369.

[3] Whitaker *v.* Tatham, 7 Bing. 628. Infra, § 1079.

[4] See supra, § 937.

[5] Graham *v.* Hamilton, 5 Ired. L. 428. Infra, § 972.

[6] Fenderson *v.* Owen, 54 Me. 372.

[7] Supra, §§ 174, 407, 493.

[8] Whart. Crim. Law, § 405; Hite *v.* State, 9 Yerg. 357. Infra, § 972.

[9] See supra, § 435; infra, § 972; Pollen *v.* Le Roy, 30 N. Y. 549.

[10] Bank U. S. *v.* Dunn, 6 Pet. 51; Peisch *v.* Dickson, 1 Mason, 9; Heckscher *v.* Binney, 3 Wood. & M. 333; Haven *v.* Brown, 7 Greenl. 421; Patrick *v.* Grant, 14 Me. 233; Gallagher *v.* Black, 44 Me. 99; George *v.* Joy, 19 N. H. 544; Hall *v.* Davis, 36 N. H. 569; Holmes *v.* Crossett, 33 Vt. 116; Sutton *v.* Bowker, 5 Gray, 416; Chester Emery Co. *v.* Lucas, 112 Mass. 424; Willis *v.* Hulbert, 117 Mass. 151; Hotchkiss *v.* Barnes, 34 Conn. 27; Ely *v.* Adams, 19 Johns. R. 313; Galen *v.* Brown, 22 N. Y. 37; Von Keller *v.* Schulting, 50 N. Y. 108; Block *v.* Ins. Co. 42 N. Y. 393; Dent *v.* Steamsh. Co. 49 N. Y. 390; Clinton *v.* Ins. Co. 45 N. Y. 454; Oliver *v.* Phelps, 20 N. J. L. 180; Suffern *v.* Butler, 21 N. J. E. 410; Com. *v.* Blaine, 4 Binn. 186; Russel *v.* Werntz, 24 Penn. St. 337; Chalfant *v.* Williams, 35 Penn. St. 212; Crawford *v.* Morris, 5 Grat. 90; Masters *v.* Freeman, 17 Ohio St. 323; Barrett *v.* Stow, 15 Ill. 423; Clark *v.* Powers, 45 Ill. 283; Weber *v.* Anderson, 73 Ill. 439; Facey *v.* Otis, 11 Mich. 213; Ins. Co. *v.* Sharp, 22 Mich. 146; Corbett *v.* Berryhill, 29 Iowa, 157; Scott *v.* Blaze, 29 Iowa, 168; Greene *v.* Day, 34 Iowa, 328; Crawford *v.* Jarrett, 2 Leigh, 630; Wilson *v.* Robertson, 7 J. J. Marsh. 78; Terrell *v.* Walker, 66 N. C. 244; Milling *v.* Crankfield, 1 McCord, 258; Bowen *v.* Slaughter, 24 Ga. 338; Crawford *v.* Brady, 35 Ga. 184; Paysant *v.* Ware, 1 Ala. 160; Morrison *v.* Taylor, 21 Ala. 779; Shuetze *v.* Bailey, 40 Mo. 69; Kimball *v.* Brawner, 47 Mo. 398; St. Louis Gas Light Co. *v.* St. Louis, 48 Mo. 121; McPike *v.* Allman, 53 Mo. 551; Shewalter *v.* Pir-

§ 940. Extrinsic circumstances, also, in cases of ambiguity, are of value in elucidating the true meaning.[1] The court and jury, in interpreting what the writer meant, must put themselves, as far as evidence can enable them to do so, in his position.[2] Thus in a case already cited, where it was doubtful what articles a written order was for, it was held admissible to prove the business of the party drawn on.[3] So, where in a partition between heirs, a right of way is assigned to one of them, and it is doubtful which of two ways was intended by the deed, extrinsic proof as to the character of the ways is admissible, to solve the doubt.[4] Evidence, also, of surrounding circumstances is admissible, to show that a guarantee was intended to be a continuing one.[5] So, such evidence has

Extrinsic evidence to prove true construction.

ner, 55 Mo. 218; Hancock *v.* Watson, 18 Cal. 137; Piper *v.* True, 36 Cal. 606; and see fully infra, §§ 942–950. So facts of public notoriety relating to a contract are to be presumed to be known to the parties, and these facts may be used in construing ambiguous terms. Woodruff *v.* Woodruff, 52 N. Y. 53. Infra, § 1243.

[1] Emery *v.* Webster, 42 Me. 204; Grant *v.* Lathrop, 23 N. H. 67; French *v.* Hayes, 42 N. H. 30: Hotchkiss *v.* Barnes, 34 Conn. 27; Knight *v.* Worsted Co. 2 Cush. 271; Phelps *v.* Bostwick, 22 Barb. 314; Halsted *v.* Meeker, 15 N. J. L. 136; Frederick *v.* Campbell, 14 S. & R. 293; Bollinger *v.* Eckert, 16 S. & R. 422; Carmony *v.* Hoober, 5 Penn. St. 305; Martin *v.* Berens, 67 Penn. St. 462; Clarke *v.* Adams, 83 Penn. St. 309; Ratcliffe *v.* Allison, 3 Rand. 537; Hammam *v.* Keigwin, 39 Tex. 34.

[2] Shore *v.* Wilson, 9 Cl. & F. 556, per Parke, B.; Guy *v.* Sharpe, 1 Myl. & K. 602, per Lord Brougham; Sweet *v.* Lee, 3 M. & Gr. 466, per Tindal, C. J.; Drummond *v.* Atty. Gen. 2 H. of L. Ca. 862, by Lord Brougham; Simpson *v.* Margetson, 11 Q. B. 32, by Lord Denman; Taylor's Ev. § 1082.

"I apprehend that there are two descriptions of evidence . . . . which are clearly admissible for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place there is no doubt that not only when the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used which, at the time the instrument was written, had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. . . . .

"This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate." Parke, B., Shore *v.* Wilson, 9 Cl. & F. 555.

[3] Hinnemann *v.* Rosenback, 39 N. Y. 98.

[4] French *v.* Hayes, 43 N. H. 30.

[5] Heffield *v.* Meadows, L. R. 5 C. P. 595.

been received to explain the meaning of the phrase, "across a country," in a steeple-chase transaction;[1] that "a thousand" means a hundred dozen;[2] and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season.[3] So, in a case elsewhere cited,[4] extrinsic evidence was received to explain the meaning of the phrase, "Godly preachers of Christ's Holy Gospel," and to show that, according to the usage of a sect to which the grantor belonged, the grant was intended for that sect. It has been held, also, admissible to introduce proof of extrinsic facts to explain the local meaning of "good" or "fine" barley,[5] to indicate the amount implied in a contract to buy "your wool" from a party;[6] and, generally, in all cases where the signification of a particular phrase is unsettled and variable in its nature, and where it is liable to have different senses attached to it in different places, to elucidate such meaning. But it is essential in such cases that the sense thus sought should be of a public and popular kind; and it will not be allowable to show that a party used the term in a sense opposed to its local and conventional usage. Thus, where a testatrix was in the habit of treating certain shares as "double shares," evidence of this was not allowed to influence the construction of her will, Page Wood, V. C., saying, "I must take things to be as I find them, and cannot allow particular expressions, said to have been made use of by this testatrix, to prevail, when they are not the general language universally applicable to the subject matter."[7] It must be remembered, however, that "A

[1] Evans *v.* Pratt, 3 M. & G. 759.

[2] Smith *v.* Wilson, 3 B. & Ad. 278.

[3] Grant *v.* Maddox, 15 M. & W. 737.

[4] Shore *v.* Wilson, 9 Cl. & F. 555.

[5] Hutchinson *v.* Bowker, 3 B. & Ad. 278.

[6] Macdonald *v.* Longbottom, 28 L. J. Q. B. 293; 29 L. J. Q. B. 256.

[7] Millard *v.* Bailey, L. R. 1 Eq. 382; 35 L. J. Ch. 312; Powell's Evidence (4th ed.) 420.

In connection with the positions of the text, the following opinions will be of value: —

"It is a rule of interpretation that the intention of the parties to a contract is to be ascertained by applying its terms to the subject matter. The admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. Thus, for the purpose of identifying the subject matter to which the written contract relates, parol testimony of that which was in the minds of the parties, and to which their attention was directed at the time, may be given. It may be shown that a sample, to which the terms of the contract are applicable, was exhibited or referred to in

written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read, nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used." [1]

Acts may be received as exposition.

§ 941. Acts of the writer of an ambiguous document, being less liable to misinterpretation than oral expressions of intention, and more likely to exhibit the writer's real

the negotiation, and other statements of the parties then made may be resorted to. The sense in which the parties understood and used the terms expressed in the writing is thus best ascertained. Accordingly, it has been recently held, in an action upon a written contract relating to advertising charts, that verbal representations as to the material of which the chart was to be made and the manner in which it would be published, although promissory in their character, were admissible. Stoops *v.* Smith, 100 Mass. 63; Hogins *v.* Plympton, 11 Pick. 97; Miller *v.* Stevens, 100 Mass. 518." Colt, J., Swett *v.* Shumway, 102 Mass. 367.

"In Macdonald *v.* Longbottom, 1 E. & E. 978, the defendant, by a written contract, had purchased of the plaintiffs, who were farmers, a quantity of wool, which was described in the contract simply as 'your wool.' Some time previously a conversation had taken place, in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip, and partly of wool they had contracted to buy of other farmers. In an action for not accepting the wool, this conversation was held admissible in evidence, for the purpose of explaining what the parties meant by the term 'your wool.' Mumford *v.* Gething, 7 C. B. (N. S.) 305, will be found equally to the point. In Thorington *v.* Smith, 8 Wall. 1, it was adjudged competent to show, by the contemporaneous understanding of the parties, that the term 'dollars' meant Confederate dollars. I will not follow further the cases, but will content myself by quoting the general rule in question, as defined by Tindal, C. J., in Shore *v.* Wilson, 9 Clark & F. 566, that definition being in these words, namely: 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or, perhaps, a corollary to the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself.'" Beasley, C. J., Sand ford & Wright *v.* R. R. Co. 37 N. J. 3. See observations of Church, C. J., in Reynolds *v.* Ins. Co. 47 N. Y. 605.

[1] Wigram on Wills, 2d ed. 130.

purpose, have been received, as to ancient documents, without the limitations just noticed as bearing on oral expressions of intention. Thus in a leading case on this point,[1] the House of Lords held that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the court in construing the grant. So, in a subsequent case,[2] Lord Chancellor Sugden, while acknowledging that he could not receive evidence of declarations of the founder of an ancient charity, as explanatory of his grant, held that it was admissible to inquire as to what acts such founder had done in relation to the charity. "Tell me," said this eminent judge, "what you have done under such a deed, and I will tell you what that deed means."[3] In a similar case, Tindal, C. J., held admissible "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed."[4] It may further[5] be laid down that all ancient instruments of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by evidence of the mode in which property dealt with by them has been held and enjoyed.[6] Evidence of contemporaneous, and even of uniform modern usage, may for the same purpose be received for the purpose of construing ancient grants and charters.[7] And in all

tory of ambiguity.

[1] Atty. Gen. *v.* Brazenose College, 2 Cl. & F. 295.

[2] Atty. Gen. *v.* Drummond, 1 Dru. & War. 353, 366, 375, 376; aff. on appeal, Drummond *v.* Atty. Gen. 2 H. of L. Cas. 837.

[3] 1 Dru. & War. 368.

[4] Shore *v.* Wilson, 9 Cl. & Fin. 569; Atty. Gen. *v.* Sidney Sussex Coll. 38 L. J. Ch. 657, 659, 660, per Ld. Hatherly, C.; Law Rep. 4 Ch. App. 722, 732, *S. C.;* Atty. Gen. *v.* May. of Bristol, 2 Jac. & W. 121, per Ld. Eldon.

[5] Taylor's Ev. § 1090.

[6] Weld *v.* Hornby, 7 East, 199, per Ld. Ellenborough; Waterpark *v.* Fennell, 7 H. of L. Cas. 650; Donegall *v.* Templemore, 9 Ir. Law R. N. S. 374; Atty. Gen. *v.* Parker, 3 Atk. 577, per Ld. Hardwicke; R. *v.* Dulwich College, 17 Q. B. 600; Atty. Gen. *v.* Murdoch, 1 De Gex, M. & G. 86. In Atty. Gen. *v.* St. Cross Hospital, 17 Beav. 435, 464, 465, Sir J. Romilly, M. R., held, that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See Atty. Gen. *v.* Clapham, 4 De Gex, M. & G. 591. See Wadley *v.* Bayliss, 5 Taunt. 752; recognized by Cresswell, J., in Doe *v.* Beviss, 7 Com. B. 511; Att. Gen. *v.* Boston, 1 De Gex & Sm. 519, 527; Doe *v.* Beviss, 7 Com. B. 456; Stammers *v.* Dixon, 7 East, 200.

[7] Chad *v.* Tilsed, 2 B. & B. 403;

cases the acts of the parties are received to give their common interpretation of ambiguous terms.[1]

Ambiguity as to property may be explained by parol.

§ 942. In application of the rule already stated,[2] parol evidence as to the extrinsic condition of the grantor's property, or as to his intentions, is admissible in order to explain ambiguous designations of property in deeds, or contracts for sale.[3] So parol evidence of boundaries and

Doe *v.* Beviss, 7 C. B. 456; Beaufort *v.* Swansea, Ex. R. 413; Shepherd *v.* Payne, 16 C. B. (N. S.) 132; Bradley *v.* Pilots, 2 E. & B. 427; Brune *v.* Thompson, 4 Q. B. 543; Sadlier *v.* Biggs, 4 H. of L. Cas. 435; Waterpark *v.* Fennell, 7 H. of L. Cas. 650.

[1] Stone *v.* Clark, 1 Met. 378; Lovejoy *v.* Lovett, 124 Mass. 270.

[2] Supra, § 939.

[3] Atkinson *v.* Cummins, 9 How. 479; Emery *v.* Webster, 42 Me. 204; Darling *v.* Dodge, 36 Me. 370; French *v.* Hayes, 43 N. H. 30; Wright *v.* Worsted Co. 2 Cush. 271; Old Col. R. R. *v.* Evans, 6 Gray, 25; Kimball *v.* Bradford, 9 Gray, 243; Stevenson *v.* Erskine, 99 Mass. 367; Putnam *v.* Bond, 100 Mass. 58; Ganley *v.* Looney, 100 Mass. 359; Pike *v.* Fay, 101 Mass. 134; Chester Co. *v.* Lucas, 112 Mass. 424; Grinnell *v.* Tel. Co. 113 Mass. 299; McFarland *v.* R. R. 115 Mass. 300; Bartlett *v.* Gas. Co. 117 Mass. 533; Fitz *v.* Comey, 118 Mass. 100; Brainerd *v.* Cowdry, 16 Conn. 1; Hotchkiss *v.* Barnes, 34 Conn. 27; Drew *v.* Swift, 46 N. Y. 204; Den *v.* Cubberly, 12 N. J. L 308; Halsteed *v.* Meeker, 15 N. J. L. 136; Fuller *v.* Carr, 33 N. J. L. 157; Jackson *v.* Perrine, 35 N. J. L. 137; Carmony *v.* Hoober, 5 Penn. St. 305; Russell *v.* Werntz, 24 Penn. St. 337; Brownfield *v.* Brownfield, 20 Penn. St. 55; Tattman *v.* Barrett, 3 Houst. 226; Dorsey *v.* Hammond, 1 Har. & J. 201; Herbert *v.* Wise, 3 Call, 240; Elliott *v.* Harton, 28 Grat. 766; Graham *v.* Hamilton, 5 Ired. L. 428; Edwards *v.* Tipton, 77 N. C. 222; Mariner *v.* Rodgers, 26 Ga. 220; Bell *v.* Brumby, 53 Ga. 643; Doe *v.* Jackson, 9 Miss. 494; Rollins *v* Claybrook, 22 Mo. 405; Jennings *v.* Briseadine, 44 Mo. 332; Means *v.* De la Vergne, 50 Mo. 343; McPike *v.* Allman, 53 Mo. 551; Shewalter *v.* Pirner, 55 Mo. 218; Schreiber *v.* Osten, 50 Mo. 513; Burleson *v.* Burleson, 28 Tex. 383; Reed *v.* Ellis, 68 Ill. 206; Kamphouse *v.* Caffner, 73 Ill. 453; Slater *v.* Breese, 36 Mich. 77; Jenkins *v.* Sharpff, 27 Wis. 472; Pinney *v.* Thompson, 3 Iowa, 74; Baker *v.* Talbot, 6 T. B. Mon. 182; Reamer *v.* Nesmith, 34 Cal. 624; Ward *v.* McNaughton, 43 Cal. 159; Altschul *v.* San Francisco, 43 Cal. 171, and cases cited in following notes.

When a sale is by sample, parol evidence of the character of the sample is admissible. "If the sale was made by sample, the description of the sample was competent upon the question whether the article tendered corresponded with that offered for sale. Hogins *v.* Plympton, 11 Pick. 97. So, also, the description given verbally by the defendant's agent, and the corresponding descriptions of the article delivered, were competent upon the question whether they were the same article. Stoops *v.* Smith, 100 Mass. 63. But such evidence must be confined to the question of identity in kind, and not extended to comparisons in degree or quality. It is admissible only when the writing does not distinctly define the article to be

locations may be received to explain ambiguous terms.[1] Thus an agreement in writing to convey "the wharf and flats occupied by T. and owned by H.," may be applied, by parol evidence, to two lots of land, only one of which bounded on the sea, and was separated from the other by a street, it appearing that both, at the time of the agreement, were owned by H. and occupied by T. for landing and storing wood and lumber, and had been originally one lot.[2] Statements, also, of a deceased vendor of land, made at the time of sale, to indicate the property sold, are admissible to aid in its identification.[3] The same principle involves proof as to the position of lines, stakes, and stones, referred to boundaries, when there is doubt as to such position;[4] though boundary lines, definitely settled by a deed, cannot be varied by parol, if such lines are ascertainable.[5] And parol evidence of disappeared monuments and stakes referred to in a conveyance is admissible.[6]

delivered, so as to enable its identity to be seen upon the face of the transaction." Wells, J., Pike *v.* Fay, 101 Mass. 136.

"It is always competent to identify by parol the subject matter of a grant. It is not important to inquire whether the parol evidence is competent for the purpose of raising a latent ambiguity, ... or whether it is evidence offered for the purpose of identifying the subject matter of the grant, or for the purpose of applying the description of the grant to the surfaces of the earth." Lord, J., Cleverly *v.* Cleverly, 124 Mass. 317. See infra, § 1002.

[1] Deery *v.* Cray, 10 Wall. 263; Hodges *v.* Strong, 10 Vt. 247; Allen *v.* Bates, 6 Pick. 460; Waterman *v.* Johnson, 13 Pick. 261; Gerrish *v.* Towne, 3 Gray, 82; Hoar *v.* Goulding, 116 Mass. 132; Dunham *v.* Gannett, 124 Mass. 151; Thomson *v.* Wilcox, 7 Lansing, 376; Blackman *v.* Doughty, 10 Vroom, 402; Carroll *v.* Norwood, 1 Har. & J. 167; Midlothian *v.* Finney, 18 Grat. 304; Hutton *v.* Arnett, 51 Ill. 198; Bybee *v.* Hageman, 66 Ill. 519; Harris *v.* Doe, 4 Blackf. 369; Beal *v.* Blair, 33 Iowa, 318; Hood *v.* Mathers, 2 A. K. Marsh. 553; Maguire *v.* Baker, 57 Ga. 109; Kimball *v.* Brawner, 47 Mo. 398; McLeroy *v.* Duckworth, 13 La. An. 410; Colton *v.* Seavey, 22 Cal. 496; O'Farrell *v.* Harney, 57 Cal. 125.

[2] Gerrish *v.* Towne, 3 Gray, 82.

[3] Parrott *v.* Watts, 37 L. T. 755.

[4] Wing *v.* Burgis, 13 Me. 111; Abbott *v.* Abbott, 51 Me. 575; Gerrish *v.* Towne, 3 Gray, 82; Pettit *v.* Shephard, 32 N. Y. 97; Massengill *v.* Boyles, 4 Humph. 205; Reed *v.* Shenck, 2 Dev. L. 415; Colton *v.* Seavey, 22 Cal. 496.

[5] Linscott *v.* Fernald, 5 Greenl. 496; Liverpool Wharf *v.* Prescott, 4 Allen, 22; Clark *v.* Baird, 9 N. Y. 183; Waugh *v.* Waugh, 28 N. Y. 94; Wynne *v.* Alexander, 7 Iredell L. 237. Infra, § 1156 *a*.

[6] Robinson *v.* Kine, 70 N. Y. 147; citing Wendell *v.* People, 8 Wend. 190; Drew *v.* Swift, 46 N. Y. 204.

§ 943. A general designation of property may be in this way explained. Thus where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, it was held permissible to show that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and further proof was received as to what particular part of the property was intended to be included in it.[1] So again, to take a familiar illustration, if an estate be conveyed by the designation of Blackacre, parol evidence is receivable to show what property is known by that name.[2] Indeed it is essential, where a testator devises a house purchased of A., or a farm in the occupation of B., to introduce extrinsic evidence to explain what house was purchased of A., or what farm was in B.'s occupation, before it can be shown what is devised.[3] Hence parol evidence is admissible to prove what is included in the expression, "known by the name mill-spot," in a deed of land.[4] So parol evidence may be received to show that the term "farm," in a deed, included a particular fenced lot.[5] So in an action on a policy of insurance of goods in a brick building, "known as D. & Co.'s car factory," parol evidence is admissible to show to what building the terms in question refer.[6] And on a written agreement to lease "the Adams House, situate on Washington Street, in Boston," parol evidence is admissible to show that in this agreement it was not intended to include the separate shops forming the whole of the ground floor except the entrance to the hotel.[7]

General designation of property may be thus particularized.

§ 944. We may therefore generally say that when a description in a deed or other document is applicable to two or more objects, parol evidence is admissible to distinguish between the objects, as well as to identify that intended by the parties.[8] It is admissible, also, to iden-

Parol evidence admissible to distinguish objects.

[1] Doe *v.* Wilford, 1 C. & P. 284; R. & M. 88; Denn *v.* Wilford, 2 C. & P. 173; Taylor, § 1036.

[2] Ricketts *v.* Turquand, 1 H. of L. Cas. 472.

[3] Sanford *v.* Raikes, 1 Mer. 653, per Sir W. Grant; Clayton *v.* Ld. Nugent, 13 M. & W. 207, per Rolfe, B.

[4] Woods *v.* Sawin, 4 Gray, 322.

[5] Madden *v.* Tucker, 46 Me. 367. So where "A.'s claim against B." is recited, and there are several such claims, evidence is admissible to show to which the recital refers. Wilson *v.* Horne, 37 Miss. 477.

[6] Blake *v.* Ins. Co. 12 Gray, 265.

[7] Sargent *v.* Adams, 3 Gray, 72.

[8] Brooks *v.* Aldrich, 17 N. H. 443;

tify or distinguish, under like circumstances, property described in a *fi. fa.*, or in a sheriff's deed.[1] But, as we have seen, parol evidence is not admissible to add articles to those already specified as passing in an assignment.[2]

Erroneous particulars in description may be rejected on parol proof.

§ 945. Suppose that in a dispositive document, which contains an adequate description of a specific object, there is introduced an erroneous particular, can such erroneous particular be rejected as surplusage, if it be proved that there exists an object, and one object only, answering the body of the description? Now, in view of the fact that there are few cases in which, if we undertake minutely to describe an object, we do not, while maintaining a general accuracy, introduce some erroneous detail, our answer to the question just put should be in the affirmative. And so has it been frequently held,[3] though it has been added that "if the

George *v.* Joy, 19 N. H. 544; Melvin *v.* Fellows, 33 N. H. 401; Bell *v.* Woodward, 46 N. H. 315; Locke *v.* Rowell, 47 N. H. 46; Rugg *v.* Hale, 40 Vt. 138; Rhodes *v.* Castner, 12 Allen, 130; Doolittle *v.* Blakesley, 4 Day, 265; Bennett *v.* Pierce, 28 Conn. 315; Brinkerhoff *v.* Olp, 35 Barb. 27; Almgren *v.* Dutilh, 5 N. Y. 28; Clark *v.* Wethey, 19 Wend. 320; Rich *v.* Rich, 16 Wend. 663; Burr *v.* Ins. Co. 16 N. Y. 267; Patton *v.* Goldsborough, 9 Serg. & R. 47; Bertsch *v.* Lehigh Co. 4 Rawle, 130; Barnhart *v.* Pettit, 22 Penn. St. 135; Aldridge *v.* Eshleman, 46 Penn. St. 420; Carrington *v.* Goddin, 13 Grat. 587; Morgan *v.* Spangler, 14 Ohio St. 102; Schlief *v.* Hart, 29 Ohio St. 150; Venable *v.* McDonald, 4 Dana (Ky.), 336; Myers *v.* Ladd, 26 Ill. 415; Marshall *v.* Gridley, 46 Ill. 247; Stewart *v.* Chadwick, 8 Iowa, 463; Sargeant *v.* Solberg, 22 Wis. 132; Spears *v.* Burton, 31 Miss. 547; Hardy *v.* Matthews, 38 Mo. 121; Senterfit *v.* Reynolds, 3 Rich. (S. C.) 128; Hughes *v.* Sandal, 25 Tex. 162. See Collins *v.* Rush, 7 S. & R. 147; Scott *v.* Sheakly, 3 Watts, 50; Ins. Co. *v.* Sailer, 67 Penn. St. 108; Harvey *v.* Vandegrift, 1 Weekly Notes, 629, to the effect that identity in such case may be a question of fact.

[1] Abbott *v.* Abbott, 51 Me. 575; McGregor *v.* Brown, 5 Pick. 170; Lodge *v.* Barnett, 46 Penn. St. 477; Matthews *v.* Thompson, 3 Ohio, 272; Doe *v.* Roe, 20 Ga. 189; Webster *v.* Blount, 39 Mo. 500.

[2] Supra, §§ 920–1; Driscoll *v.* Fiske, 21 Pick. 503; Taylor *v.* Sayre, 24 N. J. L. 647.

[3] Doe *v.* Galloway, 5 B. & Ad. 43; Goodtitle *v.* Southern, 1 M. & Sel. 219; Slingsby *v.* Grainger, 7 H. of L. Cas. 282; West *v.* Lawdray, 11 H. of L. Cas. 375; Day *v.* Trig, 1 P. Wms. 286; Selwood *v.* Mildmay, 3 Ves. 306; Miller *v.* Travers, 8 Bing. 244; Doe *v.* Chichester, 4 Dow. P. C. 65; McMurray *v.* Spicer, L. R. 5 Eq. 527; Hardwick *v.* Hardwick, L. R. 16 Eq. 168; Barber *v.* Wood, L. R. 4 Ch. D. 885; Aikman *v.* Cummings, 9 How. 470; Brown *v.* Huger, 21 How. 305; McPherson *v.* Foster, 4 Wash. C. C. 45; Esty *v.* Baker, 50 Me. 331; Peaslee *v.* Gee, 19 N. H. 273; Bailey *v.*

premises be described in general terms, and a particular description be added, the latter controls the former."[1] It is clear, also, that such particularization cannot be rejected if introduced into the writing by way of limitation.[2] But where a contract for the sale of land has been fully executed, and the purchase money paid, the vendee cannot recover damages for a deficiency in the quantity of land, without actual proof of fraud or mutual mistake, when the boundaries of the land are accurately stated, and where the quantity is given by "so many acres, *be the same more or less;*"[3] and it is held that in such a case the mere fact that the discrepancy between the quantity called for by the deed and the actual measurement is great, is not of itself sufficient to prove fraud or mistake.[4] It has, however, been ruled that where,

White, 41 N. H. 343; Park *v.* Pratt, 38 Vt. 552; Kellogg *v.* Smith, 9 Cush. 375; Davis *v.* Rainsford, 17 Mass. 207; Sargent *v.* Adams, 3 Gray, 72; Putnam *v.* Bond, 100 Mass. 58; Loomis *v.* Jackson, 19 Johns. 449; Drew *v.* Swift, 46 N. Y. 207; Opdyke *v.* Stephens, 4 Dutch. (N. J.) 89; Mackenzie *v.* Savoy, 17 S. & R. 104; Brown *v.* Willey, 42 Penn. St. 369; Lodge *v.* Barnett, 46 Penn. St. 484; Hildebrand *v.* Fogle, 20 Ohio, 147; Evansville *v.* Page, 23 Ind. 527; Slater *v.* Breese, 36 Mich. 77; Reed *v.* Schenck, 2 Dev. L. 415; Massengill *v.* Boyles, 4 Humph. 205; Stanley *v.* Green, 12 Cal. 162; Colton *v.* Seavey, 22 Cal. 496; Miller *v.* Cherry, 3 Jones (N. C.), Eq. 29. See supra, § 412; infra, §§ 996–1001; and see 3 Wash. Real Prop. 4th ed. 403.

[1] Parke, B., Doe *v.* Galloway, 5 B. & Ad. 43. See Bagley *v.* Morrill, 46 Vt. 94; Drew *v.* Swift, 46 N. Y. 209; White *v.* Williams, 48 N. Y. 344.

[2] Taylor *v.* Parry, 1 M. & Gr. 623.

[3] See infra, § 1028.

[4] Kreiter *v.* Bomberger, 82 Penn. St. 59. In this case Sharswood, J., said: "The rule was stated by Mr. Justice Sergeant, in Galbraith *v.* Galbraith, 6 Watts, 112, in these words: 'An examination of the numerous decided cases in our own reports will, I think, show that, in the common case between vendor and vendee, in a conveyance of a tract of land bounded by adjoining owners, and described as containing so many acres, *be the same more or less*, at a certain price per acre, where there is no stipulation for admeasurement, nor any *mala fides* proved, redress cannot, after the bargain is closed, be given to either party for a surplus or deficiency subsequently appearing.' This rule was adopted and confirmed in Hershey *v.* Keembortz, 6 Barr, 128. Chief Justice Gibson adding: 'The vendor is answerable, in respect of the quantity, only for *mala fides*.' There are, indeed, many dicta that the difference in the quantity may be so great as to be evidence itself of fraud or deceit, or of great misapprehension between the parties, — and then equity will relieve. Though no case is to be found of an actual application of this doctrine in favor of the vendee, or to show what must be the extent of the difference to raise the presumption; yet, perhaps, it may be fairly conceded that, in an action to enforce the payment of purchase money, a deduc-

through mutual mistake or fraud, there is an excess of land conveyed, equitable assumpsit may be maintained to recover the value of the excess.[1]

§ 946. Ambiguous expressions as to extrinsic or other objects may be explained by parol proof; but when the meaning of the ambiguous terms is thus supplied, the court must judge of the whole document in subordination to its legal sense as thus completed.[2] The contract cannot be varied; its obscure expressions may be explained, but this for the purpose not of moulding, but of developing the true sense.[3] Thus, where a deed, among other things, conveyed all

Ambiguity as to objects may be explained.

tion under such circumstances will be allowed. Such is the weight of extra-judicial opinions. Boar *v.* McCormick, 1 S. & R. 166; Glen *v.* Glen, 4 S. & R. 488; Bailey *v.* Snyder, 13 S. & R. 160; McDowell *v.* Cooper, 14 S. & R. 296; Ashcom *v.* Smith, 2 P. R. 219; Frederick *v.* Campbell, 13 S. & R. 136; Haggerty *v.* Fagan, 2 P. R. 533; Coughenour's Adm'r *v.* Stauft, 27 P. F. Smith, 191.

"The third class of cases, to which the one now under consideration belongs, is where the contract is fully executed and the purchase money paid. We are of the opinion that in this class the transaction cannot be ripped up without actual proof of fraud or mutual mistake. Upon this question the greatness of the difference may be evidence, but not sufficient of itself. There must be other circumstances. Cases of this class very rarely arise. I can find but one instance in our books. That is the case of Large *v.* Penn, 6 S. & R. 488. There the difference was very great in reference to the extent of the premises. The quantity conveyed was described as $2\frac{3}{4}$ acres, and without the words 'more or less;' the actual quantity was 1 acre 148 perches. Yet the vendee was denied relief."

[1] See cases cited infra, § 1028; Jordan *v.* Cooper, 3 S. & R. 564; Bank *v.* Galbraith, 10 Barr, 490; Jenks *v.* Fritz, 7 W. & S. 201; Fisher *v.* Deibert, 54 Penn. St. 460; Schettiger *v.* Hopple, 3 Graut, 56; Beck *v.* Garrison, cited infra, § 1028.

[2] Doe *v.* Hiscocks, 7 M. & W. 367; Doe *v.* Martin, 4 B. & Ad. 771; R. *v.* Wooldale, 6 Q. B. 549; Macdonald *v.* Longbottom, 1 E. & E. 977; Devonshire *v.* Neill, 2 L. R. Ir. 132.

[3] Purcell *v.* Burns, 39 Conn. 429; Cole *v.* Wendel, 8 Johns. 116; Dodge *v.* Potter, 18 Barb. 193; Dana *v.* Fiedler, 12 N. Y. 40; Filkins *v.* Whyland, 24 N. Y. 338; Clinton *v.* Ins. Co. 45 N. Y. 454; Den *v.* Cubberly, 12 N. J. L. 308; Sandford *v.* R. R. 37 N. J. L. 1; Thayer *v.* Torrey, 37 N. J. L. 339; McCullough *v.* Wainright, 14 Penn. St. 171; Clarke *v.* Adams, 83 Penn. St. 309; Paul *v.* Owings, 32 Md. 403; Warfield *v.* Booth, 33 Md. 63; Crawford *v.* Jarrett, 2 Leigh, 630; Sexton *v.* Windell, 23 Grat. 534; Duling *v.* Johnson, 32 Ind. 155; Haver *v.* Tenney, 36 Iowa, 80; Richards *v.* Schlegelmich, 65 N. C. 150; Paysant *v.* Ware, 1 Ala. 160; Acker *v.* Bender, 33 Ala. 230; Shuetze *v.* Bailey, 40 Mo. 69; Washington Ins. Co. *v.* St. Mary's, 52 Mo. 480; Rugely *v.* Goodloe, 7 La. An. 295; Piper *v.* True, 36 Cal. 606; Ellis *v.* Crawford, 39 Cal. 523; Franklin *v.* Mooney, 2 Tex. 452.

the "zinc" in a certain tract, excepting an ore called "franklinite," and when a contest arose as to whether a particular vein was "zinc" or "franklinite," parol evidence was held admissible to show the meaning of "zinc."[1] Where, also, the defendant agreed to pay the plaintiff a certain sum for inserting a business card in his advertising chart, when it should be "published," parol evidence was held admissible to explain the style and character of the "chart," so as to determine the meaning of the word "published."[2] Again: where a physician sold his "good will" in practice to another, evidence was admitted to show in what vicinity this practice was maintained.[3] So where there is a guarantee of general indebtedness, the details of such indebtedness can be shown by parol.[4]

Ambiguous measurement and numbers may be explained by parol.

§ 947. Measurement and numbers, when ambiguous, may be explained by parol.[5] Thus under a contract to sell by measurement, the returns of such measurement may be proved by parol.[6] So where B. agreed in writing to receive from S. 60 shares of bank stock, on which $10 per share had been paid, and to deliver S. his note for $667, to pay the balance in cash, and to pay five per cent. in advance; it was held, the nominal value of each share being $50, that parol evidence was admissible to show whether it was understood by the parties that the five per cent. advance should be paid on each share only, or on the nominal amount.[7] On a contract, also, for the purchase of a certain number of "casks," parol evidence of the size of the casks is admissible.[8]

Parol evidence admissible to prove "dollar" meant

§ 948. One of the most interesting applications of the principle before us arises from the confusion of currency during the late civil war. In construing contracts made in the Confederate States during the war, the consideration of which was so many "dollars," to make the term "dol-

[1] New Jersey Co. *v.* Boston Co. 15 N. J. Eq. 418. See supra, § 939.

[2] Stoops *v.* Smith, 100 Mass. 63.

[3] Warfield *v.* Booth, 63 Md. 63.

[4] Day *v.* Leal, 14 Johns. R. 404; Morrison *v.* Myers, 11 Iowa, 538; Snodgrass *v.* Bank, 25 Ala. 161; Vardeman *v.* Lawson, 17 Tex. 10.

[5] See infra, § 961 *a*.

[6] Hill *v.* McDowell, 14 Johns. R. 175. See infra, § 961 *a*.

[7] Cole *v.* Wendel, 9 Johns. R. 116. Contemporaneous writings also are admissible to aid in the construction of an ambiguous contract. Wilson *v.* Randall, 67 N. Y. 338. See infra, §§ 962, 971, 1015.

[8] Keller *v.* Webb, 125 Mass. 88.

lars" mean a standard widely apart from that which the parties intended would be a perversion of justice. It has consequently been held admissible, in such cases, to show what was the currency the parties had in view.[1] Where, however, there is no parol proof offered, the presumption is, that the lawful currency of the United States was intended.[2]

"Confederate dollar."

§ 949. A latent ambiguity as to the parties to a contract may be removed by showing who are the real parties in interest.[3] Thus where a writing on its face *primâ facie* creates a joint tenancy, it may be shown by the acts and dealings of the parties, though not, it seems, by declarations of intention, that a tenancy in common is what the writing, as rightly construed, creates.[4] So if a man should make an ambiguous settlement on his children, evidence will be received as to the state of his family, and the circumstances in which he is placed as to the property disposed of.[5] Parol evidence, also, has been received to show that a grantor executed a deed by other than his formal name;[6] and to identify grantee or assignee,[7] provided the writing be not thereby contradicted.[8] It has, on the same principle, been held that extrinsic evidence is admissible to prove who is the buyer and who the seller in a

Ambiguity as to parties may be explained by identification.

[1] Thorington *v.* Smith, 8 Wall. 9–12; Atlantic R. R. Co. *v.* Bank, 19 Wall. 548; Bryan *v.* Harrison, 76 N. C. 360; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259; Craig *v.* Pervis, 14 Rich. Eq. (S. C.) 150; Hightower *v.* Maull, 50 Ala. 495; Carmichael *v.* White, 11 Heisk. 262; Stewart *v.* Smith, 59 Tenn. 231; Donley *v.* Tindall, 32 Tex. 43. But see Oliver *v.* Shoemaker, 35 Mich. 464. That the term "current funds" may be explained, see Davis *v.* Glenn, 76 N. C. 427.

[2] The Confederate Note Case, 19 Wall. 557.

[3] Lancey *v.* Ins. Co. 56 Me. 562; Foster *v.* McGraw, 64 Penn. St. 464; Richmond R. R. *v.* Snead, 19 Grat. 354; Scammon *v.* Campbell, 75 Ill. 223; Bancroft *v.* Grover, 23 Wis. 463; Fallon *v.* Kehoe, 38 Cal. 44; Ellis *v.* Crawford, 39 Cal. 523. See Grant *v.* Grant, Law Rep. 2 P. & D. 8; 39 L. J. Pr. & Mat. 17, *S. C.*; 39 L. J. C. P. 140, S. P. in another proceeding; Law Rep. 5 C. P. 380, *S. C.*; aff'd. in Ex. Ch. 39 L. J. C. P. 272; and Law Rep. 5 C. P. 727; Serviss *v.* Stockstill, 30 Ohio St. 418; Mayer *v.* Adrian, 77 N. C. 83.

[4] Harrison *v.* Barton, 30 L. J. Ch. 213, by Wood, V. C.

[5] Atty. Gen. *v.* Drummond, 1 Dru. & W. 367, Sugden, C.

[6] Nixon *v.* Cobleigh, 52 Ill. 387; Aultman *v.* Richardson, 7 Neb. 1.

[7] Langlois *v.* Crawford, 59 Mo. 456.

[8] State *v.* Nashville, 2 Tenn. Ch. 755.

memorandum or note under the 17th section of the statute of frauds,[1] and who is the person referred to in a libel.[2]

Thus to enable undisclosed principal to sue or be sued, he may be proved by parol.

§ 950. The most common illustration of the exception last stated is where evidence is received to prove that P. is the real principal to a contract executed by A., who is in fact only P.'s agent. The instrument in such case is not varied by parol evidence, but parol evidence is introduced to make the instrument effective by showing who is the person whom the instrument binds or privileges. The question is, who is A.; and for the purpose either of enabling P. to bring suit on the instrument, or to be sued on the instrument by T., parol evidence is admissible to show that A. is the agent of P.[3]

§ 951. Yet it is not admissible for an agent, signing an instru-

[1] Newell *v.* Radford, L. R. 3 C. P. 52. See Whart. on Agency, §§ 719 *et seq.*

[2] Infra, § 975.

[3] Garrett *v.* Handley, 4 B. & C. 664; Higgins *v.* Senior, 8 M. & W. 834; Fowler *v.* Hollins, L. R. 7 Q. B. 616; Hutton *v.* Bullock, L. R. 9 Q. B. 572; Truman *v.* Loder, 11 A. & E. 589; Beckham *v.* Drake, 9 M. & W. 79; 2 H. L. Cas. 579; Elbing Act. Ges. *v.* Claye, L. R. 8 Q. B. 317; Calder *v.* Dobell, L. R. 6 C. P. 486; Ford *v.* Williams, 21 How. 207; Bradlee *v.* Glass Co. 16 Pick. 347; Commercial Bank *v.* French, 21 Pick. 486; Bank of N. A. *v.* Hooper, 15 Gray, 567; Lerned *v.* Johns, 9 Allen, 419; Nat. Life Ins. Co. *v.* Allen, 110 Mass. 398; Jones *v.* Ins. Co. 14 Conn. 501; Taintor *v.* Prendergast, 3 Hill, 72; Gates *v.* Brower, 9 N. Y. 205; Coleman *v.* Bank, 53 N. Y. 393; Oelrichs *v.* Ford, 21 Md. 489; Anderson *v.* Shoup, 17 Ohio St. 128; Ohio R. R. *v.* Middleton, 20 Ill. 629; Wolfley *v.* Rising, 12 Kans. 535; Hopkins *v.* Lacouture, 4 La. R. 64; May *v.* Hewitt, 33 Ala. 161; Briggs *v.* Munchon, 56 Mo. 467; Smith *v.* Moynihan, 44 Cal. 53; Engine Co. *v.* Sacramento, 47 Cal. 494.

"The rule does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal, upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, and was not known to the plaintiff when it was made, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority." Andrews, J., Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 393.

In Barry *v.* Ransom, 12 N. Y. 464, Denio, J., in speaking of the rule, says: "It is a valuable principle, which we would be unwilling to draw in question, but we think it is limited to the stipulations between the parties actually contracting with each other by the written instrument."

ment in his own name, to defend himself when sued by proof that he acted in the matter only as agent,[1] though he may prove agency in connection with an agreement by the other contracting parties that he should be regarded only as agent.[2] Nor does the right by parol evidence to charge a principal,[3] or to enable him to sue on a contract, extend to suits on sealed instruments or negotiable paper, when innocent third parties are concerned.[4]

But person signing as principal cannot set up that he was only agent.

The distinction to be kept in mind is, that while parol evidence cannot be received to discharge a party, it may be received when its effect is to show that another party, namely, the principal, is also bound.[5] Parol evidence may be also received to show that an agent, dealing for an undisclosed principal, has made himself personally liable.[6] So, a person who appears in a contract as agent may be shown to be the real principal, in the event of his being sued by the party with whom he contracted.[7] In equity, however, as we have seen, the plaintiff in such a case may, if the evidence be to such effect, be regarded as having estopped him-

[1] Wharton on Agency, § 298; Higgins *v.* Senior, 8 M. & W. 834; 2 Smith's Lead. Cases, note to Thompson *v.* Davenport; Royal Ex. Ass. *v.* Moore, 2 New R. 63; Sowerby *v.* Butcher, 2 C. & M. 371; Magee *v.* Atkinson, 2 M. & W. 440; Jones *v.* Littledale, 6 A. & E. 486; Bradlee *v.* Glass Co. 16 Pick. 347; Bank of N. A. *v.* Hooper, 15 Gray, 567; Babbett *v.* Young, 51 N. Y. 238.

[2] Williams *v.* Robbins, 16 Gray, 77; Pease *v.* Pease, 35 Conn. 131; Miles *v.* O'Hara, 1 S. & R. 32; but see Nash *v.* Town, 5 Wall. 689; Williams *v.* Christie, 4 Duer, 39; Chappell *v.* Dann, 21 Barb. 17. See Rogers *v.* Hadley, 2 H. & C. 249; Wake *v.* Harrop, 30 L. J. 273; 31 L. J. 451.

[3] Thus it has been held in Rhode Island that parol evidence is not admissible to show that A. is the real principal to a sealed instrument instead of B., and that B. is only agent. Providence *v.* Miller, 11 R. I. 272.

[4] Whart. on Ag. §§ 290, 411, 504; Emly *v.* Lye, 15 East, 7; Lefevre *v.* Lloyd, 5 Taunt. 749; Siffkin *v.* Walker, 2 Camp. 308; Leadbitter *v.* Farrer, 5 M. & S. 345; Beckham *v.* Drake, 9 M. & W. 79; Hancock *v.* Fairfield, 30 Me. 299; Bradlee *v.* Glass Man. 16 Pick. 347; Stackpole *v.* Arnold, 11 Mass. 27; Bank of N. A. *v.* Hooper, 5 Gray, 567; Dessau *v.* Bours, 1 McAll. 20; Pentz *v.* Stanton, 10 Wend. 276; Anderson *v.* Shoup, 17 Ohio St. 128; Hiatt *v.* Simpson, 8 Ind. 256; Lander *v.* Castro, 43 Cal. 497; Bogan *v.* Calhoun, 19 La. An. 472. See as to negotiable paper fully infra §§ 1058–60.

[5] Taylor's Ev. § 1055; Higgins *v.* Senior, 8 M. & W. 844, 845.

[6] Fleet *v.* Murton, L. R. 7 Q. B. 126; Fairlie *v.* Denton, L. R. 5 Ex. 169; Hutchin *v.* Tatham, L. R. 8 C. P. 482; Mason *v.* Massa, 122 Mass. 477.

[7] Carr *v.* Jackson, 7 Excheq. R. 382.

self, by an agreement upon sufficient consideration, from proceeding against the defendant.[1] It should be remembered, also, that an undisclosed principal cannot, by disclosing himself, cut off the other contracting party from any defence he might otherwise make.[2]

Surety in writing may be proved by parol.

§ 952. When a bond is by its terms joint and several, and contains no indication as to which of the obligors is surety, parol evidence, as between the parties, is admissible for the purpose of showing which of the obligors is surety, and the knowledge of this relationship by the obligees.[3] This exception is now extended to suits on negotiable paper,[4] in cases where the statute of fraud does not intervene.[5] But it is otherwise as to a document in which a party expressly describes himself as principal.[6]

Other cases of distinction and identification.

§ 953. It is also admissible to prove by parol that a certificate of deposit taken by a guardian in his own name was really a certificate of the deposit of his ward's money;[7] to show that a person acting as "treasurer" or "agent" acted as treasurer or agent for a particular company;[8]

[1] In Chandler *v.* Coe, 54 N. H. 561, it is held that if the principal was *not disclosed* at the time of the making of the contract by the agent in his own name, he may be held liable thereon by parol proof; but that if the principal was *disclosed* at the time, such evidence cannot be admitted, not by reason of the rule of evidence, but upon the ground of estoppel; that the acceptance of the instrument executed in the name of the agent is conclusive evidence of an election to look to the agent exclusively. And it was also held, that where there is an express contract in the agent's name, whether verbal or written, the principal is not liable to be sued upon an implied contract arising from the passage of the consideration between his agent and the other contracting party, unless an action might be sustained against him upon the express contract.

[2] Whart. on Agency, § 405. See Humble *v.* Hunter, 12 Q. B. 310.

[3] Davis *v.* Barrington, 30 N. H. 517; Barry *v.* Ransom, 12 N. Y. 462; Brown *v.* Stewart, 4 Md. Ch. 368; Smith *v.* Bing, 3 Ohio, 33; Dickerson *v.* Commis. 6 Ind. 128; Garrett *v.* Ferguson, 9 Mo. 125; Scott *v.* Bailey, 23 Mo. 140; Field *v.* Pelot, 1 McMul. Eq. 369. See fully infra, § 1059.

[4] Infra, §§ 1059 *et seq.*; Taylor's Ev. § 1054; Greenough *v.* Greenough, 2 E. & E. 424; Mutual Loan Co. *v.* Sudlow, 5 C. B. (N. S.) 449; Pooley *v.* Harradine, 7 E. & B. 431; Lawrence *v.* Walmsley, 12 C. B. (N. S.) 799; Bristow *v.* Brown, 13 Ir. Law R. (N. S.) 201; Davis *v.* Barrington, 30 N. H. 517; Archer *v.* Douglass, 5 Denio, 509; Hubbard *v.* Gurney, 64 N. Y. 457. See for American cases infra, §§ 1060–61.

[5] Hauer *v.* Patterson, 84 Penn. St. 254. See infra, § 1059.

[6] McMillan *v.* Parkell, 64 Mo. 286.

[7] Beasley *v.* Watson, 41 Ala. 234.

[8] Wharton on Agency, §§ 291, 296,

to show that a husband, in making an instrument, was really agent for his wife in whole or in part,[1] to show that P. was the real purchaser, and that T. was merely his trustee;[2] to show the identity of "Eli" with "Elias" in a grant from the state;[3] to show that a christian name in a deed or grant from the state was entered by mistake for another name;[4] to show, where a deed of land was executed to E. A. C., which was the name of E. A. S. before marriage, that E. A. S. was the intended grantee;[5] to show that a blank in the vendee's name in an act of sale was intended for H. T. W., as the recitals in the act indicated;[6] to show that "Hiram Gowing, cordwainer," the nominal grantee in a deed, was intended for "Hiram G. Gowing," a cordwainer, a man of middle age, and not for his infant son, Hiram Gowing;[7] to show, when there are two persons bearing the exact name of the grantee in a deed, which was intended;[8] and to show that, through a mis-punctuation, "A. B., orphan," should be read "A. B.'s orphan."[9] But, as is elsewhere seen,[10] when the mistake is a mistake of judgment on the part of a grantor, as between two persons, and not a mistake of the name of a particular intended person, parol evidence is not admissible to correct the mistake.[11]

Evidence of writer's use of language admissible in solving latent ambiguities.

§ 954. We will elsewhere observe that evidence of the course of business between two contracting parties is admissible to show that they used certain litigated words in a special sense.[12] On the same principle it is admissible to show that the writer of a unilateral document was in the habit of giving a particular meaning, dis-

409, 492, 729; Mich. State Bank *v.* Peck, 28 Vt. 200.

[1] Westholz *v.* Retaud, 18 La. An. 285; Dunham *v.* Chatham, 21 Tex. 231.

[2] Leakey *v.* Gunter, 25 Tex. 400.

[3] Henderson *v.* Hackney, 23 Ga. 383.

[4] Williams *v.* Carpenter, 42 Mo. 327; Henderson *v.* Hackney, 16 Ga. 521.

[5] Scanlan *v.* Wright, 13 Pick. 523.

[6] Beauvais *v.* Wall. 14 La. An. 199.

[7] Peabody *v.* Brown, 10 Gray, 45.

[8] Coit *v.* Starkweather, 8 Conn. 289; Avery *v.* Stites, Wright (Ohio), 56.

[9] Walker *v.* Wells, 25 Ga. 141; Tuggle *v.* McMath, 38 Ga. 648; Simmons *v.* Marshall, 3 G. Greene, 502.

[10] See infra, §§ 1082–9.

[11] See Crawford *v.* Spencer, 8 Cush. 418; Jackson *v.* Hart, 12 Johns. R. 77; Jackson *v.* Foster, 12 Johns. R. 488; Moody *v.* McCowen, 39 Ala. 586.

[12] Infra, § 962.

tinct from that primarily expressed, to a disputed word. This is frequently illustrated in cases where a testator's habit of misnaming a particular person is put in evidence to explain a particular devise.[1] Contractions and short-hand expressions may be in like manner interpreted by showing their customary meaning, or the meaning of the parties by whom they are used.[2]

Party himself admissible to prove his intent or understanding.

§ 955. Under the statutes enabling parties to be witnesses, a party, in all cases where extrinsic evidence is admissible to prove a party's declarations of intent, may be himself permitted to testify to such intent or understanding; although in most states he is precluded from so testifying where the other contracting party is deceased.[3] Nor can a party be examined to vary, by proving his intent, a contract on its face unambiguous.[4]

[1] See, for cases, infra, §§ 1010 *et seq.*

[2] Infra, § 972; Sweet *v.* Lee, 3 Man. & Gr. 452.

[3] Supra, §§ 466, 482; Hale *v.* Taylor, 45 N. H. 405; Delano *v.* Goodwin, 48 N. H. 205; Fisk *v.* Chester, 8 Gray, 506; Lombard *v.* Oliver, 7 Allen, 155.

"Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows and can testify directly what that purpose or understanding was. Accordingly it has been held that where the intention or good faith of a party to a suit becomes material, it may be shown directly as well as from circumstances; and the party himself, if a competent witness, may testify directly to his intention or understanding, unless prevented by some other principle of law applicable to the particular case. Hale *v.* Taylor, 45 N. H. 405; Norris *v.* Morrill, 40 N. H. 395; Fisk *v.* Chester, 8 Gray, 506; Thacher *v.* Phinney, 7 Allen, 146; Lombard *v.* Oliver, 7 Allen, 155. The same principle must apply to the 'understanding' of a party relative to the meaning or effect of a contract. To prove a contract, it must be shown (except in cases where the doctrine of estoppel applies) that both parties have understandingly assented to the same thing in the same sense. See 1 Parsons on Contracts, 4th ed. 399 *b*. But although the issue on trial is whether there has been a concurrence in understanding of two parties, yet it is not improper to prove separately the understanding of each. See Hale *v.* Taylor, 45 N. H. 407. It is no objection to a single piece of evidence

[4] Dillon *v.* Anderson, 43 N. Y. 231; Lewis *v.* Rogers, 34 N. Y. Sup. Ct. 64; Harrison *v.* Kirke, 37 N. Y. Sup. Ct. 396, fully cited supra, § 482. See Gould *v.* Lead Co. 9 Cush. 338, where it was held that the opinion of the director of a corporation could not be received to explain the meaning of a recorded resolution of the board.

§ 956. The admission of evidence to explain ambiguities is confined to such ambiguities as are *latent*. That which is called a *patent* ambiguity (*i. e.* one in which the imperfection of the writing is so obvious that the idea that it was intended cannot be absolutely excluded) cannot be explained by parol.[1] Judge Story, in this relation,[2] makes a new distinction: "There seems, indeed, to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the *subject matter*, in the contemplation of the parties. In such case, I should think that parol evidence might be admitted, to show the circumstances under which the contract was made, and the subject matter to which the parties referred."[3] But an ambiguity which is only

Patent ambiguities cannot be explained.

that it does not make out the whole of a plaintiff's case. The evidence to prove several propositions (all of which are requisite to the case) may be of different kinds and drawn from different sources. See Blake *v.* White, 13 N. H. 267, 272. In proving a concurrence of understandings the plaintiff may prove his own understanding by one witness, and defendant's understanding by another witness. The admissibility of a party's evidence as to how he understood a contract cannot depend upon the grounds of that understanding, though these grounds may often be very important in determining the credit to be given to such evidence. Whether his understanding is founded on personal knowledge or hearsay is of no consequence in point of law, provided it actually concurs with the other party's understanding; and, if it does not so concur, then his testimony on this point is immaterial, except in cases of estoppel, where the party claiming that the other is estopped would have to show how he himself understood the contract, and then show that the other party induced him to entertain and act upon that understanding." Delano *v.* Goodwin, 48 N. H. 205, 206, Smith, J.

[1] Bacon's Law Tracts, 99, 100; Clayton *v.* Nugent, 13 M. & W. 200; Whately *v.* Spooner, 5 Kay & J. 542; Webster *v.* Atkinson, 4 N. H. 21; Pingry *v.* Walkins, 17 Vt. 379; Horner *v.* Stillwell, 35 N. J. L. 307; Berry *v.* Matthews, 13 Md. 537; Clark *v.* Lancaster, 36 Md. 196; Bowyer *v.* Martin, 5 Rand. (Va.) 525; Morris *v.* Edwards, 1 Ohio, 189; Richmond *v.* Farquhar, 8 Blackf. 89; Panton *v.* Tefft, 22 Ill. 366; Robeson *v.* Lewis, 64 N. C. 734; Goodman *v.* Henderson, 58 Ga. 567; McGuire *v.* Stephens, 42 Miss. 724; Brown *v.* Guice, 46 Miss. 299; Peacher *v.* Strauss, 47 Miss. 358; Johnson *v.* Ballew, 2 Port. Ala. 29; Campbell *v.* Johnson, 44 Mo. 247; Jennings *v.* Briseadine, 44 Mo. 332; Mithoff *v.* Byrne, 20 La. An. 363; McNair *v.* Toler, 5 Minn. 435. See Fish *v.* Hubbard, 21 Wend. 651; and infra, § 1006.

[2] Peisch *v.* Dickson, 1 Mason, 9.

[3] See comments of Moncure, J., in

developed by extrinsic evidence is not patent in the strict sense of the term. A patent ambiguity is one which arises from the writer's own incapacity, either of perception or explanation, and exhibits itself on the face of the writing. His meaning in a particular relation he fails to exhibit, and the writing shows the failure. But in the cases mentioned by Judge Story there is no ambiguity in the writer's mind, but a conception which fails simply because the words selected by the writer are susceptible of a meaning other than that which he intended. By Sir J. Stephen the rule is stated more correctly to be, that "if the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say."[1] We may add that latent ambiguities in contracts, when raised by parol evidence, can be got rid of by parol evidence.[2]

"Patent" is "subjective," and "latent," "objective."

§ 957. Were we to translate Lord Bacon's maxim into modern terms, we might say that a patent ambiguity is subjective, that is to say, an ambiguity in the mind of the writer himself; while a latent ambiguity is objective, that is to say, an ambiguity in the thing he describes. A writer's mind may be ambiguous for several reasons. He may have no idea on the topic on which he writes; and if so, it is inadmissible to prove that he had an idea, which would be to contradict the writing itself, and which would make him say what he did not intend to say. In such case a writing is to be treated as a piece of blank paper, and is not (as is the case with a meaningless will) to be permitted in any way to disturb the due course of the law. To graft a meaning, for instance, on a meaningless will, would be to open the way to great frauds, and to contravene the statutes requiring wills to be in writing. Or a writing may be ambiguous because the writer intends it to be so. Of this an illustration is to be found in a much litigated case in which the testator left his estate to his "heir at law." It was perfectly competent for him to say in his will who his "heir at law" was, and to make such person his heir at law; but he did

Early *v.* Wilkinson, 9 Grat. 74. And see Byers *v.* Wheatly, 59 Tenn. 160.

[1] Steph. Ev. art. 91; citing Baylis *v.* R. J. 2 Atk. 239; Shore *v.* Wilson, 9 C. & F. 365. See infra, § 1006.

[2] Towle *v.* Topham (Ch. Div. 1878), 37 L. T. 308; 26 W. R. Dig. 253.

not choose to do so, but preferred to leave it to the law itself to decide who was his heir at law. Now in such a case to have taken evidence to prove that Mr. Aspden, the testator, at one time said that he liked one nephew, or that at another time he said he liked another nephew, would have been to contravene (1.) the statute which requires wills to be written; (2.) the policy of the law which forbids the transfer of property by loose talk; and (3.) the intention of the testator, which was to have the question of heirship determined, not by himself, but by the courts. Hence, in this famous case, extrinsic evidence as to his intention was properly rejected.[1] On the other hand, an ambiguity which is "latent" or "objective" is an ambiguity, not in the writer's mind, which it is not the business of the court to clear, but in the thing described, which it is the business of the court to discover and to distinguish, so as to carry out the writer's intent.

§ 958. Usage cannot be introduced either to give to a dispositive writing a meaning different from that which it bears on its face, or to interpret any of the terms used in such writing in a sense conflicting with that attached to such terms by law.[2] Thus where goods had been

Usage cannot in general vary dispositive writing.

[1] Aspden's Est. 3 Wall. Jr. 368.

[2] R. *v.* Lee, 12 Mod. 514; Smith *v.* Wilson, 3 B. & Ad. 731; Hockin *v.* Cooke, 4 T. R. 314; Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 498; Noble *v.* Durell, 3 T. R. 371; Blackett *v.* Exch. Co. 2 Cr. & J. 249; Doe *v.* Lea, 11 East, 312; Sotilichos *v.* Kemp, 3 Ex. R. 105; Holding *v.* Pigott, 7 Bing. 465, 474; 5 M. & P. 427, *S. C.;* Clarke *v.* Roystone, 13 M. & W. 752; Yeats *v.* Pim, Holt N. P. R. 95; *nom.* Yates *v.* Pym, 6 Taunt. 446, *S. C.;* Trueman *v.* Loder, 11 A. & E. 589; 3 P. & D. 267, *S. C.;* Muncey *v.* Dennis, 1 H. & N. 216; Suse *v.* Pompe, 8 Com. B. N. S. 538; Buckle *v.* Knoop, 36 L. J. Ex. 49; Insurance Co. *v.* Wright, 1 Wall. 456; Merchants' Bank *v.* State Bank, 10 Wall. 604; Moran *v.* Prather, 23 Wall. 499; Cabot *v.* Winsor, 1 Allen, 546; Dodd *v.* Farlow, 11 Allen, 426; Luce *v.* Ins. Co. 105 Mass. 297; Davis *v.* Galloupe, 111 Mass. 121; Sawtelle *v.* Drew, 122 Mass. 228; Glendale Co. *v.* Ins. Co. 21 Conn. 19; Simmons *v.* Law, 4 Abb. (N. Y.) App. Dec. 241; Lombardo *v.* Case, 45 Barb. 95; Thompson *v.* Ashton, 14 Johns. 317; Woodruff *v.* Bank, 25 Wend. 673; Markham *v.* Jaudon, 41 N. Y. 235; Farm. & Mech. Bk. *v.* Sprague, 52 N. Y. 605; Stenton *v.* Jerome, 54 N. Y. 480; Baker *v.* Drake, 66 N. Y. 518; Security Bank *v.* Nat. Bank, 67 N. Y. 458; Bank of Commerce *v.* Bissell, 72 N. Y. 615; Schenck *v.* Griffin, 38 N. J. L. 462; Coxe *v.* Heisley, 19 Penn. St. 243; Wetherill *v.* Neilson, 20 Penn. St. 448; Willmering *v.* McGaughey, 30 Iowa, 205; Osgood *v.* McConnell, 32 Ill. 74; Marc *v.* Kupfer, 34 Ill. 287; Sanford *v.* Rawlings, 43 Ill. 92; Ra-

sold through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills.[1] So where linseed was bought to be delivered at Hull, and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," evidence to show that this stipulation was intended by the parties for the benefit, not of the seller, but of the buyer, who had the option of accepting the seed during any portion of the fourteen days, was rejected.[2]

Parties may override usage by consent.

§ 959. It does not follow because a usage exists as to the object of a contract, that the contract is meant by the parties to incorporate the usage. It is within the power of parties to override by consent any usage, no matter how settled. It may be the usage of a particular business, for

fert *v.* Scroggins, 40 Ind. 195; Spears *v.* Ward, 48 Ind. 546; Marks *v.* Cass Co. Mill, 43 Iowa, 146; Werner *v.* Footman, 54 Ga. 128; Sugart *v.* Mays, 54 Ga. 554; Jackson *v.* Beling, 22 La. An. 377; Mangum *v.* Ball, 43 Miss. 288; Harvey *v.* Cady, 3 Mich. 431.

As to negotiable paper, see infra, § 1058.

The impolicy of expanding the rule admitting this kind of evidence is thus discussed by Lord Denman: "If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts; while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom." Trueman *v.* Loder, 11 A. & E. 597, 598. To the same effect is an opinion of Judge Story in The Schooner Reeside, 2 Sumn. 567.

For an article on the Usages of Trade, see 7 Cent. L. J. 958.

[1] Hodgson *v.* Davies, 2 Camp. 532; approved of by Ld. Denman in Trueman *v.* Loder, 11 A. & E. 599.

[2] Sotilichos *v.* Kemp, 3 Ex. R. 105.

instance, to accept checks given in payment of goods as cash, and hence an agent, on such usage, if the matter be open, may accept checks without incurring liability for the loss to his principal;[1] but if the principal should instruct the agent not to receive checks, then the agent cannot protect himself by setting up the usage. Wherever, in other words, it appears from the instrument, either expressly or impliedly, that the parties did not mean to be governed by an alleged custom, evidence of the custom cannot be received.[2] Thus if the custom of the country should require the tenant to plough, sow, and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labor, seeds, and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough, sow, and manure, in accordance with the custom, he being paid on quitting for the *ploughing*.[3] Nor can oral proof of custom be adduced to destroy the force of brokers' contracts.[4]

[1] Wharton on Agency, § 210.

[2] Hutton *v.* Warren, 1 M. & W. 477, per Parke, B. See Clarke *v.* Roystone, 13 M. & W. 752.

[3] 1 M. & W. 477, 478; Webb *v.* Plummer, 2 B. & A. 746.

In a case in 1870, before the Supreme Court of the United States, the topic in the text was ably discussed on the following facts: I., a wool importer in Boston, sent to D., a dealer in wool at Hartford, samples of foreign wool in bales which he had for sale, on commission, with the prices, and D. offered to purchase the different lots at the prices, if equal to the samples furnished. I. accepted the offer, provided D. would come to Boston and examine the wool on a day named, and then report if he would take it. D. accordingly went to Boston, and after examining certain of the bales as fully as he desired, and being offered an opportunity to examine all the remaining bales, and to have them opened for his inspection (which offer he declined), purchased. The wool proved, I. knowing nothing of it, to have been deceitfully packed, and on further examination was shown to be rotten and damaged wool, with tags concealed by an outer covering of fleeces in their ordinary state. On an action brought by D. to recover damages from I., it was ruled that the sale was not one by sample; and there having been no express warranty that the bales not examined should correspond with those which were, nor any circumstances from which the law could imply such a warranty, that the rule of *caveat emptor* applied. It was further determined that proof could not be received to vary the contract, that by the custom of merchants and dealers in wool in bales, at Boston and New York, the two principal markets of the country for foreign wool, there is an implied warranty of the seller to the purchaser that the same is not

[4] Infra, § 968.

§ 960. Even parol proof that the parties agreed that a written contract should be subjected to a usage conflicting with the writing is inadmissible, unless fraud or gross concurrent mistake be proved; for this would be contradicting the writing by parol evidence, and substituting

Proof of submission to a conflicting usage is inadmissible.

falsely or deceitfully packed, — especially where the parties did not know of the custom. "It is to be regretted," said Davis, J., "that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others, to extend them; and on this account mainly the conflict in decisions arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. See Notes to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 498; 2 Parsons on Contracts, §§ 9, 535; Taylor on Evidence, 943, and following. 'Usage,' says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' Blackett *v.* Royal Exchange Assur. Co. 2 Crompton & Jervis, 249. And it is well settled that usage cannot be allowed to subvert the settled rules of law. See note to 1st Smith's Leading Cases, supra. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court, in Thompson *v.* Ashton, 14 Johnston, 317, 'would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels.'

"In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In Dickinson *v.* Gay, 7 Allen, 29, which was a sale of cases of satinets made by samples, there were, in both the samples and the goods, a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that by

an inferior and treacherous medium of proof for that which is superior and which is solemnly adopted by the parties as express-

custom there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of Dodd *v.* Farlow, 11 Allen, 426, is more conclusive on the point. There, forty bales of goatskins were sold by a broker, who put into the memorandum of sale, without authority, the words 'to be of merchantable quality and in good order.'

"It was contended that by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality, and, therefore, the broker was authorized to insert the words; but the court held the custom itself invalid. They say: 'It contravenes the principle which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject.' It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

"In New York, there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in Frith *v.* Barker, 2 Johnson, 327, was, whether a custom was valid, that freight must be paid on goods lost by peril of the sea, and Chief Justice Kent, in deciding that the custom was invalid, says: 'Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law.' In Woodruff *v.* Merchants' Bank, 25 Wendell, 673, a usage in the city of New York, that days of grace were not allowed on a certain description of commercial paper, was held to be illegal. Nelson, Chief Justice, on giving the opinion of that court, says: 'The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;' and adds, 'If the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the state in respect to this description of paper.' And in Beirne *v.* Dord, 1 Selden, 95, the evidence of a custom that in the sale of blankets, in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that state on the subject is the case of Simmons *v.* Law, 3 Keyes, 219. That was an action to recover the value of a quantity of gold dust shipped by Simmons from San Francisco to New York, on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading, by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the ques-

ing their purposes.[1] It is, however, admissible to prove that the course of business between the parties gave to certain terms used by them a distinctive meaning.[2]

tion, say: 'A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined.'

"In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the state allowed evidence of usage, that in the city of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part or actual warranty. Snowden *v.* Warder, 3 Rawle, 101. Chief Justice Gibson at the time dissented from the doctrine, and the same court in later cases has disapproved of it; Coxe *v.* Heisley, 19 Penn. St. 243; Wetherill *v.* Neilson, 20 Ibid. 448; and now hold that a usage, to be admissible, 'must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract.' It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, where the cases are collected and distinctions noticed.

"The necessity for discussing this rule of evidence has often occurred in the highest courts of England, on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note to Wigglesworth *v.* Dallison, and are not different in principle from the general current of the American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable. 'These rules,' says Chief Justice Wilde, in Spartali *v.* Benecke, 10 Common Bench, 222, 'are well settled, and the difficulty that has arisen respecting them has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved.' But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sale of personal property. It introduced a new element into their contract, and added to it a warranty which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry.

[1] Oelricks *v.* Ford, 23 How. 49.

[2] See infra, § 961.

§ 961. Where, also, a dispositive writing employs ambiguous terms, usage can be appealed to, to give a definition of such terms, and to explain, not to vary, the writing. What is meant, is the question, by these terms. And in order to answer this question it is admissible to show a local usage affixing a particular meaning to such ambiguous terms, provided such evidence be explicatory of the meaning of the parties, and does not contradict the tenor of the instrument.[1] Parties, preparing a doc-

Otherwise when ambiguous business terms are to be explained.

By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade, in the manner proposed, by the custom of dealers of wool in Boston, it is easy to see it can he changed in other particulars, and in this way the whole doctrine frittered away." Davis, J., Barnard *v.* Kellogg, 10 Wall. 383.

[1] Webb *v.* Plummer, 2 B. & Ald. 746; Wigglesworth *v.* Dallison, 1 Smith's Lead. Cas. 498; Spicer *v.* Hooper, 1 Q. B. 424; Chaurand *v.* Ankerstein, Peake's N. P. Cases, 43; Cochran *v.* Retburgh, 3 Esp. 121; Evans *v.* Pratt, 3 M. & Gr. 759; Smith *v.* Wilson, 3 B. & A. 728; Roberts *v.* Barker, 1 Cr. & M. 808; Hughes *v.* Gordon, 1 Bligh, 287; Clinan *v.* Cooke, 1 Sch. & L. 22; Buckle *v.* Knoop, L. R. 2 Ex. 122; Taylor *v.* Briggs, 2 C. & P. 525; Taylor *v.* Clay, 9 Q. B. 713; Adams *v.* Royal Mail Steam Packet Co. 5 C. B. (N. S.) 493; Leidman *v.* Schultz, 14 C. B. 38; Robertson *v.* Jackson, 2 C. B. 412; Grant *v.* Paxton, 1 Taunton, 463; Planché *v.* Fletcher, 1 Doug. 521; Elton *v.* Larkins, 8 Bing. 198; Hudson *v.* Ede, Law Rep. 3 Q. B. 412; 1 Arnould on Ins. (2d Amer. ed.) 71, note; Insurance Co. *v.* Wright, 1 Wallace, 456, 485; Sturgis *v.* Cary, 2 Curtis C. C. 382; Barnard *v.* Adams, 10 How. 270; Barnard *v.* Kellogg, 10 Wall. 383; Robinson *v.* U. S. 13 Wall. 363; Howe *v.* Ins. Co. 3 Cliff. 318; Farrar *v.* Stackpole, 6 Greenl. 154; Stone *v.* Bradbury, 14 Me. 185; George *v.* Joy, 19 N. H. 544; Hart *v.* Hammett, 18 Vt. 127; Patch *v.* Ins. Co. 44 Vt. 481; Murray *v.* Hatch, 6 Mass. 465; Eaton *v.* Smith, 20 Pick. 150; Luce *v.* Ins. Co. 105 Mass. 297; Howard *v.* Ins. Co. 109 Mass. 387; Schnitzer *v.* Print Works, 114 Mass. 123; Page *v.* Cole, 120 Mass. 37; Avery *v.* Stewart, 2 Conn. 69; Collins *v.* Driscoll, 34 Conn. 43; Astor *v.* Ins. Co. 7 Cow. 202; Hinton *v.* Locke, 5 Hill, 437; Hulbert *v.* Carver, 37 Barb. 62; Dana *v.* Fiedler, 12 N. Y. 40; Markham *v.* Jaudon, 41 N. Y. 235; Dent *v.* S. S. Co. 49 N. Y. 390; Walls *v.* Bailey, 49 N. Y. 464; Lawrence *v.* Maxwell, 53 N. Y. 21; Collender *v.* Dinsmore, 55 N. Y. 204; Harris *v.* Rathbun, 2 Abb. (N. Y.) App. 326; Smith *v.* Clayton, 5 Dutch. (29 N. J. L.) 357; Hartwell *v.* Camman, 10 N. J. Eq. 128; New Jersey Co. *v.* Boston Co. 15 N. J. Eq. 418; Brown *v.* Brooks, 25 Penn. St. 110; Meighen *v.* Bank, 25 Penn. St. 288; Carey *v.* Bright, 58 Penn. St. 70; McMasters *v.* R. R. 69 Penn. St. 374; Williams *v.* Woods, 16 Md. 220; Merick *v.* McNally, 26 Mich. 374; Whittemore *v.* Weiss, 33 Mich. 348; Prather *v.* Ross, 17 Ind. 495; Myers *v.* Walker,

ument in a place or trade where certain terms have a customary meaning, may be interpreted as using these terms in the mean-

24 Ill. 133; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Hooper *v.* R. R. 27 Wis. 81; Lamb *v.* Klaus, 30 Wis. 94; Johnson *v.* Ins. Co. 39 Wis. 87; Reynolds *v.* Jourdan, 6 Cal. 108; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Drake *v.* Goree, 22 Ala. 409; Cowles *v.* Garrett, 30 Ala. 341; Soutier *v.* Kellerman, 18 Mo. 509; Taylor *v.* Sotolingo, 6 La. An. 154. See, also, Moran *v.* Prather, 23 Wall. 499; citing Seymour *v.* Osborne, 11 Wall. 546.

"Evidence may be given of a custom or usage in explanation and application of particular words or phrases, and to aid in the interpretation of the contract, but not to derogate from the rights of the parties, or to import into the contract new terms and conditions, or vary the legal effect of the transaction." Allen, J., Lawrence *v.* Maxwell, 53 N. Y. 21.

"In Barnard *v.* Kellogg, 10 Wallace, 383, this court decided that proof of a custom or usage inconsistent with a contract, and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsive evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former; 1 Smith's Leading Cases, p. 386, 7th edition; and under it the evidence was rightly received." Davis, J., Robinson *v.* United States, 13 Wallace, 365.

"Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated if the language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted, in order to expound it and arrive at its true meaning. Again, in all contracts as to the subject matter of which a known usage prevails, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing; partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded because the words are, in their ordinary meaning, unambiguous, for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the con-

ing thus customary. Thus under a contract to carry a full and complete cargo of molasses from London to Trinidad, evidence has been received to qualify the contract by showing that a cargo is full and complete if the ship be filled with casks of the standard size, although there be smaller casks of other produce freighted in the same vessel.[1] Where a writing promises to pay the "product" of hogs, parol testimony is admissible to prove what such product is;[2] and where an Irish corn merchant sends written instructions to his *del credere* agent in London to sell some oats "*on his account*," parol evidence is admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he is warranted, under these instructions, in selling in his own name.[3] Where a deed uses the term "north," it is admissible, in explanation of the term, to show a usage to run the courses by the magnetic meridian.[4] So, though according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbor on the coast; yet, where these expressions are employed in a Newfoundland policy, they may be explained by evidence of usage to mean, that the risk should not commence till the expiration of the fishing, technically called "banking," or of an intermediate voyage.[5] Evidence of usage, also, is admissible, in a suit on a written contract of sale, to show the meaning of "good, merchantable shipping hay;"[6] on a similar contract for boots, to show the meaning of "good custom cowhide;"[7] and on a similar contract for a

tractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day?' Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' a working day. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract, — it only ascertains it by expounding the language." Per Coleridge, J., Browne *v.* Byrne, 3 E. & B. 703; Powell' Evidence, 4th ed. 429.

[1] Cuthbert *v.* Cumming, 11 Ex. 405.

[2] Stewart *v.* Smith, 28 Ill. 397.

[3] Johnstone *v.* Usborne, 11 A. & E. 549.

[4] Jenny Lind Co. *v.* Bower, 11 Cal. 194.

[5] Vallance *v.* Dewar, 1 Camp. 503. See Eldredge *v.* Smith, 13 Allen, 140. As to proof of misstatements by insurance agents, see infra, § 172.

[6] Fitch *v.* Carpenter, 43 Barb. 40.

[7] Wait *v.* Fairbanks, Brayt. (Vt.) 77.

machine, to show the meaning of "team."[1] It has also been held admissible to show that by the dominant usage an inferior kind of palm oil answers to the description of "best palm oil;"[2] and that by the custom of the building trade the words "weekly accounts" refer to regular day work only;[3] and that credit for "six or eight weeks," does not necessarily give the whole eight weeks for payment for goods.[4] So, to explain the meaning of the term with "all faults," evidence is admissible to prove that these terms have a customary meaning in a contract for the sale of goods.[5]

§ 961 *a*. It has also been held admissible to admit proof of usage to show that in a contract for "freight," "freight" does not include "hay;"[6] to show the meaning of the term "dollars;"[7] to show the difference between "comediennes" and "danseuses" in a written engagement for the services of a dancing girl;[8] to determine whether "per square yard," in a contract for plastering, relates to the plastering actually laid on, or to the whole surface of the house to be plastered;[9] to settle the number of hours in a measurement of labor at so much "per day;"[10] to determine the area of mason work covered by the term of so much "per foot;"[11] to determine the meaning of "per thousand" in a contract for furnishing bricks;[12] to determine in what way the limit "not less than one foot high" is to be construed in a contract to furnish young trees;[13] to show the meaning of "square yards" in a contract for payment by measurement;[14] to prove by parol the mean-

[1] Ganson *v.* Madigan, 15 Wis. 144.

[2] Lucas *v.* Brystow, E., B. & E. 907.

[3] Myers *v.* Sarl, 3 E. & E. 306.

[4] Ashwell *v.* Retford, L. R. 9 C. P. 20; 43 L. J. C. P. 57.

[5] Whitney *v.* Boardman, 118 Mass. 242; citing Henshaw *v.* Robins, 9 Met. 83; Whitmarsh *v.* Conway Ins. Co. 16 Gray, 359; Miller *v.* Stevens, 100 Mass. 518; Swett *v.* Shumway, 102 Mass. 365; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Boardman *v.* Spooner, 13 Allen, 353, 359. See Shepherd *v.* Kain, 5 B. & Ald. 240; Schneider *v.* Heath, 3 Camp. 506.

[6] Noyes *v.* Canfield, 29 Vt. 79. See Peisch *v.* Dickson, 1 Mason, 11.

[7] Supra, § 948.

[8] Baron *v.* Placide, 7 La. An. 229.

[9] Walls *v.* Bailey, 49 N. Y. 467. See Hill *v.* McDowell, 14 Penn. St. 175.

[10] Hinton *v.* Locke, 5 Hill, 437.

[11] Ford *v.* Tirrell, 9 Gray, 401.

[12] Lowe *v.* Lehman, 15 Ohio St. 179.

[13] Barton *v.* McKelway, 22 N. J. L. 165.

[14] The authorities as to measurement are well grouped in the following opinion:—

"The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the

ing of the words "weeks," used in a theatrical contract;[1] of "months," as meaning calendar months in a charter-party;[2] of "days," as meaning working days in a bill of lading;[3] of

plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows and doors?

"And it is not to be said of this contract, that it was so plain in its terms that there could be but one conclusion as to the mode of measurement, by which the number of square yards of work should be arrived at. It is in this case as it was in Hinton *v.* Locke, 5 Hill, 437. There the work was done at so much per day. The parties there differed as to how many hours made a day's work. That is, what should be the measurement of the day? And there, evidence of the usage was admitted, not to control any rule of law, nor to contradict the agreement of the parties, but to explain an ambiguity in the contract. And the proof showing a usage among carpenters that the day was to be measured by the lapse of ten hours, it was held a valid usage; and the contract was interpreted in accordance with it.

"In Ford *v.* Tirrell, 9 Gray, 401, the contract was to build the wall of an octangular cellar, at the rate of eleven cents per foot. The only question was as to the mode of measurement. The defendant contended that the inner surface of the wall should be the rule. The plaintiff claimed that an additional allowance should be made for the necessary work at the angles to support the building. It was held that the agreement as to the compensation was equivocal and obscure, and that it was competent to prove a local usage of measuring cellar walls, in order to interpret the meaning of the language, and to ascertain the extent of the contract.

"So in Lowe *v.* Lehman, 15 Ohio St. 179, in a contract to *furnish and lay up* brick at so much *per thousand*, the controversy was as to the proper mode of counting. Evidence of a local usage, to estimate by measurement of the walls, on a uniform rule, based on the average size of brick, making slight addition for extra work and wastage, deducting for openings in wall, but not for openings in chimneys nor jambs, nor for caps, sills, nor lintels, was admitted as not unreasonable. So, in Barton *v.* McKelway, 2 Zabriskie (22 N. J.) 165, in a contract to deliver certain trees from a nursery, they were to be not less than one foot high. The dispute was as to the measurement; and evidence was held competent of a usage in that trade to measure only to the top of the ripe, hard wood and not to the tip of the tree. See, also, Wilcox *v.* Wood, 9 Wendell, 346; Grant *v.* Maddox, 15 M. & W. 737." Folger, J., Walls *v.* Bailey, 49 N. Y. 467. And see as to measurement supra, § 947.

[1] Grant *v.* Maddox, 15 M. & W. 737. See Meyers *v.* Sarl, 30 L. J. Q. B. 9; 3 E. & E. 306, *S. C.*

[2] Jolly *v.* Young, 1 Esp. 186; recognized in Simpson *v.* Margitson, 11 Q. B. 32.

[3] Cochran *v.* Retberg, 3 Esp. 121.

"corn,"[1] "pig-iron,"[2] "salt,"[3] and of similar expressions used in transportation contracts, or in policies of insurance.[4] On the same principle, evidence has been admitted to show that, by usage in the hop trade, a sale of "ten pockets of Kent hops at £5," means £5 per cwt.[5] So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt "on account of the vendor for the vendee," evidence of usage was admitted to prove that when packers signed receipts in this form, it was their duty not to part with the goods without the vendor's further orders.[6] Again: where a written contract contained a stipulation that a party should "lose no time on his own account, and do his work well, and behave himself in all respects as a good servant," extrinsic evidence was received to show that, by the custom of his trade, such a party was entitled to certain holidays.[7] In all cases, so it has been ruled, where a word is used which is susceptible of two or more meanings,[8] extrinsic evidence is admissible of the usage or course of trade at the place where the contract is made, or where it is to be carried into effect, to explain or remove such doubt. So, also, where a similar doubt arises as to the *lex loci* by which such a contract is to be construed, evidence of usage will be received to determine the place. Thus, where the question was whether goods were to be liable to freight according to their weight at the place of shipment, or according to their expanded weight at the place of consignment, the terms of the charter-party were construed by extrinsic evidence that the usage was to measure the goods according to their weight at the place of shipment.[9]

§ 962. The term "Usage," we must remember, is employed

[1] Mason *v.* Skurray, and Moody *v.* Surridge, Park Ins. 245; Scott *v.* Bourdillon, 2 N. R. 213.

[2] Mackenzie *v.* Dunlop, 3 Macq. Sc. Cas. H. of L. 26, per Ld. Cranworth, C.

[3] Journu *v.* Bourdieu, Park Insur. 245.

[4] As to "general average," see Miller *v.* Tetherington, 6 H. & N. 278; Kidston *v.* Ins Co. L. R. 1 C. P. 535; *S. C.* L. R. 2 C. P. 357.

[5] Spicer *v.* Cooper, 1 Q. B. 424.

[6] Bowman *v.* Horsey, 2 M. & Rob. 85.

[7] R. *v.* Stoke upon Trent, 5 Q. B. 303.

[8] Buckle *v.* Knoop, L. R. 2 Ex. 125; 15 W. R. 588.

[9] Bottomley *v.* Forbes, 5 Bing. N. C. 121; Powell's Evidence, 4th ed. 428.

in the class of cases which are here collected in several distinct senses. First, in construing unilateral writings, such as letters, wills, and powers of attorney, "usage" may be convertible with habit. In such case, therefore, we may prove that the writer had a habit of using certain words in a particular sense, and we may in this way arrive at the sense in which the words were used in the litigated writing to be construed.[1] Secondly, as to bilateral writings, when two persons make a written contract, we may inquire, in construing that contract, what was their course of business, and we may seek to collect their meaning from their correspondence or conversation.[2] Thirdly, every person conducting a trade is supposed to use the language of that trade, and in making a contract connected with the trade to use terms in the sense in which they are accepted in the trade, unless the usage is precluded by the terms used.[3] "Every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself."[4] Fourthly, all persons living in a district may be supposed to adopt the peculiarities of expression of such district, and evidence is therefore admissible of the sense in which litigated words are used in such district.[5] But in whatever sense the term is employed, the usage we seek to attach to such term must be brought home to the writer. In the first two classes of cases noticed above, this may be done by showing from the writings or other expressions of the persons charged an adoption of the particular meaning set up.[6] When the usage of a trade exists, by which certain words are used in a particular sense, then it is sufficient to show directly or inferentially that the writers belonged to this trade. When

Usage is to be brought home to the party to whom it is imputed.

[1] Shore *v.* Wilson, 9 Cl. & F. 355. Supra, 954; infra, §§ 1008, 1287.

[2] Rushford *v.* Hatfield, 7 East, 225; Bourne *v.* Gatliff, 3 M. & Gr. 643; 11 Cl. & F. 45; Barnard *v.* Kellogg, 10 Wall. 383; Gray *v.* Harper, 1 Story, 574; Fabbri *v.* Ins. Co. 55 N. Y. 133; Wilson *v.* Randall, 67 N. Y. 338. See further infra, § 971.

[3] Meighen *v.* Bank, 25 Penn. St 288; Carter *v.* Phil. Coal Co. 77 Penn. St. 286. Supra, § 961.

[4] Noble *v.* Kennoway, 2 Doug. 513; so Da Costa *v.* Edmunds, 4 Camp. 143, per Ld. Ellenborough. Infra, § 1243.

[5] Trimby *v.* Vignier, 1 Bing. (N. C.) 151; Clayton *v.* Gregson, 5 Ad. & El. 502; De la Vega *v.* Vianna, 1 Barn. & Ad. 284; De Wolf *v.* Johnson, 10 Wheat. 367; Bank U. S. *v.* Donally, 8 Pet. 368; Pope *v.* Nickerson, 3 Story R. 465.

[6] See Ober *v.* Carson, 62 Mo. 209.

the local interpretation of a district is set up, then it must appear that the writer was so identified with the district as to make it probable that he used words in the local sense.

When usage is that of a particular class, party must be proved to belong to the class.

§ 963. There are, however, cases in which it must be substantively shown that the party whose writings are to be construed belonged to the class by whom the contested terms were used in the assigned sense. Thus, to recur to a case already noticed, where a party, founding a charity in the early part of the eighteenth century, had, in the deed of grant, described the objects of her bounty as "godly preachers of Christ's Holy Gospel," and it became necessary to determine, a century afterwards, what persons were entitled to the charity, extrinsic evidence was admitted to show that at the time of the grant a religious sect existed, who applied this particular phraseology to Protestant Trinitarian dissenters, and that the founder was herself a member of such sect.[1] So where a term having a general and a technical meaning is used in an instrument to which there are several parties doing business in different places, we must inquire first as to the place of business of the party by whom the term is introduced into the contract, and then as to the local interpretation there attached to the term.[2] It stands to reason, also, that a party against whom a usage is offered may prove that he was ignorant of the usage, and could not, therefore, have contracted subject to its conditions.[3] It has even been said [4] that if any reason exists for believing that the opposite party will rely upon usage, the evidence on these points may be given by way of *anticipation*. In support of this view is cited an English case, where the owner of goods brought an action of assumpsit against a carrier by sea for non-delivery of the goods to him at the port of London, and the defendant pleaded that he had delivered them at that port. Under this state of facts it was held first by the Court of Exchequer

[1] Shore *v.* Wilson, 9 Cl. & Fin. 355, 580, per Ld. Cottenham. See, also, Att. Gen. *v.* Drummond, 1 Dru. & War. 353; Drummond *v.* Att. Gen. 2 H. of L. Cas. 837, 857, *S. C.* on appeal.

[2] Whart. Confl. of Laws, §§ 435 *et seq.*; Westlake, Priv. Int. Law, § 209; Power *v.* Whitmore, 1 M. & S. 141; Schmidt *v.* Ins. Co. 1 Johns. R. 249; Shiff *v.* Ins. Co. 6 Mart. (N. S.) 629; Lenox *v.* Ins. Co. 3 Johns. Cas. 178.

[3] Bourne *v.* Gatliff, 3 M. & Gr. 384; Bottomley *v.* Forbes, 5 Bing. N. C. 127; Walls *v.* Bailey, 49 N. Y. 464.

[4] Taylor's Ev. § 1077.

Chamber,[1] and then by the House of Lords,[2] that the plaintiff might prove former dealings between himself and the defendant respecting the carriage of other goods from the defendant's London wharf to the plaintiff's place of business; as such evidence was offered, not for the purpose of extending or narrowing the contract, or in any way changing it, but with the sole view of meeting a case which might be made on the other side to establish a custom of delivery at a wharf. The fact that the evidence consisted of instances of individual contracts might be open to observation, but the evidence could not be rejected on that ground;[3] and Lord Brougham observed: "A party may properly in this way anticipate objections and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out."[4] But to bring home the usage of a trade to a person engaged in such trade, it is not necessary that it should be immemorial and universal. It is enough if it be generally adopted in the trade at the time of the particular contract.[5] The proof must go, not to opinion, but to fact.[6]

One witness may prove usage.

§ 964. Although there were at one time intimations to the contrary,[7] it is now settled that a single witness is sufficient to prove a usage.[8]

Usage is to be proved to the jury; and must be reasonable, and not conflicting with the *lex fori*.

§ 965. Of the law merchant, as is elsewhere seen, a court takes judicial notice.[9] It is otherwise as to local usages, which must be put in proof to the jury as are foreign laws.[10] There is an important distinction, however, between a domestic local usage and a foreign law. A foreign law is part of an independent jurisprudence, which is accepted, when proved, without regard to the question how far it harmonizes with the *lex fori*. A domestic local

[1] Bourne *v.* Gatliff, 3 M. & Gr. 643, 689; 3 Scott N. R. 1, *S. C.*

[2] Ibid.; 11 Cl. & Fin. 45, 49, 69–71; 7 M. & Gr. 850, 865, 866, *S. C.*

[3] 11 Cl. & Fin. 70, per Ld. Lyndhurst. C.; 7 M. & Gr. 865, *S. C.*

[4] 11 Cl. & Fin. 71; 7 M. & Gr. 866, *S. C.*

[5] Legh *v.* Hewitt, 4 East, 154; Dalby *v.* Hirst, 1 B. & B. 224; 3 Moore, 536; Vallance *v.* Dewar, 1 Camp. 508; Robertson *v.* Jackson, 2 C. B. 412.

[6] Lewis *v.* Marshall, 7 M. & Gr. 744.

[7] Wood *v.* Hickok, 2 Wend. 501; Boardman *v.* Spooner, 13 Allen, 359.

[8] Robinson *v.* U. S. 13 Wall. 366.

[9] Supra, § 298.

[10] Simpson *v.* Margitson, 11 Q. B. 32, and cases cited supra, § 315.

usage, on the other hand, will not be accepted if it is unreasonable, or irreconcilable with the *lex fori*.[1] If it conflicts either with statute,[2] or with the common law,[3] it cannot be sustained. But if a business usage be reasonable, and not conflicting with the *lex fori*, it is enough, in order to adopt such usage as interpretative of a contract, to show that it is fixed and established in the trade with which the business is concerned.[4]

Meaning of term is for court, unless there be proof of usage.

§ 966. Unless there be proof of usage, as to the meaning of a term, a judge ought not to leave it to the jury to pronounce on the sense in which the term was used, but should himself construe the term according to its fixed legal or popular signification. Thus where an auctioneer sued for a sum he was to receive by a written contract only if he sold "within two months," it was held that, in the absence of admissible extrinsic evidence, this meant in point of law two lunar months; and that, unless the context, or the circumstances of the contract, showed that the parties meant two calendar months, "the conduct of the parties to the written contract alone was not admissible to withdraw the construction of a word therein, of a settled primary meaning, from the judge and transfer it to the jury."[5]

[1] Hodgson *v.* Davies, 2 Camp. 536; Fleet *v.* Murton, L. R. 7 Q. B. 124; Barnard *v.* Kellogg, 10 Wallace, 383; Farnsworth *v.* Hemmer, 1 Allen, 494; Mears *v.* Waples, 3 Houst. 581; Evans *v.* Waln, 71 Penn. St. 69; Glass Co. *v.* Morey, 108 Mass. 570. That a usage, in order to bring it to bear as that of a trade, must be established, reasonable, and well known, see Dean *v.* Swoop, 2 Binn. 72; Cope *v.* Dodd, 13 Penn. St. (1 Harris) 33; McMasters *v.* R. R. 69 Penn. St. 374; Adams *v.* Ins. Co. 76 Penn. St. 411; and cases cited in Whart. on Agency, §§ 40, 126, 676, 700. And see Pittsburg Ins. Co. *v.* Dravo, 2 Weekly Notes of Cases, 194.

[2] Smith *v.* Wilson, 3 B. & Ad. 731; Hockin *v.* Cooke, 4 T. R. 271; Doe *v.* Benson, 4 B. & A. 588.

[3] Coxe *v.* Heisley, 19 Penn. St. (7 Harris) 243; Jones *v.* Wagner, 66 Penn. St. 430; Evans *v.* Waln, 71 Penn. St. 69; Randall *v.* Smith, 63 Mo. 105; Dewees *v.* Lockhart, 1 Tex. 535.

[4] Lewis *v.* Marshall, 7 M. & G. 744; Collins *v.* Hope, 3 Wash. C. C. 149; U. S. *v.* Duval, 1 Gilpin, 372; Chicopee *v.* Eager, 9 Met. 583; Furness *v.* Hone, 8 Wend. 247; Snowden *v.* Warder, 3 Rawle, 101; Koons *v.* Miller, 3 Watts & S. 271; Eyre *v.* Ins. Co. 5 Watts & S. 116; Pittsburg *v.* O'Neill, 1 Barr, 342; Helme *v.* Ins. Co. 61 Penn. St. 107; McMasters *v.* R. R. Co. 69 Penn. St. 374; Carter *v.* Phil. Coal. Co. 77 Penn. St. 286.

[5] Simpson *v.* Margitson, 11 Q. B. 32; Powell's Evidence, 4th ed. 427.

§ 967. An agent is authorized to do whatever is usual to enable him to execute his commission,[1] though as between himself and his principal he is liable if he transgress his written instructions.[2] But as to third parties, the principal, notwithstanding his private instructions, is bound by the acts of his general agent, so far as such acts are incident to the agency, and the parties privileged by the acts are ignorant of the private limitations.[3] In subordination to the general rule, however, a power to an agent to sell oil may be limited by proof of usage giving the principal the right to reject vendees of whom he disapproves.[4] So a power to an agent to sell may be interpreted by usage to mean to sell by warranty or sample.[5]

Power of agent may be construed by usage.

§ 968. The importance of usage, as explanatory of ambiguous writings, is peculiarly illustrated by the evidence given as to the meaning of brokers' memoranda. These memoranda, as is elsewhere shown,[6] are sufficient to take a sale out of the statute of frauds; yet they are singularly brief, requiring for their interpretation expansions of meaning which, though now accepted by the courts, were originally proved by usage.[7] Special usages, in reference to the mode of payment on sales made by brokers, have been found by juries and adopted by the courts. Thus if goods in the city of London be sold by a broker, to be paid for by a bill of exchange, the custom, so found and approved, is for the vendor, at his election, when goods are payable by a bill of exchange, if he be not sat-

Usage explanatory of broker's memoranda.

[1] Whart. on Agency, §§ 126, 134.

[2] R. *v.* Lee, 12 Mod. 514; Farmers' & Mechanics' Bk. *v.* Sprague, 52 N. Y. 605.

[3] Davidson *v.* Stanley, 2 M. & G. 128; Brady *v.* Todd, 9 C. B. N. S. 592; Bennett *v.* Lambert, 15 M. & W. 489; Schuchardt *v.* Allens, 1 Wallace, 359; Damon *v.* Granby, 2 Pick. 345; Temple *v.* Pomroy, 4 Gray, 128; Rogers *v.* Kneeland, 10 Wend. 218; Nelson *v.* R. R. 48 N. Y. 498; Layet *v.* Gano, 17 Ohio, 466; Cedar Rapids R. R. *v.* Stewart, 25 Iowa, 115; Smith *v.* Supervisors, 59 Ill. 412; Palmer *v.* Hatch, 46 Mo. 585, and cases cited in Whart. on Agen. §§ 40, 126, 676.

[4] Sumner *v.* Stewart, 69 Penn. St. 321. See Hodgson *v.* Davies, infra, § 968.

[5] Alexander *v.* Gibson, 2 Camp. 555; Whart. on Agency, §§ 120, 187, 739; Dingle *v.* Hare, 7 C. B. N. S. 145; Howard *v.* Shepherd, L. R. 2 C. P. 148; Randall *v.* Kehlor, 60 Me. 37; Morris *v.* Bowen, 52 N. H. 416; Fay *v.* Richmond, 43 Vt. 25; Andrews *v.* Kneeland, 6 Cow. 354.

[6] Supra, § 75; Whart. Agen. § 715.

[7] See Whart. on Agency, § 696.

isfied with the sufficiency of the purchaser, to annul the contract, provided he take the earliest opportunity of intimating his disapproval; five days being held not too long a period for making the necessary inquiries.[1] But, apart from usage, the rule is to hold the broker's signed memoranda, if there be such, to be the primary contract between the parties.[2] It has also been held that oral proof of the custom of brokers is not admissible to vary the relation of broker and customer under the ordinary contract for a speculative purchase of stock, which is that of pledgor and pledgee.[3] It was ruled, however, that the parties to such a pledge might provide for the mode of disposing of the security, and that parol evidence of custom was admissible to show in part what this mode of disposition was.[4]

Customary incidents may be annexed to contract.

§ 969. It will hereafter be shown that it may be proved by parol that the parties to a contract have agreed to collaterally extend it in a mode not inconsistent with its written terms.[5] What may be thus done by direct agreement may be done indirectly by force of a usage to which the parties are supposed to have agreed.[6] Under this rule it is admissible to prove by parol "any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract."[7] Thus to a sale of a horse it is admissible to annex a customary warranty;[8] to a shipping contract, a usage as to the mode of engaging and paying crews;[9] to negotiable paper, silent in this respect, the incident of customary days of grace;[10] and to a lease, the reservation of ripening crops.[11] So, where a quantity of linseed oil had been

[1] Hodgson *v.* Davies, 2 Camp. 536.

[2] Supra, § 75.

[3] Baker *v.* Drake, 66 N. Y. 518; aff. Markham *v.* Jaudon, 41 N. Y. 435.

[4] Baker *v.* Drake, supra.

[5] Infra, § 1026.

[6] Ashwell *v.* Retford, L. R. 9 C. P. 20; Eldredge *v.* Smith, 13 Allen, 140. See Hatton *v.* Warren, 1 M. & W. 475, quoted infra, § 1027.

[7] Stephen's Ev. art. 90.

[8] Allen *v.* Prink, 4 M. & W. 140.

[9] Eldredge *v.* Smith, 13 Allen, 140.

[10] Renner *v.* Bank, 9 Wheat. 581.

[11] 3 Washb. Real Prop. (4th ed.) 392; Wigglesworth *v.* Dallison, 1 Dougl. 201; Adams *v.* Morse, 51 Me. 499; Backenstoss *v.* Stahler, 33 Penn. St. 251; Baker *v.* Jordan, 3 Ohio St. 438; Bond *v.* Coke, 71 N. C. 97. See 1 Smith's Lead. Cas. 300. See, however, Wintermute *v.* Light, 46 Barb. 283.

sold through London brokers by bought and sold notes, and the name of the purchaser was not disclosed in the bought note, evidence was received of a usage of trade in the city, by which every buying broker who did not, at the date of the bargain, name his principal, rendered himself liable to be treated by the vendor as the purchaser.[1] Evidence, also, when a party contracts in the body of a charter party as "agent," is admissible to show that by custom such person is personally liable if he does not disclose the name of his principal in a reasonable time.[2] In suits on written contracts of hiring, also, it has been held admissible, as we have seen, to prove a custom that the servant should have certain holidays;[3] and that the contract should be defeasible on giving a month's notice on either side.[4] It has also been held, when mining shares were sold upon the terms that they should be paid for "half in two, and half in four months," but the contract was silent as to the time of their delivery, that in an action against the purchaser for not accepting and paying for the shares, evidence was admissible of a usage among brokers, that on contracts for the sale of mining shares, the vendor was not bound to deliver them without contemporaneous payment.[5] It has even been held admissible to attach to bought and sold notes the incident of a sale by sample.[6]

§ 970. Such incidents, however, must not conflict with the writing to which they are to be appended.[7] Thus, it has been held that a parol reservation of future crops upon the land, ready for harvest, is void when repug-

But not when conflicting with writing.

[1] Humfrey *v.* Dale, 26 L. J. Q. B. 137; 7 E. & B. 266, *S. C.;* Dale *v.* Humfrey, 27 L. J. Q. B. 390; E., B. & E. 1004, *S. C.* in Ex. Ch. See Allan *v.* Sundius, 1 H. & C. 123; Fleet *v.* Murton, L. R. 7 Q. B. 126; Southwell *v.* Bowditch, L. R. 1 C. P. D. 100; *S. C.* in Ct. of App. 45 L. J. C. P. 630.

[2] Hutchinson *v.* Tatham, L. R. 8 C. P. 482.

[3] R. *v.* Stoke-upon-Trent, 5 Q. B. 303. Supra, § 961 *a*.

[4] Parker *v.* Ibbetson, 4 C. B. (N. S.) 348.

[5] Field *v.* Lelean, 30 L. J. Ex. 168, per Ex. Ch.; 6 H. & N. 617, *S. C.;* overruling Spartali *v.* Benecke, 10 Com. B. 212. See Godts *v.* Rose, 17 Com. B. 229. See, also, Bywater *v.* Richardson, 1 A. & E. 508; 3 N. & M. 748, *S. C.;* Smart *v.* Hyde, 8 M. & W. 723; and Foster *v.* Mentor Life Assur. Co. 2 E. & B. 48. See § 968.

[6] Cuthbert *v.* Cumming, 11 Ex. R. 405; Lucas *v.* Bristow, E., B. & E. 907. See Syers *v.* Jonas, 2 Exch. 111.

[7] Cent. R. R. *v.* Anderson, 58 Ga. 393.

nant to a deed which passes the grantor's entire estate in the land.[1]

Course of business admissible in ambiguous cases.

§ 971. Extrinsic evidence, as we have already seen, is admissible to prove, when the language is ambiguous, what the parties meant. To such evidence the course of the parties, in dealing with the same subject matter, is an important contribution.[2]

Opinion of expert as to construction of document is inadmissible, but otherwise to decipher or interpret.

§ 972. It is to be remembered that while an expert can give, as a matter of fact, a definition of an obscure term, he cannot be permitted to testify as to a conclusion of law, covering the interpretation of the document.[3] Thus it has been held, that to permit an expert to be asked whether it was the duty of the builders in a building contract to put in clutch-couplings, is to allow him to give an opinion covering matter entirely beyond the functions of a witness, and is error.[4] An expert, however,

[1] Brown *v.* Thurston, 56 Me. 127; Austin *v.* Sawyer, 9 Cow. 40; Wilkins *v.* Vashbinder, 7 Watts, 378; Evans 4 Waln, 71 Penn. St. 69; Ring *v.* Billings, 51 Ill. 475; Wickersham *v.* Orr, 9 Iowa, 253; Bond *v.* Coke, 17 N. C. 97.

[2] Rushford *v.* Hadfield, 6 East, 526; 7 East, 225; Broome's Maxims, 601; 1 Phil. on Ev. 2d Am. ed. 708, 729; Wigram Extrin. Ev. 57, 58; Boorman *v.* Jenkins, 12 Wend. 573; Barnard *v.* Kellogg, 10 Wallace, 383; Robinson *v.* U. S. 13 Ibid. 363; Hearn *v.* Ins. Co. 3 Cliff. 318–328; Gibson *v.* Culver, 17 Wend. 305; Bourne *v.* Gatliff, 11 Cl. & Fin. 45; 6 East, 228, 229, 526; Gray *v.* Harper, 1 Story, 574; Clinton *v.* Hope Ins. Co. 45 N. Y. 460; and see particularly Bourne *v.* Gatliff, 3 M. & Gr. 643; *S. C.* 11 Cl. & F. 45.

"It was competent for the plaintiffs to make clear any ambiguity or indefiniteness in their application for insurance. They could do this by proof of the course of business and dealing between them and the defendant; Russell Manufacturing Co. *v.* N. H. St. Boat Co. 50 N. Y. 121; *S. C.* on second appeal, May, 1873, 52 N. Y. 657; and also (as the one was connected and depended upon the other) by the course of business and dealing with other companies, with the knowledge and concert of the defendant. This did not contradict nor vary, by parol, the contract of the parties. Nor did it involve the defendant with the business of other companies, so as to make it liable for contracts with which it had no concern, any further than the course of business and dealing, and the contract of the parties to this action, contemplated by it and framed upon it, had that effect." Folger, J., Fabbri *v.* Ins. Co. 55 N. Y. 133.

[3] Supra, § 435; Norment *v.* Fastnaght, 1 McArthur, 515; Winans *v.* R. R. 21 How. 88; Collyer *v.* Collins, 17 Abb. (N. Y.) Pr. 467; Ormsby *v.* Ihmsen, 34 Penn. St. 462; Sanford *v.* Rawlings, 43 Ill. 92; Monitor *v.* Ketchum, 44 Wis. 126.

[4] Clark *v.* Detroit, 32 Mich. 348.

may be admitted to decipher or explain figures or terms which an ordinary reader is unable to understand;[1] and to explain technical terms.[2] In order, therefore, "to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible, or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions; of abbreviations, and of common words which from the context appear to have been used in a peculiar sense;[3] but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used."[4]

Parol evidence admissible to "rebut an equity."

§ 973. It may sometimes happen that a court of equity, or a court of law exercising equity powers, may impose upon a particular writing, under the circumstances under which it is brought before the court, an equitable construction, at variance with the superficial tenor of the writing.[5] Thus, as we shall see hereafter, when the purchase money is paid by A., and the title made out to B., B. may be decreed to be a trustee for A.[6] In such case, to rebut this equity, it is, from the nature of things, admissible for B. to show that he is, to a greater or less amount, the creditor of A.[7] So where, by two distinct codicils, two legacies, of the same amount and in substantially the same terms, are left to the same person, such legacies being presumed[8] not to have been intended as cumula-

[1] Kell *v.* Charmer, 23 Beav. 195; Goblet *v.* Beechey, 3 Sim. 24; Masters *v.* Masters, 1 P. Wms. 425; Norman *v.* Morrell, 4 Ves. 769; Wigram on Wills, 187; Stone *v.* Hubbard, 7 Cush. 595. See supra, § 704.

[2] Colwell *v.* Lawrence, 38 Barb. 643; Collender *v.* Dinsmore, 55 N. Y. 200; Wigram on Wills, 61. See Parke, B., in Shore *v.* Wilson, 9 Cl. & F. 555; Tindal, C. J. 9 Cl. & F. 566; and supra, §§ 435, 937–9.

[3] See Barnard *v.* Kellogg, 10 Wall. 383; Seymour *v.* Osborn, 11 Wall. 546; Robinson *v.* U. S. 13 Wall. 363; Moran *v.* Prather, 23 Wall. 499; Farmers' Bank *v.* Day, 13 Vt. 36; Knox *v.* Clark, 123 Mass. 216; Dana *v.* Fiedler, 2 Kern. 40; Collender *v.* Dinsmore, 55 N. Y. 206.

[4] Stephen's Ev. art. 91; citing Smith *v.* Wilson, 3 B. & Ad. 728; Gorrison *v.* Perrin, 2 C. B. (N. S.) 681; Blackett *v.* Royal Exch. 2 C. & J. 244; and see, as to customary terms, supra, § 937.

[5] See Hurst *v.* Beach, 5 Madd. 351; Trimmer *v.* Bayne, 7 Ves. 518.

[6] Infra, §§ 1035–8.

[7] Hall *v.* Hill, 1 Dru. & War, 114; Williams *v.* Williams, 32 Beav. 370; Livermore *v.* Aldrich, 5 Cush. 431; Horn *v.* Keteltas, 46 N. Y. 609; McGinity *v.* McGinity, 63 Penn. St. 44.

[8] See Hubbard *v.* Alexander, L. R.

tive, on the ground that the sums and the expressed terms of both exactly correspond;[1] in such case parol evidence is received to rebut the presumption of mistake, and to show that the testator intended both legacies to take effect.[2]

And so to rebut a rebuttable presumption.

§ 974. In the same way parol evidence is received to rebut the presumption that a debt due a legatee is extinguished by a legacy of a greater or less amount.[3] Parol evidence has been also received to rebut the presumption that an advance to a legatee by a parent, or person in *loco parentis*,[4] was intended to operate as an ademption, though only *pro tanto*,[5] of the legacy.[6] For the same purpose, parol evidence may be received to repel the presumption against double portions, which English courts of equity raise, when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will.[7] It follows, also, that parol evidence is received to rebut the rebuttal,[8] though, when the pre-

3 Ch. D. 798; Russell *v.* Dickson, 4 H. of L. Cas. 293; Brennan *v.* Moran, 6 Ir. Eq. R. N. S. 126; Wilson *v.* O'Leary, Law Rep. 12 Eq. 525, per Bacon, V. C.; 40 L. J. Ch. 709, *S. C.; S. C.* confirmed by Lord Justices, 41 L. J. Ch. 342.

[1] Tatham *v.* Drummond, 33 L. J. Ch. 438, per Wood, V. C.; Tuckey *v.* Henderson, 33 Beav. 174.

[2] Hurst *v.* Beach, 5 Madd. 351, 359, 360, per Leach, V. C.; recognized in Hall *v.* Hill, 1 Dru. & War. 116, 127, by Sugden, C.

[3] Wallace *v.* Pomfret, 11 Ves. 547; Edmonds *v.* Low, 3 Kay & J. 318.

[4] Taylor's Ev. § 1110; citing Benham *v.* Newell, 24 L. J. Ch. 424, per Romilly, M. R.; *S. C. nom.* Palmer *v.* Newall, 20 Beav. 32; 8 De Gex, M. & G. 74, *S. C.;* Campbell *v.* Campbell, 35 L. J. Ch. 241, per Wood, V. C.; 1 Law Rep. Eq. 383, *S. C.*

[5] Pym v. Lockyer, 5 Myl. & Cr. 29, per Lord Cottenham; recognized in Suisse *v.* Lowther, 2 Hare, 434, per Wigram, V. C. See Montefiore *v.* Guedalla, 29 L. J. Ch. 65; 1 De Gex, F. & J. 93, *S. C.;* Ravenscroft *v.* Jones, 33 L. J. Ch. 482; 32 Beav. 669, *S. C.;* Watson *v.* Watson, 33 Beav. 574; Peacock's Est. in re, 14 L. R. Eq. 238.

[6] Trimmer *v.* Bayne, 7 Ves. 515, per Ld. Eldon; Hall *v.* Hill, 1 Dru. & War. 120; Kirk *v.* Eddowes, 3 Hare, 517, per Wigram, V. C.; Hopwood *v.* Hopwood, 26 L. J. Ch. 292; 22 Beav. 428, *S. C.;* 29 L. J. Ch. 747, *S. C.* in Dom. Proc.; 7 H. of L. Cas. 728, *S. C.;* Schofield *v.* Heap, 28 L. J. Ch.

[7] Weall *v.* Rice, 2 Russ. & Myl. 251, 267; Lord Glengall *v.* Barnard, 1 Keen, 769, 793; Hall *v.* Hill, 1 Dru. & War. 128–131, per Sugden, C., explaining and limiting the two former cases; Nevin *v.* Drysdale, Law Rep. 4 Eq. 517, per Wood, V. C.; Dawson *v.* Dawson, Law Rep. 4 Eq. 504, per Wood, V. C.; Russell *v.* St. Aubyn, L. R. 2 Ch. D. 398. See Taylor's Ev. § 1110; 7th ed. § 1227.

[8] Kirk *v.* Eddowes, 3 Hare, 517; Hall *v.* Hill, 1 Dru. & War. 121.

sumption is one arising on the face of the writing, not primarily to fortify such presumption.[1] It should also be remembered that wherever there is an equitable presumption *donec in contrarium probetur*, extrinsic evidence is admissible to rebut the presumption; but when the presumption arises from the construction of the words of an instrument, *qua* words, no extrinsic evidence can be admitted.[2]

Opinion of witnesses as to libel admissible.

§ 975. Another exception to the rule arises from the necessities of the case in actions for libel. In such an action, how are the innuendoes to be proved? All the common acquaintances of the parties may know that the plaintiff is the person to whom the libel refers. Yet, if parol evidence is here inadmissible to explain, no proof of the innuendo could be obtained. Hence, under such circumstances, it is held admissible for the plaintiff, in a libel suit, in cases where his name is not mentioned, to introduce witnesses to testify that they knew the parties, and were familiar with the relations existing between them, and that on reading the libel they understood the

[1] See cases cited, and Taylor's Ev. 6th ed. § 1112, where the author says: "The important case of Hall *v.* Hill, 1 Dru. & War. 94, affords a good illustration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of £800; part to be paid during his life and the residue at his decease. He subsequently by his will bequeathed to his daughter a legacy of £800; and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declaration was tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject. 1 Dru. & War. 112. His lordship, however, finally decided that though the debt was to be regarded in the light of a portion; Ibid. 108, 109; yet as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or rather, it could not, under the circumstances, be raised by the court; and the consequence was that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law."

[2] Per Wood, V. C., Barrs *v.* Fewkes, 33 L. J. Ch. 522; 2 H. & M. 60; citing Coote *v.* Boyd, 2 Bro. C. C. 321; cf. Weal *v.* Rea, 2 Russ. & M. 267; Powell's Evidence, 4th ed. 406.

plaintiff to be the person to whom it referred; ground being first laid by proving the circumstances of the case.[1]

Dates not necessarily part of document.

§ 976. Much discussion has been had as to the binding effect of a date upon the writer of a document in which such date is stated. If, for instance, in a dispositive document, a date is given as that of the dispositive act, it is open to question how far such date is part of the essence of the disposition. Such date, it is argued, is not part of the disposition, so that it binds contractually the writer, but is simply evidence that the act of disposition took place on a particular day. But it may be that time is an essential condition of the validity of the document; it may be that the rights of third parties may be affected by the question of the accuracy of the date.[2] The French Code, in view of the dangers that would accrue if the rights of third parties were affected by dates so entered, provides, that an instrument making a disposition of property is, as to third parties, to be considered as taking effect at the time of its registry, or, in cases of non-registry, of its attestation before the proper functionary.[3] And where statutory provisions of this kind do not exist, the Roman common law provides, that where the date of a document is material in determining the rights of third parties, such date must be independently proved by the party setting up the document.[4]

[1] Supra, § 32; Folkhard on Slander, 445; 2 Starkie on Slander, 51; 2 Greenleaf's Ev. § 417; Daines *v.* Hartley, 3 Ex. 209; Martin *v.* Loci, 2 F. & F. 654; Heming *v.* Power, 10 M. & W. 569; Barnett *v.* Allen, 3 H. & N. 376–9; Homer *v.* Taunton, 5 H. & N. 661; Smart *v.* Blanchard, 41 N. H. 137; Miller *v.* Butler, 6 Cush. 71; Mix *v.* Woodward, 12 Conn. 262; Lindley *v.* Horton, 27 Conn. 58; McLoughlin *v.* Russell, 17 Ohio, 475; Morgan *v.* Livingston, 2 Rich. (S. C.) 573; Howe *v.* Souder, 58 Ga. 64; Russell *v.* Kelly, 44 Cal. 641. See, however, White *v.* Sayward, 33 Me. 322; Snell *v.* Snow, 13 Met. 278; Van Vechten *v.* Hopkins, 5 Johns. 211; and compare Du Bost *v.* Beresford, 2 Camp. 511, cited fully supra, § 253.

[2] Undoubtedly a party himself, and those claiming under him, may be bound by a solemn assertion of a date. But it is otherwise as to third parties, whose rights are thereby compromised; *e. g.* subsequent *bonâ fide* purchasers.

[3] Code Civil, art. 1328.

[4] See Weiske, Rechtslexicon, xi. 665.

In Louisiana, an act *sous seing prive* has no date, against third parties, except to prove the time when it is produced; unless the real date is shown by extrinsic evidence. Murray *v.* Gibson, 2 La. An. 311; Corcoran *v.* Sheriff, 19 La. An. 139. See McGill

§ 977. In our own law, dates are *primâ facie* presumed to give correctly the time of the execution and delivery of the documents to which they are attached,[1] though this presumption does not extend to third parties.[2] The presumption may be rebutted by proof that the document was executed on a different day.[3] Thus parol evidence is admissible to show that there was a mistake in the date of a charter party,[4] of a deed,[5] or of a will.[6] So an ambiguous date may be explained by parol.[7] Where a contract is silent as to the place

Dates to be held *primâ facie* true.

v. McGill, 4 La. An. 262; Hubnall *v.* Watt, 11 La. An. 57.

[1] Smith *v.* Battens, 1 Moo. & R. 341; Anderson *v.* Weston, 6 Bing. N. C. 296; Sinclair *v.* Baggaley, 4 M. & W. 312; Yorke *v.* Brown, 10 M. & W. 78; Morgan *v.* Whitmore, 6 Ex. 726; Malpas *v.* Clements, 19 L. J. Q. B. 435; Merrill *v.* Dawson, 11 How. 375; Smith *v.* Porter, 10 Gray, 66; Costigan *v.* Gould, 5 Denio, 290; Breck *v.* Cole, 4 Sandf. (N. Y.) 79; People *v.* Snyder, 41 N. Y. 397; Livingston *v.* Arnoux, 56 N. Y. 518; Ellsworth *v.* R. R. 34 N. J. L. 93; Claridge *v.* Klett, 15 Penn. St. 252; Glenn *v.* Grover, 3 Md. 212; Williams *v.* Woods, 16 Md. 220; Meadows *v.* Cozart, 76 N. C. 450; Abrams *v.* Pomeroy, 13 Ill. 133; Chickering *v.* Failes, 26 Ill. 507; Savery *v.* Browning, 18 Iowa, 246; Dodge *v.* Hopkins, 14 Wis. 630.

As to impossible date, see Davis *v.* Loftin, 6 Tex. 489.

[2] See Sams *v.* Rand, 3 C. B. (N. S.) 442; Baker *v.* Blackburn, 5 Ala. 417. Infra, § 1312.

[3] Steele *v.* Mart, 4 B. & C. 273; Butler *v.* Mountgarrett, 7 H. of L. Cas. 633; Anderson *v.* Weston, 6 Bing. (N. C.) 296; Sinclair *v.* Baggaley, 4 M. & W. 312; Cooper *v.* Robinson, 10 M. & W. 694; Edwards *v.* Crock, 4 Esp. 39; Sweetzer *v.* Lowell, 33 Me. 446; Bird *v.* Monroe, 66 Me. 337; Cady *v.* Eggleston, 11 Mass. 282; Dyer *v.* Rich, 1 Met. 180; Clark *v.* Houghton, 12 Gray, 38; Goddard *v.* Sawyer, 9 Allen, 78; Draper *v.* Snow, 20 N. Y. 331; Breck *v.* Cole, 4 Sandf. 79; Ellsworth *v.* R. R. 34 N. J. L. 93; Serviss *v.* Stockstill, 30 Ohio St. 418; Abrams *v.* Pomeroy, 13 Ill. 133; Meldrum *v.* Clark, 1 Morris, 130; Dodge *v.* Hopkins, 14 Wis. 630; Stockham *v.* Stockham, 32 Md. 196; Perrin *v.* Broadwell, 3 Dana (Ky.), 596; Kimbro *v.* Hamilton, 2 Swan, 190; Pressly *v.* Hunter, 1 Speers, 133; McCrary *v.* Caskey, 27 Ga. 54; Miller *v.* Hampton, Ala. Sel. Cas. 357; McComb *v.* Gilkey, 29 Miss. 146; Gately *v.* Irwine, 51 Cal. 72; Richardson *v.* Ellett, 10 Tex. 190; Perry *v.* Smith, 34 Tex. 277. See Clark *v.* Akers, 16 Kans. 166. Infra, § 1312.

[4] Hall *v.* Cazenove, 4 East, 476.

[5] Payne *v.* Hughes, 10 Ex. 430.

[6] Reffell *v.* Reffell, L. J. 35 P. & M. 121; L. R. 1 P. & D. 139; Powell's Evidence (4th ed.), 412.

[7] "When it is necessary to determine the date of a paper offered in evidence, and the name of the month is so inartifically written that upon inspection the presiding judge is unable to determine whether it should be read June or January, extraneous evidence is admissible to show the true date, and the question is a proper one to be submitted to the jury. So held in Armstrong *v.* Burrows, 6 Watts, 266.

of payment, the burden is on the party who seeks to show that the place of payment is other than that which the date of the instrument indicated.[1] A deed may be proved to have been delivered either before or after the day on which it purports to have been delivered.[2] The fact that a deed is recorded at a date prior to the alleged date of its acknowledgment will be imputed to clerical mistake, and will be no ground for rejecting or discrediting the instrument.[3]

Exception to the rule that dates are *primâ facie* true.

§ 978. To the rule that dates are to be assumed to be correct, there is an exception to be noticed. Where there is a valid ground to suppose collusion in the dating of a paper, then the inference of accuracy as to date so far yields to the inference of falsification as to require the date to be substantively proved.[4] In cases of adultery, also, when there is suspicion of collusion, and where the case depends upon the truthfulness of the dates of certain letters, these dates must be shown independently.[5]

Time may be inferred from

§ 979. The time of execution may be inferred from the circumstances of the case. Thus an indorsement or assignment is inferred to be of the same date as that of

"The same word was in dispute in that case as in this, whether the name of the month in the date of a paper should read June or January; and the court held that the question was for the jury, and not the court.

"This is so upon principle as well as authority. To the court belongs the duty of declaring the law, but it is the province of the jury to weigh evidence and determine facts. Whether certain characters were intended to represent one word or another is not a question of law, it is a question of fact; and, when the fact is in dispute, and to ascertain the truth it is necessary to resort to extraneous evidence (circumstantial and conflicting it may be), its ascertainment would seem, upon principle, to belong to the jury, and not to the court.

"It is undoubtedly the duty of the court to interpret written contracts. But reading and interpreting are very different matters. A blind man may interpret but he cannot read. The language must be ascertained before the work of interpretation commences. It does not follow that, because it is the duty of the judge to interpret, it is therefore his duty to read the paper in controversy." Walton, J., Fenderson *v.* Owen, 54 Maine, 374. See, also, Hearne *v.* Chadbourne, 65 Me. 202.

[1] King *v.* Ruckman, 20 N. J. Eq. 316.

[2] Goddard's case, 2 Rep. 4 *b*.

[3] Munroe *v.* Eastman, 31 Mich. 283.

[4] Anderson *v.* Weston, 6 Bing. (N. C.) 301; Sinclair *v.* Baggaley, 4 M. & W. 318.

[5] Trelawney *v.* Coleman, 2 Stark. R. 193; Houliston *v.* Smyth, 2 C. & P. 24.

the instrument indorsed or assigned, if there be nothing on the paper to modify the inference.[1] The post-mark on a letter, also, has been viewed as *primâ facie* proof of its date of mailing and forwarding;[2] and the date of the cancellation of a revenue stamp will be presumed, as an inference of fact, to be that of the delivery of a deed.[3] If the date is otherwise uncertain, it may be inferred from the contents of an instrument;[4] and where two deeds are executed on the same day, that which the parties intended to be prior will be adjudged such.[5] Whether an indorsement of payment of interest is to be presumed to be of the date it bears is elsewhere discussed.[6]

circumstances.

II. SPECIAL RULES AS TO RECORDS, STATUTES, AND CHARTERS.

§ 980. Judicial records, in their various forms, are, as is elsewhere seen, proof of the highest order. They are framed under the general direction of courts, by officers skilled in the work; they follow settled precedents, being mostly composed of words to which definite meanings have been long attached; they are usually, in litigated cases, scanned by intelligent and experienced counsel; if they can be upset by parol, no titles could be safe. Hence, such averments cannot be collaterally impeached by parol.[7]

Records cannot be varied by parol.

[1] Hutchinson *v.* Moody, 18 Me. 393; Parker *v.* Tuttle, 41 Me. 349; Burnham *v.* Wood, 8 N. H. 334; Balch *v.* Onion, 4 Cush. 559; Noxon *v.* De Wolff, 10 Gray, 343; Pinkerton *v.* Bailey, 8 Wend. 600; Thorne *v.* Woodhull, Anth. (N. Y.) 103; Snyder *v.* Riley, 7 Penn. St. 164; McDowell *v.* Goldsmith, 6 Md. 319; Snyder *v.* Oatman, 16 Ind. 265; Hayward *v.* Munger, 14 Iowa, 516; Stewart *v.* Smith, 28 Ill. 377; Hatch *v.* Gilmore, 3 La. An. 508; Rhode *v.* Alley, 27 Tex. 443. Infra, § 1312.

[2] R. *v.* Johnson, 7 East, 68; Shipley *v.* Todhunter, 7 C. & P. 688; New Haven Bank *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321. See infra, § 1325.

[3] Van Rensselaer *v.* Vickery, 3 Lansing, 57.

[4] Cleavinger *v.* Reimar, 3 Watts & S. 486.

[5] Barker *v.* Keete, 1 Freem. 249.

[6] Supra, § 228; infra, §§ 1100 *et seq.*

[7] Infra, § 982; 1 Co. Litt. 260 *a;* Glynn *v.* Thorpe, 1 Barn. & A. 153; Dickson *v.* Fisher, 1 W. Black. 364; Garrick *v.* Williams, 3 Taunt. 544; Galpin *v.* Page, 18 Wall. 365; The Acorn, 2 Abbott (U. S.) 434; Sanger *v.* Upton, 91 U. S. (1 Otto) 56; Boody *v.* York, 8 Greenl. 272; Ellis *v.* Madison, 13 Me. 312; Dolloff *v.* Hartwell, 38 Me. 54; Stuart *v.* Morrison, 67 Me. 549; Eastman *v.* Waterman, 26 Vt. 494; Hunneman *v.* Fire District, 37 Vt. 40; Hall *v.* Gardner, 1 Mass. 171; Legg *v.* Legg, 8 Mass. 99; Wellington *v.* Gale, 13 Mass. 483; Sheldon *v.* Kendall, 7 Cush. 217; Kelley *v.* Dresser, 11 Allen, 31; May-

§ 980 *a*. In the interpretation of a statute the whole context must be taken together.[1] Even the title and preamble are for

hew *v*. Gay Head, 13 Allen, 129; Com. *v*. Slocum, 14 Gray, 395; Capen *v*. Stoughton, 16 Gray, 364; Richardson *v*. Hazleton, 101 Mass. 108; Whiting *v*. Whiting, 114 Mass. 494; O'Shaugnessy *v*. Baxter, 121 Mass. 515; Gorman's case, 124 Mass. 190; Brintnall *v*. Foster, 7 Wend. 103; Davis *v*. Talcott, 12 N. Y. 184; Hill *v*. Burke, 62 N. Y. 111; Brown *v*. Balde, 3 Lans. 283; Wallace *v*. Coil, 24 N. J. L. 600; Kennedy *v*. Wachsmuth, 12 S. & R. 171; Hoffman *v*. Coster, 2 Whart. R. 468; Withers *v*. Livezey, 1 W. & S. 433; Coffman *v*. Hampton, 2 Watts & S. 377; McClenahan *v*. Humes, 25 Penn. St. 85; McMicken *v*. Com. 58 Penn. St. 213; Coxe *v*. Deringer, 78 Penn. St. 271; *S. C.* 82 Penn. St. 236; Ray *v*. Townsend, 78 Penn. St. 329; Com. *v*. Kreager, 78 Penn. St. 477; Burgess *v*. Lloyd, 7 Md. 178; Hoagland *v*. Schnorr, 17 Ohio St. 30; Taylor *v*. Wallace, 31 Ohio St. 151; State *v*. Clemens, 9 Iowa, 534; Ney *v*. R. R. 20 Iowa, 347; Schirmer *v*. People, 33 Ill. 276; Hobson *v*. Ewan, 62 Ill. 154; Moffitt *v*. Moffitt, 69 Ill. 641; Rice *v*. Brown, 77 Ill. 549; Robinson *v*. Ferguson, 78 Ill. 538; Herrington *v*. McCollum, 73 Ill. 476; Lawver *v*. Langhans, 85 Ill. 138; Kemper *v*. Waverley, 81 Ill. 278; Long *v*. Weaver, 7 Jones L. 626; Lamothe *v*. Lippott, 40 Mo. 142; McFarlane *v*. Randle, 41 Miss. 411; Taylor *v*. Jones, 3 La. An. 619; Edwards *v*. Edwards, 25 La. An. 200; Thompson *v*. Probert, 2 Bush, 144; Hickerson *v*. Blanton, 2 Heisk. 160; May *v*. Jameson, 11 Ark. 368; Wilson *v*. Wilson, 45 Cal. 399. As to records of towns and school districts, see Eady *v*. Wilson, 43 Vt. 362. As to impeaching judgments, see supra, § 795. As to impeaching returns of officers, see supra, § 833 *a*; infra, § 1118.

In a late Massachusetts case, for instance, the evidence was that real estate, which had been fraudulently conveyed, was attached in an action against the grantor under the Gen. Sts. c. 123, § 55, and taken on execution, and was described in the officer's return, which set out that the notice of the sale was of land situated upon Union Street. It was ruled by the Supreme Court, that evidence that in the published notice of sale the premises were described as situated on Avon Street was not competent to contradict the return. Sykes *v*. Keating, 118 Mass. 517; citing Chappell *v*. Hunt, 8 Gray, 427.

"In Campbell *v*. Webster, 15 Gray, 28, it was held that the officer's return was conclusive evidence as to the competency of the appraisers, and could not be impeached by showing that one of them was not disinterested. The same principle was recognized in Dooley *v*. Wolcott, 4 Allen, 406, and Hannum *v*. Tourtellott, 10 Allen, 494. The case of Whitaker *v*. Sumner, 7 Pick. 551, more closely resembles the case at bar. In that case the notice of the sale published in the newspaper did not in fact specify any place of sale, but the officer's return stated that he had advertised the place of sale. It was held that the return was con-

[1] De Winton *v*. Brecon, 26 Beav. 533; Com. *v*. Alger, 7 Cush. 53; State *v*. Commis. 37 N. J. 228; Com. *v*. Duane, 1 Binn. 601; Com. *v*. Montrose, 52 Penn. St. 391; Cochran *v*. Taylor, 13 Ohio N. S. 382; Cantwell *v*. Owens, 14 Md. 215; District *v*. Dubuque, 5 Clarke, 262; Brooks *v*. Mobile, 31 Ala. 227; Ellison *v*. R. R. 36 Miss. 572; Lieber, Pol. Her. ch. v.

this purpose to be taken into account.[1] But the judges are per-

clusive, that the equity of redemption passed by the sale, and that the plaintiff, who was a subsequent attaching creditor, could maintain an action against the officer for a false return. The case of Wolcott *v.* Ely, 2 Allen, 338, is not in conflict with these adjudications. That case was submitted upon an agreed statement of facts, in which the parties agreed that one of the appraisers was not disinterested. The court, in the opinion, say: 'It was held in Boston *v.* Tileston, 11 Mass. 468, that where the parties in an agreed statement of facts agree to a fact decisive of the title, the officer's return, which would have been conclusive evidence upon a trial between them, is not to be regarded.' This is not in conflict with, but clearly recognizes, the general rule that, in a trial between parties, the officer's return, when used in evidence, is conclusive." Morton, J., Sykes *v.* Keating, 118 Mass. 519.

This rule is applied in Pennsylvania to proceedings by aldermen under the Landlord and Tenant Act; Wistar *v.* Ollis, 77 Penn. St. 291; and to the indorsements of approval, by the proper court, of a statutory bond. Leedom *v.* Lombaert, 80 Penn. St. 381.

In Wistar *v.* Ollis, Mercur, J., said: "To establish fraud or want of jurisdiction, the court might have heard facts by depositions; but not to show an irregularity which contradicted the record. When heard by the court below, they do not come regularly before this court, and should be disregarded. Boggs *v.* Black, 1 Binney, 336; Blashford *v.* Duncan, 3 S. & R. 480; Cunningham *v.* Gardner, 4 W. & S. 120; McMillan *v.* Graham, 4 Barr, 140; Union Canal *v.* Keiser, 7 Harris, 134; Bedford *v.* Kelly, 11 Smith, 491; Buchanan *v.* Baxter, 17 Smith, 348.

"It is not designed to deny the correctness of the ruling in McMasters *v.* Carothers, 1 Barr, 324, and in Ayres *v.* Novinger, 8 Barr, 412, in which it was held that the selection of a jury of inquest was so far a judicial act imposed on the sheriff that it could not be delegated to another, but they are distinguishable from the present case. The former was a case of partition in the Orphans' Court, in which an inquest had been awarded. The case is badly reported, but it appears the jurors were summoned by a constable from a list furnished by one whose authority is not shown. In setting aside the inquisition, this court said there was a gross irregularity in the partition, and the case presented 'a bundle of irregularities.' In the latter case, the *record* showed that the sheriff had deputed one juror to execute the writ, and the depositions showed that this special deputation was made at the request of the landlord's attorney.

