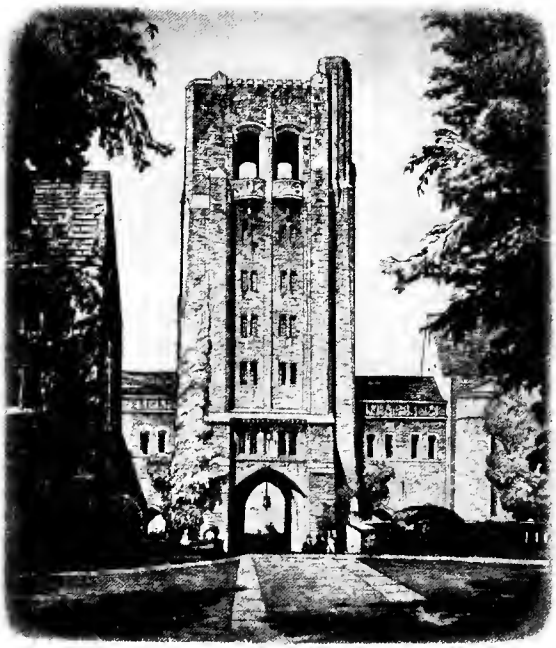

A COMMENTARY

ON THE

LAW OF EVIDENCE

IN CIVIL ISSUES.

BY

FRANCIS WHARTON, LL. D.,

AUTHOR OF TREATISES ON CONFLICT OF LAWS, MEDICAL JURISPRUDENCE, NEGLIGENCE, AGENCY, AND CRIMINAL LAW.

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BOOK II.

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(CONTINUED.)

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I. BINDING EFFECT OF JUDGMENTS.

§ 758. A JUDGMENT[1] (by which is meant the final order or decree of a court of competent jurisdiction on a matter duly

[1] Viewed as records, judgments fall under the head of documentary evidence, but for convenience are here discussed in a separate chapter.

submitted for its adjudication) may be offered in evidence, in a subsequent suit, for the following purposes: — Judgment on same subject binds.

1. *As an admission, as which it may be offered by a stranger against the party making such admission.* It is true, that, strictly, we are not entitled to speak of the *judgment* of a *court* as the *admission* of a *party*. But when a party asks the judgment of a court, and to obtain such judgment makes a particular statement, and the judgment is based on such statement, then the court may be viewed as the agent of the party making the statement, and the judgment of the court may be imputed to the party as an admission. In this sense a penal judgment against a party on the plea of guilty, may be put in evidence against such party, in a civil suit by the party injured;[1] and a judgment against a party, based on a claim on his part to possess certain goods, can be put in evidence against him, at the suit of a stranger, to show that he admitted possession of such goods.[2]

2. *As evidence of its own existence, and of its effects, to prove which it is admissible for and against strangers, as well as for and against parties and privies.* This relation of judgments will be also hereafter considered more fully.[3] We may at this point cursorily illustrate it by suits of ejectment, in which judgments

Bonnier (following in this respect Savigny) regards the authority of judgments as based on contract: "Cette importante présomption (autorité de la chose jugée) se rattachant au fond du droit, autant qu'à la preuve, les règles, sur l'effet des jugements, c'est à dire sur les personnes et sur les objets auxquels elle s'applique, reposent sur les mêmes bases que les règles sur l'effet des conventions. On l'a souvent dit avec raison *judiciis contrahimus.*" Bonnier, Traité des Preuves, § 680.

Mr. Best thus speaks in part to this point, § 594: "Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. There is certainly this difference, that estoppels are usually founded on the voluntary act of a party; whereas it is a praesumptio juris that 'judicium redditur in invitum.' Co. Litt. 248 *b*. Moreover, when judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force, 'quia transit in rem judicatam.' Pollex. 641. Like other estoppels by matter of record and estoppels by deed, judgments, in order to have a conclusive effect, must be pleaded if there be an opportunity, otherwise they are only cogent evidence for the jury."

[1] Infra, §§ 776, 838.

[2] Infra, §§ 837–8.

[3] See infra, §§ 822–4.

forming part of a chain of title are admissible against strangers;[1] by probate proceedings, which are in the same manner admissible to prove the title of the executor and administrator, though not the death of the alleged decedent;[2] and by suits by M. against his servant S., in which it is admissible for M. to put in evidence against S. a judgment against M., in favor of T., the cause of action by T. against M. being injuries sustained by T. from S.'s negligence; the judgment, however, being admissible in the suit by M. against S., not to prove S.'s negligence, but simply to prove that T. obtained and collected a judgment against M.[3] To aid in inferring the insolvency of L., also, judgments with returns of *nulla bona* against L. may be put in evidence, even in suits against strangers.[4]

3. *As to public rights, in respect to which a judgment is conclusive against all the world.*[5]

4. *As to private rights, in respect to which a judgment is conclusive, between parties and privies, of its essential conditions.* This is the distinctive attribute of judgments, and with this, therefore, it is proper that our present discussion should begin. To state the principle more fully, every judgment is conclusive, between parties and privies, as to such facts in issue, upon which the judgment is on its face conditioned, as were actually decided by the court, unless it should appear that evidence was admitted (or the converse) in the suit where the judgment was entered, which evidence would have been excluded in the suit in which the judgment was offered, or unless from some other reason the proofs in the two suits are necessarily different.[6] It is essential, however, to the admissibility of the judgment in such case, that it should have been between the parties (or their privies) to the suit in which it is offered;[7] that it should have been on the merits,[8] and that it should have been on a claim actually before the court.[9] Assuming these conditions to exist, a judgment in one suit is conclusive in another suit of all the matters which the judgment decides.[10] A company, for instance, sues S. for unpaid

[1] Infra, § 821.
[2] Infra, §§ 810–12.
[3] See infra, § 823.
[4] Infra, § 834.
[5] Infra, § 794.
[6] Infra, §§ 786–7.
[7] Infra, § 760.
[8] Infra, § 783.
[9] Infra, § 788.
[10] As general rulings to the final position in the text, see Duchess of Kingston's case, 2 How. St. 538; Fer-

premium and calls. Upon an issue directed for the purpose, S. has a judgment in his favor on the ground that he is not a stockholder. The company being wound up in chancery, S. applies for the repayment of the sum he had paid for premium and calls. In such case, the parties litigating cannot contest the decision that he never was a stockholder, and that he is therefore entitled to recover back the money paid by him by mistake.[1] Again, it becomes an essential condition to recovery in a suit that H. and W. should have been married. Upon trial of this question, the issue is found for the party setting up the marriage. The marriage cannot afterwards be disputed between the same parties, or their privies.[2] A woman, also, who in proceedings in divorce agrees to take a certain sum for alimony, which is approved by the court, and decreed accordingly, is estopped, if the alimony be paid, and there be no fraud, from claiming dower as against her former husband's vendees.[3] Where a husband, also, brings a libel for divorce, alleging the adultery of his wife, and the libel is dismissed, the act of adultery not being proved, it is held that as to the particular act of adultery attempted to

rers *v.* Arden, 6 Rep. 7 *a;* Sopwith *v.* Sopwith, 2 Sw. & Tr. 160; Mattingly *v.* Nye, 8 Wall. 370; Welsh *v.* Lindo, 1 Cranch C. C. 508; Janes *v.* Buzzard, Hempst. 240; Sevey *v.* Chick, 13 Me. 141; Dame *v.* Wingate, 12 N. H. 291; Burton *v.* Wilkinson, 18 Vt. 186; Perkins *v.* Walker, 19 Vt. 144; Spencer *v.* Dearth, 43 Vt. 98; Withington *v.* Warren, 12 Metc. 114; Com. *v.* Evans, 101 Mass. 25; Stockwell *v.* Silloway, 113 Mass. 382; Lane *v.* Cook, 3 Day, 255; French *v.* Neal, 24 Pick. 55; Lewis *v.* Lewis, 106 Mass. 309; Dewey *v.* Osburn, 4 Cow. 329; Graves *v.* Joice, 5 Cow. 261; Lion *v.* Burtis, 5 Cow. 408; Jackson *v.* Hoffman, 9 Cow. 271; Gates *v.* Preston, 41 N. Y. 113; Boerum *v.* Schenck, 41 N. Y. 182; Taylor *v.* Sindall, 34 Md. 38; Preston *v.* Harvey, 2 Hen. & M. 55; Beall *v.* Pearce, 12 Md. 565; Clagett *v.* Easterday, 42 Md. 617; Haller *v.* Pine, 8 Blackf. 175; Crosby *v.* Jeroloman, 37 Ind. 264; Maple *v.* Beach, 43 Ind. 51; Finney *v.* Boyd, 26 Wisc. 366; Massey *v.* Lemon, 5 Ired. L. 557; Dukes *v.* Broughton, 2 Speers, 620; Davis *v.* Murphy, 2 Rich. (S. C.) 560; Newton *v.* White, 53 Ga. 395; Brothers *v.* Higgins, 5 J. J. Marsh. 658; Garrett *v.* Lyle, 27 Ala. 586; Cannon *v.* Brame, 45 Ala. 262; Offutt *v.* John, 8 Mo. 120; Shelbina *v.* Parker, 58 Mo. 327; Slocomb *v.* De Lizardi, 21 La. An. 355; Megerle *v.* Ashe, 33 Cal. 74; Geary *v.* Simmons, 39 Cal. 224; Harvey *v.* Ward, 49 Cal. 124; Blake *v.* McKusick, 10 Minn. 251; Ferguson *v.* Etter, 21 Ark. 160; Atchison R. R. *v.* Commis. 12 Kans. 127.

[1] Allison's case, L. R. 9 Ch. Ap. 24; Stephen's Ev. § 41.

[2] R. *v.* Hartington, 4 E. & B. 780. See Flitters *v.* Allfrey, L. R. 10 C. P. 29.

[3] Hopper *v.* Hopper, 19 Ill. 219. See Miltimore *v.* Miltimore, 40 Penn. St. 151.

be proved, the judgment of dismissal is conclusive in another suit for divorce.[1] A party to a decree of foreclosure, to proceed to another line of illustration, no matter how slight his interest, is afterwards estopped from questioning the title of the purchasers under the decree of sale.[2] Parties, also, claiming under a defendant in execution, who was in actual possession of the land at the time of the execution of the judgment, are estopped from denying the title of the purchaser in the execution.[3] To criminal, as well as to civil judgments, does the rule apply.[4]

Burden in such cases.

§ 759. As a general rule, "where the parties and the cause of action are the same, the *primâ facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being, that where every objection urged in the second trial was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented at that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties."[5]

But is conclusive only as to parties and privies.

§ 760. On the other hand, a judgment *inter partes* cannot estop persons not directly parties or privies. As to strangers, it may be used, as we have seen, to prove relevant facts which can be only shown by record; but to affect strangers, unless it be as to public rights, or *in rem*, a judgment is ordinarily inadmissible.[6]

[1] Lewis *v.* Lewis, 106 Mass. 309.

[2] Jackson *v.* Hoffman, 9 Cow. 271.

[3] Arnot *v.* Beadle, Hill & Den. Sup. 181.

[4] Infra, § 783.

[5] Clifford, J., Gould *v.* R. R. 91 U. S. (1 Otto) 533; citing Outram *v.* Morewood, 3 East, 358; Greathead *v.* Bromley, 7 T. R. 455.

[6] Petrie *v.* Nuttall, 11 Exch. 569; Priestley *v.* Fernie, 3 H. & C. 977; Aspden *v.* Nixon, 4 How. 467; Deery *v.* Cray, 5 Wall. 795; Kearney *v.* Denn, 15 Wall. 51; Lawrence *v.* Haynes, 5 N. H. 33; King *v.* Chase, 15 N. H. 9; Buttrick *v.* Holden, 8 Cush. 233; Tracy *v.* Merrill, 103 Mass. 280; Bradford *v.* Bradford, 5 Conn. 127; Branch *v.* Doane, 17 Conn. 402; Matthews *v.* Duryee, 45 Barb. 69; Chew *v.* Brumagim, 21 N. J. Eq. 520; Rose *v.* Klinger, 8 Watts & S. 178; Winter *v.* Newell, 49 Penn. St. 507; Kramph *v.* Hatz, 52 Penn. St. 525; Dement *v.* Stonestreet, 1 Md. 116; Chesapeake Co. *v.* Gittings, 36 Md. 276; Frazier *v.* Frazier, 2 Leigh, 642; Duncan *v.* Helms, 8 Grat. 68; Thomas *v.* Bowman, 30 Ill. 84; Rogers *v.* Higgins, 57 Ill. 244; Cox *v.* Strode, 4 Bibb, 4; Griffin *v.* Richardson, 11 Ired. L. 439; Howell *v.* Gordon, 40 Ga. 302; McLemore *v.* Nuckolls, 1 Ala. Sel. Ca. 591; Degelos

§ 761. Of the principle now before us we may cite as an illustration recent New York rulings, to the effect that the trustees of a manufacturing corporation, organized under the act to authorize the formation of corporations for manufacturing and other purposes, are neither parties nor privies to a judgment against the company; and that consequently, when for any reason they become liable to pay the debts of the company, and an action is brought against them to enforce that liability, proof of the recovery of judgment against the company is neither conclusive nor *primâ facie* evidence of the debt as against the trustees.[1] And it has subsequently been broadly held in the same state, that a judgment against a company is not even *primâ facie* evidence in a subsequent action against a stockholder for the recovery of the same debt.[2]

v. Woolfolk, 21 La. An. 706; Fallon *v.* Murray, 16 Mo. 168; Cravens *v.* Jameson, 59 Mo. 69; Phelan *v.* Gardner, 43 Cal. 306; Karr *v.* Parks, 44 Cal. 46; Chant *v.* Reynolds, 49 Cal. 213. Infra, § 820.

[1] Miller *v.* White, 50 N. Y. 137. See opinion of Peckham, J., criticising Marcy *v.* Clark, 17 Mass. 330, as given under a special statute.

[2] McMahon *v.* Macy, 51 N. Y. 162. The following opinion gives a lucid recapitulation of the New York authorities on this vexed topic:—

"Whether a judgment against a company is, in a separate action against a stockholder for the recovery of the same debt, evidence of the debt sued upon, presents a question which has been much litigated in this state, and yet never decided in any of its courts of last resort. As early as 1822, Spencer, Ch. J., as a member of the court for the correction of errors, without alluding to the fact that the liability of stockholders, when sued separately, was remote, and dependent upon the contingency of the ability of the creditor to collect his debt by execution against the company, or the relation of the stockholder, when thus sued, held that as the debt against the company was also a debt against the stockholder individually, and because the company itself was concluded by the judgment, the stockholder, when sued alone, was equally concluded. Slee *v.* Bloom, 20 Johnson, 669, 684. This opinion was afterward referred to with apparent approbation in Moss *v.* Oakley, 2 Hill, 265, 267. The decision of the question not being regarded as necessary to the decision of the cases to which I have referred, but simply as the individual expression of a single judge in each case, was again presented in Moss *v.* McCullough, 5 Hill, 131; in which after a full review of all the cases, and a discussion of the principle involved by Justices Cowen and Bronson, the court held, Nelson, J., concurring, that a judgment against the company was not, as against a stockholder when sued separately for the same debt, even *primâ facie* evidence of the debt sued upon. The case went back and was retried, and upon the same facts appearing, the plaintiff was nonsuited. Then, after the change wrought in our judicial system by the Constitution of 1846,

§ 762. The Roman law is emphatic to the same effect. No judgment is a bar which is *res inter alios acta.* "Inter alios res gestas aliis non posse praejudicium facere, saepe constitutum est. Unde licet quosdem de heredibus ejus, quem debitorem tuum fuisse significas, solvisse commemores, tamen ceteri non alias ad solutionem urgentur, nisi debitum probatum fuerit."[1] A party in favor of whom a kindred issue has been determined cannot, if the issue be *res inter alios acta*, even introduce as evidence the judgment in such case, though he is not precluded from introducing, if relevant, the evidence on which such judgment was

the same case was brought before the general term of the Fourth Judicial District, where a motion for a new trial prevailed; the court holding, among other things, that the judgment against the company was, in a separate action against the stockholders, *primâ facie* evidence of the debt sued upon. 7 Barbour, 279, 296. Whether a new trial was had, or what was the ultimate disposition of the case, does not appear from the reports. The question continuing to be unsettled, came up in the court of appeals in March, 1860. Belmont *v.* Coleman, 21 N. Y. 96. So far as appears from the report of that case, seven only of the eight judges, of which it was then composed, were present. Other questions were involved. Bacon, J., who delivered the opinion of the court, held that the judgment against the company was in a suit against a stockholder for the same debt, *primâ facie* evidence of the debt. In this view two of his associates concurred, and four 'refused to commit themselves to the doctrine that a judgment against the corporation was even *primâ facie* evidence against a stockholder' (Ibid. 102), and the case was disposed of upon other grounds. In July, 1861, the question was again presented to the supreme court, of which Justice Bacon was at the time the presiding justice; and it was then, by the unanimous judgment of the court, held that a judgment against the company was not even *primâ facie* evidence in a suit against a stockholder for the recovery of the same debt. Strong *v.* Wheaton, 38 Barb. 616, 621. If, therefore, the defendant is not sustained by the weight of authority, he is certainly not so prejudiced by adjudged cases as to prevent the question presented from being considered as if it was now presented for the first time. . . . . If the judgment is even *primâ facie* evidence, not having been made so by statute, I am unable to understand why it is not, like a judgment in any other case, conclusive. But assume it to be *primâ facie* evidence of what it contains, leave the defendant to show that the plaintiff was not, in law, entitled to such recovery, and the judgment itself, as stated in the report of the referee, being for an inseparable part of its amount for labor and services, not performed by the plaintiff himself, furnished, as the court of appeals have held (Atchison *v.* Troy & Boston R. R. Co. 5 Abbott Sp. T. Rep. 329), a valid objection to the recovery, had the defendant had his day in court to make it, and hence the judgment should be reversed." Gray, C., McMahon *v.* Macy, 51 N. Y. 162, 165.

[1] L. 1, C. Inter alios acta vel jud. aliis.

rested. Weber,[1] an authoritative German commentator, gives from the Roman law the following illustrations of this topic: A. sues B. for a chattel, and has a judgment rendered in his favor; this judgment is not evidence in a suit by A. against C. for the same chattel. A. brings suit against B. civilly for damages inflicted on A. by B.'s criminal act; a judgment obtained in A.'s favor is not evidence against B., in a criminal prosecution brought by the state against B. for the same crime. A husband is divorced from his wife on the ground of his adultery; but the record of the divorce is not admissible against him in a criminal prosecution for the same offence. The Roman law recognizes an exception, however, in cases where *status* is litigated. A person in whose favor a *bonâ fide* litigation as to *status* is intelligently adjudicated, may avail himself of this judgment in a suit against others in which the same question is involved.[2] By the same law, a judgment binds all those claiming under the original parties, as well as the parties themselves.[3]

§ 763. It has been ruled in this country that a party, if bound at all, is only *primâ facie* bound by a judgment taken against him in a suit in which he is summoned but not brought into court.[4] Where, however, there is full opportunity, by notice or otherwise, to come in and to adduce evidence and cross-examine, then the judgment is a bar, even when the persons having this opportunity are not parties to the record.[5] Nor can it be objected that the former action was between other parties, when the person making the objection was one of such parties, though in connection with other persons.[6] The same burden is imposed on all persons intervening in a suit.[7] But while a verdict and conviction for

Parties comprise all who when summoned are competent to come in and take part in case.

[1] Weber, Heffter's ed. 32.

[2] L. 25, D. de statu hominum; L. 1, § fin.; L. 2; L. 3, pr. D. de agnos. et alend. See infra, § 817.

[3] Weber, Heffter's ed. 34.

[4] Taylor *v.* Pettibone, 16 Johns. R. 66; Miller *v.* Pennington, 2 Stew. (Ala.) 399.

[5] Bigelow on Estoppel, 2d ed. 47; Smith *v.* Crompton, 3 B. & Ad. 407; Swartwout *v.* Payne, 19 Johns. 294; Littleton *v.* Richardson, 34 N. H. 179; Boston *v.* Worthington, 10 Gray, 496; Chamberlain *v.* Preble, 11 Allen, 370; Stoddard *v.* Thompson, 31 Iowa, 80; Shelton *v.* Brown, 22 La. An. 162; Guidry *v.* Jeanneaud, 25 La. An. 634; Harvie *v.* Turner, 46 Mo. 444; Love *v.* Gibson, 2 Fla. 598.

[6] Larum *v.* Wilmer, 35 Iowa, 244.

[7] Markham *v.* O'Connor, 23 La. An. 688.

non-repair of a highway estops the convicted party or parish from disputing subsequently liability to repair the highway,[1] a conviction for obstructing a highway does not estop the convicted person from maintaining trespass against a prosecutor in respect of the same highway; for the proceedings are not between the same parties in respect of the same right.[2]

§ 764. It is true that a more extended liability was at one time maintained in the English courts. Thus in a case subsequently much discussed, the plaintiff, in an action against a servant of C., for penalties for fishing in the plaintiff's fishery, rested exclusively on a verdict and judgment obtained by him against another servant of C., in an action for a trespass committed on the same fishery. The servants, in both actions, justified by setting up their master's right to the fishery. The right to the fishery, therefore, was in both cases at issue. The judge trying the case admitted the record, and ruled it to be conclusive. A new trial, however, was granted, on the ground that the judgment, though *primâ facie* proof, was not conclusive;[3] and the case has since been cited as authority for the position that when the parties are really the same a judgment may be put in evidence.[4] But we cannot hold, in a case where A. and B., servants of C., are successively sued for trespasses committed by them, in exercise of an alleged right of their common master, that they are really so identical that the one must necessarily have the same defence as the other, and that the appearance of the one is to be therefore regarded as constructively that of the other. Hence it is we can well understand how Lord Ellenborough should have repudiated the idea that a judgment in a suit against one servant should be received to affect the trial of a suit against another.[5]

The test is, the right and opportunity as well as duty to come in and take a part in the case in which the judgment is entered. Where there is no such opportunity (*e. g.* where a person *sui*

[1] R. *v.* Haughton, 1 E. & B. 501.

[2] Petrie *v.* Nuttall, 11 Ex. 569; Powell's Evidence, 4th ed. 233.

[3] Kinnersley *v.* Orpe, 2 Doug. 514.

[4] Simpson *v.* Pickering, 1 C., M. & R. 529.

[5] Outram *v.* Morewood, 3 East, 366. To the same effect, see King *v.* Chase, 15 N. H. 9; and see Branch *v.* Doane, 17 Conn. 402; Case *v.* Reeve, 14 John. 81; Alexander *v.* Taylor, 4 Denio, 302.

juris is made a party to a suit without his authority or knowledge), then a judgment so obtained may be set aside, and if collusively obtained, may be collaterally impeached.[1]

Judgment need not be specially pleaded.

§ 765. The estoppel of a judgment, so it has been held in England, is not technically a bar unless pleaded;[2] and so has it been frequently held in the United States.[3] At the same time, as is stated by Mr. Stephen,[4] "if a judgment is not pleaded by way of estoppel, it is as between parties and privies a relevant fact, whenever any matter which was or might have been decided in the action in which it is given is in issue, or relevant to the issue, in any subsequent action. Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel."[5]

[1] See infra, § 797; Bayley *v.* Buckland, 1 Exch. R. 1; Thacher *v.* D'Aguilar, 11 Exch. R. 436; Reynolds *v.* Howell, L. R. 8 Q. B. 398; Hubbart *v.* Phillips, 13 M. & W. 703; Beekley *v.* Newcomb, 24 N. H. 359; Jackson *v.* Stewart, 6 Johns. 34; Hayes *v.* Shattuck, 21 Cal. 51; Bank Com. *v.* Bank, 6 Paige, 497.

[2] Vooght *v.* Winch, 2 Barn. & A. 602.

[3] Smith's Leading Cases, Am. ed. note to Duchess of Kingston's case; Brazill *v.* Isham, 2 Ker. 9; Denny *v.* Smith, 18 N. Y. 567; Krekeler *v.* Ritter, 62 N. Y. 374.

[4] Evidence, 51.

[5] Citing Vooght *v.* Winch, 2 B. & A. 662; Feversham *v.* Emerson, 11 Ex. 391; Whittaker *v.* Jackson, 2 H. & C. 926. See, also, Clink *v.* Thurston, 47 Cal. 21.

To the same effect is a ruling of the New York court of appeals in 1876: "The record of the superior court was not offered or received in evidence in bar of the action, but merely as evidence of the fact in issue. Had it been offered as constituting a bar, or as an estoppel to the action, it would have been inadmissible, not having been pleaded as a defence. Brazill *v.* Isham, 2 Ker. 9, per Denio, J.; Denny *v.* Smith, 18 N. Y. 567. But as evidence of a fact in issue it was competent, although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. No evidence was conclusive as an adjudication of the same fact in an action between the same parties. Wright *v.* Butler, 6 Wend. 284; Lawrence *v.* Hunt, 10 Ibid. 81; Embury *v.* Conner, 3 Comst. 511; Gardner *v.* Buckbee, 3 Cow. 120. The court properly held that 'the matter adjudicated between the parties in another action might be given in evidence.'" Allen, J., Krekeler *v.* Ritter, 62 N. Y. 374.

So, in a prior case, it is said: "It has been held in some cases that a judgment is only *primâ facie* when it is not pleaded where it might have been; that the party has thus waived it as an estoppel. The better opinion is the other way, in reason and authority. 1 Greenl. Ev. 522–538, inclusive, and cases cited. In the case

A judgment against representative binds principal.

§ 766. Where a party is sued merely as the representative of another, and that other has notice to come in, the proceedings being in good faith, then the principal is bound by the judgment against the representative. Thus a judgment (whether by default or by verdict) against the casual ejector, in the old proceedings in ejectment, was admissible in any subsequent suit, involving virtually the same parties and interests.[1] So a *cestui que trust* is bound, at least *primâ facie*, by a judgment against his trustee.[2] On the same reasoning the principal in whose right a defendant in replevin has made cognizance has been held bound by the judgment in such suit.[3] But a judgment against a representative, as a representative, does not ordinarily preclude him from disputing the matters decided, when sued or suing in his own right.[4]

Infant barred by proceedings in his name.

§ 767. An infant, suing by his guardian or *prochein amy*, is subjected to the same incidents as if he were suing in his own right; and if he brings a second suit on the same subject matter, he is barred by a judgment entered in the first. In such case it is not necessary to show that the first suit was instituted with his knowledge, even though he himself had reached almost to the period of majority.[5] A judgment against an infant, without a guardian, being *primâ facie* valid, though voidable, has been held to be not open to collateral impeachment.[6]

§ 768. A judgment against a married woman, having no stat-

at bar, the judgment is pleaded. Bank *v.* Nias, 4 Eng. Law & Eq. 252." Peckham, J., Miller *v.* White, 50 N. Y. 143.

[1] Taylor's Evidence, § 1500, citing Doe *v.* Huddart, 2 C., M. & R. 316; Wright *v.* Tatham, 1 A. & E. 19; Matthew *v.* Osborne, 13 C. B. 916; Doe *v.* Challis, 17 Q. B. 166; Steele *v.* Lineberger, 59 Penn. St. 308; Southern Bank *v.* Humphreys, 47 Ill. 227.

[2] Rogers *v.* Haines, 3 Greenl. 362; Van Vechten *v.* Terry, 2 Johns. Ch. 197; Willink *v.* Canal Co. 3 Green's Ch. 377; Johnson *v.* Robertson, 31 Md. 476.

[3] Hancock *v.* Welsh, 1 Stark. R. 347.

[4] Fenwick *v.* Thornton, Moody & M. 51; Legge *v.* Edmonds, 25 L. J. Ch. 125; Wheeler *v.* Ruckman, 1 Robt. (N. Y.) 408; but see Peddicord *v.* Hill, 4 T. B. Monr. 370.

[5] Morgan *v.* Thorne, 7 M. & W. 400.

[6] Marshall *v.* Fisher, 1 Jones (N. C.) L. 111; Hadley *v.* Pickett, 25 Ind. 450; Blake *v.* Douglass, 27 Ind. 416; Porter *v.* Robinson, 3 A. K. Marsh. 253; Beeler *v.* Bullitt, 3 A. K. Marsh. 280; though see Whitney *v.* Porter, 23 Ill. 445; and see comments in Bigelow on Estoppel, 2d ed. 49.

utory power to sue or be sued, cannot, it is said, prejudice her, when such judgment is on a contract.[1] It is otherwise as to judgments on torts.[2] It is clear that the record of a judgment against a husband is not admissible against the wife, under a bill filed in the name of husband and wife, concerning her separate estate.[3]

Judgment against married woman usually a nullity.

§ 769. We will elsewhere notice[4] the cases in which parties are affected by the admissions of those whose estates they take. Whoever takes an estate, takes it *cum onere;* and whatever binds the predecessor in title binds the successor.[5] Thus an executor or administrator is bound by a judgment against his decedent as to personalty.[6] A judgment against a grantor or mortgagor binds his grantee or mortgagee;[7] and an heir is bound or privileged by a judgment against or for his ancestor.[8] But a proceeding for or against a tenant for life cannot thus affect the remainderman;[9] nor can proceedings against a distributee affect an executor;[10] nor can those for or against a lessee affect the landlord.[11]

Judgment as to predecessor binds successor.

§ 770. In the relation of guarantor and principal, of co-surety, of principal and deputy, though a judgment against the one is evidence against the other,[12] there is no such privity as to prevent, even at common law, the setting up fraud or collusion as against such judgment.[13] In the ab-

Not so as to principal and surety.

[1] Morse *v.* Toppan, 3 Gray, 411; Griffith *v.* Clarke, 18 Md. 457; though see Hartman *v.* Ogborn, 54 Penn. St. 120, and Bigelow on Estoppel, 2d ed. 48.

[2] Ibid.; Baxter *v.* Dear, 24 Tex. 17.

[3] Michan *v.* Wyatt, 21 Ala. 813.

[4] Infra, § 1156.

[5] Adams *v.* Barnes, 17 Mass. 365; Shufelt *v.* Shufelt, 9 Paige, 137; Varick *v.* Edwards, 11 Paige, 289; Nat. Bank *v.* Sprague, 21 N. J. Eq. 530; Griffith *v.* Griffith, 5 Har. (Del.) 5.

[6] R. *v.* Hebden, Andr. 389; Steele *v.* Lineberger, 59 Penn St. 308; Manigault *v.* Deas, 1 Bailey Eq. 283.

[7] Doe *v.* Derby, 1 A. & E. 790; R. *v.* Blakemore, 2 Den. C. C. 410; Winslow *v.* Grindal, 2 Greenl. 64; Adams *v.* Barnes, 17 Mass. 365.

[8] Lock *v.* Norborne, 3 Mod. 141; Whittaker *v.* Jackson, 2 H. & C. 926; Gavin *v.* Graydon, 41 Ind. 559.

[9] Taylor's Evidence, § 1505.

[10] Johnson *v.* Longmire, 39 Ala. 143.

[11] Wenman *v.* Mackenzie, 5 E. & B. 447; Rees *v.* Walters, 3 M. & W. 527.

[12] Rapelye *v.* Prince, 4 Hill (N. Y.), 119.

[13] Pritchard *v.* Hitchcock, 6 Man. & Gr. 151; Hill *v.* Morse, 61 Me. 541; Heard *v.* Lodge, 20 Pick. 53; Bigelow on Estoppel (2d ed.), 66–68, 81. See Beall *v.* Beck, 3 Harr. & M. 242; Giltinan *v.* Strong, 64 Penn. St. 242;

sence, however, of proof of fraud, or collusion, a judgment against the principal is conclusive evidence of the debt, both against him and the surety.[1]

Nor does judgment against executor bind heir.

§ 771. A judgment against an executor, if it be *primâ facie*, is not conclusive evidence in a suit against the heir, to subject to the judgment lands in the heir's hands.[2] So in an administration suit, a judgment recovered against executors, who were also trustees of the real estate, has been held to be only *primâ facie* evidence of a debt against the persons interested in the real estate.[3]

Judgment against one joint contractor a bar to suit against the other.

§ 772. If A. and B. make a joint (as distinguished from a joint and several) contract with C., and B. is sued to judgment, the judgment, though without satisfaction, is a bar to a suit against A. by C.;[4] the reason being that the cause of action being indivisible, the lower security is merged in the higher.

It is otherwise, however, when the contract may be construed as joint and several.[5] Nor is a judgment in favor of a joint con-

Thomas *v.* Hubbell, 15 N. Y. 405; Decker *v.* Judson, 16 N. Y. 439. See Troy *v.* Troy R. R. 3 Lansing, 270.

[1] King *v.* Norman, 4 C. B. 884; Drummond *v.* Prestman, 12 Wheat. 516; Stovall *v.* Banks, 10 Wall. 583; Way *v.* Lewis, 115 Mass. 26; Cutter *v.* Evans, Ibid. 27; Holley *v.* Acre, 23 Ala. 603.

[2] Moss *v.* McCullough, 5 Hill, 131; Wood *v.* Byington, 2 Barb. Ch. 392; Sharpe *v.* Freeman, 45 N. Y. 802; see *S. C.* 2 Lansing, 171; Sergeant *v.* Ewing, 36 Penn. St. 156. See Thayer *v.* Hollis, 3 Metc. (Mass.) 369; Bracken *v.* Neill, 15 Tex. 109.

[3] Harvey *v.* Wild, L. R. 14 Eq. 438; 41 L. J. Ch. 698.

[4] King *v.* Hoare, 13 M. & W. 494; Higgins, ex parte, 3 De Gex & J. 33; Ward *v.* Johnson, 13 Mass. 148; Gibbs *v.* Bryant, 1 Pick. 118; Robertson *v.* Smith, 18 Johns. 459; Brown *v.* Johnson, 13 Grat. 644; Clinton Bank *v.* Hart, 5 Ohio St. 33; Pfau *v.* Lorain, 1 Cincin. 73; though see Davies *v.* Lowndes, 1 Bing. N. C. 607; Brinsmead *v.* Harrison, L. R. 6 C. P. 584.

[5] U. S. *v.* Price, 9 How. (U. S.) 83, as explaining Sheehy *v.* Mandeville, 6 Cranch, 253.

Mr. Taylor, however, says that where a plaintiff has joint and several remedies against several persons, and has obtained judgment against one, he will certainly be estopped from proceeding against the others, if the damages have been received; and he will probably be estopped, *even though the judgment has not been satisfied;* for if the law were otherwise, a plaintiff might recover damages twice over for the same cause of action, which would be repugnant to natural justice. Citing Buckland *v.* Johnson, 15 Com. B. 145; Phillips *v.* Ward, 2 H. & C. 717; Bird *v.* Randall, 3 Burr. 1345, 1353; 1 W. Bl. 373, 387, *S. C.;* recognized in Cooper *v.* Shepherd, 3 Com. B. 272; King *v.* Hoare, 13 M. & W. 496, 505,

tractor a bar to a suit against the other contractor, unless upon a plea operating as a bar to both suits.[1] Satisfaction from one joint, or joint and several debtor, is of course a bar to a suit against his fellow debtors.

Judgment against one joint tort-feasor no bar to suit against another.

§ 773. Torts, when committed by several persons jointly, are from their nature several as well as joint; and hence a judgment against one tort-feasor, on a joint tort, cannot be regarded as a bar to a suit against another tort-feasor.[2] So judgment against one trespasser will not preclude a joint trespasser from setting up a defence which was negatived by the first judgment.[3] The English courts, however, still maintain the rule that when a suit is brought against one of two joint tort-feasors, a judgment against the defendant is a bar to a suit against the other tort-feasor, for the same cause, although the first judgment remains unsatisfied.[4] "If that doctrine," says Willes, J., speaking of the rule that a judgment in such case extinguishes the claim as to the other tort-feasor, "is to be disturbed, and we are to adopt the decisions of the American courts, we can only be called upon to do so when we are taught by a court of error that Lord

per Parke, B.; Lechmere *v.* Fletcher, 1 C. & M. 623, 634, 635, per Bayley, B.

He further argues that, if an action on a joint contract or trespass be brought against two defendants, it seems that one of them may plead in abatement the pendency of another action against him for the same cause. E. of Bedford *v.* Bp. of Exeter, Hob. 137; Rawlinson *v.* Oriet, 1 Shower, 75; Carth. 96; Henry *v.* Goldney, 15 M. & W. 494, per Alderson, B. But that if A. be sued on a contract, the pendency of an action against B., for the same cause, cannot be pleaded in abatement, for in such case A. is not twice vexed; and his proper course, therefore, is either to plead the non-joinder of B., if B. is within the jurisdiction, or to appeal to the equitable authority of the court for a stay of proceedings. Henry *v.* Goldney, 15 M. & W. 594, overruling a dictum of Ld. Ellenborough, in Boyce *v.* Douglas, 1 Camp. 60. See Newton *v.* Blunt, 3 Com. B. 675, where two actions having been brought against two joint contractors, in respect of the same demand, and the debt and costs in one action having been paid, it was held that a judge at chambers might stay the proceedings in the other action without costs. Taylor's Evidence, § 1503.

[1] Phillips *v.* Ward, 2 H. & C. 717.

[2] Lovejoy *v.* Murray, 3 Wall. 1; Stone *v.* Dickinson, 5 Allen, 29; Elliott *v.* Hayden, 104 Mass. 180; Livingston *v.* Bishop, 1 Johns. 290; Atlantic Dock Co. *v.* Mayor, 53 N. Y. 64.

[3] Williams *v.* Sutton, 43 Cal. 65.

[4] Broome *v.* Wooton, Yelv. 67; Brinsmead *v.* Harrison, L. R. 6 C. P. 584; aff. King *v.* Hoare, 13 M. & W. 494.

Wensleydale was wrong. We entertain the highest respect for the American jurists, and are always ready to receive instruction from their decisions upon questions of general law. But the question, whether a plaintiff is to be allowed to maintain a second action against one whom he ought to have sued jointly with another in a former action, is purely one of procedure, and on such a question we are bound by the authorities in our own courts."[1]

Chancery will not review collaterally judgments of courts of law.

§ 774. What has just been said applies equally to the action of equitable tribunals, under systems where chancery remedies are applied by independent courts. When once a party has submitted a claim to a court of law, and judgment has been entered against him as to such claim, the question of his liability will not be afterwards collaterally opened in chancery.[2] Of course it is otherwise where the judgment is entered in the court of law from its inability to apply equitable remedies, or from other technical defects.[3]

Nor court of law the decrees of chancery.

§ 775. So, where a court of chancery, or court of probate, has jurisdiction, its decree is conclusive evidence, in a court of law, as between parties and privies, of all such facts as were directly in issue, and were necessary to the adjudication of the case.[4] It is otherwise as to the dismissal of a bill, partaking of the nature of a nonsuit,[5] though if the bill be dismissed on the merits, it is a bar.[6] Jurisdiction, however, here, as in other cases, must appear on the record, to justify the admission of the decree.[7]

§ 776. The parties in a criminal prosecution being necessarily

[1] Brinsmead *v.* Harrison, L. R. 6 C. P. 586.

[2] Hendrickson *v.* Norcross, 4 C. E. Green N. J. 417; Baldwin *v.* McCrea, 38 Geo. 650

[3] Arnold *v.* Grimes, 2 Iowa, 1; Hobbs *v.* Duff, 23 Cal. 596.

[4] Nations *v.* Johnson, 24 How. (U. S.) 195; Judson *v.* Lake, 3 Day, 318; Coit *v.* Tracy, 8 Conn. 268; Gould *v.* Stanton, 16 Conn. 12; Foster *v.* The Richard Busteed, 100 Mass. 409; Winans *v.* Dunham, 5 Wend. 47; House *v.* Wiles, 12 Gill & J. 338; Dorsey *v.* Gassaway, 2 Har. & J. 402; Pleasants *v.* Clements, 2 Leigh, 474; Morgan *v.* Patton, 4 T. B. Monr. 453; Troutman *v.* Vernon, 1 Bush, 482; McLemore *v.* Nuckolls, 37 Ala. 662 Goddard *v.* Long, 15 Miss. 783; though see Rice *v.* Lowan, 2 Bibb, 149; Mitchell *v.* Mitchell, 40 Ga. 11.

[5] Wright *v.* Dekline, Pet. C. C. 199.

[6] Pelton *v.* Mott, 11 Vt. 148.

[7] Dorsey *v.* Gassaway, 2 Har. & J. 402; Adams *v.* Tiernan, 5 Dana, 394.

distinct from those in a civil suit, and the objects of the two forms of action and the redress they afford being essentially different, it stands to reason that a judgment in a criminal suit cannot be used in a civil suit, to establish the facts on which such judgment rests.[1] "A judgment only operates by way of estoppel upon the point actually decided, and is not even evidence of any matter which came collaterally in question, although within the jurisdiction of the court, or of any matter to be inferred by argument from the judgment."[2] Thus, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forging in an action on the bill.[3] So in a suit by a widow against a party for killing her husband, the record of the acquittal of such party on an indictment for murder of the husband is irrelevant;[4] nor can a judgment in a civil suit be used to control a criminal prosecution.[5] So, though in an action for malicious prosecution the record of acquittal is admissible to show the determination of the prosecution and the plaintiff's acquittal,[6] it is irrelevant to prove innocence.[7]

Criminal and civil prosecutions cannot thus control each other.

We will hereafter see that judgments may be put in evidence to prove, as between the parties, facts incidental to a party's case.[8] Of this we have several illustrations in cases falling within the present section. Thus, on the trial of an indictment for manslaughter, the record of a prior conviction of the defendant of an assault on the deceased, and judgment thereon before her death, is admissible, not to prove the assault, but to prove the

[1] Jones *v.* White, 1 Str. 68; Helsham *v.* Blackwood, 11 C. B. 111; Smith *v.* Rummens, 1 Camp. 9; Petrie *v.* Nuttall, 11 Exc. 569; Mead *v.* Boston, 3 Cush. 404.

[2] Per De Grey, C. J., in the Duchess of Kingston's case, 2 Smith's L. C. 680.

[3] Per Blackburn, J., Castrique *v.* Imrie, L. R. 4 H. L. 434.

[4] Cottingham *v.* Weeks, 54 Ga. 275.

[5] R. *v.* Duchess of Kingston, 20 How. St. Tr. 471; R. *v.* Fontaine Moreau, 11 Q. B. 1028.

[6] Arundell *v.* Tregono, Yelv. 116; Legatt *v.* Tollervey, 14 East, 301; Caddy *v.* Barlow, 1 Man. & Ry. 277; Basebe *v.* Matthews, L. R. 2 C. P. 684.

[7] Purcell *v.* Macnamara, 9 East, 361; 1 Camp. 199; Skidmore *v.* Bricker, 77 Ill. 164.

[8] Infra, § 819.

fact of conviction.[1] So on a petition by a wife for divorce, the record of her husband's conviction of an assault on her is evidence to prove the fact of the conviction, but not its rightfulness.[2] Again, on an indictment for perjury, the record of the trial at which the alleged perjury was committed is admissible as inducement, though not to prove the perjury.[3] So in an action or indictment for escape, it is necessary, if the person escaped was a convict, to put in evidence his conviction, though this does not prove guilt.[4] On the trial of a suit on a life policy, the issue being as to whether the deceased died when engaged in a known violation of the law, the record of the acquittal of a person indicted for killing the deceased is inadmissible.[5] The effect of a plea of guilty in a criminal suit, when used as an admission in a civil suit, is hereafter noticed.[6]

§ 777. The reasons why a judgment in a civil case should bind all subsequent proceedings between the same parties on the same cause of action do not apply, so it is generally argued, when a criminal judgment is sought to be afterwards used in civil litigation. In the first place, while the parties to a civil suit, by appearing, accept the arbitrament of the court, and thereby enter into obligation to be bound thereby; in a criminal prosecution the defendant is regarded as attending by compulsion, and as entering into no such obligation. In the second place, the parties to a civil suit cannot be identical with those to a criminal suit, for in a criminal suit it is the sovereign who, nominally at least, prosecutes. Hence, in the Roman law, as well as in our own, a prior criminal judgment is not conclusive as to a subsequent civil suit for the same subject matter,[7] though such prior criminal judgment, in cases where the prosecution was private (and these were very numerous), was admissible to prove, *primâ facie*, the facts it averred.[8]

[1] Com. *v.* McPike, 3 Cush. 181.

[2] Quinn *v.* Quinn, 16 Vt. 426. See, to same effect, Bradley *v.* Bradley, 2 Fairf. 367; Woodruff *v.* Woodruff, 2 Fairf. 475.

[3] R. *v.* Christian, C. & M. 388; R. *v.* Browne, 3 C. & P. 572; R. *v.* Iles, B. N. P. 243; R. *v.* Stoveld, 6 C. & P. 489; Brown *v.* State, 47 Ala. 47. See Mead *v.* Boston, 3 Cush. 404.

[4] R. *v.* Shaw, R. & R. 526; R. *v.* Waters, 12 Cox C. C. 390; Davies *v.* Lowndes, 1 Bing. N. C. 607; Com. *v.* Miller, 2 Ashmead, 61; Kyle *v.* State, 10 Alab. 226.

[5] Cluff *v.* Ins. Co. 99 Mass. 317.

[6] Infra, § 783.

[7] L. 3. Cod. de ord. jud. iii. 8.

[8] Langenbeck, 176; Endemann, 115.

The canon law took a still stronger position. By that law, all criminal prosecutions were regarded as conducted by the sovereign authority; and the *probationes*, to justify conviction, were to be *urgentiores, luce meridiana clariores*, a rule frequently announced, probably as a merciful check on the frivolousness, the corruption, and the cruelty by which state prosecutions were in the dark ages so constantly stained. Nor was this all. In civil suits prevailed the artificial scholastic valuation of testimony, by which certain presumptions had attached to them absolute probative force; in criminal prosecutions these coercive prescriptions were withdrawn, and the judge was to determine the question of guilt by the natural processes of logic applied to the evidence in the case. Hence it was that the canon law resolutely refused to permit a prior civil judgment against the defendant to be produced against him on a criminal trial for the same offence.[1] With equal resolution, though for another reason, it was held, that a prior criminal judgment could not be used in a civil suit. Only in cases where the parties agree to accept the arbitrament of a court can they be estopped by its judgment. But the defendant in a criminal suit never agrees, nor can he be permitted to agree, to accept the arbitrament of the court by which he is tried. Hence a criminal judgment cannot be used against a party in a subsequent civil suit.[2]

§ 778. It is not necessary that a judgment, to be a bar, should be that of a court of common law or equity. The judgment of a military court, or a court-martial, if competent and constitutional, may likewise establish *res judicata*.[3]

Rulings of military courts final.

§ 779. By our own law, as well as by the Roman, a party cannot, by varying the mode of presenting his case, evade the operation of the principle that a cause once decided cannot be relitigated between the parties.[4] Thus a

Variation of form of suit does not affect principle.

[1] Durant, II. 2. De prob. § 3, nr. 20; De confess. § 3, nr. 20; Bartol. in L. 2, § 1, vi. bon. et rapt. xlvii. 8; Masc. c. 34, 149, nr. 17; 351, nr. 4; Endemann, 116.

[2] Ibid.

[3] Dynes *v.* Hoover, 20 How. U. S. 65; Woolley *v.* U. S. 20 Law Rep. 631; U. S. *v.* Reiter, 4 Am. Law Reg. N. S. 534; Hefferman *v.* Porter, 6 Cold. 391.

[4] Hancock *v.* Welsh, 1 Stark. R. 347; Outram *v.* Morewood, 3 East, 346; Hitchin *v.* Campbell, 2 W. Bl. 827; 3 Wils. 304; Whittaker *v.* Jackson, 2 H. & C. 926; Routledge *v.* Hislop, 2 E. & E. 549; Wilkinson *v.* Kirby, 15 C. B. 430; Huffer *v.* Allen,

judgment for the defendant in an action of deceit, for a false statement as to the soundness of a horse, is a bar to an action of contract on a false warranty, and so of the converse.[1] So a judgment on a plea of set-off is a bar to a suit on the claim so interposed.[2] So a party against whom judgment has been entered, when suing on a particular claim, cannot afterwards resuscitate such claim by suing it as a set-off to a subsequent action by the original defendant.[3] On the other hand it has been ruled that an action for money had and received can be maintained against a defendant in whose favor an action of trover, by the same plaintiff, on the same cause of action, had been previously determined; the reason being that the evidence to sustain trover must possess characteristics not necessary to that required to sustain the suit for money had and received.[4]

Nor does nominal variation of parties.

§ 780. Nor is the force of the rule broken by the fact that there is a nominal, if there be no substantial, difference between the parties.[5]

Judgment must have been entered on the merits to be a bar.

§ 781. To make a judgment a bar it is necessary (except in criminal cases where the verdict of acquittal without judgment is final) that judgment should be finally entered on the merits.[6] Hence a nonsuit does not bar

L. R. 2 Ex. 15; Pearse *v.* Coaker, L. R. 4 Ex. 92; Lawrence *v.* Vernon, 3 Sumn. 20; Ware *v.* Percival, 61 Me. 391; Bunker *v.* Tufts, 57 Me. 417; Gray *v.* Pingry, 17 Vt. 419; Spencer *v.* Dearth, 43 Vt. 98; Lindsey *v.* Danville, 46 Vt. 144; Livermore *v.* Herschel, 3 Pick. 33; Merriam *v.* Woodcock, 104 Mass. 326; Betts *v.* Starr, 5 Conn. 550; Gardner *v.* Buckbee, 3 Cow. 120; Collins *v.* Bennett, 46 N. Y. 490; Barker *v.* Cleveland, 19 Mich. 230; Kreuchi *v.* Dehler, 50 Ill. 176; Owens *v.* Rawleigh, 6 Bush, 656; Harbin *v.* Roberts, 33 Ga. 45; Perry *v.* Lewis, 49 Miss. 443; Taylor *v.* Castle, 42 Cal. 367.

[1] Ware *v.* Percival, 61 Me. 391; Norton *v.* Doherty, 3 Gray, 372.

[2] Eastmure *v.* Laws, 5 Bing. N. C. 444. See infra, §§ 787–8.

[3] Jones *v.* Richardson, 5 Metc. (Mass.) 247.

[4] Hitchin *v.* Campbell, 3 Wils. 240, 304; Buckland *v.* Johnson, 15 C. B. 145.

[5] Mondel *v.* Steel, 8 M. & W. 858; Thompson *v.* Roberts, 24 How. U. S. 233; Livermore *v.* Herschel, 3 Pick. 33; Belden *v.* Seymour, 8 Conn. 304; Lawrence *v.* Hunt, 10 Wend. 80; Rapelye *v.* Prince, 4 Hill (N. Y.), 119; Calhoun *v.* Dunning, 4 Dal. 120; Follansbee *v.* Walker, 74 Penn. St. 306; Barker *v.* Cleveland, 19 Mich. 230; Stoddard *v.* Thompson, 31 Iowa, 80; Lowry *v.* McMurtry, Sneed (Ky.), 251; Cartwright *v.* Carpenter, 8 Miss. 328.

[6] Durant *v.* Essex Co. 7 Wall. 107; Hull *v.* Blake, 13 Mass. 155; Morton *v.* Sweetzer, 12 Allen, 134; Sweigart

further action;[1] nor does an interlocutory judgment by default,[2] though it is otherwise as to a final judgment by default.[3] A *reversed* judgment is of course a nullity for the purposes here specified,[4] and so of a vacated or revoked order of court;[5] though it is otherwise with a judgment as to which proceedings in error are still pending.[6] A verdict without judgment is inadmissible for this purpose,[7] and so is an unconfirmed master's report.[8] So when on a suit upon an award, judgment was entered for want of an affidavit of defence, and then on affidavit that defendant did not owe plaintiff any sum whatever, the judgment was opened, without restrictions or conditions, and the case was tried on pleas which struck at the root of the award; it was ruled that the record of the judgment was inadmissible.[9]

v. Berk, 8 Serg. & R. 305; Kauffelt *v.* Leber, 9 W. & S. 93; Haws *v.* Tiernan, 53 Penn. St. 192; Gurnea *v.* Seeley, 66 Ill. 500; McFarlane *v.* Cushman, 21 Wisc. 401; Wells *v.* Moore, 49 Mo. 229; Houston *v.* Musgrove, 35 Tex. 594.

[1] R. *v.* St. Anne, Westminster, 2 Sess. Cas. 529; Homer *v.* Brown, 16 How. U. S. 354; Derby *v.* Jacques, 1 Cliff. 425; Knox *v.* Waldoborough, 5 Greenl. 185; Morgan *v.* Bliss, 2 Mass. 111; Com. *v.* Tuck, 20 Pick. 356; Greely *v.* Smith, 1 Woodb. & M. 181; Jones *v.* Howard, 3 Allen, 223; Marsh *v.* Hammond, 11 Allen, 483; Wheeler *v.* Ruckman, 51 N. Y. 391; Wortham *v.* Com. 5 Rand. 669; Holland *v.* Hatch, 15 Oh. St. 468.

[2] Whitaker *v.* Bramson, 2 Paine, 209.

[3] Miner *v.* Walter, 17 Mass. 237; Newton *v.* Hook, 48 N. Y. 676; Mailhouse *v.* Inloes, 18 Md. 328; Gatlin *v.* Walton, 66 N. C. 374; Brummagim *v.* Ambrose, 48 Cal. 366.

[4] R. *v.* Drury, 3 C. & Kir. 193; Wood *v.* Jackson, 8 Wend. 9.

[5] Taylor's Ev. § 1530.

[6] Wright *v.* Smith, 10 Ad. & E. 255; Scott *v.* Pilkington, 2 B. & S. 11; Chase *v.* Jefferson, 1 Houst. (Del.) 257.

[7] See first note to this section.

[8] Nash *v.* Hunt, 116 Mass. 237. See, generally, Hoover *v.* Mitchell, 25 Grat. 387; Verhein *v.* Strickbein, 57 Mo. 326; Merritt *v.* Campbell, 47 Cal. 542.

[9] Collins *v.* Freas, 77 Penn. St. 493. "The first assignment is to the admission in evidence of the record of the judgment previously taken in the case. The judgment had been opened generally. No conditions or restrictions had been imposed on the defendant therein. The pleas subsequently entered struck at the root of the award on which the action was founded, and denied the existence of any indebtedness; the trial then was to be had as if no judgment had been entered. The same burden of proof was imposed on the plaintiff. It gave to the defendant the same defences that were open to him at the commencement of the suit. Leeds *v.* Bender, 6 W. & S. 315; Dennison *v.* Leech, 9 Barr, 164; Carson et al. *v.* Coulter et al. 2 Grant, 121; West *v.* Irwin, 24 P. F. Smith, 258. The record was therefore inadmissible. The language of the court in their charge to the jury in relation to it was further calculated to prejudice the case." Mercur, J., Collins *v.* Freas, 77 Penn. St. 497.

§ 782. If the judgment is entered against a party because of a defect in his pleadings, this does not preclude him from bringing another suit; nor can a judgment entered on account of variance so operate. The judgment, to operate as *res adjudicata*, must be on the merits.[1] Thus a judgment is no bar which is impotent by reason of a mistake in the name of a party,[2] or because the suit was brought too soon.[3] So a judgment on a preliminary issue (*e. g.* a plea in abatement) is no impediment to bringing a new suit on the merits,[4] though it concludes the parties as to the special matter determined in the preliminary issue.[5] So a judgment on demurrer, based on formal defects, is no bar to a suit on an amended complaint, correctly setting forth a good cause of action.[6] It is otherwise, however, with a demurrer to the merits, disposing of the whole cause of action.[7] "If judgment is rendered for defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same grounds as were

Purely technical judgment no bar.