"There is, however, another reason why the defendants should not be permitted now to allege an irregularity in the summoning of a part of the jurors. Having been personally served, and attended at the hearing; having gone to trial on the merits, they should be held to have waived all errors and irregularities in the selection and summoning of the jurors. It is true the acts of assembly which hold that pleading the general issue, or a trial on the merits, in any court, civil or criminal, is a waiver of all irregularities in drawing and summoning the jurors, do not in express terms apply to an inquest under the Landlord and Tenant Act; yet the whole reason and

[1] Sedgwick Stat. Law 2d ed. 201. See Lieb. Polit. Herm. ch. iv.

mitted to go outside of the statute to consider the law as it stood before the statute, and the circumstances of its passing, so far as shown by the records of the legislature.[1] Mr. Sedgwick, indeed, says, that "we are not to suppose that the court will receive evidence of extrinsic facts as to the intention of the legislature; that is, of facts which have taken place at the time of, or prior to, the passage of a bill."[2] But as the courts will take judicial notice of matters of notoriety, it will not be necessary for evidence, in its strict sense, to be taken, to enable a survey to be made by the court of the condition of things leading to a statute. Such a survey is, in fact, inevitable, to a degree greater or less.[3] We have an illustration of this in a paragraph which Mr. Sedgwick quotes from Lord Mansfield; where that eminent judge, in construing a statute declaring void all marriages of children under age, gave, as a reason for a strict construction, that "clandestine marriages" "were become very numerous; that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief."[4] At the same time, the courts unite in refusing to push the extrinsic facts thus to be taken notice of beyond the limits of notoriety, as heretofore defined,[5] and there is no case in which witnesses or documents have been received as evidence of extrinsic facts. In this sense

So as to statutes.

spirit of them applies with full force. Burton *v.* Ehrlich, 3 Harris, 236; Fife et al. *v.* Commonwealth, 5 Casey, 429; Jewell *v.* Commonwealth, 10 Harris, 94." And see supra, §§ 824, 830, 981.

[1] Infra, §§ 1260, 1309; and see, as to evidence of the intention of the legislators, Waller *v.* Harris, 20 Wend. 555.

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it." Davis, J., U. S. *v.* Un. Pac. R. R. 91 U. S. 79.

[2] Sedgw. Stat. Law, 203; citing Southwark Bank *v.* Com. 26 Penn. St. 446.

[3] See Hadden *v.* Collector, 5 Wall. 107; Delaplane *v.* Crenshaw, 15 Grat. 457; Harris *v.* Haynes, 30 Mich. 140; Scanlan *v.* Childs, 33 Wis. 663; Keith *v.* Quinney, 1 Oregon, 364.

[4] R. *v.* Hodnett, 1 T. R. 96.

[5] See supra, §§ 278 *et seq.*

we may accept Mr. Sedgwick's conclusion, "that, for the purpose of ascertaining the intention of the legislature, no extrinsic fact, prior to the passage of the bill, which is not itself a rule of law or act of legislation, can be inquired into or in any way taken into view." [1]

A statute, as printed in the standard established as such by the legislature, cannot be attacked by parol evidence to the effect that as printed and certified it varies from its original text.[2] But when there is no such legislative rule, the enrolled bill is the standard.[3]

A charter, also, as a legislative act, cannot, under the rules above stated, be impeached collaterally by parol.[4] So, no evidence will be admissible to show that a charter granted by the crown was made or delivered at another time than when it bears date.[5]

So as to charters.

§ 981. While, however, to return to the subject of judicial records, a record cannot be collaterally impeached, except on proof of fraud or want of jurisdiction, it is otherwise with deeds by sheriffs, which are not to be regarded as *res adjudicata*. It has therefore been held that the acknowledgment of a sheriff does not cure radical defects in the authority of the sheriff; and these defects may be collaterally shown, though the deed is *primâ facie* proof of regularity.[6] It has also been held admissible for a defend-

Otherwise as to acknowledgment of sheriff's deed.

[1] Sedgwick Stat. Law, 209. See, also, Union P. R. R. *v.* U. S. 10 Ct. of Cl. 518; Paine *v.* Boston, 124 Mass. 486.

It is said, however, that parol evidence of extraneous facts, may be given in order to make a statute operative. Morrow *v.* Whitney, 95 U. S. 551.

[2] Annapolis *v.* Harwood, 32 Md. 471.

[3] Clare *v.* State, 8 Iowa, 509; Duncombe *v.* Prindle, 12 Iowa, 1. Supra, § 290.

[4] Garrett *v.* R. R. 78 Penn. St. 465.

[5] Ladford *v.* Gretton, Plowd. 490.

[6] Infra, § 1304. "It is true that the acknowledgment by the sheriff of a deed executed by him is not such *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made. Braddee *v.* Brownfield, 2 W. & S. 271. And the absence of authority, or the presence of fraud, utterly frustrates the operation of a sheriff's sale as a means of transmission of title, and may be insisted on after acknowledgment. Shields *v.* Miltenberger, 2 Harris, 76. While Spragg *v.* Shriver, 1 Casey, 284, might justify some doubt on the question in the case of a sale under a *venditioni exponas*, it is clear that an acknowledgment will not cure the want of a sufficient inquisition, or a waiver of it, in the case of a sale under a *fieri facias*. Gardner *v.* Sisk, 4 P. F. Smith, 506. But it waives all defects

ant in ejectment to prove, in defence, that the land in controversy, though embraced in the sheriff's deed, was in fact exempted from the sale.[1] But ordinarily the recitals in a sheriff's deed are regarded as conclusive between the parties to the suit and their privies;[2] though, from the nature of things, open to correction, so far as concerns their obligatory force, by the same proof of fraud or mistake as is receivable in respect to private deeds.[3]

Record imports verity.

§ 982. Leaving this partial exception, we may generally state that a record of a competent court imports such absolute verity that it cannot be collaterally contradicted, unless on proof of fraud or want of jurisdiction.[4] To

of the process or its execution, on which the court has power to act; Thompson *v.* Phillips, 1 Baldwin, 246; and mere irregularities of every kind. Blair *v.* Greenway, 1 Browne, 219. It is sufficient to raise the presumption, in the first instance, that the statutory requisites for notice to parties have been complied with, and this presumption must prevail until it is rebutted by satisfactory affirmative proof." Woodward, J., Saint Bartholomew Church *v.* Bishop Wood, Sup. Ct. of Penn. 1876; 2 Weekly Notes, 255; 80 Penn. St. 219. As to acknowledgment of non-official deeds, see infra, § 1052.

[1] Bartlett *v.* Judd, 21 N. Y. 200.

[2] Freeman on Executions, § 334; Cooper *v.* Galbraith, 3 Wash. C. C. 550; Jackson *v.* Roberts, 7 Wend. 83; Den *v.* Winans, 2 Green N. J. 6; Pollard *v.* Cocke, 19 Ala. 188; Blood *v.* Light, 31 Cal. 115.

[3] See infra, §§ 1019 *et seq.*

[4] See infra, § 1302; 1 Coke Litt. 260 *a;* Glynn *v.* Thorpe, 1 Barn. & A. 153; Amory *v.* Amory, 3 Biss. 266; Foss *v.* Edwards, 47 Me. 145; Willard *v.* Whitney, 49 Me. 235; Douglass *v.* Wickwire, 19 Conn. 489; Dowse *v.* McMichael, 6 Paige, 139; Hageman *v.* Salisberry, 74 Penn. St. 280; Roy *v.* Townsend, 78 Penn. St. 329; Kendig's App. 82 Penn. St. 68; Quinn *v.* Com. 20 Grat. 138; Southern Bank *v.* Humphreys, 47 Ill. 227; McBane *v.* People, 50 Ill. 503; Martin *v.* Judd, 60 Ill. 78; Farley *v.* Budd, 14 Iowa, 289; Allen *v.* Mills, 26 Mich. 123; Baugh *v.* Baugh, 37 Mich. 59; Galloway *v.* McKeithen, 5 Ired. L. 12; Covington *v.* Ingraham, 64 N. C. 123; Duer *v.* Thweatt, 39 Ga. 578; Alexander *v.* Nelson, 42 Ala. 462; Murrah *v.* State, 51 Miss. 652; Morris *v.* Hulbert, 36 Tex. 19.

"The jurisdiction being established, no matter how erroneous the finding of the court may be, the finding is not void, and cannot be questioned in a collateral proceeding. This is the universal rule in all courts of common law. Buckmaster *v.* Carlin, 3 Scam. 104; Swiggart *v.* Harber, 4 Ibid. 364; Rockwell *v.* Jones, 21 Ill. 279; Chestnut *v.* Marsh, 12 Ibid. 173; Weiner *v.* Heintz, 17 Ibid. 259; Horton *v.* Critchfield, 18 Ibid. 133; Iverson *v.* Loberg, 26 Ill. 179; Goudy *v.* Hall, 36 Ill. 313. The later cases are Wimberly *v.* Hurst, 33 Ill. 166; Wight *v.* Wallbaum, 39 Ibid. 555; Elston *v.* City of Chicago, 40 Ibid. 514; Mulford *v.* Stalzenback, 46 Ibid. 303; Huls *v.* Buntin, 49 Ibid. 396." Breese, J., Hobson *v.* Ewan, 62 Ill. 154.

an important distinction, however, which has been already stated,[1] we must recur. "The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of *res judicata* would remain exactly as they are, if the decisions of our tribunals could be established by oral testimony. In truth, the record of a court of justice consists of two parts, which may be denominated respectively the *substantive* and *judicial* portions. In the former — the *substantive* portion — the court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects,[2] nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner:[3] 'Nemo potest contra recordum verificare per patriam.'[4] 'Quod per recordum probatum, non debet esse negatum.'[5] In the *judicial* portion, on the contrary, the court expresses its judgment or opinion on the matter before it. This has only a conclusive effect between, and indeed in general is only evidence against, those who are parties or privies to the proceeding."[6]

§ 983. Yet even with records, when application is made to the courts controlling the record, a correction of the record, in cases of fraud or gross mistake, may be made on the error being proved by parol.[7] The application in such case, however, if it be merely by motion, and unless it takes the form of bill in equity, is to the discretion of the court, from which there is no appeal.[8]

On application to court of record mistakes may be shown by parol.

§ 984. When a petition or bill, of the character mentioned in

[1] Supra, §§ 176, 760.

[2] Co. Litt. 260 *a*; Finch, Law, 231; Gilb. Ev. 7, 4th ed.; 4 Co. 71 *a*; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

[3] See several instances collected, 1 Phill. Ev. 441, 10th ed.

[4] 2 Inst. 380.

[5] Branch Max. 186.

[6] Best's Ev. § 619.

[7] Trafton *v.* Rogers, 13 Me. 315; Com. *v.* Bullard, 9 Mass. 270; Brier *v.* Woodbury, 1 Pick. 362; Olmstead *v.* Hoyt, 4 Day, 436; Gardner *v.* Humphrey, 10 Johns. R. 53; Clammer *v.* State, 9 Gill, 279; Jenkins *v.* Long, 23 Ind. 460.

[8] King *v.* Hopper, 3 Price Exch. Rep. 495; Com. *v.* Judges of Com. Pleas, Binney, 275; Com. *v.* Judges of Com. Pleas, 1 S. & R. 192; Clymer *v.* Thomas, 7 S. & R. 180; Woods *v.* Young, 4 Cranch, 237. See § 984.

For relief petition should be specific.

the last section, is presented to a court, the fraud or mistake must be specifically set forth, and such relief craved as equity will give.[1]

Fraudulent record may be impeached.

§ 985. In cases of fraud, as we have seen more fully elsewhere,[2] records may be collaterally impeached.[3] In this way a collusive judgment,[4] or a judgment entered without jurisdiction,[5] or a fraudulent list of agents of insurance companies surreptitiously placed in the office of the attorney general,[6] may be attacked.

Record, when silent or ambiguous, may be explained by parol.

§ 986. Like all other written instruments, a record, when silent or ambiguous, may be explained by parol.[7] Thus where the record gives the name of a party ambiguously, the ambiguity may be cleared and the party identified by parol extrinsic proof.[8] So where an executor sells personal property, and the record is silent as to the statutory notice, this notice may be proved by parol.[9] Where, also, an officer made a return of service of a notice that a debtor arrested on a mesne process desired to take the oath that he did not intend to leave the state, but the return did not state where the service was made, except that it was headed with

[1] Kendig's Appeal, 2 Weekly Notes of Cas. 680; 82 Penn. St. 68.

[2] Supra, § 797.

[3] Beckley *v.* Newcomb, 24 N. H. 359; Lowry *v.* McMillan, 8 Penn. St. 157; Jackson *v.* Stewart, 6 Johns. 34; Henck *v.* Todhunter, 7 Har. & J. 275; Kent *v.* Ricards, 3 Md. Chan. 392; Stell *v.* Glass, 1 Ga. 475; Dalton *v.* Dalton, 33 Ga. 243.

[4] Whart. on Agency, § 566; Amory *v.* Amory, 3 Biss. 266; Martin *v.* Judd, 60 Ill. 78, supra, § 797; Morris *v.* Halbert, 36 Tex. 19; though see Davis *v.* Davis, 61 Me. 395.

[5] Supra, § 795.

[6] Thorne *v.* Ins. Co. 80 Penn. St. 15.

[7] Infra, § 989; Farnsworth *v.* Rand, 65 Me. 19; Eastman *v.* Cooper, 15 Pick. 276; Freeman *v.* Creech, 112 Mass. 180; Knott *v.* Sargent, 125 Mass. 95; Gardner *v.* Humphrey, 10 Johns. R. 53; Kerr *v.* Hays, 35 N. Y. 331; Shoemaker *v.* Ballard, 15 Penn. St. 92; Stark *v.* Fuller, 42 Penn. St. 23; McCart *v.* Frisby, 81 Ill. 118; Phillips *v.* Jamison, 14 T. B. Mon. 579; Carr *v.* College, 32 Ga. 557; Young *v.* Fuller, 29 Ala. 464; Saltonstall *v.* Riley, 28 Ala. 164; Temple *v.* Marshall, 11 La. An. 641; Hickerson *v.* Mexico, 58 Mo. 61. This is peculiarly the case with informal records, such as justices' dockets. Evans *v.* Williamson, 79 N. C. 86.

[8] Root *v.* Fellowes, 6 Cush. 29.

[9] Gelstrop *v.* Moore, 26 Miss. 206. See R. *v.* Wick, 5 B. & Ad. 526; R. *v.* Perranzabuloe, 3 Q. B. 400; R. *v.* Yeovely, 8 A. & E. 818. A patent ambiguity, however, cannot be so explained. Porter *v.* Byrne, 10 Ind. 146.

the name of the county for which the officer was appointed; and where it appeared that the service was actually made outside of his precinct, but this objection was waived, evidence was admitted that the service was made at a certain distance from the place of hearing, and that there were places within the county of such distance.[1] And on a question arising under a bill in equity, filed January 8, 1874, to redeem a mortgage, the evidence being that on a writ of entry to foreclose the mortgage an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 3, 1869; and that the execution was recorded June 10, 1869: it was ruled in Massachusetts that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, it was held that this was enough to commence the foreclosure as of the later date.[2] It is also competent to show by parol that a title, on which a particular suit of ejectment is tried, is equitable.[3] Additional facts, however, which

[1] Francis *v.* Howard, 115 Mass. 236. That returns, when ambiguous, may be explained by parol, see further, Atkinson *v.* Cummins, 9 How. U. S. 479; Guild *v.* Richardson, 6 Pick. 364; Dolan *v.* Briggs, 4 Binn. 499; Weidensaul *v.* Reynolds, 49 Penn. St. 73; Susq. Boom Co. *v.* Finney, 58 Penn. St. 200; Smalley *v.* Lighthall, 37 Mich. 348. As to effect of returns, see supra, § 833 *a*.

[2] Worthy *v.* Warner, 119 Mass. 550.

[3] "The second question, whether it was competent to prove by parol evidence that the title upon which the recovery was had in the first ejectment was an equitable one, has been expressly ruled by this court in Meyers *v.* Hill, 10 Wright, 9. Mr. Justice Strong said: 'Notwithstanding what has been said in some cases, it is well established, in reason and authority, that where a record is general, it may be shown by parol what were the matters in litigation. The record may be explained, though it cannot be contradicted. The matters in dispute may be identified.' This was applied in that case to the very question now before us, the admission of parol evidence to show that a former recovery in ejectment was upon an equitable title. The dictum of Mr. Justice Bell in Paull *v.* Oliphant, 2 Harris, 351, is not in conflict. That case, as we have seen, was under the Act of 1846, which required a conditional verdict to give conclusive effect to one verdict and judgment. Mr. Justice Bell merely says: 'To ascertain the character of that judgment we must look to the record of it alone. That shows not that it is such a conditional judgment as is contemplated by the statute, and the omission can-

should be of record, cannot be added to a record by parol.[1] What has been just said applies to the records of corporations.[2]

Town records may be explained by parol.

§ 987. Parol evidence cannot, generally, be received to vary the records of towns, in matters within the jurisdiction of the towns, and when the entries are duly made by the proper officers.[3] In case of contradiction or ambiguity, however, parol evidence is admissible for explanation.[4]

Former judgment may be shown by parol to relate to a particular case.

§ 988. Of the admissibility of parol proof to explain a record, the most familiar illustration is that which is supplied when the identity or non-identity of one case with another is set up, in order to sustain or disprove a plea of former recovery. It may happen that a judgment has been entered in a former suit (either civil or criminal), in which the record entries would fit the case on trial, but as to which it is alleged that parol evidence would show that the points really in issue are essentially different. Or it may be that the record of the former suit exhibits a case different from that on trial, while it is alleged that in point of fact the former case and the present are substantially the same. In either of these relations it is admissible to show by parol what was the cause of action in the former suit, so that its identity or non-identity with that on trial may be proved.[5] The same

not be aided by parol.'" Sharswood, J., Treftz *v.* Pitts, 74 Penn. State, 349.

While no evidence will be received to dispute the fact that the day specified in a record of conviction is the commission day of the assizes at which the trial took place (see Thomas *v.* Ansley, 6 Esp. 80; R. *v.* Page, Ibid. 83), yet the party against whom the record is produced is permitted to show by parol the actual day of the trial. Whitaker *v.* Wisbey, 12 Com. B. 44; Roe *v.* Hersey, 3 Wils. 274. Proof of the real day of trial would not, so it is said, in such a case, contradict the record, but would simply explain it. So, again, if a *nisi prius* record were to contain two counts, or distinct causes of action, and a verdict awarding damages to the plaintiff were entered generally, parol evidence would be admissible to show that the substantial damages were recovered on one count only. Preston *v.* Peeke, 1 E., B. & E. 336.

[1] Wilcox *v.* Emerson, 10 R. I. 270.

[2] Supra, § 663.

[3] Crommett *v.* Pearson, 18 Me. 344; Blaisdell *v.* Briggs, 23 Me. 123; Howlett *v.* Holland, 6 Gray, 418; Wood *v.* Mansell, 3 Blackf. 125.

[4] Walter *v.* Belding, 24 Vt. 658.

[5] See supra, §§ 64, 785; R. *v.* Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Miles *v.* Caldwell, 2 Wall 35; Russell *v.* Place, 94 U. S. 606; Davis *v.* Brown, 94 U. S. 423; Frost *v.*

rule applies when the object is to prove that a former judgment was entered not on the merits but on technical grounds.[1] Evidence is also admissible to show the distinctive issue on which a case is tried, when the record is silent in this respect.[2]

Shapleigh, 7 Greenl. 236; Mathews *v.* Bowman, 25 Me. 157; Dunlap *v.* Glidden, 34 Me. 517; Torrey *v.* Berry, 36 Me. 589; Lando *v.* Arno. 65 Me. 405; Perkins *v.* Walker, 19 Vt. 144; Bassett *v.* Marshall, 9 Mass. 312; Parker *v.* Thompson, 3 Pick. 429; Pease *v.* Smith, 24 Pick. 122; Com. *v.* Dillane, 11 Gray, 67; Com. *v.* Sutherland, 109 Mass. 342; Hood *v.* Hood, 110 Mass. 483; Boynton *v.* Morrill, 111 Mass. 4; Hungerford's Appeal, 41 Conn. 322; Stedman *v.* Patchin, 34 Barb. 218; Thurst *v.* West, 31 N. Y. 210; Burt *v.* Sternburgh, 4 Cow. 559; Davisson *v.* Gardner, 10 N. J. L. 289; Zeigler *v.* Zeigler, 2 S. & R. 286; Haak *v.* Breidenbach, 3 Ibid. 204; Wilson *v.* Wilson, 9 Ibid. 424; Cist *v.* Zeigler, 16 Ibid. 282; Leonard *v.* Leonard, 1 W. & S. 342; Sterner *v.* Gower, 3 Watts & S. 136; Butler *v.* Slam, 50 Penn. St. 456; Coleman's Appeal, 62 Penn. St. 252; McDermott *v.* Hoffman, 70 Penn. St. 31; Follansbee *v.* Walker, 74 Penn. St. 309; Federal Hill Co. *v.* Mariner, 15 Md. 224; Hughes *v.* Jones, 2 Md. Ch. 178; Whitehurst *v.* Rogers, 38 Md. 503; Streeks *v.* Dyer, 39 Md. 424; Barger *v.* Hobbs, 67 Ill. 592; Porter *v.* State, 17 Ind. 415; Wabash Canal *v.* Reinhart, 24 Ind. 122; Bottorf *v.* Wise, 53 Ind. 32; Hollenbeck *v.* Stanberry, 38 Iowa, 325; Duncan *v.* Com. 6 Dana, 295; Justice *v.* Justice, 3 Ired. L. 58; Dowling *v.* Hodge, 2 McMul. 209; State *v.* De Witt, 2 Hill, S. C. 282; Cave *v.* Burns, 6 Ala. 780; Rake *v.* Pope, 7 Ala. 161; State *v.* Matthews, 9 Port. 370; Robinson *v.* Lane, 22 Miss. 161; Shirley *v.* Fearne, 33 Miss. 653; State *v.* Scott, 31 Mo. 121; State *v.* Thornton, 37 Mo. 360; Hickerson *v.* Mexico, 58 Mo. 61; Hampton *v.* Dean, 4 Tex. 455; Walsh *v.* Harris, 10 Cal. 391; Jolley *v.* Foltz, 34 Cal. 321. See Greenlee *v.* Lowing, 35 Mich. 63.

[1] "It would be very unreasonable and contrary to the settled rules upon the subject to permit the plaintiff, having once been defeated on the merits, to try the same question over again in a different form. Calhoun's Lessee *v.* Dunning, 4 Dall. 120; Marsh *v.* Pier, 4 Rawle, 273; Chambers *v.* Lapsley, 7 Barr, 24.

"The charge of the judge, as filed of record in the first case, showed conclusively that both the questions referred to in the offer were submitted to the jury. In Carmony *v.* Hoober, 5 Barr, 305, the charge of the judge so filed of record was considered as sufficient to establish on what point a former recovery had passed." Sharswood, J., Follansbee *v.* Walker, 74 Penn. St. 309, citing Fleming *v.* The Insurance Co. 2 Jones, 391; Carmony *v.* Hoober, 5 Barr, 305.

[2] Supra, § 785; Preston *v.* Peeke, 1 E., B. & E. 336; Hickerson *v.* Mexico, 58 Mo. 61.

"Where it appears several issues were presented for adjudication under the declaration and pleadings of the case, and the record fails to show upon which in fact the judgment was rendered, it is competent, in some cases, to show the fact by evidence *aliunde*. Dunlap *v.* Glidden, 34 Me. 517; Rogers *v.* Libbey, 35 Me. 200; Emery *v.* Fowler, 39 Me. 326; Cunningham *v.* Foster, 49 Me. 68.

"So where a particular fact in con-

§ 989. For other purposes than the support or attack of a plea of former recovery, it is admissible to prove the cause of action of a particular record.[1] Thus in a Massachusetts case, where it appeared that P. agreed to pay S. any sum not exceeding $1,500, which S. should be legally compelled to pay C. on a certain account, and C. recovered in New Hampshire in a suit against S. a larger sum than $1,500, it was held that the cause of action in the latter suit might be identified by parol.[2]

In other cases cause of action may be proved.

§ 990. The averment of the *day* of entering a judgment cannot be collaterally contradicted by parol; and it has even been held that a judgment entered on a particular day will be imputed to the earliest practicable hour of that day.[3] Yet the better opinion is that parol evidence is admissible as to the *hour* of entry, when it is important that this should be ascertained; for this is a point as to which the record does not speak.[4] Thus, where the defendant died on a particular day on which judgment was entered against him, it is admissible to prove by the clerk that the judgment could not have been entered before eight o'clock in the morning.[5] So the

Hour of legal procedure may be proved by parol.

troversy has been, by the same parties, under an issue legitimately raised by the pleadings, litigated, parol evidence is admissible to prove the consideration and determination of that fact, if the record fails to disclose it. Such evidence is admitted in aid of the record, and must always be consistent with it. Chase *v.* Walker, 53 Me. 258.

"It is never allowed to contradict or vary the record. Gay *v.* Welles, 7 Pick. 217; NcNear *v.* Bailey, 18 Me. 251; Sturtevant *v.* Randall, 53 Me. 149.

"The evidence must be confined to the proof of such facts and issues as were, or might have been legitimately decided under the declaration and pleadings.

"The record is *conclusive* evidence that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties.

"The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues." Tapley, J., Jones *v.* Perkins, 54 Me. 396.

[1] Miles *v.* Caldwell, 2 Wall. 35; Dunlap *v.* Glidden, 34 Me. 517; Stedman *v.* Patchin, 34 Barb. 218; Justice *v.* Justice, 3 Ired. L. 58.

[2] Parker *v.* Thompson, 3 Pick. 429.

[3] Wright *v.* Mills, 4 H. & N. 488; Edwards *v.* R. 9 Ex. R. 628; Wellman, in re, 20 Vt. 693; Wiley *v.* Southerland 41 Ill. 25. The day of trial may be shown by parol. Whitaker *v.* Wisbey, 12 C. B. 44.

[4] D'Obree, ex parte, 8 Ves. 83; Lang *v.* Phillips, 27 Ala. 311.

[5] Lanning *v.* Pawson, 38 Penn. St.

hour of the service of a writ may be explained or even varied by parol.[1] And it has been held that where a writ is dated on Sunday, it may be proved by parol that the date is a mistake for another day.[2]

Collateral incidents may be shown by parol.

§ 991. It should be remembered, as has been already fully seen, that with records, as with other documentary proof, there are collateral incidents as to which parol evidence is admissible.[3] Thus, though a judgment cannot be impeached, it may be shown by evidence outside of the record that the parties interested united in limiting its lien.[4] It may be also shown by parol that a judgment against an indorser was not intended to pass as collateral to a judgment against the principal.[5] And a witness may be asked whether he has not been in prison.[6] Parol evidence is also admissible, in an action for malicious prosecution, to show that the reason why a bill of indictment had not been acted on was because it had been adjourned from term to term on account of the absence of a material witness.[7]

III. SPECIAL RULES AS TO WILLS.

Intention of wills to be drawn from writing.

§ 992. Wills are the most solemn of dispositive writings, and yet, from the circumstances under which they are frequently written, they require peculiar delicacy in the interpretation of terms, and in the elucidation of ambiguities. Many persons are unwilling to consult counsel in the preparation of wills. When counsel are called in, wills may have to be written in great haste, and from the dictation of testators sometimes incapable of collected and exact statement. Even after a will has been carefully and deliberately prepared by counsel, a testator may add codicils in a style different from that of the body of the writing, and with provisions whose consistency with prior dispositions may be open to perplexing

480. *Contra*, Wright *v.* Mills, 4 H. & N. 488. See Edwards *v.* R. 9 Exch. 628.

[1] Allen *v.* Stage Co. 8 Greenl. 207; Williams *v.* Cheeseborough, 4 Conn. 356.

[2] Trafton *v.* Rogers, 13 Me. 315.

See Whitaker *v.* Wisbey, cited supra, § 986.

[3] See supra, § 64.

[4] Sankey *v.* Reed, 12 Penn. St. 95. See Darling *v.* Dodge, 36 Me. 370.

[5] Bank *v.* Fordyce, 9 Penn. St. 275.

[6] Supra, § 567.

[7] Knott *v.* Sargent, 125 Mass. 95.

doubts. And yet, notwithstanding these side considerations, the courts have agreed that though the intent of the testator is to be effectuated, this intent is to be drawn from the will, not the will to be drawn from the intent.[1] The reasons for this stringent exclusion of testimony of the testator's intention are conclusive. (1.) In the construction of *contracts*, extrinsic evidence of concurrent intent may be admissible, because when one party states to another his intention in executing a document, and the other accepts such intention, then this expression may be so worked into the contract that the one party cannot recall it without the other's assent. In respect to *wills*, however, there can be no such mutuality in the expression of intentions; for there is no other party with whom the testator contracts. Hence it is that no testator can be regarded as bound by expressions of intention which, if made to-day, may be to-morrow revoked. Nor is this all. Experience tells us that few kinds of talk are more unre-

[1] Hunt *v.* Hort, 3 Br. C. C. 311; Miller *v.* Travers, 8 Bing. 253; Doe *v.* Hiscocks, 5 M. & W. 368; Loring *v.* Woodward, 41 N. H. 391; Pickering *v.* Pickering, 50 N. H. 349; Wells *v.* Wells, 27 Vt. 483; Crocker *v.* Crocker, 11 Pick. 252; Brown *v.* Saltonstall, 3 Met. 423; Osborne *v.* Varney, 7 Met. 301; American Soc. *v.* Pratt, 9 Allen, 109; Warren *v.* Gregg, 116 Mass. 304; Chappel *v.* Avery, 6 Conn. 31; Canfield *v.* Bostwick, 21 Conn. 550; Ryerss *v.* Wheeler, 22 Wend. 148; White *v.* Hicks, 33 N. Y. 383; Phillips *v.* McCombs, 53 N. Y. 494; Charter *v.* Otis, 41 Barb. 525; Johnson *v.* Hicks, 1 Lans. 150; Bowers *v.* Bowers, 1 Abb. (N. Y.) App. 214; Massaker *v.* Massaker, 13 N. J. Eq. 264; Leigh *v.* Savidge, 14 N. J. Eq. 124; Torbert *v.* Twining, 1 Yeates, 432; Brownfield *v.* Brownfield, 12 Penn. St. 136; Wallize *v.* Wallize, 55 Penn. St. 242; Best *v.* Hammond, 55 Penn. St. 409; Tyson *v.* Tyson, 37 Md. 567; Taylor *v.* Boggs, 20 Ohio St. 516; Hays *v.* West, 37 Ind. 21; Fraim *v.* Millison, 59 Ind. 123; Rutherford *v.* Morris, 77 Ill. 397; Watkyns *v.* Flora, 8 Ired. L. 374; Ralston *v.* Telfair, 2 Dev. Eq. 255; Willis *v.* Jenkins, 30 Ga. 167; Foscue *v.* Lyon, 55 Ala. 440; Love *v.* Buchanan, 40 Miss. 758; Gilliam *v.* Chancellor, 43 Miss. 437; Gibson *v.* Moore, 24 Mo. 227; Robnett *v.* Ashlock, 49 Mo. 171; Spoonomore *v.* Cables, 66 Mo. 579; Caldwell *v.* Caldwell, 7 Bush, 515.

Thus parol evidence of intent is inadmissible to show that "children" were meant to include illegitimate children; Shearman *v.* Angel, 1 Bailey Eq. 351; Ward *v.* Epsy, 6 Humph. 447; or that for "children" was meant "sons;" Weatherhead *v.* Baskerville, 11 How. 329; Weatherhead *v.* Sewell, 9 Humph. 272; or that by a devise to a parent, known to be dead at the time, was meant a devise to the parent's children; Judy *v.* Williams, 2 Ind. 449; or that the term "heir at law" was used in the popular, not the legal sense. Aspden's Est. 2 Wall. Jun. C. C. 368. Supra, § 957.

As to fraud and coercion, see infra, §§ 1010–2.

liable than talk about wills. Not only are expressions of intention, when uttered (and ordinarily the very fact of their utterance is a presumption against them), uttered with the consciousness that they may be at any time recalled; but, as we have already noticed, it is a common maxim that people who talk about their wills rarely make wills in conformity with their talk. What a man puts down in a solemn testamentary instrument is naturally very different from what he might say when disposed either to mystify those whom he might consider impertinent inquirers, or to please those whom for the moment he might particularly desire to please. As a general rule, therefore, declarations, as expressing the intention of a testator as to his will, are to be rejected, for the reason that such declarations, if not in themselves illusory, are subject at any moment to be recalled, and cannot be regarded as exhibiting definite intentions until they are put in a definite shape. (2.) Nor are we to forget, when considering this question, the character of the medium through which these declarations must pass. The testator's lips are sealed in death; and evidence of his intentions, thus reproduced, comes to us without that sanction which is given when there is a power of explanation in the person whose remarks are reported.[1] (3.) In view of the reasoning just expressed, and for the additional reason that public policy requires that wills should be solemn instruments, deliberately prepared, and that every proper obstacle should be put in the way of a disturbance of the ordinary course of descent by the forgery of wills, the statute of frauds, as we have already seen,[2] has prescribed peculiar sanctions as essential to due testamentary action. The statute of frauds, however, would be defied and abrogated, and the wrongs it strives to correct would be perpetuated, if it were allowable, after a will has been duly executed, and when the testator is no longer capable of assent or dissent, to empty it of its written provisions and then pour in new provisions by parol. These new provisions, if so inserted, will be destitute of the formal sanction which the statute requires, and will be, by force of the statute, if for no other reason, inoperative. Insensible provisions the courts may be unable to effectuate; ambiguous expressions may be explained by showing what they meant at the time they were used; but

[1] See supra, § 467.

[2] Supra, § 884.

provisions which were not put in by the testator himself at the time of execution and attestation cannot be put in after execution and attestation, and, *a fortiori*, cannot be put in after the testator's death. Hence it is that, with three exceptions, evidence of the testator's intentions is inadmissible in explanation of a will. These exceptions are as follows: (1.) What is said at the time of the execution and attestation is admissible as part of the *res gestae*, though not to contradict the will. (2.) When it is doubtful as to which of two or more extrinsic objects a provision, in itself unambiguous, is applicable, then evidence of the testator's declarations of intention is admissible; not to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects. When this is done, the court, so it is held, applies the will by determining which of these extrinsic objects it designates. This exception will be hereafter discussed.[1] But even this relaxation of the rule has been deplored, on account not only of its impolicy, but of the vagueness of the distinction it introduces.[2] (3.) When a will is attacked for fraud or coercion, it may be sustained by proof of prior consistent expressions; and such expressions may be received when indicating mental symptoms.[3]

[1] Infra, §§ 997, 1001.

[2] Stephen's Evidence, note xxxiv.

[3] Infra, §§ 1010–2.

Sir James Wigram, in his authoritative Treatise on Wills, collects the result of the rulings in this relation in the following seven propositions: —

"I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where

§ 993. With the exceptions, therefore, just noticed, we may regard it as settled that a testator's intentions cannot be proved by parol for the purpose of varying or even explaining his will, or, in other words, of clearing patent ambiguities.[1] No doubt we have early English cases where a less stringent rule was sustained,[2] but these cases are now discredited,[3] and with them should fall the American rulings to which they for a time gave rise.[4] Acting on the strict principle of exclusion we have noticed, the English courts have rejected evidence when tendered to show what per-

Proof of intent inadmissible to explain patent ambiguities.

the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, — see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, — courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty or the subject of disposition (*i. e. person* or *thing* intended) is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram, Wills, 10–13.

[1] See as to patent ambiguities, supra, § 956; infra, § 1006.

[2] Thomas *v.* Thomas, 6 T. R. 671; Beaumont *v.* Fell, 2 P. Wms. 141; Doe *v.* Needs, 2 M. & W. 129.

[3] See remarks of Lord Abinger in Doe *v.* Hiscocks, 5 M. & W. 368. Infra, § 997.

[4] Shore *v.* Wilson, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 565, 566, per Tindal, C. J. See Re Peel, Law Rep. 2 P. & D. 46; 39 L. J. Pr. & Mat. 36, *S. C.*

sons a testator meant to include or exclude in employing the word "relations;"[1] what articles he intended to give by the word "plate,"[2] and what property he meant to devise by the words "lands out of settlement,"[3] or by other generic terms.[4]

Evidence inadmissible to modify obvious meaning as to devisee.

§ 994. It has been further ruled that when the description of a devisee applies with exactitude to one person, parol evidence is inadmissible to show that another person, less exactly described, is the intended object of the testator's bounty.[5] It is otherwise in cases of latent ambiguity.[6]

And so are declarations qualifying terms.

§ 995. We shall hereafter[7] see that even where there is a mistake in a will caused by the inadvertence of those who prepared it, and it does not in consequence carry out the testator's intentions, still the court will not correct it. Even a letter written to a testator by his solicitor, whether by way of advice or statement, is inadmissible for the purpose of construction of the will.[8] On the same principle declarations of the testatrix, made at the time of executing the will, to the effect that she desired to have it so drawn that in case C. B. G. died before reaching the age of twenty-five, none of the property should go to the family of his mother, have been refused admission to vary the terms of the will.[9]

[1] Goodinge *v.* Goodinge, 1 Ves. Sen. 230; Edye *v.* Salisbury, Amb. 70; Green *v.* Howard, 1 Br. C. C. 31. See Sullivan *v.* Sullivan, 4 I. R. Eq. 457, where the words were "my dearly beloved." Taylor's Evid. § 1038.

[2] Nicholls *v.* Osborne, 2 P. Wms. 419; Kelly *v.* Powlett, Amb. 605.

[3] Strode *v.* Russell, 2 Vern. 621.

[4] Wigr. Wills, 99–105; Doe *v.* Hubbard, 15 Q. B. 227; Horwood *v.* Griffith, 23 L. J. Ch. 465; 4 De Gex, M. & G. 700, *S. C.;* Hicks *v.* Sallitt, 23 L. J. Ch. 571; Millard *v.* Bailey, Law Rep. 1 Eq. 378, per Wood, V. C. On the other hand, in Knight *v.* Knight, 30 L. J. Ch. 644, Stuart, V. C., appears to have held that extrinsic evidence was admissible to show that shares in an insurance company were meant to pass under the words "ready money." See Taylor, § 1089.

[5] 1 Redf. on Wills, 498; Tucker *v.* Seaman's Aid Soc. 7 Met. 188; Kelley *v.* Kelley, 25 Penn. St. 460; Wallize *v.* Wallize, 55 Penn. St. 242; Johnson's Appeal, Sup. Ct. of Penns. 1876, 3 Weekly Notes, 52.

[6] Infra, § 999.

[7] Infra, § 1008.

[8] Per James, L. J., Wilson *v.* O'Leary, L. R. 7 Ch. 456; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109; Harter *v.* Harter, L. R. 3 P. & D. 11. Infra, § 1008. In Ryerss *v.* Wheeler, 22 Wend. 148, the court strangely held that declarations made at the time of the execution could not be received, but that prior declarations were admissible.

[9] Ordway *v.* Dow, 55 N. H. 12.

§ 996. Recurring to the topic of latent ambiguities, already discussed,[1] the first specific distinction that we have to notice is that where a term (not in itself ambiguous), descriptive of an object, has two meanings, one general and popular, but which is inapplicable to any ascertainable object, and the other, capable of parol proof, is special and latent, such parol proof will be received, if the result be to indicate an object consistent with the writer's intentions as expressed in the will.[2] For this purpose, evidence of the condition of the testator's family and of his estate is admissible, under the limitations hereafter expressed.[3] But the rule just stated must be carefully guarded so as to exclude evidence of such declarations of the testator's intent as would give a new effect, in cases of the character just mentioned, to the will. As an illustration of this may be mentioned a case before Lord Penzance,[4] where a question arose as to the meaning of a clause in which the testator appointed my "son, Foster Charter," as executor. He had two sons, William Foster Charter, and Charles Charter, and "many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case,

Where primary meaning is inapplicable to any ascertainable object, evidence of secondary meaning admissible.

"There is nothing, however, ambiguous in the terms of this will. There is no doubt about the meaning of the words, and no testimony is offered tending to show that the words were used by this testatrix in any sense different from their ordinary acceptance, or tending to show any latent ambiguity, or taking the case out of the rule excluding parol testimony as above expressed. For these reasons, which I have endeavored to express as briefly as possible, I concur in the opinions already expressed. Felton *v.* Sawyer, 41 N. H. 202; Brown *v.* Brown, 44 N. H. 281; Burleigh *v.* Clough, 52 N. H. 267, are all cases in which the rule given above, from Woodeson, is recognized, and its application illustrated." Cushing, C. J., Ordway *v.* Dow, 55 N. H. 18.

[1] Supra, § 957.

[2] Doe *v.* Hiscocks, 5 M. & W. 369; Taylor on Evidence, § 1109; Trustees *v.* Peaslee, 15 N. H. 317; Brown *v.* Brown, 43 N. H. 17; Hine *v.* Hine, 39 Barb. 507; St. Luke's Home *v.* Assoc. for Ind. Females, 52 N. Y. 191; Pritchard *v.* Hicks, 1 Paige, 270; Marshall's Appeal, 2 Penn. St. 388; Mitchell *v.* Mitchell, 6 Md. 224; Robertson *v.* Dunn, 2 Murph. 133; Allan *v.* Vanmeter, 1 Metc. (Ky.) 264; Case *v.* Young, 3 Minn. 209; Hopkins *v.* Holt, 9 Wis. 228; Billingslea *v.* Moore, 14 Ga. 370; Elder *v.* Ogletree, 36 Ga. 64.

[3] Johnson *v.* Lydford, L. R. 1 P. & D. 546; Holmes *v.* Holmes, 36 Vt. 525; Wootton *v.* Redd, 12 Grat. 196.

[4] Charter *v.* Charter, L. R. 2 P. & D. 315.

but expressed an opinion that, if it were necessary, evidence of declarations of intention might be admitted." [1] But "the part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle, 'Praesumitur pro negante.'" [2] Subsequently occurred a case [3] in which the testator appointed several executors, one of whom was described as "Perceval ——, of Brighton, Esq., the father." The testator was intimately acquainted with William Perceval Boxall, of Brighton, who was commonly known as Mr. Perceval Boxall, and had a son named Perceval Gretwick Boxall. It did not appear that any person bearing the surname of Perceval was known to the testator. The court held that extrinsic evidence was admissible to assist it in ascertaining the person designated, and ordered the name of William Perceval Boxall to be included in the probate as one of the executors. It was, however, doubted whether evidence of the testator's intention would have been admissible. It has been further ruled that parol evidence is admissible to prove that a person answering in all respects to a description in a will is not the person intended by the testator, but that another person was intended who substantially but not exactly answers such description.[4]

When terms are applicable to several objects, evidence of intent admissible to distinguish.

§ 997. The most common case of latent ambiguity is that which exists when the writer makes use of a term equally descriptive of several objects, and when from the writing itself it cannot be collected which object he had in view. In such case not only can extrinsic circumstances be put in evidence from which his intent can be inferred, but his own explanatory declarations can be proved.[5] As the rule is stated by Lord Abinger: "There is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or mean-

[1] Stephen's Ev. 161.

[2] Ibid., Errata.

[3] De Rosaz, in re, L. R. 2 P. D. 56. Infra, § 1008.

[4] Woolverton, &c., in re, L. R. 7 Ch. D. 197.

[5] See Melcher *v.* Chase, 105 Mass. 125; Cleverly *v.* Cleverly, 124 Mass. 314. For exception see infra, § 1001.

ing of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is *but one case*[1] in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things,[2] or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity;[3] for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."[4] It has been consequently held, that, where a testator had devised one house "to George Gord, the son of George Gord;" another "to George Gord, the son of John Gord;" and a third, after the expiration of certain life estates, "to George Gord, the son of Gord;" evidence of his declarations was admissible to show that the person meant to be designated by the last description was George the son of *George* Gord.[5] So, where the devise was "to John Allen, the grandson of my brother Thomas, and I charge the same with the payment of £100 to each and every the brothers and sisters of the said John Allen;" and it

[1] As to rebutting an equity, see supra, § 973.

[2] See Harman *v.* Gurner, 35 Beav. 478.

[3] See Douglas *v.* Fellows, 1 Kay, 114, per Wood, V. C.

[4] Doe *v.* Hiscocks, 5 M. & W. 368, 369, by Lord Abinger; Taylor's Ev. § 1093; and see cases cited under last section.

[5] Doe *v.* Needs, 2 M. & W. 129; Doe *v.* Morgan, 1 C. & M. 235.

appeared that, at the date of the will, the testator's brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the court received evidence of the declarations of the testator, to show which grandchild was intended.[1] The same conclusion was reached where lands were left to John Cluer, of Calcot, and two persons, father and son, were of that name.[2] So, where property was devised to "William Marshall, my second cousin," and it appeared that the testator had no second cousin of that name, but that he had two first cousins once removed, one named William Marshall, and the other named William John Robert Blandford Marshall, Vice Chancellor Page Wood admitted similar evidence to resolve this latent ambiguity.[3] But to such cases the right to prove intention is limited; and we may hence accept Judge Redfield's summary,[4] that "Doe *v.* Hiscocks is now universally admitted to have settled the law upon this point; that the only cases in which evidence to prove intention is admissible are those in which the description in the will is ambiguous in its application to each of several objects."

All the surroundings and habits of testator may be proved.

§ 998. We must conclude, therefore, that unless there be a latent ambiguity as to two or more probable objects, the intentions of a testator are inadmissible to affect the construction. It is otherwise as to evidence of the family, surroundings, and habits of the testator, which, when relevant to a litigated question of construction, is always to be received.[5] Hence, where a testator appointed his "nephew A. B." executor, and his own nephew and his wife's nephew both

[1] Doe *v.* Allen, 12 A. & E. 451; 4 P. & D. 220, *S. C.*; Fleming *v.* Fleming, 31 L. J. Ex. 419; 1 H. & C. 242, *S. C.*

[2] Jones *v.* Newman, 1 W. Bl. 60, explained in Doe *v.* Hiscocks, 5 M. & W. 370.

[3] Bennett *v.* Marshall, 2 Kay & J. 740. See particularly remarks supra, § 992.

[4] 1 Redfield on Wills, ed. 1876.

[5] Atty. Gen. *v.* Drummond, 1 Dru. & W. 367; Grant *v.* Grant, L. R. 2 P. & D. 8; see *S. C.* L. R. 5 C. P. 380; L. R. 5 C. P. 727; Newman *v.* Piercy, 25 W. R. 37; Powell *v.* Biddle, 2 Dall. 70; Howard *v.* Ins. Co. 49 Me. 288; Bodman *v.* Tract Soc. 9 Allen, 447; Connolly *v.* Pardon, 1 Paige, 291; Lawrence *v.* Lindsay, 68 N. Y. 108; Rewalt *v.* Ulrich, 23 Penn. St. 388; Cresson's Appeal, 30 Penn. St. 437; Wootton *v.* Redd, 12 Grat. 196; Maund *v.* McPhail, 10 Leigh, 199; Woods *v.* Woods, 2 Jones Eq. 420; Travis *v.* Morrison, 28 Ala. 494; Hockensmith *v.* Slusher, 26 Mo. 237.

bore that name, extrinsic evidence of the testator's family and surroundings was admitted to show that the latter was the person designated.[1] So when an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann; and at the date of the will Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth, the court, in order to rebut the claim of the illegitimate Elizabeth, permitted the introduction of extrinsic evidence, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question.[2] "In construing a will," so is this position accurately expressed by Blackburn, J.,[3] "the court is entitled to put itself in the posi-

[1] Grant *v.* Grant, L. R. 2 P. & D. 8; 18 W. R. 330; followed in Grant *v.* Grant, L. R. 5 C. P. 381; 18 W. R. 951.

So, more recently, the chancery division of the English high court of justice, in Laker *v.* Hordern, 34 L. T. Rep. (N. S.) 88, held that illegitimate daughters were entitled to take under a will as *personae designatae*, on proof of the following facts, which were held admissible: H. and L. lived together as husband and wife for many years without being legally married. They had three illegitimate female children. In 1857 H. and L. were legally married, and in 1859 H. made his will, giving certain personal estate to trustees upon trust for his wife L. for life, and after her death, "for all my daughters who should attain twenty-one years or marry." H. never had any other children, and died in 1861. The children had always lived with their parents, and were spoken of and introduced as their daughters. It was held that not only was the evidence of the state of the family admissible, but that the illegitimate daughters of H. were sufficiently described in the will, and were entitled to the bequest. The court relied on a ruling of Lord Eldon, in Wilkinson *v.* Adam, 1 V. & B. 422. In this latter case, under a devise by a married man, having no legitimate children, "to the children which I may have by A. living at my decease," issue, who had acquired the reputation of being his children by A. before the date of the will, were held entitled as upon the whole will intended, and sufficiently described. In Lepine *v.* Bean, L. R. 10 Eq. 170, it was held that an illegitimate child took under a gift to "all and every my children," the testator having no legitimate children.

[2] Doe *v.* Beynon, 12 A. & E. 431; Phillips *v.* Barker, 1 Sm. & Gif. 583; Taylor, § 1085.

[3] Allgood *v.* Blake, L. R. 8 Eq. 160.

tion of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on Extrinsic Evidence, and Doe *v.* Hiscocks, he adds: "No doubt in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is, that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean."

In such cases all the extrinsic facts are to be considered.

§ 999. It was once thought that when a description of a devisee answered equally two separate claimants, the one having identity of name was to be preferred.[1] This doctrine, however, has been more recently repudiated;[2] and it is now settled that the court will take cognizance of all the facts, and place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument; and if it can by aid of such circumstances ascertain from the language of the will which of the claimants was intended by the testator, a confusion as to names will not be permitted to defeat such intent.[3] But, as has been seen,[4] this is inadmissible when

[1] Camoys *v.* Blundell, 1 H. of L. Cas. 786, per Parke, B., pronouncing the opinion of the judges. But see Drake *v.* Drake, 25 Beav. 642; 29 L. J. Ch. 850, *S. C.* in Dom. Proc.; 8 H. of L. Cas. 172, *S. C.*

[2] Drake *v.* Drake, 8 H. of L. Cas. 172, 177; Camoys *v.* Blundell, 1 H. of L. Cas. 778, 786, 792; Thomson *v.* Hempenstall, 7 Ec. & Mar. Cas. 141, per Dr. Lushington; 1 Roberts. 783, *S. C.;* though see In re Plunkett's Estate, 11 Ir. Eq. R. N. S. 361; Colclough *v.* Smyth, 14 Ir. Eq. R. N. S. 127; and 15 Ibid. 353; Garner *v.* Garner, 29 Beav. 116; Gillett *v.* Gane, Law Rep. 10 Eq. 29; 39 L. J. Ch. 818, *S. C.*

[3] Doe *v.* Huthwaite, 3 B. & A. 630; Doe *v.* Hiscocks, 5 M. & W. 368;

[4] Supra, § 994.

the object is to prove that a person less exactly described is the person meant.

Distribution among children presumed to mean all children.

§ 1000. In England, it has been held in equity that if legacies be given to a specific number of children (*e. g.* four, £1,000 being given to each of them), and it turns out that at the date of the will the testator had a greater number of children, the sum awarded, if the estate holds out, will be decreed to each of the children actually so existing.[1]

When description is only partly applicable to each of several objects, then declarations of intent are inadmissible.

§ 1001. To the rule admitting declarations as to latent ambiguities there has been proposed a qualification somewhat artificial. It has been said that if the description of the person or thing be partly applicable and partly inapplicable to each of several objects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which the language applies, evidence of the writer's declarations of intention in this respect cannot be received.[2]

Evidence admissible as to latent ambiguities.

§ 1002. To solve latent ambiguities as to property, proof of extrinsic facts is always proper; as in such case the effect of the evidence is not to vary but to apply the will.[3]

Blundell *v.* Gladstone, 11 Sim. 467, 485–488; 1 Phill. 279, 282, 283, *S. C.;* 1 H. of L. Cas. 778, *nom.* Camoys *v.* Blundell; Bernasconi *v.* Atkinson, 10 Hare, 345; Charter *v.* Charter, L. R. 7 H. L. 364; Hodgson *v.* Clarke, 1 De Gex, F. & J. 394, reversing *S. C.* Rep. 1 Giff. 139; Re Gregory's Settlt. & Wills, 34 Beav. 600; Re Noble's Trusts, 5 I. R. Eq. 140; Re Feltham's Trusts, 1 Kay & J. 528; Kilvert's Trusts, in re, L. R. 7 Ch. Ap. 170, reversing *S. C.* L. R. 12 Eq. 183. And see particularly Ryall *v.* Hannam, 10 Beav. 538.

[1] Daniell *v.* Daniell, 4 De Gex & Sm. 337; Lee *v.* Pain, 4 Hare, 249; Scott *v.* Fenoulhett, 1 Cox Ch. R. 79; Yeates *v.* Yeates, 16 Beav. 170.

[2] Doe *v.* Hiscocks, 5 M. & W. 363. See, also, Drake *v.* Drake, 3 H. of L. Cas. 172; Douglass *v.* Fellows, 1 Kay, 114; Bernasconi *v.* Atkinson, 10 Hare, 345; overruling Thomas *v.* Thomas, 6 T. R. 677; Stinger *v.* Gardner, 27 Beav. 35; *S. C.* 41 De Gex & J. 468; Stephen's Evidence, 162; Taylor's Ev. § 1109. See supra, § 997.

[3] Supra, § 942; Doe *v.* Martin, 4 B. & Ad. 785, per Parke, J.; Doe *v.* Burt, 1 T. R. 704, per Buller, J.; Castle *v.* Fox, 11 Law Rep. Eq. 542; 40 L. J. Ch. 302, *S. C.;* Webb *v.* Byng, 1 Kay & J. 580; Doe *v.* Ld. Jersey, 1 B. & A. 550; *S. C.* in Dom. Proc. 3 B. & C. 870; Herbert *v.* Reid, 16 Ves. 481; Okeden *v.* Clifden, 2 Russ. 300; Aldrich *v.* Gaskill, 10 Cush. 155; Melcher *v.* Chase, 105 Mass. 125; Cleverly *v.* Cleverly, 124 Mass. 314; Spencer *v.* Higgins, 22 Conn. 521; Crosby *v.* Mason, 32 Conn. 482;

§ 1003. Abbreviations of figures in a will may be explained by parol. Thus where a testator bequeathed to his children the sums of I. X. X., and O. X. X., parol evidence was received to the effect that the testator, in his business as a jeweller, had used the ciphers in dispute to indicate respectively £100 and £200.[1]

Abbreviations can be thus explained.

§ 1003 *a*. Wherever extrinsic facts are admissible, the testator's writings may be included among such facts. Thus where a testator directed in his will that all moneys which he had advanced or might advance to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, the court, in ad-

Testator's own writing admissible among extrinsic facts.

Domest. Miss. Appeal, 30 Penn. St. 425; Warner *v.* Miltenberger, 21 Md. 264; Young *v.* Twigg, 27 Md. 620; Ashworth *v.* Carleton, 12 Ohio St. 381; Hopkins *v.* Grimes, 14 Iowa, 73; Kinsey *v.* Rhem, 2 Ired. L. 192; McCall *v.* Gillespie, 6 Jones L. 533; Riggs *v.* Myers, 20 Mo. 239; Creasy *v.* Alverson, 43 Mo. 13.

[1] Kell *v.* Charmer, 23 Beav. 195.

As an illustration of the admissibility of parol evidence going to show to which of several objects an ambiguous testamentary expression applies, may be cited an interesting English case (Goblet *v.* Beechey, 3 Sim. 24), where the controversy turned on the word "mod," as used in the following codicil of the distinguished sculptor, Nollekens: "In case of my death, all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The plaintiff contended that the word meant "models;" the defendant, who was the executor, urged that either it was an abbreviation for "moulds," or that it should be read in connection with the words which immediately followed it, and meant "modelling tools for carving." On the one hand, it was proved that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuaries were called to prove that no such tools were known as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice Chancellor Shadwell came to a decision that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctively bequeathed by will to another person. 2 Russ. & Myl. 624; Taylor's Ev. § 1083.

dition to other extrinsic evidence of the nature and amount of the advances, admitted an unattested document, which, after the date of the will, had been drawn up by the testator, with the apparent view of furnishing a guide to his trustees on the subject.[1] On the same principle, proof of extrinsic facts will be admitted to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly attested codicil, which refers in general terms to the testator's "last will."[2]

Erroneous surplusage may be rejected.

§ 1004. We have already seen[3] that erroneous particulars in a description of property can be rejected when an object can be found answering justly and naturally to the body of the description. This rule is frequently applied to wills.[4] Thus where a testator had devised to certain legatees £1,250, which he described as "part of his stock in the 4 per cent. annuities of the Bank of England;" and at the date of the will, and thence up to the time of his death, the testator had no such stock, but he had had some money in the 4 per cents. some years before, and had sold it out, and invested the produce in long annuities; upon proof of these facts being tendered, the master of the rolls admitted the evidence, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and he then held, that as the testator obviously meant to give the legacies, but mistook the fund, the only effect of the mistake as explained by the evidence was, that the legacies ceased to be specific, and must consequently be paid out of the general personal estate.[5] In a subsequent judgment, on a similar state of facts, Lord Langdale's conclusions rested on the same grounds. "It is very necessary to observe," he said, "that in the case of Selwood *v.* Mildmay the evidence was received only for the purpose stated by the master of the rolls in his judgment," that is, in order to show how the mistake arose; "and not, as it has been erroneously supposed,[6] for the purpose of showing that the testator, when he used the erroneous descrip-

[1] Whately *v.* Spooner, 3 Kay & J. 542. But see cases cited infra, § 1006.

[2] Allen *v.* Maddock, 11 Moo. P. C. 427. See Almosino in re, 1 Sw. & Tr. 508.

[3] Supra, § 945.

[4] Anstee *v.* Nelms, 1 H. & N. 225; Coleman *v.* Eberle, 76 Penn. St. 197.

[5] Selwood *v.* Mildmay, 3 Ves. 306.

[6] In Miller *v.* Travers, 8 Bing. 252, 253; and Doe *v.* Hiscocks, 5 M. & W. 270.

tion of the 4 per cent. stock, meant to bequeath the long annuities, which he had purchased with the produce of the 4 per cent. stock; and that the result of the case was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath; not to substitute the long annuities which the testator had, and did not purport to give, for the 4 per cent. bank annuities which he had not, and did purport to give;" but simply to render legacies, which were *primâ facie* specific, payable out of the general personal estate.[1]

Otherwise as to words of limitation or description

§ 1005. On the other hand, if such alleged surplusage be introduced by way of exception or limitation, then it cannot be discharged, but must operate to defeat the devise, so far as concerns the object of the parol evidence.[2] So if there be one object, as to which all the demonstrations in a will are true, and another as to which part are true and part false, the words of such will shall be viewed as words of true limitation to pass only that object as to which all the circumstances are true.[3] To this effect is a ruling as to a devise of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk," where it appeared that the testator had bought of the duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name. The court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract.[4] So, also, where a tes-

[1] Lindgreen *v.* Lindgreen, 9 Beav. 363. See, also, Quennell *v.* Turner, 13 Beav. 240; Tann *v.* Tann, 2 New R. 412, per Romilly, M. R.; and Hunt *v.* Tulk, 2 De Gex, M. & G. 300; in which last case the lords justices, in order to set right what appeared to them to be an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule." Taylor's Ev. § 1106. See, also, Ford *v.* Batley, 23 L J. Ch. 225; Coltman *v.* Gregory, 40 L. J. 352.

[2] Taylor *v.* Parry, 1 M. & Gr. 623, per Maule, J. See supra, § 945.

[3] Doe *v.* Bower, 3 B. & Ad. 459, 460, per Parke, J.; Morrell *v.* Fisher, 4 Ex. R. 604, per Alderson, B. See, also, Boyle *v.* Mulholland, 10 Ir. Law R. N. S. 150. See supra, § 994.

[4] Taylor's Ev. § 1108; Doe *v.* Bower, 3 B. & Ad. 453; Pogson *v.* Thomas, 6 Bing. N. C. 337; Doe *v.* Ashley, 10 Q. B. 663; Webber *v.* Stanley, 16 Com. B. N. S. 698; 33 L. J. C. P. 217, *S. C.;* Smith & Goddard *v.* Ridgway, 2 H. & C. 37; *S. C.* in Ex. Ch. 4 H. & C. 577; Pedley *v.* Dodds, 2 Law Rep. Eq. 819.

tator devised to A. his *freehold* messuage, farm, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a pepper-corn rent, the court held that as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator.[1]

Patent ambiguities not to be resolved by parol.

§ 1006. Patent ambiguities cannot generally be resolved by parol; but as to such ambiguities the will must be regarded as insensible.[2] Parol evidence, therefore, is inadmissible to prove what is meant by a legacy to "——;"[3] or a legacy to "K., to L., to M.,"[4] &c.

Ademption of legacy may be proved by parol.

§ 1007. Parol evidence is admissible to establish the ademption or prepayment of a legacy. Thus, in an English case, the son, the residuary legatee under a will, was permitted to show by parol that a legacy given by the testator to his daughter had been partially anticipated by him, he having given her a portion of the sum bequeathed, stating at the same time that it was in anticipation of her legacy.[5] The same rule has been adopted in the United States.[6]

Parol proof of mistake in drafting not receivable.

§ 1008. Parol proof of mistake is usually inadmissible to correct a will. In contracts there is a distinction in this respect, arising from the fact that a scrivener's mistake is often the mistake of the agent of both parties, and therefore in such cases imputable to both. But in wills,

[1] Taylor's Ev. § 1108; Stone *v.* Greening, 13 Sim. 390; Hall *v.* Fisher, 1 Coll. 47; Quennell *v.* Turner, 13 Beav. 240; Evans *v.* Angell, 26 Beav. 202. See, also, Gilliat *v.* Gilliat, 28 Beav. 481; Mathews *v.* Mathews, 4 Law Rep. Eq. 278; Doe *v.* Bower, 2 B. & Ad. 459, per Parke, J.

[2] Miller *v.* Travers, 8 Bing. 254; Taylor *v.* Richardson, 2 Drew. 16; St. Luke's Home, &c. *v.* Soc. for Indigent Females, 52 N. Y. 191; Hill *v.* Felton, 47 Ga. 453. For other cases see supra, § 993; and supra, § 956, as to definition of patent ambiguities, and Clayton *v.* Lord Nugent, 13 M. & W. 200; Kell *v.* Charmer, 23 Beav. 195.

[3] Baylis *v.* A. J. 2 Atk. 239.

[4] Clayton *v.* Nugent, 13 M. & W. 200.

[5] Kirk *v.* Eddowes, 3 Hare, 509; Ferris *v.* Goodburn, 27 L. J. Ch. 574; Taylor's Evidence, § 1048.

[6] Rogers *v.* French, 19 Ga. 316; Nolan *v.* Bolton, 25 Ga. 352; May *v.* May, 28 Ala. 141.

the scrivener can be in no sense the agent of the legatees or devisees whose interests are affected by his supposed blunder, and to them, therefore, can such blunder be in no sense imputable. The mistake, therefore, if there be such, is one of the testator, or of the scrivener adopted by the testator; and to let the will be overridden by parol proof of such mistake would be to subordinate that which the testator declares to be his last will to something which he has not so sanctioned, and which passes through the treacherous medium of parol.[1] It is true that it has been held in England that the writer's habit of misnaming a particular person may be proved, for the purpose of showing whom he meant by a particular legatee.[2] But ordinarily a testator's

[1] Newburgh *v.* Newburgh, 5 Mad. 361; Miller *v.* Travers, 8 Bing. 244; Francis *v.* Dichfield, 2 Cowp. 531; Hayes *v.* Hayes, 21 N. J. Eq. 265; Nevius *v.* Martin, 30 N. J. L. 465; Gaither *v.* Gaither, 3 Md. Ch. 158; Higgins *v.* Carlton, 28 Md. 115; Abercrombie *v.* Abercrombie, 27 Ala. 489. See supra, §§ 954, 995.

In Massachusetts, by Gen. Stat. c. 92, § 25, when a will omits to provide for a child, such child may take as if testator had died intestate, unless the child had been already provided for, or unless it appear that the omission was intentional. Under this act evidence is admissible to show directly as well as indirectly that the omission was intentional. Converse *v.* Wales, 4 Allen, 512; Ramsdill *v.* Wentworth, 101 Mass. 125; Buckley *v.* Gerard, 123 Mass. 8.

[2] Blundell *v.* Gladstone, 11 Sim. 467; Mostyn *v.* Mostyn, 5 H. of L. Cas. 155. See R. *v.* Wooldale, 6 Q. B. 549; Abbott *v.* Massie, 3 Ves. 148, explained by Rolfe, B., in Clayton *v.* Nugent, 13 M. & W. 204, 207; Rosaz, in re, L. R. 2 P. D. 66. In Lee *v.* Pain, 4 Hare, 251–253, where this doctrine was applied, a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, £200 each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice Chancellor Wigram decided that the claimants were entitled to their respective legacies. The rule was pushed to a perilous extreme in Beaumont *v.* Fell, 2 P. Wms. 141, where a legacy, given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person was known as Catherine Earnley, proof was received that the testator usually called the claimant

mistake of fact, leading him to a provision he could not otherwise have made, cannot be proved to modify such provision.[1] Thus it is inadmissible to prove that a statement made as to an advancement was a mistake,[2] and to prove by parol that the testatrix, who omitted to provide for a particular son, believed at the time of making the will that he was dead, when he was really alive, there being nothing in the will to indicate a belief in such death.[3] But a testator's declarations have been admitted to show that an interlineation in a will was made after its execution;[4] and a subscribing witness may be examined to the same effect.[5] And when it is doubtful whether an instrument is a deed or a will, declarations of the testator are admissible to resolve the doubt.[6]

Fraud in concoction of will may be proved by parol.

§ 1009. Where, however, fraud or coercion is alleged in the concoction of a will, such fraud may be proved by parol.[7] The proof, in such cases, as the testator is out of the reach of examination, must rest upon circumstances; and whatever circumstances would logically tend to establish or negative fraud or coercion are relevant. These circumstances may be evidenced as much by parol as by written proof.[8] Proof of undue influence may be in like manner made.[9]

Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy. On this and other similar proof, the court decided in favor of the claimant. In this case, as we have noticed, declarations of the testator were admitted; but the propriety of receiving such evidence was doubted by Ld. Abinger in Doe *v.* Hiscocks, 5 M. & W. 371. See De Rosaz, in re, L. R. 2 P. D. 56, supra, § 996, where the admissibility is reserved.

[1] Jackson *v.* Sill, 11 Johns. R. 201; McAllister *v.* Butterfield, 31 Ind. 25; Skipwith *v.* Cabell, 19 Grat. 758; Rosborough *v.* Hemphill, 5 Rich. (S. C.) Eq. 95. See, however, Lee *v.* Pain and Beaumont *v.* Fell, cited supra, and Geer *v.* Winds, 4 Desau. 85.

[2] Painter *v.* Painter, 18 Ohio, 247.

[3] Gifford *v.* Dyer, 2 R. I. 99.

[4] Doe *v.* Palmer, 16 Q. B. 747; Duffy, in re, 5 Irish Eq. 506; Dench *v.* Dench, L. R. 2 Pr. D. 60. See Johnson *v.* Lyford, L. R. 1 P. & D. 546; Quick *v.* Quick, 3 Sw. & Tr. 442.

[5] Charles *v.* Huber, 78 Penn. St. 448.

[6] Sugden *v.* Ld. St. Leonards, L. R. 1 P. D. (C. A.) 154; White *v.* Hicks, 43 Barb. 64; Walston *v.* White, 5 Md. 297.

[7] Doe *v.* Hardy, 1 M. & Rob. 525; Doe *v.* Allen, 8 T. R. 147; Longford *v.* Purdon, 1 L. R. Ir. 75; Lauglin *v.* McDevitt, 63 N. Y. 213. See supra, § 931.

[8] Shailer *v.* Bumstead, 99 Mass. 112; Taylor's Will case, 10 Abb. (N.

[9] Lewis *v.* Mason, 109 Mass. 169; Harvey *v.* Sullens, 46 Mo. 147.

§ 1010. It should at the same time be remembered that as primary proof that a testator was influenced, in making the will, by fraud or compulsion, his declarations are inadmissible. In such relation they are to be regarded as hearsay.[1] But while such declarations are not admissible to prove the actual fact of fraud or improper influence by another, they may be competent, to adopt a distinction made by Colt, J., in a Massachusetts case in 1868, "to establish the influence and effect of the external acts upon the testator himself."[2] Or, as has been elsewhere said, declarations of the testator alone "are not competent evidence to prove acts of others amounting to undue influence, although when the acts are proven the declarations of the testator may be given to show the operation they had on his mind."[3] But declarations uttered long afterwards, in no sense part of the transaction, cannot be received to prove fraud.[4] For such purpose, unless made against the declarant's interest, they are but hearsay.[5]

Declarations of testator inadmissible to prove fraud or compulsion as primary proof.

§ 1011. When the condition of the testator's mind, so far as concerns testamentary capacity, is in litigation, his declarations are admissible so far as bearing on such question of capacity.[6] It is otherwise as to declarations some time subsequent to execution of a will, as to its contents, when such declarations are not connected with evidence as to his prior state of mind.[7]

Such declarations are admissible to prove testator's mental condition.

Y.) Pr. N. S. 300. See Hoges' Est. 2 Brewst. 450; McKinley *v.* Lamb, 56 Barb. 284; Rollwagen *v.* Rollwagen, 5 Thomp. & C. 402; *S. C.* 3 Hun, 121; Turner *v.* Cheeseman, 15 N. J. Eq. 243; Willett *v.* Porter, 42 Ind. 250; Rabb *v.* Graham, 43 Ind. 1; Lee *v.* Lee, 71 N. C. 139; Dennis *v.* Weekes, 51 Ga. 24; Beaubien *v.* Cicotte, 12 Mich. 459; Smith *v.* Fenner, 1 Gall. 170.

[1] Provis *v.* Reed, 5 Bing. 435; Marston *v.* Roe, 8 Ad. & El. 14; Shailer *v.* Bumstead, 99 Mass. 113; Comstock *v.* Hadlyme, 8 Conn. 254; Jackson *v.* Kniffen, 2 Johns. 31; Waterman *v.* Whitney, 1 Kern. 157.

[2] Shailer *v.* Bumstead, 99 Mass. 126.

[3] Rapello, J., Cudney *v.* Cudney, 68 N. Y. 152. See, to same effect, Linch *v.* Linch, 1 Lea (Tenn.) 526, and cases to § 1011.

[4] Gibson *v.* Gibson, 24 Mo. 227.

[5] Ibid. Supra, § 226.

[6] Robinson *v.* Adams, 62 Me. 369; Shailer *v.* Bumstead, 99 Mass. 113; Comstock *v.* Hadlyme, 8 Conn. 254; Waterman *v.* Whitney, 1 Kernan, 157; Boylan *v.* Meeker, 4 Dutch. 274; Moritz *v.* Brough, 16 S. &. R. 403; McTaggart *v.* Thompson, 14 Penn. St. 149. See, however, Reel *v.* Reel, 1 Hawks, 248; Howell *v.* Barden, 3 Dev. 442; Dennis *v.* Weekes, 51 Ga. 24; Cawthorn *v.* Haynes, 24 Mo. 236.

[7] Davis *v.* Davis, 122 Mass. 590.

§ 1012. But whenever a will is attacked on the ground that it does not exhibit the testator's real intent, he being in disturbed mind, or under undue influence at the time it was executed, it is admissible to put in evidence his prior declarations in support of the will.[1]

Parol evidence admissible to sustain will when attacked.

§ 1013. It is scarcely necessary to add that a probate of a will is *primâ facie* proof of its due execution.[2] It may subsequently be contested, by proof of incompetency of testator, or defective execution.[3]

Probate of will only *primâ facie* proof.

IV. SPECIAL RULES AS TO CONTRACTS.

§ 1014. Where a written document is resorted to by the parties for the expression of their conclusions after a series of conferences, such document will be regarded as expressing their final views, and as absorbing all other parol understandings, prior or contemporaneous. To permit evidence of prior or even of contemporaneous parol conditions to qualify the written document, would be to not only substitute media peculiarly fallible, — recollections of witnesses as to words, — for a medium whose accuracy the parties affirm, but often to substitute an abandoned for an adopted contract. Hence all prior conferences are regarded, unless there be fraud, as merged, in such case, in the final document.[4] Thus it has

Prior conferences are merged in written contract.

[1] Converse *v.* Wales, 4 Allen, 512; Dennison's Appeal, 29 Conn. 402; Starrett *v.* Douglass, 2 Yeates, 46; Neel *v.* Potter, 40 Penn. 484; Roberts *v.* Trawick, 17 Ala. 55. See Doe *v.* Shallcross, 16 Ad. & El. N. S. 758, and cases above cited.

[2] See supra, § 811; infra, § 1278; Charles *v.* Huber, 78 Penn. St. 448.

[3] Supra, § 811.

[4] Supra, § 920; Goss *v.* Nugent, 5 B. & Ad. 54; Adams *v.* Wordley, 1 M. & W. 74; Chicago *v.* Sheldon, 9 Wall. 50; Ins. Co. *v.* Lyman, 15 Wall. 664; Slocum *v.* Swift, 2 Low. 212; Chadwick *v.* Perkins, 3 Greenl. 399; City Bank *v.* Adams, 45 Me. 455; Millett *v.* Marston, 62 Me. 477; Mitchell *v.* Smith, 67 Me. 584; Wiggin *v.* Goodwin, 63 Me. 389; Smith *v.* Higbee, 12 Vt. 113; Daggett *v.* Johnson, 45 Vt. 345; Perkins *v.* Young, 16 Gray, 389; Wright *v.* Smith, 16 Gray, 499; Munde *v.* Lambie, 122 Mass. 336; Ward *v.* Commis. 122 Mass. 394; Dean *v.* Mason, 4 Conn. 428; Fitch *v.* Woodruff, 29 Conn. 82; Parkhurst *v.* Van Cortland, 1 Johns. Ch. 274; Stevens *v.* Cooper, 1 Johns. Ch. 425; Baker *v.* Higgins, 21 N. Y. 397; Jarvis *v.* Palmer, 11 Paige, 650; Delafield *v.* De Grauw, 9 Bosw. 1; Buckley *v.* Bentley, 48 Barb. 283; Bush *v.* Tilley, 49 Ibid. 599; Renard *v.* Sampson, 12 N. Y. 561; Halliday *v.* Hart, 30 Ibid. 474; Pollen *v.* Le Roy, Ibid. 549; Thorp *v.* Ross, 4 Keyes, 546; Kelley *v.* Roberts, 40 N. Y. 432; Riley *v.* City of Brooklyn, 46 N. Y. 444; Long *v.* N. Y. C. R. R. Co. 50 Ibid.

been ruled that in an action against a married woman for breach of a written agreement for the purchase of land sold to her by

76; Collender *v.* Dinsmore, 55 N. Y. 204; Gage *v.* Jaqueth, 1 Lans. 207; Germania Co. *v.* R. R. 72 N. Y. 90; Cox *v.* Bennet, 13 N. J. L. 165; Conover *v.* Wardell, 20 N. J. Eq. 266; King *v.* Ruckman, 21 N. J. Eq. 599; Ellmaker *v.* Ins. Co. 5 Penn. St. 183; Sennett *v.* Johnson, 9 Penn. St. 335; Harbold *v.* Kuster, 44 Penn. St. 392; Kirk *v.* Hartman, 63 Penn. St. 97; Gedde's App. 84 Penn. St. 482; Tatman *v.* Barrett, 3 Houst. 226; Stoddert *v.* Vestry, 2 Gill & J. 227; Neil *v.* Trustees, 31 Ohio St. 15; Wiles *v.* Harshaw, 8 Ired. Eq. 308; Logan *v.* Bond, 13 Ga. 192; Cole *v.* Spann, 13 Ala. 537; Sanford *v.* Howard, 29 Ala. 684; Hart *v.* Clark, 54 Ala. 490; Herndon *v.* Henderson, 41 Miss. 584; Cocke *v.* Bailey, 42 Miss. 81; Walter *v.* Engler, 30 Mo. 130; Price *v.* Allen, 9 Humph. 703; Savercool *v.* Farwell, 17 Mich. 308; Cincin. R. R. *v.* Pearce, 28 Ind. 502; Smith *v.* Dallas, 35 Ind. 255; Emery *v.* Mohler, 69 Ill. 221; Conwell *v.* R. R. 83 Ill. 232; Weaver *v.* Fries, 85 Ill. 356; Downie *v.* White, 12 Wis. 176; Merriam *v.* Field, 24 Wis. 640; Gelpcke *v.* Blake, 15 Iowa, 387; Pilmer *v.* Bank, 16 Iowa, 321; Hamilton *v.* Thrall, 7 Neb. 210. See, also, Flinn *v.* Calow, 1 M. & Gr. 589; Chase *v.* Jewett, 37 Me. 351; Kennedy *v.* Plank Road, 25 Penn. St. 224.

So as to shipping contracts, Slocum *v.* Swift, 2 Low. 212.

So as to insurance contracts, Shaw *v.* Ins. Co. 69 N. Y. 286; Franklin Ins. Co. *v.* Martin, 10 Vroom, 568; though such contracts may be modified by subsequent parol action; Infra, § 1017; and by proof of misstatements by agents. Infra, § 1172.

"There are cases in which resort may be had to parol evidence to ascertain the subject insured, but they are cases of latent ambiguity. So, in the construction of other contracts, parol evidence is admissible to explain such ambiguities. In this particular the rule for the construction of all written contracts is the same. Lord Mansfield said long ago that courts are always reluctant to go out of a policy for evidence respecting its meaning. Loraine *v.* Tomlinson, Douglas, 567. And so are the authorities generally. Astor *v.* The Union Insurance Company, 7 Cowen, 202; Murray *v.* Hatch, 6 Mass. 465; Levy *v.* Merrill, 4 Greenl. 480; Baltimore Fire Ins. Co. *v.* Loney, 20 Md. 36; Arnould on Insurance, 1316–17, and notes; Greenl. Ev. vol. ii. 377. It is no exception to the rule, that, when a policy is taken out expressly "for or on account of the owner" of the subject insured, or "on account of whomsoever it may concern," evidence beyond the policy is received to show who are the owners, or who were intended to be insured thereby. In such cases the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all. Finney *v.* The Bedford Ins. Co. 8 Met. 348." Strong, J., Home Ins. Co. *v.* Balt. Co. 93 U. S. 527.

"We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and under-

auction, parol evidence is inadmissible that the plaintiff requested her to bid on the property as an under-bidder, and told her that she would not be bound to take the property, but might if her husband desired, and that she did not read the agreement or know its contents when she signed it.[1] So a limited warranty cannot be extended into a general warranty by proof of a parol agreement to that effect prior to or at the delivery of a deed;[2] nor can proof be received of an oral contemporaneous agreement by a grantor to discharge certain incumbrances not created by himself;[3] nor can proof enlarging the area of property specifically described in a deed.[4]

When contract is partly written and partly oral, oral may be proved by parol.

§ 1015. The rule which has just been expressed is open to several qualifications. The first is that a contract, which is not required by statute to be in writing, may be partly expressed in writing, and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol.[5] "Where a verbal contract is entire, and a part only in part per-

standing of the parties. In the attempt to embody the contract in a written agreement there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities." Harlan, J., Snell *v.* Ins. Co. S. C. U. S. 1879, 18 Am. Law. Reg. 82.

[1] Faucett *v.* Currier, 115 Mass. 20.

[2] Raymond *v.* Raymond, 10 Cush. 134.

[3] Howe *v.* Walker, 4 Gray, 318.

[4] Barton *v.* Dawes, 10 C. B. 261; Llewellyn *v.* Jersey, 11 M. & W. 183. See other cases infra, § 1050.

[5] Sheffield *v.* Page, 1 Sprague, 285; Webster *v.* Hodgkins, 25 N. H. 128; Linsley *v.* Lovely, 26 Vt. 123; Winn *v.* Chamberlin, 32 Vt. 318; Houghton *v.* Carpenter, 40 Vt. 588; Cole *v.* Howe, 50 Vt. 35; McCormick *v.* Chevers, 124 Mass. 262; Hutchins *v.* Hebbard, 34 N. Y. 24; Hope *v.* Balen, 58 N. Y. 382; Grierson *v.* Mason, 1 Hun, 113; Smith *v.* R. R. 4 Abb. (N. Y.) App. 262; Wentworth *v.* Buhler, 3 E. D. Smith, 305; Silliman *v.* Tuttle, 45 Barb. 171; Potter *v.* Hopkins, 25 Wend. 417; Breck *v.* Cole, 4 Sandf. 79; Sale *v.* Darragh, 2 Hilt. (N. Y.) 184; Park *v.* Miller, 27 N. J. L. 338; Crane *v.* Elizabeth Ass. 29 N. J. L. 302; Miller *v.* Fichthorn, 31 Penn. St. 252; Clarke *v.* Adams, 83 Penn. St. 309; Glenn *v.* Rogers, 3 Md. 312; Randall *v.* Turner, 17 Ohio St. 262; Kieth *v.* Kerr, 17 Ind. 284; Taylor *v.* Galland, 3 G. Greene, 17; Domestic Ins. Co. *v.* Anderson, 23 Minn. 57; Johnston *v.* McRary, 5 Jones N. C. L. 369; Perry *v.* Hill, 68 N. C. 417; Moss *v.* Green, 41 Mo. 389; Mobile Co. *v.* McMillan, 31 Ala. 711; Young *v.* Jacoway, 17 Miss. 212; Cobb *v.* Wallace, 5 Coldw. 539; Thomas *v.*

formance is reduced to writing, parol proof of the entire contract is competent."[1] So if a written agreement has been treated as incomplete, parol evidence of a subsequent further and fuller agreement may be given.[2] Parol evidence is also admissible in explanation of a contract intended to be parol, but in part expression of which a written instrument is afterward executed.[3] When, also, a written contract refers to a collateral oral agreement, this necessarily involves proof of such agreement by parol.[4] And so when two contracts are made at the same time in respect to two distinct voyages, one contract being in writing and the other made orally, the fact that the one is in writing does not exclude proof of the other by parol.[5]

§ 1016. Another exception to the rule before us is based on the fact that to make a written contract there must be a written

Hammond, 47 Tex. 42. See supra, § 78; infra, § 1026.

"There can be no objection when an oral contract is made to prove that its principal terms were written down and a memorandum made of them and read at the time. The one is not a substitute to the other, and both are properly admissible without violating any rule of law." Miller, J., Lathrop *v.* Bramhall, 64 N. Y. 372.

As to statute of frauds, see supra, § 856.

[1] Grover, J., Hope *v.* Balen, 58 N. Y. 382. See, also, Hutchins *v.* Hebbard, 34 N. Y. 24; Blossom *v.* Griffin, 13 Ibid. 569; Barney *v.* Worthington, 37 Ibid. 112; Frink *v.* Green, 5 Barb. 455; Barry *v.* Ransom, 12 N. Y. 462; Batterman *v.* Pierce, 3 Hill, 171; Chester *v.* Bank of Kingston, 16 N. Y. 336; Whitney *v.* Cowan, 55 Miss. 639.

[2] Johnson *v.* Appleby, L. R. 9 C. P. 158; 22 W. R. 515; Courtenay *v.* Fuller, 65 Me. 156.

[3] "Where the parties have reduced an agreement to writing, the writing is supposed to contain all the agreement, and is the only evidence of it; and all prior or contemporaneous declarations and negotiations between the parties are excluded as evidence of the agreement, or any part of it. But here the agreement was not reduced to writing. It was intended by the parties to rest in parol, and the written instruments were subsequently executed in part execution of the parol agreement, and not for the purpose of putting that agreement in writing. It is well settled that a written instrument, thus executed does not supersede a prior parol agreement." Earl, C. J., in Barker *v.* Bradley, 42 N. Y. 319; citing Renard *v.* Sampson, 12 N. Y. 561; Thomas *v.* Dickinson, 2 Kernan, 364; Hutchins *v.* Hebbard, 34 N. Y. 24; Bowen *v.* Bell, 20 Johns. 340; Johnson *v.* Hathorn, 3 Keyes, 126; McCullough *v.* Girard, 4 Wash. C. C. R. 289; Mowatt *v.* Ld. Londesborough, 3 E. & B. 307.

[4] Ruggles *v.* Swanwick, 6 Minn. 526. See Lathrop *v.* Bramhall, 64 N. Y. 272, cited supra.

[5] Page *v.* Sheffield, 2 Curt. 377. That contemporaneous writings can be received to piece out a contract, see Wilson *v.* Randall, 67 N. Y. 338.

assent by both parties.[1] Where, therefore a written proposal is accepted by parol, this is an oral contract and may be proved by parol.[2] Hence a telegram accepted by parol may be modified, so far as concerns its contractual effect, by parol.[3] And the incidents of execution even of a bilateral contract may be sustained by parol proof. Thus parol proof is admissible to establish the delivery of a deed.[4] Ordinarily, however, the delivery of a deed is presumed from the facts of signature, delivery, and transfer of possession.[5] That it is open to either party to show that his assent was procured by fraud or duress, we have already seen.[6] Defective or qualified delivery may be also shown.[7]

Oral acceptance of written offer makes oral contract, and may be proved by parol. So of delivery.

§ 1017. If there be no statutory impediment, a written contract, aside from the prescriptions of the statute of frauds,[8] may be rescinded by parol, and a new agreement, written or unwritten, adopted in the place of that which has been rescinded. When such rescission, there having been a sufficient consideration, is proved in such a way as to establish the fact beyond reasonable doubt, courts of equity will refuse to permit the rescinded contract to be enforced; and the doctrine of chancery in this respect is applied by such courts of common law as adopt equity remedies, and, when such is the practice, through common law forms. A party, however, seeking to rescind a contract, must be free from wrong on his own part, must move promptly, must offer to put the other party in *statu quo*, and must establish his case by strong and clear evidence.[9] In other words, parol evidence is admis-

Rescission of contract, and substitution of another, may be proved by parol.

[1] Thornton *v.* Charles, 9 M. & W. 802; Heyman *v.* Neale, 2 Camp. 337; Sievewright *v.* Archibald, 17 Q. B. 115.

[2] Pacific Works *v.* Newhall, 34 Conn. 67.

[3] Beach *v.* R. R. 37 N. Y. 457.

[4] Armstrong *v.* McCoy, 8 Ohio, 128. As to parol proof of non-delivery, or non-execution of contracts, see supra, §§ 926–935.

[5] Infra, § 1314.

[6] Supra, § 931.

[7] Supra, §§ 927–9.

[8] See supra, §§ 901–2.

[9] Goss *v.* Nugent, 2 B. & Ad. 58; Price *v.* Dyer, 17 Ves. 356; Warner *v.* Daniels, 1 Wood. & M. 90; Marshall *v.* Baker, 19 Me. 402; Medomak Bk. *v.* Curtis, 24 Me. 36; Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. H. 196; Wheeden *v.* Fiske, 50 N. H. 125; Sanborn *v.* Batchelder, 51 N. H. 426; Manahan *v.* Noyes, 52 N. H. 232; Flanders *v.* Fay, 40 Vt. 316; Cutler *v.* Smith, 43 Vt. 577; Foster *v.* Purdy, 5 Met. 442; Priest *v.* Wheeler, 101 Mass. 479; Russell *v.* Barry, 115 Mass. 300; Cutter *v.* Cochrane,

sible, so is the position stated by Sir J. Stephen,[1] to prove "the existence of any subsequent oral agreement to rescind or modify

116 Mass. 408; Connelly *v.* Devoe, 37 Conn. 570; Dearborn *v.* Cross, 7 Cow. 48; Field *v.* Holbrook, 6 Duer, 597; Parker *v.* Syracuse, 31 N. Y. 376; Comstock *v.* Johnson, 46 N. Y. 615; Murray *v.* Harway, 56 N. Y. 337; Cook *v.* Cole, 6 N. J. Eq. 522; Howell *v.* Sebring, 14 N. J. Eq. 84; Bell *v.* Hartman, 9 Phil. R. 1; Graham *v.* Pancoast, 30 Penn. St. 89; Rockafellow *v.* Baker, 41 Penn. St. 319; Wilson *v.* Getty, 57 Penn. St. 266; Malone *v.* Dougherty, 79 Penn. St. 48; Shepler *v.* Scott, 85 Penn. St. 329; Creamer *v.* Stephenson, 15 Md. 211; McLean *v.* Ins. Co. 29 Grat. 361; Cain *v.* Guthrie, 8 Blackf. 409; Stewart *v.* Ludwick, 29 Ind. 230; Hume *v.* Taylor, 63 Ill. 43; Kirby *v.* Harrison, 2 Ohio St. 326; Rynear *v.* Neilin, 3 G. Greene, 310; Mather *v.* Butler, 28 Iowa, 253; Hubbell *v.* Ream, 31 Iowa, 289; Burge *v.* R. R. 32 Iowa, 101; Van Trott *v.* Wiese, 36 Wis. 439; Murphy *v.* Dunning, 30 Wis. 296; Esham *v.* Lamar, 10 B. Mon. 43; Lee *v.* Lee, 2 Duv. 134; Holtzclaw *v.* Blackerby, 9 Bush, 40; Phelps *v.* Seely, 22 Grat. 592; Prothro *v.* Smith, 6 Rich. (S. C.) Eq. 324; Murray *v.* King, 7 Ired. (Eq.) 19; Johnston *v.* Worthy, 17 Ga. 420; Lane *v.* Latimer, 41 Ga. 171; Dever *v.* Akin, 40 Ga. 423; Doll *v.* Kathman, 23 La. An. 486; Commer. Bk. *v.* Lewis, 21 Miss. 226; Henning *v.* Ins. Co. 47 Mo. 425; Bailey *v.* Smock, 61 Mo. 213; Paris *v.* Haley, 61 Mo. 453; Walker *v.* Wheatly, 2 Humph. 119; Todd *v.* Allen, 18 Kans. 543; Salmon *v.* Hoffman, 2 Cal. 138; Scanlan *v.* Gillan, 5 Cal. 182; Barfield *v.* Price, 40 Cal. 535; Waymack *v.* Heilman, 26 Ark. 449. See Goucher *v.* Martin, 9 Watts, 106.

In Grymes *v.* Sanders, 93 U. S. 55, the following rules are given:—

"A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. Kerr on Mistake & Fraud, 408; Trigg *v.* Read, 5 Humph. 529; Jennings *v.* Broughton, 17 Beav. 541; Thompson *v.* Jackson, 3 Rand. 507; Harrod's Heirs *v.* Cowan, Hardin's Rep. 543; Hill *v.* Bush, 19 Ark. 522; Jouzan *v.* Toulmin, 9 Ala. 662. . . . .

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. Thomas *v.* Bartow, 48 N. Y. 200; Flint *v.* Wood, 9 Hare, 622; Jennings *v.* Broughton, 5 De G., M. & G. 139; Lloyd *v.* Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. *v.* Rowe, 24 Wend. 74; Minturn *v.* Main, 3 Seld. 220; 7 Rob. Prac. Ch. 25, § 2, p. 432;

[1] Evidence, art. 90.

any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise." Thus it is competent to waive by parol a condition in an insurance policy that a particular act is to be evidenced

Campbell *v.* Fleming, 1 Adolph. & E. 41; Sugd. on Vend. 14th ed. 335; Diman *v.* Providence, W. & B. R. R. Co. 5 R. I. 130.

"A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under these circumstances, the loss ought not to be borne by the appellant. Hunt *v.* Silk, 5 East, 452; Minturn *v.* Main, 3 Seld. 227; Okill *v.* Whittaker, 2 Phill. 340; Brisbane *v.* Davies, 5 Taunt. 144; Andrews *v.* Hancock, 1 Brod. & Bing. 37; Skyring *v.* Greenwood, 4 Barn. & Cr. 289; Jennings *v.* Broughton, 5 De Gex, M. & G. 139.

"The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase money. They assumed no other liability. There was neither obligation nor liability on either side beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. Segur *v.* Tingley, 11 Conn. 142; Haywood *v.* Cope, 25 Beav. 140; Jennings *v.* Broughton, 17 Ibid. 232; Atwood *v.* Small, 6 Clark & Fin. 497; Marvin *v.* Bennett, 8 Paige, 321; Thomas *v.* Bartow, 48 N. Y. 198; Hunter *v.* Goudy, 1 Hamm. 451; Halls *v.* Thompson, 1 Sm. & M. 481."

While extrinsic evidence is inadmissible to contradict or vary a written instrument, "it is impossible to lay down, as a general rule, that extrinsic oral evidence is inadmissible to prove either the entire or partial dissolution of the original contract, or the substitution or annexation of a new verbal contract. But wherever it is attempted to superadd an oral to a written contract, there must be clear evidence of the actual words used." Per James, L. J., Thomson *v.* Simpson, 18 W. R. 1091; L. R. 9 Eq. 497.

On Goss *v.* Nugent, supra, Sir J. Stephen thus comments: "It was held in effect in Goss *v.* Lord Nugent, that if by reason of the statute of frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal (oral) rescission of a contract good under the statute of frauds would be good. See Noble *v.* Ward, L. R. 2 Ex. 135; and Pollock on Contracts, 411, note (6)." Stephen's Evidence, note xxxiii. to art. 90.

by writing.[1] Parol evidence is also admissible to show that the forfeiture in a policy has been unconditionally waived, and that conditions inserted in receipts for back premiums were in contravention of this waiver.[2] So parol evidence is admissible to prove that a rescinded contract has been reinstated.[3]

It is true that a chancellor will not pronounce a debt to be released in equity unless released in law; and that it is held in equity that mere voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity.[4] But there may be considerations which would prevent the debt from being enforced in a court of equity, although it might be subsisting at law.[5] Hence where a voluntary declaration by a creditor has been acted upon by the debtor, the former will be bound to make his representation good.[6]

It need scarcely be added that parol evidence is admissible to show that after signing a document the defendant assented to certain alterations made by the plaintiff before it was signed by the latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract.[7]

Exception at law as to writings under seal.

§ 1018. No doubt by the strict rule of English common law, an instrument under seal cannot be thus rescinded by parol.[8] Hence it has been ruled that a parol discharge cannot be set up to bar an action on a covenant for non-payment of money.[9] The same conclusion was reached in a

[1] Pechner *v.* Ins. Co. 65 N. Y. 195. See Stranahan *v.* Putnam, 65 N. Y. 591.

[2] McLean *v.* Ins. Co. 29 Grat. 361.

[3] Flynn *v.* McKeon, 6 Duer, 203, and cases above stated.

[4] Cross *v.* Sprigg, 6 Hare, 552.

[5] Per Turner, L. J., Taylor *v.* Manners, L. R. 1 Ch. 56.

[6] Yeomans *v.* Williams, L. R. 1 Eq. 184; 38 L. J. Ch. 283; Powell's Evidence, 4th ed. 407.

[7] Stewart *v.* Eddowes, L. R. 9 C. P. 311; 43 L. J. C. P. 204. Supra, §§ 624, 927.

[8] Fowell *v.* Forest, 2 Wms. Saund. 47 ff, 47 gg; Harris *v.* Goodwyn, 2 M. & Gr. 405; 2 Scott N. R. 459, *S. C.*; Doe *v.* Gladwin, 6 Q. B. 953, 962; Rawlinson *v.* Clarke, 14 M. & W. 187, 192; Miller *v.* Washburn, 117 Mass. 371. See, however, Brookshire *v.* Brookshire, 8 Ired. L. 74; Pickler *v.* State, 18 Ind. 226.

[9] Rogers *v.* Payne, 2 Wils. 376; recognized in West *v.* Blakeway, 2 M. & Gr. 751; Cordwent *v.* Hunt, 8 Taunt. 596. See Spence *v.* Healey, 8 Ex. R. 668; M. of Berwick *v.* Oswald, 1 E. & B. 295; The Thames Iron Works Co. *v.* The Roy. Mail St. Packet Co. 13 Com. B. (N. S.) 358.

case where an action had been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all buildings erected during the tenancy; the defendant setting up as a defence an agreement between the parties, that, if the defendant built a greenhouse on the premises he should be at liberty to remove it.[1] It has been held at common law to make no difference whether the agreement in discharge of the deed be in writing or merely oral, or whether it be executory or executed; and, therefore, if an act is required by deed to be done within a certain time, evidence cannot be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.[2] At the same time, when there has been an executed parol rescission of a contract under seal, the rescission being for an adequate consideration, equity will not permit the rescinded contract to be enforced. The obligee on the rescinded contract has, by his acts, estopped himself from enforcing such contract.[3]

Parol evidence admissible to reform a contract on ground of fraud.

§ 1019. We have heretofore observed[4] that when a contract is shown to have been modified by the parties after its execution, and when one of the parties improperly (with fraud either express or implied) seeks to enforce the original contract in defiance of such modification, he should be restrained. Fraud, employed by one party to obtain the assent of the other party, may be always, as we have also seen, shown for the purpose of impeaching the contract.[5] But a further step may be taken where it is shown that, before the execution of a contract, it was agreed, as part of the consideration of the contract, that it should be essentially modified in its operation. Supposing, in such case, facts amounting

[1] West *v.* Blakeway, 2 M. & Gr. 729; 3 Scott N. R. 199, *S. C.* But see Cort *v.* Ambergate, &c. Ry. Co. 17 Q. B. 127, 145, 146.

[2] Gwynne *v.* Davy, 1 M. & Gr. 857, 871, per Tindal, C. J.; Littler *v.* Holland, 3 T. R. 590. See Nash *v.* Armstrong, 10 C. B. (N. S.) 259. See, also, Albert *v.* The Grosvenor Invest. Co. L. R. 3 Q. B. 123; and 8 B. & S. 664, *S. C.* These cases, however, Mr. Taylor queries, § 1043.

[3] Yeomans *v.* Williams, L. R. 1 Eq. 184; Gwynne *v.* Davy, 1 M. & Gr. 868, per Tindal, C. J.; Leathe *v.* Bullard, 8 Gray, 546; Whitcher *v.* Shattuck, 3 Allen, 319; Dearborn *v.* Cross, 7 Cow. 48; Hope *v.* Balen, 58 N. Y. 380; Shughart *v.* Moore, 78 Penn. St. 469; Sowers *v.* Earnhart, 64 N. C. 96; and see cases cited supra, § 1017, and infra, § 1019.

[4] Supra, § 1017.

[5] Supra, § 93.

to express or constructive fraud to be shown, the court will reform such a contract, so as to make it what was proposed by the parties; and the remedies thus given in chancery will be applied by common law courts administering equity through common law forms, if the statute of frauds does not interpose.[1] Parol evidence is admissible to support the allegations made in such case of facts amounting to fraud. The remedy, however, is applied reluctantly and cautiously, and only on strong proof that the reformation was one agreed to by the parties at the execution of the contract, and was prevented by mutual mistake or fraud. A party seeking this remedy, also, must be himself free from blame, and must be ready to put the other party in *statu quo*.[2] Thus parol evidence has been held admissible to

[1] Supra, § 902.

[2] Sugd. Vend. & P. 8th. Am. ed. 262; Kerr on Fraud & Mist. 423; Price *v.* Dyer, 17 Ves. 356; Fowler *v.* Fowler, 4 De G. & J. 265; Mortimer *v.* Shortall, 2 Dr. & War. 363; Filmer *v.* Gott, 4 Br. Pr. C. 230; Robinson *v.* Vernon, 7 C. B. N. S. 231; Bold *v.* Hutchinson, 5 De G., M. & G. 558; Bloomer *v.* Spittle, L. R. 13 Eq. 427; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; West Bank *v.* Addie, L. R. 1 H. L. Sc. 148; Van Ness *v.* Washington, 4 Pet. 232; Rhodes *v.* Farmer, 17 How. 467; Selden *v.* Myers, 20 How. 506; Grymes *v.* Sanders, 93 U. S. 55; Oliver *v.* Ins. Co. 2 Curt. C. C. 277; The Tarquin, 2 Lowell, 358; Marshall *v.* Baker, 19 Me. 402; Medomak Bank *v.* Curtis, 24 Me. 36; Brown *v.* Holyoke, 53 Me. 9; Buel *v.* Miller, 4 N. H. 196; Lyman *v.* Little, 15 Vt. 576; Mallory *v.* Leach, 35 Vt. 156; Flanders *v.* Fay, 40 Vt. 316; Cutler *v.* Smith, 43 Vt. 577; Foster *v.* Purdy, 5 Met. 442; Bruce *v.* Bonney, 12 Gray, 107; Priest *v.* Wheeler, 101 Mass. 479; Glass *v.* Hulbert, 102 Mass. 24; Stockbridge *v.* Hudson, 102 Mass. 45; Russell *v.* Barry, 115 Mass. 300; Diman *v.* R. R. 5 R. I. 130; Wheaton *v.* Wheaton, 19 Conn. 96; Brainerd *v.* Brainerd, 15 Conn. 575; Blakeman *v.* Blakeman, 39 Conn. 320; Gillespie *v.* Moon, 2 Johns. Ch. 596; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Dorr *v.* Munsell, 13 Johns. R. 431; Gilchrist *v.* Cunningham, 8 Wend. 641; Coles *v.* Bowne, 10 Paige, 526; Wemple *v.* Stewart, 22 Barb. 154; Kent *v.* Manchester, 29 Barb. 595; New York Ice Co. *v.* Ins. Co. 31 Barb. 72; Bush *v.* Tilley, 49 Barb. 599; Cady *v.* Potter, 55 Barb. 463; Gillett *v.* Borden, 6 Lans. 219; Leavitt *v.* Palmer, 3 Comst. 19; Pitcher *v.* Hennessey, 48 N. Y. 415; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Wager *v.* Chew, 15 Penn. St. 323; Reitenbaugh *v.* Ludwick, 31 Penn. St. 131; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; Horn *v.* Brooks, 61 Penn. St. 407; Huss *v.* Morris, 63 Penn. St. 367; Martin *v.* Behrens, 67 Penn. St. 462; Whelen's Appeal, 70 Penn. St. 410; Coughenour *v.* Suhre, 71 Penn. St. 462; Wharton *v.* Douglass, 76 Penn. St. 273; Kostenbader *v.* Peters, 80 Penn. St. 438; Mays *v.* Dwight, 82 Penn. St. 462; Hall *v.* Clagett, 2 Md. Ch. 151; Farrell *v.* Bean, 10 Md. 368; Stair *v.* Bank, 31 Md. 254;

show that a bond, payable on its face in current funds, was, by

Boyce *v.* Wilson, 32 Md. 122; Kearney *v.* Sarcer, 37 Md. 264; Starke *v.* Littlepage, 4 Rand. 368; White *v.* Denman, 16 Ohio, 59; Webster *v.* Harris, 16 Ohio, 490; City R. R. *v.* Veeder, 17 Ohio, 385; Worden *v.* Williams, 24 Ill. 64; Hunter *v.* Bilyeu, 30 Ill. 228; Cleary *v.* Babcock, 41 Ill. 271; Fleming *v.* McHale, 47 Ill. 282; Miller *v.* Price, 42 Ill. 404; Smith *v.* Wright, 49 Ill. 403; Keith *v.* Ins. Co. 52 Ill. 518; Parker *v.* Benjamin, 53 Ill. 255; Moore *v.* Munn, 69 Ill. 591; Wilson *v.* Hoecker, 85 Ill. 349; Linn *v.* Barkey, 7 Ind. 69; Morris *v.* Whitmore, 27 Ind. 418; Wray *v.* Wray, 32 Ind. 126; Monroe *v.* Skelton, 36 Ind. 302; Free *v.* Meikel, 39 Ind. 318; Cain *v.* Hunt, 41 Ind. 466; Goodell *v.* Labadie, 19 Mich. 88; Beers *v.* Beers, 22 Mich. 42; Vary *v.* Shea, 36 Mich. 388; Rogers *v.* Odell, 36 Mich. 411; Hunt *v.* Carr, 3 G. Greene, 581; Longhurst *v.* Ins. Co. 19 Iowa, 354; Mather *v.* Butler, 28 Iowa, 253; Barthell *v.* Roderick, 34 Iowa, 517; Van Dusen *v.* Parley, 40 Iowa, 170; Lake *v.* Meacham, 13 Wis. 355; Smith *v.* Jordan, 13 Minn. 264; Guernsey *v.* Ins. Co. 17 Minn. 104; McCurdy *v.* Breathitt, 5 T. B. Mon. 232; Inskoe *v.* Proctor, 6 T. B. Mon. 311; Anderson *v.* Hutcheson, 4 Litt. (Ky.) 126; Coger *v.* McGee, 2 Bibb, 321; Harrison *v.* Howard, 1 Ired. Eq. 407; Potter *v.* Evcritt, 7 Ired. Eq. 152; Newsom *v.* Bufferlow, 1 Dev. Eq. 379; Peebles *v.* Horton, 64 N. C. 374; Ferguson *v.* Haas, 64 N. C. 772; Gibson *v.* Watts, 1 McCord Eq. 490; Blakely *v.* Hampton, 3 McCord, 469; Trout *v.* Goodman, 7 Ga. 383; Reese *v.* Wyman, 9 Ga. 430; Wyche *v.* Green, 11 Ga. 159; Ward *v.* Camp, 28 Ga. 74; Hamilton *v.* Conyers, 28 Ga. 276; Mitchell *v.* Mitchell, 40 Ga. 11; Dever *v.* Akin, 40 Ga. 423; Lane *v.* Latimer, 41 Ga. 171; Alston *v.* Wingfield, 53 Ga. 18; O'Neal *v.* Teague, 8 Ala. 345; Clopton *v.* Martin, 11 Ala. 187; Lockhart *v.* Cameron, 29 Ala. 355; Betts *v.* Gunn, 31 Ala. 219; Barrell *v.* Hanrick, 42 Ala. 60; Johnson *v.* Crutcher, 48 Ala. 368; Hardigree *v.* Mitchum, 51 Ala. 151; Robertson *v.* Walker, 51 Ala. 484; Harkins' Succession, 2 La. An. 923; Angomar *v.* Wilson, 12 La. An. 857; Summers *v.* U. S. Ins. Co. 13 La. An. 504; Davis *v.* Stern, 15 La. An. 177; Cox *v.* King, 20 La. An. 209; Willis *v.* Kerr, 21 La. An. 749; Mosby *v.* Wall, 23 Miss. 81; Gray *v.* Roden, 24 Miss. 667; Leitensdorfer *v.* Delphy, 15 Mo. 160; Hook *v.* Craighead, 32 Mo. 405; Tesson *v.* Ins. Co. 40 Mo. 33; Campbell *v.* Johnson, 44 Mo. 383; Thomas *v.* Wheeler, 47 Mo. 363; Henning *v.* Ins. Co. 47 Mo. 425; Schwear *v.* Haupt, 49 Mo. 226; Exchange Bank *v.* Russell, 50 Mo. 531; Pierson *v.* McCahill, 21 Cal. 122; Case *v.* Codding, 38 Cal. 191; Price *v.* Reeves, 38 Cal. 457; Gerdes *v.* Moody, 41 Cal. 335; Murray *v.* Dake, 46 Cal. 644; Taylor *v.* Moore, 23 Ark. 408; Williamson *v.* Simpson, 16 Tex. 436. See Maha *v.* Ins. Co. infra, § 1172.

The Pennsylvania practice is thus succinctly stated: "The principles which govern the admission of parol evidence affecting written instruments are well established. It may be received to explain and define the subject matter of a written agreement; Barnhart *v.* Riddle, 5 Casey, 92; Aldridge *v.* Eshleman, 10 Wright, 420; Gould *v.* Lee, 5 P. F. Smith, 99; to prove a consideration not mentioned in the deed, provided it be not inconsistent with the consideration expressed in it; Lewis *v.* Brewster, 7 P. F. Smith, 410; to establish a trust; Cozens *v.* Stevenson, 5 S. & R. 421;

an agreement made coincidently with its execution, made payable

to rebut a presumption or equity; Bank *v.* Fordyce, 9 Barr, 275; Musselman *v.* Stoner, 7 Casey, 265; to alter the legal operation of an instrument where it contradicts nothing expressed in the writing; Chalfant *v.* Williams, 11 Casey, 212; to explain a latent ambiguity; McDermot *v.* U. S. Ins. Co. 3 S. & R. 604; Iddings *v.* Iddings, 7 Ibid. 111; and to supply deficiencies in the written agreement, Miller *v.* Fichthorn, 7 Casey, 252; Chalfant *v.* Williams, supra; but, as a general rule, it is inadmissible to contradict or vary the terms of a written instrument. Hain *v.* Kalbach, 14 S. & R. 159; Barnhart *v.* Riddle, supra; Miller *v.* Fichthorn, supra; Harbold *v.* Kuster, 8 Wright, 392; Lloyd *v.* Farrell, 12 Ibid. 73; Anspach *v.* Bast, 2 P. F. Smith, 356. In cases of fraud, accident, or mistake, the rule is different. Where equity would set aside or reform the instrument on either of these grounds, parol evidence is admissible to contradict or vary the terms of the agreement as written. Christ *v.* Diffenbach, 1 S. & R. 464; Iddings *v.* Iddings, 7 Ibid. 111; Miller *v.* Henderson, 10 Ibid. 290; Parke *v.* Chadwick, 8 W. & S. 96; Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Ibid. 117; Rearich *v.* Swinehart, 1 Jones, 233. But the evidence of fraud and mistake ought to be of what occurred at the execution of the agreement, and should be clear, precise, and indubitable; Stine *v.* Sherk, 1 W. & S. 195; otherwise it should be withdrawn from the jury; Miller *v.* Smith, 9 Casey, 386. Here there is no allegation in either affidavit that the defendants were induced to execute the lease on the faith of the alleged parol agreement, or that it was omitted from the lease by fraud or mistake. Being incapable of proof, it is the same as if it had never been made, and therefore it constitutes no defence to the action. Hill *v.* Gaw, 4 Barr, 493. Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one; and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative." Williams, J., Martin *v.* Berens, 67 Penn. St. 462.

In Kostenbader *v.* Peters, 80 Penn. St. 438, the suit was trespass for occupying and cultivating a strip of land. The defendant put in evidence a deed from the plaintiff for a tract of land, the boundaries of which included the land in dispute, though the courses and distances did not. The plaintiff then offered to prove that when the deed was drawn she refused to sign it; and the distances were then numbered, and the parties went to the ground and measured the quantity of land called for by the new distances, and which did not include the land in dispute; and that the words "more or less" after the quantity of acres in the deed were then stricken out, and A. signed the deed. It was held by the Supreme Court (reversing the judgment of the court below), that this evidence should have been admitted.

"The English rule," said Paxson, J., in giving the opinion of the court, "that parol evidence is inadmissible to vary the terms of a written instrument, does not exist in this state. A number of authorities settle the doctrine that in cases of fraud or mistake as to the material facts, parol evidence of what occurred at the execution of

in Confederate currency, if paid before maturity;[1] and to insert

the writing is competent to explain the real meaning of the parties. As was said by Justice Woodward, in Chalfant *v.* Williams, 11 Casey, 212: 'We permit a deed absolute on its face to be proved a mortgage; we receive parol evidence to rebut a presumption or an equity; to supply deficiencies in the written agreement; to explain ambiguity in the subject matter of writings; to prevent frauds, and to correct mistakes.' To the same point are Dinkle *v.* Marshall, 3 Bin. 587; Woods *v.* Wallace, 10 Harris, 171; Bank *v.* Fordyce, 9 Barr, 279; Rearich *v.* Swinehart, 1 Jones, 238; Barnhart *v.* Riddle, 5 Casey, 92; Musselman *v.* Stoner, 7 Casey, 270. Was there such a mistake in the deed from the plaintiff to Abraham Dersham as would justify the admission of parol evidence to reform it? This is the important question raised by this record. We think it was clearly competent to show the tract of land as designated by the monuments on the ground, and that there was a mistake or misapprehension on the part of the plaintiff in signing the deed with the call for the Bitting Corner. Nor would the fact that the deed was read over to her affect her right to have it reformed, if, in point of fact, a mistake had been made. Such fact might have weight with the jury. All we decide now is, that the evidence should have been submitted to them for their consideration. This disposes of the first assignment. From what has been said it will be apparent that the evidence referred to in the second, third, and fourth assignments ought to have been received. The plaintiff is entitled to have this judgment reversed. Whether it will avail her in view of her own distinct evidence, that the defendant was in possession of the *locus in quo* at the time of the commission of the alleged trespass, is more than questionable." See, also, Beck *v.* Garrison, 1 Weekly Notes, 309.

In another case, it is said: —

"Nothing is better settled in this state than that not only can the ambiguities of a written instrument be explained by parol, but it may in the same manner be varied, added to, or even contradicted, where it is shown that but for the oral stipulations made at the time the party affected would not have executed it. The authorities for, as well as the reasons given in support of, this doctrine, so abound in our books that to cite the former, or to restate the latter, would be but a waste of time. But, it is said, this corporation was not bound by the declarations of its agents, they having exceeded their authority, and hence it was under no legal obligation to fulfil their undertakings. Grant this to be so; but how then can it hold the defendant to his part of the covenant? This plea would answer an excellent purpose were Caley seeking to enforce the contract against the company; but it so happens that the stick is in the other hand. 'If one party be not bound, neither is the other.' Strong, J., in the case of The Railroad Co. *v.* Stewart, 5 Wr. 59. In this respect a corporation differs nothing from a natural person; if it would enforce the contracts of its agents, it must first agree to adopt and be bound by them. In the foregoing we have discussed all the exceptions which we deem material or well taken; the rest are dismissed without further comment." Gordon, J., Caley *v.* R. R. 80 Penn. St. 363.

[1] Meredith *v.* Salmon, 21 Grat. 762.

the words "with interest" in an agreement respecting the purchase money of real estate.[1] So, where the evidence is clear and unequivocal, the court may insert the penalty in a bond, where this was omitted by mutual mistake, and where an effort is made fraudulently to take advantage of the omission.[2] But it must always be kept in mind that the party calling for the relief must be himself ready to do equity;[3] and must be free from any laches on his part.[4] *A fortiori*, he will not be aided if he himself is implicated in the fraud. Thus one party cannot as against the other party set up that the writing was meant by both parties as a fraud against creditors.[5]

Deeds may be so reformed.

§ 1020. Deeds, as well as other contracts, may be reformed under the limitations specified above.[6] It should, at the same time, be remembered that the party seeking to reform a deed, in a specific particular, "cannot introduce parol evidence of an original parol contract, or terms or stipulations at variance with the other provisions of the written instrument, as to which no fraud, mistake, or surprise, is alleged."[7]

Reformation granted in cases of concurrent mistake.

§ 1021. Courts of equity, and courts of law with equity powers, in cases also of concurrent mistake (*e. g.* where the common agent of both parties made a mistake in engrossing an instrument, or where the instrument was concocted on the basis of a mutual misconception of fact), may refuse to permit such contracts to be enforced, or may admit proof of such mistake as a defence to a suit on the contract. In such case the party seeking to take advantage of the blunder is virtually guilty of fraud, which will be checked under the limitations already prescribed.[8] Even an erroneous execu-

[1] Gump's Appeal, 65 Penn. St. 476.

[2] State *v.* Frank, 51 Mo. 98. See Prior *v.* Williams, 3 Abb. (N. Y.) App. 624. See Grymes *v.* Sanders, 93 U. S. 55, quoted supra, § 1017.

[3] Supra, § 932.

[4] Ibid.

[5] Conner *v.* Carpenter, 28 Vt. 237.

[6] See cases cited in last section, and Loss *v.* Obry, 22 N. J. Eq. 52; Coale *v.* Merryman, 35 Md. 382; Brown *v.* Molyneux, 21 Grat. 539; Hutson *v.* Fumas, 31 Iowa, 154; Van Donge *v.* Van Donge, 23 Mich. 321; Adair *v.* McDonald, 42 Ga. 506; Barfield *v.* Price, 40 Cal. 535.

[7] McAllister, J., in Emery *v.* Mohler, 69 Ill. 227, citing 1 Sugd. on Vend. & P. 161.

[8] Supra, § 1019; Fenwick *v.* Buff, 1 McArthur, 107; Peterson *v.* Grover, 20 Me. 363; Nat. Bank *v.* Ins. Co. 62 Me. 519; Barry *v.* Harris, 49 Vt. 392;

tion, leading to an erroneous sheriff's title, may be thus corrected.[1] The qualification obtaining in the English chancery, to the effect that while relief of this class will be granted to a defendant against whom a bill for specific performance is brought, it will be refused to a plaintiff seeking execution of a reformed agreement, is not generally recognized in the United States.[2]

A contract which the parties agreed at the time to treat as of moral and not of legal obligation equity will treat as a nullity, a clear case being shown.[3]

Paige *v.* Sherman, 6 Gray, 511; Hartford Ore Co. *v.* Miller, 41 Conn. 112; NcNulty *v.* Prentice, 25 Barb. 204; Mageehan *v.* Adams, 2 Binney, 109; Gower *v.* Sterner, 2 Whart. R. 75; Huss *v.* Morris, 63 Penn. St. 367; Mayo *v.* Dwight, 82 Penn. St. 462; McIntosh *v.* Saunders, 68 Ill. 128; Robins *v.* Swain, 68 Ill. 197; Milmine *v.* Burnham, 76 Ill. 362; Montgomery *v.* Shockey, 37 Iowa, 107; Larsen *v.* Burke, 39 Iowa, 703; Arbery *v.* Noland, 2 J. J. Marsh. 421; Blanchard *v.* Moore, 4 J. J. Marsh. 471; Burke *v.* Anderson, 40 Ga. 535; Leggett *v.* Buckhalter, 30 Miss. 421; Clauss *v.* Burgess, 12 La. An. 142; Wood *v.* Steamboat, 19 Mo. 529; Ladd *v.* Pleasants, 39 Tex. 415; Gammage *v.* Moore, 42 Tex. 170. See supra, §§ 856, 904, 933.

[1] Wardlaw *v.* Wardlaw, 50 Ga. 544.

[2] 1 Story's Eq. Jur. § 161; Bispham's Eq. § 382. See, however, Elder *v.* Elder, 1 Fairfield, 80; Glass *v.* Hulbert, 102 Mass. 24; Osborn *v.* Phelps. 19 Conn. 63; Miller *v.* Chetwood, 1 Green Ch. 199; Westbrook *v.* Harbeson, 2 McCord Ch. 112; Dennis *v.* Dennis, 4 Rich. Eq. 307; Climer *v.* Hovey, 15 Mich. 18.

Mr. Bispham says: "In proper cases of fraud or mistake, a party ought to have the assistance of a chancellor in enforcing a written contract with a parol variation," and cites Gillespie *v.* Moon, 2 Johns. Ch. 585; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144; Wall *v.* Arrington, 13 Ga. 88; Mosby *v.* Wall, 23 Miss. 81; Philpott *v.* Elliott, 4 Md. Ch. 273; Moale *v.* Buchanan, 11 Gill & J. 314; Bradford *v.* Bank, 13 How. 57.

[3] "As to the memorandum of Feb. 23, 1869, the evidence is full and conclusive that it was signed by the husband with the understanding that it would not be legally binding, or anything more than a moral or honorary obligation, upon either party; and by the wife after being informed that such was the husband's understanding of its effect, and after being advised by her counsel that it would not legally bind her. In short, both parties signed it with the understanding that they were not bound thereby, except so far as they might feel themselves morally obliged to carry out the intention therein expressed. Evidence of this character, though not competent to control the interpretation of the contract, is clearly admissible to show that the contract should be set aside, or treated as of no effect, in equity. Townshend *v.* Strangroom, 6 Ves. 328; Willan *v.* Willan, 16 Ves. 72; Bradford *v.* Union Bank of Tennessee, 13 How. 57; Western Railroad Co. *v.* Babcock, 6 Met. 346; Glass *v.* Hul-

Where, however, the application is made to reform a contract on the ground of mistake, and the defendant denies the mistake, clear and strong proof of mistake or fraud is necessary to induce a court to interfere.[1] And a mere mistaken opinion as to value, though common to both parties, is no ground for rescission.[2]

Parol evidence not admissible to contradict document.

§ 1022. It must also be remembered that the admissibility of evidence, in cases of fraud or concurrent mistake, for the purpose of reforming a document, depends largely on the terms of the document which it is proposed to reform. If the evidence of fraud or mistake goes to the *execution* of the document, then, as we have seen, it makes no matter what are the terms of the document, for the question is, not modification, but existence.[3] But it is otherwise when the question is whether the terms of a document were varied by parol, the document itself, so far as concerns the obligation imposed by its execution, continuing in full force. Now it is absurd to suppose that A. and B., after executing a contract for the sale of a house, would agree to take out of the contract all its material parts, and turn it into a contract for the sale of a ship. Even were the statute of frauds not in the way, the court would refuse parol evidence to prove such a change, because (if for no other reason) it is inherently improbable that such a change could have been made; and, even if it were made, no party can claim in equity to enforce an agreement so negligent. It is otherwise indeed, as we have already seen, when the offer is to

bert, 102 Mass. 24, 35." Gray, J., Earle *v.* Rice, 111 Mass. 20. See, also, Mitchell *v.* Kintzer, 5 Penn. St. 216.

[1] Supra, §§ 932, 1019; Bradford *v.* Bradford, 53 N. H. 463; Stockbridge *v.* Hudson, 102 Mass. 45; Boardman *v.* Davidson, 7 Abb. Pr. (N. S.) 439; Jackson *v.* Andrews, 59 N. Y. 244; Hyer *v.* Little, 20 N. J. Eq. 443; Morrison *v.* Morrison, 6 Watts & S. 516; Irwin *v.* Shoemaker, 8 Watts & S. 75; Edmond's Appeal, 59 Penn. St. 220; Wallace *v.* Hussey, 63 Penn. St. 24; Monroe *v.* Behrens, 67 Penn. St. 459; Gill *v.* Clagett, 4 Md. Ch. 470; Miner *v.* Hess, 47 Ill. 170; Goltra *v.* Sanasack, 53 Ill. 456; McTucker *v.* Taggart, 27 Iowa, 478; Heaton *v.* Fryberger, 38 Iowa, 185; Tripp *v.* Hasceig, 20 Mich. 254; Murphy *v.* Dunning, 30 Wis. 296; Dupree *v.* McDonald, 4 Desau. Ch. 209; Westbrook *v.* Harbeson, 2 McCord Ch. 112; Ryan *v.* Goodwyn, 1 McMull. Eq. 451; Bunse *v.* Agee, 47 Mo. 270; Makler *v.* McClelland, 21 La. An. 579.

[2] Sankey *v.* First Nat. Bank, 78 Penn. St. 48; Ludington *v.* Ford, 33 Mich. 123; Dortie *v.* Dugas, 55 Ga. 484.

[3] See supra, § 931.

prove the rescission of a contract, or its extension, in a mode not incompatible with its tenor. But to change the operative parts of a contract, retaining merely its frame, parol evidence will not be received. Thus (fraud in obtaining execution not being shown), it is inadmissible to prove by parol that an assignment was meant as a discharge;[1] or that the assignment is only for a moiety of what it purports to pass;[2] or that it was meant to secure only a portion of the creditors it purported to secure.[3] It is, in fine, not ordinarily competent[4] to prove by parol that a written contract has been modified by letting into it new provisions, where those provisions are not simply a development, or new application, of the written terms. It is not to be supposed (fraud not being proved) that if the parties took the trouble to put one contract in writing, they would not take the trouble to put another contract in writing, if they desired; nor, if a parol contract between them would be binding, is it to be supposed that they would capriciously engraft such new contract on an old written contract with conflicting provisions.[5] On the other hand, parol evidence may be received to show that certain provisions of a written contract, which could have been made by parol, have been waived, and a new parol contract substituted, when such new provisions are a reasonable modification of the old, and when it would work a fraud not to sustain the change.[6]

[1] Howard *v.* Howard, 3 Met. 548.

[2] Durgin *v.* Ireland, 14 N. Y. 322.

[3] Aldrich *v.* Hapgood, 39 Vt. 617.

[4] Supra, §§ 927–33, 1017.

[5] Vallette *v.* Canal Co. 4 McL. 192; Young *v.* McGown, 62 Me. 56; Hale *v.* Handy, 26 N. H. 206; Field *v.* Mann, 42 Vt. 61; La Farge *v.* Rickert, 5 Wend. 187; Jackson *v.* Andrews, 59 N. Y. 244; Barnes *v.* Bartlett, 47 Ind. 98; Casady *v.* Woodbury, 13 Iowa, 113; Randolph *v.* Perry, 2 Port. (Ala.) 376. See supra, § 920.

[6] Infra, § 1026; Brock *v.* Sturdivant, 12 Me. 81; Marshall *v.* Baker, 19 Me. 402; Rubber Co. *v.* Duncklee, 30 Vt. 29; Flanders *v.* Fay, 40 Vt. 316; Post *v.* Vetter, 2 E. D. Smith, 248; Wood *v.* Perry, 1 Barb. 114; Grierson *v.* Mason, 60 N. Y. 394; Raffensberger *v.* Cullison, 28 Penn. St. 426; Dictator *v.* Heath, 56 Penn. St. 290; Caley *v.* R. R. 80 Penn. St. 363; Creamer *v.* Stephenson, 15 Md. 211; Rigsbee *v.* Bowler, 17 Ind. 167; Willey *v.* Hall, 8 Iowa, 62; Adler *v.* Friedmann, 16 Cal. 138; Leeds *v.* Fassman, 17 La. An. 32.

In England a court of equity will not interfere, unless it be clearly convinced, by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected. Mortimer *v.* Shortall, 2 Dru. & War. 371, per Sugden, C.; Bold *v.* Hutchinson, 5 De Gex, M. & G. 558; Wright *v.* Goff, 22 Beav. 207, 214;

§ 1023. To reform a contract of sale on ground of fraud, it is necessary, according to the Pennsylvania practice, that the fraud should be specially set out in the declaration,[1] or, if it be set up in defence, that it should be averred in the pleas.[2] A party, seeking to rescind a contract on ground of fraud, cannot be heard until he offers to give up all the advantages of the contract.[3]

Reformation must be specially asked.

§ 1024. With an unlimited reformation of contracts as to

Ashhurst *v.* Mill, 7 Hare, 502; Gillespie *v.* Moon, 2 Johns. Ch. R. 585. See Bloomer *v.* Spittle, L. R. 13 Eq. 427. A *plaintiff* may seek the relief in equity by filing a bill, either to *reform* the writing, — in which event it will be necessary to satisfy the court that the mistake was made on *both* sides; Mortimer *v.* Shortall, 2 Dru. & War. 372, per Sugden, C.; Murray *v.* Parker, 19 Beav. 305; Rooke *v.* Ld. Kensington, 2 Kay & J. 753; Bentley *v.* Mackay, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, *S. C.;* Sells *v.* Sells, 29 L. J. Ch. 500; 1 Drew. & Sm. 42, *S. C.;* Fowler *v.* Fowler, 4 De Gex & J. 250; Elwes *v.* Elwes, 2 Giff. 545; 3 De Gex, F. & J. 667, *S. C.;* Bradford *v.* Romney, 30 Beav. 431, 438; Gray *v.* Boswell, 13 Ir. Eq. R. N. S. 77; Fallon *v.* Robins, 16 Ibid. 422; Taylor's Ev. § 1042, from which the above is taken; or to *rescind* the instrument, — in which case (though conclusive proof of error or surprise on the plaintiff's part alone will suffice; 1 Taylor's Ev. *ut supra;* Mortimer *v.* Shortall, 2 Dru. & War. 372, per Sugden, C.; Murray *v.* Parker, 19 Beav. 305; Rooke *v.* Ld. Kensington, 2 K. &. J. 753; Bentley *v.* Mackay, 31 Beav. 143, 151, per Romilly, M. R.; 4 De Gex, F. & J. 279, *S. C.;* Sells *v.* Sells, 29 L. J. Ch. 500; 1 Drew. & Sm. 42, *S. C.;* Fowler *v.* Fowler, 4 De Gex & J. 250; Elwes *v.* Elwes, 2 Giff. 545; Bradford *v.* Romney, 30 Beav. 431, 438; Gray *v.* Boswell, 13 Ir. Eq. R. N. S. 77; Fallon *v.* Robins, 16 Ibid. 422; see Harris *v.* Pepperell, 5 Law Rep. Eq. 1) it must appear that the mistake was one of vital importance. In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce, — such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like, — the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed. Mortimer *v.* Shortall, *ut supra;* Alexander *v.* Crosbie, Lloyd & G. 150.

[1] Butcher *v.* Metts, 1 Miles, 155; Jordan *v.* Cooper, 3 S. & R. 564; Huber *v.* Burke, 11 S. & R. 245; Irvine *v.* Bull, 4 Watts, 287; Clark *v.* Partridge, 2 Barr, 13; Renshaw *v.* Gans, 7 Barr, 117; Heebner *v.* Worrall, 38 Penn. St. 376; Bank *v.* Eyer, 60 Penn. St. 436.

[2] Partridge *v.* Clarke, 4 Penn. St. 166.

[3] Young *v.* Stevens, 48 N. H. 133; Underwood *v.* West, 52 Ill. 397; Spurgin *v.* Traub, 65 Ill. 170; Lane *v.* Latimer, 41 Ga. 171; and cases cited supra, §§ 932, 1019.

realty, the statute of frauds, as it exists in most of the United States, is, as we have seen, in conflict. By that statute, in its usual form of enactment, all uncertain interests in land, when created by parol, are to be treated merely as estates at will, saving only leases for a term not exceeding three years from date. Supposing a contract is duly executed in writing for the sale of land, but that, through mistake or fraud, a less quantity of land be inserted in the deed than the parties intended, can a chancellor, on the mistake or fraud being duly proved, reform the deed by inserting the greater instead of the lesser measurements? With this and cognate points the minds of chancellors have been much occupied. The statute of frauds, they have agreed, should not be permitted to work frauds; and certain broad conditions they have concurred in recognizing as exceptions to its provisions. (1.) If the defendant, admitting the contract, does not set up the statute, it will not be set up by the court. (2.) A part performance of the contract (*e. g.* by going into possession) may be treated as a substitute for a written agreement. (3.) A party who fraudulently prevents another from executing a written contract cannot set up the want of that contract. A discussion of these exceptions has been already attempted.[1] It is enough, at this point, to repeat that where either of the exceptions is established, then parol evidence to reform a contract, in cases of mutual mistake or fraud, may be received under the limitations above expressed. If the defendant sets up the statute, if there has been no part performance, if there has been no clear proof of fraud preventing the execution of a written contract, then we are forced to hold that a written contract, no matter what may be the proof of fraud or mistake outside of the limit just noticed, cannot be reformed on parol proof so as to make it pass a larger interest in land than appears on its face. It may be made to pass a less interest, not a greater.[2]

Under statute of frauds such reformation cannot pass land.

§ 1025. We may also, in obedience to the reasoning just

[1] See supra, §§ 904–11; Bispham's Equity, §§ 383 *et seq.*

[2] 1 Sugd. Vend. & P. (8th Amer. ed.) 243; Woollam *v.* Hearn, 2 Lead. Cas. in Eq. 684; Jordan *v.* Sawkins, 1 Ves. Jr. 402; Clinan *v.* Cooke, 1 Sch. & L. 22; Glass *v.* Hulbert, 102 Mass. 24; Oshorn *v.* Phelps, 19 Conn. 63; Gillespie *v.* Moon, 2 Johns. Ch. 585.

given, conclude that under the statute a written contract, executed for one purpose, cannot be turned by parol to another purpose, by discharging it of one set of contents, and putting in another set.[1] Hence it is settled that where the subsequent contract incorporates portions of the original contract and cancels the rest, the subsequent contract is the only one subsisting between the parties; and if dealing with an object which the statute requires to be in writing, such subsequent contract must be in writing.[2]

Parol contract substituted for written not sufficient under statute.

§ 1026. It may happen, however, to take an alternative already presented,[3] that the parties to a written contract, without changing its general purpose, may agree by parol that it is to be extended so as to apply to new and kindred objects; or that its terms, without being varied as between the original parties, are to be expanded so as to introduce new parties; or that new powers shall be grafted on those which the instrument already gives, or that the period for its execution should be enlarged. In such case such collateral extension can be proved by parol, there being no statutory bar.[4]

Collateral extension may be proved by parol.

[1] Supra, §§ 854 *et seq.*, 902 *et seq.*

[2] Powell on Evidence, 2d ed. 399. Therefore where the plaintiffs agreed in writing with the defendant to let him a public-house, as tenant, from year to year, with the option on his part to call for a lease for twenty-eight years, upon the terms, among others, that if he sold the lease for more than £1,200 he was to give the plaintiffs half the excess; and subsequently, by verbal agreement, a lease was granted, the terms of which differed materially from those stipulated for in the written agreement, but the parties never abandoned the agreement as to the division of the excess of the purchase money; and the defendant having sold the lease for £2,500, the plaintiff sued him for a moiety of the £1,300, the excess of the purchase money over the £1,200, it was held by the Court of Exchequer that the original agreement in writing was entirely superseded, and that the agreement under which the lease was taken was the verbal one, of which one term was the stipulation in the original contract as to the excess of the purchase money; and that as the agreement was not in writing, as required by the statute of frauds, the plaintiffs were not entitled to recover. Sanderson *v.* Graves, 23 W. R. 797; L. R. 10 Ex. 234. See Stearns *v.* Hall, 9 Cush. 31; Musselman *v.* Stoner, 31 Penn. St. 265; Adler *v.* Freedman, 16 Cal. 138.

[3] Supra, § 1022.

[4] White *v.* Parkin, 12 East, 578; Morgan *v.* Griffith, L. R. 6 Ex. 70; Lindley *v.* Lacey, 17 C. B. (N. S.) 578; Malpas *v.* R. R. L. R. 1 C. P. 336; Brady *v.* Oastler, 3 H. & C. 112; Angell *v.* Duke, L. R. 1 Q. B. 174; Cottrill *v.* Myrick, 12 Me. 222; Bon-

In other words, to adopt Sir J. Stephen's statement,[1] a party is at liberty to prove "the existence of any separate oral agreement

ney *v.* Morrill, 57 Me. 368; Courtenay *v.* Fuller, 65 Me. 156; Cummings *v.* Putnam, 19 N. H. 569; Hersom *v.* Henderson, 21 N. H. 224; Field *v.* Mann, 42 Vt. 61; Buzzell *v.* Willard, 44 Vt. 44; Richardson *v.* Hooper, 13 Pick. 446; Rennell *v.* Kimball, 5 Allen, 356; Joannes *v.* Mudge, 6 Allen, 245; McCormick *v.* Chevers, 124 Mass. 262; Raymond *v.* Sellick, 10 Conn. 480; Smith *v.* Richards, 29 Conn. 232; Orguerre *v.* Luling, 1 Hilt. (N. Y.) 383; Hoagland *v.* Hoagland, 2 N. J. Eq. 501; Gilbert *v.* Duncan, 29 N. J. L. 133; Willis *v.* Fernald, 33 N. J. L. 206; Grove *v.* Hodges, 55 Penn. St. 514; Miller *v.* Miller, 60 Penn. St. 16; Everson *v.* Fry, 72 Penn. St. 330; Malone *v.* Dougherty, 79 Penn. St. 46; Basshor *v.* Forbes, 36 Md. 154; Planters' Ins. Co. *v.* Deford, 38 Md. 382; Fusting *v.* Sullivan, 41 Md. 170; Stearns *v.* Mason, 24 Grat. 484; Bryant *v.* Dana, 8 Ill. 343; Silsbury *v.* Blumb, 26 Ill. 287; Hartford Ins. Co. *v.* Wilcox, 57 Ill. 186; Danlin *v.* Daeglin, 80 Ill. 608; Stange *v.* Wilson. 17 Mich. 342; Vanderkarr *v.* Thompson, 19 Mich. 82; Keough *v.* McNitt, 6 Minn. 513; Domestic Sewing Co. *v.* Anderson, 23 Minn. 57; Page *v.* Einstein, 7 Jones, (N. C.) L. 147; Lowry *v.* Pinson, 2 Bailey, 324; Wells *v.* Thompson, 50 Ala. 84; Lytle *v.* Bass, 7 Coldw. 303, McDonald *v.* Stewart, 18 La. An. 90; Dixon *v.* Cook, 47 Miss. 220; Bennet *v.* Peebles, 5 Mo. 132; Alexander *v.* Moore, 19 Mo. 143; Van Studdiford *v.* Hazlett, 56 Mo. 322; Weaver *v.* Fletcher, 27 Ark. 510; Babcock *v.* Deford, 14 Kans. 408; Polk *v.* Anderson, 16 Kans. 243; Thomas *v.* Hammond, 47 Tex. 43; Kelly *v.* Taylor, 23 Cal. 11; Ingersoll *v.* Truebody, 40 Cal. 603; Lockwood *v.* U. S. 5 Ct. of Cl. 379.

That the statute of frauds will not be in the way of a collateral subsequent modification of a contract for the sale of lands, see supra, § 863.

In Wilgus *v.* Whitehead, Sup. Ct. Penn. 1879, 6 Weekly Notes, 537, it was held that an oral agreement made subsequently to a contract under seal, and upon a new consideration, may, in cases not within the statute of frauds, enlarge the time of performance specified in the contract, or vary any other of its unexecuted conditions.

"An oral agreement," said Trunkey, J., giving the opinion of the court, "subsequently made on a new consideration, and before the breach of the contract, in cases falling within the general rules of common law, and not within the statute of frauds, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether, and thus make a new contract. Emerson *v.* Slater, 22 How. 28; Munroe *v.* Perkins, 9 Pick. 298.

"In an action upon a written contract to deliver specific articles at a particular time and place, parol evidence is admissible to prove that, after the making of the original contract, the parties agreed that the articles should be delivered at a different time and place. At least such parol agreement will amount to a waiver of a tender at the time or place mentioned in the original contract. Robinson *v.* Bachelder, 4 N. H. 40. See McCombs *v.* McKennan, 2 W. & S.

[1] Evidence, art. 90. And see Ball *v.* Benjamin, 73 Ill. 39.

as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them." [1]

216; Keating *v.* Price, 1 Johns. Cas. 22. In these and like cases, no consideration appears in the oral agreements other than the mutual promise that the time or place of performance should be changed. The written contracts, thus altered, continued in force, and performance or tender of performance, when and where orally agreed upon, was a good defence. The principle seems to be, that the party entitled was held to a waiver of the performance as required by the written contract, lest its enforcement would operate as a fraud upon the other.

The time for the performance of a condition of a sealed, as well as a simple contract, may be enlarged by parol. Indeed, the enlargement of time is nothing more than a waiver of strict performance. Dearborn *v.* Cross, 7 Cow. 48; Munroe *v.* Perkins, supra.

[1] "When the purpose for which a writing was executed is not inconsistent with its terms, it may properly be proved by parol. Truscott *v.* King, 2 Seld. 147, 161; Chester *v.* Bank of Kingston, 16 N. Y. 336, 343; Agawam Bank *v.* Strever, 18 Ibid. 502. The objection of the plaintiff to the evidence introduced for this purpose was therefore properly overruled." Porter, J., Hutchins *v.* Hebbard, 34 N. Y. 26.

In Bladen *v.* Wells, 30 Md. 582, it was held to be "the settled law, that parol evidence may be offered to prove any collateral, independent facts, about which the agreement is silent, referring to Creamer *v.* Stephenson, 15 Md. 211; McCreary *v.* McCreary, 5 G. & J. 157; Dorsey *v.* Eagle, 7 G. & J. 331; but concludes that in the principal case then before the court the deed was neither silent nor inconclusive as to the matter about which the parol contract was made; it related to and covered conclusively the whole subject of the contract, both as to price and quantity, and was a full, complete, and executed contract between the parties, in reference to the land which was sold. On the other hand this court, in the late case of Basshor & Co. *v.* Forbes, declared the testimony offered by the defendant to prove that his individual liability as a stockholder was waived by a verbal understanding with the plaintiffs, that they were to look to and rely upon the securities furnished by the company alone and exclusively, was admissible to prove an independent and collateral fact, not provided for by the terms of the contract. In support of which position they refer, among others, to the cases cited in Bladen *v.* Wells, also Lindley *v.* Lacy, 17 Com. B. (N. S.) 578; 2 Taylor's Evidence, §§ 1038, 1049. Vide 36 Md. 164, 167.

"The case of Allen *v.* Sowerby, Adm'r, 37 Md. 420, also sanctions the admission of parol evidence to establish 'an additional suppletory agreement,' by which something is supplied that is not in the written contract, for which it relies on Coates & Glenn *v.* Sangston, 5 Md. 130; Atwell & Appleton *v.* Miller, 11 Md. 361. To these may be added the more recent English cases cited by the appellees. Lindley *v.* Lacy, 17 C. B. (N. S.)

§ 1027. In conformity with the rule which has been just stated, parol evidence has been received of a parol agreement between two indorsers of a note to divide the loss between them;[1] of a parol agreement of an indorser of a note by which he waives demand and notice;[2] of a parol agreement by an agent that he should receive no compensation;[3] of a parol agreement for application of a payment under a written contract;[4] of a parol agreement, collateral to a lease, by which the lessor agrees to destroy all the rabbits on a place leased;[5] of a parol agreement, collateral to a written bill of sale of furniture, that the vendee shall take up the vendor's acceptance;[6] of a parol agreement, by the vendor of a gro-

Illustrations of above rule.

586; 1 L. Rep. C. P. 336; Wallis *v.* Littell, 11 C. B. (N. S.) 369; 2 Taylor's Ev. §§ 1039, 1049." Bowie, J., Fusting *v.* Sullivan, 41 Md. 169, 170.

As distinctive Pennsylvania authorities to the extent to which a contract may be qualified by parol, see Miller *v.* Henderson, 10 S. & R. 290; Drinker *v.* Byers, 2 Penn. R. 528; Parke *v.* Chadwick, 8 W. &. S. 96; Renshaw *v.* Gans, 7 Barr, 117; Bank *v.* Fordyce, 9 Barr, 275; Farrel *v.* Lloyd, 69 Penn. St. 239; Torrens *v.* Campbell, 74 Penn. St. 474.

"It is also well settled that in a case of a simple contract in writing, oral evidence is permissible to show that by a subsequent agreement the time of performance was enlarged, or the place of performance changed, the contract having been performed according to the enlarged time, or at the substituted place, or the performance having been prevented by the act of the other party; or that the agreement itself was waived or abandoned. So it has been held competent to prove an additional and suppletory agreement by parol; as, for example, where the contract for the hire of a horse was in writing, and it was further agreed by parol that accidents occasioned by his shying should be at the risk of the hirer. Le Fevre *v.* Le Fevre, 4 S. & R. 241, supports the same general rule. Shughart *v.* Moore, 78 Penn. St. 469." Woodward, J., Malone *v.* Dougherty, 79 Penn. St. 46.

In Lloyd *v.* Farrel, 2 Weekly Notes, 38, which was a suit by A. (the vendor) for the purchase money of land, the vendee set up failure of consideration on the ground that A. was equitably seised only of one third of the title, having inherited the same from his father equally with his two sisters. In answer to this evidence was offered: (1.) That the father had purchased with A.'s money, and at his request; (2.) That the deed to the defendant had been made on the express parol agreement that A. conveyed and warranted only his own title. This was held admissible, although the deed contained the usual warranty. See Farrel *v.* Lloyd, 69 Penn. St. 239.

[1] Phillips *v.* Preston, 5 How. 278.

[2] Sanborn *v.* Southard, 25 Me. 409; Fullerton *v.* Rundlett, 27 Me. 31.

[3] Joannes *v.* Mudge, 6 Allen, 245.

[4] Forster *v.* McGraw, 64 Penn. St. 464.

[5] Morgan *v.* Griffiths, L. R. 6 Ex. 70.

[6] Lindley *v.* Lacey, 17 C. B. (N. S.) 578.

cery store, that he would not carry on the business in the same neighborhood;[1] of a parol agreement as to the mode of payment;[2] of a parol agreement by the parties to an indenture of charter party to use the ship for a period which was to elapse before the charter party attached;[3] and of a parol agreement designating the place for carrying into effect a contract, and as to which it is silent.[4] To prove such collateral extensions usage may be appealed to.[5] "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."[6]

Parol evidence inadmissible to prove unilateral mistake of fact.

§ 1028. Were a person who signs a deed or other contract able to avoid performing it on the ground that he was mistaken as to its effect, it would be only necessary for him to omit reading the contract before signing it, in order to be bound or not as he chose. It is the duty of every one executing such a writing to be aware of its contents before signing; it is against the policy of law to permit those neglecting this duty to benefit by their neglect.[7] Hence a mere mistake of fact will be ordinarily no ground for relief, so far as concerns the signers of such instruments and those claiming under them.[8] Evidence, however, is admissible

[1] Pierce *v.* Woodward, 6 Pick. 206.

[2] Sowers *v.* Earnhart, 64 N. C. 96.

[3] White *v.* Packin, 12 East, 578; Seago *v.* Deane, 4 Bing. 459.

[4] Cummings *v.* Putnam, 19 N. H. 569; Musselman *v.* Stoner, 31 Penn. St. 265; Moore *v.* Davidson, 18 Ala. 209.

[5] Supra, § 969.

[6] Per Parke, B., Hatton *v.* Warren, 1 M. & W. 475.

[7] Infra, § 1243.

[8] Brown *v.* Allen, 43 Me. 590; Young *v.* McGown, 62 Me. 56; Webster *v.* Webster, 33 N. H. 18; Bradley *v.* Anderson, 5 Vt. 152; McDuffie *v.* Magoon, 26 Vt. 518; Locke *v.* Whiting, 10 Pick. 279; Fitzhugh *v.* Runyon, 8 Johns. R. 375; Cameron *v.* Irwin, 5 Hill N. Y. 272; Mills *v.* Lewis, 55 Barb. 179; Pitcher *v.* Hennessey, 48 N. Y. 415; Jackson *v.* Andrews, 59 N. Y. 244; Boyce *v.* Ins. Co. 55 N. Y. 240; Cooper *v.* Ins. Co. 50 Penn. St. 299; Wesley *v.* Thomas, 6 Har. & J. 24; Watkins *v.* Stockett, 6 Har. & J. 435; Boyce *v.* Wilson, 32 Md. 122;

to prove mistake on one side, and fraud on the other.[1] Thus an excess of quantity in a conveyance of land may be proved by parol, and damages may be recovered therefor, when the mistake was concurrent, or induced by fraud.[2] So an action will lie for the value of a deficiency of quantity.[3] It is otherwise when land is sold as containing an approximate area, "be the same more or less."[4]

Mistake of law no ground for relief.

§ 1029. Mistake of law, as is well settled, is no ground for the interposition of a chancellor for the purpose of reforming a contract. Sometimes this conclusion is based on the presumption that every one knows the law, and knowing it, cannot, without fraud, set up his subsequent ignorance. It is unnecessary, however, to resort to reasoning so artificial to support a proposition which is a necessary axiom of government.[5] It is sufficient to say that if a party mistaking the law could get rid of a contract which he made under the influence of the mistake, not only would there be very few losing

Kearney *v.* Sascer, 37 Md. 264; Harris *v.* Dinkins, 4 Desau. 60; Peques *v.* Mosby, 15 Miss. 340; Nixon *v.* Porter, 38 Miss. 401; Hathaway *v.* Brady, 23 Cal. 121; Robinson *v.* McNeil, 51 Ill. 225; Nelson *v.* Davis, 40 Ind. 366; Barnes *v.* Bartlett, 47 Ind. 98; Glenn *v.* Salter, 42 Iowa, 107; Snyder *v.* Ives, 42 Iowa, 157; Ludington *v.* Ford, 33 Mich. 123; Harter *v.* Christoph, 32 Wis. 248; Schwickerath *v.* Cooksey, 53 Mo. 75; Wade *v.* Pelletier, 71 N. C. 74; Henry *v.* Smith, 76 N. C. 311; and cases cited supra, § 1019; infra, § 1243.

[1] Supra, §§ 1019, 1021; Welles *v.* Yates, 44 N. Y. 525. See Bellows *v.* Steno, 14 N. H. 175, and cases cited supra, § 1021, as to mistake in contents of document, and § 945 as to fraud in execution. As to rejection of erroneous particulars, see supra, § 945.

[2] Jordan *v.* Cooper, 3 S. & R. 564; Bank *v.* Galbraith, 10 Barr, 490; Jenks *v.* Fritz, 7 W. & S. 201; Fisher *v.* Deibert's Adm'r, 54 Penn. St. 460; Bartle *v.* Vosbury, 3 Grant, 279; Schettiger *v.* Hopple, Ibid. 56. See Tarbell *v.* Bowman, 103 Mass. 341. In Beck *v.* Garrison, Sup. Ct. of Pennsylvania, 1875, 1 Weekly Notes, 309, which was an equitable assumpsit to recover for an excess of land, the court said: "The questions in this case were really questions of fact. There was sufficient evidence to be submitted to the jury of a promise to pay for the excess contained in the deed, if the survey should be found to contain a greater quantity of land than was to be sold at the rate of $1,000 for a single acre. There was also evidence tending to show that there was a mistake in the survey, and that the lines did actually contain an excess over the quantity intended to be sold and conveyed. These questions were fairly submitted to the jury and found in favor of the plaintiff, and therefore became a ground of recovery."

[3] See supra, § 945.

[4] Kreiter *v.* Bomberger, supra, § 945.

[5] See infra, § 1241.

contracts that would not be got rid of, but a mad spirit of speculation would be generated by the assurance that no venture, no matter how desperate, would bring personal loss. Hence it is that the courts have united in accepting the principle that a contract cannot be reformed because it was entered into under a mistake of law.[1] If, however, one party mistakes the law through the other's fraud; or if the mistake of the one be promoted by the other, then there may be relief.[2] Of mutuality of mistake we have a marked illustration in an English case, where the oldest of three brothers divided lands, of which the second brother had died possessed, under the mistaken impression, which was confirmed by a mutual friend of both parties, that land could not ascend. Here relief was granted,[3] not because there was actual fraud, but because the contract rested on a mistake which the defending contracting party had furthered.

Mistake of form, when obvious, may be corrected.

§ 1030. Where from a writing itself it appears that words have been transposed or erroneously inserted by a clerical error, then this may be corrected on trial, and the writing read according to its intended meaning.[4] Thus, in Massachusetts, where S., who in the body of a bond was recited as a surety, signed as a witness, and W., an intended witness, whose name did not appear in the body of the bond, signed as surety in the place where S. should have signed, it was held that parol evidence was admissible to show that this trans-

[1] See cases cited to § 1028, and see Hunt *v.* Rousmanier, 8 Wheat. 174; Hoover *v.* Reilly, 2 Abb. (U. S.) 471; Freeman *v.* Curtis, 51 Me. 140; Potter *v.* Sewall, 54 Me. 142; Mellish *v.* Robertson, 25 Vt. 603; Dickinson *v.* Glenney, 27 Conn. 104; Shotwell *v.* Murray, 1 Johns. Ch. 512; Champlin *v.* Laytin, 18 Wend. 407; Garnar *v.* Bird, 57 Barb. 277; Zane *v.* Cawley, 21 N. J. Eq. 130; Gebb *v.* Rose, 40 Md. 387; Brown *v.* Armistead, 6 Rand. 594; Barnes *v.* Bartlett, 47 Ind. 98; Heavenridge *v.* Mondy, 49 Ind. 434; Goltra *v.* Sanasack, 53 Ill. 456; Moorman *v.* Collier, 32 Iowa, 138; Bledsoe *v.* Nixon, 68 N. C. 521; Thurmond *v.* Clark, 47 Ga. 500; Gwynn *v.* Hamilton, 29 Ala. 233; McMurray *v.* St. Louis, 33 Mo. 377; Smith *v.* McDougal, 2 Cal. 586.

[2] Kerr on Fraud & Mistake, 400; Cooper *v.* Phibbs, L. R. 2 H. L. Cas. 149; Blakeman *v.* Blakeman, 39 Conn. 320; Wheeler *v.* Smith, 9 How. 55; Whelen's Appeal, 70 Penn. St. 425.

[3] Lansdown *v.* Lansdown, cit. 2 J. & W. 205.

[4] See supra, §§ 933, 939, 948; Loss *v.* Obry, 22 N. J. Eq. 52; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Barthell *v.* Roderick, 34 Iowa, 517; Fallon *v.* Kehoe, 38 Cal. 44; Exchange Bk. *v.* Russell, 50 Mo. 531; Moore *v.* Wingate, 53 Mo. 398; Miller *v.* Davis, 10 Kans. 541.

position was a mistake; and on this evidence S. was held liable as surety.[1] So, in the same state, where a contract is agreed to and signed, but a wrong name is inserted by the scrivener at one point in place of the name of one of the contracting parties, this mistake, it has been held, can be rectified by parol.[2] As to strangers, this right of correction is always open.[3] Thus, where a debtor delivered a certificate of stock to his creditor, with power of attorney to transfer, as collateral security, it was held that in a contest with another creditor the purchaser might show by parol that the date in the power was entered by mistake, and that the title to the stock passed to the creditor at the time of the delivery of the certificate and the power of attorney.[4]

Conveyance may be shown to be in trust.

§ 1031. To permit a conveyance, absolute on its face, but virtually in trust, to be enjoyed by the nominal grantee in defiance of the trust, would be a fraud which equity would not tolerate; and hence courts of equity, when such trusts have been fully and plainly established, have treated the grantee as a trustee, and compelled him to execute the trust. It is no bar to the exercise of this jurisdiction that the deed so acted on was one the statute of frauds requires to be in writing. The statute of frauds cannot be used as an instrument of fraud, nor do its terms include cases of this class.[5] The trust, in such case, no statute intervening, may be proved by parol; and when such is the local practice, equitable remedies of this class can be applied through common law form.[6]

[1] Richardson *v.* Boynton, 12 Allen, 138.

[2] Brown *v.* Gilman, 13 Mass. 158; though see Crawford *v.* Spencer, 8 Cush. 418, where evidence was refused to show that a grantee's name was entered by mistake of the scrivener in the place of another person, who was the intended grantee, and who entered on and occupied the land. And as to refusal to correct similar mistakes, see Jackson *v.* Hart, 12 Johns. R. 77; Jackson *v.* Foster, 12 Johns. R. 488. Where the sons and sons-in-law of a decedent united in a written agreement, one of whose provisions allotted to the sons-in-law certain portions in their own right, parol evidence was held in Alabama inadmissible, in a common law procedure, to show that such portions were intended to have been given to the sons-in-law in right of their wives. Moody *v.* McCown, 39 Ala. 586. See, however, Mitchell *v.* Kintzner, 5 Penn. St. 216.

[3] See supra, § 923.

[4] Finney's Appeal, 59 Penn. St. 398. See infra, § 1078.

[5] Supra, § 903; infra, § 1034.

[6] Price *v.* Dyer, 17 Ves. 356; Sprigg *v.* Bank, 14 Pet. 201; Russell *v.* South-

§ 1032. For the same reason, a conveyance absolute on its face may be held, if the proof be clear, to have been taken as merely a security, and will in such case be treated as a mortgage, so far as concerns parties and

Or may be shown to be a mortgage.

ard, 12 How. 139; Rhodes *v.* Farmer, 17 How. 467; Babcock *v.* Wyman, 19 How. 289; Villa *v.* Rodriguez, 12 Wall. 323; Morgan *v.* Shinn, 15 Wall. 110; Peugh *v.* Davis, 96 U. S. 332; Andrews *v.* Hyde, 3 Cliff. 516; Amory *v.* Laurence, 3 Cliff. 523; Baxter *v.* Willey, 9 Vt. 276; Wing *v.* Cooper, 37 Vt. 178; Hill *v.* Loomis, 42 Vt. 562; Stackpole *v.* Arnold, 11 Mass. 27; Flint *v.* Sheldon, 13 Mass. 443; Flagg *v.* Mann, 14 Pick. 417; Eaton *v.* Green, 22 Pick. 526; Campbell *v.* Dearborn, 109 Mass. 130; McDonough *v.* Squire, 111 Mass. 219; Benton *v.* Jones, 8 Conn. 186; Sheldon *v.* Bradley, 37 Conn. 324; Gilchrist *v.* Cunningham, 8 Wend. 641; Van Dusen *v.* Worrall, 4 Abb. (N. Y.) App. 473; Despard *v.* Wallbridge, 15 N. Y. 378; Anthony *v.* Atkinson, 2 Sweeny, 228; Horn *v.* Keteltas, 46 N. Y. 605; McMahon *v.* Macy, 51 N. Y. 161; Mechan *v.* Forrester, 52 N. Y. 277; Carr *v.* Carr, 52 N. Y. 521; Chapman *v.* Porter, 69 N. Y. 276; Matthews *v.* Sheehan, 69 N. Y. 585; Sweet *v.* Parker, 22 N. J. Eq. 453; Freytag *v.* Hoeland, 23 N. J. Eq. 36; Heister *v.* Madeira, 3 W. & S. 385; Stair *v.* Bank, 55 Penn. St. 364; Odenbaugh *v.* Bradford, 67 Penn. St. 96; Baisch *v.* Oakeley, 68 Penn. St. 92; Maffit *v.* Rynd, 69 Penn. St. 387; Haines *v.* Thompson, 70 Penn. St. 434; Bank *v.* Whyte, 1 Md. Ch. 536; *S. C.* 3 Md. Ch. Dec. 508; Farrell *v.* Bean, 10 Md. 217; Dryden *v.* Hanway, 31 Md. 254; Smith *v.* Parks, 22 Ind. 59; Church *v.* Cole, 36 Ind. 34; Preschbaker *v.* Feaman, 32 Ill. 483; Fleming *v.* McHale, 47 Ill. 282; Latham *v.* Latham, 47 Ill. 185; Smith *v.* Wright, 49 Ill. 403; Price *v.* Karnes, 59 Ill. 276; Swetland *v.* Swetland, 3 Mich. 482; Holton *v.* Meighen, 15 Minn. 69; Trucks *v.* Lindsey, 18 Iowa, 504; Kay *v.* McCleary, 25 Iowa, 191; Wilson *v.* Patrick, 34 Iowa, 362; Fairchild *v.* Rasdall, 9 Wis. 379; Wilcox *v.* Bates, 26 Wis. 465; Ragan *v.* Simpson, 27 Wis. 355; Boskowitz *v.* Davis, 12 Nev. 446; Edrington *v.* Harper, 3 J. J. Marsh. 353; Thomas *v.* McCormack, 9 Dana, 109; Mallory *v.* Mallory, 5 Bush, 464; Nichols *v.* Cabe, 3 Head, 93; Turbeville *v.* Gibson, 5 Heisk. 565; McDonald *v.* McLeod, 1 Ired. Eq. 221; Glisson *v.* Hill, 2 Jones Eq. 256; Steel *v.* Black, 3 Jones Eq. 427; Elliott *v.* Maxwell, 7 Ired. Eq. 246; Lockett *v.* Child, 11 Ala. 640; Brown *v.* Abell, 11 Ala. 1009; Locke *v.* Palmer, 26 Ala. 312; Brantley *v.* West, 27 Ala. 542; Parish *v.* Gates, 29 Ala. 254; Crews *v.* Threadgill, 35 Ala. 334; Bragg *v.* Massie, 38 Ala. 106; Barrell *v.* Hanrick, 42 Ala. 60; Ingraham *v.* Grigg, 21 Miss. 22; Vasser *v.* Vasser, 23 Miss. 378; Anding *v.* Davis, 38 Miss. 594; Weathersly *v.* Weathersly, 40 Miss. 469; Hogel *v.* Lindell, 10 Mo. 483; Tibeau *v.* Tibeau, 22 Mo. 77; Slowey *v.* McMurray, 27 Mo. 116; Thomas *v.* Wheeler, 47 Mo. 363; Summers *v.* Ins. Co. 13 La. An. 504; Moore *v.* Wade, 8 Kans. 380; Pierce *v.* Robinson, 13 Cal. 116; Lodge *v.* Turman, 24 Cal. 390; Case *v.* Codding, 38 Cal. 457; Henley *v.* Hotaling, 41 Cal. 22; Farmer *v.* Grose, 42 Cal. 169; Hannay *v.* Thompson, 14 Tex. 142; Reeves *v.* Bass, 39 Tex. 618; Blakemore *v.* Byrnside, 7 Ark. 505; McCarron *v.* Cassidy, 18 Ark. 34; Chaires *v.* Brady, 10 Fla. 133. In New Hampshire, there is a statutory exclusion of such evidence. Lund *v.*

privies.[1] "It is not questioned that an instrument absolute in its terms may be shown by parol evidence to be only a mortgage."[2]

Lund, 1 N. H. 39; Kingsley *v.* Holbrook, 45 N. H. 321. And so in Georgia. 7 Cobb's Dig. 1851, p. 274. In Maine, though resulting trusts may be so proved, for the creating or declaring of other trusts, writings are necessary. Thomaston *v.* Stimpson, 21 Me. 195; Bryant *v.* Crosby, 36 Me. 562; Richardson *v.* Woodbury, 43 Me. 206. On the Maine statute we have the following: "I. It is claimed that the estate in Oliver by deed from his father, of October 4, 1846, was in trust. But the deed is in common form, and it discloses no trust. Now, by the statutes of this state, all trusts must be 'created or declared by some writing signed by the party or his attorney,' except those 'arising or resulting by implication of law.' R. S. c. 73, § 11. The conversations and intentions of the family, before the deed was given, could not alter or change its effect. Parol evidence of the object and purpose for which the conveyance was made thereby, to convert the deed into one of trust, is not admissible. Flint *v.* Sheldon, 13 Mass. 448 Nor is there a resulting trust. The payments by the different members of the family were made at different times after the title was in Oliver. Nothing was paid by any one when the conveyance was made, and it is well settled that no resulting trust can arise from the payment or advance of money after the purchase is completed. Farnham *v.* Clements, 51 Me. 426; Dudley *v.* Bachelder, 53 Me. 403." Appleton, C. J., Gerry *v.* Stimson, 60 Me. 188.

[1] Supra, § 903; Hills *v.* Loomis, 42 Vt. 562; Clark *v.* Clark, 43 Vt. 685; French *v.* Burns, 35 Conn. 359; Whitney *v.* Townsend, 2 Lansing, 249; Chapman *v.* Porter, 69 N. Y. 276; Matthews *v.* Sheehan, 69 N. Y. 585; Phillips *v.* Hulsizer, 20 N. J. Eq. 308; Crane *v.* De Camp, 21 N. J. Eq. 414; McGinity *v.* McGinity, 63 Penn. St. 38; Harper's Appeal, 64 Penn. St. 315; Klinik *v.* Price, 4 W. Va. 4; Shays *v.* Norton, 48 Ill. 100; Kent *v.* Agard, 24 Wis. 378; Kent *v.* Lasley, 24 Wis. 654; Robertson *v.* Willoughby, 65 N. C. 520; Turner *v.* Kerr, 44 Mo. 429; Phillips *v.* Croft, 42 Ala. 477; Faris *v.* Dunn, 7 Bush, 276; Honore *v.* Hutchings, 8 Bush, 687; Raynor *v.* Lyons, 37 Cal. 452; McKinney *v.* Miller, 19 Mich. 142. The nature of the consideration will be of much weight in determining the equities. See Cornell *v.* Hall, 22 Mich. 377.

[2] Strong, J., in Morgan *v.* Shinn, 15 Wall. 110; citing Babcock *v.* Wyman, 19 How. 289.

The practice in New York is stated in the following opinions:—

"It is now too late to controvert the proposition that a deed, absolute upon its face, may in equity be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this state are fully committed to the doctrine; and, whatever may be the rule in other states, here, in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact that the adjudications have entered into and controlled business transactions, and become a rule of property, to authorize a recon-

§ 1033. A deed, however, that is absolute on its face, and which is duly delivered, and possession taken under it, cannot be contradicted by parol evidence to the effect that it was intended only as a trust, unless fraud or concurrent mistake be shown, and the evidence be plain and strong, and relate to intention coincident with the execu-

Evidence must be plain and strong.

sideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from. The principle was recognized by the chancellor in Holmes *v.* Grant, 8 Paige, 243; although it was not applied in that case, and had been before asserted under like circumstances in Robinson *v.* Cropsey, 2 Edw. Ch. R. 138; affirmed 6 Paige, 480. It was expressly adjudged in Strong *v.* Stewart, 4 J. C. R. 167, that parol evidence was admissible to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is Clark *v.* Henry, 2 Cow. 324, which was followed by this court in Murray *v.* Walker, 31 N. Y. 399. In Hodges *v.* Tennessee Marine & Fire Insurance Co. 4 Seld. 416, the court says that, 'from an early day in this state, the rule, that parol evidence is admissible for the purpose named, has been established as the law of our courts of equity; and it is not fitting that the question should be reëxamined, and the cases in which it has been so adjudged are cited with approval.' In Sturtevant *v.* Sturtevant, 20 N. Y. 39, the same judge, pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust; and it was decided that while a deed absolute in terms could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see Despard *v.* Walbridge, 15 N. Y. 374. The rule does not conflict with that other rule which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties; and courts of equity will always look through the forms of a transaction and give effect to it so as to carry out the substantial intent of the parties." Allen, J., Horn *v.* Keteltas, 46 N. Y. 609.

So, in a later case: —

"It is always competent to show that an assignment or conveyance, absolute in form, was only intended as a security. Hodges *v.* Tennessee M. & F. Ins. Co. 8 N. Y. 416; Despard *v.* Walbridge, 15 N. Y. 374; Sturtevant *v.* Sturtevant, 20 N. Y. 39." Earl, C., McMahon *v.* Macy, 51 N. Y. 161.

In Pennsylvania, it is now settled that the fourth section of the Act of 1856, requiring instruments of trust to be in writing, made no alteration in the rule theretofore existing, which allowed a deed, absolute on its face, to be shown by parol to be a mortgage. Ballentine *v.* White, 77 Penn. St. 20; Maffitt *v.* Rynd, 69 Penn. St. (19 P. F. Smith) 387.

tion.[1] A party setting up a trust title of this class must do equity by an offer to redeem.[2]

Under statute of frauds, sufficient if trust is manifested in writing.

§ 1034. We have already seen,[3] that the terms of the statute of frauds do not prevent a parol declaration of trust. No statute, in fact, without great injustice, could prohibit the enforcement of such declarations. "It is not required by the statute that a trust should be created by writing, and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing, but that they shall be manifested and proved by writing; plainly meaning that there should be evidence in writing proving that there was such a trust. Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing, and then the statute is complied with; and indeed the

[1] Supra, § 904; Movan *v.* Hays, 1 Johns. Ch. 339; St. John *v.* Benedict, 6 Johns. Ch. 111; Barrett *v.* Carter, 3 Lansing, 68; Hutchinson *v.* Tindall, 3 N. J. Eq. 357; Whyte *v.* Arthur, 17 N. J. Eq. 521; Cook *v.* Barr, 44 N. Y. 156; Goucher *v.* Martin, 9 Watts, 106; Lingenfelter *v.* Richey, 62 Penn. St. 128; Com. *v.* Kreager, 78 Penn. St. 477; Collier *v.* Collier, 30 Ind. 32; Minot *v.* Mitchell, 30 Ind. 228; Nicoll *v.* Mason, 49 Ill. 358; Lantry *v.* Lantry, 51 Ill. 451; Knowles *v.* Knowles, 86 Ill. 1; Burns *v.* Byrne, 45 Iowa, 285; Barkley *v.* Lane, 6 Bush, 587; Waddingham *v.* Loker, 44 Mo. 132; Markham *v.* Carothers, 47 Tex. 21; Thomas *v.* Hammond, 47 Tex. 42. See Parlin *v.* Small, 68 Me. 289; Hassam *v.* Barrett, 115 Mass. 256.

. . . . "In a case where a trust, or the conversion of an absolute estate into a mortgage, is attempted to be made out by parol evidence, the court and jury exercise the functions of a chancellor, and the evidence, assuming the testimony of the witnesses to be true, ought to be such as would satisfy his conscience. 'The judge alone is the chancellor. The province of the jury is to aid him in ascertaining the facts out of which the equities arise. If the facts are not disputed, he is to declare their effect, and determine whether the claim or the defence is well founded. A chancellor is judge, both of the equity and of the facts. It is in his discretion whether he will send an issue to a jury; and if he does, their verdict is only advisory. It is not conclusive upon him. Whenever, therefore, upon the trial of an ejectment, founded upon an equitable title, the court is of an opinion that the facts proved do not make out a case in which a chancellor would decree a conveyance, it is their duty to give binding instructions to that effect to the jury.' Strong, J., in Todd *v.* Campbell, 8 Casey, 252." Sharswood, J., McGinity *v.* McGinity, 63 Penn. St. 44. And see, under statute of frauds, §§ 863, note, 903.

[2] Supra, § 1033; Thomas *v.* Wright, 9 S. & R. 87; Hughes *v.* Davis, 40 Cal. 117.

[3] Supra, § 903.

great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit that it must be proved *in toto* not only that there was a trust, but what it was."[1] An answer in chancery has consequently been held sufficient to sustain the establishment of a trust; and so have, *a fortiori*, written admissions.[2]

Resulting trust may be proved by parol.

§ 1035. Where one person pays the purchase money, and another takes the title, then, in equity, the person taking the title will be treated as trustee for the person paying the money. In such case parol evidence is admissible to prove the trust, though such evidence must be clear and strong.[3] The broad principle is, that whoever pays the purchase money of land is entitled to the fruits of that which he purchases, though the legal title is in another.[4] To this rule exists a well marked exception, that when the money is advanced

[1] Lord Alvanley in Foster *v.* Hale, 3 Ves. 707. See Smith *v.* Matthews, 6 W. R. 644, and in prior notes hereto; and see eases eited in 2 Wash. Real Prop. 50, 51 (4th ed.), and supra, § 903.

[2] 3 Sugd. V. & P. 252; Rob. on Frauds, 95; Randall *v.* Morgan, 12 Ves. 67. See supra, § 903.

[3] Dyer *v.* Dyer, 2 Cox, 92; Buck *v.* Pike, 2 Fairfield, 9; Baker *v.* Vining, 30 Me. 127; Page *v.* Page, 8 N. H. 187; Moore *v.* Moore, 38 N. H. 187; Hutchins *v.* Heywood, 50 N. H. 491; Penney *v.* Fellows, 15 Vt. 525; Peabody *v.* Tarbell, 2 Cush. 232; Kendall *v.* Mann, 11 Allen, 15; Blodgett *v.* Hildredth, 103 Mass. 487; Barrows *v.* Bohan, 41 Conn. 278; Boyd *v.* McLean, 1 Johns. C. R. 582; Swinburne *v.* Swinburne, 38 N. Y. 568; Richards *v.* Millard, 56 N. Y. 574; Jackman *v.* Ringland, 4 Watts & S. 149; McGinity *v.* McGinity, 63 Penn. St. 39; Hays *v.* Quay, 68 Penn. St. 263; Farrel *v.* Lloyd, 69 Penn. St. 239. See Lloyd *v.* Farrel, supra, § 1027; Creed *v.* Bank, 1 Ohio St. 1; Miller *v.* Stokely, 5 Ohio St. 194; Lewis *v.* White, 16 Ohio St. 44; Hollis *v.* Hayes, 1 Md. Ch. 479; Cecil Bk. *v.* Snively, 23 Md. 261; Dryden *v.* Hanway, 31 Md. 354; Bank U. S. *v.* Carrington, 7 Leigh, 566; Phelps *v.* Seely, 22 Grat. 587; Borst *v.* Nalle, 28 Grat 423; Parmlee *v.* Sloan, 37 Ind. 469; Kane *v.* Herrington, 50 Ill. 232; Thomas *v.* Chicago, 55 Ill. 403; Roberts *v.* Opp, 56 Ill. 34; Smith *v.* Smith, 85 Ill. 189; McGuire *v.* McGowen, 4 Dess. Ch. 481; Price *v.* Brown, 4 S. C. 144; Harvey *v.* Ledbetter, 48 Miss. 95; McCarrol *v.* Alexander, Ibid. 128; Paul *v.* Chonteau, 14 Mo. 580; Rings *v.* Richardson, 53 Mo. 585; Kennedy *v.* Kennedy, 57 Mo. 73; Faris *v.* Dunn, 7 Bush, 276; Honore *v.* Hutchins, 8 Bush, 687; Holder *v.* Nunnelly, 2 Cold. 288; Pillow *v.* Thomas, 57 Tenn. 121; Byers *v.* Danley, 27 Ark. 77; Oberthier *v.* Stroud, 33 Tex. 522. See Nicklin *v.* Wythe, 2 Sawyer, 535.

The money must form a considerable part of the purchase. Roberts *v.* Ware, 40 Cal. 634.

[4] Sugd. V. & P. 255; Wray *v.* Steele, 2 Ves. & B. 388; Lench *v.* Leneh, 10 Ves. 517; Houghton, ex parte, 17 Ves. 251; Hayden *v.* Denslow; 27 Conn. 335.

by a parent, and the legal title taken in a child, the advance will be supposed to be for the benefit of the child.[1] Equity will also enforce a resulting trust where a conveyance is made in a trust declared only in part; while as to the residue there is no disposition on the face of the writing.[2] The doctrine, it should be observed, is analogous to the common law rule, that where there is a feoffment without consideration the use results to the feoffor.[3] Parol evidence is of course as admissible to disprove as to prove the trust.[4]

§ 1036. In several states of the Union, among which may be mentioned Maine, Massachusetts, New York, Indiana, Michigan, and Wisconsin, resulting trusts are restricted by statute.[5]

Exception in several states.

§ 1037. The evidence to establish a parol trust must be weighed with peculiar caution where it consists of declarations of a deceased person; and nothing but proof of the strongest character will sustain a decree enforcing a trust in such a case.[6] The admissions of trust must come directly from the party charged with the trust.[7]

Caution when alleged trustee is deceased.

§ 1038. Parol evidence, also, will be received to prove an agreement to reconvey. Thus, in an English equity case, the evidence was that the plaintiff had conveyed an estate to the defendant without consideration, on

Person fraudulently obtaining or re-

[1] Sayre *v.* Hughes, L. R. 5 Eq. 376; Hepworth *v.* Hepworth, L. R. 11 Eq. 10; Soar *v.* Foster, 4 Kay & J. 152; Tucker *v.* Burrow, 2 Hem. & M. 515.

[2] Lloyd *v.* Spillet, 2 Atk. 150.

[3] Grey *v.* Grey, 2 Swans. 598.

[4] Edwards *v.* Edwards, 2 Y. & C. Ex. 123; Brady *v.* Cubitt, 1 Dougl. 31; Beecher *v.* Major, 2 Dr. & Sm. 431. Supra, §§ 973–4.

A denial, under oath, by the trustee, is not an insuperable bar to relief. Bartlett *v.* Pickersgill, 3 East, 577, n. Supra, §§ 973–4.

[5] Bispham's Eq. § 84. As to limitations of statutes restricting such trusts, see Foote *v.* Bryant, 47 N. Y. 544; Fisher *v.* Fobes, 22 Mich. 454; Johnson *v.* Johnson, 16 Minn. 512. As to Pennsylvania, Act of April 22, 1856, Roy *v.* Townsend, 78 Penn. St. 329. Supra, § 863, n.

[6] Hill on Trustees, *156; Wilkins *v.* Stephens, 1 Y. & C. Ch. C. 431; Groves *v.* Groves, 3 Y. & J. 170; Baker *v.* Vining, 30 Maine, 121; Boyd *v.* McLean, 1 Johns. Ch. 582; Botsford *v.* Burr, 2 Johns. Ch. 413; McGinity *v.* McGinity, 63 Penn. St. 42; Nixon's Appeal, Ibid. 279; Kistler's Appeal, 73 Penn. St. 400; Com. *v.* Kreager, 78 Penn. St. 477; Capehart *v.* Capehart, 2 Phila. 134; Johnson *v.* Quarles, 46 Mo. 423; Ringo *v.* Richardson, 53 Mo. 385. As has been already seen, a party is ordinarily inadmissible to prove such a case against the estate of a deceased party. Supra, §§ 464–7.

[7] Com. *v.* Kreager, 78 Penn. St. 477.

taining title may be treated as trustee.

the understanding that the defendant should, in certain events, reconvey it to him. On the plaintiff applying for a reconveyance, the defendant pleaded the statute of frauds; but the Court of Chancery made a decree for a reconveyance, on the ground that the statute of frauds was never intended to prevent a court of equity from giving relief in a case of a plain, clear, and deliberate fraud.[1] Generally, when a title is fraudulently obtained, equity will treat the person fraudulently obtaining the title as trustee for the real owner, though the case is proved only by parol.[2] So equity will relieve in a proper case between the *cestui que trust* and the trustee's vendee. Thus where, on proceedings in partition, the administrator conveyed to the husband the wife's share of the land, the husband paying no money, it was held that the wife might prove these facts by parol as against a purchaser with notice.[3] To rebut equities of this class, parol evidence is necessarily admissible.[4]

Particular recitals may estop.

§ 1039. A recital in a deed is evidence against him who executed the deed, and against every person claiming under him.[5] Recitals, in this view, have been classed as particular and general. A *particular* recital is conclusive evidence of matters stated in it, when offered in a suit directly on the deed. "If a distinct statement of a particular fact is made in the recital of an instrument under seal, and a contract is made with reference to that recital, it is clear that as between the parties to such instrument and in an action upon it, it is not competent for the party bound to deny the recital."[6] Among particular recitals the following may be enumerated:

[1] Haigh *v.* Caye, L. R. 7 Ch. 469. See, also, generally, Cipperly *v.* Cipperly, 4 Thomp. & C. 342; Blaylock's Appeal, 73 Penn. St. 146; Anderson *v.* McCarty, 61 Ill. 64; Belohradsky *v.* Kuhn, 69 Ill. 548; McDill *v.* Gunn, 43 Ind. 315. As to statute of frauds, see supra, §§ 901–912.

[2] Church *v.* Sterling, 16 Conn. 388; Hunter *v.* Hopkins, 12 Mich. 227; Kennedy *v.* Kennedy, 2 Ala. 571.

[3] Mitchell *v.* Kintzer, 5 Penn. St. 216. See, also, Earle *v.* Rice, 111 Mass. 20.

[4] Supra, § 973-74; and see cases cited supra, § 1035.

[5] Com. Dig. Evid. (B. 5); Gwyn *v.* Neath, Ex. 122; L. R. 3 Ex. 209.

[6] Parke, B., in Carpenter *v.* Buller, 8 M. & W. 212. See Shelly *v.* Wright, Willes, 9; Lainson *v.* Tremere, 1 Ad. & E. 792; Bowman *v.* Taylor, 1 Ad. & E. 278; Van Rensalaer *v.* Kearney, 11 How. 332; Green *v.* Clark, 13 Vt. 58; Stow *v.* Wyse, 7 Conn. 214; Bonner *v.* Metcalf, 58 Ga. 236.

That a lot is bounded by a particular road, which does not mean, however, that such road was fit for travel;[1] that the title consists of certain specified links;[2] that the party conveying was entitled, as agent, to convey.[3] Eminently is an estoppel operative when the recital involves a bilateral agreement to admit a fact.[4] It is otherwise, however, when the recital is collateral to the purposes of the action. In such case, being a mere unilateral admission, it does not estop.[5] Infants are not bound by recitals in deeds executed by their guardians,[6] but married women are estopped by recitals in deeds by which they are bound.[7]

Otherwise as to general recitals.

§ 1040. *General* recitals (*i. e.* those which do not aver particular facts, or aver them non-contractually) may be *primâ facie*, but are never conclusive, evidence against the party making them, "since certainty is of the essence of an estoppel."[8] The very fact of indefiniteness leads to the inference that there is no contract between the parties as to the recital, but that it is a mere vague expression, open to correction by the party by whom it is made.[9] Where the recital

[1] Parker *v.* Smith, 17 Mass. 540; Tufts *v.* Charlestown, 2 Gray, 271; Rodgers *v.* Parker 9 Gray, 445; Stetson *v.* Dow, 16 Gray, 323; Gaw *v.* Hughes, 111 Mass. 296; Cox *v.* James, 45 N. Y. 562; Bellinger *v.* Burial Soc. 10 Penn. St. 137.

[2] Carver *v.* Jackson, 4 Pet. 85; Scott *v.* Douglass, 7 Ohio, 287; 3 Washburn on Real Prop. 100.

[3] Stow *v.* Wyse, 7 Conn. 214. See Huntington *v.* Havens, 5 Johns. Ch. 23.

[4] Bigelow on Estoppel, 2d ed. 269; Young *v.* Raincock, 7 C. B. 310; Stroughill *v.* Buck, 14 Q. B. 781; Carver *v.* Jackson, 4 Peters, 1; Bruce *v.* U. S. 17 How. 437; Parker *v.* Smith, 17 Mass. 413; Fox *v.* Union Sugar Ref. Co. 109 Mass. 292; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Bower *v.* McCormick, 23 Grat. 310; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Ballou *v.* Jones, 37 Ill. 95; Williams *v.* Swetland, 10 Iowa, 51; Comstock *v.* Smith, 26 Mich. 306; Courvoisier *v.* Bouvier, 3 Neb. 55.

[5] Carpenter *v.* Buller, 8 M. & W. 212. Infra, § 1083.

[6] Milner *v.* Harewood, 18 Vesey, 274.

[7] Jones *v.* Frost, L. R. 7 Ch. 776.

[8] 3 Washburn on Real Prop. (1876) 101; Bigelow on Estoppel, 2d ed. 266; Lainson *v.* Tremere, 1 Ad. & E. 792; Hepp *v.* Wiggett, 10 Com. B. 32; Right *v.* Bucknell, 2 Barn. & Ad. 278; Butcher *v.* Musgrave, 1 Man. & G. 625; Carpenter *v.* Buller, 8 M. & W. 212; Doane *v.* Wilcutt, 16 Gray, 368; Huntington *v.* Havens, 5 Johns. Ch. 23; Naglee *v.* Ingersoll, 6 Barr, 185; Hays *v.* Askew, 5 Jones (L.), 63. As to admissions by predecessor in title, see infra, § 1156.

[9] Miller *v.* Moses, 56 Me. 128; Wright *v.* Tukey, 3 Cush. 290; Doane *v.* Wilcutt, 16 Gray, 368; Naglee *v.* Ingersoll, 7 Barr, 185; Noble *v.* Cope, 50 Penn. St. 17. See Doe *v.* Shelton, 2 Ad. & El. 265, where it was held that a vendee was not estopped from disputing a recital of bankruptcy.

involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation.[1] But a recital in a deed, though not estopping, may make, even against the heirs of the grantor, a *primâ facie* case.[2]

Recitals do not bind third parties.

§ 1041. It need scarcely be added that, so far as concerns third parties, a recital in a deed, unless for the purpose of proving reputation and tradition,[3] is hearsay.[4] Even when offered in evidence by a third person, against the party making the recital, a recital may be explained and disputed by parol.[5]

Recitals of purchase money open to parol explanations.

§ 1042. Recitals of receipt of purchase money stand on a distinct basis, it being held that though they may be called particular, they may be varied or explained by the parties by parol proof. They partake in this respect of the nature of receipts, which, as we will presently see,[6] are open to parol explanations.[7] "Even as against a party to a deed,

[1] South E. R. R. *v.* Wharton, 6 Hurl. & N. 520; Osborne *v.* Endicott, 6 Cal. 153; Carpenter *v.* Buller, 8 M. & W. 212; Davis *v.* Bromar, 55 Miss. 671. See infra, § 1156.

[2] Penrose *v.* Griffith, 4 Binn. 231 Allen *v.* Allen, 9 Wright (Penn.), 473; Cumberland Valley R. R. *v.* McLanahan, 59 Penn. St. 23; Grubb *v.* Grubb, 74 Penn. St. 25.

[3] See supra, §§ 194, 210.

[4] "A recital in a conveyance is only evidence against the parties to it, and privies in blood or in estate. It does not bind strangers or those who claim by title paramount. Hill *v.* Draper, 10 Barb. 454; Sharp *v.* Speir, 4 Hill, 76; Penrose *v.* Griffith, 4 Binn. 231; Garver *v.* Jackson, 4 Peters, 1; Crane *v.* Lessee of Morris, 6 Ibid. 611." Allen, J., Hardenburgh *v.* Lakin, 47 N. Y. 111. And see Schuylkill Ins. Co. *v.* McCreary, 58 Penn. St. 304; Yahoola Co. *v.* Irby, 40 Ga. 479; Lamar *v.* Turner, 48 Ga. 329; Smith *v.* Penny, 44 Cal. 161; Carver *v.* Jackson, 4 Pet. 1, 83; Penrose *v.* Griffith 4 Binn. 231; and see fully supra, §§ 171, 173, 923.

[5] See supra, § 923; infra, § 1044.

[6] Infra, § 1064.

[7] R. *v.* Scammonden, 3 T. R. 474; Barbank *v.* Gould, 15 Me. 118; Bassett *v.* Bassett, 55 Me. 127; Baxter *v.* Greenleaf, 65 Me. 405; Vogt *v.* Ticknor, 48 N. H. 242; White *v.* Miller, 22 Vt. 380; Thayer *v.* Viles, 23 Vt. 494; Davenport *v.* Mason, 15 Mass. 85; Wilkinson *v.* Scott, 17 Mass. 249; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431; Trott *v.* Irish, 1 Allen, 481; Estabrook *v.* Smith, 6 Gray, 572; Miller *v.* Goodwin, 8 Gray, 542; Clark *v.* Houghton, 12 Gray, 38; Drury *v.* Tremont Imp. Co. 13 Allen, 168; Belden *v.* Seymour, 8 Conn. 304; Shephard *v.* Little, 14 Johns. 210; Whitbeck *v.* Whitbeck, 9 Cow. 266; Vechte *v.* Brownell, 8 Paige, 212; Bratt *v.* Bratt, 21 Md. 578; Andrews *v.* Andrews, 12 Ind. 348; Swope *v.* Forney, 17 Ind. 385; Elder *v.* Hood, 38 Ill. 533; Groesbeck *v.* Seeley, 13 Mich. 329; Reynolds *v.*

the recital of the consideration paid is not conclusive, and is admissible as *primâ facie* evidence only because one party has signed and the other has accepted the deed containing the recital.[1] As between third persons, such recitals are no evidence whatever."[2] Where, however, a vendor, without fraud or con-

Vilas, 8 Wis. 471; Dayton *v.* Warren, 10 Minn. 233; Gordon *v.* Gordon, 1 Metc. Ky. 285; Dudley *v.* Bosworth, 10 Humph. 9; Wesson *v.* Stephens, 2 Ired. Eq. 557; Kennedy *v.* Kennedy, 2 Ala. 571; Parker *v.* Foy, 43 Miss. 260; Beard's Succession, 14 La. An. 121; Rabsuhl *v.* Lack, 35 Mo. 316; Coles *v.* Soulsby, 21 Cal. 47.

The cases are well stated in the following opinion:—

"The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor. For every other purpose it may be varied or explained by parol proof. The grantor may show, notwithstanding the acknowledgment of payment, that no money was paid, and recover the price in whole or in part against the grantee. Wilkinson *v.* Scott, 17 Mass. 249. This clause is *primâ facie* evidence only of payment, and may be controlled or rebutted by other proof. Clapp *v.* Tirrell, 20 Pick. 247. The recitals in the deed, of the amount and payment of consideration, do not estop the grantee from sustaining an action for the price. Thayer *v.* Viles, 23 Vt. 494; White *v.* Miller, 22 Vt. 380. 'This clause is either formal or nominal,' says Dagget, J., in Belden *v.* Seymour, 8 Conn. 304, 'and not designed to fix conclusively the amount either paid or to be paid.' The amount of consideration and its receipt is open to explanation by parol proof in every direction. It may be shown that the price of the land was less than the consideration expressed in the deed, as in Bowen *v.* Bell, 20 Johns. 338; or that it was contingent, depending upon the price the grantee may obtain upon a resale of the land, as in Hall *v.* Hall, 8 N. H. 129; or that it was in iron, when the deed expressed a money consideration, as in McCrea *v.* Purmort, 16 Wend. 460; or that no money was paid, but that it was an advancement, as in Meeker *v.* Meeker, 16 Conn. 387; or that a portion of the price was to be paid by the grantee, and the balance was an advancement, as in Hayden *v.* Mentzer, 10 S. & R. 329; or that it was paid by some one other than the grantee, and thus raise a resulting trust, as in Scoby *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 397; Dudley *v.* Bosworth, 10 Humph. 9. The damages for the breach of the covenants in a deed may be increased or diminished, as between the parties, by proof of a greater or less price paid for the land than is expressed in the deed. Belden *v.* Seymour, 8 Conn. 304; Morse *v.* Shattuck, 4 N. H. 229. The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation in every direction." Appleton, J., Goodspeed *v.* Fuller, 46 Me. 147.

[1] Paige *v.* Sherman, 6 Gray 511.

[2] Gray, C. J., Rose *v.* Taunton, 119 Mass. 100, citing Spaulding *v.* Knight, 116 Mass. 148, 155.

In New Hampshire we have the following: "In Preble *v.* Baldwin, 6 Cush. 549, parol evidence, proving an additional consideration to that stated in the deed, was objected to as inadmissi-

current mistake, accepts the engagement of a third party for the stipulated consideration, and on the faith of such engagement acknowledges the receipt of the consideration, he will not be permitted, in a controversy with the vendee, to show that the consideration was not received.[1]

Not admissible against strangers.

§ 1043. Whether in an action of ejectment the recital of receipt of purchase money is *primâ facie* evidence of payment has been much disputed. It is indubitably so when a party buys on the faith of a recorded deed which contains such a recital, and then proceeds against the vendor. But it is otherwise as to strangers.[2] Thus where T., a party holding a prior (though unrecorded) deed from S., brings ejectment against P., a subsequent purchaser (though with a prior recorded title), under a statute which enables a deed of subsequent date, but of prior record, to hold, when *bonâ fide*, and for good consideration, against a prior unrecorded deed; the recital of payment of purchase money in the latter deed is not even *primâ facie* proof of payment.[3]

ble, as tending to vary and contradict the terms of the deed. The court overruled the objection, remarking, 'We do not consider this an open question;' and in Davenport *v.* Mason, 15 Mass. 85, it was held that parol evidence, though not admissible to contradict or vary the terms of the deed, may be permitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other written contract. Swisher *v.* Swisher's Adm'r, 1 Wright's Rep. 755, cited in 3 Phill. Ev. 1479 (ed. 1843), and cited in the defendant's brief, is exactly in point. It was there held that an agreement between the grantor and grantee contemporaneous with the deed, that the grantor should occupy the premises rent free, might be received in evidence, not being inconsistent with the deed, but an independent fact." Smith, J., Quimby *v.* Stebbins, 55 N. H. 422.

[1] McMullin *v.* Glass, 27 Penn. St. 151. Infra, §§ 1045, 1066.

[2] See cases cited, infra, § 1044; Rose *v.* Taunton, 119 Mass. 200.

[3] The following opinion discusses the authorities bearing upon this point:—

"He may have taken the deed in entire good faith, within the meaning of the statutes, though he paid no consideration; or he may have purchased in bad faith, and yet have paid a valuable consideration. Good faith *and* a valuable consideration are both required to give (by the statute) the record precedence over the prior unrecorded deed.

"But at law the authorities are conflicting as to the burden of proving the consideration or the want of it. In Jackson *v.* McChesney, 7 Cowen, 360, the Supreme Court of New York, while admitting the rule to be as above stated, yet held that, in an action of ejectment, when the strict legal title only is in question, the recital of the consideration in the deed is *primâ fa-*

§ 1044. We have just seen that recitals of receipt of purchase money are open to explanation by the parties to a contract. The right so to explain is not confined to cases where consideration is recited. It applies to all cases of consideration, whether recited or not. And generally at common law, as between the parties to a written contract, the consideration may be attacked by the party against whom suit is brought on the instrument, and parol proof is admissible to assail the consideration stated, to show a consideration when none is recited, or vary that of which there is a recital.[1]

Consideration may be proved or disproved by parol.

cie evidence of its payment. And the same doctrine was reiterated (though the point was wholly unnecessary to the decision) in Wood *v.* Chapin, 13 N. Y. 509. Now if there were any difference in the effect to be given to the fact of payment or non-payment, at law or in equity, there might be some tangible ground for such a distinction in the mode or burden of proof. But as the fact of the payment of the consideration will equally support the deed, and the want of its payment will equally defeat it in both courts, it is not easy to discover any solid foundation for the distinction. Besides, the recital in the deed in such a case as the present would seem to be *res inter alios*, mere hearsay, and to stand upon no other ground than the mere declaration of the grantor, which would be no evidence against any party not claiming under the deed, but against it. It would be otherwise with a recorded deed upon the faith of which the party has purchased, as in such a case the law has made the record evidence upon which he has a right to rely. And the Supreme Court of Alabama, in Nolen et al. *v.* Heirs of Gwyn, 16 Ala. 725 (and see McGintry et al. *v.* Reeves, 10 Ala. 137), repudiate the distinction, and fully adopt at law the rule which, we have already stated, seems to us the more reasonable and just, whenever the question is whether the immediate purchase of the party to the suit was for a valuable consideration. The recital, therefore, of the consideration in the deed from Bacon to the defendant was not, in our opinion, any evidence of its payment, and no other evidence of it was given." Christiancy, J., Shotwell *v.* Harrison, 22 Mich. 418. See infra, § 1048.

[1] Foster *v.* Jolly, 1 C., M. & R. 707; Solly *v.* Hinde, 2 C. & M. 516; Abbott *v.* Hendricks, 1 M. & Gr. 791; Doe *v.* Statham, 7 D. & Ry. 141; Bank U. S. *v.* Dunn, 6 Pet. 51; Quimby *v.* Morrill, 47 Me. 470; Nutting *v.* Herbert, 37 N. H. 346; Wilkinson *v.* Scott, 17 Mass. 249; Paget *v.* Cook, 1 Allen, 522; Holden *v.* Parker, 110 Mass. 324; Hannan *v.* Hannan, 123 Mass. 441; Belden *v.* Seymour, 8 Conn. 304; Purmort *v.* McCrea, 5 Paige, 620; Wheeler *v.* Billings, 38 N. Y. 263; Hebbard *v.* Haughian, 70 N. Y. 57; Farnum *v.* Burnett, 21 N. J. Eq. 87; Fitler *v.* Beckley, 2 Watts & S. 458; Strawbridge *v.* Cartledge, 7 Watts & S. 394; Galway's Appeal, 34 Penn. St. 242; Watterston *v.* R. R. 74 Penn. St. 208; Cunningham. *v.* Dwyer, 23 Md. 219; Clarke *v.* Dederick, 31 Md. 148; Fusting *v.* Sullivan, 41 Md. 162; Wrightsman *v.* Bowyer, 24 Grat. 433; Jones *v.* Buffum, 50 Ill. 277; Huebsch *v.* Scheel, 81 Ill. 281; Morris *v.* Tillson, 81 Ill. 607 (as to Illinois statute, see

Thus, where the language of a guarantee leaves it doubtful whether the consideration be past or present, and, consequently, whether the instrument be valid or invalid, parol evidence of extrinsic circumstances may be received to solve the doubt.[1] So when a consideration expressed on an instrument has failed, another can be proved.[2] So where no consideration is expressed

Gage *v.* Lewis, 68 Ill. 613, cited supra, § 931); Collier *v.* Mahon, 21 Ind. 492; McMahan *v.* Stewart, 23 Ind. 590; McDill *v.* Gunn, 43 Ind. 315; Burdit *v.* Burdit, 2 A. K. Marsh. 143; Haywood *v.* Moore, 2 Humph. 584; Gaugh *v.* Henderson, 2 Head, 628; Nichols *v.* Bell, 1 Jones L. 32; Wade *v.* Carter, 76 N. C. 171; Curry *v.* Lyles, 2 Hill S. C. 404; Clements *v.* Lundrum, 26 Ga. 401; Eckles *v.* Carter, 26 Ala. 563; Thomas *v.* Barker, 36 Ala. 392; Miller *v.* McCoy, 50 Mo. 212; Hollocher *v.* Hollocher, 62 Mo. 267; Lockwood *v.* Canfield, 20 Cal. 126; Dickson *v.* Burks, 11 Ark. 307; Clinton *v.* Estes, 20 Ark. 216; Waymack *v.* Heilman, 26 Ark. 449; Perry *v.* Smith, 34 Tex. 277.

"The amount or kind of consideration is not considered an essential part of the contract, and is open to contradiction or explanation, like a common receipt. Frink *v.* Green, 5 Barb. 456; Bingham *v.* Weiderwax, 1 N. Y. 509; Murray *v.* Smith, 1 Duer, 412; McCrea *v.* Purmort, 16 Wend. 460." Ingalls, J., Barker *v.* Bradley, 42 N. Y. 320.

"Where a grantor has conveyed a farm, reserving in the deed the use of the buildings thereon for a period of time afterwards, the grantee is not estopped by the deed to show that there was an oral agreement, at the time, that he should have what manure should be made by the grantor's cattle on the place in the mean time, for the use of the premises. Farrar *v.* Smith, 64 Me. 74.

"In Weaver *v.* Woods, 9 Barr, 220, it was decided by this court that, where a written contract is executed for a consideration therein mentioned, a party is not concluded in an action for the breach of a parol contract from showing that the agreement evidenced by the writing was the consideration for the contemporaneous parol contract." Sharswood, J., Everson *v.* Fry, 72 Penn. St. 330.

S., after conveying a dwelling-house to P., continued to occupy it several weeks after the deed. In an action of assumpsit by P. against S., for use and occupation of the premises during this period, it was held, that parol evidence of a contract that S. should thus occupy as part of the consideration of the conveyance did not tend to contradict the deed, and was properly admitted in answer to the claim for rent. Quimby *v.* Stebbins, 55 N. H. 420.

How far the recital of consideration in sealed instruments can in law be disputed, see infra, § 1045.

[1] Goldshede *v.* Swan, 1 Ex. R. 154, and cases there cited; Edwards *v.* Jevons, 8 Com. B. 436; Colbourn *v.* Dawson, 10 Com. B. 765; Bainbridge *v.* Wade, 16 Q. B. 89; Hoad *v.* Grace, 31 L. J. Ex. 98; 7 H. & N. 494, *S. C.;* Wood *v.* Priestner, 4 H. & C. 681; Heffield *v.* Meadows, 4 Law Rep. C. P. 595. As to burden of proof being on party seeking to avoid such writing, see Steele *v.* Hoe, 14 Q. B. 431; Brown *v.* Batchelor, 1 H. & N. 255; Mare *v.* Charles, 5 E. & B. 978.

[2] Leifchild's case, L. R. 1 Eq. 231; Tull *v.* Parlett, M. & M. 472; Dorsey

in writing, one may be proved by parol;[1] and it may be shown by parol that a bond is not in fact usurious, though apparently so on its face.[2] Parol evidence, also, is admissible to prove an extrinsic consideration varying that expressed;[3] and on an assignment for creditors, which does not expressly recite the amount due, parol evidence is admissible to prove such amount.[4] Again, when in a bill of sale of goods the whole consideration is not stated, parol evidence is admissible to supply the deficiency.[5] A recital of receipt of purchase money, in a contract for sale, may be qualified by parol.[6] Such recitals, as we have seen, are not evidence in any sense between third parties;[7] though they are an impeachable admission which may be received against the party making them and his privies. Partial or entire failure of consideration of negotiable paper may also be shown by parol, so far as concerns parties with notice, although the averment, "value received," is *primâ facie* proof of consideration.[8]

v. Hagard, 5 Mo. 420; Cowan *v.* Cooper, 41 Ala. 187. Otherwise in cases of fraud. Young's Est. 3 Md. Ch. 461.

"The consideration clause is open to explanation and can be varied by parol proof." Allen, J., Hubbard *v.* Haughian, 70 N. Y. 59; citing Purmort *v.* McCrea, 16 Wend. 460; Bingham *v.* Werderwax, 1 Comst. 509; Battle *v.* Bank, 3 Comst. 88. See Wade *v.* Carter, 76 N. C. 171.

[1] Leifchild's case, L. R. 1 Eq. 231; Peacock *v.* Monk, 1 Ves. Sen. 128; Hilton *v.* Homans, 23 Me. 136; Hope *v.* Smith, 35 N. Y. Sup. Ct. 458; Hayden *v.* Mentzer, 10 S. & R. 329; Weaver *v.* Wood, 9 Barr, 220; Bowser *v.* Cravener, 56 Penn. St. 132; Booth *v.* Hynes, 54 Ill. 363; Landman *v.* Ingram, 49 Mo. 212; and see cases cited infra, § 1054.

[2] Campbell *v.* Shields, 6 Leigh, 517.

[3] Lewis *v.* Brewster, 57 Penn. St. 410; Malone *v.* Dougherty, 72 Penn. St. 48; Holmes's Appeal, 79 Penn. St. 279; Taylor *v.* Preston, 79 Penn. St. 436.

[4] Platt *v.* Hedge, 8 Iowa, 386.

[5] Nedvikek *v.* Meyer, 46 Mo. 600.

[6] Supra, § 1039; infra, § 1064.

[7] Spaulding *v.* Knight, 116 Mass. 148; Weaver *v.* Wood, 9 Penn. St. 220; Smith *v.* Conrad, 15 La. An. 579.

[8] Herrick *v.* Bean, 20 Me. 51; Wise *v.* Neal, 39 Me. 422; Bourne *v.* Ward, 51 Me. 191; Cross *v.* Rowe, 22 N. H. 77; Sowles *v.* Sowles, 11 Vt. 146; Parish *v.* Stone, 14 Pick. 198; Black River Bk. *v.* Edwards, 10 Gray, 389; Corlies *v.* Howe, 11 Gray, 125; Stacy *v.* Kemp, 97 Mass. 166; Pettibone *v.* Roberts, 2 Root, 258; Edgerton *v.* Edgerton, 8 Conn. 6; Slade *v.* Halsted, 7 Cow. 322; Sawyer *v.* McLouth, 46 Barb. 350; Snyder *v.* Wilt, 15 Penn. St. 59; Druley *v.* Hendricks, 13 Ind. 478; Great West. Ins. Co. *v.* Rees, 29 Ill. 272; Foy *v.* Blackstone, 31 Ill. 538; Davis *v.* Strohm, 17 Iowa, 421; Thomas *v.* Thomas, 7 Wis. 476; Hubbard *v.* Galusha, 23 Wis. 398;

Seal is evidence of consideration, but may be impeached by proof of fraud or of mistake.

§ 1045. By the English common law, a seal, attached to a written instrument, is held to be conclusive proof of consideration. In equity, however, the recital can be overhauled on proof of fraud or mistake; and this doctrine is in the United States generally accepted by common law courts.[1]

Consideration expressed in contract cannot be disputed by those claiming under it, but other consideration may be proved in rebuttal if fraud be charged.

§ 1046. But even in equity, a party claiming under a sealed document is bound by the general character of the consideration stated in the deed. He cannot, for instance, as part of his own case, if money be averred, prove natural love and affection; or if natural love and affection be averred, prove money.[2] Yet where a deed is assailed by third parties on the ground of fraud, a larger field is opened, and, as relevant evidence to the issue of fraud, it is admissible to show, in addition to the consideration of affection expressed, a valuable consideration paid, or the converse.[3]

Folger *v.* Donsman, 37 Wis. 620; Austin *v.* Kinsman, 13 Rich. S. C. Eq. 259; Smith *v.* Brooks, 18 Ga. 440; Cartwright *v.* Clopton, 25 Ga. 85; Knight *v.* Knight, 28 Ga. 214; Boynton *v.* Twitty, 53 Ga. 214; Murrah *v.* Bank, 20 Ala. 392; Newton *v.* Jackson, 23 Ala. 335; Wynne *v.* Whisenant, 37 Ala. 46; Matlock *v.* Livingston, 17 Miss. 489; Klein *v.* Keyes, 17 Mo. 326; Klein *v.* Dinkgrave, 4 La. An. 540; Byrne *v.* Grayson, 15 La. An. 457; Griffin *v.* Cowan, 15 La. An. 487. See Benton *v.* Sumner, 57 N. H. 117. Infra, § 1060.

[1] Lowe *v.* Peers, 4 Burr. 2225; Emmons *v.* Littlefield, 13 Me. 233; Ely *v.* Alcott, 4 Allen, 506; Treadwell *v.* Buckley, 4 Day, 395; Farnum *v.* Burnett, 21 N. J. Eq. 87; Strawbridge *v.* Cartledge, 7 Watts & S. 394; Hoeveler *v.* Mugele, 66 Penn. St. 348; Kenzie *v.* Penrose, 2 Scam. 315; Jones *v.* Jones, 12 Ind. 389; Lawton *v.* Buckingham, 15 Iowa, 22; Jeter *v.* Tucker, 1 S. C. 246; Johnson *v.* Boyles, 26 Ala. 576; Brooks *v.* Hartmann, 1 Heisk. 36; McLean *v.* Houston, 2 Heisk. 37; Bennett *v.* Solomon, 6 Cal. 134; Splawn *v.* Martin, 17 Ark. 146. As to the strict common law rule, see Rountree *v.* Jacob, 2 Taunt. 141; Lowe *v.* Peers, 4 Burr. 2225; Hill *v.* Manchester, 2 B. & Ald. 544; Jones *v.* Sasser, 1 Dev. & Bat. L. 452.

In New Jersey the rule in the text is established by statute. Wakeman *v.* Illingsworth, 10 Vroom, 431.

[2] Peacock *v.* Monk, 1 Ves. Sen. 128; Gale *v.* Williamson, 8 M. & W. 408; Morse *v.* Shattuck, 4 N. H. 229; Holbrook *v.* Holbrook, 30 Vt. 432; Morris *v.* Ryerson, 28 N. J. L. 97; Clagett *v.* Hall, 9 Gill & J. 80; Rockhill *v.* Spraggs, 9 Ind. 30. See O'Connor *v.* Kelly, 114 Mass. 97; Thornburg *v.* Newcastle R. R. 14 Ind. 499; Lufburrow *v.* Henderson, 30 Ga. 482; Mead *v.* Steger, 5 Port. 498.

[3] Filmer *v.* Gott, 7 Br. C. C. 70; Gale *v.* Williamson, 8 M. & W. 405; Pott *v.* Todhunter, 2 Coll. 76; Clifford *v.* Turrell, 1 Y. & C. (Ch. R.) 138; Brown *v.* Lunt, 37 Me. 423; Abbott

§ 1047. But no matter what may be the consideration averred in a deed, a party collaterally attacking such deed for fraud may impeach by parol such consideration.[1] Thus, where a conveyance was expressed to have been made in consideration of £10,000, and natural love and affection, the court, on a motion to set it aside, allowed parol proof to show that the estate was worth £30,000, and that there was no natural love and affection in the case.[2]

When fraud is charged strangers may disprove consideration.

§ 1048. It has been indeed ruled that the consideration necessary in such case to sustain a deed must be of the same general character as that expressed in the deed, unless the deed should aver other considerations.[3] But it must be remembered that the issue here is *fraud*. Did the parties to the deed intend to defraud third parties? To rebut this charge, general evidence of *bona fides* is properly admissible.[4] Such is, *a fortiori*, the case where the deed, in addition to the specified consideration, avers "divers other considerations."[5] And in any view, where a deed recites no consideration, or a nominal or inadequate consideration, then the party claiming under the deed may prove a substantial consideration;[6]

To disprove fraud *bona fides* is admissible.

v. Marshall, 48 Me. 44; Wait *v.* Wait, 28 Vt. 350; Buckley's Appeal, 48 Penn. St. 491; Lewis *v.* Brewster, 57 Penn. St. 410; Potter *v.* Everitt, 7 Ired. Eq. 152; Gordon *v.* Gordon, 1 Metc. Ky. 285; Miller *v.* Bagwell, 3 McCord S. C. 562; Hair *v.* Little, 28 Ala. 236; Eystra *v.* Capelle, 61 Mo. 578; Stiles *v.* Giddens, 21 Tex. 783; Reynolds *v.* Vilas, 8 Wis. 481.

[1] See §§ 923–8; Estabrook *v.* Smith, 6 Gray, 572; Hannah *v.* Wadsworth, 1 Root, 458; Bowen *v.* Bell, 20 Johns. R. 338; Bolton *v.* Jacks, 6 Robt. (N. Y.) 166; Miller *v.* Fichthorn, 31 Penn. St. 252; Hoeveler *v.* Mugele, 66 Penn. St. 348; Triplett *v.* Gill, 7 J. J. Marsh. 438; Whittaker *v.* Garnett, 3 Bush, 402; Johnson *v.* Taylor, 4 Dev. L. 355; Myers *v.* Peeks, 2 Ala. 648. See O'Connor *v.* Kelly, 114 Mass. 97.

[2] Filmer *v.* Gott, 7 Br. C. C. cited by Lord Kenyon in R. *v.* Scammonden, 3 T. R. 475–6; Taylor's Ev. § 1040.

[3] Emery *v.* Chase, 5 Greenl. 232; Griswold *v.* Messenger, 9 Pick. 517; Maigley *v.* Hauer, 7 Johns. R. 341; Hurn *v.* Soper, 6 Har. & J. 276; Sewell *v.* Baxter, 2 Md. Ch. 447; Ellinger *v.* Crowl, 17 Md. 361; Duval *v.* Bibb, 4 Hen. & M. 113; Harrison *v.* Castner, 11 Ohio St. 339; Galbraith *v.* Cook, 30 Ark. 417.

[4] Gale *v.* Williamson, *ut supra;* Miller *v.* Goodwin, 8 Gray, 542; McKinster *v.* Babcock, 26 N. Y. 378; Hayden *v.* Mentzer, 10 Serg. & R. 329; Bank U. S. *v.* Brown, Riley (S. C.) Ch. 138.

[5] Pomeroy *v.* Bailey, 43 N. H. 118; Benedict *v.* Lynch, 1 Johns. Ch. 370; Chesson *v.* Pettijohn, 6 Ired. L. 121.

[6] Peacock *v.* Monk, 1 Ves. Sen. 128; Tull *v.* Parlett, M. & M. 472; Leifchild's case, L. R. 1 Eq. 231; Hilton

though, as against a third party contesting the deed, the onus of proving the consideration will lie on the party claiming under the deed; for the mere statement in the operative part of a document, that it was made for good and valuable consideration, will not suffice to raise a presumption (when contested by innocent purchasers without notice), that any substantial consideration has ever in fact been given.[1] So, as we have seen, if a contract or other deed under seal specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed.[2] It is otherwise, as has been just noticed, if the object be to establish or negative the existence of fraud, in which case such proof will be admissible.

Bonâ fide purchasers and judgment vendees may assail consideration.

§ 1049. It is scarcely necessary to add that not only a *bonâ fide* purchaser without notice is entitled to assail a deed for want of consideration, but that the same right belongs to the bankrupt assignee of the grantor, and to purchasers of the estate at sheriff's sale.[3] Hence judgment creditors, as well as subsequent innocent purchasers

v. Homans, 23 Me. 136; Wood *v.* Beach, 7 Vt. 522; Pierce *v.* Brew, 43 Vt. 292; Frink *v.* Green, 5 Barb. 455; Benedict *v.* Lynch, 1 Johns. Ch. 370; Hope *v.* Smith, 35 N. Y. Sup. Ct. 458; White *v.* Weeks, 1 Penn. 486; Hayden *v.* Mentzer, 10 S. & R. 323; Weaver *v.* Wood, 9 Barr, 220; Bowser *v.* Cravener, 56 Penn. St. 132; Booth *v.* Hynes, 54 Ill. 363; Laudman *v.* Ingram, 49 Mo. 212.

[1] Kelson *v.* Kelson, 10 Hare, 385. Supra, § 1043.

[2] Peacock *v.* Monk, 1 Ves. Sen. 128, per Ld. Hardwicke; cited by Alderson, B., in Gale *v.* Williamson, 8 M. & W. 408. But see Clifford *v.* Turrell, 1 Y. & C. Ch. R. 138; 9 Jur. 633, *S. C.* on appeal; Taylor's Ev. § 1040.

[3] Estabrook *v.* Smith, 6 Gray, 572; Cheney *v.* Gleason, 117 Mass. 557; Sweetzer *v.* Bates, 117 Mass. 466; Rose *v.* Taunton, 119 Mass. 100; Hitchcock *v.* Kiely, 41 Conn. 611; Hecht *v.* Koegel, 25 N. J. Eq. 135; Carpenter *v.* Carpenter, 25 N. J. Eq. 194; Phelps *v.* Morrison, 25 N. J. Eq. 538; Ellinger *v.* Crowl, 17 Md. 361; Sanborn *v.* Long, 41 Md. 107; Dietrich *v.* Koch, 35 Wis. 618; Bigelow *v.* Doolittle, 36 Wis. 115; Duvall *v.* Bibb, 4 Hen. & M. 113; Swift *v.* Lee, 65 Ill. 336; Andrews *v.* Andrews, 12 Ind. 348; Harrison *v.* Castner, 11 Ohio, St. 339; Johnson *v.* Taylor, 4 Dev. L. 355; Wade *v.* Saunders, 70 N. C. 270; Johnson *v.* Lovelace, 51 Ga. 18; Myers *v.* Peek, 2 Ala. 648; Carter *v.* Happel, 49 Ala. 539; Patten *v.* Casey, 57 Mo. 118; Ames *v.* Gilmore, 59 Mo. 337; Turbeville *v.* Gibson, 5 Heisk. 565; Groesbeck *v.* Seeley, 13 Mich. 329; Shotwell *v.* Harrison, 22 Mich. 418 (quoted supra, § 1043); Peck *v.* Vandenberg, 30 Cal. 11; Menton *v.* Adams, 49 Cal. 620.

from the grantor, may show that the deed was a mere gift,[1] or that it was simply an advancement,[2] or that the nominal was greater than the real consideration.[3]

V. SPECIAL RULES AS TO DEEDS.

Deeds not open to variation by parol proof.

§ 1050. To deeds the rules just expressed are eminently applicable, for the reason that the more solemn are the formalities prescribed for a dispositive document, and the more permanent are meant to be the dispositions it makes, the more unjust is its variation by an agency so liable to careless or fraudulent falsification as is unwritten speech. Hence it is that the courts are uniform in their refusal to admit, except in cases of fraud, or gross concurrent mistake, parol evidence to contradict or to vary the terms of a deed as between the parties.[4] The same protection is applied to

[1] Gelpcke *v.* Blake, 19 Iowa, 263; Johnson *v.* Taylor, 4 Dev. N. C. 355; Myers *v.* Peek, 2 Ala. 648.

[2] Gordon *v.* Gordon, 1 Mete. (Ky.) 285.

[3] Abbott *v.* Marshall, 48 Me. 44; McKinster *v.* Babcock, 26 N. Y. 378; Foster *v.* Reynolds, 38 Mo. 553; Metzner *v.* Baldwin, 11 Minn. 150. See Rose *v.* Taunton, 119 Mass. 100.

[4] See cases cited supra, §§ 1014, 1045; Jenkins *v.* Einstein, 3 Biss. 128; Kimball *v.* Morrell, 4 Greenl. 368; Pride *v.* Lunt, 19 Me. 115; Gerry *v.* Stimpson, 60 Me. 186; Proctor *v.* Gilson, 49 N. H. 62; Vermont R. R. *v.* Hills, 23 Vt. 681; Butler *v.* Gale, 27 Vt. 739; Childs *v.* Wells, 13 Pick. 121; Harlow *v.* Thomas, 15 Pick. 66; Raymond *v.* Raymond, 10 Cush. 134; Dodge *v.* Nichols, 5 Allen, 548; Howe *v.* Walker, 4 Gray, 318; Winslow *v.* Driskell, 9 Gray, 363; Warren *v.* Cogswell, 10 Gray, 76; Howes *v.* Barker, 3 Johns. R. 506; Jackson *v.* Steamburg, 20 Johns. R. 49; Hyer *v.* Little, 20 N. J. Eq. 443; Snyder *v.* Snyder, 6 Binn. 483; Stine *v.* Sherk, 1 Watts & S. 195; Caldwell *v.* Fulton, 31 Penn. St. 475; Tobin *v.* Gregg, 34 Penn. St. 461; Timms *v.* Shannon, 19 Md. 296; Richmond R. R. *v.* Sneed, 19 Grat. 354; Trullinger *v.* Webb, 3 Ind. 198; Burns *v.* Jenkins, 8 Ind. 417; New Albany Co. *v.* Fields, 10 Ind. 187; Sage *v.* Jones, 47 Ind. 122; August *v.* Seeskind, 6 Coldw. 166; Porter *v.* Jones, 6 Coldw. 313; Bryan *v.* Walsh, 7 Ill. 557; Lindsey *v.* Lindsey, 50 Ill. 79; Case *v.* Peters, 20 Mich. 298; Beers *v.* Beers, 22 Mich. 60; Orton *v.* Harvey, 23 Wis. 99; Marshall *v.* Dean, 4 J. J. Marsh. 583; Dickinson *v.* Dickinson, 2 Murph. N. C. 279; Patton *v.* Alexander, 7 Jones (N. C.) L. 603; Atkinson *v.* Scott, 1 Bay, 307; Milling *v.* Crankfield, 1 McCord, 258; Williamson *v.* Wilkinson, 2 Dev. Eq. 376; Bratton *v.* Clawson, 3 Strobh. 127; Norwood *v.* Byrd, 1 Rich. (S. C.) 135; Logan *v.* Bond, 13 Ga. 192; Hanby *v.* Tucker, 23 Ga. 132; Sawyer *v.* Vories, 44 Ga. 662; Phillips *v.* Costley, 40 Ala. 486; Wade *v.* Percy, 24 La. An. 173; Caldwell *v.* Layton, 44 Mo. 220; Turner *v.* Turner, 44 Mo. 535; King *v.* Fink, 51 Mo. 209; Westbrooks *v.* Jeffers, 33 Tex. 86. So as to gov-

plans which are annexed to and made part of deeds,[1] though in such case the incorporation must be clearly made out.[2] To deeds also, with peculiar rigor, is the rule applied, that to what is written no new ingredients can be added by parol.[3]

Party and privy cannot contradict averments.

§ 1051. That which is averred in a deed neither party nor privy can contradict. Thus where a wife signed a deed with her husband, which deed contained no release of dower, it was held inadmissible, after his death, to defeat her claim for dower, by proving that at executing the deed, for five dollars paid her, she agreed to release her dower.[4] A covenant of warranty also, against "all the world claiming under the grantor," cannot be enlarged by parol into a warranty against all the world in general.[5] Where a deed for a farm contains no reservation of the growing crop to the grantor, such reservation cannot be proved by parol.[6] And where the owner of land, in a conveyance of a portion thereof, granted "a right of way to be used in common over and upon the land of the grantor, on the easterly side of the land conveyed," parol evidence was held inadmissible to show that the grant was intended by the grantor to be only a right to reach a portion of the land conveyed.[7]

Certificate of acknowledgment open to parol dispute.

§ 1052. It has been said that parol evidence is inadmissible to contradict the certificate of acknowledgment of a deed.[8] But this conclusion is founded on a *petitio principii*. We cannot logically declare that a deed is acknowledged, when the acknowledgment is the point in dis-

ernor's patents. Iowa Falls R. R. *v.* Woodbury Co. 38 Iowa, 498.

[1] Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Way *v.* Arnold, 18 Ga. 181.

[2] Chesley *v.* Holmes, 40 Me. 536.

[3] See supra, § 936; Barton *v.* Dawes, 12 C. B. 261; Llewellyan *v.* Jersey, 11 M. & W. 183; Noble *v.* Bosworth, 19 Pick. 314; Clark *v.* Houghton, 12 Gray, 38; Swick *v.* Sears, 1 Hill (N. Y.), 17; Acker *v.* Phœnix, 4 Paige, 305; Rathbun *v.* Rathbun, 6 Barb. 98; Machir *v.* McDowell, 4 Bibb, 473.

[4] Lothrop *v.* Foster, 51 Me. 367.

[5] Raymond *v.* Raymond, 10 Cush. 134.

[6] Austin *v.* Sawyer, 9 Cow. 39; Wintermute *v.* Light, 46 Barb. 278; Smith *v.* Porter, 39 Ill. 28; McIlvaine *v.* Harris, 20 Mo. 457. But see *contra*, Merrill *v.* Blodgett, 34 Vt. 480; Backenstoss *v.* Stahler, 33 Penn. St. 251; Harbold *v.* Kuster, 44 Penn. St. 392; Flynt *v.* Conrad, Phill. (N. C.) L. 190. And see Robinson *v.* Pritzer, 3 W. Va. 335.

[7] Miller *v.* Washburn, 117 Mass. 371.

[8] Greene *v.* Godfrey, 44 Me. 25; Kerr *v.* Russell, 69 Ill. 666.

pute, for this is equivalent to saying that we know it is a deed because it is acknowledged, and that we know it is acknowledged because it is a deed. The true view is, that the certificate of acknowledgment is *primâ facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal, between the parties, by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction.[1] As to all other persons it is open to dispute.[2] When executed in conformity

[1] 3 Washb. on Real Prop. (4th ed.) 326; Smith *v.* Ward, 2 Root, 374; Jackson *v.* Schoonmaker, 4 Johns. R. 161; Thurman *v.* Cameron, 24 Wend. 87; Schrader *v.* Decker, 9 Barr, 14; Hale *v.* Patterson, 51 Penn. St. 289; Williams *v.* Baker, 71 Penn. St. 482; Duff *v.* Wynkoop, 74 Penn. St. 300; Heeter *v.* Glasgow, 79 Penn. St. 79; Miller *v.* Wentworth, 4 Weekly Notes, 88; Eyster *v.* Hathaway, 50 Ill. 521; Wannell *v.* Kem, 57 Mo. 478; Tatum *v.* Goforth, 9 Iowa, 247; Borland *v.* Walrath, 33 Iowa, 130; Pringle *v.* Dunn, 37 Wis. 449; Dodge *v.* Hollingshead, 6 Minn. 25: Edgerton *v.* Jones, 10 Minn. 427; Fisher *v.* Meister, 24 Mich. 447; Hourtienne *v.* Schnoor, 33 Mich. 274; Johnson *v.* Pendergrass, 4 Jones L. 479; Ford *v.* Teal, 7 Bush, 156; Woodhead *v.* Foulds, 7 Bush, 222; Hughes *v.* Colman, 10 Bush, 246; Bledsoe *v.* Wiley, 7 Humph. 507; Westbrooks *v.* Jeffers, 33 Tex. 86; Landers *v.* Bolton, 26 Cal. 406.

As English authorities to this effect, see Doe *v.* Lloyd, 1 M. & Gr. 671, 684; Kinnersley *v.* Orpe, 1 Doug. 58; and other cases cited and criticised supra, § 741.

The officer may himself be examined as to the competency of the party. Truman *v.* Lore, 14 Ohio St. 151.

As to effect of acknowledgments as entitling a document to be received in evidence, see supra, §§ 740–1.

As to acknowledgment of sheriff's deeds, see supra, §§ 981–2.

[2] In Pennsylvania we have the following: —

"Under the Act of the 24th February, 1770, 1 Sm. 307, establishing a mode by which husband and wife may convey the estate of the wife, the official certificate of acknowledgment is the only evidence that the wife has acknowledged the deed in the form required by the statute, in order to make a valid conveyance of her interest in real estate, and, except in cases of fraud and duress, it is conclusive of every material fact appearing on its face. But though it is not conclusive as between the parties in cases of fraud and imposition, or of duress, and may be overcome by parol evidence, it is conclusive as to subsequent purchasers for a valuable consideration without notice. Schrader *v.* Decker, 9 Barr, 14; Louden *v.* Blythe, 4 Harris, 532; Louden *v.* Blythe, 3 Casey, 22; Michener *v.* Cavender, 2 Wright, 334; Hall *v.* Patterson, 1 P. F. Smith, 289.

"But it is conclusive of such fact only as the magistrate is bound to record and certify, not of facts which he is not required to certify under the provisions of the statute. The general rule in regard to certificates given by persons in official station is, that the law never allows a certificate of a

with statute, it may be regarded as a judicial act; but even treating an acknowledgment as a judicial act, it follows that it may

mere matter of fact, not coupled with any matter of law, to be admitted in evidence. If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But, as to matters which he was not bound to record, his certificate, being extra-official, is merely the statement of a private person, and will, therefore, be rejected. So, where an officer's certificate is made evidence of facts, he cannot extend its effects to other facts by stating those also in the certificate; but such parts of the certificate will be suppressed. 1 Greenleaf's Evid. § 498; Omichund *v.* Barker, Willes R. 549, 550; Wolfe *v.* Washburn, 6 Cowen, 261; Johnson *v.* Hocker, 1 Dall. 406; 3 Cowen & Hill's Evidence, note 701, p. 1044.

"As the magistrate is not required by the act to certify that the wife was of full age when she acknowledged the deed, she is not concluded by his certificate of the facts from showing that she was a minor when she signed and delivered it." Williams, J., Williams *v.* Baker, 71 Penn. St. 481; S. P., Ledger Co. *v.* Cook, 6 Weekly Notes, 421.

In Hecter *v.* Glasgow, 79 Penn. St. 79, the rule is thus stated by Paxson, J.:—

"The certificate of a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. It is conclusive of the facts certified to in the absence of fraud or duress. This is the current of all the authorities in this state. Jamison *v.* Jamison, 3 Whart. 457; Hall *v.* Patterson, 1 P. F. Smith, 289; McCandless *v.* Engle, Ibid. 309. In the case first cited it was held that parol evidence of what passed at the time of the acknowledgment was not admissible for the purpose of contradicting the certificate, except in cases of fraud and imposition. In a number of cases parol evidence has been freely admitted to overthrow the certificate, as in Michener *v.* Cavender, 2 Wr. 337; Louden *v.* Blythe, 4 Harris, 541; and Schrader *v.* Decker, 9 Barr, 14. But in all these cases gross fraud and imposition had been practised, affecting the acknowledgment itself. There is another class of cases in which parol evidence has been admitted to show facts *dehors* the certificate, as in Keen *v.* Coleman, 3 Wr. 299, where a married woman fraudulently represented that she was a widow.

"The true rule deducible from the authorities is: that the certificate of the justice of the acknowledgment of a deed or mortgage is a judicial act, and, in the absence of fraud or duress, conclusive as to the facts therein stated. A purchaser *bonâ fide* and without notice of the fraud is protected against it, but as to all other persons parol evidence may be admitted to show fraud or duress connected with the acknowledgment."

Where a deed when offered in evidence appears to be duly attested and acknowledged, the presumption is that it was attested at the time of its execution; and this presumption can be overcome only by clear and satisfactory evidence to the contrary, such as is required for the reformation or rescission of a deed or other instrument on the ground of mistake. Pringle *v.* Dunn, 37 Wis. 449.

In Kerr *v.* Russell, 69 Ill. 666, the court held that on the single testimony of the party an acknowledgment could not be attacked. S. P., Knowles *v.* Knowles, 83 Ill. 1.

be collaterally impeached by proof, not only of fraud and want of jurisdiction, but of gross patent violation of the ordinary rules of justice.[1]

Defective acknowledgment may be explained by parol.

§ 1053. When an acknowledgment is defective in any of its averments, these may be supplied by parol proof.[2] It is enough if there be a substantial compliance with the statute.[3] A defect in the wife's acknowledgment in a suit not involving the wife's dower has been held in Michigan not to exclude the deed when offered to prove the husband's transfer of his title.[4] And in New York, where a certificate of acknowledgment to a deed averred that the identity of the person acknowledging was proved to the officer by a witness named, who, being sworn, stated his place of residence and that he knew the persons proposing to acknowledge to be the identical ones described in, and who executed the deed, it was ruled that the certificate was sufficient within the recording statute, it being the opinion of the court that it was not necessary to specify in the certificate that the officer had satisfactory evidence of the identity of the person acknowledging, and that the facts stated showed that he had such evidence.[5]

The certificate of the officer taking the acknowledgment, it should be added, is evidence of its own genuineness, when the officer is recognized by the local law as competent for the purpose.[6]

[1] Supra, § 495.

[2] Carpenter *v.* Dexter, 8 Wall. 513; though see Johnston *v.* Haines, 2 Ohio, 55; Ennor *v.* Thompson, 46 Ill. 214; Graham *v.* Anderson, 42 Ill. 514; Borland *v.* Walrath, 33 Iowa, 130. See Harty *v.* Ladd, 3 Oregon, 353.

[3] Carpenter *v.* Dexter, 8 Wall. 513; Thayer *v.* Torrey, 37 N. J. L. 339; McIntire *v.* Ward, 5 Binney, 296; Jamison *v.* Jamison, 5 Whart. 457; Miller *v.* Wentworth, 4 Weekly Notes, 82; Simpson *v.* Montgomery, 25 Ark. 365; Calumet *v.* Russell, 68 Ill. 426; Dial *v.* Moore, 51 Mo. 589; Hughes *v.* Colman, 10 Bush, 246; Smith *v.* Elliott, 39 Tex. 201. See Hardin *v.* Kirk, 49 Ill. 153; Wannell *v.* Kem, 57 Mo. 478, laying down a stricter rule as to examination of married women.

[4] Conrad *v.* Long, 33 Mich. 78.

As to particular exceptions to acknowledgments, see Morton *v.* Smith, 2 Dill. 316; Woodruff *v.* McHarry, 56 Ill. 218; Crispen *v.* Hannavan, 50 Mo. 415; Callaway *v.* Fash, 50 Mo. 420.

[5] Ritter *v.* Worth, 58 N. Y. 628; reversing *S. C.* 1 N. Y. S. C. (T. & C.) 406.

[6] 3 Washb. Real Prop. (4th ed.) 326; Tracy *v.* Jenks, 15 Pick. 468; Thurman *v.* Cameron, 24 Wend. 87; People *v.* Snyder, 41 N. Y. 402; Keichline *v.* Keichline, 54 Penn. St. 76.

§ 1054. We have just seen that the sanctity attached to deeds has secured for them a peculiarly vigilant application of the rule that, between parties, a written contract is not to be varied by parol. The very sanctity, however, that invites this protection is an additional reason why there should be peculiar precautions to keep deeds from being used as the instruments of fraud, either actual or constructive. Hence it is that the courts have united in holding that evidence is admissible to show that a deed was in fact not executed, or that its execution was only conditional;[1] that its execution was procured by fraud or duress,[2] or by concurrent mistake;[3] that it was never delivered, or delivered only contingently;[4] or that its purpose was illegal.[5] When a deed, also, uses ambiguous terms, these terms may be explained by parol;[6] and, for the purpose of bringing out the true meaning, extrinsic circumstances may be shown, and proof introduced of all objects to which ambiguous terms may apply, so that such terms may be explained.[7] In deeds, as well as in other dispositive writings, erroneous particulars may be rejected, even between the parties, as surplusage;[8] and the parties, when there is a latent ambiguity concerning them, may be identified by parol.[9] Even usage, in cases of doubtful terms, may be introduced to elucidate such terms;[10] and a party to a deed may be examined, in cases of doubt, to explain his own intent.[11] So far as concerns consideration, the most solemn deed is open to collateral attack; and the recital of consideration existing, while it precludes the grantor from disputing generally the fact that some consideration existed, does not prevent either him or the grantee from explaining, as against third parties, what the consideration really was.[12]

Between parties, deeds may be varied on proof of ambiguity and fraud.

The limitations, also, which have been expressed as to contracts are to be strictly applied to deeds. Thus, all prior conferences between the parties are merged in and extinguished by a deed;[13]

[1] Supra, § 927.
[2] Supra, § 931.
[3] Supra, § 933.
[4] Supra, § 930.
[5] Supra, § 935.
[6] Supra, § 937.
[7] Supra, §§ 942–6.
[8] Supra, § 945.
[9] Supra, §§ 950 *et seq.*
[10] Supra, § 961.
[11] Supra, § 955.
[12] Supra, § 1042.
[13] Supra, § 1014.

yet in equity, if not at law, a deed may be rescinded, or even reformed, on parol proof of concurrent mistake or fraud.[1] It is true that under the statute of frauds a deed cannot in this way be ordinarily made to pass a larger interest in land;[2] but even under that statute equity will sustain such a reformed deed, when there has been, on the one side, a performance of the contract.[3] And recitals of deeds, while inoperative (except to prove pedigree or ancient reputation) as to strangers, may be, in so far as they are general, open to variation and explanation by the parties.[4]

Deed may be attacked by *bonâ fide* purchasers and judgment vendees.

§ 1055. We have already seen that a *bonâ fide* purchaser from a party may attack a prior fraudulent conveyance of such party. The same right may be exercised by a party *bonâ fide* purchasing the property under an execution.[5]

Mortgage can be impeached for fraud.

§ 1056. A mortgage may be impeached for fraud on the same principles that have just been stated as applicatory to deeds.[6] When so impeached, the mortgagee may show other considerations than those recited in the mortgage.[7] But between the mortgagor and the mortgagee, at common law, the mortgagor cannot set up the falsity of the consideration as a defence.[8]

Deed may be shown to be in trust.

§ 1057. A deed, whether of realty or personalty, is subject to the rules we have already laid down in reference to contracts generally, that a conveyance, absolute on its face, may be shown to be a mortgage, or to be in trust. Ordinarily this is done by proceedings in equity; but in states where equity is administered through common law forms, a remedy may be had at common law.[9]

[1] Supra, § 1019.
[2] Supra, § 1024.
[3] Supra, § 904.
[4] Supra, § 1040.
[5] See supra, §§ 1046 *et seq.*
[6] Clark *v.* Houghton, 12 Gray, 38.
[7] Abbott *v.* Marshall, 48 Me. 44; McKinster *v.* Babcock, 37 Barb. 265; *S. C.* 26 N. Y. 378; Foster *v.* Reynolds, 38 Mo. 553. See Metzner *v.* Baldwin, 11 Minn. 150.
[8] Meads *v.* Lansingh, Hopk. (N. Y.) 124.
[9] See supra, §§ 1031–5.

VI. SPECIAL RULES AS TO NEGOTIABLE PAPER.

§ 1058. Additional reasons come in to apply with distinctive stringency to negotiable paper the rule, that a document cannot, when sued on contractually, be varied by parol proof. It would destroy business if those who put their names to such paper could set up private understandings by which their liability could be qualified. Hence it is, that for the purpose of qualifying such liability, when negotiable paper is sued on, parol evidence is not ordinarily admissible.[1] The only exception is when it is sought, as between the parties to the paper, or as to persons taking the paper with notice after it is due, to prove by parol that the paper was executed or moulded in fraud, or by accident or mistake which it would be fraudulent to take advantage of; or when, as to purchasers for value before maturity, actual concern in the fraudulent concoction is proposed to be proved.[2] Other more informal instru-

Negotiable paper not susceptible of parol variation.

[1] Johnson *v.* Roberts, L. R. 10 Ch. Ap. 505; Brown *v.* Wiley, 20 How. 442; Forsythe *v.* Kimball, 91 U. S. 294; Spofford *v.* Brown, 1 McArthur, 223; Brown *v.* Spofford, 93 U. S. 474; Warren *v.* Starrett, 15 Me. 443; Crocker *v.* Getchell, 23 Me. 392; Goddard *v.* Hill, 33 Me. 582; Fairfield *v.* Hancock, 34 Me. 93; City Bank *v.* Adams, 45 Me. 455; Porter *v.* Porter, 51 Me. 376; Rose *v.* Learned, 14 Mass. 154; Billings *v.* Billings, 10 Cush. 178; Prescott Bk. *v.* Caverly, 7 Gray, 217; Wright *v.* Morse, 9 Gray, 337; Davis *v.* Pope, 12 Gray, 193; Davis *v.* Randall, 115 Mass. 547; Alsop *v.* Goodwin, 1 Root, 196; Buckley *v.* Bentley, 48 Barb. 283; Ely *v.* Kilborn, 5 Denio, 514; Halliday *v.* Hart, 30 N. Y. 474; Meyer *v.* Beardsley, 30 N. J. L. 236; Mason *v.* Graff, 35 Penn. St. 448; Anspach *v.* Bast, 52 Penn. St. 356; Alter *v.* Langebartel, 5 Phila. 151; Coughenour *v.* Suhre, 72 Penn. St. 464; Wharton *v.* Douglass, 76 Penn. St. 276; Wilmer *v.* Harris, 5 Har. & J. 1; McSherry *v.* Brooks, 46 Md. 103; Holzworth *v.* Koch, 26 Ohio St. 33; Tucker *v.* Talbot, 15 Ind. 114; McClintic *v.* Cory, 22 Ind. 170; Campbell *v.* Robbins, 29 Ind. 271; Fow *v.* Blackstone, 31 Ill. 538; McEwan *v.* Ortman, 34 Mich. 325; Racine Bank *v.* Keep, 13 Wis. 209; Daniel *v.* Ray, 1 Hill S. C. 32; Hunter *v.* Graham, 1 Hill S. C. 370; Bartlett *v.* Lee, 33 Ga. 491; McLaren *v.* Bk. 52 Ga. 131; Henderson *v.* Thompson, 52 Ga. 149; Holt *v.* Moore, 5 Ala. 521; Standifer *v.* White, 9 Ala. 527; West *v.* Kelly, 19 Ala. 353; Cowles *v.* Townsend, 31 Ala. 133; Adams *v.* Thomas, 54 Ala. 175; Heaverin *v.* Donnell, 15 Miss. 244; Inge *v.* Hance, 29 Mo. 399; Borden *v.* Peay, 20 Ark. 293; Daniel on Neg. Inst. § 80.

[2] Forsythe *v.* Kimball, 91 U. S. (1 Otto), 291.

"Without proof or allegation of fraud, it has frequently been held that such evidence is not admissible to change or contradict the terms of a promissory note. Hoare et al. *v.* Graham, 3 Camp. 56; Moseley, Assignee,

ments, as is elsewhere shown, may be modified by parol, or may be so restrained as to take effect only contingently.[1] Not so is it with negotiable paper, whose efficiency cannot be affected by such testimony, except as to parties with notice, under limitations to be presently given.[2] Hence in an action by a savings

v. Hanford, 10 B. & C. 729; Free *v.* Hawkins, 8 Taunt. 92; Hill *v.* Gaw, 4 Barr, 493; Anspach *v.* Bast, 2 P. F. Smith, 356." Mercur, J., Wharton *v.* Douglass, 76 Penn. St. 276. That fraud may be proved for this purpose, see Brewster *v.* Brewster, 38 N. J. L. 119. And see Martin *v.* Berens, 67 Penn. St. 462; Coughenour *v.* Suhre, 71 Penn. St. 464. That such proof must be clear and strong, in order to affect purchaser for value before maturity, see Brown *v.* Spofford, 95 U. S. 474; Battles *v.* Loudenslager, 5 Weekly Notes, 339.

"Where the supposed defect or infirmity in the title of the instrument appears on the face at the time of the transfer, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law, as has been held by this court in several cases. Andrews *v.* Pond, 13 Pet. 65; Fowler *v.* Brantly, 14 Pet. 318. But it is a very different thing when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Goodman *v.* Simonds, 20 How. 366; Collins *v.* Gilbert, 94 U. S. (4 Otto) 758." Clifford, J., Brown *v.* Spofford, 95 U. S. 339.

In Collins *v.* Gilbert, *ut supra*, a draft was duly made and accepted and delivered to C., who received it as security for the performance of a contract. C. transferred it, and it, before maturity, came into plaintiff's hands, as he claimed, for value. It was ruled that unless notice to plaintiff thereof could be shown, evidence of the circumstances attending the giving of the bill to C. could not be shown against plaintiff.

"Decided cases almost without number support that proposition, but if the note or bill is founded in fraud, or was fraudulently obtained and put in circulation, the indorsee must prove that he paid value for it before he can recover the amount. Tucker *v.* Morrill, 1 Allen, 528; Maither *v.* Maidstone, 1 C. B. (N. S.) 287; Sistermans *v.* Field, 9 Gray, 337; Brush *v.* Scribner, 11 Conn. 390." Clifford, J., Collins *v.* Gilbert, 94 U. S. 758.

As to presumption of regularity, see infra, § 1301.

Compare Hollenbeck *v.* Shutts, 1 Gray, 431; Allen *v.* Furbish, 4 Gray, 431; Billings *v.* Billings, 10 Cush. 178.

[1] See supra, §§ 927, 934.

[2] Cunningham *v.* Wardwell, 12 Me. 466; Boody *v.* McKenney, 23 Me. 517; Hatch *v.* Hyde, 14 Vt. 25; Trustees *v.* Stetson, 5 Pick. 506; Tower *v.* Richardson, 6 Allen, 351; Currier *v.* Hale, 8 Allen, 47; Erwin *v.* Saunders, 1 Cow. 249; Woodward *v.* Foster, 18 Grat. 200; Graves *v.* Clark, 6 Blackf. 183; Miller *v.* White, 7 Blackf. 491; Foy *v.* Blackstone, 31 Ill. 538; Jones *v.* Albee, 70 Ill. 34; Wren *v.* Hoffman, 41 Miss. 616; Jones *v.* Jeffries,

bank upon a promissory note, against one signing as surety thereon, parol evidence that the defendant signed the note solely at the request of the treasurer of the bank, because of a rule thereof as to the number of the names required, and upon the assurance that the bank would not look to him, has been rejected in Massachusetts.[1] Even incidents which to ordinary contracts may be annexed by parol evidence cannot be so annexed to negotiable paper. Thus, as against third parties without notice, it is inadmissible to prove by parol that the party signing a note is not principal but agent;[2] or that a note is only payable on contingencies;[3] or that a note payable generally is payable at a particular bank[4] (though an agreement between the parties to the suit may be shown relative to the place where payment is to be demanded, the note being silent on this point);[5] or that a note is payable otherwise than in legal currency, unless so expressed in the note itself;[6] though evidence has been received to show the business meaning of "currency,"[7] and as between the parties or those infected with notice, it is admissible to show that a local currency is intended to be the medium of payment.[8] But the liabilities of the acceptor of a bill, or the certifier of a check, cannot be varied by proof of custom.[9]

17 Mo. 577; Smith *v.* Thomas, 29 Mo. 307.

[1] Barnstable Savings Bank *v.* Ballou, 119 Mass. 487; but see cases cited infra, § 1061.

[2] See infra, §§ 1060 *et seq.*

[3] Woodbridge *v.* Spooner, 5 B. & Ald. 333; Free *v.* Hawkins, 8 Taunt. 92; 1 J. B. Moore, 535; Moseley *v.* Hanford, 10 B. & C. 729; Foster *v.* Jolly, 1 Cromp., M. & R. 703; Brown *v.* Wiley, 20 How. 442; Sears *v.* Wright, 24 Me. 278; Underwood *v.* Simonds, 12 Met. 275; Foster *v.* Clifford, 44 Wis. 569; Litchfield *v.* Falconer, 2 Ala. 280; McClanaghan *v.* Hines, 2 Strobh. 122.

[4] Patten *v.* Newell, 30 Ga. 271.

[5] Brent *v.* Bank, 1 Peters, 92; McKee *v.* Boswell, 33 Mo. 567.

[6] Linville *v.* Holden, 2 McArthur, 329; McMinn *v.* Owen, 2 Dall. 173; Lang *v.* Johnson, 24 N. H. 302; Bradley *v.* Anderson, 5 Vt. 152; Gilman *v.* Moore, 14 Vt. 457; Woodin *v.* Foster, 16 Barb. 146; Hair *v.* La Brouse, 10 Ala. 548; Smith *v.* Elder, 15 Miss. 507; Cockrill *v.* Kirkpatrick, 9 Mo. 688; Baugh *v.* Ramsey, 4 T. B. Mon. 155; Noe *v.* Hodges, 3 Humph. 162; Fields *v.* Stunston, 1 Coldw. 140; Self *v.* King, 28 Tex. 552. See Bryan *v.* Harrison, 76 N. C. 360; Davis *v.* Glenn, 76 N. C. 427.

[7] Pilmer *v.* Bank, 16 Iowa, 321; Haddock *v.* Woods, 46 Iowa, 433. See Cowles *v.* Garrett, 30 Ala. 341. Supra, § 948.

[8] Thorington *v.* Smith, 8 Wall. 1, 12. Supra, § 948.

[9] Merchants' Bank *v.* State Bank, 10 Wall. 604; Higgins *v.* Moore, 34 N. Y. 417; Lawrence *v.* Maxwell, 53 N. Y. 19; Security Bank *v.* National Bank, 67 N. Y. 458.

§ 1059. So far as concerns the immediate contracting parties, a blank indorsement exhibits at the best a contract by implication. It is true that as to *bonâ fide* holders of paper regularly negotiated, it establishes a liability indisputable if the signature be genuine.[1] As to holders with notice, however, the liability may be modified by parol, on proof of fraud, or of facts which make it inequitable for the plaintiff to recover.[2] On the broad question here involved, there is a strong current of authority to the effect that an indorsement in blank, being but a short-hand expression of a contract, may be expanded and explained between the parties by parol.[3] On the other hand, we have authorities to the effect that an indorser cannot show, against his indorsee, that it was agreed that the indorsement was to be without recourse, or for other reasons inoperative.[4] The cases may, in some measure, be reconciled by holding that while the indorsement cannot be *contradicted* by extrinsic proof, it is admissible to show, in most jurisdictions, any facts which would make it inequitable for the plaintiff to recover. Thus, not only may failure of consideration, as we have seen, be inquired into between the parties or privies,[5] but the indorser, as to such parties and privies, may show that his

Blank indorsements may be explained by parol.

[1] Union Bank *v.* Willis, 8 Met. 504; Brown *v.* Butler, 99 Mass. 179; Way *v.* Butterworth, 108 Mass. 509; Allen *v.* Brown, 124 Mass. 77.

[2] Infra, § 1060. Phillips *v.* Preston, 5 How. 278; Susquehanna Co. *v.* Evans, 4 Wash. C. C. 480; Smith *v.* Morrill, 54 Me. 48; Sylvester *v.* Downer, 20 Vt. 355; Barker *v.* Prentiss, 6 Mass. 430; Clapp *v.* Rice, 13 Gray, 403; Smith *v.* Barber, 1 Root, 207; Perkins *v.* Catlin, 11 Conn. 213; Herrick *v.* Carman, 10 Johns. 224; Bruce *v.* Wright, 5 Thom. & C. 81; Boynton *v.* Pierce, 79 Ill. 145; Love *v.* Wall, 1 Hawks, 313; Gomez *v.* Lazarus, 1 Dev. Eq. 205; Davis *v.* Morgan, 64 N. C. 570; Mendenhall *v.* Davis, 72 N. C. 150.

[3] Byles on Bills (Shars. ed. 267), relying on Kidson *v.* Dilworth, 5 Price, 564; Castrique *v.* Battigieg, 10 Moore P. C. 94; and see, to same effect, Smith *v.* Morrill, 54 Me. 49; Susquehanna Co. *v.* Evans, 4 Wash. C. C. 480; Bruce *v.* Wright, 3 Hun, 548; Ross *v.* Espy, 66 Penn. St. 481.

[4] Free *v.* Hawkins, 8 Taunt. 92; Hoare *v.* Graham, 3 Camp. 57; Bank U. S. *v.* Higginbottom, 9 Pet. 51; Prescott Bk. *v.* Caverly, 7 Gray, 217; Howe *v.* Merrill, 5 Cush. 80; Dale *v.* Gear, 38 Conn. 15; Bank of Albion *v.* Smith, 27 Barb. 489; Woodward *v.* Foster, 18 Grat. 205; Beattie *v.* Brown, 64 Ill. 360; Campbell *v.* Robins, 29 Ind. 271; Levering *v.* Washington, 3 Minn. 323; First Nat. Bank *v.* Nat. Marine Bank, 20 Minn. 23; Barnard *v.* Gaslin, 23 Minn. 192.

[5] Supra, § 1044. In addition to the cases already cited, see Denton *v.* Peters, L. R. 5 Q. B. 457; Woodward *v.* Foster, 18 Grat. 205.

indorsement was obtained in such a way as to make its enforcement a fraud;[1] and that it was made in trust for special ends, and cannot be sued on absolutely, supposing that the evidence goes to establish mutual mistake or fraud.[2] So far as

[1] Dale *v.* Gear, 38 Conn. 15; Benton *v.* Martin, 52 N. Y. 570; Hill *v.* Ely, 5 S. & R. 363.

[2] See Daniel's Neg. Inst. § 721, where the questions in the text are discussed with much learning and ability.

From a learned Maine judge we have the following review of cases:—

"In Brewster *v.* Dana, 1 Root, 267, it is said by the court that a blank indorsement has no certain import until filled up. In Barker *v.* Prentiss, 6 Mass. 430, the indorsement was in blank, which implies *primâ facie* an absolute transfer of the note, but the court held that parol evidence was admissible to show what the real contract was, and that the note was indorsed for collection only. The same doctrine was advanced in Herrick *v.* Carman, 10 Johns. 224. Same in Lawrence *v.* Stonington Bank, 6 Conn. 521. In Boyd *v.* Cleveland, 4 Pick. 525, the plaintiff was permitted to show by parol evidence, that at the time of the indorsement of the note to him, the defendant agreed to pay it if the maker did not, and that the implied conditions requiring demand and notice were dispensed with. Same in this state. Fullerton *v.* Rundlett, 27 Me. 31.

"In Weston *v.* Chamberlin, 7 Cush. 404, the precise question was determined which is raised in this case: whether a prior indorser of a promissory note can maintain an action for contribution against a subsequent indorser, on proving that, by an oral agreement between the indorsers, at the time of indorsing the note, they were as between themselves, co-securities; and the court held that he could. The same doctrine was affirmed in Clapp *v.* Rice, 13 Gray, 403. Also in Phillips *v.* Preston, 5 How. U. S. R. 278; 16 Curtis, 396. . . . .

"It is idle to attempt to reconcile these decisions with the doctrine that a blank indorsement is in effect a contract in writing not to be varied by parol, and that in these cases it is not varied. In all these cases the contracts implied in the blank indorsements are varied, in fact swallowed up and extinguished, so far as they are in conflict, by the express verbal agreements. So far as both are alike, or not in conflict, both are permitted to stand. But when they are in conflict, the implied contract yields, and the express contract, whether written or verbal, prevails.

"In Taunton Bank *v.* Richardson, 5 Pick. 436, the plaintiff offered to prove that by a verbal agreement, made prior to the indorsement of the note in suit, demand and notice had been dispensed with. This was resisted upon the ground that it would vary the written contract created by the blank indorsement. The answer of the court was, 'That the evidence did not attempt to change the contract, but to show that a condition beneficial to the defendants had been *waived* by them; that they had agreed to dispense with notice, not that by the contract itself notice would not be necessary.' It is not surprising that legal minds should not rest satisfied with the logic of this decision. If by a previous or contemporaneous verbal agreement an important condition of a written contract is waived, is not the written contract *varied* by the verbal agreement? And is not the

concerns the relations of indorsers to each other, though *primâ facie* liable to each other in the order in which their names stand

rule violated, which holds that all previous and contemporaneous negotiation and discussion on the subject are merged or extinguished by the writing, and cannot be shown to vary it? If not, then one condition after another might in this way be waived, until nothing would be left of the written contract, and yet the rule referred to would not be violated. Conditions in written contracts may unquestionably be waived by subsequent verbal agreements without violating any rule of law, but not by previous or contemporaneous ones, — a distinction which seems to have been overlooked in the case just noticed.

"The only rational ground on which to justify the admission of evidence of a verbal agreement to control the contract implied by law in a blank indorsement is that laid down by Mr. Justice Washington, in Susquehanna Bridge Co. *v.* Evans, 4 Wash. C. C. 480 (U. S. D. p. 396, § 2132), namely, 'The reasons which forbid the admission of parol evidence, to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand.'

"The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made. 'Expressum facit, cessare tacitum.' Perkins *v.* Catlin, 11 Conn., on page 226, a case in which this question is very fully and ably discussed, and the conclusion reached that a blank indorsement is not a contract in writing; that the law implies a contract, as in a great variety of other cases, simply because the parties have failed to make an express one, and because otherwise the indorsement would be meaningless; that a blank indorsement is only *primâ facie* evidence of the contract implied by law; and that it is competent, as between the parties to the indorsement, to prove, by parol evidence, the agreement which was in fact made, at the time of the indorsement." Walton, J., in Smith *v.* Morrill, 54 Me. 49. See, to same general effect, Downer *v.* Chesebrough, 36 Conn. 39; Ross *v.* Espy, 66 Penn. St. 481.

In North Carolina we have the following ruling: —

"There is no written contract to be altered; the whole (except the signature, which by itself does not make a contract) exists in parol, and must be established by such proof. It may be admitted, and the authorities seem that way, that when a person, other than the payee or indorsee of a note, writes his name across the back of it, after it has been delivered by the maker, and not as a part of the original transaction, and delivers it for value to another, the law presumes that he intended to become a guarantor of the note. But this presumption is not one of law, but of fact merely, and may be rebutted. In Love *v.* Wall, 1 Hawks, 313, a second indorser of a promissory note was allowed, in defence of an action brought against him by the first indorser, to prove an agreement different from what the law presumes from the order of their names on the back of the instrument, and that in fact they were jointly liable as sureties for the maker. In Gomez *v.* Lazarus, 1 Dev. Eq. 205, it was taken as clear that the acceptor of a bill of exchange, as between him and an indorser, might prove that

on the paper, "it may be proved by parol that the payee or indorsee was the real principal, or that all the parties were joint principals, or some of them joint sureties."[1] For, as a general rule, proof of a collateral contract by parol may be given to show the liability of indorsers as between themselves.[2] Hence, in an action by an indorser and holder of a promissory note against a prior indorser, the defendant may prove that the indorsers were all accommodation indorsers and co-sureties.[3] But the indorser of a note in blank cannot show by parol, as against the holder, to whom he delivered it, that he was not liable as indorser, unless he at the same time prove concurrent mistake or fraud in which the holder was concerned. He cannot thus qualify or contradict the absolute terms of the writing.[4]

Relations of parties with notice may be varied by parol, and

§ 1060. Generally as between parties with notice, or parties taking the paper out of the ordinary course of business, agreements annexing modifying collateral incidents to the paper or to the liabilities of the maker or indorsers, may be shown by parol.[5] Hence, one of two makers

they were joint sureties for the drawer. In Davis *v.* Morgan, 64 N. C. Rep. 570, the payee of a note who had written his name in blank across the back was permitted to prove that such signature was not intended as an indorsement, but as a receipt of payment from the maker. In Sylvester *v.* Downer, 20 Vt. 355, the court held that by an indorsement in blank the defendant became presumptively bound as a joint promisor. But Redfield, J., adds, 'But the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation.' See, to the same effect, Clapp *v.* Rice, 13 Gray, 403. See, also, Perkins *v.* Catlin, 11 Conn. 213, and numerous other cases cited in a note on page 121 of 2 Parsons on Notes & Bills." Rodman, J., in Mendenhall *v.* Davis, 72 N. C. Rep. 154; but see Norton *v.* Coons, 6 N. Y. 33.

[1] Chapman, J., Sweet *v.* McAlister, 4 Allen, 355, citing Clapp *v.* Rice, 13 Gray, 403. And see, to same effect, Nurre *v.* Chittenden, 56 Ind. 462; Melms *v.* Wirdekoff, 14 Wis. 18. Supra, § 952.

[2] Phillips *v.* Preston, 5 How. U. S. 278. See supra, § 952.

[3] Easterly *v.* Barber, 66 N. Y. 433; citing Griffith *v.* Reed, 21 Wend. 502; Davis *v.* Morgan, 64 N. C. 570; Edelen *v.* White, 6 Barb. 408.

In Pennsylvania, however, under the statute of frauds, in an action by a second indorser against a first indorser, the latter cannot show by parol that the plaintiff was the surety of the maker, as this would contravene the statute of frauds. Hauer *v.* Patterson, 84 Penn. St. 254. See supra, § 952.

[4] 2 Parsons Notes & B. 501; Bank U. S. *v.* Dunn, 6 Pet. 51; Brown *v.* Wiley, 20 How. 442; Specht *v.* Howard, 16 Wall. 564; Brown *v.* Spofford, 95 U. S. 474; Skinner *v.* Church, 36 Iowa, 91; Charles *v.* Denio, 42 Wis. 5; Foster *v.* Clifford, 44 Wis. 56.

[5] Barker *v.* Prentiss, 6 Mass. 430; Kingman *v.* Kelsie, 3 Cush. 339; Riley

of a promissory note may prove, as against parties with notice, that he was only a surety.[1] Consideration, also, as between the parties, may be disputed.[2] As parties, considered as such in relation to each other, are the joint makers,[3] the drawer and acceptor of a bill; the drawer and payee of a bill; the maker and payee of a note; and the indorser and immediate indorsee of a bill or note.[4] Want of consideration, however, cannot be set up by the maker of a note against an indorsee; nor by a prior but not his immediate indorser against an indorsee; nor by the acceptor of a bill against the payee, as a rule; the reason being that these relations are too remote.[5]

so of consideration.

v. Gerrish, 9 Cush. 104; Rohan *v.* Hanson, 11 Cush. 44; Crosman *v.* Fuller, 17 Pick. 171; Creech *v.* Byron, 115 Mass. 324; Case *v.* Spaulding, 24 Conn. 578; Scott *v.* Ocean Bank, 23 N. Y. 239; Milton *v.* R. R. 4 Lansing, 76; Bookstaver *v.* Jayne, 3 Thomp. & C. (N. Y.) 397; Watkins *v.* Kirkpatrick, 26 N. J. L. 84; Petrie *v.* Clarke, 11 S. & R. 377; Walker *v.* Geisse, 4 Wh. 258; Depeau *v.* Waddington, 6 Wh. 220; *S. C.* 2 Am. Leading Cas. 155; Hoffman *v.* Miller, 1 Ibid. 676; Kirkpatrick *v.* Muirhead, 16 Penn. St. 123; National Bank *v.* Perry, 2 Weekly Notes, 484; Haile *v.* Peirce, 32 Md. 327; Peck *v.* Beckwith, 10 Ohio St. 497; Harris *v.* Pierce, 6 Ind. 162; Rawlings *v.* Fisher, 24 Ind. 52; Collins *v.* Gilson, 29 Iowa, 61; Harrison *v.* McKim, 18 Iowa, 485; Catlin *v.* Birchard, 13 Mich. 110; Foulks *v.* Rhodes, 12 Nev. 225; Carhart *v.* Wynn, 22 Ga. 24; Dixon *v.* Edwards, 48 Ga. 142; Branch Bank *v.* Coleman, 20 Ala. 140; O'Leary *v.* Martin, 21 La. An. 389; Davidson *v.* Bodley, 27 La. An. 149; Smith *v.* Paris, 53 Mo. 274; Clarke *v.* Scott, 45 Cal. 86; Bissenger *v.* Guiteman, 6 Heisk. 277.

But if the question of the existence of an indorsement is at issue, parol evidence is admissible. Supra, §§ 927–8. Hence parol evidence is admissible to prove that a party's name on a negotiable instrument is not an indorsement. Samarin *v.* Courrégé, 13 La. An. 25; Cole *v.* Smith, 29 La. An. 551.

How far admissions may be received for this purpose, see infra, § 1163.

[1] Hubbard *v.* Gurney, 64 N. Y. 457; overruling Campbell *v.* Tate, 7 Lans. 370, and Benjamin *v.* Arnold, 5 T. & C. 54; and relying on Archer *v.* Douglass, 5 Den. 509; Pintard *v.* Davis, 1 Zab. 632; Davis *v.* Barrington, 30 N. H. 517; Bank *v.* Hoge, 6 Ohio, 17. See supra, § 952.

[2] Supra, § 1044; Story on Bills, § 188; Abbott *v.* Hendricks, 1 M. & G. 795; Barnet *v.* Offerman, 7 Watts, 130; Jones *v.* Horner, 60 Penn. St. 214; Clarke *v.* Dederick, 31 Md. 148; Jones *v.* Buffum, 50 Ill. 277. As to Illinois statutes, see § 931, note.

[3] Robertson *v.* Deatherage, 82 Ill. 511.

[4] See Daniels on Neg. Inst. § 174; Easton *v.* Pratchett, 1 C., M. & R. 798; Holiday *v.* Atkinson, 5 B. & C. 501; Abbott *v.* Hendricks, 1 M. & Gr. 791; Clement *v.* Reppard, 15 Penn. St. 111. As to admissions in such cases see infra, § 1163.

[5] Story on Bills, § 188; 1 Parsons N. & B. 176; Daniels on Neg. Inst. 174; Hoffman *v.* Bk. 12 Wall. 181. See Hunter *v.* Wilson, 4 Exch. 489.

§ 1061. It is elsewhere observed that, on suing on a written contract, an undisclosed party may be shown by parol to be the real plaintiff, though not in such a way as to cut off the defendant from any defence he might otherwise have against the agent, who is the nominal plaintiff. It is also shown that a plaintiff, suing a nominal party to a contract, may, in order to charge an undisclosed principal, prove by parol the existence of such principal, but that such nominal party cannot introduce such proof in order to relieve himself from liability.[1] There is no reason why the same distinction should not apply to negotiable paper, as between parties with notice, so far, at least, as to make the principal liable on a contract of indebtedness of which the paper, explained and applied by parol, may be evidence.[2] It is clear that an undisclosed principal may by parol admission and guarantee make himself liable on his agent's note,[3] though unless his name appear on the note itself he cannot be made directly liable on the note.[4] And where it is doubtful, on the face of the paper, whether principal or agent is liable, parol evidence, going to the understanding of the parties, may be received to solve the doubt.[5] It may also be proved by

Real parties may be brought out by parol.

But, as will presently be seen, the relationship of the parties may be brought out by parol, so as to show that they are not privy to each other.

[1] See supra, § 952.

[2] Jones *v.* Littledale, 6 A. & E. 486; Hoffman *v.* Bank, 12 Wall. 181; Chandler *v.* Coe, 54 N. H. 561. See Daniels on Neg. Paper, § 418; Bartlett *v.* Hawley, 120 Mass. 92; aff. Tuckerman Co. *v.* Fairbank, 98 Mass. 101; Holzworth *v.* Koch, 26 Ohio St. 33.

"It is well settled by decisions in Massachusetts and elsewhere, that a man may make the name and signature of another virtually his own by allowing it to be used as such in the course of his business." Loomis, J., Pease *v.* Pease, 35 Conn. 147; citing Fuller *v.* Hooper, 3 Gray, 334; Bryant *v.* Eastman, 7 Cush. 111; Melledge *v.* Boston Iron Co. 5 Cush. 158; Commercial Bank *v.* French, 21 Pick. 486; Lindus *v.* Bradwell, 5 C. B. 583; Bank of Cape Fear *v.* Wright, 3 Jones Law, 376. To same effect see Edmunds *v.* Hooper, L. R. 1 Q. B. 97; Story on Notes, 7th ed. § 67, note.

[3] Lindus *v.* Bradwell, 5 C. B. 583; Brown *v.* Parker, 7 Allen, 337; cases cited supra, §§ 951–2.

[4] Chitty on Bills, 22; Fenn *v.* Harrison, 3 Durn. & E. 761; Williams *v.* Robbins, 16 Gray, 80; Pentz *v.* Stanton, 10 Wend. 271; De Witt *v.* Walton, 9 N. Y. 571.

Otherwise as to non-negotiable instruments. Dykers *v.* Townsend, 24 N. Y. 57. See, however, *contra*, Story on Agency, § 155; and see articles in 14 Alb. L. J. 409; 15 Alb. L. J. 117.

[5] Byles on Bills, 27, note; Dow *v.* Moore, 47 N. H. 419; Johnson *v.* Smith, 21 Conn. 627; Bank of Ge-

parol that a party sued on a note was known by the plaintiff to have signed merely in a representative capacity; and in such case, it being proved that such person acted solely as agent for another, he will not be held liable on the note.[1] *A fortiori*, an agent indorsing a note to his principal cannot be held liable on his indorsement to his principal, when the indorsement was made by him, and was known by the plaintiff to have been so made, simply for the purpose of passing the note to the principal.[2] But an agent, signing without any indication of agency on the paper, cannot evade his liability to *bonâ fide* holders without notice by proof that he was only agent.[3] And it may also be shown by

neva *v.* Patchin Bank, 19 N. Y. 312; Early *v.* Wilkinson, 9 Grat. 68; Musser *v.* Johnson, 42 Mo. 78; Campbell *v.* Nicholson, 12 Rob. (La.) 433.

[1] Kidson *v.* Dilworth, 5 Price, 364; Dowman *v.* Jones, 7 Q. B. 103; Williams *v.* Robbins, 16 Gray, 77; Pease *v.* Pease, 35 Conn. 131; Mott *v.* Hicks, 1 Cowen, 513; Miles *v.* O'Hara, 1 S. & R. 32; Sharpe *v.* Bellis, 61 Penn. St. 69; Lewis *v.* Brehme, 33 Md. 412; Milligan *v.* Lyle, 24 La. An. 144; Barnstable Bk. *v.* Ballou, 119 Mass. 487. Supra, § 1058.

[2] Wharton on Agency, § 295; Castrique *v.* Buttigieg, 10 Moore P. C. 94; Sharp *v.* Emmett, 5 Whart. 288; Milligan *v.* Lyle, 24 La. An. 144.

[3] Lefevre *v.* Lloyd, 5 Taunt. 749; Beckham *v.* Drake, 9 M. & W. 79; Sowerby *v.* Butcher, 2 C. & M. 368; Leadbitter *v.* Farrer, 3 M. & S. 34; Hancock *v.* Fairfield, 30 Me. 299; Stackpole *v.* Arnold, 11 Mass. 27; Bank of N. A. *v.* Hooper, 5 Gray, 567; Pentz *v.* Stanton, 10 Wend. 276; Bogan *v.* Calhoun, 19 La. An. 472; Lander *v.* Castro, 43 Cal. 497.

In 1 Am. Lead. Cas. 633, the law is thus stated: —

"Where there is a doubt or ambiguity on the face of the instrument, as to whether the person means to bind himself, or only to give an evidence of debt against an institution or body of which he is a representative, parol evidence is undoubtedly admissible; not, indeed, to show the intention of the parties to the contract, but to prove extrinsic circumstances by which the respective liability of the principal and agent may be determined; such as, to which the consideration passed and credit was given, and whether the agent had authority, and whether it was known to the party that he acted as agent. The extent of the principle as to the admissibility of parol evidence appears to be this: Where the name of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent of either view, of its being the engagement of the principal or of the agent, parol evidence is admissible, in a suit against the agent, ... to discharge him, by proving that the consideration passed directly to the principal; as, that credit having been given to the principal alone, the consideration of the note signed by him was an antecedent liability on the part of the principal, and that the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part."

parol, as against a plaintiff proved to be cognizant of the facts, that the defendant's name was attached to the note only as surety;[1] or that the relation of the plaintiff and the defendant is that of co-sureties;[2] or that the relation of a person signing his name on the back of a note was not intended by the parties to involve individual liability;[3] or that an indorsement, as against the holder, was solely for the holder's accommodation.[4] The consideration of negotiable paper, as between parties in immediate relationship to each other, being, as we have seen, always open to impeachment,[5] parol evidence is admissible to determine such relationship.[6]

Ambiguities in such paper may be explained.

§ 1062. In any view, ambiguities as to the parties and subject matter of negotiable paper may be explained by parol, provided that in so doing the explanation is limited to such ambiguities, and in no case the sense of the

See, also, Wharton on Agency, §§ 290, 495, 458, and an elaborate discussion in Albany Law Journal for 1875, p. 275. See, also, Sumwalt *v.* Ridgely, 20 Md. 107; Haile *v.* Peirce, 32 Md. 327; Lazarus *v.* Skinner, 2 Ala. 718; Smith *v.* Alexander, 31 Mo. 193; McClellan *v.* Reynolds, 49 Mo. 313.

[1] Supra, § 952; Greenough *v.* McClelland, 2 E. & E. 424; Mutual Loan Fund Assoc. *v.* Sudlow, 5 Com. B. (N. S.) 449; Pooley *v.* Harradine, 7 E. & B. 431; Taylor *v.* Burgess, 5 H. & N. 1; Lawrence *v.* Walmsley, 12 Com. B. (N. S.) 799; Bristow *v.* Brown, 13 Ir. Law R. (N. S.) 201; Bailey *v.* Edwards, 34 L. J. Q. B. 41; 4 B. & S. 761, *S. C.*; Bank *v.* Kent, 4 N. H. 221; Adams *v.* Flanagan, 36 Vt. 400; Hubbard *v.* Gurney, 64 N. Y. 457; Bank of St. Mary *v.* Mumford, 6 Ga. 44; Pollard *v.* Stanton, 5 Ala. 451; Emmons *v.* Overton, 18 B. Mon. 643; Ward *v.* Stout, 32 Ill. 399; Dunn *v.* Sparks, 7 Ind. 490.

[2] Sweet *v.* McAllister, 4 Allen, 353; Horne *v.* Bodwell, 5 Gray, 457; Bright *v.* Carpenter, 9 Ohio, 139; though see Johnson *v.* Crane, 16 N. H. 68; and see Oldham *v.* Broom, 28 Ohio St. 41. *Aliter*, when contravening the statute requiring contracts of suretyship to be in writing. Supra, §§ 952, 1059.

[3] Supra, § 1059; Maynard *v.* Fellows, 43 N. H. 255; Harris *v.* Brooks, 21 Pick. 195; Parks *v.* Brinkerhoff, 2 Hill (N. Y.), 663; Northumberland Bank *v.* Eyer, 58 Penn. St. 97; Dale *v.* Moffitt, 22 Ind. 113; Collins *v.* Gilson, 29 Iowa, 61; Day *v.* Billingsly, 3 Bush, 157; Jennings *v.* Thomas, 21 Miss. 617; Powell *v.* Thomas, 7 Mo. 440; Lewis *v.* Harvey, 18 Mo. 74.

[4] Patten *v.* Pearson, 55 Me. 39; Farnum *v.* Farnum, 13 Gray, 508; Driver *v.* Miller, 16 La. An. 131. See cases supra, § 1059.

[5] See supra, § 1044; Jones *v.* Horner, 60 Penn. St. 214; Clarke *v.* Dederick, 31 Md. 148; Jones *v.* Buffum, 50 Ill. 277.

[6] Munroe *v.* Bordier, 8 C. B. 862; Arbouin *v.* Anderson, 1 Q. B. 498; Hoffman *v.* Bank, 13 Wall. 181; Horn *v.* Fuller, 6 N. H. 511; Aldrich *v.* Stockwell, 9 Allen, 45; Brummel *v.* Enders, 18 Grat. 873.

instrument is overridden:[1] as, for instance, when a person signs a note as "cashier," or "treasurer," to prove the institution of which he is an officer;[2] where A. gives a note as "agent," to prove whom he really represented;[3] and when the note recites ambiguously the consideration, to explain the recital.[4]

VII. SPECIAL RULES AS TO OTHER INSTRUMENTS.

§ 1063. Releases, especially when under seal, partake of the nature of deeds, and are not susceptible, unless fraud or mutual mistake be set up, of contradiction or variation by parol.[5] It has been held that the principle above stated applies to unliquidated as well as to liquidated claims.[6]

Releases cannot be contradicted by parol.

§ 1064. Receipts, being informal and non-dispositive writings, may be modified, explained, or impugned by parol.[7] That this is the case in ordinary receipts for the payment of money is a necessary consequent of the infor-

Receipts may be corrected by parol.

[1] Wilson *v.* Tucker, 10 R. I. 578; Jamison *v.* Pomeroy, 9 Penn. St. 230; Haile *v.* Peirce, 32 Md. 327; Isler *v.* Kennedy, 64 N. C. 530; Lockwood *v.* Avery, 8 Ala. 502; Taylor *v.* Strickland, 37 Ala. 642.

[2] Baldwin *v.* Bank, 1 Wall. 234; Bank of Newburg *v.* Baldwin, 1 Cliff. 519; Farmers' Bank *v.* Day, 13 Vt. 36; Hovey *v.* Magill, 2 Conn. 680.

[3] Paige *v.* Stone, 10 Met. (Mass.) 160; Haile *v.* Peirce, 32 Md. 327; Baker *v.* Gregory, 28 Ala. 544; South. Life Co. *v.* Gray, 3 Fla. 262.

[4] Walker *v.* Clay, 21 Ala. 797; Garton *v.* Bank, 34 Mich. 271.

[5] Deland *v.* Amesbury, 7 Pick. 244; Wood *v.* Young, 5 Wend. 620; Stearns *v.* Tappin, 5 Duer, 294; Noble *v.* Kelly, 40 N. Y. 420; State *v.* Messick, 1 Houst. 347; Ill. Cent. R. R. *v.* Welch, 52 Ill. 183; Turnipseed *v.* McMath, 13 Ala. 44. That such an instrument, however, may be avoided by fraud, see Martin *v.* Righter, 10 N. J. Eq. 510.

[6] Noble *v.* Kelly, 40 N. Y. 420; citing Stearns *v.* Tappin, 5 Duer, 294.