Judgment on demurrer.

[1] Lampen *v.* Kedgewin, 1 Mod. 207; Hitchin *v.* Campbell, 2 W. Bl. 779–827; R. *v.* Sheen, 2 C. & P. 634; R. *v.* Clark, 1 Br. & B. 473; R. *v.* Vandercomb, 2 Leach, 708; People *v.* Barrett, 1 Johns. R. 66; McDonald *v.* Rainor, 8 Johns. R. 442; Vaughan *v.* O'Brien, 39 How. (N. Y.) Pr. 515; Heikes *v.* Com. 26 Penn. St. 513; Com. *v.* Somerville, 1 Va. Ca. 164; Hoover *v.* Mitchell, 25 Grat. 387; Kendal *v.* Talbot, 1 A. K. Marsh. 321; Thomas *v.* Hite, 5 B. Monr. 590; Whitley *v.* State, 38 Ga. 50; Waller *v.* State, 40 Ala. 325; Wells *v.* Moore, 49 Mo. 229; Verhein *v.* Strickbein, 57 Mo. 326; Shelbina *v.* Parker, 58 Mo. 327.

As to criminal cases, see Whart. Cr. Law (7th ed.), § 551 *et seq.*

[2] Wixom *v.* Stephens, 17 Mich. 518.

[3] Clark *v.* Young, 1 Cranch, 181; Perkins *v.* Parker, 10 Allen, 22; Woodbridge *v.* Banning, 14 Oh. St. 328; University *v.* Maultsby, 2 Jones (N. C.) Eq. 241.

[4] Whart. Crim. Law, §§ 536, 551; Clark *v.* Young, 1 Cranch, 181; Griffin *v.* Seymour, 15 Iowa, 30; Birch *v.* Funk, 2 Met. (Ky.) 544. See infra, § 1111 *et seq.*

[5] Whart. Crim. Law, § 536; Gray *v.* Hodge, 50 Ga. 262.

As to admissions, see infra, § 838 *et seq.*

[6] R. *v.* Birmingham, 3 Q. B. 223; Gilman *v.* Rives, 10 Pet. 298; Aurora City *v.* West, 7 Wall. 90; Com. *v.* Goddard, 13 Mass. 456; Chapin *v.* Curtis, 23 Conn. 388; Foster *v.* Com. 8 Watts & S. 77; Griffin *v.* Seymour, 15 Iowa, 30; Crumpton *v.* State, 43 Ala. 31; Rawls *v.* State, 8 S. & M. 599; Harding *v.* State, 22 Ark. 210.

[7] Wilson *v.* Ray, 24 Ind. 156; Keater *v.* Hock, 16 Iowa, 23; Perkins *v.* Moore, 16 Ala. 17; Terry *v.* Hammonds, 47 Cal. 32.

disclosed in the first declarations."[1] Where, however, the plaintiff "fails on a demurrer to his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right."[2] But the dismissal of a bill in equity is a bar, when the dismissal is on the merits.[3] And so in New York as to the dismissal of a complaint at law after all the evidence is closed and both parties have rested.[4]

Dismissal of bill.

§ 783. In England we have a ruling of the house of lords to the effect that a judgment entered by compromise cannot constitute *res judicata*.[5] In this country, however, the tendency is to hold that the fact that consent enters into the composition of a judgment does not render it, if there be no fraud, the less effective as a bar.[6] The same conclusion has been reached as to judgments by confession,[7] though in England a judgment by default, as we have seen, does not preclude a party from afterwards suing on a set-off he might have pleaded to the first suit.[8] A judgment founded on a plea of guilty, or of *nolo contendere*, it has been held, is in like manner conclusive in a subsequent criminal prosecution.[9] In civil suits, however, *nolo contendere* is not such an admission of guilt as to be evidence against the party pleading it.[10] But a plea of guilty may, in a civil suit involving the same subject matter, be used as an admission.[11] Thus the plaintiff, in an action for assault, may

Judgment by consent a bar.

[1] Clifford, J., Gould *v.* R. R. 91 U. S. (1 Otto) 533. See infra, § 838 *et seq.*

[2] Clifford, J., Gould *v.* R. R. 91 U. S. (1 Otto) 534, citing Aurora City *v.* West, 7 Wall. 90; Gilman *v.* Rives, 10 Pet. 298; Richardson *v.* Boston, 24 How. 188.

For demurrers as admissions, see infra, § 840.

[3] Borrowscale *v.* Tuttle, 5 Allen, 377. See Lewis *v.* Lewis, 106 Mass. 309.

[4] Wheeler *v.* Ruckman, 51 N. Y. 391.

[5] Jenkins *v.* Robertson, L. R. 1 H. L. Sc. Ap. 117.

[6] Chamberlain *v.* Preble, 11 Allen, 370. See Bigelow on Estoppel (2d ed.), citing further Brown *v.* Sprague, 5 Denio, 545; Fletcher *v.* Holmes, 25 Ind. 458; Bank *v.* Hopkins, 2 Dana, 395; Dunn *v.* Pipes, 20 La. An. 276.

[7] Leonard *v.* Simpson, 2 Bing. N. C. 176; 2 Scott, 355; Neusbaum *v.* Keim, 24 N. Y. 325; Sheldon *v.* Stryker, 34 Barb. 116; Dean *v.* Thatcher, 3 Vroom, 476. See other cases in Bigelow on Estoppel (2d ed.), 18.

[8] Howlett *v.* Tarte, 10 C. B. N. S. 813.

[9] State *v.* Lang, 63 Me. 220.

[10] Com. *v.* Horton, 9 Pick. 206; Com. *v.* Tilton, 8 Metc. 232.

[11] See infra, § 838; R. *v.* Fontaine Moreau, 11 Q. B. 1033; Bradley *v.* Bradley, 2 Fairf. 367; Woodruff *v.*

show by the record a conviction of the defendant for the same assault, he having pleaded guilty.[1]

Point once settled judicially not to be impeached collaterally.

§ 784. Indeed, so important is it held to be that judicial conclusions, deliberately and finally affirmed by courts of competent jurisdiction, should be treated by other courts as final, that, as has been well stated,[2] a point once so adjudicated, "however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit, in the same or any other court at law, or in chancery, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action."[3] It makes no matter whether such point is presented singly or concurrently with others. A party who is defeated by judgment entered against him on a particular claim cannot revive such claim by tacking it to others as the basis of a fresh suit.[4] So a judgment in an action to recover interest due upon a note may be conclusive, on the issue of usury, in a suit brought on the principal of the note.[5]

Parol evidence admissible to identify or to distinguish.

§ 785. We have just noticed cases in which the rule is, that judgments relative to the same object cannot be received. It is now to be observed, that even when the parties are the same and the judgment *primâ facie* admissible, it is always open to a party against whom such judgment is offered to show, by parol or otherwise, that notwithstanding this apparent identity, there is a difference in the points

Woodruff, 2 Fairf. 475; Clark *v.* Irwin, 9 Ham. 131.

[1] Green *v.* Bedell, 48 N. H. 546.

[2] Bigelow on Estoppel, 2d ed. 451.

[3] To this are cited, Aurora City *v.* West, 7 Wall. 82; Tioga R. Co. *v.* Blossburg R. R. 20 Wall. 137; Lynch *v.* Swanton, 53 Me. 100; Bunker *v.* Tufts, 57 Me. 417; Smith *v.* Smith, 50 N. H. 212; Smith *v.* Way, 9 Allen, 472; Lewis *v.* Lewis, 106 Mass. 309; Demarest *v.* Darg, 32 N. Y. 281; Hendrickson *v.* Norcross, 4 C. E. Green, 417; Sergeant *v.* Ewing, 36 Penn. St. 156; Babcock *v.* Camp, 12 Oh. St. 11; French *v.* Howard, 14 Ind. 455; Eimer *v.* Richards, 25 Ill. 289; Doyle *v.* Reilly, 18 Iowa, 108; Heath *v.* Frackleton, 20 Wisc. 320; Amory *v.* Amory, 26 Wisc. 152; Jordan *v.* Faircloth, 34 Ga. 47; Baldwin *v.* McCrea, 38 Ga. 650; Bobe *v.* Stickney, 36 Ala. 482; Stewart *v.* Dent, 24 Mo. 111; Martin *v.* McLean, 49 Mo. 361; Winston *v.* Affalter, 49 Mo. 263; Garwood *v.* Garwood, 29 Cal. 514; Norton *v.* Harding, 3 Oreg. 361.

[4] Finney *v.* Finney, L. R. 1 P. & D. 483.

[5] Newton *v.* Hook, 48 N. Y. 676.

submitted in the two cases. The issue thus raised as to identity is one of fact, which the jury must determine.[1] So the substantial as well as formal identity may be shown by parol.[2] But

[1] Infra, § 986; supra, § 64; Ricardo *v.* Garcias, 12 Cl. & F. 368; R. *v.* Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Hunter *v.* Stewart, 4 De Gex, F. & J. 168; Langmead *v.* Maple, 18 C. B. N. S. 255; Moss *v.* Anglo-Egypt. Nav. Co. L. R. 1 Ch. Ap. 108; Wemyss *v.* Hopkins, 23 W. R. 691; Beere *v.* Fleming, 13 Ir. C. L. 506; Dolphin *v.* Aylward, 15 Ir. Eq. R. N. S. 583; Aspden *v.* Nixon, 4 How. 467; Goodrich *v.* City, 5 Wall. 566; Packet Co. *v.* Sickles, 55 Wall. 580; Perkins *v.* Walker, 19 Vt. 144; Aiken *v.* Peck, 22 Vt. 255; Post *v.* Smilie, 48 Vt. 185; Piper *v.* Richardson, 9 Metc. (Mass.) 155; Harding *v.* Hale, 2 Gray, 399; Com. *v.* Dillane, 11 Gray, 67; Bodwarth *v.* Phelon, 13 Gray, 413; Burlen *v.* Shannon, 99 Mass. 200; Leonard *v.* Whitney, 109 Mass. 265; Com. *v.* Sutherland, 109 Mass. 342; Hood *v.* Hood, 110 Mass. 483; Boynton *v.* Morrill, 111 Mass. 4; Hanham *v.* Sherman, 114 Mass. 19; Smith *v.* Sherwood, 4 Conn. 276; Stowell *v.* Chamberlain, 3 Thomp. & C. 374; Richmond *v.* Hays, 3 N. J. L. 492; Davisson *v.* Gardner, 10 N. J. L. 289; McDermott *v.* Hoffman, 70 Penn. St. 31; Follansbee *v.* Walker, 74 Penn. St. 306; Barger *v.* Hobbs, 67 Ill. 592; Gist *v.* McJenkin, 1 Speers, 157; Bradley *v.* Johnson, 49 Ga. 412; Newton *v.* White, 47 Ga. 400; Rake *v.* Pope, 7 Ala. 161; Chamberlain *v.* Gaillard, 26 Ala. 504; Robinson *v.* Lane, 22 Miss. 161; Clemens *v.* Murphy, 40 Mo. 121. For other cases see § 986, and Freeman on Judgments, §§ 297, 298.

"It is a very familiar principle that a judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. Cow. & Hill's Notes, vol. 3, p. 826. And, although a decree in express terms professes to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact. Coit *v.* Tracy, 8 Conn. 268; Manny *v.* Harris, 2 Johns. 24." Bacon, J., The People *v.* Johnson, 38 N. Y. 65.

[2] Hughes *v.* Jones, 2 Md. Ch. 178. See fully infra, § 986.

"The fifth error assigned is to the admission of the testimony of James L. Gwinn, a witness called for the plaintiff below for the purpose of proving that the location claimed by the plaintiff on a former trial in the United States court in 1857, the record of which was in evidence, was the same as alleged in the present trial. That former suit was clearly admissible as persuasive evidence in this. Koons *v.* Hartman, 7 Watts, 20; Levers *v.* Van Buskirk, 4 Barr, 309. At all events it was in evidence, and we are not now dealing with the question of its admissibility. When the record of a former suit is in evidence, it is settled that a party may give parol evidence of what transpired on a former trial, in order to show that it was the same subject matter, and the same title which was then passed upon. Brindle *v.* McIlvaine, 10 S. & R. 282; Haak *v.* Breidenbach, 3 Ibid. 204; Carmony *v.* Hoober, 5 Barr, 305. This of course is not to contradict the record but to explain it." Sharswood, J., McDermott *v.* Hoffman, 70 Penn. St. 52.

a point not at issue by the record cannot be shown by parol to have been decided by the case.[1]

Judgment not an estoppel when evidence necessarily different.

§ 786. A judgment is an estoppel, it should be remembered, on the principle *ne bis idem*. When a party has a chance of trying his case on the merits, he is concluded by a judgment against him; he cannot hold back, and, if things go against him, begin afresh. But how if he has no chance of trying his case on the merits? How is it if the first trial is before a court that is prevented, by its rules, from receiving a material part of the evidence the party has to offer? Is a second court, restricted by no such rules, bound by the judgment of the first? In England the converse of this principle is illustrated by those cases in which, under the old law, the wife could not, in answer to her husband's suit for divorce, set up her own divorce from him, when the evidence in the latter case was obtained on the wife's evidence, which was inadmissible in the first.[2] But this exception should not be admitted in favor of a plaintiff who, having elected to bring a suit in a jurisdiction where the evidence is restricted, and is worsted and judgment entered against him, attempts to open the question in another jurisdiction, under more liberal rules of evidence.[3] On the other hand, where a suit for trespass *quare clausum fregit* is brought, and the defendant pleads *liberum tenementum*, and has a verdict, and a suit is brought for another trespass on the same property, if it appear that in the first case the evidence went to a portion of the land to which the defendant could justify, and in the second case to a portion of the land to which he could not justify, the former judgment is no bar.[4] Again, a judgment on an action of trespass *quare clausum fregit* is no bar to a writ of right;[5] and a judgment for the defendant on a contract, in which a promise and a breach was averred, is no bar to an ac-

[1] Manny *v.* Harris, 2 Johns. R. 24; Jackson *v.* Wood, 3 Wend. 27.

[2] Stoate *v.* Stoate, 2 Sw. & Tr. 223; though see Sopwith *v.* Sopwith, 2 Sw. & Tr. 160.

[3] Maloney *v.* Horan, 12 Abb. (N. Y.) Pr. N. S. 289. See, generally, Terry *v.* Hammonds, 47 Cal. 32; Williams *v.* Walker, 62 Ill. 517.

[4] Smith *v.* Royston, 8 M. & W. 386. See Dunckle *v.* Wiles, 5 Denio, 296; Connery *v.* Brooke, 73 Penn. St. 80.

[5] Arnold *v.* Arnold, 17 Pick. 4; though see Calhoun *v.* Dunning, 4 Dall. 120.

tion on a tort, based on the defendant's fraudulent representations.[1]

When evidence in second case necessarily enough to secure a judgment in first, then first judgment is a bar.

§ 787. In criminal issues, where the plea of *autrefois acquit* is interposed, it is laid down that when the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first, then the plea is generally good, but not otherwise.[2] The same test may be applied with equal accuracy to civil practice.[3] Thus a verdict for the defendant in trover, on a plea of not guilty, will be no defence to him on an action for money had and received for the price of the goods, when in the latter case the evidence is that the goods were sold by the plaintiff's order, on which evidence a verdict in the former case for the plaintiff could not have been had.[4] So a judgment in an action for false imprisonment is no bar to an action for malicious prosecution.[5]

Party not precluded from suing on claim he does not present.

§ 788. It may be that a party, having an opportunity of introducing a particular claim when suing on a general account, omits to do so. In such case, he is not precluded from bringing up such claim in a second suit, even though in the first suit he agreed to submit "all matters in difference" to an award.[6] So, *a fortiori*, where the plaintiff, without any such agreement, in the former suit, presented only part of his case.[7] On the other hand, it has been declared by high authority, that "where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction,

[1] Norton *v.* Huxley, 13 Gray, 285.

[2] Whart. Cr. Law, 7th ed. § 755, and authorities there cited.

[3] Taylor's Ev. § 1512; Hitchin *v.* Campbell, 2 W. Bl. 831; Hunter *v.* Stewart, 4 De Gex, F. & J. 178; Dolphin *v.* Aylward, 15 Ir. Eq. R. N. S. 583; Dubois *v.* R. R. 5 Fish. Pat. Cas. 208; Riker *v.* Hooper, 35 Vt. 457; Marsh *v.* Pier, 4 Rawle, 273; Connery *v.* Brooke, 73 Penn. St. 80; Lindsley *v.* Thompson, 1 Tenn. Ch. 272.

[4] Hitchin *v.* Campbell, 2 W. Bl. 831; Buckland *v.* Johnson, 15 C. B. 161.

[5] Guest *v.* Warren, 9 Exch. 379.

[6] Ravee *v.* Farmer, 4 T. R. 146. See Seddon *v.* Tutop, 6 T. R. 607; Webster *v.* Lee, 5 Mass. 334.

[7] Florence *v.* Jenings, 2 C. B. N. S. 454; Bagot *v.* Williams, 3 B. & C. 240; Washington, &c. Co. *v.* Sickles, 24 How. 333; Post *v.* Smilie, 48 Vt. 185; Wood *v.* Curl, 4 Metc. (Mass.) 203; Louw *v.* Davis, 13 Johns. R. 227; White *v.* Moseley, 8 Pick. 356; Elliott *v.* Smith, 23 Penn. St. 131; McQuesney *v.* Hiester, 33 Penn. St. 435; Kauff *v.* Messner, 4 Brewst. 98; Thorpe *v.* Cooper, 5 Bing. 129; Amsden *v.* R. R. 32 Iowa, 288; Barger *v.* Hobbs 67 Ill. 592. See Freeman on Judgments, §§ 279–286.

the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward."[1] Thus where a party implicitly submits, or is bound to submit, all of an aggregate claim of kindred items to a jury, and then takes judgment for a part (as when he sues for the rent due for two years and takes judgment for rent for one year, after submitting the whole to the jury), then he is precluded from suing a second time on the dropped items.[2] He is also estopped where he submits his demands to the jury with inadequate proof;[3] nor does it better his case that he lost the first suit in consequence of an erroneous exclusion of evidence by the court,[4] nor that he has subsequently discovered evidence which would change the result.[5]

[1] Henderson *v.* Henderson, 3 Hare, 115, per Wigram, V. C. See, also, Srimut Rajah *v.* Katama Natchiar, 11 Moo. Ind. App. C. 50; Farquharson *v.* Seton, 5 Russ. 45; Partridge *v.* Usborne, Ibid. 195; Chamley *v.* Lord Dunsany, 2 Sch. & Lef. 718, per Ld. Eldon; M. of Breadalbane *v.* M. of Chandos, 2 Myl. & Cr. 732, 733, per Lord Cottenham, cited Taylor, § 1513.

[2] Baker *v.* Stinchfield, 57 Me. 363; Warren *v.* Comings, 6 Cush. 103; Smith *v.* Jones, 15 Johns. R. 229; Willard *v.* Sperry, 16 Johns. R. 121; Miller *v.* Covert, 1 Wend. 487; Reformed Church *v.* Brown, 54 Barb. 191; Burford *v.* Kersey, 48 Miss. 643; Wickersham *v.* Whedon, 33 Mo. 561; Navc *v.* Wilson, 33 Ind. 294; Schmidt *v.* Zahensdorf, 30 Iowa, 498; Bigelow on Estoppel, 98.

[3] Miller *v.* Manice, 6 Hill (N. Y.), 114.

[4] Smith *v.* Whiting, 11 Mass. 445.

[5] Marriott *v.* Hampton, 7 T. R. 269, overruling Moses *v.* Macferlan, 2 Burr. 1005; Flint *v.* Bodge, 10 Allen, 128.

Again, when a plaintiff having a demand for a liquidated sum (consisting of several items) takes a verdict for a part of this sum, he cannot afterwards bring a second action for the residue. Bagot *v.* Williams, 3 B. & C. 235, 241. See Smith *v.* Johnson, 15 East, 213; Dunn *v.* Murray, 9 B. & C. 780, 788. See Ravec *v.* Farmer, 4 T. R. 146. It is on the same principle settled, that where a plaintiff who declares on several causes of action fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless

It is plain, also, that when the plaintiff sues upon and submits for adjudication an entire demand, based upon an indivisible cause of action, by taking judgment for a part, he loses the right to sue for the remainder.[1] He may, however, avoid this peril by voluntarily withdrawing from the court, before judgment, a portion of the claim.[2]

Defendant, omitting to prove payment or other claim as set-off, cannot afterwards sue for the money so paid.

§ 789. Where a party, sued on a debt on which he has made a partial payment, omits, when he is able to do so, to prove such payment, he cannot afterwards maintain a suit against his original creditor for the payment.[3] Whenever, to put this conclusion in general terms, it is the duty of a party, when sued, to defend and protect his rights, then, if he omit this duty, he cannot afterwards, as plaintiff, sue for such rights.[4] If, from any circumstances, it is his duty to present his defence, and leave it to be determined by court and jury, then if he neglect this duty, his claim is lost to him.

This principle has been said to be applicable to set-offs of all classes,[5] though as to a purely equitable defence its applicability

he elects to be nonsuited generally, or can induce the court to set aside the verdict he has obtained. Stafford *v.* Clark, 2 Bing. 382, per Best, C. J.

[1] Goodrich *v.* Yale, 8 Allen, 454; Marble *v.* Keyes, 9 Gray, 221; Bancroft *v.* Winspear, 44 Barb. 209; Reformed Church *v.* Brown, 54 Barb. 191; Stein *v.* Prairie Rose, 17 Oh. St. 471; Fish *v.* Folley, 6 Hill, 54; Weber *v.* R. R. 36 N. J. L. 213; Carvill *v.* Garrigues, 5 Barr, 152. See Bagot *v.* Williams, 3 B. & C. 235.

[2] O'Beirne *v.* Lloyd, 43 N. Y. 248.

[3] Baker *v.* Stinchfield, 57 Me. 363; Loring *v.* Mansfield, 17 Mass. 394 (qualifying Rowe *v.* Smith, 16 Mass. 306); Tilton *v.* Gordon, 1 N. H. 33; Binck *v.* Wood, 43 Barb. 315; *S. C.* 37 How. Pr. 653, overruling Smith *v.* Weeks, 26 Barb. 463; Corbet *v.* Evans, 25 Penn. St. 310; Davis *v.* Murphy, 2 Rich. (S. C.) 560; Broughton *v.* McIntosh, 1 Ala. 103; Mitchell *v.* Sanford, 11 Ala. 695; Bates *v.* Spooner, 45 Ind. 489; Greenabaum *v.* Elliott, 60 Mo. 25.

In Burwell *v.* Knight, 51 Barb. 267, it was held that this rule does not apply when on the first case judgment was taken by default; and to the same effect is Rowe *v.* Smith, 16 Mass. 306; but see, *contra*, Davis *v.* Murphy, 2 Rich. (S. C.) 560. See, also, Snow *v.* Prescott, 12 N. H. 535, overruling Tilton *v.* Gordon, 1 N. H. 33; Battey *v.* Button, 13 Johns. 187; Walker *v.* Ames, 2 Cow. 428; Mitchell *v.* Sanford, 11 Ala. 695; and, per *contra*, Emmerson *v.* Herriford, 8 Bush, 229.

[4] Footman *v.* Stetson, 32 Me. 17; Doak *v.* Wiswell, 33 Me. 355; Walker *v.* Ames, 2 Cow. 428; Dudley *v.* Stiles, 32 Wisc. 371. See Huffer *v.* Allen, L. R. 2 Exch. 15.

[5] Baker *v.* Stinchfield, 57 Me. 363; though see Davenport *v.* Hubbard, 46 Vt. 200; Greenabaum *v.* Elliott, 60 Mo. 25.

has been denied;[1] and with unquestionable accuracy where the equitable defence was one of which the court on the first trial could not take jurisdiction.[2]

[1] McCreary *v.* Casey, 45 Cal. 128.

[2] Gordon *v.* Kennedy, 36 Iowa, 167.

In a case decided in Missouri in 1875, this point was discussed on the following facts: An administrator, after personal service, obtained judgment by default on a note given to the intestate, and realized the amount due, and the maker subsequently sued to recover back the money, claiming that the debt had already been paid to the deceased. The proof showed merely a promise of the latter to deliver up the note. It was held by the supreme court, 1st, that the duty of surrendering it was a moral and not a legal obligation, and not a good consideration for the promise, and hence, that such agreement would not sustain the action against the administrator; 2d, that the judgment in favor of that officer, in the suit brought by him, was *res adjudicata;* and the failure to set up therein the defence of payment conclusively barred the maker from subsequently prosecuting the claim. Such is the rule, so was it declared, as now established in all cases, unless the party can show some ground for equitable interference.

"This is the recognized," so the court argued, "and, I may say, at the present time, the universal doctrine. Some of the earlier decisions in Massachusetts announced a different rule, but they cannot be supported, and are not now regarded as authority. In the case of Rowe *v.* Smith, 16 Mass. 306, the plaintiff had paid $50 on a $400 note, and taken a receipt. Afterwards he was sued on the $400 note, and judgment was entered against him for the whole amount. An action by the plaintiff to recover back the $50 was sustained. Parker, C. J., stated that his first impression was against the recovery, but it was finally sustained on the ground that the defendant had received $50 which he was not entitled to retain, and that he could not conscientiously be permitted to keep it.

"The case of Loring *v.* Mansfield, 17 Mass. 394, involves the same principle decided in Rowe *v.* Smith, with the difference of fact that in the former case the plaintiff in the second action appeared in the first and contested the recovery, but did not attempt to prove the payment for which he afterwards brought an action. The court decided, however, that he could not recover, the ground being substantially that, having been in court, he ought to have proved his whole defence when he had an opportunity.

"In neither case was there any actual trial as to the payment claimed to be recovered. This case, therefore, not only impairs the authority of Rowe *v.* Smith, but in fact overrules it.

"The case of Whitcomb *v.* Williams, 4 Pick. 228, cited and greatly relied on by plaintiff's counsel, does not in the least aid him. The case went off on different grounds. The court say: 'In this case a cause of action has been shown, independent of the judgment; nor was the proof of the judgment at all material to the merits of the case.'

"'There can be no doubt,' says Freeman, 'that the Massachusetts decisions are in direct conflict with the true rule upon the subject, both English and American, and they were induced by yielding to the hardships of the particular cases in which they were pronounced, and are good illus-

The rule just stated, however, does not preclude a party from withholding a cross demand from a jury, and afterwards offering it as the ground of an independent suit.[1] A vendee, for instance, is sued for the price of a stove, and a verdict is had against him, he making no defence. He then sues the vendor for damage accruing from the latter's negligent construction of the stove, and the vendor sets up the former judgment as conclusive. In such case, it is held by the English queen's bench, that as the vendee was at liberty to advance the claim for damages as a set-off or not, as he chose, he is not barred by a judgment in a suit when that claim was not in issue.[2] We may sustain this, in all cases in which a party is at liberty to either produce or withhold his claim, on the ground that no one party has a right, by suing another, to compel such other person

trations of the maxim, "that hard cases make bad precedents." ' Freem. Judg. § 286; 2 Sm. Lead. Cas. 667. 'It is clear, that if there be a *bonâ fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation.' Cadaval *v.* Collins, 4 Ad. & El. 867. A party having found a receipt for a debt which he had been compelled to pay by judgment, having sought to recover back the money paid, Lord Kenyon, before whom the case came, said: 'I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After recovery by process of law there would be no security for any person.' Marriott *v.* Hampton, 7 T. R. 269.

"In the recent case of Huffer *v.* Allen, L. R. 2 Exch. 15, it was declared that 'it was not competent for either party to an action to aver anything, either expressing or importing a contradiction to the record, which, while it stands, is, as between them, of uncontrollable verity.' To the same purport are nearly all the American cases. Tilton *v.* Gordon, 1 N. H. 33; Broughton *v.* McIntosh, 1 Ala. 103; Mitchell *v.* Sanford, 11 Ibid. 695; Corbet *v.* Evans, 25 Penn. St. 310; Kirklan *v.* Brown, 4 Humph. 174; Loomis *v.* Pulver, 9 Johns. 244; Battey *v.* Button, 13 Johns. 187.

"The case of Walker *v.* Ames, 2 Cow. 428, was of special hardship. There had been a recovery on an account, and also on a note given in settlement of the same account. The defendant in that action then sued to recover back one half of the judgment thus improperly recovered. The court held that the action would not lie; 'that there could be no end to litigation nor any security to a person,' if such an action could be brought.

"It may, therefore, be stated as the established rule, that where a defendant has been legally in court, and fails or neglects to make his defence, if he has one, the judgment will be conclusive upon him, unless he can show some ground for equitable interference." Greenabaum *v.* Elliott, 60 Mo. 25, 30, 31, Wagner, J.

[1] Davenport *v.* Hubbard, 46 Vt. 200.

[2] Davis *v.* Hedges, L. R. 6 Q. B. 687.

to offer, at that moment and before that court, a claim he does not at that time or before that court, choose to offer.[1]

§ 790. If, indeed, when a party is sued, he has a cross demand which, if proved, would *pro tanto* extinguish the plaintiff's claim, and if, instead of setting up his cross demand, he admits the validity of the original claim, this precludes him from afterwards bringing a reverse suit on his cross demand. This position, based as it is on the policy of the law favoring consolidation of litigation, is pushed to a questionable limit in a New York case, where, after a surgeon had recovered (on a confessed judgment, the defendant admitting the cause of action) for his services rendered to a patient, the patient turned round and sued the surgeon for negligence in the performance of his services. The court of appeals held that the latter action could not be maintained, since the patient, by confessing the judgment, admitted the plaintiff's right to recover.[2] It has also been held in the same state that where a manufacturer obtained judgment for the price of machinery sold by him, the vendee could not afterwards recover from the manufacturer for breach of warranty.[3] In these cases, however, the original defendant, by his answer, or by his course on trial, admitted the validity of the plaintiff's claim; and what he thus admitted he could not be permitted afterwards to controvert. It is otherwise when there is no such admission;[4] and we may therefore hold that a party, when sued, is not bound to set up a cross demand that he may have against the plaintiff, but that he may reserve (if by plea or otherwise he does not admit the validity of the plaintiff's claim) his cross demand for an independent suit in which he is to be plaintiff himself. Otherwise a defendant would be put in a position very inferior to a plaintiff. A plaintiff may, at any time, by taking a nonsuit, voluntarily reserve his claim for another trial. If a defendant is not permitted to withdraw his set-off from a jury, and to bring it forward as the basis of another suit, then the contest between

[1] Hadley *v.* Greene, 2 Tyr. 390; Bridge *v.* Gray, 14 Pick. 55.

[2] Gates *v.* Preston, 41 N. Y. 113; relying on White *v.* Merritt, 7 N. Y. 352; and Davis *v.* Tallcot, 12 N. Y. 184. See, *contra*, Sykes *v.* Bonner, Cin. Sup. Ct. 464.

[3] Davis *v.* Tallcot, 12 N. Y. 184.

[4] Mondel *v.* Steel, 8 M. & W. 858; Davis *v.* Hedges, L. R. 6 Q. B. 687; Bascom *v.* Manning, 52 N. H. 132; Burnett *v.* Smith, 4 Gray, 50; Ihmsen *v.* Ormsby, 32 Penn. St. 198.

himself and the plaintiff is very unequal; and he would be refused a privilege of which plaintiffs can make important use. We would be compelled, therefore, if we reject the view here presented, to hold that whether a party is entitled to withdraw a claim put before a jury, depends upon whether he is plaintiff or defendant; if a plaintiff, he has this right; but he has it not, so would we be forced to say, if he is defendant. But it cannot be intended by the law that a party's rights should be thus arbitrarily disposed of; and therefore we must hold that a party who has a cross demand is not precluded by a judgment against him in which such demand is not involved, but, if he has not confessed the original plaintiff's claim, may make his cross demand the basis of a suit against the original plaintiff.[1] It is scarcely necessary to add, that a party who submits his cross demand to the jury is bound by the action of the court thereon.[2]

§ 791. A party, also, on the same principle, who omits to set up a defence to one suit is not precluded from setting this defence to another suit of the same class. Thus it may be that a tenant sued for rent has a set-off, or other avoidance, which is a good defence; but if he omit to present this defence, and it is not passed upon by the court and jury, he is not thereby precluded from setting it up in defence to a subsequently accruing instalment of the same rent.[3]

§ 792. Pursuing the line thus noticed, it follows that when there is a series of successive claims, a judgment in a suit for one of such claims cannot conclude suits for claims accruing subsequently to the suit.[4] Suppose, for instance, a person has a nuisance on his premises, for which he is sued by a party injured; it would not be pretended that if he is acquitted in a suit for deleterious consequences produced to-day, he will be therefore exonerated from suit for injurious consequences produced to-morrow.[5] Nor could it be maintained that a judgment in favor of the plain-

Judgment in successive or recurring claims not exhaustive.

[1] See, also, Barker *v.* Cleveland, 19 Mich. 230; and remarks in Bigelow on Estoppel, 104 *et seq.*

[2] Sargent *v.* Fitzpatrick, 4 Gray, 511; O'Connor *v.* Varney, 10 Gray, 231.

[3] Howlett *v.* Tarte, 10 C. B. N. S. 813.

[4] Leland *v.* Marsh, 16 Mass. 389; Marcellus *v.* Countryman, 65 Barb. 201. See Reformed Church *v.* Brown, 54 Barb. 191.

[5] See People *v.* Townsend, 3 Hill (N. Y.), 479; R. *v.* Fairie, 8 E. & B. 486; 8 Cox C. C. 66.

tiff for yesterday's nuisance would be conclusive in a suit for to-day's nuisance.[1] Nor, if a way is obstructed, could a judgment on a suit for yesterday's obstruction bar a suit from being brought for to-day's obstruction.[2] Nor, if a series of drams are sold at a bar, can an action for a sale yesterday prevent an action from being brought for a sale to-day.[3] We may therefore hold that although, when the question at issue goes to the general liability of the defendant to the plaintiff, a judgment may be admitted as *primâ facie* determining such liability, yet a judgment on a suit for a breach of yesterday cannot be conclusive as to a suit for a breach of to-day. The same distinction may be asserted as to recurring claims: *e. g.* taxes, and debts due by instalments.[4] But where the question whether a certain thing is a nuisance or a trespass is solemnly determined between the parties by a judgment for the plaintiff, then the defendant is estopped from denying, on a suit for a continuing offence, the fact that the thing complained of is a nuisance or a trespass.[5]

Judgment not conclusive as to collateral points.

§ 793. A judgment is conclusive as to all the averments essential to its maintenance, but not so as to collateral matters, which, though introduced into the case, or deducible from the judgment, yet were not necessary parts of the issues of the case.[6] Thus where a bill in equity, seeking to set aside a deed, alleged that the complainant believed that T. executed the deed in question, but did not directly aver such execution, it was ruled that the fact of the execution not being in issue, a decree in favor of the defendant could not be used to estop a party to the suit from claiming against the deed.[7]

§ 794. It has been seen that a dispositive judgment (*i. e.* one

[1] Richardson *v.* Boston, 19 How. U. S. 263.

[2] Evelyn *v.* Haynes, cited Taylor on Ev. § 1509; Connery *v.* Brooke, 73 Penn. St. 80.

[3] See Whart. Cr. L. § 2443; State *v.* Coombs, 32 Me. 529.

[4] Bigelow on Estoppel, 2d ed. 34; Duncan *v.* Bancroft, 110 Mass. 267.

[5] Fowle *v.* R. R. 107 Mass. 352; Plate *v.* R. R. 37 N. Y. 472.

[6] Smith *v.* Royston, 8 M. & W. 381; Carter *v.* James, 13 M. & W. 137; Leonard *v.* Whitney, 109 Mass. 265; Crandall *v.* Gallup, 12 Conn. 365; Dunckle *v.* Wiles, 5 Denio, 296; Woodgate *v.* Fleet, 44 N. Y. 1; Hibshman *v.* Dulleban, 4 Watts, 183; Benton *v.* O'Fallon, 8 Mo. 650; Fish *v.* Lightner, 44 Mo. 268; Sawyer *v.* Boyle, 21 Tex. 28.

[7] Crandall *v.* Gallup, 12 Conn. 365.

which has a contractual force, operating as by estoppel) only binds as between parties and privies. A qualification of this rule is to be found in cases where the judgment is based on a public right or duty; *e. g.* the rights of ferry, or of tolls, or other franchises; and the liability to repair roads or sea-walls. Yet, except as to the immediate parties to such suits, judgments are only *primâ facie* proof of liability or of duty.[1] *Verdicts* may be also received for the same purpose, under conditions to be hereafter stated.[2]

Judgment as to public rights admissible against strangers.

II. WHEN JUDGMENT MAY BE IMPEACHED.

§ 795. A judgment entered by a court which, on the face of the record, has either no jurisdiction, or a jurisdiction which does not attach, is *coram non judice*, and may be impeached even by the party in favor of whom the judgment was obtained;[3] *a fortiori* by the party against whom it was given.[4] An inferior court must show on the record that it had jurisdiction.[5] The same distinction holds

Judgment may be collaterally impeached for want of jurisdiction.

[1] See fully supra, § 200; Reed *v.* Jackson, 1 East, 357; Brisco *v.* Lomax, 8 A. & E. 198; Evans *v.* Rees, 10 A. & E. 151; R. *v.* Leigh, 10 A. & E. 398; Pim *v.* Curell, 6 M. & W. 234; Croughton *v.* Blake, 12 M. & W. 205; Spencer *v.* Dearth, 43 Vt. 98; Fowler *v.* Savage, 3 Conn. 96; Gibson *v.* Nicholson, 2 S. & R. 422; and see Freeman on Judgments, § 419.

[2] Infra, § 831.

[3] Mercier *v.* Chace, 9 Allen, 242.

So a judgment for the defendant for want of jurisdiction, is no bar to a suit by the same plaintiff against the same defendant in a court having jurisdiction. Offutt *v.* Offutt, 2 Har. & G. 178.

[4] R. *v.* Chester, 1 W. Bl. 25; R. *v.* Washbrook, 4 B. & C. 732; Briscoe *v.* Stephens, 2 Bing. 213; 9 Moore, 413; Huthwaite *v.* Phaire, 1 M. & Gr. 159; Rogers *v.* Wood, 2 B. & Ad. 245; Whyte *v.* Rose, 3 Q. B. 493; Linnell *v.* Gunn, L. R. 1 Ecc. 363; Custis *v.* Turnpike Co. 2 Cranch C. C. 81; Lincoln *v.* Tower, 2 McLean, 473; Board of Works *v.* Columbia College, 17 Wall. 521; Thompson *v.* Whitman, 18 Wall. 457; Hill *v.* Mendenhall, 21 Wall. 453; Stevens *v.* Fassett, 27 Me. 266; Penobscot R. R. *v.* Weeks, 52 Me. 456; Gay *v.* Smith, 38 N. H. 171; Com. *v.* Goddard, 13 Mass. 457; Borden *v.* Fitch, 15 Johns. 121; Latham *v.* Edgerton, 9 Cow. 227; Gage *v.* Hill, 43 Barb. 44; Smith *v.* Ferris, 1 Daly, 18; Kintz *v.* McNeal, 1 Denio, 436; State *v.* Cooper, 1 Green N. J. 361; Fisher *v.* Longnecker, 8 Barr, 410; James *v.* Smith, 2 S. C. 183; Parish *v.* Parish, 32 Ga. 653; Richardson *v.* Hunter, 23 La. An. 255; Bates *v.* Spooner, 45 Ind. 489; Bonsall *v.* Isett, 14 Iowa, 309; Mayo *v.* Ah Loy, 32 Cal. 477; Dorsey *v.* Kendall, 8 Bush, 294; North *v.* Moore, 8 Kans. 143.

[5] Harris *v.* Willis, 15 C. B. 709; Crawford *v.* Howard, 30 Me. 422; Clark *v.* Bryan, 16 Md. 171; Adams *v.* Tiernan, 5 Dana, 394; Gray *v.* McNeal, 1 Ga. 424.

good with respect to superior courts with limited statutory jurisdiction,[1] or with regard to courts of any class, obviously transcending their powers.[2] If the record, however, avers the facts necessary to constitute jurisdiction, such averments cannot (except in cases of fraud to be hereafter noticed) be collaterally disputed by parties or privies.[3] Nor, where the record shows jurisdiction (unless with the exception already noticed), can parties or privies collaterally dispute the rulings of courts on questions of jurisdiction which they did not dispute at the time.[4]

§ 796. At the same time, it is now settled by the supreme court of the United States that a person sued in one state, on a judgment obtained in another, may defend by pleading specially that in point of fact the court rendering judgment had not jurisdiction of his person;[5] or that the attorney appearing for him appeared without his authority.[6] Indeed, wherever the record does not aver an appearance in person, it is open to a party to contest a judgment by pleading that the appearance of an attorney, as averred by the record, was unauthorized by the party.[7]

[1] Harris *v.* Hardeman, 14 How. U. S. 334; Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Ins. Co. 35 N. H. 162; Huntington *v.* Charlotte, 15 Vt. 46; Embury *v.* Conner, 3 Comst. 322. See, however, Hahn *v.* Kelly, 34 Cal. 391; Tibbs *v.* Allen, 27 Ill. 119; and remarks in Bigelow on Estoppel, 2d ed. 124.

[2] Windsor *v.* McVeigh, cited infra, § 796.

[3] McCormick *v.* Sullivant, 10 Wheat. 192; Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Ins. Co. 35 N. H. 162; Coit *v.* Haven, 30 Conn. 190; Hartman *v.* Ogborn, 54 Penn. St. 120; Clark *v.* Bryan, 16 Md. 171; Simmons *v.* McKay, 5 Bush, 25; Callen *v.* Ellison, 13 Oh. St. 446; Moffitt *v.* Moffitt, 69 Ill. 641; Rice *v.* Brown, 77 Ill. 549; Hahn *v.* Kelly, 34 Cal. 391; 35 Cal. 533; McCauley *v.* Fulton, 44 Cal. 355; Smith *v.* Wood, 37 Texas, 616; though see Comstock *v.* Crawford, 3 Wall. 397, where it was held that the jurisdictional recitals of a statutory probate court were only *primâ facie* evidence of the facts recited.

[4] Sheldon *v.* Wright, 5 N. Y. 497; Fitshugh *v.* McPherson, 9 Gill & J. 51.

[5] Thompson *v.* Whitman, 18 Wall. 457; Knowles *v.* Gaz. Co. 19 Wall. 58.

[6] Hill *v.* Mendenhall, 21 Wall. 453. That in such cases the plea must be special, see Price *v.* Hickok, 39 Vt. 292; Aldrich *v.* Kinney, 4 Connect. 380; Shumway *v.* Stillman, 4 Cow. 292, 447; Starbuck *v.* Murray, 5 Wend. 148; Bimeler *v.* Dawson, 4 Scam. 536.

[7] Shelton *v.* Tiffin, 6 How. U. S. 163; Watson *v.* Bank, 4 Metc. 343; Bodurtha *v.* Goodrich, 3 Gray, 508; Denison *v.* Hyde, 6 Conn. 508; Kerr *v.* Kerr, 41 N. Y. 272; Brown *v.* Nichols, 42 N. Y. 26; Westcott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304; Harshey *v.* Blackmarr, 20 Iowa, 161; Warren *v.* Lusk, 16 Mo.

And where the record does not show service, the judgment is not admissible against the party not served.[1] It should be added, that it is not as to service only that a court, even of superior jurisdiction, may so transcend its powers, that its judgment may be collaterally impeached. "All courts," says a learned judge of the supreme court of the United States, giving the opinion of the court in a case decided in 1876,[2] "even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of these judgments.[3] Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.[4] So it was

102; Baker *v.* Stonebraker, 34 Mo. 172; Watson *v.* Hopkins, 27 Tex. 637. See Wiley *v.* Pratt, 23 Ind. 628.

[1] "A personal judgment, rendered in one state against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence, outside of the state where rendered, of any personal liability to the plaintiff of the parties proceeded against by publication." Bradley, J., Board of Public Works *v.* Columbia College, 17 Wall. 521.

[2] Windsor *v.* McVeigh, Alb. L. J. Jan. 6, 1877. See cases infra, § 893.

[3] Norton *v.* Meador, Circuit Court for California.

[4] See the language of Mr. Justice Miller, to the same purport, in the

held by this court in Bigelow *v.* Forrest,[1] that a judgment in a confiscation case condemning the fee of the property was void for the remainder after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: 'Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally; but, under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.'[2] So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way."

Former judgment may be avoided on proof of fraud.

§ 797. Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite party may show the fraud and thus avoid the judgment. In criminal issues this is settled law. An acquittal or conviction a party manages to have entered against himself, is no bar to a second prosecution.[3] The same reasoning applies to civil issues, in cases in which a party, suing for a just debt, finds himself confronted by a judgment entered against him in a suit fraudulently and collusively brought in his name, but without his authority.[4] If an attorney should fraudulently bring suit

case of Ex parte Lange, 18 Wall. 163.

[1] 9 Wall. 351.

[2] 9 Wall. 350.

[3] R. *v.* Davis, 12 Mod. 9; R. *v.* Furzer, Say. 90; State *v.* Little, 1 N. H. 257; State *v.* Brown, 16 Conn. 54; Com. *v.* Alderman, 4 Mass. 477; Com. *v.* Jackson, 2 Va. Cas. 501; Bubson *v.* People, 31 Ill. 409; Dunlap *v.* Cody, 31 Iowa, 260; Hulverson *v.* Hutchinson, 39 Iowa, 316; State *v.* Davis, 4 Blackf. 345; State *v.* Atkinson, 9 Humph. 677; State *v.* Colvin, 11 Humph. 599; Ellis *v.* Kelly, 8 Bush, 621; State *v.* Jones, 7 Ga. 422; State *v.* Cole, 48 Mo. 70.

[4] "It is also important to bear in mind that the validity of a judgment of a court of competent jurisdiction, upon parties legally before it, may be questioned on the ground that it was pronounced through fraud, connivance, or covin of any description, or not in

in the name of a party, and should suffer judgment to be taken against such party, it would be a gross perversion of justice to hold that such party, afterwards suing in ignorance of such judgment, could not set up its fraud when it is sprung upon him on trial by the defendant. In accordance with this view, we find numerous cases in which the right of a party to attack for fraud a fraudulent judgment is declared. In such case, however, the evidence must be plain, and the fraud must be directed against the rights of an innocent party.[1] In conformity with this view, it has been held by the supreme court of the United States, that a nominal plaintiff who brings suit for the use of his assignee, cannot, by a dismissal of such suit by agreement, however solemn, with the defendant, bar the plaintiff's right to institute a second suit on the same cause of action.[2] So by the same high tribunal it has been recently determined that where a judgment is entered by agency of an unauthorized attorney, it may be avoided by setting up this defence in a special plea.[3] No doubt we have several cases which contain rulings apparently impugning the position that has been just announced.[4] Independently, however, of

a real suit, or if pronounced in a real and substantial suit between parties who were really not in contest with each other. Earl of Bandon *v.* Becher, 3 Cl. & F. 510." Powell's Evidence, 4th ed. 231.

[1] Bayley *v.* Buckland, 1 Exch. R. 1; Thatcher *v.* D'Aguilar, 11 Exch. R. 436; Reynolds *v.* Howell, L. R. 8 Q. B. 398; Hubbart *v.* Phillips, 13 M. & W. 703; Smith *v.* McKean, 26 Me. 411; Beekley *v.* Newcomb, 24 N. H. 359; Hawley *v.* Mancius, 7 John. Ch. 182; Davis *v.* Headley, 22 N. J. Eq. 115; Martin *v.* Rex, 6 S. & R. 296; Hall *v.* Hamlin, 2 Watts, 354; Ulrich *v.* Voneida, 1 Penn. R. 250; Hartman *v.* Oghorn, 54 Penn. St. 620; Com. *v.* Trout, 76 Penn. St. 379; Whetstone *v.* Whetstone, 31 Iowa, 276; Hulverson *v.* Hutchinson, 39 Iowa, 316; Scranton *v.* Stewart, 52 Ind. 68; Field *v.* Flanders, 40 Ill. 470; Martin *v.* Judd, 60 Ill. 78; Cox *v.* Hill, 3 Ohio, 411; Ellis *v.* Kelly, 8 Bush, 621; Hayes *v.* Shattuck, 21 Cal. 51; Edgell *v.* Sigerson, 20 Mo. 494; Thouvenin *v.* Rodrigues, 24 Tex. 468; Morris *v.* Halbert, 36 Tex. 19. See Lowry *v.* McMillan, 8 Penn. St. 157; Henck *v.* Todhunter, 7 Har. & J. 275; Stell *v.* Glass, 1 Ga. 475; Dalton *v.* Dalton, 33 Ga. 243.

[2] Welsh *v.* Mandeville, 1 Wheat. 233.

[3] Hill *v.* Mendenhall, 21 Wall. 453.

[4] See Christmas *v.* Russell, 5 Wall. 290; Granger *v.* Clark, 22 Me. 130; Davis *v.* Davis, 61 Me. 395; Atkinsons *v.* Allen, 12 Vt. 624; McRae *v.* Mattoon, 13 Pick. 53; Krekeler *v.* Ritter, 62 N. Y. 372; Anderson *v.* Anderson, 8 Ohio, 108; Smith *v.* Smith, 22 Iowa, 516; Kelley *v.* Mize, 3 Sneed, 59. And see other cases cited infra, § 803.

the fact that these cases refer to actions governed by common law and not by equity, we may reconcile them, even at common law, with the principle asserted above, by holding that fraud cannot be collaterally set up by a party to a judgment in any case in which he is either directly or constructively, either by action, or by want of vigilance when he was bound to be vigilant, a party to the fraud. That when an innocent person, who is not chargeable with laches, is defrauded by a judgment entered against him by unauthorized parties, he can have no relief in those cases where such a judgment is sprung on him collaterally, cannot be rightfully maintained either in equity or at common law; and it is in this sense that we must understand Chancellor Kent, when in a case already cited,[1] he declares that a party cannot collaterally impeach a judgment except in cases of fraud.[2] It is agreed generally that fraud can always be set up by strangers to the judgment.[3]

§ 798. It must be remembered at the same time, that when a party has the opportunity of applying to the court entering the judgment to open it, he must do so, and cannot resort to a collateral attack. Thus in a case decided in New York, in 1876, it is said by a learned judge: "The judgment could not be impeached collaterally, nor could the same facts be retried between the same parties. The offer of the plaintiff was in effect to retry the issue. Judgments may be impeached in equity for fraud, but for no other reason.[4] The remedy of the plaintiff was by application for a retrial in the superior court, or for other relief if the judgment had been procured by false or mistaken testimony, and other evidence had been discovered by which the truth could be established."[5] "The power of the supreme court to annul a judgment or decree for fraud in procuring it," so it is

[1] Hawley *v.* Mancius, 7 Johns. Ch. 182.

[2] See, as containing intimations to the same effect, Bandon *v.* Becher, 3 Cl. & F. 479.

[3] R. *v.* Duchess of Kingston, 20 How. St. Tr. 544; Phillipson *v.* Egremont, 6 Q. B. 605; Perry *v.* Meddowcroft, 10 Beav. 122; Harrison *v.* Southampton, 4 De Gex, M. & G. 137; Great Falls Co. *v.* Worster, 45 N. H. 110; Atkinson *v.* Allen, 12 Vt. 619; Mitchell *v.* Kintzer, 5 Barr, 216; Thompson's Appeal, 57 Penn. St. 175; De Armond *v.* Adams, 25 Ind. 455; Callahan *v.* Griswold, 9 Mo. 775. Supra, § 760.

[4] Davoue *v.* Fanning, 4 J. Ch. 199.

[5] Krekeler *v.* Ritter, 62 N. Y. 372, 374, 375, Allen, J.

said by another learned judge of the same court, "is undoubted, although the jurisdiction is carefully limited and guarded, and will only be exercised in clear cases. The jurisdiction in one court, to vacate, in an independent proceeding, the judgment of another having power to render it, is in its nature so extraordinary as to demand a close adherence to principles and precedents in exercising it. Courts do not exercise it when there has been negligence on the part of the party seeking the relief. That a judgment is final and conclusive of the right or thing adjudicated by it is the rule; and judgments and decrees of a competent court will not be annulled for a suspicion of fraud, or because the party complaining may in fact have been unjustly cast in judgment." [1]

§ 799. Mere irregularities, however, in a record, will not be ground for collaterally impeaching a judgment, unless such irregularities show want of jurisdiction, or afford a presumption of fraud, or exhibit a gross violation of the ordinary rules of justice.[2] Thus, it is no objection to a judgment record offered in evidence, that the record shows that the cause was tried without the intervention of a jury, and did not show that the jury had been waived in the mode provided by the statute; it being held, that though this error might be fatal in a direct revision, it could not be attacked collaterally.[3]

But not for minor irregularities.

III. AWARDS.

§ 800. An award of arbitrators or referees, duly appointed, is as conclusive on parties and privies as is a judgment.[4] When the award is final and is ostensibly on all the matters submitted, the presumption is that the arbitra-

Awards may have the force of judgments.

[1] Andrews, J., Smith *v.* Nelson, 62 N. Y. 288, citing Stilwell *v.* Carpenter, 59 N. Y. 414; Foster *v.* Wood, 6 John. Ch. 89; Simpson *v.* Howden, 3 Myl. & Cr. 108; Powers *v.* Butler, 3 Green's Ch. 465; Dobson *v.* Pearce, 12 N. Y. 157.

[2] Bragg *v.* Lorio, 1 Woods, 209; Wood *v.* Wilson, 4 Houst. (Del.) 94; Bigelow *v.* Barre, 30 Mich. 1; Bates *v.* Spooner, 45 Ind. 489; McCauley *v.* Harvey, 49 Cal. 497. Supra, § 796.

[3] Maxwell *v.* Stewart, 21 Wall. 71.

[4] Doe *v.* Rosser, 3 East, 15; Commings *v.* Heard, 10 B. & S. 606; *S. C.* L. R. 4 Q. B. 669; Pease *v.* Whitton, 31 Me. 117; Lloyd *v.* Barr, 11 Penn. St. 41. See Ravee *v.* Farmer, 4 T. R. 146; Bates *v.* Townley, 2 Exc. R. 152; Newall *v.* Elliot, 1 H. & C. 797; Darlington *v.* Gray, 5 Wharton R. 487.

tor disposed of all such matters referred.[1] So when an arbitrator has not transcended his authority;[2] whether he be a professional or non-professional man,[3] the court will not interfere with his award.[4] It is essential, in such case, however, that the award should be certain,[5] and practicable.[6] Even an arbitration *in pais*, when submitted to and accepted by the parties, cannot be impeached, except on proof of fraud or gross irregularities.[7] An award, like a judgment in a civil suit, cannot, in order to prove the facts it avers, be put in evidence in a criminal prosecution.[8] It has also been held that an award, under the English practice, unlike a verdict or judgment, cannot be received as evidence in the nature of reputation.[9]

IV. JUDGMENTS OF FOREIGN AND SISTER STATES.

§ 801. Whatever may at former periods have been regarded as the law in England, it is now settled in that country that the final judgment of a foreign court is conclusive on the merits if such judgment be for a definite sum;[10] and this even though the judgment proceeded on a mistaken notion of English law.[11] This result, however, was not reached without hesitation, and at one time there was an inclination to hold that a foreign judgment is not to be treated as constituting a record debt, but only as evidence of a simple

Foreign judgments *in personam* are conclusive.