[7] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & Ad. 313; Wallace *v.* Kelsall, 7 M. & W. 273; Bowes *v.* Foster, 2 H. & N. 779; Farrar *v.* Hutchinson, 9 Ad. & E. 641; Lee *v.* R. R. L. R. 6 Ch. Ap. 527; Rollins *v.* Dyer, 16 Me. 475; Richardson *v.* Reede, 43 Me. 161; Furbush *v.* Goodwin, 25 N. H. 425; Nye *v.* Kellum, 18 Vt. 594; Street *v.* Hall, 29 Vt. 165; Guyette *v.* Bolton, 46 Vt. 228; Corlies *v.* Howe, 11 Gray, 125; Pitt *v.* Ins. Co. 100 Mass. 500; Nelson *v.* Weeks, 111 Mass. 223; Calhoun *v.* Richardson, 30 Conn. 210; Coon *v.* Knap, 8 N. Y. 402; Sheldon *v.* Ins. Co. 26 N. Y. 460; Buswell *v.* Poineer, 37 N. Y. 312; Baker *v.* Ins. Co. 43 N. Y. 283; Foster *v.* Newborough, 58 N. Y. 481; Green *v.* Man. Co. 1 Thomp. & C. 5; Joslyn *v.* Capron, 64 Barb. 599; Bird *v.* Davis, 14 N. J. Eq. 467; Middlesex *v.* Thomas, 20 N. J. Eq. 39; Pleasants *v.* Pemberton, 2 Dall. 196; Penns.

mality of such instruments. But the rule is not limited to ordinary receipts. Thus in an action by an attaching officer against a receiptor, the latter is not estopped, by a receipt reciting the value of the goods, and that they are free from incumbrance, and agreeing to give them up when the officer should appoint, from setting up the intervening bankruptcy and discharge of the defendants in attachment.[1] Even where a creditor, upon payment of a portion of an undisputed account, gives a receipt in full, he is not thereby precluded from recovering the balance of the account, though the receipt was given intelligently, and there was no fraud or error.[2] To all classes of receipts is the rule applicable. A receipt, for instance, given by a fire or life insurance agent for the premium of a policy, may be explained by parol;[3] and so may a receipt given by such an agent stating that the receipt was "to be binding until policy is received;"[4] and so a receipt for a note with the words, "which I agree to account for on demand."[5] Where, also, a receipt is embodied in a promissory note, the receipt is open to explanation as fully as if it were in a separate instrument.[6] The same liberty extends to receipts indorsed on deeds or notes;[7] and to bankers' pass-

Ins. Co. *v.* Smith, 3 Whart. R. 520; Dutton *v.* Tilden, 13 Penn. St. 46; Gue *v.* Kline, 13 Penn. St. 60; Batdorf *v.* Albert, 59 Penn. St. 59; Russell *v.* Church, 65 Penn. St. 9; Cramer *v.* Shriner, 18 Md. 140; Walker *v.* Christian, 21 Grat. 291; Deford *v.* Seinour, 1 Ind. 532; Pauley *v.* Weisart, 59 Ind. 241; Carr *v.* Minor, 42 Ill. 179; Leonard *v.* Dunton, 51 Ill. 482; Elston *v.* Kennicott, 52 Ill. 272; Ditch *v.* Vollhardt, 82 Ill. 134; Rowe *v.* Wright, 12 Mich. 289; Bell *v.* Utley, 17 Mich. 508; Hammond *v.* Harrison, 21 Mich. 274; Schultz *v.* R. R. 44 Wis. 638; Wilson *v.* Derr, 69 N. C. 137; Clarke *v.* Deveaux, 1 S. C. 172; Dunagan *v.* Dunagan, 38 Ga. 554; Walters *v.* Odom, 53 Ga. 286; City Bank *v.* Kent, 57 Ga. 283; Hogan *v.* Reynolds, 8 Ala. 59; Oakley *v.* State, 40 Ala. 372; Motley *v.* Motley, 45 Ala. 555; Dunn *v.* Pipes, 20 La. An. 276; Draughan *v.* White, 21 La. An. 175; Borden *v.* Hays, 21 La. An. 581; Smith, in re, 22 La. An. 253; Williams *v.* State, 20 Miss. 58; Wallace *v.* Wilson, 30 Mo. 335; Grumley *v.* Webb, 44 Mo. 444; Byrne *v.* Schwing, 6 B. Mon. 199; Hawley *v.* Bader, 15 Cal. 44; Pool *v.* Chase, 46 Tex. 207. As to recitals of receipt of purchase money in deeds, see supra, § 1039.

[1] Lewis *v.* Webber, 116 Mass. 450.

[2] Ryan *v.* Ward, 48 N. Y. 20.

[3] Reyner *v.* Hall, 4 Taunt. 725; Ferebee *v.* Ins. Co. 68 N. C. 11. See Luckie *v.* Bushby, 13 C. B. 844; Farmers' Ins. Co. *v.* Bair, 82 Penn. St. 33.

[4] Scurry *v.* Ins. Co. 51 Ga. 624.

[5] Eaton *v.* Alger, 2 Abb. (N. Y.) App. 5.

[6] Smith et al. *v.* Holland, 61 N. Y. 635.

[7] Straton *v.* Rastall, 2 T. R. 366;

books.[1] A certificate of deposit issued by a bank is also merely evidence of debt, in the nature of a receipt, and parol evidence is admissible to explain it, as in the case of a receipt.[2]

§ 1065. A receipt in a policy of marine insurance is an exception to the rule, and is held to be conclusive,[3] though it is otherwise as to the adjustment of a loss made without full knowledge of the circumstances.[4] Nor, though the usual acknowledgment in a policy of insurance of the receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured, is it so as between the underwriters and the broker.[5]

Receipts for marine insurance are conclusive.

§ 1066. A party, however, may, as to innocent third parties, estop himself from disputing a receipt;[6] as where a warehouseman gives a receipt of goods, which the holder passes to a *bonâ fide* dealer.[7] "So, under circumstances which would create an estoppel by conduct, an acknowledgment of receipt of money or property will become binding even between the parties; as in the case of a receipt given by an attaching officer, with knowledge, for goods attached as the property of a third person, whereby the officer is prevented from levying upon other goods, and induced to leave those attached in the possession of the receiptor."[8] So a receipt by a

Receipts may be estoppels in favor of third parties.

Graves *v.* Key, 3 B. & Ald. 313. Supra, §§ 1042–4.

[1] Com. Bk. *v.* Rhind, 3 Macq. Sc. Cas. 643.

[2] Hotchkiss *v.* Mosher, 48 N. Y. 478.

[3] Arnould, Ins. 180, 181; Bigelow on Estoppel, 2d ed. 429; Mutual Ben. Co. *v.* Ruse, 8 Ga. 536; Illinois Co. *v.* Wolf, 37 Ill. 354.

[4] Luckie *v.* Bushby, 13 C. B. 844; Reyner *v.* Hall, 4 Taunt. 725; Shepherd *v.* Chewter, 1 Camp. 274; Adams *v.* Sanders, 4 C. & P. 25.

[5] Dalzell *v.* Mair, 1 Camp. 532; Anderson *v.* Thornton, 8 Ex. R. 428. See Farmers' Ins. Co. *v.* Bair, 82 Penn. St. 33.

[6] Bigelow on Estoppel, 2d ed. 429; Stackpole *v.* Robbins, 47 Barb. 212; Graves *v.* Dudley, 20 N. Y. 76. See Scott *v.* Whittemore, 27 N. H. 309; Curtis *v.* Wakefield, 15 Pick. 437.

[7] McNeil *v.* Hill, Woolw. 96; citing Austin *v.* Craven, 4 Taunt. 644; Whitehouse *v.* Frost, 12 East, 614; White *v.* Wilkes, 5 Taunt. 176; Conard *v.* Ins. 1 Peters, 386; Gardiner *v.* Snydam, 7 N. Y. 357; Gibson *v.* Bank, 11 Ohio St. 311. See Knights *v.* Wiffen, L. R. 5 Q. B. 660; supra, § 1039; yet, even in such cases, mistake may be set up. Second Nat. Bk. *v.* Walbridge, 19 Ohio St. 419.

[8] Bigelow on Estoppel, 2d ed. 430; citing Dewey *v.* Field, 4 Met. 381; Dezell *v.* Odell, 3 Hill, 215; Dresbach *v.* Minnis, 45 Cal. 223; Bleven *v.* Freer, 10 Cal. 172; Gaff *v.* Harding, 66 Ill. 61. To the same point, see James *v.* Bligh, 11 Allen, 4; Wakefield *v.* Stedman, 12 Pick. 562; Van

county treasurer, acknowledging the redemption of land sold for taxes, is part of a record title which cannot be contradicted by parol.[1] And if a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt may be conclusive as to payment by the agent.[2]

Bonds may be shown by parol to be payable on contingencies.

§ 1067. We have heretofore[3] seen that it is admissible to prove by parol that a written instrument is only an escrow, or that it was delivered with the understanding that it is not to go into effect except upon a contingency that has not happened. On the same reasoning it is admissible to prove by parol that a bond, by an agreement contemporaneous with its execution, is to lose its efficiency on the happening of a contingency.[4] But this is not allowable when the terms of the bond are thereby impugned.[5] Thus where a warrant of attorney was given to confess judgment at once, it was held inadmissible to prove by parol an agreement that judgment should only be entered on a specific contingency.[6]

Subscriptions cannot be contradicted by parol.

§ 1068. A subscription to pay money to a business, or other enterprise, may in one sense be regarded as a naked promise to pay a particular amount, and if so, it is to be treated as an ordinary dispositive writing, not *primâ facie* open to parol correction, yet subject to any equities that may exist between the parties.[7] When, however,

Ostrand *v.* Reed, 1 Wend. 424; Coon *v.* Knap, 8 N. Y. 402; and see Craig *v.* Lewis, 110 Mass. 377; Candee *v.* Burke, 4 Thomp. & C. 143; *S. C.* 1 Hun, 546; Stone *v.* Vance, 6 Ohio, 246; Dale *v.* Evans, 14 Ind. 288; Stapleton *v.* King, 33 Iowa, 28; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Brown *v.* Brooks, 7 Jones L. 93; Wilson *v.* Duer, 69 N. C. 137; Grumley *v.* Webb, 48 Mo. 562; Rice *v.* Crow, 6 Heisk. 28.

[1] Halsey *v.* Blood, 29 Penn. St. 319.

[2] Hunter *v.* Walters, L. R. 11 Eq. 292.

[3] Supra, §§ 927, 930.

[4] Chester *v.* Bank, 16 N. B. 336; Morrison *v.* Morrison, 6 Watts & S. 516; Leppoc *v.* Bank, 32 Md. 136. See, also, supra, § 255.

[5] Philadelphia R. R. *v.* Howard, 13 How. 307; Musselman *v.* Stoner, 31 Penn. St. 265; Chetwood *v.* Brittan, 5 N. J. Eq. 628; Towner *v.* Lucas, 13 Grat. 705; Wemple *v.* Knopf, 15 Minn. 440.

[6] Fulton *v.* Hood, 34 Penn. St. 365. See, also, Hendrickson *v.* Evans, 25 Penn. St. 441.

[7] Supra, §§ 920–3; Rutland, &c. R. R. *v.* Crocker, 29 Vt. 540; O'Hear *v.* De Goesbriand, 33 Vt. 593; Bull *v.*

subscriptions are interdependent, one made on the faith of the other, then no such equities can be introduced; and each subscriber is estopped, so far as concerns other *bonâ fide* subscribers, from denying the binding effect of his subscription. Nor can a subscriber to a corporation so set up secret parol conditions to modify his subscription.[1]

Talcott, 2 Root, 119; Hackney *v.* Ins. Co. 4 Barr, 185; Coil *v.* Pittsburg College, 40 Penn. St. 445; Erie P. R. *v.* Brown, 25 Penn. St. 156; Plank Road *v.* Arndt, 31 Penn. St. 317; Custar *v.* Titusville, 63 Penn. St. 385; Jones *v.* Turnpike Co. 7 Ind. 547; Sourse *v.* Marshall, 23 Ind. 194.

[1] Gilman *v.* Veazie, 24 Me. 202; George *v.* Harris, 4 N. H. 533; White Mountain R. R. *v.* Eastman, 34 N. H. 124; Stewards of Meth. Ch. *v.* Town, 49 Vt. 29; Brigham *v.* Meed, 10 Allen, 245; Turnpike Co. *v.* Thorp, 13 Conn. 173; Mann *v.* Cook, 20 Conn. 178; Palmer *v.* Lawrence, 3 Sandf. S. C. 161; Crane *v.* Elizabeth Ass. 29 N. J. L. 302; Garrett *v.* R. R. 78 Penn. St. 465; Banet *v.* R. R. 13 Ill. 509; Corwith *v.* Culver, 69 Ill. 502; Burhans *v.* Johnson, 15 Wis. 286; Smith *v.* Tallahassee, 30 Ala. 650. See Angell & Ames on Corp. § 146.

In Caley *v.* R. R. 80 Penn. St. 363, the question in the text is thus discussed by Sharswood, J.: "Where one subscribes to the stock of a public corporation prior to the procurement of its charter, such subscription is to be regarded as absolute and unqualified, and any condition attached thereto is void. Bedford Railroad Co. *v.* Bowser, 12 Wr. 29. The reason for this rule is obvious; the commissioners, who are appointed to receive such subscriptions, are not the accredited agents of the corporation, for it is not yet in being, but are rather the agents of the public, acting under limited and definite powers which every one is bound to know; and if he be misled by representations which such agents have no right to make, it is his own folly. Any other rule would lead to the procurement, from the commonwealth, of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable. When, however, the company is once organized a different order prevails. Such a company may receive conditional subscriptions for its stock, and when it does so do, it is bound to the performance of the conditions therein contained. Railroad Co. *v.* Stewart, 5 Wr. 54; Railroad Co. *v.* Hickman, 4 Ca. 318. Doubtless the act of incorporation might alter this rule, and put all stock subscriptions within the category of and subject them to the same conditions as those made before organization. But the Act of 1849, subject to the provisions of which the plaintiff company was erected, has in it nothing to indicate that the legislature intended to restrict the power which corporations ordinarily possess over their own stock. It follows that the plaintiff might dispose of its stock as of any other of its property in such manner as, in its judgment, might best subserve the purposes of its erection, and to this end might receive conditional subscriptions for such use.

"Again, after the organization of a company, chartered for some public purpose, as in this case for the building

§ 1069. Where, however, a subscription has been fraudulently obtained, this fraud may be set up as a defence to an action on the subscription, as to the party guilty of the fraud.[1] But it is otherwise when the false representations which constitute the alleged fraud were false representations of *law*.[2] Parol evidence is admissible to show, in case of misdescription, for what object the subscription was intended.[3]

Fraud may be a defence.

§ 1070. So far as bills of lading are receipts, they are open to explanation by parol evidence.[4] Nor does the fact that the ship-

of a railroad, if one subscribe, without condition, to the stock of such company, he does so in view of the general powers conferred upon it by the legislature, and he is responsible, with his fellow corporators, for the proper and lawful exercise of those powers; and he cannot, therefore, set up an unlawful act of the directors as an excuse for the non-payment of his subscription, for it is within his own power to prevent such abuse of authority.

"As was said in Graff *v.* The Railroad Co. 7 Casey, 489, the contract of subscription is not only with the company, but also with all the other shareholders; hence the subscriber may not set up even the fraud of the directors in order to defeat his contract. But whenever a power intervenes, over which he can have no control, to alter, in a material point, the character of his contract without his assent, actual or implied, such intervention works his release; as where, by an act of the general assembly, a turnpike company was authorized to alter the termini of its road, in that case it was held that a subscriber to its stock was released from his contract of subscription. Turnpike Co. *v.* Phillips, 2 Pa. R. 184; Plank Road Co. *v.* Arndt, 7 Ca. 317. The reason for this is, that such termini form part of the conditions which enter into the contract, and as the supreme power, over which the subscriber has no control, intervenes to alter such conditions, he is thereby released. A contrary doctrine would involve the unreasonable supposition that a contract might be imposed upon a party who had never assented thereto."

In Garrett *v.* R. R. 78 Penn. St. 465, it was held that where a subscriber to stock of a proposed railroad allowed his name to remain on the articles of association until final organization of the company, he cannot withdraw, although no part of his subscription had been paid up. Nor will he be permitted, in an action against him for the amount due on his subscription, to set up, as a defence, any alleged invalidity of the corporation, by evidence that it had failed to comply with essential conditions prescribed in its charter.

As to obligations of stockholders, see Muir *v.* Bank, infra, § 1249.

[1] Wharton on Agency, § 165; Kennedy *v.* Panama Co. L. R. 2 Q. B. 580; New York Co. *v.* De Wolf, 31 N. Y. 273; Jones *v.* Turnpike Co. 7 Ind. 547; Graff *v.* R. R. 31 Penn. St. (7 Cas.) 489.

[2] Upton *v.* Tribilcock, 91 U. S. (1 Otto) 5; Rashell *v.* Ford, L. R. 2 Eq. 750; Lewis *v.* Jones, 4 B. & C. 506; Fish *v.* Cleland, 33 Ill. 243.

[3] Musselman *v.* R. R. 2 Weekly Notes of Cases, 105; Turnpike Co. *v.* Myers, 6 S. & R. 12.

[4] Bates *v.* Todd, 1 Mood. & R. 106;

pers gave an order to the warehousemen for a cargo, and then settled with them on the faith of the bill of lading, which for some cause was erroneous, take the case out of the general rule.[1] It is otherwise when the bill of lading involves a contract, in which case parol evidence, except in cases of fraud or mistake, cannot be received to vary the terms.[2]

Bills of lading are open to explanation.

Berkeley *v.* Watling, 7 Ad. & E. 29; Mar. Ins. Co. *v.* Ruden, 6 Cranch, 338; Sutton *v.* Kettell, 1 Sprague, 309; The Lady Franklin, 8 Wall. 325; The Delaware, 14 Wall. 579; The Invincible, 1 Lowell, 225; The I. W. Brown, 1 Biss. 76; O'Brien *v.* Gilchrist, 34 Me. 554; Richards *v.* Doe, 100 Mass. 524; Grace *v.* Adams, 100 Mass. 505; Graves *v.* Harwood, 9 Barb. 477; Putnam *v.* Furman, 71 N. Y. 590; Cafiero *v.* Welsh, 3 Leg. Gaz. 21; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; Mitchell *v.* Express Co. 46 Iowa, 214; Atwell *v.* Miller, 11 Md. 348; Cincin. R. R. Co. *v.* Pontius, 19 Ohio St. 221. See Erb *v.* Keokuk R. R. 43 Mo. 53; Wayland *v.* Moseley, 5 Ala. 430; McTyer *v.* Steele, 26 Ala. 487; Hedricks *v.* Morning Star, 18 La. An. 353; Steamboat *v.* Webb, 9 Mo. 193.

[1] The I. W. Brown, 1 Biss. 76.

"As to the quantity of goods delivered to a carrier, the bill of lading furnishes *primâ facie* evidence only, and is always open to contradiction and explanation by parol evidence, like any receipt. Wolfe *v.* Myers, 3 Sandf. Sup. Ct. R. 7; Meyer *v.* Peck, 29 N. Y. 590. In the case of Myer *v.* Peck, it was held that a stipulation in a bill of lading, that 'any damage or deficiency in quantity, the consignee will deduct from balance of freight due the captain,' will not be understood as a guarantee that the captain had received the whole quantity of goods specified. That case is an authority in point in this. The language used in this bill of lading, is: 'All damage caused by the boat or carrier, or deficiency of cargo from quantity, as herein specified, to be paid by the carrier and deducted from freight.' Here is an agreement that the carrier will be bound by the quantity specified, or that the bill of lading shall furnish the only evidence of the quantity. Such an agreement might, doubtless, be made by a carrier; but the language used would have to be quite clear and explicit to preclude the carrier from showing by parol a mistake in the quantity." Earl, C., Abbe *v.* Eaton, 51 N. Y. 413.

[2] "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be, that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abbott on Shipping (7th Am. ed.), 323; O'Brien *v.* Gilchrist, 34 Me. 558; 1 Parsons on Shipping, 186; Maclachlan on Shipping, 338; Emerigon on Insur. 251. Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or

A bill of lading in such case stands on the footing of all other contracts, and cannot be varied by parol unless on proof of fraud or gross concurrent mistake.[1] Thus it has been held on high authority[2] that a clean bill of lading imports that

charterer of the vessel, and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods, as between the shipper and the carrier, by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley *v.* Bigelow, 12 Pick. 307; The Eddy, 5 Wallace, 495. Such an instrument is twofold in its character: that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Maclachlan on Shipping, 338, 339; Smith's Mercantile Law (6th ed.), 308. Beyond all doubt, a bill of lading in the usual form is a receipt for the quantity of goods shipped, and a promise to transport and deliver the same as therein stipulated. Bates *v.* Todd, 1 Moody & Robinson, 106; Berkeley *v.* Watling, 7 Adolphus & Ellis, 29; Wayland *v.* Mosely, 5 Alabama, 430; Brown *v.* Byrne, 3 Ellis & Blackburne, 714; Blaikie *v.* Stembridge, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is only *primâ facie* evidence of the fact, and not conclusive, and, therefore, the facts which it recites may be contradicted by oral testimony; but in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. 1 Greenleaf's Evidence (12th ed.), 305; Bradley *v.* Dunipace, 1 Hurlstone & Colt. 525. Text-writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state or condition was bad, or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites; but in all other respects it is to be treated like other written contracts. Hastings *v.* Pepper, 11 Pickering, 42; Clark *v.* Barnwell et al. 12 Howard, 272; Ellis *v.* Willard, 5 Selden, 529; May *v.* Babcock, 4 Ohio, 346; Adams *v.* Packet Co. 5 C. B. (N. S.) 492; Sack *v.* Ford, 13 C. B. (N. S.) 100." Clifford, J., in The Delaware, 14 Wall. 600.

As to invoice, see Dows *v.* Bank, 91 U. S. (1 Otto) 618. Infra, § 1141.

[1] Ibid.; Adams *v.* Packet Co. 5 C. B. (N. S.) 492; Bradley *v.* Dunipace, 1 Hurl. & C. 525; Clark *v.* Barnwell, 12 How. 272; Hasting *v.* Pepper, 11 Pick. 42; Long *v.* R. R. 50 N. Y. 76; Creery *v.* Holly, 14 Wend. 28; Little Rock R. R. *v.* Hall, 32 Ark. 659.

[2] Nelson, J., Creery *v.* Holly, 14 Wend. 28. See The Wellington, 1 Biss. 279.

the goods are stowed under deck, and that parol evidence, that the vendor agreed that the goods should be stowed on deck, could not be legally received, even in an action by the vendor against the purchaser for the price of the goods, which were lost in consequence of the stowage of the goods in that manner by the carrier. Even when it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; and that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck, though the court admitted that where there is a well known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under the deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner.[1] So in a Connecticut case, where testimony was offered by the carrier to prove a verbal agreement that the goods might be stowed on deck,[2] the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument. Evidence of usage in a particular trade, it is true, is admissible to show that certain goods in that trade may be stowed on deck.[3] "But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition."[4]

§ 1071. Hereafter we will see[5] how far an applicant for insurance may explain the written statement of his agent, who is

[1] Clifford, J., in The Delaware, 14 Wall. 600; citing Sproat *v.* Donnell, 26 Me. 187. See, also, 2 Taylor on Evidence, §§ 1062, 1067; Hope *v.* State Bank, 4 Louisiana R. 212; 1 Arnould on Insurance, 70; Lapham *v.* Insurance Co. 24 Pick. 1.

[2] Barber *v.* Brace, 3 Conn. 14.

[3] 1 Smith's Leading Cases (6th American edition), 837, cited by Clifford, J., The Delaware, *ut supra.*

[4] Clifford, J., The Delaware, *ut supra*, citing The Reeside, 2 Sumner, 570; 1 Duer on Ins. § 17. See, however, Vernard *v.* Hudson, 3 Sumner, 406; Sayward *v.* Stevens, 3 Gray, 101.

[5] Infra, § 1172.

Insurance applications may be explained by parol.

also agent of the insurer. We have now to observe that applications made by parties themselves, and statements of their losses, are in like manner open to explanation.[1]

[1] Connecticut Ins. Co. *v.* Schwenk, 94 U. S. 593. In this case the court say: —

"It has repeatedly been held that errors and omissions in the proofs of loss furnished to insurers in cases of fire insurance may be corrected or supplied at the trial. In McMasters *v.* The Insurance Co. of North Amer. 55 N. Y. 222, the plaintiff had stated in his proofs of loss that he had other insurance on the same property, a fact which, if true, avoided his policy, and he had verified his statement by his oath. Yet he was held not to be estopped by the statement, and he was permitted to prove at the trial that the statement was a mistake. Hubbard *v.* The Hartford Fire Ins. Co. 33 Iowa, 325, is to the same effect. So are the Ætna Fire Ins. Co. *v.* Allen, 48 Ill. 431; Comm. Fire Ins. Co. *v.* Huckenburger, 52 Ibid. 464, and numerous other cases that might be cited. But it is contended that evidence to show Nolan's affidavit was a mistake ought not to have been admitted without notice to the insurers before the trial that such evidence would be offered, and in support of this position Campbell *v.* The Charter Oak Fire & Marine Ins. Co. 10 Allen, 213, and Irving *v.* The Excelsior Ins. Co. 1 Bosw. 500, are cited. In the former of these cases it was held, that if an incorrect statement of a material matter has been made through mistake in a notice and proof of loss furnished to insurers, in compliance with a requirement in the conditions of insurance annexed to a policy, and no amended statement has been furnished to the insurers before the trial of an action upon the policy, the insured cannot be allowed to prove the mistake and show that the facts were not as therein stated. But that case is very different from the one we have before us. There a true statement of the material fact in the proofs of loss was called for by the policy, and it was made a condition precedent to the insurer's liability. The erroneous statement, therefore, was relied upon by the assured as the notice required by the conditions of the policy, and as a necessary basis of his suit. It must have been in substance averred in his declaration, and for these reasons the insurers were misled in regard to a matter which the assured had obligated himself to state truly as a condition precedent to his right to remuneration for his loss. But even in that case the court declined to say that the incorrect statement in the proofs of loss could not be corrected. All that was decided was that the mistake and the correction could not be first made known to the insurers at the trial of the action to recover for the loss, and obviously for the reason that the correction then would be a surprise to them. Irving *v.* The Excelsior Fire Ins. Co. is substantially the same. Neither of the cases can be considered as deciding that an insured is estopped by an erroneous statement of a fact in the proofs of loss furnished by him, even though a true statement of that fact be a condition of the policy. He may correct it, though not first at the trial. But in the case we have in hand it was not a condition of the policy that a statement of the age of the deceased should accompany the proofs

of death. The insurer's liability was independent of that. Nolan's affidavit, therefore, was superfluous. And it was but a statement of his conjecture. He stated that according to the best of his judgment the person whose life was insured was between sixty-six and seventy years of age at the time of his death. This can hardly be regarded as a contradiction of the statement made in the application. The insurers ought not to have been misled by it, and it does not appear that they were. They alleged no surprise when the evidence was offered to show that Nolan had no knowledge on the subject and that he was mistaken. We cannot, therefore, say there was error in receiving the evidence."

BOOK III.

EFFECTS OF PROOF.

CHAPTER XIII.

ADMISSIONS.

I. General Rules.
- Admissions not to be considered as strictly evidence, § 1075.
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- Estoppels do not bind as to strangers, § 1078.
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- Credibility of admission a question of fact, § 1080.
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- Estoppels may be also substitutes for proof, § 1086.
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- Such admissions must be specific to have weight, § 1089.
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- Admissions may prove contents of writings, § 1091.
- Such admissions must go to facts, § 1092.
- Must be strictly guarded, § 1093.
- Admissions not excluded because party could be examined, § 1094.
- Admissions may prove execution of document, unless when there are attesting witnesses, § 1095.
  - May prove marriage, § 1096.
  - May prove domicil, § 1097.
  - But not record facts, § 1098.
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  - By Roman law cannot be received when self-serving, § 1100.
  - And so by our own law, § 1101.
  - Except when part of the *res gestae*, or when stating symptoms, or fixing dates, § 1102.
- Whole context of a written admission must be proved, § 1103.
- Not always so as to answers in equity under oath, § 1104.
- Otherwise at common law, § 1105.
- Practice as to exhibits, § 1106.
- Whole of applicatory legal procedure usually goes in, § 1107.
- So of whole relevant part of a conversation, § 1108.
- So of testimony, reproduced from a former trial, § 1109.

II. Admissions in Judicial Proceedings.
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Pleadings may be admissions, § 1116.
But collaterally pleas do not always admit that which they do not contest, § 1116 *a*.
Admissions by plea are rebuttable, § 1117.
So of process, § 1118.
Affidavits and bill and answers in chancery may be put in evidence against party making them, § 1119.
Party's testimony in another case may be used against him, § 1120.
Inventory an admission by executor, § 1121.

III. Documentary Admissions.
Written admissions entitled to peculiar weight, § 1122.
Instrument may be an admission, though undelivered, § 1123.
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Notes and acknowledgments are evidence of indebtedness, § 1125.
So are indorsements on negotiable paper, § 1126.
So may be letters, § 1127.
And telegrams, § 1128.
And memoranda, § 1129.
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So may partnership books, § 1132.
So may accounts stated, § 1133.
Whole account may go in, § 1134.
So may indorsements of interest against the party making them; but not to suspend statute of limitations, § 1135.

IV. Admissions by Silence or Conduct.
Silence of a party during another's statements may imply admission, § 1136.
Weight depends upon circumstances, § 1137.
If party was unable or not called upon to answer, such evidence is valueless, § 1138.
So as to party acquiescing in testimony of witness, or reception of documents, § 1139.
Otherwise as to silence on reception of accounts, § 1140.
So of invoices, § 1141.
Silent admissions may estop, § 1142.
Extension of estoppels of this class, § 1143.
Party permitting another to deal with his property may be estopped, § 1144.
And so as to any contractual representation of a fact, § 1145.
Party knowingly contracting on an erroneous assumption cannot afterwards repudiate, § 1146.
Party selling cannot set up invalidity of sale, § 1147.
Owner of land bound by tacit representations, § 1148.
Subordinate cannot dispute superior's title, § 1149.
Other party's action must be influenced, and the misleading conduct must impose a liability based on contract or negligence, § 1150.
Assumed character cannot afterwards be repudiated, § 1151.
But silence, on being told of an unauthorized act, does not estop, § 1152.
Admitting official character of a person is a *primâ facie* admission of his title, § 1153.
Letters in possession of a party not ordinarily admissible against him, § 1154.
Admissions made, either without the intention of being acted on, or without being acted on, do not estop, nor can third parties use estoppel, § 1155.

V. Admissions by Predecessor in Title.
Self-disserving admissions of predecessor in title may be received against successor, § 1156.
Such declarations must not conflict with record title, must not be hearsay, and must be self-disserving, § 1157.

Executors are so bound by their decedent, § 1158.
Landlord's admissions receivable against tenant, § 1159.
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But admissions of party holding a subordinate title do not affect principal, § 1161.
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Vendee or assignee of chattel bound by vendor's or assignor's admissions, § 1163.
Indorser's declarations inadmissible against an indorsee, § 1163 *a*.
In suits against strangers, declarant, if living, must be produced, § 1163 *b*.
Bankrupt assignee bound by bankrupt's admissions, § 1164.
Admissions of predecessor in title cannot be received if made after title is parted with, § 1165.
Exception in case of concurrence or fraud, § 1166.
Declarations of fraud cannot infect innocent vendee, § 1167.
Self-serving admissions of predecessor in title inadmissible, § 1168.
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VI. ADMISSIONS OF AGENT, AND ATTORNEY, AND REFEREE.

Agent employed to make contract binds his principal by his representations, § 1170.
And this though the representations were unauthorized, § 1171.
Applicant for insurance may contradict written statement made by agent, § 1172.
Admissions of agent receivable when part of the *res gestae*, § 1173.
So in torts, if coincident with the act charged, § 1174.
When admissions are not by a general agent in the scope of his business, nor part of the *res gestae*, special authorization must be proved, § 1175.
So as to torts, § 1176.
General agent may make non-contractual admissions, § 1177.
Non-contractual admissions are open to correction, § 1179.
After business is closed, agent's power of representation ceases, § 1180.
Servant's admissions are subject to the same restrictions as to ime, § 1181.
As to scope are more limited than those of other agents, § 1182.
Agency must be established *aliunde*, § 1183.
Attorney's admissions bind client, § 1184.
Attorney's admissions may be used by strangers, § 1185.
Implied admissions of counsel bind in particular case, § 1186.
Attorney's authority must be proved *aliunde*, § 1187.
So of admissions of attorney's clerk, § 1188.
Attorney's admissions may be recalled before judgment, § 1189.
Admissions of referee bind principal, § 1190.
Party not estopped by unilateral reference, § 1191.

VII. ADMISSIONS BY PARTNERS AND PERSONS JOINTLY INTERESTED.

Persons jointly interested may bind each other by admissions, § 1192.
Such declarations must relate to a joint business, § 1193.
Admissions of partners reciprocally admissible, § 1194.
As to acknowledgment to take debt out of statute, § 1195.
Such power ceases at dissolution of connection, § 1196.
So as to joint contractors, § 1197.
Persons interested, but not parties, may affect suit by admissions, § 1198.
But mere community of interest does not create such liability, § 1199.
Executors against executors, indorsers against indorsees, § 1199 *a*.
Declarations of declarant cannot establish against others his interest with them, § 1200.
Authority terminates with relationship, § 1201.
Admissions in fraud of associates may be rebutted, § 1202.
Self-serving statements of associates inadmissible, § 1203.
In torts, co-defendant's admissions

not to be received against the others, unless concert is proved, § 1204.
But where conspiracy is proved admissions of co-conspirators are receivable, § 1205.
But not after conspiracy closed, § 1206.
VIII. Admissions by Trustees, Officers, and Principals.
Admissions of nominal party cannot prejudice real party, § 1207.
Guardian's admissions not receivable against ward, § 1208.
Public officer's admissions may bind constituent, § 1209.
Representative's admissions inoperative before he is clothed with representative authority, § 1210.
And so after he leaves office, § 1211.
Principal's admissions receivable against surety, § 1212.
Cestui que trust's admissions bind trustee, § 1213.
IX. Admissions of Husband and Wife.
Husband's declarations may be received against wife, § 1214.
His agency must be proved *aliunde*, § 1215.
Wife's admissions may be received when she is entitled to act juridically, § 1216.
Her admissions may bind her husband, § 1217.
May bind her trustees, § 1218.
May bind her representatives, § 1219.
Admissions of adultery to be closely scrutinized, § 1220.

I. GENERAL RULES.

§ 1075. Whether an extra-judicial admission is evidence is a question much agitated by jurists both early and recent. In a strict and scientific sense, such an admission is not so much evidence, as a dispensation from evidence. It may, it is true, when offered as a *quasi* contract between the parties (*e. g.* when the plaintiff, in the business on which the suit is brought, admits something, and on this the defendant acts), amount to an estoppel.[1] But in other cases it is merely a waiver, by one party, of his right that the other party should be required to prove a particular fact in issue. In such cases, therefore, an admission is a fact to be proved by evidence, not evidence to prove a fact. In this sense the Roman law speaks when it declares that an admission is not *probatio*, but *levamen probationis*.[2] Admissions, therefore, in the present chapter, are treated rather as things to be proved, than as a mode of proving things.

Admissions not strictly "evidence."

§ 1076. An admission, to have the effect of conceding, either wholly or *primâ facie*, an adversary's case, must relate to a past or present state of facts. If I say, "I now owe you so much," this may be treated as an admission.

An admission must relate to existing conditions.

[1] Supra, § 920.

[2] See Bald. in L. 3 Cod. iv. 30, qu. 10; Mascard. I. qu. 7, nr. 11; Pacian, L. C. 11, nr. 10; Endemann, 135. See to this point, Edmunds *v.* Groves, 2 M. & W. 642.

If I say, "I will pay you so much in the future," this is not an admission, unless, with other evidence, it implies a present indebtedness. This distinctive feature of admissions is recognized in Roman jurisprudence as well as in our own. "Qua de causa recte dicemus, arcaria nomina nullam facere obligationem, sed obligationis factae *testimonium* praebere."[1] "Verbis: quod sua quisque voce protestatus est, id infirmaret, testimonioque proprio resisteret."[2] "Quum res non instrumentis gerantur, sed in haec rei gestae *testimonium* conferatur."[3] If an admission, when viewed in this sense, is to be effective, it must relate to the present, not to the future, and must be in the concrete.[4] From it is thereby excluded the assumption that the declarant intends to establish an obligatory relation with another.[5] As has been well stated,[6] the declarant draws simply from his own knowledge or recollection, and turns, therefore, only to the past; the contractant, on the other hand, establishes, in connection with his co-contractor, a new legal relation, and turns to the future. The *promise* is productive; the *admission* simply reproductive. This condition of retrospectiveness applies also to estoppels. "An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made."[7]

§ 1077. *Extra-judicial* admissions may be either contractual (being in such case dispositive),[8] constituting an estoppel when they form part of the statements by which one party is induced to contract with the other; or they are non-contractual and non-dispositive, when they consist of casual statements, not part of a contract with the

Non-contractual admissions do not conclude, and may be rebutted.

[1] Gaius, Inst. iii. § 131.

[2] C. 13; C. 4, 30.

[3] C. 12; C. 4, 19.

[4] Mabley *v.* Kittleberger, 37 Mich. 360.

[5] Gönner, Handb. des Proc. ii. 46; Hesse, juristisch. Probleme, 24.

[6] Hesse, *ut supra.*

[7] Field, J., Insurance Company *v.* Mowry, 96 U. S. 547.

[8] To documents, generally, the distinction, in this respect, is expressed by the terms *dispositive* and *non-dispositive*, since under documents fall wills, which cannot be spoken of as contractual. As all admissions, on the other hand, are either contractual or non-contractual, I here adopt the latter terms as, in this relation, more exact. It should be remembered that a document which may be void contractually, for want of due formalities, may be receivable as a non-contractual admission of some particular fact in the case. Crawford *v.* Jones, 54 Ala. 459; supra, § 698; infra, § 1124.

other party, or not uttered in such a way as to induce another to alter his position in consequence. Supposing an admission is set up, not as the basis of a contract, but simply as the concession of a fact on which the opposite party relies to make out his case, then the admission, as we have already seen, is not a *probatio*, but a *levamen probationis;* it does not *prove* a fact, in the strict sense, when offered against the declarant, but it relieves the party relying on it from proving such fact, thereby throwing the burden of disproving on the declarant.[1] By the scholastic jurists such admissions were spoken of sometimes as half proofs; sometimes as presumptions. With us, evidence that they were made may be admissible, either as yielding presumptions against the party charged, or as relieving (under ordinary circumstances) the party offering them from the necessity of more formal proof.[2] At the same time it must be remembered that they are not conclusive proof of that which they state; that they may be readily neutralized by proof that they were uttered in ignorance, or levity, or mistake;[3] and hence that they are, at the best, to be regarded

[1] Mascard. I. C. No. 26; Endemann, 137.

[2] Infra, § 1088; Hamilton *v.* Paine, 17 Me. 219; Pike *v.* Wiggin, 8 N. H. 356; Tenney *v.* Evans, 14 N. H. 343; Plummer *v.* Currier, 52 N. H. 287; Goodnow *v.* Parsons, 36 Vt. 46; Loomis *v.* Wadhams, 8 Gray, 557; Linsley *v.* Bushnell, 15 Conn. 225; Doyle *v.* St. James's Church, 7 Wend. 178; Black *v.* Lamb, 12 N. J. Eq. 108; Silvis *v.* Ely, 3 Watts & S. 420; McGill *v.* Ash, 7 Penn. St. 397; Wolf *v.* Studebaker, 65 Penn. St. 459; Brandywine R. R. *v.* Ranck, 78 Penn. St. 454; Hope *v.* Evans, 4 Sm. & M. 321; Fidler *v.* McKinley, 21 Ill. 308; Secor *v.* Pestana, 37 Ill. 525; Higgs *v.* Wilson, 3 Metc. (Ky.) 337; Harvey *v.* Anderson, 12 Ga. 69; Ector *v.* Welsh, 29 Ga. 443.

[3] McCraw *v.* Ins. Co. 78 N. C. 149; Steele *v.* Wood, 78 N. C. 365.

Of this an illustration given in the Roman books is as follows: A. writes to B., asking for a loan of money. B. answers saying that he has no money at his disposal, and has just been forced to borrow 10 pieces of gold from C. C., upon receiving this information, sues B. for ten pieces of gold, and puts the letter in evidence. The letter, it is held, is not sufficient to sustain C.'s suit. In such a case it might readily be assumed that B. might have been influenced, in the statement made as to C.'s loan, by a desire to get rid of A.'s importunities; nor is it necessary to suppose that the statement was a pure falsehood, for the loan may have been expected, or B. may have had reason to suppose, though erroneously, that it was actually received. In weighing a non-contractual admission, also, it is important to inquire whether the party making the statement expects at the time he makes it that it will work to his advantage. Men readily believe what they wish to be true; and even supposing that the declarant makes his declaration honestly, the fact that

as only cumulative proof, which afford but a precarious support, and on which no party should be content to rest his case.[1] This is eminently the case when the party who made the admissions is deceased, in which case admissions alleged to have been made by him should be cautiously weighed;[2] or when there is any suspicion attachable to the admission as a class, as is the case with admissions of adultery;[3] or when they on their face appear to have been uttered in order to elude inquiry.[4] In fine, where the

he makes it, when its utterance is apparently beneficial to himself, does not justify us in juridically assuming its verity. The same observation may be made as to confessions which may be instigated, as is the case with some of those of Byron and Rousseau, by a morbid desire of notoriety. In fine, to enable us to repose confidence in a party's admissions, they must be made at a time when the person making them believed them to be against his interest. In the Roman law, this is laid down as a test which determines the value to be attached to all admissions by a party. In our own law, while we cannot apply this test so as to determine the admissibility, it is of much value in determining credibility. And even as to admissibility, if we exclude all confessions which are induced by the hope of an advantage held out to the party confessing by a person in authority, the same rule should be good as to admissions in civil suits.

[1] Snow *v.* Paine, 114 Mass. 520; Garrison *v.* Akin, 2 Barb. 25; Tracy *v.* McManus, 58 N. Y. 257; Quarles *v.* Littlepage, 2 Hen. & M. 401; Horner *v.* Speed, 2 Patt. & H. 616; Chicago R. R. *v.* Button, 68 Ill. 409; Clark *v.* Larkin, 9 Iowa, 391; Martin *v.* Algona, 40 Iowa, 390; Pillow *v.* Thomas, 57 Tenn. 121; Printup *v.* Mitchell, 17 Ga. 558; Crockett *v.* Morrison, 11 Mo. 3; Cafferatta *v.* Cafferatta, 23 Mo. 235; O'Brien *v.* Flynn, 8 La. An. 307. See, as qualifying the text, Mauro *v.* Platt, 62 Ind. 450. That the acknowledgment of a signature to a note does not conclude the party making it, see Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 Mass. 1. See supra, § 705.

[2] Supra, § 467; Pollock *v.* Ray, 85 Penn. St. 428; Dupre *v.* McCright, 6 La. An. 146; Wilder *v.* Franklin, 10 La. An. 279; Croizet's Succession, 12 La. An. 401.

[3] Supra, § 483; infra, § 1220; Lyon *v.* Lyon, 62 Barb. 138; Prince *v.* Prince, 25 N. J. Eq. 310; Evans *v.* Evans, 41 Cal. 103; Mathews *v.* Mathews, 41 Tex. 331.

As to admissions made by a person when intoxicated, see Gore *v.* Gibson, 13 M. & W. 623; Jefferds *v.* People, 5 Parker C. R. 522; State *v.* Bryan, 74 N. C. 351; McCraw *v.* Ins. Co. 78 N. C. 149; Pillow *v.* Thomas, 57 Tenn. 121. See supra, §§ 401–3.

As to talking in sleep, see Best's Evid. § 529; Whart. Cr. Law, 7th ed. § 684; People *v.* Robinson, 19 Cal. 40.

[4] The student will find the distinctions in the text expanded with great subtlety and clearness in Hesse's Juristische Probleme, Jena, 1872. Admissions, in this interesting treatise, are treated: (1.) As confessions; (2.) As statements of account; and (3.) As estoppels, the latter being viewed as constituting an Anerkennungsvertrag.

party seeking to prove admissions in no way altered his position in consequence of their utterance, the party making them can always prove their untruth,[1] though not by introducing subsequent inconsistent declarations.[2]

Estoppels do not bind as to strangers.

§ 1078. It should also be remembered, that estoppels can never bind as to strangers, since as to strangers they are always non-contractual;[3] and that even recitals in deeds, which estop the parties, may be contradicted by strangers.[4]

Loose talk does not usually estop.

§ 1079. To constitute an estoppel, also, it is usually necessary that the statement or conduct charged should have been intentional, with the object of inducing the other party to change his situation in consequence. A party will not be estopped by information given by him merely informally, as a matter of conversation, with no intention of establishing a contractual relation with the party to whom he speaks; it being the duty of the parties asking him for such information to notify him, if they would bind him, that they intended to act upon his answers.[5] At the same time a party, by negligence in asserting a claim at a time when strangers are seeking *bonâ fide* to buy a property on which such claim is chargeable, may be afterwards estopped from setting up such claim against such strangers.[6]

Credibility of admissions a question of fact.

§ 1080. Truthfulness, however, as we have already observed, being essential to a non-contractual admission (as distinguished from an estoppel), the credibility of such an admission is a question of fact, resting on the presumption that no prudent man would declare an untruth to his own disadvantage. Quum legibus nostris dictum sit, quicunque *quis pro se dixerit aut scripserit*, ea nihil ipsi prodesse neque creditoribus praejudicare."[7] "Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi

[1] Herne *v.* Rogers, 9 B. & C. 577; Newton *v.* Belcher, 1 Q. B. 921; Newton *v.* Liddiard, 12 Q. B. 927; Atty. Gen. *v.* Stephens, 1 Kay & J. 748; Depue *v.* Place, 7 Penn. St. 428.

[2] Kean *v.* Ellmaker, 7 S. & R. 1; Galbraith *v.* Green, 8 S. & R. 85.

[3] See cases cited supra, § 923; infra, § 1083, notes to § 55.

[4] R. *v.* Neville, Peake, 91; Carter *v.* Carter, 1 K. & J. 649; Mayor *v.* Blamire, 8 East, 487. See supra, § 1041; infra, § 1088.

[5] Hackett *v.* Callender, 32 Vt. 99. See cases in Whart. Cr. Law, tit. "False Pretences," holding that false "puffs" are not false pretences.

[6] Storrs *v.* Baker, 6 Johns. Ch. 166. Infra, §§ 1136, 1145, 1150.

[7] Nov. 28, c. 1; Hesse, 29.

adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet *ex suis subnotationibus* debiti *probationem* praebere posse."[1] Hence "*contra* se dicere" is essential to the weight of an admission. Self-love and vanity, so it is justly argued, will hinder a prudent man from falsehoods that would redound to his credit.[2] Yet we must remember that this proposition applies mainly to matters of pecuniary interest When we come to questions of pedigree, of *status*, and of marriage, different influences come in which render the tests jut given of but little weight. In matters of pedigree, in particular, a statement which one man would shrink from as discrediable another would advance with pride. By some men an aristocratic connection might be claimed untruthfully; by other it might be untruthfully disclaimed. Sinister bars, indicatig a royal illegitimate descent, are blazoned boastfully on som escutcheons; from others they have been obliterated with scorn. Nor can we forget that pecuniary interest may sometimes be overbalanced by other more powerful passions. The autor of Junius, whoever he was, must have often untruthfully denied his responsibility for his handiwork, not because he might not have made money by such an avowal, but because it would ave involved him in social ignominy. Sir Walter Scott, agaist what we might consider his interest, repeatedly disavowed Waverley, and went so far as to write a laudatory review, attributing that great novel to another author. For a man of gallantry, as Lord Denman reminds us, it is as disgraceful to admit an intrigue as it would be unprofessional to avoid it.[3] On the other hand, the German poets of the Sturm und Drang period were in the habit, following Lord Byron, of intimating their complicity in merely imaginary crimes. Even among prudent men, a little obvious interest, against which a party makes an admission, may be greatly overbalanced by a superior secret interest of which nobody knows but the declarant. The truthfulness, therefore, of an apparently self-disserving statement is a presumption of fact depending upon all the circumstances of the case. We must inquire whether the statement was really self-disserving, and even

[1] C. 7; C. 4, 19.

[2] Hesse, *ut supra*, 29; citing further I. 26, § 2; D. xvi. 3.

[3] Supra, § 4 note.

if it were so in a business sense, we must remember that it may be discredited by showing that it was made under mistake, or from a desire on the declarant's part to produce a sensation, or to avoid a disclosure of a fact with which the admission is inconsistent.[1]

Admission may be by acts.

§ 1081. Admissions may be by acts as well as by words.[2] Thus in a suit for injury caused by a train passing a platform, it has been held admissible to prove that the railroad company caused the platform to be removed the day after;[3] and in a suit for injury through falling into a cellar, the plaintiff has been permitted to prove that the defendant, "immediately after the accident, put a gas-light close to the opening."[4] Not only acts done in silence, but silence itself, may be shown, as we will soon more fully see,[5] for the purpose of proving an admission. Thus it is admissible to show that after the plaintiff's claim became due, he paid a claim due from him to the defendant without any effort at or suggestion of set-off.[6] That a party pays interest on or instalments of a debt, may be also shown as an admission of indebtedness.[7] The assumption of an office, to take another illustration, is an admission of appointment to such office, and subjects the party to the liabilities attached to such office, though he made no claim in words to the office.[8] Again, the payment of money by A. to B. is an admission by A. that B. is the proper payee, though not, it is said, by B., that A. is the person bound to pay.[9] When, also, the question is, whether the stationing a flagman at a crossing is requisite to public safety, the fact that a flagman has been

[1] See supra, § 1077; Saveland *v.* Green, 40 Wis. 431.

The authority of an admission is strengthened by the fact that it is offered against a party who does not testify. Robinson *v.* Stuart, 68 Me. 61.

[2] Infra, § 1151; Russell *v.* Miller, 26 Mich. 1.

[3] Pennsyl. R. R. *v.* Henderson, 51 Penn. St. 315; West Chester R. R. *v.* McElwee, 67 Penn. St. 311.

[4] McKee *v.* Bidwell, 74 Penn. St. 218. Otherwise as to dismissal of a servant after an alleged negligent act. Couch *v.* Coal Co. 46 Iowa, 17.

[5] See infra, § 1136.

[6] Strong *v.* Slicer, 35 Vt. 40.

[7] Washer *v.* White, 16 Ind. 136. Infra, § 1362.

[8] Bevan *v.* Williams, 3 T. R. 635; R. *v.* Borrett, 6 C. & P. 124; R. *v.* Giles, Leigh & C. 502; R. *v.* Story, R. & R. 81; R. *v.* Hunter, 10 Cox C. C. 642. See Whart. Cr. Law, § 2113. Infra, § 1319.

[9] James *v.* Biou, 2 Sim. & St. 606; Chapman *v.* Beard, 3 Anstr. 942.

assigned by the company to such station (he being absent at the time of the collision), may be treated as an admission by the company that a flagman should be so stationed.[1]

Admission of a *right* to be distinguished from admission of a *fact.*

§ 1082. Admissions may also be distinguished as admissions of *right* and admissions of *fact.* I may be sued for a particular claim, and I may be proved to have admitted either the justice of the claim, or the truth of certain facts from which the justice of the claim may be inferred. Admissions of the first class, unless part of a contract, or unless involving some specific, self-disserving fact, are of no weight.[2] I may, also, admit a claim against me for the sake of peace, or from a misunderstanding of the facts; and in such case I can withdraw the admission if it is not part of a contract.[3] A right, also, may be conceded on various grounds, and those conceding it may leave open on which of these grounds rests the concession. The convention, for instance, that offered the crown to William III. left it open whether the abdication of James, or the choice of the people, or the superior force of William, produced their action. Hence the acceptance of William involved logically neither an admission that he was the legitimate sovereign, nor that he was a conqueror, nor that he was king by a revolutionary popular choice. On the other hand, either the abdication of James, or the *vis major* of William, might be admitted without admitting the right of William to the throne. Or, to take another illustration, I may acknowledge that B. has a claim against me, but unless my acknowledgment is pointed at a particular account, that particular account cannot be proved by my acknowledgment. On the other hand, I may admit the account, but this does not admit a debt, for the account may have been paid, or there may be a set-off. The admission of a right, therefore, does not logically involve the admission of a fact, nor does the admission of a fact logically involve the admission of a right An admission

[1] McGrath *v.* R. R. 63 N. Y. 522.

[2] Infra, § 1089. See Colt *v.* Selden, 5 Watts, 525; Sandford *v.* Decamp, 8 Watts, 542; McLendon *v.* Shakleford, 32 Ga. 474; Balt. City R. R. *v.* McDonnell, 43. Md. 534. As will be seen the distinction is of peculiar importance when it relates to a party's admissions in respect to written instruments. Infra, § 1097.

And see Moore *v.* Hitchcock, 4 Wend. 262.

[3] Infra, § 1090.

of a right, unless involving necessarily a fact, is provable only against the party on a suit for the right; an admission of a fact may be proved in all suits in which it is relevant. An admission of a right is to be strictly construed, as it is generally made vaguely, expressive of a mere sentiment, or tentatively, as part of a compromise; and unless proved to have been made solemnly as to a specific claim, does not bind. An admission of a fact, on the other hand, often becomes effective in proportion to the inadvertence of its expression. Each may be made contractually, and if so each may be an estoppel; but when made non-contractually and non-forensically, the first is of little value unless logically including the second.[1]

Contractual admissions distinguishable from non-contractual.

§ 1083. We must, however, again emphasize, as bearing on both admissions of rights and admissions of facts, the radical distinction already[2] noticed, between admissions which are contractual and dispositive, and such as are non-contractual and non-dispositive; in other words, between admissions made intentionally, for the purpose of transferring a right, and admissions made casually, for the purpose of narrating an incident.[3] The contractual and disposi-

[1] Yet the distinction between these two classes of admissions cannot be always definitely made. Many admissions partake of the qualities of both classes; in many cases an admission of one class involves an admission of another. My admission of the justice of a claim, for instance, may be of such a character that it presupposes an admission of the truth of certain facts; my admission of particular facts may be logically an admission of the justice of the claim. The apparent admission of a fact may be only the admission of a conclusion; the admission of a conclusion may be necessarily the admission of a fact. See supra, § 15. Yet, when we view the two kinds of admissions in their essence, we find that the difference between them is material. The one is an exercise of the power that each man has of disposing of himself and his property. The other is an exercise only of the power of observation and memory, made admissible, in a court of justice, without the party himself being necessarily sworn, for the reason that being made by him against his own interests, its truth is *primâ facie* assumed. See Bähr, die Anerkennung, p. 169; Endemann, p. 121; Steffy *v.* Carpenter, 37 Penn. St. 41; and supra, § 920. Compare Brackett *v.* Wait, 6 Vt. 411; Ramsbottom *v.* Phelps, 18 Conn. 278; Martin *v.* Peters, 4 Roberts. 434; Ray *v.* Bell, 24 Ill. 444; Husbrook *v.* Strawser, 14 Wis. 403; Zemp *v.* R. R. 9 Rich. 84; Stewart *v.* Conner, 13 Ala. 94; Beebe *v.* De Baun, 8 Ark. 510; Carter *v.* Bennett, 4 Fla. 283; Hays *v.* Cage, 2 Tex. 501.

[2] Supra, § 1077–8.

[3] See supra, § 920, where this distinction is discussed in reference to documents.

tive admission[1] is equivalent to an offer which, when accepted by the other party, makes a contract. Such an admission, as we will presently see, when made as the basis of a contract, cannot be revoked. The non-contractual admission, on the other hand, not being acted on by the party to whom it is addressed, may at any time be recalled or qualified by the party making it.[2] Hence also it is, as we have seen, that while an admission may be an estoppel, when sued upon directly, as the basis of an action, it may be qualified or neutralized when offered by third parties simply as an evidential fact.[3]

§ 1084. The distrust of non-contractual (or casual, to use Mr. Bentham's term) admissions as a mode of proof is not confined to the Roman law. In England, courts of equity go so far in applying the distinction that has been just expressed, as to decline to rest a decree on oral admissions or declarations *which are not put directly in issue by the pleadings*, and which, consequently, have not been open to explanation or disproof,[4] Even as to *written* admissions, it has been argued, the fact of their not being put in issue by the pleadings will naturally detract from their weight, as the party against whom they are offered in evidence will, in such case, have had no opportunity of explaining them.[5] In the United States, the conclusion above stated, so far as it involves an absolute rule of evidence, has not been accepted.[6] So far, however, as it goes to attach little weight to non-contractual, as distinguished from contractual admissions, it is sustained by the authorities cited in prior sections.

[1] See Wetzell, Civil Proc. i. p. 139; Weiske, Rechtslexicon, xi. 662.

[2] See supra, §§ 920, 1077–1080; infra, §§ 1151, 1155.

[3] Carpenter *v.* Buller, 8 M. & W. 209; South E. R. R. *v.* Warton, 6 H. & N. 520; Stronghill *v.* Buck, 14 Q. B. 780; Wiles *v.* Woodward, 5 Ex. 557; Richards *v.* Johnston, 4 H. & N. 660; Morgan *v.* Coachman, 14 C. B. 100; Francis *v.* Boston, 4 Pick. 365; Weed Machine Co. *v.* Emerson, 115 Mass. 554; Bigelow on Estoppel, 258. Supra, § 923; infra, § 1155.

[4] Austin *v.* Chambers, 6 Cl. & Fin. 1, 38, 39; Attwood *v.* Small, Ibid. 234; Copland *v.* Toulmin, 7 Ibid. 350, 373, 375.

[5] McMahon *v.* Burchell, 2 Phill. 127, 132, 133; 1 Coop. R. temp. Ld. Cottenham, 475, *S. C.;* Crosbie *v.* Thompson, 11 Ir. Eq. R. 404, per Brady, Ch.; Swift *v.* M'Tiernan, Ibid. 602, per Ibid.; Malcolm *v.* Scott, 3 Hare, 39, 63; and see Margareson *v.* Saxton, 1 Y. & C. Ex. R. 529; and Fitzgerald *v.* O'Flaherty, 2 Moll. 394, n.; Taylor's Ev. § 668.

[6] Story Equity Pl. § 265 *a*, note 1.

§ 1085. The term "non-contractual," it must be repeated, applies exclusively to statements casually made, without the intention of establishing a business relation. When an admission is made by one party, in such a way that the other party relies on the admission as the consideration for something done or forborne by him, then this admission may conclude by way of estoppel the party making it.[1] In other words, he is bound, when his admission is accepted and acted on by the opposite party, in a contract which he can only avoid on proof of fraud, illegality, or mistake.[2] At the same time estoppel, to adopt the language of the books, must, in order to be effective, be mutual.[3]

Contractual admissions may operate as estoppels.

§ 1086. What has been said in regard to admissions, that they are not evidence on the one side, but dispensations of evidence, which would otherwise have to be offered on the other side, applies also to estoppels. "An estoppel," so speaks a high authority, "is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature, — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it, though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol; . . . . and this is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to

Estoppels may be substitutes for proof.

[1] See fully infra, §§ 1151–1155; Fishmongers' Co. *v.* Robertson, 6 M. & Gr. 193; Bowman *v.* Rostron, 2 A. & E. 295; Pickard *v.* Sears, 6 A. & E. 474; Scammon *v.* Scammon, 33 N. H. 52; Wakefield *v.* Crossman, 25 Vt. 298; Bower *v.* McCormick, 23 Grat. 310; Isler *v.* Harrison, 71 N. C. 64; Tompkins *v.* Philips, 12 Ga. 52; Lamar *v.* Turner, 48 Ga. 329; Rose *v.* West, 50 Ga. 474; Garrett *v.* Garrett, 27 Ala. 687; and see, also, cases cited supra, §§ 617, 923, 1079, 1083; and see Moriarty *v.* R. R. 5 Q. B. 320.

[2] See supra, §§ 927, 1019, 1030.

[3] 2 Smith's Lead. Cas. 442; Perrie *v.* Nuttall, 11 Ex. 569; Bigelow on Est. 47. Supra, § 1078.

supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose."[1]

Even a false statement may be an estoppel.

§ 1087. As has been already incidentally noticed, a party, by even false statements, by which he induces others to change in some way their position, may preclude himself afterwards from showing the falsehood of such statements. This position is accepted by the Roman law as well as by our own. Donellus, after telling us that *confiteri* may be to enter into a binding dispositive act, adds, "Confiteri est fateri id, quod a nobis quaesitum est: id autem est, quod nobis objicitur; quod intenditur ab aliquo, id lingua verum esse agnoscere. Potest autem quivis agnoscere et dicere verum esse, quod intenditur, etiam qui id falsum esse sciat, multoque citius is, qui putat rem ita se habere, ut dicit, quae secus habeat."[2] In this view, a party making such a statement, thereby inducing another to enter into a contract with him, is bound to such other by such statement, whether it be true or false.[3] A person, for instance, falsely claiming to be an agent, cannot dispute his statement when sued on it by a party acting on his pretension.[4] A party warranting cannot escape liability by claiming that his warranty was false.[5]

Otherwise as to non-contractual admissions.

§ 1088. On the other hand, as we have seen, a non-contractual admission is of no weight unless it is true. If made under a mistake or error of fact, it may be repudiated. "*Non videntur* qui errant, *consentire*."[6] "*Non fatetur qui errat*."[7] Nor are such admissions binding if based

[1] 2 Sm. L. C. 693.

[2] Donel. Com. L. 28, c. 1.

[3] Cave *v.* Mills, 7 H. & N. 913; and see Salem Bk. *v.* Gloucester Bk. 17 Mass. 1; McCance *v.* R. R. 3 H. & C. 343. Infra, §§ 1146, 1151.

[4] Whart. on Agency, § 541.

[5] See Bigelow on Est. 288–9.

[6] Lofft Max. 553.

[7] L. 116, D. (L. 17) Ulpian. See, as to unreliability of admissions, supra, § 1077; and so of admissions of agent, infra, § 1179; and see generally, Hunter *v.* Heath, 67 Me. 507; Pecker *v.* Hoit, 15 N. H. 143; Stephens *v.* Vroman, 18 Barb. 250; Tracy *v.* McManus, 58 N. Y. 257; Matthews *v.* Dare, 20 Md. 248; Ray *v.* Bell, 24 Ill. 444; Young *v.* Foute, 43 Ill. 33; Rose *v.* West, 50 Ga. 474; Roberts *v.*

on a mistake of law.[1] It is scarcely necessary to repeat that an admission may be contractual as to the party with whom it is made, operating as an estoppel when sued on by such party, but non-contractual as to strangers, as to whom, when they sue on it, it may be rebutted.[2]

Such admission must be specific.

§ 1089. To admit a non-contractual admission, offered in evidence merely to relieve the party offering it from proving a particular part of his case, the admission must be specific.[3] Thus the admission of a "debt" due the plaintiff will not be sufficient proof to support an account presented by plaintiff to defendant in connection with which the general admission was made;[4] though an admission as to a particular account may be evidence on which it may be sustained.[5] Nor will an admission of the genuineness of a signature avail against a party to whom the paper containing the signature was not shown.[6]

General admissions made for purpose of compromise inadmissible, but otherwise as to admission of facts.

§ 1090. An implied admission of liability made as part of the negotiations for a compromise, expressly for the purposes of peace (whether or no such admission be made under the technical proviso "without prejudice"), will not be received in evidence against the party by whom it is made, when its object was merely to suggest a scheme of settlement. The policy of the law favors amicable settlements of litigation, and therefore protects negotiations *bonâ fide* made for the purpose of effecting such settlements.[7] Aside from the reason just mentioned, it may be

Trawick, 22 Ala. 490; Wynn *v.* Garland, 16 Ark. 440. As to receipts see supra, § 1064.

[1] Moore *v.* Hitchcock, 4 Wend. 292; Rowen *v.* King, 25 Penn. St. 409; Solomon *v.* Solomon, 2 Ga. 18.

[2] Supra, §§ 923, 1078; Carter *v.* Carter, 1 K. & J. 649. That non-contractual admissions are only *primâ facie* and rebuttable evidence against the party making them, see supra, §§ 1077–8; and see Baker *v.* Dewey, 1 B. & C. 704; Stratton *v.* Rastall, 2 T. R. 366; Reeve *v.* Whitmore, 2 Dr. & S. 450.

[3] Chambers Co. *v.* Clews, 21 Wall. 317; Ripley *v.* Paige, 12 Vt. 353; Clarendon *v.* Weston, 16 Vt. 332; Smith *v.* Jones, 15 Johns. R. 229; Smith *v.* Smith, 1 Greene (Iowa), 307; Watson *v.* Byers, 6 Ala. 393. Supra, § 1082.

[4] U. S. *v.* Kuhn, 4 Cranch C. C. 401; Quarles *v.* Littlepage, 2 Hen. & M. 401; Gibney *v.* Marchay, 34 N. Y. 301; Douglass *v.* Davie, 2 McCord, 219.

[5] Vinal *v.* Burrill, 16 Pick. 401; Sugar *v.* Davis, 13 Ga. 462.

[6] Infra, § 1095.

[7] Hoghton *v.* Hoghton, 15 Beav. 321; Cory *v.* Bretton, 4 C. & P. 462; Healey *v.* Thatcher, 8 C. & P. 388;

well argued that where the communication is made because the party is ready to offer a sacrifice for the sake of peace, this cannot be regarded as the admission of a right in the other side.[1]

Paddock *v.* Forrester, 3 M. & Gr. 903; 3 Scott N. R. 734; Cassey *v.* R. R. L. R. 5 C. P. 146; Skinner *v.* R. R. L. R. 9 Ex. 298; McCorquodale *v.* Bell, L. R. 1 C. P. D. 471; Home Ins. Co. *v.* Baltimore, 93 U. S. 527; Rowell *v.* Montville, 4 Greenl. 270; Rideout *v.* Newton, 17 N. H. 71; Perkins *v.* Concord R. R. 44 N. H. 223; Gerrish *v.* Sweetser, 4 Pick. 374; Batchelder *v.* Batchelder, 2 Allen, 105; Saunders *v.* McCarthy, 8 Allen, 42; Harrington *v.* Lincoln, 4 Gray, 563; Gay *v.* Bates, 99 Mass. 263; Durgin *v.* Somers, 117 Mass. 55; Draper *v.* Hatfield, 124 Mass. 53; Daniels *v.* Woonsocket, 11 R. I. 4; Williams *v.* Thorp, 8 Cow. 201; Payne *v.* R. R. 40 N. Y. Sup. Ct. 8; Wrege *v.* Westcott, 30 N. J. L. 212; Slocum *v.* Perkins, 3 S. & R. 295; Tryon *v.* Miller, 11 Whart. 11; Arthur *v.* James, 28 Penn. St. 236; Reynolds *v.* Manning, 15 Md. 510; Paulin *v.* Howser, 63 Ill. 312; Barker *v.* Bushnell, 75 Ill. 220; Kinsey *v.* Grimes, 7 Blackf. 290; State *v.* Dutton, 11 Wis. 371; Richards *v.* Noyes, 44 Wis. 609; Watson *v.* Williams, Harper, 447; Wilson *v.* Hines, 1 Minor (Ala.), 255; Ferry *v.* Taylor, 33 Mo. 323.

In Paddock *v.* Forrester, 3 Mann. & G. 903, 919, it was held that where a letter expressed to be without prejudice is replied to, neither the letter nor the reply is admissible, even though the reply is not expressed to be without prejudice. Tindal, C. J., said: "It is of great importance that parties should be left unfettered by correspondence which has been entered into upon the understanding that it is to be without prejudice."

[1] Underwood *v.* Courtown, 2 Sch. & Lef. 67; Thomson *v.* Austen, 2 D. & R. 361; Robinson *v.* R. R. 7 Gray, 92. Supra, § 1082.

In Hoghton *v.* Hoghton, 15 Beav. 278, 321, before Sir John Romilly, certain letters were written after the dispute had arisen, with a view to a compromise, and "without prejudice." Their admission being objected to, it was said that, if rejected, the court would have before it only part of the correspondence. "Such communications, made with a view to an amicable arrangement, ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

In Jones *v.* Foxall, 15 Beav. 388, which was a suit for a breach of trust, Sir John Romilly said: "I have paid no attention to the correspondence and negotiations which occurred. . . . . I find that the offers were in fact made *without prejudice* to the rights of the parties. I shall, as far as I am able, in all cases endeavor to repress a practice which, when I was first acquainted with the profession, was never ventured upon, but which, according to my experience in this place, has become common of late, viz., that of attempting to convert offers of compromise into admissions or acts prejudicial to the persons making them. If this were permitted, the effect would be that no attempt to compromise a dispute could ever be made. . . . . In my opinion, such letters and offers are admissible for one purpose only, namely, to show that an attempt has been made to compromise the suit, which may sometimes be necessary; as, for instance, in order to account for a lapse of time; but never

It has been also held that the admission of a party in a case stated for the opinion of the court cannot afterwards be used against him.[1] If, however, in a negotiation between litigants, a fact is conceded as true, such concession not being made "without prejudice," or hypothetically, or as a condition in a pending treaty, the admission may be afterwards used, for what it is worth, against the party by whom it is made.[2] When such negotiations are admitted in part, however, all the relevant conditions, if called for, must be proved.[3] And when an offer is made in a letter written "without prejudice," and such offer is accepted,[4] or when an admission is made in such a letter subject to a condition, and such condition has been performed,[5] then the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice."[6] But when a letter is written as an offer of compromise, and is not accepted, no part is admissible.[7]

for the purpose of fixing the person making them with any admissions contained in such letters. And I shall do all I can to discourage this modern, and, as I think, most injurious practice."

[1] Hart's Appeal, 8 Penn. St. 32.

[2] Nicholson *v.* Smith, 3 Stark. R. 129; Wallace *v.* Small, M. & M. 446; Unthank *v.* Ins. Co. 4 Biss. 357; Home Ins. Co. *v.* Balt. Co. 93 U. S. 527; Cole *v.* Cole, 33 Mc. 542; Hamblett *v.* Hamblett, 6 N. H. 333; Perkins *v.* Concord, 44 N. H. 223; Eastman *v.* Amoskeag, 44 N. H. 143; Doon *v.* Ravey, 49 Vt. 293; Marsh *v.* Gold, 2 Pick. 285; Gerrish *v.* Sweetser *v.* Pick. 374; Hartford Bridge Co. *v.* Granger, 4 Conn. 142; Fuller *v.* Hampton, 5 Conn. 416; Murray *v.* Coster, 4 Cow. 635; Sailor *v.* Hertzogg, 2 Penn. St. 182; Holler *v.* Weiner, 15 Penn. St. 242; Arthur *v.* James, 28 Penn. St. 236; Cates *v.* Kellogg, 9 Ind. 506; Ashlock *v.* Linder, 50 Ill. 169; Church *v.* Steele, 1 A. K. Marsh. 328; Mayor *v.* Howard, 6 Ga. 213; Prussel *v.* Knowles, 5 Miss. 90; Garner *v.* Myrick, 30 Miss. 448; Delogny *v.* Rentoul, 2 Mart. La. 175. See Short Mountain Co. *v.* Hardy, 114 Mass. 197; Molyneaux *v.* Collier, 13 Ga. 406. Supra, § 1082.

In Clapp *v.* Foster, 34 Vt. 580, the court admitted evidence that the defendant offered to settle the plaintiff's claim if the latter would consent to a continuance. See, also, Grubbs *v.* Nye, 21 Miss. 443. In Cuming *v.* French, 2 Camp. 106, n, an offer to settle a note was held *primâ facie* proof of authenticity of signature.

In Thomas *v.* Morgan, 2 C., M. & R. 496; *S. C.* Tyr. 1085, which was an action for injury to cattle through defendant's mischievous dogs, an offer to settle was held admissible as some evidence of *scienter*, but to be entitled to but little weight, as the offer may have been prompted by mere charity.

[3] Scott *v.* Young, 4 Paige, 542.

[4] In re River Steamer Co. L. R. 6 Ch. 822; 19 W. R. 1130.

[5] Holdsworth *v.* Dimsdale, 19 W. R. 798.

[6] Powell's Evidence, 4th ed. 269.

[7] Home Ins. Co. *v.* Balt. Co. 93 U. S. 527.

§ 1091. For a long time it was an open and much agitated question in England whether the admission by a party of the contents of a written instrument could be received in derogation of the principle that such instruments cannot be proved by parol. After numerous conflicting dicta and rulings at nisi prius, the question came before the Court of Exchequer in 1840. It was then ruled, that "whatever a party says, or his acts amounting to admissions, are evidence against himself, *though such admissions may involve what must necessarily be contained in some deed or writing.*" . . . . "The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of, the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may be reasonably presumed to be so. The weight and value of such testimony is another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible."[1]

Party's admission may prove contents of writings.

§ 1092. It is true that much exception has been taken to this modification of the rule that a written instrument cannot be proved by parol, and it has been urged that the exception will eat away the rule. The exception, however, is sanctioned by the high authority of the present English practice; though it is said the witness when a party ought not to be compelled to testify as to the contents of such instru-

Admission must go to facts.

[1] Slatterie *v.* Pooley, 6 M. & W. 664, Parke, B. See, to same effect, Howard *v.* Smith, 3 Scott N. R. 574; Boulter *v.* Peplow, 9 C. B. 493; Pritchard *v.* Bagshawe, 11 C. B. 459; King *v.* Cole, 2 Exch. 628; Boileau *v.* Rutlin, 2 Exch. 665; Murray *v.* Gregory, 5 Exch. 468; R. *v.* Basingstoke, 14 Q. B. 611; Ansell *v.* Baker, 3 C. & K. 145.

It has been also held, where, on an action for contribution towards money paid on a written contract, there was evidence of the express authority of the defendant to enter into the contract, of the execution thereof, and that the defendant, when informed of the amount paid, did not dispute his liability, that the contract need not be put in evidence. Chappell *v.* Bray, 6 H. & N. 145.

ments.[1] The same general conclusion has been reached in the United States, so far, at least, as to hold that the contents of a document, not requiring the attestation of witnesses, may be proved by admissions.[2] But in any view the statement relied on must be distinctly a statement of fact, and not merely an opinion or inference of law by the deponent.[3] It must be an admission of a *fact* as distinguished from the admission of a *right*.[4]

§ 1093. It has, however, been with much force objected,[5] that to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the instrument itself, when duly proved, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. We are also reminded that Lord Tenterden, and Maule, J., have pointedly condemned this relaxation of the old practice;[6] and that even Parke, B., to whom the relaxation is mainly due, has questioned whether such admissions may not be sometimes quite unsatisfactory to a jury;[7] while the same acute reasoner has qualified his own conclusions by reverting to the elementary principles we have already noticed,[8] as to the treacherous character of this kind of proof. For, to apply these principles to the present issue, the witness not only may misunderstand what the party has said, but, by unintentionally altering a few of the expressions really used, may give to

Such admissions must be strictly guarded.

[1] Darby *v.* Ousely, 1 H. & N. 1; Powell's Evidence, 4th ed. 310. But see supra, § 480.

[2] See Smith *v.* Palmer, 5 Cush. 513; Loomis *v.* Wadhams, 8 Gray, 557; Crichton *v.* Smith, 34 Md. 42; Taylor *v.* Peek, 21 Grat. 11. For other rulings bearing on the same question see New York Ice Co. *v.* Parker, 8 Bosw. 688; Robeson *v.* Schuy. Nav. Co. 3 Grant, 186; Taylor *v.* Henderson, 38 Penn. St. 60; Gay *v.* Lloyd, 1 Greene (Iowa), 78; Bivins *v.* McElroy, 11 Ark. 23; Brooks *v.* Isbell, 22 Ark. 488; Ward *v.* Valentine, 7 La. An. 184. An outstanding equity in land, it has been held, may be proved by a party's admission. Lewis *v.* Harris, 31 Ala. 689; Warfield *v.* Lindell, 30 Mo. 272.

[3] Morgan *v.* Couchman, 14 C. B. 101; Goodell *v.* Smith, 9 Cush. 492.

[4] See supra, § 1082; Bloxam *v.* Elsee, 1 C. & P. 558; R. & M. 187.

[5] Taylor's Ev. § 382.

[6] Bloxam *v.* Elsee, *ut supra;* Boulter *v.* Peplow, 9 Com. B. 501.

[7] Slatterie *v.* Pooley, 6 M. & W. 669.

[8] Supra, § 318.

the statement an effect completely at variance with what was intended.[1] To the same effect is an opinion by a leading Irish judge. "The doctrine laid down in that case,"[2] says Chief Justice Pennefather, speaking of Slatterie *v.* Pooley, "is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."[3]

Admissions not excluded because party could be examined.

§ 1094. It must be also remembered that, as a general rule, the extra-judicial admission of a party will not be received to prove that for which a higher class of evidence is required, unless such higher class of evidence is not attainable.[4] This rule, however, will not preclude the putting in evidence the admissions of a party, made out of court, even though he be in court, open to examination, at the time they are offered.[5]

§ 1095. But whatever may be the law as to admission of the contents of writings, it was settled in England, before the 17 &

[1] Note to Earle *v.* Picken, 5 C. & P. 542.

[2] Lawless *v.* Queale, 8 Ir. Law, 385. See Henman *v.* Lester, 12 C. B. (N. S.) 781.

[3] See, also, Henman *v.* Lester, 31 L. J. C. P. 370, 371, per Byles, J.; 12 Com. B. (N. S.) 781, 782, *S. C.*

"The case which called forth these remarks," comments Mr. Taylor, "was an action for use and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination, the existence of a written agreement; and the court held that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent."

[4] Barrett *v.* Wright, 13 Pick. 45, cited § 1094; Welland Co. *v.* Hathaway, 8 Wend. 480; Morris *v.* Wadsworth, 17 Wend. 103; Jameson *v.* Conway, 10 Ill. 227; Threadgill *v.* White, 11 Ired. L. 591. Infra, § 1098.

[5] Clark *v.* Hougham, 2 B. & C. 149; Woolway *v.* Rowe, 1 Ad. & El. 114; Robinson *v.* Stuart, 68 Me. 61; Phœnix Ins. Co. *v.* Clark, 58 N. H.; Brubacker *v.* Taylor, 76 Penn. St. 83; Mason *v.* Poulson, 43 Md. 162; Hall *v.* The Emily Banning, 33 Cal. 522. Infra, § 1120.

To this effect, in fact, may be cited most of the cases in which admissions have been received in evidence since the statutes removing the incompetency of parties.

18 Vict. c. 125, that a party could not, by admitting the extra-judicial *execution* of a deed, dispense with the duty laid on the other side of proving such deed by the attesting witnesses.[1] There can be no question, however, that a party may make a *primâ facie* case against himself by admitting the execution of a note or other instrument as to which the law does not prescribe more formal proof.[2] Admissions of this kind, when non-contractual,[3] may be rebutted by the maker on proof of mistake;[4] nor are they admissible, unless it be shown that at the time of making them the note was exhibited to the party making the admission.[5]

Admission cannot prove execution where attestation is required.

§ 1096. An admission, we have elsewhere seen,[6] may prove marriage; and an admission of a party that he had been married according to the laws of a foreign country, if such admission be corroborated by proof of cohabitation, may make it unnecessary to prove that the marriage had been celebrated according to the laws of that country.[7]

May prove marriage.

§ 1097. The declarations of a person deceased as to his domicil are admissible, when his intention is in question.[8] The same mode of proof is admissible, even when parties are alive, for the purpose of determining intent.[9] But mere vague unexecuted expressions of intent cannot be so received.[10]

Declarations as to domicil admissible.

[1] See cases cited supra, § 725.

Where a testator bequeathed certain stock to his daughters, to stand in the executor's name until the expiration of the charter, which was renewed, parol declarations of the testator as to the renewal of the charter were held inadmissible. Barrett *v.* Wright, 13 Pick. 45.

[2] Nichols *v.* Allen, 112 Mass. 23; Daniel *v.* Ray, 1 Hill (S. C.), 32.

[3] See supra, §§ 1076–8.

[4] Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

[5] Shaver *v.* Ehle, 16 Johns. R. 201; Palmer *v.* Manning, 4 Denio, 131; Glazier *v.* Streamer, 57 Ill. 91.

[6] Supra, §§ 86 *et seq.*

[7] R. *v.* Newton, 2 M. & Rob. 503, per Wightman and Cresswell, JJ.; 1 C. & Kir. 164, *S. C. nom.* R. *v.* Simmonsto. But see R. *v.* Flaherty, 2 C. & Kir. 782; and supra, §§ 83 *et seq.*, and infra, § 1297.

[8] Brodie *v.* Brodie, 2 Sw. & Tr. 259; Ennis *v.* Smith, 14 How. 400; Kennedy *v.* Ryall, 67 N. Y. 380.

[9] Thorndike *v.* Boston, 1 Met. (Mass.) 242; Kilburne *v.* Bennett, 3 Met. (Mass.) 199; Burgess *v.* Clark, 3 Ind. 250. See supra, § 482.

[10] Bangor *v.* Brewer, 47 Me. 97; Harvard College *v.* Gore, 5 Pick. 370. See Lord Somerville's case, 5 Ves. 750; Anderson *v.* Lanenville, 9 Moo. P. C. 325; Moke *v.* Fellman, 17 Tex. 367; Wharton Confl. of Laws, § 62.

The date of a contract has been held to be admissible, as one among other incidents to make up a presumption

But not record facts.

§ 1098. We have seen elsewhere that an admission, whether under oath on an examination or otherwise, is not admissible to prove record facts.[1] It is at the same time competent to show by admissions the consequences of facts stated by record. Thus a witness can be asked whether he has not been in prison.[2] So, in an action for wages, an admission by the plaintiff that his claim had been referred to an arbitrator, who had made an award against him, has been held admissible evidence on behalf of the defendant.[3]

Admissions under duress inadmissible.

§ 1099. An admission, as well as a confession, made under duress, is inadmissible, even though bilateral.[4] Unless, however, otherwise provided by statute, the fact that an answer was extorted from a witness, when under examination in a court of justice, does not preclude its reception in evidence against him in a civil issue;[5] and the same rule applies to an admission obtained through a bill in equity.[6] Even though a witness is prevented from explaining his testimony at trial, such testimony can afterwards be used against him.[7]

Party's statements when self-serving inadmissible by Roman law.

§ 1100. The extra-judicial writings of a party, according to the Roman standards, cannot be received in his favor, *quia nullus idoneus testis in re sua intelligitur*.[8] Hence comes the maxim, *Scriptura pro scribente nihil probat*.[9] When offered *against* a party making them, such writings are evidence, not because they are writings, but because they are admissions made by a party against his interest.

of domicil at a particular place. Lougee *v.* Washburn, 16 N. H. 134; Cavendish *v.* Troy, 41 Vt. 99.

[1] Supra, §§ 63, 64, 541, 991, 1094.

[2] Supra, §§ 541, 991.

[3] Murray *v.* Gregory, 5 Exch. R. 468.

[4] Stockfleth *v.* De Tastet, 4 Camp. 11; Robson *v.* Alexander, 1 M. & P. 448; Tilley *v.* Damon, 11 Cush. 247; Foss *v.* Hildreth, 10 Allen, 76. Supra, § 931. As to proof of duress, see Snyder *v.* Braden, 58 Ind. 143.

[5] Supra, § 488; infra, § 1120; Grant *v.* Jackson, Pea. R. 203; Ashmore *v.* Hardy, 7 C. & P. 501.

[6] Bates *v.* Townley, 2 Ex. R. 157. Infra, § 1119.

[7] Collett *v.* Keith, 4 Esp. 212. See Milward *v.* Forbes, 4 Esp. 171. Infra, § 1120.

[8] L. 10, D. xxii. 5.

[9] See more fully supra, §§ 170, 265; and see James *v.* Stookey, 2 Wash. C. C. 139; Proprietary *v.* Ralston, 1 Dall. 18; Framingham Co. *v.* Barnard, 2 Pick. 532; Robinson *v.* R. R. 7 Gray, 92; Bailey *v.* Wakeman, 2 Denio, 220; Beach *v.* Wheeler, 24 Penn. St. 212; Douglass *v.* Mitchell, 35 Penn. St. 440; Nourse *v.* Nourse, 116 Mass. 101.

To the rule that such statements cannot be received to further the interests of the party producing them, the Roman practice notes the following exceptions: merchants' books of original entries, when verified by the party's oath;[1] and papers forming part of those produced by the opposite party. But, as a general rule, statements made by a party out of court, in his own favor, cannot be received on trial to prove his case.[2]

And so by our own law.

§ 1101. By our own courts the same conclusions have been reached. A party's self-serving declarations cannot be put in evidence in his own favor, whether he be living or dead at the trial. Nor is the result changed by the statutes enabling a party to be called as a witness in his own behalf. That which he could prove by his sworn statements he is not permitted to prove by statements which are unsworn. In any view, therefore, the extra-judicial self-serving declarations of a party are inadmissible for him, with the exceptions hereafter stated, as evidence to prove his case.[3] Thus the declarations of a person in possession of land, in support of his own title, are inadmissible,[4] and so are self-serving declarations of possessors of chattels,[5] and so is the declaration of an alleged *cestui que trust*, not made in the alleged trustee's presence, when the object is to establish the trust.[6] By the same rule a party sued on an alleged loan cannot put in evidence his declaration at the time of the loan to prove that his pecuniary con-

[1] See supra, § 678.

[2] Supra, §§ 619, 736.

[3] Handly *v.* Call, 30 Me. 9; Buswell *v.* Davis, 10 N. H. 413; Judd *v.* Brentwood, 46 N. H. 430; Baird *v.* Fletcher, 50 Vt. 603; Jacobs *v.* Whitcomb, 10 Cush. 255; Nourse *v.* Nourse, 116 Mass. 101; Whitney *v.* Houghton, 125 Mass. 451; North Stonington *v.* Stonington, 31 Conn. 412; Downs *v.* R. R. 47 N. Y. 83; Duvall *v.* Darby, 38 Penn. St. 56; Graham *v.* Hollinger, 46 Penn. St. 55; Murray *v.* Cone, 26 Iowa, 276; Hogsett *v.* Ellis, 17 Mich. 351; White *v.* Green, 5 Jones (N. C.) L. 47; Gordon *v.* Clapp, 38 Ala. 357; Marx *v.* Bell, 48 Ala. 497; Heard *v.* McKee, 26 Ga. 332; Bowie *v.* Maddox, 29 Ga. 285; Hall *v.* State, 48 Ga. 607; Tucker *v.* Hood, 2 Bush, 85; Lester *v.* Woolley, 57 Tenn. 358; Darrett *v.* Donnelly, 38 Mo. 492; Rice *v.* Cunningham, 29 Cal. 492.

[4] Peabody *v.* Hewett, 52 Me. 33; Morrill *v.* Titcomb, 8 Allen, 100; Jackson *v.* Cris, 11 Johns. R. 437; Hedrick *v.* Gobble, 63 N. C. 48; Salmons *v.* Davis, 29 Mo. 176; and cases cited infra, § 1168.

[5] Bradley *v.* Spofford, 23 N. H. 444; Swindell *v.* Warden, 7 Jones L. 575; Turner *v.* Belden, 9 Mo. 787.

[6] Com. *v.* Kreager, 78 Penn. St. 477.

dition was such as to make it improbable that he would borrow money.[1]

Except when part of the *res gestae.*

§ 1102. It may, however, happen that statements of a party are so interwoven with a contract as to form part of it, or are so wrought up in a transaction that they form a necessary incident of any narrative of such transaction. In such case the party's declarations are admissible, as we have already seen, as part of the *res gestae*.[2] Self-serving declarations, therefore, are admissible as part of a transaction, and they are so whenever they are its incidental emanations; whenever, in other words, they were uttered instinctively, the transaction speaking through them, not they speaking about the transaction. If, on the other hand, instead of being the immediate reflex of the transaction, they are uttered after there has been time for concoction, they are inadmissible.[3] This is so in torts as well as contracts.[4] Declarations, however, when received as part of the *res gestae*, are admitted, not to prove their own truth, but to exhibit the attitude of the parties, and to show the transaction in all its aspects. Thus where the question was whether the defendant had acquired a right of way over a field belonging to the plaintiff, it was held, in Connecticut, admissible for the plaintiff to put in evidence his declarations while ploughing the field, that the party claiming the right of way had no such right, but only used the same by the owner's permission; the evidence being received not as proof of the assertion, but as showing that the act of ploughing was the assertion of a right inconsistent with the alleged right of way.[5]

[1] Douglass *v.* Mitchell, 35 Penn. St. 440.

[2] See supra, §§ 258, 264; Milne *v.* Leisler, 7 H. & N. 786; Green *v.* Bedell, 48 N. H. 546; Blake *v.* Damon, 103 Mass. 199; Beardslee *v.* Richardson, 11 Wend. 25; Ahern *v.* Goodspeed, 72 N. Y. 108; Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; Louden *v.* Blythe, 16 Penn. St. 532; Potts *v.* Everhardt, 26 Penn. St. 493; Scott *v.* Shaler, 28 Grat. 89; Purkiss *v.* Benson, 28 Mich. 538; Stephens *v.* McCloy, 36 Iowa, 659; Bass *v.* R. R. 42 Wis. 654; Allen *v.* Seyfried, 43 Wis. 414; Hart *v.* Freeman, 42 Ala. 567; Head *v.* State, 44 Miss. 731; Sherley *v.* Billings, 8 Bush, 147; Tevis *v.* Hicks, 41 Cal. 123; Colquitt *v.* State, 34 Tex. 550.

[3] Supra, § 262.

[4] See supra, § 263; Fellowes *v.* Williamson, M. &. M. 306; Polston *v.* See, 54 Mo. 291.

[5] Sears *v.* Hayt, 37 Conn. 406. See Carrig *v.* Oaks, 110 Mass. 144.

Another exception to the rule is to be found in the reception, under the limitations already noticed, of a party's declarations as to his physical or mental condition, when such are in controversy.[1] Such declarations, also, may be received to fix a date.[2]

And so when stating symptoms or fixing dates.

§ 1103. A party offering a written admission of his opponent, must offer the whole; a part cannot be picked out, but the whole context, so far as qualifying the sense, must be introduced.[3] The admission of part of an account, for instance, involves the admission of the whole.[4] This, however, does not require the admission of distinct items in account books;[5] nor other writings in the same letter-book or compilation.[6] A letter can be put in evidence without offering that to which it was a reply,[7] though if what purports to be an entire correspondence be offered, it must be offered complete,[8] and if a letter is put in, this carries with it all memoranda on the letter;[9] nor can a writing go in evidence without carrying with it its indorsements.[10] A letter addressed to a party, found in his pos-

The whole context of a written admission must be proved.

[1] Supra, §§ 268–9.

[2] Com. *v.* Sullivan, 123 Mass. 221.

[3] Supra, §§ 617–620, 924; Bermon *v.* Woodridge, 2 Dougl. 788; Ld. Bath *v.* Bathersea, 5 Mod. 10; Cobbett *v.* Grey, 4 Ex. R. 729; Percival *v.* Caney, 4 De Gex & Sm. 622; Mut. Ins. Co. *v.* Newton, 22 Wall. 32; Storer *v.* Gowen, 18 Me. 174; Webster *v.* Calden, 55 Me. 165; Whitwell *v.* Wyer, 11 Mass. 6; Lynde *v.* McGregor, 13 Allen, 172; Hopkins *v.* Smith, 11 Johns. R. 161; Clark *v.* Crego, 47 Barb. 599; Barnes *v.* Allen, 1 Abb. (N. Y.) App. 111; Blair *v.* Hum, 2 Rawle, 104; Searles *v.* Thompson, 18 Minn. 316; Satterlee *v.* Bliss, 36 Cal. 489; People *v.* Murphy, 39 Cal. 52; Harrison *v.* Henderson, 12 Ga. 19; Jordan *v.* Pollock, 14 Ga. 145; Fitzpatrick *v.* Harris, 8 Ala. 32; Howard *v.* Newsom, 5 Mo. 523. See Harrison *v.* Henderson, 12 Ga. 19; Spanagel *v.* Dellinger, 38 Cal. 278.

[4] See supra, §§ 619, 620, 924; infra, § 1134.

[5] Catt *v.* Howard, 3 Stark. R. 6; Reeve *v.* Whitmore, 2 Dr. & S. 446.

[6] Sturge *v.* Buchanan, 10 Ad. & E. 598; Darby *v.* Ouseley, 1 H. & N. 1.

[7] Barrymore *v.* Taylor, 1 Esp. 326; De Medina *v.* Owen, 3 C. & K. 72; North Berwick Co. *v.* Ins. Co. 52 Me. 336; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29; Cary *v.* Pollard, 14 Allen, 285; Stone *v.* Sanborn, 104 Mass. 319; Wiggin *v.* R. R. 120 Mass. 201; Brayley *v.* Jones, 33 Ind. 508; Lester *v.* Sutton, 7 Mich. 331. See Merritt *v.* Wright, 19 La. An. 91; Newton *v.* Price, 41 Ga. 186. Infra, § 1127. Compare article in Pittsburg L. J., May 9, 1877.

[8] Supra, § 607; Roe *v.* Day, 7 C. & P. 705; Watson *v.* Moore, 1 C. & K. 625; Bryant *v.* Lord, 19 Minn. 396; Stockham *v.* Stockham, 32 Md. 196; Moore *v.* Hawkes, 56 Ga. 557; Merritt *v.* Wright, 19 La. An. 91.

[9] Dagleish *v.* Dodd, 5 C. & P. 238. See supra, § 619.

[10] Supra, § 619; infra, § 1135.

session, cannot be put in evidence without showing he replied to it, or in some other way acquiesced in its contents.[1]

Whole of answer in equity and sworn returns need not be read.

§ 1104. In equity, however,[2] if a plaintiff read particular facts from an answer, the defendant cannot by the English practice, as part of the proof of the case, read other facts, unless qualifying and explaining the meaning of those read by the plaintiff.[3] But it is said that on a motion for a decree the defendant's answer will be treated as an affidavit, of which the whole must be read.[4]

Otherwise at common law.

§ 1105. At common law, admissions contained in pleas, or answers in chancery, cannot be offered separately from the documents to which they are attached; the whole document must go in.[5] Even an answer in chancery cannot in common law practice be read, without the bill to which the answers are given, should this be required by the party against whom the answers are offered.[6]

Practice as to exhibits.

§ 1106. Although the exhibits attached to the answers of a person, when sworn, cannot be read without the examinations,[7] yet a party obtaining knowledge of such documents by a suit in chancery may compel their admission in a suit at common law, without putting in evidence the chancery proceedings.[8] "It is surmised," said Lord Denman, "that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in chancery, and then producing them without the answers, which may have greatly qualified and altered their effect. But I cannot think that a judge at nisi prius has anything to do with these considerations:

[1] Com. *v.* Eastman, 1 Cush. 189. Infra, § 1154.

[2] See supra, § 1099; infra, § 1112.

[3] Davis *v.* Spurling, 1 Russ. & M. 68; Bartlett *v.* Gillard, 3 Russ. 156. See remarks of Swayne, J., Clements *v.* Moore, 6 Wall. 299–315.

[4] Stephens *v.* Heathcote, 1 Drew. & Sm. 138; Taylor's Evidence, § 660.

[5] Percival *v.* Caney, 4 De Gex & Sm. 623; Bermon *v.* Woodbridge, 2 Dougl. 788; Marianski *v.* Cairns, 1 Macq. Sc. Cas. 212; Baildon *v.* Walton, 1 Exch. C. 617; Bath *v.* Batheresea, 5 Mod. 10.

As to pleadings, see infra, § 1110. As to equity practice, infra, § 1112.

[6] Pennell *v.* Meyer, 2 M. & Rob. 98; 8 C. & P. 470. But see Ewer *v.* Ambrose, 4 B. & C. 25; Rowe *v.* Brenton, 8 B. & C. 737.

[7] See Holland *v.* Reeves, 7 C. & P. 36. Supra, § 618.

[8] Long *v.* Champion, 2 B. & Ad. 284; Sturge *v.* Buchanan, 10 Ad. & E. 605. See Falconer *v.* Hanson, 1 Camp. 171.

he is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved."[1]

Whole of applicatory legal procedure usually goes in.

§ 1107. In actions against officers for misconduct in office, the introduction of particular writs, or other documents issued by them, to charge them, carries with it the introduction of any excusatory matter contained in such documents.[2] But it may be now considered settled that when a warrant is put in evidence, to charge a sheriff or other officer with misconduct in making a wrongful seizure, the sheriff is not relieved from producing justificatory evidence by the fact that such justification is recited in the warrant put in evidence against him.[3] In equity, where an answer contains an admission of the receipt of money, this admission is not to be regarded as drawing into it and identifying with it statements, in other parts of the answer, of independent payments or settlements of the money so admitted to be received.[4]

So of whole relevant portions of conversation.

§ 1108. Where part of a conversation is put in evidence by one party, the other is entitled to put in the whole, so far as it is relevant. A., for instance, cannot put in evidence against B. remarks of B. containing admissions, without putting in evidence the substance of all that related to such remarks in the conversation.[5] "Nor can

[1] Sturge *v.* Buchanan, 10 A. & E. 605. See, further, Long *v.* Champion, 2 B. & Ad. 286; Hewitt *v.* Piggott, 5 C. & P. 75, 77; Jacob *v.* Lindsay, 1 East, 460; Falconer *v.* Hanson, 1 Camp. 171; 2 Ph. Ev. 341. In the latter cases it was held, that using a party's oral admission against him necessitates the introduction of papers referred to by him, without which his statement would be incomplete.

[2] Haylock *v.* Sparke, 1 E. & B. 471; Haynes *v.* Hayton, 6 L. J. K. B. (O. S.) 231; recognized in Bessey *v.* Windham, 6 Q. B. 172, cited in Taylor on Evidence, § 658. See supra, § 830.

[3] White *v.* Morris, 11 C. B. 1015; Glave *v.* Wentworth, 6 Q. B. 173, n.; Bowes *v.* Foster, 27 L. J. Ex. 463; Taylor on Evidence, § 659. See infra, § 1118; supra, §§ 824, 834.

[4] Robinson *v.* Scotney, 19 Ves. 584; Freeman *v.* Tatham, 5 Hare, 329.

[5] Queen Caroline's case, 2 B. & B. 297; Beckham *v.* Osborne, 6 M. & Gr. 771; Fletcher *v.* Froggatt, 2 C. & P. 566; Storer *v.* Gowen, 18 Me. 174; Ripley *v.* Paige, 12 Vt. 353; O'Brien *v.* Cheney, 5 Cush. 148; Bristol *v.* Warner, 19 Conn. 7; Hopkins *v.* Smith, 11 Johns. 161; Stuart *v.* Kissam, 2 Barb. 493; Fox *v.* Lambson, 3 Halst. 275; Gill *v.* Kuhn, 6 S. & R. 333; Thomson *v.* Austen, 2 S. & R. 361; Hamsher *v.* Kline, 57 Penn. St. 397; Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Penn. St. 185; Phares *v.* Barber, 61 Ill. 271; Miller *v.* R. R. 52

it make any difference whether the part is brought out by the direct examination of a party's own witness or the cross-examination of the witness of his adversary." [1] But collateral statements are not made admissible because part of the conversation; nor can they be introduced, by means of cross-examination, to make out an independent case for the party by whom they are made unless they are part of the context of the admission received.[2] Nor does the limitation exact the introduction of interviews subsequent to that in which the admissions proved were made.[3] If the substance be proved, it is not necessary to reproduce the words.[4] Nor is the evidence excluded by the fact that there were other portions of the conversation which the witness did not hear.[5]

So of testimony reproduced from a former trial.

§ 1109. When the testimony of a witness, as given in another cause, is offered, the whole relevant portion of the testimony, including cross-examination as well as examination, must be given;[6] and where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, the court held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on his behalf of the agreement and its contents; and that, too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs

Ind. 51; Overman *v.* Coble, 13 Ired. L. 1; Bradford *v.* Bush, 10 Ala. 386; Howard *v.* Newsom, 5 Mo. 523.

[1] Sharswood, J., Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Penn. St. 185.

[2] Prince *v.* Samo, 7 A. & E. 627; Blight *v.* Ashley, Pet. C. C. 15; Barnum *v.* Barnum, 9 Conn. 242; Fox *v.* Lambson, 7 Halst. 275; Hatch *v.* Potter, 7 Ill. 725; Edwards *v.* Ford, 2 Bailey, 461; Ward *v.* Winston, 20 Ala. 167. Supra, § 1100.

[3] Adam *v.* Eames, 107 Mass. 275.

[4] Hale *v.* Silloway, 1 Allen, 21; Mays *v.* Deaver, 1 Iowa, 216; Dennis *v.* Chapman, 19 Ala. 29. See fully § 514.

[5] Com. *v.* Pitzinger, 110 Mass. 101.

[6] Goss *v.* Quinton, 3 M. & G. 825; Ridgway *v.* Darwin, 7 Ves. 404; Robinson *v.* Scotney, 19 Ves. 584; Smith *v.* Biggs, 5 Sim. 391; Tibbetts *v.* Flanders, 18 N. H. 284; Marsh *v.* Jones, 21 Vt. 378; Woods *v.* Keyes, 14 Allen, 236; Com. *v.* Richards, 18 Pick. 434; Gildersleeve *v.* Caraway, 10 Ala. 260. Supra, § 180.

to produce it.[1] The whole testimony must be taken together. One portion without the other is incompetent. It is not, however, necessary that the testimony should be given verbatim. Its substance is enough.[2]

II. JUDICIAL ADMISSIONS.

§ 1110. A *confessio*, to be *judicialis*, must be before a judge competent to take jurisdiction of the particular suit, and the suit must be brought regularly before him. The presence, actual or constructive, of the judge, is as essential to the solemnity of the *confessio* as is that of the notary to the solemnity of the *instrumentum publicum*.[3] Nor is the admission a bar if in an *ex parte* proceeding; it must be on an issue accepted by the other side in order to bind either.[4] The appearance in court, however (by person or attorney), of the other side, is such an acceptance. *Absente adversario*, the confession is operative only *quae solam voluntatem confitentis declarat*, or *in his quae dependent solum ex voluntate confitentis*.[5] But when formally made, a judicial confession is conclusive as to the issue, unless shown to have been made by mistake or to have been secured by fraud.[6] And it may be used against the party making it in all other cases in which it is relevant, though it may not in such cases conclude.[7]

Admissions by plea conclusive.

§ 1111. It should be noticed, in respect to pleas in abatement, that where one defendant pleads generally the non-joinder of

[1] Goss *v.* Quinton, 3 M. & G. 825; Taylor's Ev. § 658.

[2] Supra, §§ 180, 514.

[3] Tancred, p. 211; Mascard. concl. 347, nr. 53.

[4] See supra, § 1078.

[5] Mascard. concl. 348. nr. 1.

[6] Supra, §§ 837–8; infra, § 1116; Marsh *v.* Mitchell, 26 N. J. Eq. 497; Gridley *v.* Conner, 4 La. An. 416; Denton *v.* Erwin, 5 La. An. 18; Edson *v.* Freret, 11 La. An. 710.

[7] R. *v.* Fontaine Moreau, 11 Q. B. 1033; Bradley *v.* Bradley, 2 Fairf. 367; Perry *v.* Simpson Co. 40 Conn. 313. Supra, § 838; infra, § 1116. See Brazill *v.* Isham, 2 Kern. 9.

"A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission. No application was made to the court to be relieved from the effect of this admission, or to weaken or modify its full import; and, while it thus stood, in the language of Woodruff, J., in Robbins *v.* Codman, 4 E. D. Smith, 325, 'after such an admission it was not necessary for the plaintiffs to prove it, nor would it be permitted to the defendant to deny it.'" Bacon, J., Paige *v.* Willet, 38 N. Y. 31.

other parties as co-defendants, such plea is not divisible; but if it fails in part, it must fail altogether.[1] When a plea of abatement is decided against a defendant, such plea going to the merits, the judgment has been at common law held to be final if the action is for a definite sum.[2] It is otherwise when the judgment is interlocutory, in which case liability only to nominal damages is admitted.[3]

So of pleas in abatement.

§ 1112. So far as concerns the particular suit in which the plea is entered, it may be generally declared that whenever a material averment well pleaded is passed over by the adverse party without denial, whether this be by pleading in confession and avoidance, or by demurring in law, or by suffering judgment to go by default, it is thereby, for the purpose of pleading, if not for the purpose of trial before the jury, conceded to be so far true that it need not be proved by the opposite side.[4] "It is a fundamental rule in pleading, that a material fact asserted on one side and not denied on the other is admitted."[5] But such admissions do not bind collaterally.[6]

In pleading, that which is not disputed is admitted.

The distinctive effects of demurrers have been already discussed.[7]

[1] Hill *v.* White, 6 Bing. N. C. 26.

[2] Pasmore *v.* Bousfield, 2 Stark. R. 298.

[3] Weleker *v.* Le Pelletier, 1 Camp. 481; Morris *v.* Lotan, 1 M. & Rob. 233. See per Pollock, C. B., in Crellin *v.* Calvert, 14 M. & W. 18, 19, and per Rolfe, B., in Ibid. 22; and see Crellin *v.* Calvert, 14 M. & W. 11.

[4] Taylor's Ev. § 748; citing Steph. Pl. 248; Jones *v.* Brown, 1 Bing. N. C. 484; Le Gaillon *v.* L'Aigle, 1 B. & P. 368; Prowse *v.* Shipping Co. 13 Moo. P. C. 484. See, also, Coffin *v.* Knott, 2 Greene (Iowa), 582.

[5] McAllister, J., Simmons *v.* Jenkins, 76 Ill. 482; citing Dana *v.* Bryant, 1 Gilm. 104; Pearl *v.* Wellman, 3 Ibid. 311; Briggs *v.* Dorr, 19 Johns. 95; Jack *v.* Martin, 12 Wend. 316; Raymond *v.* Wheeler, 9 Cow. 295.

[6] See infra, § 1116 *a*.

[7] See supra, § 840.

The English equity practice in this respect is thus recapitulated by Mr. Taylor (Ev. § 759):—

"First, every bill which is ordered to be taken *pro confesso* may be read as evidence of the facts therein contained, in the same manner as if such facts had been admitted to be true by the defendant's answer. See 11 G. 4 and 1 W. 4, c. 36, § 14; Cons. Ord. Ch. 1860, Ord. xxii. Next, where a cause is heard upon a bill and answer, the answer is admitted to be true on all points. See Cburton *v.* Frewen, 35 L. J. Ch. 692; and no other evidence is admitted, unless it be matter of record to which the answer refers, and which is provable by the record. Cons. Ord. Ch. 1860, Ord. xix. r. 2. Then, it is generally true that, where a defendant, in his

§ 1113. As we have already had occasion to see, when a suit is brought on a former judgment, the record of such judgment cannot, unless on proof of fraud or mistake, or non-identity, be disputed in the second suit.[1] Nor is this rule limited to cases where the suit is simply for the revival of a judgment, or for its transfer to another jurisdiction. Thus if an executor or administrator confess judgment, or suffer it to go against him by default, he thereby admits assets in his hands, and hence he cannot be permitted to dispute the fact, in an action on such judgment, based on a *devastavit*.[2] *Some* proof must indeed be given that the assets have been wasted, in order to charge the executor or administrator personally in such a case; but slight evidence has been held enough for this purpose.[3]

Judgment conceded by administrator admits assets.

§ 1114. It was at one time intimated that paying money into court admits everything which the plaintiff would have to prove in order to recover the money.[4] The better opinion, however, now is, that payment into court

Paying money into court is an admission *pro tanto*.

answer to a bill, admits the existence and contents of a document, the plaintiff may use such admission for the purposes of the suit, without producing the document as evidence at the hearing. M'Gowan *v.* Smith, 26 L. J. Ch. 8, per Kindersley, V. C.; Lett *v.* Morris, 4 Sim. 607. Still, a demurrer is regarded by courts of equity as simply raising the question of law, without any admission of the truth of the allegations contained in the bill, — so that if the demurrer be overruled, an answer may still be put in (as to when a party may plead and demur to the same pleading at the same time at common law, see 15 & 16 Vict. c. 76, § 80); and a plea is merely a statement of circumstances sufficient to show that, *supposing* the facts charged to be true, the defendant is not bound to answer. It follows from this state of the law, that in any future action between the same parties, neither the demurrer nor plea can be received in evidence, as amounting to an admission of the facts charged in the bill. Tomkins *v.* Ashby, M. & M. 32, per Abbott, C. J."

That affidavits and answers may be put in evidence against the party making them, see infra, §§ 1116, 1119.

The Roman law is given supra, § 461.

See, as to Massachusetts practice, Elliott *v.* Hayden, 104 Mass. 180. As to how far introducing depositions or answer in chancery necessitates admission of bill, see supra, § 828.

[1] See supra, §§ 758 *et seq.*

[2] Skelton *v.* Hawling, 1 Wils. 258; Re Trustee Relief Act, Higgins's Trusts, 2 Giff. 562. See supra, §§ 783, 837.

As to inventories as admissions, see infra, § 1121.

[3] Leonard *v.* Simpson, 2 Bing. N. C. 176, 180, per Tindal, C. J.; 2 Scott, 335, *S. C.* See, also, Cooper *v.* Taylor, 6 M. & Gr. 989.

[4] Per cur. Dyer *v.* Ashton, 1 B. & C. 3.

upon the *indebitatus* counts admits only a hypothetical or alternative liability, to the extent of the money paid in, on the declaration; and it would appear that, practically, the contract must be proved.[1] But if in a statement of claim the claim is based upon a special contract, payment into court is an admission of such contract,[2] to the extent to which it is obligatory upon the plaintiff to prove it,[3] and an admission of the specific breach in respect of which the payment is made.[4] Beyond this sum, however, damages are not admitted; nor is there an admission of any sum to which the action does not apply. Thus, while payment into court in an action upon a bill or a promissory note admits the instrument, and also, *primâ facie*, admits the precise sum to be due upon it,[5] yet, if the instrument be payable by instalments, such payment admits only that the sum paid was due upon the bill or note, and does not preclude the defendant from pleading the statute of limitations as to any further sum.[6] A defendant also, by so paying, is not precluded from taking any other objection, in order to limit the operation of the contract declared on, and to prevent the plaintiff from recovering more than the amount that was really paid in.[7] A like qualified admission was recognized in a case where the declaration, after stating that the defendant and another were indebted to the plaintiff in a certain sum, to wit, £250, but that the debt was barred by the statute of limitations, averred that the defendant afterwards, and within six years from the commencement of the suit, signed a written promise to pay his proportion of the debt, which proportion amounted to a certain sum, to wit, a moiety of the debt, and then assigned non-payment as a breach. In this case it was held that the defendant, by paying 10*s.* into court, admitted the contract and breach but disputed the amount due.[8]

[1] Kingham *v.* Robins, 5 M. & W. 94.

[2] Archer *v.* English, 1 M. & G. 876; Powell's Ev. 267.

[3] Cooper *v.* Blick, 2 Q. B. 915.

[4] Rucker *v.* Palsgrave, 1 Camp. 550.

[5] Tattenhall *v.* Parkinson, 2 M. & W. 752.

[6] Reid *v.* Dickons, 5 B. & Ad. 599.

[7] Cox *v.* Parry, 1 T. R. 464.

[8] Lechmere *v.* Fletcher, 1 C. & M. 623.

That paying money into court admits only the special contract set out in the declaration only to that extent to which the plaintiff is bound to prove it, see Cooper *v.* Blick, 2 Q. B. 915; where the plaintiff, having de-

§ 1115. In actions of tort the law has been thus comprehensively stated: [1] —

If "the declaration is general and unspecific, the payment of money into court, although it admits *a* cause of action, does not admit *the* cause of action sued for; and the plaintiff must give evidence of the cause of action sued for before he can recover larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, we think that the payment of money into court admits the cause of action sued for, and so stated in the declaration." [2] The conclusion above given was not reached, however, without some faltering. The Court of Queen's Bench, to use the summary of a learned English commentator, "ruled one way,[3] the Court of Common Pleas ruled another;[4] and the barons of the Exchequer, in their anxiety to be right, ruled both ways." [5] But the judgment of Jervis, C. J., as above given, may be regarded as a final settlement of this vexed question.[6]

In torts only when declaration is specific.

§ 1116. We have already noticed that the pleadings of a party in one case may, under certain circumstances, be used against the same party in another case.[7] It may here be incidentally observed, that an answer under oath is to be regarded as admissible against the party making it, in all independent suits in which it is relevant. As is said by a learned expositor,[8] "A person's answer in chancery is evidence against him, by way of admission, in favor of a person who was

Pleadings in other cases may be admissions.

clared upon a contract by the defendants to employ him, to wit, in the capacity of editor of a newspaper at a certain salary, to wit, at the rate of £400 per annum, the defendants paid money into court. It was held that on this state of the pleading they admitted the capacity in which the plaintiff had engaged to serve them, but not the amount of salary which they had agreed to pay him. The test, so held the court, was, what must the plaintiff have proved, had *non assumpsit* been pleaded, and it was decided that the former averment was material and the latter immaterial.

[1] Jervis, C. J., in Perren *v.* Monmouthshire R. Co. 11 C. B. 863.

[2] Powell's Evidence, 4th ed. 267.

[3] Leyland *v.* Tancred, 16 Q. B. 664.

[4] Screger *v.* Carden, 11 C. B. 851.

[5] Story *v.* Finnis, 6 Ex. R. 123; Knight *v.* Egerton, 7 Ex. R. 407.

[6] Taylor's Ev. § 765.

[7] Supra, § 838.

[8] Phillipps on Evidence, vol. 1, Van Colt's ed. 1849, p. 366.

no party to the chancery suit; for the statement, being upon oath, cannot be considered conventional merely."[1] One defendant, however, cannot be affected by his co-defendant's answer.[2]

But collaterally pleas do not always admit that which they do not contest.

§ 1116 *a*. Collaterally, it should be remembered, pleas are not to be regarded as admitting that which they do not contest. A plea of confession and avoidance, it is true, is to be regarded as admitting, for the purposes of the particular issue, the existence of the claim which it seeks to avoid, by the introduction of an avoiding defence; but even such a plea may, on due cause shown, be withdrawn, and one traversing the plaintiff's cause of action substituted. So far as concerns collateral actions, a plea setting up an avoiding defence cannot, when confining itself to the avoidance, be treated as admitting the plaintiff's claim. The defendant, for instance, pleads a release; and this, it may be said, admits the claim released. But this conclusion does not necessarily result. A man may obtain a release from a claim which he does not owe; and collaterally, that he obtained such a release is no proof, by itself, of the existence of the claim. "Non utique existimatur confiteri de intentione adversarii, quocum agitur quia exceptione utitur."[3]

Admissions by plea are rebuttable.

§ 1117. The qualities of an estoppel, which are imputable to a party's pleas, so far as concerns the particular case in which they are pleaded, are not imputable to such pleas when offered in evidence collaterally, even in cases where they are admissible.[4] Thus where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and then went on to aver that the bond

[1] See, to same effect, Cook *v.* Barr, 44 N. Y. 158. See, also, cases cited supra, §§ 838, 1099.

[2] Infra, § 1199.

"It is contended by the appellant's counsel in his brief that the answer of Jacob Reese to the bill of complaint is competent evidence against the other defendants, and that the admissions therein made are sufficient proof of the agreement of sale and its part performance. But the principle is very well settled that the answer of one defendant cannot be used as evidence against his co-defendant. Stewart *v.* Stone, 3 G. & J. 514; Hayward *v.* Carroll, 4 H. & J. 520; Calwell *v.* Boyer, 8 G. & J. 149." Grason, J., Reese *v.* Reese, 41 Md. 558–59.

[3] L. 9, D. de exceptionib. xli. 9. See Crump *v.* Gerock, 40 Miss. 765; Kimball *v.* Bellows, 13 N. H. 58; and see fully supra, § 839.

[4] See supra, §§ 760, 837–8; Leggett *v.* R. R. L. R. 1 Q. B. D. 599.

was given to secure, among other moneys, the sum mentioned in the *said* agreement; and the replication, tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; it was held, that the admission was available for the purpose of that suit only; and, consequently, the plaintiff was at liberty to dispute the corrupt nature of the agreement, in a subsequent action on a deed, which was signed by the defendant at the same time with the bond by way of collateral security.[1]

§ 1118. What has been said of pleading equally applies to process. A party by issuing process admits the facts which such process assumes.[2] Thus where a magistrate was sued in trespass for assault and false imprisonment, the warrant of commitment put in evidence by the plaintiff was held to be admissible on behalf of the defendant, as proof of the information recited in it.[3] It has been even held, in a case where an under sheriff's letter was produced by the plaintiff to affect the defendant, that the letter was *primâ facie* evidence also of certain facts stated therein, which tended to excuse the sheriff.[4] So far as concerns the returns of officers, "It is well settled that the return of an officer, as to all matters which are properly the subject of his return, is conclusive so far as it affects parties and privies to the process returned."[5]

So of process.

§ 1119. That an admission in pleading may be effectually used against the party making it has been already seen. It

[1] Carter *v.* James, 13 M. & W. 137. See Rigge *v.* Burbidge, 15 M. & W. 598; 4 Dowl. & L. 1, *S. C.;* and Hutt *v.* Morrell, 3 Ex. R. 241, per Pollock, C. B.; Taylor's Ev. § 747.

[2] See supra, §§ 828 *et seq.* In Bessey *v.* Windham, 6 Q. B. 166, in order to fix a sheriff in an action of trespass, the plaintiff put in the warrant under which the seizure was made; and as this recited the writ of *fi. fa.*, the Court of Queen's Bench held that it was some evidence of the writ, and, consequently, that it tended to protect the sheriff, as showing that the seizure was made by the authority of the law. This ruling, however, has been somewhat qualified by a subsequent decision of the Court of Common Pleas. White *v.* Morris, 11 Com. B. 1015. See, also, Bowes *v.* Foster, 27 L. J. Ex. 263, per Watson, B.; Taylor's Ev. § 659. See supra, § 1107.

[3] Haylock *v.* Sparke, 1 E. & B. 471.

[4] Haynes *v.* Hayton, 6 L. J. K. B. (O. S.) 231; recognized in Bessey *v.* Windham, 6 Q. B. 172; and see supra, §§ 833 *a*, 837.

[5] Ames, J., Baker *v.* Baker, 125 Mass. 9, citing Campbell *v.* Webster, 15 Gray, 28; Hannum *v.* Tourtellott, 10 Allen, 494. Supra, § 833. See Sykes *v.* Keating, 118 Mass. 517, cited supra, § 980.

may be here repeated that an admission, made in an affidavit, though not necessarily an estoppel, is from its deliberativeness and solemnity entitled to an authority much greater than an ordinary conversational admission.[1] But an answer in chancery, though sworn to, is not conclusive against the party making it;[2] though of course it is *primâ facie* proof.[3] A bill in chancery, it is said, is not admissible at all against the plaintiff in proof of the admissions it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel.[4] The question how far equity pleadings are to be introduced as a whole has been already discussed.[5]

Affidavits and answers and bills in chancery may be put in evidence against the party making them.

§ 1120. The admissions of a party, when examined as a witness in another case, may be used against him in a subsequent civil issue;[6] nor is such evidence excluded by the fact that the party against whom his former evidence is produced is present at the trial.[7] If he does not offer himself as a witness this enhances the value of the admission.[8] When a party is examined in his own behalf, his admission can be used against him in subsequent stages of the same suit, or in other suits.[9] It is no objection to the admission of such

Admissions of a party when examined as witness.

[1] R. *v.* Clarke, 8 T. R. 220; Thornes *v.* White, Tyr. & Gr. 110; Doe *v.* Steel, 3 Camp. 115; Rowe *v.* Hulett, 50 Vt. 637; Forrest *v.* Forrest, 6 Duer, 102; Bowen *v.* De Lattre, 6 Whart. R. 430; Fulton *v.* Gracey, 15 Grat. 314; Snydacker *v.* Brosse, 51 Ill. 357; Ill. Cent. R. R. *v.* Cobb, 64 Ill. 148; Williams *v.* Reynolds, 86 Ill. 263; Trustees *v.* Bledsoe, 5 Ind. 133; Davenport *v.* Cummings, 15 Iowa, 219; Mushat *v.* Moore, 4 Dev. & B. L. 124. See, as to effect of answers under oath, Elliott *v.* Hayden, 104 Mass. 180; Knowlton *v.* Moseley, 105 Mass. 136; Root *v.* Shields, 1 Woolw. 340; Cook *v.* Barr, 44 N. Y. 158; Wylder *v.* Crane, 53 Ill. 490; Lawrence *v.* Lawrence, 21 N. J. Eq. 317.

[2] Doe *v.* Steel, 3 Camp. 115; Cameron *v.* Lightfoot, 2 W. Bl. 1190; Studdy *v.* Sanders, 2 D. & R. 347; De Whelpdale *v.* Milburn, 5 Price, 481.

[3] Bates *v.* Townley, 2 Ex. R. 157.

[4] Boileau *v.* Rutlin, 2 Ex. R. 665; Doe *v.* Sybourn, 7 T. R. 3, per Ld. Kenyon.

[5] Supra, §§ 1104–9.

[6] Supra, §§ 488, 537; Stockflesh *v.* De Tastet, 4 Camp. 11; Robson *v.* Alexander, 1 M. & P. 448; Ashmore *v.* Hardy, 7 C. & P. 501; Carr *v.* Griffin, 44 N. H. 510; Tooker *v.* Gormer, 2 Hilt. (N. Y.) 71. See Beeckman *v.* Montgomery, 14 N. J. Eq. 106; Mitchell *v.* Napier, 22 Tex. 120.

[7] Lorenzana *v.* Camarillo, 45 Cal. 125. Supra, § 1094.

[8] Robinson *v.* Stuart, 68 Me. 61.

[9] McAndrews *v.* Santee, 57 Barb. 193; Woods *v.* Gevecke, 28 Iowa, 561. See supra, §§ 488, 1099. As to affidavits by party, see § 1120.

evidence that the witness had not the opportunity of fully explaining himself;[1] nor that the questions were irrelevant;[2] nor that the witness answered under compulsion.[3] But by statute in some jurisdictions evidence thus obtained in penal suits cannot be used against the party giving it.[4]

§ 1121. The inventory filed by an executor or administrator, when sworn to by such officer or his agent, is *primâ facie* proof of the facts it states; and the executor or administrator, who has pleaded *plene administravit*, will be forced to show, either the non-existence of such assets, or that they have not reached his hands, or that they have been duly administered.[5] Formerly, in England, when inventories were without signature or verification, they were not treated as *primâ facie* evidence of assets, though they might, in connection with other circumstances, have afforded some proof of the value of the estate.[6] It was, however, held that verification by a probate stamp, though admissible as slight evidence of assets to the amount covered thereby, was not sufficient by itself to throw upon the executors the burden of proving the non-receipt of such assets.[7] It was otherwise when there was evidence of long assent to the payment of the duty, or of other suspicious circumstances.[8]

Inventory an admission by executor.

[1] Collett *v.* Keith, 4 Esp. 212. See supra, § 1099.

[2] Smith *v.* Beadnell, 1 Camp. 30; Stockflesh *v.* De Tastet, 4 Camp. 11.

[3] Supra, § 1099.

[4] So by Rev. U. S. Stat. § 860, which has been held not to apply to books seized by revenue officer. U. S. *v.* Myers, 1 Hugh. 533.

[5] Giles *v.* Dyson, 1 Stark R. 32; explained in Stearn *v.* Mills, 4 B. & Ad. 660, 662; Parsons *v.* Hancock, M. & M. 330, per Parke, J.; Hickey *v.* Hayter, 1 Esp. 313; 6 T. R. 384, *S. C.;* Young *v.* Cawdrey, 8 Taunt. 734. See Hutton *v.* Rossiter, 7 De Gex, M. & G. 9.

See this question discussed, in its common law relations, in Williams on Ex. (7th ed.) 1968. See, also, Smith's Probate Law, 119; Richards *v.* Sweetland, 7 Cush. 324.

[6] Stearn *v.* Mills, 4 B. & Ad. 657.

[7] Mann *v.* Lang, 3 A. & E. 699; Stearn *v.* Mills, 4 B. & Ad. 663, 664. These cases overrule Foster *v.* Blakelock, 5 B. & C. 328.

[8] Mann *v.* Lang, 3 A. & E. 702, per Ld. Denman; Curtis *v.* Hunt, 1 C. &. P. 180, per Ld. Tenterden; Rowan *v.* Jebb, 10 Irish Law R. 217; Lazenby *v.* Rawson, 4 De Gex, M. & G. 556, 563, 564, per Ld. Cranworth; Taylor's Evidence, § 786.

III. DOCUMENTARY ADMISSIONS.

§ 1122. A written admission by a party, it need scarcely be said, if published by him, is strong evidence against him or those claiming under him. *Scriptura contra scribentem probat.*[1] To this rule, the Roman law presents the following qualification. When in a written stipulation, *cautio*, the *causa* is expressed (*cautio discreta*), the burden is on the promisor, should he defend on the ground that the *cautio* was *indebite* or *sine causa*, to make out his case. When, however, the *causa* is not expressed in the writing (*cautio indiscreta*), the plaintiff has the burden on him of proving the consideration. We find this expressly stated in an extract from Paulus,[2] who declares that a creditor who takes a mere informal memorandum of indebtedness must prove the consideration: it being his duty, if he would relieve himself from this burden, to have the consideration specified in the instrument.

Written admissions entitled to peculiar weight.

§ 1123. If A. has among his papers a written acknowledgment of indebtedness to B., which acknowledgment has never been delivered to B., can such acknowledgment be used against A., or A.'s representatives? Certainly A.'s books, containing his accounts, can be so used, for such books are prepared for the purpose of determining business relations with other parties;[3] but can a memorandum of indebtedness, which has never been delivered to the alleged creditor, be evidence against the alleged debtor? On this point there has been much discussion among foreign jurists. The French Code makes such a paper evidence.[4] On the other hand, it is argued with much strength in Germany, that a unilateral paper of this kind can have no contractual force; that the party holding it is at liberty at any time to destroy or qualify it; and that its non-delivery is to be regarded as a presumption of its non-validity.[5] Yet it must be remembered that such papers may be taken, especially after a party's death, as admissions by him of specific facts.[6] And a letter, admitting a

Written admissions may have evidential force though not delivered.

[1] See Cook *v.* Barr, 44 N. Y. 156.

[2] L. 25, § 4, D. xxii. 3. See, also, L. 13, c. iv. 30.

[3] See supra, § 678.

[4] Code Civil, art. 1332.

[5] See Weiske's Rechtslexicon, 660.

[6] See Toner *v.* Taggart, 5 Binn. 490.

fact, is evidence, irrespective of the question of delivery.[1] So papers found on a party, if he be shown to be in any way implicated in them, can be used in evidence against him to charge him with complicity in an illegal act.[2] But by our own law, as we shall hereafter more fully see, there must be something more than a mere note, found among a party's papers, to charge him with indebtedness.[3] An account, however, need not be delivered in order to be efficacious as an admission, provided it appear that it was intended by the party making it to be an accurate statement.[4]

§ 1124. Nor does the fact that the writing is void as an obligation make it any the less an admission of a debt.[5] Thus a note, void from being executed on a Sunday, may be put in evidence as admitting indebtedness.[6] So where a power of attorney, executed by an agent, is void for want of a seal, it may be used as an admission.[7] By the same reasoning, an unsigned answer by a party before a register in bankruptcy, taken down by his attorney, may be used in evidence to contradict his testimony in a collateral proceeding.[8] An unstamped instrument, also, void as an obligation, may be received evidentially as an admission.[9] It has been also held, to take an illustration of another class, that a document, executed by an agent, but invalid for want of authority in the agent to execute, may be used against the agent as an admission.[10]

Invalid instrument may be valid as an admission.

[1] See Medway *v.* U. S. 6 Ct. of Cl. 421.

[2] See R. *v.* Cooper, L. R. 1 Q. B. D. 19, cited infra, § 1154.

[3] See fully infra, § 1154.

[4] Bruce *v.* Garden, 17 W. R. 990.

[5] See Hutchins *v.* Scott, 2 M. & W. 809; Falmouth *v.* Roberts, 9 M. & W. 471; Agricult. College *v.* Fitzgerald, 16 Q. B. 432; Rumsey *v.* Sargent, 21 N. H. 397; Fort *v.* Gooding, 9 Barb. 371; Hickey *v.* Hinsdale, 12 Mich. 99; Crawford *v.* Jones, 54 Ala. 459; supra, § 698. See Thomas *v.* Arthur, 7 Bush, 245. So an infant's admissions can be used against him when of age. O'Neill *v.* Read, 7 Ir. L. R. 434.

[6] Lea *v.* Hopkins, 7 Penn. St. 492; Ayres *v.* Bane, 39 Iowa, 518; Riley *v.* Butler, 36 Ind. 51.

[7] Morrell *v.* Cawley, 17 Abb. (Pr.) 76. See Beach *v.* Sutton, 5 Vt. 209; Ross *v.* Gould, 5 Greenl. 204; Womack *v.* Womack, 8 Tex. 397.

As to non-producible writings being proved by parol, see supra, § 130.

[8] Knowlton *v.* Moseley, 105 Mass. 136.

[9] 3 Pars. on Cont. 295; Matheson *v.* Ross, 2 H. of L. 286; Atkins *v.* Plympton, 44 Vt. 21; Moore *v.* Moore, 47 N. Y. 468; Reis *v.* Hellman, 25 Ohio St. 180; *S. C.* 1 Cincin. 30. See supra, §§ 697–8.

[10] Huffman *v.* Cartwright, 44 Tex. 296.

§ 1125. It is scarcely necessary to say that a negotiable instrument is a *primâ facie* admission to the amount expressed on the paper.[1] The same is true of certificates of indebtedness.[2] And orders for payment of money, in the hands of the drawee, are *primâ facie* evidence that the drawer has received the amount.[3]

Notes and other acknowledgments are admissible as admissions of indebtedness.

§ 1126. Self-disserving indorsements on instruments are, on the principles above stated, *primâ facie* evidence against the party making or permitting such indorsements, though, like receipts, they are open to parol explanation.[4] If self-serving, they are inadmissible;[5] though, as is elsewhere shown, it has been much discussed whether an indorsement of part payments, which is only superficially self-disserving, may be produced in evidence, by the party making it or his representatives, when the effect is to take the debt out of the statute, and therefore greatly to serve him.[6] When self-disserving, and when on the instrument sued on, they need not be proved by the party sued.[7] But to be thus received, they must be in some way imputable to the party claiming under the instrument.[8]

Indorsements of payment on paper are admissions.

§ 1127. A letter, when it forms part of a contract, or is part of the material from which a contract may be constructed, may not only be received against the writer as an admission, but may bind him by way of estoppel. If contractual, to fall back on the distinction already put,[9] letters may estop; if non-contractual, they afford only *primâ facie* proof.[10]

Letters receivable as admissions.

[1] 1 Pars. on Notes, 176; Redfield & Big. Cases, 186; Grant *v.* Vaughan, 3 Burr. 1516; Bowers *v.* Hurd, 10 Mass. 427; Fisher *v.* Fisher, 98 Mass. 303; Mowry *v.* Bishop, 5 Paige, 98; Bunting *v.* Allen, 18 N. J. L. 299.

[2] Ala. R. R. *v.* Sanford, 36 Ala. 703.

[3] Child *v.* Moore, 6 N. H. 33; Rawson *v.* Adams, 17 Johns. R. 130; Curle *v.* Beers, 3 J. J. Marsh. 170. Infra, §§ 1362–3.

[4] See supra, §§ 228 *et seq.*, 619, 924; Harper *v.* West, 1 Cranch C. C. 192; Clarke *v.* Ray, 1 Har. & J. 318; Gilpatrick *v.* Foster, 12 Ill. 355; Carey *v.* Phil. Co. 33 Cal. 694.

[5] Sorrell *v.* Craig, 15 Ala. 789.

[6] Supra, § 228, and see §§ 229–230; infra, § 1135.

[7] Lloyd *v.* McClure, 2 Greene (Iowa), 139. See supra, §§ 619, 924.

[8] Jacobs *v.* Putnam, 4 Pick. 108; Turrell *v.* Morgan, 7 Minn. 368.

[9] See supra, §§ 1078–85.

[10] Dodge *v.* Van Lear, 5 Cranch C. C. 278; Pettibone *v.* Derringer, 4 Wash. C. C. 215; Connecticut *v.* Bradish, 14 Mass. 296; New England Ins. Co. *v.* De Wolf, 8 Pick. 56; Beers *v.* Jackman, 103 Mass. 192; Union

Ordinarily, however, it is evidentially, rather than dispositively, that letters are used in evidence against the writer; they are employed, in other words, not to bind him to a disposition of property, but to show his admission of a fact, which admission, by force of the distinction above given, is but *primâ facie* proof, open to correction and explanation by the writer himself.[1] A letter to a third person is as admissible for this purpose as is a letter to the other party in the suit;[2] but in such case the admission, to be operative, must be specific.[3] It is not necessary to the admissibility of a letter that it should be signed; if traceable to the writer, and if involving a self-disserving admission of any kind, this is enough.[4] Nor is it an objection that the letters are insulated; a letter containing a particular admission may come in by itself;[5] nor is it necessary in such case, that the whole correspondence should be put in.[6] Nor is it fatal to the admissibility of a written admission that it was in answer to a letter meant as a trap.[7]

Letters are admissible as admissions, though made after the commencement of litigation.[8]

Canal *v.* Loyd, 4 Watts & S. 394; Snyder *v.* Reno, 38 Iowa, 329. See Knight *v.* Cooley, 34 Iowa, 218.

[1] Supra, §§ 923, 1085; Marshall *v.* R. R. 16 How. (U. S.) 314; Mulhall *v.* Keenan, 18 Wall. 342; Goddard *v.* Putnam, 22 Me. 363; Jacobs *v.* Shorey, 48 N. H. 100; Short Mountain Co. *v.* Hardy, 114 Mass. 197; Newcomb *v.* Cramer, 9 Barb. 402; Bank *v.* Culver, 2 Hill (N. Y.), 531; Stacy *v.* Graham, 3 Duer, 444; Wollenweber *v.* Ketterlinus, 17 Penn. St. 389; Douglass *v.* Mitchell, 35 Penn. St. 440; Downer *v.* Morrison, 2 Grat. 250; Coats *v.* Gregory, 10 Ind. 345; Shaw *v.* Davis, 7 Mich. 318; Harrison *v.* Henderson, 12 Ga. 19; Buchanan *v.* Collins, 42 Ala. 419; Prussel *v.* Knowles, 5 Miss. 90; Swann *v.* West, 41 Miss. 104; South. Ex. Co. *v.* Thornton, 41 Miss. 216; Porter *v.* Ferguson, 4 Fla. 102.

As to how far letters can be received without whole correspondence, see supra, § 1103.

[2] Longfellow *v.* Williams, Pea. Add. Ca. 225; Rose *v.* Cunynghame, 11 Ves. 550; Gibson *v.* Holland, L. R. 1 C. P. 1; Wilkins *v.* Burton, 5 Vt. 76; Robertson *v.* Ephraim, 18 Tex. 118.

[3] Betts *v.* Loan Co. 21 Wis. 80. Supra, § 1076–9.

[4] Bartlett *v.* Mayo, 33 Me. 518.

[5] North Berwick Co. *v.* Ins. Co. 52 Me. 336; Newton *v.* Price, 41 Ga. 186, and other cases cited supra, § 1103.

A letter containing an admission by a party is evidence against him, although the letter was in reply to another which the party is not called upon to produce. Wiggin *v.* R. R. 120 Mass. 201. See supra, § 1103.

[6] Supra, §§ 618 *et seq.*, 1103.