[1] Bhear *v.* Harradine, 7 Ex. R. 269; Harrison *v.* Creswick, 13 C. B. 399; Jewell *v.* Christie, L. R. 2 C. P. 296.

[2] Stroud, in re, 8 C. B. 518.

[3] Fuller *v.* Fenwick, 3 Com. B. 705, 711, per Wilde, C. J.; In re Brown & Croydon Can. Co. 9 A. & E. 526, per Ld. Denman.

[4] Toby *v.* Lovibond, 5 Com. B. 784, per Wilde, C. J.; Barrett *v.* Wilson, 1 C., M. & R. 586; Johnson *v.* Durant, 2 B. & Ad. 925; Phillips *v.* Evans, 12 M. & W. 309.

[5] Williams *v.* Wilson, 9 Ex. R. 90.

[6] Wenman *v.* Mackenzie, 5 E. & B. 447, per Ld. Campbell; Alder *v.* Savill, 5 Taunt. 454; Taylor, § 1498.

[7] Males *v.* Lowenstein, 10 Oh. St. 512; Burrows *v.* Guthrie, 61 Ill. 70; Reynolds *v.* Roebuck, 37 Ala. 408.

[8] R. *v.* Fontaine Moreau, 11 Q. B. 1028.

[9] Evans *v.* Rees, 10 A. & E. 151; 2 2 P. & D. 627, *S. C.*; R. *v.* Cotton, 3 Camp. 444; Wenman *v.* Mackenzie, 5 E. & B. 447; Taylor, § 1498.

[10] Bank of Australasia *v.* Nias, 16 Q. B. 717; Patrick *v.* Shedden, 2 E. & B. 14; Scott *v.* Pilkington, 2 Best & S. 11; Paul *v.* Roy, 15 Beav. 433; Arnott *v.* Redfern, 3 Bing. 353; Doglioni *v.* Crispin, L. R. 1 H. L. 301; Godard *v.* Gray, L. R. 6 Q. B. 139; Ricardo *v.* Garcias, 12 Cl. & F. 368; Castrique *v.* Imrie, L. R. 4 H. L. 414; Gen. St. Nav. Co. *v.* Guillou, 11 Mees. & W. 877; Simpson *v.* Fogo, 1 J. & H. 18; *S. C.* 1 H. & M. 195.

[11] Godard *v.* Gray, L. R. 6 Q. B. 139.

contract debt.[1] But it was finally decided by the house of lords,[2] and by the judicial committee of the privy council,[3] that the home tribunal cannot act as a court of appeal from the foreign tribunal; *i. e.* a foreign judgment cannot be impeached as being erroneous on the merits or founded on a mistake either of fact or law. The question, however, was reserved whether when a foreign court wilfully refuses to apply English law, when by the comity of nations it is applicable, the judgment of such foreign court is then impeachable in an English court. In the opinion of Lord Hatherley it is.[4] To entitle such judgments to be accepted as binding, however, they must be entered in conformity with the settled principles of private international law.[5] Among these principles are the following: —

(1.) The court, in personal actions, must have jurisdiction of the person of the party affected.[6]

(2.) The court, in real actions, must have jurisdiction of the thing.

(3.) The parties interested must have had opportunity to come in and be heard.[7]

(4.) The judgment, if *in personam*, and for a pecuniary claim, must be for a fixed sum.[8]

When offered for plaintiff.

That a plaintiff can rely on a foreign judgment, as the basis of a suit, and that this judgment is at least *primâ facie* proof of his claim, is admitted by all Anglo-American courts by whom the question is discussed. The controversy which has been just noticed is as to the conclusiveness of such foreign judgment. Mr. Smith, in an authoritative note to the Duchess of Kingston's case, has presented the arguments

[1] Hall *v.* Odber, 11 East, 124; Plummer *v.* Woodburne, 4 B. & C. 625; Smith *v.* Nicolls, 5 Bing. N. C. 208.

[2] Castrique *v.* Imrie, L. R. 4 H. L. 415. See Imrie *v.* Castrique, 8 C. B. N. S. 405, overruling Castrique *v.* Imrie, Ibid. I.

[3] Messina *v.* Petrococchino, L. R. 4 P. C. 150; 41 L. J. P. C. 27; 20 W. R. 451.

[4] See Simpson *v.* Fogo, 1 J. & H. 18. Powell's Ev. 4th ed. 129.

[5] Shaw *v.* Gould, L. R. 3 H. of L. 55; Castrique *v.* Imrie, L. R. 4 H. of L. 428; Bischoff *v.* Wethered, 9 Wall. 812; Whart. Confl. of L. 792.

[6] Infra, § 803.

[7] See Whart. Confl. of Laws, § 793; and see Rebstock *v.* Rebstock, 2 Pitts. (Penn.) 124; Crafts *v.* Clark, 31 Iowa, 77. And see supra, § 796.

[8] Henderson *v.* Henderson, 6 Q. B. 288; Sadler *v.* Robins, 1 Camp. 253. That it may be for costs, see Russell *v.* Smyth, 9 M. & W. 810; though see Sheehy *v.* Ass. Co. 2 C. B. (N. S.) 211.

on both sides with his usual clearness. "Now, upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court; that when they do so, it is *de gratiâ*, and from a wish to extend the limits of justice — *ampliare justitiam*. But that it would be to amplify injustice, were they to enforce a sentence which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows, that facts can never so well be inquired into as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated." [1]

[1] 2 Smith's L. C. 686. The decrees of foreign courts in equity, it is said, are open to more doubt than are the judgments of foreign courts of law; but it has been intimated that an English court of chancery would, in a proper case, entertain a bill founded on such foreign decree, for the purpose of giving effect to it in regard to English property. Henderson *v.* Henderson, 6 Q. B. 297, per Ld. Denman; Houlditch *v.* M. of Donegal, 8 Bligh N. S. 301; 2 Cl. & Fin. 470; Lloyd & G. 82, *S. C.*

Judge Story, in a well known passage in his Conflict of Laws, thus urges the conclusiveness of foreign judgments. "It is, indeed," says he, "very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for criminal conversation; is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant or of debt, or of a breach of contract, are all the circumstances to be reëxamined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex aequo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules

A foreign judgment *in personam*, it should be remembered, may come into court, when adduced by the defendant, in two ways: (1.) The plaintiff, having obtained judg- When offered for defendant.

of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule, that the judgment is to be *primâ facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law, *fori rei judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits." Story, Confl. of Laws, § 607.

Mr. Taylor (§ 1553) thus marshals the English authorities on this controversy. It has several times been held by the court of the queen's bench; Henderson *v.* Henderson, 6 Q. B. 288, 298, 299; Ferguson *v.* Mahon, 11 A. & E. 179, 183; 3 P. & D. 143, *S. C.;* Bk. of Australasia *v.* Nias, 16 Q. B. 717; Munroe *v.* Pilkington, 31 L. J. Q. B. 81; 2 B. & S. 11, *S. C., nom.* Scott *v.* Pilkington; once by the court of common pleas; Vanquelin *v.* Bouard, 15 Com. B. N. S. 341; 33 L. J. C. P. 78, *S. C.;* and once by the court of exchequer; De Cosse Brissac *v.* Rathbone, 6 H. & N. 301; 30 L. J. Ex. 238, *S. C.;* that no inquiry can be instituted into the merits of the original action, or the propriety of the decision, and that the defendant is not at liberty to raise any objection, which would have constituted a defence in the foreign court, and which, consequently, should there have been pleaded and finally disposed of. The same doctrine, too, has been advanced with more or less confidence, by Lord Nottingham (Gold *v.* Canham, cited in note to Kennedy *v.* Cassillis, 2 Swanst. 325), Lord Kenyon (Galbraith *v.* Neville, 1 Doug. 6, n.), Lord Ellenborough (Tarleton *v.* Tarleton, 4 M. & Sel. 22), Sir L. Shadwell (Martin *v.* Nicholls, 3 Sim. 458), Lord Wensleydale (citing Martin *v.* Nicolls, in Becquet *v.* MacCarthy, 2 B. & Ad. 954), and the court of exchequer of Ireland (Sims *v.* Thomas, 3 Ir. Law R. 415). On the other hand, Lord Hardwicke (Isquierdo *v.* Forbes, cited by Lord Mansfield in 1 Doug. 6), Lord Mansfield (Walker *v.* Witter, 1 Doug. 1), Chief Baron Eyre (Phillips *v.* Hunter, 1 Doug. 1), Mr. Justice Buller (Galbraith *v.* Neville, 1 Doug. 6, n.; Messin *v.* Ld. Massareene, 4 T. R. 493), Mr. Justice Bayley (Tarleton *v.* Tarleton, 4 M. & Sel. 23), and especially Lord Brougham (Houlditch *v.* M. of Donegal, 8 Bligh N. S. 301, 337–342; 2 Cl. & Fin. 470, 477–479, *S. C.;* Den *v.* Lippmann, 5 Cl. & Fin. 1, 20–22), have strenuously argued that such judgments are only *primâ facie* proof of the facts they aver.

An elaborate view of the same topic will be found in Bigelow on Estoppel, chap. iv.

ment in the same cause of action in a foreign court, sues in the home court on such cause of action, saying nothing about the foreign judgment. In such case it has been ruled that the defendant cannot set up the foreign judgment, if unsatisfied (as he could a domestic judgment), as a defence. The plaintiff, such is the reason given, has no higher remedy in consequence of the foreign judgment, and he cannot issue immediate execution upon it in this country, but can only enforce it by bringing a fresh action on contract.[1] It is however settled, that if the foreign judgment has been satisfied, this will bar the suit.[2] In such case, however, as the plaintiff elects to sue on the contract, and not on the judgment, the contract may be disputed by the defendant.[3] (2.) If, to a suit on an ordinary cause of action, the defendant adduces a foreign judgment, on the same cause of action, in his favor, this, if properly pleaded, will bar the suit.[4] In such case, however, although the plea, in England, need no longer set forth the proceedings and judgment at length,[5] nor contain, as formerly was the case,[6] any formal commencement or conclusion; yet if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country by reason of allegiance, domicil, or temporary presence,[7] or that the foreign court had jurisdiction over the subject matter of the suit, or that, by the law of the foreign country, the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action;[8] or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit;[9] in any of these cases, the plea will be exposed to the risk of being held bad on demurrer.[10] On the other hand, if the defendant, instead of pleading judgment, contents himself

[1] See infra, § 805, and see Smith *v.* Nicolls, 5 Bing. N. C. 208, 220, 221; 7 Scott, 147, *S. C.*; Wilson *v.* Dunsany, 18 Beav. 293.

[2] Barber *v.* Lamb, 29 L. J. C. P. 234; 8 Com. B. N. S. 95, *S. C.*

[3] Infra, § 805.

[4] Phillips *v.* Hunter, 2 H. Bl. 410, per Eyre, C. J.; Plummer *v.* Woodburne, 4 B. & C. 625; 7 D. & R. 25, *S. C.*; Ricardo *v.* Garcias, 12 Cl. & Fin. 368.

[5] Ricardo *v.* Garcias, 12 Cl. & Fin. 638.

[6] Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[7] Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877, 894.

[8] Plummer *v.* Woodburne, 4 B. & C. 625; 7 D. & R. 25, *S. C.*; Frayes *v.* Worms, 10 Com. B. N. S. 149.

[9] Ricardo *v.* Garcias, 12 Cl. & Fin. 368.

[10] Taylor's Ev. § 1548.

with putting it in evidence, it is subject to the contingencies to which, according to local practice, a domestic judgment, when not pleaded, is subject.[1]

§ 802. In this country we have many rulings to the effect that foreign judgments are only *primâ facie* evidence of debt, though most of these rulings rest upon English cases to the same effect, which cases are now, in England, overruled.[2] In New York, however, we have a recent ruling, accepting the final conclusions of the English courts, and holding that a foreign judgment *in personam* binds parties appearing before the court rendering the judgment, when such court has jurisdiction.[3] Such, on the principles of private international law now prevalent, is the better view, assuming always, as will presently be more fully seen, that the court rendering judgment had jurisdiction, and the parties were duly before the court.

§ 803. A foreign judgment, as we have seen,[4] is always impeachable for want of jurisdiction;[5] and hence, for want of personal service, within the jurisdiction, on the defendant, this being internationally essential to jurisdiction.[6] Thus where a settlement was made in Eng-

Impeachable for want of jurisdiction or fraud.

[1] See supra, § 765.

[2] Middlesex Bank *v.* Butmann, 29 Me. 19; Rankin *v.* Goddard, 54 Me. 28; Taylor *v.* Barron, 30 N. H. 78; Boston Co. *v.* Hoitt, 14 Vt. 92; Bartlett *v.* Knight, 1 Mass. 400; Bissell *v.* Briggs, 9 Mass. 462; Aldrich *v.* Kinney, 4 Conn. 380; Hitchcock *v.* Aicken, 1 Caines, 460; Pawling *v.* Bird, 13 Johns. R. 192; Benton *v.* Burgot, 10 S. & R. 240; Taylor *v.* Phelps, 1 Har. & G. 492; Barney *v.* Patterson, 6 Har. & J. 182; Pritchett *v.* Clark, 3 Har. (Del.) 517; Williams *v.* Preston, 3 J. J. Marsh. 600; Garland *v.* Tucker, 1 Bibb, 361; Clark *v.* Parsons, Rice, 16; Bimeler *v.* Dawson, 4 Scam. 536. See Burnham *v.* Webster, 1 Wood. & M. 172.

It should be noticed that, "in two of the cases just cited (Barney *v.* Patterson, and Taylor *v.* Phelps), it is said that, when foreign judgments are only incidentally involved, they have the same conclusiveness as domestic judgments; and in Cummings *v.* Banks, 2 Barb. 602, it is said that all the American authorities agree in this proposition." Bigelow on Estoppel (2d ed.), 177.

[3] Lazier *v.* Westcott, 26 N. Y. 146. See Cummings *v.* Banks, 2 Barb. 602.

[4] Supra, § 801.

[5] Schibsby *v.* Westenholz, L. R. 6 Q. B. 155; Novelli *v.* Rossi, 2 B. & Ad. 757; Blackburn, J., Castrique *v.* Imrie, 39 L. J. C. P. 358; Shelton *v.* Tiffin, 6 How. 163; Carleton *v.* Bickford, 13 Gray, 591; Folger *v.* Ins. Co. 99 Mass. 266; Borden *v.* Fitch, 15 Johns. R. 121; Andrews *v.* Herriot, 4 Cow. 524; Kerr *v.* Kerr, 41 N. Y. 272.

[6] Ferguson *v.* Mahan, 11 Ad. & E. 179; Don *v.* Lippman, 5 Cl. & Fin.

land on a marriage between a Turk domiciled in England and an English lady, the former promising to reside always in England, Hall, V. C., held that a Turkish court could not, by a decree of divorce pronounced without notice to the wife or other persons interested under the settlement, make void the settlement.[1] So it has been held, that a foreign judgment can be contested, even by parties and privies, for fraud in its concoction;[2] or for its flagrant violation of justice;[3] or for non-identity of subject matter;[4] or for incurable defectiveness or obscurity;[5] or for manifest errors in its processes;[6] or for any violation of the principles of international law.[7]

1; Cavan *v.* Stewart, 1 Stark. 525; Houlditch *v.* Donegal, 8 Bligh N. S. 338; Vallee *v.* Dumergue, 4 Ex. 290; Brook, in re, 16 Com. B. N. S. 403; Kuehling *v.* Lebermann, 2 Weekly Notes, 616; Kerr *v.* Condy, 9 Bush, 372.

A plea to the jurisdiction, in order to be good, must aver that the defendant was not a subject of the foreign state, or resident, or even present in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicil, or temporary presence, by the decision of the courts. Gen. Nav. Co. *v.* Guillou, 11 M. & W. 894; Cowan *v.* Braidwood, 1 M. & Gr. 892, 893, per Tindal, C. J.; Russell *v.* Smyth, 9 M. & W. 810; Reynolds *v.* Fenton, 3 Com. B. 187. If true, it may be in addition averred that the defendant had no notice of the suit. Cowan *v.* Braidwood, 1 M. & Gr. 893. It has been further said (though this position, except in suits commenced by attachment, cannot be maintained, at least in the United States), that the plea must allege that the defendant was not the owner (see Taylor's Evidence, § 1537) of real property in such state; for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present though really absent. Cowan *v.* Braidwood, 1 M. & Gr. 882; 2 Scott N. R. 138, *S. C.*; Douglas *v.* Forrest, 4 Bing. 686, 701–703; 1 M. & P. 663, *S. C.*

[1] Colliss *v.* Hector, L. R. 19 Eq. 334; 23 W. R. 485; 44 L. J. Ch. 267; Powell's Evidence (4th ed.), 234.

[2] Phillimore Int. Law, iv. 678. See Wood *v.* Watkinson, 17 Conn. 500; Welsh *v.* Sykes, 3 Gilm. 197.

[3] Price *v.* Dewhurst, 8 Sim. 279; Ferguson *v.* Mahon, 11 Ad. & E. 181; Henderson *v.* Henderson, 6 Q. B. 298; Cowan *v.* Braidwood, 1 M. & Gr. 895; Windsor *v.* McVeigh, supra, § 796.

[4] Ricardo *v.* Garcias, 12 Cl. & Fin. 368. See Burnham *v.* Webster, 1 Wood. & M. 172.

[5] Obicini *v.* Bligh, 8 Bing. 335.

[6] Reimers *v.* Druce, 23 Beav. 145; Simpson *v.* Fogo, 1 Johns. & Hem. 18; 1 Hem. & M. 195; Windsor *v.* McVeigh, supra, § 796.

[7] Shaw *v.* Gould, L. R. 3 H. of L. 55; Bank *v.* Nias, 16 Q. B. 717; Baring *v.* Clagett, 3 B. & P. 215; Wolff *v.* Oxholm, 6 M. & Sel. 92; Simpson *v.* Fogo, 1 Johns. & Hem. 18; 1 Hem. & M. 195; Kerr *v.* Condy, 9 Bush, 372. When the want of service is to be taken advantage of by plea, it is nec-

§ 804. We will elsewhere see,[1] that the proceedings of courts of justice are presumed to be regular, until the contrary appears. This presumption is applicable so far to foreign judgments, that if the record itself is regular, a party, suing on such judgment, need not allege in his declaration, either that the foreign court had jurisdiction over the parties or the cause,[2] or that the proceedings had been properly conducted.[3] On the other hand, as we have seen, there are English cases intimating that it is still necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or justification.[4]

Jurisdiction presumed if proceedings are regular.

§ 805. Whether a foreign judgment, entered on a debt, merges the debt, is a question which has been already discussed. It has been argued that when the foreign court has jurisdiction *in personam*, there is such a merger;[5] but recently this has been doubted, and it has been held,[6] that a plaintiff, who has obtained a foreign judgment in his favor, may either resort to such original cause, or bring an action on contract upon the judgment.[7] At the same time, as has been prop-

Foreign judgment as a merger.

essary, so it has been held in England, for the defendant to negative every state of facts on which the judgment can be supported. It is, therefore, prudent to aver, that, without process, the suit in the foreign court would be a nullity, unless, so it has been intimated, the plea contains a distinct averment that the defendant has had no notice or knowledge whatever of the suit. Reynolds *v.* Fenton, 3 Com. B. 187; Sheehy *v.* The Profess. Life Assur. Co. 13 Com. B. 787; Maubourquet *v.* Wyse, L. R. 1 C. L. 471. It will, at the same time, be remembered that, in Ferguson *v.* Mahon, 11 A. & E. 179; 3 P. & D. 143, *S. C.*, the plea was held good, though it merely denied a notice of process; but Mr. Taylor (§ 1540) objects that that case, which was an action on an Irish judgment, can only be sustained, if at all, on the ground that an English court will judicially recognize the fact that an action must be commenced by process in Ireland. Reynolds *v.* Fenton, 3 Com. B. 191, per Maule, J.

[1] Infra, § 1302.

[2] Robertson *v.* Struth, 5 Q. B. 941.

[3] Cowan *v.* Braidwood, 1 M. & Gr. 882, 892, 895, per Maule, J.; 2 Scott N. R. 138, *S. C.*

[4] Collett *v.* Ld. Keith, 2 East, 260; Gen. St. Navig. Co. *v.* Guillou, 11 M. & W. 877. See Ricardo *v.* Garcias, 12 Cl. & Fin. 377. Supra, §§ 801–3.

[5] Ricardo *v.* Garcias, 12 Cl. & Fin. 368; McGilvray *v.* Avery, 30 Vt. 538; Westlake Priv. Int. Law, art. 393.

[6] See supra, § 801.

[7] Hall *v.* Odber, 11 East, 118, 126, 127, per Bayley, J.; Smith *v.* Nicolls, 5 Bing. N. C. 221, 222, per Tindal, C. J.; Bk. of Australasia *v.* Harding, 19 L. J. C. P. 345; 9 Com. B. 661, *S. C.*; Kelsall *v.* Marshall, 26 L. J. C. P. 19; 1 Com. B. N. S. 241, *S. C.*

erly observed, when the plaintiff waives the judgment, the defendant, notwithstanding the production of the judgment, may dispute the plaintiff's demand; for it may well be contended, that, by this mode of declaring, the plaintiff has himself courted a reinvestigation of the merits.[1]

Foreign judgment cannot be disputed collaterally.

§ 806. What has been said with regard to the right of impeaching foreign judgments applies only, it must be remembered, to cases where the validity of such judgments comes directly in litigation. It is acknowledged, even by those who hold that a foreign judgment is open to direct attack, that when it comes up *collaterally* in question, it cannot be disputed.[2]

Confederate judgments.

§ 807. Judgments of courts of the Confederate States during the late war are to be treated, it is said, as foreign judgments.[3] But to this view there is a serious practical objection. It is logical, indeed, to adopt the theory that the seceding states were never out of the Union, and that consequently judgments of such states are under the protection of the federal Constitution. It is also logical to treat the courts of the Confederate States as out of the pale of the Constitution. The difficulty, however, is in pleading. The declaration would aver a judgment in a state not belonging to the American Union. Such a declaration would be virtually on a foreign judgment. But a foreign judgment, rendered in the courts of a state whose independence our own government has not acknowledged, cannot be recognized as a judgment on which suit can be brought. The better view is to treat all judgments of distinctively Confederate courts created for national purposes by the Confederate government as nullities; but to regard all judgments of duly constituted courts of the seceding states as judgments of states in the Union, unless when such judgments in some way impair the rights of the federal government, or of citizens under the Constitution.[4]

See Middlesex Bank *v.* Butman, 29 Me. 19; McVicker *v.* Beedy, 31 Me. 314.

[1] 2 Smith L. C. 683.

[2] See Tarleton *v.* Tarleton, 4 M. & Sel. 20; recognized by Lord Brougham in Houlditch *v.* M. of Donegal, 8 Bligh N. S. 341; 2 Cl. & Fin. 478, *S. C.*

[3] Pepin *v.* Lachenmeyer, 45 N. Y. 27; Shaw *v.* Lindsay, 46 Ala. 290. *Per contra*, Penn. *v.* Tollison, 26 Ark. 545.

[4] Horn *v.* Lockhart, 17 Wall. 580. See White *v.* Cannon, 6 Wall. 443; Hickman *v.* Jones, 9 Wall. 197; Steere

§ 808. So far as concerns the judgments rendered on the merits in the several states of the American Union, when offered in a sister state as the basis of a suit, it is now agreed by the state courts, under the lead of the supreme court of the United States, that *nil debet* is a bad plea to such a judgment; that the proper plea to it is *nul tiel record;* and that it is conclusive on the merits.[1] It is nevertheless open to a party to deny the jurisdiction of the court rendering the judgment;[2] and as evidencing want of jurisdiction to aver by plea that the defendant had not been served with process, or that the attorney is without authority to appear.[3]

Judgments of states of American Union are conclusive.

v. Tenney, 50 N. H. 463. See Pennywit *v.* Kellogg, 1 Cinn. 17. In Alabama it has been held, that a judgment rendered by a court under the Confederate system would be treated as only *primâ facie* proof, after reconstruction. Martin *v.* Hewitt, 44 Ala. 418; Mosely *v.* Tuthill, 45 Ala. 621. In Arkansas such judgments have been held void. Penn *v.* Tollison, 26 Ark. 545; Thompson *v.* Mankin, 26 Ark. 586.

[1] Mills *v.* Duryee, 7 Cranch, 481; Hampton *v.* McConnel, 3 Wheat. 234; Logansport Gas Co. *v.* Knowles, 2 Dill. 421; McElmoyle *v.* Cohen, 13 Pet. 312; Christmas *v.* Russel, 5 Wall. 290; Sweet *v.* Brackley, 53 Me. 346; Rankin *v.* Goddard, 54 Me. 28; Bissell *v.* Briggs, 9 Mass. 462; Com. *v.* Green, 17 Mass. 515; Hall *v.* Williams, 6 Pick. 232; Stockwell *v.* McCracken, 109 Mass. 84; Rocco *v.* Hackett, 2 Bosw. 579; Rogers *v.* Burns, 27 Penn. St. 525; Merchants' Ins. Co. *v.* De Wolf, 33 Penn. St. 45. See Brinkley *v.* Brinkley, 50 N. Y. 184; De Ende *v.* Wilkinson, 2 Pat. & H. 663; Matoon *v.* Clapp, 8 Oh. 248; Burnley *v.* Stevenson, 24 Oh. St. 474; Indiana *v.* Helmer, 21 Iowa, 370; Cone *v.* Hooper, 18 Minn. 533; Walton *v.* Sugg, Phil. (N. C.) 98.

[2] D'Arcy *v.* Ketchum, 11 How. 165; Board of Public Works *v.* Columbia College, 17 Wall. 521; Thompson *v.* Whitman, 18 Wall. 457; Galpin *v.* Page, 18 Wall. 350; Knowles *v.* Gas Co. 19 Wall. 58; Hill *v.* Mendenhall, 21 Wall. 453; Hall *v.* Williams, 6 Pick. 232; Folger *v.* Ins. Co. 99 Mass. 266; Kerr *v.* Kerr, 41 N. Y. 272; Aldrich *v.* Kinney, 4 Conn. 380; Shumway *v.* Stillman, 4 Cow. 292; Starbuck *v.* Murray, 6 Wend. 447; Kerr *v.* Kerr, 41 N. Y. 272; Reel *v.* Elder, 62 Penn. St. 308; Eby's Appeal, 70 Penn. St. 308; Noble *v.* Oil Co. 2 Weekly Notes; Westcott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304.

[3] Ibid.; Watson *v.* Bank, 4 Metc. 343; Denison *v.* Hyde, 6 Conn. 508; Shumway *v.* Stillman, 6 Wend. 447; Puckett *v.* Pope, 3 Ala. 552; Harshey *v.* Blackmarr, 20 Iowa, 161.

On this topic we have, in 1876, the following opinion from the supreme court of Massachusetts: "It appeared at the trial in the superior court, that at the time the suit in Pennsylvania was commenced and at the time judgment therein was rendered, both parties were residents of that state and subject to the jurisdiction of its courts. The record of the former suit shows that personal service was made upon the defendant. As the court had jurisdiction of the subject matter and of the parties, the judgment was conclusive against the defendant in Pennsylvania, and it is

§ 809. It follows, therefore,[1] that what has been said in respect to domestic judgments is applicable, by reason of the provision in the Constitution of the United States, to a judgment of one state in the American Union, when sued on in another state. Such judgment, as is a domestic judgment, is open to be impeached for fraud or want of jurisdiction, or for gross irregularities or perversions of justice.[2]

Such judgment may be avoided by proof of fraud or non-jurisdiction.

V. ADMINISTRATION AND PROBATE.

§ 810. We have already said that a judgment as to *status* is not necessarily extra-territorially binding. Under this head may be noticed the German *Todes-Erklärung*, or judicial declaration of death, which, though a protection to innocent third persons, is only *primâ facie* proof, so far as concerns the parties, of the facts it recites.[3] Still less can letters of administration be regarded as proof of the fact of death of the alleged decedent; and when offered, even as between parties or privies, they may be rebutted and invalidated by proof that the party whom they declared to be dead was really alive.[4] There is no question that, so far as con-

Letters of administration proof of title but not of recital.

difficult to see how he could, by removing to another state, acquire the right to impeach it by proof that no service was made on him, or that it was fraudulently obtained. Carleton *v.* Bickford, 13 Gray, 591; Ewer *v.* Coffin, 1 Cush. 23; Hall *v.* Williams, 6 Pick. 232. But it is not necessary to decide that question. The superior court ruled that the record made a *primâ facie* case for the plaintiff, and permitted the defendant to introduce evidence upon the issues of service of the original writ upon him, and of fraud in obtaining the judgment. Upon those issues, the defendant offered to show that he did not owe the plaintiff anything, and the court properly rejected the evidence. It has no tendency to contradict the return of the officer, whose duty it was to serve the writ without any inquiry as to the justice of the claim. The ground that the defendant did not owe the debt, should have been taken in the former suit. Upon this the judgment is conclusive, and the defendant cannot retry the merits of the case, by alleging that it was fraudulently obtained." Brainard *v.* Fowler, 119 Mass. 265, Morton, J.

[1] See authorities cited in two previous notes.

[2] See authorities cited, supra, § 795 *et seq.*

[3] Whart. Confl. of L. § 133.

[4] 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; Tisdale *v.* Ins. Co. 26 Iowa, 170; Lancaster *v.* Ins. Co. 62 Mo. 121; French

cerns the *effect* of a judgment of probate,[1] it is evidence as against all the world; and that the letters are *primâ facie* proof of the title of the administrator, if the court has jurisdiction.[2] A court of high authority has gone so far as to hold that a grant of letters to A. as administrator of B., when B. is still living, though supposed to be dead, is a protection to a person making *bonâ fide* payment to A. of a debt due B.[3] To sustain this conclusion it is argued by Earl, J., that the decision of a court of probate, as to the death of a party, cannot be collaterally impeached. But this conclusion assumes that the probate court had jurisdiction, which, unless under a peculiar and local statute, could not be if there was no deceased person to be administered to. Apart from such statute, we must hold that letters of administration to a living person are void.[4] We must, on similar reasoning, hold that when the suit depends upon proof of the death of a particular person, as a substantive fact, letters of administration, being *res inter alios acta*, are inadmissible to prove such death.[5] And it is now settled by the supreme court of the United States, that letters of administration are not admissible as evidence, in proof of death, in a suit brought by a plaintiff in his individual character, and not as administrator, to recover a claim on a policy of life

v. Frazier, 7 J. J. Marshall, 426; English *v.* Murray, 13 Tex. 366. See fully infra, § 1278.

[1] See supra, § 759.

[2] Blackham's case, 1 Salk. 290; Barrs *v.* Jackson, 1 Phill. 588; Cutts *v.* Haskins, 9 Mass. 543; Holyoke *v.* Harkins, 9 Pick. 259; Barker, ex parte, 2 Leigh, 719.

Thus in New York, "when the complaint alleges the death of the intestate, and the due and legal appointment of the plaintiff as administrator of the estate, and the answer contains only a general denial of those allegations, the letters of administration in due form, produced in evidence, are sufficient to establish the representative character in which the plaintiff assumes to sue. 2 R. S. 80, §§ 56, 58; 2 Steph. N. P. 1904; Starkie on Ev. 9th Amer. ed. *394, 361; 3 Phil. on Ev. *665, 548, 5th Am. ed.; Newman *v.* Jenkins, 10 Pick. 515; Jeffers *v.* Radcliff, 10 N. H. 242; and see Dale Adm. *v.* Roosevelt, 8 Cow. 333. The letters produced in evidence in this case were sufficient, *primâ facie*, to prove the plaintiff's character as administrator of the effects of Charles Belden, deceased." Folger, J., Belden *v.* Mecker, 47 N. Y. 310.

[3] Roderigas *v.* Savings Inst. N. Y. Ct. of Appeals, 1876, Am. Law Rep. Ap. 1876, 205.

[4] Allen *v.* Dundas, 3 T. R. 125; Jochumsen *v.* Bk. 3 Allen, 87; Griffith *v.* Frazier, 8 Cranch, 9, per Marshall, C. J.; Fisk *v.* Norvel, 9 Tex. 13; and see a learned note of Judge Redfield, in Am. Law Reg. Ap. 1876, 212.

[5] See Carroll *v.* Carroll, 60 N. Y. 123, quoted infra, § 1278.

insurance, the right of action depending on the death of the third person, whose life the policy insured.[1] Nor is there any reason why such letters should be evidence to prove death, in an action brought on the policy by the administrator.[2]

§ 811. A probate of a will is the judicial action of a court having jurisdiction, admitting a will as *primâ facie* genuine and valid. Technically it is a copy of the will, sealed with the seal of the court of probate, and attached to a certificate that the will has been proved, and that administration of the goods of the deceased has been granted to one or more of the executors named, or, in default of executors, to administrators. A probate of a will is only *primâ facie* proof of the validity of the will as against parties seeking to avoid it on ground of insanity,[3] or on the ground of other incompetency,[4] or of imperfect execution.[5] And a person indicted for forging a will cannot set up the probate of the will as even *primâ facie* a defence.[6] Letters of administration are conclusive as to the probate of a will to which the letters are attached, and can only be avoided by showing the will to be a forgery, or that there is a subsequent will.[7] And the probate is at least *primâ facie* proof of the title of the executor to sue.[8] On the other hand, where there is a decree of a court of probate, as to a matter exclusively within its jurisdiction, such matter being at issue, and intelligently decided, the decree is conclusive.[9] This rule has been extended to a sentence of a court of

Probate of a will not conclusive as to strangers, but otherwise as to parties.

[1] Mutual Ins. Co. *v.* Tisdale, 91 U. S. (1 Otto) 238; citing 2 Phil. on Evid. (ed. 1868) 93, *m;* Clayton *v.* Gresham, 10 Ves. 288; Moons *v.* De Bernales, 1 Russ. 307.

[2] See Cent. L. J., March 17, 1876. In an Irish case, however, where the question raised was whether a child had been born alive or dead, Lord Chancellor Sugden held, that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive. Reilly *v.* Fitzgerald, 6 Ir. Eq. 349. See Jeffers *v.* Radcliff, 10 N. H. 242.

[3] Marriot *v.* Marriot, 1 Str. 671.

[4] Dickinson *v.* Hayes, 31 Conn. 417.

[5] Charles *v.* Huber, 78 Penn. St. 449.

[6] R. *v.* Buttery, R. & R. 342.

[7] Bradley, J., Mutual Ins. Co. *v.* Tisdale, 91 U. S. (1 Otto) 243; citing 2 Smith's Ld. Cas. (6th Am. ed.) 669; Vanderpoel *v.* Van Valkenburg, 6 N. Y. 190; Colton *v.* Ross, 2 Paige, 396.

[8] Noel *v.* Walls, 1 Lev. 235; Marriot *v.* Marriot, 1 Str. 671; Belden *v.* Meeker, 47 N. Y. 307; Carroll *v.* Carroll, 60 N. Y. 121; Charles *v.* Huber, 78 Penn. St.; and see fully infra, § 1278. See Spencer *v.* Williams, L. R. 2 P. & D. 230.

[9] Potter *v.* Webb, 2 Greenl. 257;

probate declaring a particular person to be next of kin.[1] But the probate of a will purporting to have been executed by a married woman in pursuance of a power, is no evidence that the power has been duly executed.[2] It need scarcely be added that executors and other parties claiming under a will are bound by the decree of the court of probate establishing it.[3] With regard to recitals (*e. g.* that of the presence of a party in court), a decree of a court of probate has been held to be *primâ facie* evidence as to strangers,[4] though this can only be good to prove the record action of the court. Such recitals cannot be received to estop parties not served, but who should have been served.[5]

§ 812. Inquisitions of lunacy are necessarily *ex parte*, so far as concerns the person claimed to be a lunatic; since, on the assumption by which alone they have validity, he is a lunatic, and if a lunatic, he is not capable of putting in a valid appearance. Were it not for the theory, hereafter noticed, that such proceedings are *in rem*,[6] they could not be held admissible against strangers; and at the most, as to strangers dealing *bonâ fide* with the alleged lunatic, they are but

Inquisition of lunacy *primâ facie* proof.

Lawrence *v.* Englesby, 24 Vt. 42; Loring *v.* Steineman, 1 Metc. (Mass.) 204; Jourden *v.* Meier, 31 Mo. 40; Carter *v.* McManus, 15 La. An. 676.

[1] Barrs *v.* Jackson, 1 Phill. 582; Thomas *v.* Ketteriche, 1 Ves. Sen. 333; Doglioni *v.* Crispin, L. R. 1 H. L. 301.

[2] Barnes *v.* Vincent, 5 Moo. P. C. 201. See Noble *v.* Willock, L. R. 2 P. & D. 276.

In respect to recent English authorities on this point, it must be remembered that the act of parliament passed in 1857 for the establishment of the court of probate (20 & 21 Vict. c. 77; and 20 & 21 Vict. c. 79, Ir.) has materially altered the law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed. Formerly these documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to real estate. Doe *v.* Calvert, 2 Camp. 389, per Lord Ellenborough. The ecclesiastical tribunals by which they were granted had no control over devises of real property; and even when a will of lands was irretrievably lost, nothing would induce them to look at the probate. Doe *v.* Calvert, 2 Camp. 389, per Ld. Ellenborough. In respect to personalty, however, the probate would have furnished conclusive evidence. Allen *v.* Dundas, 3 T. R. 125. In this country this distinction never was recognized, and consequently the decisions based on it have no authority in our courts. See Taylor's Ev. § 1565.

[3] Judson *v.* Lake, 3 Day, 318; Lovelady *v.* Davis, 33 Miss. 577; Potter *v.* Adams, 24 Mo. 159.

[4] Sawyer *v.* Boyle, 21 Tex. 28. See Lovell *v.* Arnold, 2 Munf. 167.

[5] Randolph *v.* Bayue, 44 Cal. 366.

[6] See infra, § 817.

primâ facie proof.[1] As to parties who promote such an inquisition, however, it is conclusive, so far as to preclude those taking part in the procedure from contesting the insanity of the alleged lunatic at the particular time.[2]

V. JUDGMENT AS PROTECTION TO A JUDGE.

Judgment a conclusive protection to judge.

§ 813. Another important evidentiary property of judgments is founded upon the rule of law which, on grounds of policy, protects judges from collateral responsibility for errors of judgment. A judge, whether inferior or otherwise, orders a seizure of property, on a case being proved before him, which in his opinion justifies such seizure. He is sued for trespass, and in his defence the record of his judgment is produced. It may be that this record assumes as proved one of the very facts necessary to the jurisdiction of the court. But however this may be, the judgment is conclusive as to these facts.[3] In the leading case on this topic,[4] the defendants, magistrates of London, were sued in trespass for directing the seizure, under the "Bum-boat" Act, subsequently repealed, of a vessel; and it was part of the plaintiff's case that the vessel, instead of being a "Bum-boat," which condition was necessary to give the magistrate jurisdiction, was a ship. The plaintiffs offered on trial, therefore, to prove that the boat was not a bum-boat, but this they were not permitted to do, the court holding that the record was exclusive evidence of the points mooted by the defendants. The record was then put in evidence, and it being found to contain no error on its face, and to exhibit a full justification for the defendants, the plaintiffs were nonsuited. On a motion to take off the nonsuit, the plaintiffs' counsel urged strongly that if the vessel were not a bum-boat, the magistrates had no jurisdiction, and that it was admissible, therefore for the plaintiffs to show the character of the vessel, for the purpose of showing such want of jurisdiction. The court, however, held that the evidence was properly rejected; the reasons given being that the question as to whether the vessel was a

[1] See cases cited infra, § 1254.

[2] See infra, § 1254; Houstoun, in re, 1 Russ. R. 312.

[3] Basten *v.* Carew, 3 B. & C. 649; Mould *v.* Williams, 5 Q. B. 469.

[4] Brittain *v.* Kinnaird, 1 B. & B. 432; affirmed in R. *v.* Bolton, 1 Q. B. 74; R. *v.* Buckinghamshire, 3 Q. B. 809; Mould *v.* Williams, 5 Q. B. 473

bum-boat was that which the law expressly committed to the judgment of the magistrates, and "that if a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction." No doubt there is a force in these reasons which well deserves the commendation afterwards bestowed on them by Lord Denman, C. J., and Coleridge, J.[1] If a statute says, "A magistrate is authorized to determine a particular issue," and if the policy of the law requires, as it does, that no magistrate shall be liable to a private suit for an erroneous judgment, then for an erroneous determination of such particular issue the magistrate cannot be made liable to private suit. Yet to the conclusiveness of this argument it is essential that the issue should be one the legislature really commits to the magistrate for determination. It is a *petitio principii* to say, "The case is within the magistrate's jurisdiction, because he has decided a particular fact in a particular way; and he has decided that fact in a particular way, because the case is within his jurisdiction." Suppose, for instance, in an action of trespass against a magistrate for executing process out of his county, the record should aver the process to be executed within the county, would this conclude the plaintiff? Or, under the recent statutes authorizing vagrants to be arrested and summarily imprisoned, would it be an answer, supposing a man of known respectability and gravity should be so arrested and should sue the magistrate, for the magistrate to say, "You are a vagrant, because the record says so; and the record says so, because you are a vagrant?" Hence it is that the position that the record of a magistrate is conclusive in his favor, has been regarded in this country as advanced too far when it includes those points which are the prerequisites to the attaching of jurisdiction.[2] But however this may be (and the point is one of anxious difficulty), we must regard it as settled that in all other respects the magistrate's record, if on its face regular, is conclusive in his favor if sued civilly for an erroneous judgment. It should be, in any view, kept in mind, that the record only protects a judge when acting in a judicial capacity.[3] It has conse-

[1] R. *v.* Bolton, 1 Q. B. 74; R. *v.* Buckinghamshire Justices, 3 Q. B. 809.

[2] Clapper, ex parte, 3 Hill (N. Y.), 458.

[3] Fernley *v.* Worthington, 1 M. & Gr. 491.

quently been held that a magistrate's warrant cannot be set up by him as a defence to an action of trespass brought against him for issuing a warrant of distress to enforce payment of a highway rate, should the rate prove invalid; for although the rate must be good in order to give him jurisdiction, he cannot judicially decide upon its validity.[1]

VII. JUDGMENTS IN REM.

Admiralty judgments good against all the world.

§ 814. By Anglo-American law, the decree of a court of admiralty or of exchequer, having jurisdiction, when the proceedings are *in rem*, in cases of collision, prize, or forfeiture, has extra-territorial validity, whether the court be foreign or domestic.[2] This ubiquity of authority is applied even in cases where the sentence is founded on mistake of law.[3] It is otherwise, however, if the jurisdiction does not appear, or if there was no summons or hearing,[4] or where the sentence is outrageously unjust.[5] The decree of a court of admiralty in this country is held conclusive as to the essential facts on which the decree rests;[6] and this view is also now accepted

[1] Mould *v.* Williams, 5 Q. B. 476, per Ld. Denman; Weaver *v.* Price, 3 B. & Ad. 409; Morrell *v.* Martin, 3 M. & Gr. 593, per Tindal, C. J.; Ld. Amherst *v.* Ld. Sommers, 2 T. R. 372; Taylor's Ev. § 1485.

[2] Stringer *v.* Ins. Co. L. R. 4 Q. B. 676; Hughs *v.* Cornelius, Ld. Ray. 473; Scott *v.* Shearman, 2 W. Black. 977; Lothian *v.* Henderson, 3 B. & P. 499; Bernardi *v.* Motteux, 2 Doug. 574; The Helena, 4 Ch. Rob. 3; Cooke *v.* Sholl, 5 T. R. 255; Godard *v.* Gray, L. R. 6 Q. B. 139; Dalgleish *v.* Hodgson, 7 Bing. 504; Bolton *v.* Gladstone, 5 East, 160; Croudson *v.* Leonard, 4 Cranch, 434; Peters *v.* Ins. Co. 3 Sumn. 389; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Mankin *v.* Chandler, 2 Brock. 125; Dunham *v.* Ins. Co. 1 Low. 253; The Vincennes, 3 Ware, 171; French *v.* Hall, 9 N. H. 137; Whitney *v.* Walsh, 1 Cush. 29; Denison *v.* Hyde, 6 Conn. 508; Grant *v.* McLachlin, 4 Johns. 34; Gelston *v.* Hoyt, 13 Johns. 561; 3 Wheat. 246; Street *v.* Ins. Co. 12 Rich. (S. C.) 13; Duncan *v.* Stokes, 47 Ga. 593. See Brown *v.* Bridge, 106 Mass. 563.

[3] Imrie *v.* Castrique, 8 C. B. N. S. 403; L. R. 4 H. L. 414; Williams *v.* Amroyd, 7 Cranch, 423.

[4] Windsor *v.* McVeigh, supra, § 796; The Griefswald, Swabey, 430; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Rose *v.* Himely, 4 Cranch, 241; Slocum *v.* Wheeler, 1 Conn. 429; Sawyer *v.* Ins. Co. 12 Mass. 291. See Denison *v.* Hyde, 6 Conn. 508.

[5] Ibid. As to foreign prize judgments, it is well to remember that Lord Thurlow and Lord Ellenborough held that the practice of receiving such judgments at all in evidence rested upon an overstrained comity, and was often productive of cruel injustice. Fisher *v.* Ogle, 1 Camp. 419, 420; Donaldson *v.* Thompson, Ibid. 432.

[6] Croudson *v.* Leonard, 4 Cranch,

in England.[1] It is otherwise, however, as to the proceedings of foreign courts acting irregularly, and without proper pleadings.[2] Nor can recitals of facts not absolutely necessary to the decree bind strangers.[3] In cases of condemnation, the ground of condemnation, to be conclusive, must clearly appear.[4] So it is held in England that the decree may be disputed and the facts opened, when the language of the sentence, by setting out several reasons for judgment, leaves it uncertain whether the ship was condemned upon a ground which would warrant its condemnation by the law of nations, or upon other ground, which amounts only to a breach of the municipal regulations of the condemning country.[5] In any way it is agreed that the decree is conclusive only as to matters essential to the decree.[6]

§ 815. Independently of prize and admiralty judgments, which have been just noticed, a judgment *in rem*, entered by a court having jurisdiction, is conclusive everywhere

Judgment *in rem* binds all the world.

434; Baxter *v.* Ins. Co. 6 Mass. 277; Calhoun *v.* Ins. Co. 1 Binn. 299; Street *v.* Ins. Co. 12 Rich. (S. C.) 13; Groning *v.* Ins. Co. 1 Nott & McC. 537. *Contra*, Johnson *v.* Ludlow, 1 Caines Sel. Ca. 30; Radcliff *v.* Ins. Co. 9 Johns. 277; Ocean Ins. Co. *v.* Francis, 6 Cow. 404; Thompson *v.* Stewart, 8 Conn. 171; Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Bailey *v.* Ins. Co. 1 Treadw. (S. C.) 381; Bourke *v.* Granberry, Gilm. (Va.) 16. See Bigelow on Estoppel, 2d ed. 151 *et seq.*

[1] Lothian *v.* Henderson, 3 Bos. & P. 499; Hobbs *v.* Henning, 17 C. B. N. S. 791.

[2] Bradstreet *v.* Ins. Co. 3 Sumn. 600; Sawyer *v.* Ins. Co. 12 Mass. 291.

[3] Van Vechten *v.* Griffiths, 4 Abb. (N. Y.) App. 487.

[4] See Lothian *v.* Henderson, *ut supra;* Christie *v.* Secretran, 8 T. R. 192; Bradstreet *v.* Ins. Co. 3 Sumn. 600; Robinson *v.* Jones, 8 Mass. 536; Gray *v.* Swan, 1 Har. & J. 142.

It should be remembered that Tindal, C. J., has held that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only. Dalgleish *v.* Hodgson, 7 Bing. 504; Fisher *v.* Ogle, 1 Camp. 418, per Ld. Ellenborough. And it is argued that if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show that in fact the judgment had proceeded upon some other ground than that of an infraction of neutrality. Calvert *v.* Bovill, 7 T. R. 527, per Lawrence, J. See Taylor's Ev. § 1542.

[5] Dalgleish *v.* Hodgson, 7 Bing. 495, 504; 5 M. & P. 407, *S. C.;* Hobbs *v.* Henning, 17 Com. B. N. S. 791; 34 L. J. C. P. 117, *S. C.;* Bernardi *v.* Motteux, 2 Doug. 575; Calvert *v.* Bovill, 7 T. R. 523; Baring *v.* Clagett, 3 B. & P. 215; Taylor's Ev. § 1542.

[6] Calvert *v.* Bovill, 7 T. R. 523; Maley *v.* Shattuck, 3 Cranch, 458; Fitzsimmons *v.* Ins. Co. 4 Cranch, 186.

and against everybody,[1] provided the court have jurisdiction *in rem* as to the object of the judgment.[2] Mr. Smith, in his Leading Cases,[3] defines a judgment *in rem* to be "an adjudication pronounced upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose;" and this definition is declared by Mr. Taylor to be "the best, if not the only reliable one, to be found in the books;" but he at the same time suggests that the definition may be regarded as unduly broad, as including criminal convictions, and inquisitions in lunacy.[4] Nor is this the only criticism to be made on the unqualified use of the word *status* in Mr. Smith's definition. A judgment as to *status* is not a judgment *in rem*, so far as concerns persons. A foreign conviction of infamy determines the *status* of the convict; but such conviction is not extra-territorially regarded as operative in attaching infamy. So a state may by statute or otherwise defer the majority of its subjects until they are thirty; but the better opinion now is that this *status* of pupilage does not cling to them extra-territorially, but that in other countries they can, at twenty-one, be made responsible for their debts. So non-business men are by German and French law incapacitated, under certain circumstances, from making negotiable paper; but no one now regards this prohibition, though it is emphatically one of *status*, as ubiquitous.[5] By text-writers, also, of high authority the term judgment *in rem* is extended to cover divorces, and adjudications in bankruptcy. But a decree in divorce is not necessarily ubiquitously valid;[6] and a foreign bankrupt discharge only protects the bankrupt as to claims against him by persons domiciled in the same state.[7] So, also, slavery was eminently a *status;* yet it was held by the supreme court of the United States that a judgment declaring a person to be free bound only parties and privies, and was not a judgment *in rem*, good against all the world.[8]

[1] 2 Smith's Lead. Cas. 661; Hannaford *v.* Hunn, 2 C. & P. 155; Cammell *v.* Sewell, 3 H. & N. 646; The Rio Grande, 23 Wall. 458. See Webster *v.* Adams, 58 Me. 317.

[2] Penn. R. R. *v.* Pennock, 51 Penn. St. 244; Noble *v.* Oil Co. 79 Penn. St. 354, per Mercur, J.

[3] 2 Smith's Lead. Cas. 662.

[4] Taylor's Evidence, § 1487.

[5] See the cases collected in Wharton Confl. of Laws, §§ 84–122.

[6] See Wharton Confl. of Laws, § 204. Infra, § 817.

[7] Wharton Confl. of Laws, § 852 *a*.

[8] Davis *v.* Wood, 1 Wheat. 215.

§ 816. From what has just been said it will be seen that grave differences exist as to the limits of judgments *in rem*, supposing that to judgments *in rem* it is an essential incident that they should be extra-territorially conclusive. That this quality cannot be absolutely predicated of foreign judgments of marriage and of legitimacy, has been already incidentally noticed.[1] How far judgments of prize and admiralty courts are extra-territorially conclusive, has been just considered. It may be now in addition noticed that the English courts have recognized as judgments *in rem*, forfeitures pronounced by the court of exchequer,[2] letters of probate,[3] or administration;[4] sentences of deprivation and expulsion, whether delivered by the spiritual court, a visitor, or a college;[5] orders of justices for dividing roads under the act of 34 G. 3, c. 64;[6] decrees of settlement by an order of justices, whether unappealed against[7] or confirmed by a court of quarter sessions on appeal;[8] and judgments of outlawry.[9] In Ireland the same quality has been assigned to judgments by the commissioners or sub-commissioners of excise, inland revenue, or customs.[10] Yet all these rulings relate to infra-territorial courts, under the local law established by a common sovereign. We have nothing to show, that, so far as concerns personal *status*, an English court would hold itself bound absolutely by the decree of a foreign tribunal.[11]

Scope of judgments *in rem*.

[1] The authorities on this topic are discussed at large in my work on Conflict of Laws, to which, for the sake of brevity, I now merely refer.

[2] Geyer *v.* Aguilar, 7 T. R. 696, per Ld. Kenyon; Scott *v.* Shearman, 2 W. Bl. 977; Cooke *v.* Sholl, 5 T. R. 255.

[3] Noel *v.* Wells, 1 Lev. 235, 236; Allen *v.* Dundas, 3 T. R. 125.

[4] Bouchier *v.* Taylor, 4 Br. P. C. 708. See Prosser *v.* Wagner, 1 Com. B. (N. S.) 289; though see supra, § 810.

[5] Philips *v.* Bury, 2 T. R. 346, per Ld. Holt; R. *v.* Grundon, 1 Cowp. 315, 321, 322, per Ld. Mansfield.

[6] R. *v.* Hickling, 7 Q. B. 880.

[7] R. *v.* Kenilworth, 2 T. R. 599, per Buller, J.

[8] R. *v.* Wick St. Lawrence, 5 B. & Ad. 533, per Ld. Denman.

[9] Co. Lit. 352 *b*.

[10] Maingay *v.* Gahan, Ridg. L. & S. 1, 79; 1 Ridg. P. C. 43, 44, n., *S. C.* There, according to Mr. Taylor (§ 1488), the Irish Ex. Ch. expressly overruled Hensbaw *v.* Pleasance, 2 W. Bl. 1174, a decision which, according to Fitzbiggon, Ch. (see Ridg. L. & S. 79), was reprobated by Ld. Mansfield, in Dixon *v.* Cock, and was frequently condemned by Ld. Lifford, Ch.

[11] See, also, Roberts *v.* Fortune, 1 Harg. L. Tracts, 468, n., per Lee, C. J.; Terry *v.* Huntington, Hardr. 480; and Fuller *v.* Fotch, Carth. 346.

That a foreign decree of bankruptcy, though a decree as to *status*, cannot be regarded as imposing disabilities on the bankrupt which pursue him to every country in which he settles, would not be seriously maintained either in England or the United States.[1]

Decrees as to personal *status* not necessarily ubiquitous.

§ 817. It is with the qualification just stated (*i. e.* that the term does not necessarily imply ubiquitous conclusiveness), that we are to understand other rulings to the effect that a judgment as to personal *status* is a judgment *in rem*. Thus it has been held by the supreme court of the United States that the proceedings of a competent court, determining pedigree, is *in rem*,[2] yet we would not hold, as to a foreign decree of legitimacy (*e. g.* in a polygamous descent), that it determined questions our courts could not revise. So it has been declared that the order of a court, having jurisdiction of a minor, appointing his tutor, is good against all the world;[3] but we do not at the same time regard foreign non-natural decrees of minority as everywhere binding. So, extra-territorial validity has been claimed for the decree of a court appointing a guardian of a lunatic, the decree emanating from the proper court of his domicil; but if the lunatic appears as sane in a foreign land, this decree would not bar foreign creditors.[4] That a judgment of divorce can only be in a qualified sense regarded as extra-territorially binding, is amply shown in another work whose conclusions are here reaffirmed.[5]

Judgments *in rem* do not bind *in personam*, and must

§ 818. It is scarcely necessary to add that a judgment *in rem* of a foreign state cannot, unless there has been such a personal service as gives jurisdiction to the court, bind *in personam* extra-territorially.[6] Hence a foreign bank-

[1] See this point discussed in Whart. Confl. of Laws, §§ 101, 388.

[2] Ennis *v.* Smith, 14 How. 400. See, however, Kearney *v.* Dean, 15 Wall. 51; Bigelow on Estoppel (2d ed.), 144.

[3] Garrison's Succession, 15 La. An. 27; Whart. Confl. of Laws, § 259; Savigny, Röm. Recht, viii. § 380; Bar, Int. Privat Recht, § 106; but see, *contra*, Johnstone *v.* Beattie, 1 Phil. Ch. 17; 10 Cl. & Fin. 42; Dawson *v.* Jay, 2 Sm. & Giff. 199; *S. C.* 3 D., M. & G. 764; explained in Stuart *v.* Bute, 9 H. L. C. 440; Story's Confl. of L. § 499.

[4] Wharton's Confl. of Laws, § 269; See Houstoun, in re, 1 Russ. R. 312. Supra, § 812.

[5] Wharton's Confl. of Laws, § 127, *et seq.*

[6] See supra, § 815; 2 Phillipps Evidence, 198; Story's Confl. of Laws, § 549; 3 Burge's Com. 1014; D'Arcy

rupt adjudication does not extra-territorially bind a party over whom the court has not acquired personal jurisdiction.[1] Nor, even as to property attached, can a judgment *in rem* be maintained against collateral attacks, unless the proceedings be conducted according to established rules of justice, forming part of private international law.[2] Thus it was held by the supreme court of the United States, in 1876, in a case already cited, that the jurisdiction acquired by the seizure of property, in a proceeding *in rem* for its condemnation for alleged forfeiture, does not authorize the attaching court to pass upon the question of forfeiture absolutely, but only to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential to sustain the judgment.[3]

be in accordance with established rules of justice.

VIII. RECORDS VIEWED EVIDENTIALLY.

§ 819. It is not merely the judgment that the parties to a suit are precluded from disputing; they are equally bound by the incidental action of the court to whose abitrament they submit. Hence, when the parties are the same, the record of a former suit may be put in evidence to establish a controverted fact. The parties are concluded by the record, unless fraud be shown.[4] But to make the record thus admissible (*e. g.* as in cases of returns to executions), the parties must be virtually the same, or the parties to the second suit must be privies to the parties in the first.[5]

Averments of record of former suit admissible between same parties.

v. Ketchum, 11 How. 165; Boswell *v.* Otis, 11 How. 336; Bissell *v.* Briggs, 9 Mass. 462; Phelps *v.* Brewer, 9 Cush. 390; Steel *v.* Smith, 7 W. & S. 447; Scott *v.* Noble, 72 Penn. St. 120.

[1] Kuehling *v.* Leberman, Sup. Ct. Penn. 1876, 2 Weekly Notes of Cas. 616.

[2] Wharton Confl. of Laws, § 792; Bradstreet *v.* Ins. Co. 3 Sumn. 601; and see cases cited supra, § 814.

[3] Windsor *v.* McVeigh, Alb. L. J. Jan. 6, 1877, quoted supra, § 796.

[4] See cases cited supra, §§ 759–60, and see 776; Janes *v.* Buzzard, 1 Hempst. 240; Parsons *v.* Copeland, 33 Me. 370; Canon *v.* Abbot, 1 Root, 251.

As to the effect of criminal judgments, in this respect, upon civil, see supra, § 776.

[5] Bank of Alex. *v.* Mandeville 1 Cranch C. C. 575; Bott *v.* Burnell, 11 Mass. 163; Lawrence *v.* Pond, 17 Mass. 433; Whitaker *v.* Sumner, 7 Pick. 551; Fowler *v.* Collins, 2 Root,

§ 820. The distinction elsewhere[1] noticed, between bilateral and unilateral proofs, applies necessarily to records. A record is bilateral when introduced between parties and privies, and when so used, as we have seen, cannot be disputed. Records, or particular parts of records, on the other hand, are unilateral when offered to show a particular fact, as a *primâ facie* case either for or against a stranger.[2] Even parol testimony may be used to explain the applicability of the record in such a case. Thus where it became important to show that a particular piece of property was at a certain time bound by an attachment, it was held admissible to put in evidence the writ which had been served, but not returned, with parol evidence to prove the service.[3] Rights of a public nature are among the most conspicuous illustrations of the principle before us; and as to these, as we have already seen, judgments, and even verdicts, are admissible in all cases in which common reputation would be received.[4] A writ of restitution, also, unaccompanied by the judgment, and *inter alios acta*, has been received for a plaintiff, not to establish a title, but to show what the property was, of which the plaintiff was possessed, and the extent of his occupancy.[5] So, as we have occasion elsewhere to see, the issuing of letters of administration has been held to be collaterally *primâ facie* proof of the administrator's title, though not of the averments of the record.[6] So decrees of courts, settling administration accounts, have been held in collateral proceedings *primâ facie* proof of such accounts, there being

Records admissible evidentially against strangers.

231; Jackson *v.* Vedder, 3 Johns. R. 8; Paynes *v.* Coles, 1 Munf. 373; Burroughs *v.* Hunt, 13 Ind. 178; Banks *v.* Sharp, 6 J. J. Marsh. 180; Pailhes *v.* Thielen, 1 La. An. 34; Robinett *v.* Compton, 2 La. An. 846.

Records, also, may be admissible as part of the *res gestae*. Wells *v.* Shipp, 1 Walk. (Miss.) 353.

[1] Infra, §§ 1183–5; supra, § 760.

[2] Bartlett *v.* Decrcet, 4 Gray, 111; Caverly *v.* Gray, 7 Gray, 216; Com. *v.* Slocum, 14 Gray, 395; Brown *v.* Littlefield, 7 Wend. 454; Key *v.* Dent, 14 Md. 86; Gray *v.* Gray, 3 Litt. (Ky.) 465; Bumpass *v.* Webb, 3 Ala. 109; Ryburn *v.* Pryor, 14 Ark. 505; Dexter *v.* Paugh, 18 Cal. 372.

As to ancient records, see supra, § 200.

[3] Tomlinson *v.* Collins, 20 Conn. 364. See Wilder *v.* Holden, 24 Pick. 8.

[4] Supra, §§ 200, 794.

[5] Lee *v.* Stiles, 21 Conn. 500. See Calvert *v.* Marlow, 18 Ala. 67.

[6] Supra, § 810. French *v.* Frazier, 7 J. J. Marsh. 425; Tisdale *v.* Ins. Co. 26 Iowa, 170; English *v.* Murray, 13 Tex. 366.

averment of due notice.[1] But, as a rule, the acts of courts, as well as the acts of individuals, are mere hearsay as to strangers,[2] unless such judgments be *in rem*, or are offered to prove public acts, or inducement, as hereafter defined.[3]

§ 821. It is scarcely necessary to say that a judgment of a court of law, or a decree of chancery, is admissible, though *res inter alios acta*, to prove a link in a chain of title. The record, as it imports absolute verity, is conclusive between parties and privies;[4] though open, as is elsewhere seen, to be explained by parol when obscure, or to be impeached on ground of fraud.[5] But, as to strangers, a recital in a record, that a party whose lands are sold was heir to a former owner, is not sufficient to make out the chain. The fact of heirship must be independently proved.[6] So a deed from a sheriff cannot be shown without proving authority in the sheriff.[7] Hence, in making up such record title, when depending upon a sheriff's sale, it is proper to put in evidence not merely the execution, but the judgment,[8] though beyond this it has been held unnecessary to go, as against the judgment defendant's successors.[9]

Record admissible to prove link in title.

§ 822. When the object is to show justification, in cases where damages are sought for a trespass, it is admissible to prove by record an authorization of court.[10] So

Other cases of admissibility.

[1] Owens *v.* Collins, 3 Gill & J. 25; Evans *v.* Iglehart, 6 Gill & J. 171; Stockett *v.* Jones, 10 Gill & J. 276; Atwell *v.* Milton, 4 Hen. & M. 253; Smith *v.* Hoskins, 7 J. J. Marsh. 502; Neville *v.* Robinson, 1 Bailey, 361; Brown *v.* Wright, 5 Ga. 29. See Wilhelm *v.* Cornell, 3 Grant, 178; Street *v.* Street, 11 Leigh, 498.

[2] See supra, § 175; infra, §§ 1078, 1088.

[3] Infra, § 823.

[4] Inman *v.* Mead, 97 Mass. 310; Casler *v.* Shipman, 35 N. Y. 533; Den *v.* Hamilton, 7 Halst. (N. J.) 109; Coursin *v.* Ins. Co. 46 Penn. St. 323; House *v.* Wiles, 12 Gill & J. 338; Barney *v.* Patterson, 6 Har. & J. 182; Shanks *v.* Lancaster, 5 Grat. 110; Baylor *v.* Dejarnette, 13 Grat. 152; Buckingham *v.* Hanna, 2 Oh. St. 551; White *v.* Rice, 48 Ind. 225; Splahn *v.* Gillespie, 48 Ind. 397; Nichol *v.* McCalister, 52 Ind. 586; Turpin *v.* Brannon, 3 McCord, 261; Doe *v.* Roe, 36 Ga. 321; Montgomery *v.* Robinson, 49 Cal. 259.

[5] See infra, § 985.

[6] Lovell *v.* Arnold, 2 Munf. 167; Archer *v.* Bacon, 12 Mo. 149; Wardlaw *v.* Hammond, 9 Rich. (S. C.) 454.

[7] Infra, §§ 1312–15.

[8] See Gaskell *v.* Morris, 7 Watts & S. 32.

[9] Fortier *v.* Zimpel, 6 Ga. 53.

[10] State *v.* Hyde, 29 Conn. 564; Plummer *v.* Harbut, 5 Iowa, 308; Taylor's Ev. § 1481.

when the object is to show payment by the plaintiff for the defendant, a record is admissible to show a decree against the plaintiff and the defendant jointly, and full satisfaction by the plaintiff.[1]

Judgments admissible against strangers to prove their legal effects.

§ 823. We have already had occasion [2] to dwell upon the important distinction between judgments, when offered between parties and privies, in which cases they are (with certain limitations already expressed) conclusive as to their subject matters; and judgments when offered for or against strangers, in which case they are admissible only to prove their existence and their effects. In other words, judgments, in the latter case, are admissible to prove, not why they were given, for this is *res inter alios acta;* but what they did, for this, when it is relevant, is admissible against all the world. A judgment by A. against B., for instance, in a private claim, is not admissible in a suit by A. against C., as proof of any direct indebtedness from C. to A.; but if in A.'s suit against C. it becomes relevant to show that A. had obtained and collected a judgment against B., then the record of the judgment in the suit of A. against B. is admissible for this purpose. When a judgment is offered for such purpose it is sometimes said in the books to be offered as *inducement;* though it would be more correct to say that as against strangers a judgment is admissible to prove its existence and legal effects.[3] Thus, to recur to an illustration already noticed, where there is a judgment against a master for the servant's negligence, and the master sues the servant, the servant cannot controvert the fact that the judgment was entered against the master, though the judgment (if the servant was not summoned to come in and defend) is no

[1] Davidson *v.* Peck, 4 Mo. 438.

[2] Supra, §§ 759, 820.

[3] Stephen's Ev. art. 40; Green *v.* New River Co. 4 T. R. 590; *S. C.* 2 Smith's Lead. Cas. 585; King *v.* Chase, 15 N. H. 9; Vogt *v.* Ticknor, 48 N. H. 242; Spencer *v.* Dearth, 43 Vt. 98; Griffin *v.* Brown, 2 Pick. 304; Weld *v.* Nichols, 17 Pick. 538; Com. Bk. *v.* Eddy, 7 Metc. (Mass.) 181; Goodnow *v.* Smith, 97 Mass. 181; Kip *v.* Brigham, 7 Johns. 168; McMichael *v.* McDermott, 17 Penn. St. 353; Borough of York *v.* Forscht, 23 Penn. St. 391; Key *v.* Dent, 14 Md. 86; Ray *v.* Clemens, 6 Leigh, 600; Gaither *v.* Brooks, 1 A. P. Marsh. 409; Head *v.* McDonald, 7 T. B. Monr. 203; State *v.* Foster, 3 McCord, 442; Havis *v.* Taylor, 13 Ala. 324; Donnell *v.* Jones, 17 Ala. 689; McGill *v.* Monette, 37 Ala. 49; Fox *v.* Fox, 4 La. An. 135; Lee *v.* Lee, 21 Mo. 531.

evidence of the servant's liability.[1] On the other hand, where the servant is jointly sued with the master (and in this way we have brought before us, in sharp contrast, judgments as to parties and judgments as to strangers), then he is bound, as to his liability, by the judgment.[2] Again, to return to the question of the admissibility of judgments, for the purpose of proving their legal effects against strangers, it has been generally declared that a judgment establishing the relationship of debtor and creditor between A. and B. may, when such fact is relevant, be afterwards used collaterally to show *primâ facie* such relationship.[3] A judgment against a surety, it is also laid down, will be conclusive, in a suit against the principal, to show the fact that the judgment was entered, but not to show the existence of the debt, for which purpose, being *res inter alios acta*, it is not even admissible.[4] In a suit, also, against a deputy sheriff for misconduct, the record of a judgment against his principal is admissible to show that such a judgment was rendered, but not to prove the deputy's default for which such judgment was rendered.[5] A judgment, also, against the guarantor may be always introduced in a suit brought for reimbursement by the guarantor against his principal.[6] So, in order to prove diligence, but for no other purpose, it is admissible in a suit against the indorsers of a note, to prove a judgment against the maker prosecuted to insolvency.[7] In all cases, to pass to another line of illustrations, where it is sought to discredit a witness, a record of the conviction of the witness is admissible when pertinent, whoever may be the parties to the suit.[8] So also, when a witness is

[1] Green *v.* New River, 4 T. R. 590; Pritchard *v.* Hitchcock, 6 M. & G. 165; 2 Smith's Lead. Cas. 585; Freeman on Judgments, § 417.

[2] Bailey *v.* Bussing, 37 Conn. 349.

[3] Sidensparker *v.* Sidensparker, 52 Me. 481; Chamberlain *v.* Carlisle, 26 N. H. 540; Candee *v.* Lord, 2 Comst. 269. It has been held, however, in Alabama, that in a suit to set aside a conveyance, by a creditor of the grantor, a judgment in favor of the creditor and against the grantor is inadmissible to affect the grantee. Troy *v.* Smith, 33 Ala. 469. See *contra*, Vogt *v.* Ticknor, 48 N. H. 242; Church *v.* Chapin, 35 Vt. 231; Inman *v.* Mead, 97 Mass. 310; Freeman on Judgments, § 418.

[4] King *v.* Norman, 4 C. B. 884.

[5] Lewis *v.* Knox, 2 Bibb, 453. See, also, Cox *v.* Thomas, 9 Grat. 323.

[6] Copp *v.* McDugall, 9 Mass. 1; Lee *v.* Clarke, 1 Hill, 56.

[7] Lane *v.* Clark, 1 Mo. 657. For parallel cases, see Preslar *v.* Stallworth, 37 Ala. 405; Marlatt *v.* Clary, 20 Ark. 251; Gragg *v.* Richardson, 25 Ga. 570.

[8] Wharton's Cr. L. § 659; Real, in

to be contradicted by showing his testimony on a former trial, the record of such former trial may be put in.[1] In an action of malicious prosecution, also, the record of acquittal is admissible to prove such acquittal, though not to prove want of probable cause.[2]

How far criminal judgments can be put in evidence in civil cases been already discussed.[3]

To prove judgment, record must be complete.

§ 824. If the object of the evidence be to prove, as an estoppel, or as a link of title, a particular judicial result: *e. g.* the entering of a judgment; it is not enough to have a certificate of the result. The whole record, so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete.[4] The component parts of the record should be so attached that it will appear that the certificate extends to them all.[5] A certificate that a transcript is true and perfect, enumerating all the usual parts of a record, is sufficient.[6] So far as concerns other courts, a record of an unfinished suit cannot be received for dispositive purposes.[7]

re, 55 Barb. 186, *S. C.;* 7 Abb. Pr. N. S. 23; Morrison *v.* Chapin, 97 Mass. 72.

[1] Clarges *v.* Sherwin, 12 Mod. 343.

[2] Supra, § 776.

The fact that a judgment or decree might, if directly attacked, be held invalid, does not preclude it from being used for the purposes above noted. Sebastian *v.* Ford, 6 Dana, 436; Wildey *v.* Bonney, 31 Miss. 644. See Hill *v.* Parker, 5 Rich. S. C. 87.

[3] Supra, § 776.

[4] See supra, §§ 95–106, 120; R. *v.* Smith, 8 B. & C. 341; Godofrey *v.* Jay, 3 C. & P. 192; R. *v.* Robinson, 1 C. & D. 329; Porter *v.* Cooper, 6 C. & P. 354; R. *v.* Birch, 3 Q. B. 431; Jay *v.* East Livermore, 56 Me. 107; Merrill *v.* Foster, 33 N. H. 379; Hawks *v.* Truesdell, 99 Mass. 557; Davidson *v.* Murphy, 13 Conn. 213; Belden *v.* Meeker, 2 Lansing, 470; Com. *v.* Trout, 76 Penn. St. 379; Numbers *v.* Shelly, 78 Penn. St. 426; Carrick *v.* Armstrong, 2 Coldw. 265; Evans *v.* Reed, 2 Mich. N. P. 212; Sternburg *v.* Callanan, 14 Iowa, 251; Smith *v.* Smith, 22 Iowa, 516; Miles *v.* Wingate, 6 Ind. 458; Young *v.* Thompson, 14 Ill. 380; Miller *v.* Deaver, 30 Ind. 371; Oliver *v.* Persons, 30 Ga. 391; Mitchell *v.* Mitchell, 40 Ga. 11; Hallet *v.* Eslava, 3 St. & P. 105; Anderson *v.* Cox, 6 La. An. 9; Loper *v.* State, 4 Miss. 429; Wash *v.* Foster, 3 Mo. 205; Mason *v.* Wolff, 40 Cal. 246; Ogden *v.* Walters, 12 Kans. 282. As to verdicts, see infra, § 831.

[5] Susquehanna R. R. *v.* Quick, 68 Penn. St. 189; Herndon *v.* Givens, 16 Ala. 261.

[6] Coffee *v.* Neely, 2 Heisk. 304.

[7] Heath *v.* Page, 63 Penn. St. 108. See, as to exemplifications generally, supra, § 95. The formal English practice was undoubtedly (Co. Lit. 260 *a;* 3 Bl. Com. 24) to enroll the record in full length on parchment. This prac-

Hence, when a judgment is introduced in evidence, to sustain an attachment, the declaration goes in with the judgment,[1]

tice has never been insisted on in this country; Brainard *v.* Fowler, 119 Mass. 262; and in England is now subjected to many exceptions. In courts of inferior jurisdiction a full formal enrolment is not attempted. Dyson *v.* Wood, 3 B. & C. 449. Thus in a case where an act of parliament authorizing the owners of lands taken by a railroad company to claim damages from the company, the amount in case of dispute to be settled by a sheriff's jury, directed that the verdicts and judgments thereon should be deposited with the clerk of the peace for the county among the records, and should be deemed records, the court held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for the purpose. Manning *v.* E. Cos. Ry. Co. 12 M. & W. 237, 243, 249. Quarter sessions orders, also, directing the removal of paupers, may be proved by the paper book, in which the proceedings of the court have been entered by the clerk of the peace, or by a copy of it, provided the minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no other record of a more formal character is kept. R. *v.* Yeoveley, 8 A. & E. 806.

Road proceedings by the quarter sessions are treated with the same liberality, though if the jurisdiction do not appear in the minutes, — as, for instance, if the caption be omitted, — neither the book nor the copy can be received. R. *v.* Ward, 6 C. & P. 366, explained in R. *v.* Yeoveley, 8 A. & E. 818, 819; Giles *v.* Siney, 13 W. R. 92.

The decrees or other action of ecclesiastical courts may be proved, if it appear there is no other record, by the minute books in which they are entered, or by copies of such books. Houliston *v.* Smyth, 2 C. & P. 25; R. *v.* Hains, Comb. 337, per Lord Holt; Skin. 584, *S. C.* And by the practice of the house of lords a judgment may be proved, either by an examined copy of the minute, or by producing a copy of the journal in which it is entered, purporting to be printed by the authorized printer. Jones *v.* Randall, 1 Cowp. 17; Taylor's Ev. Ibid. § 1408.

It is otherwise, however, when the object for which the testimony is offered is to prove an admission of a party (infra, §§ 828, 839), or to establish the fact that a certain judicial proceeding has taken place; as, for instance, that a trial has been had, a verdict given, or a writ issued, without regard to the facts disputed at the trial, found by the jury, or mentioned in the writ, and irrespective of all ulterior proceedings in the cause; in which cases it has been held that the record need not be formally drawn up. Pitton *v.* Walter, 1 Str. 162; Fisher *v.* Kitchingham, Willes, 367. Infra, §§ 828, 831. In R. *v.* Gordon, C. & Marsh. 410, Lord Denman held that an allegation in an indictment for perjury, that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the inscription was entered. On the other hand, in R. *v.* Thring, 5 C. & P. 507; and R. *v.* Robinson, 1 Crawf. & D. C. C. 329, it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

[1] Hageman *v.* Salisberry, 74 Penn. St. 280; Numbers *v.* Shelly, 78 Penn. St. 426.

and all relevant portions of the declaration are proof, for what they are worth.[1] But a complete extension of the record will not be exacted when all that is substantial appears.[2] But in some shape, if the judgment of a court is put in evidence to effect a transfer of rights, the preliminary conditions of the judgment must appear on the record. Even a sentence in admiralty, to sustain its admissibility for such purpose, must have attached to it the preliminary proceedings on which it is based;[3] and a judgment of an ecclesiastical or probate court cannot prove title without producing the libel and answer, and the defensive allegations.[4] To admit, for the same purpose, an award, when made under rule of court or by voluntary submission, the necessary constitution of the authority and regular procedure of the arbitrators must appear.[5] When, under the terms of the ref-

[1] Numbers *v.* Shelly, *ut supra.* In this case, Gordon, J., said: "The whole record was admissible, and the *narr.* was part of the record. Erb *v.* Scott, 2 Harris, 20. As the judgment was evidence, so was also the declaration, for by it that upon which the judgment was founded would appear. We apprehend that, as the record, as a whole, imports unity, so every part of it is admissible to prove that which it legitimately sets forth. It is no doubt true, that, where the *narr.* contains allegations not pertinent or material to the case, such allegations would not be admissible. Such, however, was not the case with the matter in hand; the waiver, as set forth, was not only pertinent and material, but it was part of the record."

[2] See supra, § 95. "It is not now denied that the record of the court of common pleas for Luzerne County, in the State of Pennsylvania, offered in evidence by the plaintiff, was duly authenticated according to the statutes of the United States and of this commonwealth. U. S. Sts. 1790, c. 11; 1804, c. 56; Gen. Sts. c. 131, § 61. It is not extended with the formality and accuracy required in the records of our own courts, but it is sufficient in substance, and contains all the essential requisites of a judicial record. It shows the parties to the suit, the subject matter of the suit, jurisdiction over the parties, a final judgment of the court for fixed sums in damages and costs, and the date of the judgment. Knapp *v.* Abell, 10 Allen, 485. It was, therefore, rightly admitted in evidence." Brainard *v.* Fowler, 119 Mass. 262, Morton, J. In Kansas it has been ruled that a certificate of the entry of a foreign judgment may be received as *primâ facie* proof of the judgment, without requiring the whole record to be certified. Haynes *v.* Cowen, 15 Kans. 637.

[3] Com. Dig. Ev. C. 1; Taylor's Ev. § 1411.

[4] Leake *v.* M. of Westmeath, 2 M. & Rob. 394, per Tindal, C. J., overruling Stedman *v.* Gooch, 1 Esp. 6.

[5] Antram *v.* Chace, 15 East, 209; Brazier *v.* Jones, 8 B. & C. 124; Gisborne *v.* Hart, 5 M. & W. 56; Stalworth *v.* Inns, 13 M. & W. 466; Wright *v.* Graham, 3 Ex. R. 131; Eads *v.* Williams, 4 De Gex, M. & G. 674; Lord *v.* Lord, 5 E. & B. 404.

erence, the award is to be good although it be executed by a less number than all the arbitrators, it must be shown that the arbitrator, who has not signed the instrument, has had notice to attend the execution, and has omitted or refused to do so.[1] To awards, however, by public administrative officers, in the absence of evidence of any usage inconsistent with the award, the maxim *Omnia praesumuntur ritè esse acta*,[2] will be held to apply.[3]

Journals of court admissible to prove action of court.

§ 825. The journals of a court, in those jurisdictions where such journals are kept, though not technically part of the record, are to be regarded as proof, when duly verified, of the action of the court in any matter to which they relate. They are therefore admissible, in any view, provisionally.[4] In such case, the object being to show that some other proceeding has occurred before the same court, a minute of the former proceeding will be admitted in lieu of the record, whenever the formal record cannot be presumed to have been made up.[5] The minutes of a court, however, cannot be introduced to contradict a record.[6]

Docket entries not admissible when full record can be had.

§ 826. What has been said of the minutes of the court applies, *a fortiori*, to the docket entries, regularly made by the clerk or prothonotary,[7] which give the details from which the record is made up, and which can be

[1] White *v.* Sharp, 12 M. & W. 712; Wright *v.* Graham, 3 Ex. R. 134, per Parke, B.; in re Beck & Jackson, 1 Com. B. N. S. 695; Taylor's Ev. § 1420.

[2] Infra, § 1318.

[3] R. *v.* Haslingfield, 2 M. & Sel. 558; Doe *v.* Gore, 2 M. & W. 321; Doe *v.* Mostyn, 12 Com. B. 268; Heysham *v.* Forster, 5 M. & R. 277. See Manning *v.* East. Cos. Ry. Co. 12 M. & W. 237; Williams *v.* Eyton, 27 L. J. Ex. 176; 2 H. & N. 771, *S. C.;* 4 H. & N. 357, *S. C.* in Ex. Ch.

[4] R. *v.* Browne, 3 C. & P. 572.

[5] R. *v.* Tooke, 25 How. St. Tr. 446–449; recognized in R. *v.* Smith, 8 B. & C. 343; R. *v.* Robinson, 1 Craw. & D. C. C. 329; R. *v.* Reilly, Ir. Cir. R. 795, per Doherty, C. J.

So far, however, as concerns the testimony of a former witness, a judge's notes are not original evidence, but can only be used to refresh his memory. Supra, § 180; and see Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64. As to justice's minutes, see Grosvenor *v.* Tarbox, 39 Me. 129. As to trial lists, see Wilkins *v.* Anderson, 11 Penn. St. 399.

[6] Den *v.* Downam, 13 N. J. L. 135; Mandeville *v.* Stockett, 28 Miss. 398. See Strong *v.* Bradley, 13 Vt. 9.

[7] Com. *v.* Balkom, 3 Pick. 281; Townsend *v.* Way, 5 Allen, 426; Keller *v.* Killion, 9 Iowa, 329; Prentiss *v.* Holbrook, 2 Mich. 372; Hair *v.* Melvin, 2 Jones L. 59; Handley *v.* Russel, Hard. (Ky.) 145.

received in place of the record until it is made up.[1] No limit is fixed for the time when this admissibility expires. "In New Hampshire the record is never extended, except in very particular cases, unless a party desires a copy to sustain a suit on it, or for some other use. And this is often made up twenty or thirty years after the rendition of the judgment. Until such extension, everything rests on the docket entries."[2] But though while the record is as yet inchoate, docket entries are part of its material, yet, after the record is extended, they cannot be used to impeach it collaterally. The court which controls the record must be applied to for relief.[3] Nor can such entries be received as representing the record, when the record is completed. In such case, if objection be made, the duty of the party offering the proof is to have the record fully extended and certified.[4] Thus in a suit against the indorser of a writ, the docket entry stating the indorsal by the defendant is not admissible when the writ itself can be produced.[5] Bankruptcy also must be proved by the whole record, not by certified copies of particular parts of the process.[6] Nor, in any view, can docket entries be substituted for the entire record of the proceedings of another court, if the object be to prove the judgment as a bar or as a title.[7] If the record, however, be lost, the docket entries be-

[1] Williams *v.* U. S. 17 Pet. 144 ; 1 How. 290 ; Ellis *v.* Madison, 13 Me. 312; Willard *v.* Whitney, 49 Me. 235; Leathers *v.* Cooley, 49 Me. 337; Jay *v.* Livermore, 56 Me. 109 ; State *v.* Neagle, 65 Me. 468; Willard *v.* Harvey, 24 N. H. 344 ; Benedict *v.* Cutting, 13 Metc. 181; Read *v.* Sutton, 2 Cush. 115; Pruden *v.* Alden, 23 Pick. 184 ; Cent. Corp. *v.* Lowell, 15 Gray, 106 ; Boyd *v.* Com. 36 Penn. St. 355 ; Boothe *v.* Dorsey, 11 Gill & J. 247 ; Garfield *v.* Douglass, 22 Ill. 100; Eastman *v.* Harteau, 12 Wisc. 267 ; Hartley *v.* Chandler, 5 Ala. 867; Governor *v.* Bancroft, 16 Ala. 605; Ross *v.* Davis, 30 Ga. 823.

[2] Willard *v.* Harvey, 24 N. H. 344; cited Jay *v.* Livermore, 56 Me. 117.

[3] Leveringe *v.* Dayton, 4 Wash. C. C. 698 ; Southgate *v.* Burnham, 1 Me. 369 ; Willard *v.* Whitney, 49 Me. 235 ; Austin *v.* Howe, 17 Vt. 654 ; Read *v.* Sutton, 2 Cush. 115.

[4] Leveringe *v.* Dayton, 4 Wash. C. C. 698 ; Austin *v.* Howe, 17 Vt. 654 ; Brown *v.* Hathaway, 10 Minn. 303 ; Sharp *v.* Wickliffe, 3 Litt. (Ky.) 10.

[5] Wilson *v.* Hobbs, 32 Me. 85.

[6] Waterman *v.* Robinson, 5 Mass. 303; Moore *v.* Voss, 1 Cranch C. C. 179. See infra, § 829.

[7] Leveringe *v.* Dayton, 4 Wash. 698; Austin *v.* Howe, 17 Vt. 654; Brown *v.* Hathaway, 10 Minn. 303 ; Sharp *v.* Wickliffe, 3 Litt. (Ky.) 10.

come primary evidence.[1] When lost, the docket entries can be proved by parol.[2]

Rule relaxed as to ancient records.

§ 827. An ancient record, taken from the proper depository, may be proved in fragments, when no fuller proof is attainable.[3] Thus it has been held in England, that ancient depositions may be read without the interrogaries, or, as the case may be, without the bills and answers to which they relate, proof being given that fruitless search has been made for the interrogatories or bill;[4] and so as to ancient surveys, and returns to inquisitions, coming from the proper custody, though the commissions on which such surveys and inquisitions were based could not be found.[5] It is otherwise, however, when the fragments offered have no internal evidence of authority.[6]

For evidential purposes, portions of record may be admitted; *e.g.* writs and their returns.

§ 828. It frequently happens, as is elsewhere incidentally noticed,[7] that record proof is appealed to merely to establish evidentially (as distinguished from dispositively, or from estoppel) some circumstance relevant to the case.[8] Thus, for instance, it may be one of the links of proof in a case that, as a mere evidential fact, a decree of chancery was made on a particular day; and if so, it will be necessary only to prove the decree.[9] Or again, the object is to prove that A. B. was resident at C. at the particular time. As an item of proof in such a case, it is admissible to put in evidence a justice's writ, of the date in question, in favor of A. B. of C.[10] If the object be to prove an arrest

[1] Harvey *v.* Thomas, 10 Watts, 63; Boyd *v.* Com. 36 Penn. St. 355.

[2] Pruden *v.* Alden, 23 Pick. 187; Tillotson *v.* Warner, 3 Gray, 574. See supra, § 135.

[3] See fully supra, § 136.

[4] Bayley *v.* Wylie, 6 Esp. 85; Rowe *v.* Brenton, 8 B. & C. 765; Byam *v.* Booth, 2 Price, 234. Supra, § 136.

[5] Taylor's Ev. § 1423, citing Rowe *v.* Brenton, 8 B. & C. 747; Doe *v.* Roberts, 13 M. & W. 520; Anderton *v.* Magawley, 3 Br. P. C. 588; Gabbett *v.* Clancy, 8 Ir. R. 299; and see supra, §§ 137, 200; Little *v.* Downing, 37 N. H. 355; Hawkins *v.* Craig, 1 B. Mon. 27.

[6] Taylor's Ev. § 1423, citing Evans *v.* Taylor, 7 A. & E. 617; 3 N. & P. 174; Vaux Barony, Min. Ev. 67; Leighton *v.* Leighton, 1 Str. 308.

[7] Supra, § 820, 823; infra, § 1082.

[8] See Benedict *v.* Heineberg, 43 Vt. 231; Lee *v.* Stiles, 21 Conn. 500; Smith *v.* Pattison, 45 Miss. 619; Watts *v.* Clegg, 48 Ala. 561; and see English cases cited in note 7, § 824.

[9] Blower *v.* Hollis, 1 C. & M. 396; Leake *v.* Westmeath, 2 M. & Rob. 397; Attwood *v.* Taylor, 1 M. & Gr. 289; Whitmore *v.* Johnson, 10 Humph. 610.

[10] Cavendish *v.* Troy, 41 Vt. 99.

or attachment, the officer's return to this effect establishes a *primâ facie* case.[1] And, generally, when the object is to introduce certain record facts, as part of the indicatory evidence of a case (as when the object is to show that a certain writ issued, or was returned in a particular way), then the pertinent portions of a record may be certified and put in evidence separately.[2] But where a sheriff sues a purchaser at sheriff's sale for damages for breach of contract of sale, the judgment, as well as the execution, must be put in evidence.[3]

So with depositions and

§ 828 *a*. By strict practice, depositions in chancery cannot be read without bill and answer in the case in which they were taken.[4] In such case, however, the bill and

[1] Allen *v.* Gray, 11 Conn. 95; Browning *v.* Hanford, 5 Denio, 586; Boynton *v.* Willard, 10 Pick. 166; Perryman *v.* State, 8 Mo. 208.

[2] See infra, § 834; Tindall *v.* Murphy, Hempst. 21; Oldtown *v.* Shapleigh, 33 Me. 278; Potter *v.* Tyler, 2 Metc. (Mass.) 58; Huntington *v.* Rumnill, 3 Day, 390; Lee *v.* Stiles, 21 Conn. 500; Spoor *v.* Holland, 8 Wend. 445; Glenn *v.* Garrison, 17 N. J. L. 1; Capling *v.* Herman, 17 Mich. 524; Chicago R. R. *v.* Mahan, 42 Ill. 159; Sowden *v.* Craig, 26 Iowa, 156; Hobson *v.* Doe, 4 Blackf. 487; Chinn *v.* Caldwell, 4 Bibb, 543; Lock *v.* Winston, 10 Ala. 841; Creagh *v.* Savage, 14 Ala. 454; Smith *v.* McGehee, 14 Ala. 404; Price *v.* Emerson, 14 La. An. 141; Henderson *v.* Cargill, 31 Miss. 367; Lee *v.* Lee, 21 Mo. 657; Vassault *v.* Austin, 32 Cal. 597. See Myers *v.* Clark, 3 Watts & S. 535; Wharton Peer. 12 Cl. & F. 301.

"The return 'not found,' upon the execution against the person, was sufficient evidence against the sheriff of the escape of the debtor, and that the sheriff had not detained him in custody. 2 R. S. 382, § 81; Bradley *v.* Bishop, 7 Wend. 353; Boomer *v.* Laine 10, Ibid. 525." Earl, C., Bensel *v.* Lynch, 44 N. Y. 165. See infra, § 834.

"The effect of a writ of *fieri facias* varies according to circumstances. If an execution debtor bring an action against the sheriff for seizing his goods, the defendant may justify his conduct by producing the writ without any copy of the judgment; but if the action be brought by a stranger, both the writ and the judgment must be proved. Doe *v.* Murless, 6 M. & Sel. 114, per Bayley, J. The reason for this distinction seems to be, that in the former case the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and might have moved to set it aside, if it be open to objection. Doe *v.* Murless, 6 M. & Sel. 114, per Bayley, J. The rule being once established, it applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant. Perhaps, however, the rule does not apply, where the purchaser from the sheriff is the execution creditor." 2 Ph. Ev. 95; Taylor, § 1570.

[3] Gaskell *v.* Morris, 7 Watts & S. 32.

[4] Infra, § 1104; Laybourn *v.* Crisp, 4 M. & W. 326, per Ld. Abinger; Blower *v.* Hollis, 1 C. & M. 396,

answer are not evidence for the jury, and only for the judge, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.[1] In any way, depositions, by themselves, may be put in evidence, as admissions against the party making them, without putting in evidence the rest of the record.[2] And although an answer in chancery, in the old practice, could not be put in evidence without putting in evidence the bill,[3] in England this is now changed by the new rules; and even in the old practice, the reading of the interrogatory part of the bill was alone required, and that only when the answer was ambiguous, without referring to the questions.[4] To prove reputation, also, a part of an ancient record may be introduced.[5]

answers in chancery.

§ 829. Under the American bankrupt system, certified copies of the assignment in bankruptcy, and of an assessment decreed by the court, are admissible to sustain the right of the bankrupt assignee to sue for the assessment.[6]

Bankrupt assignments.

Maule, *argu.*; 2 Ph. Ev. 149; B. N. P. 240; Nigthingal *v.* Devisme, 5 Burr. 2594.

[1] Chappel *v.* Purday, 14 M. & W. 303. See, also, Cazenove *v.* Vaughan, 1 M. & Sel. 4.

[2] Highfield *v.* Peake, M. & M. 109. Supra, § 824 (note 7).

[3] See infra, § 1105.

[4] Pennell *v.* Meyer, 2 M. & Rob. 98; 8 C. & P. 470; S. P., McGowen *v.* Young, 2 St. (Ala.) 276.

[5] Supra, §§ 200, 827.

[6] Michener *v.* Payson, U. S. Circuit Ct. Phil. Ap. 75, reported in Weekly Notes of Cases. McKennan, C. J., said:—

"The first assignment of error relates to the admission in evidence of a record of proceedings in bankruptcy in the district court for the Northern District of Illinois, against the Republic Insurance Company of Chicago, as assignee of which the defendant in error brought this suit. It was objected to on the ground that it does not purport to be a copy of the whole record, but it was admitted to show: (1.) an assignment to the plaintiff below; and (2.) an assessment by the authority of the bankruptcy court upon the stock of the bankrupt company to pay losses. There can be no doubt of the admissibility of this record to show the assignment, because the 14th section of the bankrupt act expressly provides that a copy thereof, duly certified by the clerk of the court, under the seal thereof, shall be conclusive evidence of the assignee's title to sue for the bankrupt's property.

"But was it properly admitted for the additional purpose for which it was offered. The bankrupt act, while it enacts that the proceedings in all cases of bankruptcy shall be deemed matters of record, does not treat these proceedings as constituting an integral record, for it declares that they shall not be recorded at large, but shall be filed, kept, and numbered in the office of the clerk of the court; and copies of such records, duly certified by that officer, under the seal of the court, are

The schedule also, filed by a bankrupt, is competent evidence on the issue whether his discharge was fraudulent.[1]

But such portions must be complete.

§ 830. In order, however, to admit separate portions of record to prove certain facts, they must be shown to be complete in their relation to such facts.[2] Thus, if the object be to show that a search warrant legally issued, it must appear that it was preceded by the proper oath;[3] if the object is to prove service of process, an officer's return must be set forth.[4] It is also stated that writs and warrants, before their return, must be proved by actual production, though after their return, when they become matters of record, they are provable by copies.[5]

Verdict inadmissible without record.

§ 831. It may happen that it may be material to prove that verdict was taken in a particular case in a particular way, not for the purpose of concluding the parties, but for evidentiary effect; *e. g.* for refreshing the memory of a witness, or for forming one of the links of the chain of circumstantial evidence in a matter collateral to the merits of the verdict. In such case the verdict may be put in evidence as a mere evidentiary fact, not as in any way showing that the verdict was

made presumptive evidence of all the facts therein stated. It would, therefore, seem to be the intent of the act that, in so far as any of these proceedings might be used as evidence, copies of them are to be authenticated as separate records, and so are competent presumptive evidence of the facts stated in them. The certificate of the clerk of the court authenticates the copies of the papers and proceedings contained in the record 'as true copies of all the papers filed, proceedings had, and record and docket entries made in said case, and of the whole thereof in any way relating to an assessment upon the stockholders of said company,' &c. It is an exemplification of all 'matters of record' touching the assessment, and as such was properly admitted to show that fact." See, to the same effect, Scott *v.* Leather, 3 Yeates, 184; Safford *v.* Grout, 120 Mass. 20; Magoon *v.* Warfield, 3 G. Greene, 293.

[1] Stevens *v.* Thompson, 17 N. H. 103. See Simpson *v.* Carleton, 1 Allen, 109.

[2] Buford *v.* Hickman, 1 Hempst. 232; Glenn *v.* Garrison, 17 N. J. L. 1; Kendrick *v.* Kendrick, 4 J. J. Marsh. 241; Welch *v.* Walker, 4 Port. 120; Vassault *v.* Austin, 32 Cal. 597.

[3] Halsted *v.* Brice, 13 Mo. 171.

[4] Peers *v.* Carter, 4 Litt. (Ky.) 268; Lyne *v.* Bank, 5 J. J. Marsh. 545.

[5] Taylor's Evidence, § 1424, citing B. N. P. 234.

The mere fact of a paper being found among a bundle of papers in a clerk's office does not make it an office paper, and so admissible. Bank *v.* Donaldson, 6 Penn. St. 179.

true, but simply as proving that it was taken.[1] For the purpose of proving reputation, a verdict, without judgment, has been held admissible,[2] even against strangers, when the verdict goes directly to reputation. But this holds good only as to ancient verdicts and such as have been acquiesced in by the parties;[3] and, as a general rule, a verdict cannot be put in evidence unless judgment has been entered on it; and then it binds by estoppel only parties and privies.[4]

§ 832. We have observed that in order to prove an estoppel, the whole record of a case must be put in. When a record is put in for collateral purposes, however, not only is it true, as has been seen, that portions of the record can be put in by themselves, but there are cases in which they can only be received when offered separately.[5] Thus in proving, as we have seen, the opposing party's admissions in answer to a bill of discovery, only so much of the bill as is necessary to explain the answers can be admitted.[6] Whenever it happens that a part of a record may be admissible evidence for one of the parties while the rest is inadmissible, only the admissible part can be read to the jury.[7]

Admissibility of part does not necessitate admission of whole.

[1] R. *v.* Tooke, 25 How. St. Tr. 446; R. *v.* Smith, 8 B. & C. 343. Supra, §§ 824 (note 7), 825.

[2] Supra, §§ 200, 827.

[3] Schaeffer *v.* Kreitzer, 6 Binn. 430.

[4] Davis *v.* Wood, 1 Wheat. 6; U. S. *v.* Addison, 6 Wall. 291; Mahoney *v.* Ashton, 4 Har. & M. 295; Donaldson *v.* Jude, 2 Bibb, 57.

This strictness does not apply, however, when the record is not at the time complete. R. *v.* Browne, 3 C. & P. 572. Supra, § 825.

Where records are made up informally, judgment, however, may be inferred. Deloach *v.* Worke, 3 Hawks, 36; Foster *v.* Compton, 2 Stark. R. 364; Garland *v.* Scoones, 2 Esp. 648.

In England, a verdict cannot, in general, be proved by putting in the *nisi prius* record with the *postea* indorsed, but a copy of the judgment rendered upon it must be produced. Pitton *v.* Walter, 1 Str. 162; Lee *v.* Gansel, 1 Cowp. 3, per Ld. Mansfield; Fitch *v.* Smalbrook, T. Raym. 32; Fisher *v.* Kitchingman, Willes, 367; Gillespie *v.* Cumming, Long. & T. 181; Holt *v.* Miers, 9 C. & P. 196. This has been deviated from in two N. P. cases: Foster *v.* Compton, 2 Stark. R. 364; and Garland *v.* Scoones, 2 Esp. 648. It has been said, also, that this rule does not apply to the issues out of chancery or out of court of admiralty, because in these cases it is not usual to enter up judgment. See Taylor's Evidence, § 1407; Buller N. P. 324. Nor to cases where the court in which the verdict is rendered has no power to set it aside. Felter *v.* Mulliner, 2 Johns. 181.

[5] See supra, §§ 692, 823, 832.

[6] McGowen *v.* Young, 2 St. (Ala.) 276. Supra, § 828.

[7] "When one party introduces and

Parts of ancient records may be received.

§ 833. So, for other reasons than those just stated, when a record is ancient, and when its imperfect condition is to be ascribed to the usual deteriorating effects of time, it is admissible to prove such portions of it as are attainable, imperfect as they may be.[1] Thus ancient depositions may be read without putting in evidence commissions, bills, or interrogatories, due proof being made of unavailing search.[2] It is essential, however, that such documents should have been produced from the proper office, and should on their face exhibit *primâ facie* evidence of regularity.[3] When lost, such records may be supplied by parol.[4]

§ 833 *a.* An officer's return in execution of a writ may be admissible for the following purposes: —

reads from such a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so. But we know of no rule which, because a party may use a record or part of it to establish a fact that can only be established by record, authorizes the same party to use everything else which may be found in the record, however irrelevant to the issue on trial, or however it may violate other well established principles of the law of evidence.

"It is possible that the plaintiff had a right to show that the divorce suit against him was brought long after the publication of the slander, and after Tappan had been sued for it; and that for this purpose the record was admissible. But this by no means established his right to bring before the jury the entire merits of the divorce suit, the depositions taken in that suit which bear hardly upon Tappan, who was no party to it, and the answer of Beardsley making charges against Tappan, when the latter could make no reply to them.

"Upon this question the case of the Marine Insurance Co. *v.* Hodgson, 6 Cranch, 206; Rutherford *v.* Geddes, 4 Wall. 220; and Laybourn *v.* Crisp, 4 M. & W. 320, are directly in point; and the authorities cited by Mr. Taylor, in his work on Evidence, § 1413, fully sustain the proposition laid down by him, that depositions in chancery can only be read when the bill shows that the cause was against the same parties, or those claiming in privity with them." Miller, J., Tappan *v.* Beardsley, 10 Wall. 435. See, also, Numbers *v.* Shelly, 78 Penn. St. 426.

[1] Beverley *v.* Craven, 2 M. & Rob. 140; Rowe *v.* Brenton, 8 B. & C. 747; 3 M. & R. 133; Doe *v.* Roberts, 13 M. & W. 520; Kellington *v.* Trinity College, 1 Wils. 170; Hawkins *v.* Craig, 1 B. Mon. 27. Supra, §§ 136, 194, 703, 827.

[2] Bayley *v.* Wylie, 6 Esp. 85; Byam *v.* Booth, 2 Price, 234; Beverley *v.* Craven, 2 M. & Rob. 140.

[3] Leighton *v.* Leighton, 1 Str. 308; Evans *v.* Taylor, 7 A. & E. 617; 3 N. & P. 174; Beaufort *v.* Smith, 4 Ex. R. 450; Taylor's Evidence, § 1424. Supra, §§ 136, 194.

[4] Supra, § 136.

1. *As a link in title, or in any other way as a basis of suit.* In this case it goes in as part of a record, and cannot, for the reasons before stated as to records generally, be collaterally attacked by parties or privies. If false, the duty of the party is to have it corrected by a direct application to the court. Collaterally, if it is duly verified, and within the jurisdiction of the court, it cannot be assailed.[1] Even fraud and collusion cannot be set up collaterally, when there is an opportunity to obtain correction by the court issuing the process.[2] But when there is no opportunity of obtaining correction from the court issuing the process, then the writ is open to collateral explanation, or to attack on the ground of fraud, or of irregularity by the parties.[3] And while such a return may be explained, when ambiguous, by parol;[4] if it be hopelessly defective, no presumption of regularity can be used to give it efficiency.[5] When offered against strangers, the return, at the most, is, as we have seen, but *primâ facie* evidence of the facts it avers.

Return of officer may be evidence.

2. *As binding the officer making it.* In such case the return is a solemn admission, conclusive against the officer and his privies.[6] He may, however, put in evidence supplementary facts,

[1] Fenwick *v.* Fenwick, 2 W. Bl. 788; Miller *v.* U. S. 11 Wall. 294; Brown *v.* Kennedy, 15 Wall. 597; Stinson *v.* Snow, 10 Me. 263; Huntress *v.* Tiney, 39 Me. 237; Clough *v.* Monroe, 34 N. H. 381; Bowles *v.* Bowles, 45 N. H. 124; Wood *v.* Deane, 20 Vt. 612; Tyler *v.* Smith, 8 Metc. 599; Dooley *v.* Wolcott, 4 Allen, 406; Allen *v.* Martin, 10 Wend. 300; Sample *v.* Coulson, 9 W. & S. 62; Paxson's Appeal, 49 Penn. St. 195; Rivard *v.* Gardner, 39 Ill. 125; Rowell *v.* Kleim, 44 Ind. 290; Brown *v.* May, 28 Ga. 531; Hallowell *v.* Page, 24 Mo. 590. Infra, § 983.

[2] Infra, § 982. U. S. *v.* Lotridge, 1 McLean, 246; Egery *v.* Buchanan, 5 Cal. 53; Angell *v.* Bowler, 1 R. I. 77. As to mode of application, see infra, § 983. See Freeman on Executions, § 363.

[3] Butts *v.* Francis, 4 Com. 424; Watson *v.* Watson, 6 Conn. 334; Sanford *v.* Nichols, 14 Conn. 324; Patterson *v.* Britt, 11 Ired. L. 383; Jackson *v.* Jackson, 13 Ired. 159; Grant *v.* Harris, 16 La. An. 323; Trott *v.* McGarock, 17 Yerg. 469.

[4] Infra, § 986.

[5] Infra, §§ 1302, 1311–12.

[6] Infra, § 837; Herman on Executions, § 242; Foster *v.* Cookson, 1 Q. B. 419; Woodgate *v.* Knatchbull, 2 T. R. 155; Field *v.* Smith, 2 M. & W. 388. And see Cowan *v.* Wheeler, 31 Me. 439; Huntress *v.* Tiney, 39 Me. 23; Johnston *v.* Stone, 40 N. H. 197; Benjamin *v.* Hathaway, 3 Conn. 528; Sheldon *v.* Payne, 7 N. Y. 453; McClelland *v.* Slingluff, 7 W. & S. 134; Heffner *v.* Reed, 3 Grant's Cas. 245; McMicken *v.* Com. 58 Penn. St. 213; Splahn *v.* Gillespie, 48 Ind. 397.

not inconsistent with his return.[1] When offered in the officer's favor, however, the return is but *primâ facie* proof of its contents.[2]

3. *As binding the parties.* A party issuing a writ is also bound by it, and is ordinarily estopped from disputing its averments.[3] So far as concerns such parties, the verity of the returns of the officers cannot, as we have seen, be disputed collaterally. The redress must be by application to the court from which the execution issues.[4] When, however, a return is ambiguous, it may be explained by parol.[5]

4. *As proving its legal effects.* A return may be put in evidence against strangers to prove that it issued; or to prove, in the same manner as may a judgment, its legal effects.[6] But when used to affect the interest of strangers, such returns, so far as concerns facts which it is the duty of the officer to state, are only *primâ facie* evidence, at the best, and as to other facts are not evidence at all.[7]

Return of *nulla bona* admissible to prove insolvency.

§ 834. A *fi. fa.* returned *nulla bona*, or returned in such a way as to indicate insolvency in the execution defendant, may be put in evidence as *primâ facie* proof in a link in the evidence to prove such insolvency.[8] To the execution, however, it has been held proper that the record

[1] Infra, §§ 988, 991.

[2] Freeman on Executions, § 366.

[3] Ibid. Infra, § 1118.

[4] Infra, §§ 982–3. See Freeman on Executions, § 364.

[5] Infra, § 986. Herman on Executions, §§ 240, 244, 295.

[6] See supra, §§ 822–4. R. *v.* Elkins, 4 Burr, 2129; Gyfford *v.* Woodgate, 11 East, 299; Oldtown *v.* Shapleigh, 33 Me. 278; Claggett *v.* Richards, 45 N. H. 363; Hathaway *v.* Goodrich, 5 Vt. 65; Witherell *v.* Goss, 26 Vt. 750; Whitaker *v.* Sumner, 7 Pick. 189; Potter *v.* Tyler, 2 Metc. (Mass.) 58; Cornell *v.* Cook, 7 Cow. 310; Browning *v.* Hanford, 7 Hill, 120; Diller *v.* Roberts, 13 S. & R. 60; Paxson's App. 49 Penn. St. 195; Hill *v.* Kling, 4 Oh. 137; Phillips *v.* Elwell, 14 Oh. St. 244; Bank *v.* Pullen, 4 Dev. 297; Crow *v.* Hudson, 21 Ala. 561; Kendall *v.* White, 19 Mo. 248.

[7] Cow. & Hill's Notes to Phil. on Ev. No. 383; Freeman on Executions, § 365; Angier *v.* Ash, 6 Fost. 105; Claggett *v.* Richards, 45 N. H. 363; Witherell *v.* Goss, 26 Vt. 750; Bott *v.* Burnell, 11 Mass. 165; Bruce *v.* Holden, 21 Pick. 189; Phillips *v.* Elwell, 14 Oh. St. 244. See infra, § 1155.

[8] Brown *v.* Brooks, 25 Penn. St. 210; Wheelock *v.* Kost, 77 Ill. 296; Collins *v.* Fitzpatrick, 6 J. J. Marsh. 67; Buttram *v.* Jackson, 32 Ga. 409; McMurphy *v.* Bell, 16 La. An. 369; Eichelberger *v.* Pike, 22 La. An. 142. See Palister *v.* Little, 6 Greenl. 350; Meyer *v.* Mohr, 1 Robt. (N. Y.) 333; Carr *v.* Youse, 39 Mo. 346. See Leonard *v.* Simpson, 2 Bing. N. C. 176.

should be attached;[1] and even if this be dispensed with, the execution must have the seal of the court.[2] Proceedings in insolvency are in like manner admissible to prove, in collateral proceedings, the debtor's insolvency.[3]

Bills of exceptions and review proceedings admissible.

§ 835. As between the parties, proceedings in error, including bills of exceptions, are admissible.[4] But this will not authorize the reading, on a second trial, of *ex parte* statements introduced into bills of exceptions or applications for review.[5] A bill of exceptions, on the plea of *res adjudicata*, is admissible to show the identity of the two suits.[6]

IX. RECORDS AS ADMISSIONS.

Record may be received when it involves an admission by the party against whom it is offered.