[7] U. S. *v.* Champagne, 1 Ben. 241.

[8] Holler *v.* Weiner, 15 Penn. St. 242; Prussel *v.* Knowles, 5 Miss. 90.

Letters of third parties are ordinarily inadmissible, being hearsay.[1] Hence a letter addressed to a party cannot be admitted as proof against him, unless it be proved that he received it and acted on it.[2] Whether a letter written, but not sent, can be put in evidence against a party, has been already discussed.[3]

Telegram may be an admission.

§ 1128. Telegrams, under the same restrictions as those which have been noticed as appertaining to letters, may be treated as constituting admissions on the part of the person by whom they are sent.[4] If tending to make up a contract, they bind him contractually. If merely evidential, they may be treated as non-contractual admissions, which, so far as concerns the party from whom they emanate, are subject to the usual incidents of such admissions.[5] It is scarcely neces-

[1] Williams *v.* Manning, 41 How. (N. Y.) Pr. 454; Wolstenholme *v.* Wolstenholme, 3 Lans. 457; Rosenstock *v.* Tormey, 32 Md. 169; Underwood *v.* Linton, 44 Ind. 72; Livingston *v.* R. R. 35 Iowa, 555.

[2] Smiths *v.* Shoemaker, 17 Wall. 630. See fully infra, 1154.

[3] Supra, § 1123.

[4] See supra, § 617.

[5] Com. *v.* Jeffries, 7 Allen, 548; Beach *v.* R. R. 37 N. Y. 457; Taylor *v.* The Robert Campbell, 20 Mo. 254; Wells *v.* R. R. 30 Wis. 605.

See, to effect of non-contractual admissions, supra, §§ 1075–8.

In Minnesota Linseed Oil Co. *v.* Collier White Lead Co., decided in 1876, by the United States Circuit Court for the District of Minnesota, the plaintiff, whose place of business was at Minneapolis, on the 31st of July, which was Saturday, deposited in the telegraph office at that place a telegram directed to defendant at St. Louis, offering to sell a quantity of linseed oil at fifty-eight cents per gallon. The dispatch was sent the same day, but was not delivered to defendant until between eight and nine o'clock Monday morning following. On Tuesday morning, a few minutes before ten o'clock, defendant deposited a telegram accepting plaintiff's offer in the telegraph office at St. Louis. A telegram was sent by plaintiff to defendant on the same day revoking the offer. The price of the kind of oil which was the subject of negotiation was subject to sudden and great fluctuations, and had in fact, after the offer was made, risen considerably. The court held that the same rule applied to contracts by telegraph as to those by mail, and that a contract is completed when the acceptance of a proposition is deposited for transmission in the telegraph office, whether the message is received by the person sending it or not. But it also held that an immediate answer should have been returned; and that an acceptance of the proposition, telegraphed after a delay of twenty-four hours from the time of its receipt, was not an acceptance within a reasonable time, and did not operate to complete the contract. See, to same general effect, Coupland *v.* Arrowsmith, 18 Law Times (N. S.), 75; Henkel *v.* Pape, L. R. 6 Exch. 7; Verdin *v.* Robertson, 10 Ct. Sess. Cas. (3d series) 35; Beach *v.* Raritan & Del. Bay R. R. Co. 37 N. Y. 457; Alb. L. J. Jan. 20, 1877.

sary to say, that, to charge a party with a telegram, the original draft in the handwriting of the party or his agent must be produced.[1] A sender, however, may be regarded as the employer of the telegraph company in such a sense as to make the message sent and delivered by the company primary evidence against him.[2] To prove a dispatch to have been received at a telegraph office, it must in some way be identified with the office.[3] The mere fact, however, of a telegram being dispatched to a party at a given place, and of an answer purporting to have been sent by him as at the same place, is no proof that he was at such place at the particular time. The operator at the place where the party was addressed must be called as a witness to prove the party's presence, or his own original, as an admission in his own writing, must be produced.[4] A telegram, it is generally held, is not a privileged communication; and the operator may be compelled to disclose its contents.[5]

Memoranda, when self-disserving may be received.

§ 1129. It is not necessary, as has been noticed, in order to charge a party with a written admission, that it should have been signed by him. Any memorandum, the authorship of which can be traced to him, may be put in evidence against him. Loose notes, or other casual writings, may be thus employed.[6] The effect of entries of receipt of interest on a note is elsewhere discussed.[7]

Receipts are admissions, but open to explanation.

§ 1130. As is elsewhere abundantly shown, a written receipt is *primâ facie* evidence of payment, liable to be explained by parol.[8] A receipt, however, as we have also seen, may be, when advanced as a basis for the action of third parties, an estoppel as to such third parties.[9] In other words, a receipt, when unilateral, is open to

[1] Durkee *v.* R. R. 29 Vt. 127; Benford *v.* Zanner, 40 Penn. St. 9; Matteson *v.* Noyes, 25 Ill. 591; Williams *v.* Brickell, 37 Miss. 682. Supra, §§ 76, 617.

[2] Durkee *v.* R. R. 29 Vt. 127. See other cases supra, §§ 76, 617; and see Williamson *v.* Freer, L. R. 9 C. P. 393.

[3] Richie *v.* Bass, 15 La. An. 668.

[4] Howley *v.* Whipple, 48 N. H. 487.

[5] Supra, § 595.

[6] Bartlett *v.* Mayo, 33 Me. 518; Hosford *v.* Foote, 3 Vt. 391; Stannard *v.* Smith, 40 Vt. 513; Wadsworth *v.* Ruggles, 6 Pick. 63; Leeds *v.* Dunn, 10 N. Y. 469; Cook *v.* Anderson, 20 Ind. 15; Snyder *v.* Reno, 38 Iowa, 329; Gaines *v.* Gaines, 39 Ga. 68. See Scammon *v.* Scammon, 28 N. H. 419.

[7] Infra, § 1135; supra, § 1126.

[8] See supra, § 1064.

[9] Supra, §§ 1065–7.

explanation by the party making it, but when bilateral, concludes.[1]

Corporation and club books may be used as admissions.

§ 1131. From what has been said, it follows that bank books are admissible as showing a *primâ facie* case against the bank by whom the entries are made;[2] and against a party dealing with the bank, so far as he has made the person making the entries his agent.[3] The books are evidence, also, between the bank and its stockholders.[4] Entries made by strangers, however, without the knowledge of the litigants, cannot be received as against either of the litigants.[5] Ordinarily the bank books are not evidence, in suits to which the bank is not a party, without proving such books by the clerk who made the entry, if within process, or proving his handwriting, if he is outside of process.[6] The same reasoning applies to the books of other corporations.[7] With regard to club and society books, it has been correctly held that entries in such books, when kept by the proper officer and accessible to all the members, are admissible against such members.[8]

Partnership books so admissible.

§ 1132. Partnership books, on the same principle, are admissible in suits by one partner against the other.[9] As a condition of such admissibility, however, it must appear that the partner sued had access to the books, or in some way authorized the entries charging him to be made, and that the books were fairly kept.[10] Such books are also evi-

[1] See supra, § 1078.

[2] Supra, § 662. See Whart. on Agency, §§ 671 *et seq.*, and cases there cited; Olney *v.* Chadsey, 7 R. I. 224; Manhattan Bank *v.* Lydig, 4 Johns. R. 377; State Bank *v.* Johnson, 1 Hill (S. C.), 404; Forniquet *v.* R. R. 6 How. (Miss.) 116.

[3] Williamson *v.* Williamson, L. R. 7 Eq. 542; Union Bank *v.* Knapp, 3 Pick. 96; Brown *v.* Bank, 119 Mass. 69; Allen *v.* Coit, 6 Hill (N. Y.), 318. See supra, § 662.

[4] Merchants' Bk. *v.* Rawls, 21 Ga. 334.

[5] Barnes *v.* Simmons, 27 Ill. 512.

[6] Philadelphia Bk. *v.* Officer, 12 S. & R. 49; Ridgway *v.* Bk. 12 S. & R. 256; Courtney *v.* Com. 5 Rand. (Va.) 666. See, however, Crawford *v.* Bank, 8 Ala. 79; and see supra, § 662.

[7] See supra, § 662; Board of Educ. *v.* Moore, 17 Minn. 412.

[8] Raggett *v.* Musgrave, 2 C. & P. 556; Alderson *v.* Clay, 1 Stark. R. 405; Ashpitel *v.* Sercombe, 5 Ex. R. 147; Allen *v.* Coit, 6 Hill, N. Y. 318.

[9] Symonds *v.* Gas Co. 11 Beav. 283; Lodge *v.* Prichard, 3 De Gex, M. & G. 706; Boardman *v.* Jackson, 2 Ball & B. 382; Tucker *v.* Peaslee, 36 N. H. 167; Topliff *v.* Jackson, 12 Gray, 565; Caldwell *v.* Leiber, 7 Paige, 483; White *v.* Tucker, 9 Iowa, 100; Perry *v.* Banks, 14 Ga. 699.

[10] Adams *v.* Funk, 53 Ill. 219; Tur-

dence against the partnership when sued by a stranger;[1] but not evidence against a stranger when sued by the partnership,[2] unless such books fall under the category of books of original entry.[3] After dissolution, entries cease to charge the partnership as such.[4]

So of accounts stated.

§ 1133. Wherever it is the duty of one party to state and forward an account for the information, of another, the entries of the accountant may be used as *primâ facie* evidence against him.[5] Such accounts, however, until final settlement, are open to correction by the parties.[6] But the fact that an account was stated after the commencement of the suit does not exclude it.[7] Even an account, made out but not sent in, may be treated as an admission.[8]

The omission by an insolvent of a claim, in the schedule of debts returned by him, is at least *primâ facie* evidence, as against the insolvent, that no such debt is due.[9] An account filed by a party, stating a debt to a third party, makes a *primâ facie* case for such third party.[10]

An account may be evidence in favor of the party making it

nipseed *v.* Goodwin, 9 Ala. 372. See Moon *v.* Story, 8 Dana, 226.

[1] Infra, § 1194.

[2] Brannin *v.* Foree, 12 B. Mon. 506.

[3] Supra, § 678.

[4] Boyd *v.* Foot, 5 Bosw. (N. Y.) 110. Infra, § 1201.

[5] Morland *v.* Isaac, 20 Beav. 392; Ryan *v.* Rand, 26 N. H. 12; Currier *v.* R. R. 31 N. H. 209; Chase *v.* Smith, 5 Vt. 556; Nichols *v.* Alsop, 6 Conn. 477; Peck *v.* Minot, 4 Robt. (N. Y.) 323; Carroll *v.* Ridgaway, 8 Md. 328; King *v.* Maddux, 7 Har. & J. 467; Mertens *v.* Nottebohms, 4 Grat. 163; Halleck *v.* State, 11 Ohio, 400; Goodin *v.* Armstrong, 19 Ohio, 44; Kirby *v.* Watt, 19 Ill. 393; State *v.* Woodard, 20 Iowa, 541; Byrne *v.* Schwing, 6 B. Mon. 199; Gradwohl *v.* Harris, 29 Cal. 150; Gaines *v.* Gaines, 39 Ga. 68; Turner *v.* Lewis, 6 La. An. 774; Murdoch *v.* Finney, 21 Mo. 138.

[6] "The account rendered on the 16th of April, 1864, was, at the most, but *primâ facie* evidence that there were no other transactions which should properly form a part of it. Lockwood *v.* Thorne, 18 N. Y. R. 285. An account rendered is not conclusive against either party to it, but may be impeached or corrected within a reasonable time after its rendition or its receipt. Should the balance claimed be actually paid, the account would still be open to correction in the same manner. Ibid." Hunt, Com. Champion *v.* Joslyn, 44 N. Y. 656.

[7] Hyde *v.* Stone, 7 Wend. 354; Stowe *v.* Sewall, 3 St. & P. 67.

[8] Bruce *v.* Garden, 17 W. R. 990. Supra, § 1123.

[9] Hart *v.* Newcomb, 3 Camp. 13; though see Nicholls *v.* Downes, 1 M. & Rob. 13, where Lord Tenterden held the insolvent estopped by the admission; and see Tilghman *v.* Fisher, 9 Watts, 441.

[10] Burrows *v.* Stevens, 39 Vt. 378. Supra, §§ 1131–2.

as against a party who has access to the books, and has full opportunity from time to time of testing their accuracy.[1]

The effect of silence in the reception of an account is discussed in another section.[2]

Whole account must go in.

§ 1134. As has been already incidentally noticed,[3] the party receiving an account cannot ordinarily put the debit side in evidence, without putting in the whole account;[4] and where an account is made up of several stages, embracing distinct settlements, the last settlement *primâ facie* includes and extinguishes the first.[5] When mixed up with independent unwritten statements, the written and the unwritten explanations are to be taken together.[6]

Indorsements of interest admissible against party making them, but not to bar statute of limitations.

§ 1135. An interesting question here arises as to the effect of an indorsement of payment of interest on a bond or note. Unquestionably such an indorsement is evidence against its maker whenever he undertakes to claim the debt of which the indorsement indicates the payment of interest. The indorsement when made was self-disserving; it was an admission against his interests; it is therefore, in accordance with the rule here stated, admissible to defeat his claim for interest. But if the entries were made while the statute of limitations was impending, and if their effect be to revive a debt which would otherwise become extinct, then, from being self-disserving they would become in the highest degree self-serving. A debt of $10,000 would in this way be recalled into life by an entry of payment of a quarter's interest. Hence it has been properly held that an entry made after the creditor's remedy is impaired by the lapse of time is not a declaration against interest, and is consequently inadmissible to defeat the running of the statute.[7] In England this ques-

[1] Symonds *v.* Gas Co. 11 Beav. 283; Boardman *v.* Jackson, 2 Ball & B. 382; Lodge *v.* Prichard, 3 De Gex, M. & G. 906.

[2] See infra, § 1140.

[3] Supra, §§ 620, 1103.

[4] Supra, §§ 620, 1103, Bell *v.* Davis, 3 Cranch C. C. 4; Morris *v.* Hurst, 1 Wash. C. C. 433; Walden *v.* Sherburne, 15 Johns. 409; Jones *v.* Jones, 4 Hen. & M. 447; Young *v.* Bank, 5 Ala. 179. See, however, Chesapeake Bank *v.* Swain, 29 Md. 483.

[5] Dorsey *v.* Kollock, I N. J. L. 35.

[6] Cramer *v.* Shriner, 18 Md. 140. See Matthews *v.* Coalter, 9 Mo. 696.

[7] Briggs *v.* Wilson, 5 De Gex, M. & G. 12; Glynn *v.* Bank, 2 Ves. Sen. 38; Sorrell *v.* Craig, 15 Ala. 789 See Turner *v.* Crisp, 2 Str. 827.

tion has been partially settled by Lord Tenterden's Act, which provides that no indorsement or memorandum of interest on any writing, made by the creditor, shall be such a payment as to take the case out of the operation of the statute of limitations. Similar enactments exist in several of the United States. At common law, however, the question is still, in many jurisdictions, open to agitation; and it becomes, in such cases, important to determine whether an entry of payment on a note or other writing must be shown, by evidence outside of the paper (when the object is to suspend the operation of the statute), to have been made before the right of action was barred by the statute. The ordinary presumption, as is well known, is that a document, unless the contrary be shown, is executed on the date it bears on its face;[1] and this presumption has been directly applied, by high authorities, to entries of the class here immediately under discussion.[2] But this has not been without a vigorous protest,[3] it being argued that such a presumption, if accepted, is peculiarly invidious as to the debtor; for the reason that, as he cannot before trial have access to the writing in the creditor's hands, he will be in the dark as to the date of the entry, and hence unable to contradict it. But this reasoning does not hold good in those states in which a party may obtain, before trial, an inspection of papers relied on by his opponent.[4]

IV. ADMISSIONS BY SILENCE OR CONDUCT.

Statements by one party to the other received in

§ 1136. If A., when in B.'s presence and hearing, makes statements which B. listens to in silence, interposing no objection, A.'s statements may be put in evidence against B. whenever B.'s silence is of such a nature as to lead to the inference of assent.[5] "A declaration in the pres-

[1] See supra, §§ 977, 979; infra, § 1313.

[2] Smith *v.* Battens, 1 M. & Rob. 341. See Anderson *v.* Weston, 6 Bing. N. C. 302; Briggs *v.* Wilson, 5 De Gex, M. & G. 20. Supra, § 228.

[3] Taylor's Ev. § 629.

[4] Mr. Taylor cites, as sustaining his views, Lord Ellenborough's *dicta* in Rose *v.* Bryant, 2 Camp. 321.

[5] Hayslep *v.* Gymer, 1 Ad. & E. 162; Morgan *v.* Evans, 3 Cl. & F. 205; Gaskill *v.* Skene, 14 Q. B. 664; Wiggins *v.* Burkham, 10 Wall. 129; Rea *v.* Missouri, 17 Wall. 532; Bailey *v.* Woods, 17 N. H. 365; Corser *v.* Paul, 41 N. H. 24; Com. *v.* Call, 21 Pick. 515; Jewett *v.* Banning, 23 Barb. 13; McClenkan *v.* McMillan, 6 Penn. St. 366; Knight *v.* House, 29 Md. 194; Hagenbaugh *v.* Crabtree, 33 Ill. 225; Pierce *v.* Goldsberry, 35

silence may be proved.

ence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little where the party hearing it has no means of personally knowing the truth or falsehood of the statement."[1] "Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have denied, the presumption of acquiescence arises."[2] And again, extending the doctrine to accusations of crime: "A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is, that the imputation is well founded or he would have repelled it."[3]

Weight depends upon circumstances.

§ 1137. When the statement is put in the form of an interrogation, the inference gains additional strength.[4] Even where there is no personal appeal, the same doctrine applies, though with diminished force. Thus, A.'s silence, when declarations are made in his presence by another person, A. taking no part in the conversation, may be evidence against A., though of slight value.[5] So the silence of a person, whose name is on negotiable paper, on receiving notice of protest, may go to the jury for what it is worth.[6] And the dropping by A. of certain claims against B., at an arbitration at

Ind. 317; Green *v.* Harris, 3 Ired. L. 210; Wells *v.* Drayton, 1 Mill (S. C.), 111; Block *v.* Hicks, 27 Ga. 522; Drumright *v.* State, 29 Ga. 430; Alston *v.* Grantham, 26 Ga. 374; Bradford *v.* Haggerthy, 11 Ala. 698; Benziger *v.* Miller, 50 Ala. 207; Davis *v.* Bowmar, 55 Miss. 671; People *v.* McCrea, 32 Cal. 98. See 1 Cow. & Hill N. 191.

[1] Per Parke, J., Hayslep *v.* Gymer, 1 A. & E. 163; cf. Neile *v.* Jakle, 2 C. & K. 709.

[2] Hunt, J., Gibney, *v.* Marchay, 34 N. Y. 305; Gebhart *v.* Burkett, 57 Ind. 378.

[3] Best on Presumptions, § 241; affirmed in State *v.* Cleaves, 59 Me. 300–1, and reaffirmed in State *v.* Reed, 62 Me. 142. See, also, First Nat. Bank *v.* Reed, 36 Mich. 263; State *v.* Pratt, 20 Iowa, 267; State *v.* Swink, 2 Dev. & Bat. 9; Keith *v.* State, 27 Ga. 483.

[4] Andrews *v.* Frye, 104 Mass. 234; Mitchell *v.* Napier, 22 Tex. 120.

[5] Turner *v.* Yates, 16 How. 14; Boston R. R. *v.* Dana, 1 Gray, 83; Smith *v.* Hill, 22 Barb. 656; Andres *v.* Lee, 1 Dev. & B. Eq. 318. See, however, Child *v.* Grace, 2 C. & P. 193; Moore *v.* Smith, 14 S. & R. 388.

[6] Greenfield Bank *v.* Crafts, 2 Allen, 269.

which A. is called upon and undertakes to present all his claims against B., may be used in evidence against A.[1]

If party was unable or not called on to answer, such evidence is valueless.

§ 1138. But it is otherwise when B.'s silence is of a character not to justify such an inference.[2] Thus, neither a person when asleep,[3] nor when intoxicated,[4] nor a deaf person,[5] can be in this way prejudiced by statements made in his presence; though it is otherwise as to a foreigner, if it appear that he understood the language spoken.[6] Nor even under our present practice does a defendant's silence, when charges are judicially made against him, authorize such charges to be proved against him on future trials.[7] It has also been held that statements made by a clergyman to his congregation in a sermon cannot be put in evidence against the congregation, although they listened in silence to the statements;[8] nor, generally, is such silence an assent unless the statements were such as properly to call for a response;[9] nor unless the

[1] Moore *v.* Dunn, 42 N. H. 471. See supra, §§ 785–87.

[2] Com. *v.* Kenney, 12 Met. (Mass.) 235; Com. *v.* Harvey, 1 Gray, 487; Larry *v.* Sherburne, 2 Allen, 35; Donnelly *v.* State, 2 Dutch. 601; Francis *v.* Edwards, 77 N. C. 271. See Mattox *v.* Bays, 5 Dana (Ky.), 461; Slattery *v.* People, 76 Ill. 217; Boyd *v.* Bolton, Irish Rep. 8 Eq. 113.

[3] Lanergan *v.* People, 39 N. Y. 39.

[4] State *v.* Perkins, 3 Hawks, 377.

[5] Tufts *v.* Charlestown, 4 Gray, 537. See Com. *v.* Gahavan, 9 Allen, 271; State *v.* Perkins, 3 Hawks, 377; Barry *v.* State, 10 Ga. 511.

[6] Wright *v.* Maseras, 56 Barb. 521.

[7] Child *v.* Grace, 2 C. & P. 193; R. *v.* Turner, 1 Moody C. C. 347; R. *v.* Appleby, 3 Starkie N. P. C. 33. See, however, Lord Denman's remarks in Simpson *v.* Robinson, 12 Q. B. 512; and see R. *v.* Coyle, 7 Cox, 74; U. S. *v.* Brown, 4 Cranch C. C. 508; Com. *v.* Kenney, 12 Met. (Mass.) 235; Com. *v.* Walker, 13 Allen, 570; Bob *v.* State, 32 Ala. 560; Noonan *v.* State, 9 Miss. 562; Broyles *v.* State, 47 Ind. 251.

In Cowell *v.* Patterson, Sup. Ct. Iowa, 1878, it was held that the waiver of a preliminary examination by one charged with the commission of a crime will not estop him from showing, on a writ of *habeas corpus*, that the evidence against him is insufficient to warrant his detention.

[8] Johnson *v.* Trinity Church, 11 Allen, 123.

[9] Corser *v.* Paul, 41 N. H. 24; Vail *v.* Strong, 10 Vt. 457; Mattocks *v.* Lyman, 16 Vt. 113; Hersey *v.* Barton, 23 Vt. 685; Brainard *v.* Buck, 25 Vt. 573; Com. *v.* Harvey, 1 Gray, 487; McGregor *v.* Wait, 10 Gray, 72; Jewett *v.* Banning, 21 N. Y. 27; Moore *v.* Smith, 14 S. & R. 388; Barry *v.* Davis, 33 Mich. 515; Rolfe *v.* Rolfe, 10 Ga. 143; Abercrombie *v.* Allen, 29 Ala. 281; Wilkins *v.* Stidger, 22 Cal. 231; Boyd *v.* Bolton, 8 Ir. Rep. Eq. 113.

truth or falsehood of the statements were within the range of the party's knowledge.[1]

Discharge of a servant by a master, subsequent to an alleged negligent act by a servant, cannot be regarded as an admission by the master that the act was negligent.[2] It is said to be otherwise, however, as to repairs to a structure through negligence in the construction of which it is alleged a party was previously injured.[3]

So as to party hearing in silence the testimony of a witness whom he has the right to disclaim; and as to admission of documents.

§ 1139. An interesting question arises, under the law enabling parties to testify, as to the effect on a party of the testimony of witnesses called by him whom he has the right to contradict. At common law there can be no doubt that such testimony cannot be afterwards used against the party by whom it may be adduced.[4] Even at present, under the recent statutes, such evidence, it has been held in Pennsylvania, cannot be employed in other suits against the party introducing it.[5] It is otherwise, so it has been held in Maine, in respect to the statements of witnesses made at a prior hearing of the same case, which statements the party is at liberty to contradict, he being entitled to be sworn as a witness in the case.[6] And in England, in a case[7] in which a question was raised relative to the admissibility of certain depositions, which the defendant had used in a chancery suit, wherein the same facts were in issue, Crompton, J., said: "A document knowingly used as true, by a

[1] Hayslep *v.* Gymer, 1 A. & E. 163; Com. *v.* Kenney, 12 Met. 235; Edwards *v.* Williams, 3 Miss. 846.

[2] Couch *v.* Coal Co. 46 Iowa, 17. See Campbell *v.* R. R. 45 Iowa, 76.

[3] Supra, § 1081.

[4] Melen *v.* Andrews, M. & M. 336; R. *v.* Appleby, 3 Stark. R. 33; R. *v.* Turner, 1 Moo. C. C. 347; Child *v.* Grace, 2 C. & P. 193; Com. *v.* Kenney, 12 Met. 237.

[5] See Ayres *v.* Wattson, 57 Penn. St. 360.

"It would be perilous, indeed, to any party to produce and examine a witness in court, if all that he might say could afterwards be used in evidence against him as an admission. He admits, indeed, by producing him, that he is a credible witness, but only *pro hac vice*, so far as that case is concerned. He does not admit that everything he says is true, either in that or any other proceeding. A party in the same suit may give evidence which contradicts his own witness, or shows that he was mistaken, though he cannot directly impeach his veracity." McDermott *v.* Hoffman, 70 Penn. St. 52.

[6] Blanchard *v.* Hodgkins, 62 Me. 120.

[7] Richards *v.* Morgan, 4 B. & S. 641.

party in a court of justice, is evidence against him as an admission even for a stranger to the prior proceedings, at all events, when it appears to have been used for the very purpose of proving the very fact, for the proving of which it is offered in evidence in the subsequent suit." And it has been held that where a book, purporting to be that of a deputy surveyor, had been three times, without objection, received in evidence in the same cause, it could be admitted on a subsequent trial without further proof.[1] But silence during an adversary's testimony cannot, in any view, be imputed to a party as an admission.[2]

Silence on reception of accounts no admission.

§ 1140. When accounts are presented, the party to whom they are handed is not expected to speak; and his silence under such circumstances is not ordinarily to be treated as an admission of the debt.[3] Yet with business men, the undue retention of an account without exceptions, when the practice is to return accounts in a reasonable time, if objected to, with the objections, may give rise, as against the party retaining, to a presumption of fact, whose strength depends upon the circumstances of the concrete case.[4] In fine, whenever

[1] Unger *v.* Wiggins, 1 Rawle, 331.

[2] Broyles *v.* State, 47 Ind. 251.

[3] Gibney *v.* Marchay, 34 N. Y. 301; Champion *v.* Joslyn, 44 N. Y. 653; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Mellon *v.* Campbell, 11 Penn. St. 415; Quarles *v.* Littlepage, 2 Hen. & M. 401; Robertson *v.* Wright, 17 Grat. 534; Bright *v.* Coffman, 15 Ind. 371; Churchill *v.* Fulliam, 8 Iowa, 45; Glenn *v.* Salter, 50 Ga. 170. See Stiles *v.* Brown, 1 Gill (Md.), 350.

[4] Wiggins *v.* Burkham, 10 Wall. 129; Freeland *v.* Heron, 7 Cranch, 147; Hopkirk *v.* Page, 2 Brock. 20; Hayes *v.* Kelley, 116 Mass. 300; Manhattan Co. *v.* Lydig, 4 Johns. R. 377; Hutchinson *v.* Bank, 48 Barb. 302; Phillips *v.* Tapper, 2 Penn. St. 323; Tams *v.* Bullitt, 35 Penn. St. 308; Tams *v.* Lewis, 42 Penn. St. 402; Darlington *v.* Taylor, 3 Grant (Penn.) 195; Randel *v.* Ely, 3 Brewst. 270; Robertson *v.* Wright, 17 Grat. 534; Miller *v.* Bruns, 41 Ill. 293; Sheppard *v.* Bank, 15 Mo. 143; Evans *v.* Evans, 2 Coldw. 143; Webb *v.* Chambers, 3 Ired. L. 374; Lever *v.* Lever, 2 Hill (S. C.) Ch. 158; McCulloch *v.* Judd, 20 Ala. 703; Freeman *v.* Howell, 4 La. An. 196. See Boody *v.* McKenney, 23 Me. 517.

"The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it; as that the party

accounts are exhibited to a party who is interested in them (*e. g.* an agent's accounts to his principal, or a partner to a copartner), and are not excepted to in a reasonable time, this is an implication of assent.[1] It has also been held that a banker's pass-book, when unexcepted to, is evidence of acquiescence by the customer of the principles on which the accounts are made up.[2] The raising an objection to a particular item may be *primâ facie* regarded as an assent to the items to which no objection is made.[3]

was absent from home, suffering from illness, or expected shortly to see the other party, and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined. Lockwood *v.* Thorne, 18 N. Y. 289. As regards merchants residing in different countries, Judge Story says: 'Several opportunities of writing must have occurred.' We see no objection to the rule as he lays it down, in respect to parties in the same country. When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in nowise concluded by the admission implied from his silence after it was rendered. Perkins *v.* Hart, 11 Wheaton, 256. The proposition, that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear it is always a question exclusively for the court. The point was so ruled by this court in Toland *v.* Sprague, 12 Peters, 336. See, also, Lockwood *v.* Thorne, 1 Kernan, 175. Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties." Swayne J., Wiggins *v.* Burkham, 10 Wall. 131.

A distinction has been taken in Ireland between such accounts as are *sent by post*, and those *delivered by hand;* and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him as evidence that he had acquiesced in their contents. Price *v.* Ramsay, 2 Jebb & Sy. 338, cited in Taylor's Evidence, § 735.

[1] Sherman *v.* Sherman, 2 Vern. 276; Tickel *v.* Short, 2 Ves. Sr. 239; Rich *v.* Eldredge, 42 N. H. 153; Meyer *v.* Reichardt, 112 Mass. 108; Oram *v.* Bishop, 7 Halst. (N. J.) 163; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Philips *v.* Tapper, 2 Penn. St. 323; Lever *v.* Lever, 2 Hill (S. C.) Ch. 158; Rayne *v.* Taylor, 12 La. An. 765.

[2] Williamson *v.* Williamson, L. R. 7 Eq. 542.

It should be remembered that an account sent by a creditor to a debtor has been held in equity evidence of a contract; Morland *v.* Isaac, 20 Beav. 392; and even where the account, although made out, was not sent in, a contract was implied. Bruce *v.* Garden, 17 W. R. 990.

[3] Chisman *v.* Count, 1 Man. & Gr. 307.

§ 1141. What has been said as to accounts applies to invoices. An invoice makes a *primâ facie* case against a business man who receives and retains it without dissent.[1] So of invoices.

§ 1142. Admissions by silence, as well as admissions by speech, may have a contractual force, and may bind the party to whom they are imputable as effectually as if they were spoken. When they are so interwoven with acts as to put the actor in a specific attitude towards other persons, by which they are induced to do or omit to do a particular thing, then he is estopped from subsequently denying that he occupied such position, and is compelled to make good any losses which such contractual parties may have sustained by his course in this relation. In such cases, however, it must appear that the party complaining changed his situation in consequence of the conduct of the other party, and that the conduct of such other party was calculated to have this effect.[2] The doctrine, however, does not apply to silence as to a statement of a fact not yet in existence, nor to a matter of future intention.[3] Silent admissions may estop.

§ 1143. In their first conception, estoppels of this class were parts of solemn acts, in which the community was called upon to witness the attitude of the parties to a contract. "They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery of seisin, entry acceptance of an estate, Extension of estoppels of this class.

[1] Field *v.* Moulson, 2 Wash. C. C. 155. Though see Wolf *v.* Ins. Co. 20 La. An. 383; and see Dows *v.* Bank, 91 U. S. (1 Otto) 618.

[2] See supra, § 1085; Pickard *v.* Sears, 6 A. & E. 474; Atty. Gen. *v.* Stephens, 1 Kay & J. 748; Harrison *v.* Wright, 13 M. & W. 820; Miles *v.* Furber, L. R. 8 Q. B. 77; Dairy Ass. 11 Bkrt. Reg. 253; Carroll *v.* R. R. 111 Mass. 1; Connihan *v.* Thompson, 111 Mass. 270; Rice *v.* Barrett, 116 Mass. 312; Hexter *v.* Knox, 39 N. Y. Sup. Ct. 109; Griswold *v.* Haven, 25 N. Y. 595; Bodine *v.* Killeen, 53 N. Y. 93; Chapman *v.* Rase, 56 N. Y. 137; Dillett *v.* Kemble, 25 N. J. Eq. 66; Beaupland *v.* McKeen, 28 Penn. St. 124; Philips *v.* Blair, 38 Iowa, 649; Summerville *v.* R. R. 62 Mo. 391; St. Louis *v.* Shields, 62 Mo. 247; Grace *v.* McKissack, 49 Ala. 163; Weedon *v.* Landreaux, 26 La. An. 729; Snow *v.* Walker, 42 Tex. 154.

[3] Bank of Louisiana *v.* Bank of New Orleans, 43 L. J. Ch. 269; Langdon *v.* Doud, 10 Allen, 433; *S. C.* 6 Allen, 423; White *v.* Ashton, 51 N. Y. 580. Supra, § 1076.

and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." [1] Modern business, however, in discarding in most cases publicity in the negotiation of contracts, has so enlarged the sphere of estoppels of this class that they extend to all cases where one party by his conduct wilfully or negligently induces another party to do or omit to do a particular thing.[2] But there must be privity between the party charging the estoppel and the party charged. In other words, the act or negligence relied on must establish a causal relation between the party charged with the party claiming to be estopped.[3]

[1] Parke, B., Lyon *v.* Reed, 13 M. & W. 309.

[2] Graves *v.* Key, 3 B. & Ad. 318; Stow *v.* U. S. 5 Ct. of Claims, 362; Barron *v.* Cobleigh, 11 N. H. 559; Stevens *v.* Dennett, 51 N. H. 324; Dewey *v.* Field, 4 Met. 381; Zuchtman *v.* Roberts, 109 Mass. 53; Stephens *v.* Baird, 9 Cow 274; Dezell *v.* Odell, 3 Hill, 215; Atlantic Co. *v.* Leavitt, 54 N. Y. 35; Barnard *v.* Campbell, 55 N. Y. 456; Comstock *v.* Smith, 26 Mich. 306; People *v.* Brown, 67 Ill. 435; Peters *v.* Jones, 35 Iowa, 512; Crawford *v.* Ginn, 35 Iowa, 543; Drake *v.* Wise, 36 Iowa, 476; Smith *v.* Penny, 44 Cal. 161; Dresbach *v.* Minnis, 45 Cal. 223; May *v.* R. R. 48 Ga. 109; Thomas *v.* Pullis, 56 Mo. 211. See Bigelow on Estoppel, 437 *et seq.*

"When one," says Lord Denman, "by his words or conduct (and this includes silence) wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Per Lord Denman, Pickard *v.* Sears, 6 A. & E. 474; cf. Attorney General *v.* Stephens, 1 K. & J. 724. By the term "wilfully," in the above rule, it has been laid down (per Parke, B., Freeman *v.* Cooke, 2 Exch. 663) that "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he does act upon it as true, the party making the representation would be equally precluded from contesting its truth and conduct by negligence or omission; where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth may often have the same effect." Hence negligence, in doing an act calculated to mislead a prudent business man, may estop. Manufact. Bank *v.* Hazard, 30 N. Y. 226; Horn *v.* Cole, 51 N. H. 287; Preston *v.* Mann, 15 Conn. 118; Pierce *v.* Andrews, 6 Cush. 4; McKelvey *v.* Truby, 4 Watts & S. 231; Kirk *v.* Hartman, 63 Penn. St. 97; Rice *v.* Bunce, 49 Mo. 231; and see Bigelow on Estoppel (2d ed.), 490–1; 4 Southern Law Rev. 647.

[3] Kinney *v.* Whiton, 44 Conn. 262; Mayenborg *v.* Haynes, 50 N. Y. 675. Infra, § 1150.

Party permitting another to deal with his property may be estopped.

§ 1144. Hence if A., having a claim to property, wilfully or negligently permits B. to deal with such property as if he were absolute owner, A. will not be permitted to assert his claim to such property against innocent third parties dealing with B. as absolute owner.[1]

And so as to any contractual representation of a fact.

§ 1145. Again: if A., a creditor of B., directly or indirectly holds himself out as approving a general assignment by B. to C., A. is afterwards estopped from disputing such assignment as against third parties.[2] So, as a general rule, we may say that whenever a representation of a fact (as distinguished from a representation of an intention)[3] has been made or assented to by one party for the purpose of influencing another's conduct, and this representation has been acted on by the latter, to his loss, this loss may be redressed in equity if not in law.[4]

Parties knowingly contracting on errone-

§ 1146. As we have already observed, falsity, in cases of bilateral admissions, does not affect liability. Hence where parties have knowingly agreed to act upon an assumed state of facts, their rights will be made to de-

[1] Kerr on Fraud, 298; 1 Story Eq. Jur. § 384; Railroad Co. *v.* Dubois, 12 Wall 47; Dewey *v.* Field, 4 Met. 381; Neven *v.* Belknap, 2 Johns. 573; Hope *v.* Lawrence, 50 Barb. 258; Carpenter *v.* Carpenter, 10 C. E. Green, 194; Burke's Est. 1 Pars. Eq. 473; Adlum *v.* Yard, 1 Rawle, 171; Com. *v.* Green, 4 Whart. 604; Carr *v.* Wallace, 7 Watts, 400; Chapman *v.* Chapman, 59 Penn. St. 214; Hinds *v.* Ingham, 31 Ill. 400.

A negligent misstatement of law may estop. Storrs *v.* Baker, 6 Johns. Ch. 166. Supra, § 1079; infra § 1150.

[2] Guiterman *v.* Landis, 1 Weekly Notes, 622.

[3] Taylor's Evidence § 771, citing Jorden *v.* Money, 5 H. of L. Cas. 185.

[4] Hammersley *v.* Baron de Biel, 12 Cl. & Fin. 45, 62, n., per Ld. Cottenham; 88, per Ld. Campbell; Neville *v.* Wilkinson, 1 Br. C. C. 543; Montefiori *v.* Montefiori, 1 W. Bl. 363; Bentley *v.* Mackay, 31 Beav. 155, per Romilly, M. R.; Laver *v.* Fielder, 32 L. J. Ch. 375, per Romilly, M. R.; 32 Beav. 1, *S. C.;* Gale *v.* Lindo, 1 Vern. 475; Jorden *v.* Money, 5 H. of L. Cas. 185; Money *v.* Jorden, 15 Beav. 372; Hutton *v.* Rossiter, 7 De Gex, M. & G. 9; Pulsford *v.* Richards, 17 Beav. 87, 94, per Romilly, M. R.; Yeomans *v.* Williams, 1 Law Rep. Eq. 184; Hodgson *v.* Hutchenson, 5 Vin. Abr. 522; Cookes *v.* Mascall, 2 Vern. 200; Wankford *v.* Fotherley, Ibid. 322; Luders *v.* Anstey, 4 Ves. 501. See Wright *v.* Snowe, 2 De Gex & Sm. 321; Maunsell *v.* White, 4 H. of L. Cas. 1039; Bold *v.* Hutchinson, 24 L. J. Ch. 285, per Romilly, M. R.; 20 Beav. 250, *S. C.;* 5 De Gex, M. & G. 558, *S. C.* on appeal; Traill *v.* Baring, 4 Giff. 485; *S. C.* cited Taylor's Ev. § 185.

ous assumption cannot afterwards repudiate.

pend on such assumption, and not upon the truth.[1] Thus it has been held in England, that if an agent or a workman knowingly renders an untrue account to his principal or employer, and such account is adopted by the party to whom it is given, it cannot afterwards be gainsaid by the person who rendered it.[2]

§ 1147. Another illustration of the rule above given is, that

Party selling cannot set up invalidity of sale against purchaser.

a party selling or assigning cannot, unless there be fraud or gross mistake, dispute his right to make the sale, as against his vendee or assignee.[3] It has been also held that a corporation issuing bonds purporting to be executed in conformity with statute cannot, as against *bonâ fide* holders of such bonds, deny such conformity;[4] that where commissioners were empowered by a local act to issue mortgage securities, they cannot, as against a *bonâ fide* holder for value, set up an illegality in the original issue of any security;[5] and that a company cannot rely on an informality in the issue of their debentures as an answer to a petition for winding up.[6] It is also laid down that where a company registers a person as a shareholder, and induces him, on the faith of such registration, to pay a call, they cannot be allowed to dispute his title to the shares.[7]

§ 1148. Parties interested in real estate are in like manner

Owner of land bound in the same way.

precluded from asserting any latent equity they may hold against a *bonâ fide* purchaser or incumbrancer, whom they have permitted to purchase or incumber

[1] Supra, § 1087; M'Cance *v.* R. R. Co. 3 H. & C. 343.

[2] Molton *v.* Camroux, 2 Ex. R. 487; aff. in Ex. Ch. 4 Ex. R. R. 17. See, also, Cave *v.* Mills, 7 H & N. 913; Skyring *v.* Greenwood, 4 B. & C. 281; Shaw *v.* Picton, Ibid. 715.

[3] See Bigelow on Estoppel, 452–467; Mangles *v.* Dixon, 1 M. & Gord. 446; Ramsden *v.* Dyson, L. R. 1 H. L. 129; Rolt *v.* White, 3 De Gex, J. & S. 360; Beaufort *v.* Neald, 12 Cl. & F. 249.

[4] Knox Co. *v.* Aspinwall, 21 How. 539; Bissel *v.* Jeffersonville, 24 How. 287; Society of Savings *v.* New London, 29 Conn. 174. See South Ottawa *v.* Perkins, 94 U. S. 260, cited supra § 290.

[5] Webb *v.* Herne Bay Commissioners, L. R. 5 Q. B. 642; 19 W. R. 241. See Dooley *v.* Cheshire, 15 Gray, 494; Stoddart *v.* Shetucket, 34 Conn. 542.

[6] Re Exmouth Dock Co. L. R. 17 Eq. 181; 22 W. R. 104.

[7] Hart *v.* Frontino, &c., Gold Mining Co. L. R. 5 Ex. 111; Re Bahia & Francisco Ry. Co. *v.* Tritten, L. R. 3 Q. B. 584; 9 B. & S. 844, *S. C.* See, also, Webb *v.* Herne Bay Improving Com. L. R. 3 Q. B. 642, *S. C.*

without notice of their equity, when they were themselves privy to such purchase or incumbrance.[1] The following canons on this point have been laid down by the law lords in the English House of Lords: "If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. So if a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined."[2] By Lord Kingsdown it was said, in addition, that "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."[3] So where the defendant in an execution, from whom a waiver of an inquisition has been fraudulently obtained, is present at the sheriff's sale under the inquisition, but gives no notice of his claim based on the fraudulency of the waiver, he is afterwards estopped from disputing the validity of the sale.[4] Of incumbrances or assignments of record, however, such notice is not necessary.[5]

Whether estoppels of this class can pass a title, as against the statute of frauds, is a question still open to doubt.[6]

[1] See cases cited supra, §§ 1142–5. See, also, Gregory *v.* Mighell, 18 Ves. 328.

[2] Ramsden *v.* Dyson, L. R. 1 H. of L. 129.

[3] Lord Kingsdown, in Ramsden *v.* Dyson, L. R. 1 H. of L. 129; affirming Gregory *v.* Mighell, 18 Ves. 328.

[4] Jackson *v.* Morter, 3 Weekly Notes, 140; relying on Hageman *v.* Salisberry, 74 Penn. St. 280; and qualifying Hope *v.* Everhart, 70 Penn. St. 234; and see fully cases cited supra, § 1144.

[5] Sulphine *v.* Dunbar, 55 Miss. 255.

[6] In Hays *v.* Levingston, 34 Mich.

§ 1149. As a general rule, a party taking a subordinate title is precluded (unless there be fraud) from maintaining that the party from whom he takes had no title at the

Subordinate in title cannot dis-

384, Cooley, J., gives a thoughtful opinion on the question in the text, arguing with much acuteness that when the statute requires the transfer in writing, such transfer cannot be worked by estoppel. From this opinion the following passages are extracted: —

"It is not to be denied, however, that there are several cases that apply the principle of estoppel indiscriminately to both real and personal estate. The cases in Maine are very decided. Hatch *v.* Kimball, 16 Me. 147; Durham *v.* Alden, 20 Me. 228; Rangeley *v.* Spring, 21 Me. 137; Copeland *v.* Copeland, 28 Me. 525; Stevens *v.* McNamara, 36 Me. 176; Bigelow *v.* Foss, 59 Me. 162. These cases appear to have overruled Hamlin *v.* Hamlin, 19 Me. 141. The following are usually referred to as supporting the Maine cases: McCune *v.* McMichael, 29 Geo. 312; Beaupland *v.* McKeen, 28 Penn. St. 124; Shaw *v.* Bebee, 35 Vt. 205; Brown *v.* Wheeler, 17 Conn. 345; Brown *v.* Bowen, 30 N. Y. 519; Basham *v.* Turbeville, 1 Swan, 437. Of these the Georgia case related to a parol partition of slaves, acquiesced in until after the death of one of the parties, and was decided without any discussion of, or reference to, the distinction between real and personal estate. The case in Pennsylvania was a suit on a promissory note given on a purchase of lands, the payment of which was resisted on the ground of failure of title. The persons in whom the title was alleged to be had been the plaintiff's agents in the sale, and had been paid a commission for making it; and they were held to be estopped from denying the plaintiff's right. It is to be observed of this case that the title was only incidentally in question, and also that in Pennsylvania the distinction between legal and equitable remedies is not kept up. In the Vermont case, the court is contented to dispose of the question very briefly, by saying that the rule of estoppel, which is applied to personal property 'upon reason and principle, to prevent fraud and promote justice, should be extended to real property.' It would have been more satisfactory if the court had pointed out on what ground, when the legislature, 'to prevent frauds and promote justice,' had applied wholly different rules to the transfer of personal property and of real property, the courts would justify their action in venturing to abolish the distinction. The Connecticut case was one in which the question of estoppel related to a distribution of property, which, though not in pursuance of the statute, had been sanctioned by a written agreement of the parties. In the New York case the complaint was of the flooding of the plaintiff's mill by a dam which let the water back upon it; and the question was whether the defendants were estopped from asserting title to the land on which the mill stood, by the fact that their ancestor, through whom they claimed, had asserted his right at the time the plaintiffs bought the land and built the mill, though aware of all the facts. The case was begun and tried under the Code, which does away with the distinction between legal and equitable actions. The case in Swan goes to the extreme of sustaining an estoppel against an infant, and certainly should not be followed

time of the transfer.[1] Hence a licensee is estopped from denying the title of licensor to grant the license; and consequently a licensee of a patent cannot dispute the title of the patentee.[2] A tenant cannot dispute his landlord's title,[3] nor can an agent dispute that of his principal.[4] A bailee, also, is estopped from denying that his bailor had at the time the bailment was made authority to make it,[5] though when the bailee is evicted by title paramount he can set up such title against the bailor.[6]

pute the title under which he takes, nor bailee that of bailor.

§ 1150. To constitute an estoppel, however (whether the alleged estopping act consist in suppression or assertion), the party alleged to be influenced must in some way change his position in consequence of the impression thus made upon him.[7] In other words, the estopping act must be either contractual as distinguished from non-contractual,[8] or must be infected with such neg-

Other party's action must be affected, and the misleading conduct must impose a liability based

in this state. Ryder *v.* Flanders, 30 Mich. 336."

"Equity," such is the distinction taken, "may always compel the owner of the title to release it, when that is the proper redress for a fraud committed by him in respect to the title; but the remedy is properly administered by compelling the fraudulent owner to convey, instead of treating the case as one of estoppel in the strict sense."

It was consequently held that title to realty cannot be transferred at law merely by the application of the doctrine of estoppel; and that where the owner of realty denied his own title thereto, and procured its sale through another, to one who was ignorant of his rights, but afterwards asserted his title in a court of law, he could not be estopped from doing so; but that if any relief could be had against him, it must be in equity.

[1] Sanderson *v.* Collman, 4 M. & G. 209; Stott *v.* Rutherford, 92 U. S. 107.

[2] Doe *v.* Baytop, 3 A. & E. 188; Crossley *v.* Dixon, 10 H. L. Cas. 304; Kinsman *v.* Parkhurst, 18 How. 289.

[3] Bigelow on Estoppel, 350; Williams *v.* Heales, L. R. 9 C. R. 171; Knight *v.* Smythe, 4 M. & S. 347; Balls *v.* Westwood, 2 Camp. 12; Page *v.* Kinsman, 43 N. H. 328; Bailey *v.* Kilburn, 10 Met. 176; Miller *v.* Lang, 99 Mass. 13; Hawes *v.* Shaw, 100 Mass. 187; Whalin *v.* White, 25 N. Y. 462.

[4] Miles *v.* Furber, L. R. 8 Q. B. 77; Dixon *v.* Hammond, 3 B. & Ald. 310. See Whart. on Agency, §§ 242, 573, 761.

[5] Gosling *v.* Birnie, 7 Bing. 338; Cheesman *v.* Exall, 6 Exc. 341; Rogers *v.* Weir, 34 N. Y. 463; Lund *v.* Bank, 37 Barb. 129; King *v.* Richards, 6 Whart. 418.

[6] Biddle *v.* Bond, 6 B. & S. 225. See Sinclair *v.* Murphy, 14 Mich. 392; Dixon *v.* Hammond, 2 B. & A. 310; Stonard *v.* Dunkin, 2 Camp. 344; Hall *v.* Griffin, 10 Bing. 246; Zulietta *v.* Vinent, 1 De Gex, M. & G. 315; Knights *v.* Willen, L. R. 5 Q. B. 660.

[7] See cases cited supra, § 1136.

[8] See supra, §§ 1078, 1081.

either on contract or on negligence.

ligence as was likely, in the usual order of things, to have led the party injured to incur the damage of which he complains.[1] The latter phase is thus stated: "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct or culpable negligence calculated to have that result, and such *culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice*, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."[2] Unless, however, there is a change of position produced in the party to whom the representations are (either tacitly or expressly) made, or on whom the inculpatory negligence thus acts, no estoppel is worked.[3] Thus it has been held that a railroad company

[1] Arnold *v.* Cheque Bank, L. R. 1 C. P. D. 578.

[2] 1 Story's Eq. 391; Carr *v.* R. R. L. R. 10 C. P. 316. Supra, §§ 1144–6.

"To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that 'The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' Hill *v.* Epley, 31 Penn. St. 334; Henshaw *v.* Bissell, 18 Wall. 271; Biddle Boggs *v.* Merced Mining Co. 14 Cal. 368; Davis *v.* Davis, 26 Ibid. 23; Commonwealth *v.* Moltz, 10 Barr, 531; Copeland *v.* Copeland, 28 Me. 539; Delaplaine *v.* Hitchcock, 6 Hill, 14; Haves *v.* Marchant, 1 Curtis C. C. 136; Zuchtmann *v.* Robert, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining it benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated." Field, J., Brant *v.* Coal Co. 93 U. S. 326.

[3] Infra, § 1155.

is not ordinarily estopped from showing that certain goods, alleged to have been delivered to them as carriers, had never reached their hands, although the plaintiff had received from them advice notes for such goods;[1] nor is a party giving a receipt ordinarily estopped by the receipt.[2]

A character assumed cannot afterwards be repudiated when the basis of another's action.

§ 1151. We have already[3] noticed that a party may, in assuming a character, express himself as effectually as he could by a verbal statement. It follows from this that when the assumption of a character is the consideration for a contract, such assumption binds contractually, and estops the party making it.[4] Thus where A., by the assumption of a false character, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the validity of the transfer to him, or from otherwise denying his character as a shareholder.[5] So, at least in equity, the same liability will be imposed on an infant who has actually deceived a tradesman by fraudulently representing himself to be of full age, and who has thus obtained credit for goods supplied to him.[6] It has also been ruled that, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he will not be permitted, as against parties to the proceedings, to deny their regularity.[7] So a party, recognizing another as his agent as to third parties, cannot afterwards repudiate, as to such parties, the

[1] Ibid.; Supra, § 1070. See, also, Gosley *v.* Birnie, 7 Bing. 339; 5 M. & P. 160; Hawes *v.* Watson, 2 B. & C. 540; Sheridan *v.* Quay Co. 4 C. B. N. S. 618.

[2] See supra, §§ 1044, 1066, 1144.

[3] Supra, § 1081.

[4] Robinson *v.* Kitchin, 21 Beav. 365; *S. C.* 8 De Gex, M. & G. 88. See, also, supra, § 1087.

[5] Sheffield & Manch. Ry. Co. *v.* Woodcock, 7 M. & W. 574, 582, 583; Cheltenham & Gt. West. Union Ry. Co. *v.* Daniel, 2 Q. B. 281, 292; In re North of Eng. Jt. St. Bk. Co., ex parte Straffon's Ex'ors, 22 L. J. Ch. 194, 202, 203; Taylor *v.* Hughes, 2 Jones & Lat. 24. See Swan *v.* North Brit. Australasian Co. 7 H. & N. 603; *S. C.* in Ex. Ch. 2 New R. 521; 2 H. & C. 175; and 32 L. J. Ex. 273; cited in Taylor's Ev. § 773.

[6] Ex parte Unity Jt. St. Mutual Bank. Associat., in re King, 3 De Gex & J. 63; Nelson *v.* Stocker, 28 L. J. Ch. 760; 4 De Gex & J. 458, *S. C.*

[7] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, Ibid. 61; Gouldie *v.* Gunston, 4 Camp. 381; Watson *v.* Wace, 5 B. & C. 153; explained in Heane *v.* Rogers, 9 B. & C. 586, 587; Mercer *v.* Wise, 3 Esp. 219; Harmar *v.* Davis, 7 Taunt. 577; Flower *v.* Herbert, 2 Ves. Sen. 326.

agency;[1] and the same rule applies to the recognition by a husband of a wife.[2]

But silence on being told of an unauthorized act does not estop.

§ 1152. When, however, there are liabilities to be assumed, a party, merely standing by when informed that he is in a position which imposes the liabilities, cannot be held to have accepted the liabilities. "No authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorized cannot fix you with the heavy liabilities which shares in a joint stock company would create."[3] In other words, in such case the admission is not contractual, and cannot, therefore, estop.[4] It is otherwise when the admission becomes contractual by a change of position on the other side. Thus, where a company, under circumstances which made it doubtful whether the agreement was binding on its shareholders, transferred its business to a new company, one of the terms of agreement being that the shareholders in the old company should receive shares in the new company, and share certificates were sent to all the shareholders in the old company, it was held, that a shareholder who had acknowledged the receipt of and retained the certificates was a shareholder in the new company; but that one who had taken no notice of the communication was not a shareholder.[5] And where shares were allotted to a person, in pursuance of an authority signed by him to have his name entered as a shareholder, and he paid calls and received a dividend on such shares, such person was held precluded from denying that he was a shareholder.[6]

[1] Summerville *v.* R. R. 62 Mo. 391.

[2] Johnston *v.* Allen, 39 How. (N. Y.) Pr. 506. See supra, §§ 84, n., 1081.

[3] Lord Hatherley in Bank of Hindustan *v.* Allison, L. R. 6 C. P. 22.

[4] Supra, §§ 1078–1085.

[5] Challis's case, 19 W. R. 453; L. R. 6 Ch. 266.

[6] Sewell's case, L. R. 3 Ch. 131; 15 W. R. 1031.

"Where a company had registered an assignment of debentures, it was held that they could not equitably set off against the transferee any claim which they had against the transferror. Higgs *v.* North Assam Tea Co. L. R. 4 Ex. 87; 17 W. R. 1125; followed by Lord Romilly, In re North Assam Tea Co. L. R. 10 Eq. 465; 18 W. R. 126; cf. In re General Estates Co. L. R. 3 Ch. 758; 16 W. R. 919. This last doctrine has recently been extended to a case where there was no registration; for, a company having received notice of an assignment for value of one of their debentures, and

§ 1153. Closely related to the last position is another on which we shall have further occasion to dilate.[1] If I recognize another as holding an official character, this, so far as I am concerned, is such an acceptance of his official character as makes it unnecessary for him, in a suit against me in this relation, to prove his official character.[2] If I libel another, ascribing to him a particular office, this is a *primâ facie* case against me, so far as concerns his right to hold such office.[3] So I cannot, after executing a bond to a corporation, deny the corporate capacity of the corporation to do business.[4] In each of these cases, however, it is of course open to me to set up fraud by which I was entrapped into the recognition.[5] And where I have a right to elect between two debtors, it will require a strong case of recognition of the one to preclude me from having recourse to the other.[6]

Admission of official character of a person is *primâ facie* admission of his title.

§ 1154. We have already touched generally upon the question how far a memorandum of indebtedness from A. to B., found among A.'s papers, can be used by B. against A.[7] We should, in this relation, keep in mind that the fact that an unanswered letter, or other document, is found in the custody of a party, is not ordinarily ground for the admission of the document as evidence against him.[8] Were it otherwise, an innocent man might, by the artifices of others, be charged with a *primâ facie* case of guilt which he might find it difficult to repel.[9] "It was a great deal too broad a proposition

Letter in possession of a party, not admissible against him.

acknowledged the receipt by stamping the duplicate notice, Malins, V. C., held that this stamping estopped them from setting up against the transferee any equities attaching between themselves and the transferror. Brunton's case, L. R. 19 Eq. 302; 23 W. R. 286." Powell's Evidence, 4th ed. 249.

[1] See infra, §§ 1315–17; supra, § 739 *a*.

[2] Radford *v.* McIntosh, 3 T. R. 632; Peacock *v.* Harris, 10 East, 104; Lipscome *v.* Holmes, 2 Camp. 441; Pritchard *v.* Walker, 3 C. & P. 212, per Vaughan, B., Dickinson *v.* Coward, 1 B. & A. 677; Inglis *v.* Spence, 1 C., M. & R. 432; Crofton *v.* Poole, 1 B. & Ad. 561; Jay *v.* Carthage, 48 Me. 353; Clough *v.* Whitcomb, 105 Mass. 482; Seeds *v.* Kahler, 76 Penn. St. 262.

[3] Barryman *v.* Wise, 4 T. R. 368.

[4] St. Louis *v.* Shields, 62 Mo. 247.

[5] Supra, § 931.

[6] Curtis *v.* Williamson, L. R. 10 Q. B. 87. See Whart. on Agency, §§ 463–470–2.

[7] Supra, § 1123.

[8] U. S. *v.* Crandall, 4 Cranch C. C. 683; People *v.* Green, 1 Parker C. R. 11.

[9] R. *v.* Hevey, 1 Lea. Cr. C. 232; R. *v.* Plumer, R. & R. 264; Doe *v.* Frankis, 11 A. & E. 795; Com. *v.*

to say, that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."[1] "What is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."[2] It is otherwise, however, when the party addressed in any way invited the sending to him of the letter;[3] or when there is any ground to infer he acted on the letter.[4] So if it appear that a letter from A., making certain claims or charges, has been received by B., and partially answered, or otherwise recognized, the letter may be read for what it is worth against B.[5] Where such tacit recognition is claimed, the whole conversation or correspondence which constitutes the recognition must be given.[6]

Admissions made non-negligently without the intention of being acted on, or without being acted on,

§ 1155. We must again, in closing the question of estoppels by silence and by conduct, recur to the fundamental distinction already laid down[7] between contractual and non-contractual admissions. A non-contractual admission is, at the best, but slight evidence, susceptible of being easily rebutted. Peculiarly is this the case with regard to admissions made without the intention of be-

Eastman, 1 Cush. 189; Smiths *v.* Shoemaker, 17 Wall. 630; Dutton *v.* Woodman, 9 Cush. 262; Robinson *v.* R. R. 7 Gray, 92; Fearing *v.* Kimball, 4 Allen, 125; Com. *v.* Edgerly, 10 Allen, 184; People *v.* Green, 1 Parker C. R. 11; Waring *v.* Tel. Co. 44 How. (N. Y.) Pr. 69.

[1] Lord Denman, Doe *v.* Frankis, 11 A. & E. 795.

[2] Lord Tenterden, in Fairlie *v.* Denton, 3 C. & P. 103; St. Louis R. R. *v.* Thomas, 85 Ill. 464.

[3] R. *v.* Cooper, L. R. 1 Q. B. D. 19. In this case it was held that when a letter is put in course of transmission, the postmaster general holds it as the agent of the receiver, citing R. *v.* Jones, 1 Den. Cr. C. 551; 19 L. J. (M. C.) 162; R. *v.* Buttery, cited 4 B. & Ald. 179; and that, therefore, letters in the post office, invited by the defendant, might be put in evidence against the defendant, though the letters had never been held by him.

[4] Dewett *v.* Piggott, 9 C. & P. 75; R. *v.* Horne Tooke, 25 How. St. Tr. 120; R. *v.* Watson, 2 Stark. 140; Smiths *v.* Shoemaker, 17 Wall. 630. Supra, § 175.

[5] Gaskill *v.* Skeene, 14 Q. B. 668; Fenno *v.* Weston, 31 Vt. 345; Allen *v.* Peters, 4 Phil. R. 78; Higgins *v.* R. R. 7 Jones N. C. (L.) 470; Haynes *v.* Crutchfield, 7 Ala. 189. See, also, Lucy *v.* Mouflet, 5 H. & N. 229; Doe *v.* Frankis, 11 A. & E. 795; Gore *v.* Hawsey, 3 F. & F. 509; Pacific R. R. *v.* Thomas, 19 Kans. 256.

[6] Mattocks *v.* Lyman, 16 Vt. 113.

[7] Supra, §§ 1078–85.

ing acted on, or which, if acted on, have not operated to change for the worse the condition of the party so acting.[1] Hence it is that while an admission may be contractual as to the party to whom it is made, it may be non-contractual as to third parties.[2] Thus, where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorized a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying £50, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the plaintiff, as his property.[3] Again, it is now held that a sheriff's return, though it be conclusive evidence in the particular cause in which it is made, or for the purposes of an attachment, does not operate as an estoppel in any other action or proceeding, either as against the sheriff or as against his bailiff.[4]

do not estop; and so as to third parties.

[1] Howard *v.* Hudson, 2 E. & B. 1; Foster *v.* Ins. Co. 3 E. & B. 48; Lackington *v.* Atherton, 7 M. & Gr. 360; Bank of Hindustan *v.* Allison, L. R. 6 C. P. 227; Nourse *v.* Nourse, 116 Mass. 101; and see cases cited supra, § 1150.

[2] Supra, § 923.

[3] Sandys *v.* Hodgson, 10 A. & E. 472.

[4] Stimson *v.* Farnham, L. R. 7 Q. B. 175; Standish *v.* Ross, 3 Ex. R. 527; Brydges *v.* Walford, 6 M. & Sel. 42; 1 Stark. R. 389, n., *S. C.*; Jackson *v.* Hill, 10 A. & E. 477; Remmett *v.* Lawrence, 15 Q. B. 1004; Levy *v.* Hale, 29 L. J. C. P. 127. Holmes *v.* Clifton, 10 A. & E. 673; overruling Beynon *v.* Garrat, 1 C. & P. 154.

Freeman *v.* Cooke, 2 Ex. R. 654, according to Mr. Taylor (Ev. § 782), carries this doctrine to its extreme limit, if it does not transgress the strict bounds of law. That was an action of trover brought against a sheriff for seizing the plaintiff's goods under a *fi. fa.* against his brother, to which the defendant pleaded not guilty, not possessed, and leave and license. It appeared at the trial that the plaintiff, fearing an execution, had removed his goods to his brother's house, and when the sheriff's officer came there, the plaintiff, supposing that he had a writ against himself, warned him not to seize the goods as they belonged to his brother. The officer, however, producing his writ, which was against the brother, the plaintiff, before the goods were actually seized, told him that they were the property of a third party; but the officer disregarded this last statement, and seized and sold the goods as belonging to the brother. On this state of facts, the jury found that the goods were the plaintiff's, but that, before the seizure, he falsely stated to the officer that they belonged to his brother, and that the officer was thereby induced to seize them as his brother's. The court, on this finding, directed the verdict to be entered for the plaintiff, on the grounds, first, that the plaintiff did not intend to induce the officer to seize the goods as those of the brother; and next, that no reasonable man would have seized the goods on the faith of the plaintiff's representations *taken altogether*.

But at the same time a party who by his negligence causes another person to take a step injurious to himself, may be bound to recompense the party so injured for the injury.[1]

V. ADMISSIONS BY PREDECESSORS IN TITLE.

Predecessor's admissions admissible against successor.

§ 1156. The self-disserving admissions of a predecessor in title, as a rule, are admissible against those who follow and claim under him, when such admissions (1.) were made when such predecessor was in possession; and (2.) are compatible with the rule that parol evidence is not admissible to vary dispositive writing.[2] Declarations of this class are to be received not only in disparagement or diminution of the property which the declarant enjoyed in the premises, but as evidence of any fact which is not foreign to the statement

[1] Supra, § 1150.

[2] Supra, § 237; Bp. of Meath *v.* M. of Winchester, 3 Bing. N. C. 183; Maddison *v.* Nuttall, 6 Bing. 226; 3 M. & P. 544, *S. C.*; Doe *v.* Cole, 6 C. & P. 359, per Patterson, J.; De Whelpdale *v.* Milburn, 5 Price, 485; Barr *v.* Mostyn, 5 Ex. R. 69; Gery *v.* Redman, L. R. 1 Q. B. Div. 173; Sly *v.* Dredge, L. R. 2 P. D. 91 (see supra, § 226); Trimlestown *v.* Kemmis, 9 Cl. & F. 749; Clark, in re, 9 Blatch. 379; Samson *v.* Blake, 6 Bankr. Reg. 410; Dale *v.* Gower, 24 Me. 563; Beedy *v.* Macomber, 47 Me. 451; Pike *v.* Hayes, 14 N. H. 19; Badger *v.* Story, 16 N. H. 168; Baker *v.* Haskell, 47 N. H. 479; Smith *v.* Forrest, 49 N. H. 230; Hunt *v.* Haven, 56 N. H. 87; Beecher *v.* Parmele, 9 Vt. 352; Blake *v.* Everett, 1 Allen, 248; Coyle *v.* Cleary, 116 Mass. 208; Pickering *v.* Reynolds, 119 Mass. 111; Rogers *v.* Moore, 10 Conn. 13; Spaulding *v.* Hallenbeck, 35 N. Y. 204; Smith *v.* McNamara, 4 Lans. 169; Kent *v.* Harcourt, 33 Barb. 491; Chadwick *v.* Fonner, 69 N. Y. 404; Townsend *v.* Johnson, 3 Pen. (N. J.) 706; Ten Eyck *v.* Runk, 26 N. J. L. 513; Edwards *v.* Derrickson, 28 N. J. L. 39; Union Canal *v.* Loyd, 4 Watts & S. 393; Sergeant *v* Ingersoll, 15 Penn. St. 343; Horn *v.* Brooks, 61 Penn. St. 407; Weems *v.* Disney, 4 Har. & M. 156; Gaither *v.* Martin, 3 Md. 146; Keener *v.* Kauffman, 16 Md. 296; Comstock *v.* Smith, 26 Mich. 306; Peoples *v.* Devault, 11 Heisk. 431; Yates *v.* Yates, 76 N. C. 142; Gidney *v.* Logan, 79 N. C. 214; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Horn *v.* Ross, 20 Ga. 210; Meek *v.* Holten, 22 Ga. 491; Cloud *v.* Dupree, 28 Ga. 170; Harrell *v.* Culpepper, 47 Ga. 635; Brewer *v.* Brewer, 19 Ala. 481; Fralick *v.* Presley, 29 Ala. 457; Graham *v.* Busby, 34 Miss. 272; Mulliken *v.* Greer, 5 Mo. 489; Gamble *v.* Johnston, 9 Mo. 605; Potter *v.* McDowell, 31 Mo. 62; Allen *v.* McGaughey, 31 Ark. 252; Wright *v.* Carillo, 22 Cal. 595; McFadden *v.* Wallace, 38 Cal. 51.

As to declarations of deceased mortgagor as against mortgagee, see Stowell *v.* Hazlett, 66 N. Y. 635.

See Moss *v.* Dearing, 45 Iowa, 530, where declarations of a grantor, to the effect that he was indebted to a grantee, when in possession, were admitted to sustain a conveyance when attacked by grantor's creditors.

against interest, and which forms substantially a part of it.[1] Thus, the declarations of the ancestor, that he held the land as the tenant of a third person, are admissible to show the seisin of that person, in an action brought by him against the heir for the land;[2] and declarations of a former owner as to boundaries are in like manner admissible.[3] So, declarations by a tenant have been admitted to show the extent of the tenement occupied by him,[4] the amount of rent paid, and the fact of its payment;[5] and the name of the landlord.[6] It may also be generally declared that whatever accompanies a title, in the way of recital or description, qualifies, at least *primâ facie*, the title. Thus, the rule before us admits, as against succeeding holders of a title, maps, recitals in deeds, monuments, and boundaries of which an owner, during his ownership, was author.[7] Such evidence may be received, not only against privies, but against strangers.[8] The reason for this conclusion is, that possession implies *primâ facie* an absolute interest, and any statement which would tend to limit it to a less interest is self-disserving. But for this same reason such declarations cannot be used as evidence of *title* at all; they are only evidence of the grounds on which the tenant claims possession. For he might be but a tenant at will, and yet claim to be a tenant for life, which, being less than a fee, would be presumptively *self-disserving*, though really self-serving. In short, they are evidence that the occupant never pretended to have more than a limited right or estate, not as showing, or even tending to show, that he really had such a right or estate.

[1] R. *v.* Birmingham, 1 B. & S. 763.

[2] Doe *v.* Pratt, 5 B. & A. 223.

[3] Supra, §§ 237 *et seq.*; Dawson *v.* Mills, 32 Penn. St. 302; Cansler *v.* Fite, 5 Jones (N. C.) L. 424.

[4] Mountnoy *v.* Collier, 1 E. & B. 630. See infra, § 1161.

[5] R. *v.* Birmingham, 5 B. & S. 763; R. *v.* Exeter, L. R. 4 Q. B. 341; 10 B. & S. 433.

[6] Peaceable *v.* Watson, 4 Taunt. 16; Holloway *v.* Rakes, cited by Buller, J., in Davies *v.* Pierce, 2 T. R. 55; Doe *v.* Green, 1 Gow R. 227.

[7] Supra, §§ 237, 1041–2; Bridgman *v.* Jennings, 1 Ld. Ray, 734; Daggett *v.* Shaw, 5 Met. 223; Davis *v.* Sherman, 7 Gray, 291; Penrose *v.* Griffith, 4 Binn. 231; Weidman *v.* Kohr, 4 Serg. & R. 174; Gratz *v.* Beates, 45 Penn. St. 495; Allen *v.* Allen, 45 Penn. St. 468; Cumberl. Valley R. R. *v.* McLanahan, 59 Penn. St. 23; Grubb *v.* Grubb, 74 Penn. St. 25; Davis *v.* Jones, 3 Head, 603.

[8] Carne *v.* Nicoll, 1 Bing. N. C. 430; Davies *v.* Pierce, 2 T. R. 53; Peaceable *v.* Watson, 4 Taunt. 16; Doe *v.* Coulthred, 7 A. & E. 235; Doe *v.* Langfield, 16 M. & W. 497; Gery *v.* Redman, L. R. 1 Q. B. D. 161. Supra, § 237.

As a condition of admissibility, it has been said not to be necessary that the declarant should be dead,[1] though the better view is to restrict the admissibility of declarations of living predecessors, in suits against strangers, to cases where such declarations are part of the *res gestae*.[2]

§ 1157. What has been said is subject to the condition that the declarations sought to be introduced should not contradict the record title. For this purpose they cannot be received.[3] Nor can they be received when they go to create an incumbrance which, under the statute of frauds, or the recording acts of the jurisdiction, cannot be created by parol. If, however, the former owner of an estate, with the qualifications above noticed, has made an admission in respect to such estate, such admission is to be received in evidence, as against the representatives and successors of such former owner, as much as it would be against such owner himself.[4] The

Such declarations must not conflict with record title; must not be hearsay, and must be self-disserving.

Burdens and limitations pass with estate.

[1] Walker *v.* Broadstock, 1 Esp. 458, per Thomson, B.; Doe *v.* Rickarby, 5 Esp. 4, per Ld. Alvanley. To same effect is Brolaskey *v.* McClain, 61 Penn. St. 146, as to declarations of occupants as to nature of their possession. In Papendick *v.* Bridgewater, 5 E. & B. 166, Walker *v.* Broadstock was questioned.

[2] Papendick *v.* Bridgewater, 5 E. & B. 166; Taylor's Ev. § 617; citing Doe *v.* Wainwright, 8 A. & E. 700, 701; Doe *v.* Langfield, 16 M. & W. 513, 514, per Parke, B. In Phillips *v.* Cole, 10 A. & E. 111, Ld. Denman, in pronouncing the judgment of the court, observes: "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them." See supra, § 237, and cases cited § 1163 *b*.

[3] Doe *v.* Webster, 12 A. & E. 442; Dodge *v.* Savings Co. 93 U. S. 379; Pain *v.* M'Intier, 1 Mass. 69; Pitts *v.* Wilder, 1 N. Y. 625; Gibney *v.* Marchay, 34 N. Y. 301. See Ozmore *v.* Hood, 53 Ga. 114; Anderson *v.* Kent, 14 Kans. 207. Supra, §§ 920, 942; infra, § 1160.

[4] Supra, § 237; 1 Wash. Real Prop. (4th ed.) 497; 2 Ibid. 282–4; 3 Ibid. 427; Walker's case, 3 Co. 23; Beverley's case, 4 Co. 123–4; Coole *v.* Braham, 3 Exc. 185; Dodge *v.* Savings Co. 93 U. S. 379; Peabody *v.* Hewett, 52 Me. 33; Smith *v.* Powers, 15 N. H. 546; Dow *v.* Jewell, 18 N. H. 340; Bell *v.* Woodward, 46 N. H. 315; Hurlburt *v.* Wheeler, 40 N. H. 73; Denton *v.* Perry, 5 Vt. 382; Howe *v.* Howe, 99 Mass. 88; Pickering *v.* Reynolds, 119 Mass. 111; White *v.* Loring, 24 Pick. 319; Hodges *v.* Hodges, 2 Cush. 455; Bosworth *v.* Sturtevant, 2 Cush. 392; Hill *v.* Bennett, 24 Conn. 363; Gibney *v.* Marchay, 34 N. Y. 301; Pope *v.* O'Hara, 48 N. Y. 446; Pierce *v.* McKeehan, 3 Penn. St. 136; Alden *v.* Grove, 18 Penn. St. 377; Van Blarcom *v.* Kip, 26 N. J. L. 351; Hale *v.* Monroe, 28 Md. 98; Mc-

same rule holds with regard to limitations imposed on an estate. Thus deeds to strangers, to give a single illustration, from one under whom defendants, in a suit of ejectment, claim, are admissible against the defendants, to show the grantor's view as to the boundary lines of the land granted.[1] It should, however, be remembered that the admissions of a grantor cannot, as we have observed, be received to contradict the tenor of a deed, unless, as has been heretofore seen, there be such ground laid of fraud or

Canless *v.* Reynolds, 57 N. C. 268; Howell *v.* Howell, 47 Ga. 492; Pearce *v.* Nix, 34 Ala. 183; Arthur *v.* Gayle, 38 Ala. 259; Cavin *v.* Smith, 24 Mo. 221; Carpenter *v.* Carpenter, 8 Bush, 283; Bollo *v.* Navarro, 33 Cal. 459. See, however, Clarke *v.* Waite, 12 Mass. 439. Admissions, however, to operate as above, must be specific. Hugus *v.* Walker, 12 Penn. St. 173.

That a grantor's declarations at time of execution of trust deeds are admissible to explain possession, see Gidney *v.* Logan, 79 N. C. 214; affirming Carraway *v.* Cox, 8 Ired. 79; Kirby *v.* Master, 70 N. C. 540.

Acts and declarations of the owner manifesting an intent to devote the property to a public use are proper evidence to prove a dedication, and the acceptance may be proved by long public use, or by the acts of the proper public officers recognizing and adopting the highway. Cook *v.* Harris, 61 N. Y. 448. "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature than to be attacked by parol evidence. They are competent simply to explain the character of the possession in a given case. Thus, the declaration of the ancestor that he held as a tenant of a person named, is admissible in an action brought by such tenant against the heir. Pitts *v.* Wilder, 1 Comst. 525; Jackson *v.* Miller, 6 Cow. 751; 6 Wend. 228; 4 Taunt. 16, 17." Hunt, J., Gibney *v.* Marchay, 34 N. Y. 303.

[1] Hale *v.* Rich, 48 Vt. 217; citing Davis *v.* Judge, 44 Vt. 500.

If such evidence is compatible with the rule that parol proof cannot be received to affect writings, "any declaration by the possessor that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, may safely be received in evidence, on account of its probable truth." Chambers *v.* Bernasconi, 1 C. & J. 457, per Ld. Lyndhurst; Peaceable *v.* Watson, 4 Taunt. 17, per Sir J. Mansfield, C. J.; Crease *v.* Barrett, 1 C., M. & R. 931; 5 Tyr. 473, *S. C.*, per Parke, B.; Doe *v.* Langfield, 16 M. & W. 497. It matters not whether the declaration be made verbally; Carne *v.* Nicoll, 1 Bing. N. C. 430; 1 Scott, 466, *S. C.;* Baron de Bode's case, 8 Q. B. 243, 244; R. *v.* Birmingham, 31 L. J. M. C. 63; 1 B. & S. 763, *S. C.;* R. *v.* Exeter, 4 Law Rep. Q. B. 341; 38 L. J. M. C. 127; 10 B. & S. 433, *S. C.;* or in writing; Doe *v.* Jones, 1 Camp. 367; R. *v.* Exeter, 4 Law Rep. Q. B. 341; 38 L. J. M. C. 127; and 10 B. & S. 433, *S. C.;* or by deed; Doe *v.* Coulthred, 7 A. & E. 235; Garland *v.* Cope, 11 Ir. Law R. 514; or in answer to a bill in chancery. Trimlestown *v.* Kemmis, 9 Cl. & F. 779; Taylor's Ev. § 618.

mistake as would lead a chancellor to reform the instrument.[1] Nor are they evidence if they rest merely on hearsay.[2] Hence an answer to a bill in chancery, narrating what the declarant has heard *another person state* respecting his title, is not admissible to defeat his estate, at least if he does not add that he believes such statement to be true.[3] Nor are they admissible unless self-disserving;[4] nor can the declarations of a party, made before acquiring an interest in property, be used against vendees to whom, after subsequently acquiring such property, he conveys it.[5]

Executors are so bound by their decedent.

§ 1158. As a further illustration of the general rule which is before us, it may be noticed that the admissions of a decedent made as to debts due by him are evidence against his executor or administrator,[6] supposing such admissions go to matters of *fact* as distinguished from matters of *right*,[7] and are adequately established.[8] How far an executor, bringing an action on a life policy, where the issue was suicide, could be affected by his decedent's declarations of an intention to commit suicide, was discussed in an interesting case before the Supreme Court of Pennsylvania in 1876. Declarations indicating such an intention were admitted; but it was held that to such admissibility it is essential that the intent should be specific.[9]

Landlord's admissions

§ 1159. A landlord's admissions in a prior lease, on the principles already stated, have been held evidence so far as they charge the estate, against a lessee claiming

[1] Supra, § 1019.

[2] Trimlestown *v.* Kemmis, 9 Cl. & F. 784, affirming unanimous opinion of judges.

[3] Ibid.

[4] Supra, § 237; infra, § 1169.

[5] Eckert *v.* Cameron, 43 Penn. St. 120.

[6] Smith *v.* Smith, 3 Bing. N. C. 29; *S. C.* 7 C. & P. 401; Jones *v.* Jones, 21 N. H. 219; Albert *v.* Ziegler, 29 Penn. St. 50; Gordner *v.* Heffley, 49 Penn. St. 163. See Cheeseman *v.* Kyle, 15 Ohio St. 15; Nash *v.* Gibson, 16 Iowa, 305; Burckmyer *v.* Mairs, Riley, S. C. 208; Boone *v.* Thompson, 17 Tex. 605. And so as to provisions made by the decedent. Smith *v.* Maine, 25 Barb. 33.

In Watson *v.* Snyder, 40 L. T. N. S. 37, it was held by Lopes, J., that in an action by an executor to recover a debt due to the estate, a parol statement by his testator against his pecuniary interest with reference to such debt is admissible.

[7] Supra, § 1082.

[8] Supra, § 469.

[9] Continental Ins. Co. *v.* Delpeuch, 82 Penn. St. 225. See, as to other cases of declarations in life insurance cases, supra, § 269.

under a subsequent lease;[1] and generally, what a landlord admits is evidence against the tenant, in a suit against the tenant, provided such evidence does not derogate from the written title under which the tenant holds, supposing the lease to be in good faith, and not collusive.[2]

receivable against tenant.

§ 1160. The rule is the same whether the declarant has parted with the whole of his estate, after making the declarations, or has parted with only a portion. Thus, in cases where such declarations do not conflict with the statute of frauds or the recording acts, and do not contravene the record title, a predecessor's declarations can be received, in a suit against the successor or grantee, to show that the predecessor held the land as tenant of the party bringing suit,[3] or for any other purpose which casts a burden on the successor as privy in estate to his predecessor.[4] But such declarations, as we have seen, cannot be received for the purpose of contradicting the averments of deeds executed by the declarant, unless fraud or mistake be set up.[5] And it should be remembered that such declarations, if made by mistake, or in ignorance, do not bind either the party making them or his successors, unless they operate by way of estoppel.[6]

Tenancy and other burdens may be so proved.

§ 1161. An occupant of land, however, as a tenant or otherwise, cannot affect by his admissions his landlord's title; and hence, in an action by a party claiming an easement in land against the owner, the admissions of an occupant of the land are inadmissible for the plaintiff,[7] though in the common law action of ejectment, from

Admissions of party holding subordinate title do not affect principal.

[1] Crease *v.* Barrett, 1 C., M. & R. 932.

[2] See Crane *v.* Marshall, 16 Me. 27.

[3] Doe *v.* Pettett, 5 B. & A. 223.

[4] Bridgman *v.* Jennings, 1 Ld. Ray. 734; Woolway *v.* Rowe, 1 A. & E. 114; Davies *v.* Pierce, 2 T. R. 53; Blake *v.* Everett, 1 Allen, 248; Stearns *v.* Hendersass, 9 Cush. 497; Hyde *v.* Middlesex, 2 Gray, 267; Plimpton *v.* Chamberlain, 4 Gray, 320; Rogers *v.* Moore, 10 Conn. 13; Weidman *v.* Kohr, 4 Serg. & R. 174; Dawson *v.* Mills, 32 Penn. St. 302; Williard *v.* Williard, 56 Penn. St. 119; Robinson *v.* Robinson, 22 Iowa, 427; Thomas *v.* Wheeler, 47 Mo. 363.

[5] See supra, §§ 920, 1019; Doe *v.* Webster, 12 A. & E. 442; Carpenter *v.* Hollister, 13 Vt. 552; Wood *v.* Willard, 36 Vt. 82; Pain *v.* McIntier, 1 Mass. 69; Pinner *v.* Pinner, 2 Jones L. 398; Walker *v.* Blassingame, 17 Ala. 810.

[6] Jackson *v.* Miller, 6 Cow. 751; Hawley *v.* Bennett, 5 Paige, 104; Heaton *v.* Findlay, 12 Penn. St. 304. Supra, §§ 1078–1085.

[7] Infra, § 1350; Scholes *v.* Chadwick, 2 M. & Rob. 507; Papendick *v.*

the technical peculiarities of that action, the admissions of the tenant in possession can be produced against the landlord.[1] So admissions of a tenant for life do not bind the remainder man.[2] Nor can the declarations of a tenant for years, by admitting an incumbrance, be received against the owner of the fee.[3]

Judgment debtor's declarations admissible against successor.

§ 1162. The position of a judgment debtor may be such, as to his goods taken in execution, as to deprive his declarations, when made after judgment, of that self-disserving character which is necessary to establish admissibility so far as concerns subsequent purchasers of such goods.[4] Yet, so far as the debtor is the party through whom the title is traced, execution purchasers, claiming under him, are liable to be prejudiced by his declarations and acts when self-disserving.[5] Declarations of an escaped or non-arrested debtor have been held admissible in an action against the sheriff for escape, or for a false return, though such decla-

Bridgewater, 5 E. & B. 166. See Tickle *v.* Brown, 4 A. & E. 378; Taylor's Ev. § 714; Hanley *v.* Erskine, 19 Ill. 265.

[1] Doe *v.* Litherland, 4 A. & E. 784.

[2] Infra, § 1350; Papendick *v.* Bridgewater, 5 E. & B. 166; Howe *v.* Malkin, 40 L. T. (N. S.) 196; Hill *v.* Roderick, 4 Watts & S. 221; Pool *v.* Morris, 29 Ga. 374.

In Howe *v.* Malkin (supra), C. P. D. Ap. 1879, it was held that declarations of a tenant for life in possession as to boundaries could not be received to affect the remainder man. "The rule is," said Grove, J., "that, though you cannot give in evidence a declaration *per se*, yet when there is an act accompanied by a statement which is so mixed up with it as to become part of the *res gestae*, evidence of such statement may be given. The statements here do not come fairly within that rule."

And Denman, J., added: "The case of Papendick *v.* Bridgewater (*ubi supra*) disposes of Mr. Bosanquet's strongest argument. That case decided that a declaration by a tenant was not sufficient to bind the reversioner. It is true that it was not a case of boundary, but I think it is in point in principle. It is urged that Tickle *v.* Brown (*ubi supra*) was an authority for the defendant on the strength of a dictum which fell from Patterson, J. But in the present case the declarations sought to be given in evidence were not declarations accompanying an act, no evidence being tendered of any act whatever having been done by the declarant."

[3] Supra, § 237.

[4] See Vandyke *v.* Bastedo, 15 N. J. L. 224; Renshaw *v.* The Pawnee, 19 Mo. 532.

[5] Outcalt *v.* Ludlow, 32 N. J. L. 239; King *v.* Wilkins, 11 Ind. 347; Ross *v.* Hayne, 3 Greene (Iowa), 211; Stephens *v.* Williams, 46 Iowa, 540; Roebke *v.* Andrews, 26 Wis. 311. See Avery *v.* Clemons, 18 Conn. 306; Pomeroy *v.* Bailey, 43 N. H. 118; Martel *v.* Somers, 26 Tex. 551; Mulholland *v.* Ellitson, 1 Coldw. 307.

rations, to be properly admissible, should be part of the *res gestae*.[1]

Vendee or assignee of chattel bound by vendor's or assignor's admissions.

§ 1163. Where A., the possessor of a chattel, or *chose in action*, assigns it to B., B. takes it charged with equities which could have been maintained against A., supposing that B. has notice or ought to take notice of such equities; and from this it follows that B., under such circumstances, is as much exposed to the admission against him of A.'s self-disserving[2] declarations as to such equities, as he would be to the admission of any other legal evidence going to establish such equities.[3] From the very limitations of this proposition, however, it will be noticed that as against a *bonâ fide* purchaser, without notice, such admissions cannot be received.[4] It may be also observed that declarations by the owner of a chattel signifying his intention to give it away, may be part of the proof on which the donee of the chattel may rely.[5]

Indorser's declaration inadmissible against indorsee.

§ 1163 *a*. Of the rule that the declarations of the owner of a chattel or *chose in action* may be used against a vendee with notice, one of the most familiar instances is that of the indorsee of an overdue note, or of a note as to whose defects he has notice, and who, when suing on

[1] Sloman *v.* Herne, 2 Esp. 695; Rogers *v.* Jones, 7 B. & C. 89.

[2] If self-serving, they are inadmissible unless part of the *res gestae*. Riddle *v.* Dixon, 2 Penn. St. 372. Hence, when made in the absence of the assignee, they cannot be received for the purpose of showing a conspiracy to defraud creditors. Scott *v.* Heilager, 14 Penn. St. 238; McElfatrick *v.* Hicks, 21 Penn. St. 402.

[3] Welstead *v.* Levy, 1 M. & Rob. 138; Beauchamp *v.* Parry, 1 B. & Ad. 19; Harrison *v.* Vallance, 1 Bing. 45; Hatch *v.* Dennis, 1 Fairf. 244; Fisher *v.* True, 38 Me. 534; White *v.* Chadbourne, 41 Me. 149; Brindle *v.* McIlvaine, 10 S. & R. 282; Kellogg *v.* Krauser, 14 S. & R. 137; Gibblehouse *v.* Strong, 3 Rawle, 437; Blackstock *v.* Long, 19 Penn. St. 340; Lincoln *v.* Wright, 23 Penn. St. 76. See Paige *v.* Cagwin, 7 Hill, 361; Bunbury *v.* Brett, 18 Ind. 363; Vennum *v.* Thompson, 38 Ill. 143; Ritchy *v.* Martin, Wright (Ohio), 441; Wyckoff *v.* Carr, 8 Mich. 44; Horton *v.* Smith, 8 Ala. 73; Brown *v.* McGraw, 20 Miss. 267; Murray *v.* Oliver, 18 Mo. 405; Gallagher *v.* Williamson, 23 Cal. 331. That the declarations of a mortgagor, when executing a chattel mortgage, are part of the *res gestae*, see Bushnell *v.* Wood, 85 Ill. 88. That the declarations of a debtor, whose debt has been attached, are evidence, if made before the attachment, see Magee *v.* Raignel, 64 Penn. St. 110.

[4] Tousley *v.* Barry, 16 N. Y. 497. See Edington *v.* Ins. Co. 69 N. Y. 193.

[5] Larimore *v.* Wells, 29 Ohio St. 13.

such note, is chargeable with the self-disserving admissions of his indorser or assignor, made when holding the note, that the note was without consideration, or is paid, or is infected with similar defects, when such admissions are part of the *res gestae*, or when the declarant is dead.[1] On the other hand, where a note is received *bonâ fide*, without notice, and before it is due, by the indorsee, he cannot be charged with such admissions.[2] Declarations of an indorser *after* parting with the note are clearly inadmissible.[3]

In suits against strangers,

§ 1163 *b*. In such cases, however, where the declaration, in a suit against strangers, relates to facts which

[1] Peckham *v*. Potter, 1 C. & P. 232; Kent *v*. Lowen, 1 Camp. 177; Beauchamp. *v*. Parry, 1 B. & Ad. 89; Hatch *v*. Dennis, 10 Me. 244; Wheeler *v*. Walker, 12 Vt. 427; Bond *v*. Fitzpatrick, 4 Gray, 89; Roe *v*. Jerome, 18 Conn. 138; Robbins *v*. Richardson, 2 Bosw. 248; Hollister *v*. Reznor, 9 Ohio St. 1; Blount *v*. Riley, 3 Ind. 471; Abbott *v*. Muir, 5 Ind. 444; Williams *v*. Judy, 8 Ill. 282; Curtiss *v*. Martin, 20 Ill. 557; Sharp *v*. Smith, 7 Rich. 3; Cleaveland *v*. Davis, 3 Mo. 331. Infra, § 1199 *a*. That if the declarant is alive he must be called, see Hedger *v*. Horton, 3 C. & P. 179. The party against whom the declaration is offered must stand on the same title as the declarant. 2 Parsons on Notes, 472; Phillips *v*. Cole, 10 A. & E. 106; Jackson *v*. Bard, 4 Johns. R. 230. As discussing the position in the text, see Bailey *v*. Wakeman, 2 Denio, 220; Paige *v*. Cagwin, 7 Hill, 361. "It has long been settled that the declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the State of New York in the case of Paige *v*. Cagwin, 7 Hill, 361, and is now admitted to be sound doctrine; and that the party is since deceased makes no difference; Beech *v*. Wise, 1 Hill, 612; or that the transfer is made after maturity. The same is true of the declarations of a mortgagee; Earl *v*. Clute, 2 Abb. Ct. App. Dec. 11, or of the assignor of a judgment; 16 N. Y. 497; or of an indorser; Anthon's N. P. 141); or of a judgment debtor. 1 Denio, 202." Hunt, J., Dodge *v*. Saving Co. 93 U. S. 382. And see Edington *v*. Ins. Co. 67 N. Y. 193. Supra, § 269. At the same time we must remember that, as is stated by Andrews, J., in Van Sachs *v*. Kretz, 72 N. Y. 548, "The qualification found in Paige *v*. Cagwin, that the vendee or assignee *must be a purchaser for value*, in order to make the declaration inadmissible, is an essential part of the rule."

[2] Shaw *v*. Broom, 4 D. & R. 730; Woolray *v*. Rowe, 1 A. & E. 116; Matthews *v*. Houghton, 10 Me. 420; Fitch *v*. Chapman, 10 Conn. 8; Smith *v*. Schank, 18 Barb. 344; Kent *v*. Walton, 7 Wend. 256; Whitaker *v*. Brown, 8 Wend. 490; Weidman *v*. Kohr, 4 S. & R. 174; Eckert *v*. Cameron, 43 Penn. St. 120; Lister *v*. Boker, 6 Blackf. 439; Thorp *v*. Goewey, 85 Ill. 611; Sharp. *v*. Smith, 7 Richards. 3; Glanton *v*. Griggs, 5 Ga. 424; Porter *v*. Rea, 6 Mo. 48. Infra, § 1199.

[3] Camp *v*. Walker, 5 Watts, 482; Mitchell *v*. Welsh, 17 Penn. St. 339.

the declarant himself can prove, not being part of the *res gestae*, and he is living at the time, he should be called to prove them.[1]

declarant, if living, should be called.

§ 1164. An assignee in insolvency, also, is open to be prejudiced, in a suit against him, by the admissions of his assignor made before the assignment, as the case may be;[2] but it is otherwise as to declarations made after such period.[3] Thus declarations of an insolvent debtor, made after an assignment, are inadmissible against a particular creditor, to prove fraud in a preference given by the assignment to such creditor.[4] And such declarations, even when made coincidently with the assignment, cannot be admitted to defeat its plain provisions.[5]

Bankrupt assignee affected by bankrupt's admissions.

§ 1165. As a general rule, applicable to all cases of declarations against proprietary interest, such declarations, made after the declarant has parted with his interest, cannot be received to affect the title of a *bonâ fide* grantee, donee, or successor.[6] The same limitation ap-

Inadmissible when made after title is parted with.

[1] Hedger *v.* Horton, 3 C. & P. 179; Rand *v.* Dodge, 17 N. H. 343; Coit *v.* Howd, 1 Gray, 547; Currier *v.* Gale, 14 Gray, 504; Topping *v.* Van Pelt, 1 Hoffm. 545; Hanley *v.* Erskine, 19 Ill. 265. See Harriman *v.* Brown, 8 Leigh, 697; Lowry *v.* Moss, 1 Strobh. 63; Lamar *v.* Minter, 13 Ala. 31. See Papendick *v.* Bridgewater, and cases cited supra, § 1156.

[2] Coole *v.* Braham, 3 Exch. R. 185; Jarrett *v.* Leonard, 2 M. & S. 265; Von Sachs *v.* Kretz, 72 N. Y. 548; Brown *v.* McGraw, 20 Miss. 267; Gallagher *v.* Williamson, 23 Cal. 331; Norton *v.* Kearney, 10 Wis. 443; though see Bullis *v.* Montgomery, 3 Lansing, 255. How far a bankrupt assignee, or an assignee who by statute represents *creditors*, and who is consequently a purchaser, is able to contest such admissions, depends upon the statute.

[3] Jarrett *v.* Leonard, 2 M. & Sel. 265; Taylor *v.* Kinloch, 2 Stark. R. 394; Smallcome *v.* Bruges, 13 Price, 136; Robson *v.* Kemp, 4 Esp. 234; Adams *v.* Davidson, 10 N. Y. 309; Barber *v.* Terrell, 54 Ga. 146; Weinrich *v.* Porter, 47 Mo. 293. In Heywood *v.* Reed, 4 Gray, 574, subsequent admissions were received. See infra, § 1166.

[4] Phœnix *v.* Ins. Co. 5 Johns. R. 412. See Bullis *v.* Montgomery, 3 Lansing, 255.

[5] Vance *v.* Smith, 2 Heisk. 343.

[6] Crease *v.* Barrett, 1 C., M. & R. 419; Palmer *v.* Cassin, 2 Cranch C. C. 66; Clements *v.* Moore, 6 Wall. 299; Thompson *v.* Bowman, 6 Wall. 316; U. S. *v.* Lot of Jewelry, 13 Blatch. 60; Gillingham *v.* Tebbetts, 33 Me. 360; McLellan *v.* Longfellow, 34 Me. 552; Baxter *v.* Ellis, 57 Me. 179; Eaton *v.* Corson, 59 Me. 510; Worthing *v.* Worthing, 64 Me. 235; Baker *v.* Haskell, 47 N. H. 479; Haywood *v.* Reed, 4 Gray, 574; Lucas *v.* Trumbull, 15 Gray, 306; Lynde *v.* McGregor, 13 Allen, 175; Winchester *v.* Charter, 97 Mass. 140; Holbrook *v.* Holbrook, 113 Mass. 44;

plies to the declarations of a mortgagee, after assignment of mortgage to a third person;[1] and to a mortgagor's declarations after the execution of the mortgage.[2] Even a donor's depreci-

Wilcox *v.* Waterman, 113 Mass. 296; Somers *v.* Wright, 114 Mass. 171; Perkins *v.* Barnes, 118 Mass. 484; Warshauer *v.* Jones, 117 Mass. 345; Hayden *v.* Stone, 121 Mass. 413; Frear *v.* Evertson, 20 Johns. R. 142; Padgett *v.* Lawrence, 10 Paige, 170; Hubbell *v.* Alden, 4 Lansing, 214; Jacobs *v.* Remsen, 36 N. Y. 670; Taylor *v.* Marshall, 14 Johns. 204; Beach *v.* Wise, 1 Hill, 612; Sprague *v.* Kneeland, 12 Wend. 161; Paige *v.* Cagwin, 7 Hill, 361; Booth *v.* Swezey, 4 Seld. 279; Hanna *v.* Curtis, 1 Barb. Ch. 263; Ogden *v.* Peters, 15 Barb. 560; Ford *v.* Williams, 3 Kern. 577; Cuyler *v.* McCartney, 40 N. Y. 224; Smith *v.* Exch. Co. 40 N. Y. Sup. Ct. 492; Browning *v.* Ins. Co. 71 N. Y. 574; Price *v.* Plainfield, 10 Vroom, 608; Eby *v.* Eby, 5 Penn. St. 435; Bailey *v.* Clayton, 20 Penn. St. 295; Pringle *v.* Pringle, 59 Penn. St. 281; Hartman *v.* Diller, 62 Penn. St. 37; Pier *v.* Duff, 63 Penn. St. 37; Lewis *v.* Long, 3 Munford, 136; Houston *v.* McCluney, 8 W. Va. 135; Wynne *v.* Glidewell, 17 Ind. 446; Hubble *v.* Osborn, 31 Ind. 249; Burkholder *v.* Casad, 47 Ind. 418; Campbell *v.* Coon, 51 Ind. 76; Cochran *v.* McDowell, 15 Ill. 10; Rivard *v.* Walker, 39 Ill. 413; Dunaway *v.* School Direct. 40 Ill. 247; Minor *v.* Phillips, 42 Ill. 126; Bunker *v.* Green, 48 Ill. 243; Randegger *v.* Ehrhardt, 51 Ill. 101; Jewett *v.* Cook, 81 Ill. 260; Savery *v.* Spaulding, 8 Iowa, 239; Gray *v.* Earl, 13 Iowa, 188; Roebke *v.* Andrews, 26 Wis. 311; Shirland *v.* Iron Works, 41 Wis. 162; Burt *v.* McKinstry, 4 Minn. 204; Harshaw *v.* Moore, 12 Ired. L. 247; Hunsucker *v.* Farmer, 72 N. C. 372; De Bruhl *v.* Patterson, 12 Rich. 363; Gill *v.* Strozier, 32 Ga. 688; Cornett *v.* Cornett, 33 Ga. 219; Harrell *v.* Culpepper, 47 Ga. 635; Barber *v.* Terrell, 54 Ga. 146; Porter *v.* Allen, 54 Ga. 623; Flanders *v.* Maynard, 58 Ga. 56; Bilberry *v.* Mobley, 21 Ala. 277; Holly *v.* Flournoy, 54 Ala. 99; Cleaveland *v.* Davis, 3 Mo. 331; Garland *v.* Harrison, 17 Mo. 282; Weinrich *v.* Porter, 47 Mo. 293; Wright *v.* Hessey, 59 Tenn. 42; Thompson *v.* Herring, 27 Tex. 282; Garrahy *v.* Green, 32 Tex. 202; Carpenter *v.* Carpenter, 8 Bush, 283; Sumner *v.* Cook, 12 Kans. 162; Hutchings *v.* Castle, 48 Cal. 152.

"In all the cases in this state and in Massachusetts, in which declarations have been received, they related to the land in controversy, were made by the declarant while in possession, and were offered in evidence against him or those deriving title under him. Chapman *v.* Twitchell, 37 Me. 59; Bartlett *v.* Emerson, 7 Gray, 174. 'The exceptions to the general rule excluding hearsay evidence,' remarks Gray, J., in Hall *v.* Mayo, 97 Mass. 418, 'which permit the introduction of reputation or tradition, or of declarations of persons deceased, as to matters of public or general interest, or questions of pedigree, do not extend to a question of private boundary, in which no considerable number of persons have a legal interest.'" Appleton, C. J., Sullivan Granite Co. *v.* Gordon, 57 Me. 522.

A deceased person's declarations, however solemnly made, cannot be used to impeach a prior assignment made by him. Pringle *v.* Pringle, 59 Penn. St. 281.

[1] Kinna *v.* Smith, 2 Green Ch. N. J. 14.

[2] Winchester *v.* Charter, 97 Mass.

atory declarations are inadmissible if made after the gift.[1] *A fortiori* a grantor's subsequent declarations cannot be received to dispute, as against *bonâ fide* purchasers, the averments of his deed.[2]

§ 1166. It is otherwise, however, when the grantor's admissions are made in presence of the grantee, and not dissented from by the latter.[3] And, "if the grantor is permitted by the grantee to remain in actual possession of the thing granted, what he says may be given in evidence, on the principle that what a man says who is in possession of either lands or goods is admissible to prove in what capacity he is there.[4] But this exception cannot be extended to a mere constructive possession. The possession is a fact, and how it is held is a fact; and this may be shown by the declarations of the possessor, on the same grounds upon which mere hearsay is permitted when it forms part of the *res gestae*."[5] The same result necessarily follows when there is a fraudulent collusion between grantor and grantee, by which the latter, after obtaining possession, is a confederate, for fraudulent purposes, of the former. Such fraudulent confederacy, however, must be proved

Exception in case of concurrence or fraud.

140; Perkins *v.* Barnes, 118 Mass. 484; distinguishing Sweetzer *v.* Bates, 117 Mass. 466.

[1] Newman *v.* Wilbourne, 1 Hill Ch. S. C. 10; Gregory *v.* Walker, 38 Ala. 26; Cornett *v.* Fain, 33 Ga. 219; Grooms *v.* Rust, 27 Tex. 231. See Jones *v.* Robertson, 2 Munf. 187.

[2] Pierce *v.* Faunce, 37 Me. 63; Brackett *v.* Wait, 6 Vt. 411; Barnard *v.* Pope, 14 Mass. 434; Taylor *v.* Robinson, 2 Allen, 562; Tyler *v.* Mather, 9 Gray, 177; Gates *v.* Mowry, 15 Gray, 564; Varick *v.* Briggs, 6 Paige, 323; Padgett *v.* Lawrence, 10 Paige, 170; Vrooman *v.* King, 36 N. Y. 477; Postens *v.* Postens, 3 Watts & S. 127; Ferguson *v.* Staver, 33 Penn. St. 411; Cochran *v.* McDowell, 15 Ill. 10; Rust *v.* Mansfield, 26 Ill. 36; Gill *v.* Strozier, 32 Ga. 688; Cornett *v.* Cornett, 33 Ga. 219; Price *v.* Bank, 17 Ala. 374; Stewart *v.* Thomas 35 Mo. 202; Christopher *v.* Corrington, 2 B. Mon. 357; Beall *v.* Barclay, 10 B. Mon. 261; Cohn *v.* Mulford, 15 Cal. 50; Thompson *v.* Herring, 27 Tex. 282.

See Field *v.* Tibbetts, 57 Me. 358, to the effect that such admissions would be immaterial.

[3] Lark *v.* Lindstead, 2 Md. Ch. 162; Myers *v.* Kinzie, 26 Ill. 36; Wiler *v.* Manley, 51 Ind. 169; Wilson *v.* Woodruff, 5 Mo. 40. Supra, § 1136.

[4] See, also, Adams *v.* Davidson, 10 N. Y. 309; McDowell *v.* Rissell, 37 Penn. St. 164; Pier *v.* Duff, 63 Penn. St. 59; Wiler *v.* Manly, 51 Ind. 169; Grant *v.* Lewis, 14 Wis. 487. And compare Tedrowe *v.* Esher, 56 Ind. 443.

[5] Sharswood, J., Pier *v.* Duff, 63 Penn. St. 63.

aliunde, to the satisfaction of the court, before the declarations of the grantor, after the grant, are admissible.[1]

Declarations of fraud cannot infect innocent vendee.

§ 1167. To infect a grantee or vendee, therefore, with his grantor's or vendor's fraud, it is necessary that he should be privy to the fraud; and hence the grantor's declarations as to the transaction being fraudulent on his part are not admissible against the grantee, unless there be proof of collusion *aliunde*.[2] As against creditors, however, such declarations, taken in connection with suspicious conduct by the grantee, are matters for consideration of a jury in determining whether there is fraud.[3] When such declarations are made after the assignment, they are inadmissible, except under the conditions above stated.[4]

[1] Steph. Ev. p. 46; Downs *v.* Belden, 46 Vt. 674; Waterbury *v.* Sturtevant, 18 Wend. 353, as qualified in Cuyler McCartney, 40 N. Y. 228; Reitenbach *v.* Reitenbach, 1 Rawle, 362; Wilbur *v.* Strickland, 1 Rawle, 458; Hartman *v.* Diller, 62 Penn. St. 43; Pier *v.* Duff, 63 Penn. St. 59; Lark *v.* Linsteed, 2 Md. Ch. 162; Myers *v.* Kinzie, 26 Ill. 36; Randegger *v.* Ehrhardt, 51 Ill. 101; Jones *v.* King, 86 Ill. 225; Johnson *v.* Quarles, 46 Mo. 423; Boyd *v.* Jones, 60 Mo. 454. Infra, §§ 1194, 1205, and cases in § 1167.

"To make such declarations competent, there must be some evidence of a common purpose or design; but a very slight degree of concert or collusion is sufficient." Woodward, J., McDowell *v.* Rissell, 37 Penn. St. 164; approved by Sharswood, J., Hartman *v.* Diller, 62 Penn. St. 43. But is this not going too far? Undoubtedly, as we shall have occasion hereafter to see, there have been extreme rulings on the other side, to the effect that when a criminal offence is charged in a civil suit (*e. g.* conspiracy), the offence must be made out beyond reasonable doubt. Infra, § 1245. The proper view is, that in this as well as all other issues in civil trials, preponderance of proof is enough. But there must be preponderance of proof to establish a conspiracy, so as to let in declarations of co-conspirators. No mere suspicion of a conspiracy will suffice.

[2] Carpenter *v.* Hollister, 13 Vt. 552; Alexander *v.* Gould, 1 Mass. 165; Tibbals *v.* Jacobs, 31 Conn. 428; Cuyler *v.* McCartney, 40 N. Y. 228 (overruling Waterbury *v.* Sturtevant, 18 Wend. 353); Reichart *v.* Castator, 5 Binn. 109; Payne *v.* Craft, 7 Watts & S. 458. See Venable *v.* Bank U. S. 2 Pet. 107; Littlefield *v.* Getchell, 32 Me. 390; Cochran *v.* M'Dowell, 15 Ill. 10; Pinner *v.* Pinner, 2 Jones L. 398; Hodge *v.* Thompson, 9 Ala. 131; Mahone *v.* Williams, 39 Ala. 202; Carrollton Bank *v.* Cleveland, 15 La. 616; Enders *v.* Richards, 33 Mo. 598; Zimmerman *v.* Lamb, 7 Minn. 421; Bogert *v.* Phelps, 14 Wis. 88; Selsby *v.* Redlon, 19 Wis. 17.

[3] Bridge *v.* Eggleston, 14 Mass. 245; Jackson *v.* Myers, 11 Wend. 553; Savage *v.* Murphy, 8 Bosw. 75; McDowell *v.* Goldsmith, 6 Md. 319; Hunter *v.* Jones, 6 Rand. 541; Satterwhite *v.* Hicks, Busb. L. 105.

[4] Dennison *v.* Benner, 41 Me. 332; Ellis *v.* Howard, 17 Vt. 330; Horri-

§ 1168. It is also a necessary qualification of the rule before us, that such declarations are only admissible when self-disserving; in other words, when made by the predecessor in title knowingly against interest.[1] But declarations not self-disserving may become admissible when part of the *res gestae*, or when offered to rebut contemporaneous statements.[2]

Inadmissible when self-serving.

§ 1169. It should be remembered that the question is not merely whether the declaration tends to disparage the declarant's estate, but whether, in its bearing on the successor against whom it was offered, it was, as to the utterer, self-disserving when uttered. Nor can the declarant affect by his admissions any estate which he has not power to alienate or incumber. Thus it is held that a tenant for life cannot prejudice, by an admission, the interest of a remainder man or reversioner, and the same rule should, on principle, apply to a tenant in tail.[3] It has been held that slight evidence of ownership will be sufficient to receive such declara-

So the declarations must be against particular interest.

gan *v.* Wright, 4 Allen, 514; Hall *v.* Hinks, 21 Md. 406; Wheeler *v.* McCorristen, 24 Ill. 40; Mobly *v.* Barnes, 26 Ala. 718; Sutter *v.* Lackman, 39 Mo. 91; Jones *v.* Morse, 36 Cal. 205.

[1] Peabody *v.* Hewett, 52 Me. 33; Smith *v.* Powers, 15 N. H. 546; Newell *v.* Horn, 47 N. H. 379; Ware *v.* Brookhouse, 7 Gray, 454; Niles *v.* Patch, 13 Gray, 254; Smith *v.* Martin, 17 Conn. 399; Jackson *v.* Cris, 11 Johns. R. 437; Riddle *v.* Dixon, 2 Penn. St. 372; Sample *v.* Robb, 16 Penn. St. 305; Alden *v.* Grove, 18 Penn. St. 377; Miller *v.* State, 8 Gill, 141; Dorsey *v.* Dorsey, 3 Har. & J. 410; Masters *v.* Varner, 5 Grat. 168; Hicks *v.* Forrest, 6 Ired. Eq. 528; Hedrick *v.* Gobble, 63 N. C. 48; Sasser *v.* Herring, 3 Dev. L. 340; Cox *v.* Easely, 11 Ala. 362; McMullen *v.* Mayo, 8 Sm. & M. 298; Watson *v.* Bissell, 27 Mo. 220; Tucker *v.* Tucker, 32 Mo. 464; Leach *v.* Fowler, 20 Ark. 143; Jilson *v.* Stebbins, 41 Wis. 235.

[2] Supra, § 258, 1102; Hodgdon *v.* Shannon, 44 N. H. 572; Marcy *v.* Stone, 8 Cush. 4; Hood *v.* Hood, 2 Grant (Penn.), 229; Hugus *v.* Walker, 12 Penn. St. 173; Duffy *v.* Congregation, 48 Penn. St. 46; Dawson *v.* Callaway, 18 Ga. 573; Nelson *v.* Iverson, 17 Ala. 99; Thompson *v.* Drake, 32 Ala. 99.

[3] See, apparently *contra*, Reynoldson *v.* Perkins, Amb. 563; Pendleton *v.* Rooth, 1 Giff. 45, per Stuart, V. C.; Ibid. 1 Giff. 35; 1 De Gex, F. & J. 81, *S. C.* Reynoldson *v.* Perkins, *ut supra*, was, however, the case of a release, under a decree for foreclosure, by the first tenant in tail. Pendleton *v.* Rooth, 1 De Gex, F. & J., is a peculiar case, and no conclusion can be drawn from it outside of the facts there stated. As a rule, the declarations of a tenant in tail cannot bind the inheritance. Of course, if they are produced in favor of a purchaser, as evidence of a contract on valuable consideration to bar the estate tail, it would be different.

tions; and a learned judge has gone so far as to say that where a person was seen felling timber in a wood, this was a sufficient act of ownership, though probably he was in fact a mere laborer, to raise a presumption that he was possessed of the fee, and consequently to let in any statement made by him as to who was the actual proprietor.[1]

VI. ADMISSIONS BY AGENT, ATTORNEY, AND REFEREE.

Agent employed to make contract binds principal by representations which are part of contract.

§ 1170. When an agent is employed to make a contract on behalf of his principal, this involves the duty and right of doing whatever is necessary to enable the contract to be executed; and whatever statements the agent may make, incidental to the discharge of this duty, bind the principal as much as if they were made by the principal. They are primary evidence, as part of the contract, which it is not necessary to call the agent himself to verify.[2] The principal cannot defend on the

[1] Doe *v.* Arkwright, 5 C. & P. 575, Parke, B.

[2] Hern *v.* Nichols, 1 Salk. 289; Dawson *v.* Atty, 7 East, 367; R. *v.* Hall, 8 C. & P. 358; Doe *v.* Hawkins, 2 Q. B. 212; Fountaine *v.* R. R. L. R. 5 Eq. 316; Mortimer *v.* McCallan, 6 M. & W. 58; Barwick *v.* Bk. L. R. 2 Exch. 259; Mechanics' Bank *v.* Bk. of Columbia, 5 Wheat. 336; Cliquot's Champagne, 3 Wall. 114; Demerrit *v.* Meserve, 39 N. H. 521; Barber *v.* Britton, 26 Vt. 112; Putnam *v.* Sullivan, 4 Mass. 45; Baring *v.* Clark, 19 Pick. 220; Bird *v.* Daggett, 97 Mass. 494; Willard *v.* Buckingham, 36 Conn. 365; Thallhimer *v.* Brinkerhoff, 4 Wend. 394; Sandford *v.* Handy, 23 Wend. 260; Bennett *v.* Judson, 21 N. Y. 230; New York & N. H. R. R. *v.* Schuyler, 34 N. Y. 30; Anderson *v.* R. R. 54 N. Y. 344; Hathaway *v.* Johnson, 55 N. Y. 93; Green *v.* Ins. Co. 62 N. Y. 642; Indianap. R. R. *v.* Tyng. 63 N. Y. 653; Hough *v.* Doyle, 4 Rawle, 294; Penns. R. R. *v.* Plank Road, 71 Penn. St. 350; Columb. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; De Voss *v.* Richmond, 18 Grat. 338; Continental Ins. Co. *v.* Kasey, 25 Grat. 268; Coyle *v.* R. R. 11 W. Va. 94; Madison R. R. *v.* Norwich Sav. Co. 24 Ind. 458; Haller *v.* Crawford, 37 Ind. 279; Rowell *v.* Klein, 44 Ind. 290; Mut. Ins. Co. *v.* Cannon, 48 Ind. 265; Chicago, &c. R. R. *v.* Coleman, 18 Ill. 297; Cook *v.* Hunt, 24 Ill. 535; Chicago R. R. *v.* Lee, 60 Ill. 501; Pinnix *v.* McAdoo, 68 N. C. 56; Baldwin *v.* Ashley, 54 Ala. 82; Doe *v.* Robinson, 24 Miss. 688; Peck *v.* Ritchey, 66 Mo. 114. See, also, Great Western Railway *v.* Willis, 18 C. B. N. S. 748. Thus, it has been said: "When it is proved that A. is agent of B., whatever A. does or says, or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B." Per Gibbs, C. J., Langhorn *v.* Allnutt, 4 Taunt. 519. Evidence of an interpreter's version of

ground that the representations made by the agent, within the apparent scope of the agent's authority, were false. If he reaps the fruits, he is liable for the misconduct by which these fruits were produced.[1] Such fraudulent representations, also, when touching questions of fact, avoid a contract made under their influence, and expose the parties making or adopting them to an action for deceit.[2] An agent, also, may estop a principal by disclaiming title at a sale.[3] But an agent's declarations, when going to an admission of liability as a question of law, cannot be used against the principal by a party who negligently, without the inquiry incumbent on him, accepts them.[4] And, generally, a misrepresentation as to law will not bind, when there is no fraud, and no misrepresentation of facts.[5]

As a corporation can only act through agents, what an agent admits, it is itself to be regarded as admitting.[6]

an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter. Reid *v.* Hoskins, 6 E. & B. 953. Powell's Evidence, 4th ed. 259. That a bank cashier may so bind the bank, see Harrisburg Bk. *v.* Tyler, 3 Watts & S. 373; and that a railroad president may do so within his scope, see Charleston R. R. *v.* Blake, 12 Rich. 634. So as to a protest by a master of a vessel as binding his employers. Atkins *v.* Elwell, 45 N. Y. 753.

[1] Gladstone *v.* King, 1 Maule & S. 35; Willes *v.* Glover, 1 Bos. & Pul. 14; Fitzherbert *v.* Mather, 1 T. R. 12; Proudfoot *v.* Montefiori, L. R. 2 Q. B. 50; Maynard *v.* Rhode, 1 C. & P. 360; Roberts *v.* Fonnereau, Park on Ins. 285; Mackintosh *v.* Marshall, 11 Mee. & W. 116; Hammatt *v.* Emerson, 27 Me. 308; Ruggles *v.* Ins. Co. 4 Mason, 74; Kibbe *v.* Ins. Co. 11 Gray, 163; Indianap. R. R. *v.* Tyng, 63 N. Y. 653; Rockford *v.* R. R. 65 Ill. 224; Wiggins *v.* Leonard, 9 Iowa, 194; Whart. on Agency, § 468.

[2] Whart. on Neg. §§ 164 *et seq.*

[3] Richards *v.* Murphy, 1 Whart. 185; Caley *v.* R. R. 80 Penn. St. 363.

[4] Upton *v.* Tribilcock, 91 U. S. (1 Otto) 45, Hunt, J., citing Beaufort *v.* Neald, 2 Cl. & F. 248; Smith's case, L. R. 2 Ch. Ap. 613; Denton *v.* McNeil, L. R. 2 Eq. 532. As to the distinction between admissions of fact and admissions of right, see supra, § 1082.

[5] Upton *v.* Tribilcock, *ut supra;* Lewis *v.* Jones, 4 B. & C. 506; Rashall *v.* Ford, L. R. 2 Eq. 750; Starr *v.* Bennett, 5 Hill, 303; Fish *v.* Cleland, 33 Ill. 243.

[6] Nat Ex. Co. *v.* Drew, 2 Macq. 103; Ranger *v.* R. R. 5 H. L. Cas. 72; Mackay *v.* Com. Bk. L. R. 5 P. C. 391; Barwick *v.* Bk. L. R. 2 Ex. 259; Smith *v.* Winterbotham, L. R. 8 Q. B. 244; Fogg *v.* Griffin, 2 Allen, 1; McGenness *v.* Adriatic Mills, 116 Mass. 177; Green's Brice's Ultra Vires, 425; Whart. on Agency, §§ 57, 670, 671; Angell & Ames on Corp. 9th ed. § 309; and see Bank U. S. *v.* Dunn, 6 Pet. 51; Fairfield *v.* Thorp, 13 Conn. 173; Toll Bridge Co. *v.* Betsworth, 30 Conn. 380; Stewart *v.* Bank, 11 S. & R. 267; Farmers' Bank *v.* McKee, 2 Barr, 321; Spalding *v.* Bk. 9 Barr, 28. See cases cited supra, § 735.

§ 1171. As an agent authorized to conduct a business enterprise is to be regarded as empowered to take all the necessary steps to carry on such enterprise, he binds his principal, by all representations he may make within the apparent scope of his duties,[1] to parties dealing with him without any notice of a restriction in this respect on his powers. He may not only have no authority to make such representations, but he may be expressly ordered not to make them. As to parties, however, without knowledge of these limitations, he binds his principal.[2] His admissions are bilateral; in other words, they are part of the contract made by his principal, and as such bind the principal.

Such representations binding though unauthorized.

§ 1172. An apparent exception to the above rule arises from the peculiar relation of applicants for insurance to agents soliciting insurances. The agent is the party by whom the application is prepared: the applicant is led to regard the statements before him as mere matters of form, and signs them accordingly. "The reason for this," we are informed, "is, that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto."[3] In other words, in cases of this class, a party is not estopped by representations made in his behalf by a person who, though nominally his agent, is really the agent for the other contracting party.[4] This position, however, is not to be pushed so far as to

Applicant for insurance may contradict written statement made by agent.

[1] Hanover Co. *v.* Iron Co. 84 Penn. St. 279.

[2] Barwick *v.* Eng. Joint St. Co. L. R. 2 Exc. 259; Maddock *v.* Marshall, 18 C. B. (N. S.) 829; Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Howard *v.* Sheward, L. R. 2 C. P. 148; Burnham *v.* R. R. 63 Me. 298; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Mundorff *v.* Wickersham, 63 Penn. St. 87. See Whart. on Agency, §§ 122, 460.

[3] Miller, J., Ins. Co. *v.* Wilkinson, 13 Wall. 222. That the agent of the insurer cannot, by processes of the character above noticed, be made the agent of the insured, so as to estop the insured, see Ins. Co. *v.* Mahone, 21 Wall. 157; Malleable Iron Works *v.* Ins. Co. 25 Conn. 465; Hough *v.* Ins. Co. 29 Conn. 10; Hunt *v.* Ins. Co. 2 Duer, 481; Rowley *v.* Ins. Co. 36 N. Y. 550; Clinton *v.* Ins. Co. 45 N. Y. 454; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; North Am. Ins. Co. *v.* Throop, 22 Mich. 146; Anson *v.* Ins. Co. 23 Iowa, 84; New England Ins. Co *v.* Schettler, 38 Ill. 166; Commerc. Ins. Co. *v.* Ives, 56 Ill. 402; Sullivan *v.* Ins. Co. 43 Ga. 423.

[4] See, as qualifying the above conclusion, Jennings *v.* Ins. Co. 2 Denio, 75; Brown *v.* Ins. Co. 18 N. Y. 385,

open the policy, with its constituent papers, to parol variation, on the ground that the plaintiff's statement was inadvertently expressed, and that material stipulations made by the agent of the company, and which were part of a parol contract between the insured and the agent, were omitted in preparing the policy.[1]

overruled by subsequent New York cases, cited above. As holding to a stricter view than the text, see Manhattan Ins. Co. *v.* Webster, 59 Penn. St. 227; Aurora Ins. Co. *v.* Eddy, 55 Ill. 222.

See, also, Maher *v.* Ins. Co. 67 N. Y. 283.

The following is part of a comprehensive review of the authorities, by Cooley, J.: "In this case it is conceded that the oral answer made to the inquiry about incumbrances mentioned the large mortgage, but it is disputed that it specified the small one also. The plaintiff claims that he gave the agent full information on the subject, and insists that if there was any failure to mention it in the application, it was for reasons operating exclusively upon the mind of the agent, and not affecting his own action. We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had claimed it from relying upon incorrect recitals to defeat it, when he himself had drafted those recitals, and was morally responsible for their truthfulness. Plumb *v.* Cattaraugus Mutual Ins. Co. 18 N. Y. 394; Rowley *v.* Empire Ins. Co. 36 N. Y. 550 (overruling earlier New York cases); Anson *v.* Winnesheik Ins. Co. 23 Iowa, 84; Malleable Iron Works *v.* Phœnix Ins. Co. 25 Conn. 465; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Hough *v.* City Fire Ins. Co. 29 Conn. 10; Patten *v.* Farmers' F. Ins. Co. 40 N. H. 383; Columbia Ins. Co. *v.* Cooper, 50 Penn. St. 331; Olmstead *v.* Ætna Live Stock, &c. Ins. Co. 21 Mich. 246. And we think the estoppel is precisely the same where the agent of the insurer drafts the papers as it would be in the case of an individual insurer who was himself personally present and acting. Rowley *v.* Empire Ins. Co. 36 N. Y. 550; Anson *v.* Winnesheik Ins. Co. 23 Iowa, 84; Marshall *v.* Columbian F. Ins. Co. 27 N. H. 165; Peoria M. &. F. Ins. Co. *v.* Hall, 12 Mich. 214; Woodbury Savings Bank *v.* Charter Oak Ins. Co. 31 Conn. 517." Cooley, J., The North American Fire Insur. Co. *v.* Throop, 22 Mich. R. 158. See Hartford Ins. Co. *v.* Davenport, 36 Mich. 609; and criticism on Central Law Journal, March 21, 1879, p. 225.

[1] In Insurance Co. *v.* Mowry, 96 U. S. 547, it was held inadmissible, when the company set up forfeiture, for the holder of the policy to show that by parol agreement between the parties, before the execution of the policy, forfeiture on non-payment of premium was to be waived. "All previous verbal arrangements," said Field, J., "were merged in the written agreement. . . . . If, by inadvertence or mistakes, provisions other than those intended were inserted, or stipulated provisions omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company." So far as the above is inconsistent with Ins. Co. *v.* Wilkinson,

§ 1173. Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act, while it is in progress, is so far part of the *res gestae* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations, explanatory of these acts, are admissible; nor in proving such declarations is it necessary that he should be himself called.[1]

Agent's admission receivable when part of the *res gestae*.

we must consider the latter case over ruled. See Plum *v.* Ins. Co. 18 N. Y. 392; Rowly *v.* Ins. Co. 36 N. Y. 550, sustaining the admissibility of such evidence, but apparently qualified by Le Roy *v.* Ins. Co. 45 N. Y. 80.

In Combs *v.* Ins. Co. 43 Mo. 148, the insured, in a fire insurance policy, was permitted to show that he truly stated the facts to the agent, but that those were not truly recited in the application, though this was signed by the insured.

[1] Bree *v.* Holbrook, Doug. 654; Fitzherbert *v.* Mather, 1 T. R. 12; Biggs *v.* Lawrence, 3 T. R. 454; Fairlie *v.* Hastings, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 451; Mortimer *v.* McCallen, 6 M. & W. 58; Howard *v.* Sheward, L. R. 2 C. P. 148; Lee *v.* Munroe, 7 Cranch, 366; Flint *v.* Transp. Co. 7 Blatch. 536; Lamb *v.* Barnard, 16 Me. 364; Burnham *v.* R. R. 63 Me. 298; Baring *v.* Clark, 19 Pick. 220; Cooley *v.* Norton, 4 Cush. 93; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Willard *v.* Buckingham, 36 Conn. 395; Bristol Knife Co. *v.* Bank, 41 Conn. 421; Bank U. S. *v.* Davis, 2 Hill (N. Y.), 451; Sandford *v.* Handy, 23 Wend. 260; Thalhimer *v.* Brinkerhoof, 6 Cowen, 90; McCotter *v.* Hooker, 4 Seld. 497; Price *v.* Powell, 3 Comst. 322; Luby *v.* R. R. 17 N. Y. 131; Anderson *v.* R. R. 54 N. Y. 340; Merchants' Bank *v.* Griswold, 72 N. Y. 473; Hannay *v.* Stewart, 6 Watts, 487; Stockton *v.* Demuth, 7 Watts, 39; Reed *v.* Dick, 8 Watts, 479; Woodwell *v.* Brown, 44 Penn. St. 121; Hanover R. R. *v.* Coyle, 55 Penn. St. 396; Dodge *v.* Bache, 57 Penn. St. 421; Union R. R. *v.* Riegel, 73 Penn. St. 72; Mullan *v.* Steamship Co. 78 Penn. St. 25; Grim *v.* Bonnell, 78 Penn. St. 152; Thomas *v.* Sternheimer, 29 Md. 268; Youngstown *v.* Moore, 30 Ohio St. 133; Sisson *v.* R. R. 14 Mich. 489; Toledo R. R. *v.* Goddard, 25 Ind. 185; Whiteside *v.* Margarel, 51 Ill. 507; Sweatland *v.* Tel. Co. 26 Iowa, 433; Simmons *v.* Rust, 39 Iowa, 241; Pinnix *v.* McAdoo, 68 N. C. 370; McComb *v.* R. R. 70 N. C. 178; South Exp. Co. *v.* Duffey, 48 Ga. 358; Newton Man. Co. *v.* White, 53 Ga. 395; Adams *v.* Humphreys, 54 Ga. 496; Strawbridge *v.* Shawn, 8 Ala. 820; Bohannan *v.* Chapman, 13 Ala. 641; Beardslee *v.* Steinmesch, 38 Mo. 168; Union Savings Co. *v.* Edwards, 47 Mo. 445; Malecek *v.* R. R. 57 Mo. 17; Robinson *v.* Walton, 58 Mo. 380; Neely *v.* Naglee, 23 Cal. 152; Smith *v.* Wallace, 25 Wis. 55; Owens *v.* Northrup, 30 Wis. 482.

"It has been often held that, to make declarations admissible on this ground, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well

§ 1174. The statements, as well as the conduct of an agent during the performance of a tort, are imputable to the principal, as part of the *res gestae*, whenever the tort itself is so imputable.[1] Thus the admissions of the captain of a steamer, as to damage to crops on shore by fire from the steamer, made while she was running under his command, and at the time the fire was communicated, are evidence against the owners who employed him,[2] and so of the admissions of a captain of a vessel at the time of carrying off a slave;[3] and of the declarations of the servants of a railroad company at the time of a collision;[4] and of the admissions of the servant of a common carrier during the period of the carrying, if such admissions are not narratives of a past act, and are therefore the act itself talking, not a talking about the act.[5] It is essential, therefore, that they should be coincident with the events to which they refer. If made after there has been an interval giving time for reflection, then, unless the agent be empowered to speak for the company at such time, statements of the agent, explaining or even admitting the act, cannot be received, though he continues in the company's employment.[6] At

So in torts if connected with act charged.

calulated to unfold the nature and character of the acts they were intended to explain, and to so harmonize with them as to constitute a single transaction. Enos *v.* Tuttle, 3 Conn. R. 250; Comstock *v.* Hadlyme, 8 Ibid. 263; Russell *v.* Frisbie, 19 Ibid. 209; Ford *v.* Haskell, 32 Ibid. 492; Bradbury *v.* Bardin, 35 Ibid. 583; Sears *v.* Hayt, 37 Ibid. 406." Phelps, J., Rockwell *v.* Taylor, 41 Conn. R. 59.

[1] Rhodes *v.* Lowry, 54 Ala. 4. See, however, Cooper *v.* Slade, 6 H. of L. 746.

[2] Gerke *v.* Steam Nav. Co. 9 Cal. 251.

[3] Price *v.* Thornton, 10 Mo. 135.

[4] Toledo R. R. *v.* Goddard, 25 Ind. 185.

[5] Packet Co. *v.* Clough, 20 Wall. 540; Burnside *v.* R. R. 47 N. H. 554.

[6] To the same effect, see Allen *v.* Denstone, 8 C. & P. 760; Fairlie *v.* Hastings, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 431; Langhorn *v.* Allnut, 4 Taunt. 519; Mortimer *v.* McCallan, 6 M. & W. 58; Great W. R. R. *v.* Willis, 18 C. B. (N. S.) 748; Maury *v.* Talmadge, 2 McLean, 157; Robinson *v.* R. R. 7 Gray, 92; Wakefield *v.* R. R. 117 Mass. 544; Enos *v.* Tuttle, 3 Conn. 250; Sears *v.* Hayt, 37 Conn. 406; Rockwell *v.* Taylor, 41 Conn. 59; Luby *v.* R. R. 17 N. Y. 131; Anderson *v.* R. R. 54 N. Y. 334; Price *v.* R. R. 31 N. J. L. 229; Penn. R. R. *v.* Books, 57 Penn. St. 339; Va. & Tenn. R. R. *v.* Sayers, 26 Grat. 329; Milwaukee R. R. *v.* Finney, 10 Wis. 388; Mich. Cent. R. R. *v.* Gongaz, 55 Ill. 503; Mich. Cent. R. R. *v.* Coleman, 28 Mich. 446; Mabley *v.* Kittleberger, 37 Mich. 360; Osgood *v.* Bringolf, 32 Iowa, 265; Treadway *v.* R. R. 40 Iowa, 527; Cramer *v.* Burlington, 45 Iowa, 627; Patterson *v.* R. R. 4 S. C. 153; Griffin *v.* R. R. 26 Ga.

the same time we must remember that, as has been already seen, the duration to which the *res gestae* extends depends upon the concrete case.[1]

When admissions are not by a general agent, in the scope of his business, nor part of the *res gestae*, special authorization must be proved.

§ 1175. We have already noticed,[2] that a principal is estopped, as against the other contracting parties, by such of his agent's representations as were among the inducements leading such other contracting parties to execute the contract. But as *primâ facie* proof against the principal may also be introduced (in all cases in which the agent is authorized so to speak for the principal) the agent's non-contractual admissions, made after the contract is executed. Of these admissions, two incidents are to be noticed: (1.) Being non-contractual and unilateral,[3] they are not conclusive on the principal; and, (2.) They cannot be put in evidence unless special authority to make them can be proved. "As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though

111; East Tenn. R. R. *v.* Duggan, 51 Ga. 212; Cent. R. R. *v.* Kelly, 58 Ga. 107; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Murphy *v.* May, 9 Bush, 33; Nashville R. R. *v.* Messino, 1 Sneed, 220; and see fully for distinctions stated infra, § 1176.

As extending the period of the *res gestae*, see Malecek *v.* R. R. 57 Mo. 20. As taking a wider view than that of the text, see Chapman *v.* R. R. 55 N. Y. 579.

[1] Supra, §§ 256–262.

[2] Supra, § 1170.

[3] See supra, § 1083.

it may have some relation to the business in which the person making that assertion was employed as agent."[1] . . . . Peculiarly is this the case with regard to admissions made by an agent as to the character of a past act as to which his principal is charged with liability.[2]

§ 1176. In respect to torts, a distinction is to be noticed between torts based on contract, and torts consisting of a violation of the duty *Sic utero tuo ut non alienum laedas*, So as to torts.