§ 836. A judgment may be also treated as evidentiary when it involves a self-disserving admission of the party against whom it is offered.[7] Thus the record of a judgment on default, which has been paid, recovered in a former suit between the same parties, upon a note of the same character as that in suit, is admissible in the latter suit.[8] A plea of guilty, in a criminal case, may be in like manner and for similar purposes put in evidence.[9] A judgment may be thus used even when offered by a stranger.[10] A., for instance, brings against T. a suit in which A., as we shall hereafter see, charges T. with damaging goods intrusted to A. by P.; P., in a suit against A., may use the record of the suit of A. against T. for the purpose of showing that

[1] Tindall *v.* Murphy, Hempst. 21; Glenn *v.* Garrison, 17 N. J. L. 1; State *v.* Records, 5 Harr. (Del.) 146; Vassault *v.* Austin, 32 Cal. 597; Coonce *v.* Munday, 3 Mo. 374. See, however, to the effect that the record of the judgment is unnecessary, Potter *v.* Tyler, 2 Metc. (Mass.) 58. As to introducing, for other purposes, single writs, see supra, § 828.

[2] Davis *v.* Ransom, 26 Ill. 100.

[3] Heywood *v.* Reed, 4 Gray, 574; Simpson *v.* Carleton, 1 Allen, 109; McMurphy *v.* Bell, 16 La. An. 369.

[4] Levers *v.* Van Buskirk, 4 Penn. St. 309; Voorhies *v.* Eubank, 6 Iowa, 274; Emery *v.* Whitwell, 6 Mich. 474; Beauchamp *v.* Mudd, Hard. (Ky.) 163; Warden *v.* Mendocino County, 32 Cal. 655.

[5] Wheeler *v.* Ruckman, 35 How. Pr. 350; Francis *v.* Hazlerig, 1 A. K. Marsh. 93; Beeler *v.* Young, 3 Bibb, 520.

[6] Sharp *v.* Carlile, 5 Dana, 487.

[7] Boston *v.* Richardson, 13 Allen, 146; Truby *v.* Seibert, 12 Penn. St. 101; McDermott *v.* Hollman, 70 Penn. St. 52.

[8] City Bank *v.* Dearborn, 20 N. Y. 244.

[9] See supra, § 776; infra, §§ 838, 1113–1120.

[10] Smith *v.* Shackleford, 9 Dana, 452.

A., at the time, held P.'s goods.[1] The same rule applies as to the admissibility of parts of a record. So far as these are used as substitutes for evidence in a trial, and are acted upon by the opposite party, they cannot, except in cases of fraud or gross mistake, be withdrawn.[2] The effect of such admissions, so far as concerns strangers, is considered in another section.[3]

Parties bind themselves by their admission of record.

§ 837. When an officer, or his sureties, is sued on his return, then such return is conclusive against him so far as it involves admission of the reception of goods by himself.[4] Returning that the goods were taken as property of the defendant does not estop him, however, from showing that the goods were not the property of the defendant.[5] A party, also, who has obtained possession of property by decree of court solemnly prayed for by himself, cannot afterwards, in a suit against him to recover claims on such property, deny the ownership.[6] Again: a party may preclude himself from offering evidence inconsistent with the attitude assumed by him in a particular suit. Thus whenever a party solemnly, on record, claims and obtains a right or privilege, he is ordinarily precluded afterwards, even as against strangers, from denying such right or privilege.[7] A party, also, who recognizes another on record as the possessor of a property or privilege, is estopped, in the same suit, from denying such property or privilege;[8]

[1] Tiley *v.* Cowling, 1 Ld. Ray. 744.

[2] Blain *v.* Patterson, 47 N. H. 523; Huntington *v.* Bank, 6 Pick. 340; Elwood *v.* Lannon, 27 Md. 200; Adams *v.* Adams, 23 Ind. 50; Carradine *v.* Carradine, 33 Miss. 698; Devall *v.* Watterston, 18 La. An. 138.

[3] See infra, § 1120.

[4] Supra, § 833 *a;* infra, §§ 1110–20, 1155; Stevens *v.* Bigelow, 12 Mass. 434; Winchell *v.* Stiles, 15 Mass. 230; Kuhlman *v.* Orser, 5 Duer, 242; People *v.* Reeder, 25 N. Y. 302. See Bailey *v.* Kimball, 26 N. H. 351.

[5] Arnold *v.* Brown, 24 Pick. 89; Hopkins *v.* Chandler, 17 N. J. L. 299.

[6] Flanigan *v.* Turner, 1 Black U. S. 491. See, to same general effect, The Mary, 1 Mason, 365; Pitts *v.* Gilliam, 1 Head, 549.

[7] Infra, § 1136; Bul. N. P. 242; Stephen's Ev. 52; Tiley *v.* Cowling, 1 Ld. Ray. 744; Jermain *v.* Langdon, 8 Paige, 41; Giles *v.* Halbert, 12 N. Y. 32; Bowen *v.* De Lattre, 6 Whart. R. 430; Armstrong *v.* Fahnestock, 19 Md. 58; Carlisle *v.* Foster, 10 Oh. St. 199; Dunn *v.* Keegin, 4 Ill. 292; Hawkins *v.* Hall, 3 Ired. Eq. 280; McQueen *v.* Sandel, 15 La. An. 140; Field *v.* Langsdorf, 43 Mo. 32. See, as to admissions in pleadings, infra, §§ 1110–20.

[8] Kelleran *v.* Brown, 4 Mass. 443; Hinsdale *v.* Larned, 16 Mass. 65; Kuypers *v.* Church, 6 Paige, 570; Piper *v.* Sloneker, 2 Grant (Penn.),

though he may offer evidence to explain, though not to contradict, such admissions.[1] It is scarcely necessary to add that the rule before us does not prevent a party from trying several separate though inconsistent forms of action or pleas,[2] nor from making tentative averments in pleading, even though under oath, as against third parties.[3] And an heir, who in a bill in equity against an executor admits the due execution of a will, is not precluded, in proceedings before the surrogate, from contesting such execution.[4]

Pleadings may be admissions.

§ 838. We will elsewhere notice the extent to which an attorney may make admissions for his client.[5] It is proper to add at this place that the pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts.[6] Yet even if such admissions are thus brought home to the party, they are entitled to little weight. At the time they were made they were self-serving, not self-disserving; as a matter of practice, pleadings are

113; Kingsbury *v.* Buchanan, 11 Iowa, 387; Johnstone *v.* Scott, 11 Mich. 232.

[1] Whitcher *v.* Morey, 39 Vt. 459; Yawger *v.* Manning, 30 N. J. L. 182.

[2] Porter *v.* Nelson, 4 N. H. 130; Child *v.* Allen, 33 Vt. 476; Wheeler *v.* Ruckman, 1 Roberts. (N. Y.) 408; Gillespie *v.* Mather, 10 Penn. St. 28; Zeigler *v.* King, 9 Md. 330; Hess *v.* Heeble, 4 Serg. & R. 246.

[3] Hotchkiss *v.* Hunt, 49 Me. 213; Beatty *v.* Randall, 5 Allen, 441; Werkheiser *v.* Werkheiser, 3 Rawle, 326; McLemore *v.* Nuckolls, 1 Ala. Sel. Cas. 591; Warren *v.* Hall, 6 Dana, 455. See infra, §§ 1110–20.

[4] Mason *v.* Alston, 5 Selden, 28.

[5] Infra, § 1170.

[6] Infra, § 1110; Parsons *v.* Copeland, 33 Me. 370; Green *v.* Bedell, 48 N. H. 546; Currier *v.* Silloway, 1 Allen, 19; Gordon *v.* Parmelee, 2 Allen, 212; Bliss *v.* Nichols, 12 Allen, 443; Brown *v.* Jewell, 120 Mass. 215; Cook *v.* Barr, 44 N. Y. 156; Tabb *v.* Cabell, 17 Grat. 160. See Hammat *v.* Russ, 16 Me. 171; Ayers *v.* Ins. Co. 17 Iowa, 176; Meade *v.* Black, 22 Wisc. 241; Hobson *v.* Ogden, 16 Kans. 388. As to estoppels by record admissions, see infra, §§ 1110–1120.

"The allegations by the defendant in the suits brought by her were competent evidence in the nature of admissions of the facts in controversy. They appear to have been made by her authority, and she prosecuted the suits in which these allegations were the foundation of her claim. Currier *v.* Silloway, 1 Allen, 19; Gordon *v.* Parmelee, 2 Allen, 212. The latter case is a direct authority upon the point." Hoar, J., Bliss *v.* Nichols, 12 Allen, 445.

often framed by counsel, rather to put an issue into shape, than to exhibit the client's actual stand-point as to particular facts; and even where the client signs such papers, he does so as a matter of mere form.[1] So far as concerns the party, pleadings at common law are inadmissible, if disputed, as evidence of the truth of the facts stated therein.[2] A plea of guilty, in a criminal issue, however, being presumed to be solemnly entered by the defendant himself, may be put in evidence against him as a confession of the fact, in a civil issue.[3] And a plea verified by affidavit, or an answer in chancery, may be properly viewed as a solemn admission, susceptible of being introduced in other suits against the party by whom it is intelligently made.[4] It

[1] Melvin *v.* Whiting, 13 Pick. 184; Owens *v.* Dawson, 1 Watts, 149; Banks *v.* Johnson, 4 J. J. Marsh. 649; Newell *v.* Newell, 34 Miss. 385. See Church *v.* Shelton, 2 Curt. 271; Rambler *v.* Choat, 1 Cranch C. C. 167. That admissions not put in issue by the pleadings will not be received in evidence in equity, see Copeland *v.* Toulmin, 7 Cl. & F. 356.

[2] Boileau *v.* Rutlin, 2 Ex. 680.

In accordance with the distinction just stated, it has been properly ruled that a disclaimer of title in an action at law on which judgment has been entered, but which has been adjudged by a decree in equity to be founded in mistake, is not admissible in a subsequent suit as evidence of an admission by the party disclaiming. Currier *v.* Esty, 116 Mass. 577.

"In the suit in equity between these parties, it was adjudged that the disclaimer in the writ of entry and the judgment thereon was founded in misapprehension and mistake of facts, and that the defendant should be perpetually enjoined from availing himself of them, by way of estoppel, against the plaintiff. Currier *v.* Esty, 110 Mass. 536.

"At the trial of the present action of trespass, the defendant did not attempt to disregard the decree in equity, by availing himself of the disclaimer and the judgment at law as an estoppel. He only offered the disclaimer as evidence of a declaration by the plaintiff against his interest; and the judgment as vesting the title in himself.

"But the disclaimer, having been judged to be founded in mistake, was no evidence of an admission by the plaintiff. And a judgment upon a disclaimer does not transfer title, or operate otherwise than by estoppel. Oakham *v.* Hall, 112 Mass. 535." Gray, C. J., Currier *v.* Esty, 116 Mass. 577.

As to *pleas in abatement* as admissions, see infra, § 1111.

As to *equity practice*, infra, § 1112.

As to *paying money* into court, infra, § 1114.

[3] Supra, § 783; Anon. cited Phil. Ev. 25; R. *v.* Fontaine Moreau, 11 Q. B. 1033; Bradley *v.* Bradley, 2 Fairf. 367; Green *v.* Bedell, 48 N. H. 546; Clark *v.* Irvin, 9 Ham. 131. See supra, § 776.

[4] Infra, § 1116; McMahon *v.* Burchell, 1 Coop. Ca. 209; Williams *v.* Cheney, 3 Gray, 215; Central, &c. Corp. *v.* Lowell, 15 Gray, 106; Van Rensselaer *v.* Akin, 22 Wend. 549;

has been held that the admission of a party, on an amicable reference of the correctness of an account, is evidence, however slight, against him subsequently;[1] though it is otherwise as to an admission in a case stated for the opinion of the court,[2] and as to an admission in a plea, signed by a party's attorney in his behalf, but rejected by the court.[3] Such admissions, when not contractual, are always rebuttable.[4]

Pleadings not evidence of facts against third parties.

§ 839. Pleadings, however, so far as they consist in the written contentions of the parties to a cause, are not in any view evidence, collaterally, of the truth of the facts they aver. They may, as part of a record, be introduced for the purpose of showing, when it is relevant, that a particular issue was adjudicated in a particular way;[5] but they are inadmissible, certainly as to strangers, for the purpose of proving even such facts as were essential to the finding.[6]

Stump *v.* Henry, 6 Md. 201; Hunter *v.* Jones, 6 Rand. (Va.) 541; Earl *v.* Shoulder, 6 Oh. 409; Tupper *v.* Kilduff, 26 Mich. 394; McNair *v.* Ragland, 1 Dev. N. C. Eq. 533; Cooper *v.* Day, 1 Rich. Eq. S. C. 26; Lunday *v.* Thomas, 26 Ga. 537; Whitlock *v.* Crew, 28 Ga. 289; Brandon *v.* Cabiness, 10 Ala. 156; McLemore *v.* Nuckolls, 1 Ala. Sel. Ca. 591; *S. C.* 37 Ala. 662; Pearsall *v.* McCartney, 28 Ala. 110; Alford *v.* Hughes, 14 La. An. 727; Henderson *v.* Cargill, 31 Miss. 367; Cook *v.* Hughes, 37 Tex. 343. A party's answer to a bill of discovery cannot of course be put in evidence for himself. Clark *v.* Depew, 25 Penn. St. 509. See, however, Rees *v.* Lawless, 4 Litt. (Ky.) 219. That affidavits of a party are admissible against him when admitting facts pertinent to issue, though the suit be by strangers, see Cook *v.* Barr, 44 N. Y. 158; Fulton *v.* Gracey, 15 Grat. 314; Trustees *v.* Bledsoe, 5 Ind. 133; Davenport *v.* Cummings, 15 Iowa, 219; Mushat *v.* Moore, 4 Dev. & B. 124.

In New York, it may be noticed, a verified answer is not evidence unless put in by the opposing party. "The old equity rule, that where a bill is so framed as to compel an answer on oath, and the verified answer denies any fact alleged in the bill, the alleged fact is not established unless shown by two witnesses, or by proof equivalent to the testimony of two witnesses, does not apply to pleadings under the Code. *A verified answer is not evidence, and so does not weigh as one witness.* Stilwell *v.* Carpenter, 62 N. Y. 639.

[1] Tams *v.* Lewis, 42 Penn. St. 402. See, as to other cases of record admissions, infra, §§ 1110–20.

[2] Hart's Appeal, 8 Penn. St. 32.

[3] Com. *v.* Lannan, 13 Allen, 563.

[4] Infra, § 1117. And see, generally, Kimball *v.* Bellows, 13 N. H. 58; Crump *v.* Gerock, 40 Miss. 765.

[5] See Com. *v.* McPike, 3 Cush. 181.

[6] Ibid.; Com. *v.* Goddard, 2 Allen, 148; Hunt *v.* Daniels, 15 Iowa, 146; Shaw *v.* McDonald, 21 Ga. 395; Saltmarsh *v.* Bower, 34 Ala. 613; Persons

§ 840. The effect of a judgment on a demurrer, when offered to bar a subsequent suit, has been already noticed.[1] With regard to a demurrer as an admission, it may be here stated that "the admission, even by way of demurrer, to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission had been made *ore tenus* before a jury."[2] At the same time, a "demurrer only admits the facts which are well pleaded; it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument."[3] And so the "mere averments of a legal conclusion are not admitted by a demurrer, unless the facts and circumstances set forth are sufficient to sustain the allegation."[4]

A demurrer may be an admission.

A demurrer to the plaintiff's evidence admits all the facts that the evidence tends to prove.[5]

§ 841. Wherever a fact, pertaining to a record, is not entered on the record, then, in ordinary practice, it may be certified to by the proper clerk, and the certificate received as evidence.[6] Thus the certificate of a clerk of a circuit court has been received to prove that a cause was not tried at the circuit;[7] and the certificate of a court of appeals is evidence to prove reversal of a judgment.[8]

Certificate of clerk admissible to prove facts within his range.

v. Jones, 12 Ga. 371; Shaw *v.* Macon, 21 Ga. 281.

[1] Supra, § 782.

[2] Clifford, J., Gould *v.* R. R. 91 U. S. (1 Otto) 533, citing Bouchard *v.* Dias, 3 Den. 238; Perkins *v.* Moore, 16 Ala. 17; Goodrich *v.* The City, 5 Wall. 573; Aurora City *v.* West, 7 Wall. 99; Beloit *v.* Morgan, 7 Wall. 619.

[3] Clifford, J., Gould *v.* R. R. 91 U. S. (1 Otto) 536.

[4] Ibid.; citing Ford *v.* Peering, 1 Ves. Jr. 78; Nesbitt *v.* Berridge, 8 L. T. (N. S.) 76; Murray *v.* Clarendon, L. R. 9 Eq. 11; Dillon *v.* Barnard, 21 Wall. 430; Lea *v.* Robeson, 12 Gray, 280.

[5] Golden *v.* Knowles, 120 Mass. 336; Com. *v.* Parr, 5 W. & S. 345; Brister *v.* State, 26 Ala. 108.

[6] See supra, §§ 80, 120–126.

[7] Wright *v.* Murray, 6 Johns. R. 286.

[8] Hoy *v.* Couch, 6 Miss. 188.

CHAPTER XI.

STATUTORY EXCLUSION OF PAROL PROOF. STATUTE OF FRAUDS.

I. General Considerations.
- Statutory assignments of probative force, § 850.
- Error in this respect of scholastic jurists, § 851.
- Intensity of proof cannot be arbitrarily fixed, § 852.
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- Estates in land can be assigned only in writing, § 856.
- Surrender by operation of law excepted, § 858.
- Such surrender includes act by landlord and tenant inconsistent with tenant's interest, § 860.
- Mere cancellation of deed does not revest estate, § 861.
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- In other respects writing is essential to transfer of interest in lands, § 863.
  - Though seal is not necessary, § 865.
- But interest in lands does not include perishing severable crops and fruit, § 866.
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  - (As to equitable modifications of statute in this respect, see infra, § 903 *et seq.*)

III. Sales of Goods.
- Sales of goods must be evidenced by writing, unless there be part payment, or earnest. Delivery and consideration must appear, § 869.
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- Place of signature immaterial, and initials may suffice, § 873.
- When main object is sale of goods, writing is necessary, § 874.
- Acceptance and receipt of goods takes sale out of statute, § 875.
- Acceptance by carrier or expressman is not acceptance by vendee, § 876.
- Partial payment may take sale out of statute, § 877.

IV. Guarantees.
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But will where statute is used to perpetuate fraud, § 908.
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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 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.

§ 851. The error of the scholastic jurists, in this respect, may

[1] See Hand *v.* Ballou, 12 N. Y. 541.

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.

Error in this respect of the scholastic jurists.

§ 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

Intensity of proof cannot be arbitrarily fixed.

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 statute of frauds.

§ 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 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.[3] It says: "Now that important business is transacted largely in writing;

[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.

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

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."[1] 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,[2] 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."

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 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.[3] If the lessee takes possession, the question arises whether by the statute the lease is

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

[1] See Rob. on Frauds, Pref.

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

[3] 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.

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."[1] A lease which does not exceed three years from the time of making is, under the English statute, valid, although parol.[2] 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."[3]

§ 855. "Estates at will," under the statute, are to be treated, so it has been argued, as tenancies from year to year;[4] 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.[5] 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.[6] A term of three years, to commence at a future date, does not meet the requisitions of the statute; the three years, to be within the meaning of the statute, must begin with the date of the lease.[7] 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.[8]

§ 856. The third section of the statute of frauds virtually pro-

[1] Ibid.

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

[3] 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.

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

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

[6] 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.

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

[8] 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.

vides 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. 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." [1] 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.[2]

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 in possession.[3] It even precludes parol assignments and surrenders of leases for terms less than three years.[4]

[1] 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, Wilson *v.* Black, 104 Mass. 406.

[2] 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 Oh. 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.

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

[4] 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.*

§ 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,[1] 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.[2]

Surrender by operation of law excepted.

§ 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.[3] But it is argued that if a lessee were to accept, *in accordance 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.[4] But a lease will not, under the exception, be held to be surrendered by the acceptance of a *void* lease, which creates no new

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

[2] See 1 Wms. Saunders, 236, e; 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 acceptanee 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.

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

[4] 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.

estate whatever,[1] 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.*[2] Nor is a surrender worked by the single circumstance of a tenant entering into an agreement to purchase the leased estate;[3] though this may of course be done by written limitations express or implied.[4] 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.[5]

Surrender by operation of law now held to include acts done by landlord and tenant inconsistent with tenant's interest.

§ 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 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.[6] 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.[7]

[1] 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.

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

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

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

[5] 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.

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

[7] 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,

§ 861. However it may be in equity,[1] 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.[2] Nor can we infer surrender merely from the deed being found cancelled in the possession of the lessor.[2] 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.[3]

Mere cancellation of deed does not revest estate.

§ 862. Assignments, as well as surrenders, may take place by operation of law, and thus be excepted from the statute. A lessor, 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."[4] 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,

Assignments by operation of law excepted by statute.

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.

[1] 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. 882; 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.

[2] 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.

[3] 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.

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

present or future, vested or contingent,[1] 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.[2]

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

§ 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.[3] The statute has been held to extend to contracts to abate a tenant's rent;[4] to submit to arbitration the question whether a lease shall be granted;[5] to assign an equitable interest;[6] to relinquish a tenancy, and let another party into possession for the residue of a term;[7] to permit the profits of a clergyman's living to be received by a trustee;[8] to become a partner in a colliery, which was to be demised by the partnership upon royalties;[9] to transfer an easement;[10] to take furnished lodgings;[11] to sell a pew in a church for an unlimited period;[12] to reserve a shed from the operation of a deed;[13] to sell brick being part of a burned house;[14]

[1] 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.

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

[3] 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 Wisc. 501.

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

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

[6] Smith *v.* Burnham, 3 Sumn. 435; Richards *v.* Richards, 9 Gray, 313; Simms *v.* Killian, 12 Iredell, 252.

[7] 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.*

[8] Alchin *v.* Hopkins, 1 Bing. N. C. 102; 4 M. & Sc. 615, *S. C.*

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

[10] 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.

[11] 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.

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

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

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

to grant,[1] or otherwise to transfer to another a mortgagor's equity of redemption ;[2] to procure, as a broker, the sale of a lease.[3] 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 ;[4] or a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises ;[5] or a contract relating to the investigation of a title to land ;[6] or an agreement for board and lodging, no particular rooms being demised ;[7] or an irrevocable executed license for the enjoyment of an easement ;[8] 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 ;[9] or an agreement to take a family of boarders and lodgers ;[10] 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.[11]

§ 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.[12]

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

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

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

[4] Russel *v.* Russel, 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 Wisc. 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.

[5] Hoby *v.* Roebuck, 7 Taunt. 157.

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

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

[8] 1 Washburn's Real Prop. 4th ed. 639; Angell on Watercourses, § 168; Browne on Frauds, § 232.

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

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

[11] 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.

[12] Taylor's Ev. § 949; Bligh *v.* Brent, 2 Y. & C. Ex. R. 268; Bradley *v.* Holdsworth, 3 M. & W. 422;

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]

Hibblewhite *v.* M'Morine, 6 M. & 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; and see, also, Powell *v.* Jessopp, 18 Com. B. 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, Bs.

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

§ 865. So far as concerns terms for years, the better opinion is,

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 differences 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 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.

Distinctive Legislation in Pennsylvania. (Continued.)

"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. Bell *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

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

Under statute seal is not neces-

Distinctive Legislation in Pennsylvania. (Continued.)

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 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.

Distinctive Legislation in Pennsylvania. (Continued.)

495; Poorman *v.* Kilgore, 37 Pa. St. 311; Thurston *v.* Franklin College, 16 Pa. St. 154; Poorman *v.* Kilgore, supra; 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. 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

[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.

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

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

Distinctive Legislation in Pennsylvania. (Continued.)

are those where the defendant's default is in 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, 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 differ-

Distinctive Legislation in Pennsylvania. (Continued.)

ence 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.*

[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

Distinctive Legislation in Pennsylvania. (Continued.)

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.* 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 Pennsylvania 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

Distinctive Legislation in Pennsylvania. (Continued.)

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 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. 426, 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,

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 in actual mature existence at the time of the contract, — as, for instance, a growing crop of corn,[2] or hops,[3] or potatoes,[4] or peaches,[5] or turnips,[6] — though the purchaser is to harvest or dig them.[7] 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

"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 permanent attachment to it.

Distinctive Legislation in Pennsylvania. (Continued.)

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 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., June, 1877."

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

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

[3] 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.

[4] 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.

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

[6] 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.

[7] 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.

an interest in lands.[1] Hence the statute has been held to cover agreements respecting the sale of growing trees,[2] or grass,[3] or standing though growing underwood,[4] or growing poles.[5]

§ 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."[6] If, however, what is sold is the crop, ripe,

[1] 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 Metc. (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.

[2] 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.

[3] Crosby *v.* Wadsworth, 6 East, 602; Carrington *v.* Roots, 2 M. & W. 248; Gilmore *v.* Wilbur, 12 Pick. 120; Powell *v.* Rich, 41 Ill. 466.

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

[5] 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 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.

[6] 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 Metc. (Mass.) 34; Whitmarsh *v.* Walker, 1 Metc. (Mass.) 313; Claflin *v.* Carpenter, 4 Metc. (Mass.) 583.

and to be cut before it draws materially from the soil, then the crop is not "an interest in land."[1] 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.[2] But when the essence of the thing sold is labor, not land, the statute does not apply.[3]

Agent's authority need not be in writing, unless required by statute.

§ 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. 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.[4] For the sale of goods, under the statute of frauds, a parol authority is adequate.[5] An auctioneer's memorandum or entry, signed by him, whether as to real or personal estate, binds both parties.[6]

[1] 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 Metc. (Mass.) 313; Claflin *v.* Carpenter, 4 Metc. (Mass.) 580; Kilmore *v.* Howlett, 48 N. Y. 569; Smith *v.* Bryan, 5 Md. 141; Cain *v.* McGuire, 13 B. Monr. 340.

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

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

[4] 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. Ch. 351; 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.

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

[6] 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 Metc. 388; McComb *v.* Wright, 4 Johns. Ch. 659; Johnson *v.* Buck, 6 Vroom, 338; Pugh *v.* Chesseldine, 11 Ohio, 109; Hart *v.* Woods, 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.

III. SALES OF GOODS.

§ 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."[1] One party cannot sign as the other's agent;[2] but there may be a common agent for both parties.[3] The language in the fourth section is in this respect substantially the same as that of the seventeenth;[4] and in order to satisfy either, it has been held that the *consideration* for the *agreement* in the one case, and for the *bargain*[5] 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,[6] not only to bargains for the sale of goods, but to agreements upon consideration of marriage,[7] to contracts for the sale of lands, and to agreements not to be performed within a year,[8] 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

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

[1] 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."

[2] Sharman *v.* Brandt, L. R. 6 Q. B. 720.

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

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

[5] 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.

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

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

[8] 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.

adopted in New Hampshire,[1] New York,[2] New Jersey,[3] Maryland,[4] South Carolina,[5] Georgia,[6] Michigan,[7] Indiana,[8] and Wisconsin.[9] It has been rejected in Maine,[10] Vermont,[11] Massachusetts,[12] Pennsylvania,[13] Ohio,[14] North Carolina,[15] and Missouri.[16] A covenant under seal, however, need not, it is said, express the consideration.[17] 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,[18] but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.[19] Even, however, under the strict rule

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

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

So by Revised 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.

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.

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

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

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

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

[7] Jones *v.* Palmer, 1 Doug. 379.

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

[9] Taylor *v.* Pratt, 3 Wisc. 674.

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

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

[12] Packard *v.* Richardson, 17 Mass. 122.

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

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

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

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

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

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

[19] 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.* Willson, 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 Wisc. 231; Lecat *v.* Tavel, 3 McCord, 158; Otis *v.* Hazeltine, 27 Cal. 80. See Taylor's Ev. § 934.

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.[1]

§ 870. The contract, under the statute, must contain the names of the parties, and the general terms of the bargain,[2] and the promise,[3] either directly or by reference;[4] but any memorandum will suffice, which contains all that leads to future certainty.[5] 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.[6] 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;[7] 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.[8] Nor

Other material averments must be in writing.

[1] 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.

[2] Archer *v.* Baynes, 5 Ex. R. 625; Wood *v.* Midgley, 5 De Gex, M. & G. 41; Holmes *v.* Mitchell, 7 Com. B. (N. S.) 361; Laythoarp *v.* Bryant, 2 Bing. N. C. 742; Remick *v.* Sandford, 118 Mass. 102; aff. *S. C.* 120 Mass. 315.

[3] 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.

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

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

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

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

[8] 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'Wolf, 1 Peters, 499.

is it necessary that the writing should specify, when this is not practicable, the particular mode,[1] or time of payment, or even the specific price in figures.[2] Hence a written order for goods "on moderate terms" is sufficient,[3] though, if a definite price be agreed upon, it should be stated in the contract.[4]

§ 871. As to parties, greater particularity is requisite; and either expressly or inferentially their names must be collected from the memorandum.[5] The statute was held to be satisfied in 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.[6] But, under the statute, no substantial part of the contract can be by parol.[7]

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.[8] For this

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

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

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

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

[5] 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.;* 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.

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

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

[8] Supra, § 617; Allen *v.* Bennet, 3 Taunt. 169; Jackson *v.* Lowe, 1 Biog. 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; 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

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.[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] 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,[6] or by an answer to a bill in chancery, or by an affidavit in any legal proceeding;[7] or by an auctioneer's

& S. 394; Douglass *v.* Mitchell, 35 Penn. St. 440; Downer *v.* Morrison, 2 Grat. 250. See Passaic Co. *v.* Hoffman, 3 Daly, 495.

[1] 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 Metc. 385; Talman *v.* Franklin, 14 N. Y. 584. See Parkman *v.* Rogers, 120 Mass. 264.

[2] Taylor's Ev. § 937, citing Archer *v.* Baynes, 5 Ex. R. 625; Richards *v.* Porter, 6 B. & 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.

[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 Wisc. 605.

[6] 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; 3 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 Wisc. 80; Robertson *v.* Ephraim, 18 Tex. 118. See Clark *v.* Tucker, 2 Sandf. 157; Kinloch *v.* Savage, 1 Speers, 143.

[7] See fully infra, § 912; and see

memorandum;[1] or by a broker's entries;[2] or by any other written engagement, though signed solely by the party charged or his agent.[3] But a written memorandum, made after the action is brought, will not satisfy the statute.[4]

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.[5] 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.[6] 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.[7] 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.[8] In New York, under the Revised Stat-

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.

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

[2] Wharton on Agency, § 718.

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

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

[5] 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.* Brinkenhoff, 2 Hill (N. Y.), 663; Hill *v.* Johnston, 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.

[6] Johnson *v.* Dodgson, 2 M. & W. 659, per Ld. Abinger; Taylor, § 939.

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

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

utes, the memorandum must be signed at the end by the party charged.[1] While the party's christian name may be given by initials, or omitted altogether;[2] 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,[3] or if it be subscribed, without signature, "by your affectionate mother,"[4] 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.[5] 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.[6] An oral acceptance of a written and signed proposal in its entirety is sufficient.[7]

[1] 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.

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

[3] 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.

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

[5] 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.

[6] 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.* Wood-

[7] Taylor's Ev. § 940, citing Creswell, 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.* 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.

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

§ 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 incidentally 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]

Acceptance and receipt of

§ 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

bury, 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.

[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.* 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; Shindler *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.

compliance with both requisites is necessary.[1] An acceptance and receipt of a substantial part of the goods, however, will be as operative as an acceptance and receipt of the whole.[2] The acceptance may either precede or follow the receiving of the article, or may accompany such receiving.[3] The authorization of an agent to receive, does not imply authorization to accept.[4] The receipt must be of a character to preclude the vendor from retaining any lien on the goods.[5] 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.[6] 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.[7] The acceptance must be absolute and final.[8] It must

goods takes case out of statute.

[1] 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.

[2] 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.

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

[4] 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 Metc. (Mass.) 133; Outwater *v.* Dodge, 6 Wend. 400.

[5] 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.

[6] 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.

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

[8] 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. See, as denying proposition in

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]

Where the goods are ponderous or inaccessible, a constructive delivery will suffice;[7] 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 de-

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.* Scot, 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.* Tibbetts, 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. Ex. 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; Bailey *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.

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

[7] See Parker *v.* Jervis, 3 Keyes, 271.

livery of other indicia of property.[1] Such acts, however, must be unequivocal.[2] 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.[3] 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.[4]

Acceptance by carrier or expressman is not acceptance by vendee.

§ 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.[5] 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.[6] Acceptance by the customary carrier, or expressman, is not *per se* sufficient.[7] The carrier's authority from the vendee,

[1] 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 Metc. (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.

[2] 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.* Sandford, 120 Mass. 309; Wilkes *v.* Ferris, 5 Johns. R. 335; Stanton *v.* Small, 3 Sandf. 230.

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

[4] 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.

[5] 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.

[6] Johnson *v.* Dodgson, 2 M. & W. 656, per Parke, B.; Frostburg *v.* Mining Co. 9 Cush. 117; 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, *S. C.*; 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, and cases cited to note 4, § 875.

[7] Frostburg *v.* Mining Co. 9 Cush.

however, is a question of fact.[1] 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.[2]

§ 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,[3] and it is sufficient if this payment be made subsequent to the sale, if the object be to validate the sale.[4] A *tender*, unaccepted, is insufficient.[5] And the payment must be *actual*.[6] A mere *agreement* to pay, without corresponding credit, or some equivalent act of acceptance taking place, is not by itself enough.[7]

Partial payment may take case out of statute.

IV. GUARANTEES.

§ 878. The fourth section of the statute of frauds, which has been held to be inapplicable to deeds,[8] 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 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.[9] An

Guarantees must be in writing.

117. See Meredith *v.* Meigh, 2 E. & B. 364.

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

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

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

[4] 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.

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

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

[7] 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.

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

[9] As to meaning of words "lawfully authorized," see Norris *v.* Cooke

oral guarantee of the note of a third person, given in payment of a debt of the guarantor, is within the statute.[1]

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.[2] In the application of this distinction, it has 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.[3] 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.[4] It is plain that an agreement, upon a new and sufficient consideration to pay another's debt, is not within the statute.[5]

30 L. T. 224; and see generally, 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.

[1] Gill *v.* Herrick, 111 Mass. 501; Dows *v.* Swett, 120 Mass. 322.

[2] 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; Hunter *v.* Randall, 62 Me. 423; Alger *v.* Scoville, 1 Gray, 391; Jepherson *v.* Hunt, 2 Allen, 423; 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; Merriman *v.* Liggett, 1 Weekly Notes, 379; Jefferson *v.* Slagle, 66 Penn. St. 202; Chamberlin *v.* Ingalls, 38 Iowa, 300; Lester *v.* Bowman, 39 Iowa, 611; Dickenson *v.* Colter, 45 Ind. 445; Patmor *v.* Haggard, 78 Ill. 607.

[3] 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.

[4] 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.*, per Ex. Ch., where three judges thought that the defendant's undertaking did, and five thought that it did not, render him primarily liable.

[5] Gold *v.* Phillips, 10 Johns. R. 412; Myers *v.* Morse, 15 Johns. R. 425; Farley *v.* Cleveland, 9 Cow. 639;

§ 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."[1] It has been consequently held, that to bring the case within the statute, the liability of that other must continue, notwithstanding the promise.[2] Thus 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.[3] 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.[4] It is said, also, to make no difference whether the goods were delivered to the third party,[5] or the debt incurred,

To constitute a guarantee under the statute, the indebtedness of the person guaranteed must be continuous.

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; Bissig *v.* Britton, 59 Mo. 204. See Green *v.* Disbrow, 56 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.

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

[2] See Gull *v.* Lindsay, 4 Ex. R. 45, 52; Butcher *v.* Stcuart, 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. 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; Allshouse *v.* Ramsay, 6 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. Meriden Co. *v.* Zingsen, 48 N. Y. 247.

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

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

[5] 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.

or the default committed by him, before or after the promise by the defendant; for a promise to indemnify is substantially within the statute.[1] 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.[2] It must be noticed, however, that the statute covers cases of promises to make good the *tortious* as well as the *contractual* defaults of another.[3]

§ 881. A guarantee, to take the case out of the statute, must be exact and fully proved. "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."[4]

[1] 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.

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

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

[4] 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

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.[1] It should also be observed that though there may be, in other respects, such a part performance of marriage contracts as to take the case out of the statute,[2] yet that the marriage *per se* is not a part performance within this rule.[3] 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.[4] But it is now ruled in England, that an oral agree-

so as to comply with the statute of frauds." Reed's Cases, *ut supra*.

[1] Taylor's Ev. § 945; B. N. P. 280 *c*.

[2] 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.

[3] 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 Oh. St. 501. See expressions in Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

[4] 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 he 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.

ment made before marriage will be enforced in equity, if subsequently to the marriage it has been recognized and adopted in writing;[1] though there will be no interference, unless it appear that the marriage was contracted on the faith of the agreement.[2]

VI. AGREEMENTS IN FUTURO.

§ 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 argued that the statute is inapplicable in any case where the action is brought upon an *executed* consideration.[5]

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

[1] 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. 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.

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

[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; Suggett *v.* Cason, 26 Mo. 221; Haugh *v.* Blythe, 20 Ind. 24; Marley *v.* Noblett, 42 Ind. 85; Curtis *v.* Sage, 35 Ill. 22; Larimer *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.

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

[5] See Taylor's Ev. §§ 893, 900–2, 953–4; Souch *v.* Strawbridge, 2 Com. B. 814, per Tindal, C. J. See Re

A *part 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 party who re-

Pentreguinea Coal Co. 4 De Gex, F. & J. 541.

[1] Boydell *v.* Drummond, 11 East, 142, 156, 159.

[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; 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 Bayley, J.

[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 Mavor *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.

[6] Birch *v.* Liverpool, *ut supra;* Sherman *v.* Trans. Co. 31 Vt. 162; 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; Harris *v.* Porter, 2 Harr. (Del.) 27.

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

VII. WILLS.

§ 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,[2] 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 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

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

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

[2] 7 Will. 4 and 1 Vict. c. 26.

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 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 sig-

[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.

nature is valid, if it appears on any part of the instrument.[1]

§ 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 re-written, 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] So under a statute requiring two witnesses to a will, a will altered after one witness has signed is not duly proved.[5] As the word "presence," mentioned in the will act (as distinguished from the statute of frauds), means not only a bodily, but a mental 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.[6] Under the New York statute, when witnesses

Distinctive adjudications under statutes.

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

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

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.[1] 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 afterward wrote his name in another form in another part of the instrument, this was held not a sufficient authentication of the previous signature.[2] 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.[3] 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.[4] 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.[5] 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 purpose 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.[6]

[1] Sisters of Charity of St. Vincent de Paul *v.* Kelly. Opinion by Folger, J., Alb. L. J. Dec. 23, 1876.

[2] Ibid.

[3] 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.*

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

[5] 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 supra, § 939.

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

§ 887. Under the statute of frauds (in its original terms), it is not necessary for the witnesses 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.[1] 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.[2]

§ 888. In making the acknowledgment,[3] 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,[4] or if he requests the witnesses to put their names *underneath his*,[5] or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,[6] or even, it seems, if he desires them to sign without stating that the paper is his will,[7] 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 attested,[8] 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.[9] It is not, however, essen-

[1] 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.

[2] 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.

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

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

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

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

[7] 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.

[8] Hudson *v.* Parker, 1 Roberts. 14; Ilott *v.* Genge, 3 Curt. 175, 181; Countess de Zicby 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. The text is reduced from Taylor on Evidence, § 967 *et seq.*

[9] In re Byrd, 3 Curt. 117; In re

tial 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.[1] 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.[2]

Testator may sign by a mark, or have his hand guided; and witnesses may sign by initials and without additions.

§ 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,[3] or he may sign by his mark only,[4] though his name does not appear, or though a wrong name does by mistake appear,[5] in the body of the will;[6] and the attesting witnesses, whether they can write or not, may also sign

Olding, 2 Ibid. 865; Cooper *v.* Bockett, 3 Ibid. 648; 4 Moo. P. C. R. 419, *S. C.;* and cases cited supra.

[1] 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.

[2] Taylor's Evidence, § 970; supra, §§ 727, 737; Sandilands, in re, L. R. 6 C. P. 411; Burgoyne *v.* Showler, 1 Roberts. 5, per Dr. Lushington; Hitch *v.* Wells, 10 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, *S. C.;* Smith *v.* Smith, L. R. 1 P. & D. 143, *S. C.* See Croft *v.* Croft, 4 Swab. & Trist. 10; and Wright *v.* Rogers, L. R. 1 P. & D. 678, *S. C.* See In re Thomas, 1 Swab. & Trist. 255, per Sir C. Creswell; 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.

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

[4] 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.* 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.

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

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

as marksmen;[1] and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.[2] It has even been held sufficient for witnesses to subscribe the will by their initials.[3] 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,[4] or even stamp,[5] the testator's signature by his direction.[6] The *witnesses*, however, must attest the will, either by their own signatures or their marks.[7]

§ 890. A will, as is the case with other documents under the statute of frauds, when imperfect in itself may, by clear reference to it as an existing document,[8] 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 unex-

Imperfect will may be completed by reference to existing document.

[1] 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.

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

[3] Taylor, § 974; 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.*

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

[5] 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.*

[6] 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.

[7] In re Cope, 2 Roberts. 335; In re Duggins, 39 L. J. Pr. & Mat. 24; Taylor, § 974.

[8] 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. 1 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.

ecuted will be cured.[1] Hence unattested wills and codicils have been confirmed by subsequent attested codicils.[2] Parol evidence may be received to explain irregularities as to attestation.[3]

Revocation cannot ordinarily be proved by parol.

§ 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 intention, 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,[4] 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

[1] 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.

[2] 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. See, also, Anderson *v.* Anderson, L. R. 13 Eq. 381. See supra, § 872.

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

[4] See De Pontès *v.* Kendall, 31 L. J. Ch. 185, per Romilly, M. R. See Hicks, re, 38 L. J. Pr. & Mat. 65; 1 Law Rep. P. & D. 683, *S. C.*; Fraser, re, 2 Law Rep. P. & D. 40; 39 L. J. Pr. & Mat. 20, *S. C.*

under the will act, so far as concerns a common subject matter of interpretation, in connection with the rulings under the statute of frauds.[1]

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,[2] even where such paper had to be proved by parol.[3] 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.[4]

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

§ 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.[5]

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

§ 894. Revocation will not be complete, unless the act of spoliation be deliberately effected on the document, *animo revocandi*.[6] This is expressly rendered necessary by the will act,[7] and is impliedly required by the statute of frauds.[8] It is further clear, that the burden of showing that a once valid will has been revoked by

[1] Taylor, § 981, citing In re Cunningham, 29 L. J. Pr. & Mat. 71; 4 Swab. & Trist. 194, *S. C.*

[2] 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.

[3] Haward *v.* Davis, 2 Binn. 406; Jones *v.* Murphy, 8 Watts & S. 275; Day *v.* Day, 2 Green Ch. (N. J.) 549; Legare *v.* Ashe, 1 Bay, 464. See Nelson *v.* McGiffert, 3 Barb. Ch. 158.

[4] 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; Geaves *v.* Price, 3 Swab. & Trist. 71; Birks *v.* Birks, 4 Swab. & Trist. 23.

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

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

[7] Taylor's Evid. § 980.

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

mutilation, will lie upon the party who undertakes to prove the revocation.[1]

Contemporaneous declarations admissible.

§ 895. Declarations of the testator, accompanying the act of spoliation (though not such as are subsequently made),[2] will be admissible to explain his intent.[3]

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

§ 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 bystander saved it without his knowledge, before, as it seems, it was at all burnt, the court held the revocation was complete.[4] But where a testator, being angry with the 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 he not been stopped, would have gone further in the process of destruction.[5] 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."[6] 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*.[7] Even the act of

[1] Harris *v.* Berrall, 1 Swab. & Trist. 153; Benson *v.* Benson, Law Rep. 2 P. & D. 172.

[2] 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; Kirkpatriek, 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; Deveemon *v.* Deveemon, 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.

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

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

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

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

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

tearing off the *seal* from a will, which had needlessly been executed as a sealed instrument, has been deemed a revocation.[1] 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.[2]

So of cancellation and of obliteration.

§ 897. The will act omits the term cancellation in its enumeration of the modes of destroying wills,[3] but under the statute, as well as at common law, any effective, intentional cancellation by the testator, destroys the efficiency of a will.[4] 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.[5]

§ 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.[6]

Parol evidence admissible to show that

§ 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.[7] So such evidence has been

[1] 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.*

[2] 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.*

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

[4] See supra, § 630; Townley *v.* Watson, 3 Curt. 761, 764, 768, 769; 3 Ec. & Mar. Cas. 17, *S. C.*

[5] 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.

[6] 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. See Rawlins *v.* Rickards, 28 Beav. 370; Ibbott *v.* Bell, 34 Beav. 395; Quinn *v.* Butler, 6 Law Rep. Eq. 225.

[7] Laxley *v.* Jackson, 3 Phillips Ec. 128; Richards *v.* Mumford, 2 Philli-

the destruction of will was intentional, or that its destruction was believed by testator.

received to show that a will, produced as a testator's last will, had been fraudulently secreted by parties 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 Tapley, JJ., in Maine, in 1870, as against Cutting, Walton,

more, 23; Dan *v.* Brown, 4 Cow. 490.

[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; Eckersly *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. 281.

[3] Nichol, J., in Thynne *v.* Stanhope, 1 Addams, 52, citing Lord Mansfield, in Burtensbaw *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.* Benson, 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).

[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.

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 contents of written instruments. At the same time, while 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; Haward *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.*

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 not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a

[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 Metc. (Mass.) 486; Morton *v.* Deane, 13 Metc. (Mass.) 385; Ryan *v.* Hall, 13 Metc. (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; Rice *v.* Manley, 2 Hun, 492 (overruling 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.

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 agreement can be substituted for another by consent, and parol is admissible to prove such substitution.[11]

Parol contract cannot be substituted for written, under statute.

[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.* Penn, 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, *S. C.*; aff'd in Ex. Ch.; L. R. 3 Q. B. 272.

[11] See infra, § 1017.

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.[1] 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.[2] 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.[3] 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.[4] The same conclusion results where one of the conditions is severed from the other by being part performed.[5]

[1] 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 Metc. 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.

[2] See observations of Parke, B., in Marshall *v.* Lynn, 6 M. & W. 109.

[3] 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.

[4] Mayfield *v.* Wadsly, 3 B. & C. 357; Wood *v.* Benson, 2 Tyrw. 93; Pierce *v.* Woodward, 6 Pick. 206; Mobile Ins. Co. *v.* McMillan, 31 Ala. 720.

[5] Page *v.* Monks, 5 Gray, 492; Trowbridge *v.* Wetherbee, 11 Allen,

§ 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;[1] and that a conveyance in fee simple is really but a mortgage.[2] 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.[3] On the other hand, parol evidence is admissible to repel the implication of a trust from letters and other written proof.[4] 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.[5]

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.[6] The rule[7] 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.[8] Trusts *ex maleficio* and implied trusts are not within the Act of 1856.[9]

§ 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

Performance or readiness to perform a contract as amended

364; Hess *v.* Fox, 10 Wend. 436; Dock *v.* Hart, 7 Watts & S. 172.

[1] Infra, §§ 1033–1035.

[2] Infra, § 1031, 1034.

[3] 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.

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

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

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

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

[8] Barnet *v.* Dougherty, 32 Pa. St. 371.

[9] Church *v.* Ruland, 64 Pa. 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 Pa. St. 495; Best *v.* Campbell, 62 Pa. 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 Pa. St. 233; Bowers *v.* Oyster, 3 Pa. Rep. (P. & W.) 239.

may be proved by way of accord and satisfaction.

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]

Contract may be reformed on above conditions.

§ 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] 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

[1] See supra for other cases, § 856; and see, particularly, infra, § 1019, 1033. See Weir *v.* Hill, 2 Lans. 278; Ingles *v.* Patterson, 36 Wisc. 373.

[2] Cummings *v.* Arnold, 3 Metc. 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.

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]

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

§ 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 queen's bench,[6] 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 disso-

[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.* Crossly, 2 Eq. Cas. Abr. 32.

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

[6] 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.

lution of contracts of this class should be in writing, such dissolution may be proved so as to defeat an action on the contract.[1]

[1] 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. ee 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. 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.

Mr. 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

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 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

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

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 Metc. (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 Wisc. 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.

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]

So in cases of part performance.

§ 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 Massachusetts, however, this exception is not admitted,[3] nor is it in North Carolina,[4] Mississippi,[5] Tennessee,[6] or Maine.[7] In any

[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; Browne on Frauds, § 447; Arnold *v.* Cord, 16 Ind. 177; Coyle *v.* Davis, 20 Wisc. 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.

[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. Ap. 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; 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; 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 Oh. St. 62; Printup *v.* Mitchell, 17 Ga. 558; Ford *v.* Finney, 35 Ga. 358; Rawson *v.* Bell, 46 Ga. 19; Rosser *v.* Harris, 48 Ga. 512; Parke *v.* Leewright, 20 Mo. 85; Tatum *v.* Brooker, 51 Mo. 148; Ottenhouse *v.* Burleson, 11 Tex. 87; Arguello *v.* Edinger, 10 Cal. 150; Hoffman *v.* Felt, 39 Cal. 109; Reedy *v.* Smith, 42 Cal. 245.

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

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

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

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

[7] 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

case, the parol agreement to be sustained must be definite; 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.[1] 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.[2] Even possession taken, as an incident 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.[3] Such possession, it should be remem-

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 this 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.*

[1] See Wright *v.* Puckett, 22 Grat. 374; Robertson *v.* Robertson, 9 Watts, 32; Phillips *v.* Thompson, 1 Johns. Ch. 131; Lester *v.* Kinne, 37 Conn. 9; 1 Sugd. V. & P. 8th Am. ed. 226; and see Lacon *v.* Mertins, 3 Atk. 3; Frye *v.* Shepler, 7 Barr, 91; Cole *v.* Potts, 2 Stockt. N. J. 67; Long *v.* Duncan, 10 Kans. 294.

[2] 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.* 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; Smith *v.* Smith, 1 Rich. Eq. 130; Cummings *v.* Gill, 6 Ala. 562; Byrd *v.* Odem, 9 Ala. 755; Perkins *v.* Hadsell, 50 Ill. 216; Ridley *v.* McNairy, 2 Humph. 174.

[3] 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.*

bered, must be actual, not merely technical and constructive;[1] must be exclusive;[2] must be subsequent to the agreement;[3] must be with the vendor's knowledge and consent, and not surreptitious or adverse;[4] must be permanent,[5] and must be of a character the loss of which could not be compensated for in damages.[6]

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.

[1] 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.

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

[3] 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.

[4] 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.

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

[6] "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 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 Akerman *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

§ 910. Mere payment of purchase money, however, is not sufficient part performance to compel the execution of such a parol contract;[1] 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.[2] Nor, as we have seen,[3] is marriage considered to be such part performance of a parol marriage settlement as will make such settlement operative.[4] It is also to be remembered that the exception of part 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.[5]

But payment of purchase money is not enough.

Penn. St. 495; Van Loon *v.* Davenport, 1 Week. Notes (Phila.).

[1] 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, 35 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.* Cosby, 2 A. K. Marsh. 106; Lefferson *v.* Dallas, 20 Oh. St. 74; Parke *v.* Leewright, 20 Mo. 85; Johnston *v.* Glancy, 4 Blackf. 94; Mather *v.* Scoles, 35 Ind. 5; Mialhi *v.* Lazzabe, 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.

[2] 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 Wisc. 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.

[3] Supra, § 882.

[4] 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 Oh. St. 501; Hatcher *v.* Robertson, 4 Strobh. Eq. 179.

[5] O'Herlihy *v.* Hatcher, 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 Metc. (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.

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.[1]

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.[2] The same effect has been assigned to a *pro confesso* decree.[3] 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.[4]

Whether title to lands can be transferred by estoppel under the statute, is hereafter discussed.[5]

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

[2] 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. 457; McGowen *v.* West, 7 Mo. 569.

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

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

[5] Infra, § 1148.

CHAPTER 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.

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

Whole document must be taken together, § 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.

Want of due delivery, or of contingent delivery, 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.

So of illegality, § 935.

Between parties intent cannot be proved to alter 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.

Erroneous particulars may be rejected as surplusage, § 945.

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

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.

Otherwise in case of ambiguities, § 961.

Usage is to be brought home to the party to whom it is imputed, § 962.

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.
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.
Opinion of witnesses as to libel admissible, § 975.
Dates not necessarily part of contract, § 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 on ground of fraud, 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.
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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.
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.
Erroneous surplusage may be rejected, § 1004.
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 t law as to writings under seal, § 1018.
Parol evidence admissible to reform a contract on ground of fraud, § 1019.
So as to concurrent mistake § 1021.
But not ordinarily to contradict document, § 1022.
Reformation must be specially asked, § 1023.
Under statute of frauds parol con-

tract cannot be substituted for written, § 1025.
Collateral extension of contract may be proved by parol, § 1026.
Parol evidence inadmissible 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 a mortgage, § 1031.
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.
So of other trusts, § 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.
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 consideration may be proved in rebuttal of fraud, § 1046.
When fraud is alleged, stranger may disprove consideration, § 1047.
And so may *bonâ fide* purchasers and judgment vendees, § 1049.

V. Special Rules as to Deeds.
Deeds not open to variation by parol proof, § 1050.
Acknowledgment may be disputed by parol, § 1052.
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 §§ 1039–1042.)
VI. Special Rules as to Negotiable Paper.
Negotiable paper not susceptible of parol variation, § 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 be 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.
Bills of lading are open to explanation, § 1070.

I. GENERAL RULES.

§ 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

Parol evidence generally not admissible to vary documents between parties.

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 without reference to the litigation into which it is afterwards pressed)[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 the writer himself. But whether such documents are informally or formally constituted, they agree in this, that, so far as concerns 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.[3] 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, as to strangers. 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.

[3] The distinction between dispositive and non-dispositive (or casual) documents is recognized by Mr. 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.

the parties or privies to a dispositive document, valid in itself, its terms cannot ordinarily be varied by parol.[1]

[1] 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; 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 Metc. 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; 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; Collender *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; 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, 76 Ill. 484; Warren *v.* Crew, 22 Iowa, 315; Atkinson *v.* Blair, 38 Iowa, 266; Irish *v.* Dean, 39 Wisc. 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; 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. 667; 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.* Mc-

§ 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 to those specified in a bill of sale.[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]

New ingredients cannot be added.

§ 922. Auctioneers' conditions of sale may be taken as afford-

Quade, 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 Lieber'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 Oh. St. 201; Johnson *v.* Pierce, 16 Oh. St. 472; Snyder *v.* Koons, 20 Ind. 389; Freeman *v.* Bass, 34 Ga. 355; Drake *v.* Dodworth, 4 Kans. 159.