[1] Wharton on Agency, § 160; Sir W. Grant in Fairlie *v.* Hastings, 10 Ves. 126. See to same general effect, Doe *v.* Roberts, 16 M. & W. 778; Faussett *v.* Faussett, 7 Ec. & Mar. 93; Garth *v.* Howard, 8 Bing. 451; Chicago *v.* Greer, 9 Wall. 726; Ins. Co. *v.* Mahone, 21 Wall. 152; Gooch *v.* Bryant, 13 Me. 386; Bank *v.* Steward, 37 Me. 519; Burnham *v.* Ellis, 39 Me. 319; Woods *v.* Banks, 14 N. H. 101; Page *v.* Parker, 40 N. H. 47; Lowe *v.* R. R. 45 N. H. 370; Barnard *v.* Henry, 25 Vt. 289; Upham *v.* Wheelock, 36 Vt. 27; Wheelock *v.* Hardwick, 48 Vt. 19; Corbin *v.* Adams, 6 Cush. 93; Dorne *v.* Man. Co. 11 Cush. 205; Johnson *v.* Trinity Church, 11 Allen, 123; Fogg *v.* Pew, 10 Gray, 409; Blanchard *v.* Blackstone, 102 Mass. 343; Wilson *v.* Bowden, 113 Mass. 422; Anderson *v.* Bruner, 112 Mass. 14; Lane *v.* R. R. 112 Mass. 455; Cortland Co. *v.* Herkimer, 44 N. Y. 22; Lansing *v.* Coleman, 58 Barb. 611; Happy *v.* Mosher, 48 N. Y. 313; Hoag *v.* Lamont, 60 N. Y. 96; First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 279; Runk *v.* Ten Eyck, 24 N. J. L. 756; Fawcett *v.* Bigley, 59 Penn. St. 411; Pier *v.* Duff, 63 Penn. St. 59; Custar *v.* Gas Co. 63 Penn. St. 381; Columb. Ins. Co. *v.* Masonheimer, 76 Penn. St. 138; Bradford *v.* Williams, 2 Md. Ch. 1; Wheatley *v.* Wheeler, 34 Md. 62; Balt. & O. R. R. *v.* Gallahue, 12 Grat. 655; Balt. R. R. *v.* Christie, 5 W. Va. 325; Thomas *v.* Rutledge, 67 Ill. 213; Linblom *v.* Ramsey, 75 Ill. 246; Grimshaw *v.* Paul, 76 Ill. 164; Converse *v.* Blumrich, 14 Mich. 109; Peck *v.* Detroit, 29 Mich. 313; Fort Wayne R. R. *v.* Gildersleeve, 33 Mich. 133; Kalamazoo *v.* McAlister, 36 Mich. 327; Smith *v.* Wallace, 25 Wis. 55; Lucas *v.* Barrett, 1 Greene (Iowa), 510; Swenson *v.* Aultman, 14 Kans. 273; Griffin *v.* R. R. 26 Ga. 11; Weight *v.* R. R. 26 Ga. 330; Wilcox *v.* Hall, 53 Ga. 635; Newton *v.* White, 53 Ga. 395; Todd *v.* Bank, 54 Ga. 497; Governor *v.* Baker, 14 Ala. 652; Winter *v.* Bent, 31 Ala. 33; Alabama R. R. *v.* Johnson, 42 Ala. 242; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Golson *v.* Ebert, 52 Mo. 260; Cosgrove *v.* R. R. 54 Mo. 495; Cook *v.* Whitfield, 41 Miss. 541.

[2] Infra, § 1180; Packet Co. *v.* Clough, cited in last section; Franklin Bk. *v.* Cooper, 36 Me. 179; Craig *v.* Gilbreth, 47 Me. 416; Lime Rock Bk. *v.* Hewett, 52 Me. 531; Pemigewasset Bk. *v.* Rogers, 18 N. H. 255; Austin *v.* Chittenden, 33 Vt. 553; Robinson *v.* R. R. 7 Gray, 192; Chelmsford *v.* Demarest, 7 Gray, 1; Wakefield *v.* R. R. 117 Mass. 544; Anderson *v.* R. R. 54 N. Y. 334; Price *v.* R. R. 31 N. J. L. 229; Bank *v.* Davis, 6 Watts & S. 285; Bigley *v.* Williams, 80 Penn. St. 107; Mobile R. R. *v.* Ashcraft, 48 Ala. 15. See more fully Wharton on Agency, § 160.

or, as they are called in the Roman law, Aquilian torts.[1] (1.) If I order an agent to make a contract into which fraud or other wrong enters, so that the contract is tortious, then I am bound by all the statements he may make in the performance of his agency; and I am estopped by these statements so far as they induce the other contracting party to alter his position.[2] (2.) If I direct an agent to injure another person (*e. g.* to pull down his house, or assault his person), then, as my agent is a co-conspirator with me, his admissions can be put in evidence against me, if made while the relationship continues;[3] though, since they are unilateral[4] (*i. e.* not part of a contract), they may be explained or rebutted by me. But (3.) If, when in performance of my lawful duty to a third person, my agent, from carelessness, injures such third person (*e. g.* as is the case with the agents of a railroad company negligently injuring a passenger), then, as his tort is entirely outside of his agency, such only of his statements as are part of the tortious act are admissible against me, and these statements (being non-contractual, *i. e.* not part of the consideration of a contract) can be rebutted by me. His *subsequent* statements are not admissible against me, because he was not my agent, either real or apparent, for the purpose of making such statements. These statements are therefore mere hearsay.[5] Thus it has been correctly held that the statements of agents of a railroad company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, such statements having been made some time before or some time after the accident, are not admissible against the company, no authority in the agent to make the admissions being proved.[6] So the admission of a brakeman after an accident, imputing negligence to the engineer, cannot be received.[7]

[1] See Wharton on Negligence, §§ 8, 786, for an expansion of this distinction.

[2] See supra, § 1170.

[3] Infra, § 1205. See Dobbins *v.* U. S. 96 U. S. 395, to the effect that the admission of the lessee of an alleged distillery may bind owner.

[4] See supra, § 1079.

[5] See authorities, supra, § 1174; Green *v.* Woodbury, 48 Vt. 5.

[6] Va. & Tenn. R. R. Co. *v.* Sayers, 26 Grattan, 329. Though see Chapman *v.* R. R. 55 N. Y. 579.

[7] Michigan Cent. R. R. *v.* Coleman, 28 Mich. 446; and see other cases cited supra, § 1174.

§ 1177. As has been already incidentally seen, a party who commits the management of his whole business, or of a particular line of his business, to an agent, is bound by the admissions of the agent, as to the entire business committed to him; nor, when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestae*, or should have been specially authorized. Eminently is this the case with corporations. Thus it has been held in England that on a suit against a railroad company for a lost parcel, a statement made by the station master, generally representing the defendant, intimating that the parcel was stolen by a porter of the defendant, is admissible against the defendant.[1] So, in Massachusetts, in an action against a manufacturing corporation for a nuisance, a statement of its superintendent that the nuisance existed and would be remedied, and that "he would not have it around his place for $500," is competent evidence against the corporation, the superintendent being the corporation's general representative.[2] And, generally, power to an agent to admit, transfers the agent's admissions to the principal.[3]

General agents may make non-contractual admissions.

[1] Kirkstall *v.* R. R. L. R. 9 Q. B. 468. See Morse *v.* R. R. 6 Gray, 450.

[2] McGenness *v.* Adriatic Mills, 116 Mass. 177.

"The remaining question is in reference to the admission of evidence of the statement of the superintendent. The defendant is a corporation, and can only act through its agents, and, in the absence of any evidence to the contrary, the superintendent in charge of the mill must be deemed the proper person to whom to make complaint, and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to and should be, was therefore properly put in evidence. Morse *v.* Connecticut River R. R. 6 Gray, 450. The expression used by him, that he 'would not have it around his place, as it was around there, for $500,' was a mere mode of stating that the nuisance existed, and could not have been considered as an admission that this sum was the amount of the damages, nor do we understand that it was put in evidence as such." Devens, J., McGenness *v.* Adriatic Mills, 116 Mass. 180. See, to same effect, Charleston R. R. *v.* Blake, 12 Rich. S. C. 634.

[3] Burt *v.* Palmer, 5 Esp. 145; Coates *v.* Bainbridge, 5 Bing. 58; Anderson *v.* Sanderson, 2 Stark. 204; Dowdall *v.* R. R. 13 Blatch. 463; Morse *v.* R. R. 6 Gray, 450; Hyland *v.* Sherman, 2 E. D. Smith, 234; Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Custar *v.* Gas Co. 63 Penn. St. 381; Bennett *v.* Holmes, 32 Ind. 108; Howe *v.* Snow, 32 Iowa, 433; Ward *v.*

§ 1178. Where, however, there is no special power given to an agent to represent the principal for the purpose of settlement, or other action involving the power to admit, then, it must be again noticed, the agent's declarations as to facts are hearsay, unless part of the *res gestae*. The agent himself must be called to prove these facts; his statements as to them, as reported by other witnesses, cannot be received.[1] "The admission of an agent cannot be assimilated to the admission of the principal. The party is bound by his own admission; and is not" (when it is part of the contract) "permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, and not by his mere assertion."[2]

Non-contractual admissions open to correction.

§ 1179. It is scarcely necessary here to repeat that statements of an agent, not part of a contract, are, in the few cases in which they are admissible in evidence, open to correction and explanation by the principal. This is the case, as we have seen, with similar statements by the principal himself.[3] This rule is peculiarly applicable to statements which are thrown off by the agent carelessly, and without full knowledge of the circumstances.[4]

In contracts, after business is closed. agent's power of representation ceases.

§ 1180. So far as concerns dispositive or contractual representations, the power of an agent (who is not a general agent for such purposes) to bind his principal in this way ceases when the principal business is transacted. His representations, made during the negotiations, conclude his principal, as we have seen, when they are part of the consideration of the contract. His admis-

Leitch, 30 Md. 326; Buchanan *v.* Collins, 42 Ala. 419; Northrup *v.* Ins. Co. 47 Mo. 435. This position is pushed to undue length in Malecek *v.* R. R. 57 Mo. 20.

[1] See for authorities supra, § 1174.

[2] Sir William Grant, in Fairlie *v.* Hastings, 10 Ves. 126.

[3] Supra, §§ 1078, 1083.

[4] Craig *v.* Gilbreth, 47 Me. 416; Austin *v.* Chittenden, 33 Vt. 553; Hubbard *v.* Elmer, 7 Wend. 441; Tracy *v.* McManus, 58 N. Y. 257; Patton *v.* Minesinger, 25 Penn. St. 393; Custar *v.* Gas Co. 63 Penn. St. 381; Franklin Bank *v.* Nav. Co. 11 Gill & J. 28; Milwaukee R. R. *v.* Finney, 10 Wis. 388.

sions (if he be a mere special agent for the particular purpose), made after the contract is executed, are not even admissible against the principal.[1] We therefore, in this relation, fall

[1] Hern *v.* Nichols, 1 Salk. 289; Fairlie *v.* Hastings, 10 Ves. 125; Kirkstall Co. *v.* R. R. L. R. 9 Q. B. 468; Stiles *v.* Danville, 42 Vt. 282; Lobdell *v.* Baker, 1 Met. (Mass.) 193; Stiles *v.* R. R. 8 Met. 44; Lowell *v.* Winchester, 8 Allen, 109; Hubbard *v.* Elmer, 7 Wend. 446; Jex *v.* Board of Education, 1 Hun (N. Y.), 159; Magill *v.* Kauffman, 4 S. & R. 320; Hough *v.* Doyle, 4 Rawle, 291; Clark *v.* Baker, 2 Whart. 340; Bank of Northern Liberties *v.* Davis, 6 W. & S. 285; Stewartson *v.* Watts, 8 Watts, 392; Penn. R. R. *v.* Books, 57 Penn. St. 339; Waterman *v.* Peet, 11 Ill. 648; Chic. &c. R. R. *v.* Lee, 60 Ill. 501; Chic., B. & Q. R. R. *v.* Riddle, 60 Ill. 534; Rowell *v.* Klein, 44 Ind. 290; Bowen *v.* School District, 36 Mich. 149; Pollard *v.* R. R. 7 Bush, 597; Williams *v.* Williams, 11 Ired. L. 281; Pinnix *v.* McAdoo, 68 N. C. 56; McComb *v.* R. R. 70 N. C. 178; Raiford *v.* French, 11 Rich. (S. C.) 367; Colquitt *v.* Thomas, 8 Ga. 268; East. B. *v.* Taylor, 41 Ala. 93; Reynolds *v.* Rowley, 2 La. An. 890; Caldwell *v.* Garner, 31 Mo. 131; Levy *v.* Mitchell, 6 Ark. 138; Greer *v.* Higgins, 8 Kans. 519.

"The opinion of an agent, based on past occurrences, is never to be received as an admission of his principals; and this is doubly true when the agent is not a party to those occurrences." Strong, J., Ins. Co. *v.* Mahone, 21 Wall. 157; citing Packet Co. *v.* Clough, 20 Wall. 528; Hough *v.* Doyle, 4 Rawle, 291; Hubbard *v.* Elmer, 7 Wend. 446; Stiles *v.* R. R. 8 Met. 46; Clark *v.* Baker, 2 Whart. 340. See, to same effect, Tuggle *v.* R. R. 62 Mo. 425; Ashmore *v.* Towing Co. 38 N. J. L. 13.

"It is a well established rule that the declarations of an agent, made at the time of the particular transaction, which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestae*. It is equally as well settled that the declarations of an agent, made after the transaction is 'fully completed and ended,' are not admissible. The declarations of officers of a corporation rest upon the same principles as apply to other agents." Penn. R. R. *v.* Books, 57 Penn. St. 339; Huntington R. R. *v.* Decker, 82 Penn. St. 119.

The admissions of telegraph operators, made after the message is delivered, and not part of the *res gestae*, cannot be received to affect the company, in a suit against it for negligence. McAndrew *v.* Tel. Co. 17 C. B. 3; Robinson *v.* R. R. 7 Gray, 92; Grinnell *v.* Tel. Co. 112 Mass. 299; U. S. *v.* Gildersleeve, 29 Md. 232; Sweatland *v.* Tel. Co. 29 Iowa, 433; Aiken *v.* Tel. Co. 5 S. C. 358.

In an action against a national bank, as gratuitous bailee of property which had been stolen by burglars, a witness, who had testified to conversations with defendant's president, in which he notified him of attempts by burglars to enter the bank, and of indications of an intended robbery, and urged upon him the necessity of greater care, was permitted to testify, under objection, that the president, after the burglary, requested him not to mention such conversations. It was held by the court of appeals that the admission was erroneous, as the president's acts and declarations after the transaction, and when not acting

back on the general rule, that non-contractual admissions (in other words, admissions not forming part of the consideration of a contract),[1] are not admissible unless part of the *res gestae*, or unless they are made with the special authority of the principal, or by his general representative.[2]

Admissions of servant are subject to same restrictions as to time.

§ 1181. A servant, as distinguished from an agent, as is elsewhere shown,[3] is regarded by the law as so far a mechanical extension of his master, that whatever he does, in the discharge of his master's orders, is so much his master's action, that for it his master is suable, not himself. Hence, the acts and words of a servant, so far as they are incidental to and explanatory of his action when executing his master's orders, are evidence against his master.[4] Thus when the soundness of a cable is questioned in an action against the owners of a vessel for damage caused by the breaking of the cable, the declarations of the crew, when paying out

within the limit of his authority, were not binding upon, and could not affect, the defendant. First Nat. Bank of Lyons *v.* Ocean Nat. Bank, 60 N. Y. 279. Van Leuven *v.* First Nat. Bank, 54 N. Y. 671, distinguished.

[1] See supra, §§ 1173–5.

[2] Fairlie *v.* Hasting, 10 Ves. 123; Garth *v.* Howard, 8 Bing. 451; Langhorn *v.* Allnut, 4 Taunt. 519; Mortimer *v.* McCallan, 6 M. & W. 58; Great W. R. R. *v.* Willis, 18 C. B. (N. S.) 748; Allen *v.* Denstone, 8 C. & P. 760; Polleys *v.* Ins. Co. 14 Met. 141; Robinson *v.* R. R. 7 Gray, 92; Wakefield *v.* R. R. 117 Mass. 544; Anderson *v.* R. R. 54 N. Y. 334; Price *v.* R. R. 31 N. J. L. 229; Hynds *v.* Hays, 25 Ind. 31; Lafayette R. R. *v.* Ehman, 30 Ind. 83; Bennett *v.* Holmes, 32 Ind. 108; Bellefontaine R. R. *v.* Hunter, 33 Ind. 335; Dickenson *v.* Colter, 45 Ind. 445; Pittsburg R. R. *v.* Theobald, 51 Ind. 246; Michigan Cent. R. R. *v.* Carrow, 73 Ill. 348; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Price *v.* Thornton, 10 Mo. 135; Ready *v.* Highland Mary, 20 Mo. 264.

"The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narrative of the transaction in which he had been employed, are not admissible in evidence against the principal." Rogers, J., Hough *v.* Doyle, 4 Rawle, 294. "It would be a mere affectation of learning to cite the long array of cases from Hannay *v.* Stewart, 6 Watts, 487, to Fawcett *v.* Bigley, 9 P. F. Smith, 411, in which this rule has been reiterated and applied. The declarations in question were certainly admissible, as those of an agent of a common carrier in the course of his employment as such, but not to prove a prior special contract." Sharswood, J., Pennsylvania Railroad Co. *v.* Plank Road Co. 71 Penn. St. 355.

[3] Wharton on Agency, § 536.

[4] Wharton on Agency, §§ 159 *et seq.*; Weeks *v.* Barron, 38 Vt. 420; Black *v.* R. R. 45 Barb. 40.

the cable, may be put in evidence;[1] and so the acts and remarks of a workman, while engaged in manufacturing an article alleged to be pirated, are admissible against his master in a suit for infringing the patent.[2]

§ 1182. Yet we must remember that a servant moves within a limited orbit, one far more limited than that of an agent; and that consequently the admissions of a servant are more jealously guarded than are those of an agent. An agent is authorized to exercise discretion; when a servant is authorized to exercise discretion, then he ceases to be a servant and becomes an agent. Those dealing with a mere servant, knowing him to be such, know that except in the immediate discharge of a mechanical duty he is not authorized to bind his master by his admissions. Hence, ordinarily, a master, except within such range, is not so bound.[3] But where a servant is made an agent for a particular purpose (*e. g.* where a porter or other servant is employed to represent a railroad company in all matters concerning baggage), then his declarations may be admissible against his employer.[4]

As to scope, are more limited than those of agent.

§ 1183. As declarations of an agent are only admissible when the agency is proved, to permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declarations. It would be a *petitio principii* to say that he was an agent because his declarations were admissible, and his declarations were admissible because he was an agent. Hence the rule is settled that such declarations cannot be received until there be proof of the agency *aliunde*.[5] An error in this respect, however, is cured, if after

Agency must be established by proof *aliunde*.

[1] Reed *v.* Dick, 8 Watts, 479.

[2] Aikin *v.* Bemis, 3 Wood. & M. 348.

[3] Robinson *v.* R. R. 7 Gray, 92; McGregor *v.* Wait, 10 Gray, 72; Wakefield *v.* R. R. 117 Mass. 544; Anderson *v.* R. R. 54 N. Y. 334; Penns. R. R. *v.* Books, 57 Penn. St. 339; Michigan Central R. R. *v.* Carrow, 73 Ill. 348; Mobile R. R. *v.* Ashcraft, 48 Ala. 15.

[4] Morse *v.* R. R. 6 Gray, 450; Lane *v.* R. R. 112 Mass. 455; Cortland *v.* Herkimer Co. 44 N. Y. 22. See Malecek *v.* R. R. 57 Mo. 17.

[5] Fairlie *v.* Hastings, 10 Ves. 126; Mussey *v.* Beecher, 3 Cush. 517; Brigham *v.* Peters, 1 Gray, 139; McGregor *v.* Wait, 10 Gray, 72; Haney *v.* Donnelly, 12 Gray, 361; Fitch *v.* Chapman, 10 Conn. 8; Jaeger *v.* Kelley, 52 N. Y. 274; Hill *v.* R. R. 63 N. Y. 101; Clark *v.* Baker, 2 Whart. 340; Chambers *v.* Davis, 3 Whart. 40; Robeson *v.* Nav.

the declarations are received the agency is proved satisfactorily by independent evidence.[1]

Attorney's admissions bind client.

§ 1184. As a matter of practice, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may conclude his client, in cases in which, on the faith of such admissions, a change of position is adopted on the other side. Such admissions, part of a mutual plan for the trial of the case, are irrevocable by the client, except in cases of fraud.[2] It is otherwise, however, with

Co. 3 Grant (Penn.), 186; Jordan *v.* Stewart, 23 Penn. St. 244; Williams *v.* Davis, 69 Penn. St. 21; Grim *v.* Bonnell, 78 Penn. St. 152; Rosenstock *v.* Tormey, 32 Md. 169; Farmer *v.* Lewis, 1 Bush, 66; Royal *v.* Sprinkle, 1 Jones L. 505; Grandy *v.* Ferebee, 68 N. C. 356; Stenhouse *v.* R. R. 70 N. C. 542; Francis *v.* Edwards, 77 N. C. 271; Mapp *v.* Phillips, 32 Ga. 72; Wilcoxen *v.* Bohanan, 53 Ga. 219; Craighead *v.* Wells, 21 Mo. 404; Coon *v.* Gurley, 49 Ind. 199; Breckenridge *v.* McAfee, 54 Ind. 141; Reynolds *v.* Ferrel, 86 Ill. 590; Sypher *v.* Savery, 39 Iowa, 258; Streeter *v.* Poor, 4 Kans. 412; Howe Machine Co. *v.* Clark, 15 Kans. 492.

"'An agent is competent to prove his own authority when it is by parol, but his declarations *in pais* are not proof of it; and though they become evidence, as parts of the *res gestae*, if made in the conduct of the business intrusted to him, yet other evidence must first establish his authority to speak before his words shall bind his principal. Jordan *v.* Stewart, 11 Harris, 244. Agency cannot be proved by the declarations of the agent, without oath, and in the absence of the party to be affected by them.' Clark *v.* Baker, 2 Wharton, 340; Chambers *v.* Davis, 3 Wharton, 44." Woodward, J., Grim *v.* Bonnell, 78 Penn. St. 152.

Nor can an agent's declarations be received, on behalf of the principal, to prove that a third party was not also the principal's agent. Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

[1] Rowell *v.* Klein, 44 Ind. 291. See Pinnix *v.* McAdoo, 68 N. C. 56.

[2] Stephen's Ev. art. 17; Langley *v.* Oxford, 1 M. & W. 508; Elton *v.* Larkins, 1 M. & Rob. 196; 5 C. & P. 385; Doe *v.* Bird, 7 C. & P. 6; Marshall *v.* Cliffs, 4 Camp. 133; Pike *v.* Emerson, 5 N. H. 393; Burbank *v.* Ins. Co. 24 N. H. 550; Smith *v.* Hollister, 32 Vt. 695; Lewis *v.* Sumner, 13 Met. 269; Herbert *v.* Alexander, 2 Call, 499; Daniel *v.* Ray, 1 Hill S. C. 32; Smith *v.* Bossard, 2 McCord Ch. 406; Wilson *v.* Spring, 64 Ill. 18; Lacoste *v.* Robert, 11 La. An. 33; Kohn *v.* Marsh, 3 Robt. La. 48; Smith *v.* Mulliken, 2 Minn. 319. See fully Whart. on Agency, §§ 585 *et seq.* When a mistake may be recalled during the trial, see infra, § 1189.

"It has been repeatedly held that an attorney may admit facts on the trial, or, in pleading, waive a right of appeal, review, notice, &c., and confess a judgment. Talbot *v.* McGee, 4 Mon. 377; Pike *v.* Emerson, 5 N. H. 393; Alton *v.* Gilmanton, 2 Ibid. 520.

"In the case of Herbert *v.* Alexander, 2 Call, Va. R. 499, it was held that an attorney represents his clients,

non-contractual admissions of the attorney, not accepted as part of the mutual arrangements for the trial of the case.[1] Such admissions may be rebutted; but nevertheless they constitute *primâ facie* evidence, or, in other words, they relieve, at the first instance, the opposing party from the burden of proving that which they admit, supposing the authority of the attorney to be first proved.[2] Thus an attorney, by admitting a signature to a document in litigation, relieves the opposing party from proving such signature;[3] by calling upon the opposite side to produce a bill "accepted by A." (the client) admits A.'s acceptance;[4] by appearing for parties as owners of a ship admits their joint ownership.[5] And so on a second trial, a written agreement admitting certain facts signed by the counsel when the first trial opened, has been regarded as dispensing *primâ facie* with the proof of such facts.[6] And a written admission to an auditor, to be used by the auditor in making up his report, is operative against the party in future proceedings in same case.[7]

and in court may do such acts as his client might do himself.

"In the case of Pierce *v.* Perkins, 2 Dev. Eq. 250, it was held that a party after decree cannot dispute the authority of his attorney to bind him in any agreement made in conducting and determining the suit.

"In Smith *v.* Bossard, 2 McC. Ch. 406, it was held the attorney might bind the client by referring the matter in dispute to accountants without the knowledge of his client, and his assent to their report will be binding.

"From these adjudged cases, as well as upon principle, it is apparent that such admissions as were made on the trial in this case must bind the party, unless fraudulently and collusively made. Nor can it matter that one of the parties is a *feme covert*. Having committed her rights to an attorney, he must be held to have power to do the same acts on the trial which she could perform in person, and no one can controvert her power to admit that a particular sum was due on a mortgage executed by her, so as to be binding." Walker, J., Wilson *v.* Spring, 64 Ill. 18.

[1] Young *v.* Wright, 1 Camp. 141; Floyd *v.* Hamilton, 33 Ala. 235.

[2] Moulton *v.* Bowker, 115 Mass. 36; Lord *v.* Bigelow, 124 Mass. 185; Bathgate *v.* Haskin, 59 N. Y. 533; Thomas *v.* Kinsey, 8 Ga. 421; McLean *v.* Clark, 47 Ga. 24; Cassels *v.* Usry, 51 Ga. 621; McRea *v.* Bank, 16 Ala. 755; People *v.* Garcia, 25 Cal. 531.

[3] Milward *v.* Temple, 1 Camp. 375. An admission by counsel before a justice relieves from proving handwriting on appeal. Overholzer *v.* McMichael, 10 Penn. St. 139.

[4] Holt *v.* Squire, Ry. & M. 282.

[5] Marshall *v.* Cliff, 4 Camp. 133.

[6] Van Wart *v.* Wolley, Ry. & M. 4; Truby *v.* Seybert, 12 Penn. St. 101; Merchants' Bk. *v.* Marine Bk. 3 Gill, 98.

[7] Holderness *v.* Baker, 44 N. H. 414.

But mere conversational admissions by an attorney, thrown off collaterally, cannot bind his client, the attorney being a special, not a general agent;[1] nor are such admissions receivable when made tentatively, for purposes of compromise.[2] So casual and informal admissions by counsel at a formal trial are not evidence on a subsequent trial.[3] And in any view, an attorney's power thus to admit ceases when he withdraws from the case.[4]

Attorney's admissions on trial may be used by strangers.

§ 1185. An attorney's admission, when duly authorized, is to be treated as if made by the party himself.[5] Hence such admission may subsequently be used against such party by a stranger.[6]

Implied admissions of counsel bind particular case.

§ 1186. It must be remembered that in every trial there are facts with the proof of which counsel may tacitly agree to dispense. When a case is tried on this principle and is closed, such facts cannot ordinarily be disputed by the party by whom they have been tacitly admitted.[7]

[1] Doe *v.* Richards, 2 C. & K. 216; Patch *v.* Lyon, 9 Q. B. 147; Watson *v.* King, 3 C. B. 608; Holton *v.* Lake Co. 55 Ind. 194.

"Admission of an attorney, in order to bind his client, must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial. Those which occur in mere conversations, though they relate to the matters in issue in the case, cannot be received in evidence against the client." 1 Greenleaf's Evid. § 186; Beck, J., Treadway *v.* R. R. 40 Iowa, 526.

[2] Saunders *v.* McCarthy, 8 Allen, 42. Supra, § 1090.

[3] Colledge *v.* Horn, 3 Bing. 119; R. *v.* Coyle, 7 Cox C. C. 74; Adee *v.* Howe, 15 Hun, 20; Wilkins *v.* Stidger, 22 Cal. 231.

[4] Janeway *v.* Skerritt, 30 N. J. L. 97.

[5] See supra, §§ 836 *et seq.*

[6] Ibid. In Truby *v.* Seybert, 12 Penn. St. 101, as explained in McDermott *v.* Hoffman, 70 Penn. St. 32, the point ruled was, "that if a party, or his counsel in his defence, make a concession of a fact within his own knowledge, which is pertinent in another issue with another plaintiff, the record of the first suit as introductory to evidence of the concession, and the concession itself, though proved by parol, are good evidence for the new plaintiff; and what is said by Mr. Justice Bell in that case is certainly true, that a record between other parties may be admissible in evidence whenever it contains a solemn admission or judicial declaration by any such parties in regard to the existence of any particular fact."

[7] Child *v.* Roe, 1 E. & B. 279; Stracy *v.* Blake, 1 M. & W. 168.

In the case of Colledge *v.* Horn, 3 Bing. 119; *S. C.* 10 Moore, 431, Taylor's Ev. § 709, on a second trial the defendant endeavored to avoid part of his opponent's demand, by proving an admission, which, on the former trial, had been made in the plaintiff's presence by the plaintiff's counsel, in his opening address to the

§ 1187. The employment of an attorney, like the employment of an agent, cannot be proved by his own admission; his admissions cannot be received, unless he is shown to be an attorney *aliunde*,[1] nor can his admissions out of court be received without proof of special authority.[2] The employment must be proved to include the particular suit as to which admission is made.[3]

Attorney's authority must be proved *aliunde*.

§ 1188. The admissions made by an attorney's clerk, in performance of his ordinary office duties, are treated, when in the scope of his authorization, as tantamount to the admissions of the attorney himself.[4] The power of attorneys and their assistants, in this relation, is discussed at large in another work.[5]

Admissions of attorney's clerk equivalent to admissions of attorney.

§ 1189. So far as concerns matters of law, no error of counsel can prejudice the client if such error is recalled before judgment. The court, in fact, as has been seen, can on its own motion correct defective law presented to it by counsel.[6] So far as concerns errors in fact, the

Attorney's admissions may be recalled before judgment.

jury. The judge rejected this evidence; and although the court above subsequently granted a new trial, they did so, not on the ground that the ruling was wrong, but because the facts were not sufficiently before them. Mr. Justice Burrough declared that if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement; but the other learned judges, it is said, forbore giving any opinion on a question which they held to be one of great nicety. See Haller *v.* Worman, 2 F. & F. 165; R. *v.* Coyle, 7 Cox C. C. 74. As to the authority of counsel to bind a client by a compromise or agreement made at the trial, see Swinfen v. Swinfen, 25 L. J. C. P. 303; 26 Ibid. 97; 1 Com. B. N. S. 364, *S. C.;* 27 L. J. Ch. 35, coram Romilly, M. R. *S. C.;* 24 Beav. 549, *S. C.;* Judge of M. R. aff'd by Lds. Js. 2 De Gex & J. 38; 27 L. J. Ch. 491, *S. C.;* Chambers *v.* Mason, 5 Com. B. N. S. 59; Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890; Pristwick *v.* Poley, 34 L. J. C. P. 189; *S. C. nom.* Prestwick *v.* Poley, 18 Com. B. N. S. 806; Strauss *v.* Francis, L. R. 1 Q. B. 379; *S. C.* 7 B. & S. 365, and cases cited in Whart. on Agency, §§ 589 *et seq.*

[1] Supra, § 1183; Burghart *v.* Angerstein, 6 C. & P. 645; Pope *v.* Andrews, 9 C. & P. 564; Wagstaff *v.* Wilson, 4 B. & Ad. 339.

[2] Snyder *v.* Armstrong, 6 Weekly Notes, 412.

[3] Whart. on Agency, § 582; Wagstaff *v.* Wilson, 4 B. & Ad. 339; Moffit *v.* Witherspoon, 10 Ired. L. 185.

[4] Griffiths *v.* Williams, 1 T. R. 710; Truelove *v.* Burton, 9 Moore, 64; Taylor *v.* Williams, 2 B. & Ad. 845; Standage *v.* Creighton, 5 C. & P. 406; Power *v.* Kent, 1 Cow. 211; Birkbeck *v.* Stafford, 14 Abb. (N. Y.) 285; *S. C.* 23 How. Pr. 236.

[5] Whart. on Agency, § 579.

[6] Supra, §§ 276, 283; Weber, Hefftter's ed. 65.

statements of counsel, when made in the client's presence, and as his representative, are by the Roman law treated as if made by the client himself. "Ea quae advocati praesentibus his, quorum causae aguntur, allegant, perinde habenda sunt, ac si ab ipsis dominis litium proferantur."[1] But this is accepted with the qualification that the client is entitled to recall the admission at any time before judgment entered, if it should appear that the error is not traceable to any wrongful intent of his own, and that the opposite party is not prejudiced thereby.[2] It is otherwise when, in consequence of the attorney's admissions, the position of the opposite party has been altered so that it would be detrimental to the latter for the admission to be revoked.[3]

Referee's admissions bind principal.

§ 1190. A party who, when applied to for information as to a negotiation, says, "Go to R., who represents me in this matter," is bound by R.'s representations, within the scope of the reference, to the same effect as if R. was his duly appointed agent for the purpose.[4] This is eminently the case where one of several associates is constituted the mouthpiece of a firm for the purpose of specially answering questions.[5] On the same principle parties may bind themselves by the opinion of counsel acting as referee.[6] Such agreement to refer may be inferred from actions as well as from words.[7]

§ 1191. If, in an agreement to refer, the parties mutually engage to be bound by the decision of the referee, the doctrine of estoppel would preclude a further agitation of the question;[8]

[1] L. 1, C. de error advoc.

[2] See Mitchell *v.* Cotton, 3 Fla. 136, and cases cited supra, § 1184.

[3] See supra, § 1085.

[4] Hood *v.* Reeve, 3 C. & P. 532; Williams *v.* Innes, 1 Camp. 234; Daniel *v.* Pitt, 6 Esp. 74; Allen *v.* Killinger, 8 Wall. 480; Chapman *v.* Twitchel, 37 Me. 59; Bailey *v.* Blanchard, 62 Me. 168; Folsom *v.* Batchelder, 22 N. H. 47; Tuttle *v.* Brown, 4 Gray, 457; Chadsey *v.* Greene, 24 Conn. 562; Duval *v.* Covenhoven, 4 Wend. 561; Bedell *v.* Ins. Co. 3 Bosw. 147; Sands *v.* Shoemaker, 4 Abb. (N. Y.) App. 149; Wehle *v.* Spelman, 1 Hun, 634; *S. C.* 4 Thomp. & C. 648; Trustees *v.* Cokely, 5 Ind. 164; Hudspeth *v.* Allen, 26 Ind. 165; Delesline *v.* Greenland, 1 Bay, 458; McNeeley *v.* Hunton, 24 Mo. 281.

But the authorization must be specific, Lambert *v.* People, N. Y. Ct. of App. 1879.

[5] Shaw *v.* Stone, 1 Cush. 228.

[6] Sybray *v.* White, 1 M. & W. 435; Downs *v.* Cooper, 2 Q. B. 256; Price *v.* Hollis, 1 M. & Sel. 105.

[7] Gardner *v.* Moult, 10 A. & E. 464; Pritchard *v.* Bagshawe, 11 C. B. 459; Boileau *v.* Rutlin, 2 Exch. R. 675.

[8] See Males *v.* Lowenstein, 10 Ohio St. 512; Burrows *v.* Guthrie, 61 Ill.

but it is otherwise when there is simply a loose engagement by one party to bind himself if the other should determine a certain question in a particular way; for an engagement of this kind is open to attack on ground of misconception, mistake, or fraud.[1] In any view, the agreement to refer must be clearly shown,[2] and the answer of the referee must be within the scope of the reference.[3] A mere reference by a party, in answer to inquiries as to his character, to the business men of the place he lives in, will not be sufficient to justify the declarations of such business men being put in evidence against him.[4]

Party not estopped by unilateral reference.

VII. ADMISSIONS BY PARTNERS AND PERSONS JOINTLY INTERESTED.

§ 1192. When several persons are jointly interested in a common enterprise, the declarations of one of them are receivable in evidence against the others, as well as against himself, if such declarations were made when the declarant was engaged in carrying on the enterprise. Each party becomes the agent of the others, privileged to bind the others, under the limitation heretofore expressed as to agency.[5] This liability extends to non-contractual as well as to contractual admissions. Thus where the obligee of a bond filed a bill against two joint and several obligors, alleging that the bond had been delivered up to one of them by mistake, and praying that he, the obligee, might recover the amount due on it, an admission by the party to whom the bond was given up, that it had been delivered to her by mistake, was held to be evi-

Admissions of persons jointly interested receivable against each other.

70; Trustees *v.* Cokely, 5 Ind. 164; Reynolds *v.* Roebuck, 37 Ala. 408.

[1] Garnet *v.* Bell, 3 Stark. R. 160; though see Lloyd *v.* Willan, 1 Esp. 178.

[2] Barnard *v.* Macy, 11 Ind. 536.

[3] Duvall *v.* Covenhoven, 4 Wend. 561.

[4] Rosenbury *v.* Angell, 6 Mich. 508.

[5] Kemble *v.* Farren, 3 C. & P. 623; American Fur Co. *v.* U. S. 2 Pet. 358; State *v.* Soper, 16 Me. 293; Davis *v.* Keene, 23 Me. 69; State *v.* Thibeau, 30 Vt. 100; Martin *v.* Root, 17 Mass. 222; Com. *v.* Brown, 14 Gray, 419; Colt *v.* Eves, 12 Conn. 243; Crippen *v.* Morss, 49 N. Y. 63; Chester *v.* Dickerson, 54 N. Y. 1; Trego *v.* Lewis, 58 Penn. St. 463; Walker *v.* Pierce, 21 Grat. 722; Dickinson *v.* Clarke, 5 W. Va. 280; Patten *v.* Ohio, 6 Ohio St. 467; Dickerson *v.* Turner, 12 Ind. 223; Falkner *v.* Leith, 15 Ala. 9; Stewart *v.* State, 26 Ala. 44; Mask *v.* State, 32 Miss. 405; Armstrong *v.* Farrar, 8 Mo. 627; State *v.* Ross, 29 Mo. 32; Irby *v.* Brigham, 9 Humph. 750; State *v.* Hogan, 3 La. An. 714; Tuttle *v.* Turner, 28 Tex. 759.

dence against the coöbligor, though the joint answer of the defendants had traversed the allegation as to mistake, and, simply admitting the delivery of the bond, had stated that the party to whom it was given up had destroyed it.[1] And incidental statements made by one joint proprietor of a theatre have been admitted against his co-proprietors.[2]

Such declarations must relate to a joint business.

§ 1193. Such declarations, however, to be admissible, must relate to a matter of joint business; mere community of interest, as we will see,[3] will not be enough to sustain such admissibility.[4] Thus where a member of a firm of machinists, in Baltimore, engaged in an enterprise for the running of an ice and tow-boat, his declarations, in this relation, were held not admissible against his partners in the machine business.[5] It may be otherwise as to acts and declarations of tenants in common in each other's presence when offered to settle their respective rights.[6]

Admissions of partners reciprocally admissible.

§ 1194. Wherever a settled partnership is first established, the admissions of one partner are admissible against his fellow partners, when made as to partnership affairs, during the continuance of the partnership,[7] though they cannot be received to prove the partnership.[8]

[1] Crosse *v.* Bedingfield, 12 Sim. 35.

[2] Kemble *v.* Farren, 3 C. & P. 623.

[3] Infra, 1199.

[4] 1 Phil. Ev. 378; Brannon *v.* Hursell, 112 Mass. 63; Elliott *v.* Dudley, 19 Barb. 326; Edwards *v.* Tracy, 62 Penn. St. 378; White *v.* Gibson, 11 Ired. L. 283; South. Life Ins. Co. *v.* Wilkinson, 53 Ga. 545, and cases cited infra, § 1199.

[5] Wells *v.* Turner, 16 Md. 133.

[6] Crippen *v.* Morss, 49 N. Y. 63.

[7] Rapp *v.* Latham, 2 B. & Ald. 795; Fox *v.* Clifton, 6 Bing. 792; Latch *v.* Wedlake, 11 Ad. & E. 959; Nicholls *v.* Dowding, 1 Stark. R. 81; R. *v.* Hardwick, 11 East, 589; Sandilands *v.* March, 2 B. & Ald. 673; Lincoln *v.* Claflin, 7 Wall. 132; Bank U. S. *v.* Lyman, 20 Vt. 666; Barrett *v.* Russell, 45 Vt. 43; Smith *v.* Collins, 115 Mass. 388; Gandolfo *v.* Appleton, 40 N. Y. 533; Moers *v.* Martens, 17 How. Pr. 280; Wells *v.* Turner, 16 Md. 133; Adams *v.* Funk, 53 Ill. 219; Hahn *v.* Savings Bank, 50 Ill. 456; Bennett *v.* Holmes, 32 Ind. 108; State *v.* Nash, 10 Iowa, 81; Peck *v.* Lusk, 38 Iowa, 93; People *v.* Pitcher, 15 Mich. 397; McFadyen *v.* Harrington, 67 N. C. 29; Johnson *v.* State, 29 Ala. 62; Cady *v.* Kyle, 47 Mo. 346; Oldham *v.* Bentley, 6 B. Mon. 428. Where A., B., and C. sue D. as partners, upon an alleged contract for the shipment of bark, an admission by A., that the bark was his exclusive property, and not that of the firm, has been held receivable as against B. and C. Lucas *v.* De La Cour, 1 M. & S. 249.

[8] Ibid.; infra, § 1200; Edwards *v.* Tracy, 62 Penn. St. 378; Cross *v.* Langley, 50 Ala. 8; Campbell *v.* Has-

Even the admissions of a silent partner, not made a party in the case, may be thus used against his associates.[1]

§ 1195. By Lord Tenterden's Act of 1828 (adopted in several of the United States) one partner cannot, even by a written acknowledgment of a debt, either during the partnership, or after its dissolution, take the case out of the statute of limitations, as against the other members of the firm.[2]

As to acknowledgment to take case out of statute of limitations.

§ 1196. Although, after dissolution of the partnership, the power to bind by admissions ceases,[3] it may be kept alive by special agreement.[4] And it has been further ruled that a self-disserving admission, by a former partner, after the dissolution of the firm, as to a firm transaction

Power ceases at dissolution.

tings, 29 Ark. 512; McCann *v.* McDonald, 7 Neb. 305.

"The declarations of a party to the suit as to the existence of a partnership are unquestionably competent to prove him to have been a member of the alleged firm, and who were admitted by him to have been the persons composing it. Such declarations are not, however, competent evidence against the others, and it is the duty of the court so to instruct the jury. Taylor *v.* Henderson, 17 S. & R. 453; Johnston *v.* Warden, 3 Watts, 101; Haughey *v.* Strickler, 2 W. & S. 411; Lenhart *v.* Allen, 8 Casey, 312; Bowers *v.* Still, 13 Wright, 65; Crossgrove *v.* Himmelrich, 4 P. F. Smith, 203. The same rule has been applied to the admissions of a defendant not served with process, and not, therefore, a party to the issue. Porter *v.* Wilson, 1 Harris, 641." Sharswood, J., Edwards *v.* Tracy, 62 Penn. St. 378.

[1] Weed *v.* Kellogg, 6 McLean, 44; Fickett *v.* Swift, 41 Me. 65; Webster *v.* Stearns, 44 N. H. 498; Odiorne *v.* Maxcy, 15 Mass. 39; Munson *v.* Wickwire, 21 Conn. 513; Chester *v.* Dickerson, 54 N. Y. 1; Folk *v.* Wilson, 21 Md. 538; Holmes *v.* Budd, 11 Iowa, 186; Fail *v.* McArthur, 31 Ala. 26; American Iron Co. *v.* Evans, 27 Mo. 552; Mámlock *v.* White, 20 Cal. 598.

[2] Taylor's Evidence, §§ 537, 675.

[3] Kilgour *v.* Finlyson, 1 H. Bl. 155; Parker *v.* Merrill, 6 Greenl. 41; Baker *v.* Stackpoole, 9 Cow. 420; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Williams *v.* Manning, 41 How. (N. Y.) Pr. 454; Tassey *v.* Church, 4 W. & S. 141; Hogg *v.* Orgill, 34 Penn. St. 344; Miller *v.* Neimerick, 19 Ill. 172; Winslow *v.* Newlan, 45 Ill. 145; Pennoyer *v.* David, 8 Mich. 407; Daniel *v.* Nelson, 10 B. Mon. 316; Morgan *v.* Hubbard, 66 N. C. 394; Johnson *v.* Marsh, 2 La. An. 772; Dowzelot *v.* Rawlings, 58 Mo. 75; Flowers *v.* Helm, 29 Mo. 324. Infra, § 1202.

"While the partnership continues, the declarations or admissions of each of the partners made in respect to the business of the firm will bind it. But upon the occurrence of a dissolution, this power to bind the firm, by either acts or declarations, comes to an end." Dowzelot *v.* Rawlings, 58 Mo. 77; Sherwood, J. See Shelmire's Appeal, 70 Penn. St. 285.

[4] Burton *v.* Issit, 5 B. & Ald, 267; Ide *v.* Ingraham, 5 Gray, 106.

which is still unclosed, is admissible as *primâ facie* evidence against the firm;[1] though if the partner ceases to have any interest in the result, the reason for such admission fails.[2]

Entries in the partnership books by one partner are admissible, after the partnership is closed, to charge a copartner, when the latter had opportunity to examine the books at the time of entry, and did not dissent.[3]

So as to joint contractors.

§ 1197. In a suit by joint contractors, the admissions of one of their number who acts for the others are receivable as the declarations of all;[4] and hence in a suit against parties who have agreed to buy a boat, the admissions of one, in the scope of the business, bind the others.[5] The admissions of a joint covenantor, no matter how small may be his interest,[6] are by the same reasoning admissible against his associates.

Persons interested, but not parties to suit, may affect such suit by their admissions.

§ 1198. Admissibility in the cases we have just enumerated does not depend upon the declarant being summoned as a party to the suit in which his declarations are offered. If, at the time of the declarations, he were engaged in a common enterprise with either of the parties to the suit, his declarations are admissible, when within the scope of the joint interest, against them.[7]

Mere community of interest not enough to extend such liability.

§ 1199. There must, however, in order to prejudice parties by each other's declarations, be such a joinder as makes them each other's representatives in the enterprise. The mere possession of common interests does not impose this reciprocal liability.[8] Thus the admission

[1] Pritchard *v.* Draper, 1 Rus. & M. 191; Pierce *v.* Wood, 23 N. H. 519; Loomis *v.* Loomis, 26 Vt. 198; Bridge *v.* Gray, 14 Pick. 55; Hitt *v.* Allen, 13 Ill. 592; Fisher *v.* Tucker, 1 McCord Ch. 169; Cochran *v.* Cunningham, 16 Ala. 448; Curry *v.* Kurtz, 33 Miss. 24; Nalle *v.* Gates, 20 Tex. 315.

[2] Taylor's Evidence, citing Parker *v.* Morrell, 2 Phill. 464; *S. C.* 2 C. & Kir. 599; Gillinghan *v.* Tebbetts, 33 Me. 360; Coppage *v.* Barnett, 34 Miss. 621.

[3] Dunnell *v.* Henderson, 23 N. J. Eq. 174. Supra, §§ 1131–3.

[4] Bank U. S. *v.* Lyman, 20 Vt. 666.

[5] Rotan *v.* Nichols, 22 Ark. 244.

[6] Walling *v.* Rosevelt, 16 N. J. L. 41.

[7] Whitcomb *v.* Whiting, 2 Dougl. 652; Wood *v.* Braddick, 1 Taunt. 104; Weed *v.* Kellogg, 6 McLean, 44; Bucknam *v.* Barnum, 15 Conn. 68, and cases cited supra, § 1192.

[8] Fox *v.* Waters, 12 Ad. & E. 43; Scholey *v.* Walton, 12 M. & W. 514;

of the receipt of money by one of several trustees, joint defendants, but not personally liable, has been held not receivable to charge the other trustees,[1] nor the admission of one executor to prove a debt against his co-executors;[2] nor the admission of one of several part-owners or tenants in common against his associates;[3] nor for such purpose the admission by one of several members of a board of public officers;[4] nor by one of several underwriters on the same policy;[5] nor by one of several co-distributees, co-legatees, or co-devisees against another, even though the declarant should be a party to the case.[6] It is otherwise, as we have seen, with declarations of tenants in common, in each other's presence, as to their respective rights.[7]

§ 1199 *a*. The admission of an heir cannot prejudice the ex-

Tullock *v.* Dunn, R. & M. 416; Brannon *v.* Hursell, 112 Mass. 63; Elliott *v.* Dudley, 19 Barb. 326; Slaymaker *v.* Gundacker, 10 S. & R. 75; Edwards *v.* Tracy, 62 Penn. St. 378; Wells *v.* Turner, 16 Md. 133; Eakle *v.* Clarke, 30 Md. 322; Chamberlain *v.* Dow, 10 Mich. 319; Wonderly *v.* Booth, 19 Ind. 169; Blakeney *v.* Ferguson, 14 Ark. 641; Dickenson *v.* Clarke, 5 W. Va. 280; White *v.* Gibson, 11 Ired. 283; South. Life Ins. *v.* Wilkinson, 53 Ga. 545; McCune *v.* McCune, 29 Mo. 117; McDermott *v.* Mitchell, 47 Cal. 249. A bare trustee cannot thus bind his principal. Godbee *v.* Sapp, 53 Ga. 283.

[1] Davies *v.* Ridge, 3 Esp. 101; Walker *v.* Dunspaugh, 20 N. Y. 170; Jex *v.* Board, 1 Hun, 157.

[2] Fox *v.* Waters, 12 Ad. & E. 43; Tullock *v.* Dunn, Ry. & M. 416; Scholey *v.* Walton, 12 M. & W. 514; Elwood *v.* Deifendorf, 5 Barb. 398; Hammon *v.* Huntley, 4 Cow. 493. See Pease *v.* Phelps, 10 Conn. 62. Compare 8 Cent. L. J. 82.

[3] Jaggers *v.* Binnings, 1 Stark. R. 64; McLellan *v.* Cox, 36 Me. 95; Page *v.* Swanton, 39 Me. 400; Cuyler *v.* McCartney, 40 N. Y. 228; Dan *v.* Brown, 4 Cow. 483; Pier *v.* Duff, 63 Penn. St. 63. See Bryant *v.* Booze, 55 Ga. 438.

[4] Lockwood *v.* Smith, 5 Day, 309; Jex *v.* Board, 1 Hun, 157.

[5] Lambert *v.* Smith, 1 Cranch C. C. 361.

[6] Shailer *v.* Bumpstead, 99 Mass. 130; Osgood *v.* Manhattan Co. 3 Cow. 612; Boyd *v.* Eby, 8 Watts, 66; Hauberger *v.* Root, 6 W. & S. 431; Dotts *v.* Fetzer, 9 Penn. St. 88; Clark *v.* Morrison, 25 Penn. St. 453; Titlow *v.* Titlow, 54 Penn. St. 222; Walkup *v.* Pratt, 5 Har. & J. 53; Forney *v.* Ferrell, 4 W. Va. 729; Thompson *v.* Thompson, 13 Ohio St. 356; Roberts *v.* Frawick, 13 Ala. 68; Blakey *v.* Blakey, 33 Ala. 616; Prewett *v.* Coopwood, 30 Miss. 369; Turner *v.* Belden, 9 Mo. 787; Hambright *v.* Brockman, 59 Mo. 52. See *contra*, Greenleaf's Ev. § 174; Atkins *v.* Sanger, 1 Pick. 192; Jackson *v.* Vail, 7 Wend. 125. And see Milton *v.* Hunter, 13 Bush, 163, where it is held that the admission of one legatee is admissible against another legatee, being appellees on a question of probate, the question being whether there was undue influence or imposition at the execution of the will.

[7] Crippen *v.* Morss, 49 N. Y. 63.

ecutor;[1] nor that of a tenant for life, the remainder man.[2]

Executors as against executors; indorsers against indorsees.

Nor are the declarations of an administrator admissible against a special administrator, appointed to act during the administrator's absence from the country.[3] Nor do the admissions of an executor bind a subsequent administrator *de bonis non*.[4] Nor can the admission of an indorser of negotiable paper prejudice another *bonâ fide* indorser,[5] though it is otherwise as to joint indorsers.[6] And where a party takes negotiable paper that is overdue, or with notice, he is open to be affected on trial by the admissions of his predecessors in title,[7] provided such admissions were before the assignment.[8]

Declarations of declarant cannot prove his joint interest as against his alleged partners.

§ 1200. Yet we must remember that we cannot prove that a party is jointly interested by his own declarations, and then introduce his declarations for the reason that he is jointly interested, even though he be joined in the record. This would be equivalent to saying that his declarations are admissible because he is a party, and that he is a party because his declarations are admissible. In order to introduce such declarations, we must first prove to the satisfaction of the court that the person making them was jointly interested in a common enterprise with the parties against whom his declarations were offered, and that his declarations were in the carrying on of this common enterprise.[9] This is familiar law when partnership is

[1] Osgood *v.* Manhattan Co. 3 Cow. 612; Dillard *v.* Dillard, 2 Strobh. 89; though see Reagan *v.* Grim, 13 Penn. St. 508, as to cases in which the administrator is the mere representative of the heirs.

[2] Hill *v.* Roderick, 4 Watts & S. 221; Pool *v.* Morris, 29 Ga. 374. Supra, § 1161.

[3] Rush *v.* Peacock, 2 M. & Rob. 162. See McArthur *v.* Carrie, 32 Ala. 75.

[4] Pease *v.* Phelps, 10 Conn. 62. See Eckert *v.* Triplett, 48 Ind. 174, to the effect that such admissions are *primâ facie* evidence.

[5] Russell *v.* Doyle, 15 Me. 112; Washburn *v.* Ramsdell, 17 Vt. 299; Baker *v.* Briggs, 8 Pick. 122; Lewis *v.* Woodworth, 2 Comst. 512; Beach *v.* Wise, 1 Hill (N. Y.), 612; Slaymaker *v.* Gundacker, 10 S. & R. 75; Crayton *v.* Collins, 2 McCord, 457; Perry *v.* Graves, 12 Ala. 246; Dowty *v.* Sullivan, 19 La. An. 448; Blancjour *v.* Tutt, 32 Mo. 576. See § 1163 *a*.

[6] Howard *v.* Cobb, 3 Day, 309; Bound *v.* Lathrop, 4 Conn. 336; Painter *v.* Austin, 37 Penn. St. 458; Camp *v.* Dill, 27 Ala. 553.

[7] Supra, § 1163 *a*.

[8] Ibid.

[9] Supra, § 1194; Gray *v.* Palmers, 1 Esp. 135; Catt *v.* Howard, 3 Stark. R. 3; Buckingham *v.* Burgess, 1 McLean, 549; Burnham *v.* Sweatt, 16 N. H. 418; Burke *v.* Miller, 7 Cush.

sought to be proved by the admission of a putative partner;[1] and even a statement by one partner, that certain indebtedness incurred by himself is for the firm, is inadmissible to charge the firm.[2] The same doctrine has been expressed in a suit against three persons charged with having jointly made a promissory note. In such case, it is held, the joint making must be proved before the admission of one of the alleged makers can be used against the other.[3] But if the declarant be by any process sued alone, as survivor, or if judgment has been taken by default against his associates, then as against himself, such declarations can be received.[4]

It has been held that the declaration of one of two alleged partners, that he, the declarant, was solely liable on the debt, is admissible, when self-disserving, on behalf of the other alleged partner.[5] It is otherwise, however, in cases in which such partner could be called as a witness.[6]

§ 1201. If one of the parties engaged in a common enterprise die, death, in dissolving the relationship, closes, as we have seen, the power of the survivor to charge, by his admissions, the estate of the deceased.[7] For the same

After death admissions by survivor can-

547; Cuyler *v.* McCartney, 40 N. Y. 228; Kimmell *v.* Geeting, 2 Grant (Penn.), 125; Benford *v.* Sanner, 40 Penn. St. 9; Boswell *v.* Blackman, 12 Ga. 591.

[1] Gibbons *v.* Wilcox, 2 Stark. 81; Grant *v.* Jackson, Peake, 214; Queen Caroline's case, 2 Br. & B. 302; Pleasants *v.* Fant, 22 Wallace, 116; Burgess *v.* Lane, 3 Me. (3 Greenl.) 165; Gooch *v.* Bryant, 13 Me. 386; Grafton Bk. *v.* Moore, 13 N. H. 99; Tuttle *v.* Cooper, 5 Pick. 414; Burke *v.* Miller, 7 Cush. 547; Dutton *v.* Woodman, 9 Cush. 255; Bucknam *v.* Barnum, 15 Conn. 68; Whitney *v.* Ferris, 10 Johns. R. 66; Jones *v.* Hurlbut, 39 Barb. 403; Harris *v.* Wilson, 7 Wend. 57; Flanagin *v.* Champion, 2 N. J. Eq. 51; Uhler *v.* Browning, 28 N. J. L. 79; Lenhart *v.* Allen, 32 Penn. St. 312; Edwards *v.* Tracy, 62 Penn. St. 378; Clawson *v.* State, 14 Ohio St. 234; Pierce *v.* McConnell, 7 Blackf. 170; Wiggins *v.* Leonard, 9 Iowa, 194; Metcalf *v.* Conner, Litt. (Ky.) Cas. 497; McCorkle *v.* Doby, 1 Strobh. 396; White *v.* Gibson, 11 Iredell L. 283; Henry *v.* Willard, 73 N. C. 35; Scott *v.* Dansby, 12 Ala. 714; Cross *v.* Langley, 50 Ala. 8; Clark *v.* Huffaker, 26 Mo. 264; Berry *v.* Lathrop, 24 Ark. 12; Campbell *v.* Hastings, 29 Ark. 512.

[2] Elliott *v.* Dudley, 19 Barb. 326; White *v.* Gibson, 11 Ired. L. 283.

[3] Gray *v.* Palmers, 1 Esp. 135.

[4] Ellis *v.* Watson, 2 Stark. R. 453, Abbott, C. J.

[5] Lucas *v.* De la Cour, 1 M. & Sel. 249; Starke *v.* Kenan, 11 Ala. 818; Danforth *v.* Carter, 4 Iowa, 230.

[6] Carlyle *v.* Plumer, 11 Wisconsin, 96.

[7] Supra, § 1180, 1196; Story on Partnership, § 324 *a*; Atkins *v.* Tred-

not bind estate of associates, nor the converse.

reason, the declarations of the executor, or the administrator of the deceased party cannot affect the survivor.[1]

Admissions in fraud of associates may be rebutted.

§ 1202. Supposing a case to occur in which one associate makes admissions in fraud of another, the associates thus prejudiced have it open to them to apply the same checks, as will presently be noticed, in respect to fraudulent admissions by a nominal plaintiff. It will be permitted to the parties, against whom such admissions are offered, to prove their fraud and falsity.[2] It is true that if the admissions are contractual, and if the party making them had apparent authority to make them, his associates are bound to parties *bonâ fide* acting on such admissions.[3] But if the admissions are non-contractual, they can be rebutted.[4]

Self-serving declarations of associate not admissible.

§ 1203. When the effect of a declaration, by one party to a joint obligation, is to throw the indebtedness on the other, such declaration is inadmissible, in a suit to fix the other.[5]

In torts, co-defendants' admissions not reciprocally applicable, but otherwise when concert is proved.

§ 1204. In actions for tort, the plaintiff, unless there be proof of confederacy on the part of the defendants, cannot use the admission of one defendant against the other.[6] It is otherwise in cases of confederacy, or in cases, as we have had occasion to see, where the declarant was the agent of the party against whom the declaration is used.[7] Such statements as are part of the *res gestae* are of course receivable.[8] Hence, though the declara-

gold, 2 B. & C. 63; Fordham *v.* Wallis, 10 Hare, 217; Slaymaker *v.* Gundacker, 10 S. & R. 75; Gaunce *v.* Backhouse, 37 Penn. St. 350. See Boyd *v.* Foot, 5 Bosw. 110.

[1] Slater *v.* Lawson, 1 B. & Ad. 396; Hathaway *v.* Haskell, 9 Pick. 24.

[2] Taylor's Ev. § 679; citing Phillips *v.* Clagett, 11 M. & W. 84; Rawstone *v.* Gandell, 15 M. & W. 304.

[3] Supra, §§ 1083–4.

[4] Supra § 1088.

[5] Very *v.* Watkins, 23 How. 469.

[6] Daniels *v.* Potter, M. & M. 501; Morse *v.* Royal, 12 Ves. 362. See as to imputability of admissions of grantor or assignor to grantee or assignee, when collusion is shown, supra, § 1166.

[7] Lincoln *v.* Claflin, 7 Wall. 132; Jacobs *v.* Shorey, 48 N. H. 100; State *v.* Larkin, 49 N. H. 139; Jenne *v.* Joslyn, 41 Vt. 478; Bridge *v.* Eggleston, 14 Mass. 250; Wiggins *v.* Day, 9 Gray, 97; Dart *v.* Walker, 3 Daly, 138; Scott *v.* Baker, 37 Penn. St. 330; McCabe *v.* Burns, 66 Penn. St. 356; Claytor *v.* Anthony, 6 Rand. 285;

Supra, § 258.

tions of co-trespassers, when a narrative of past events, are inadmissible against each other, such declarations, during the execution of the trespass, are admissible as part of the *res gestae*.[1]

Admission of co-conspirators receivable against each other.

§ 1205. Wherever conspiracy is shown (which is usually inductively from circumstances), there the declarations of one co-conspirator, in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter.[2] "The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all."[3]

But not after conspiracy closed.

§ 1206. But here, as in other previous modifications of the rule before us, we must keep in mind the underlying distinction between admissions in furtherance of a con-

Ellis *v.* Dempsey, 4 W. Va. 126; Snyder *v.* Laframboise, Breese, 268; Miller *v.* Sweitzer, 22 Mich. 391; Raisler *v.* Springer, 38 Ala. 703; Street *v.* State, 43 Miss. 1; Harrison *v.* Wisdom, 7 Heisk. 99; Gray *v.* Nations, 1 Ark. 557; People *v.* Trim, 39 Cal. 75. Supra, §§ 1174, 1176. See as to criminal cases, Whart. Cr. Law, tit. "Evidence."

[1] North *v.* Miles, 1 Camp. 389; Bowsher *v.* Calley, 1 Camp. 391; R. *v.* Hardwick, 11 East, 585; Powell *v.* Hodgetts, 2 C. & P. 432. See Wright *v.* Comb, 2 C. & P. 232; Daniels *v.* Potter, M. & M. 503.

[2] R. *v.* Stone, 6 T. R. 528; Nudd *v.* Burrows, 91 U. S. (1 Otto) 426; U. S. *v.* McKee, 3 Dill. 546; Lee *v.* Lamprey, 43 N. H. 13; Apthorp *v.* Comstock, 2 Paige, 482; Ormshy *v.* People, 53 N. Y. 472; Dewey *v.* Moyers, 72 N. Y. 70; Kimmell *v.* Geeting, 2 Grant (Penn.), 125; Jackson *v.* Summerville, 13 Penn. St. 359; Kelsey *v.* Murphy, 26 Penn. St. 78; Brown *v.* Parkinson, 58 Penn. St. 458; Burns *v.* McCabe, 72 Penn. St. 309; Confer *v.* McNeal, 74 Penn. St. 112; Chicago R. R. *v.* Collins, 56 Ill. 212; Philpot *v.* Taylor, 75 Ill. 309; Kenyon *v.* Woodruff, 33 Mich. 310; Carskadon *v.* Williams, 7 W. Va. 1; Bryce *v.* Butler, 70 N. C. 585; Bushell *v.* Bank, 20 La. An. 464; Gundry *v.* Lyons, 29 La. An. 4. For criminal cases see Whart. Cr. Law, Tit. "Evidence."

"The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise, they should not be regarded." Field, J., Lincoln *v.* Claflin, 7 Wall, 138, 139.

[3] Gibson, C. J., Rogers *v.* Hall, 4 Watts, 361; aff. by Rogers, J., in Gibbs *v.* Neely, 7 Watts, 307; and by Agnew, J., in Confer *v.* McNeal, 74 Penn. St. 115. See, to same effect, McDowell *v.* Risell, 37 Penn. St. 164; Deakers *v.* Temple, 41 Penn. St. 234; McKinley *v.* McGregor, 3 Whart. R. 397; Bredin *v.* Bredin, 3 Barr, 81. See, also, R. *v.* O'Connell, Arm. & T. 475.

spiracy and admissions after its close. An admission of a co-conspirator, in any way coincident with and explanatory of a conspiracy during its continuance, is admissible; a narrative, after the conspiracy, so far as concerns the subject matter of the declaration, is terminated, is inadmissible.[1] Thus, where the defendant was charged with conspiring with T. and others to defraud the revenue, it was shown by the prosecution that the defendant was a landing waiter, and T. an agent for importers, at the custom-house; it being their duty each to make entries of the contents of cases imported, so as to check the other. On thirteen occasions they made false entries, entering packages at less than their real bulk. T.'s check book was offered by the prosecution, for the purpose of showing by the counterfoil that the defendant received from him part of the money of which the government had been defrauded by their operations; but this was rejected by the court, on the ground that the statement was made after the plot was consummated, and related only to the distributing of plunder.[2] It is of course understood, that, to entitle the declarations of a co-conspirator to admission, the conspiracy must be first proved *aliunde*.[3]

VIII. ADMISSIONS BY TRUSTEES, OFFICERS, AND PRINCIPALS.

Admissions of nominal party cannot prejudice real party.

§ 1207. Where a party to a suit is a mere trustee, or one whose name is used only for purposes of form, it has been argued that the admissions of such a party are to be received at common law for what they are worth, when offered on trial by the opposing interest.[4] But where a court of common law applies chancery rem-

[1] See supra, §§ 171–5, 1180; R. *v.* Hardy, 24 How. St. Tr. 451; U. S. *v.* White; 5 Cranch C. C. 38; State *v.* Pike, 51 N. H. 105; Benford *v.* Sanner, 40 Penn. St. 9; Lynes *v.* State, 36 Miss. 617; Strady *v.* State, 5 Cold. 300; Clinton *v.* Estes, 20 Arkansas, 216.

[2] R. *v.* Blake, 6 Q. B. 126. To the same general effect see R. *v.* O'Connell, Arm. & T. 257.

[3] See supra, 1183; and see Com. *v.* Crowninshield, 10 Pick. 497; Com. *v.* Ingraham, 7 Gray, 46; Benford *v.* Sanner, 40 Penn. St. 9; Helser *v.* McGrath, 58 Penn. St. 458; Clawson *v.* State, 14 Ohio St. 234; State *v.* Daubert, 42 Mo. 239; Reid *v.* Lottery Co. 29 La. An. 388.

[4] Bauerman *v.* Radenius, 7 T. R. 663; 2 Esp. 653; Alner *v.* George, 1 Camp. 392; Gibson *v.* Winter, 5 B. & Ad. 96; Franklin Bank *v.* Cooper, 36 Me. 180; Beatty *v.* Davis, 9 Gill, 211; Helm *v.* Steele, 3 Humph. 472; Hogan *v.* Sherman, 5 Mich. 60; Jones *v.* Norris, 2 Ala. 526; Sally *v.* Gooden, 5 Ala. 78. See Lee *v.* R. R. L. R. 6 Ch. Ap. 527.

edies, the meddling of such nominal party will be prohibited,[1] and evidence of admissions by him may be rejected by the court, when it is in derogation of the rights of the party beneficially interested, supposing the declarant to have no interest in the suit; or when it is in fraud of the rights of such beneficiary.[2] Under such circumstances courts have stricken off pleas in bar setting up as estoppels releases by the nominal party in fraud of the rights of the real party.[3] In any view, the termination of the nominal party's interest in the suit, prior to such release, deprives the release of all validity.[4] Even though receipts or other acknowledgments by the nominal party be admitted in evidence, it is competent for the real party to show that such acknowledgments were illusory and false, either in whole or part.[5] It should at the same time be remembered that the actual party may bind himself to the declarations of the nominal party by silent acquiescence or by actual authorization;[6] and that admissions by an assignor, made before the assignment, the assignor being the nominal party to the suit, are receivable against the assignee.[7]

Guardian's admissions not receivable against ward.

§ 1208. A guardian, or *prochein amy*, is a mere officer of the court, appointed to protect an infant's interests; and hence it has been held, that although the name of a functionary of this class appears on the record, his prior admissions cannot be received to prejudice his ward's

In Moriarty *v.* R. R. L. R. 5 Q. B. 320, Blackburn, J., said: "What the plaintiff on the record has said is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, it would be admissible."

As to judgments, see supra, § 767.

[1] Welsh *v.* Mandeville, 1 Wheat. 233.

[2] Butler *v.* Millett, 47 Me. 492; Sargeant *v.* Sargeant, 18 Vt. 371; Dazey *v.* Mills, 10 Ill. 67; Graham *v.* Lockhart, 8 Ala. 9; Chisholm *v.* Newton, 1 Ala. 371; Sykes *v.* Lewis, 17 Ala. 261; Thompson *v.* Drake, 32 Ala. 98. See Rawstone *v.* Gandell, 15 M. & W. 304.

In Robinson *v.* Hutchinson, 31 Vt. 443, admissions of a party, who was executor and legatee under a will, were admitted to show the testator's insanity.

[3] Payne *v.* Rogers, 1 Dougl. 407; Innell *v.* Newman, 4 B. & Ald. 419; Manning *v.* Cox, 7 Moore, 617; Johnson *v.* Holdsworth, 4 Dowl. 63.

[4] Supra, §§ 1165–8.

[5] Supra, §§ 1083, 1168; Wallace *v.* Kelsall, 7 M. & W. 273; Farrar *v.* Hutchinson, 9 A. & E. 641.

[6] Carr *v.* Casey, 20 Ill. 637.

[7] Moriarty *v.* R. R. L. R. 5 Q. B. 320.

case.[1] But an admission made *bonâ fide*, in order to facilitate a trial, will be received in the same way as the admission of the attorney in the cause.[2] Clearly an admission by a guardian in one suit cannot be used against the infant in another suit.[3] Nor can a parent's admissions as to general liability be received to prejudice an infant child.[4]

Public officer's admissions may bind constituent.

§ 1209. A public officer may be vested with such authority by his constituents as to bind them by the admissions he makes. Wherever he is authorized to contract, there his declarations, when part of the negotiation (there being no conflicting statute), are as admissible as would be, under the same circumstances, the admissions of a private agent.[5] It is necessary, however, to impose liability on the constituent, that these declarations should be within the apparent scope of the officer's authority.[6] Admissions made by a public officer, after the closing of a transaction, as to its character, if against his interest, might, if he be deceased, be admitted on the ground that the self-disserving admissions of a deceased person may be received.[7] But if the officer be still living, such evidence would be inadmissible, as hearsay.[8] He must be called as a witness, if he has relevant evidence to give.[9] When so called, his testimony is subject to the rule which forbids the contradiction of records by parol.[10]

Admission of representative, before clothed with repre-

§ 1210. Not until a representative (*e. g.* guardian, executor, or trustee) fairly assumes the representative character, can his admissions be regarded as considerate or intelligent or self-disserving; and hence such admis-

[1] 1 Dan. Ch. Pr. 169; Cowling *v.* Ely, 2 Stark. 366; Morgan *v.* Thorne, 7 M. & W. 408; Sinclair *v.* Sinclair, 13 M. & W. 460; Eccles *v.* Harrison, 6 Ec. & Mar. Cas. 204; Mertz *v.* Detweiler, 8 Watts & S. 376; Matthews *v.* Owling, 54 Ala. 202. See supra, § 767; and see, as qualifying above, Tenney *v.* Evans, 14 N. H. 343.

[2] Taylor's Ev. §§ 673, 700.

[3] Eccleston *v.* Speke, 3 Mod. 258; Hawkins *v.* Luscombe, 2 Swanst. 392.

[4] Balt. City R. R. *v.* McDonnell, 43 Md. 534.

[5] Supra, § 1170; Sharon *v.* Salisbury, 29 Conn. 113.

[6] Mitchell *v.* Rockland, 41 Me. 363; Walker *v.* Dunspaugh, 20 N. Y. 170; Green *v.* North Buffalo, 56 Penn. St. 110. See Burgess *v.* Wareham, 7 Gray, 345. See supra, §§ 1170–5.

[7] Blackmore *v.* Boardman, 28 Mo. 420. Supra, § 226.

[8] Morrell *v.* Dixfield, 30 Me. 157.

[9] Corinna *v.* Exeter, 13 Me. 321.

[10] See supra, § 920.

sentative authority, does not bind constituent.

sions, if made before acceptance of such office, cannot bind the constituent.[1] So far as such admissions are incidental to the proper arrangement of the estate they bind the estate, but otherwise not.[2]

Nor do such admissions after leaving office.

§ 1211. So the admissions of an executor or trustee, after leaving office, cannot be used against his constituents.[3]

Principal's admissions receivable against surety.

§ 1212. When a surety is sued for the debt on which he is surety, and when the principal's conduct is involved in the merits of the suit, then the principal's self-disserving admissions, when part of the *res gestae*, are evidence against the surety;[4] though if the principal be alive, and such declarations are not part of the *res gestae*, the admissions may be inadmissible as secondary.[5] In such cases the proper question is, was the principal the agent of the surety as to the particular matter in litigation? If so, his admissions,

[1] Fenwick *v.* Thornton, M. & M. 51; Legge *v.* Edmonds, 25 L. J. Ch. 125; although we have an intimation extending the liability by Tindal, C. J., in Smith *v.* Morgan, 7 M. & Rob. 257; Moore *v.* Butler, 48 N. H. 161. See Hanson *v.* Parker, 1 Wils. 257. See supra, § 766; and see Waterman *v.* Wallace, 13 Blatch. 128.

[2] See supra, § 771; Lobb *v.* Lobb, 26 Penn. St. 327; Magill *v.* Kauffman, 4 S. & R. 314.

[3] Hueston *v.* Hueston, 2 Ohio St. 488. Supra, § 1180.

[4] Perchard *v.* Tindall, 1 Esp. 394; Goss *v.* Worthington, 3 B. & B. 132; Middleton *v.* Melton, 10 B. & C. 317; Ingle *v.* Collard, 1 Cranch C. C. 134; Hinckley *v.* Davis, 6 N. H. 210; Bayley *v.* Bryant, 24 Pick. 198; Amherst Bank *v.* Root, 2 Met. (Mass.) 522; Meade *v.* McDowell, 5 Binn. 195; Parker *v.* State, 8 Blackf. 292; Chapel *v.* Washburn, 11 Ind. 393. See Mahaska *v.* Ingalls, 16 Iowa, 81.

As to distinction between contractual and non-contractual admissions, see supra, § 1083.

[5] Pitman on Princ. & Surety, 129; citing Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. 192; Hart *v.* Horn, 2 Camp. 92; Ward *v.* Suffield, 5 Bing. N. C. 381; and see discussion in Agricultural Co. *v.* Keeler, 44 Conn. 165.

"In these cases the main inquiry is, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestae*. If so, they are admissible; otherwise they are not." Taylor's Ev. § 710.

In Williamsburg Ins. Co. *v.* Frothingham, 122 Mass. 391, which was an action on a bond, one condition of the bond being that the obligor should keep true and correct books, a book kept by him, containing entries relating to the business of the company, was held competent evidence against him and his sureties of the amount of premiums collected by him. Citing Whitnash *v.* George, 8 R. & C. 556; *S. C.* 3 M. & Ry. 46; 1 Taylor on Ev. § 710.

during this agency, within the orbit of the agency, are admissible under the same conditions as the admissions of other agents.[1] Thus the admissions of the principal (in cases of official or other bonds) as to the amount received by him, such admissions consisting of contemporaneous entries on his books, or of like self-disserving declarations, are receivable against the surety;[2] though the official reports of a principal are at the best only *primâ facie* evidence against his surety in an action on the bond.[3] And the principal's admissions, made after the relation of suretyship is closed, cannot be received to affect the surety.[4] Nor are the principal's admissions, made before the creation of the debt, evidence against the surety.[5]

Cestui que trust's admissions bind trustee.

§ 1213. Admissions by a *cestui que trust*, or party beneficially interested, may be received against his trustee, or other nominal representative;[6] and those of the indemnifying creditor in a suit against the sheriff for

[1] Supra, §§ 1173 *et seq.*; Hinckley *v.* Davis, 6 N. H. 210; Richardson *v.* Hitchcock, 28 Vt. 757; Davis *v.* Whitehead, 1 Allen, 276; Com. *v.* Kendig, 2 Penn. St. 448; Bondurant *v.* Bank, 7 Ala. 830; State *v.* Grupe, 36 Mo. 365; Union Savings Co. *v.* Edwards, 47 Mo. 445.

In Fenner *v.* Lewis, 10 Johns. 38, this admissibility was extended to admissions, by a principal, of receipt of goods whose price was sued for. But *quaere* under statutes enabling principal to be called.

That a judgment against the principal may under the same limitations be admissible against the surety, see supra, § 770.

[2] Supra, § 1197; Perchard *v.* Tyndall, 1 Esp. 594; Whitnash *v.* George, 8 B. & C. 556; *S. C.* 3 Man. & R. 42; Drummond *v.* Prestman, 12 Wheat. 515; U. S. *v.* Gaussen, 19 Wall. 198; Williamsburg Ins. Co. *v.* Frothingham, 122 Mass. 391; Agricultural Co. *v.* Keeler, 44 Conn. 161.

[3] Bissell *v.* Saxton, 66 N. Y. 55.

[4] Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. R. 192; Smith *v.* Whittingham, 6 C. & P. 78; Caermarthen R. R. *v.* Manchester R. R. L. R. 8 C. P. 685; Chelmsford *v.* Demarest, 7 Gray, 1; Cassity *v.* Robinson, 8 B. Mon. 279; Hatch *v.* Elkins, 65 N. Y. 489; Longenecker *v.* Hyde, 6 Binn. 1; Beal *v.* Beck, 3 Har. & McH. 242; Hotchkiss *v.* Lynn, 2 Blackf. 222; Blair *v.* Ins. Co. 10 Mo. 559. See Griffith *v.* Turner, 4 Gill, 111; Stetson *v.* Bank, 2 Ohio St. 167; and supra, § 770.

And so as to admissions of the principal's personal representatives. Harrison *v.* Heflin, 54 Ala. 553.

As to judgments see supra, § 770.

[5] Dawes *v.* Shed, 15 Mass. 6; Cheltenham *v.* Cook, 44 Mo. 29; Longenecker *v.* Hyde, 6 Binn. 1.

[6] Hanson *v.* Parker, 1 Wils. 257; R. *v.* Hardwick, 11 East, 579; May *v.* Taylor, 6 M. & Gr. 261, 266; Hart *v.* Horn, 2 Camp. 92; Bell *v.* Ansley, 16 East, 143; Richardson *v.* Field, 6 Greenl. 305; Kendall *v.* Lawrence, 22 Pick. 540. See Reed *v.* Pelletier, 28 Mo. 173.

process executed under the creditor's direction.[1] But in such cases, the interest of the beneficial party, whose admissions are put in evidence, must cover the whole of the claim represented by the nominal party. If the nominal party represents two or more beneficiaries, then the admissions of one of the latter cannot, with the limitations expressed elsewhere, be received to prejudice the suit, unless such admitting party was expressly or impliedly the representative of the others.[2] And the trusteeship must be proved *aliunde*.[3]

IX. ADMISSIONS OF HUSBAND AND WIFE.

§ 1214. That a particular article of property belonged separately to the wife may be proved, after the husband's death, by his declarations;[4] and his self-disserving declarations, in accordance with the rule already expressed, will be admissible, as against his successors, to prove the separate property of his wife,[5] though not when in collusion

Husband's declarations against his interests admissible.

"The declarations and admissions of the real party in interest, though his name does not appear as the party of record, are competent evidence against him, the law giving them the same rights as though he were a party to the record. 1 Greenleaf on Evidence, § 180; 2 Starkie on Evidence (Metcalf's ed.), 40, 41.

"This rule is recognized in Richardson *v.* Field, 6 Greenl. 305; May & Cheeseman *v.* Taylor, 6 Man. & Gr. 261 (46 E. C. L. R. 259); and Kendall *v.* Lawrence, 22 Pick. 540." Barrows, J., Bigelow *v.* Foss, 59 Me. 164.

[1] Dowden *v.* Fowle, 4 Camp. 38; Young *v.* Smith, 6 Esp. 121; Harwood *v.* Keys, 1 M. & Rob. 204. See Deming *v.* Lull, 17 Vt. 398; and see supra, § 1212.

[2] Doe *v.* Wainwright, 8 A. & E. 691; May *v.* Taylor, 6 M. & Gr. 261; Pope *v.* Devereux, 5 Gray, 409; Prewett *v.* Land, 36 Miss. 495.

[3] Com. *v.* Kreager, 78 Penn. St. 477. Supra, § 1101.

[4] Cassell *v.* Hill, 47 N. H. 407; Gackenbach *v.* Brouse, 4 Watts & S. 546; McKee *v.* Jones, 6 Penn. St. 425; Moyer's Appeal, 77 Penn. St. 482; Crain *v.* Wright, 46 Ill. 107; though see Parvin *v.* Capewell, 45 Penn. St. 89.

"Declarations made by the husband at the time of receiving the wife's money or *choses in action*, or afterwards, clearly evincive of the intent at the moment of reduction to possession, are sufficient to repel the presumption of personal acquisition by him, and establish the relation of trustee for the wife. Johnston *v.* Johnston's Executors, 7 Casey, 450; Gicker's Adm'rs *v.* Martin, 14 Wright, 138. Now by the evidence of the husband himself the intent with which he received can be most satisfactorily established." Mercur, J., Moyer's Appeal, *ut supra*.

[5] Supra, § 238; Day *v.* Wilder, 47 Vt. 584; Sharp *v.* Maxwell, 30 Miss. 589; Cook *v.* Burton, 5 Bush, 64.

or in fraud of creditors.[1] The husband's admissions, also, that certain money was lent by his wife to him, as against himself, before any claims of creditors existed, may be always received;[2] but it is otherwise when such declarations lose their self-disserving quality, and their object appears to have been family support against creditors;[3] or the support in any way of his wife's interests;[4] or when the admissions are made after his interest in the property has ceased.[5]

Husband's agency must be proved *aliunde*.

§ 1215. When the effort is to charge the wife by declarations of her husband as her agent, his agency cannot be proved by his admissions.[6] Nor can the wife's title ordinarily be prejudiced by the husband's declarations in her absence, or without proof that he was her agent.[7]

Wife when entitled to act juridically may admit.

§ 1216. So far as a married women is entitled by law to do business on her own account, so far is she able to bind herself by admissions.[8] But the admissions of a woman made *before* marriage cannot bind her husband to pay her antenuptial debts;[9] though such admissions, when self-disserving, can be received to show, as against husband and wife, that certain property, claimed by the latter, belonged to third persons.[10]

[1] Kline's Appeal, 39 Penn. St. 463; Deakers *v.* Temple, 41 Penn. St. 234. See Parvin *v.* Capewell, 45 Penn. St. 89; Brooks *v.* Dent, 1 Md. Ch. 523.

[2] Townsend *v.* Maynard, 45 Penn. St. 198; Backmann *v.* Killinger, 55 Penn. St. 414.

[3] Kline's Appeal, 39 Penn. St. 463; Brooks *v.* Dent, 1 Md. Ch. 523; Bagley *v.* Birmingham, 23 Tex. 452. See Smith *v.* Scudder, 11 S. & R. 325.

[4] Thomas *v.* Madden, 50 Penn. St. 261. See Hanson *v.* Millett, 55 Me. 184.

[5] Gillespie *v.* Walker, 56 Barb. 185.

[6] Second Bank *v.* Miller, 2 Thomp. & C. (N. Y.) 104; Whitesearver *v.* Bonney, 9 Iowa, 480.

[7] Deck *v.* Johnson, 1 Abb. (N. Y.) App. 497; Pierce *v.* Hasbrouck, 49 Ill. 23; Campbell *v.* Quackenbush, 33 Mich. 287; Livesley *v.* Lasalette, 28 Wis. 38; Kirkman *v.* Bank, 77 N. C. 394. See Holly *v.* Flournoy, 54 Ala. 99.

[8] Morrell *v.* Cawley, 17 Abb. (N. Y.) Pr. 76; McLean *v.* Jagger, 13 How. (N. Y.) Pr. 494; Hackman *v.* Flory, 16 Penn. St. 196; Winter *v.* Walter, 37 Penn. St. 155; Liggett's Appeal, 1 Weekly Notes, 353; Lasselle *v.* Brown, 8 Blackf. 221. See supra, § 768; Bergman *v.* Roberts, 61 Penn. St. 497; Dewey *v.* Goodenough, 56 Barb. 54; Snydacker *v.* Brosse, 51 Ill. 357.

[9] Ross *v.* Winners, 1 Halst. (N. J.) 366. See Sheppard *v.* Starke, 3 Munf. 29; Churchill *v.* Smith, 16 Vt. 560.

[10] Hollinshead *v.* Allen, 17 Penn. St. 275; Claussen *v.* La Franz, 1 Iowa, 226.

§ 1217. A man may constitute his wife his agent, and if so he is bound by her admissions in the scope of the agency.[1] The agency, however, must be established, before the admissions can come in, though it can be inferred from circumstances indicating that he authorized her to act for him.[2] Her admissions, also, must be within the range of the delegated authority, as otherwise they are inadmissible.[3] Accordingly, where a wife was carrying on business at a distance from her husband, it was held that her admission as to the amount of rent, and the terms of tenancy, was not evidence of the facts against him, in replevin by him against his landlord. "A wife," Alderson, B., said, "cannot bind her husband by her admissions, unless they fall within the scope of the authority which she may be reasonably presumed to have derived from him; and where she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade. . . . . Here it could not be necessary, for the purpose of carrying on the business of the shop, that she should

Her admissions bind her husband when she is authorized to act for him.

[1] Carey *v.* Adkins, 4 Camp. 92; Meredith *v.* Footner, 11 M. & W. 202; Clifford *v.* Burton, 1 Bing. 199; Emerson *v.* Blonden, 1 Esp. 142; Pickering *v.* Pickering, 6 N. H. 124; Chamberlain *v.* Davis, 33 N. H. 121; Felker *v.* Emerson, 16 Vt. 653; Riley *v.* Suydam, 4 Barb. 222; Ripley *v.* Mason, Hill & Denio Sup. 66; McKinley *v.* McGregor, 3 Whart. R. 369; Murphy *v.* Hubert, 16 Penn. St. 50; Peck *v.* Ward, 18 Penn. St. 506; Barr *v.* Greenawalt, 62 Penn. St. 172; Stall *v.* Meek, 70 Penn. St. 181; Colgan *v.* Philips, 7 Rich. 359; Rochelle *v.* Harrison, 8 Port. 351; Lang *v.* Waters, 47 Ala. 624; Cantrell *v.* Colwell, 3 Head, 471. See Gebhart *v.* Burkett, 57 Ind. 378.

[2] Alban *v.* Pritchett, 6 T. R. 680; Denn *v.* White, 7 T. R. 112; Clifford *v.* Burton, 8 Moore, 16; Gregory *v.* Parker, 1 Camp. 394; Plimmer *v.* Sells, 3 N. & M. 422; Gilson *v.* Gilson, 16 Vt. 464; Butler *v.* Price, 115 Mass. 578; Second Bank *v.* Miller, 2 Thomp. & C. 104; Benford *v.* Zanner, 40 Penn. St. 9; Continental Ins. Co. *v.* Delpeuch, 82 Penn. St. 225; Southern Ins. Co. *v.* Wilkinson, 53 Ga. 535; Whitescarver *v.* Bonney, 9 Iowa, 480.

[3] Meredith *v.* Footner, 11 M. & W. 202; White *v.* Holman, 12 Me. 157; Goodrich *v.* Tracy, 43 Vt. 314; McGregor *v.* Wait, 10 Gray, 72; Turner *v.* Coe, 5 Conn. 93; Logue *v.* Link, 4 E. D. Smith, 63; Peck *v.* Ward, 18 Penn. St. 506; Sheppard *v.* Starke, 3 Munf. 29; Hunt *v.* Straw, 33 Mich. 85; May *v.* Little, 3 Ired. L. 27; Hussey *v.* Elrod, 2 Ala, 339; Jordan *v.* Hubbard, 26 Ala. 433; Queener *v.* Morrow, 1 Coldw. 123; Burnett *v.* Burkhead, 21 Ark. 77.

make admissions of an antecedent contract for the hire of the shop."[1] When she is competent to act through an attorney, she is bound by his admissions.[2]

Her admissions receivable against her trustees.

§ 1218. On the principle heretofore stated, that a *cestui que trust's* admissions bind his trustee, a married woman's declarations, when she is *capax negotii*, can be put in evidence against her trustees in suits in which they are the parties.[3]

After her death, her admissions against her interest bind her representatives.

§ 1219. In conformity with the rule already stated, as to the admissibility of the self-disserving admissions of a predecessor in title, the declarations of a wife, as to an antenuptial agreement, by which her chattels were to pass to her husband, may bind her representatives after her death.[4]

Admissions of adultery closely scrutinized.

§ 1220. So far as concerns divorce cases, the policy of the law precludes the granting of a divorce on the mere admissions by either party of adultery.[5] The House of Lords has gone so far as to absolutely exclude such evidence in divorce cases; though letters written by the wife to third parties have been admitted in evidence when it was first shown that they were written uninfluenced by fear or promise, and that the writer was then living apart from her husband.[6] It has been also intimated that the wife's oral confession of guilt to a third party may be received as cumulative proof.[7] By the House of Lords, also, as a general rule, all letters written by the wife after her separation, either to the husband or to the adulterer, are excluded, unless connected with some particular fact

[1] Meredith *v.* Footner, 11 M. & W. 202.

[2] Wilson *v.* Spring, 64 Ill. 18, quoted supra, § 1184.

[3] See supra, § 1213. McLemore *v.* Nuckolls, 1 Ala. (Sel.) Cas. 591.

[4] See supra, §§ 1156 *et seq.*; Crane *v.* Gough, 4 Md. 316.

[5] Supra, § 283; Cloncurry's case, Macq. Pr. in H. of L. 606; Washburn *v.* Washburn, 5 N. H. 195; White *v.* White, 45 N. H. 121; Baxter *v.* Baxter, 1 Mass. 346; Lyon *v.* Lyon, 62 Barb. 138; Devanbagh *v.* Devanbagh, 5 Paige, 554; Prince *v.* Prince, 25 N. J. Eq. 310; Scott *v.* Scott, 17 Ind. 309; Sawyer *v.* Sawyer, Walk. (Mich.) 48; Savoie *v* Ignogoso, 7 La. R. 281; Evans *v.* Evans, 41 Cal. 107; Craig *v.* Craig, 31 Tex. 203; Mathews *v.* Mathews, 41 Tex. 331. See 2 Bishop Marr. & Div. §§ 240, 251.

[6] Ld. Cloncurry's case, Macq. Pr. in H. of L. 606.

[7] Lord Ellenborough's case, Ibid. 655. But see Wiseman's case, Ibid. 631.

otherwise in proof,[1] or coming simply cumulatively.[2] But where a wife deserted her husband, who held a situation at Malta, and resided in England for several years, during which time she had resided with a paramour and had borne him four children, the lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstance of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit.[3] The ecclesiastical courts applied less stringent tests. It is true that by a canon passed in 1603, a mere confession, unaccompanied by other circumstances, was insufficient, even under the most solemn sanctions, to support a prayer for a separation *a mensa et thoro;*[4] yet where there was strong corroborative evidence, such admissions were received as basis of a decree; and in a leading case letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, considered sufficient to establish her guilt, though they were intercepted before reaching the party addressed, and though their avowal of adultery was only indirect.[5] The court of divorce has gone so far as to hold that a decree for the dissolution of marriage can be rested, where there is no collusion, on unsupported admissions of adultery.[6]

[1] Dundas's case, Ibid. 610.

[2] Boydell's case, Ibid. 651.

[3] Miller's case, Ibid. 620–623; Taylor's Ev. § 696.

[4] Mortimer *v.* Mortimer, 2 Hagg. Const. 316; Taylor's Ev. § 696.

[5] Grant *v.* Grant, 2 Curt. 16; Caton *v.* Caton, 7 Ec. & Mar. Cas. 15; Faussett *v.* Faussett, 7 Ec. & Mar. Cas. 88; Matchin *v.* Matchin, 6 Barr, 332. See Betts *v.* Betts, 1 Johns. Ch. 197; Hansley *v.* Hansley, 10 Ired. 506.

[6] Robinson *v.* Robinson, Sw. & Tr. 362; Williams *v.* Williams, L. R. 1 P. & D. 29.

CHAPTER XIV.

PRESUMPTIONS.

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I. GENERAL CONSIDERATIONS.

§ 1226. A PRESUMPTION of law is a juridical postulate that a particular predicate is universally assignable to a particular subject.[1] A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful, from a fact which is proved.[2]

Presumption of law is a juridical postulate; presumption of fact is an

[1] See this illustrated infra, § 1237.

[2] Windscheid's Pandekt. i. § 138.

Hence, a presumption of fact, to be valid, must rest on a fact in proof.[1] Presumptions, therefore, in this sense are to be regarded rather as among the effects of proof than as proof itself.

argument from fact to fact.

§ 1227. Presumptions are usually classified as follows: —

Prevalent classification.

1. Irrebuttable or absolute presumptions of law, *praesumtiones juris et de jure.*

2. Rebuttable or provisional presumptions of law, *praesumtiones juris;*

3. Presumptions of fact, *praesumtiones hominis;* which pre-

[1] "No inference of fact or of law," says a learned judge of the Supreme Court of the United States, "is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Stark. on Evid. p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open or visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass *v.* Mitchell, 35 Penn. St. 440." . . . . Strong, J., U. S. *v.* Ross, 92 U. S. 284. In R. *v.* Burdett, 4 B. & Ald. 161, Abbott, C. J., said: "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment." . . . .

That presumptions must rest on established facts, see Richmond *v.* Aiken, 25 Vt. 324; Tanner *v.* Hughes, 53 Penn. St. 289; McAleer *v.* McMurray, 58 Penn. St. 126; O'Gara *v.* Eisenlohr, 38 N. Y. 296; People *v.* Hessing, 28 Ill. 410; Hamilton *v.* People, 29 Mich. 193; Frost *v.* Brown, 2 Bay S. C. 133; Bach *v.* Cohn, 3 La. An. 103; Pennington *v.* Yell, 11 Ark. 212; Lawhorn *v.* Carter, 11 Bush, 7. To the same effect is Bonnier, Traité des Preuves, ii. 387, 420. Compare remarks of Lord Cairns, in Belhaven Peerage, L. R. 1 App. Cas. 278.

"The foundation of all human knowledge must be laid in the examination of particular objects and particular facts; *and it is only so far as our general principles are resolvable into these primary elements that they possess either truth or utility.*" Dugald Stewart on the Human Mind, ch. iv.

sumptions are always rebuttable, and are determinable by free logic.[1]

Presumptions of law unknown to classical Romans.

§ 1228. The classical Roman law recognized only two kinds of evidence: (1.) persons (*testes*), and (2.) things (*instrumenta*). A witness called in a court of justice deposes to certain things from which inferences are to be drawn; or these things are brought into court without the agency of a witness, and from the things as thus produced inferences can in like manner be drawn. Thus, Paulus tells us: "Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia quam personae instrumentorum loco habentur."[2] *Testes* are placed on the same basis with *instrumenta*, — *instrumenta* including everything from which a conclusion is to be inferred. Both *testes* and *instrumenta* are to be weighed by the rules of logic, applied to the case as it comes up, and not by those of technical jurisprudence, announced before the case is heard. In the whole of the Corpus Juris we meet with no such expressions as *praesumtio juris* and *praesumtio hominis*. The idea that it is for the court to say that certain conclusions are to be uniformly inferred from certain facts, never entered into the classical mind. Presumptions, indeed, are discussed at large in the Digest, and to them a distinct chapter is in part devoted.[3] But the presumptions there noticed deal, not with the effect of evidence, but the mode of determining the burden of proof.

In Roman law *praesumtiones* were modes of determining burden of proof.

§ 1229. The Roman rule with regard to the burden of proof has been already fully set forth. As a general proposition, as we have seen,[4] the actor is required to prove the case he advances; yet there are obvious qualifications to this rule which it was the business of the jurist to define. An actor, for instance, cannot be required to prove a negative when the matter is wholly within the knowledge of his opponent.[5] So it is often a matter of doubt whether a particular fact is technically part of the actor's case or the excipient's; and this doubt the law must de-

[1] See, as to last form of presumption, Mead *v.* Parker, 115 Mass. 413; Hamilton *v.* People, 29 Mich. 193.

[2] L. i. D. xxii. 4.

[3] Tit. xxii. 3, *De probationibus et praesumtionibus.*

[4] Supra, § 357.

[5] Supra, § 367. See L. 25, D. xxii. 3.

termine. In proceedings *in rem*, to take another illustration, each party is an *actor;* and the law has to settle in advance which party has to begin and how much each party has to prove, in order to make out a *primâ facie* case. Questions of this kind, relating exclusively to the burden of proof, have to be settled by positive rules; and the positive rules the jurists announce for this purpose, in answer to questions put to them, they call *praesumtiones*. *Praesumtiones*, therefore, in the classical sense, denote rules for determining the burden of proof before its reception, but not for determining what is to be the weight of proof when received.[1] Nothing prevents the judge, if required by his convictions to do so, from deciding *in concreto* against the *praesumtio* that a short time before was so important to him in determining the burden of proof. Not merely evidence, in its strict sense, but argument, as a logical process, is available to lead him to such conclusions. Every case, when the evidence is in, is to be determined by a preponderance of proof. As making up proof, reason and evidence are indeed regarded as coördinate factors,[2] and reason is to be largely influenced by what we call presumptions of fact. But of arbitrary presumptions of law, assigning to evidence, when admitted, an unreasonable and untruthful meaning, the jurists give no instance.[3] The only contingency in which, on a *primâ facie* case for the actor being made out, the classical *praesumtiones* (*i. e.* rules for determining the burden of proof) influence the issue, is when the evidence is in equilibrium, in which case judgment is against the *actor*.[4]

What we call presumptions of facts

§ 1230. Hence, by the classical Roman law, what we now call presumptions were at the highest only assumptions of practical reason. The power of inference was to be logically exercised in each case in the concrete.[5] The

[1] Endemann's Beweislehre, § 24, p. 86, — a work which I have freely used in the preparation of this chapter. Gell. Noct. art. iii. c. 16.

[2] Supra, §§ 1–6; and see particularly supra, § 278.

[3] Endemann, *ut supra*, § 24, p. 87. Sir J. Stephen (Ev. p. 2) defines a "presumption" "as a rule of law that courts and judges (juries?) shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." This excludes presumptions *juris et de jure*. Bonnier (Traité des Preuves, ii. 418) throws overboard the scholastic terms in a body, styling them "ces expressions barbares."

[4] See fully supra, § 457.

[5] See Durant, I. c. nr. 19; Endemann, Beweislehre, § 19.

were regarded as logical inferences.

question of the force of such presumptions, as we would call them, was exclusively for the logician; and though they are noticed frequently by the jurists, they are styled, not *praesumtiones*, but *signa*, *argumenta*, or *exempla*.[1]

§ 1231. Such was the classical Roman doctrine. The Middle Ages inaugurated a new era. Business, in the old sense, was extinct; and courts no longer met to hear arguments on the application of principles to a concrete case. Wrong, indeed, existed in abundance; but it was not put on trial by a competent court. Unsuccessful wrong, or what appeared to be such, was punished by fine or by killing, without the trouble of what we would now call a trial; successful wrong was not punished at all. Of course, among the active minds who, in the seclusion of the cloister, speculated on everything, there were some who speculated on jurisprudence; but the jurisprudence they dealt with was based on an imaginary, and not on an actual humanity. They made ideas realities, and they made men unrealities.[2] Not recollecting that it is impossible to predict even what any one person will do under particular circumstances, they attempted to establish rules which would be applicable only if all men who should afterwards exist should do what was predicted. Certain maxims they conceived to be right, or to fit in with some preconceived system of ethics, and these maxims they declared to be either *primâ facie* or absolutely true, even in concrete cases, where such maxims were *primâ facie* or absolutely false. And in place of the real man as he might happen to appear on trial, they set up an ideal man, who was to be always presumed, no matter what be the evidence, to have specific unvarying attributes.[3] In like manner, to every act which might

Prevalent classification of scholastic origin.

[1] See Quinct. V. c. 8.

[2] See the topic in the text expanded in an article in the Forum, 1875, pp. 201 *et seq.*

[3] See infra, § 1262.

It was here that the realistic philosophy came into play, and exercised an influence which it is important to particularly examine.

Have general ideas a real existence? When we speak of man, is there such a real thing as a generic man, with no such *differentiae* as distinguish one individual man from another? When we speak of an abstract homicide, is there such a real thing as such a homicide, which is marked by none of the *differentiae* which distinguish one particular homicide from another? The foreshadowing of the mediæval speculations on this point we find in a passage in Porphyry's Introduction to the Categories of Aristotle: "Mox de generibus et speciebus illud quidem

be the object of litigation they declared certain incidents to belong arbitrarily. Every man was presumed to act from the motive which the law attached beforehand to the act.

sive subsistant sive in solis nudiis intellectibus posita sint, sive subsistentia corporalia sint an incorporalia et utrum separata a sensilibus an insensilibus posita et circa haec consistentia, dicere recusabo: altissimum enim est negotium hujusmodi et majoris indigens inquisitionis." Herzog's Ency. 13, 668. The question is here, therefore, thrown out, whether general ideas have a reality independent of their subjective existence, or whether they are exclusively the fictions of the subjective consciousness. By Boethius the discussion of this question was introduced in the spheres both of theology and jurisprudence. See Cousin's observations in his Ouvrages inédits d'Abelard, Par. 1836; Köhler, in his Realismus, &c., Gotha, 1858; and Mill's Logic, ii. 441. Three solutions were proposed: *universalia* were either *ante rem*, or *in re*, or *post rem*. By the first theory, the general conception really exists before the particular; has its own real attributes, and is the only absolute existence, the particulars emanating from it being conditioned, limited, and imperfect. By the second view the general exists only in actual concrete existences, as something that is common and essential to them; yet it (the general) is not a pure subjective creation of consciousness, but is inherent necessarily in the particulars. By the third view (the distinctively nominalistic), the general has no objective reality: that is to say, it corresponds to nothing in the particular things themselves, but it exists only through the induction of the understanding, which, comparing the particulars, draws from them certain general characteristics, which, in a particular aspect, they hold in common.

The realistic theory took immediate hold of the jurists of the Middle Ages, and this for several reasons. The jurists were mostly ecclesiastics, and dogmatic ecclesiasticism then accepted realism as a divine verity. The jurists had no concrete cases to decide, for their opinion was not then asked by the rude courts who disposed of property and life. The jurists also, in penal inquiries, held the canon law to be authoritative; and the canon law, for the purposes of the confessional, constructed an elaborate theory of presumptive proof based upon realism. The sacerdotal judgment had to be guided so as to determine rightly all the probable cases that might arise. Hence, books of casuistry were published, in which all the current forms of guilt were generalized; specific qualities assigned to each; and the announcement made that, for certain general overt acts certain motives were to be imperatively presumed. It is remarkable that Lord Coke's classification of presumptions was taken from the canon lawyers, whose authority in other respects he so vehemently denounced. And it is still more remarkable that the realistic hypothesis, derived from theology and metaphysics, should linger even to the present day in our courts of law. We are still constantly told of an "abstract killing," to which certain invariable accidents are necessarily attached; and we are informed that whenever an abstract killing is proved, then these accidents (one of which is malice) are to be assigned to it as *praesumtiones juris*. See article in

§ 1232. The term *praesumtio juris et de jure*, which was introduced by the glossators of the twelfth and thirteenth centuries, was originally intended to express an intense presumption: *praesumtio juris imperativi* or *superlativi*.[1] Much difficulty had been felt in finding suitable limits for such "superlative" presumptions; "disputant doctores sed non convenit inter eos, quid nomine praesumtionis juris et de jure veniat; est enim illud a doctoribus confictum, veluti barbarum, certam significationem non habet."[2] At last it was concluded to get rid of all doubt as to their force by making them irrebuttable; and it was announced that presumptions *juris et de jure* were presumptions which did not admit of juridical disproof. Finally all irrebuttable presumptions became presumptions *juris et de jure*, and all presumptions *juris et de jure* became irrebuttable. Hence it necessarily resulted that not only fictions were regarded as identical with presumptions *juris et de jure*, but all indisputable propositions were admitted into the same category; and therefore conclusions which rested on supposed invariable natural laws were thus classified. It is a *praesumtio juris et de jure* that information known only at London this morning cannot be known at Rome this afternoon. It is a *praesumtio juris et de jure* that a man who was at London seven days ago cannot to-day be at Rome. And then, as a reasonable being intends what he does, it is a *praesumtio juris*, if not *de jure*, that before a case is tried, the intent, even when intent is in litigation, is to be assumed.

Scholastic derivation of *praesumtiones juris et de jure.*

§ 1233. Such are the speculations of the scholastic civilians from whom the conclusions of our own text writers have been mainly derived. It is remarkable, for instance, that the commentators on the Roman law on whom Mr. Best relies are Alciat (1492–1550), Menoch (1532–1609), Mascardius (1550–1600), Matthaeus (1601–1654), and Huber (1636–1694), all of them exponents of the scholastic jurisprudence, adopting more or less fully its tendency to absorb in jurisprudence all other sciences, and to merge the regulative element in the speculative; all of

Forum for 1875, p. 201, from which the above is reduced.

[1] Globig, Theorie der Wahrscheinlichkeit, ii. 56.

[2] Cocceius, Diss. de prob. dir. neg. § 17, cited by Burckhard, 370.

them, so far as concerns the distinction between *praesumtiones juris* and *praesumtiones juris et de jure*, following the Italian glossarists, by whom this distinction was created, and thus abandoning the Roman standards, which restricted the term *praesumtio* to such postulates as the law establishes for the purpose of relieving a party from the burden of a particular proof.

Gradual reduction of *praesumtiones juris et de jure.*

§ 1234. The assignment of irrebuttability to presumptions, however, is as repugnant to the practical jurisprudence of business life, as it is to the philosophical jurisprudence of Rome. Practical jurisprudence soon discovers that a presumption that is irrebuttable in an age of ignorance is rebuttable in an age of civilization.[1] That a man cannot be, in the same week, in Rome and in London, was an irrebuttable presumption in the twelfth century; it is no presumption at all in the nineteenth. That information cannot be passed instantaneously from one business centre to another was, in the twelfth century, irrebuttably presumed; in the nineteenth century most of our business contracts are affected by information so received. That an appropriate intent is assignable to an ideal man doing an ideal act may be speculatively true; that such an intent is to be assumed in advance of a trial cannot be practically accepted by courts having to do with real men, put on trial for acts, many of which are without motive (*e. g.* in issues of negligence), and many of which are done suddenly, in heedlessness, in passion, in self-defence, or through necessity. Hence it is that the old presumptions *juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,[2] when he tells us that certain presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among *praesumtiones juris tantum*, or considered as presumptions of fact to be made at the discretion of a jury.[3] The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *juris et de jure* that while the class is still said to exist, no perfect individuals of the class can be found. The unimpeachability of records is one of the last survivors of these presumptions, and

[1] See Mill's Logic, i. 389.

[2] Best's Ev. § 307.

[3] He cites to this Ph. & Am. Ev. 460; 1 Ph. Ev. 10th ed.

the unimpeachability of records is still spoken of as a presumption *juris et de jure;* but whatever may be the name given to this presumption, it vanishes when it is confronted by proof of fraud or coercion.[1]

In modern Roman law distinction is denied.

§ 1235. While in our own law *praesumtiones juris et de jure* preserve an existence which is now merely titular, in the modern Roman law, as taught by its most authoritative commentators, even this titular recognition is refused. The scholastic *praesumtiones juris et de jure*, it is held by the best French and German commentators on this particular topic,[2] are resolvable into the following classes: —

1. Conclusions from natural laws, the disproval of which is impossible.

2. Processual rules, enacted to facilitate litigation that in the long run is just, or to check litigation that in the long run is vexatious.

3. Fictions, which, though false, are assumed by the policy of the law.

4. Statutory presumptions, such as those introduced, by way of limitation, to quiet titles, or (as in the case of the statute of frauds) to exclude inferior and unreliable proof.[3]

In our own law unnecessary.

§ 1236. The modification just noticed, of the old classification of presumptions, avoids what is evil in that classification, and retains what is good. By getting rid of the term irrebuttable presumptions we not only remove a series of presumptions, really rebuttable, from a category to which they do not belong, but we relieve the practical administration of justice from the embarrassments which are produced from judges applying, in their charges to juries, the term irrebuttable to presumptions which are open to disproof. On the other hand, we retain, restoring them to their proper place, those leading axioms of law (*e. g.* the postulates that all persons are cognizant of the law to which they are subject, and that all sane persons are responsible for their acts) which were once called presump-

[1] See striking illustrations of this in Windsor *v.* McVeigh, 93 U. S. 274, and other cases cited supra, §§ 795–7.

[2] See Endemann's Beweislehre, 85–94; Burckhard, Civilistische Praesumtionen, 369 *et seq.;* 11 Vierteljahrschrift für Gesetzgebung, 601; Bonnier, Traité des Preuves, ii. 387–414 *et seq.*

[3] See this point discussed supra, §§ 851–53.

tions *de juris et de jure*, but which are really among the neces sary principles from which jurisprudence starts.

§ 1237. Dropping, therefore, the term *praesumtiones juris et de jure*, as unnecessary if not unphilosophical, we proceed to discuss, as the subject of the present chapter, presumptions of law, in their general sense, and presumptions of fact. Our first duty will be to inquire in what these presumptions differ. And on examination, the points of difference will be found to be as follows: —

Presumptions of law distinguishable from presumptions of fact.

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for instance, may say, that a person not heard of for ten years is to be counted as dead. This is a presumption of law, and is arbitrarily to be applied to all cases where parties have been absent for such period without being heard from. If there be no such statute, then logic, acting inductively, will have to establish a rule to be drawn from all the circumstances of a particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person, who carries a concealed weapon, there being no statute, does so with an evil intent, is a question of logic (*i. e.* probable reasoning, acting on all the circumstances of the case), with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the courts as well as juridical maxims established by the legislature. To make, however, a maxim established by the courts in this sense a statute, it must be not only definitely promulgated by judicial authority, but finally accepted; such maxims being, to adopt Blackstone's metaphor, statutes worn out by time, the maxim remaining, though the formal part of the statute has disappeared. The chief maxims of this kind are the presumption of innocence, the presumption of knowledge of law, and the presumption of sanity. Presumptions of law, therefore, are uniform and constant rules, applicable only

generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically.[1]

2. To a presumption of law probability is not necessary; but probability is necessary to a presumption of fact. Knowledge of law is in all cases presumed, though in no case it perfectly exists, and in multitudes of cases does not exist at all in the concrete. So we can conceive of cases in which it is highly improbable that an accused person is innocent of the crime with which he is charged; yet probable or improbable as guilt may antecedently appear, he is presumed to be innocent until he is proved to be guilty. On the other hand, without probability, there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable, upon all the facts of the case, he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing, there can be no presumption against me of intent. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Until the evidence is adduced there can be no presumption of fact; there is no presumption of law that is not applicable before the evidence is adduced.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance: all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime;* it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that *doing* presumes *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane; may be adults or infants; may be at liberty or under coercion: in each case, so far as concerns the presumption of law, they are persons

[1] See Hamilton *v.* People, 29 Mich. 193.

charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane; is an adult or an infant; is at liberty or under coercion; is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly and equally applicable, in anticipation of the facts developed on trial. Thus, for instance, all children born in wedlock are presumed by law to be legitimate until the contrary be proved; and this presumption applies to all children so born, no matter who they may be. On the other hand, whether a bastard is born of a particular father, is determinable usually by presumptions of fact attachable to conditions as to which no two cases present precisely the same type.

Presumptions of fact may be by statute made presumptions of law.

§ 1238. It must be kept in mind, at the same time, as we have already incidentally seen, that the law-making power may attach to any particular fact or chain of facts certain legal consequences, and in this way turn a presumption of fact into a presumption of law. Of presumptions either established or destroyed by statute, our own legislation gives numerous instances.[1] The presumption of death derived from absence has been introduced into the codes of most of our states. The presumption of fact, by which a debt, unrecognized for a series of years, is supposed to have been paid, is made a rule of law by our statutes of limitation. In most of our states we have declared by statute that the presumption of guilt arising from silence when accused shall not extend to cases where a defendant declines to testify in his own behalf. In all our states we have statutes limiting the effect of parol proof.[2]

Fallacy arising from am-

§ 1239. The difficulties we have just noticed are largely owing, the reader must have already noticed, to the ambiguity of the terms employed. The ambiguity in the term

[1] Statutes declaring that certain certificates, or other acts, should be *primâ facie* proof are constitutional. See elaborate review by C. J. Gray, Holmes *v.* Hunt, 122 Mass. 505. And see supra, §§ 850, 1237.

[2] As to the statute of frauds, see supra, §§ 851–53.

Ambiguity of terms "law," "legal," and "presumption."

"presumption," is thus noticed by Mr. Mill:[1] "To be acquainted with the guilty is a *presumption* of guilt; this man is so acquainted, therefore we may *presume* that he is guilty; this argument proceeds on the supposition of an exact correspondence between *presume* and *presumption*, which does not really exist; for 'presumption' is commonly used to express a kind of *slight suspicion*, whereas 'to presume' amounts to absolute belief." Whether Mr. Mill is right in his definition of "presume" and "presumption" need not now be considered. It is enough for the present purpose to say that the words, even if not distinguishable in the way Mr. Mill states, go to a jury, if left without explanation, open to meanings from which conclusions diametrically opposite can be drawn. The term "law" may be used, in connection with presumptions, in three senses: (1.) A presumption of law, in its technical sense, is, as we have seen, a presumption which jurisprudence itself applies, aside from the concrete case, to certain general conditions whenever they arise. (2.) But a presumption of law may be also a presumption of fact which jurisprudence permits; and it is the practice of judges to say that a presumption of fact is "legal," *i. e.* that it is one the law will sustain. (3.) "Law," as we have already seen, may be used as including the laws of nature and of philosophy, as well as those of formal jurisprudence. Juries are constantly told, for instance, that certain conclusions of mental or physical science are presumptions of law; and in this way they are led to suppose that such conclusions bind, as absolute rules of jurisprudence, the particular case, no matter what may be the phases the evidence may assume. This error, which tends to subordinate justice to arbitrary form,[2] can be best corrected by an analysis, in this relation, of the presumptions which come most frequently before the courts. This analysis we now undertake.

II. PSYCHOLOGICAL PRESUMPTIONS.

§ 1240. "Psychological facts," says Mr. Best,[3] "are those which have their seat in an animate being by virtue of the qualities by which it is animate; . . . . as, for instance, the sen-

[1] Mill's Logic, ii. 442.

[2] See supra, § 852.

[3] Evidence, § 12.

sations or recollections of which he (an intelligent agent) is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. Psychological facts are obviously incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by confession of the party whose mind is their seat, index animo sermo, — or by presumptive inference from physical ones." Among psychological presumptions may be enumerated the following.

Law presumed to be known by all subjects.

All persons subject to a law are irrebuttably presumed to know what it is;[1] though this, as we have seen, is an axiom of law rather than a presumption.[2] That the axiom contains an untruth is conceded. No man, in a civilized community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd;[3] but predicated it

[1] 1 Hale, 42; R. *v.* Price, 3 P. & D. 421; *S. C.* 11 Ad. & E. 727; Middleton *v.* Croft, Str. 1056; R. *v.* Esop, 7 C. & P. 456; R. *v.* Good, 1 C. & K. 185; Stokes *v.* Salomons, 9 Hare, 79; R. *v.* Hoatson, 2 C. & K. 777; R. *v.* Bailey, R. & R. 1; Stockdale *v.* Hansard, 9 A. & E. 131; Barronet's case, 1 E. & B. 1; Pearce & D. 51; U. S. *v.* Learned, 11 Int. Rev. Rep. 149; The Ann, 1 Gallis. 62; U. S. *v.* Anthony, 11 Blatch. 200; Cambioso *v.* Maffett, 2 Wash. C. C. 98; Com. *v.* Bagley, 7 Pick. 279; Winehart *v.* State, 6 Ind. 30; Black *v.* Ward, 27 Mich. 191; Whitton *v.* State, 37 Miss. 379. As a very strong case in which this presumption was applied may be noticed Muir *v.* Glasgow Bank, cited infra, § 1249.

[2] Supra, § 1236.

[3] "Besides," objects Mr. Livingston, in his report on the Louisiana Penal Code, "is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten, or might be found in books that were in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities."

is both of ignorant and learned, so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong. For this several reasons are given. Mr. Austin inclines to think that the law refuses to recognize ignorance of the law as a defence, because the law has no tests by which ignorance of law can be measured. Who can tell whether, in any given case, such ignorance exists? Who can tell whether such ignorance is inevitable?[1] Pascal argues that society would be destroyed if such an excuse were held good. Discussing the alleged Jesuit dogma that ignorance relieves from responsibility, he says, with fine satire, that till he heard this, he had supposed that the most depraved were the most culpable, but that now he finds that the more stolid the brutishness, or the more reckless the levity of the criminal, the more blameless he becomes; and to illustrate his criticism he appeals to Aristotle's observation, that "All wicked men are ignorant of what they ought to do, and what they ought to avoid; and it is this very ignorance which makes them wicked and vicious."[2] To this it may be added, that government would come to a stand-still if this principle were not enforced. Few people would read tax laws, few would read municipal ordinances, if ignorance in the first case would excuse paying taxes; in the second case, would excuse obedience to police regulations; and the more reckless crime becomes, the more sullen and resolute would be the ignorance it would cultivate.

But knowledge of contingent law not required.

§ 1241. It must be remembered at the same time, that the knowledge of law which is here assumed is simply practical knowledge commensurate with the duties whose non-discharge the law, in the concrete case, condemns. A person who commits a public wrong, for instance, is bound to know that the wrong is subject to penal consequences: if it is *malum in se*, his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defence; if it is *malum prohibitum*, it should

See, also, Martindale *v.* Faulkner, 2 C. B. R. 720, Maule, J.; R. *v.* Mayer, L. R. 3 Q. B. 629; Cutter *v.* State, 36 N. J. L. 125. Supra, § 1029. This is adopted by Hunt, J., in Upton *v.* Tribilcock, 91 U. S. (1 Otto) 45. See South Ottawa *v.* Perkins, cited supra, § 289.

[1] Austin's Lectures, 2d ed. i. 498.

[2] Pascal, 4th Prov. Letter.

be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, since otherwise no police laws could be enforced. But when questions of construction of documents come up, then, as we will hereafter see more fully, a party cannot be always held liable civilly for adopting a probable construction which the courts may ultimately hold to be erroneous.[1] There are also different grades of requisite knowledge proportionate to the duties assumed. Thus a person not claiming to be a legal specialist is liable, when the question comes up in a civil issue, only for a lack of that knowledge of law common to non-specialists of his class.[2] On the other hand, a person claiming to be a specialist in the law is liable for a lack of the knowledge common to good practitioners of his school.[3] So a knowledge of the legal bearings of the rules of their respective associations is imputed to the members of a stock exchange,[4] and to the members of a club;[5] and parties taking under a lease are presumed to know the title which they accept;[6] and those executing instruments to know what such instruments mean.[7] But whatever be the degree of knowledge of the law the law presumes the individual to have, he is presumed to have absolutely. The presumption, if it is to be called such (it being, as we have noticed, more properly an axiom of jurisprudence), is irrebuttable, unless in cases of fraud.

Communis error facit jus.

§ 1242. It should also be kept in mind that there are cases in which *communis error facit jus*, and in which, therefore, the courts will sustain a prevalent construction, which is erroneous, rather than disturb titles which have been settled under such construction.[8] But this exception cannot be recognized, so it is said by Lord Denman, "unless it (the error) can be traced to some competent authority, and if it

[1] Beauchamp *v.* Winn, L. R. 6 H. L. 223; Ireland *v.* Livingston, L. R. 5 Eng. App. 395; Brent *v.* State, 43 Ala. 297; Kostenbader *v.* Spotts, 80 Penn. St. Infra, § 1242.

[2] Whart. on Neg. §§ 414, 510, 520, 749; Miller *v.* Proctor, 20 Ohio St. 442.

[3] See cases cited at large in Whart. on Agency, §§ 596 *et seq.*

[4] Stewart *v.* Canty, 8 M. & W. 160; Mitchell *v.* Newhall, 15 M. & W. 389.

[5] Raggett *v.* Musgrave, 2 C. & P. 556.

[6] Butler *v.* Portarlington, 1 Con. & L. 24.

[7] Lewis *v.* R. R. 5 H. & N. 867; Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Clem *v.* R. R. 9 Ind. 488. Infra, § 1243.

[8] See Kostenbader *v.* Spotts, 80 Penn. St. 430.

be irreconcilable to some clear legal principle." [1] By Lord Ellenborough a less stringent and more reasonable distinction is taken: to enable the maxim to operate, the error must not be "floating," but "must have been made the groundwork and substratum of practice." [2]

Knowledge of fact a presumption of fact.

§ 1243. That a person knows what he does is also sometimes called a presumption of law. If we take presumption of law to mean something that the law declares to be universally true until rebutted, then that all persons know what they are about is not a presumption of law, for there are many persons (*e. g.* persons influenced by fraud or coercion) as to whom the law declares just the contrary. But that a person who is *capax negotii* should set up ignorance of facts as ground of exculpation or of defence would be against the policy of the law; and hence, where there is no fraud or coercion, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but if his ignorance is negligent or culpable, then the law declares that it cannot protect him.[3] Apart from this liability, we have a right to infer, as a presumption of fact based upon our experience of business, that an intelligent person who does a thing in his particular line of business knows what he is about.[4] An underwriter, for instance, in cases where he is not misled by the insured, is assumed to be familiar with Lloyd's Shipping List.[5] A merchant, also, dealing in a particular market, is taken to be acquainted with the custom of that market.[6]

[1] Lord Denman, C. J., O'Connell *v.* R. Leahy's Rep. 28.

[2] Isherwood *v.* Oldknow, 3 M. & S. 396; and see Broom's Max. (5th ed. 139); R. *v.* Justices, 2 B. & S. 680; Jones *v.* Tapling, 12 C. B. (N. S.) 846; Phipps *v.* Ackers, 9 Cl. & F. 598.

[3] See cases cited in Wharton's Criminal Law, tit. "Negligence."

[4] Doe *v.* Turford, 3 B. & Ad. 890, 895; Champneys *v.* Peck, 1 Stark. R. 404; Pritt *v.* Fairclough, 3 Camp. 305; Young *v.* Turing, 2 M. & Gr. 603, per Ld. Abinger; 2 Scott N. R. 752, *S. C.;* Burton *v.* Blin, 23 Vt. 151; Grace *v.* Adams, 100 Mass. 505; Moore *v.* Des Arts, 2 Barb. Ch. 636; Woodruff *v.* Woodruff, 52 N. Y. 53; Mears *v.* Graham, Blackf. 144; Burritt *v.* Dickson, 8 California, 113. Supra, § 1029; infra, § 1259. Otherwise in case of an ignorant seaman. The Tarquin, 2 Low. 358.

[5] Mackintosh *v.* Marshall, 11 M. & W. 116.

[6] Bayliffe *v.* Butterworth, 1 Ex. R. 429, per Alderson, B.; Pollock *v.* Stables, 12 Q. B. 765; Greaves *v.* Legg, 11 Ex. R. 642; 2 H. & N. 210, *S. C.*, in Ex. Ch. *nom.* Graves *v.* Legg; Buckle *v.* Knoop, 36 L. J. Ex. 49; *S. C.* aff. in Ex. Ch. Ibid. 223; Dun-

And a party is assumed to have read the contents of an instrument executed by him; nor is evidence, when an instrument is offered against him, that he did not read it, admissible unless coupled with proof of fraud.[1] To wills this inference has been frequently applied;[2] though the inference may be rebutted by proof of facts indicating fraud, coercion, or undue influence.[3] But a party buying a railway ticket will not be assumed to have notice of conditions printed on its back in small type.[4]

Party signing document assumed to have read it.

§ 1244. In criminal issues, that the defendant should be presumed to be innocent until the contrary be proved beyond reasonable doubt is unquestionably a presumption of law. The presumption, in such case, is to be treated as weighing so far in favor of the defendant as to require, in connection with reasonable doubt of guilt, an acquittal. In other words, reasonable doubt of guilt, in criminal trials, is ground for acquittal in cases where, if we subtracted the probative force of the presumption of innocence, there might be a conviction.

Presumption of innocence.

§ 1245. In civil issues, however, the presumption of innocence, in cases where it is applicable, is not technically evidential, but is of value only so far as it affects the burden of proof. A railroad company, for instance, is sued for damages incurred through the negligence of

In civil issues preponderance decides.

can *v.* Hill, 6 L. R. Ex. 25. See, also, Noble *v.* Kennoway, 2 Doug. 513; Da Costa *v.* Edmunds, 2 Camp. 143, cited supra, § 962; Bayley *v.* Wilkins, 7 Com. B. 880; Taylor *v.* Stray, 2 Com. B. N. S. 175; Hodgkinson *v.* Kelly, per Lord Romilly, M. R. 6 Law Rep. Eq. 496; Coles *v.* Bristowe, 4 Law Rep. Ch. Ap. 3; Bowring *v.* Shepherd, 49 L. J. Q. B. 129; Grissell *v.* Bristowe, 4 L. R. C. P. 36.

[1] Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Lee *v.* Ins. Co. 3 Gray, 583; Ryan *v.* Ins. Co. 41 Conn. 168; Germania Ins. Co. *v.* R. R. 72 N. Y. 90; Turner *v.* Lucas, 13 Grat. 705; Woodward *v.* Foster, 18 Grat. 200; South. Ins. Co. *v.* Yates, 28 Grat. 585; Hartford Ins. Co. *v.* Gray, 80 Ill. 28. This has been applied to cases of signature by mark. Doran *v.* Mullen, 78 Ill. 342. See Hunter *v.* Walters, cited supra, § 932; Harris *v.* Story, 2 E. D. Smith, 363; Clem *v.* R. R. 8 Ind. 488; and cases cited supra, § 940.

[2] Browning *v.* Budd, 6 Moo. P. C. 430; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109.

[3] Duane, in re, 2 Sw. & Tr. 590; Mitchell *v.* Thomas, 6 Moore P. C. 137; Scowler *v.* Plowright, 10 Moore P. C. 440; Fulton *v.* Andrew, L. R. 7 H. L. 461. See Hastilow *v.* Stobie, L. R. 1 P. & D. 64.

[4] Malone *v.* R. R. 12 Gray, 388;

one of its subalterns. The subaltern is so far presumed to be innocent that the company is not put on the defence until a *primâ facie* case of negligence is made out by the plaintiff.[1] Yet, when such a case is made out, courts do not tell juries, "If there is reasonable doubt as to negligence, you must find for the defendant;" but they say, "You must find in conformity with the preponderance of proof." There is no general presumption of non-peccability in civil issues. The wrong, when a wrong is sued for, must be proved at least *primâ facie* by the plaintiff; and then the presumption of good character is simply one of inference, variable with the particular case. In civil issues, character is always presumed to be so far good as to throw the burden of proof on those assailing it;[2] but its effect on the decision of the issue is to be determined by the concrete proof. To meet the burden of proof thrown under such circumstances upon the *actor*, it is sufficient if he prove a *primâ facie* case. If the proofs of exculpation are in the hands of the opposite side, and the latter does not produce them, the presumption is that they do not exist.[3] Where, however, there is an equipoise of evidence, then the judgment must be against the party attacking. The burden was on him to prove *culpa* or *dolus*, and he has failed to make good his case.[4]

§ 1246. It has just been said that the doctrine, that a reasonable doubt of guilt is to work an acquittal, does not apply to civil issues. If it did, in the numerous cases in which fraud or negligence is charged on both sides there might be a dead lock, since in such cases, if there be reasonable doubt on both sides, there could be no verdict at all.[5] But be this as it may, the doctrine that reasonable doubt should produce an acquittal sprang

Parker *v.* R. R. 25 W. R. 97. See Georgia R. R. *v.* Rhodes, 56 Ga. 168.

[1] See supra, § 359.

[2] Williams *v.* E. I. Co. 3 East, 192; Rodwell *v.* Redge, 1 C. & P. 220; Ross *v.* Hunter, 4 T. R. 33; Leete *v.* Ins. Co. 15 Jurist, 1161; Goggans *v.* Monroe, 31 Ga. 331; Pratt *v.* Andrews, 4 Comst. 493.

[3] See infra, § 1265.

[4] Supra, §§ 357–8; Ross *v.* Hunter, 4 T. R. 33; Ireland *v.* Livingstone, L. R. 5 Eng. Ap. 575; Timson *v.* Moulton, 3 Cush. 269; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) Ch. 7; Pollock *v.* Pollock, 71 N. Y. 137; Horan *v.* Weiler, 41 Penn. St. 470.

[5] Thus if contributory negligence, or contributory fraud, be set up by the defendant in such suits, and there is reasonable doubt as to this, and reasonable doubt as to the defendant's culpability, there could be no verdict.

from the hardship of a system which inflicted capital punishment on all felonies; and is in any view defensible only on the ground that where penal judgments are to be inflicted, and where the state with all its power prosecutes, there proof of guilt should be strong. It is otherwise where the suit is between two private citizens, to each of whom character is supposed to be dear, and each of whom has the same opportunities of vindication by local process. Hence, the better view is, that in civil issues the result should follow the preponderance of evidence, even though the result imputes crime. Of course, as a factor in such a calculation is to be considered the presumption of innocence attachable to good character when character is unassailed.[1]

[1] Cooper *v.* Slade, 6 H. of L. Cas. 772; Magee *v.* Mark, 11 Ir. R. (N. S.) 449; Huchberger *v.* Ins. Co. 4 Biss. 265; Scott *v.* Ins. Co. 1 Dillon, 105; Payne *v.* Solomon, 14 Bk. Reg. 162; Knowles *v.* Scribner, 57 Me. 497 (though see Thayer *v.* Boyle, 30 Me. 475); Ellis *v.* Buzzell, 60 Me. 209; Matthews *v.* Huntley, 9 N. H. 150; Folsom *v.* Brown, 5 Foster, 222; Bradish *v.* Bliss, 35 Vt. 326; Weston *v.* Gravlin, 49 Vt. 507; Schmidt *v.* Ins. Co. 1 Gray, 529; Gordon *v.* Parmelee, 15 Gray, 413; Munzon *v.* Atwood, 30 Conn. 102; Kane *v.* Ins. Co. 10 Vroom, 696; unanimously reversing *S. C.* 9 Vroom, 441; Young *v.* Edwards, 72 Penn. St. 267; Jones *v.* Greaves, 26 Ohio St. 2; Lyon *v.* Fleahman, 34 Ohio St. 17; Simmons *v.* Ins. Co. 8 W. Va. 474; Darling *v.* Banks, 14 Ill. 46; McConnell *v.* Ins. Co. 18 Ill. 228; Hall *v.* Barnes, 82 Ill. 228; Lewis *v.* People, 82 Ill. 104 (though see McConnell *v.* Ins. Co. 18 Ill. 228); Byrket *v.* Monohon, 7 Blackf. 83; Bissell *v.* West, 35 Ind. 54; Elliott *v.* Van Buren, 33 Mich. 99; Washington Ins. Co. *v.* Wilson, 7 Wis. 169; Blaese *v.* Ins. Co. 37 Wis. 31 (though see Freeman *v.* Freeman, 31 Wis. 235); Pryce *v.* Ins. Co. 29 Wis. 270; Ætna Ins. Co. *v.* Johnson, 11 Bush, 587; Stovell *v.* State, 3 Law & Eq. Rep. 490; Kincade *v.* Bradshaw, 3 Hawks, 63; Schell *v.* Toomer, 56 Ga. 168; Rothschild *v.* Ins. Co. 62 Mo. 356; Wightman *v.* Ins. Co. 8 Robt. (La.) 442; Hoffman, *v.* Ins. Co. 1 La An. 216; Sparks *v.* Dawson, 47 Tex. 138; March *v.* Walker, 48 Tex. 372; Smith *v.* Smith, 5 Oregon, 186; Burr *v.* Wilson, 22 Minn. 206. See May on Insurance, § 583. See, *contra*, Clark *v.* Dibble, 16 Wend. 604; Woodbeck *v.* Keller, 6 Cow. 118; Coulter *v.* Stewart, 2 Yerger, 225; Lanter *v.* McEwen, 8 Blackf. 495; Tucker *v.* Call, 45 Ind. 31; Bradley *v.* Kennedy, 2 Greene (Iowa), 231; Forshee *v.* Abrams, 2 Iowa, 571; Ellis *v.* Lindley, 38 Iowa, 461; Barton *v.* Thompson, 46 Iowa, 31; Polston *v.* See, 54 Mo. 291 (though see Rothschild *v.* Ins. Co. 62 Mo. 356). And see, also, Chalmers *v.* Shackell, 6 C. & P. 475; Thurtell *v.* Beaumont, 1 Bing. 339; Willmet *v.* Harmer, 8 C. & P. 695; Neeley *v.* Lock, 8 C. & P. 532; Lavender *v.* Hudgers, 32 Ark. 763; and a judicious criticism in 10 Am. Law Rev. 642.

In Kane *v.* Ins. Co. 38 N. J. L. 441, it was held that where the defence to an action on an insurance policy is burning by design, the defendant is bound to establish the defence beyond

Love of life presumed.

§ 1247. Love of life may be assumed when necessary to determine the burden of proof. Thus in a case decided by the Supreme Court of Pennsylvania in 1876, it was held that when the evidence is in equilibrium, on an issue of suicide, it will be inferred that suicide is not established. "The desire of self-preservation," it was said by Mercur, J., giving the opinion of the court, "is firmly imbedded in human nature;" and the ruling of the court below, that the burden was on the party setting up suicide, was affirmed.[1] To sustain suicide, intention must be proved.[2] But the mere fact of suicide will not support the hypothesis of insanity, though it is otherwise when other facts are adduced, of which, taking them in the aggregate, insanity is the most probable explanation.[3]

Good faith presumed.

§ 1248. Good faith in a contracting party has been frequently declared to be a rebuttable presumption of law.[4] So far, however, as concerns the direct application of the

reasonable doubt. Woodhull, J., in an elaborate and able opinion, to which reference may be made as exhibiting the view opposed to that in the text, cites, as authorities for this conclusion, Thurtell *v.* Beaumont, 1 Bing. 339; Butman *v.* Hobbs, 35 Me. 227; Shultz *v.* Ins. Co. 2 Ins. L. J. 495. This ruling, however, was reversed in 10 Vroom, 696.

The conclusions given in the text, on the other hand, are vindicated by Barrows, J., in a case decided in Maine, in 1875, where it was held that in an action of slander for charging one with adultery, a preponderance of testimony will support a plea of justification. Ellis *v.* Buzzell, 60 Me. 209. See, also, note (*a*) to Willmet *v.* Harmer, 8 Car. & P. 695, in E. C. L. R. vol. 34, p. 590, and cases there cited.

In Knowles *v.* Scribner, 57 Me. 497, it was held, that the complainant in a bastardy process against a married man is not bound to furnish the same amount of proof of the defendant's guilt as would be necessary to convict him if he were on trial for adultery, in order to entitle herself to a verdict and contribution from the father of her bastard child. And see Russell *v.* Baptist Sem. 73 Ill. 337.

[1] Continental Insurance Co. *v.* Delpeuch, 82 Penn. St. 225; Guardian, &c. Life Ins. Co. *v.* Hogan, 80 Ill. 35; Way *v.* R. R. 40 Iowa, 341. See Terry *v.* Ins. Co., cited infra, § 1252, note; Morrison *v.* R. R. 63 N. Y. 643.

[2] Shank *v.* Aid Soc. 84 Penn. St. 385.

[3] Terry *v.* Ins. Co. 15 Wall. 580; Coverston *v.* Ins. Co. 4 Big. Ins. Rep. 169; McClure *v.* Ins. Co. Ibid. 320; Brooks *v.* Barrett, 7 Pick. 94; Wolff *v.* Ins. Co. 8 Ins. L. J. 97. See Sadler *v.* Sadler, 3 C. B. (N. S.) 87; infra, § 1252.