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

[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.*

ing 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 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, the distinction between a dispositive and a non-dispositive writing is illustrated by a later case, which decided that *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]

§ 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

Dispositive documents may be varied as to strangers by parol.

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

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

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.[1] Even a party executing such a writing may correct by parol its mistakes, when the issue is with a third person.[2]

[1] 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; 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 Wisc. 614; 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; Hussman *v.* Wilke, 50 Cal. 250. See, for other cases, infra, §§ 1041, 1043, 1047–48, 1078, 1155.

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

"The rule that parol testimony may not be given to contradict a written contract is applied only in suits between the parties to the instrument or their privies. The parties to a written instrument have made it the authentic memorial of their agreement, and for them it speaks the whole truth upon the subject matter. It does not apply to third persons, who are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such a case, may give the same kind of testimony. Badger *v.* Jones, 12 Pick. 371; Reynolds *v.* Magness, 2 Iredell, 26." Folger, J., McMasters *v.* Insurance Co. 55 N. Y. 233.

"The rule that parol evidence is inadmissible to vary the terms of a valid written instrument would have been applicable. A stranger to the contract, however, cannot invoke this rule. 1 Greenleaf on Evidence, § 279." Dwight, C., Dempsey et al. *v.* Kipp, 61 N. Y. 471.

"The rule of evidence that where the parties to a contract have reduced their agreement to writing, parol evidence shall not be received to alter or contradict the written instrument, applies to controversies between the parties and those claiming under them. The parties have constituted the written instrument to be the authentic memorial of their contract; and because of this compact the instrument must be taken, as between them, to speak the truth and the whole truth in relation to its subject matter. But strangers have not assented to this compact, and therefore are not bound by it. When their rights are concerned, they are at liberty to show that the written instrument does not disclose the full or true character of

§ 924. Before the question of variation by parol comes up, the whole context of the document in litigation must be considered.[1] 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.[2] 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.[3] 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.[4] 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.[5]

Whole document must be considered.

It has sometimes been said that words are to be determined in their primary sense,[6] unless it appear that they are used in a tech-

the transaction. And if they be then at liberty when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this conventional law or neither. 2 Ired. 30. See, also, to the same point, Krider *v.* Lafferty, 1 Wharton R. 314, and Edgerly *v.* Emerson, 3 Foster R. 564." People *v.* Anderson, 44 Cal. 65, Wallace, C. J. "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.

[1] Supra, § 619; infra, § 1103.

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

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

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

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

[6] 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; Abbott *v.* Middleton, 7 H. of L. Cas.

nical 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.

Written entries of more weight than printed.

§ 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

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]

Informal memoranda excluded from operation of rule.

§ 927. The first question to determine, in 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.[9] "Parol evidence," argues Archibald, J., in a

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.

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

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

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

[9] Davis *v.* Jones, 17 C. B. 625; 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. & B. 282; 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; Butler *v.* Smith, 35 Miss. 457; Treadwell *v.* Reynolds, 47 Cal. 171. Infra, § 934.

cuted, or was only conditional.

case determined in the high court of justice in November, 1875,[1] "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. But here the jury were satisfied of this; they found that the document was only handed to the plaintiff as being the terms upon which he might sell to any responsible purchaser, and I think they had ample grounds for their conclusion. Besides the defendant's denial, the plaintiff confessed that he was an architect and surveyor, and had not £60,000 in the world; yet if this were a contract, he is bound to pay down £60,000 for the mere good will of the pianoforte business. Many other circumstances show that the plaintiff did not intend to purchase the concern himself, but only to find a purchaser. No doubt the defendant's language is somewhat unfortunate in this document, but we must take it now that he did not mean what he appears to say. . . . . 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:[2] '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[3] is not so strong in its facts, but the same doctrine is as clearly laid down. So again in Wake *v.* Harrop[4] the same law is laid down; while Mackinnon's case[5] is stronger than any. There the issue was on a plea of *non assumpsit*, as here. No plea of fraud could be placed on the record, as the bill was held by a purchaser before maturity for value and without notice. But it was decided that Mr. Mackinnon was not liable, though he had

[1] Clever *v.* Kirkman, 24 W. R. 159; 33 L. T. 672.
[2] 6 E. & B. 370.
[3] 2 H. & C. 227.
[4] 6 H. & N. 768.
[5] L. R. 4 C. P. 784.

indorsed the bill, because he never intended to indorse a bill. He was induced to put his name to the paper because he was told it was a guarantee; his mind never went with his act; hence he never contracted, and the plea of *non assumpsit* was proved. That is precisely the case here. From this paper it would appear that the defendant had agreed to sell his business to the plaintiff on the terms mentioned. But he never did so agree. Parol evidence is not admissible to vary the 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 Mr. 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]

§ 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 parol agreement.[4] 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.[5] So, also,

Parol evidence admissible to prove that document was conditioned on a non-performed condition.

[1] See to same effect, Leppoc *v.* Bank, 32 Md. 136; Blake *v.* Coleman, 22 Wisc. 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.

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

[5] 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? "

parol proof has been received to show that a sale under a written instrument was to be by sample;[1] and to establish a condition, attached to a sale, that the vendor would not ply his trade in the same neighborhood.[2]

§ 929. It is true that this exception must be strictly guarded. It is ordinarily inadmissible, for instance, for a party, sued on a writing for the payment of money on a particular day, to prove a parol agreement that the time of payment should be extended to a subsequent day.[3] 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.[4] 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 to mine all that he could, the lease containing no such provision.[5]

It has even been held inadmissible, in apparent conflict with the positions heretofore and subsequently expressed, to prove by parol that an absolute written engagement is only to be enforced on a contingency,[6] though this limitation is only effective in strictly common law suits, as in equity such evidence is receivable. The interposition of fraud, actual or constructive, would in any view make 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. In such case, a party who has been fraudulently induced to sign an instrument, by the other party holding

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

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

[3] 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.

[4] Leslie *v.* De la Torre, 12 East, 583. See Weston *v.* Emes, 1 Taunt. 115.

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

[6] 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.

out by parol certain material conditions, may prove such conditions as a defence.[1] 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.[2]

§ 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;[3] or, as has been seen, that it was not to go into effect until an event which never happened.[4] A party, however, who acknowledges delivery, cannot, without proof of fraud, contradict the acknowledgment, on the ground that the instrument was but an escrow,[5] though the averment of time of delivery may be varied by parol.[6] Negotiable paper, however, cannot be qualified by evidence of this class, so as to affect innocent third parties,[7] nor bonds, when the proof contradicts the averments of the instrument, unless there be proof of fraud or concurrent mistake.[8] Possession of a deed, it may be added, is presumptive proof of delivery.[9]

Want of due delivery may be proved by parol, and so that document is only to go into effect on a contingency.

§ 931. It is therefore always admissible for a party to show that his execution of the contract was induced by fraud or compulsion. Before the rules excluding parol testi-

Fraud or duress may be shown

[1] See infra, § 1019; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. 222.

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

[3] 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.

[4] See supra, §§ 927–28; infra, 1067. Davis *v.* Jones, 17 C. B. 625; 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; Butler *v.* Smith, 35 Miss. 457; Treadwell *v.* Reynolds, 47 Cal. 171. See Morrison *v.* Lovejoy, 6 Minn. 319; and see infra, § 1067.

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

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

[7] See infra, § 1058.

[8] 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.

[9] 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.

by parol, and so as to insanity.

mony to vary documents can be applied, we must determine whether a document legally exists. That it exists must 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,[1] or elicited by fraud,[2] or that through the other party's fraud material parts of the contract were omitted or altered.[3] For it is a settled principle of equity, — a principle absorbed in the common law of many jurisdictions, — that where a party is drawn into a contract

[1] 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 ; 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.

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

[3] 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, 3 Weekly Notes, 140, 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.

by misrepresentation, 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.[1] It is scarcely necessary to add that proof of imbecility or of drunkenness on

[1] "In the case where the false representation is made by one who is no party to the agreement entered into on the faith of it, the contract may be avoided, and all that equity can then do is to compel the person who made the representation to make good his assertion as far as may be possible. In cases, however, where the false misrepresentation is made by a person who is party to the agreement, the power of equity is more extensive; there the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it, or the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, or where the court will affirm it, giving him compensation only, is not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which I apprehend governs the cases, although it is in some instances of very difficult application, and leads to refined distinctions, is the following; namely, that if the representation made be one which can be made good, the party to the contract shall be compelled or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he pleases, to avoid the contract. Thus, if a man misrepresents the tenure or situation of an estate, — as if he sell an estate as freehold which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, — such a misrepresentation, as it cannot be made true, would, at the option of the party deceived, annul the contract; but if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges; and even in the cases where the property is subject to a small rent not stated, or the rental is somewhat less than it was represented, the court does not annul the contract, but compels the seller to allow a sufficient deduction from the purchase money. It does so on this principle: that by this means he in fact makes good his representation, and that the statement made was not such as in substance deceived the purchaser as to the nature and quality of the thing he bought. 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

part of one of the contracting parties may be received as tending to show fraud in the other party.[1]

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, as follows: —

"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, 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 considera-

[1] Affleck *v.* Affleck, 3 Sm. & G. 394; Molton *v.* Camroux, 4 Exch. 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.

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

tion 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] 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.* Sharp, Sup. Ct. Penns. 1876; 3 Weekly Notes, 45, 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 indubi-

§ 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.[1]

Concurrent mistake may be proved to invalidate document.

§ 934. Mistake by one party alone, however, unless there be fraud, is no ground for rescission;[2] and even where the mistake is concurrent, the complainant must have a strong case and be ready to do equity.[3] And in all cases of this class, the fraud or concurrent mistake must be clearly shown.[4]

§ 935. So, by 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.[5] Nor can any form of instrument of indebtedness preclude a debtor from setting up usury.[6] But the implication of usury may be rebutted by showing that the reservation of excess was a mistake in fact.[7]

Illegality of document may be proved by parol.

§ 936. Intention declared orally is not necessarily that which

table, 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."

[1] 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.

[2] Infra, § 1028.

[3] See infra, § 1019 *et seq.*

[4] Supra, § 933; infra, § 1022.

[5] 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; 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. 599; 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.

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

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

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 mere 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 private 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]

Intent cannot be proved to affect written meaning.

[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; 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.* Hays, 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;

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 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

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.

[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; 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; Fryer *v.* Patrick, 42 Md. 51; Davis *v.* Shaw, 42 Md. 410; Ins. Co. *v.* Troop, 22 Mich. 146; West. R. R. *v.* Smith, 75 Ill. 497; 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; Am. Ex. Co. *v.* Schier, 55 Ill. 140; 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.

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.[1] An omitted inventory, also, referred to in a deed, may be supplied by extrinsic proof;[2] and a short-hand memorandum may be by parol expanded.[3] So where on the face of a writing it is doubtful whether a principal or an agent is primarily liable, parol proof may be received to settle the doubt.[4] 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.[5] 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.[6] As we shall hereafter see,[7] the rule before us is eminently applicable where signs or terms of art are employed.[8] "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."[9]

Declarations of intention

§ 938. When declarations of intention are admissible, under the restrictions above stated, it is not necessary that they should be contemporaneous.[10] It is elsewhere shown

[1] Verzan *v.* McGregor, 23 California, 339.

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

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

[4] 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.*

[5] Atty. Gen. *v.* Grote, 2 Russ. & Myl. 699, per Ld. 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.

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

[7] Infra, § 972.

[8] Infra, §§ 938, 972.

[9] 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; Colwell *v.* Lawrence, 38 Barb. 643; Hite *v.* State, 9 Yerg. 357. Infra, § 972.

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

need not be contemporaneous.

that declarations of a deceased predecessor in title are admissible to affect his successors,[1] and that declarations of deceased relatives are admissible in questions of pedigree.[2] 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 would be received;[3] and so, also, has it been held as to previous declarations.[4] But such declarations must relate to the specific writing in dispute.[5]

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 instrument. In the largest sense, this office is performed by the attaching to words their proper meaning.[6] Hence punctuation may be supplied by aid of parol evidence as to intent;[7] words that are blurred or defaced may be deciphered by aid of the same evidence;[8] foreign words may be translated by interpreters,[9] abbreviations expanded by persons familiar with the objects described,[10] and terms of art defined by experts.[11] It is in accordance with the same principle that ambiguities, in reference either to the persons affected by the instrument or to the thing passed by it, may be explained by parol evidence.[12]

[1] Infra, § 1156.

[2] Supra, § 201.

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

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

[5] Whitaker *v.* Tatham, 7 Bing. 628. Infra, § 1089.

[6] See supra, § 937.

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

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

[9] Ibid. 374. Supra, § 174.

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

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

[12] 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;

§ 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

Circumstantial evidence to prove true construction.

Masters *v.* Freeman, 17 Oh. St. 323; Barrett *v.* Stow, 15 Ill. 423; Clark *v.* Powers, 45 Ill. 283; 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.* Pirner, 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.* Hooher, 5 Penns. St. 305; Martin *v.* Berens, 67 Penn. St. 463; 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.

on.[1] 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 are intended by the deed, extrinsic proof as to the character of the ways is admissible to solve the doubt.[2] Evidence, also, of surrounding circumstances is admissible, to show that a guarantee was intended to be a continuing one.[3] So, such evidence has been received to explain the meaning of the phrase "across a country" in a steeple-chase transaction;[4] that "a thousand" means a hundred dozen;[5] and that a contract to pay an actor so much a week was a contract to pay only during the theatrical season.[6] So, in a case elsewhere cited,[7] 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,[8] to indicate the amount implied in a contract to buy "your wool" from a party;[9] 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."[10] It must be remembered, however, that "A

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

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

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

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

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

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

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

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

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

[10] Millard *v.* Bailey, L. R. 1 Eq.

written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous

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 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., Sandford & Wright *v.* R. R. Co. 37 N. J. 3.

"It is unnecessary, however, to go beyond actual notice that a change had taken place which the finding established. This knowledge is a circumstance proper to be considered in

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 expository of ambiguity.

§ 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 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,[2] 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

determining the intention of the defendant in the language employed, and it does not conflict with the rule that parol evidence is inadmissible to vary the terms of written instruments. We may resort to surrounding circumstances in all cases of doubtful construction and *patent* ambiguity. If the words are clear and unambiguous, a contrary intention derived from outside circumstances is of no avail. A new contract cannot be made by showing that the intention was to make one different from that expressed. But to ascertain what the contract is in case of ambiguous language, a resort may be had to the circumstances surrounding the author at the time. So his knowledge or ignorance of certain facts are competent to determine what he meant by the language. . . . . Mr. Parsons, in his work on Contracts, lays down the rule in such cases as follows: 'If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony, and this intention will be taken as the meaning of the parties expressed in the instrument, if it be a meaning, which may be distinctly derived from a fair and rational interpretation of the words actually used.'

" This intention, however, it should be observed, is to be ascertained, except in cases of *latent* ambiguity, by a development of the circumstances under which the instrument was made. Mere declarations are not admissible for the purpose, but the knowledge of facts by the party is competent; and notice that a change had been made is as potent upon the question of intention, as if the defendant knew that these buildings were actually used as distilleries. I think they are chargeable with that knowledge; but they certainly knew that a change had taken place." Church, Ch. J., Reynolds *v.* Insurance Co. 47 N. Y. 605.

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

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

court in construing the grant. So, in a subsequent case,[1] 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."[2] 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."[3] It may further[4] 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.[5] 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.[6]

Ambiguity as to property may be explained by parol.

§ 942. In application of the rule already stated,[7] 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,

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

[2] 1 Dru. & War. 368.

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

[4] Taylor's Ev. § 1090.

[5] 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.

[6] Chad *v.* Tilsed, 2 B. & B. 403; Doe *v.* Beviss, 7 C. B. 456; Beaufort *v.* Swansea, 3 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.

[7] Supra, § 939.

or contracts for sale.[1] So parol evidence of boundaries and locations may be received to explain ambiguous terms.[2] 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

[1] 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.* Cowdrey, 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; Tatman *v.* Barrett, 3 Houst. 226; Dorsey *v.* Hammond, 1 Har. & J. 201; Herbert *v.* Wise, 3 Call, 240; Jenkins *v.* Sharpff, 27 Wisc. 472; Graham *v.* Hamilton, 5 Ired. L. 428; 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. 213; Schreiber *v.* Osten, 50 Mo. 513; Reed *v.* Ellis, 68 Ill. 206; Burleson *v.* Burleson, 28 Tex. 383; Pinney *v.* Thompson, 3 Iowa, 74; Baker *v.* Talbot, 6 T. B. Monr. 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 delivered, so as to enable its identity to be seen upon the face of the transaction." Wells, J., Pike *v.* Fay, 101 Mass. 136.

[2] 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; Thomson *v.* Wilcox, 7 Lansing, 376; 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; Kimball *v.* Brawner, 47 Mo. 398; McLeroy *v.* Duckworth, 13 La. An. 410; Colton *v.* Seavey, 22 Cal. 496.

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.[1] 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;[2] though boundary lines, definitely settled by a deed, cannot be varied by parol, if such lines are ascertainable.[3]

§ 943. Where a fine, also, 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.[4] 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.[5] 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.[6] Hence parol evidence is admissible to prove what is included in the expression, "known by the name mill-spot," in a deed of land.[7] So parol evidence may be received to show that the term "farm," in a deed, included a particular fenced lot.[8] So in an action on a policy of insurance of goods in a brick building, "known as D. & Co.'s car

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

[2] 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.

[3] 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.

[4] Doe *v.* Wilford, 1 C. & P. 284; R. & M. 88; Denn *v.* Wilford, 2 C. & P. 173; Taylor, § 1036.

[5] Ricketts *v.* Turquand, 1 H. of L. Cas. 472.

[6] Sanford *v.* Raikes, 1 Mer. 653, per Sir W. Grant; Clayton *v.* Ld. Nugent, 13 M. & W. 207, per Rolfe, B.

[7] Woods *v.* Sawin, 4 Gray, 322.

[8] 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.

factory," parol evidence is admissible to show to what building the terms in question refer.[1] So, 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.[2]

§ 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.[3] It is admissible, also, to identify or distinguish, under like circumstances, property described in a *fi. fa.*, or in a sheriff's deed.[4] But, as we have seen, parol evidence is not admissible to add articles to those already specified as passing in an assignment.[5]

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

[1] Blake *v.* Ins. Co. 12 Gray, 265.

[2] Sargent *v.* Adams, 3 Gray, 72.

[3] Brooks *v.* Aldrich, 17 N. H. 443; 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 Oh. St. 102; 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 Wisc. 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.

[4] 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.

[5] Supra, §§ 920–1; Driscoll *v.* Fiske, 21 Pick. 503; Taylor *v.* Sayre, 24 N. J. L. 647.

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.[1] But it has been added that "if the premises be described in general terms, and a particular description be added, the latter controls the former."[2] It is clear, also, that such particularization cannot be rejected if introduced into the writing by way of limitation.[3] 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; 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 very great, is not of itself sufficient to prove fraud or mistake.[4] It has, however, been ruled that where

[1] 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; 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.* White, 41 N. H. 343; Park *v.* Pratt, 38 Vt. 552; Kellogg *v.* Smith, 7 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; Mackentile *v.* Savoy, 17 S. & R. 104; Brown *v.* Willey, 42 Penn. St. 369; Lodge *v.* Barnett, 46 Penn. St. 484; Hildebrand *v.* Fogle, 20 Oh. 147; Evansville *v.* Page, 23 Ind. 527; 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.

[2] 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.

[3] Taylor *v.* Parry, 1 M. & Gr. 623.

[4] Kreiter *v.* Bomberger, 2 Weekly Notes, 685, Sup. Ct. of Penn. 1876. 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 Jus-

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]

Ambiguity as to extrinsic objects may be explained.

§ 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

tice 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 deduction under such circumstances will be allowed. Such is the weight of extrajudicial 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 Grant, 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.

[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; Paul *v.* Owings, 32

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]

§ 947. Again: under a contract to sell by measurement, the returns of such measurement may be proved by parol.[2] 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.[3] 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."[4] Again: where a physician sold his "good will" in practice to another, evidence was admitted to show in what vicinity this practice was maintained.[5] So where there is a guarantee of general indebtedness, the details of such indebtedness can be shown by parol.[6]

§ 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 "dollars" mean a standard widely apart from that which the parties intended would be a perversion of justice.

Parol evidence admissible to prove "dollar" meant "Confederate" dollar.

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.* Sehlegelmich, 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.

[1] New Jersey Co. *v.* Boston Co. 15 15 N. J. Eq. 418. See supra, § 939.

[2] Hill *v.* McDowell, 14 Johns. R. 175.

[3] Cole *v.* Wendel, 8 Johns. R. 116.

[4] Stoops *v.* Smith, 100 Mass. 63.

[5] Warfield *v.* Booth, 33 Md. 63.

[6] 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.

It has consequently been held admissible, in such cases, to show what was the currency the parties intended.[1] Where, however, there is no parol proof offered, the presumption is that the lawful currency of the United States was intended.[2]

Ambiguity as to parties may be explained by identification.

§ 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

[1] Thorington *v.* Smith, 8 Wall. 9–12; Atlantic R. R. Co. *v.* Bank, 19 Wall. 548; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259; Craig *v.* Pervis, 14 Rich. Eq. (S. C.) 150; Hightower *v.* Maull, 50 Ala. 495; Donley *v.* Tindall, 32 Tex. 43.

[2] "The anomalous condition of things at the South had created, in the meaning of the term 'dollars,' an ambiguity which only parol evidence could in many instances remove. It was, therefore, held in Thorington *v.* Smith, where this condition of things, and the general use of Confederate notes as currency in the insurgent states were shown, that parol evidence was admissible to prove that a contract between parties in those states during the war payable in 'dollars' was in fact made for the payment of Confederate dollars; the court observing, in the light of the facts respecting the currency of the Confederate notes which were detailed, that it seemed 'hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States.'

"The decision upon which reliance is placed, as thus seen, only holds that a contract made during the war in the insurgent states, payable in Confederate notes, is not for that reason invalid; and that parol evidence, under the peculiar condition of things in those states, is admissible to prove the value of the notes, at the time the contract was made, in the legal currency of the United States. In the absence of such evidence the presumption of law would be, that by the term 'dollars' the lawful currency of the United States was intended. This case affords, therefore, no support to the position of the appellants here, for no evidence was produced by them that payment of the bonds in Confederate notes was intended by the railroad company when they were issued, or by the parties who purchased them." Field, J. 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 Wisc. 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.

[4] Harrison *v.* Barton, 30 L. J. Ch. 213, by Wood, V. C.

received as to the state of his family, and the circumstances in which he is placed as to the property disposed of.[1] Parol evidence, also, has been received to show that a grantor executed a deed by other than his formal name;[2] and to identify grantee or assignee.[3] 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 memorandum or note under the 17th section of the statute of frauds.[4]

§ 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.[5]

Thus to enable undisclosed principal to sue or be sued, he may be proved by parol.

[1] Atty. Gen. *v.* Drummond, 1 Dru. & W. 367, Sugden, C.

[2] Nixon *v.* Cobleigh, 52 Ill. 387.

[3] Langlois *v.* Crawford, 59 Mo. 456.

[4] Newell *v.* Radford, L. R. 3 C. P. 52. See Whart. on Agency, § 719 *et seq.*

[5] 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; Trueman *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 Oh. 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

§ 951. Yet it is not admissible for an agent, signing an instrument 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, or to enable him to sue on a contract, extend to suits on sealed instruments or negotiable paper, when innocent third parties are concerned.[3]

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.[4] Parol evidence may be also received to show that an agent, dealing for an undisclosed principal, has made himself personally liable.[5] So, a person who appears in a contract as

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."

[1] Wharton on Agency, § 298; Higgins *v.* Senior, 8 M. & W. 834; 2 Smith's Lead. Cas., 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, 29; 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] 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 Oh. St. 128; Hiatt *v.* Simpson, 8 Ind. 256; Lander *v.* Castro, 43 Cal. 497; Bogan *v.* Calhoun, 19 La. An. 472. See fully infra, §§ 1058–60.

[4] Taylor's Ev. § 1055; Higgins *v.* Senior, 8 M. & W. 844, 845.

[5] Fleet *v.* Murton, L. R. 7 Q. B. 126; Fairlie *v.* Fenton, L. R. 5 Ex. 169; Hutchins *v.* Tatham, L. R. 8 C. P. 482.

agent may be shown to be the real principal, in the event of his being sued by the party with whom he contracted.[1] 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 himself, by an agreement upon sufficient consideration, from proceeding against the defendant.[2] 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.[3]

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.[4] This exception is now extended to suits on negotiable paper.[5]

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;[6] to show that a person acting as "treasurer" or "agent" acted as treasurer or agent for a particular company;[7]

[1] Carr *v.* Jackson, 7 Excheq. R. 382.

[2] 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.

[3] Whart. on Agency, § 405. See Humble *v.* Hunter, 12 Q. B. 310.

[4] 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.

[5] 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. See, for American cases, infra, § 1060-61.

[6] Beasley *v.* Watson, 41 Ala. 234.

[7] Wharton on Agency, §§ 291, 296, 409, 492, 729; Mich. State Bank *v.* Peck, 28 Vt. 200.

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 in law 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, distinct from that primarily expressed, to a disputed word. This is

[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, §§ 1028–9.

[11] See Crawford *v.* Spencer, 8 Cush. 418; Jackson *v.* Hart, 12 Johns. R. 77; Jackson *v.* Foster, 12 Johns. R. 488; Moody *v.* McCown, 39 Ala. 586.

[12] Infra, § 962.

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]

§ 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]

Party himself admissible to prove his intent or understanding.

[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 that it does not make out the whole of plaintiff's case. The evidence to

[4] Dillon *v.* Anderson, 43 N. Y. 231; Lewis *v.* Rogers, 34 N. Y. Sup. Ct. 64; Harrison *v.* Kirke, 38 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 developed by extrinsic evidence is not patent in the strict sense

Patent ambiguities cannot be explained.

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, 6 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; McGuire *v.* Stevens, 42 Miss. 724; Brown *v.* Guice, 46 Miss. 299; Peacher *v.* Strauss, 47 Miss. 353; Johnson *v.* Ballew, 2 Port. Ala. 29; Jennings *v.* Briscadine, 44 Mo. 332; Mithoff *v.* Byrne, 20 La. An. 363; Campbell *v.* Johnson, 44 Mo. 247; 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 Early *v.* Wilkinson, 9 Grat. 74.

of the term. A patent ambiguity is one which exists in the writer himself, 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 Mr. 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]

§ 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. 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 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;

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

[1] Steph. Ev. art. 91, citing Baylis *v.* R. J. 2 Atk. 239; Shore *v.* Wilson, 9 C. & F. 365. See infra, § 1006.

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.

Usage cannot in general vary dispositive writing.

§ 958. 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 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;[2] but if the principal should instruct the agent not to receive checks, then the agent cannot protect himself by setting up the usage. Usage, in fine, 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.[3] Thus where goods had been sold through a London

[1] Aspden's Est. 3 Wall. Jr. 368.

[2] Wharton on Agency, § 210.

[3] 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; Yates *v.* Pym, 6 Taunt. 446; 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; 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; Thompson *v.* Ashton, 14 Johns. 317; Woodruff *v.* Bank, 25 Wend. 673; 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; Lombardo *v.* Case, 45 Barb. 95; Glendale Co. *v.* Ins. Co. 21 Conn. 19; Farm. & Mech. Bk. *v.* Sprague, 52 N. Y. 605; Simmons *v.* Law, 4 Abb. (N. Y.) App.

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]

§ 959. 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.[3] Thus if the custom of the country should require the tenant to plough, sow, and manure a certain portion

Dec. 241; Osgood *v.* McConnell, 32 Ill. 74; Marc *v.* Kupfer, 34 Ill. 287; Sanford *v.* Rawlings, 43 Ill. 92; Raert *v.* Scroggins, 40 Ind. 195; Spears *v.* Ward, 48 Ind. 541; 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.

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.

[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.

[3] Hutton *v.* Warren, 1 M. & W. 477, per Parke, B. See Clarke *v.* Roystone, 13 M. & W. 752.

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*.[1]

[1] 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 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 decision 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.*

§ 960. Even parol proof that the parties agreed that a written contract should be subjected to a usage conflicting with the writ-

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 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 goat-skins 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

ing is inadmissible, unless fraud or gross concurrent mistake be proved; for this would be contradicting the writing by parol

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 question, 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 Pennsylvania State, 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.* Dal-

evidence, and substituting an inferior and treacherous medium of proof for that which is superior and which is solemnly adopted by the parties as expressing 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]

Otherwise when ambiguous business terms are to be explained.

§ 961. Where, however, 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 custom or 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.[3] Parties, preparing a

lison, 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. 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 be changed in other particulars, and in this way the whole doctrine frittered away." Davis, J., Barnard *v.* Kellogg, 10 Wall. 383.

[1] Oelricks *v.* Ford, 23 How. 49.

[2] See infra, § 961.

[3] Webb *v.* Plummer, 2 B. & Ald. 746; Wigglesworth *v.* Dallison, 1 Smith's Lead. Cas. 498; Spicer *v.* Hooper, 1 Q. B. 424; Chanrand *v.* Augerstein, Peake's N. R. Cases, 43; Cochran *v.* Petburgh, 3 Esp. 121;

document in a place or trade where certain terms have a customary meaning, may be interpreted as using these terms in the meaning thus customary. Thus under a contract to carry

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. (2 Amer. ed.) 71, note; Insurance Co. *v.* Wright, 1 Wallace, 456, 485; Sturgis *v.* Cary, 2 Curtis C. C. 362; Barnard *v.* Adams, 10 How. 270; Barnard *v.* Kellogg, 10 Wall. 383; Robinson *v.* U. S. 13 Wall. 363; 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. 210; 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, 24 Ill. 133; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332; Hooper *v.* R. R. 27 Wisc. 81; Lamb *v.* Klaus, 30 Wisc. 94; Johnson *v.* Ins. Co. 39 Wisc. 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

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

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 extrinsic 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 writ en 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 contractors 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's Evidence, 4th ed. 429.

[1] Cuthbert *v.* Cumming, 11 Ex. 405.

[2] Stewart *v.* Smith, 28 Ill. 397.

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.[1] 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.[2] 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.[3] Evidence of usage, also, is admissible, in a suit on a written contract of sale, to show the meaning of "good merchantable shipping hay;"[4] on a similar contract for boots, to show the meaning of "good custom cowhide;"[5] and on a similar contract for a machine, to show the meaning of "team."[6] 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;"[7] and that by the custom of the building trade the words "weekly accounts" refer to regular day work only;[8] and that credit for "six or eight weeks," does not necessarily give the whole eight weeks for payment for goods.[9] 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.[10]

[1] Johnstone *v.* Usborne, 11 A. & E. 549.

[2] Jenny Lind Co. *v.* Bower, 11 Cal. 194.

[3] Vallance *v.* Dewar, 1 Camp. 503. See Eldredge *v.* Smith, 13 Allen, 140.

[4] Fitch *v.* Carpenter, 43 Barb. 40.

[5] Wait *v.* Fairbanks, Brayt. (Vt.) 77.

[6] Ganson *v.* Madigan, 15 Wisc. 144.

[7] Lucas *v.* Bristow, E., B. & E. 907.

[8] Myers *v.* Sarl, 3 E. & E. 306.

[9] Ashwell *v.* Retford, L. R. 9 C. P. 20; 43 L. J. C. P. 57.

[10] Whitney *v.* Boardman, 118 Mass. 242.

"The expression in the contract, by which the defendants agreed to purchase the Cawnpore buffalo hides with 'all faults' was one of such a character that, if in common use and having a well established meaning in the trade in such articles, such meaning might properly be shown. It is not necessary that words should be technical, scientific, or ambiguous in themselves, in order to entitle a party to show by parol evidence the mean-

§ 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;"[1] to show the meaning of the term "dollars;"[2] to show the difference between "comediennes" and "danseuses" in a written engagement for the services of a dancing girl;[3] to determine whether "per square yard," in a contract for plastering

ing attached to them by the parties to the contract. Whitmarsh *v.* Conway Ins. Co. 16 Gray, 359; Miller *v.* Stevens, 100 Mass. 518; Swett *v.* Shumway, 102 Mass. 365. Nor does it appear by the exceptions that any evidence was admitted that gave to these words any meaning different from that which the presiding judge attributed to them in the instruction given by him, based upon the hypothesis that the jury might find that there was no meaning determined by the general usage of trade. This instruction substantially was, that while the plaintiffs must prove that the hides were 'Cawnpore buffalo hides,' known and sold as such; yet if the defendants got the articles contracted for, having agreed to take them 'with all faults,' they were bound to take them with 'all defects arising in any way either from defects in the cure, or in the packing, or in the shipping or transporting of the hides, not however included in the term sea damage.' For the contingency of damage by sea an allowance was to be made according to the contract, in the price. The defendants argue that this instruction was defective, and that it was not only necessary for the plaintiffs to show that these were Cawnpore hides, but also that they were 'properly cured, as such hides should be cured, properly packed, and of merchantable quality.'

"But the phrase, 'with all faults,' cannot be limited, as the defendants contend, 'to all such faults or defects as the thing described ordinarily has.' That would be to deprive it of force entirely. Its meaning is, such faults or defects as the thing might have, retaining still its character and identity as the article described. The authorities cited by the defendants sustain this view, and not the one contended for by them. Thus in Shepherd *v.* Kain, 5 B. & Ald. 240, cited in Henshaw *v.* Robins, 9 Met. 83, it was held that in the sale of a copper-fastened vessel 'with all faults,' the term meant such faults as a copper-fastened vessel might have, but that it would not cover the sale of a vessel not copper-fastened. The only other authority cited by the defendants on this point is Schneider *v.* Heath, 3 Camp. 506, which decides no more than that 'to be taken with all faults' cannot avail a vendor who knew of secret defects, and used means to prevent the buyer from discovering them. A similar limitation was given by the presiding judge in the present case. Nor, if the phrase 'with all faults' had not been in the contract, is it easy to see how the defendants could have demanded anything more than that the article bought by them should answer the description of 'Cawnpore buffalo hides.' Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Boardman *v.* Spooner, 13 Allen, 353, 359." Devens, J., Whitney *v.* Boardman, 118 Mass. 246.

[1] Noyes *v.* Canfield, 29 Vt. 79. See Peisch *v.* Dickson, 1 Mason, 11.

[2] Supra, § 948.

[3] Baron *v.* Placide, 7 La. An. 229.

relates to the plastering actually laid on, or to the whole surface of the house to be plastered;[1] to settle the number of hours in a measurement of labor at so much "per day;"[2] to determine the area of mason work covered by the term of so much "per foot;"[3] to determine the meaning of "per thousand" in a contract for furnishing bricks;[4] to determine in what way the limit "not less than one foot high" is to be construed in a contract to furnish young trees;[5] to show the meaning of "square yards" in a contract for payment by measurement;[6] to prove by parol the mean-

[1] Walls *v.* Bailey, 49 N. Y. 467. See Hill *v.* McDowell, 14 Penn. St. 175.

[2] Hinton *v.* Locke, 5 Hill, 437.

[3] Ford *v.* Tirrell, 9 Gray, 401.

[4] Lowe *v.* Lehman, 15 Oh. St. 179.

[5] Barton *v.* McKelway, 22 N. J. L. 165.

[6] 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 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 Oh. 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,

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 "corn,"[4] "pig-iron,"[5] "salt,"[6] and of similar expressions used in transportation contracts, or in policies of insurance.[7] 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.[8] 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.[9] 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.[10] In all cases, so it has been ruled, where a word is used which is susceptible of two or more meanings,[11] extrinsic evidence is admissible of the usage or course

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.

[1] Grant *v.* Maddox, 15 M. & W. 737. See Myers *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.

[4] Mason *v.* Skurray, and Moody *v.* Surridge, Park Ins. 245; Scott *v.* Bourdillon, 2 N. R. 213.

[5] Mackenzie *v.* Dunlop, 3 Macq. Sc. Cas. H. of L. 26, per Ld. Cranworth, C.

[6] Journu *v.* Bourdieu, Park Insur. 245.

[7] 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.

[8] Spicer *v.* Cooper, 1 Q. B. 424.

[9] Bowman *v.* Horsey, 2 M. & Rob. 85.

[10] R. *v.* Stoke upon Trent, 5 Q. B. 303.

[11] Buckle *v.* Knoop, L. R. 2 Ex. 125; 15 W. R. 588.

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.[1]

Usage is to be brought home to the party to whom it is imputed.

§ 962. The term "Usage," we must remember, is employed 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.[2] 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.[3] 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.[4] "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."[5] 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

[1] Bottomley *v.* Forbes, 5 Bing. N. C. 121; Powell's Evidence, 4th ed. 428.

[2] Shore *v.* Wilson, 9 Cl. & F. 355. Supra, § 954; infra, §§ 1008, 1287.

[3] Rushford *v.* Hatfield, 7 East, 225; Barnard *v.* Kellogg, 10 Wall. 383; Gray *v.* Harper, 1 Story, 574; Bourne *v.* Gatliff, 3 M. & Gr. 643; 11 Cl. & F. 45; Fabbri *v.* Ins. Co. 55 N. Y. 133. See further infra, § 971.

[4] Meighen *v.* Bank, 25 Penn. St. 288; Carter *v.* Phil. Coal Co. 77 Penn. St. 286. Supra, § 961.

[5] Noble *v.* Kennoway, 2 Doug. 513; so Da Costa *v.* Edmunds, 4 Camp. 143, per Ld. Ellenborough. Infra, § 1243.

used in such district.[1] 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.[2] 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 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.

§ 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.[3] 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.[4]

[1] 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.

[2] See Ober *v.* Carson, 62 Mo. 209.

[3] 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.

[4] 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.

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.[1] It has even been said[2] 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 chamber,[3] and then by the house of lords,[4] 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;[5] 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."[6] 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.[7] The proof must go, not to opinion, but to fact.[8]

[1] Bourne *v.* Gatliff, 3 M. & Gr. 384; Bottomly *v.* Forbes, 5 Bing. N. C. 127; Walls *v.* Bailey, 49 N. Y. 464.

[2] Taylor's Ev. § 1077.

[3] Bourne *v.* Gatliffe, 3 M. & Gr. 643, 689; 3 Scott N. R. 1, *S. C.*

[4] Ibid.; 11 Cl. & Fin. 45, 49, 69–71; 7 M. & Gr. 850, 865, 866, *S. C.*

[5] 11 Cl. & Fin. 70, per Ld. Lyndhurst, C.; 7 M. & Gr. 865, *S. C.*

[6] 11 Cl. & Fin. 71; 7 M. & Gr. 866, *S. C.*

[7] 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.

[8] Lewis *v.* Marshall, 7 M. & Gr. 744.

One witness may prove usage.

§ 964. Although there were at one time intimations to the contrary,[1] it is now settled that a single witness is sufficient to prove a usage.[2]

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.[3] It is otherwise as to local usages, which must be put in proof to the jury as are foreign laws.[4] 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 usage, on the other hand, will not be accepted if it is unreasonable, or merely transient or partial, or irreconcilable with the *lex fori*.[5] If it conflicts either with statute,[6] or with

[1] Wood *v.* Hickok, 2 Wend. 501; Boardman *v.* Spooner, 13 Allen, 359.

[2] Robinson *v.* U. S. 13 Wall. 366.

[3] Supra, § 298.

[4] Simpson *v.* Margitson, 11 Q. B. 32, and cases cited supra, § 315.

[5] 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; Evans *v.* Waln, 71 Penn. St. 69. 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, in which the supreme court of Pennsylvania, in Oct. 1875, discussed the usage of "double tripping," in the towing of barges, as follows: "The practice of 'double tripping' was not so unreasonable that a court would take it from the jury as a matter of legal instruction. Indeed, it would seem to be really necessary, that when a large tow is taken with the current, and there the destination should require it to be taken up the stream, that part of the tow should be detached to enable the tug to tow the remainder up stream and return for that left behind. If this really constituted the mode of towing these enormous and heavily laden barges (and the jury must determine the fact), and was notorious and well known to the insurance company, we cannot say that the court erred in instructing the jury that such a usage of trade fell within the terms and protection of the policy. The voyage was from Pittsburg to St. Louis. This necessarily informed the insurance company that the current of the Mississippi must be stemmed in conducting the tow to its destination. The transition to the *mode* of doing this was natural to the thought of those making the insurance. A single tow-boat conducting a fleet of these immense barges — holding thousands of bushels of coke or coal —

[6] Smith *v.* Wilson, 3 B. & Ad. 731; Hockin *v.* Cooke, 4 T. R. 271; Doe *v.* Benson, 4 B. & A. 588.

the common law,[1] 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.[2]

Meaning of term is for court, unless there be proof of usage.

§ 966. Unless there be proof of usage, 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.[3]

Power of agent may be construed by usage.

§ 967. An agent is authorized to do whatever is usual to enable him to execute his commission,[4] though as between himself and his principal he is liable if he transgress his written instructions.[5] But as to third parties, the principal, notwithstanding his private instructions, is

may manage the fleet down stream (and experience has shown that even this is often difficult and attended with danger), but the immense power of the tow-boat is inadequate to control the whole fleet up stream. The question was therefore one more of fact than of law. The instruction of the court being proper as to the usage of the trade, there might be another question arising as to the reasonable exercise of the right of the boatman in detaching a part of his tow, and leaving it secured in a proper place and proper manner. On this point the company might have asked for instruction, but, not having done so, the point is not before us."

[1] Coxe *v.* Heisley, 19 Penn. St. (7 Harris) 243; Jones *v.* Wagner, 66 Penn. St. 430; Evans *v.* Waln, 71 Penn. St. 69.

[2] 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 Metc. 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.

[3] Simpson *v.* Margitson, 11 Q. B. 32; Powell's Evidence, 4th ed. 427.

[4] Whart. on Agency, §§ 126, 134.

[5] R. *v.* Lee, 12 Mod. 514; Farmers' & Mechanics' Bk. *v.* Sprague, 52 N. Y. 605.

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.[1] 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.[2] So a power to an agent to sell may be interpreted by usage to mean to sell by warranty or sample.[3]

Usage explanatory of broker's memoranda.

§ 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,[4] 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.[5] 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 satisfied 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.[6] 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.[7]

[1] 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; Layct *v.* Gano, 17 Oh. 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.

[2] Sumner *v.* Stewart, 69 Penn. St. 321. See Hodgson *v.* Davies, supra, § 968.

[3] 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.

[4] Supra, § 75; Whart. Agen. § 715.

[5] See Whart. on Agency, § 696.

[6] Hodgson *v.* Davies, 2 Camp. 536.

[7] Supra, § 75.

§ 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.[1] 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.[2] 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."[3] Thus to a sale of a horse it is admissible to annex a customary warranty;[4] to a shipping contract, a usage as to the mode of engaging and paying crews;[5] to negotiable paper, silent in this respect, the incident of customary days of grace;[6] and to a lease, the reservation of ripening crops.[7] So, where a quantity of linseed oil had been 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.[8] In suits on written contracts of hiring, also, it has been held admissible to prove a custom that the servant should have certain holidays;[9] and that the contract should be defeasible on giving a month's notice on either side.[10] 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

Customary incidents may be annexed to contract.

[1] Infra, § 1026.

[2] 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.

[3] Stephen's Ev. art. 90.

[4] Allen *v.* Prink, 4 M. & W. 140.

[5] Eldredge *v.* Smith, 13 Allen, 140.

[6] Renner *v.* Bank, 9 Wheat. 581.

[7] 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 Oh. (N. S.) 438; Bond *v.* Coke, 71 N. C. 97. See 1 Smith's Lead. Cas. 300. See, however, Wintermute *v.* Light, 46 Barb. 283.

[8] 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.

[9] R. *v.* Stoke-upon-Trent, 5 Q. B. 303.

[10] Parker *v.* Ibbetson, 4 C. B. (N. S.) 348.

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.[1] It has even been held admissible to attach to bought and sold notes the incident of a sale by sample.[2]

§ 970. Such incidents, however, must not conflict with the writing to which they are to be appended. Thus, it has been held that a parol reservation of future crops upon the land, ready for harvest, is void when repugnant to a deed which passes the grantor's entire estate in the land.[3]

§ 971. Circumstantial 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.[4]

Course of business admissible in ambiguous cases.

[1] 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. 3 E. & B. 48.

[2] Cuthbert *v.* Cumming, 11 Ex. R. 405; Lucas *v.* Bristow, E., B. & E. 907. See Syers *v.* Jonas, 2 Exch. 111.

[3] Brown *v.* Thurston, 56 Me. 127; Austin *v.* Sawyer, 9 Cow. 40; Wilkins *v.* Vashbinder, 7 Watts, 378; Evans *v.* Waln, 71 Penn. St. 69; Ring *v.* Billings, 51 Ill. 475; Wickersham *v.* Orr, 9 Iowa, 253; Bond *v.* Coke, 71 N. C. 97.

[4] 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; 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

§ 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.[1] 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.[2] An expert, however, may be admitted to decipher or explain figures or terms which an ordinary reader is unable to understand;[3] and to explain technical terms.[4] 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;[5] 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."[6]

Opinion of expert as to construction of document is inadmissible, but otherwise to decipher or interpret.

§ 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

Parol evidence admissible to "rebut an equity."

action, contemplated by it and framed upon it, had that effect." Folger, J., Fabbri *v.* Ins. Co. 55 N. Y. 133.

[1] 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.

[2] Clark *v.* Detroit, 32 Mich. 348.

[3] 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.

[4] 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.

[5] 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; Farmer's Bk. *v.* Day, 13 Vt. 36; Dana *v.* Fiedler, 2 Kern. 40; Collender *v.* Dinsmore, 55 N. Y. 206.

[6] 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.

the writing.[1] 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 trustee for A.[2] 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.[3] 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 contrary to the general rule,[4] presumed not to have been intended as cumulative, on the ground that the sums and the expressed terms of both exactly correspond;[5] 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.[6]

§ 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.[7] Parol evidence has been also received to rebut the presumption, that an advance to a legatee by a parent, or person in *loco parentis*,[8] was intended to operate as an ademption, though only *pro tanto*,[9] of the legacy.[10] For the same purpose, parol evidence may be received to repel

[1] See Hurst *v.* Beach, 5 Madd. 351; Trimmer *v.* Bayne, 7 Ves. 518.

[2] Infra, §§ 1035–8.

[3] 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.

[4] See 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.

[5] Tatham *v.* Drummond, 33 L. J. Ch. 438, per Wood, V. C.; Tuckey *v.* Henderson, 33 Beav. 174.

[6] 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.

[7] Wallace *v.* Pomfret, 11 Ves. 547; Edmonds *v.* Low, 3 Kay & J. 318.

[8] 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 DeGex, M. & G. 74, *S. C.;* Campbell *v.* Campbell, 35 L. J. Ch. 241, per Wood, V. C.; 1 Law Rep. Eq. 383, *S. C.*

[9] Pym *v.* Lockyer, 5 Myl. & Cr. 29, per Ld. 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.

[10] 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. 488, *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.

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.[1] It follows, also, that parol evidence is received to rebut the rebuttal,[2] though, when the presumption is one arising on the face of the writing, not primarily to fortify such presumption.[3] 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, *quâ* words, no extrinsic evidence can be admitted.[4]

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 innuendos to be proved? All the common acquaintances of the parties may know that the plaintiff

[1] Weall *v.* Rice, 2 Russ. & Myl. 251, 267; Ld. 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. See Taylor's Ev. § 1110.

[2] Kirk *v.* Eddowes, 3 Hare, 517; Hall *v.* Hill, 1 Dru. & War. 121.

[3] See cases cited, and Taylor's Ev. § 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.

[4] 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;

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 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 contract.

§ 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. 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

cf. Weal *v.* Rea, 2 Russ. & M. 267; Powell's Evidence, 4th ed. 406.

[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, 42 N. H. 137; Miller *v.* Butler, 6 Cush. 71; Chenery *v.* Goodrich, 98 Mass. 224; 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; Russell *v.* Kelly, 44 Cal. 641. Sec, *contra*, White *v.* Sayward, 33 Me. 322; Snell *v.* Snow, 13 Metc. 278; Van Vechten *v.* Hopkins, 5 Johns. 211; and see 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.

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.[1]

Dates to be held *primâ facie* true.

§ 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,[2] though this presumption does not extend to third parties.[3] The presumption may be rebutted by proof that the document was executed on a different day.[4] Thus parol evidence is admissible to show that there was a mistake in the date of a charter party,[5] of a deed,[6] or of a will.[7] An ambiguous date may be ex-

[1] See Weiske, Rechtslexicon, xi. 665.

In Louisiana, an act *sous seing privé* 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 *v.* McGill, 4 La. An. 262; Hubnall *v.* Watt, 11 La. An. 57.

[2] 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. 716; 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. 255; Glenn *v.* Grover, 3 Md. 212; Williams *v.* Woods, 16 Md. 220; Abrams *v.* Pomeroy, 13 Ill. 133; Savery *v.* Browning, 18 Iowa, 246; Chickering *v.* Failes, 26 Ill. 507; Dodge *v.* Hopkins, 14 Wisc. 630.

As to impossible date, see Davis *v.* Loftin, 6 Tex. 489.

[3] See Sams *v.* Rand, 3 C. B. (N. S.) 442; Baker *v.* Blackburn, 5 Ala. 417. Infra, § 1312.

[4] 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.* Crook, 4 Esp. 39; Sweetzer *v.* Lowell, 33 Me. 446; Cady *v.* Eggleston, 11 Mass. 282; Dyer *v.* Rich, 1 Metc. 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; Abrams *v.* Pomeroy, 13 Ill. 133; Meldrum *v.* Clark, 1 Morris, 130; Pressly *v.* Hunter, 1 Speers, 133; Dodge *v.* Hopkins, 14 Wisc. 630; Stockham *v.* Stockham, 32 Md. 196; Perrin *v.* Broadwell, 3 Dana (Ky.), 596; Kimbro *v.* Hamilton, 2 Swan, 190; McCrary *v.* Caskey, 27 Ga. 54; Miller *v.* Hampton, Ala. Sel. Cas. 357; McComb *v.* Gilkey, 29 Miss. 146; Richardson *v.* Ellett, 10 Tex. 190; Perry *v.* Smith, 34 Tex. 277. See Clark *v.* Akers, 16 Kans. 166. Infra, § 1312.

[5] Hall *v.* Cazenove, 4 East, 476.

[6] Payne *v.* Hughes, 10 Ex. 430.

[7] Reffell *v.* Reffell, L. J. 35 P. & M. 121; L. R. 1 P. & D. 139; Powell's Evidence (4th ed.), 412.

plained by parol.[1] Where a contract is silent as to the place 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.[2] A deed may be proved to have been delivered either before or after the day on which it purports to have been delivered.[3] 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.[4]

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.[5] 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.[6]

[1] "When it is necessary to determine the date of a paper offered in evidence, and the name of the month is so inartificially 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.

"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.

[2] King *v.* Ruckman, 20 N. J. Eq. 316.

[3] Goddard's case, 2 Rep. 4 *b*.

[4] Munroe *v.* Eastman, 31 Mich. 283.

[5] Anderson *v.* Weston, 6 Bing. (N. C.) 301; Sinclair *v.* Baggaley, 4 M. & W. 318.

[6] Trelawney *v.* Coleman, 2 Stark.

§ 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 instrument indorsed or assigned, — if, in case of a note, this be before maturity.[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] The date, also, of an instrument may be inferred from its contents;[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]

Time may be inferred from 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; and so of statutes and charters.

R. 193; Houliston *v.* Smyth, 2 C. & P. 24.

[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 Wolf, 10 Gray, 343; Pinkerton *v.* Bailey, 8 Wend. 600; Thorne *v.* Woodhull, Anth. (N. Y.) 103; Snyder *v.* Riley, 6 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. 251.

[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;

§ 980 *a*. In the interpretation of a statute the whole context

Boody *v*. York, 8 Greenl. 272; Ellis *v*. Madison, 13 Me. 312; Dolloff *v*. Hartwell, 38 Me. 54; 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; Kelley *v*. Dresser, 11 Allen, 31; Mayhew *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; 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; Ray *v*. Townsend, 78 Penn. St. 329; Com. *v*. Kreager, 78 Penn. St. 477; Burgess *v*. Lloyd, 7 Md. 178; Hoagland *v*. Schnorr, 17 Oh. St. 30; 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; 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. So, also, as to records of towns and school districts. Eady *v*. Wilson, 43 Vt. 362.

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.

"The tenant offered to show that there was an error in the notice of the sale under the execution, as printed in the newspaper, the premises being described as situated on Avon Street instead of Union Street. But we are of the opinion that this evidence was incompetent. The officer's return sets out that the notice of the sale was of land situated on Union Street, and it is conclusive upon parties and all persons in privity with them. It has uniformly been held that the officer's return of the acts done by him in the levy of an execution are thus conclusive. In Chappell *v*. Hunt, 8 Gray, 427, the officer returned that one of the appraisers was chosen by 'Chester Cornwall, the attorney of the debtor,' and it was held that it could not be shown that said Cornwall was not the attorney of the debtor, and had no authority to act for him. 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

must be taken together.[1] Even the title and preamble are for

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 conclusive, 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.

In this case, 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

[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.* Montro e, 52 Penn. St. 391; Cochran *v.* Taylor, 13 Oh. 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 permitted 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.[2] Mr. Sedgwick, indeed, says, that "we are not to suppose that the courts 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."[3] 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.[4] 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."[5] 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 hereto-

So as to statutes and charters.

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 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] Sedgwick, Stat. Law, 2d ed. 201; see Lieb. Polit. Herm. ch. iv.

[2] Infra, §§ 1260, 1309; and see as to evidence of the intention of the legislators, Waller *v.* Harris, 20 Wend. 555.

[3] Sedg. Stat. Law, 203; citing Southwark Bk. *v.* Com. 26 Penn. St. 446.

[4] See Hadden *v.* Collector, 5 Wall. 107; Delaplane *v.* Crenshaw, 15 Grat. 457; Harris *v.* Haynes, 30 Mich. 140; Scanlan *v.* Childs, 33 Wisc. 663; Keith *v.* Quinney, 1 Oregon, 364.

[5] R. *v.* Hodnett, 1 T. R. 96.

fore defined,[1] and there is no case in which witnesses or documents have been received as evidence of extrinsic facts. In this sense 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."[2]

A statute cannot be attacked by parol evidence to the effect that as printed and certified it varies from its original text.[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]

Otherwise as to acknowledgment of sheriff's deed.

§ 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] So, also, it has been held admissible for a de-

[1] See supra, § 278 *et seq.*

[2] Sedgwick Stat. Law, 209. See, also, Union P. R. R. *v.* U. S. 10 Ct. of Cl. 518.

[3] Annapolis *v.* Harwood, 32 Md. 471.

[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 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

fendant 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. In fine, it may be generally stated 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 an important distinction, however, which has been already stated,[5] 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

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. 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; Dows *v.* McMichael, 6 Paige, 139; Hageman *v.* Salisberry, 74 Penn. St. 280; Roy *v.* Townsend, 78 Penn. St. 329; 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; Galloway *v.* McKeithen, 5 Ired. L. 12; Covington *v.* Ingram, 64 N. C. 123; Duer *v.* Thweatt, 39 Ga. 578; Alexander *v.* Nelson, 42 Ala. 462; 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, 47 Ibid. 396." Breese, J., Hobson *v.* Ewan, 62 Ill. 154.

[5] Supra, §§ 176, 760.

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;[1] 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:[2] 'Nemo potest contra recordum verificare per patriam.'[3] 'Quod per recordum probatum, non debet esse negatum.'[4] 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."[5]

On application to court of record mistakes may be shown by parol.

§ 983. Yet even with records, when application is made to the court 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.[6] 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.[7]

For relief on ground of fraud or mistake, petition should be specific.

§ 984. When a petition or bill, of the character mentioned in 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. In a case decided by the supreme court of Pennsylvania in 1876,[8] the evidence

[1] 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.

[2] See several instances collected, 1 Phill. Ev. 441, 10th ed.

[3] 2 Inst. 380.

[4] Branch, Max. 186.

[5] Best's Ev. § 734.

[6] Trafton *v.* Rogers, 13 Me. 315; Com. *v.* Bullard, 9 Mass. 270; Brier *v.* Woodbury, 1 Pick. 362; Olmsted *v.* Hoyt, 4 Day, 436; Gardner *v.* Humphrey, 10 Johns. R. 53; Clammer *v.* State, 9 Gill, 279; Jenkins *v.* Long, 23 Ind. 460.

[7] 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; King *v.* Hopper, 3 Price Exch. Rep. 495. See § 984.

[8] Kindig's Appeal, 2 Weekly Notes of Cas. 680.

was that a prothonotary having omitted to index a judgment in favor of B., afterwards interlined it in the judgment docket. Before an auditor appointed to distribute the proceeds of a sheriff's sale, B., who was a subsequent judgment creditor, offered to show that the interlineation had been made after the entry of his judgment. The auditor overruled this offer, and awarded the fund to A. Upon the petition of B., a rule was then granted on A. to show cause why the entry on the judgment docket should not be stricken off, and this rule was based on a petition setting forth the prothonotary's error, but not averring fraud, or any act on the part of the plaintiff in consequence of such error. It was held by the supreme court, that the petition did not set forth ground for relief. "In such case," said the court, "the petition must set forth substantially an equity which gives the court chancery jurisdiction, and pray for some relief that a court of equity can give in such a case. Now the petition does not set forth any fraud of the defendant in procuring a falsification of the record, or any such accident or mistake as confers equity jurisdiction on the ground of fraud, accident, or mistake. It does not even set forth the unauthorized act of a third person. Nor does it show, as a ground of relief, that the petitioner examined the record before lending his money, or doing any act on the faith of the state of the record which, by reason of its then condition, misled him; while its only specific prayer for relief is not for an injunction to prevent the respondent from using it to his prejudice, but is a prayer that the entry on the judgment index, which he terms the interlineation of the lien, should be stricken from the judgment docket. It is, therefore, not substantially a bill in equity to enjoin the respondent (or appellee) from the benefit of the lien of his award, on the ground of fraud or other head of equity; but is really, with all its verbiage, nothing more than an application to amend or correct the record of the entry on the judgment index. The proof also fails to connect the appellee (or respondent) with any fraud or unauthorized falsification of the entry. In fact, it is apparent that the act was that of the officer himself (the prothonotary), who called on the ex-officer to make a correction of a matter happening within the term of office of the latter. Being done with the consent of the prothonotary, it was really his act. His error was in suffering

the amendment of the judgment index without the authority of the court. This was a grave misdemeanor on his part. Had the court been applied to it would, in allowing the correction, have made it so that the interest of a prior lien creditor would have been protected. But, as we said in the beginning, on this point, the court having refused the petition to strike off the entry, it was an exercise of sound discretion from which there was no appeal, and it is not our province to correct the refusal if it were a mistake."

Fraudulent record may be impeached.

§ 985. In cases of fraud, as we have seen more fully elsewhere,[1] records may be collaterally impeached.[2] In this way a collusive judgment,[3] or a judgment entered without jurisdiction,[4] may be set aside.

Record, when silent or ambiguous, may be explained by parol.

§ 986. Like all other written instruments, however, a record, when silent or ambiguous, may be explained by parol.[5] Thus where the record gives the name of a party ambiguously, the ambiguity may be cleared and the party identified by parol extrinsic proof.[6] So where an executor sells personal property, and the record is silent as to the statutory notice, this notice may be proved by parol.[7] So, also, where 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 the name of the county for which the officer was appointed; and

[1] Supra, § 797.

[2] 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.

[3] Wharton 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.

[4] Supra, § 795.

[5] Infra, § 989; Farnsworth *v.* Rand, 65 Me. 19; Eastman *v.* Cooper, 15 Pick. 276; Gardner *v.* Humphrey, 10 Johns. R. 53; Freeman *v.* Creech, 112 Mass. 180; Kerr *v.* Hays, 35 N. Y. 331; Shoemaker *v.* Ballard, 15 Penn. St. 92; Stark *v.* Fuller, 42 Penn. St. 23; Phillips *v.* Jamison, 14 T. B. Monr. 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.

[6] Root *v.* Fellowes, 6 Cush. 29.

[7] 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.

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] So, 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 should be of record, cannot be added to a record by parol.[4]

[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. 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.

[4] Wilcox *v.* Emerson, 10 R. I. 270.

§ 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.[1] In case of contradiction or ambiguity, however, parol evidence is admissible for explanation.[2]

Town records may be explained by parol.

§ 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.[3] The same

Former judgment may be shown by parol to relate to a particular case.

That shows not that it is such a conditional judgment as is contemplated by the statute, and the omission cannot 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] Crommett *v.* Pearson, 18 Me. 344; Blaisdell *v.* Briggs, 23 Me. 123; Howlett *v.* Holland, 6 Gray, 418; Wood *v.* Mansell, 3 Blackf. 125.

[2] Walter *v.* Belding, 24 Vt. 658.

[3] See supra, §§ 64, 785; R. *v.* Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Miles *v.* Caldwell, 2 Wall. 35; Frost *v.* 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

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]

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; Sterner *v.* Gower, 3 Watts & S. 136; Butler *v.* Slam, 50 Penn. St. 456; 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; 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.

[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. Nothing seems better settled than that the evidence thus offered was competent. It did not contradict the record, but was entirely consistent with it. On the general issue under the pleas of *non assumpserunt*, the defendant could have defeated the plaintiff by showing that the contract was not made with him, but with a firm of Follansbee & Walker. Non-joinder of plaintiffs in an action *ex contractu* may be taken advantage of under the general issue. 1 Chitty's Pleadings, 13. Whenever it does not contradict the record, parol evidence may be given to show that a former recovery was had, not upon the merits, but upon some technical objection to the form of action or otherwise. The cases upon this subject are too numerous to cite; it will be sufficient to refer to some of our own decisions: 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; Fleming *v.* The Insurance Co. 2 Jones, 391; Carmony *v.* Hoober, 5 Barr, 305; Coleman's Appeal, 12 P. F. Smith, 252." Sharswood, J., Follansbee *v.* Walker, 74 Penn. St. 309.

[2] Supra, § 785; Preston *v.* Peeke,

In other cases cause of action may be proved.

§ 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]

Hour of legal procedure may be proved by parol.

§ 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

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 Maine, 517; Rogers *v.* Libbey, 35 Maine, 200; Emery *v.* Fowler, 39 Maine, 326; Cunningham *v.* Foster, 49 Maine, 68.

"So where a particular fact in controversy 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 Maine, 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. If otherwise, it might contradict or vary the record.

"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 record does not speak.[1] 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.[2] So the hour of the service of a writ may be explained or even varied by parol.[3] 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.[4]

§ 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.[5] 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.[6] So it may be shown by parol that a judgment against an indorser was not intended to pass as collateral to a judgment against the principal.[7]

Collateral incidents may be shown by parol.

III. SPECIAL RULES AS TO WILLS.

§ 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 will, and with provisions whose consistency with prior dispositions may be open to perplexing doubts. And yet, notwithstanding these side considerations, the

Intention of wills to be drawn from writing.

[1] D'Obree, ex parte, 8 Ves. 83; Lang *v.* Phillips, 27 Ala. 311.

[2] Lanning *v.* Pawson, 38 Penn. St. 480. *Contra*, Wright *v.* Mills, 4 H. & N. 488; Edwards *v.* R. 9 Exch. R. 628.

[3] Allen *v.* Stage Co. 8 Greenl. 207; Williams *v.* Cheeseborough, 4 Conn. 356.

[4] Trafton *v.* Rogers, 13 Me. 315. See Whitaker *v.* Wisbey, cited supra, § 986.

[5] See supra, § 64.

[6] Sankey *v.* Reed, 12 Penn. St. 95. See Darling *v.* Dodge, 36 Me. 370.

[7] Bank *v.* Fordyce, 9 Penn. St. 275.

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*, 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 unreliable 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 con-

[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 Metc. 423; Osborne *v.* Varney, 7 Metc. 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; Massaker *v.* Massaker, 13 N. J. Eq. 264; Leigh *v.* Savidge, 14 N. J. Eq. 124; Bowers *v.* Bowers, 1 Abb. (N. Y.) App. 214; 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; Hayes *v.* West, 37 Ind. 21; 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; Love *v.* Buchanan, 40 Miss. 758; Gilliam *v.* Chancellor, 43 Miss. 437; Robnett *v.* Ashlock, 49 Mo. 171; 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. Jr. C. C. 368. Supra, § 957.

sciousness 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 very 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 strike out part of its contents, and insert new provisions. 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 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 testa-

[1] See supra, § 467.

[2] Supra, § 884.

tor's death. Hence it is that with two 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, indeed, 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 partial relaxation of the rule has been deplored, on account not only of its impolicy, but of the vagueness of the distinction it introduces; and it has been questioned whether it would not be better either to exclude declarations of intent *in toto*, or to admit them *in toto*.[2]

[1] Infra, § 997.

[2] Stephen's Evidence, 163.

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 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

§ 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. No doubt we have early English cases where a less stringent rule was sustained,[1] but these cases are now discredited,[2] and with them should fall the American rulings to which they for a time gave rise.[3] Acting on the strict principle of exclusion we have noticed, the English courts have rejected evidence when tendered to show what persons a testator meant to include or exclude in employing the word "relations;"[4] what articles he intended to give by the word "plate,"[5] and what property he meant to

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] Thomas *v.* Thomas, 6 T. R. 671; Beaumont *v.* Fell, 2 P. Wms. 141; Doe *v.* Needs, 2 M. & W. 129.

[2] See remarks of Lord Abinger in Doe *v.* Hiscocks, 5 M. & W. 368. Infra, § 997.

[3] 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.*

[4] 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 Ev. § 1038.

[5] Nicholls *v.* Osborn, 2 P. Wms. 419; Kelly *v.* Powlett, Amb. 605.

devise by the words "lands out of settlement,"[1] or by other generic terms.[2] In this country, in developing this view, it has been repeatedly held, 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.[3]

§ 994. In a leading English case,[4] the testator devised all his freehold and real estate "in the county of Limerick and in the city of Limerick." He had no real estates in the county of Limerick, but his landed property consisted of estates in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the testamentary charges. Under these circumstances the court held, that the devisee could not be allowed to show by parol evidence that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake[5] he erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. "The plaintiff," said Chief Justice Tindal, in pronouncing the joint opinion of himself, Lord Lyndhurst, and Lord Chancellor Brougham,[6] "contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of, or in addition

[1] Strode *v.* Russell, 2 Vern. 621.

[2] 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.

[3] 1 Redf. on Wills, 498; Tucker *v.* Seaman's Aid Soc. 7 Metc. 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.

[4] Miller *v.* Travers, 8 Bing. 244.

[5] See, also, Francis *v.* Dichfield, 2 Coop. 531, per Ld. Hardwicke.

[6] Ld. Lyndhurst, C. B., and Tindal, C. J., had been summoned to assist the Lord Chancellor in this case.

to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted." [1]

The same result was reached in a case decided by the supreme court of Pennsylvania in 1876.[2] The suit was an ejectment brought by Margaret Williams against John Robinson, "for that portion of the woodland late of Joseph Robinson, deceased, *lying northwest of the old wood road*, and north of Damon Stevens." The defendant disclaimed as to a portion of the land described, and as to the residue pleaded not guilty. Upon the trial, the plaintiff put in evidence the will of Joseph Robinson, by which he devised to the defendant, John Robinson, "one half of the woodland lying *south of the old wood road*, and north of Damon Stevens;" and named the plaintiff Margaret Williams his residuary devisee. She also showed that the testator owned about twenty-five acres to the *northwest*, and about four acres to the *south* of this "old wood road," and rested. The defendant then offered to show by parol that the testator had intended to devise to him, the defendant, one half of the woodland "*lying northwest of the old wood road*," and that the word "*south*" had been written by mistake. To this offer plaintiff objected, and the objection was sustained. Upon a verdict and judgment for the plaintiff, the defendant took a writ of error, assigning for error the rejection of the parol evidence offered by him. In the supreme court, the ruling was affirmed. "It is shown very clearly," say the court, "by the late Chief Justice Reed in Wallize *v.* Wallize,[3] that parol evidence is inadmissible to change the

[1] 8 Bing. 249, 250; Taylor's Evid. § 994.

[2] Robinson *v.* Williams, 1 Weekly Notes, 337.

[3] 55 Penn. St. 242.

terms of a will, or correct a supposed mistake. It would defeat the chief purpose of the statute relating to wills, in requiring a writing to be signed by the party. This is not a case for the application of the principle that parol evidence may be given to identify the thing described in the will; but the purpose of the offer was, in fact, to change the terms of the will, and to substitute one thing for another; in other words, to change the word 'south' and make it read 'north,' and thereby alter the subject of the devise."[1]

§ 995. 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.[2] And 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.[3] 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.[4]

Where primary meaning is inapplicable to any ascertainable object, evidence of

§ 996. Where a term, 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

[1] 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.

[2] See infra, § 1008; Newburgh *v.* Newburgh, 5 Mart. 361.

[3] Per James, L. J., Wilson *v.* O'Leary, L. R. 7 Ch. 456; Powell's Evidence, 4th ed. 423.

[4] Ordway *v.* Dow, 55 N. H. 12.

"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.

the will.[1] For this purpose, evidence of the condition of the testator's family and of his estate is admissible, under the limitations hereafter expressed.[2] 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,[3] 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, but expressed an opinion that, if it were necessary, evidence of declarations of intention might be admitted."[4] 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.'"[5]

secondary meaning admissible.

§ 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. 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 instruc-

When terms are applicable to several objects, evidence of intent admissible to distinguish.

[1] 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 Wisc. 228; Billingslea *v.* Moore, 14 Ga. 370; Elder *v.* Ogletree, 36 Ga. 64.

[2] Johnson *v.* Lydford, L. R. 1 P. & M. 546; Holmes *v.* Holmes, 36 Vt. 525; Wootton *v.* Redd, 12 Grat. 196.

[3] Charter *v.* Charter, L. R. 2 P. & D. 315.

[4] Stephen's Ev. 161.

[5] Ibid., Errata.

tions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is *but one case*,[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,

[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.

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 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."

§ 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 always 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

All the surroundings and habits of testator may be proved.

[1] Doe *v.* Allen, 12 A. & E. 451; 4 P. & D. 220, *S. C.*; Fleming *v.* Fleming, 31 L. J. Ex. 419; I 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; 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; 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.

nephew both 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

[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.

itself in the position 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]

[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; 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

§ 1000. In England, it has been held in equity that if legacies be given to a specified number of children (*e. g.* four, £1000 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 other 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] Thus where a testator bequeathed to his children the sums of I. X. X., and O. X. X., the court received parol evidence to the effect that the testator had,

Hare, 345; In re Bridget Feltham, 1 Kay & J. 528; 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; Yeats *v.* Yeates, 16 Beav. 170.

[2] Doe *v.* Hiscocks, 5 M. & W. 33. See, also, Drake *v.* Drake, 8 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.

[3] 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; Okeden *v.* Clifden, 2 Russ. 300; Spencer *v.* Higgins, 22 Conn. 521; Crosby *v.* Mason, 32 Conn. 482; Domest. Miss. Appeal, 30 Penn. St. 425; Warner *v.* Miltenberger, 21 Md. 264; Young *v.* Twigg, 27 Md. 620; Ashworth *v.* Carleton, 12 Oh. 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.

in his business as a jeweller, used the ciphers in dispute to indicate respectively £100 and £200.[1] So where a will devises "the M. farm, containing eight fields," evidence is admissible to show that the farm contains nine fields, and that the word "eight" was entered by mistake.[2]

§ 1003. 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,[3] 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.[4] And where a testator devised "all his lands in

[1] Kell *v.* Charmer, 23 Beav. 195.

[2] Coleman *v.* Eberly, 76 Penn. St. 197.

[3] Goblet *v.* Beechey, 3 Sim. 24.

[4] 2 Russ. & Myl. 624; Taylor's Ev. § 1083.

the parish of Doynton " to his daughter, and it appeared that he had a farm, which at that date was generally reputed to be wholly in Doynton, but which subsequently turned out to be partly in another parish, the court of exchequer rightly held that the entire farm passed under the will.[1] A similar conclusion was reached in a case 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, upon which the court, in addition 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.[2] 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."[3]

Erroneous surplusage may be rejected.

§ 1004. We have already seen[4] 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. 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

[1] Anstee *v.* Nelms, 1 H. & N. 225.
[2] Whateley *v.* Spooner, 3 Kay & J. 542.
[3] Allen *v.* Maddock, 11 Moo. P. C. 427. See Almosino in re, 1 Sw. & Tr. 508.
[4] Supra, § 945.
[5] Selwood *v.* Mildmay, 3 Ves. 306.

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,[1] for the purpose of showing that the testator, when he used the erroneous description 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.[2]

§ 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.[3] 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.[4] 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.

[1] In Miller *v.* Travers, 8 Bing. 252, 253; and Doe *v.* Hiscocks, 5 M. & W. 270.

[2] Lindgreen *v.* Lindgreen, 9 Beav. 363. See, also, Quennell *v.* Turner, 13 Beav. 240; Tann *v.* Tano, 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.

[3] Taylor *v.* Parry, 1 M. & Gr. 623, per Maule, J. See supra, § 945.

[4] 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.

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.[1] So, also, where a testator 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.[2]

Patent ambiguities not to be resolved by parol.

§ 1006. Patent ambiguities, however, cannot generally be resolved by parol; but as to such ambiguities the will must be regarded as insensible.[3] Parol evidence, therefore, is inadmissible to prove what is meant by a legacy to "——;"[4] or a legacy to "K. L. M.,"[5] &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.[6] The same rule has been adopted in the United States.[7]

[1] 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.

[2] 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. See Doe *v.* Bower, 2 B. & Ad. 459, per Parke, J.

[3] 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. See supra, § 956, as to definition of patent ambiguities, and see Clayton *v.* Lord Nugent, 13 M. & W. 200; Kell *v.* Charmer, 23Beav. 195.

[4] Baylis *v.* A. J. 2 Atk. 239.

[5] Clayton *v.* Nugent, 13 M. & W. 200.

[6] Kirk *v.* Eddowes, 3 Hare, 509; Ferris *v.* Goodburn, 27 L. J. Ch. 574; Taylor's Evidence, § 1048.

[7] Rogers *v.* French, 19 Ga. 316;

§ 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, 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

Parol proof of mistake not receivable.

Nolan *v.* Bolton, 25 Ga. 352; May *v.* May, 28 Ala. 141.

[1] Newburgh *v.* Newburgh, 5 Mad. 361; 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 under Massachusetts statute, Ramsdill *v.* Wentworth, 101 Mass. 125. Supra, § 954.

[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. 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

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] To sustain such an allegation, declarations of a testatrix, made shortly after the execution of the will, have been received, when a foundation has been laid showing a prior condition of mind rendering her open to fraud and undue influence.[8] Proof of undue influence is always

testator usually called the claimant 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, and as an authority on that point, Beaumont *v.* Fell, may be considered overruled. In its other points it is hardly to be reconciled with the authorities cited infra in this section.

[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 Oh. 247.

[3] Gifford *v.* Dyer, 2 R. I. 99.

[4] Doe *v.* Palmer, 16 Q. B. 747; Duffy, in re, 5 Irish Eq. 506. 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. 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; Laughn *v.* McDevitt, 63 N. Y. 213. See supra, § 931.

[8] Shailer *v.* Bumstead, 99 Mass. 112; Taylor's Will case, 10 Abb. (N. 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; Willett *v.* Porter, 42 Ind. 250; Rabb

admissible on such an issue.[1] But declarations uttered long afterwards, in no sense part of the transaction, cannot be received to prove fraud.[2] For such purpose, unless made against the declarant's interest, they are but hearsay.[3]

§ 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.[4] 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."[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]

Such declarations are admissible to prove testator's mental condition.

§ 1012. Hence 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 declarations in support of the will.[7]

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 execu-

Probate of will only

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] Lewis *v.* Mason, 109 Mass. 169; Harvey *v.* Sullens, 46 Mo. 147.

[2] Gibson *v.* Gibson, 24 Mo. 227.

[3] Supra, § 226.

[4] 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 Kernan, 157.

[5] Shailer *v.* Bumstead, 99 Mass. 126.

[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] Doe *v.* Shallcross, 16 Ad. & El. N. S.) 758; Dennison's Appeal, 29 Conn. 402; Starrett *v.* Douglass, 2 Yeates, 46; Neel *v.* Potter, 40 Penn. 484; Roberts *v.* Trawick, 17 Ala. 55.

primâ facie proof.

tion.[1] It may subsequently be contested, by proof of incompetency of testator, or defective execution.[2]

IV. SPECIAL RULES AS TO CONTRACTS.

Prior conferences are merged in written contract.

§ 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 extinguishing all other parol understandings, prior or contemporaneous. To permit evidence of prior or even of contemporaneous understandings 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.[3]

[1] See supra, § 811; infra, § 1278; Charles *v.* Huber, 78 Penn. St. 448.

[2] Supra, § 811.

[3] 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; Chadwick *v.* Perkins, 3 Greenl. 399; City Bank *v.* Adams, 45 Me. 455; Millett *v.* Marston, 62 Me. 477; Wiggin *v.* Goodwin, 63 Me. 389; Smith *v.* Highee, 12 Vt. 113; Perkins *v.* Young, 16 Gray, 389; Wright *v.* Smith, 16 Gray, 499; 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; Kelly *v.* Roberts, 40 N. Y. 432; 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; Riley *v.* City of Brooklyn, 46 N. Y. 444; Long *v.* N. Y. C. R. R. Co. 50 Ibid. 76; Collender *v.* Dinsmore, 55 N. Y. 204; Gage *v.* Jaqueth, 1 Lans. 207; 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; Tatman *v.* Barrett, 3 Houst. 226; Stoddert *v.* Vestry, 2 Gill & J. 227; 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; 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; Downie *v.* White, 12 Wisc. 176; Merriam *v.* Field, 24 Wisc. 640; Gelpcke *v.* Blake, 15 Iowa, 387; Pilmer *v.* Bank, 16 Iowa, 321. See, also, Flinn *v.* Calow, 1 M. & Gr. 589; Chase *v.* Jewett, 37 Maine, 351; Kennedy *v.* Plank Road, 25 Penn. St. 224.

Thus it has 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 auction, parol evidence is inadmissible that the plaintiff requested her to bid on the property as an underbidder, 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 performance is reduced to writing, parol proof of the entire contract is competent."[6] So if a written agreement has been treated as

[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; 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; 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; 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.

As to statute of frauds, see supra, § 856.

[6] 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.

incomplete, parol evidence of a subsequent further and fuller agreement may be given.[1] 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.[2] When, also, a written contract refers to a collateral oral agreement, this necessarily involves proof of such agreement by parol.[3] 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.[4]

Oral acceptance of written offer makes oral contract, and may be proved by parol. So of delivery.

§ 1016. Another exception to the rule before us is based on the fact, that to make a written contract there must be a written assent by both parties.[5] Where, therefore, a written proposal is accepted by parol, this is an oral contract and may be proved by parol.[6] Hence a telegram accepted by parol may be modified, so far as concerns its contractual effect, by parol.[7] 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.[8] Ordinarily, however, the deliv-

455; Barry *v.* Ransom, 12 N. Y. 462; Batterman *v.* Pierce, 3 Hill, 171; Chester *v.* Bank of Kingston, 16 N. Y. 336.

[1] Johnson *v.* Appleby, L. R. 9 C. P. 158; 22 W. R. 515; Courtenay *v.* Fuller, 65 Me. 156.

[2] "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.

[3] Ruggles *v.* Swanwick, 6 Minn. 526.

[4] Page *v.* Sheffield, 2 Curt. 377.

[5] Thornton *v.* Charles, 9 M. & W. 802; Heyman *v.* Neale, 2 Camp. 337; Sievewright *v.* Archibald, 17 Q. B. 115.

[6] Pacific Works *v.* Newhall, 34 Conn. 67.

[7] Beach *v.* R. R. 37 N. Y. 457.

[8] Armstrong *v.* McCoy, 8 Ohio, 128.

ery of a deed is presumed from the facts of signature, delivery, and transfer of possession.[1]

Rescission of contract, and substitution of another, may be proved by parol.

§ 1017. A written contract, aside from the prescriptions of the statute of frauds,[2] may be rescinded by parol, and a new agreement, written or unwritten, adopted and executed 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 show by strong and clear evidence, either accident, mistake, or fraud, to make such rescission equitable.[3] In other

[1] Infra, § 1314.

[2] See supra, §§ 901–2.

[3] 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 Metc. 442; Priest *v.* Wheeler, 101 Mass. 479; Russell *v.* Barry, 115 Mass. 300; Cutter *v.* Cochrane, 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; Creamer *v.* Stephenson, 15 Md. 211; Cain *v.* Guthrie, 8 Blackf. 409; Stewart *v.* Ludwick, 29 Ind. 230; Hume *v.* Taylor, 63 Ill. 43; Kirby *v.* Harrison, 2 Oh. St. 326; Rynear *v.* Neilin, 3 G. Greene, 310; Mather *v.* Butler, 28 Io. 253; Hubbell *v.* Ream, 31 Iowa, 289; Burge *v.* R. R. 32 Iowa, 101; Van Trott *v.* Wiese, 36 Wisc. 439; Murphy *v.* Dunning, 30 Wisc. 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; Salmon *v.* Hoffman, 2 Cal. 138; Scanlan *v.* Gillan, 5 Cal. 182; Barfield *v.*

words, parol evidence is admissible, so is the position stated by

Price, 40 Cal. 535; Waymack *v.* Heilman, 26 Ark. 449. See Goucher *v.* Martin, 9 Watts, 106.

In Grymes *v.* Sanders, Sup. Ct. U. S. Oct. T. 1876 (Alb. L. J. Nov. 18, 1876), 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; 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

Mr. Stephen,[1] to prove "the existence of any subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds, or otherwise." So parol evidence is admissible to prove that a rescinded contract has been reinstated.[2]

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.[3] 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.[4] 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.[5]

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

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.

On Goss *v.* Nugent, supra, Mr. 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.

[1] Evidence, art. 90.

[2] Flynn *v.* McKeon, 6 Duer, 203, and cases above stated.

[3] Cross *v.* Sprigg, 6 Hare, 552.

[4] Per Turner, L. J., Taylor *v.* Manners, L. R. 1 Ch. 56.

[5] Yeomans *v.* Williams, L. R. 1 Eq. 184; 38 L. J. Ch. 283; Powell's Evidence, 4th ed. 407.

latter, for such evidence does not vary the contract, but only proves the condition of the document when it first became a contract.[1]

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.[2] 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.[3] The same conclusion was reached in a 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.[4] 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.[5] 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.[6]

[1] Stewart *v.* Eddowes, L. R. 9 C. P. 311; 43 L. J. C. P. 204. Supra, § 624.

[2] Fowell *v.* Forrest, 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. 266.

[3] 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.

[4] 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.

[5] 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.

[6] 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.* Shat-

§ 1019. Courts of equity having jurisdiction, as we have seen, to rescind contracts on ground of mistake or fraud, it is a necessary incident of this jurisdiction that when a contract is shown to have been modified by the parties, 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. But equity does not stop with thus precluding the enforcement of a contract so modified. Supposing concurrent mistake, surprise, or fraud to be demonstrated, the court will reform such a contract, so as to make it what was intended 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 mistake, surprise, or fraud. The remedy, however, is applied reluctantly and cautiously, and only on strong proof that the reformation was one intended by the parties at the execution of the contract, and was prevented only by mutual mistake, surprise, 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

Parol evidence admissible to reform a contract on ground of fraud.

tuck, 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.

[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 Bk. L. R. 2 Ex. 259; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; West Bk. *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; Oliver *v.* Ins. Co. 2 Curt. C. C. 277; 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; 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 Metc. 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.

show that a bond, payable on its face in current funds, was, by

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; Coughenour *v.* Suhre, 71 Penn. St. 462; Huss *v.* Morris, 63 Penn. St. 367; Martin *v.* Behrens, 67 Penn. 462; Whelen's Appeal, 70 Penn. St. 410; Wharton *v.* Douglass, 76 Penn. St. 273; Hall *v.* Clagett, 2 Md. Ch. 151; Farrell *v.* Bean, 10 Md. 368; Stair *v.* Bk. 31 Md. 254; Boyce *v.* Wilson, 32 Md. 122; Kearney *v.* Sascer, 37 Md. 264; Starke *v.* Littlepage, 4 Rand. 368; White *v.* Denman, 16 Oh. 59; Webster *v.* Harris, 16 Oh. 490; City R. R. *v.* Veeder, 17 Oh. 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; 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; Hunt *v.* Carr, 3 G. Greene, 581; Longhurst *v.* Ins. Co. 19 Iowa 364; Barthell *v.* Roderick, 34 Iowa, 517; Van Dusen *v.* Parley, 40 Iowa, 170; Mather *v.* Butler, 28 Iowa, 253; Lake *v.* Meacham, 13 Wisc. 355; Smith *v.* Jordan, 13 Minn. 264; Guernsey *v.* Ins. Co. 17 Minn. 104; McCurdy *v.* Breathitt, 5 T. B. Monr. 232; Inskoe *v.* Proctor, 6 T. B. Monr. 311; Anderson *v.* Hutcheson, 4 Litt. (Ky.) 126; Coger *v.* McGee, 2 Bibb, 321; Harrison *v.* Howard, 1 Ired. Eq. 407; Potter *v.* Everitt, 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 A. 368; 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. 225; 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; Wil-

an agreement made coincidently with its execution, made payable

liamson *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; 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 Kostenbaden *v.* Peters, before the supreme court of Pennsylvania, in 1856, 2 Weekly Notes, 531, 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

in Confederate currency, if paid before maturity;[1] and to insert

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 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

[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]

§ 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]

§ 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

So as to mistake.

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. 2 Weekly Notes of Cases, 316.

[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, Sup. Ct. U. S. Oct. T. 1876 (Alb. L. J. Nov. 18, 1876, 342), 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.

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.[1] Even an erroneous execution, leading to an erroneous sheriff's title, may be thus corrected.[2] 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.[3]

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.[4]

[1] Supra, § 1019; Fenwick *v.* Bruff, 1 McArthur, 107; Peterson *v.* Grover, 20 Me. 363; Nat. Bk. *v.* Ins. Co. 62 Me. 519; Paige *v.* Sherman, 6 Gray, 511; Hartford Ore Co. *v.* Miller, 41 Conn. 112; McNulty *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; 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.

[2] Wardlaw *v.* Wardlaw, 50 Ga. 544.

[3] 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.* Bk. 13 How. 57.

[4] "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

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]

§ 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.[2] 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 courts would refuse parol evidence to prove such a change, because (if for no other reason) it is inherently improbable that

But not ordinarily to contradict document.

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.* Hulbert, 102 Mass. 24, 35." See, also, Mitchell *v.* Kintzer, 5 Penn. St. 216. Gray, J., Earle *v.* Rice, 111 Mass. 20.

[1] Supra, §§ 932, 1019; Bradford *v.* Bradford, 54 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 Wisc. 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] See supra, § 931.

such a change could have been made; and, even if it were made, no party can claim equity to enforce an agreement so negligent. It is otherwise, indeed, as we have already seen, when the offer is to prove the rescission of a contract, or its extension, in a mode not incompatible with its tenor. But to reverse the contents of a contract, retaining its formal and operative texture, 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.[5] On the other hand, parol evidence may be received to show that the 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 Metc. 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. (Al.) 376. See supra, § 920.

[6] 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; Creamer *v.* Stephenson, 15 Md. 211; Rigsbee *v.* Bowler, 17 Ind. 167; Willey *v.* Hall, 8 Iowa, 62; Adler *v.* Friedman, 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; 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.*

§ 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 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

Under statute of frauds such reformation cannot pass land.

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 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; 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.

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? On this and cognate points the minds of chancellors have been greatly agitated. 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]

Parol contract substituted for written not sufficient under statute.

§ 1025. We may, also, in obedience to the reasoning just 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.[3] Hence it is settled that where the subsequent contract incorporates

[1] See supra, §§ 904–11; Bispham's Equity, § 383 *et seq.*

[2] 1 Sugd. Vend. & P. (8th Am. 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; Osborn *v.* Phelps, 19 Conn. 63; Gillespie *v.* Moon, 2 John. Ch. 585. See Glass *v.* Hulbert, 102 Mass. 31.

[3] Supra, §§ 854 *et seq.*, 902 *et seq.*

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.[1]

Collateral extension may be proved by parol.

§ 1026. It may happen, however, to take an alternative already presented, 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.[2]

[1] 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.

[2] 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; Bonney *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; Joannes *v.* Mudge, 6 Allen, 245; Richardson *v.* Hooper, 13 Pick. 446; Rennell *v.* Kimball, 5 Allen, 356; 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.*

In other words, to adopt Mr. Stephen's statement,[1] a party is at liberty to prove "the existence of any separate oral agreement 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 transaction between them." [2]

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; Stange *v.* Wilson, 17 Mich. 342; Vanderkarr *v.* Thompson, 19 Mich. 82; Keough *v.* McNitt, 6 Minn. 513; 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; Kelly *v.* Taylor, 23 Cal. 11; Ingersoll *v.* Truebody, 40 Cal. 603; Lockwood *v.* U. S. 5 Ct. of Cl. 379.

[1] Evidence, art. 90.

[2] "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 a Maryland case we have the following: —

"The test of admissibility in such cases is whether the evidence offered tends to alter, vary, or contradict the written contract, or only to prove an independent collateral fact, about which the written contract was silent. In the former case, the testimony is inadmissible; in the latter, it is competent and proper. The case of Bladen *v.* Wells & Wife, is a good illustration of the former, and Basshor & Co. *v.* Forbes, of the latter. In Bladen *v.* Wells, the grantors, by their deed, in consideration of $1,300, conveyed to the grantee certain lands therein described; afterwards they filed their bill, alleging that at the time of the sale the appellant (the grantee) agreed that if the lands contained not more than 140 acres, it was to belong to the appellant, but if more the appellant was to pay the appellees for the excess over 130 acres, at the rate of ten dollars in gold, or twenty dollars in currency, per acre. Exceptions were taken to the evidence in relation to the agreement; in commenting upon which this court held such testimony inadmissible, because the alleged contract and the case made by the bill were inconsistent with the deed, in which all previous contracts regarding the land were merged. 30 Md. 582. This case distinctly recognizes 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

§ 1027. In conformity with the rule which has been just stated, parol evidence has been received of a parol agreement be-

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.) 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, 2 Weekly Notes, 160; *S. C.* 79 Penn. St. 239.

In Lloyd *v.* Farrell, 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

tween two indorsers of a note to divide the loss between them;[1] of a parol agreement of an indorser to 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 grocery store, that he would not carry on the business in the same neighborhood;[7] of a parol agreement as to the mode of payment;[8] 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;[9] and of a parol agreement designating the place for carrying into effect a contract, and as to which it is silent.[10] To prove such collateral extensions usage may be appealed to.[11] "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."[12]

Parol evidence inadmissible to

§ 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

express parol agreement that A. conveyed and warranted only his own title. This was held admissible, although the deed contained the usual warranty. See Farrell *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] Foster *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.

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

[8] Sowers *v.* Earnhart, 64 N. C. 96.

[9] White *v.* Packin, 12 East, 578; Seago *v.* Deane, 4 Bing. 459.

[10] Cummings *v.* Putnam, 19 N. H. 569; Musselman *v.* Stoner, 31 Penn. St. 265; Moore *v.* Davidson, 18 Ala. 209.

[11] Supra, § 969.

[12] Per Parke, B., Hatton *v.* Warren, 1 M. & W. 475.

prove unilateral mistake of fact.

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. Hence a mere mistake of fact will be ordinarily no ground for relief, so far as concerns the writers of such instruments and those claiming under them.[1] Evidence, however, is admissible to prove mistake on one side, and fraud on the other.[2] 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.[3] So an action will lie for the value of a deficiency of quantity.[4]

[1] 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; Wesley *v.* Thomas, 6 Har. & J. 24; Watkins *v.* Stockett, 6 Har. & J. 435; Boyce *v.* Wilson, 32 Md. 122; Kearney *v.* Sascer, 37 Md. 264; Harris *v.* Dinkins, 4 Desau. 60; Nelson *v.* Davis, 40 Ind. 366; Peques *v.* Mosby, 15 Miss. 340; Nixon *v.* Porter, 38 Miss. 401; Hathaway *v.* Brady, 23 Cal. 121; Robinson *v.* McNeil, 51 Ill. 225; Barnes *v.* Bartlett, 47 Ind. 98; Ludington *v.* Ford, 33 Mich. 123; Harter *v.* Christoph, 32 Wisc. 248; Schwickerath *v.* Cooksey, 53 Mo. 75; Wade *v.* Pelletier, 71 N. C. 74; and cases cited supra, § 1019; infra, §§ 1078, 1243.

[2] 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.

[3] 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."

[4] See supra, § 945.

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.[1] 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 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.[2] 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.[3] 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,[4] not because there was actual fraud, but because the contract rested on a mistake which the defending contracting party had furthered.

§ 1030. Where from a writing itself it appears that words

[1] See infra, § 1241.

[2] 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; Shotwell *v.* Murray, 1 Johns. Ch. 512; Champlin *v.* Laytin, 18 Wend. 407; Garnar *v.* Bird, 57 Barb. 277; Dickinson *v.* Glenney, 27 Conn. 104; 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.

[3] 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.

[4] Lansdown *v.* Lansdown, Mosley, 364.

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.[1] 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 transposition was a mistake; and on this evidence S. was held liable as surety.[2] 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.[3] As to strangers, this right of correction is always open.[4] 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.[5]

Mistake of form, when obvious, may be corrected.

§ 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

Conveyance may be shown

[1] 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. Ambiguities: 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.

[2] Richardson *v.* Boynton, 12 Allen, 138.

[3] 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.

[4] See supra, § 923.

[5] Finney's Appeal, 59 Penn. St. 398. See infra, § 1078.

to be in trust, or to be a mortgage.

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.[1] The trust, in such case, may be proved by parol; and when such is the local practice, equitable remedies of this class can be applied through common law form.[2]

[1] Supra, § 903; infra, § 1034.

[2] Price *v.* Dyer, 17 Ves. 356; Sprigg *v.* Bank, 14 Pet. 201; Russell *v.* Southard, 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; 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. 467; 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; 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 Wisc. 379; Wilcox *v.* Bates, 26 Wisc. 465; Ragan *v.* Simpson, 27 Wisc. 355; 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;

§ 1032. For the same reason, a conveyance absolute on its face may be shown, 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 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]

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.* 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: "1. 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.* Clemants, 51 Maine, 426; Dudley *v.* Bachelder, 53 Maine, 403." Appleton, C. J., Gerry *v.* Stimson, 60 Maine, 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; 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 Wisc. 378; Kent *v.* Lasley, 24 Wisc. 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

§ 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

Evidence must be plain and strong.

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 reconsideration 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. Chy. 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."

gross concurrent mistake be shown, and the evidence be clear, and relates to intention coincident with the execution.[1] A party,

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.

"The first specification of error complains that the learned court below admitted parol evidence to show that the transfer by White to Ballentine, dated April 1, 1855, though in form an absolute conveyance, was in reality intended by the parties as a mortgage to secure indebtedness then existing, and money to be subsequently loaned. The contention of the plaintiff in error is founded entirely upon the fourth section of the Act of April 22, 1856, Pamph. L. 533; but as the transfer in question was executed April 1, 1855, and that section is clearly prospective, as was held in Lingenfelter *v.* Ritchey, 8 P. F. Smith, 488, it is unnecessary to consider this assignment further. It is, however, proper to add, that this court has decided the question in Maffitt's Administrator *v.* Rynd, 19 P. F. Smith, 387, where it is said that 'it cannot be maintained that the Act of April 22, 1856, has made any alteration in what has always heretofore been the established rule on this subject in Pennsylvania.'" Ballentine *v.* White, 77 Penn. St. 25.

[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; Barkley *v.* Lane, 6 Bush, 587; Waddingham *v.* Loker, 44 Mo. 132. See 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.

however, setting up a trust title of this class, must do equity by an offer to redeem.[1]

Under statute of frauds, sufficient if trust is manifested in writing.

§ 1034. We have already seen,[2] 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 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."[3] An answer in chancery has consequently been held sufficient to sustain the establishment of a trust; and so have, *a fortiori*, written admissions.[4]

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.[5] The money, however, must form a considerable

[1] Supra, § 1033; Thomas *v.* Wright, 9 S. & R. 87; Hughes *v.* Davis, 40 Cal. 117.

[2] Supra, § 903.

[3] Lord Alvanley in Foster *v.* Hale, 3 Ves. 707. See Smith *v.* Matthews, 6 W. R. 644, and in prior notes hereto; and see cases cited in 2 Wash. Real Est. 50, 51 (4th ed.), and supra, § 903.

[4] 3 Sugd. V. & P. 252; Roh. on Frauds, 95; Randall *v.* Morgan, 12 Ves. 67. See supra, § 903.

[5] 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; Hutchings *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.* Hildreth, 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

part of the purchase.[1] 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.[2] To this rule exists a well marked exception, that when the money is advanced by a parent, and the legal title taken in a child, the advance will be supposed to be for the benefit of the child.[3] 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.[4] 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.[5] Parol evidence is of course as admissible to disprove as to prove the trust.[6]

§ 1036. In several states of the Union, among which may be mentioned Maine, Massachusetts, New York, Indiana, Michigan, and Wisconsin, resulting trusts of the class just specified are prohibited by statute.[7]

v. Quay, 68 Penn. St. 263; Farrell *v.* Lloyd, 69 Penn. St. 239. See Lloyd *v.* Farrell, supra, § 1027; Creed *v.* Bank, 1 Oh. St. 1; Miller *v.* Stokely, 5 Oh. St. 194; Lewis *v.* White, 16 Oh. 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; Parmlee *v.* Sloan, 37 Ind. 469; Kane *v.* Herrington, 50 Ill. 232; Thomas *v.* Chicago, 55 Ill. 403; Roberts *v.* Opp, 56 Ill. 34; 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.* Chouteau, 14 Mo. 580; Rings *v.* Richardson, 53 Mo. 585; Kennedy *v.* Kennedy, 57 Mo. 73; Faris *v.* Dunn, 7 Bush, 276; Honore *v.* Hutchings, 8 Bush, 687; Holder *v.* Nunnelly, 2 Cold. 288; Byers *v.* Danley, 27 Ark. 77; Oberthier *v.* Stroud, 33 Tex. 522. See Nicklin *v.* Wythe, 2 Sawyer, 535.

[1] Roberts *v.* Ware, 40 Cal. 634.

[2] Sugd. V. & P. 255; Wray *v.* Steele, 2 Ves. & B. 388; Lench *v.* Lench, 10 Ves. 517; Houghton, ex parte, 17 Ves. 251; Hayden *v.* Denslow, 27 Conn. 335.

[3] 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.

[4] Lloyd *v.* Spillet, 2 Atk. 150.

[5] Grey *v.* Grey, 2 Swans. 598.

[6] 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.

[7] 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.

§ 1037. The evidence of such a 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.[1] The admissions of trust must come directly from the party charged with the trust.[2]

So of other trusts.

§ 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 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.[3] 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.[4] 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.[5] To rebut equities of this class, parol evidence is necessarily admissible.[6]

[1] 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.

[2] Com. *v.* Kreager, 78 Penn. St. 477.

[3] Haigh *v.* Kaye, 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.

[4] Church *v.* Sterling, 16 Conn. 388; Hunter *v.* Hopkins, 12 Mich. 227; Kennedy *v.* Kennedy, 2 Ala. 571.

[5] See, also, Earle *v.* Rice, 111 Mass. 20; Mitchell *v.* Kintzer, 5 Penn. St. 216.

[6] Supra, § 973–74; and see cases cited supra, § 1035.

§ 1039. A recital in a deed is evidence against him who executed the deed, and against every person claiming under him.[1] 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."[2] Among particular recitals the following may be enumerated: That a lot is bounded by a particular road, which does not mean, however, that such road was fit for travel;[3] that the title consists of certain specified links;[4] that the party conveying was entitled, as agent, to convey.[5] Eminently is an estoppel operative when the recital involves a bilateral agreement to admit a fact.[6] 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.[7] Infants are not bound by recitals in deeds executed by their guardians,[8] but married women are estopped by recitals in deeds by which they are bound.[9]

Particular recitals may estop.

§ 1040. *General* recitals (*i. e.* those which do not aver particular facts, or aver them non-contractually) may be *primâ facie*

[1] Com. Dig. Evid. (B. 5); Gwyn *v.* Neath, Ex. 122; L. R. 3 Ex. 209.

[2] 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.

[3] 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.

[4] Carver *v.* Jackson, 4 Pet. 85; Scott *v.* Douglass, 7 Oh. 287; 3 Washburn on Real Prop. 100.

[5] Stow *v.* Wyse, 7 Conn. 214. See Huntington *v.* Havens, 5 Johns. Ch. 23.

[6] 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.

[7] Carpenter *v.* Buller, 8 M. & W. 212. Infra, § 1083.

[8] Milner *v.* Harewood, 18 Vesey, 274.

[9] Jones *v.* Frost, L. R. 7 Ch. 776.

but are never conclusive evidence against the party making them, "since certainty is of the essence of an estoppel."[1] 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.[2] Where the recital involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral admission, and is open to explanation.[3] But a recital in a deed, though not estopping, may make, even against the heirs of the grantor, a *primâ facie* case.[4]

Otherwise as to general recitals.

§ 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,[5] is hearsay.[6] Even when offered in evidence by a third person, against the party making the recital, a recital may be explained and disputed by parol.[7]

Recitals do not bind third parties.

§ 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 par-

Recitals of purchase money

[1] 3 Washburn on Real Prop. (1876) 101; Bigelow on Estoppel, 2d ed. 266; Lainson *v.* Tremere, 1 Ad. & E. 792; Kepp *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, 7 Barr, 185; Hays *v.* Askew, 5 Jones (L.), 63. As to admissions by predecessor in title, see infra, § 1156.

[2] 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.

[3] South E. R. R. *v.* Wharton, 6 Hurl. & N. 520; Osborne *v.* Endicott, 6 Cal. 153; Carpenter *v.* Buller, 8 M. & W. 212. See infra, § 1156.

[4] 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.

[5] See supra, §§ 194, 210.

[6] "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; Carver *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.

[7] See supra, § 923; infra, § 1044.

ties by parol proof. They partake in this respect of the nature of receipts, which, as we will presently see,[1] are open to parol explanations.[2] "Even as against a party to a deed,

open to parol explanations.

[1] Infra, § 1064.

[2] 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.* Vilas, 8 Wisc. 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.* Soulshy, 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 Verm. 494; White *v.* Miller, 22 Verm. 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

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 concurrent 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.[3]

§ 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 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

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 inadmissible, 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.

[3] McMullin *v.* Glass, 27 Penn. St. 151. Infra, §§ 1045, 1066.

purchase money in the latter deed is not even *primâ facie* proof of payment.[1]

Consideration may be proved or disproved by parol.

§ 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 show a consideration when none is recited, or vary

[1] 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 facie* 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.

that of which there is a recital.[1] 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

[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; Belden *v.* Seymour, 8 Conn. 304; Wheeler *v.* Billings, 38 N. Y. 263; 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; 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; 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. 214; 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.

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 in writing, one may be proved by parol;[3] and it may be shown by parol that a bond is not in fact usurious, though apparently so on its face.[4] Parol evidence, also, is admissible to prove an extrinsic consideration varying that expressed;[5] and on an assignment for creditors, which does not expressly recite the amount due, parol evidence is admissible to prove such amount.[6] Again, when in a bill of sale of goods the whole consideration is not stated, parol evidence is admissible to supply the deficiency.[7] A recital of receipt of purchase money, in a contract for sale, may be qualified by parol.[8] Such recitals, as we have seen, are not evidence in any sense between third parties;[9] though they are an impeachable admission which may be received against the party making them and his privies. So, also, partial or entire failure of consideration of negotiable paper may always be shown by parol, so far as concerns parties with notice, although the averment, "value received," is *primâ facie* proof of consideration.[10]

[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 *v.* Hagard, 5 Mo. 420; Cowan *v.* Cooper, 41 Ala. 187; otherwise in cases of fraud. Young's Est. 3 Md. Ch. 461.

[3] 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; Laudman *v.* Ingram, 49 Mo. 212; and see cases cited infra, § 1054.

[4] Campbell *v.* Shields, 6 Leigh, 517.

[5] Lewis *v.* Brewster, 57 Penn. St. 410; Malone *v.* Dougherty, 79 Penn. St. 48; Holmes's Appeal, 79 Penn. St. 279; Taylor *v.* Preston, 79 Penn. St. 436.

[6] Platt *v.* Hedge, 8 Iowa, 386.

[7] Nedridek *v.* Meyer, 46 Mo. 600.

[8] Supra, § 1039; infra, § 1064.

[9] Spaulding *v.* Knight, 116 Mass. 148; Weaver *v.* Wood, 9 Penn. St. 220; Smith *v.* Conrad, 15 La. An. 579.

[10] Herrick *v.* Bean, 20 Me. 51; Wise *v.* Neal, 39 Me. 422; Bourne *v.* Ward,

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 *primâ facie* disputed by those claiming under it, but other consideration may be proved

§ 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

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; 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. 165; 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.

[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. 515; 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.

[2] Peacocke *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.

to the consideration expressed, a valuable consideration paid, or the converse.[1]

in rebuttal if fraud be charged.

§ 1047. Hence 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.[2] 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.[3]

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.[4] 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.[5] Such is, *a fortiori*, the case where the deed, in addition to the specified consideration, avers "divers other considerations."[6] And in any view, where a deed

[1] 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 *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 Wisc. 481.

[2] 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.

[3] Filmer *v.* Gott, 7 Br. P. C. cited by Lord Kenyon in R. *v.* Scammonden, 3 T. R. 475–6; Taylor's Ev. § 1040.

[4] 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 Oh. St. 339.

[5] 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.

[6] Pomeroy *v.* Bailey, 43 N. H. 118; Benedict *v.* Lynch, 1 Johns. Ch. 370; Chesson *v.* Pettijohn, 6 Ired. L. 121.

recites no consideration, or a nominal or inadequate consideration, then the party claiming under the deed may prove a substantial consideration;[1] 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.[2] 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.[3] 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.

So by *bonâ fide* purchasers and judgment vendees.

§ 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.[4] Hence judgment

[1] Peacock *v.* Monk, 1 Ves. Sen. 128; Tull *v.* Parlett, M. & M. 472; Leifchild's case, L. R. 1 Eq. 231; Hilton *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.

[2] Kelson *v.* Kelson, 10 Hare, 385. Supra, § 1043.

[3] 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.

[4] 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 Wisc. 618; Bigelow *v.* Doolittle, 36 Wisc. 115; Duvall *v.* Bibb, 4 Hen. & M. 113; Swift *v.* Lee, 65 Ill. 336; Andrews *v.* Andrews, 12 Ind. 348; Harrison *v.* Castner, 11 Oh. St. 339; Johnson *v.* Taylor, 4 Dev. L. 355; Wade *v.* Saunders, 70 N. C. 270; Johnson *v.* Lovelace, 51 Ga. 18; Myers *v.* Peeks, 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

creditors, as well as subsequent innocent purchasers 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.

§ 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

Deeds not open to variation by parol proof.

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.

[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 Metc. (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; August *v.* Seeskind, 6 Coldw. 166; Porter *v.* Jones, 6 Coldw. 313; Sage *v.* Jones, 47 Ind. 122; 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 Wisc. 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

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]

§ 1051. 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] So, where a deed for a farm contains no reservation of the growing crop to the grantor, such reservation cannot be proved by parol.[6] So, 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]

§ 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*.

Certificate of acknowledg-

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 governor'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.

We cannot logically declare that a deed is acknowledged, when the acknowledgment is the point in dispute. 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

ment open to parol dispute.

[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; 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 Wisc. 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 is to be regarded as a judicial act; but even treating an acknowledgment as a judicial act, it follows that it may be collaterally impeached by proof not only of fraud and want

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.

In Heeter *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 Wisc. 449.

In Kerr *v.* Russell, 69 Ill. 666, the court went so far as to hold that on the single testimony of the party an

of jurisdiction, but of gross patent violation of the ordinary rules of justice.[1]

§ 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]

§ 1054. We have just seen that the sanctity attached to deeds has secured for them a peculiarly vigilant application of the rule

acknowledgment could not be attacked.

[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; 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, 1 N. Y. S. C. (T. & C.) 406, reversed; Ritter *v.* Worth, 58 N. Y. 628.

[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.

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, though in variance from the language used, 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] yet in equity, if not at law, a deed may be rescinded, or even reformed, on parol proof of concurrent mistake or fraud.[14] It is

[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.
[14] Supra, § 1019.

true that under the statute of frauds a deed cannot in this way be ordinarily made to pass a larger interest in land;[1] 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.[2] 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.[3]

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.[4]

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.[5] When so impeached, the mortgagee may show other considerations than those recited in the mortgage.[6] But between the mortgagor and the mortgagee, at common law, the mortgagor cannot set up the falsity of the consideration as a defence.[7]

Deed may be shown to be 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.[8]

VI. SPECIAL RULES AS TO NEGOTIABLE PAPER.

Negotiable paper not susceptible of parol variation.

§ 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

[1] Supra, § 1024.
[2] Supra, § 904.
[3] Supra, § 1040.
[4] See supra, § 1047 *et seq.*
[5] Clark *v.* Houghton, 12 Gray, 38.
[6] 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.
[7] Meads *v.* Lansingh, Hopk. (N. Y.) 124.
[8] See supra, §§ 1031–5.

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, to prove by parol that the paper was executed or moulded by fraud, or by accident or mistake which it would be fraudulent to take advantage of.[2] Other more infor-

[1] Johnson *v.* Roberts, L. R. 10 Ch. Ap. 505; Brown *v.* Wiley, 20 How. 442; Spofford *v.* Brown, 1 McArthur, 223; 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; Tucker *v.* Talbot, 15 Ind. 114; McClintic *v.* Cory, 22 Ind. 170; Campbell *v.* Robbins, 29 Ind. 271; Fow *v.* Blackstone, 31 Ill. 538; Racine Bank *v.* Keep, 13 Wisc. 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; 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, *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.