[4] See Best's Evidence, §§ 346–7; Greenwood *v.* Lowe, 7 La. An. 197; Mandall *v.* Mandall, 28 La. An. 556; Richards *v.* Kountze, 4 Neb. 200; Bumpus *v.* Fisher, 21 Tex. 561. Supra, §§ 358, 366.

maxim to civil issues, we must regard it, in the same way as we regard the presumption of innocence, as an assumption of the law made for the determination of the burden of proof, and not for the adjudication of the merits. A person who is sued is charged with bad faith, and the burden is on the plaintiff to prove the charge; or the defendant sets up bad faith in the plaintiff, and the burden is on the defendant to make this defence good.[1] But when the actor, in either relation, establishes a *primâ facie* case, and this is met by evidence sustaining good faith on the other side, then the case must be decided on the merits.[2] It should be remembered, at the same time, that when an act which is *primâ facie* illegal is shown, then the burden as to good faith is shifted. Thus, when an agent, by the character of his office, is precluded from buying from or selling to his principal unless the latter is fully advised of the agent's relation to the transaction and is capable of forming an intelligent and responsible judgment, then, when a sale to or a purchase from the principal is traced to the agent, the burden is on the agent to prove good faith.[3]

§ 1249. Yet in one conspicuous relation the doctrine that the

[1] Greenwood *v.* Lowe, 7 La. An. 197. See supra, § 366.

[2] See fully supra, § 366; Marksbury *v.* Taylor, 10 Bush, 519; Young *v.* Edwards, 72 Penn. St. 267; Vanbibber *v.* Beirne, 6 W. Va. 168. As to evidence of character in such cases, see supra, §§ 47 *et seq.*

[3] See supra, § 366, for cases. In Hunter *v.* Atkyns, 3 M. & K. 135; cf. Gibson *v.* Jeyes, 6 Ves. 277, Lord Brougham said: "There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation." In the case of Rhodes *v.* Bate, L. R. 1 Ch. App. 258, Lord Justice Turner expressed an opinion that in cases of trifling benefits the court would not interfere to set them aside upon the mere proof of influence derived from a confidential relationship, but would require proof of *mala fides*, or of undue or unfair exercise of the influence. Powell's Evidence, 4th ed. 75.

law will not impute bad faith has a practical weight in determining the issue. When an instrument is susceptible of two conflicting probable constructions, the court will adopt that construction which is most consistent with good faith, and will hold that such construction was intended by the parties.[1] And this rule of construction

Ambiguous instrument to be construed in a sense consistent with good faith.

[1] Atkyns *v.* Horde, 1 Burr. 106; Lewis *v.* Davison, 4 M. & W. 654; Richards *v.* Bluck, 6 C. B. 441; Ireland *v.* Livingston, L. R. 5 Eng. Ap. 395; Marsh *v.* Whitmore, 21 Wall. 178; Tucker *v.* Meeks, 2 Sweeny, 736; Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Foster *v.* Rockwell, 104 Mass. 167; St. Louis Gas Co. *v.* St. Louis, 46 Mo. 121; Goosey *v.* Goosey, 48 Miss. 210; Greenwood *v.* Lowe, 7 La. An. 197; Bessent *v.* Harris, 63 N. C. 542; Long *v.* Pool, 68 N. C. 479; Wbart. on Agency, § 248.

"It is a branch of this rule, that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning. Co. Litt. 42 *a* & *b*; Finch, Law, 57; Lewis *v.* Davison, 4 M. & W. 654. Thus, where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. 'In facto quod se habet ad bonum et malum, magis de bono, quàm de malo, lex intendit.' Co. Litt. 78 *b*." Best's Ev. § 347.

The rule in the text was applied by the House of Lords, in April, 1879, to determine a litigation remarkable for the immensity of the interests involved. (Muir *v.* Glasgow Bank, London Times, Ap. 11, 1879; London Law Times, Ap. 12, 19, 1879.) The facts, as stated in the Times, were these: Two ladies, Mrs. Syme and Mrs. Boyd, conveyed to Mr. Muir and other trustees £6,000 in stock of the City of Glasgow Bank. Under the directions of the company, a deed of transfer of the shares to the trustees was prepared in 1874, and the trustees accepted the shares as "trust-disponees," "in terms of the contract of copartnership of the bank, subject to all the articles and regulations of the company in the same manner as if they had subscribed the said contract." They were entered in the stock ledger of the bank as "trust-disponees" of the two ladies, and the same description of them was to be found in the stock certificate, the indorsement upon it, and the dividend warrants. In no published list of shareholders did their names appear, and in the returns to the Board of Inland Revenue and the Registrar of Joint Stock Companies the stock was entered under the surname of Syme, and was said to be held by the trust-disponees of Mrs. Syme and Mrs. Boyd. The principal, if not the sole, question in the case, was as to the exact nature of the contract which had been thus entered into by the trustees. No one has denied that it is perfectly possible, under English or Scotch law, for a trustee or an executor so to make an agreement that he may shield himself against personal liability. It is, as Lord Cairns explained, all a matter of the use of apt, decisive words. Relying on the authority of Lord Kingsdown, and, indeed, of several other judges, English and Scotch, the appellants endeavored to show that there was a very

applies to cases where an act or fact is fairly susceptible of two interpretations, one lawful and the other unlawful.[1] So, when it is doubtful which of two deeds of the same date was first executed, priority will be imputed to the instrument which,

great difference in this respect between the laws of England and Scotland. They went so far as to contend that in Scotland every body of trustees constitutes a kind of informal corporation with limited liability, and that they were *primâ facie* answerable only to the amount of their trust funds. No doubt the genius of the Scotch law has been to encourage open and avowed trusts, and to discourage secret trusts. But Lord Cairns thought that there was no substantial difference between the two systems of law; the utmost that could be said was that there were differences in the application of common principles, owing to differences in machinery. And as to the point immediately before us he said: "The first question, whether in Scotland or in England, must be, 'What is the contract which the parties have entered into?' and that must be accompanied by another question, 'What is the contract which the parties were competent to enter into?' *For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed.* Now, it is to be observed that the directors of the bank were a body with limited and clearly defined powers and acting in the execution of delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors and the character of the contract which they were empowered to enter into. With regard to the directors also, it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership; if they placed the stock and capital of the bank in the power of persons brought upon the register upon terms less favorable to the other shareholders than the deed authorized, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability." With the application of this presumption the question of hardship has nothing to do. "It is difficult," so Lord Cairns concludes, "to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the City of Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves and probably without any trust estate behind sufficient to indemnify them, have become subject to loss or ruin by entering for the advantage of others into a partnership attended with risks of which they probably were forgetful, or which they did not fully realize. The duty of your lordships is, however, to declare the law, and of the law applicable to this case your lordships can, I think, entertain no doubt."

[1] Kenton County Court *v.* Bank Lick Co. 10 Bush, 529.

by having precedence, will best support the intention of the parties.[1]

Contract presumed to have been made in view of a law under which it is valid.

§ 1250. Suppose a contract is good by the *lex solutionis*, and bad by the *lex loci contractus*, or the converse; which law is to apply? This question may be illustrated by cases in which a contract by the one law is void for usury, and by the other law is valid; and by cases in which an obligor is *capax negotii* by the one law, but is a minor by the other law. It has been argued that, in such cases, the courts must arbitrarily apply the law to which the obligation, on abstract principles is subject.[2] It has been answered, however, and with good reason, that parties who enter into a contract are to be presumed to do so *bonâ fide*, intending the contract to be performed; and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative.[3] And, on the same principle, it has been held that where a party undertakes to perform a contract in a particular place, he will be presumed to intend that the contract should be construed according to the usages and laws of such place.[4]

Genuineness as presumption of truth.

§ 1251. It has been sometimes said that when a document is shown to be genuine, the law presumes that it is true. But genuineness and truthfulness are so far from being convertible, that documents prepared to effect any political, social, or ecclesiastical end, are from their nature *ex parte*, and are to be received only subject to such qualifications as may be supplied by a knowledge of the character and aims of their authors. It is true that if we could conceive an

[1] Taylor *v.* Horde, 1 Burr. 107.

[2] See Story's Confl. of Laws, § 76.

[3] Whart. Confl. of L. §§ 112, 115, 429, 501; Hellman, in re, L. R. 2 Eq. 363; Cutler *v.* Wright, 22 N. Y. 472; Kilgore *v.* Dempsey, 25 Ohio St. 413; Kenyon *v.* Smith, 24 Ind. 11; Smith *v.* Whitaker, 23 Ill. 367; Arnold *v.* Potter, 22 Iowa, 194; Talcott *v.* Despatch Co. 41 Iowa, 249; Baldwin *v.* Gray, 16 Mart. 192; Saul *v.* His Creditors, 17 Mart. 596; Depau *v.* Humphreys, 20 Mart. 1; Brown *v.* Freeland, 34 Miss. 181. See supra, § 314.

[4] Bayliffe *v.* Butterworth, 1 Ex. R. 429; Pollock *v.* Stables, 12 Q. B. 705; Buckle *v.* Knoop, 36 L. J. Ex. 223; Greaves *v.* Legg, 2 H. & N. 210.

ideal genuine document, without any distinctive *differentia* of its own, we might speak of an ideal presumption of law that such a document is true. But there is no ideal genuine document; as soon as genuineness is established, it brings with it a series of incidents peculiar to itself, by which the inference of veracity is moulded. The English and French proclamations, for instance, during the Napoleonic wars, are genuine documents; yet, as to the truth of these, the only inference that is admissible is that no conclusion can be reached without taking into account the bias and purposes of the parties speaking, and the accuracy of their information. In all cases, where documents are produced to affect third parties, we must consider, also, in determining veracity, the degree of recognition the document has received, and the depository from which it is taken.[1] The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or spuriousness affords inferences of truth or falsehood. But this conclusion is a *praesumtio hominis*, or logical conclusion, as distinguished from a *praesumtio legis*, or arbitrary legal conclusion.[2]

Sanity generally presumed.

§ 1252. All persons who have reached years of discretion are regarded *primâ facie*, by a rebuttable presumption of law (*praesumtio juris*), to be sane.[3] Hence the burden of proof, when the issue is on a contract, is on the party disputing sanity.[4] In respect to testamentary capacity, it has

[1] See supra, §§ 194–5.

[2] See Quinct. V. 5; L. 4, D. xxii. 4; L. 26, § 2, D. xvi. 3; Endemann, 258. As to distinction between genuineness and veracity, see Paley's Evidences, Introd. Chap.

[3] Harris *v.* Ingledees, 3 P. Wms. 91; Dyce Sombre *v.* Troup, 1 Deane Ec. R. 38; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Jackson *v.* Van Dusen, 5 Johns. R. 158; Jackson *v.* King, 4 Cow. 207; Bogardus *v.* Clark, 4 Paige, 623; Trumbull *v.* Gibbons, 2 Zab. 117; Turner *v.* Cheesman, 15 N. J. Ch. 243; Rees *v.* Stille, 38 Penn. St. 138; Egbert *v.* Egbert, 78 Penn. St. 326; Werstler *v.* Custer, 46 Penn. St. 502; Thompson *v.* Kyner, 65 Penn. St. 368; Anderson *v.* Cranmer, 11 W. Va. 502; Jarrett *v.* Jarrett, 11 W. Va. 584; Runyan *v.* Price, 15 Ohio St. 1; Lilly *v.* Waggoner, 27 Ill. 395; Porter *v.* Campbell, 58 Tenn. 81; Saxon *v.* Whitaker, 30 Ala. 237; Cotton *v.* Ulmer, 45 Ala. 378; Farrell *v.* Brennan, 32 Mo. 328; State *v.* Smith, 53 Mo. 267. For criminal cases see Whart. Cr. L. tit. "Insanity."

[4] See cases last cited, and see supra, § 356, note; Sutton *v.* Sadler, 3 C. B. (N. S.) 87; Dyce Sombre *v.* Troup, 1 Deane Ec. R. 38, 49; Phelps *v.* Hartwell, 1 Mass. 71; Howe *v.* Howe, 99 Mass. 88; Burton *v.* Scott,

been held that the burden of proving capacity is on the party setting up the will;[1] though this burden is removed by incidental and implied proof of capacity at time of signing.[2] The distinction between the two classes of cases may be perhaps found in the circumstance, that contracts are the usual incidents of business, and, according to our ordinary notions, imply business capacity; while a will is an exceptional act, often executed in periods of extreme debility and exhaustion, and therefore does not necessarily assume business capacity. In several jurisdictions, also, the decisions rest on the statutory requisition that a testator should be of sound mind. It should be added that on a feigned issue from chancery, based on a *primâ facie* case of insanity, the burden is on the actor in the suit.[3]

Insanity presumed to continue.

§ 1253. It has frequently been said to be a presumption of law that chronic insanity is continuous;[4] but that such presumption does not exist as to fitful and exceptional attacks.[5] This, however, is a mere *petitio principii;* it being tantamount to saying that chronic insanity is chronic, and transient insanity is transient. The presumption as to the continuance of insanity, such is the more correct statement, is

3 Rand. Va. 399; Myatt *v.* Walker, 44 Ill. 485. In Terry *v.* Ins. Co. 1 Dillon, 403; aff. 15 Wall. 580, it was held that as to whether suicide was the product of insanity, there is no presumption on either side; and in Sadler *v.* Sadler, 3 C. B. (N. S.) 87, it was held that the presumption is one of fact, not to operate when evidence conflicts. See other cases supra, § 1247. For burden of proof see supra, § 356.

[1] Crowninshield *v.* Crowninshield, 2 Gray, 524; Comstock *v.* Hadlyme, 8 Conn. 261; Delafield *v.* Parish, 25 N. Y. 10; Ean *v.* Snyder, 46 Barb. 230; Taff *v.* Hosmer, 14 Mich. 309.

[2] Davis *v.* Rogers, 1 Houst. 44.

[3] Frank *v.* Frank, 2 M. & Rob. 314, quoted supra, § 356, note.

[4] R. *v.* Layton, 4 Cox C. C. 149; R. *v.* Stokes, 3 C. & K. 188; Cartwright *v.* Cartwright, 1 Phillimore, 100; Atty. Gen. *v.* Parnther, 3 Bro. C. C. 441; White *v.* Wilson, 13 Ves. 88; Prinsep *v.* Dyce Sombre, 10 Moo. P. C. 232; Nichols *v.* Binns, 1 Sw. & Tr. 243; Smith *v.* Tebbitt, L. R. 1 P. & D. 398; Hoge *v.* Fisher, 1 Pet. C. C. R. 163; Breed *v.* Pratt, 18 Pick. 115; Hix *v.* Whittemore, 4 Met. 545; Sprague *v.* Duel, 1 Clarke N. Y. 90; Titlow *v.* Titlow, 54 Penn. St. 216; State *v.* Spencer, 1 Zab. 196; Carpenter *v.* Carpenter, 3 Bush, 283; Ballew *v.* Clark, 2 Ired. L. 23; State *v.* Brinyea, 5 Ala. 244; Saxon *v.* Whittaker, 30 Ala. 237; Ripley *v.* Babcock, 13 Wis. 425; State *v.* Reddick, 7 Kans. 143.

[5] Hall *v.* Warren, 9 Ves. 605; White *v.* Wilson, 13 Ves. 87; Lewis *v.* Baird, 3 McLean, 56; Hix *v.* Whittemore, 4 Met. 545; State *v.* Reddick, 7 Kans. 143; People *v.* Francis, 38 Cal. 183.

one of fact, varying with the particular case.[1] In insanity of a permanent type, however, the inference is that of continuance.[2]

§ 1254. An inquisition of lunacy is, as to strangers, at the most only *primâ facie* proof of business incompetency,[3] though it may conclude parties.[4] Hearsay in the neighborhood is inadmissible to prove insanity.[5] The issue of insanity is to be determined by the facts proved in the particular case;[6] though, in arriving at a conclusion, the opinions of persons who have observed the alleged lunatic, whether such persons be experts or non-experts, are to be considered.[7] Letters addressed to the alleged lunatic are inadmissible unless acted on by him.[8]

Insanity may be inferred from circumstances.

§ 1255. It will be inferred that a person of ordinary intelligence, on being advised of danger, will take ordinary care for self-preservation. Thus it has been held in Pennsylvania,[9] that in the absence of evidence to the

Prudence in avoiding danger will be presumed.

[1] Thornton *v.* Appleton, 29 Me. 298; Sadler *v.* Sadler, 3 C. B. (N. S.) 87; Smith *v.* Tebbitt, L. R. 1 P. & D. 434; Anderson *v.* Gill, 3 Macqueen, S. C. Cas. 197.

[2] State *v.* Wilner, 40 Wis. 304.

[3] Faulder *v.* Silk, 3 Camp. 126, per Ld. Ellenborough; Dane *v.* Kirkwall, 8 C. & P. 683, per Patteson, J.; Frank *v.* Frank, 2 M. & Rob. 315, 316, n.; Sargeson *v.* Sealy, 2 Atk. 412; Bannatyne *v.* Bannatyne, 2 Roberts. 475–477; Hume *v.* Burton, 1 Ridg. P. C. 204. See Prinsep & E. India Co. *v.* Dyce Sombre, 16 Moo. P. C. 232, 239, 244–247; Hamilton *v.* Hamilton, 10 R. I. 538; Hart *v.* Deamer, 6 Wend. 497; Hoyt *v.* Adee, 3 Lansing, 173; Hicks *v.* Marshall, 8 Hun, 327; Hutchinson *v.* Sandt, 4 Rawle, 234; Gangwere's Est. 14 Penn. St. 417; McGinnis *v.* Com. 74 Penn. St. 245; Lancaster Bank *v.* Moore, 78 Penn. St. 407. Such an inquisition is admissible for the defendant in a criminal issue. R. *v.* Bowler, 3 Stark. Ev. 1704*; Wheeler *v.* State, 34 Ohio St. . *Aliter*, it is said, when the question is the validity of a deed. Leggate *v.* Clark, 111 Mass. 308.

[4] Supra, § 812.

[5] Wright *v.* Tatham, 1 Ad. & El. 313; 7 Ad. & El. 313; 4 Bing. N. C. 489; Lancaster Bank *v.* Moore, 78 Penn. St. 407; overruling Rogers *v.* Walker, 6 Barr, 371; Supra, § 812; Ashcraft *v.* De Armond, 44 Iowa, 229.

In criminal issues, evidence of the defendant's subsequent acts or conduct is not admissible to prove insanity at the time of the offence, except when so connected with evidence of a previous state of mental disorder as to strengthen the inference of its continuance at the time of the murder, or when they indicate permanent unsoundness. Commonwealth *v.* Pomeroy, 117 Mass. 143.

[6] See Mill's Appeal, 44 Conn. 484; Ashcraft *v.* De Armond, 44 Iowa, 229; Ross *v.* McQuiston, 45 Iowa, 185.

[7] Supra, §§ 451 *et seq.*

[8] Wright *v.* Tatham, cited § 175.

[9] Pennsylvania Railroad Co. *v.* Weber, 76 Penn. St. 157.

contrary, a person who has been killed by a train, at a railway crossing, will be so far presumed to have observed the requisite precautions, that the burden of proof is on the railway company to show the contrary.[1] It is scarcely necessary to add that presumptions of this class are presumptions of fact, varying in intensity with the capacity of the subject. To an infant, but a slight degree of prudence is imputed; the degree imputed increases with years and opportunities.[2]

Supremacy of husband presumed.

§ 1256. Where, in the commission of a crime (excepting, it is said, treason and murder), the husband and wife are present, and coöperating in the criminal act, it is a presumption of law, capable of being rebutted by proof, that the wife is acting under coercion.[3] In civil actions for torts the same *primâ facie* presumption exists in the wife's favor; though this may be rebutted by proof that she instigated the tort, or by other circumstances showing her independent and free concurrence.[4] Such presumption does not apply to acts

[1] Though see, *contra*, Wilcox *v.* Rome, &c. Railroad Co. 39 N. Y. 358. In Weiss *v.* R. R. 2 Weekly Notes, 214; *S. C.* 79 Penn. St. 387, the court said: "When the plaintiffs below closed their evidence, they had a perfect *primâ facie* case to go to the jury. They had given evidence of the negligence of the defendants, and no contributory negligence of the deceased appeared. The presumption of law (?) was that he had done all that a prudent man would do under the circumstances to preserve his own life, and that he had stopped, and looked, and listened." See Whitford *v.* Southbridge, 119 Mass. 564.

[2] See Whart. Neg. §§ 310, 315, 322. In Nagle *v.* R. R. 6 Weekly Notes, 510, it was held that *after* fourteen years an infant is chargeable with contributory negligence as a matter of law but not so *before* fourteen. "At fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years." Paxson, J. But there is no reason why we should in this case depart from the rule which refuses to add to the number of presumptions of law. Whether an infant is to be defeated in a suit on the ground of contributory negligence, depends upon two questions, both of fact. The first is, did he recklessly, judging him according to his lights, run into the danger. If he did not, then comes the question whether the defendant, with due prudence, could have avoided doing the harm. The defendant would have a right to infer that a person, apparently capable of self-preservation, would avoid the collision. But this is a presumption, not of law, but of fact.

[3] See 1 Hale, 46, 47; R. *v.* Manning, 2 C. & K. 887, and cases cited in Whart. Cr. Law, tit. "Husband," &c.

[4] Marshall *v.* Oakes, 51 Me. 308.

done in the husband's absence.[1] So, in their marital relations, the supremacy of the husband will be presumed. Thus a deed of gift to a married woman will be *primâ facie* presumed to be in her husband's custody.[2]

Wife in housekeeping inferred to be her husband's agent.

§ 1257. Where a wife has charge of her husband's household, domestic articles, bought by her for the family, are inferred to have been ordered by his authority,[3] if she is not herself of independent means, regarded by the local law as *capax negotii*.[4] Where there is ground to infer agency, this agency makes the husband liable; otherwise not.[5] If she leaves his house voluntarily and causelessly this presumption ceases.[6] If without cause she has been expelled from his house, she is by law presumed to have authority to bind him for necessaries.[7]

Probable consequences intended.

§ 1258. That a man intends the probable consequences of what he does is sometimes styled a presumption of law. This, however, is an error, if by presumption of law is meant a presumption to be imposed by the courts as universally applicable. It is not universally true that a man intends the probable consequences of his act. A manufacturer of pistols, for instance, knows that it is probable that some of the pistols he makes may be used to kill; but the killing that results he does not in the eye of the law intend. Probable consequences may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent. We are unable, therefore, to say of all the probable consequences of acts

[1] Com. *v.* Butler, 1 Allen, 4.

[2] McLain *v.* Smith, 17 Mo. 49. In Russell *v.* Baptist Sem. 73 Ill. 337, the presumption of supremacy was pushed to an extreme.

[3] Lane *v.* Ironmonger, 13 M. & W. 368; Freestone *v.* Butcher, 9 C. & P. 647; Morgan *v.* Chetwynd, 4 Fost. & F. 451; Philipson *v.* Hayter, L. R. 6 C. P. 38; Pickering *v.* Pickering, 6 N. H. 124; Felker *v.* Emerson, 16 Vt. 653; Stall *v.* Meek, 70 Penn. St. 181. Supra, § 1217. And see Roscoe's Nisi Prius Ev. 13th ed. pp. 534–5.

[4] That there is no presumption, where the husband and wife live together on the wife's real estate, that the husband is liable for the expenses of housekeeping and the wife is not, see Lovell *v.* Williams, 125 Mass. 439, and compare Jolly *v.* Rees, 15 C. B. (N. S.) 628.

[5] Lane *v.* Ironmonger, *ut supra*; Montague *v.* Benedict, 3 B. & C. 631; Reid *v.* Teakle, 13 C. B. 627; Philipson *v.* Hayter, L. R. 6 C. P. 38.

[6] Johnston *v.* Sumner, 3 H. & N. 261; Biffin *v.* Bignell, 7 H. & N. 877.

[7] Bazeley *v.* Forder, L. R. 3 Q. B. 562; Wilson *v.* Ford, L. R. 3 Exc. 63.

that they were intended by the authors of such acts. The most we can say is, that most of such probable consequences were intended; and that judging from analogy, or imperfect induction,[1] such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences being presumedly intended.[2] In all departments of jurisprudence this line of reasoning is applied. The owners of a vessel, for instance, that attempts to run a blockade, are inferred to be privy to the intent of their agents; though they may be relieved by showing that at the time of the shipment they did not know that the blockade existed.[3] He who publishes a libel is presumed to do so intentionally, though the presumption may be rebutted by proof of coercion or fraud on part of the plaintiff.[4] We *infer*, under such circumstances, intent; but we infer it (even when a party is examined as to his motives) [5] from the facts of the particular case. The process is induction from facts, not deduction from arbitrary law.[6]

A business transaction is supposed to have its ordinary object.

§ 1259. Akin to the last presumptions is that of adequate purpose imputed *primâ facie* to business men in business operations. Business transactions, when proved, are assumed to have been performed with the ordinary object of such transactions. Thus when an old lease expires, and rent is afterwards received, the landlord is presumed to continue the tenancy from year to year;[7] though this presumption may be rebutted by proving that the payment was made under circumstances inconsistent with it; as, for example, under the impression that the old lease was still subsisting.[8] In actions

[1] See supra, §§ 6–12, 482, 954.

[2] The Atalanta, 6 Rob. Adm. 440; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Pontifex *v.* Bignold, 3 M. & Gr. 63; Craven, ex parte, L. R. 10 Eq. 648; Cheeseborough, in re, L. R. 12 Eq. 358; Wood, in re, L. R. 7 Ch. 302; Knapp *v.* White, 23 Conn. 529; Quinebaug Bk *v.* Brewster, 30 Conn. 559; Jones *v.* Ricketts, 7 Md. 108; Hart *v.* Roper, 6 Ired. Eq. 349; Butler *v.* Livingston, 15 Ga. 565; Gauldin *v.* Shehee, 20 Ga. 531; Mears *v.* Graham, 8 Blackf. 144.

[3] Baltazzi *v.* Ryder, 12 Moo. P. C. 168.

[4] See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[5] Supra, §§ 482, 954.

[6] Infra, § 1261.

[7] Bishop *v.* Howard, 2 B. & C. 100; Doe *v.* Taniere, 12 Q. B. 998; Eccles. Commiss. *v.* Merral, Law Rep. 4 Ex. 162. In these last two cases the lessors were a corporation.

[8] Doe *v.* Crago, 6 Com. B. 90. See Trent *v.* Hunt, 9 Ex. R. 24, per Alderson, B.

of trover, also, the jury will be advised to presume a conversion from unexplained evidence of a demand and refusal.[1] And where a complex business deception is proved, an intention to defraud will be inferred.[2]

Passing a new statute presumes an alteration of prior law.

§ 1260. The same inference applies to corporate and legislative action. Thus when a statute is passed (whether such statute be a constitutional amendment, an act of legislature, federal or state, a municipal by-law, a rule of court, or an ecclesiastical order), such statute presumes a change of the prior law. But this is a mere presumption of fact, to be measured as to its force by the concrete case,[3] In some cases, *e. g.* where a code is adopted in place of the common law, or in consolidation of prior statutes, the presumption vanishes.[4] Nor will it be presumed that a legislature intended a construction in conflict with reason,[5] or public duty.[6]

Malice a presumption of fact.

§ 1261. The presumption of malice is subject to the same considerations as that of intent. That such presumption is a presumption of fact in criminal issues has been shown at length in another work.[7] We are told that it is a presumption of law that intentional hurt done to another is malicious.[8] Now this is either a vicious circle, averring that something is malicious because it is malicious, or the argument rests on the major premise, that all hurts are malicious, which is untrue in fact. The only legitimate presumption we can draw in such cases is a presumption of fact, viz., that it is probable, from the circumstances of the case, that malice existed.

The fallacy of turning an inference of fact, in respect to intent,

[1] Caunce *v.* Spanton, 7 M. & Gr. 903; Stancliffe *v.* Hardwick, 2 C., M. & R. 1, 12; Thompson *v.* Trail, 2 C. & P. 334; 6 B. & C. 36; 9 D. & R. 31, *S. C.;* Thompson *v.* Small, 1 Com. B. 328; Davies *v.* Nicholas, 7 C. & P. 339; Clendon *v.* Dinneford, 5 C. & P. 13; 3 Stark. Ev. 1160, 1161; Taylor's Ev. § 144. See Towne *v.* Lewis, 7 Com. B. 608.

[2] Doeblin *v.* Duncan, N. Y. Ct. of App. Nov. 1876; Beam *v.* Macomber, 33 Mich. 127. Supra, §§ 366, 1248.

[3] See Sedgwick Stat. Law, 228, n.; Potter's Dwarris on Stat. 156; Cooley's Const. Lim. 168, 172–7. Supra, § 980 *a*.

[4] Nunnally *v.* White, 3 Metc. (Ky.) 584.

[5] Farnum *v.* Blackstone, 1 Sumn. 46; Wickham *v.* Page, 49 Mo. 526; Neenan *v.* Smith, 50 Mo. 525. Supra, § 980 *a;* infra, § 1309.

[6] Bennett *v.* McWhorter, 2 W. Va. 441.

[7] Whart. Cr. Law, tit. "Evidence."

[8] See State *v.* Hessenkamp, 17 Iowa, 25.

into a presumption of law, may be thus illustrated: "All men who kill, do so maliciously. A. has killed B. Therefore he has done so maliciously." This is the argument as to intent put syllogistically. But this may be indefinitely varied; and of these variations we may take the following, some of which have been sanctioned by the courts: "Men who fly when accused are guilty. A. flies when accused. Therefore," &c. Or, "Accused parties who fabricate evidence are guilty of the offence they thus attempt to cover. A. has done this: Therefore," &c. Or, "He who has a motive to commit a crime commits it. A. had a motive to commit a particular crime: Therefore A.," &c. Or, "He who was in the neighborhood at the time of the crime, committed it. A. was in such neighborhood: Therefore A.," &c.[1] Now, no one doubts that it is admissible, as part of a series of facts from which guilt may be inferred, to prove that the defendant had a motive to commit the crime, and that he was in the neighborhood at the time the crime was committed; nor can it be disputed that the inference of guilt in the latter case is the same in kind as the inference of guilty intent from the mere fact of firing a shot. We must therefore either treat all presumptions of fact as presumptions of law; or we must remand the presumptions of malice and of intent to their proper place among presumptions of fact.[2] Our office, in other words, in all questions of motive and purpose, is, as has been said, not deduction, but induction. Our reasoning is not, "All acts of class A. have a specific intent, and this act, being of class A., consequently has such intent;" but it is, "The circumstances of the case before us make it probable that the act was done intentionally." The process is one of inference from fact, not of predetermination by law.[3]

Question one of logical inference.

§ 1262. The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus we are told by an authoritative writer, that "The *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of 'Not guilty' to an

Same rule exists in civil as in criminal issues.

[1] See supra, §§ 851, 1231, as to the scholastic origin of the fallacy now discussed.

[2] See supra, § 1237.

[3] Supra, §§ 1–15. See Mill's Logic, chap. xxiii. For a fuller exposition of the above argument the reader is referred to the article already noticed in the Forum for 1875.

action for libel, a conclusive presumption of malice."[1] Now, here again is either a mere *petitio principii*, being equivalent to saying, "A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly," or we have exhibited to us, not a "conclusive" but a probable presumption of malice. Undoubtedly the fact that a document, attacking the character of another, is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice; for, when the publication is privileged, then, in order to show malice, facts inconsistent with *bona fides* must be proved.[2] Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another for the purpose of obtaining the latter's goods.[3] Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii;* or it rests on a false premise, namely, that a man who, by means of an untruth, obtains another's goods intends to cheat, in teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved.[4] In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

§ 1263. Negligence, it has been said, is a presumption which judges will direct jurors to make "from the mere happening of

[1] Taylor's Evidence, § 71; citing Haire *v.* Wilson, 9 B. & C. 643; R. *v.* Shipley, 4 Doug. 73, 177; Fisher *v.* Clement, 10 B. & C. 475; Baylis *v.* Lawrence, 10 A. & E. 925.

[2] Bromage *v.* Prosser, 4 B. & C. 247; Spill *v.* Maule, L. R. 4 Ex. 232; Whitefield *v.* R. R. 1 E., B. & E. 115; Taylor *v.* Hawkins, 16 Q. B. 308; Cooke *v.* Wildes, 5 E. & B. 328; Toogood *v.* Spyring, 1 C., M. & R. 181, 193; 4 Tyr. 582, *S. C.;* Coxhead *v.* Richards, 2 Com. B. 569; Wright *v.* Woodgate, 2 C., M. & R. 573; Tyr. & Gr. 12, *S. C.;* Gilpin *v.* Fowler, 9 Ex. R. 615; Somerville *v.* Hawkins, 10 Com. B. 583; Harris *v.* Thompson, 13 Com. B. 333; R. *v.* Wallace, 3 Ir. L. R. (N. S.) 38.

[3] Tapp *v.* Lee, 3 Bos. & Pul. 371. See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[4] See these cases enumerated in detail in Whart. Cr. Law. tit. "False Pretences."

an accident."[1] No doubt by statute this may be done, as in those states in which legislatures have provided that railroad companies shall be liable in all cases of firing. But if the question be whether negligence (*i. e.* a want of due diligence in a particular case) is to be inferred logically from facts which do not indicate negligence, the question answers itself. We have in all cases of injury in which negligence is charged, two hypotheses. The first is, that the facts do not show negligence, in which case negligence cannot be inferred. The second is, that the facts show negligence, in which case the position before us is again a mere *petitio principii*. It is equivalent to saying that negligence is to be inferred because negligence is shown.

Negligence is a presumption of fact.

§ 1264. We now proceed to another line of rulings, in which flexible logical inferences have been too often spoken of as inflexible presumptions of law. Where a written instrument is shown to have been altered, defaced, or destroyed, we may properly infer that this was done in the interest of the party to be benefited by the spoliation; and should he attempt to make use of the instrument in its corrupted state, or to offer parol evidence of its contents when it has been so destroyed, not only will he be precluded from taking advantage of his fraud, but among the several probable interpretations of the instrument, that which was most unfavorable to him will be adopted.[2] So a spoliation of papers, by a neutral vessel when captured, has been held to give a strong inference of hostile purpose.[3] Again: as will be presently more fully seen, where the finder of a lost jewel refuses to produce it, the inference is that it is a jewel of the highest probable value;[4]

Presumption against spoliation.

[1] Taylor's Ev. 7th ed. § 188, and cases cited.

[2] Haldane *v.* Harvey, 4 Burr. 2484; R. *v.* Arundel, Hob. 109; White *v.* Lincoln, 8 Ves. 363; Atty. Gen. *v.* Windsor, 24 Beav. 679; The Tillie, 7 Ben. 382; Ville du Havre, 7 Ben. 328; McDonough *v.* O'Niel, 113 Mass. 92; Merwin *v.* Ward, 15 Conn. 377; Little *v.* Marsh; 2 Ired. Eq. 18; Henderson *v.* Hoke, 1 Dev. & B. Eq. 119; Halyburton *v.* Kershaw, 3 Desau. (S. C.) 105.

As to interlineations and erasures, see supra, §§ 621 *et seq.*; Thompson *v.* Thompson, 9 Ind. 323.

[3] The Hunter, 1 Dods. Adm. 480; The Pizarro, 2 Wheat. 227.

[4] Armory *v.* Delamirie, 1 Str. 505; 1 Smith's L. C. 301; Mortimer *v.* Craddock, 7 Jurist, 45.

though this presumption will not be applied to cases where a party, responsible for goods, loses them merely negligently, or is prevented from producing them by causes in no way implying dishonesty.[1] And generally, even in respect to spoliation, the presumption is not universal and inelastic, but special, varying in force with the concrete case.

§ 1265. Yet when testimony has been shown to be mutilated, the party so mutilating, if he would make use of it, must show that the original character of the testimony was not thereby affected.[2] Thus where, shortly after the commission of an offence, the agents of the prosecution made some changes in the *indiciae* remaining on the site of the offence, it was held incumbent on the prosecution to show the character of these changes.[3] So proof of the forgery of false testimony is admissible against the party by whom the fabrication is made.[4] The same presumption of disfavor is drawn where an infant heir to an estate is kidnapped and sent abroad,[5] and against all forms of attempted suppression of or tampering with evidence.[6] Thus, if an accounting party parts with or destroys his books, the strongest inferences, consistent with the rest of the case, will be made against him.[7] But these inferences also vary with the case.

Against party mutilating or tampering with evidence.

§ 1266. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence

[1] Claunes *v.* Perrey, 1 Camp. 8.

[2] Edmund's case, 1 Whart. & St. Med. Jur. § 167; Joannes *v.* Bennett, 5 Allen, 169; Gardner *v.* People, 6 Parker C. R. 156; Blake *v.* Fash, 44 Ill. 302; Sheils *v.* West, 17 Cal. 324. See supra, §§ 622 *et seq.*; and see Price *v.* Tallman, 1 Coxe, N. J. 447.

[3] State *v.* Knapp, 45 N. H. 148.

[4] See Com. *v.* Webster, 5 Cush. 316.

The guards to be put on this species of presumption are discussed fully in Whart. Cr. Law, tit. "Evidence."

[5] Annesley *v.* Anglesea, 17 How. St. Tr. 1140.

[6] Leeds *v.* Cook, 4 Esp. 256; Gray *v.* Haig, 20 Beav. 219; Moriarty *v.* R. R. L. R. 5 Q. B. 314; Curlewis *v.* Cerfield, 1 Q. B. 814; Owen *v.* Slack, 2 Sim. & St. 606; Bell *v.* Frankis, 4 M. & Gr. 446; Sutton *v.* Davenport, 27 L. J. C. P. 54; Thayer *v.* Stearns, 1 Pick. 109; Grimes *v.* Kimball, 3 Allen, 518; People *v.* Rathbun, 21 Wend. 509; Meyer *v.* Barker, 6 Binn. 228; Reed *v.* Dickey, 1 Watts, 152; Page *v.* Stephens, 23 Mich. 357; People *v.* Marion, 29 Mich. 31; Winchell *v.* Edwards, 57 Ill. 41; Revell *v.* State, 26 Ga. 275; Blevins *v.* Pope, 7 Ala. 371; Bell *v.* Hearne, 10 La. An. 515; Lucas *v.* Brooks, 23 La. An. 117. See, however, remarks in Baker *v.* Ray, 2 Russell, 73.

[7] Gray *v.* Haig, 20 Beav. 231.

in all cases in which it could be produced.[1] Thus where the plaintiff's identity is disputed, it has been held,[2] that his persistent refusal to appear in person at the trial is a suspicious circumstance, affording an inference against him, to be weighed by the jury. "The question," said Agnew, C. J., "is not upon his right to stay away, but upon the motive which may have caused his absence. A man of ordinary intelligence must know that his failing to appear, when he had a strong motive to appear, would be evidence against him. If he relies upon his ability to disprove the motive imputed, he takes the risk, but he leaves the effect of his conduct, as a matter of evidence for the opposite side, to go to the jury, who must weigh both sides to determine the real motive." And in a case already noticed, where a liquor merchant sued for goods sold and delivered, and the only evidence was that some hampers of full bottles had been delivered to the defendant, but there was no evidence of the contents of the bottles; Lord Ellenborough told the jury to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt.[3]

So against withholding of material facts.

§ 1267. When, on the unexplained refusal of a party to produce on trial documents which have been called for, the opposite party introduces parol evidence of the contents of the papers,[4] then, if there be doubt, the probable interpretation most unfavorable to the suppressing party

So of holding back documents and witnesses.

[1] See cases cited in last section; supra, § 367, Abbott, C. J., in R. v. Burdett, 43 B. & Ald. 161; Wentworth v. Lloyd, 10 H. of L. Cases, 589; Durgin v. Danville, 47 Vt. 95; Frick v. Barbour, 64 Penn. St. 120; Fowler v. Sergeant, 1 Grant, 355; Miller v. Jones, 32 Ark. 315.

"Lord Mansfield forcibly observed, in Blatch v. Archer, that 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.' Cowper, 63, 65." Graves, C. J., Wallace v. Harris, 32 Mich. 394.

See Armory v. Delamire, 1 Str. 505; R. v. Jarvis, Dears. C. C. 552; 7 Cox C. C. 53; Atty. Gen. v. Windsor, 24 Beav. 679; Brown v. Turner, 13 C. B. (N. S.) 485; Evans v. Botterell, 3 B. & S. 787; Jenkin v. King, L. R. 7 Q. B. 468; 20 W. R. 669; Shoenberger v. Hackman, 37 Penn. St. 87; Mordecai v. Beal, 8 Porter 529.

[2] Brown v. Shock, 77 Penn. St. 471.

[3] Clunnes v. Pezze, 1 Camp. 8.

On this principle, in admitting evidence of a will proved to have been destroyed by the heir at law, the judge of the Irish court of probate said that he should be satisfied with evidence much less cogent than in the case of a lost will. Mahood v. Mahood, Ir. R. 8 Eq. 359.

[4] Supra, § 153.

will be adopted.[1] But this is a matter solely of logical inference. "The mere non-production of written evidence," says Sir. W. D. Evans,[2] "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." The non-calling of a witness, however, will not justify an arbitrary presumption of suppression.[3] And where a person refused to allow his former solicitor to give evidence of matters connected with the professional relation, it was held in the House of Lords, that there was no arbitrary adverse presumption which could be used as proof against him.[4] Such presumption is not substantive proof. The material facts of the opposing case must nevertheless be proved.[5]

Presumption from non-production is not substantive proof.

§ 1268. It follows, therefore, that the presumption arising from mere non-production cannot be used to relieve the opposing party from the burden of proving his case. But when a *primâ facie* case is proved, sufficient by itself to sustain a judgment, then a party refusing to exhibit books which would, if produced, settle the matter either one way or the other, or to give other explanations, not only prejudices his case on trial, but precludes himself from subsequently objecting that the case of the opposite party, though sufficient for judgment, did not introduce all the facts.[6]

Against party fleeing from justice.

§ 1269. Under ordinary circumstances, where there is a fair and just administration of justice, when a party accused of crime flies from trial, this affords an

[1] Cooper *v.* Gibbons, 3 Camp. 363; Crisp *v.* Anderson, 1 Stark. 35; Hanson *v.* Eustace, 2 How. (U. S.) 653; Clifton *v.* U. S. 4 How. 242; Barber *v.* Lyon, 22 Barb. 622; Cross *v.* Bell, 34 N. H. 83; Life Ins. Co. *v.* Ins. Co. 7 Wend. 31; Shortz *v.* Unangst, 3 W. & S. 45.

[2] 2 Ev. Pothier, 337, cited in text in Best's Ev. 414.

[3] Scovill *v.* Baldwin, 27 Conn. 316.

[4] Wentworth *v.* Lloyd, 10 H. of L. Cas. 589.

[5] Chaffee *v.* U. S. 18 Wall. 516. See Clifton *v.* U. S. 4 How. 242. Supra, § 1067.

[6] Roe *v.* Harvey, 4 Burr. 2484; Bate *v.* Kinsey, 1 C., M. & R. 41; Sutton *v.* Davenport, 27 L. J. C. P. 54. See supra, §§ 153 *et seq.*

inference of fact, more or less strong, according to the circumstances of the case.[1] It should be at the same time remembered that there are many conditions (*e. g.* public excitement or political prejudice, interfering with the fairness of a trial) which may make it prudent for a man, conscious of his own innocence, to consult safety by flight.[2] When such is the case, the inference cannot be logically applied.

III. PHYSICAL PRESUMPTIONS.

Infants presumed incapable of matrimony.

§ 1270. Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable.[3] The same limit is prescribed by the Roman law, and by the Council of Trent.[4]

And so of crime.

§ 1271. Children under seven are presumed irrebuttably to be incapable of crime;[5] between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli*.[6] A boy under fourteen is presumed incapable of rape, as principal in the first degree;[7] or of an assault with intent to ravish.[8]

[1] Whart. Cr. Law, tit. "Evidence;" People *v.* Rathbun, 21 Wend. 509; Revel *v.* State, 26 Ga. 275; State *v.* Williams, 54 Mo. 170.

[2] Golden *v.* State, 25 Ga. 527; State *v.* Phillips, 24 Mo. 475.

[3] Bishop Mar. & Div. § 148; 1 Black. Com. 436.

[4] Whart. Confl. of Laws, § 147.

[5] See authorities in Whart. Cr. Law, tit. "Persons capable of Crime;" and see, also, State *v.* Goin, 9 Humph. 175; Godfrey *v.* State, 31 Ala. 323; R. *v.* Owen, 4 C. & P. 236.

[6] Com. *v.* Mead, 10 Allen, 398; 1 Green Cr. R. 402; R. *v.* Smith, 1 Cox C. C. 260.

[7] R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 C. & P. 118; State *v.* Pugh, 7 Jones N. C. L. 61; 1 Green Cr. Rep. 402; Whart. Cr. Law, tit. "Rape."

In England this presumption is not affected by the Act of 24 & 25 Vict. c. 100, §§ 48, 50; R. *v.* Groombridge, 7 C. & P. 582, per Gaselee, J., and Ld. Abinger; and it applies to the offence of carnally abusing a girl under ten years of age. R. *v.* Jordan, 9 C. & P. 118, per Williams, J. But if the boy have a mischievous discretion, he may be a principal in the second degree. 1 Hale, 630. The patient may be convicted of an unnatural crime, though the agent be under fourteen. R. *v.* Allen, 1 Den. 364; 2 C. & Kir. 869, *S. C.*

[8] R. *v.* Eldershaw, 3 C. & P. 396, per Vaughan, B.; R. *v.* Phillips, 8 C. & P. 736, per Patteson, J.; R. *v.* Groombridge, 7 C. & P. 582; People *v.* Randolph, 2 Parker C. R. 213; State *v.* Sam, Winston N. C. 300. *Contra*, Com. *v.* Green, 2 Pick. 380.

§ 1272. As an infant under seven is not *capax doli*, an action for false imprisonment lies for the arrest of such an infant under charge of felony.[1] An infant of any age may, through his guardian or *prochein ami*, recover damages for a negligent injury.[2] Whether contributory negligence is imputable to an infant has been already discussed.[3] Testamentary capacity, so far as concerns personal property, is by the common law imputed to boys of fourteen years and girls of twelve, provided they have disposing memory;[4] though in many jurisdictions this capacity is further limited by statute. So far as concerns real estate, the right of absolute alienation is by common law refused to infants under twenty-one;[5] and they may avoid such conveyance when of age.[6] It has, however, been held that an infant lessee, though not liable on the contract of tenancy, is liable in a suit for use and occupation.[7] The contracts of an infant, it is scarcely necessary to add, may be ratified on his attaining majority.[8]

How far competent in civil relations.

§ 1273. In cases where it is proved either directly or inferentially that there are several persons, in the same circle of society, bearing the same name, mere identity of name, by itself, is not sufficient to establish identity of person.[9] The inference, however, rises in strength with circum-

Presumption of identity from name.

[1] Marsh *v.* Loader, 14 C. B. N. S. 535.

[2] Wharton on Neg. § 322.

[3] Supra, § 1255.

[4] 1 Will. on Ex. 14–16.

[5] See King *v.* Bellord, 1 Hem. & M. 343.

[6] Tucker *v.* Moreland, 10 Pet. 59; Bool *v.* Mix, 17 Wend. 120; Stafford *v.* Roof, 9 Cow. 626.

[7] Blake *v.* Concannon, Ir. R. 4 C. L. 323.

As to the imputability to an infant of contributory negligence see supra, § 1255; Whart. on Negligence, §§ 312, 322.

As to how far an infant can act as a trustee, or exercise a power, see King *v.* Bellord, 1 Hem. & M. 343, and authorities there cited; also In re Arnit's Trusts, 5 I. R. Eq. 352; Taylor, 590; 1 Bl. Com. 465, 466; Co. Lit. 78 *b*.

As to admissions by an infant, see supra, § 1124, note.

As to how far infant shareholders are liable to actions for calls, see Newry & Ennisk. Rail. Co. *v.* Combe, 5 Rail. Cas. 633; 3 Ex. R. 565, *S. C.;* Leeds & Thirsk Rail. Co. *v.* Fearnley, 5 Rail. Cas. 644; 4 Ex. R. 26, *S. C.;* Cork & Bandon Rail. Co. *v.* Cazenove, 10 Q. B. 935; North West. R. R. *v.* McMichael, 5 Ex. R. 114.

[8] Baylis *v.* Dineley, 3 M. & S. 477; Oliver *v.* Houdlet, 13 Mass. 237; Reed *v.* Batchelder, 1 Met. 559; Gillett *v.* Stanley, 1 Hill, 122.

[9] See cases cited supra, § 701; Jones

stances indicating the improbability of there being two persons of the same name at the same place at the same time.[1] Names, therefore, with other circumstances, are facts from which identity can be presumed.[2] Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.[3]

Death presumed after unexplained absence of seven years.

§ 1274. By the canon law, no length of absence gives a presumption of law of death; the presumption is one of fact, depending on the concrete case.[4] By the English common law, at the close of a continuous absence abroad[5] of seven years, during which time nothing is heard of the absent person, by those who would natu-

v. Jones, 9 M. & W. 75; Mooers *v.* Bunker, 29 N. H. 420; Kinney *v.* Flynn, 2 R. I. 319; Bennett *v.* Libhart, 27 Mich. 489; Ellsworth *v.* Moore, 5 Iowa, 486; Moss *v.* Anderson, 7 Mo. 337; Morrissey *v.* Ferry Co. 47 Mo. 521; Nicholas *v.* Lansdale, Litt. (Ky.) Sel. Ca. 21; McMinn *v.* Whelan, 27 Cal. 300; and see Reed *v.* Gage, 33 Mich. 179.

[1] Supra, § 701; Greenshields *v.* Henderson, 9 M. & W. 75; Sewall *v.* Evans, 4 Q. B. 626; Murietta *v.* Wolfhagen, 2 C. & K. 744; Bogue *v.* Bigelow, 29 Vt. 179; Burford *v.* McCue, 53 Penn. St. 427; Kelly *v.* Valney, 5 Penn. L. J. Rep. 300; Balbec *v.* Donaldson, 2 Grant (Penn.), 459; Cates *v.* Loftus, 3 A. K. Marsh. 292; Cooper *v.* Poston, 1 Duvall, 92; Brown *v.* Metz, 33 Ill. 339; Gitt *v.* Watson, 18 Mo. 274; State *v.* Moore, 61 Mo. 276; McMinn *v.* Whelan, 27 Cal. 300.

Even an entry in a registry of baptism may be sufficient evidence of the identity of a child. Morrissey *v.* Ferry Co. 47 Mo. 521.

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

"In the absence of circumstances to cast doubt upon the fact of identity, the identity of name is enough to raise a presumption of identity of person." Graves, C. J., Goodell *v.* Hibbard, 32 Mich. 48.

[3] Stebbing *v.* Spicer, 8 C. B. 827; Jarmaine *v.* Hooper, 6 M. & G. 827; Stebbins *v.* Spicer, 8 M., G. & S. 827; Sweeting *v.* Fowler, 1 Stark. R. 106; State *v.* Vittum, 9 N. H. 519; Kincaid *v.* Howe, 10 Mass. 205.

In State *v.* Vittum, supra, it was held that this presumption was not rebuttable. *Contra*, R. *v.* Peace, 3 B. & Ald. 579.

As to presumption from indelibility of tattoo marks, see R. *v.* Orton, Cockburn, C. J., Charge II. 760.

As to test from similarity of hair, see Ibid. 53.

[4] Wharton's Confl. of Laws, § 133.

[5] Under the term "abroad" has been included, in this country, absence from the state of the absentee's residence prior to disappearance. Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373. See Fulweiler *v.* Baugher, 15 S. & R. 45.

rally have heard of him, if alive, death is presumed, as a presumption of law rebuttable by proof or counter presumptions.[1] This view is accepted in most jurisdictions in the United States.[2] But if there is no proof of unexplained absence, the mere lapse of time, even supposing that it would make the party eighty years old, if living, is not by itself enough to prove death.[3] It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable,[4] though even when one hundred years is reached, the conclusion is not absolute.[5] With other circumstances[6] (*e. g.* non-claimer of rights, or exposure to peculiar sickness or other calamity, or advanced years), death at a far earlier period may be inferred.[7]

[1] Stephen's Ev. ch. 14, art. 99; Doe *v.* Jesson, 6 East, 85; Doe *v.* Deakin, 4 B. & A. 43; Hopewell *v.* De Pinna, 2 Camp. 113; Rust *v.* Baker, 8 Sim. 443.

[2] Davis *v.* Briggs, Sup. Ct. U. S. 1878; Moffit *v.* Varden, 5 Cranch C. C. 658; Montgomery *v.* Bevans, 1 Sawyer, 653; Stevens *v.* McNamara, 36 Me. 176; Stinchfield *v.* Emerson, 52 Me. 465; Smith *v.* Knowlton, 11 N. H. 191; Winship *v.* Conner, 42 N. H. 341; Flynn *v.* Coffee, 12 Allen, 133; Loring *v.* Steineman, 1 Met. 204; Sheldon *v.* Ferris, 45 Barb. 124; Osborn *v.* Allen, 26 N. J. L. 388; Burr *v.* Sim, 4 Whart. R. 150; Bradley *v.* Bradley, 4 Whart. R. 173; Whiteside's Appeal, 23 Penn. St. 114; Holmes *v.* Johnson, 42 Penn. St. 159; Crawford *v.* Elliott, 1 Houst. 465; Tilly *v.* Tilly, 2 Bland, 436; Whiting *v.* Nicholl, 46 Ill. 230; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Foulks *v.* Rhea, 7 Bush, 568; Cofer *v.* Thurmond, 1 Ga. 538; Adams *v.* Jones, 39 Ga. 479; Smith *v.* Smith, 49 Ala. 156; Learned *v.* Corley, 43 Miss. 687; Primm *v.* Stewart, 7 Tex. 178. See Bowden *v.* Henderson, 2 Sm. & Giff. 360, as to rebuttal by counter presumptions.

Whether a person is alive at a given date is a question for the jury, and "his existence at an antecedent period may or may not afford a reasonable inference that he was living at a subsequent date." Per Giffard, L. J., In re Phene's Trusts, L. R. 5 Ch. 150.

[3] Weale *v.* Lower, Pollex. 67; Napper *v.* Landers, Hutt. 119; Hall, in re, 1 Wall. Jr. 85; Letts *v.* Brooks, Hill & Denio, Supp. (N. Y.) 36; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. 455; Duke of Cumberland *v.* Graves, 9 Barb. 595.

[4] Jones *v.* Waller, 1 Price, 229; R. *v.* Lumley, L. R. 1 C. C. 196; Doe *v.* Michael, 17 Q. B. 276; Allen *v.* Lyons, 2 Wash. C. C. 475; Ackerman, in re, 2 Redf. (N. Y.) 521; Sprigg *v.* Moale, 28 Md. 497. See Montgomery *v.* Bevans, 1 Sawyer, 653; Manby *v.* Curtis, 1 Price, 225.

[5] Beverly *v.* Beverly, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756; Burney *v.* Ball, 24 Ga. 505.

[6] See infra, § 1277.

[7] R. *v.* Harborne, 2 A. & E. 544; *S. C.* 4 Nev. & Man. 344; Beasney's Trusts, in re, L. R. 7 Eq. 498; Sellick *v.* Booth, 1 Y. & C. 117; Main, in re, 1 Sw. & Tr. 11; Allen *v.* Lyons, 2

When not regulated by statute, question one of experience.

The presumption before us, it should be remembered, when not governed by statute, is one of experience varying logically with the circumstances of the particular case.[1] Thus when the object was to prove the business entries of a person alleged to be deceased, the court permitted such entries to be read on the bare proof that they were fifty-four years old.[2] Where feoffments, also, for terms varying from ninety-nine to eighty years have been made to particular tenants, the practice has been to overlook the possibility of their surviving the expiration of the terms in determining the nature of the remainders.[3] But the deposition of a witness, taken sixty years before a trial, has been rejected in the absence of proof of search for the witness.[4] So where a term was for sixty years, the court took into consideration the possibility of the termor living after its expiration.[5] On the other hand, in an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were

Wash. C. C. 475; White *v.* Mann, 26 Me. 361; Merritt *v.* Thompson, 1 Hilt. (N. Y.) 550; Clarke *v.* Canfield, 15 N. J. Eq. 119; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Spears *v.* Burton, 31 Miss. 547; Hancock *v.* Ins. Co. 62 Mo. 26; Lancaster *v.* Ins. Co. 62 Mo. 121; Ross *v.* Clore, 3 Dana, 189. See charge of Cockburn, C. J., in R. *v.* Orton, and Breadalbane case, L. R. 1 H. L. Sc. 182. In Prudential Insur. Co. *v.* Edmonds, L. R. 2 App. Cas. 487, the House of Lords was equally divided upon the question how far a statement of a witness, to the effect that she saw the alleged deceased (her uncle), as she believed, in Melbourne, seven years after his supposed disappearance, coupled with proof that there had not been diligent inquiry for him at Melbourne, would justify a judge in telling a jury that the presumption of death was overcome.

[1] Tindall, in re, 30 Beav. 151; Doe *v.* Walley, 8 B. & C. 22; R. *v.* Lumley, L. R. 1 C. C. 196; Lapsley *v.* Grierson, 1 H. of L. Cas. 498; Clarke *v.* Cummings, 5 Barb. (N. Y.) 339; Ringhouse *v.* Keever, 49 Ill. 470; Hancock *v.* Ins. Co. 62 Mo. 26.

"In Doe *v.* Deakin, 4 B. & Ald. 433, it was held that persons in the neighborhood, not of the family, might testify that the absent person had not been heard of by them. And if the demandant's husband had been heard of as living within seven years, though by persons not members of his family, it would certainly affect the presumption upon which she relied." Hoar, J., Flynn *v.* Coffee, 12 Allen, 133.

[2] Doe *v.* Michael, 17 Q. B. 276. See Jones *v.* Waller, 1 Price, 229; Doe *v.* Davies, 10 Q. B. 314. See supra, § 238.

[3] Weale *v.* Lower, Pollex. 67, per Ld. Hale; Napper *v.* Sanders, Hutt. 119; Ld. Derby's case, Lit. R. 370.

[4] Benson *v.* Olive, 2 Str. 920; Wanby *v.* Curtis, 1 Price, 225.

[5] Beverley *v.* Beverley, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756.

permitted to infer that all these persons were dead, but that they died unmarried.[1]

Continuance of life.

§ 1275. The presumption of continuance of life, which exists in cases where a person living a short time since is inferred to be living now, is therefore necessarily variable, readily yielding to the presumption, already noticed, deducible from the expiration of a period beyond which the continuance of life is improbable.[2] And the presumption of innocence may be invoked in criminal prosecutions, to either weaken or strengthen the presumption that the life of a particular person continues.[3]

Period of death to be inferred from facts of case.

§ 1276. When there has been an unexplained absence for seven years, death, so it has been ruled, is presumed to have taken place at the close of the seven years; or, as it is sometimes put, the party is assumed to have continued in life until that period has expired.[4] But in England it is now said that the time of death, whenever it is material, must be a subject of distinct proof by the party interested in fixing the time; for there is no presumption as to when, during the seven years, he died;[5] and this view is accepted by a preponderance of authority in the United States.[6]

[1] Doe *v.* Deakin, 3 C. & P. 402; 8 B. & C. 22. As to judicial notice of death, see supra, § 333.

[2] See Bowden *v.* Henderson, 2 Sm. & Giff. 360; Innis *v.* Campbell, 1 Rawle, 373; Keech *v.* Rinehart, 10 Penn. St. 240. Supra, § 1274; infra, § 1277.

[3] R. *v.* Twyning, 2 B. & A. 386; R. *v.* Lumley, 1 Law Rep. C. C. 196; 38 L. J. M. C. 86; and 11 Cox, 274, *S. C.* See, further, R. *v.* Jones, 11 Cox, 358; and see, as to presumptions in bigamy prosecutions, Whart. Cr. L. tit. "Bigamy;" R. *v.* Harborne, 2 A. & E. 540; R. *v.* Mansfield, 1 Q. B. 449. See, also, Lapsley *v.* Grierson, 1 H. of L. Cas. 498.

Absence unheard of in another state of the American Union is equivalent to absence beyond seas. Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373. See cases cited in Whart. Cr. Law, tit. "Bigamy."

[4] White *v.* Mann, 26 Me. 361; Eagle *v.* Emmet, 4 Bradf. N. Y. 117; Merritt *v.* Thompson, 1 Hilt. N. Y. 550; Clarke *v.* Canfield, 15 N. J. Ch. 119; Garden *v.* Garden, 2 Houst. 574; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Ross *v.* Clore, 3 Dana, 189; Puckett *v.* State, 1 Sneed, 355. See Burr *v.* Sim, 4 Whart. 150.

[5] Re Phene's Trusts, L. R. 5 Ch. 150; Re Lewes's Trusts, L. R. 6 Ch. 357; 40 L. J. Ch. 507. See, to same effect, Lewes's Trusts, re, Law. Rep. 11 Eq. 236; Hickman *v.* Upsall, L. R.

[6] Davis *v.* Briggs, S. C. U. S. 1878; White *v.* Mann, 26 Me. 370; Smith *v.* Knowlton, 11 N. H. 197; Stouvenel *v.* Stephens, 2 Daly (N. Y.), 319;

Fact of death inferred from other facts.

§ 1277. It has been incidentally observed that, aside from the general presumption of death arising from unexplained absence abroad for seven years, certain facts have been noticed by the courts as affording grounds on which inferences of death, more or less strong, may rest.[1]

20 Eq. 136; Lambe *v.* Orton, 29 L. J. Ch. 286; Thomas *v.* Thomas, 2 Drew. & Sm. 298; In re Benham's Trusts, 37 L. J. Ch. 265, per Rolt, L. J.; reversing decision by Malins, V. C., as reported in 36 L. J. Ch. 502; L. R. 4 Eq. 416, *S. C.;* In re Peck, 29 L. J. Pr. & Mat. 95; Dunn *v.* Snowden, 32 L. J. Ch. 104; 2 Drew. & Sm. 201, *S. C.;* Doe *v.* Nepean, 5 B. & Ad. 86; 2 N. & M. 219, *S. C.;* Nepean *v.* Doe d. Knight, 2 M. & W. 894, in Ex. Ch.; 2 Smith L. C. 476, 492, 577, *S. C.* In that case Ld. Denman, in pronouncing the judgment of the court, observes: "Inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914.

In Phene's Trusts, supra, the evidence was that N., born in 1829, went to America in 1853, and wrote home frequently until August, 1858, when he wrote on board an American man-of-war. From this date no letters were received from him. It was found, however, that he was entered in the books of the American navy as having deserted on June 16, 1860, when on leave, and had not been heard from since. "If I am to draw a conclusion at all," said Giffard, L. J., "I should infer that a person in the position of a sergeant, having nothing against his character, would not desert, and that he died while on leave, and so was not heard of by the authorities. It is enough for me, however, to state that in my opinion the burden of proof is on the representative of Nicholas Phene Mill, and that Nicholas Phene Mill's representative has not proved affirmatively that Nicholas Phene Mill survived the testator." Hence Giffard, L. J., refused to presume that N. was alive on January 6, 1861, overruling Benham's Trusts, L. R. 4 Eq. 416.

[1] Best on Evidence (1870), § 409. See R. *v.* Inhabitants of Twining, 2 B. &. A. 386; R. *v.* Inhabitants of Harborne, 2 A. & E. 540. In the latter case Lord Denman said: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of facts, *without reference to accompanying circumstances, such, for instance, as the age or health of the party.* There can be no such strict presumption of law. It may be

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McCartee *v.* Camel, 1 Barbour Ch. 456; Whiting *v.* Nicholl, 46 Ill. 241; Tisdale *v.* Ins. Co. 26 Iowa, 171; 28 Iowa, 12; State *v.* Moore, 11 Ired. (N. C.) L. 160; Spencer *v.* Roper, 13 Ired. (L.) 333; Hancock *v.* Ins. Co. 62 Mo. 26; *S. C.* Cent. L. J. Sept. 15, 1876.

The return of a person, presumed to have been dead, after an absence of over seven years, during which he had not been heard from, avoids any acts done by his representatives without judicial authority. Mayhugh *v.* Rosenthal, 1 Cincin. 492.

Among these facts may be noticed: Presence on board a ship known to have been lost at sea, the inference of death increasing with the length of time elapsing since the shipwreck;[1] exposure to peculiar perils, to which death will be imputed if the party has not been subsequently heard from;[2] ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive;[3] cessation in writing of letters, and of communications with relatives, in which case the presumption rises and falls with the domestic attachments of the party.[4] Thus, death may be inferred by a jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, finally, and without explanation, disappears.[5]

said: Suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Proof, therefore, that the party was alive twenty-five days before the second marriage, was held to overcome the presumption of innocence; which, on the other hand, prevailed in R. *v.* Twining against proof that the defendant had been heard of alive one year previous to the marriage. To the same effect is Lapsley *v.* Grierson, 1 H. L. Cas. 498.

[1] See Cockburn, C. J., charge in R. *v.* Orton, for an able exposition of this presumption. Sillick *v.* Booth, 1 Y. & C. 117; Ommaney *v.* Stilwell, 23 Beav. 328; Patterson *v.* Black, 2 Park. on Ins. 919; Garry *v.* Post, 13 How. Pr. 118; Hudson *v.* Poindexter, 42 Miss. 304.

[2] Watson *v.* King, 1 Stark. R. 121; 4 Camp. 272; White *v.* Mann, 26 Me. 361.

In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly. In re Hutton, 1 Curt. 595; Taylor's Ev. § 158.

[3] Pancoast *v.* Addison, 2 Har. & J. 350. See Benham's Trusts, in re L. R. 4 Eq. 415; White *v.* Mann, 26 Me. 361; Hall, in re, Wallace, J., 185; Jackson *v.* Etz, 5 Cow. 314; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. 455; Clarke *v.* Canfield, 15 N. J. Ch. 119; Holmes *v.* Johnson, 42 Penn. St. 159; Spencer *v.* Roper, 13 Ired. 333; Ringhouse *v.* Keever, 49 Ill. 470; John Hancock Ins. Co. *v.* Moore, 34 Mich. 4; Bailey *v.* Bailey, 36 Mich. 181.

To infer death, within the period of seven years, it is necessary that there should have been conscientious and diligent inquiry made at the places where the person resided within the seven years, and from his relatives and connections. Ibid.

[4] Supra, § 1274; Tisdale *v.* Ins. Co. 26 Iowa, 170; Hancock *v.* Ins. Co. 62 Mo. 121; Lancaster *v.* Ins. Co. 62 Mo. 12; Scheel *v.* Eidman, 77 Ill. 301; Eaton *v.* Tallmadge, 24 Wis. 217; Anderson *v.* Parker, 6 Cal. 197; Ewing *v.* Savary, 3 Bibb, 235. Supra, § 223.

[5] Hancock *v.* Ins. Co. 62 Mo. 26. See Doe d. Lloyd *v.* Deakin, 4 B. &

It is scarcely necessary to say that evidence tending to rebut such presumption (*e. g.* proof that the alleged deceased had been heard from by letter, or was personally warned in a litigated suit), is always relevant for what it is worth.[1]

It must be also kept in mind that, in any view, death is a matter of inference, not of demonstration, depending upon an identification of remains as to which there is always a possibility of mistake.[2]

Letters testamentary not collaterally proof of death.

§ 1278. In all questions relating to the authority of the parties to whom letters testamentary or administrative are granted, such letters are *primâ facie* proof of the death of the alleged decedent,[3] and are conclusive in cases where there is "no plea in abatement denying the death of [the principal], and setting up the consequent invalidity of the letters of administration."[4] Such letters, also, are conclusive as to parties and privies.[5] But a party, to whose estate letters of administration have been taken out, on an erroneous belief that he was dead, is not precluded by the letters from recovering from third parties debts they have *bonâ fide* paid to the administrator.[6] And between strangers, when the fact of death is to be proved, letters of administration to his estate are *res inter alios acta*, and are inadmissible.[7]

A. 433. See the judgment of Lord Ellenborough in Doe d. George *v.* Jesson, 6 East, 85; Rowe *v.* Hasland, 1 W. Black. 404; Bailey *v.* Hammond, 7 Ves. 590; Doe d. France *v.* Andrews, 15 Q. B. 756.

[1] Keech *v.* Rinehart, 10 Penn. St. 240; Smith *v.* Smith, 49 Ala. 156. Supra, § 223.

[2] See Whart. on Hom. § 640; Udderzook's case, Ibid. Appendix.

[3] See fully supra, § 810; Thompson *v.* Donaldson, 3 Esp. 63; Moons *v.* De Bernales, 1 Russ. 301; French *v.* French, 1 Dick. 268; Newman *v.* Jenkins, 10 Pick. 515; McKimm *v.* Riddle, 2 Dall. 100; Cunningham *v.* Smith, 70 Penn. St. 458; McNair *v.* Ragland, 1 Dev. (N. C.) Eq. 533; Tisdale *v.* Ins. Co. 26 Iowa, 170; French *v.* Frazier, 7 J. J. Marsh. 425.

[4] Sharswood, J., Cunningham *v.* Smith, 70 Penn. St. 458; citing Newman *v.* Jenkins, 10 Pick. 515; McKimm *v.* Riddle, 2 Dall. 100; Axers *v.* Musselman, 2 P. A. Browne, 115.

[5] Carroll *v.* Carroll, 2 Hun, 609; *S. C.* on App. 60 N. Y. 123; Randolph *v.* Bayne, 44 Cal. 366; Lewis *v.* Ames, 44 Tex. 319.

[6] Supra, § 810.

[7] Ibid.; Thompson *v.* Donaldson, 3 Esp. 63; Beamish, in re, 9 W. R. 475; Jochumsen *v.* Suffolk Bank, 3 Allen, 87; Carroll *v.* Carroll, 60 N. Y. 123; Buntin *v.* Duchane, 1 Blackf. 26; English *v.* Murray, 13 Tex. 366. See fully supra, §§ 810, 811.

On this topic we have the following from the New York Court of Appeals: —

"Letters testamentary and of ad-

§ 1279. When simply the fact is known of the death of a person capable of having had issue, death without issue cannot be presumed.[1] But such presumption may be drawn from any circumstances indicating non-marriage or childlessness.[2]

Death without issue not to be presumed.

ministration are conclusive evidence of the authority of the persons to whom granted, and are sufficient to establish the representative character of the plaintiff who assumes to sue by virtue thereof. 2 R. S. 80, § 56; Belden *v.* Meeker, 47 N. Y. 307; Farley *v.* McConnell, 52 Ibid. 630. So, also, a will proved with a certificate of the surrogate, and attested by his seal of office, may be read in evidence without further proof, and the record of the same, and the exemplification of the same by the surrogate, may be received in evidence the same as the original will would be if produced and proved. 2 R. S. 58, § 15. The object of this provision was to make the certificate of the surrogate and the record of the will or exemplification *primâ facie* evidence only. Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190, 199. In 2 Greenleaf's Evidence, § 339, it is said, that 'The proof of the plaintiff's representative character is made by producing the probate of the will, or the letters of administration, which *primâ facie* are sufficient evidence for the plaintiff of the death of the testator or intestate, and of his own right to sue.' This is undoubtedly the true rule, and it will be found upon examination that the authorities cited upon this question relate mainly to cases where the right of the administrator or executor to sue is involved, or where the parties were connected with the proceeding, interested in the estate, and had their rights adjudicated upon when the will was established before the Probate Court. Such are the cases cited from other states, with scarcely any exception, and none of them can be regarded as sustaining the broad principle that the probate of a will of itself establishes the death of the testator in any other case. The general rule laid down in 1 Greenleaf's Evidence, § 550, as to the effect of the probate of a will, or the grant of letters of administration, is also liable to criticism, and is not, I think, sustained by the English cases which are cited to support it. It may then be considered as established by the cases relied on by the plaintiff's counsel that letters testamentary, and the proofs of a will before a surrogate, are only evidence in some proceedings arising out of the will itself, and the parties who claim under it or are connected with it; and they cannot, upon their face, affect, or in any way control, the interest of parties who are

[1] Richards *v.* Richards, 15 East, 293; Stinchfield *v.* Emerson, 52 Me. 465; Sprigg *v.* Moale, 28 Md. 497; Harvey *v.* Thornton, 14 Ill. 217; Hays *v.* Tribble, 3 B. Mon. 106. See, however, Doe *v.* Deakin, 3 C. & P. 402; 8 B. & C. 22, under name of Doe *v.* Walley, where a jury were permitted to presume that four elder brothers, who had not been heard from, had died without issue.

[2] King *v.* Fowler, 11 Pick. 302; M'Comb *v.* Wright, 5 Johns. Ch. 263. See Doe *v.* Griffin, 15 East, 293; Webb's Est. in re, 5 Ir. R. Eq. 235. See Greaves *v.* Greenwood (Ex. Div. 1876), 24 W. R. 926; Miller *v.* Beates, 3 S. & R. 490.

§ 1280. The Schoolmen, on the topic of survivorship, as well as on most other topics they discussed, laid down a series of presumptions of law, settling the various contingencies which they contemplated as probable. Presumptions of law of this class, we need scarcely say, are no longer recognized.[1] The question of survivorship must be determined by all the facts in the particular case.[2] Hence in Massachusetts, in a case where a father, seventy years old, and his daughter, thirty-three years old, were lost together in a steamer foundering at sea, when of the circumstances of the loss nothing was known, it was held that there could be no presumption of survivorship, and that there was no evidence, therefore, on which a party bringing suit could recover.[3] In an English case, somewhat similar in character, the court, unable to reach a satisfactory conclusion, advised a compromise, which was effected.[4]

Presumption of survivorship in a common disaster one of fact.

§ 1281. The rule that the *actor*, who seeks, when there is no proof of the circumstances of the common death, to recover on the basis of the survivorship of his decedent, must fail from want of proof to make out his case, has been further applied in a case in which a husband gave his whole property to his wife, providing that, "in case my said wife shall die in my lifetime," the estate should go to the children. The testator, his wife, and children perished at sea, being swept from the deck by the same wave. The Lord Chancellor (as-

If there be no proof of circumstances of death *actor* must fail.

entirely disconneeted with the proceedings before the surrogate, and not within his jurisdiction. It follows, therefore, that in an action of ejectment brought by the widow to recover her dower, the probate of the will, and the proeeedings thereon, are not competent evidence to prove the fact that the husband is dead, which is the very basis and foundation of the action, and without proof of which it cannot be maintained.

"The English eases sustain the doctrine that letters of administration are not evidence of death, and that it must be otherwise proved. In Thompson *v.* Donaldson, 3 Esp. 63, Lord Kenyon held that letters of administration are not sufficient proof of death, and remarked: 'The death was a fact eapable of proof otherwise.' See, also, Moons *v.* De Bernales, 1 Russ. 301." Miller, J., Carroll *v.* Carroll, 60 N. Y. 123.

[1] Phene's Trusts, in re, L. R. 5 Ch. 150; Barnett *v.* Tugwell, 31 Beav. 232; Coye *v.* Leach, 8 Met. (Mass.) 371; Smith *v.* Croom, 7 Fla. 81.

[2] Sillick *v.* Booth, 1 Y. & C. 117, 126; Moehring *v.* Mitchell, 1 Barb. Ch. 264; Pell *v.* Ball, 1 Cheves Ch. 99; Smith *v.* Croom, 7 Fla. 81.

[3] Coye *v.* Leaeh, 8 Met. 371.

[4] R. *v.* Hay, 2 W. Bl. 640. See Fearne's Posth. Works, 38.

sisted by Cranworth, B., Wightman, J., and Martin, B.) held that there was no evidence to prove that the wife survived the husband, and that consequently the plaintiff, whose case rested on the assumption of the wife's survivorship, could not recover.[1] The same conclusion was afterwards reached,[2] where the husband and wife and their two children perished at sea in the same storm;[3] and where[4] a husband and wife were killed in a railway collision, their dead bodies being found together two days after death.

§ 1282. Upon a survey of the cases, we may conclude the law to be as follows:[5] (1.) Where persons ranging between infancy and extreme old age perish by a common catastrophe, and where there is no information as to either of them subsequent to the shock, no such presumption can be drawn from differences of age or sex as will enable a court to give judgment for a plaintiff seeking to recover on the claim of survivorship. (2.) At the same time, in consistency with the rulings above given, if one of the parties is in extreme infancy, or in very advanced and decrepit old age, we may assume, as a presumption of fact, that such person died before another

But if any circumstances of death are proved, these are ground for induction.

[1] Underwood *v.* Wing, 4 De G., M. & G. 633.

[2] Wing *v.* Angrave, 8 H. of L. Cas. 183.

[3] See Robinson *v.* Gallier, 2 Wood's C. C. 478; *S. C.* in South. L. R. Oct. 1876.

In Wollaston *v.* Berkeley, L. R. 2 Ch. D. 213; L. and G., a husband and wife, were drowned with all hands on board at sea. By a settlement made on their marriage, L. agreed that he would after the marriage transfer certain funds to the trustees, and G. assigned to the trustees other funds. The trustees were to pay the income of the funds to be conveyed by L. to L. for life, and after his death to G. for life, and then in trust for children, or in default of children, in trust for the survivor of L. or G., his or her executors and administrators. The trustees were to pay the income of G.'s funds to L. during his and her joint lives, and in case he should survive, then, after G.'s decease, to transfer the bonds to whomever she might appoint by will, and, in default of appointment, to her next of kin; but if she should survive L., in trust to transfer the bonds to her, her executors or administrators. After the marriage L.'s funds were transferred to the trustees. L. by will gave his whole property to his wife absolutely, and G. bequeathed the whole of her property to her husband for life, and after her death to her sisters. It was held that the funds settled belonged to the legal personal representatives of each settlor.

[4] Wheeler, in re, 31 L. J. P. M. & A. 40. See Kansas Pac. R. R. *v.* Miller, 2 Col. T. 442.

[5] See Whart. & St. Med. Jur. 3d ed. § 1045.

not so disabled, in all cases where there was an opportunity to struggle for life. (3.) The law only refuses to permit a presumption of fact of this class to be drawn where there is no evidence at all as to the parties subsequent to the shock. If there is any evidence, no matter how slight, leading to the conclusion that one of the parties was seen alive subsequent to a period when the other was probably dead, this is ground on which a jury may find survivorship.[1]

Presumption of loss of ship from lapse of time.

§ 1283. The length of time after which it is to be presumed that a ship, which has been unheard of, is lost, is to be determined by the inferences to be drawn from the concrete case.[2] As a basis of proof, mere rumors are not sufficient; there must be trustworthy information.[3] If there are any indications of foundering, — *e. g.* a violent storm at a particular point where the ship was, her unseaworthiness, remnants of wreck, — the loss may be put earlier than would be permissible if the ship had not been heard of at all.[4] But there must be proof of the ship having left port.[5]

[1] Mr. Best (Evidence, § 410) states the rule as follows : —

"When, therefore, a party on whom the onus lies of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this, that the law presumes both to have perished at the same moment: this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment."

[2] Green *v.* Brown, 2 Str. 1199; Thompson *v.* Hopper, 6 E. & B. 172; Newby *v.* Reed, 1 Park. Ins. 148; Oppenheim *v.* Leo Woolf, 3 Sandf. Ch. 571; Biccard *v.* Shepherd, 14 Moore P. C. 471; Houstman *v.* Thornton, Holt N. P. C. 243; Twemlin *v.* Oswin, 2 Camp. 85.

[3] Koster *v.* Reed, 6 B. & C. 22.

[4] Sillick *v.* Booth, 1 Y. & C. 117. See charge of Chief Justice Cockburn, in R. *v.* Orton, as to loss of The Bella.

[5] Koster *v.* Innes, R. & M. 333; Cohen *v.* Hinckley, 2 Camp. 51.

IV. PRESUMPTIONS OF UNIFORMITY AND CONTINUANCE.

§ 1284. When a juridical relation is once established, it is enough, generally, for a party relying on such relation to show its establishment, and the burden is then on the opposite party to show that the relation has ceased to exist. It has frequently been said, that in such cases the law presumes the continuance of the relation. But this is to confound two very different things: burden of proof requiring me to prove a particular thing, and presumption of law assuming a thing without proof. Ordinarily a party seeking to assail an established condition has the burden on him to make good his case. I claim under a will, for instance; but after proving the will, though the party attacking the will has the burden on him, supposing the will to be duly proved, to show a superior title, yet this is a matter only of burden of proof, and there is no such presumption of law in my favor as will interfere with the ultimate adjudication of the case on the merits. A debt was due me a year ago. I prove this, and the defendant has the burden on him to prove payment; but when the question is whether such payment is proved, this question is not affected by any presumption of law drawn from the fact that a year ago the debt was due.[1] From this it follows that when I once establish a juridical relation in itself not so limited as to time as to have expired at the period of litigation, it is not necessary for me to prove the continuance of the relation. The burden is on my antagonist to prove that the relation has ceased to exist; though, as has just been said, there is no presumption of law against him which, when the evidence is all in, can outweigh any preponderance in such evidence in his favor.[2] We are therefore to understand

Burden on party seeking to prove change in existing conditions.

[1] See L. 12, 25, § 2; D. L. 1 C. de probat. See supra, §§ 354 *et seq.*

[2] See Heffter, App. to Weber, 280; Scales *v.* Key, 11 A. & E. 819; Mercer *v.* Cheese, 4 M. & Gr. 804; Price *v.* Price, 16 M. & W. 232; Rixford *v.* Miller, 49 Vt. 319. It is in this sense that we are to understand the term "presumption," as used in the following as well as in other opinions: —

"A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence. Walrod *v.* Ball, 9 Barb. 271; Cooper *v.* Dedrick, 22 Ibid. 516; Smith *v.* Smith, 4 Paige, 432; McMahon *v.*

that the presumption of continuance, as it is called, is simply a presumption of fact, whose main use is in designating the party on whom lies the burden of proof. In this sense we are justified in holding that the continuance of an existing condition is a presumption of fact, dependent for its intensity on the circumstances of the particular case. The burden is on the party seeking to show change, and if he fails to show it, he loses his case.[1] But the question is one dependent upon the relation of conditions to time. A state of war, for instance, existing yesterday, will be presumed to continue to-day; but it will not be presumed to continue after the lapse of three years.[2] In fact, so far from continuance being a legal presumption, in things dependent upon human purposes, the presumption, in the long run, is the other way. Man never continueth in one stay. Of what will happen ten years hence, the only presumption that can be offered with anything like certainty is, that there will be a change, at least in the actors in the drama, from what is happening to-day. The time required for the change depends upon the nature of the object. Fifty years ago, the houses in one of our western cities did not exist. Ten minutes ago, the man whom I now see standing in front of one of those houses was in his counting-room, or in the cars. We cannot, therefore, speak of a legal presumption of continuance, when, if we are to draw any inference that would be perma-

Harrison, 2 Seld. 443; Sleeper *v.* Van Middlesworth, 4 Denio, 431; Nixon *v.* Palmer, 10 Barb. 175. This analogy is fairly applicable to the present case, and justifies the admission of this evidence." Hunt, C., Wilkins *v.* Earle, 44 N. Y. 172. See, also, R. *v.* Lilleshall, 7 Q. B. 158.

[1] Bell *v.* Kennedy, L. R. 3 H. L. 307; Smout *v.* Ibery, 10 M. & W. 1; Jackson *v.* Irvin, 10 Camp. 50; Brown *v.* Burnham, 28 Me. 38; Eames *v.* Eames, 41 N. H. 177; Farr *v.* Payne, 10 Vt. 615; Martin *v.* Ins. Co. 20 Pick. 389; Randolph *v.* Easton, 23 Pick. 242; Kilburn *v.* Bennett, 3 Met. 199; Brown *v.* King, 5 Met. 173; Gelston *v.* Hoyt, 1 Johns. Ch. 543; Wright *v.* Ins. Co. 6 Bosw. 269; Leport *v.* Todd, 32 N. J. L. 124; Bell *v.* Young, 1 Grant (Pa.), 175; Erskine *v.* Davis, 25 Ill. 251; Murphy *v.* Orr, 32 Ill. 489; Goldie *v.* McDonald, 78 Ill. 605; Montgomery Plank R. *v.* Webb, 27 Ala. 618; Barelli *v.* Lytle, 4 La. An. 558; Swift *v.* Swift, 9 La. An. 117; Sullivan *v.* Goldman, 19 La. An. 12; Mullen *v.* Pryor, 12 Mo. 307; O'Neil *v.* Mining Co. 3 Nev. 141. As to continuance of partnership, see Clark *v.* Alexander, 8 Scott N. R. 161; Alderson *v.* Clay, 1 Stark. 405; Clark *v.* Leach, 32 Beav. 14. As to continuance of agency, see Whart. on Agency, § 94; Pickett *v.* Packham, L. R. 4 Ch. Ap. 190; Ryan *v.* Sams, 19 Q. B. 460.

[2] Covert *v.* Gray, 34 How. (N. Y.) Pr. 450.

nently applicable, it would be that of change. And yet, for short calculations, so far as is consistent with the inductions of social science, we are justified in saying, as a means for adjusting the burden of proof, that the presumption is so far in favor of continuance, that the burden is on a party who seeks to show a change from a condition which, when we last heard from it, was settled, and which from the nature of things, would probably exist to-day unchanged.[1]

Residence presumed to be continuous.

§ 1285. For the purpose, in like manner, of determining the burden of proof, we may hold, as a presumption of fact, more or less strong according to the concrete case, that a party is presumed to continue to reside in the last place known to have been accepted by him as such residence.[2] The same inference is applicable to the settlement of a pauper,[3] and to domicil.[4]

Occupancy presumed to be continuous.

§ 1286. When occupancy is proved, whether of real or personal property, we may infer, for the like purpose, as a presumption of fact, that the occupation is continuous; the inference varying with the person occupying, the

[1] Among the illustrations of the proposition in the text may be mentioned the following: —

Where a jury found that a certain custom existed up to the year 1689, the court held that in the absence of all evidence of its abolition, it was to be concluded that the custom still subsisted at the time of the trial in 1840. Scales *v.* Key, 11 A. & E. 819.

It has also been held in England, in a settlement case, that where a son, though long since arrived at manhood, has continued unemancipated, as in the days of his infancy, this state would be held to continue, unless there be some evidence to the contrary. R. *v.* Lilleshall, 7 Q. B. 158; explaining R. *v.* Oulton, 5 B. & Ad. 958; 3 N. & M. 62, *S. C.* So, the appointment of a party to an official situation will (R. *v.* Budd, 5 Esp, 230, per Ld. Ellenborough; Pickett *v.* Packham, 4 Law Rep. Ch. Ap. 190), at least for a reasonable time, be presumed to continue in force.

So, if a debt be shown to have once existed, its continuance will be presumed, in the absence of proof of payment, or some other discharge. Jackson *v.* Irvin, 2 Camp. 50, per Ld. Ellenborough.

As to uniformity of habits, indicating system, see supra, § 38 *et seq.*; and see Blake *v.* Ass. Soc. 40 L. T. 211.

[2] Bell *v.* Kennedy, L. R. 3 H. L. 307; Whicker *v.* Hume, 7 H. of L. 124; Church *v.* Rowell, 49 Me. 367; Littlefield *v.* Brooks, 50 Me. 475; Shaw *v.* Shaw, 98 Mass. 158; Randolph *v.* Easton, 23 Pick. 242; Kilburn *v.* Bennett, 3 Met. 199; First Nat. Bk. *v.* Balcom, 35 Conn. 351; Goldie *v.* McDonald, 78 Ill. 605; Daniels *v.* Hamilton, 52 Ala. 105; Prather *v.* Palmer, 4 Ark. 456; Swift *v.* Swift, 9 La. An. 117; Whart. Confl. of Laws, § 56.

[3] R. *v.* Budd, 5 Esp. 230.

[4] Whart. Confl. of Laws, § 56.

thing occupied, and the place and period of occupation.[1] For the same purpose, also, ownership is presumed to continue until alienation.[2]

§ 1287. We have already noticed that in civil, as well as in criminal issues, the character of a party is presumed to be good, and that the burden is on those by whom it is assailed.[3] We have also seen that when, in particular issues, character is admissible to increase or reduce damages, character is regarded as convertible with reputation; and the inquiry is, not what are the peculiar traits of the party, in the opinion of the witness examined, but what is the reputation of the party in the community in which he lives.[4] In questions of identity, however, the habits of individuals may come up for comparison, and it may become a material question whether a claimant has the characteristic traits of the person with whom he pretends to be identical. And the admissibility of evidence of this class rests on the psychological assumption that habits become a second nature, and that special aptitudes are not unlearned, and special characteristics are not extinguished.[5] But questions of identity are an exception to the general rule, which is, that evidence of habit is inadmissible for the purpose of showing that a particular person did or did not do a particular thing.[6] On the other hand, when a series of acts of a particular person

Habit presumed to be continuous.

[1] Smith *v.* Stapleton, Plowd. 193; Winkley *v.* Kaime, 32 N. H. 268; Currier *v.* Gale, 9 Allen, 522; Rhone *v.* Gale, 12 Minn. 54.

[2] Magee *v.* Scott, 9 Cush. 148.

[3] Supra, § 55.

[4] Supra, § 49.

[5] For a series of acute observations on this principle, see the charge of Cockburn, C. J., in R. *v.* Orton.

[6] "Each separate and individual case must stand upon, and be decided by, the evidence particularly applicable to it. Although 'it is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins,' it seems clear that, ordinarily, evidence that the defendant entered into contracts with third persons in a particular form, would not be admissible in tending to show that he had made a similar contract with the plaintiff. 'The fact of a person having once or many times in his life done a particular act in a particular way,' does not prove 'that he has done the same thing in the same way upon another and different occasion.' See Hollingham *v.* Head, 4 C. B. N. S. (93 E. C. L.) 388; Jackson *v.* Smith, 7 Cowen, 717; Spenceley *v.* De Willott, 7 East, 108; Filer *v.* Peebles, 8 N. H. 226; Wentworth *v.* Smith, 44 N. H. 419; Holcombe *v.* Hewson, 3 Campb. 391; True *v.* Sanborn, 27 N. H. 383; Lincoln *v.* Taunton C. M. Co. 9 Allen, 181; Smith *v.* Wilkins, 6 C. & P. 180; Phelps *v.* Conant, 30 Vt. 277." Delano *v.* Goodwin, 48 N. H. 205.

is in evidence, a litigated act imputed to him may be tested by comparison with the acts proved to emanate from him.[1] It may be shown, for instance, to sustain a presumption of payment by an employer of a particular workman's wages, that all the workmen in the same employ were regularly paid.[2] It has also, as we have seen,[3] been held admissible to prove habit or system in order to rebut the defence of accident, or to infer *scienter*. We have a right, again, to infer, as a presumption of fact, that mental conditions continue unchanged, unless there be reasons to infer the contrary. It is on this ground that we infer the continuance of sanity and of chronic insanity;[4] and of purposes once deliberately formed.[5] The habit, also, of a writer, in using words in a particular sense, may be shown in certain cases of latent ambiguity,[6] and habits of spelling and writing to indicate genuineness.[7]

Continuance of coverture.

§ 1288. Coverture, once proved, is inferred to continue, this being a presumption of fact, varying with the concrete case.[8]

Solvency and insolvency.

§ 1289. The same inference is applied to solvency,[9] and to insolvency, each of which is presumed (as a presumption of fact) to continue until the contrary is proved.[10] An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency.[11]

Value to be inferred from circumstances.

§ 1290. Whether the value of a thing at a particular period may be inferred from its value at other periods depends upon the circumstances of the case. An article whose value fluctuates greatly cannot, by proof that it

[1] See argument as to comparison of hands, supra, § 717.

In a Pennsylvania case, decided in 1876, we have the following: "It was a very natural conclusion that a man who always paid his taxes promptly in biennial period, previous to the time of sale, would have paid them in time in 1832 and 1833. This, therefore, was a question for the jury, and not the court." Agnew, C. J., Coxe *v.* Derringer, 3 Weekly Notes, 103; *S. C.* 82 Penn. St. 236.

[2] Infra, § 1362.

[3] Supra, § 38.

[4] See supra, §§ 1252, 1253.

[5] Whart. on Homicide, § 440.

[6] Supra, § 962.

[7] Supra, §§ 714–8.

[8] Erskine *v.* Davis, 25 Ill. 251.

[9] Wallace *v.* Hull, 28 Ga. 68.

[10] Brown *v.* Burnham, 28 Me. 38. See Eames *v.* Eames, 41 N. H. 177; Burlew *v.* Hubbell, 1 Thomp. & C. (N. Y.) 235; Body *v.* Jewsen, 33 Wis. 402; Ramsey *v.* McCanley, 2 Tex. 189. The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. Supra, § 834.

[11] Safford *v.* Grout, 120 Mass. 20.

had a certain price a year ago, be presumed to have the same value now.[1] On the other hand, as to a thing whose value is more or less constant, proof of recent price in the vicinity may be material in enabling the price at the period in litigation to be adjusted.[2] A remote period, under different conditions, cannot in any view be taken as a standard.[3] Nor can peculiar associations, likely to give a fictitious value, be taken into account.[4] Distant markets cannot be consulted in proof of value;[5] though it is otherwise if the markets be in any way inter-dependent,[6] or sympathetic.[7]

But system necessary to admission of collateral values.

§ 1291. Things of a different species cannot be taken into consideration in determining value;[8] nor should much weight be attached to proof that prices had been offered in private negotiations by third parties; such evidence being open to fraud; and at the best, indicating only private opinion, not the opinion of a market.[9] And while hearsay is admissible to prove the state of a market;[10] the value of an article, or the extent of a party's income, cannot ordina-

[1] Campbell *v.* U. S. 8 Ct. of Cl. 240; Kansas Stockyard Co. *v.* Couch, 12 Kans. 612; Waterson *v.* Seat, 10 Fla. 326. That value is to be inferred from circumstances, see Com. *v.* Burke, 12 Allen, 182; People *v.* Caryl, 12 Wend. 547; Harrison *v.* Glover, 72 N. Y. 451; Cummings *v.* Com. 2 Va. Cas. 128; Houston *v.* State, 13 Ark. 66. Hence a party, to show value, may prove what he paid. Dowdall *v.* R. R. 13 Blatch. 403. Supra, §§ 39, 447, 448.

[2] The Pennsylvania, 5 Ben. 253; White *v.* R. R. 30 N. H. 188; French *v.* Piper, 43 N. H. 439; Paine *v.* Boston, 4 Allen, 168; Benham *v.* Dunbar, 103 Mass. 365; Dixon *v.* Buck, 42 Barb. 70; Columbia Bridge *v.* Geisse, 38 N. J. L. 39; Roberts *v.* Dunn, 71 Ill. 46. See Potteiger *v.* Huyett, 2 Notes of Cas. 690; Abbey *v.* Dewey, 25 Penn. St. 413; East Brandywine R. R. *v.* Ranck, 78 Penn. St. 454.

[3] Palmer *v.* Ferrill 17 Pick. 58; McCracken *v.* West, 17 Ohio 16. See Cahen *v.* Platt, 69 N. Y. 349.

[4] Davis *v.* Sherman, 7 Gray, 291; Fowler *v.* Middlesex, 6 Allen, 92. See, generally, Kent *v.* Whitney, 9 Allen, 62; Boston R. R. *v.* Montgomery, 119 Mass. 114; Freyman *v.* Knecht, 78 Penn. St. 141; Shenango *v.* Braham, 79 Penn. St. 447; Baber *v.* Rickart, 52 Ind. 594; McLaren *v.* Birdsong, 24 Ga. 265. See, as to proof of value, supra, §§ 446–450.

[5] Harrington *v.* Baker, 15 Gray, 538; Greely *v.* Stilson, 27 Mich. 153.

[6] Siegbert *v.* Stiles, 39 Wis. 533; Berry *v.* Duxberry, 54 Ala. 446.

[7] Cliquot's Champagne, 3 Wall. 114; Rice *v.* Manley, 64 N. Y. 82; Kermott *v.* Ayer, 11 Mich. 181; Sisson *v.* R. R. 14 Mich. 489; Comstock *v.* Smith, 20 Mich. 338; Hanson *v.* Lawdon, 19 Kans. 201.

[8] Gouge *v.* Roberts, 53 N. Y. 619.

[9] Perkins *v.* People, 27 Mich. 386. See Snell *v.* Cottingham, 72 Ill. 161.

[10] Supra, § 449.

rily be inferred from the record of a tax assessment. This is the act of a third party, who must be called if obtainable.[1]

Foreign law presumed to correspond with our own.

§ 1292. In a previous chapter it has been shown[2] that the settled rule is that foreign states, whose jurisprudence is derived from the same common source as ours, are presumed to possess laws materially the same as our own. This presumption, however, does not extend to states whose jurisprudence springs from a different system, nor can we impute to a foreign jurisprudence idiosyncrasies we know to be peculiar to ourselves. But in any view, if we wish to prove a foreign law as distinguished from our own, we must prove such law as a fact.[3]

Constancy of nature presumed.

§ 1293. The constancy of natural laws is to be assumed until the contrary be proved. The seasons, for instance, pursue, in the long run, a regular course; and we may therefore assume that winter is cold and summer is warm; though this may be qualified by proof that in an exceptional season the winter was comparatively mild or the summer was comparatively cool. It may be that in a particular winter, even in a northern climate, we may have no snow-storms; yet if this be not shown, we infer that what is usual is continuous, and not only do we take each fall the steps that will enable us to shelter ourselves against snow, but we assume as to any given past winter that there fell the usual quantity of snow. So with regard to ice. In New England, for instance, ice crops are usually formed each winter, and these may be stored if due diligence be shown; and on a suit based on lack of diligence in this respect, it would be inferred, until the contrary was shown, that the winter was cold enough to produce the usual quantity of ice. Hence it is that *casus*, or the extraordinary interruption of apparent physical laws, must be affirmatively shown by the party alleging such interruption; and until such proof, that which is usual is deemed to be constant.[4] In order, however, that evidence based on the constancy of nature should be received, similarity of conditions should be first established. Thus in an action to recover

[1] Flint *v.* Flint, 6 Allen, 34; Kenderson *v.* Henry, 101 Mass. 152; Raynes *v.* Bennett, 114 Mass. 424.

[2] See supra, § 314.

[3] Supra, §§ 314 *et seq.* And see Com. *v.* Kenney, 120 Mass. 387.

[4] See cases supra, § 363.

damages for injury caused by removing stones from a river, resulting in the washing away the plaintiff's land, it has been held not error to exclude evidence of the effects of the action of the water at another place and time, the forces and surroundings not being first shown to be alike.[1] But when the conditions are the same, evidence of common phenomena (*e. g.* snow in the immediate vicinity to prove snow in the place of inquiry) in one place may be received to infer such phenomena in another.[2]

Physical sequences to be presumed.

§ 1294. The ordinary physical sequences of nature are to be contemplated by us as probable; and hence we are to presume them as existing among the contingencies to be expected by reasonable men. Among these we may specify the falling of water from a higher to a lower level;[3] the spreading of fire in inflammable material;[4] the continuous movement of a railway train over the track, and the fact that the shock on meeting an obstacle is in proportion to momentum;[5] and the effect of water in extinguishing fire.[6]

So of probable habits of animals.

§ 1295. We may also assume, as a presumption of fact, that animals, as a general rule, will act in conformity with their nature.[7] Thus it is probable that untended cattle will stray;[8] that horses will take fright at extraordinary noises and sights;[9] and that certain kinds of dogs will

[1] Hawks *v.* Inhabitants, 110 Mass. 110. As to inferences from system, see §§ 39, 268, 448, 1346; Mill's Logic, ch. xiv.

[2] Brooks *v.* Acton, 117 Mass. 204. Supra, § 46.

[3] Collins *v.* Middle Level Com. L. R. 4 C. P. 279.

[4] L. 30, § 3; D. ad leg. Aquil.; Tuberville *v.* Stamp, 1 Salk. 13; Filliter *v.* Phippard, 11 Q. B. 347; Smith *v.* R. R. L. R. 5 C. P. 98; Perley *v.* R. R. 98 Mass. 414; Higgins *v.* Dewey, 107 Mass. 494; Calkins *v.* Barger, 44 Barb. 424; Collins *v.* Groseclose, 40 Ind. 414; Gagg *v.* Vetter, 41 Ind. 228; Hanlon *v.* Ingram, 3 Iowa, 81; Averitt *v.* Murrell, 4 Jones L. (N. C.) 223; Cleland *v.* Thornton, 43 Cal. 437.

[5] See R. *v.* Pargeter, 3 Cox C. C. 191; Caswell *v.* R. R. 98 Mass. 194; Wilds *v.* R. R. 29 N. Y. 315; Jones *v.* R. R. 67 N. C. 125.

[6] Metallic Comp. Co. *v.* R. R. 109 Mass. 277.

[7] See Carlton *v.* Hescox, 107 Mass. 410; Rowe *v.* Bird, 48 Vt. 578.

[8] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

[9] R. *v.* Jones, 8 Camp. 230; Hill *v.* New River Co. 15 L. T. N. S. 555; Lake *v.* Milliken, 62 Me. 240; Jones *v.* R. R. 107 Mass. 261; Judd *v.* Fargo, 107 Mass. 265; People *v.* Cunningham, 1 Denio, 524; Congreve *v.* Morgan, 18 N. Y. 84; Loubz *v.* Hafner, 1 Dev. (N. C.) L. 185; Moreland *v.* Mitchell County, 40 Iowa, 394, quoted supra, § 437.

In Darling *v.* Westmoreland, 52 N. H. 401, it was held, in an action

worry sheep.[1] The habits and temper of animals, however, it is said, cannot be shown by proof of habits or temper of particular animals of the same species.[2]

So of conduct of men in masses.

§ 1296. Taking men in bodies, and contemplating their action as a mass, there are certain incidents which may be regarded as probable, and which, under certain conditions, are presumable.[3] Thus it is to be inferred that persons will be passing a thoroughfare in such numbers as to make it dangerous to discharge at random a gun towards such thoroughfare;[4] that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;[5] and that persons in fright will act instinctively and convulsively.[6]

against a town for an obstruction, at which a horse took fright, admissible to prove that other horses had taken fright at the same obstruction. *Contra*, Hawks *v.* Charlemont, 110 Mass. 110. In Clinton *v.* Howard, 42 Conn. 295, and Moreland *v.* Mitchell Co. 40 Iowa, 394 (see supra, § 735), it was held that it was admissible to prove that certain obstructions were likely to frighten horses.

[1] See Read *v.* Edwards, 17 C. B. N. S. 245; Marsh *v.* Jones, 21 Vt. 378; Woolf *v.* Chalker, 31 Conn. 121; Swift *v.* Applebone, 23 Mich. 252.

When the character of an animal comes into question, the general inference is, that he will follow the natural bent of the species to which he belongs. See question discussed fully in Whart. on Neg. §§ 923–5. But when the burden is on a party to prove a *scienter* in the owner of a mischievous animal it is admissible to put in evidence particular facts; Worth *v.* Gilling, L. R. 2 C. P. 1; Judge *v.* Cox, 1 Stark. R. 285; Kittredge *v.* Elliott, 16 N. H. 77; Whittier *v.* Franklin, 46 N. H. 23; Arnold *v.* Norton, 25 Conn. 92; Buckley *v.* Leonard, 4 Denio, 500; Cockerham *v.* Nixon, 11 Ired. L. 269; McCaskill *v.* Elliott, 5 Strobhart, 196; as well as general reputation; Whart. on Neg. § 924; but as to general reputation, see *contra*, Heath *v.* West, 26 N. H. 191.

[2] Collins *v.* Dorchester, 6 Cush. 396; Hawks *v.* Charlemont, 110 Mass. 110. See, however, Darling *v.* Westmoreland. 52 N. H. 401.

[3] See Whart. on Neg. § 108.

[4] See People *v.* Fuller, 2 Parker C. R. 16; Barton's case, 1 Stra. 481; Triscoll *v.* Newark Co. 37 N. Y. 637; Sparks *v.* Com. 3 Bush, 111; State *v.* Vance, 17 Iowa, 138; State *v.* Worthingham, 23 Minn. 528; Bizzell *v.* Booker, 16 Ark. 308.

[5] Scott *v.* Shepherd, 2 W. Black. 892; Guille *v.* Swan, 19 Johns. 381; Fairbanks *v.* Kerr, 70 Penn. St. 86.

[6] R. *v.* Pitts, C. & M. 284; Adams *v.* R. R. 4 L. R. C. P. 739; Sears *v.* Dennis, 105 Mass. 310; Coulter *v.* Exp. Co. 5 Lansing, 67; Buel *v.* R. R. 31 N. Y. 314; Frink *v.* Potter, 17 Ill. 406; Greenleaf *v.* R. R. 29 Iowa, 47.

V. PRESUMPTIONS OF REGULARITY.

Marriage presumed to have been regular.

§ 1297. When a man and woman have lived together as man and wife, and have been recognized as such in the community in which they live, their marriage will be held *primâ facie* conformable, so far as concerns its solemnities, with the practice of the *lex loci contractus*.[1] If a marriage is shown to have taken place, then the law presumes regularity until the contrary be proved.[2] This "presumption of law," as was said by Lord Lyndhurst,[3] and approved by Lord Cottenham,[4] "is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability."[5] Thus, in support of a plea of coverture, a certificate of the defendant's marriage in a Roman Catholic chapel according to the rites of that church, with evidence of subsequent cohabitation, been held *primâ facie* proof of a valid marriage under 6 & 7 Will. 4, c. 85, without proof that the solemnities prescribed by the statute were employed.[6] In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with.[7] It has been said, however, that

[1] Supra, § 84; Harrod *v.* Harrod, 1 K. & J. 15; R. *v.* Brampton, 10 East, 302; Redgrave *v.* Redgrave, 38 Md. 93; Jones *v.* Reddick, 79 N. C. 290.

[2] R. *v.* Allison, R. & R. 109; Rugg *v.* Kingsmill, L. R. 1 Ad. & Ec. 343; R. *v.* Creswell, L. R. 1 Q. B. D. 446.

[3] Morris *v.* Davies, 5 Cl. & Fin. 163.

[4] Piers *v.* Piers, 2 H. of L. Cas. 362.

[5] Supra, § 84; infra, § 1318; and see Harrison *v.* Southampton, 22 L. J. Ch. 722; Breadalbane case, L. R. 1 H. L. Sc. 182; Cunningham *v.* Cunningham, 2 Dow, 507; Campbell *v.* Campbell, L. R. 1 Sc. App. 193.

[6] Sichel *v.* Lambert, 15 C. B. N. S. 781.

[7] Smith *v.* Huson, 1 Phill. 924.

In De Thoren *v.* Attorney General, L. R. 1 App. Cas. H. L. (Div.) 686, it was ruled by the lord chancellor (Lord Cairns), that the presumption of marriage is much stronger than the presumption in regard to other facts. Hence when a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, and afterward removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent, by verbal declaration. The inference to be drawn was inference that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. The *onus* of rebutting a marriage by habit and repute, it was said, is thrown on those who deny it. See remarks supra, §§ 83, 84, 298, 1096.

this presumption will not be allowed to operate in suits for damages against alleged adulterers.[1] And when concubinage is once proved, the inference is that it continues; and consequently, in such case, marriage must be substantively proved, if set up.[2]

[1] Catherwood *v.* Caslon, 13 M. & W. 261; though see Rooker *v.* Rooker, 33 L. J. Pr. & Mat. 42.

[2] Lapsey *v.* Grierson, 1 H. L. Ca. 498; Clayton *v.* Wardell, 4 N. Y. 230; Caujolle *v.* Ferrie, 23 N. Y. 106; Foster *v.* Hawley, 8 Hun, 68; L. R. 8 Ch. 383; 25 W. R. 453; 34 L. T. 477. Yardley's Est. 75 Penn. St. 211; Jones *v.* Jones, 48 Md. —; *S. C.* 4 Am. Law T. R. 489. See supra, § 84.

In Vane *v.* Vane, heard before the Vice Chancellor Malins, on Nov. 1876, the contention of the plaintiff was that he was the oldest legitimate son of his late father, Sir F. F. Vane; and that an older brother, since deceased, leaving a son, who was defendant, was born before his parents' marriage. The vice chancellor, in the teeth of the declarations of Lady Vane, in her extreme old age, decided in favor of the legitimacy of the older brother.

"We have no doubt," says an ingenious criticism on this ruling, "the vice chancellor decided rightly in favor of the possessor of the title and estates; but he was obviously very much influenced by the excessive unusualness and romantic character of the plaintiff's story. Here, he says, is a man who declares that his own mother and father had palmed off an illegitimate child on the world as legitimate, and other relatives have assisted, and how monstrous a thing that is to believe!"

. . . . "A man of fashion," such is the allegation, "hating his distant heir, or devoutly attached to his mistress, determines that his next son by her shall be his heir, promises to marry her to legitimatize the child, and when it is born prematurely, conceals the facts for six weeks. The marriage takes place at the end of three weeks from the birth, that is, as soon as the mother is strong enough, and for the rest of his life the father acknowledges the son as his heir, his excuse in his own mind being that he intended to be married before the child could be born. Nevertheless, he was so anxious about possible ultimate detection, that he took the excessively unusual step in a family of the second rank, of obtaining a private act of parliament for the settlement of his estates, in which act the heirship of his son is incidentally declared. The mother, however, in extreme old age, in some anger with her son, or out of some regard for the law, declares that the baronet, like all born before him, was illegitimate. That it was not so, the vice chancellor has decided no doubt rightly; but taken in itself, where was the enormous improbability of the story? That Sir F. F. Vane should so act? Why in the last generation one of the Wortley Montagues advertised to all the world his intention of so acting, with the additional unfairness that the son whom he would have acknowledged as his heir would not have been his own. Once committed, neither Sir F. F. Vane nor Lady V. could retreat, and as to remainder of the family, certainty rested with those two alone. The story was disproved by counter evidence, but that evidence was not strengthened by the immense presumption of error, which the courts saw in the inherent im-

§ 1298. That a person born in a civilized nation is legitimate is a presumption of law, to be binding until rebutted.[1] *A fortiori* is a child born during wedlock, before any judicial separation, presumed to be legitimate, no matter how soon the birth be after the marriage;[2] though this presumption may be overcome by proof that the alleged father was incapable, on ground either of impotence or absence, of being father of the child.[3] When access is proved, it requires the strongest evidence of non-intercourse to justify a judgment of illegitimacy.[4] Separation, however, by a court of competent

Legitimacy a presumption of law.

probability of the story." London Spectator, Dec. 2, 1876.

But the question is not one of presumption in the case above stated. The principle is, that when a marriage is avowed and acted on by the parties for years, strong proof will be required to set it aside.

[1] 5 Co. 98 *b;* Morris *v.* Davies, 5 Cl. & F. 163; Banbury Peerage case, 1 Sim. & St. 153; Head *v.* Head, 1 Sim. & St. 150; Cope *v.* Cope, 1 M. & Rob. 269, 276; *S. C.* 5 C. & P. 604; Sullivan *v.* Kelly, 3 Allen, 148; Caujolle *v.* Ferrie, 26 Barb. 177; Com. *v.* Stricker, 1 Br. App. xlvii.; Com. *v.* Shepherd, 6 Binn. 283; Senser *v.* Bower, 1 Pen. & Watts, 450; Strode *v.* Mogowan, 2 Bush, 621; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Whitman *v.* State, 34 Ind. 360; State *v.* Worthingham, 23 Minn. 528; Dinkins *v.* Samuel, 10 Rich. S. C. 66. As to presumptions in case of children born ten months after non-intercourse, see supra, § 334.

[2] Stegall *v.* Stegall, 2 Brock. 256.

[3] Morris *v.* Davies, 5 Cl. & F. 163; R. *v.* Mansfield, 1 Q. B. 444; Atchley *v.* Sprigg, 33 L. J. Ch. 345; Strode *v.* Magowan, 2 Bush, 621; Ward *v.* Dulaney, 23 Miss. 410; Herring *v.* Goodson, 43 Miss. 392.

[4] Head *v.* Head, 1 Sim. & St. 150; Cope *v.* Cope, 1 M. & Rob. 269, 276; 5 C. & P. 604, *S. C.;* Morris *v.* Davies, 3 C. & P. 215, 427; 5 Cl. & Fin. 163, *S. C.;* Wright *v.* Holdgate, 3 C. & Kir. 158; Legge *v.* Edmonds, 25 L. J. Ch. 125; Banbury Peer. in Appendix, n. E. to Le Marchant's Gardner's Peer. Selw. N. P. 748–750, and 1 Sim. & St. 153, *S. C.;* R. *v.* Luffe, 8 East, 193; Taylor's Ev. § 91 *a;* Sullivan *v.* Kelly, 3 Allen, 148. That parents are incompetent to prove non-access, see supra, § 608.

But where the question was, who were the children of A., a married woman, so as to take under a will, it was held that under the 32 & 33 Vict. A.'s husband was admissible to corroborate evidence going to prove that only one of A.'s children was legitimate. Yearwood's Trusts, L. R. 5 Ch. D. 545. See Rideout's Trusts, L. R. 10 Eq. 41.

Sir J. Stephen (Evid. art. 98) states the law to be, that "declarations by either parent as to sexual intercourse are not regarded as relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders, when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.

Legitimacy cannot be assailed by

jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are *primâ facie* illegitimate.[1]

But adultery on the wife's part, no matter how clearly proved, will not have this effect, if the husband had access to the wife at the beginning of the period of gestation, unless there should be positive proof of non-intercourse.[2] "In every case," so is the rule declared by the English House of Lords, "where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."[3]

§ 1299. In the Roman law we have the well known maxim, *Pater est quem nuptiae demonstrant.*[4] This, however, has been construed to be a rebuttable presumption, simply throwing the burden of proof on those disputing the legitimacy of children born in wedlock. "For children," so is the law expressed by Windscheid, a commentator of the highest recent authority,[5] "who are conceived in matrimony, the law gives the presumption that the child is procreated (erzeugt) by the husband; but this does not exclude proof to the contrary. This proof must, to be effective, show the impossibility of the husband being the father; it is not enough to prove adultery by the wife, at the period of conception, with another man."[6] To this point are several modern

Time of parturition may be settled by experts.

evidence of the mother's bad character for chastity. Warlick *v.* White, 76 N. C. 175.

[1] Sidney *v.* Sidney, 3 P. Wms. 275; St. George's *v.* St. Margaret's, 1 Salk. 123.

[2] Bury *v.* Phillpot, 2 Mylne & K. 349; Head *v.* Head, 1 Sim. & St. 150; Com. *v.* Shepherd, 6 Binn. 283; Com. *v.* Stricker 1 Br. App. xlvii.; Com. *v.* Wentz, 1 Ash. 269; State *v.* Pettaway, 3 Hawks, 623.

[3] Banbury Peerage case, 1 Sim. & St. 153. See Plowes *v.* Bossey, 2 Dr. & Sm. 145; Atchley *v.* Sprigg, 33 L. J. Ch. 345.

[4] L. 5, D. (ii. 4).

[5] Windscheid, Lehrbuch des Pandektenrechts, 3d ed. Düsseldorf, 1873, § 56 *b.*

[6] L. 11, § 9, D. (xlviii. 5); L. 29, § 1, D. (xxii. 3); L. 6, D. l. 6.

judicial decisions.[1] The time of conception is determined, in the Roman practice, by reckoning backwards from the time of birth; and the rule is, that there must be not less than 182 days, and not more than 10 months, to establish legitimacy.[2] German jurists have continued to maintain the *minimum* of 182 days.[3] In our own practice, the question of legitimacy, when a child is born on either side of the usual limits of parturition, is determined on the testimony of experts; though, in cases beyond question, the court may determine what is notorious, as part of the ordinary laws of nature.[4]

The presumption of legitimacy from family likeness has been already noticed.[5]

Woman over fifty-five presumed past childbearing.

§ 1300. The inferences as to barrenness vary with circumstances, though a woman under fifty-five will not be ordinarily presumed to be beyond childbearing.[6]

Paper presumed to be regularly negotiated.

§ 1301. Business men, in the negotiation of bills and notes, have every reason to act not only fairly but exactly; and hence, in view of the importance of extending to negotiable paper all proper aid for the maintenance of its credit, the courts have been prompt to determine that it is a *primâ facie* presumption of fact that such paper, when on the market, has been regularly negotiated. Hence, the holder of an unimpeached promissory note is presumed, until

[1] Seuff. Archiv. i. 162; ii. 254; viii. 229; x. 267; xii. 36; xix. 36.

[2] L. 12, D. i. 5; L. 5; L. 3, § 11, D. xxxviii. 16.

[3] Windscheid, *ut supra.*

[4] See cases reported at large in 2 Whart. & Stille Med. Jur. §§ 40 *et seq.* Supra, § 334.

[5] Supra, § 346.

[6] See In re Widdow's Trusts, L. R. 11 Eq. 408, where a widow, aged fifty-five years and four months, and a spinster, aged fifty-three years and nine months, were presumed to be past childbearing; In re Millner's Estate, L. R. 14 Eq. 245, where a similar presumption was made about a married woman aged forty-nine years and nine months, who had been married some years; Groves *v.* Groves, 9 L. T. R. N. S. 533, where Wood, V. C., mentioned fifty as the age below which the court would presume a woman might bear children when there had been long prior cohabitation.

In Croxton *v.* May (1878) it was held that by the Court of Appeal, 39 L. T. R. N. S. 467), that the court would not presume that a woman aged fifty-four years and six months, and who has never had any children, but has only cohabited with her husband three years, is past childbearing. As to judicial notice, see supra, § 334.

the contrary is shown, to be a *bonâ fide* holder for value.[1] Value is presumed, until the contrary is shown, in all acceptances and indorsements in regular course.[2] And the transfer of a bill or note is presumed, until the contrary is shown, to have been before maturity and in the usual course of business.[3] "Nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence or to invalidate the title of the holder supported by that presumption."[4]

§ 1302. The presumption of regularity is frequently applied to judicial proceedings; and it is sometimes said that whatever a court of record does, it is presumed to do right. This, however, is not correct. A court of record is required to act exactly and minutely; and to have record proof of all its important acts. If it does not, these acts cannot be put in evidence.[5] Unless in case of ancient records, missing links cannot be presumed. "With respect to the general principle of presuming a regularity of procedure," says Sir W. D. Evans, "it may perhaps appear to be the true conclusion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregu-

Burden on party assailing judicial records.

[1] Collins *v.* Martin, 11 B. & P. 648; Goodman *v.* Simonds, 20 How. U. S. 343; Collins *v.* Gilbert, 94 U. S. 758; Scott *v.* Williamson, 24 Me. 343; Perain *v.* Noyes, 39 Me. 384; Perkins *v.* Prout, 47 N. H. 387; Tucker *v.* Morrill, 1 Allen, 528; Bank of Orleans *v.* Barry, 1 Denio, 116; Bank *v.* Hoge, 35 N. Y. 68; Phelan *v.* Moss, 67 Penn. St. 63; Ellicott *v.* Martin, 6 Md. 509; Paton *v.* Coit, 5 Mich. 505; American Ins. Co. *v.* Cutler, 36 Mich. 261; Curtis *v.* Martin, 20 Ill. 557; Lathrop *v.* Donaldson, 22 Iowa, 234; Dickerson *v.* Burke, 25 Ga. 225; Earbee *v.* Wolfe, 9 Port. 366; Boyd *v.* McIvor, 11 Ala. 822; Ross *v.* Drinkard, 35 Ala. 434; Fuller *v.* Hutchings, 10 Cal. 523.

[2] Story on Bills, §§ 16, 78; Walker *v.* Sherman, 11 Met. (Mass.) 170; Miller *v.* McIntyre, 9 Ala. 638; Clark *v.* Schneider, 17 Mo. 295.

[3] Burnham *v.* Webster, 19 Me. 232; Walker *v.* Davis, 33 Me. 516; Bissell *v.* Morgan, 11 Cush. 198; Noxon *v.* De Wolf, 10 Gray, 343; Hopkins *v.* Kent, 17 Md. 113; Mobley *v.* Ryan, 14 Ill. 51; Woodworth *v.* Huntoon, 40 Ill. 131; Cook *v.* Helms, 5 Wis. 107; Beall *v.* Leverett, 32 Ga. 105; New Orleans Can. *v.* Templeton, 20 La. An. 141. See Loomis *v.* Mowry, 8 Hun, 311.

[4] Clifford, J., Collins *v.* Gilbert, 94 U. S. 758; citing Story on Bills (4th ed.), § 416; Byles on Bills (10th ed.), 119; Chitty on Bills (12th ed.), 257; Mills *v.* Barber, 1 Mees. & Wels. 425; Murray *v.* Gardner, 2 Wall. 120; Bank *v.* Neal, 22 How. 108. See supra, § 1058.

[5] Supra, § 830.

larity. This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists."[1] The true view is, not that the law presumes that a judicial record is right; but that, if on its face it is complete and regular, the law throws upon the party objecting to it the burden of proving any latent imperfections by which it may be affected.[2]

§ 1303. In conformity with the rule above stated, where damages are assessed, it will be presumed that they are assessed on a good cause of action when such is averred;[3] where jurisdiction

[1] 2 Ev. Poth. 33, cited in text by Mr Best, Ev. § 360.

[2] R. *v.* Lyme Regis, 1 Dougl. 159; Caunce *v.* Rigby, 3 M. & W. 68; James *v.* Heward, 3 G. & Dav. 264; Parsons *v.* Lloyd, 3 Wils. 341; Tayler *v.* Ford, 22 W. R. 47; 29 L. J. N. S. 392; Van Omeron *v.* Dowick, 2 Camp. 44; Phillips *v.* Evans, 1 Cr. & M. 461; Gosset *v.* Howard, 10 Q. B. 453; Bank U. S. *v.* Dandridge, 12 Wheat. 69; Florentine *v.* Barton, 2 Wall. 210; Cofield *v.* McClelland, 16 Wall. 331; McNitt *v.* Turner, 16 Wall. 352; Garnharts *v.* U. S. 16 Wall. 162; Pittsburg R. R. *v.* Ramsey, 22 Wall. 322; Ready *v.* Scott, 23 Wall. 352; Sprague *v.* Litherberry, 4 McLean, 442; Segee *v.* Thomas, 3 Blatch. 11; Kibbe *v.* Dunn, 5 Biss, 233; Austin *v.* Austin, 50 Me. 74; Stearns *v.* Stearns, 32 Vt. 678; Cowen *v.* Bolkom, 3 Pick. 281; Apthorp *v.* North, 14 Mass. 167; Sanford *v.* Sanford, 28 Conn. 6; Schermerhorn *v.* Talman, 14 N. Y. 93; Rowe *v.* Parsons, 13 N. Y. Supreme Court, 338; Mandeville *v.* Reynolds, 68 N. Y. 528; Cromelien *v.* Brink, 29 Penn. St. 522; Williamson *v.* Fox, 38 Penn. St. 214; Smith *v.* Williamson, 11 N. J. L. 313; State *v.* Lewis, 22 N. J. L. 564; Den *v.* Gaston, 25 N. J. L. 615; Hudson *v.* Messick, 1 Houst. Del. 275; Brown *v.* Connelly, 5 Blackf. 390; Brackenridge *v.* Dawson, 7 Ind. 383; Morgan *v.* State, 12 Ind. 448; Kelly *v.* Garner, 13 Ind. 399; Owen *v.* State, 25 Ind. 371; Markel *v.* Evans, 47 Ind. 326; Outlaw *v.* Davis, 27 Ill. 467; Tibbs *v.* Allen, 27 Ill. 119; Moore *v.* Neil, 39 Ill. 256; Rosenthal *v.* Renick, 44 Ill. 202; Stampofski *v.* Hooper, 86 Ill. 321; McNorton *v.* Akers, 24 Iowa, 369; Merritt *v.* Baldwin, 6 Wis. 439; Bunker *v.* Rand, 19 Wis. 253; Tharp *v.* Com. 3 Metc. (Ky.) 411; Vincent *v.* Eames, 1 Metc. (Ky) 247; Letcher *v.* Kennedy, 3 J. J. Marsh. 701; Sidwell *v.* Worthington, 8 Dana, 74; Brown *v.* Gill, 49 Ga. 549; Tyler *v.* Chevalier, 56 Ga. 168; McGrews *v.* McGrews, 1 St. & Port. 30; Stubbs *v.* Leavitt, 30 Ala. 138; Gray *v.* Cruise, 36 Ala. 559; State *v.* Farish, 23 Miss. 483; Grinstead *v.* Foute, 26 Miss. 476; Reynolds *v.* Nelson, 41 Miss. 83; State *v.* Williamson, 57 Mo. 192; Wadsworth's Succes. 1 La. An. 966; Gibson *v.* Foster, 2 La. An. 509; Brooks *v.* Walker, 3 La. An. 150; Towne *v* Bossier, 19 La. An. 162; People *v.* Garcia, 25 Cal. 531; Butcher *v.* Bank, 2 Kans. 70; Sumner *v.* Cook, 12 Kans. 162; Dodge *v.* Coffin, 15 Kans. 277; Ward *v.* Baker, 16 Kans. 31; State *v.* Gibson, 21 Ark. 140; Callison *v.* Autry, 4 Tex. 371; Frosh *v.* Holmes, 8 Tex. 29.

[3] Barnes *v.* Jennings, 40 Vt. 45.

is averred, all the facts necessary to constitute jurisdiction will be presumed;[1] where successive decisions are inconsistent with a general order of court, a reversal of that order will be presumed;[2] where an amendment appears on the record in error it will be presumed to have been duly authorized;[3] and where a writ is duly returned, it will be presumed that it was duly served;[4] though in all these cases the presumption is available simply for the purpose of throwing the burden on the party alleging defects in a record otherwise complete. It will be, to the same extent, inferred that where a parish deed of apprenticeship has been approved by the proper court, the proper statutory notices have been given;[5] and that there have been due stamps.[6] It should be remembered that the rebuttability of presumptions of this kind may be lost by delay in applying to the proper court for correction; and after twenty years such presumptions may be treated as irrebuttable.[7] It is scarcely necessary here to repeat that judicial records are presumed to have been correctly made.[8] When regular, they cannot, except in cases of fraud or non-jurisdiction, be collaterally impeached.[9] If erroneous, the court of the record must be applied to for relief.[10] The same presumption of regularity applies to judicial proceedings of other states;[11] and to inferior courts when jurisdiction appears on the record.[12]

§ 1304. We must again recall the caution that the presumption before us goes simply to the burden of proof, and cannot,

[1] Ray *v.* Rowley, 4 Thomp. & C. 43; 1 Hun, 614; Hays *v.* Ford, 55 Ind. 52.

[2] Bohun *v.* Delessert, 2 Coop. 21.

[3] Pedan *v.* Hopkins, 13 S. & R. 45.

[4] Bastard *v.* Trutch, 3 A. & E. 451; 5 N. & M.1 09; Bosworth *v.* Vandewalker, 53 N. Y. 597; Fitler *v.* Patton, 8 W. & S. 455; Drake *v.* Duvenick, 45 Cal. 455.

[5] R. *v.* Whiston, 4 A. & E. 607; R. *v.* Whitney, 5 A. & E. 191; 6 N. & M. 552.

[6] R. *v.* Long Buckley, 7 East, 45. For other cases see R. *v.* Benson, 2 Camp. 508; Lee *v.* Johnstone, L. R. 1 H. L. Sc. 426.

[7] See Williams *v.* Eyton, 2 H. & N. 771; *S. C.* 4 H. & N. 357; Society Prop. Gos. *v.* Young, 2 N. H. 310; Brown *v.* Wood, 17 Mass. 68.

[8] Reed *v.* Jackson, 1 East, 355; Ramsbottom *v.* Buckhurst, 2 M. & Sel. 567, per Ld. Ellenborough; 1 Inst. 260; R. *v.* Carlisle, 2 B. & Ad. 367–369, per Lord Tenterden; Leedom *v.* Lombaert, 80 Penn. St. 381; Coxe *v.* Derringer, 82 Penn. St. 236.

[9] Supra, §§ 981, 982.

[10] Supra, § 983.

[11] Ripple *v.* Ripple, 1 Rawle, 386; Morgan *v.* Neville, 74 Penn. St. 176.

[12] See infra, § 1308.

except in cases of ancient records, on principles to be hereafter discussed,[1] supply the proof of averments necessary to make a record complete.[2] Hence the presumption will not be allowed to operate so as to dispense with a check specifically prescribed by statute;[3] nor to cure process on its face defective;[4] nor to confer jurisdiction on a court when the record itself shows that the proceedings were so irregular that the court had no jurisdiction.[5]

But patent defects cannot in this way be supplied.

§ 1305. In matters *in pais*, the presumption of regularity is more liberally applied. Thus after a verdict, a court in review will assume that all facts necessary for the support of the verdict were proved, unless the contrary appear in the record duly before the court.[6] It is also held that the notes taken by the judge at nisi prius will be so far assumed to be true, that no party is allowed to raise before the court in banc any question respecting the rejection of evidence at the trial, unless it appears from these notes that the evidence was formally tendered.[7]

In error, necessary facts will be presumed.

§ 1306. When a military court has jurisdiction, and its records, if open to revision, give an adequate narrative of its procedure, the burden is on the party assailing them to prove irregularity.[8] It has been held that where a town was proved to be in the military occupation of an enemy, and proclamations, purporting to be signed by the general in

So as to military courts.

[1] Infra, § 1347.

[2] See supra, §§ 824, 830, 981; Messinger *v.* Kintner, 4 Binn. 97.

[3] U. S. *v.* Jonas, 19 Wall. 598.

[4] Supra, § 795.

[5] Galpin *v.* Page, 18 Wall. 365; Com. *v.* Blood, 97 Mass. 538. Supra, § 804.

[6] Speers *v.* Parker, 1 T. R. 141; Jackson *v.* Pesked, 1 M. & Sel. 237, per Lord Ellenborough; Steph. Pl. 162–164; Davis *v.* Black, 1 Q. B. 911, 912, per Ld. Denman, C. J., and Patteson, J.; 1 G. & D. 432, *S. C.;* Harris *v.* Goodwyn, 2 M. & Gr. 405; 2 Scott N. R. 459; 9 Dowl. 409, *S. C.;* Goldthorpe *v.* Hardman, 13 M. & W. 377; Minor *v.* Bank, 1 Peters, 68; Pittsburg R. R. *v.* Ramsay, 22 Wall. 276; Dobson *v.* Campbell, 1 Sumn. 319; Addington *v.* Allen, 11 Wend. 375; Wagers *v.* Dickey, 17 Ohio, 439; Coil *v.* Willis, 18 Ohio, 28. See, also, Smith *v.* Keating, 6 Com. B. 136; Kidgill *v.* Moor, 9 Com. B. 364; Delamere *v.* The Queen, 2 Law Rep. H. L. 419; 36 L. J. Q. B. 313, in Dom. Proc. *S. C.* So in criminal cases. R. *v.* Waters, 1 Den. C. C. 356; R. *v.* Bowen, 13 Q. B. 790; Beale *v.* Com. 25 Penn. St. 11; Powell on App. Jur. 158.

[7] Gibbs *v.* Pike, 9 M. & W. 351; 1 Dowl. P. C. 409, cited in Taylor's Ev. § 78.

[8] Slade *v.* Minor, 2 Cranch C. C. 139.

command, were posted on its walls, the inference was proper that the placards had been posted by order of the commander.[1]

So as to keeping of records.

§ 1307. The law also assumes that proper official care is taken of public records and files.[2]

Otherwise as to presumption of jurisdiction of justices, and special courts.

§ 1308. It is otherwise, so far as concerns jurisdiction, as to proceedings before justices of the peace, and before courts of special and limited jurisdiction, whatever may be their grade.[3] As to such tribunals, the facts necessary to jurisdiction must be shown.[4] But justices of the peace, and other judicial officers, though of special and limited powers, will be presumed to have acted regularly, as to a matter within their jurisdiction, unless the record show to the contrary.[5] And a warrant of conviction, purporting to be founded on a preceding conviction, has been sustained in England, though it does not state that the evidence was given on oath, or in the presence of the prisoner.[6]

Legislative proceedings presumed to be regular.

§ 1309. The legislature, whether federal or state, when acting within its constitutional range, is presumed to act in conformity with law, whenever the contrary does not plainly and expressly appear.[7] Hence we must *primâ facie* hold that the respective houses, as component parts of a legislature, act within their jurisdiction, and agreeably to parliamentary usages and the rules of law and justice.

[1] Bruce *v.* Nicolopulo, 11 Ex. R. 129.

[2] Reed *v.* Jackson, 1 East, 855; Hall *v.* Kellogg, 16 Mich. 135; Rice *v.* Cunningham, 29 Cal. 492. As to regularity of recorded title, see infra, § 1311.

[3] R. *v.* Hulcott, 6 T. R. 583; R. *v.* Bloomsbury, 4 E. & B. 520; Carratt *v.* Morley, 1 Q. B. 18; R. *v.* Totness, 11 Q. B. 80; Day *v.* King, 5 A. & E. 359; Johnson *v.* Reid, 6 M. & W. 24; Jackson *v.* New Milford, 34 Conn. 266; Pelton *v.* Platner, 13 Ohio, 209; Mills *v.* Hamaker, 11 Iowa, 206.

[4] R. *v.* All Saints, 7 B. & C. 790; Gossett *v.* Howard, 10 Q. B. 452; R. *v.* Stainforth, 11 Q. B. 66; R. *v.* Preston, 12 Q. B. 816; R. *v.* Morris, 4 T. R. 552; Omerod *v.* Chadwick, 16 M. & W. 367; Goulding *v.* Clark, 34 N. H. 148; Graham *v.* Whitely, 26 N. J. L. 254; State *v.* Hinchman, 27 Penn. St. 479; Swain *v.* Chase, 12 Cal. 283; Tompert *v.* Lithgow, 1 Bush, 176.

[5] Christie *v.* Unwin, 11 A. & E. 379; Clark in re, 2 Q. B. 630; Chesterton *v.* Fairlar, 7 A. & E. 713; Halleck *v.* Cambridge, 1 Q. B. 593; State *v.* Hinchman, 27 Penn. St. 479; Davis *v.* State, 17 Ala. 354; Brown *v.* Connelly, 5 Blackf. 390.

[6] Bailey, ex parte, 3 E. & B. 607.

[7] See Cochran *v.* Arnold, 58 Penn. St. 399; Garrett *v.* R. R. 78 Penn. St. 465; Wickham *v.* Page, 49 Mo. 526; Sedgwick's Stat. Law, 228, n.; Cooley's Const. Lim. 168, 172. Supra, §§ 980 *a*, 1260.

It has therefore been held that a warrant issued by the speaker of a legislative house, at the instance of the house, for the arrest of a witness, need not contain any recital of the grounds on which it was founded.[1]

Regularity assumed as to proceedings of corporations.

§ 1310. So far as concerns the burden of proof, when the record of a municipal or other corporation is put in evidence, and such record is complete, and is in conformity with law, the burden is on the party assailing it. The record is not presumed to be correct until it has been duly proved; but when it is so proved, and when by law it is evidence of the facts it narrates, then it is to be accepted as true until impeached.[2] When, however, a statute prescribes certain conditions as the prerequisites of corporate action, it must appear from the record that these conditions existed.[3]

So of minutes of societies.

§ 1311. What has been said as to the records of corporations, when such records are kept in conformity with law, applies, though with diminishing force, to the minutes of societies,[4] and to the entries made by deceased business men.[5] Supposing such papers and entries to be admissible in evidence, and to be regular on their face, the burden of proof is on the party attacking them.

Dates inferred to be correctly averred.

§ 1312. We have already observed that dates stated in a document are true only *primâ facie*, and may be disputed even by parties.[6] But, until disproved, such dates are assumed to be correct. "This has been held to apply to letters,[7] bills of exchange and promissory notes,[8] and the indorsements on them,[9] and also to bankers' checks.[10] So, a deed

[1] Gossett *v.* Howard, 10 Q. B. 411, 455–459.

[2] Supra, § 987; Grady's case, 1 De Gex, J. & S. 488; Lane's case, 1 De Gex, J. & S. 504; Muzzey *v.* White, 3 Greenl. 290; Copp *v.* Lamb, 13 Me. 312; Hathaway *v.* Addison, 48 Me. 440; Soc. Prop. Gos. *v.* Young, 2 N. H. 310; Cobleigh *v.* Young, 15 N. H. 403; West Springfield *v.* Root, 18 Pick. 318; Spurr *v.* Bartholomew, 2 Met. 479; Bassett *v.* Porter, 10 Cush. 418; Slate *v.* Lime, 23 Minn. 521; Endres *v.* Lloyd, 56 Ga. 592; Louisville *v.* Hyatt, 2 B. Mon. 177.

[3] Clark *v.* Wardwell, 55 Me. 61.

[4] Supra, § 1131.

[5] Supra, § 238.

[6] Supra, § 977.

[7] Hunt *v.* Massey, 5 B. & Ad. 902; Goodtitle d. Baker *v.* Milburn, 2 M. & W. 853; Potez *v.* Glossop, 2 Exch. 191. See, however, the observations of Lord Wensleydale in Butler *v.* Lord Mountgarrett, 7 Ho. Lo. Cas. 633, 646.

[8] Anderson *v.* Weston, 6 Bing. N. C. 296; Meadows *v.* Cozart, 76 N. C. 450.

[9] Smith *v.* Battens, 1 Moo. & R. 341. Supra, § 977.

[10] Laws *v.* Rand, 3 C. B. N. S. 442.

is presumed to have been executed,[1] and delivered,[2] on the day it is dated;" and so as to receipts.[3] "And where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties;[4] as, for instance, where property is sought to be conveyed by lease and release, both of which are contained in one deed, a priority of execution of the lease will be presumed.[5] So, in construing a deed or will, priority or posteriority in the collocation of words will be disregarded, in order to carry into effect the manifest intention of the parties."[6]

Formalities of documents presumed to be correct.

§ 1313. Documents, on their face solemnly executed, are presumed to have been executed in conformity with the local law of the place of execution, so far as to throw the burden of proving the contrary on the assailing party.[7] If secondary evidence be offered to prove the contents of a document, the inference, until the contrary is shown, is that the document was in due form,[8] and was duly stamped,[9] unless there is evidence that the document remained without stamp some time after the execution, in which case the *onus* is shifted, and lies upon the party who relies on the document.[10] So when an incorporated land company makes a partition of its lands, it will be presumed, after twenty years, that

[1] Anderson *v.* Weston, 6 Bing. N. C. 296, 300.

[2] Stone *v.* Grubbam, 1 Rol. 3, pl. 5; Oshey *v.* Hicks, Cro. Jac. 263; Best's Ev. § 402.

[3] Caldwell *v.* Gamble, 4 Watts, 292.

[4] Taylor d. Atkyns *v.* Horde, 1 Burr. 106.

[5] Per North, C. J., in Barker *v.* Keets, 1 Freem. 251.

[6] Brice *v.* Smith, Willes, 1, and the cases cited; Richards *v.* Bluck, 6 C. B. B. 441. Supra, § 979; Best's Ev. § 364.

[7] Roberts *v.* Pillow, 1 Hempst. 624; R. *v.* Gray, 10 B. & C. 807; R. *v.* Ashburton, 8 Q. B. 876; R. *v.* Whiston, 4 A. & E. 667; Doe d. Griffin *v.* Mason, 3 Camp. 7. See, also, Doe d. Lewis *v.* Bingham, 4 B. & A. 672; Brighton Railway Company *v.* Fairclough, 2 Man. & G. 674; Clements *v.* Macheboenf, 92 U. S. 418; Van Rensselaer *v.* Vickery, 3 Lansing, 57; Thayer *v.* Marsh, 18 N. Y. Sup. Ct. 501; Diehl *v.* Emig, 65 Penn. St. 320; Hardin *v.* Crate, 78 Ill. 583; Pringle *v.* Dunn, 37 Wis. 449; State *v.* Lawson, 14 Ark. 114; Sadler *v.* Anderson, 17 Tex. 245. Supra, § 739 *a*. As to alteration of document, see supra, §§ 629, 630.

[8] Brown *v.* Bank, 3 Penn. St. 187.

[9] Hart *v.* Hart, 1 Hare, 1; Pooley *v.* Goodwin, 4 A. & E. 94; R. *v.* Long Buckley, 7 East, 65; Closmadenc *v.* Carrel, 18 C. B. 36. Supra, §§ 697–9.

[10] Marine Investment Co. *v.* Haviside, L. R. 5 E. & I. App. 624; 42 L. J. Chan. 173; Powell's Evidence, 4th ed. 83.

there was a due notification to parties of its procedure, and that its acts were regular.[1] And a foreign notary will be presumed to have addressed a notice of non-payment, proved to have been mailed, in the right way.[2]

§ 1314. Generally if a contract is on its face regularly executed, the burden of proof is on those who assail such regularity.[3] Thus where certain formalities are requisite to the validity of an act done by a joint stock company, as to which act there is evidence showing acquiescence by the stockholders, a compliance with these formalities will be *primâ facie* inferred.[4] Sealing (although there be no impressions of a seal) and delivery also may be inferred as a presumption of fact, from attestation and signature, when accompanied by transfer of possession.[5]

When execution of document is *primâ facie* shown, burden is on assailant.

It will also be presumed that attesting witnesses really and regularly witnessed the execution of the document to which their signatures are attached.[6] Missing links, also, as we will presently see, may be presumed, especially when these links are the formal execution, by

[1] Freeman *v.* Thayer, 33 Me. 76; Munroe *v.* Gates, 48 Me. 463; Society *v.* Young, 2 N. H. 310; Freeholders *v.* State, 4 Zabr. 718. See infra, § 1347; Stevens *v.* Taft, 3 Gray, 487; Russell *v.* Marks, 3 Metc. (Ky.) 37.

[2] McGarr *v.* Lloyd, 3 Penn. St. 474.

[3] Doe *v.* Mason, 3 Camp. 7; Doe *v.* Bingham, 4 B. & A. 672; Cherry *v.* Heming, 4 Ex. R. 633; Horan *v.* Weiler, 41 Penn. St. 470; Sutphen *v.* Cushman, 35 Ill. 186; Thayer *v.* Barney, 12 Minn. 502; Smith *v.* Jordan, 13 Minn. 264.

[4] Grady's case, 1 De Gex, J. & S. 504; British Prov. Ass. Co., in re, 1 De Gex, J. & S. 488.

[5] Fassett *v.* Brown, Pea. R. 23; Talbot *v.* Hodgson, 7 Taunt. 251; Doe *v.* Lewis, 6 M. & Gr. 386; 10 Cl. & F. 346; Hall *v.* Bainbridge, 12 Q. B. 699, 710; Sandilands, in re, L. R. 6 C. P. 411; Ward *v.* Lewis, 4 Pick. 518; Vernol *v.* Vernol, 63 N. Y. 45. As to what constitutes a seal, see supra, § 692.

In Cherry *v.* Heming, 4 Exch. R. 633, an action of covenant was brought by the assignor against the assignees of certain letters patent to recover the consideration money for the assignment, and one of the defendants named Heming pleaded *non est factum*. At the trial Heming produced the deed, which was signed and executed by all the parties to it except himself; but although a seal had been placed for him in the usual way, his signature was not attached, neither was there any attesting witness to his execution. As, however, he had acted under the deed, and recognized it as a valid instrument, the jury presumed, with the approbation of the court, that he had duly executed it. Taylor's Ev. § 128.

[6] See supra, § 739. That parol evidence may prove delivery, see supra, § 1016.

trustees or agents, of powers conferred on them, and when the presumption is in aid of continuous possession.[1]

Officer presumed to be regularly appointed.

§ 1315. It is a presumption of fact, varying in intensity with the circumstances, that a person acting as a public officer is authorized to act as such. The presumption may be very weak, as where a mere intruder, whose want of authority ordinary penetration would discover, usurps an office; or it may be very strong, as where a person, honestly believing himself to be appointed, is honestly accepted by the body of those with whom he acts. The presumption cannot be called a presumption of law, for it lacks one of the essential incidents of a presumption of law, *i. e.* universal equality of application to all cases; and it is to be regarded simply as one of these presumptions of fact which determine the burden of proof. In this sense we are to hold that a person acting as a public or quasi public officer is to be so far recognized as such that his appointment is to be treated as regular until the contrary be proved.[2] As officers, in the sense above stated, have been re-

[1] Infra, §§ 1347–57; Robins *v.* Bellas, 4 Watts, 255; Warner *v.* Henby, 48 Penn. St. 187.

"The maxim, *Omnia praesumuntur rite esse acta*, is applied by the courts to the execution both of deeds and wills. Where all the witnesses are dead, and the handwriting of one of them is proved, the statement in the attestation clause will be presumed to be correct. Adam *v.* Kerr, 1 B. & P. 360; Andrews *v.* Mottley, 12 C. B. N. S. 526. The court of probate goes further than this, and presumes that all formalities have been complied with in respect of a will when the attestation clause is in the usual form. Vinnicombe *v.* Butler, 3 S. & T. 580. When there is no attestation clause, or when it is not in the usual form, the courts of common law will, it seems, presume compliance with all formalities in respect of a will; Spilsbury *v.* Burdett, 10 Cl. & F. 840; and the tendency of the court of probate will be to give effect to the testator's intentions. In the Goods of Rees, 34 L. J. P. M. & A. 56. Of course, the evidence of attesting witnesses may rebut the presumption of due execution. Croft *v.* Croft, 34 L. J. P. M. & A. 44; 13 W. R. 526. But when a will appears on the face of it to have been duly attested, and surrounding circumstances imply that this was so, the contrary evidence of one attesting witness will not rebut the presumption of due execution. Wright *v.* Rogers, 17 W. R. 833." Powell's Ev. 83.

[2] R. *v.* Verelst, 3 Camp. 432; Monke *v.* Butler, 1 Rolle R. 83; Riley *v.* Packington, L. R. 2 C. P. 53; Butler *v.* Hunter, 7 H. & N. 826; Marshall *v.* Lam, 5 Q. B. 115; Bowley *v.* Barnes, 8 Q. B. 1037; R. *v.* Gordon, 2 Leach C. C. 581; Berryman *v.* Wise, 4 T. R. 366; Doe *v.* Brown, 5 B. & A. 243; R. *v.* Howard, 1 M. & Rob. 188; McGahey *v.* Alston, 2 M. & W. 188; Faulkner *v.* Johnson, 11 M. & W. 581; R. *v.* Roberts, 38 L. T.

garded trustees under a turnpike act;[1] justices of the peace;[2] soldiers engaged in recruiting;[3] constables and policemen;[4] weigh-masters of particular markets;[5] attorneys;[6] post officers and their employees,[7] and masters in chancery and commissioners.[8] Even when a party is indicted for misconduct in office, it is sufficient, *primâ facie*, to show that he acted in the particular office in which the misconduct is supposed.[9] The rule which has just been stated applies though the suit be brought in the name of the officer,[10] and though the title be directly put in issue by the pleading.[11]

Presumption does not apply to special agents.

§ 1316. This presumption, however, does not apply to special private agents,[12] though the fact that a general agent is recognized as such by his principal makes it unnecessary for the party relying on such agency to prove a

690; Bank U. S. *v.* Dandridge, 12 Wheat. 70; Minor *v.* Tillotson, 7 Pet. 100; Sheets *v.* Selden, 2 Wallace, 177; Mech. Bank *v.* Union Bank, 22 Wall. 276; Jacob *v.* U. S. 1 Brock. 520; Hutchings *v.* Van Bokkelen, 34 Me. 126; Cabot *v.* Given, 45 Me. 144; Jay *v.* Carthage, 48 Me. 353; State *v.* Roberts, 52 N. H. 492; Briggs *v.* Taylor, 35 Vt. 57; Fay *v.* Richmond, 43 Vt. 25; Com. *v.* McCue, 16 Gray, 226; Clough *v.* Whitcomb, 105 Mass. 482; Wilcox *v.* Smith, 5 Wend. 231; Hamlin *v.* Dingman, 5 Lansing, 61; Nelson *v.* People, 23 N. Y. 293; Woolsey *v.* Rondout, 4 Abb. App. Decis. 639; Saltar *v.* Applegate, 3 Zabr. 115; Kilpatrick *v.* Frost, 2 Grant (Penn.), 168; Stevens *v.* Hoy, 43 Penn. St. 260; Seeds *v.* Kahler, 76 Penn. St. 263; Conolly *v.* Riley, 25 Md. 402; Strang, ex parte, 21 Ohio St. 610; Druse *v.* Wheeler, 22 Mich. 439; Shelbyville *v.* Shelbyville, 1 Mete. (Ky.) 54; Landry *v.* Martin, 15 La. R. 1; Cooper *v.* Moore, 44 Miss. 386; Titus *v.* Kimbro, 8 Tex. 210; Whart. on Agency, §§ 44, 121.

[1] Pritchard *v.* Walker, 3 C. & P. 212.

[2] Berryman *v.* Wise, 4 T. R. 366.

[3] Walton *v.* Gavin, 16 Q. B 48.

[4] Berryman *v.* Wise, 4 T. R. 366; Butler *v.* Ford, 1 C. & M. 662.

[5] McMahan *v.* Leonard, 6 H. of L. Cas. 970; Hays *v.* Dexter, 13 Ir. L. R. N. S. 106.

[6] Pearce *v.* Whale, 5 B. & C. 38. Infra, § 1317.

[7] R. *v.* Rees, 6 C. & P. 606.

[8] Marshall *v.* Lamb, 5 Q. B. 115; R. *v.* Newton, 1 C. & Kir. 480.

[9] Clay's case, 2 East P. C. 580; R. *v.* Rees, 6 C. & P. 606; R. *v.* Goodwin, 1 Lew. C. C. 100; Com. *v.* Fowler, 10 Mass. 290; People *v.* Cock, 4 Seld. 67; State *v.* Perkins, 4 Zab. 409; Com. *v.* Rupp, 9 Watts, 114; State *v.* Hill, 2 Speers, 150.

[10] M'Gahey *v.* Alston, 2 M. & W. 206, 211; M'Mahon *v.* Lennard, 6 H. of L. Cas. 970; Doe *v.* Barnes, 8 Q. B. 1037, which was an action of ejectment brought by parish officers; Cannell *v.* Curtis, 2 Bing. N. C. 228; 2 Scott, 379, *S. C.*

[11] Dexter *v.* Hayes, 11 Ir. Law R. N. S. 106; *S. C. nom.* Hayes *v.* Dexter, 13 Ir. Law R. N. S. 22, per Ex. Ch.; M'Mahon *v.* Lennard, 6 H. of L. Cas. 1000.

[12] Short *v.* Lee, 2 Jac. & W. 468; Best's Ev. § 357.

formal authorization as against the principal.[1] It is also clear that if I recognize A. as agent for P., and deal with A. as such, this relieves him, when subsequently proceeding against me, from the burden of proving his official character.[2] Nor does the rule affect special officers, such as executors and administrators, whose appointment is to be proved by record.[3] But that a *corporation* has acted as such will be *primâ facie* proof of incorporation without strict proof, unless such proof be required by statute.[4]

So of person exercising a profession.

§ 1317. That to a person exercising a profession the same rule applies may be generally declared. What a person holds himself out to be he cannot deny that he is; and hence if a person claims to be a professional man, it is not necessary to prove him to be a professional man in a suit against him for damages. The same rule applies to all cases where a party claims to hold a particular position on the faith of which he claims credit. He is estopped from afterwards disputing his pretensions, even though they be false.[5] The converse position, though open to much greater difficulty, has been held true,[6] and an attorney has been permitted to maintain an action for defamation of him in his professional capacity, on mere proof that he acted as an attorney.[7] At common law the same rule

[1] See Whart. on Agency, §§ 42, 44; Merchants' Bank *v.* State Bank, 10 Wall. 604; Faneuil Hall Bk. *v.* Bk. of Brighton, 16 Gray, 534; Reed *v.* R. R. 120 Mass. 43; Hughes *v.* R. R. 36 N. Y. Sup. Ct. 222.

[2] Supra, § 1153.

[3] Supra, § 67; Hathaway *v.* Clark, 5 Pick. 490.

"When the appointment is the result of the proceedings or determinations of a court, such as the assignee of a bankrupt (Pasmore *v.* Bontfield, vol. 1 Cow., Hill & Edwards's Notes to Phil. Ev. 5th ed. 1868, p. 593; Starkie's Ev. by Sharswood, pp. 647, 717), this kind of parol proof is not sufficient, but the appointment must be strictly proved in the ordinary way, ... by letters of administration themselves, or by the record, or a certified copy of the proceedings, or of the appointment, as the action of courts is proved in other cases. 2 Cow., H. & Ed. Notes, above cited, 452 to 454; 1 Green. Ev. § 519; Starkie's Ev. 717, 693, and 694." Christiancy, J., Albright *v.* Cobb, 30 Mich. R. 361. See Piatt *v.* McCullough, 1 McLean, 78.

[4] R. *v.* Langton, L. R. 2 Q. B. D. 296.

[5] Supra, §§ 1087, 1151. See R. *v.* Fordingbridge, E., B. & E. 678; R. *v.* St. Marylebone, 4 D. & R. 475; Bevan *v.* Williams, 3 T. R. 635.

[6] Radford *v.* McIntosh, 3 T. R. 632.

[7] Berryman *v.* Wise, 4 T. R. 366. See McGahey *v.* Alston, 2 M. & W. 206; McMahan *v.* Leonard, 6 H. of L. Cas. 970.

has been held as to surgeons in all cases in which the slander assumes that the plaintiff was a surgeon;[1] and in actions against physicians for negligence, it is sufficient to prove that the physician lacked the qualifications customary with physicians of the school he claimed to belong to, without showing that he had a diploma.[2] But where the issue is, directly or indirectly, whether the plaintiff was entitled to exercise a particular profession, then he must prove his title.[3]

Action of officers and other functionaries presumed to be regular.

§ 1318. On the same reasoning the acts of an executive officer of the government (*e. g.* sheriffs, registers, treasurers, surveyors) are presumed to be regular, so far as to throw the burden of proof on the party collaterally assailing such acts on the ground of irregularity.[4] So when a duty is undertaken, and time requisite for the performance of the duty has elapsed, and there is no proof of the non-performance of the duty, the jury, as a presumption of fact, to be drawn from the whole case, may infer that the duty was performed.[5] The presumption just given is not limited to

[1] Gremare *v.* Valon, 2 Camp. 144; Cope *v.* Rowlands, 2 M. & W. 160.

[2] See Whart. on Neg. § 733.

[3] Collins *v.* Carnegie, 1 A. & E. 695; *S. C.* 3 N. & M. 703. See Taylor's Ev. § 143, citing and criticising Sellers *v.* Tell, 4 B. & C. 655; Cortis *v.* Kent, 7 B. & C. 314.

[4] R. *v.* Hinckley, 12 East, 361; R. *v.* Catesby, 2 B. & C. 814; Gosset *v.* Howard, 10 Q. B. 411; R. *v.* Stainforth, 11 Q. B. 66; R. *v.* Broadhempston, 1 E. & E. 155; Ross *v.* Reed, 1 Wheat. 482; Phil. R. R. *v.* Stimpson, 14 Pet. 448; Minter *v.* Crommelin, 18 How. 89; U. S. *v.* Weed, 5 Wall. 62; Dixon *v.* R. R. 4 Biss. 137; Shorey *v.* Hussey, 32 Me. 579; Wheelock *v.* Hall, 3 N. H. 310; Kimball *v.* Lamphrey, 19 N. H. 215; Forsaith *v.* Clark, 21 N. H. 409; Drake *v.* Mooney, 31 Vt. 617; Richardson *v.* Smith, 1 Allen, 541; Jones *v.* Boston, 104 Mass. 461; People *v.* Bank, 4 Bosw. 363; Smith *v.* Hill, 22 Barb. 656; Wood *v.* Terry, 4 Lansing, 80; Coxe *v.* Deringer, 82 Penn. St. 236; Plank Road *v.* Bruce, 6 Md. 457; Davis *v.* Johnson, 3 Munf. Va. 81; Ward *v.* Barrows, 2 Ohio St. 241; Ashe *v.* Lanham, 5 Ind. 435; Banks *v.* Bales, 16 Ind. 423; Chickering *v.* Failes, 29 Ill. 294; Niantic Bk. *v.* Dennis, 37 Ill. 381; Morrison *v.* King, 62 Ill. 30; McHugh *v.* Brown, 33 Mich. 2; Rowan *v.* Lamb, 4 Greene (Iowa), 468; Arnold *v.* Juneau Co. 43 Wis. 627; Kobs *v.* Minneapolis, 22 Minn. 159; Palmer *v.* Boling, 8 Cal. 384; Boyd *v.* Buckingham, 10 Humph. 434; Jewell *v.* Porche, 2 La. An. 148; Morse *v.* McCall, 13 La. An. 215; Webster *v.* Gottschalk, 15 La. An. 376; New Orleans *v.* Halpin, 17 La. An. 148; Trotter *v.* Schools, 9 Mo. 69; Moreau *v.* Branham, 27 Mo. 351; Dupuis *v.* Thompson, 16 Fla. 69; Sadler *v.* Anderson, 17 Tex. 245.

[5] That the rule applies to administrators, see Doe *v.* Turford, 3 B. & Ad. 890; Rugg *v.* Kingsmill, L. R. 1 Ad. & Ec. 343; R. *v.* Stainforth, 11 Q. B. 66; Minter *v.* Crommelin, 18 How. 87;

officers of state.[1] Thus in a prosecution for bigamy, where the marriage was proved by the witness present to have taken place at the parish church and to have been solemnized by the curate of the parish, it was held unnecessary to prove either the registration of the marriage, or the fact of any license having been granted.[2]

This presumption, however, is not to be extended so as to make it cover substantive independent facts as distinguished from facts which are the mere incidents of others duly established.[3]

It must be further kept in mind, as to presumptions of this class, that to throw the burden on the objector, the conduct of the officer must be on its face regular.[4]

§ 1319. It is sometimes said that the law presumes that public officers do their duty. The law, however, presumes no such thing. If a public officer is sued for misconduct, then the case goes to the jury on the evidence, there being no presumption of virtue in his favor sufficient to outweigh preponderating proof on the other side. What the law says, and all that it in this respect says, is, that a public officer is so far assumed *primâ facie* to do his duty that the burden is on the party seeking to charge him with misconduct.[5] And this is in full harmony with the general rule

Burden of proof is on party charging public officer with misconduct.

Dana *v.* Kemble, 19 Pick, 112; Todemier *v.* Aspinwall, 43 Ill. 401; Conwell *v.* Watkins, 71 Ill. 488; Paine *v.* Tutwiler, 27 Grat. 440; Philips *v.* Morrison, 3 Bibb, 105; Forman *v.* Crutcher, 2 A. K. Marsh. 69.

[1] O'Hara *v.* Blood. 27 La. An. 57.

[2] R. *v.* Allison, R. & R. 109. See supra, § 1297, for other cases.

[3] "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact." Strong, J., U. S. *v.* Ross, 92 U. S. 283, 284, 285. See Houghton *v.* Rees, 34 Mich. 481.

[4] Supra, § 1304; Welsh *v.* Cochran, 63 N. Y. 181.

[5] Bruce *v.* Holden, 21 Pick. 187; Clapp *v.* Thomas, 5 Allen, 158; Phelps *v.* Cutler, 4 Gray, 137; McMahon *v.*

above given, that on the actor lies the burden. The same reasoning applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, but only so far, the conduct of such officer is *primâ facie* presumed to be right.[1] In a suit by a private person against an officer, the burden is on the plaintiff to make out his case, just as a similar burden is on the plaintiff in a suit by an officer against a private person. When the facts go to the jury, there is no more a presumption of law in either case that the officer did right than there is a presumption of law that the private person did right. In criminal prosecutions for misconduct in office, the presumption in favor of the officer, when the case goes to the jury, is only the ordinary presumption of innocence.

Regularity of business men presumed.

§ 1320. We have already had occasion to observe[2] that it is an ordinary inference that the action of business men will be conducted with business regularity. Of this inference it may be mentioned, by way of illustration, that a party is assumed to have read a paper to which his name is signed.[3] Where, also, a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is to be assumed that they are interested in equal moieties.[4] We infer, in the same way, that bills of exchange and promissory notes are given for a sufficient consideration.[5] And a bill of exchange, in the absence of proof to the contrary, is inferred to have been accepted within a reasonable time after its date, and before it came to maturity.[6] A seal,

Davidson, 13 Minn. 357; State *v.* Melton, 8 Mo. 417.

[1] Lee *v.* Polk Co. Copper Co. 21 How. 493; Dixon *v.* R. R. 4 Biss. 137; Hartwell *v.* Root, 19 Johns. R. 345; Sheldon *v.* Wright, 7 Barb. 39; Nelson *v.* People, 23 N. Y. 293; Alleghany *v.* Nelson, 25 Penn. St. 232; Kelly *v.* Creen, 53 Penn. St. 302; Jenkins *v.* Parkhill, 25 Ind. 473; Todemier *v.* Aspinwall, 43 Ill. 401; Dollarhide *v.* Muscatine Co. 1 Greene (Iowa), 158; Guy *v.* Washburn, 23 Cal. 111; Hickman *v.* Boffman, Hard. (Ky.) 348; Ellis *v.* Carr, 1 Bush, 527; Phelps *v.* Ratcliffe, 3 Bush, 334; Dawkins *v.* Smith, 1 Hill (S. C.) Ch. 369; Jones *v.* Muisbach, 26 Tex. 235.

[2] Supra, §§ 1243, 1301.

[3] Hartford Ins. Co. *v.* Gray, 80 Ill. 28. Supra, § 1243, for other cases.

[4] Farrar *v.* Beswick, 1 Moo. & R. 527, per Parke, B.

[5] Byles on Bills (8th ed.), 2, 108.

[6] Roberts *v.* Bethell, 12 C. B. 778. For other instances, see Carter *v.* Abbott, 1 B. & C. 444; Houghton *v.* Gilbart, 7 C. & P. 701; Leuckart *v.* Cooper, 7 C. & P. 119; Cunningham *v.* Fonblanque, 6 C. & P. 44; Best's Ev. § 404.

also, attached to a bond, will be presumed to be the proper seal of the party.[1]

Non-existence to be inferred from non-claimer.

§ 1320 *a*. On the same principle, if a party should present a claim, of old date, to a solvent person, the fact that the claim has lain dormant for years subjects it to much prejudice.[2] The presumption, however, is open to be rebutted by proof of the intermediate insolvency of the debtor, or of other grounds for the suspension of the debt. The reasoning is, that a claim which a party does not undertake to realize, he discredits. On the same reasoning, the fact that a patent lies dormant for years affords an inference of its inutility.[3] And a settlement of a counter-claim may be inferred from the giving an obligation for a sum materially less than due on the face of the account.[4]

Agreement to pay to be inferred from acceptance of services.

§ 1321. When services are accepted, the ordinary inference is that the party accepting has agreed to pay for them.[5] But this presumption varies with circumstances, and when the services are rendered by one member of a family to another, no such presumption can be drawn.[6]

Other implied agreements.

§ 1322. If a business man forwards goods to another, either for the latter's use, or for sale, the delivery and acceptance of the goods presume an agreement to purchase;[7] if a servant is hired, it is presumed to be for the usual period of service;[8] when marriage is promised, the en-

[1] Mills *v.* Machine Co. 79 Ill. 450. Supra, § 694.

[2] T. *v.* D., L. R. 1 P. & D. 27; Sibbering *v.* Balcarres, 3 De Gex & Sm. 735; Taylor's Ev. § 121, citing Birch, in re, 17 Beav. 358. See H., falsely called C., *v.* C. 31 L. J. Pr. & Mat. 103.

[3] Bakewell's Patent, in re, 15 Moo. P. C. 385; Allen's Patent, in re, L. R. 1 P. C. 507; *S. C.* 4 Moo. P. C. N. S. 443.

[4] Crist *v.* Garner, 2 Pen. & W. 251.

[5] See 1 Broom & Hadley's Com. (Am. ed.) 132–4; Whart. on Agency, § 323; 1 Wait's Actions, 99; Smith *v.* Thompson, 8 C. B. 44; Scott, in re, 1 Redf. (N. Y.) 234.

[6] See Wharton on Agency, § 324, and cases there cited; and see Wilcox *v.* Wilcox, 48 Barb. 327; Gallaher *v.* Vought, 8 Hun, 87; King *v.* Kelly, 28 Ind. 89.

[7] See 1 Broom & Hadley's Com. (Am. ed.) 132–4, and cases there cited; 1 Wait's Actions, 99; Barr *v.* Williams, 23 Ark. 244.

[8] Best's Ev. § 400.

gagement will be presumed to be to marry within a reasonable time.[1]

Mailing letter *primâ facie* proof of delivery.

§ 1323. The mailing a letter, properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is *primâ facie* proof of the reception of the letter by the person to whom it is addressed.[2] Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.[3] In cases of registered letters the presumption is strong;[4] in cases of ordinary letters where there is no mail delivery, there is no presumption at all,[5] and delivery must be substantively proved.[6] The rule as to letters,

[1] Phillips *v.* Crutchley, 3 C. & P. 78; 1 Moore & P. 239.

[2] Saunderson *v.* Judge, 2 H. Bl. 509; R. *v.* Johnson, 7 East, 65; Kufh *v.* Weston, 3 Esp. 54; Warren *v.* Warren, 1 C., M. & R. 250; Stocken *v.* Collin, 7 M. & W. 515; Woodcock *v.* Houldsworth, 16 M. & W. 124; Shipley *v.* Todhunter, 7 C. & P. 630; Skilbeck *v.* Garbett, 7 Q. B. 846 (a case of delivery to a postman); Dunlap *v.* Higgins, 1 H. of L. Cas. 381; Lindenberger *v.* Beal, 6 Wheat. 104; Oakes *v.* Weller, 13 Vt. 63; Connecticut *v.* Bradish, 14 Mass. 296; New Haven Bank *v.* Mitchell, 15 Conn. 200; Russell *v.* Beckley, 4 R. I. 525; Thallhimer *v.* Brinckerhoff, 6 Cow. 90; Starr *v.* Torrey, 22 N. J. L. (2 Zab.) 190; Callan *v.* Gaylord, 3 Watts, 321; Tanner *v.* Hughes, 53 Penn. St. 289; Shoemaker *v.* Bank, 59 Penn. St. 79; Plath *v.* Ins. Co. 23 Minn. 479.

In England this presumption has been adopted by the legislature in many acts of parliament, but with this difference, that no rebutting evidence is admissible, and therefore, the presumption is conclusive. Powell's Ev. 4th ed. 86. For decisions on these statutes, see Bishop *v.* Helps, 2 C. B. 45; Bayley *v.* Nantwich, 2 C. B. 118.

[3] Ibid.; Reidpath's case, 40 L. J. Ch. 39; U. S. *v.* Babcock, 3 Dillon C. C. 571; Freeman *v.* Morey, 45 Me. 50; Greenfield Bank *v.* Crafts, 4 Allen, 447; First Nat. Bank *v.* McManigle, 69 Penn. St. 156; Foster *v.* Leeper, 29 Ga. 294. See Tate *v.* Sullivan, 30 Md. 464; Lyon *v.* Guild, 5 Heisk. 175.

[4] Best's Ev. § 403.

[5] Bilbgerry *v.* Branch, 19 Grat. 393; James *v.* Wade, 21 La. An. 548.

[6] "There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. A strong probability of its receipt may arise, as was said in Tanner *v.* Hughes, 3 P. F. Smith, 289, and the fact of its deposit in the mail-bag, in connection with other circumstances, may be sufficient to warrant the court in referring the question of its receipt to the determination of the jury." Williams, J., First Nat. Bank of Bellefonte *v.* McManigle, 69 Penn. St. 159.

"Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we

however, applies only to letters mailed at points other than that at which the party written to resides. Notices of local transactions, to persons living in the same place as that from which the notice is issued, should, it seems, be served personally.[1] "It is well settled, that where the transaction, of which notice is to be given, takes place in the same town in which the party to whom the notice is to be given resides, such notice must be personal, or at his domicil or place of business, and not through the post-office.[2] It is also well settled, that, when the party resides in another town, notice by the post-office is sufficient[3] and conclusive, even though it was in fact never received."[4]

concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Comm. *v.* Jeffries, 7 Allen, 563, that this 'is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed.' This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. 'A fact,' says Agnew, J., Tanner *v.* Hughes, 53 Penn. St. 290, 'in connection with other circumstances, to be referred to the jury,' under appropriate instructions, as its value will depend upon all the circumstances of the particular case." Dillon, Circuit Judge, United States *v.* Babcock, 3 Dillon's C. C. R. 573.

[1] Shelburne Bank *v.* Townsley, 102 Mass. 177; Ransom *v.* Mack, 2 Hill, 587; Sheldon *v.* Benham, 4 Hill, 129.

[2] Shelburne Bank *v.* Townsley, supra, citing Peirce *v.* Pendar, 5 Met. 352; Chit. Bills (12th Am. ed.), 473.

[3] Ibid.; Munn *v.* Baldwin, 6 Mass. 316.

[4] Shed *v.* Brett, 1 Pick. 401. "In this case the transaction occurred in New York, and not in Buckland, where the defendant resided. The letter, however, in which the plaintiffs undertook to give the notice, was addressed to the defendant, not at Buckland, but at Shelburne Falls, and the report shows that he was in the habit of receiving letters at the post-offices of these two places respectively, and about as often at one as at the other. The question as to the proper mode of notifying a man by mail depends much less on the place of his exact legal domicil than upon the locality of the post-office at which he usually receives his letters; and if he is in the habit of resorting for that purpose equally and indifferently to two post-offices, a communication may very properly be addressed to him at either. United States Bank *v.* Carneal, 2 Pet. 543; Story on Notes, § 343. The plaintiffs appear to have put him on the same footing, for the purpose of post-office communication, as if he were a resident of Shelburne Falls. The letter was left at the post-office, not for the purpose of being transmitted by mail to any other town or post-office, and not to go into the hands of any official carrier charged with the distribution of letters at the dwelling-houses and places of business of inhabitants of the vicinity; on the contrary, it did not go into the mail at all, but was simply deposited at the Shelburne Falls post-office, to remain there until called for by the defend-

To enable the presumption to operate, it is essential that the letter should be addressed with specific correctness. Thus it has been held that no presumption of delivery attached to a letter addressed, "Mr. Haynes, Bristol," [1] though the burden, when the mailing of a letter to a particular person is shown, is on the party impeaching the completeness of the address.[2] Such letters may be evidence of the dishonor of commercial paper, and, coupled with proof that they were not returned from the dead-letter office, may be received as giving notice of the dissolution of a partnership.[3] The same inference from regularity may be drawn as to the delivery of telegraphic dispatches;[4] though ordinarily the original message should be produced.[5]

Letter presumed to arrive at usual time of delivery.

§ 1324. A letter, duly stamped and mailed is inferred, by a presumption of fact, to be delivered at the usual time for such delivery.[6]

Post-mark *primâ facie* proof.

§ 1325. The post-mark on a letter, if decipherable, raises a presumption that the letter was in the post at the time and place specified in such post-mark, but this again is a rebuttable presumption.[7] The post-mark, however, is not, it is said, evidence of the date of forwarding.[8]

ant." Shelburne Bk. *v.* Townsley, 102 Mass. 177, Ames, J.

[1] Walter *v.* Haynes, Ry. & M. 149. And see, as narrowing the rule, Allen *v.* Blunt, 2 Woodb. & M. 121. See Phillips *v.* Scott, 43 Mo. 86.

[2] McGarr *v.* Lloyd, 3 Penn. St. 474.

[3] Kenney *v.* Altvater, 77 Penn. St. 34. See Wilcoxen *v.* Bohanan, 53 Ga. 219.

[4] Com. *v.* Jeffries, 7 Allen, 548; U. S. *v.* Babcock, 3 Dillon, 571.

[5] Howley *v.* Whipple, 48 N. H. 487; cited at large supra, § 76.

[6] The law on this point is thus well stated by Mr. Powell (Evidence, 4th ed., 81): "A letter is presumed to have arrived at its destination at the time at which it would be delivered in the ordinary course of postal business, and the sender is never held answerable for any delay which occurs in its transmission through the post. Stocken *v.* Collin, 7 M. & W. 515. So that where any notice has to be given on a particular day, it is sufficient to post it so that it would, in the ordinary course, arrive at its destination on that day, and if it is delayed in the

[7] Powell's Evidence, 4th ed. 88; R. *v.* Johnson, 7 East, 65; Fletcher *v.* Braddyl, 3 Stark. R. 64; R. Watson, 1 Campb. 215; Archangelo *v.* Thompson, 2 Camp. 623; Shipley *v.* Todhunter, 7 C. & P. 680; Stocken *v.* Collen, 7 M. & W. 515; Butler *v.* Mountgarrett, 7 H. of L. Cas. 633; *S. C.* 6 Ir. Law R. (N. S.) 77; New Haven Bk. *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321.

[8] Shelburne Bk. *v.* Townsley, 102 Mass. 177.

§ 1326. If a servant or clerk is permitted by his master to act as such, then whenever a letter, whether sent by post or by hand, is proved to have been correctly addressed and delivered to the clerk or servant of the person to whom it was addressed, it will be presumed that it came into his hands, although this presumption can be rebutted.[1] Where notices to quit are delivered to a servant at the house occupied by the tenant, this presumption has been applied.[2] So where a letter is put in a box from which it is an invariable practice of a letter carrier to take letters at fixed periods, mailing will be presumed.[3]

Delivery to servant is delivery to master.

§ 1327. The principle before us, based as it is on the assumption that as absolute certainty in such proof cannot be obtained, it is enough, in order to make out a *primâ facie* case, to show that a letter is forwarded in a way by which letters are usually received, applies to other than post-office delivery.[4] Hence, where it was proved to be the usage of a hotel for letters addressed to guests to be deposited in an urn at the bar, and then to be sent, about every fifteen min-

Letters delivered presumed to have been received.

post, the sender is not responsible for the delay. Ward *v.* Lord Londesborough, 12 C. B. 252. This is important in reference to notices to quit and notices of dishonor. Here we may allude to the rule laid down by the House of Lords in Dunlop *v.* Higgins, 1 H. L. Cas. 381, that a contract to buy goods entered into by letter is complete when the letter of acceptance is posted; and the rule was held to be the same, in the case of a contract to take shares, by the Court of Appeal in Chancery in Harris's case, 20 W. R. 690; 41 L. J. Ch. 621; L. R. 7 Ch. 587. But the Court of Exchequer, in The British & American Telegraph Co. *v.* Colson, L. R. 6 Ex. 108; 40 L. J. Ex. 97, held that if the letter of allotment is not received there is no contract; and in Reidpath's case, 19 W. R. 219; L. R. 11 Eq. 86; 40 L. J. Ch. 39, Lord Romilly held that it was necessary to prove receipt by the allottee when denied. Lord Justice Mellish, in Harris's case, said that he had great difficulty in reconciling The British & American Telegraph Co. *v.* Colson with the decision in Dunlop *v.* Higgins, and Vice Chancellor Malins followed suit in Wall's case, L. R. 15 Eq. 20; 42 L. J. Ch. 372. Although the decisions in The British & American Telegraph Co. *v.* Colson and Reidpath's case have not been overruled, they would appear to be unsound; for if a contract is complete when a letter of acceptance is posted, how can it possibly become subsequently incomplete because that letter is not received?"

[1] Macgregor *v.* Kelly, 3 Ex. 794.

[2] Tanham *v.* Nicholson, L. R. 5 H. L. 561.

[3] Skilbeck *v.* Garbett, 7 Q. B. N. S. 846.

[4] See cases cited supra, § 1323; New Haven Bk. *v.* Mitchell, 15 Conn. 206. See Crandall *v.* Clark, 7 Barb. 169.

utes, to the rooms of the guests to whom such letters were addressed, it was held to be a presumption of fact that a letter addressed to one of the guests, and left at the bar was received by such guest.[1] In case of a denial, by the party addressed, of reception, then the case goes to the jury as a question of fact.

Letter in answer to one mailed to the writer presumed to be genuine.

§ 1328. If I should mail a letter to B., addressing him at his residence, and I should receive by mail an answer purporting to come from B., the fact that such an answer is so received makes a *primâ facie* case in favor of the genuineness of the answer. The subalterns of the post-office are government officials, whose action is presumed to be regular; and if I can prove that B. lived at the place where he was addressed, then the burden is on him to show that he did not receive the letter, and that the reply mailed in response was not genuine.[2]

But not telegrams.

§ 1329. It is otherwise, so has it been argued, as to telegraphic dispatches, which are forwarded not in original but in copy, and by private, not public agents.[3]

Presumption from habits of forwarding letters.

§ 1330. Testimony by a clerk that it was his invariable custom to carry certain classes of letter to the post-office, of which class the letter in question was one, though he had no reccollection as to such letter specifically, has been held sufficient to let a copy of the letter in evidence, after noticc to the other side to produce.[4] If the letter is shown to have been given to such a clerk for the purpose of mailing, then it will be inferred that the letter was mailed, though the clerk has no specific recollection of the letter.[5] Mailing will in such case be also inferred, if the witness state that it was in the ordinary course of business his practice to carry letters delivered to him (as was the letter in controversy) to the post, although he has no recollection of the particular letter.[6]

[1] Dana *v.* Kemble, 19 Pick. 112.

[2] Connecticut *v.* Bradish, 14 Mass. 296; Chaffee *v.* Taylor, 3 Allen, 598; Johnson *v.* Daverner, 19 Johns. 134.

[3] Howley *v.* Whipple, 48 N. H. 488.

[4] Thallhimer *v.* Brinckerhoff, 6 Cow. 96.

[5] Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Londesborough, 12 C. B. 252; Toosey *v.* Williams, 1 Moo. & M. 129; Pattesbell *v.* Turford, 3 B. & Ald. 890; Pritt *v.* Fairclough, 3 Camp. 305; Hagedorn *v.* Reid, 3 Camp. 379; Skilbeck *v.* Garbett, 7 Q. B. 846; Spencer *v.* Thompson, 6 Ir. L. R. (N. S.) 537.

[6] Skilbeck *v.* Garbett, 7 Q. B. 846; Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Ld. Londesborough, 12 Com.

VI. PRESUMPTIONS AS TO TITLE.

§ 1331. It has been frequently said that possession of property, whether real or personal, is a presumption of title.[1] But this is not a presumption, but an inference to be drawn only in those cases in which the possession has a color of right, and if so, the statement is a mere truism, amounting to simply this, that where a person holds property claiming it as his own, he holds it on a claim of right. But there is no such presumption in favor of a wrong-doer, appearing as such, or of a person whose possession is confessedly

Presumption in favor of possession.

B. 252; Spencer *v.* Thompson, 6 Ir. Law R. (N. S.) 537, 565.

[1] 2 Wms. Saund. 47 f; Best's Ev. § 366; Webb *v.* Fox, 1 T. R. 397, by Lord Kenyon; Millay *v.* Butts, 35 Me. 139; Vining *v.* Baker, 53 Me. 544; Baxter *v.* Ellis, 57 Me. 178; Waldron *v.* Tuttle, 3 N. H. 340; Winkley *v.* Kaime, 32 N. H. 268; Carr *v.* Dodge, 40 N. H. 403; Austin *v.* Bailey, 37 Vt. 219; Simpson *v.* Carleton, 14 Gray, 506; Currier *v.* Gale, 9 Allen, 522; Durbrow *v.* McDonald, 5 Bosw. 130; Gray *v.* Gray, 2 Lansing, 173; Bordine *v.* Combs, 15 N. J. L. (3 Gr.) 412; Entriken *v.* Brown, 32 Penn. St. 364; Robinson *v.* Hodgson, 73 Penn. St. 202; Coxe *v.* Deringer, 78 Penn. St. 271; Drummond *v.* Hopper, 4 Harr. (Del.) 327; Allen *v.* Smith, 1 Leigh, 231; Hovey *v.* Sebring, 24 Mich. 232; Ward *v.* McIntosh, 12 Ohio St. 231; Caldwell *v.* Evans, 5 Bush, 380; Park *v.* Harrison, 3 Humph. 412; Finch *v.* Alston, 2 St. & P. (Ala.) 83; Sparks *v.* Rawls, 17 Ala. 211; Vastine *v.* Wilding, 45 Mo. 89; Goodwin *v.* Garr, 8 Cal. 615.

For the position above stated, that the possessor of property is presumed to have rightfully acquired title, is sometimes cited a well known Roman maxim: *Quaelibet possessio praesumitur juste adquisitur.* But the reasoning of the jurists, taking their exposition of presumptions in a body, shows that they intend by presumptions, when used in this as well as in all other relations, rules for the burden of proof, and not presumptions of law; and that, in the particular case before us, they are to be construed only as asserting that, as a matter of proof, he who holds property is entitled to retain it until a better title is shown in some one else. In other words, no one is to be presumed to have a good title against a possession. But this negative presumption is far from being equivalent to the affirmative proposition, that every possessor is presumed to have a good title. Weber, Heffter's ed. 95. The presumption, if it be such, is effective only in regulating the burden of proof. When the evidence of both sides is in, then there is no presumption, in the strict sense of the term at all. Indeed, a brief tortious possession, as is noticed in the text, resisted promptly by the dispossessed party, tells rather against than for the aggressor. On the other hand, a long possession, acquiesced in by a dispossessed party, may estop the latter, when by any acts on his part he induced the party in possession to remain, and make improvements, and thereby alter his position. The question is one of inference from the facts in the concrete.

not based on title. Thus, a person picking up money in the street has no presumption of title in his favor; nor is there any ultimate presumption in favor of the possessor of chattels when the subject of an action of replevin or of an indictment for larceny.

As to realty.

§ 1332. So far as concerns real estate, possession, or reception of rents from the person in possession, has been held so far *primâ facie* evidence of seisin in fee, as to throw, in actions of ejectment, upon a contesting party, the burden of proving a superior title;[1] but this arises from the peculiar character of the action.[2] Possession, also, is sufficient title to sustain a suit for trespass;[3] and it has been held that on a suit against a county for road damages, proof of possession of real estate for only nine years makes a sufficient *primâ facie* case.[4] Proof of payment of taxes is admissible in order to strengthen the presumption.[5] Death does not terminate such presumption, but the same possessory rights pass at once to the representatives of the deceased; and the burden of proof is on all parties attacking such possession.[6]

§ 1333. A mere tortious possession, however, obtained by vio-

[1] Best's Ev. § 366; Jayne *v.* Price, 5 Taunt. 326; Denn *v.* Barnard, Cowp. 595; R. *v.* Overseers, 1 B. & S. 763; Metters *v.* Brown, 1 H. & C. 686; Doe *v.* Coulthred, 7 A. & E. 239; Lewis *v.* Davies, 2 M. & W. 503; Wendell *v.* Blanchard, 2 N. H. 456; Hawkins *v.* County, 2 Allen, 251; Brown *v.* Brown, 30 N. Y. 519; Corning *v.* Troy Factory, 44 N. Y. 577; Read *v.* Goodyear, 17 S. & R. 350; Seechrist *v.* Baskin, 7 W. & S. 403; Hoffman *v.* Bell, 61 Penn. St. 444; Coxe *v.* Deringer, 78 Penn. St. 271; Ward *v.* McIntosh, 12 Ohio St. 231; Hunt *v.* Utter, 15 Ind. 318; Smith *v.* Hamilton, 20 Mich. 433; Crow *v.* Marshall, 15 Mo. 499. And see, further, cases cited in last section. As to presumption of regularity of tax sales, see infra, § 1353.

[2] The whole theory of lease, entry, and ouster is based on the idea of some imaginary grantor who made a lease, on the strength of which the plaintiff entered, and then the defendant turned him out of possession. This leads directly back to the title which would confer the right of possession. Hence, to show an adverse title to the imaginary lessor is to destroy the possessory right dependent thereon; and hence the form of action is used to determine title.

But this would not have been the case in the older forms of action at the common law, the writ of right, above all, or the writ of entry *sur disseisin*, where the presumption of rightfulness of possession had no place.

[3] Elliott *v.* Kent, 7 M. & W. 312; where it was said that in such case the presumption was conclusive.

[4] Hawkins *v.* County, 2 Allen, 251.

[5] Hodgdon *v.* Shannan, 44 N. H. 572; Durbrow *v.* McDonald, 5 Bosw. 130; Burke *v.* Hammond, 76 Penn. St. 172.

[6] Alexander's Succession, 18 La. An. 337.

lence, is not possession in the meaning of the rule before us; and against such a wrong-doer the party wrongfully dispossessed may make out a *primâ facie* case, in an action of ejectment, on proof of a prior possession, however short.[1] Possession of a year, for instance, by a party who received the key of a room from the lessor of the plaintiff, has been held sufficient to sustain the plaintiff's case against the defendant, who broke in at night and took forcible possession.[2]

Otherwise as to tortious possession.

§ 1334. The possession, also, to found such presumption, must be independent. If the evidence shows only a qualified, subordinate, or contested interest, no title beyond that proved is to be presumed as against a superior title, even though a possession of twenty years be shown.[3] Possession with consent of the owner raises no presumption against such owner.[4]

Such possession must be independent.

§ 1335. The circumstance that a constructive possession only has been maintained for at least part of the time does not remove the burden of proving title from a party claiming against a possession which for the rest of the time was absolute.[5]

But need not be so as to the whole period.

§ 1336. What has been said as to realty applies necessarily to personalty.[6] A striking illustration of this principle is to be found in the rulings that ordinarily the possession of a negotiable promissory note, indorsed in blank, is such evidence of ownership as to sustain a suit.[7] The

Possession may infer title as to personalty.

[1] Asher *v.* Whitelock, Law Rep. 1 Q. B. 1; Clifton *v.* Lilley, 12 Tex. 130; White *v.* Cooper, 8 Jones (N. C.) L. 48. See Weston *v.* Higgins, 40 Me. 102. That a mere tortious possession, however, can be the basis from which a title by presumption may run, is elsewhere shown.

[2] Doe *v.* Dyeball, 3 C. & P. 610; M. & M. 346, *S. C.* See Doe *v.* Barnard, 13 Q. B. 945; Doe *v.* Cooke, 7 Bing. 346; 5 M. & P. 181, *S. C.* See, also, Brest *v.* Lever, 7 Mees. & Wels. 593.

[3] Linscott *v.* Trask, 35 Me. 150; Dame *v.* Dame, 20 N. H. 28; Colvin *v.* Warford, 20 Md. 357; Field *v.* Brown, 24 Grat. 96; Sparks *v.* Rawls, 17 Ala. 211; Nieto *v.* Carpenter, 21 Cal. 455.

[4] Magee *v.* Scott. 9 Cush. 148; Nieto *v.* Carpenter, 21 Cal. 455.

[5] Glass *v.* Gilbert, 58 Penn. St. 266.

[6] Elliott *v.* Kemp, 7 M. & W. 312; Millay *v.* Butts, 35 Me. 139; Cambridge *v.* Lexington, 17 Pick. 222.

[7] Shepherd *v.* Currie, 1 Stark. 454; Alford *v.* Baker, 9 Wend. 323; Wickes *v.* Adirondack Co. 4 Thomp. & C. 250; Weidner *v.* Schweigart, 9 S. & R. 385; Zeigler *v.* Gray, 12 S. & R. 42; Union Canal *v.* Lloyd, 4 Watts & S.

possession of negotiable paper under such circumstances, however, is not evidence of money lent,[1] nor can a loan be presumed from the handing of securities from one party to another, but rather the payment of a prior debt.[2] Property, also, is presumed to be in the consignee named in a bill of lading.[3]

So as to vessels.

Vessels are subject to the same presumption.[4] Possession, therefore, of a ship, under a bill of sale which is void for non-compliance with a registry statute, enables a plaintiff to support an action of trover against a stranger, for converting a part of the ship.[5] In fine, it may be generally held that a mere naked possession, when on its face fair, will entitle a party to maintain trespass, or even trover, as against a wrong-doer.[6]

Possession, also, will be sufficient evidence of title in an action on a marine policy of insurance; and the fact of possession will sustain a recovery until the defendant produces conflicting evidence.[7]

Mere holder of paper has this presumption.

§ 1337. Even though there be no ear-marks or links associating the holder with the document, such holder, by the fact of producing a document, presents *primâ facie* evidence for a jury in support of his claim.[8] We have an illustration of this in an English case, in which it was held that the production by a plaintiff of an I O U signed by the defendant, though not addressed to any one by name, is, in general, evidence of an account stated between the parties.[9] It was held, however, that such evidence may be rebutted by

393. See Crandall *v.* Schroeppel, 4 Thomp. & C. 78; 1 Hun, 557; Rubey *v.* Culberston, 35 Iowa, 264; Penn *v.* Edwards, 50 Ala. 63. See fully for other cases infra, §§ 1362, 1363.

[1] Fesenmayer *v.* Adcock, 16 M. & W. 449. See Gerding *v.* Walker, 29 Mo. 426.

[2] Aubert *v.* Wash, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60. But see infra, § 1337.

[3] Lawrence *v.* Minturn, 17 How. 100.

[4] Stacy *v.* Graham, 3 Duer, 444; Bailey *v.* New World, 2 Cal. 370.

[5] Sutton *v.* Buck, 2 Taunt. 302.

[6] Jeffries *v.* Gt. West. Rail. Co. 5 E. & B. 802. See Sutton *v.* Buck, 2 Taunt. 309; Fitzpatrick *v.* Dunphey, Irish L. R. 1 N. S. 366; Viner *v.* Baker, 53 Me. 923; Magee *v.* Scott, 9 Cush. 150.

[7] Robertson *v.* French, 4 East, 130, 137; Sutton *v.* Buck, 2 Taunt. 302. See Thomas *v.* Foyle, 5 Esp. 88, per Ld. Ellenborough.

[8] Fesenmayer *v.* Adcock, 16 M. & W. 449, per Pollock, C. B.

[9] Fesenmayer *v.* Adcock, 16 M. & W. 449, qualifying Douglass *v.* Holme, 12 A. & E. 691; Curtis *v.* Rickards, 1 M. & Gr. 47.

showing that the writing was not given in acknowledgment of a debt due.[1]

Policy of the law is favorable to presumptions from lapse of time.

§ 1338. Lord Plunkett, in a famous metaphor, has expressed a truth in this relation which has been frequently repeated by other courts, if not with the same felicity of expression, at least with equal emphasis. "If Time," said Lord Plunkett, in words afterwards adopted by Lord Brougham, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away."[2] The weight to be attached to presumptions of this class, as dispensers of security and enhancers of value, has been recognized by a series of eminent Pennsylvania judges. "Now, when we add to these considerations and precedents," says Agnew, C. J., in 1875, "the weight always attached to the lapse of time, in raising presumptions and quieting titles, as the means of maintaining peace, order, and harmony in the relations of civil society, there can be but one right conclusion in this case. The importance of such presumptions is stated with great emphasis and fulness of reference to authorities by Justice Kennedy, in Bellas *v.* Levan,[3] which he sums up in this conclusion: It is too obvious not to be seen and felt by every one how very important it is to the best interests of the state that titles to lands, instead

[1] Lemere *v.* Elliott, 30 L. J. Ex. 350; 6 H. & N. 656, *S. C.;* Croker *v.* Walsh, 2 Ir. Law. Rep. (N. S.) 552; Wilson *v.* Wilson, 14 Com. B. 616, 626.

[2] See "Statesmen of the Time of George III.," by Ld. Brougham (3d ed.), p. 227, n. The above passage has been variously rendered in different publications. In the case of Malone *v.* O'Connor, Napier, Ch., cited it as follows: "Time, with the one hand, mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." Drury's Cas. in Ch. temp. Napier, 944. This version is probably more accurate than any other, as it was furnished to the chancellor by one of the counsel in the *quare impedit*, on the trial of which Ld. Plunkett made use of the imagery in his address to the jury. Taylor's Evid. § 67. See, also, remarks in Whart. Crim. L. tit. "Limitations," and passage from Demosthenes there cited.

[3] 4 Watts, 294.

of being weakened and impaired by lapse of time, should be strengthened, until they shall become incontrovertibly confirmed by it."[1] The presumptions which are thus favored, it should at the same time be remembered, apply only to such possession as gives title under the statute of limitations, or is so long and undisputed as to imply acquiescence on the part of, if not grants from, adverse interests.

Soil of highway presumed to belong to adjacent proprietor.

§ 1339. It has been observed in a prior chapter,[2] that when system has been established, in connection with a litigated fact, the conditions of other members of the same system may be proved. It is to the same general principle that we may trace a presumption, often recognized, that the soil to the middle of a highway belongs to the owner of the adjoining land,[3] which land is necessary to the grant under which such owner takes. The presumption, however, may

[1] "The application of this doctrine to chamber surveys," so the same opinion goes on to say, "is a striking example. Caul *v.* Spring, 2 Watts, 390; Oyster *v.* Bellas, Ibid. 397; Nieman *v.* Ward, 1 W. & S. 68. Justice Kennedy, in Bellas *v.* Levan, supra, says: 'Twenty years (now twenty-one) from the return of survey by the deputy into the surveyor general's office were held (referring to Caul *v.* Spring) to be sufficient to raise an absolute and conclusive presumption that the survey was rightly made.' 'And that,' said C. J. Black, 'even where there was an unexecuted order of resurvey by the board of property,' referring to Collins *v.* Barclay, 7 Barr, 67. 'In short,' continued Judge Black, 'the courts of this state seem uniformly, and especially of late, to have refused to go back more than twenty-one years to settle any difficulties about the issue of warrants or patents, or the making or returning of surveys, or the payment of purchase money to the commonwealth.' Stimpfler *v.* Roberts, 6 Harris, 299. On the subject of presumptions from lapse of time, see, also, Mock *v.* Astley, 13 S. & R. 382; Goddard *v.* Gloninger, 5 Watts, 209; Nieman *v.* Ward, 1 W. & S. 68; Ormsby *v.* Ihmsen, 10 Casey, 462; McBarron *v.* Gilbert, 6 Wright, 279. In the case before us, the surveys of Gray were made and accepted thirty-three years before the issuing of John Bitler's warrant, and thirty-five years before the survey made upon it." Fritz *v.* Brandon, 78 Penn. St. 355.

[2] Supra, § 44.

[3] Doe *v.* Pearsay, 7 B. & C. 304; 9 D. & R. 908, *S. C.;* Steel *v.* Prickett, 2 Stark. R. 463, per Abbott, C. J.; Cooke *v.* Green, 11 Price, 736; Scoones *v.* Morrell, 1 Beav. 251; Simpson *v.* Dendy, 8 Com. B. (N. S.) 433; Berridge *v.* Ward, 10 Com. B. (N. S.) 400; R. *v.* Strand Board of Works, 4 B. & S. 526; 2 Smith's Lead. Cas. 5th Am. ed. 216; Harris *v.* Elliott, 10 Pet. 53; Morrow *v.* Willard, 30 Vt. 118; Newhall *v.* Ireson, 8 Cush. 595; Child *v.* Starr, 4 Hill, 369; Winter *v.* Peterson, 4 Zab. 527; Cox *v.* Freedly, 33 Penn. St. 124.

be rebutted by showing that the road and the adjoining land belonged to different proprietors;[1] or that there was an adverse proprietorship in a stranger.[2] But the use of a private right of way gives no presumption of ownership of the soil.[3]

So of hedges and walls.

§ 1340. Another illustration of the same rule is to be found in an English decision, that where farms belonging to different owners are separated by a hedge and ditch, the hedge is presumed (so far as concerns the burden of proof) to belong to the owner of the land which does not contain the ditch.[4] On the other hand, it is argued that when partition walls are used in common by the owners of the houses or lands thus separated, it will be presumed, *primâ facie*, that the wall, and the land on which it stands, belong to them in equal moieties as tenants in common.[5] This presumption, however, yields to proof that the wall is built on land parts of which were separately contributed by each proprietor.[6] A bank or boundary of earth, taken from the adjacent soil, on the other hand, is presumed *pro tanto* to belong to the proprietor of the adjacent land.[7]

Soil under water presumed to belong to owner of land adjacent.

§ 1341. Unless there is an express limitation by way of boundary shown on the title of a party claiming, it is presumed that the soil of unnavigable rivers, *usque ad medium filum aquae*, together with the right of fishing,[8] but not the right of abridging the width or interfering with the course of the stream,[9] belongs to the owner of the adjacent land.[10] On the other hand, as to navigable rivers

[1] Headlam *v.* Hedley, Holt N. P. R. 463.

[2] Doe *v.* Hampson, 4 C. B. 269.

[3] Smith *v.* Howden, 14 C. B. (N. S.) 398.

[4] Guy *v.* West, 2 Sel. N. P. 1296, per Bayley, J.

[5] Cubitt *v.* Porter, 8 B. C. 257; 2 M. & R. 267, *S. C.*; Wiltshire *v.* Sidford, 1 M. & R. 404; 8 B. & C. 259, n., *S. C.*; Washburn on Easements, ch. 4, § 3. See Doane *v.* Badger, 12 Mass. 65; Campbell *v.* Mesier, 4 Johns. Ch. 334.

[6] Matts *v.* Hawkins, 5 Taunt. 20; Murly *v.* McDermott, 8 A. & E. 138; 3 N. & P. 256.

[7] Callis on Sewers, 4th ed. 74; D. of Newcastle *v.* Clark, 8 Taunt. 627, 628, per Park, J.

[8] See Marshall *v.* Nav. Co. 3 B. & S. 732.

[9] Bickett *v.* Morris, 1 Law Rep. H. L. Sc. 47.

[10] Carter *v.* Murcot, 4 Burr. 2163; Wishart *v.* Wyllie, 1 Macq. Sc. Cas. H. of L. 389; Lord *v.* Commiss. for City of Sydney, 12 Moo. P. C. R. 473; Crossley *v.* Lightowler, Law Rep. 3 Eq. 279; Law Rep. 2 Ch. Ap. 478, *S. C.*

and arms of the sea, the soil *primâ facie* is vested in the sovereign and the fishery *primâ facie* is public.[1]

So of alluvion.

§ 1342. Alluvion is presumed to belong to the owner of the land upon which it is formed.[2] The same rule holds as to alluvion on the sea-shore; though it has been ruled that where the sea retreats suddenly, leaving uncovered a tract of land, the title to this tract belongs to the state.[3] It is scarcely necessary to add that presumptions in all cases of title of this class are controlled by the specific limitations of deeds.[4]

Tree presumed to belong to owner of soil.

§ 1343. A tree is presumed to belong to the owner of the land from which its trunk arises, though its roots extend into an adjacent estate.[5] When the tree grows on a boundary, it has been argued that the property in the tree is presumed to be in the owner of that land in which it was first sown or planted.[6] The weight of authority, however, in such case, is that the tree is owned in common by the land-owners.[7]

So of minerals.

§ 1344. *Primâ facie*, the ownership of subjacent minerals is imputed to the owner of the surface.[8]

§ 1345. But this presumption readily yields to proof of a grant of the minerals to a stranger.[9] The right, so it has been held, is

[1] Carter *v.* Murcot, 4 Burr. 2163; Malcomson *v.* O'Dea, 10 H. of L. Cas. 593; 3 Washb. Real Prop. 56; Blundell *v.* Catterall, 5 B. & A. 293, 298.

[2] Banks *v.* Ogden, 2 Wall. 57; Saulet *v.* Shepherd, 4 Wall. 508; Granger *v.* Swart, 1 Woolw. 88; The Schools *v.* Risley, 10 Wall. 91; Deerfield *v.* Arms, 17 Pick. 41; Trustees *v.* Dickinson, 9 Cush. 544.

[3] Att'y Gen. *v.* Chambers, 4 De G. & J. 55; Emans *v.* Turnbull, 2 Johns. 322; St. Clair *v.* Lovingston, 23 Wall. 47.

[4] See 3 Wash. on Real Prop. 4th ed. 420 *et seq.*

[5] Claflin *v.* Carpenter, 4 Met. 580; Hoffman *v.* Armstrong, 48 N. Y. 201.

[6] Holder *v.* Coates, M. & M. 112, per Littledale, J.; Masters *v.* Pollie, 2 Roll. R. 141. *Contra*, Waterman *v.* Soper, 1 Ld. Ray. 737; Anon. 2 Roll. R. 255.

[7] 1 Wash. on Real Prop. 12; Griffin *v.* Bixby, 12 N. H. 454; Skinner *v.* Wilder, 38 Vt. 45; Dubois *v.* Beaver, 25 N. Y. 115.

[8] Humphries *v.* Brogden, 12 Q. B. 739, 746; Smart *v.* Norton, 5 E. & B. 30; Harris *v.* Ryding, 5 M. & W. 60; Roberts *v.* Haines, 6 E. & B. 643; aff. in Ex. Ch., Haines *v.* Roberts, 7 E. & B. 625; Rowbotham *v.* Wilson, 6 E. & B. 593; 8 E. & B. 123, *S. C.* in Ex. Ch.; 8 H. of L. Cas. 348; Caledonian Rail. Co. *v.* Sprot, 2 Macq. Sc. Cas. H. of L. 449.

[9] Adams *v.* Briggs, 7 Cush. 366; Caldwell *v.* Fulton, 31 Penn. St. 478; Caldwell *v.* Copeland, 37 Penn. St. 427; Clement *v.* Youngman, 40 Penn.

one of the ordinary incidents of property in land, and is not founded on any presumption of a grant or an easement.[1]

Easements may be presumed from unity of grant.

§ 1346. A common system of title,[2] or a unity of grant, gives a *primâ facie* right, so has it been held, to the proprietor of an upper story to the support of the lower story; and, on the same principle, the owner of the lower story has a *primâ facie* claim to the shelter naturally afforded by the upper rooms.[3] When there are two adjoining closes, also, belonging to different owners, taking from a common vendor, the owner of the one has *primâ facie* a limited right[4] to the lateral support of the other.[5] The right, however, does not justify the imposition of an additional weight by the erection of new buildings.[6] And the right, either to support or drainage, may be sustained when both proprietors take the property as it stands from a common grantor.[7] It has, however, been held by Lord Westbury, where a dock and a wharf belonging to A. were so situated that the bowsprits of vessels in the dock for many years projected over a part of the wharf, and where A. subsequently granted the wharf to B., the law would not imply a reservation in favor of the vendor of the right for the bowsprits to project over the wharf as before.[8]

St. 341; Armstrong *v.* Caldwell, 53 Penn. St. 287. See Yale's Title to California Lands.

[1] Backhouse *v.* Bonomi, 9 H. of L. Cas. 503. Also, Wakefield *v.* Buccleuch, Law Rep. 4 Eq. 613, per Malins, V. C.; Taylor's Ev. § 106.

[2] Supra, § 44.

[3] Humphries *v.* Brogden, 12 Q. B. 747, 756, 757; Caledonian Ry. Co. *v.* Sprot, 2 Macq. Sc. Cas. H. of L. 449. See Foley *v.* Wyeth, 2 Allen, 131; Lasala *v.* Holbrooke, 4 Paige, 169; McGuire *v.* Grant, 1 Dutch. (N. J.) 356.

[4] See Smith *v.* Thackeray, Law Rep. 1 C. P. 564; 1 H. & R. 615, *S. C.* As to these limits, see Thurston *v.* Hancock, 12 Mass. 226.

[5] 2 Roll. Abr. 564, Trespass, J. pl. 1; Taylor's Ev. § 106.

[6] Murchie *v.* Black, 34 L. J. C. P. 337; Farrand *v.* Marshall, 21 Barb. 409. As to right of support based on twenty years' possession, see Wyatt *v.* Harrison, 3 B. & Ad. 871; Hide *v.* Thornborough, 2 C. & Kir. 250; Partridge *v.* Scott, 3 M. & W. 220; Humphries *v.* Brogden, 12 Q. B. 748–750; Richart *v.* Scott, 7 Watts, 460.

[7] See Murchie *v.* Black, 34 L. J. C. P. 337; Washburne on Easements, 556; Richards *v.* Rose, 9 Ex. R. 218; U. S. *v.* Appleton, 1 Sumn. 492; Partridge *v.* Gilbert, 15 N. Y. 601. Cf. Solomon *v.* Vintners' Co. 4 H. & N. 585; Pyer *v.* Carter, 1 Hurl. & Nor. 916; Hall *v.* Lund, 32 L. J. Exch. 113. See, however, as greatly qualifying this conclusion, Suffield *v.* Brown, 3 New R. 343; Carbery *v.* Willis, 7 Allen, 369; Randell *v.* McLaughlin, 10 Allen, 366; Butterworth *v.* Crawford, 46 N. Y. 349.

[8] Suffield *v.* Brown, 9 L. T. N. S. 627;

§ 1347. Where a title, good in substance, is held, and where adverse to the parties, against whom the presumption is invoked, there is undisputed possession, consistent with such title, for twenty years, or for a period which other circumstances make equivalent to twenty years, missing links, of a formal character, may be presumed (as a presumption of fact, based on all the circumstances of the case) against adverse parties who, when competent to dispute such possession, have acquiesced in it.[1]

Where title substantially good exists, and there is long possession, missing links will be presumed.

§ 1348. When there has been continued possession, of the character stated, the court will presume a grant or letter patent from the sovereign, as initiating such possession.[2] Hence, in England, charters, and even acts of parliament, have been thus presumed, after long possession accompanied by uncontested acts of ownership;[3] and in several

Grants will be so presumed.

33 L. J. Ch. 249; *S. C.* per Ld. Westbury, Ch., reversing a decision of Romilly, M. R. 2 New R. 378; Taylor's Ev. § 106. As dissenting from Lord Westbury's reasoning, however, we may notice the argument of the court in Pyer *v.* Carter, *ut supra*, and the conclusions in Huttemeier *v.* Albro, 18 N. Y. 52; and McCarty *v.* Kitchenmann, 47 Penn. St. 243. See, also, Leonard *v.* Leonard, 7 Allen, 283; but see, as according with the principle of Suffield *v.* Brown, Randall *v.* McLaughlin, 10 Allen, 366.

[1] See Best's Evidence, § 392; Johnson *v.* Barnes, L. R. 7 C. P. 593; *S. C.* L. R. 8 C. P. 527; Hammond *v.* Cooke, 6 Bing. 174; Attorney Gen. *v.* Hospital, 17 Beav. 435; Angus *v.* *v.* Dalton, L. R. 4 Q. B. D. 162; Burr *v.* Galloway, 1 McLean, 496; Clements *v.* Macheboeuf, 92 U. S. 418; Hill *v.* Lord, 48 Me. 83; Brattle *v.* Bullard, 2 Met. 363; Valentine *v.* Piper, 22 Pick. 85; White *v.* Loring, 24 Pick. 319; Jackson *v.* McCall, 10 Johns. 377; Cuttle *v.* Brockway, 24 Penn. St. 145; Cheney *v.* Walkins, 2 Har. & J. 96; Coulson *v.* Wells, 21 La. An. 383; Paschall *v.* Dangerfield, 37 Tex. 273. See, as indicating limits of this rule, Hanson *v.* Eustace, 2 How. 653; Nichol *v.* McCalister, 52 Ind. 586; and see, for specifications, infra, § 1352. That a dedication of a highway may be thus presumed, subject to the reservations which usage establishes, see Mercer *v.* Woodgate, 10 B. & S. 833; Arnold *v.* Holbrook, L. R. 8 Q. B. 96.

[2] Lopez *v.* Andrews, 3 M. & R. 329; Mayor *v.* Horner, Cowp. 102; Reed *v.* Brookman, 3 T. R. 158; Attorney General *v.* Dean of Windsor, 24 Beav. 679; Devine *v.* Wilson, 10 Moore P. C. R. 527; O'Neill *v.* Allen, 9 Ir. Law N. S. 132; Healey *v.* Thurm, L. R. 4 C. L. 495; Reed *v.* Brookman, 3 T. R. 158; Pickering *v.* Stamford, 2 Ves. Jun. 583; Townsend *v.* Downer, 32 Vt. 183; Emans *v.* Turnbull, 2 Johns. R. 313; Jackson *v.* McCall, 10 Johns. R. 377; Mather *v.* Trinity Ch. 3 S. & R. 509; Cuttle *v.* Brockway, 24 Penn. St. 145; Williams *v.* Donell, 2 Head, 695; Rooker *v.* Perkins, 14 Wis. 79; Davis *v.* Bowmar, 55 Miss. 673; Beatty *v.* Michon, 9 La. An. 102; Grimes *v.* Bastrop, 26 Tex. 310.

[3] Delarue *v.* Church, 2 L. J. Ch. 113; Little *v.* Wingfield, 11 Ir. Law

American states (*e. g.* Pennsylvania) an analogous limitation is adopted by statute. But a grant of public lands will not be presumed from uninterrupted possession of only ten years;[1] nor will this presumption be made in behalf of a party with whose case the presumption is inconsistent.[2]

Grant of incorporeal hereditament presumed after twenty years.

§ 1349. By the English common law, if a party, and those under whom he claims, have enjoyed from time immemorial estates the subject of grant, the presumption that a grant had been made is irrebuttable, and the right is held to be valid. But as it is impossible to prove enjoyment from time immemorial, a definite period of uninterrupted possession (*e. g.* twenty years as a minimum)[3] was considered by the courts as a basis from which prior indefinite possession might be presumed by the jury. Subsequently this rule was extended by presuming the existence, not of an ancient, but of a modern grant, from the proof of user, as of right, for twenty years.[4] By Lord Tenterden's Act,[5] thirty years' uninterrupted enjoyment to rights of common or profits *à prendre* gives a *primâ facie* title, and sixty years adverse possession an absolute title. The limits as to rights of way, easements, and water-courses, are reduced to twenty and forty years respectively.[6] Prior to Lord Tenterden's Act, "it became a usual mode of claiming title to an incorporeal hereditament" (for it is to incorporeal hereditaments alone that title by prescription applies at common law) "to allege a feigned grant, within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it, setting forth the names of the supposed parties to the document, with the excuse of profert that the document had been lost by time or accident. On a traverse of the

R. N. S. 63; Roe *v.* Ireland, 11 East, 280; Goodtitle *v.* Baldwin, Ibid. 488; Attor. Gen. *v.* Ewelme Hospital, 17 Beav. 366; and see Johnson *v.* Barnes, L. R. 7 C. P. 593; *S. C.* L. R. 8 C. P. 527.

[1] Walker *v.* Hanks, 27 Tex. 535; Biencourt *v.* Parker, 27 Tex. 558.

[2] Sulphen *v.* Norris, 44 Tex. 204.

[3] Bailey *v.* Appleyard, 3 N. & P. 257.

[4] See Reed *v.* Brookman, 3 T. R. 151; Angus *v.* Dalton, L. R. 4 Q. B. D. 162; Lon. Law Mag. May, 1879.

[5] 2 & 3 Will. 4, c. 71.

[6] For cases construing this statute, see Lowe *v.* Carpenter, 6 Exch. 825; Warburton *v.* Parke, 2 H. & N. 64; Blewett *v.* Tregonning, 3 A. & E. 554; Wilkinson *v.* Proud, 11 M. & W. 33; Cooper *v.* Hubbuck, 12 C. B. (N. S.) 456; Shuttleworth *v.* Le Fleming, 19 C. B. (N. S.) 687.

grant, proof of uninterrupted enjoyment for twenty years was held cogent proof of its existence; and this was termed making title by non-existing grant." [1] The same presumption, as to the grant of an incorporeal hereditament, based on enjoyment for twenty years, has been sustained in this country.[2] But there must be an exclusive enjoyment for twenty years to sustain such presumption; and the presumption may be rebutted by proof of lack of such enjoyment.[3] Thus a general usage (*e. g.* that of leaving lumber on a river bank), when not accompanied by claim of title and exclusive occupation, gives no foundation to the presumption of a grant.[4]

§ 1350. It should also be remembered that the grant, to be

[1] Best's Evidence, § 377.

[2] Tudor's Leading Cases, 114; Washburn on Easements, 3d ed. 110; 2 Washb. Real Prop. (4th ed.) 319; Ricard *v.* Williams, 7 Wheat. 109; Farrar *v.* Merrill, 1 Greenl. 17; Bullen *v.* Runnels, 2 N. H. 255; Valentine *v.* Piper, 22 Pick. 93; Melvin *v.* Locks, 17 Pick. 255; Brattle St. Ch. *v.* Bullard, 2 Met. 363; Sibley *v.* Ellis, 11 Gray, 417; Ingraham *v.* Hutchinson, 2 Conn. 584; Emans *v.* Turnbull, 2 Johns. R. 313; Benbow *v.* Robbins, 71 N. C. 338; Hall *v.* McLeod, 2 Metc. (Ky.) 98. See Glass *v.* Gilbert, 58 Penn. St. 266; McCarty *v.* McCarty, 2 Strobh. 6.

In Pennsylvania, while it is doubted whether a legal prescription is recognized (Rogers, J., Reed *v.* Goodyear, 17 S. & R. 352), yet the presumption stated in the text, as to incorporeal hereditaments, is established. Ibid., citing Tilghman, C. J., in Kingston *v.* Leslie, 18 S. & R. 383; and approved in 1875, by Agnew, C. J., in Carter *v.* Tinicum Fishing Co. 77 Penn. St. 315; quoted infra, § 1352.

[3] Livett *v.* Wilson, 3 Bing. 115; Dawson *v.* Norfolk, 1 Price, 246; Hurst *v.* McNiel, 1 Wash. C. C. 70; Rowell *v.* Montville, 4 Greenl. 270; Nichols *v.* Gates, 1 Conn. 318; Brant *v.* Ogden, 1 Johns. R. 156; Palmer *v.* Hicks, 6 Johns. R. 133; Irwin *v.* Fowler, 5 Robt. (N. Y.) 482; Burke *v.* Hammond, 76 Penn. St. 179; Field *v.* Brown, 24 Grat. 74; Best's Ev. § 378.

The time, it should be noticed, varies with local law. "In Connecticut it is fifteen years, in analogy to its statute of limitations. Sherwood *v.* Burr, 4 Day, 244–249. In Pennsylvania, twenty-one years. Strickler *v.* Todd, 10 S. & R. 63, and cases cited infra. In Massachusetts, twenty years. Sargent *v.* Ballard, 9 Pick. 251, 254." 2 Washb. Real Prop. 4th ed. 319.

As to presumptive rights to fences, in Maine, see Harlow *v.* Stinson, 60 Me. 349.

Where a fishing mill-dam built more than 110 years before 1861, in the river Derwent, in Cumberland (the river at the place not being navigable), was used more than sixty years before 1861, in the manner in which it was used in 1861, a presumption was held to exist of a grant from the proprietors of adjacent lands whose rights were thereby affected. Leconfield *v.* Lonsdale, L. R. 5 C. P. 657.

[4] Bethum *v.* Turner, 1 Greenl. 111; Tickham *v.* Arnold, 3 Greenl. 120.

presumed against the owner of the inheritance, must have been with *his* acquiescence: acquiescence by a tenant for life, or other subordinate party, will not be enough to incumber the fee.[1] To this acquiescence, a knowledge of the easement is essential. If there be no such knowledge (*e. g.* where water percolates through undefined subterranean passages), no length of time can establish acquiescence.[2] But the acquiescence of the owner may be established inferentially.[3] Thus, after the evidence was given of user by the public of an alleged public way for nearly seventy years, during the whole of which period the land had been on lease, it was held that from these facts the jury were at liberty to infer a dedication to the public use by the owner of the inheritance.[4]

Acquiescence must have been by owner of inheritance and with knowledge of the facts.

It need scarcely be added that the presumption of title to an easement merely from twenty years' possession is only *primâ facie*, and may be rebutted.[5] When, however, it appears that this enjoyment has for the period in question been acquiesced in by the owner of the inheritance, this may estop him from disputing the right to the easement; and in such case the presumption may be treated as irrebuttable, — not because it is technically a *praesumtio juris et de jure*, but because a party is not permitted, after inducing by his acquiescence another to alter his position, to ignore the rights which such other has thereby acquired. "It may," also, "be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water, for instance, in a particular way, for more than

Such presumption may amount to an estoppel.

[1] Best's Ev. § 379, citing 2 Wms. Saund. 175; and see Wood *v.* Veal, 5 Barn. & Ald. 454; Daniel *v.* North, 11 East, 372; Ricard *v.* Williams, 7 Wheat. 59; Cooper *v.* Smith, 9 S. & R. 26; Edson *v.* Munsell, 10 Allen, 568; Stevens *v.* Taft, 11 Gray, 33; Smith *v.* Miller, 11 Gray, 148; Coalter *v.* Hunter, 4 Rand. 58; Nichols *v.* Aylor, 7 Leigh, 546; Biddle *v.* Ash, 2 Ashm. 211. Supra, § 1161.

[2] Chasemore *v.* Richards, 7 H. of L. Cas. 349.

[3] Gray *v.* Bond, 2 B. & B. 667.

[4] Winterbottom *v.* Derby, L. R. 2 Ex. 316.

[5] Livett *v.* Wilson, 3 Bing. 115; Campbell *v.* Wilson, 3 East, 294; Bethum *v.* Turner, 1 Greenl. 111; Tyler *v.* Wilkinson, 4 Mason, 397; Sargent *v.* Ballard, 9 Pick. 251; Corning *v.* Gould, 16 Wend. 531; Cooper *v.* Smith, 9 S. & R. 26; Wilson *v.* Wilson, 4 Dev. 154; Ingraham *v.* Hough, 1 Jones (N. C), 39; Lamb *v.* Crossland, 4 Rich. 536.

twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it." [1]

Acquiescence for less than twenty years may, with other circumstances, infer a grant.

§ 1351. It must be repeated that a possession for less than twenty years can be helped out by proof of other circumstances, so as to enable a grant to be presumed.[2] The presumption in such case is one of fact for the jury, under the instructions of the court.[3] And among the circumstances which will sustain such a presumption, as has been seen, is to be considered such acquiescence by adverse interests as approaches an estoppel.[4]

Presumption as to intermediate deeds and other procedure.

§ 1352. Intermediate deeds of conveyance of interests in freehold may, on like principles, be inferred in cases where there has been quiet possession for at least twenty years,[5] or when after long continued possession there is conduct equivalent to an estoppel, which may be im-

[1] Washburne on Easements, 3d ed. 114, citing Strickler *v.* Todd, 10 S. & R. 63; Olney *v.* Fenner, 2 R. I. 211; Pillsbury *v.* Moore, 44 Me. 154; Belknap *v.* Trimble, 3 Paige, 577; Townshend *v.* McDonald, 2 Kern. 381; Hazard *v.* Robinson, 3 Mason, 272; Wilson *v.* Wilson, 4 Dev. (N. C.) 154; Gayetty *v.* Bethune, 14 Mass. 51; Parker *v.* Foote, 19 Wend. 309; Corning *v.* Gould, 16 Wend. 531; Hall *v.* McLeod, 2 Metc. (Ky.) 98; Wallace *v.* Fletcher, 10 Foster, 434; Winnipiseogee Co. *v.* Young, 40 N. H. 420; Tracy *v.* Atherton, 36 Vt. 512; Burnham *v.* Kempton, 44 N. H. 88. See Leconfield *v.* Lonsdale, L. R. 5 C. P. 657; and see opinion of Agnew, C. J., in Carter *v.* Tinecum Fishing Co. 77 Penn. St. 315, quoted infra, § 1352.

Duncan, J., in Strickler *v.* Todd, 10 S. & R. 63, speaks of an "uninterrupted exclusive enjoyment above twenty-one years" of a water privilege as affording a "*conclusive* presumption;" but this must be understood, in order to reconcile the case with other Pennsylvania rulings, to mean "conclusive *proof* of prescription."

[2] See supra, §§ 1347, 1348; and see Bright *v.* Walker, 1 C., M. & R. 222, 223, per Parke, B.; Stamford *v.* Dunbar, 13 M. & W. 822, 827; Lowe *v.* Carpenter, 6 Ex. R. 830, 831, per Parke, B.; Taylor, § 111.

[3] Doe *v.* Cleveland, 9 B. & C. 844; Doe *v.* Davies, 2 M. & W. 503; Carter *v.* Tinicum Fishing Co. 77 Penn. St. 310.

[4] Doe *v.* Helder, 3 B. & Ald. 790; Kingston *v.* Leslie, 10 S. & R. 383; Foulk *v.* Brown, 2 Watts, 214.

[5] See supra, § 1347; Knight *v.* Adamson, 2 Freem. 106; Wilson *v.* Allen, 1 Jac. & W. 611; Tenny *v.* Jones, 3 M. & Scott, 472; Cooke *v.* Soltan, 2 S. & St. 154; Farrer *v.* Merrill, 1 Greenl. 17; Stockbridge *v.* West Stockbridge, 14 Mass. 257; Com. *v.* Low, 3 Pick. 408; Melvin *v.* Locks,

puted to the party from whom the deed is presumed.[1] In such

17 Pick. 255; White *v.* Loring, 24 Pick. 319; Ryder *v.* Hathaway, 21 Pick. 298; Brattle *v.* Bullard, 2 Met. 363; Attorney General *v.* Meetinghouse, 3 Gray, 1, 62; Jackson *v.* Murray, 7 Johns. R. 5; Livingston *v.* Livingston, 4 Johns. Ch. 287; Burke *v.* Hammond, 76 Penn. St. 179; Cheney *v.* Walkins, 2 Har. & J. 96; Jefferson Co. *v.* Ferguson, 13 Ill. 33; Riddlehoner *v.* Kinard, 1 Hill (S. C.) Ch. 376; Nixon *v.* Car Co. 28 Miss. 414; Newman *v.* Studley, 5 Mo. 291; McNair *v.* Hunt, 5 Mo. 300.

[1] See Doe *v.* Hilder, 3 B. & A. 790; Cottrell *v.* Hughes, 15 C. B. 532.

In a case decided in 1875, in Pennsylvania, it was shown that Sanderlin held title to a fishery in 1748, and that in 1754 the fishery, on proceedings in partition, was adjudged to "the representatives of Mary (his daughter), late wife of James," subject to a ground rent, the whole estate being divided into five shares. Elizabeth and others, reciting that they were heirs of "James, who was an heir of Sanderlin," conveyed in 1805 to Carter; the deed also recited the proceedings in partition; also prior deeds reciting the partition, and that the grantors were heirs of other heirs of Sanderlin, and conveying to Carter their interest in two fifths of the fishery. There was no other evidence of the pedigree of the grantors, nor of any claim by the descendants of Sanderlin for the fishery. This was held sufficient to raise a presumption of a grant, to make a good title to Carter of the fishery. Carter *v.* Tinicum Fishing Co. 77 Penn. St. 310.

In this case we have from Agnew, C. J., the following valuable summary of the Pennsylvania cases: —

"Presumptions arising from great lapse of time and non-claim are admitted sources of evidence, which a court is bound to submit to a jury, as the foundation of title by conveyances long since lost or destroyed.

"This is stated by C. J. Tilghman, in Kingston *v.* Leslie, 10 S. & R. 383. There the absence of all claim for years, on the part of a female branch of a family, represented by Honorie Herrman, at an early day was held to constitute a ground to presume that her title had been vested in the male branch. Judge Tilghman remarked: 'I do not know that there is any positive rule defining the time necessary to create a presumption of a conveyance. In the case of easements and other incorporeal hereditaments, which do not admit of actual possession, the period required by law for a bar by the statute of limitations is usually esteemed sufficient ground for a presumption.' This doctrine of lapse of time is discussed at large by Justice Rogers, in Reed *v.* Goodyear, 17 S. & R. 352, 353. 'The courts of law,' he remarks, 'pay especial attention to rights acquired by length of time. Although it has been doubted (he says) whether a legal prescription exists in Pennsylvania, yet the doctrine of presumption prevails in many instances.' He quotes and approves the language of Chief Justice Tilghman, in Kingston *v.* Leslie, in relation to presumptions in the case of easements and incorporeal hereditaments, and adds: 'The rational ground for a presumption is where, from the conduct of the party, you must suppose an abandonment of his right.' Among the cases he cites is one directly applicable to a fishery: 'So a plaintiff had forty years' possession of a piscary; the court decreed the defendants to surrender and release their title to the same, though the surren-

case possession will justify the presumption, provided it be ex-

der made by the defendants' ancestor was defective;' Penrose *v.* Trelawney, cited in Vernon, 196. Justice Sergeant said, in Foulk *v.* Brown, 2 Watts, 214, 215, 'The court will not encourage the laches and indolence of parties, but will presume, after a great length of time, some composition or release to have been made; this length of time does not operate as a positive bar, but as furnishing evidence that the demand has been satisfied. But it is evidence from which, when not rebutted, the jury is bound to draw a conclusion, though the court cannot.' Again he says: 'The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost, or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors.' Acts of ownership over incorporeal hereditaments, corresponding to the possession of corporeal, are deemed a foundation for a presumption. 'The execution of a deed,' says Gibson, C. J., 'is presumed from possession in conformity to it for thirty years; and why the entire existence of a deed should not be presumed from acts of ownership for the same period, which are equivalent to possession, it would not be easy to determine.' Taylor *v.* Dougherty, 1 W. & S. 327. And said Black, C. J., in Garrett *v.* Jackson, 8 Harris, 335: 'But where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be afterwards disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.' This is repeated by Justice Woodward, in Pierce *v.* Cloud, 6 Wright, 102–114. See his remarks also in Fox *v.* Thompson, 7 Casey, 174, that links in title are supplied by long and unquestioned assertion of title. The same principles are repeated by the late C. J. Thompson, in Warner *v.* Henby, 12 Wright, 190. The necessity of relaxing the rules of evidence in matters of ancient date was shown in Richards *v.* Elwell, 12 Wright, 361, a case of parol bargain and sale of land, and possession for forty years. The court below held the party to the same strictness of proof required in a recent case. It was there said by this court: 'If the rule which requires proof to bring the parties face to face, and to hear them make the bargain, or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of forty years, when shall it be? It is contrary to the presumptions raised in all other cases, — presumptions which are used to cut off and destroy rights and titles founded upon records, deeds, wills, and the most solemn acts of men. Based upon a time much shorter, we have the presumptions of a deed, grant, release, payment, survey, abandonment, and the like.' And again: 'There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain.' The same principles are held in the following cases: Turner *v.* Waterson,

clusive and continuous.[1] Hence it has been held in England,

4 W. & S. 171; Hastings *v.* Wagner, 7 Ibid. 215; Brock *v.* Savage, 10 Wright, 83." Agnew, C. J., Carter *v.* Tinicum Fishing Co. 77 Penn. St. 315. See, also, to same effect, Brown *v.* Day, 78 Penn. St. 129.

The following points, relating to presumptions of title, are to be considered in connection with the text.

Ownership or title to land is really not a fact, but a conclusion of law from a series of facts. The existence of any one of these, it is true, is a matter of proof by the person who is obliged to assert it, as in any other case; but the result of the whole is a legal right. Besides this, not merely the nature of the proof of the facts from which such title is deduced, but, owing to the varied forms of action in which it is tried, the person by whom the proof is to be made, must be considered.

It follows from this that it is not proper to speak, in an absolute sense, of presumptions of title. At least in England, and those of the United States who still follow the traditions of the feudal system, all land in the first instance belongs to the sovereign, and his rights cannot be affected by lapse of time or mere adverse claim; a grant from him must be positively shown, unless under very peculiar circumstances. In Pennsylvania this was once carried so far that no one could recover in ejectment without showing title out of the commonwealth, though he might not be able to connect that title with his own. This, however, was qualified as to long settled parts of the state, by later decisions, see Smith *v.* Townshend, 32 Penn. St. 434, and is now remedied by statute.

It follows, therefore, that there can be no legal presumption of ownership as such. Nor as a presumption of fact has it any existence. When a man is seen to enter a house with a pass-key, there is a presumption in favor of the rightfulness of the act; but standing alone it would give rise to a very faint inference of title, because he might be but a tenant, a lodger, or a member of the owner's family. The same may be said in regard to a man ploughing a field, or gathering fruit, or any other such isolated act. No abstract conclusion is warranted by incidents like these; it is only when repeated so often, under such circumstances, and with such apparent exclusion of the rights of others, as to fall under the legal definition of possession, that there is any room for presumptions; but even then it must appear that, according to the common experience of men at the particular time and place, possession is most usually associated with ownership. Such is the case in the newer parts of this country, where agricultural tenancy is exceptional: and so it would be in France. But in certain counties of England and Ireland, and also in parts of India, the probability would be the other way. The weight to be given to possession must vary, therefore, with the circumstances, and it can seldom, without other explanatory facts, justify a peremptory conclusion. Indeed, when the effect of possession is considered in the abstract, without regard to the form of the action in which it is presented, it will in general, if not always, be found, that the presumption which is derived from it is confined to some alleged fact, which is merely a link in the chain of title: as where a man enters claiming under

[1] Doe *v.* Gardiner, 12 C. B. 319; Burke *v.* Hammond, 76 Penn. St. 179.

that where the plaintiff's title rests on feoffment, and he shows a deed and remains in exclusive possession for many years, this raises a presumption — not of ownership — but of the former existence of the deed, which may or may not suffice to complete the chain.

The true doctrine on this subject is laid down by Tindal, Ch. J., in Doe *v.* Cooke, 6 Bing. 179: "No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, 'good in substance,' *but wanting some collateral matter* to make it complete in point of form. In such cases, where the possession has been shown to be consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed." And to the same effect are Doe *v.* Reed, 5 B. & A. 236; Doe *v.* Waterton, 3 B. & A. 149. In Pennsylvania, before the Statute of 1855, it was held that in the case of a perpetual rent no presumption of a release or extinguishment of the rent could be made upon the mere fact of its non-payment for any period of years. St. Mary's Church *v.* Miles, 1 Wharton. 229.

The case of easements is somewhat different. In regard to ways, watercourses, fisheries, or the like, an uninterrupted user is a constant and conspicuous interference with the exclusive right of the owner of the soil, and not ordinarily justifiable on any theory of tenancy or subordinate title. Hence the user being *primâ facie* inconsistent with the owner's right, and from its nature not concealed from him, it is held that the court may direct the jury to presume some previous grant, because unlawfulness cannot be presumed, and the only way by which at law an incorporeal hereditament can be created is by a grant under seal. In truth, it is the extremely artificial nature of this presumption that has created the difficulty which judges and juries often have felt in regard to it. If the modern doctrine of license, which is the more rational explanation of such special rights, had been earlier introduced, it would have saved much trouble, for juries would then have had their attention called to the question whether the license was revocable or not, an element of which would be the consideration given. At any rate in England the Prescription Act of William IV. has put an end to what was, in theory at least, a very unsatisfactory state of the law, by substituting an actual statute of limitations in its stead.

Now, passing from these geoeral observations, the occasions on which the presumption of the existence of a fact essential to title is made are obviously in *actions:* —

I. Between the real owner and the possessor of the land.

II. Between a former possessor of the land and one in actual possession.

III. Between vendor and purchaser.

I. As a general rule, nothing but some statute of limitations can prevent the holder of the legal title from recovering at law: no mere possession different from or of less duration than that which is requisite under the statute creates any presumption of title. The difference at common law between the writs of right and of entry, and the action of ejectment, is familiar. The latter is based on a right of possession, and a consequent right of entry on the land. The writ of entry was based on an actual previous seisin, and a consequent right of entry. The writ of right was based on title alone. Formerly in England

that he has had uninterrupted enjoyment of the premises for

the periods of limitation in respect to each of these actions was different. In many of the United States, as in Pennsylvania, the distinction has vanished, and the same period of time is applicable where the suit is based on possession alone, or where on title, or where on both. But this has not produced any effect on the rules at common law as applied to actions of ejectment; for instance, that the defendant must have had actual, open, notorious, continuous, and adverse possession during the statutory period upon some color of right, otherwise the right of entry is not taken away. There may be reason for the interference of a court of equity, on special grounds, but at law the true owner must recover unless barred by the statute. In the case of a vacant lot of ground, for instance, the true owner will always recover, no matter how remote the origin of his title, and no matter under what number of mesne conveyances the defendant claims. De Haven *v.* Landell, 31 Penn. St. 120.

The case as between tenants in common is not an exception to this, though it is sometimes spoken of as that of presumption of grant or release. The truth is, that the statute does not run as between tenants in common, because each has a right of entry. But where there has been an exclusive and hostile perception of the whole profits of the land for more than the statutory period, there the jury can justly be told to presume a turning out, or assumption of adverse ownership, on some ground bad or good. The only difference is, that this presumption would require a stronger state of facts than as between strangers. Indeed, the shortest way of expressing this is, that with tenants in common, as with tenants for years, there is a preliminary presumption that possession remains consistent with its origin 'till the contrary is proved; and this must be shown by acts and conduct inconsistent with that presumption.

II. When the suit is by a former possessor for a disturbance of his possession, the question is complicated in a double way; by the form of action, and by the character of the possession. As to the form of action, where there has been a mere temporary disturbance of possession, for which trespass is the remedy, very little needs to be said in the first instance. If the plaintiff has acquired possession, however wrongfully, he can recover damages for an interference therewith by a mere intruder, who cannot use the want of title of his adversary as a shield. This is the rule in all civilized jurisprudence. In Rome, indeed, there was a special interdict to protect possession even against the rightful owner. In England, and in many of the United States, however, while the exercise of force in recovering possession is a criminal offence, it is not a ground for civil remedies; Buring *v.* Reed, 11 Q. B. 904; Harvey *v.* Brydges, 14 M. & W. 437; 1 Exch. 117; Overdeer *v.* Lewis, 1 W. & S. 90; Rich *v.* Keyser, 54 Penn. St. 86 (except when there is personal injury); and, therefore, to an action of trespass, a plea of title, or *liberum tenementum*, to use the technical phrase, will convert trespass, according to some authorities, into a contest of ownership. Fisher *v.* Morris, 5 Whart. 358; Hagling *v.* Okey, 8 Exch. 531. When this is the case, however, presumptions can be made only of particular facts, and not of ownership itself.

Still, as a rule, in trespass the plaintiff will succeed, upon proof of antecedent actual physical possession of the

twenty years, without molestation from the feoffor, the jury will

land, for however short a period. Catteris *v.* Cowper, 4 Taunt. 547. If the action is ejectment, however, a more difficult problem is often to be solved. That action, of course, is an admission of possession by the defendant at the date of the issuing of the writ. The first question is, then, How was that possession acquired? The old English books are full of nice distinctions on the subject of disseisin, which correllates with, but is not the same thing, as dispossession. Seisin had a meaning in the feudal times involving duties and privileges in regard to the lord, mesne or suzerain, which has long faded away. Yet, when Lord Mansfield, as late as the case of Taylor *v.* Horde, 2 Smith Lead. Cas. 485, developed, if he did not invent, the doctrine of disseisin by election, through which an action of ejectment was enabled to do the work of the old real actions,— for it gives the plaintiff the right to treat the same state of facts either as a temporary trespass or a formal ouster at his pleasure,— it was thought an innovation. Resulting from this, however, there is one matter which belongs to the subject in hand, and that is, that for the purposes of an ejectment, almost any act by a defendant infringing on the possession of the plaintiff will be presumed to have been done under pretence or claim of ownership, unless a formal disclaimer has been filed.

Then as to the plaintiff's own case. It is sometimes said broadly he must recover on the strength of his own and not on the weakness of the defendant's title, and that title in a mere stranger can he set up to defeat him. *Beati possidentes* is a law maxim which has become famous; but it is not universal. There remains always the distinction between the possessor and the intruder. One who, without pretence of claim, goes on land in possession of another, cannot retain it on the mere ground of an outstanding title. If the antecedent possession has been so established as to be consistent only with ownership, it will, for the purpose of the suit, be presumed to be connected with it. And an outstanding title to be resorted to must be a living one capable of enforcement, and not abandoned or ideal. There is a good deal of conflict of authority on this subject, but this at least is now admitted, that where the plaintiff's case is one of possession morally just, every presumption of fact to supply wanting links will be made. The best illustration of this is in the English decisions on the subject of attendant terms. These are long terms of years created by way of mortgage, usually, for the payment of debts or portions. If their purpose had been answered, it was very usual not to obtain a formal surrender of them by the trustees; but they were left, as it was called, to attend the inheritance. As the unexpired term constitutes the legal estate for the time being, it furnished to purchasers and others protection against intervening concealed incumbrances. But if, in an action of ejectment by the true owner, the defendant could set up such an outstanding term, whose purposes had long since been answered, he could insist on its being a legal bar to the plaintiff's recovery. Hence grew up the practice of judges directing juries in such cases to *presume* a surrender of such a term after many years of inaction. But this was long contested, and perhaps rightly, as a presumption contrary to the truth, and what was worse in a presumption, contrary to usual experience, which

be entitled to presume, in his favor, that the necessary formali-

was, that conveyances constantly abstained from requiring a surrender of such terms, for the reasons stated. Hill on Trustees, p. *255. Indeed, when the beneficial owner has never been in actual possession, no such presumption can be made. Doe *v.* Williams, 2 M. & W. 749.

Of course, the extent to which a plaintiff in ejectment can rely on his antecedent possession alone is a matter of degree. Theoretically, if the *factum* be once established; if, to put an extreme case, a plaintiff can show against an intruder a notorious exclusive possession for nineteen years, this would authorize a judge to disregard an apparent title in another, though as between him and the plaintiff the statute of limitations would be no bar. On the other hand, when it comes down to a case of mere "squatting" on either side, the last in time may well insist on holding until the rightful owner appears. So again the nature of the property must affect the presumptions derived from possession. In a case in Pennsylvania, Krider *v.* Lafferty, 1 Whart. 303, cutting of willows on swamp land for basket making, during the proper season of the year, was held to be evidence of possession sufficient to raise a presumption of right. In some states, though the sea-shore is *publica juris*, yet the right to gather seaweed may be established by evidence of user. But no one could imagine any such inference possible from mere casual trespasses, such as fishing from rocks or shooting in the woods. These are wanting in the continuity which characterizes the assertion of a just claim, and hence fail on the presumption of that rightfulness.

III. Lastly between vendor and vendee the weight of presumption is measured by a different standard still. Setting aside actions at law for breach of a contract to convey, in equity the rule as to specific performance is inflexible not to force on a purchaser a title doubtful in law or fact; not to compel him to accept a lawsuit instead of an estate. Hence a chancellor must be chary of taking presumptions for facts, though he might, as a juryman, be willing to act on them. It is only one side that he hears, the other is not in court. For this reason a court of equity seldom acts on mere presumptions of fact, which may be passed upon without hesitation in hostile litigation. The rule seems settled that a purchaser can be bound only where a judge at nisi prius should direct a jury peremptorily, on any point in the title where direct evidence is wanting, to find, on the facts as proved, the existence of a missing link, as a presumption of law. Fry on Specific Perform. § 581. See Emery *v.* Grocock, 6 Madd. 54. And even then there is room for argument on the difference between presumptions *juris et de jure*, and *juris tantum*. A rebuttable presumption of law may be as dangerous as one of fact simply. For instance, where there is a mortgage of record, no purchaser would be safe in relying on the naked assertion of the vendor that no interest had been paid by him for twenty years, or even by positive proof to that effect, for the mortgage might include other property, the owner of which may have kept down the interest by reason of some private arrangement to which the mortgagee was not a party, or there may have been some acknowledgment of the existence of the debt in another form. See Barnwell *v.* Harris, 1 Taunt. 439; Pratt *v.* Eby, 67 Penn. St. Rep. 376. A very

ties of a livery of seisin took place.[1] So, as we have seen, under similar conditions, the formalities of deeds will be presumed to have been duly executed, when this does not contradict the deeds themselves.[2]

Instances of links of title so supplied.

§ 1353. On the principle, and with the limitations just stated, the courts have held that after a long extended continuous possession, acquiesced in by parties capable of contesting such possession, juries may rightfully presume

strong illustration of the risk which would be run in presuming the payment of incumbrances is to be found in a case under the Pennsylvania Act of 1855, which provides that where no claim or demand has been made for a ground rent, annuity, or charge for twenty-one years, nor any action brought, it shall be presumed to have been extinguished, and be thereafter irrecoverable; and it was proved that though no such claim or demand had been made on the actual terre tenant of the land, during the statutory period, an action had been brought against the original covenantee; and it was held that the statute was no bar. Hiester *v.* Shaeffer, 45 Penn. St. 537. And yet this statute has been expressly held to be one of oleabtus limitation. Korn *v.* Browne, 64 Penn. St. 55.

As a rule, however, a title dependent on the statute of limitations is marketable, — that is, where there has been an unquestioned, exclusive possession, with no circumstances to suggest a doubt of its lawful origin. In England a period of sixty years is usually insisted on, in order to cover exceptions from the statute, and exclude the risk of an outstanding life estate, or, as some think, by analogy to the limitation of the writ of right. See 2 Sugd. Vend. & Pur. 132; Prosser *v.* Watts, 6 Madd. 59. A shorter period would probably be considered sufficient in those states in this country where there is a limitation to the exceptions to the statutes themselves. See Shober *v.* Dutton, 6 Phila. Rep. 185; Pratt *v.* Eby, 67 Penn. St. 371.

In concluding these observations, it is proper to say that their purpose has chiefly been to call attention to the frequent inapplicability of presumptive evidence to the title to land, which is controlled by rules which should, in the interest of the community, be fixed and simple. The ordinary controversies between men arise out of isolated acts, as to which presumptions are often as safe guides as direct proof. They neither follow nor make precedents. But the rights which belong to real estate partake of its permanency. The instinct of mankind that the evidence of the existence of these rights should, as far as possible, be unchanging, plain, and not dependent on casual inference, has shown itself in Statutes of Fraud and in Recording Acts. It is best in the interests of society that the policy which these represent should be maintained at the risk of occasional injustice.

[1] Rees *v.* Lloyd, Wightw. 123; Doe *v.* Cleveland, 9 B. & C. 864; 4 M. & R. 666, *S. C.;* Doe *v.* Davies, 2 M. & W. 503; Doe *v.* Gardiner, 12 Com. B. 319.

[2] Supra, § 1313.

The doctrine of presumption in such cases is ably discussed in the London Law Magazine for May, 1859, p. 281.

the execution of ancient deeds of partition;[1] of ancient wills so far as the curing of defects of execution;[2] of powers to agents to make conveyances;[3] of deeds by agents shown to have had due power to convey;[4] of deeds of conveyance by trustees to beneficial owner.[5] The same presumption has extended to the enrolment as a preliminary to the assignment of a term by A. to secure the payment of an annuity to B. of the annuity,[6] to the due execution of deeds and wills;[7] to the existence of the proper preliminaries to ancient deeds by land companies or other corporations;[8] to the passage of acts of the legislature, when constitutional and appropriate;[9] to the adoption of by-laws, when such by-laws are necessary to explain a usage of long standing;[10] and to the proof of death of remote ancestors with-

[1] Hepburn *v.* Auld, 5 Cranch, 262; Munroe *v.* Gates, 48 Me. 463; Society *v.* Wheeler, 1 N. H. 310; Alleghany *v.* Nelson, 25 Penn. St. 332; Russell *v.* Marks, 3 Metc. (Ky.) 37.

[2] Hill *v.* Lord, 48 Me. 83; Maverick *v.* Austin, 1 Bailey, 59; Morrill *v.* Cone, 22 How. 82.

[3] Stockbridge *v.* West Stockbridge, 14 Mass. 257; Tarbox *v.* McAtee, 7 B. Mon. 279.

[4] Clements *v.* Macheboeuf, 92 U. S. (2 Otto) 418; Marr *v.* Given, 23 Me. 55; Vail *v.* McKernan, 21 Ind. 421. See Doe *v.* Martin, 4 T. R. 39.

In Clements *v.* Macheboeuf, supra, it was said by Clifford, J.: —

"The rule is, that if the deed is apparently within the scope of the power, the presumption is, that the agent performed his duty to his principal. . . . .

"Subject to certain exceptions, not applicable to this case, the general rule is, that the presumption in favor of the conveyance will be allowed to prevail in all cases where it was executed as matter of duty, either by an agent or trustee, if the instrument is regular on its face."

[5] 3 Sugd. Vend. & Pur. 25; Best's Evidence, § 394; Keene *v.* Deardon, 8 East, 267; Marr *v.* Gilliam, 1 Coldw. 488; Wilson *v.* Allen, 1 Jac. & W. 620; Emery *v.* Grocock, 6 Madd. 54; Doe *v.* Cooke, 6 Bing. 180. And see, as illustrations of the principle that trustees will be presumed to have conveyed when it was their duty so to do, England *v.* Slade, 4 T. R. 682; Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Lloyd, Pea. Ev. App. 41.

[6] Doe *v.* Mason, 3 Camp. 7, per Lord Ellenborough; Doe *v.* Bingham, 4 B. & A. 672, which was on 53 G. III. c. 141. See Lond. & Brigh. Ry. Co. *v.* Fairclough, 2 M. & Gr. 674.

[7] Supra, § 1313.

[8] Supra, § 1313. In Campbell *v.* Liverpool, L. R. 9 Eq. 570, where it appeared that by an act of Wm. III. certain corporation land was set apart for a burial ground, and afterwards consecrated, it was held that a conveyance from the corporation might be presumed.

[9] Lopez *v.* Andrews, 3 Man. & R. 329; queried, however, in R. *v.* Exeter, 12 A. & E. 532; Atty. Gen. *v.* Ewelme Hosp. 17 Beav. 366; compare Eldridge *v.* Knott, Cowp. 215; McCarty *v.* McCarty, 2 Strobh. 6.

[10] R. *v.* Powell, 3 E. & B. 377; May. of Hull *v.* Horner, 1 Cowp. 110, per Lord Mansfield.

out issue.[1] To tax and administration sales this presumption has been held applicable.[2] But there must be possession taken under the sale, or otherwise time exercises no curative effect.[3]

Links in record will in the same way be supplied.

§ 1354. We have already noticed[4] that when a record is on its face complete and authoritative, the burden of proof is on the party by whom it is assailed. We have now to advance a step further, and to consider those titles in which, after a long possession, it is discovered, in making up the title, that one of its record links cannot be found. Is it not likely that such link once existed, but is now lost? The answer to this question depends upon the degree of care with which records, at the time under consideration, were kept, and the casualties to which they were exposed. And in determining the question of the existence of such link, and its subsequent loss, a very important point for consideration is the long acquiescence of adverse parties, — an acquiescence not probable if the title was bad. Hence it is that the courts have assumed the existence and loss of such links, after a lapse of time varying with the conditions under which the records were placed.[5]

Defects of form in this way cured.

§ 1355. It is otherwise (apart from the statute of limitations) when in judicial procedures the defects go to want of jurisdiction or other fatal blemish.[6] But ordinarily a title, sustained by uninterrupted enjoyment, will not

[1] Roscommon's Claim, 6 Cl. & F. 97; Oldham *v.* Woolley, 8 B. & C. 22. See McComb *v.* Wright, 5 Johns. R. 263; Hays *v.* Gribble, 3 B. Mon. 106.

[2] Austin *v.* Austin, 50 Me. 74; Colman *v.* Anderson, 10 Mass. 105; Pejobscot *v.* Ransom, 14 Mass. 145. See, however, as to Pennsylvania, Lackawanna Iron Co. *v.* Fales, 55 Penn. St. 90; Heft *v.* Gephart, 65 Penn. St. 510. And, as leading to a contrary conclusion, Blackwell on Tax Titles, pp. 91–3. See, as to presuming missing links, infra, § 1354.

[3] Coxe *v.* Deringer, 78 Penn. St. 271. See *S. C.* 3 Weekly Notes, 97.

[4] Supra, § 1304.

[5] Plowd. 411; Finch L. 399; Crane *v.* Morris, 6 Pet. 598; Reedy *v.* Scott, 23 Wall. 352; Sagee *v.* Thomas, 3 Blatch. 11; Battles *v.* Holley, 6 Greenl. 145; Freeman *v.* Thayer, 33 Me. 76; Winkley *v.* Kaime, 32 N. H. 268; Coxe *v.* Deringer, 78 Penn. St. 271; Plank Road *v.* Bruce, 6 Md. 457; Markel *v.* Evans, 47 Ind. 326; Breckenridge *v.* Waters, 4 Dana, 620; Alston *v.* Alston, 4 S. C. 116; Desverges *v.* Desverges, 31 Ga. 753; Wyatt *v.* Scott, 33 Ala. 313; Austin *v.* Jordan, 35 Ala. 642; State *v.* Williamson, 57 Mo. 192; Palmer *v.* Boling, 8 Cal. 384; Hillebrant *v.* Burton, 17 Tex. 138. As to sales by administrators, see Pejobscot *v.* Ransom, 14 Mass. 145.

[6] Hathaway *v.* Clark, 5 Pick. 490; Lytle *v.* Colts, 27 Penn. St. 193; Nichol *v.* McAlister, 52 Ind. 586.

be permitted to fail because the record does not set forth every minor detail necessary to make the proceedings perfect.[1] Thus a deed of apprenticeship, under which the parties acted, will be presumed to have been regularly executed;[2] and so defects in the recording of ancient deeds may be explained by parol.[3] Wherever, also, an administrative record is executed, such record will *primâ facie* be regarded as regular.[4]

License may be thus presumed.

§ 1356. A license to relieve a party from a check on a title may be thus presumed. Thus, in a case where ejectment was brought to recover a house and lot, which had been let for a long term of years, it appeared that the lease contained a covenant by the lessee that the house should not be used as a shop without the consent of the lessor, there being a proviso for reëntry on the breach of the covenant. It was held by the court that the jury could presume a license from proof of the uninterrupted user of the premises as a beer-shop for twenty years.[5]

Title in such case must be substantial.

§ 1357. A substantial title, however, is the prerequisite to the invocation of the presumptions which have been just stated, for "no case can be put in which any presumption has been made, except when a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such *case only*, has it ever been allowed."[6]

[1] See cases cited supra, § 645.

[2] R. *v.* Hinckley, 12 East, 361; R. *v.* Whiston, 4 A. & E. 607; 6 N. & M. 65, *S. C.*; R. *v.* Whitney, 5 A. & E. 191; 6 N. & M. 552, *S. C.*; R. *v.* Stainforth, 11 Q. B. 66. See, also, R. *v.* St. Mary Magdalen, 2 E. & B. 809; R. *v.* Broadhempston, 28 L. J. M. C. 18; 1 E. & E. 154, *S. C.*

[3] Booge *v.* Parsons, 2 Vt. 456; Bettison *v.* Budd, 21 Ark. 578.

[4] Sumner *v.* Sebec, 3 Greenl. 223; Isbell *v.* R. R. 25 Conn. 556; Farr *v.* Swan, 2 Penn. St. 245; Byington *v.* Allen, 11 Iowa, 3. Supra, § 645.

[5] Gibson *v.* Doeg, 2 H. & N. 615. As to other presumptions of license, see Seneca *v.* Zalinski, 15 Hun, 571.

[6] Tindal, C. J., Doe *v.* Cooke, 6 Bin. 179; though see Little *v.* Wingfield, 11 Ir. L. R. (N. S.) 63 *et seq.*, as criticising above passage. Doe *v.* Gardiner, 12 C. B. 319; Richardson *v.* Dorr, 5 Vt. 9; Warner *v.* Henby, 48 Penn. St. 187. See, also, Burke *v.* Hammond, 76 Penn. St. 179; Winstan *v.* Prevost, 6 La. An. 164; and cases cited supra, §§ 1347 *et seq.*

§ 1358. It need scarcely be added that the presumption of such conveyances is rebuttable by counter-proof, though a party by acquiescence in an imperfect title may be estopped from disputing it.[1]

Presumption is rebuttable.

§ 1359. When a deed or will, or other attested document,[2] is thirty years old or upward, and is produced from the proper archives or other unsuspected depository, then such document proves itself, and the testimony of the subscribing witness is not necessary, though he may be called by the contesting party to dispute genuineness.[3] The same rule applies in the Roman law.[4] It has been argued that where a system of registry is established by law, no archives can be considered as giving the *primâ facie* genuineness, except those which the statute indicates. This distinction, however, cannot be maintained, as registration does not supersede the common law mode of proof, but merely dispenses with some of the requisites. And in any view, the question is one only of burden of proof. Documents so protected by age and safe keeping are *primâ facie* receivable in evidence; and the burden is on him who would resist their admission. But when this is undertaken by him, then the question of admissibility is to be decided, as is already shown, by the proof and presumptions belonging to the concrete case.[5]

Burden on party assailing documents of over thirty years old.

VII. PRESUMPTION OF PAYMENT.

§ 1360. Aside from statutes of limitation, if a bond is permitted to remain without interest collected, or any recognition of indebtedness on the part of the debtor, for twenty years, the law presumes payment, and proceeds to throw the burden of proving non-payment on the creditor.[6] The same presumption applies to tax claims;[7] to

Presumption of payment after twenty years.

[1] Hurst *v.* McNiel, 1 Wash. C. C. 70; Nieto *v.* Carpenter, 21 Cal. 455; Chiles *v.* Conley, 2 Dana, 21; Irvin *v.* Fowler, 5 Robt. (N. Y.) 482; Nichols *v.* Gates, 1 Conn. 318; English *v.* Register, 7 Ga. 387.

[2] Best's Ev. § 362.

[3] Burling *v.* Patterson, 9 C. & P. 570; Talbot *v.* Hudson, 7 Taunt. 251; S. P. Stockbridge *v.* W. Stockbridge, 14 Mass. 256. See fully supra, § 732.

[4] Endemann's Beweislehre, §§ 86, 87. See supra, §§ 194, 703, 732.

[5] See fully supra, §§ 194, 703, 732, 733.

[6] Jackson *v.* Wood, 12 Johns. R.

[7] Hopkinton *v.* Springfield, 12 N. H. 328.

judgments;[1] to mortgages;[2] and to other liens;[3] but not to administration bonds.[4] Whether payment can be inferred, within twenty years, is to be determined by all the evidence in the case.[5] It is so improbable that a creditor would permit an unpaid bond to lie fruitless for eighteen or nineteen years, that slight circumstances, in connection with such proof, will be sufficient as a presumption of fact to justify a jury in a conclusion of payment.[6] It should be remembered that the period of twenty years may be made to give way to a positive statute defining limit.[7]

242; Bird *v.* Inslee, 23 N. J. Eq. 363; Delaney *v.* Robinson, 2 Whart. 503; Eby *v.* Eby, 5 Barr, 435; King *v.* Coulter, 2 Grant, 77; Reed *v.* Reed, 46 Penn. St. 242; Stockton *v.* Johnson, 6 B. Mon. 409; Hale *v.* Pack, 10 W. Va. 145.

[1] Kinsler *v.* Holmes, 2 S. C. 483. See, however, Daly *v.* Erricson, 45 N. Y. 786.

[2] Jarvis *v.* Albro, 67 Me. 310; Inches *v.* Leonard, 12 Mass. 379; Barned *v.* Barned, 21 N. J. Eq. 245.

[3] Boyd *v.* Harris, 2 Md. Ch. 210; Buchanan *v.* Rowland, 5 N. J. L. 721; Doe *v.* Gildart, 6 Miss. 606; Drysdale's Appeal, 14 Penn. St. 531.

[4] Potter *v.* Titcomb, 7 Greenl. 302.

[5] Sadler *v.* Kennedy, 11 W. Va. 187.

[6] Denniston *v.* McKeen, 2 McLean, 253; Rodman *v.* Hoops, 1 Dall. 85; Didlake *v.* Robb, 1 Woods, 680; Hopkins *v.* Page, 2 Brock. 20; Inches *v.* Leonard, 12 Mass. 379; Clark *v.* Hopkins, 7 Johns. R. 556; Gray *v.* Gray, 2 Lansing, 173; Brubaker *v.* Taylor, 76 Penn. St. 83; Usher *v.* Gaither, 2 Har. & M. 457; Carroll *v.* Bovin, 7 Gill, 34; Boyd *v.* Harris, 2 Md. Ch. 210; Millege *v.* Gardner, 33 Ga. 397; Downs *v.* Scott, 3 La. An. 278; Lyon *v.* Guild, 5 Heisk. 175.

[7] Grafton Bank *v.* Doe, 19 Vt. 463. "A legal presumption of payment does not, indeed, arise short of twenty years; yet it has been often held that a less period, with persuasive circumstances tending to support it, may be submitted to the jury as ground for a presumption of fact. 'When less than twenty years has intervened,' says Chief Justice Gibson, 'no legal presumption arises, and the case, not being within the rule, is determined on all the circumstances; among which the actual lapse of time, as it is of a greater or less extent, will have a greater or less operation.' Henderson *v.* Lewis, 9 S. & R. 384. In Ross *v.* McJunkin, 14 S. & R. 369, fourteen years was treated as having this effect. In Diamond *v.* Tobias, 2 Jones, 312, a time short of twenty years was allowed with circumstances, Mr. Justice Coulter remarking: 'But exactly what these circumstances may be never has been and never will be defined by the law. There must be some circumstances, and when there are any it is safe to leave them to the jury.' In Webb *v.* Dean, 9 Harris, 29, the period fell short of sixteen years; in Hughes *v.* Hughes, 4 P. F. Smith, 240, of nineteen years." Sharswood, J., Moore *v.* Smith, 81 Penn. St. 182. In this case, where an affidavit of defence set forth that there had been a sheriff's sale of the defendant's property, and distribution by the sheriff, in which distribution plaintiffs had participated, although the defendant was not able to specify with certainty what amount plaintiffs had received, because he had not been able to in-

§ 1361. We must also observe that the presumption that a bond or specialty has been paid after a lapse of twenty years "is in its nature essentially different from the bar imposed by the statute to the recovery of a simple contract debt. The latter is a prohibition of the action; the former, *primâ facie*, obliterates the debt. The bar (of the statute) is substantially removed by nothing less than a promise to pay, or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise, when there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. . . . . The statute of limitations is a bar, whether the debt is paid or not. Not so where suit is brought on a sealed instrument. The fact of indebtedness is then in controversy, and the legal presumption of payment from lapse of time is nothing more than a transfer of the *onus* of proof from the debtor to the creditor. Within twenty years the law presumes the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show, by something more than his bond, that the debt has not been paid, and this he may do, because the presumption raises only a *primâ facie* case against him." [1]

Presumption from lapse of time to be distinguished from stay by limitation.

§ 1362. Payment, as has been already incidentally noticed, may be shown by extrinsic facts.[2] Among inferences which have been allowed weight in this connection, even after the lapse of comparatively short periods, are, the payment of intermediate debts; as where tradesmen's bills, or tax bills, or claims for interest, or rent, of later date, are proved to have been paid,[3] and the possession of the docu-

Payment may be inferred from facts.

spect the docket of the sheriff who made the sale and distribution; it was held that, in connection with the lapse of time which had passed, there was enough to send the case to a jury.

[1] Strong, J., in Reed *v.* Reed, 46 Penn. St. 242. See Connelly *v.* McKean, 64 Penn. St. 113; Birkey *v.* McMakin, 64 Penn. St. 343.

[2] See Connecticut Trust Co. *v.* Melendy, 119 Mass. 449; Doty *v.* James, 28 Wis. 319; Whisler *v.* Drake, 35 Iowa, 103; Garnier *v.* Renner, 51 Ind. 372.

[3] 1 Gilb. Ev. 309; Colsell *v.* Budd, 1 Camp. 27; Hodgdon *v.* Wight, 36 Me. 326; Brewer *v.* Knapp, 1 Pick. 337; Attleboro *v.* Middleboro, 10 Pick.

ment by which the debt is expressed.[1] It has been doubted whether the presumption arising from possession of the document applies to bills produced by acceptors without proof that they have been in circulation;[2] but the better view is that such proof is not necessary to give a *primâ facie* case to the acceptor producing the bill.[3] Possession of a note by the maker, however, when the maker has access to the papers of the payee, is not by itself proof of payment.[4]

378; Robbins *v.* Townsend, 20 Pick. 345; Crompton *v.* Pratt, 105 Mass. 255; Decker *v.* Livingston, 15 Johns. R. 479. See Walton *v.* Eldridge, 1 Allen, 293, as showing rebuttability of such presumptions.

[1] Gibbon *v.* Featherston, 1 Stark. R. 225; Shepherd *v.* Currie, 1 Stark. R. 454; Brembridge *v.* Osborne, 1 Stark. R. 300; Egg *v.* Barnett, 3 Esp. 196; Mills *v.* Hyde 19 Vt. 59; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Weidner *v.* Schweigart, 9 S. & R. 385; Zeigler *v.* Gray, 12 S. & R. 42; Rubey *v.* Culhertson, 35 Iowa, 264; Somervail *v.* Gillies, 31 Wis. 152; Penn *v.* Edwards, 50 Ala. 63; Lane *v.* Farmer, 13 Ark. 63; Union Canal Co. *v.* Loyd, 4 Watts & S. 393; Carroll *v.* Bowie, 7 Gill, 34; Ross *v.* Darby, 4 Munf. (Va.) 428. See Page *v.* Page, 15 Pick. 368; and see supra, §§ 1225, 1336.

[2] Pfiel *v.* Vanbatenberg, 2 Camp. 439; 2 Greenl. on Ev. § 439.

[3] Connelly *v.* McKean, 64 Penn. St. 118. In this case it was said by Sharswood, J.: "It was expressly held by Lord Kenyon, in Egg *v.* Barnett, 3 Esp. Rep. 196, that to prove payment of a debt due by the defendant to the plaintiff, a check on a banker to his favor and indorsed by him was evidence to go to the jury of payment. Lord Kenyon said: 'This is not merely using the name in the body of the draft, which is arbitrary and would of itself be certainly no evidence, but here the money has been actually received by the plaintiff and his servant, for their names are put on the backs of the checks as receiving the money. This is evidence to go to the jury. See Gibbon *v.* Featherstonhaugh, 1 Starkie, 225; Brembridge *v.* Osborne, Ibid. 300; Shepherd *v.* Currie, Ibid. 454; Patton *v.* Ash, 7 S. & R. 116; Weidner *v.* Schweigart, 9 Ibid. 385; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Hill *v.* Gayle, 1 Alabama, 275."

[4] Grey *v.* Grey, 47 N. Y. 552. The point is thus argued by Peckham, J.: "The question is then simply, Is the production of this note by the defendant, under the facts of this case, evidence of its discharge, when it is proved not to have been paid or satisfied? I think it is not. We have been referred by the defendant's counsel to 1 Pothier on Obligations, 573, as precisely in point. He says that Boiseau holds that possession of the note affords a presumption of its payment, but if he allege a release he must prove it; for a release is a donation, and a donation ought not to be presumed. Pothier differs, and thinks it should be presumed, unless the creditor shows the contrary. But Pothier agrees with Boiseau, 'that if the debtor were the general agent or clerk of the creditor, *having access to his papers*, possession alone might not be a sufficient presumption of payment or release; so if he was a neighbor, into

Where the question is whether a particular workman has been paid his back wages, it is admissible to prove that other workmen employed by the defendant were paid by him every week, and that the defendant was never heard to complain of non-payment.[1] The same presumption may be drawn from other habits of payment.[2]

From reception of money or securities.

§ 1363. Payment, also, *pro tanto*, may be inferred from the fact that money or securities were paid by the debtor to the creditor.[3] Such presumption may be rebutted by

whose house the effects of the creditor had been removed on account of a fire.' This latter proposition seems applicable to this case. Here the case shows without contradiction that the defendant, living at home with his father, had a key that fitted his father's desk, where this note was kept. See, to the same effect, Kenney *v.* Pub. Ad. 2 Brad. 319. The two cases cited by the defendant's counsel, of Beach *v.* Endress, 51 Ibid. 470, and Edwards *v.* Campbell, 23 Barb. 423, were both cases of instruments delivered up as having been paid and to be cancelled. The circumstances of the surrender in each case were proved. In the latter case the surrender of the note was made by the payee, eight days before her death, to a third person, to be delivered to the maker, saying, 'he had boarded him, &c., and he ought to have it, for it would not be more than right for him to have it.' Though the plaintiff had possession of the note at the trial, the Supreme Court held he was not entitled to recover, and reversed the judgment he had obtained." Peckham, J., Grey *v.* Grey, 47 N. Y. 554. See Bowman *v.* Teall, 23 Wend. 306; Allaire *v.* Whitney, 1 Hill, 484; Waydell *v.* Luer, 5 Hill, 448; *S. C.* 3 Den. 410; Hill *v.* Beebe, 13 N. Y. 556; Nesbitt *v.* Lockman, 34 N. Y. 169; Bedell *v.* Carll, 33 N. Y. 581.

The possession of a lease by the lessor with the seals cut off is no evidence of a surrender by written instrument according to the statute of frauds. Doe *v.* Thomas, 9 B. & C. 288.

[1] Lucas *v.* Novosilieski, 1 Esp. 296; Sellen *v.* Norman, 4 C. & P. 80.

[2] Evans *v.* Birch, 3 Camp. 10.

[3] Welch *v.* Seaborn, 1 Stark. R. 474; Aubert *v.* Walsh, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60; Graham *v.* Cox, 2 C. & Kir. 702; Mountford *v.* Harper, 16 M. & W. 825; Risher *v.* The Frolic, 1 Woods, 92; First Nat. Bank *v.* Leach, 52 N. Y. 350; Patton *v.* Ash, 7 Serg. & R. 116; First Nat. Bank *v.* McManigle, 69 Penn. St. 156; Shinkle *v.* Bank, 22 Ohio St. 516; Pope *v.* Dodson, 58 Ill. 361; Fuller *v.* Smith, 5 Jones (N. C.) Eq. 192; Carson *v.* Lineburger, 70 N. C. 173; Robinson *v.* Allison, 36 Ala. 525; Vimont *v.* Welch, 2 A. K. Marsh. 110; Wood *v.* Hardy, 11 La. An. 760. See Rockwell *v.* Taylor, 41 Conn. 55; Swain *v.* Ettling, 32 Penn. St. 486. In Mountford *v.* Harper, 16 M. & W. 825, the drawing of a check by A. in favor of B. and payment of it to B. was held to show *primâ facie* payment by A. to B., without showing that A. gave it to B. "The strength of the evidence," says Mr. Roscoe (Ev. 13th ed. 40), "must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other

proof that the payment was on other accounts.[1] The prevalent opinion, however, is, that the mere acceptance of negotiable paper by a creditor from a debtor, unless under circumstances affording a presumption that payment was meant, does not itself extinguish an antecedent debt.[2] A presumption of payment has been made from the drawing of lines across the instrument proving indebtedness;[3] from an entry of credit on such instrument;[4] from an intermediate settlement of accounts;[5] and from a remittance by mail when such mode of payment is au-

similar circumstances." See Phillips *v.* Warren, 14 M. & W. 379.

[1] Haines *v.* Pearce, 41 Md. 221; Mechanics *v.* Wright, 53 Mo. 153. See Waite *v.* Vose, 62 Me. 184.

[2] Ward *v.* Evans, Ld. Raym. 938; Mussen *v.* Price, 4 East, 197; Peter *v.* Beverly, 10 Pet. 532; Wallace *v.* Agry, 4 Mason, 336; Ward *v.* Howe, 38 N. H. 35; Nail *v.* Foster, 4 Comst. 312; Jewett *v.* Plack, 43 Ind. 368; Matteson *v.* Ellsworth, 33 Wis. 488; Lawhorn *v.* Carter, 11 Bush, 7; May *v.* Gamble, 14 Fla. 467.

In Maine, Vermont, and Massachusetts, however, the tendency is to hold that the acceptance of a negotiable note or bill of exchange by the creditor for a preëxisting debt is a payment of such debt, unless a contrary intention is shown. "The reason assigned for this presumption of fact is, that a creditor may indorse such paper, and, if he could compel payment of the original debt, the debtor might be afterwards obliged to pay the note to the indorsee, and thus be twice charged, without any remedy at law." Dickerson, J., Strang *v.* Hirst, 61 Me. 14; citing Perrin *v.* Keen, 19 Me. 355; Paine *v.* Dwinel, 53 Me. 53; Thatcher *v.* Dinsmore, 5 Mass. 299; Pomeroy *v.* Rice, 16 Pick. 22; Milledge *v.* Iron Co. 5 Cush. 168; Varner *v.* Nobleboro, 2 Greenl. 121; Wemet *v.* Lime Co. 46 Vt. 458. See Perkins *v.* Cady, 111 Mass. 318.

"The courts in these states also hold that the presumption of payment is rebutted, and the creditor may repudiate the security taken and rely upon the original contract, when there is any fraud in giving it, or it is accepted under an ignorance of the facts, or a misapprehension of the rights of the parties. French *v.* Price, 24 Pick. 21; Paine *v.* Dwinel, 53 Me. 53. (See, to same point, Wemet *v.* Lime Co. 46 Vt. 458.)

"Where a creditor accepts a note or bill of exchange for a debt, there is a presumption of fact that there is an agreement between the drawer and the drawee that it will be accepted. The parties are presumed to act in good faith toward each other, and the tendering of such paper, without such understanding, is a breach of good faith. This may be done to obtain delay, or to deceive the creditor, by the delusive hope that in accepting the paper offered he gets additional security for his debt. Besides, the giving of such paper may have influenced the creditor to part with his property." Dickerson, J., Strang *v.* Hirst, 61 Me. 14. See De Forest *v.* Bloomingdale, 5 Denio, 304.

[3] Pitcher *v.* Patrick, 1 Stew. & P. 478.

[4] Graves *v.* Moore, 7 T. B. Mon. 341. See supra, §§ 229, 1115.

[5] Hedrick *v.* Bannister, 12 La. An. 373.

thorized by the creditor though not otherwise.[1] So payment of a debt, after the death of the parties, may be presumed from the fact that at the time of maturity the debtor was in opulence, and the creditor in needy circumstances.[2]

Presumption of payment only *primâ facie*, and may be rebutted.

§ 1364. On the other hand, in order to rebut the presumption of payment, it is admissible for the creditor to prove the debtor's poverty;[3] circumstances making it inconvenient to the parties to pay or receive the debt;[4] any immediate recognition by the debtor;[5] mistake in the acceptance of a security;[6] or any other facts from which non-payment can be inferred, though these facts, in order to rebut the presumption, must be such as to give a preponderance of proof to the theory of non-payment.[7]

Receipts proof of payment, but may be rebutted.

§ 1365. Receipts, if for the same debt, or in full of all demands, are *primâ facie* evidence of payment;[8] though whether they are for the same debt, when they are on their face indefinite, is to be determined from all the evidence in the case.[9] That a receipt may be rebutted by proof of fraud, or mistake, or of an understanding between the parties that it should be provisional, is now settled.[10]

[1] See Boyd *v.* Reed, 6 Heisk. 63. See supra, § 1323.

[2] Levers *v.* Van Buskirk, 4 Barr, 309; Henderson *v.* Lewis, 9 S. & R. 379; Lesley *v.* Nones, 7 S. & R. 410; Diamond *v.* Tobias, 12 Penn. St. 312; Conelly *v.* McKean, 64 Penn. St. 113; Ross *v.* Darley, 4 Munf. 428.

[3] Farmers' Bk. *v.* Leonard, 4 Harr. (Del.) 536.

[4] McLellan *v.* Crofton, 6 Greenl. 307; Crooker *v.* Crooker, 49 Me. 416; Eustace *v.* Goskins, 1 Wash. (Va.) 188.

[5] Delaney *v.* Robinson, 2 Whart. R. 503; Eby *v.* Eby, 5 Penn. St. 435; Reed *v.* Reed, 46 Penn. St. 242.

[6] Wemet *v.* Lime Co. 46 Vt. 458. See cases cited supra, § 1363.

[7] Foulk *v.* Brown, 2 Watts, 209; Strohm's App. 23 Penn. St. 351.

[8] Supra, §§ 1064, 1130; Rollins *v.* Dyer, 16 Me. 475; Obart *v.* Letson, 17 N. J. L. 78; Marston *v.* Wilcox, 2 Ill. 270; Underwood *v.* Hoosack, 38 Ill. 208; Prov. Ins. Co. *v.* Fennell, 49 Ill. 180.

[9] Reed *v.* Phillips, 5 Ill. 39; Daniels *v.* Burso, 40 Ill. 307; Greenlee *v.* McDowell, 3 Jones (N. C.) L. 325; Wooten *v.* Nall, 18 Ga. 609; Hollingsworth *v.* Martin, 23 Ala. 591.

[10] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & Ad. 313; Bowes *v.* Foster, 2 H. & N. 779; Farrar *v.* Hutchinson, 9 Ad. & E. 641; Rollins *v.* Dyer, 16 Me. 475; Pitt *v.* Berkshire Ins. Co. 100 Mass. 500; Sheldon *v.* Ins. Co. 26 N. Y. 460; Baker *v.* Ins. Co. 43 N. Y. 383; Penns. Ins. Co. *v.* Smith, 3 Whart. R. 520; Byrne *v.* Schwing, 6 B. Mon. 199. See more fully supra, §§ 1064, 1130.

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