"The offer rejected by the court was 'to prove that the note was not to be payable until defendant got the money from the bridge.' The objection was that the terms of the note could not be contradicted. The note was in express terms payable at a stipulated time. The offer was therefore clearly incompetent without showing fraud or mistake, or that there was a subsequent agreement made on a sufficient consideration. The deficiencies in a written agreement' which may be supplied by parol evidence, are not such as contradict or vary the express terms of the writing. The latter can be shown only under an offer to prove

mal instruments, 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 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 upon a loan, and upon the assurance that the bank would not look to him for payment, cannot be received.[3] 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;[4] or that a note is only payable on contingencies;[5] or that a note payable generally is payable at a particular bank[6] (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

fraud and mistake at the time of the execution of the writing. The deficiences spoken of in some of the cases are those only which are independent of the writing, and arise from the fact that the parties did not put all of their agreement in writing, but left parts of their arrangement unprovided for by it; and are also not inconsistent with the terms of the writing. We think the court committed no error in rejecting the offer in the form it was presented. The cases are collected in Martin *v.* Berens, 17 P. F. Smith, 462." Agnew, J., Coughenour *v.* Suhre, 71 Penn. St. 464.

See, to same effect, 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; Wren *v.* Hoffman, 41 Miss. 616; Jones *v.* Jeffries, 17 Mo. 577; Smith *v.* Thomas, 29 Mo. 307.

[3] Barnstable Savings Bank *v.* Ballou, 119 Mass. 487; but see cases cited nfra, § 1061.

[4] See infra, § 1060 *et seq.*

[5] 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; Sears *v.* Wright, 24 Me. 278; Underwood *v.* Simonds, 12 Metc. 275; Litchfield *v.* Falconer, 2 Ala. 280; McClanaghan *v.* Hines, 2 Strobh. 122.

[6] Patten *v.* Newell, 30 Ga. 271.

this point);[1] or that a note is payable otherwise than in legal currency, unless so expressed in the note itself;[2] though evidence has been received to show the business meaning of "currency,"[3] 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.[4]

Blank indorsements may be explained by parol.

§ 1059. So far as concerns the immediate contracting parties, a blank indorsement exhibits at the best a contract at short hand. It is true that as to *bonâ fide* holders of paper regularly negotiated, it establishes a liability indisputable if the signature be genuine. As to holders with notice, however, the liability may be modified by parol, by proof of fraud, or of facts which make it inequitable for the plaintiff to recover.[5] 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.[6] 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.[7] The cases may, in some measure, be reconciled

[1] Brent *v.* Bank, 1 Peters, 92; McKee *v.* Boswell, 33 Mo. 567.

[2] 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. Monr. 155; Noe *v.* Hodges, 3 Humph. 162; Fields *v.* Stunston, 1 Coldw. 140; Self *v.* King, 28 Tex. 552.

[3] Pilmer *v.* Bank, 16 Iowa, 321. See Cowles *v.* Garrett, 30 Ala. 341. Supra, § 948.

[4] Thorington *v.* Smith, 8 Wall. 1, 12. Supra, § 948.

[5] Infra, § 1060. Phillips *v.* Preston, 5 How. 278; Susquehanna Bridge 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; 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.

[6] 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.* Morrell, 54 Me. 49; Susquehanna Bk. *v.* Evans, 4 Wash. C. C. 480; Bruce *v.* Wright, 3 Hun. 548; Ross *v.* Espy, 66 Penn. St. 481.

[7] 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

by holding that while the indorsement cannot be *contradicted* by extrinsic proof, it is admissible to show, in our present practice, 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,[1] but the indorser may show that his indorsement was obtained in such a way as to make its enforcement a fraud;[2] and that it was made in trust for special ends, and cannot be sued on absolutely.[3]

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; Campbell *v.* Robins, 29 Ind. 271.

[1] 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.

[2] Dale *v.* Gear, 38 Conn. 15; Benton *v.* Martin, 52 N. Y. 570; Hill *v.* Ely, 5 S. & R. 363.

[3] 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 Maine, 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,

§ 1060. Generally as between parties with notice, or parties taking the paper out of the ordinary course of business, agree-

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 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 Snsquehanna 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

ments annexing modifying incidents to the paper or to the liabilities of the maker or indorsers, may be shown by parol.[1] Consideration, also, as between the par-

Relations of parties with notice may be varied by

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 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.

It is of course inadmissible for an indorser, as against a *bonâ fide* holder, to show, as a defence, that the indorsement, by a parol agreement, was to be without recourse. See Daniel's Neg. Inst., *ut supra;* Skinner *v.* Church, 36 Iowa, 91.

[1] Barker *v.* Prentiss, 6 Mass. 430; Kingman *v.* Kelsie, 3 Cush. 339; Riley *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.* Clark, 11 S. & R. 377; Walker *v.* Geisse, 4 Wh. 258; Depeau *v.* Waddington, 6 Wh. 220; *S. C.* 2 Am. Leading Cases, 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. See Campbell *v.* Tate, 7 Lans. 370; 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; 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; Smith *v.* Paris, 53 Mo. 274; Clarke *v.* Scott, 45 Cal. 86; Bissenger *v.* Guiteman, 6 Heisk. 277.

parol, and so of consideration.

ties, may be disputed.[1] As parties, considered as such in relation to each other, are 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.[2] 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.[3]

Real parties may be brought out by parol.

§ 1061. It is elsewhere declared that on suing on a written contract, an undisclosed party may be shown by parol to be principal, though not in such a way as to cut off the defendant from any defence he might otherwise have against the agent. 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.[4] There is no reason why the same distinction should not apply to negotiable paper, as between parties with notice.[5] It is clear that an undisclosed principal may by parol admission and guarantee make himself liable on his agent's note.[6] So 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.[7] It may also be proved by parol

[1] 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.

[2] 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.

[3] 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.

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.

[4] See supra, § 952.

[5] 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.

[6] Lindus *v.* Bradwell, 5 C. B. 583; Brown *v.* Parker, 7 Allen, 337; cases cited supra, §§ 951–2.

[7] Byles on Bills, 27, note; Dow *v.* Moore, 47 N. H. 419; Johnson *v.* Smith, 21 Conn. 627; Early *v.* Wilkinson, 9 Grat. 68; Musser *v.* Johnson, 42 Mo. 78; Campbell *v.* Nicholson, 12 Rob. (La.) 433.

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

[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."

See, also, Wharton on Agency, §§ 290, 295, 458, and an elaborate dis-

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 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 instrument is overridden:[7] as for instance, when a per-

cussion 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; 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.

[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.

[7] Wilson *v.* Tucker, 10 R. I. 578; Jamison *v.* Pomeroy, 9 Penn. St. 230; Haile *v.* Peirce, 32 Md. 327; Isler *v.*

son signs a note as "cashier," or "treasurer," to prove the institution of which he is an officer;[1] where A. gives a note as "agent," to prove whom he really represented;[2] and when the note recites imperfectly the consideration, to explain the recital.[3]

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.[4] It has been held, that the principle above stated applies to unliquidated as well as to liquidated claims.[5]

Releases cannot be contradicted by parol.

Kennedy, 64 N. C. 530; Lockwood *v.* Avery, 8 Ala. 502; Taylor *v.* Strickland, 37 Ala. 642.

[1] 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.

[2] Paige *v.* Stone, 10 Metc. (Mass.) 160; Haile *v.* Peirce, 32 Md. 327; Baker *v.* Gregory, 28 Ala. 544; South. Life Co. *v.* Gray, 3 Fla. 262.

[3] Walker *v.* Clay, 21 Ala. 797.

[4] 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.

[5] "Upon what principle the supreme court confined the abatement from the verdict to ten dollars, I have not been able to conjecture, unless perhaps it was assumed that the consideration of a release under seal was open to inquiry, and if it appeared that such consideration was not equal in amount to the whole demand or thing released, the release only operated *pro tanto*. This, however, cannot, I think, be seriously claimed; the seal itself imports full consideration, and the release and discharge, under seal, full and complete satisfaction. And this is equally true whether the real or only a nominal consideration is expressed. The idea that an action may be prosecuted for damages for an assault and battery, slander, libel, or other tort, and notwithstanding a release and discharge, the party may go to the jury on the question whether the consideration expressed in the release is an adequate compensation, would not be entertained for a moment; and I am not aware of any difference in this respect when the action is *trover or trespass de bonis asportatis*. In the absence of fraud, it is to be deemed conclusively shown by the release, that, upon considerations satisfactory to the releasor, he has accepted satisfaction.

"Our statute, making a seal presumptive evidence only of a consideration, has no application to such a discharge. See Stearns *v.* Tappin, 5 Duer, 294, and cases therein cited, and 22 Barb. 97." Woodruff, J., Noble *v.* Kelly, 40 N. Y. 420.

§ 1064. Receipts being informal and non-dispositive writings, may be modified, explained, or impugned by parol.[1] That this is the case in ordinary receipts for the payment of money, is a necessary consequent of the informality 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.[2] 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.[3] To all classes of receipts is the rule applicable. A receipt, for instance, given by a fire or life

Receipts may be corrected by parol.

[1] 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. 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. 332; Carr *v.* Minor, 42 Ill. 179; Leonard *v.* Dunton, 51 Ill. 482; Elston *v.* Kennicott, 52 Ill. 272; Rowe *v.* Wright, 12 Mich. 289; Bell *v.* Utley, 17 Mich. 508; Hammond *v.* Harrison, 21 Mich. 274; 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; 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. Monr. 199; Hawley *v.* Bader, 15 Cal. 44. As to recitals of receipt of purchase money in deeds, see supra, § 1039.

[2] Lewis *v.* Webber, 116 Mass. 450.

[3] Ryan *v.* Ward, 48 N. Y. 20.

insurance agent for the premium of a policy, may be explained by parol;[1] and so may a receipt given by such an agent stating that the receipt was "to be binding until policy is received,"[2] and so a receipt for a note with the words, "which I agree to account for on demand."[3] 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.[4] The same liberty extends to receipts indorsed on deeds or notes;[5] and to bankers' pass-books.[6] 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.[7]

§ 1065. A receipt in a policy of marine insurance is an exception to the rule, and is held to be conclusive,[8] though it is otherwise as to the adjustment of a loss made without full knowledge of the circumstances.[9] Nor, though the usual acknowledgment in a policy of insurance of

Receipts for marine insurance are conclusive.

[1] Reyner *v.* Hall, 4 Taunt. 725; Ferebee *v.* Ins. Co. 68 N. C. 11. See Luckie *v.* Bushby, 13 C. B. 844.

[2] Scurry *v.* Ins. Co. 51 Ga. 624.

[3] Eaton *v.* Alger, 2 Abb. (N. Y.) App. 5.

[4] Smith et al. *v.* Holland, 61 N. Y. 635.

[5] Straton *v.* Rastall, 2 T. R. 366; Graves *v.* Key, 3 B. & Ald. 313.

[6] Com. Bk. *v.* Rhind, 3 Macq. Sc. Cas. 643.

[7] Hotchkiss *v.* Mosher, 48 N. Y. 478.

"The certificate was simply an acknowledgment of so much money deposited with the bank. It was of the same force and effect as a receipt for money. The word 'certify' adds no additional force to the instrument, as purporting a contract. It contained no promise on the part of the defendants; and if it had, the portion which operated as a receipt for money was quite as capable of separation from that part which evidenced a contract as in the case of a bill of lading. A certificate or acknowledgment, that another has deposited a sum of money, has the effect of an acknowledgment by one party that he has received a sum of money from another. A simple certificate like the one in question is not the basis of an action like a promise in writing, but would be evidence, like a receipt, to raise an implied promise to pay in an action for money had and received. We are of the opinion that parol evidence was admissible to explain the certificate in the same manner as in the case of a receipt." Leonard, J., Hotchkiss *v.* Mosher, 48 N. Y. 482.

[8] 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.

[9] 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.

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.[1]

Receipts may be estoppels in favor of third parties.

§ 1066. A party however may, as to innocent third parties, estop himself from disputing a receipt;[2] as where a warehouseman gives a receipt of goods, which the holder passes to a *bonâ fide* dealer.[3] "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."[4] So a receipt by a county treasurer, acknowledging the redemption of land sold for taxes, is part of a record title which cannot be contradicted by parol.[5] 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.[6]

[1] Dalzell *v.* Mair, 1 Camp. 532; Anderson *v.* Thornton, 8 Ex. R. 428.

[2] 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.

[3] 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.* Suydam, 7 N. Y. 357; Gibson *v.* Bank, 11 Oh. 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 Oh. St. 419.

[4] Bigelow on Estoppel, 2d ed. 430; citing Dewey *v.* Field, 4 Metc. 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 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 Oh. 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.

[5] Halsey *v.* Blood, 29 Penn. St. 319.

[6] Hunter *v.* Walters, L. R. 11 Eq. 292.

§ 1067. We have heretofore[1] 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.[2] But this is not allowable when the terms of the bond are thereby impugned.[3] 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.[4]

Bonds may be shown by parol to be payable on contingencies.

§ 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.[5] When, however, 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.[6]

Subscriptions cannot be contradicted by parol.

[1] Supra, §§ 927, 930.

[2] Chester *v.* Bank, 16 N. Y. 336; Morrison *v.* Morrison, 6 Watts & S. 516; Leppoc *v.* Bank, 32 Md. 136. See, also, supra, § 255.

[3] 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.

[4] Fulton *v.* Hood, 34 Penn. St. 365. See, also, Hendrickson *v.* Evans, 25 Penn. St. 441.

[5] Supra, §§ 920-3; Rutland, &c. R. R. *v.* Crocker, 29 Vt. 540; O'Hear *v.* De Goesbriand, 33 Vt. 593; Bull *v.* 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.

[6] Gilman *v.* Veazie, 24 Me. 202; George *v.* Harris, 4 N. H. 533; White Mountain R. R. *v.* Eastman, 34 N. H. 124; 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.

§ 1069. Where, however, a subscription has been fraudulently obtained, this fraud may be up as a defence to an action on the

465; Banet *v.* R. R. 13 Ill. 509; Corwith *v.* Culver, 69 Ill. 502; Burhans *v.* Johnson, 15 Wisc. 286; Smith *v.* Tallahassee, 30 Ala. 650. See Angell & Ames on Corp. § 146.

In Caley *v.* R. R., Supt. Ct. Penns. 1876, 2 Weekly Notes, 313, it was said by Sharswood, J., speaking for the court: "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 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.

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]

§ 1070. So far as bills of lading are receipts, they are open to explanation by parol evidence.[4] Nor does the fact that the shippers 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.[5] It is otherwise when the bill of lad-

Bills of lading are open to explanation.

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, that the *termini* had been illegally changed.

[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; 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; Cafiero *v.* Welsh, 3 Leg. Gaz. 21; Balt. St. Co. *v.* Brown, 54 Penn. St. 77; 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.

[5] 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 Sand. Sup. Ct. R. 7; Meyer *v.* Peck,

ing involves a contract, in which case parol evidence, except in cases of fraud or mistake, cannot be received to vary the terms.[1]

28 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.

[1] "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 Ins. 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 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; Berkley *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 re-

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 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

ceipt, 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, 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; Hastings *v.* Pepper, 11 Pick. 42; Long *v.* R. R. 50 N. Y. 76; Creery *v.* Holly, 14 Wend. 28.

[2] Nelson, J., Creery *v.* Holly, 14 Wend. 28. See The Wellington, 1 Biss. 279.

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]

[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.

BOOK III.

EFFECTS OF PROOF.

CHAPTER XIII.

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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 all 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. 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."[3] "Verbis: quod sua quisque voce protestatus est, id infirmaret, testimonioque proprio resisteret."[4] "Quum res non instrumentis geran-

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.

[3] Gaius, Inst. iii. § 131.

[4] C. 13; C. 4, 30.

tur, sed in haec rei gestae *testimonium* conferatur."[1] If an admission, when viewed in this sense, is to be effective, it must relate to the present, not to the future. From it by its very terms is excluded the assumption that the declarant intends to establish an obligatory relation with another.[2] As has been well stated,[3] the declarant draws simply from his own knowledge or recollection, and turns, therefore, only to the past; the person who enters into a contract establishes, in connection with his co-contractor, a new legal relation, and turns to the future. The promise is productive; the admission simply reproductive.

§ 1077. *Extra-judicial* admissions may be either contractual (being in such case dispositive),[4] 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 other party. In the latter case, the admission, we have 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.[5] 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.[6] At the same time it must be remembered

Non-contractual admissions do not conclude.

[1] C. 12; C. 4, 19.

[2] Gönner, Handb. des Proz. ii. 46; Hesse, juristisch. Probleme, 24.

[3] Hesse, *ut supra*

[4] 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.

[5] Mascard. I. C. No. 26; Endemann, 137.

[6] 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; Bran-

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; and hence that they are, at the best, to be regarded 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 where there is any suspicion attachable to the admission as a class, as is the case with admissions of adultery;[3] or where they on their face appear to have been uttered in order to elude inquiry.[4] In fine, where the 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.[5] It should also be remembered, that estoppels can never bind strangers, since as to strangers they are always non-contract-

dywine 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.

[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; 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. Thus the acknowledgment of a signature to a note does not conclude the party making it. Hall *v.* Huse, 10 Mass. 39; Salem Bank *v.* Gloucester Bk. 17 Mass. 1. See supra, § 705.

[2] Supra, § 467; 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. As to talking in sleep, see Best's Ev. § 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.

[5] 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.

ual;[1] and that even recitals in deeds, which estop the parties, may be contradicted by strangers.[2]

Non-contractual admissions dependent upon circumstances for credit.

§ 1078. Supposing an admission to be non-contractual, — *i. e.* a statement by one party, as was seen in the last section, which is not the consideration for the act or forbearance of another party, — it is not to be accepted without a careful scrutiny of the circumstances under which it was made. Here we find an essential distinction between the admission and the estoppel.[3] The estoppel binds whether it is true or false; the admission only when true. I may untruly say, "I have no title to this land;" yet if in consequence of my disclaiming such title at a public sale, B. buys the land, I may hereafter be estopped from setting up my title against B. But if my admission has not been the cause of B. doing or omitting any act, then, if he should sue me, this admission is entitled to no weight whatever should it prove to be untrue. It is admissible in evidence, as, *primâ facie*, a *levamen probationis*, but the only ground for its admission is the presumption that a declaration made by me against my interest is true. Even this presumption vanishes in the face of evidence that I made the admission through levity, or ignorance, or simulation. We have an interesting illustration of this in the Justinian Code.[4] "Veteris juris, dubitationem decidentes sancimus, si quidem tutor vel curator pro substantia pupilli vel adulti aliquid dixerit, ad majorem quantitatem eam reducens, sive pro utilitate pupilli, sive pro sua (sola) simplicitate, sive per aliam quam cunque causam nihil *veritati praejudicare*, sed hoc obtinere, quod ipsius rei inducit natura, — et mensura ostendit substantiae pupillaris." What the guardian, according to this ruling, says with regard to the greatness of his ward's estate, is not to be put in evidence against him, if it be shown that the statement was an unfounded exaggeration, uttered either idly or for the purpose of swelling his own or his ward's importance. When circumstances, therefore, show that admissions were uttered carelessly, the presumption of their truth decreases in proportion to

[1] See cases cited supra, § 923; infra, §§ 1083, note (6), 1155.

[2] R. *v.* Neville, Pea. R. 91; Carter *v.* Carter, 1 K. & J. 649; Mayor *v.* Blamire, 8 East, 487. See supra, § 1041; infra, § 1088.

[3] See fully infra, §§ 1087–8.

[4] C. 13; C. 5, 13.

the carelessness with which they were spoken; while on the other hand the presumption of truth rises in proportion to the information, the seriousness, and the deliberation of the party speaking. Justinian gives peculiar emphasis to this antithesis: "Sin autem inventario publice facto res pupillares conscripserit et ipse per hujusmodi scripturam confessus fuerit ampliorem quantitatem substantiae, nihil esse aliud inspiciendum, nisi hoc, quod inscripsit, et secundum vires ejusdem scripturae patrimonium pupilli exigi." From such an inventory the seriousness and the deliberation of the admission (*confessio*, *scriptura*) are presumed, while the presumption that it was made in brag or levity is proportionally excluded. From such conditions we may infer the truth of the admission; because no prudent man would, to his own disadvantage (*contra se*), make a deliberate misstatement. "Neque enim sic homo simplex, immo magis stultus invenitur, ut in publico inventari scribi *contra se* aliquid patiatur."[1]

Intent necessary to give weight to such admission.

§ 1079. To the validity of a *confessio*, an *animus confitendi* is as a general rule necessary. It is clear that a statement, thrown out as a joke or even as a brag, and accepted as such by the opposite side, is not a *confessio*, or statement binding the party making it.[2] A party, also, so has it been held, will not be estopped by information uttered by him, as he supposes, merely informally, as a matter of conversation; it being the duty of the persons asking him for such information to notify him if they intended to act upon his answers.[3] The *animus confitendi*, in such sense, has been treated as convertible with the *animus veram dicendi*, or, to adopt a German rendering, with *Ernstlichkeit*, or seriousness.[4] If the party admitting is not in earnest in making the admission, and does not mean it as a contractual admission, then, so far as concerns himself, he is not to be regarded as intending to be bound. So far as concerns *bonâ fide* third parties, relying on his statements, the question depends upon whether the admission was made in such a way as would lead a business man of ordinary prudence to rely on it. If not so made, a statement

[1] Hesse, 28.

[2] See cases in Whart. Cr. Law, § 2102, holding that false "puffs" are not false pretences.

[3] Hackett *v.* Callender, 32 Vt. 99.

[4] Endemann, 153.

cannot be regarded as binding the party making it.[1] 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 even 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 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

[1] In Heane *v.* Rogers, 9 B. & C. 586, Bayley, J., said: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence — and strong evidence — against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers." Powell's Evidence, 4th ed. 226.

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]

Credibility a question of fact.

§ 1080. The credibility of a self-disserving, non-contractual admission, therefore, 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, quaecunque *quis pro se dixerit aut scripserit*, ea nihil ipsi prodesse, neque creditoribus praejudicare."[2] "Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit. Unde neque fiscum neque alium quemlibet *ex suis subnotationibus* debiti *probationem* praebere posse."[3] 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.[4] 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 just given of but little weight. In matters of pedigree, in particular, a statement which one man would shrink from as discreditable, another would advance with pride. To some men an aristocratic connection might be claimed untruthfully; by others it might be untruthfully disclaimed. Sinister bars, indicating a royal illegitimate descent, are blazoned boastfully on some 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 author 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 have involved him in social ignominy. Sir Walter Scott, against 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 unpro-

[1] See Whart. Cr. Law, §§ 683–693.
[2] Nov. 28. c. 1; Hesse, 29.
[3] C. 7; C. 4, 19.
[4] Hesse, *ut supra*, 29; citing further I. 26, § 2; D. xvi. 3.

fessional to avoid it.[1] 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 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.

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 ad-

[1] Supra, § 483, note.

[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.

[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.

mission by A. that B. is the proper payee, though not, it is said, by B., that A. is the person bound to pay.[1] 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 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.[2]

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, when not part of a contract, are entitled to less weight than admissions of the second class.[3] I may, for instance, 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. My saying that I do not now admit a liability I formerly admitted does not expose me to the imputation of having in one or the other case spoken falsely. I express, in both cases, only a conclusion at which I have arrived, and this conclusion I may be at liberty to recall or modify. It is otherwise as to my admission of facts of which I am personally cognizant.[4]

C. 642. See Whart. Cr. Law, § 2113. Infra, § 1319.

[1] James *v.* Biou, 2 Sim. & St. 606; Chapman *v.* Beard, 3 Anstr. 942.

[2] McGrath *v.* R. R. 63 N. Y. 522.

[3] See McLendon *v.* Shakleford, 32 Ga. 474; Balt. City R. R. *v.* McDonnell, 43 Md. 534.

[4] 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 powers 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.

Of course if I make such admission without due consideration or knowledge, it may be repudiated.[1]

§ 1083. What is just said is subject to 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 dispositive admission[4] 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.[5] Hence, also, it is, 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.[6]

Contractual admission distinguishable from non-contractual.

§ 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.[7] Even

121; Steffy *v.* Carpenter, 37 Penn. St. 41; and supra, § 920.

[1] 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 Wisc. 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.

[4] See Wetzell, Civil Proc. i. p. 139; Weiske, Rechtslexicon, xi. 662.

[5] See supra, §§ 920 1077–1080; infra, §§ 1151, 1155.

[6] 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.

[7] Austin *v.* Chambers, 6 Cl. & Fin.

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.[1] In the United States, the conclusion above stated, so far as it involves an absolute rule of evidence, has not been accepted.[2] 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.

§ 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.[3] 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.[4] At the same time estoppel, to adopt the language of the books, must, in order to be effective, be mutual.[5]

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 estop-

Estoppels may be substitutes for proof.

1, 38, 39; Attwood *v.* Small, Ibid. 234; Copland *v.* Toulmin, 7 Ibid. 350, 373, 375.

[1] 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.

[2] Story Equity Pl. § 265 *a*, note 1.

[3] 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.

[4] See supra, §§ 927, 1019, 1030.

[5] 2 Smith's Lead. Cas. 442; Perrie *v.* Nuttall, 11 Ex. 569; Bigelow on Est. 47.

pel," 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 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. Hence it is that 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,

[1] 2 Sm. L. C. 693.

[2] Donel. Com. L. 28, c. 1.

whether it be true or false.[1] 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.[2] A party warranting cannot escape liability by claiming that his warranty was false.[3]

Otherwise as to non-contractual admissions.

§ 1088. On the other hand, 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*."[4] "*Non fatetur qui errat*."[5] Nor are such admissions binding if based on a mistake of law.[6] 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.[7]

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.[8] 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;[9] though an admission as to a par-

[1] 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.

[2] Whart. on Ageney, § 541.

[3] See Bigelow on Est. 288–9.

[4] Lofft Max. 553.

[5] 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, Peeker *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.* Trawick, 22 Ala. 490; Wynn *v.* Garland, 16 Ark. 440. As to receipt, see supra, § 1064.

[6] Moore *v.* Hitchcock, 4 Wend. 292; Rowen *v.* King, 25 Penn. St. 409; Solomon *v.* Solomon, 2 Ga. 18.

[7] 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.

[8] 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.

[9] U. S. *v.* Kuhn, 4 Cranch C. C. 401; Quarles *v.* Littlepage, 2 Hen. & M. 401; Gihney *v.* Marchay, 34 N. Y. 301; Douglass *v.* Davie, 2 McCord, 219.

ticular account may be evidence on which it may be sustained.[1] Nor will an admission of the genuineness of a signature avail against a party to whom the paper containing the signature was not shown.[2]

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.[3] Independent of the reason just mentioned, it may be 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 on the other side.[4]

[1] Vinal *v.* Burrill, 16 Pick. 401; Sugar *v.* Davis, 13 Ga. 462.

[2] Infra, § 1095.

[3] Hoghton *v.* Hoghton, 15 Beav. 321; Cory *v.* Bretton, 4 C. & P. 462; Healey *v.* Thatcher, 8 C. & P. 388; 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; 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; Williams *v.* Thorp, 8 Cow. 201; Payne *v.* R. R. 40 N. Y. Sup. Ct. 8; Wrege *v.* Westcott, 30 N. J. L. 212; 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 Wisc. 371; 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."

[4] 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

It has been also held that the admission of a party in a case stated for the opinion of the courts cannot afterwards be used against him.[1] If, however, in such negotiation 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 ad-

correspondence. "Such communications, made with a view to an amicable arrangement, ought to be held very sacred; for if parties were to be afterward 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 person 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 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; Cole *v.* Cole, 33 Me. 542; Hamblett *v.* Hamblett, 6 N. H. 333; Perkins *v.* Concord, 44 N. H. 223; Eastman *v.* Amoskeag, 44 N. H. 143; Marsh *v.* Gold, 2 Pick. 285; Gerrish *v.* Sweetser, 4 Pick. 374; Hartford Bridge Co. *v.* Granger, 4 Conn. 142; Fuller *v.* Hampton, 5 Conn. 416; Murray *v.* Coster, 4 Cow. 635; 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.* 5 Tyr. 1085, which was an action for injury to cattle through defendant's mischievous dogs, an offer

mitted, however, the whole must be proved.[1] And when an offer is made in a letter written "without prejudice," and such offer is accepted,[2] or when an admission is made in such a letter subject to a condition, and such condition has been performed,[3] then the letter can be used in evidence against the writer, notwithstanding that it was written "without prejudice."[4]

Party's admission may prove contents of writings.

§ 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."[5]

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.

[1] Scott *v.* Young, 4 Paige, 542.

[2] In re River Steamer Co. L. R. 6 Ch. 822; 19 W. R. 1130.

[3] Holdsworth *v.* Dimsdale, 19 W. R. 798.

[4] Powell's Evidence, 4th ed. 269.

[5] 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

§ 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; although it is limited to cases in which the admission has been voluntary by the party making it; for he cannot be compelled to make such admissions, nor ought questions which tend to elicit them to be allowed.[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]

Limitations of this rule.

§ 1093. It has, however, been with much force objected,[4] that to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the production of the instrument itself, 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;[5] 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;[6]

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.

[1] Darby *v.* Ousely, 1 H. & N. 1; Powell's Evidence, 4th ed. 310.

[2] See Smith *v.* Palmer, 6 Cush. 513; Loomis *v.* Wadhams, 8 Gray, 557; Crichton *v.* Smith, 34 Md. 42; Taylor *v.* Peck, 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 (Io.) 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.

[4] Taylor's Ev. § 382.

[5] Bloxam *v.* Elsie, Ry. & M. 188; Boulter *v.* Peplow, 9 Com. B. 501.

[6] Slatterie *v.* Pooley, 6 M. & W. 669.

while the same acute reasoner has qualified his own conclusions by reverting to the elementary principles we have already noticed,[1] 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 the statement an effect completely at variance with what was intended.[2] To the same effect is an opinion by a leading Irish judge. "The doctrine laid down in that case,"[3] 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."[4]

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.[5] 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.[6]

[1] Supra, § 318.

[2] Note to Earle *v.* Picken, 5 C. & P. 542.

[3] Lawless *v.* Queale, 8 Ir. Law, 385. See Henman *v.* Lester, 12 C. B. (N. S.) 781.

[4] 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."

[5] 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.

[6] Clark *v.* Hougham, 2 B. & C. 149; Woolway *v.* Rowe, 1 Ad. & El. 114;

§ 1095. But whatever may be the law as to admission of the contents of writings, it was settled in England, before the 17 & 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 renders it, so it has been held, 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]

Declarations as to domicil admissible.

Brubacker *v.* Taylor, 76 Penn. St. 83; Mason *v.* Poulson, 43 Md. 162; Hall *v.* The Emily Banning, 33 Cal. 522.

To this effect, in fact, may be cited all the cases in which admissions have been put in evidence since the statutes removing the incompetency of parties.

[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, § 83 *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, § 84 *et seq.*, and infra, § 1297.

[8] Brodie *v.* Brodie, 2 Sw. & Tr. 259; Ennis *v.* Smith, 14 How. 400.

[9] Thorndike *v.* Boston, 1 Metc. (Mass.) 242; Kilburn *v.* Bennett, 3 Metc. (Mass.) 199; Burgess *v.* Clark, 3 Ind. 250.

But mere vague unexecuted expressions of intent cannot be so received.[1] The date of a contract has been held to be admissible, as one among other incidents, to make up a presumption of domicil at a particular place.[2]

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.[3] 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.[4] 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.[5]

Admissions under duress inadmissible.

§ 1099. An admission, as well as a confession, made under duress, is inadmissible, even though bilateral.[6] 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;[7] and the same rule applies to an admission obtained through a bill in equity.[8] Even though a witness is prevented from explaining his testimony at trial, such testimony can afterwards be used against him.[9]

Party's statements when self-serving inadmissible.

§ 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*.[10] Hence comes the maxim, *Scriptura pro scribente nihil probat*.[11]

[1] 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.

[2] Lougee *v.* Washburn, 16 N. H. 134; Cavendish *v.* Troy, 41 Vt. 99.

[3] Supra, §§ 63, 64, 541, 991, 1094.

[4] Supra, § 541.

[5] Murray *v.* Gregory, 5 Exch. R. 468.

[6] Stockflesh *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.

[7] Supra, § 488; infra, § 1120; Grant *v.* Jackson, Pea. R. 203; Ashmore *v.* Hardy, 7 C. & P. 501.

[8] Bates *v.* Townley, 2 Ex. R. 157. Infra, § 1119.

[9] Collett *v.* Keith, 4 Esp. 212. See Milward *v.* Forbes, 4 Esp. 171. Infra, § 1120.

[10] L. 10, D. xxii. 5.

[11] See more fully supra, §§ 170, 265; and see James *v.* Stookey, 2 Wash.

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. 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]

§ 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] By the same rule a party sued on an alleged loan cannot put in evidence his

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.

[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; Jacobs *v.* Whitcomb, 10 Cush. 255; Nourse *v.* Nourse, 116 Mass. 101; North Stonington *v.* Stonington, 31 Conn. 412; Downs *v.* R. R. 47 N. Y. 83; 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; 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.

declarations at the time of the loan to prove that his pecuniary condition was such as to make it improbable that he would borrow money.[1]

Except when part of the *res gestae*, or when stating symptoms.

§ 1102. It may, however, happen, that statements of a party may be so interwoven with a contract as to form part of it, or may be 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 into which they immediately entered.[3] This is so in torts, as well as contracts.[4] In slander, for instance, for charging the plaintiff with taking the defendant's lumber, the plaintiff's declarations at the time of taking the lumber are admissible, as part of the *res gestae*, though the defendant was not at the time present.[5] So in deceit for falsely representing the solvency of a stranger, inducing the plaintiff to trust him with goods, the plaintiff's statements at the time of the sale, that the trust was on the basis of the recommendation, have been received in their behalf.[6] Such declarations, however, are admitted not to prove their own truth, but to exhibit the attitude of the parties. Thus in an action for trespass to real estate, the point at issue being 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

[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; Tomkins *v.* Saltmarsh, 14 Serg. & R. 275; Louden *v.* Blythe, 16 Penn. St. 532; Potts *v.* Everhardt, 26 Penn. St. 493; Purkiss *v.* Benson, 28 Mich. 538; Stephens *v.* McCloy, 36 Iowa, 659; 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.

[5] Polston *v.* See, 54 Mo. 291.

[6] Fellowes *v.* Williamson, M. & M. 306.

with the alleged right of way.[1] Another exception to the rule that self-serving declarations are inadmissible, 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.[2]

The whole context of a written admission must be proved.

§ 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-

[1] Sears *v.* Hayt, 37 Conn. 406. See Carrig *v.* Oaks, 110 Mass. 144.

[2] Supra, §§ 268-9.

[3] Supra, §§ 617–20, 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.* Dunklee, 30 Vt. 29; Cary *v.* Pollard, 14 Allen, 285; Stone *v.* Sanborn, 104 Mass. 319; Wiggin *v.* R. R. 120 Mass. 201; Newton *v.* Price, 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.

[8] 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; 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 sanctioned its contents.[1]

§ 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] "It is an established rule of evidence in equity, that where an answer, which is put in issue, admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred."[4] 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.[5]

Whole of answer in equity and sworn returns need not be read.

§ 1105. But 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.[6] 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.[7]

Otherwise at common law.

§ 1106. Although the exhibits attached to the answers of a person, when so sworn, cannot be read without the examinations,[8] 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.[9] "It is surmised," said Lord Denman, while pro-

Practice as to exhibits.

[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.

[4] Swayne, J., Clements *v.* Moore, 6 Wall. 299–315.

[5] Stephens *v.* Heathcote, 1 Drew. & Sm. 138; Taylor's Evidence, § 660.

[6] Percival *v.* Caney, 4 De Gex & Sm. 623; Bermon *v.* Woodbridge, 2 Dongl. 788; Marianski *v.* Cairns, 1 Macq. Sc. Cas. 212; Baildon *v.* Walton, 1 Exch. C. 617; Bath *v.* Bathersea, 5 Mod. 10.

As to pleadings, see infra, § 1110. As to equity practice, infra, § 1112.

[7] 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.

[8] See Holland *v.* Reeves, 7 C. & P. 36. Supra, § 618.

[9] Long *v.* Champion, 2 B. & Ad. 284; Sturge *v.* Buchanan, 10 Ad. & E. 605. See Falconer *v.* Hanson, 1 Camp. 171.

nouncing the judgment of the court "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: 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

[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; 1 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.

[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.

all that related to such remarks in the conversation.[1] "Nor can 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."[2] 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.[3] Nor does the limitation exact the introduction of interviews subsequent to that in which the admissions proved were made.[4] If the substance be proved, it is not necessary to reproduce the words.[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

[1] Queen Caroline's case, 2 B. & B. 297; Beckham *v.* Osborne, 6 M. & Gr. 771; Thomson *v.* Austen, 2 S. & R. 361; 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; Wolf Creek Diamond Co. *v.* Schultz, 71 Penn. St. 185; Phares *v.* Barber, 61 Ill. 271; Miller *v.* R. R. 52 Ind. 51; Overman *v.* Coble, 13 Ired. L. 1; Bradford *v.* Bush, 10 Ala. 386; Howard *v.* Newsom, 5 Mo. 523.

[2] Sharswood, J., Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Penn. St. 185.

[3] 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.

[4] Adam *v.* Eames, 107 Mass. 275.

[5] Hale *v.* Silloway, 1 Allen, 21; Mays *v.* Deaver, 1 Iowa, 216; Dennis *v.* Chapman, 19 Ala. 29. See fully § 514.

[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.

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 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.

Admissions by plea conclusive.

§ 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 work an estoppel.[7]

[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.

So far as concerns the particular trial, "a mere denial in an answer will not allow a defendant to insist upon a fact brought out by the plaintiff's evidence, although, if the matter had been set up by way of defence, it would have availed to defeat the action. Brazill *v.* Isham, 2 Kern. 9. For a still stronger reason, a party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to

§ 1111. It should be noticed, in respect to pleas in abatement, that where defendant pleads generally the non-joinder of 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, the judgment is final, when the action is for a certain 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, conclusively admitted.[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] The distinctive effects of demurrers have been already discussed.[6]

In pleading, that which is not disputed is admitted.

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.

[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; De 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 supra, § 840.

The English equity practice in this respect is thus recapitulated by Mr. Taylor (Ev. § 759):—

"First, every bill which is ordered to he taken *pro confesso* may he 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 bill and answer, the answer is admitted to be true on all points. See Churton *v.*

So, also, in suits brought upon former judgment.

§ 1113. As we have already had occasion abundantly 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 the slightest evidence has been held enough for this purpose.[3]

§ 1114. It was at one time intimated that paying money into court admits everything which the plaintiff would have to prove

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 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.

[a] 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.

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.

in order to recover the money.[1] The better opinion, however, now is that payment into court upon the *indebitatus* counts admits only a liability, to the extent of the money paid in, on one or more of the contracts in the declaration; and it would appear that, practically, the contract must be proved.[2] But if in a statement of claim the claim is based upon a special contract, payment into court is an admission of such contract,[3] to the extent to which it is obligatory upon the plaintiff to prove it,[4] and an admission of the specific breach in respect of which the payment is made.[5] 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,[6] 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.[7] 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.[8] 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.[9]

Paying money into court is an admission *pro tanto*.

[1] Per cur. Dyer *v.* Ashton, 1 B. & C. 3.

[2] Kingham *v.* Robins, 5 M. & W. 94.

[3] Archer *v.* English, 1 M. & G. 876; Powell's Ev. 267.

[4] Cooper *v.* Blick, 2 Q. B. 915.

[5] Rucker *v.* Palsgrave, 1 Camp. 550.

[6] Tattenhall *v.* Parkinson, 2 M. & W. 752.

[7] Reid *v.* Dickons, 5 B. & Ad. 599.

[8] Cox *v.* Parry, 1 T. R. 464.

[9] Lechmere *v.* Fletcher, 1 C. & M. 623.

That paying money into court ad-

§ 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]

Pleadings in other cases may be admissions.

§ 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

mits 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 declared 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.

a learned expositor,[1] "a person's answer in chancery is evidence against him, by way of admission, in favor of a person who was no party to the chancery suit; for the statement, being upon oath, cannot be considered conventional merely."[2] One defendant, however, cannot be affected by his co-defendant's answer.[3]

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 be treated as admitting the plaintiff's claim. The defendant, for instance, pleads payment; and this, it may be said, admits the debt alleged to have been paid. But this conclusion does not necessarily result. A man may pay an unjust claim with which he is harassed; and the fact that he pays it once, without taking due proof, is no reason why he should pay it a second time. "Non utique existimatur confiteri de intentione adversarii, quocum agitur quia exceptione utitur."[4]

§ 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.[5] Thus

Such admissions are rebuttable.

[1] Phillipps on Evidence, vol. 1, Van Cott's ed. 1849, p. 366.

[2] See, to same effect, Cook *v.* Barr, 44 N. Y. 158. See, also, cases cited supra, §§ 838, 1099.

[3] 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.

[4] 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.

[5] See supra, §§ 760, 837–8.

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 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]

So of process.

§ 1118. What has been said of pleading equally applies to process. A party by issuing process, *primâ facie* 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]

Affidavits and answers and bills in

§ 1119. That an admission in pleading may be effectually used against the party making it, has been already seen. It may be here repeated that an admission, made in an affidavit, though not necessarily an estoppel, is

[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.

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]

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] The same rule applies when a party is examined in his own behalf; in which case his admission can be used against him in subsequent stages of the same suit, or in other suits.[8] It is no objection to the admission of such evidence that the witness had not the opportunity of fully explaining himself;[9] nor that the questions were irrelevant;[10] nor that the witness answered under compulsion.[11]

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; 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. 143; 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; Stockfleth *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, § 1004.

[8] McAndrews *v.* Santee, 57 Barb. 193; Woods *v.* Gevecke, 28 Iowa, 561. See supra, §§ 488, 1099. As to affidavits by party, see § 1120.

[9] Collett *v.* Keith, 4 Esp. 212. See supra, § 1099.

[10] Smith *v.* Beadnell, 1 Camp. 30; Stockfleth *v.* De Tastet, 4 Camp. 11.

[11] Supra, § 1099.

§ 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.[1] 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.[2] It was, however, held that 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.[3] It was otherwise when there was evidence of long assent to the payment of the duty, or of other suspicious circumstances.[4]

Inventory an admission by executor.

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.*[5] 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 indis-*

Written admissions entitled to peculiar weight.

[1] 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.* Swectland, 6 Cush. 324.

[2] Stearn *v.* Mills, 4 B. & Ad. 657.

[3] 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.

[4] 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.

[5] See Cook *v.* Barr, 44 N. Y. 156.

creta), the plaintiff has the burden on him of proving the consideration. We find this expressly stated in an extract from Paulus,[1] 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 may have evidential force though not delivered.

§ 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;[2] 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.[3] 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.[4] Yet it must be remembered that such papers may be taken, especially after a party's death, as admissions by him of specific facts. And a letter, admitting a fact, is evidence, irrespective of the question of delivery.[5] 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.[6] 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.[7] An account, however, need not be delivered in order to be efficacious as an admission, provided it ap-

[1] L. 25, § 4, D. xxii. 3. See, also, L. 13, c. iv. 30.

[2] See supra, § 678.

[3] Code Civil, art. 1332.

[4] See Weiske's Rechtslexicon, 660.

[5] See Medway *v.* U. S. 6 Ct. of Cl. 421.

[6] See R. *v.* Cooper, L. R. 1 Q. B. D. 19, cited infra, § 1154.

[7] See fully infra, § 1154.

pear that it was intended by the party making it to be an accurate statement.[1]

Invalid instrument may be valid as an admission.

§ 1124. Nor does the fact that the writing is void as an obligation make it any the less an admission of a debt.[2] Thus a note, void from being executed on a Sunday, may be put in evidence as admitting indebtedness.[3] So where a power of attorney, executed by an agent, is void for want of a seal, it may be used as an admission.[4] 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.[5] An unstamped instrument, also, void as an obligation, may be received evidentially as an admission.[6] 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.[7]

Notes and other acknowledgments are admissible as admissions of indebtedness.

§ 1125. It is scarcely necessary to say that a negotiable instrument is a *primâ facie* admission to the amount expressed on the paper.[8] The same is true of certificates of indebtedness.[9] And orders for payment of money, in the hands of the drawee, are *primâ facie* evidence that the drawer has received the amount.[10]

[1] Bruce *v.* Garden, 17 W. R. 990.

[2] 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. 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.

[3] Lea *v.* Hopkins, 7 Penn. St. 492; Ayres *v.* Bane, 39 Iowa, 518; Riley *v.* Butler, 36 Ind. 51.

[4] 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.

[5] Knowlton *v.* Moseley, 105 Mass. 136.

[6] 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.

[7] Huffman *v.* Cartwright, 44 Tex. 296.

[8] 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.

[9] Ala. R. R. *v.* Sanford, 36 Ala. 703.

[10] 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.

§ 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.[1] If self-serving, they are inadmissible;[2] 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.[3] When self-disserving, and when on the instrument sued on, they need not be proved by the party sued.[4] But to be thus received, they must be in some way imputable to the party claiming under the instrument.[5]

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,[6] letters may estop; if non-contractual, they afford only *primâ facie* proof.[7] 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. In such case, being only unilateral, they are but *primâ facie* proof, open to correction and explanation by the writer himself.[8] A letter to a third

Letters receivable as admissions.

[1] 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.

[2] Sorrell *v.* Craig, 15 Ala. 789.

[3] Supra, § 228, and see §§ 229–230; infra, § 1135.

[4] Lloyd *v.* McClure, 2 Greene (Iowa), 139. See supra, §§ 619, 924.

[5] Jacobs *v.* Putnam, 4 Pick. 108; Turrell *v.* Morgan, 7 Minn. 368.

[6] See supra, §§ 1078–85.

[7] 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 Canal *v.* Loyd, 4 Watts & S. 394; Snyder *v.* Reno, 38 Iowa, 329. See Knight *v.* Cooley, 34 Iowa, 218.

[8] 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.

person is as admissible for this purpose as is a letter to the other party in the suit;[1] but in such case the admission, to be operative, must be distinct.[2] 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.[3] Nor is it an objection that the letters are insulated; a letter containing a particular admission may come in by itself;[4] nor is it necessary, in such case, that the whole pertinent correspondence should be put in.[5] Nor is it fatal to the admissibility of a written admission that it was in answer to a letter meant as a trap.[6]

Letters are admissible as admissions, though made after the commencement of litigation.[7]

Letters of third parties are ordinarily inadmissible, being hearsay.[8] 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.[9] Whether a letter written, but not sent, can be put in evidence against a party, has been already discussed.[10]

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.[11] If tending to make

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.

[1] 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.

[2] Betts *v.* Loan Co. 21 Wisc. 80.

[3] Bartlett *v.* Mayo, 33 Me. 518.

[4] 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.

[5] Supra, §§ 618 *et seq.*, 1103.

[6] U. S. *v.* Champagne, 1 Ben. 241.

[7] Holler *v.* Weiner, 15 Penn. St. 242; Prussel *v.* Knowles, 5 Miss. 90.

[8] 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.

[9] Smiths *v.* Shoemaker, 17 Wall. 630. See fully infra, § 1154.

[10] Supra, § 1123.

[11] See supra, § 617.

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.[1] It is scarcely necessary 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.[2] 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.[3] To prove a dispatch to have been received at a telegraph office, it must in some way be identified with the office.[4] 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

[1] 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 Wisc. 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 is 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, Beach *v.* Raritan & Del. Bay R. R. Co. 37 N. Y. 457; 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. Alb. L. J. Jan. 20, 1877.

[2] 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.

[3] Durkee *v.* R. R. 29 Vt. 127. Supra, §§ 76, 617.

[4] Richie *v.* Bass, 15 La. An. 668.

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.[1] A telegram, it is hardly necessary to add, is not a privileged communication; and the operator may be compelled to disclose its contents.[2]

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.[3] The effect of entries of receipt of interest on a note is hereafter discussed.[4]

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.[5] 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.[6] In other words, a receipt, when unilateral, is open to explanation by the party making it, but when bilateral, concludes.[7]

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;[8] and against a party dealing with the bank, so far as he has made the person making the entries his agent.[9] The books are

[1] Howley *v.* Whipple, 48 N. H. 487.

[2] Supra, § 595.

[3] Bartlett *v.* Mayo, 38 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.

[4] Infra, § 1135.

[5] See supra, § 1064.

[6] Supra, §§ 1065–7.

[7] See supra, § 1078.

[8] See Whart. on Agency, § 671 *et seq.*, and cases there cited; Olney *v.* Chadsey, 7 R. I. 224; Manhattan Bk. *v.* Lydig, 4 Johns. R. 377; State Bk. *v.* Johnson, 1 Mill (S. C.), 401; Forniquet *v.* R. R. 6 How. (Miss.) 116.

[9] Williamson *v.* Williamson, L. R. 7 Eq. 542; Union Bk. *v.* Knapp, 3 Pick. 96; Brown *v.* Bank, 119 Mass. 69; Allen *v.* Coit, 6 Hill (N. Y.), 318. See supra, § 662.

evidence, also, between the bank and its stockholders.[1] Entries made by strangers, however, without the knowledge of the litigants, cannot be received as against either of the litigants.[2] 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.[3] The same reasoning applies to the books of other corporations.[4] 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.[5]

Partnership books so admissible.

§ 1132. Partnership books, on the same principle, are admissible in suits by one partner against the other.[6] 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.[7] Such books are also evidence against the partnership, when sued by a stranger;[8] but not evidence against a stranger when sued by the partnership,[9] unless such books fall under the category of books of original entry.[10] After dissolution, entries cease to charge the partnership as such.[11]

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.[12] Such accounts, however, until

[1] Merchants' Bk. *v.* Rawls, 21 Ga. 334.

[2] Barnes *v.* Simmons, 27 Ill. 512.

[3] 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.

[4] See supra, § 662; Board of Educ. *v.* Moore, 17 Minn. 412.

[5] 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.

[6] 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.

[7] Adams *v.* Funk, 53 Ill. 219; Turnipseed *v.* Goodwin, 9 Ala. 372. See Moon *v.* Story, 8 Dana, 226.

[8] Infra, § 1194.

[9] Brannin *v.* Foree, 12 B. Mon. 506.

[10] Supra, § 678.

[11] Boyd *v.* Foot, 5 Bosw. (N. Y.) 110. Infra, § 1201.

[12] Morland *v.* Isaac, 20 Beav. 392; Ryan *v.* Rand, 26 N. H. 12; Currier

final settlement, are open to correction by the parties.[1] But the fact that an account was stated after the commencement of the suit does not exclude it.[2] Even an account, made out, but not sent in, may be treated as an admission.[3]

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.[4] An account filed by a party, stating a debt to a third party, makes a *primâ facie* case for such third party.[5]

An account may be evidence in favor of the party making it as against a party who has access to the books, and has full opportunity from time to time of testing their accuracy.[6] The effect of silence in the reception of an account is discussed in another section.[7]

Whole account must go in.

§ 1134. As has been already incidentally noticed,[8] the party receiving an account cannot ordinarily put the debit side in evidence, without putting in the whole account;[9] and where an account is made up of several stages, em-

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.* Wooderd, 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.

[1] "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.

[2] Hyde *v.* Stone, 7 Wend. 354; Stowe *v.* Sewall, 3 St. & P. 67.

[3] Bruce *v.* Garden, 19 W. R. 990. Supra, § 1123.

[4] 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.

[5] Burrows *v.* Stevens, 39 Vt. 378. Supra, §§ 1131–2.

[6] Symonds *v.* Gas Co. 11 Beav. 283; Boardman *v.* Jackson, 2 Ball & B. 382; Lodge *v.* Prichard, 3 De Gex, M. & G. 906.

[7] See infra, § 1140.

[8] Supra, §§ 620, 1103.

[9] Supra, §§ 620, 1103; Bell *v.* Davis, 3 Cranch C. C. 4; Morris *v.* Hurst, 1

bracing distinct settlements, the last settlement *primâ facie* includes and extinguishes the first.[1] When mixed up with independent unwritten statements, the written and the unwritten explanations are to be taken together.[2]

§ 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 after 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.[3] In England this question 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, un-

Indorsements of interest admissible against party making them, but not to bar statute of limitations.

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 Bk. *v.* Swain, 29 Md. 483.

[1] Dorsey *v.* Kollock, 1 N. J. L. 35.

[2] Cramer *v.* Shriner, 18 Md. 140. See Matthews *v.* Coalter, 9 Mo. 696.

[3] 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.

less 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 absolute against 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 silence may be proved.

§ 1136. If A., when in conversation with B., 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 presence 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."[6] "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

[1] See supra, §§ 977, 979; inf. § 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; Bailey *v.* Woods, 17 N. H. 365; Corser *v.* Paul, 41 N. H. 24; Wiggins *v.* Burkham, 10 Wall. 129; Rea *v.* Missouri, 17 Wall. 532; 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 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; People *v.* McCrea, 32 Cal. 98. See 1 Cow. & Hill N. 191.

[6] Per Parke, J., Hayslep *v.* Gymer, 1 A. & E. 163; cf. Neile *v.* Jakle, 2 C. & K. 709.

to the same. If he is silent when he ought to have denied, the presumption of acquiescence arises." [1] 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." [2]

§ 1137. When the statement is put in the form of an interrogation, the inference gains additional strength.[3] 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.[4] 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.[5] Even the dropping by A. of certain claims against B., at an arbitration at which A. is called upon and undertakes to present all his claims against B., may be used in evidence against A.[6]

§ 1138. But it is otherwise when B.'s silence is of a character not to justify such an inference.[7] Thus, neither a person when asleep,[8] nor when intoxicated,[9] nor a deaf person, can be in this way prejudiced by statements made in his presence; [10] though it is otherwise as to a foreigner, if it appear that he understood the language spoken.[11] 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.[12] It has also been held that statements

[1] Hunt, J., Gibney *v.* Marchay, 34 N. Y. 305.

[2] Best on Presumptions, § 241, affirmed in State *v.* Cleaves, 59 Me. 300–1, and reaffirmed in State *v.* Reed, 62 Me. 142.

[3] Andrews *v.* Frye, 104 Mass. 234; Mitchell *v.* Napier, 22 Tex. 120.

[4] 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 Serg. & R. 388.

[5] Greenfield Bk. *v.* Crafts, 2 Allen, 269.

[6] Moore *v.* Dunn, 42 N. H. 471. See supra, §§ 785–87.

[7] Com. *v.* Harvey, 1 Gray, 487; Larry *v.* Sherburne, 2 Allen, 35. See Mattox *v.* Bays, 5 Dana (Ky.), 461; Slattery *v.* People, 76 Ill. 217; Boyd *v.* Bolton, Irish Rep. 8 Eq. 113.

[8] Lanergan *v.* People, 39 N. Y. 39.

[9] State *v.* Perkins, 3 Hawks, 377.

[10] Tufts *v.* Charlestown, 4 Gray, 537.

[11] Wright *v.* Maseras, 56 Barb. 521.

[12] Child *v.* Grace, 2 C. & P. 193; R. *v.* Turner, 1 Moody C. C. 347;

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;[1] nor, generally, is such silence an assent unless the statements were such as properly to call for a response;[2] nor unless the truth or falsehood of the statements were within the range of the party's knowledge.[3]

So as to party hearing in silence the testimony of a witness whom he has the right to disclaim.

§ 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 used afterwards 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

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 Metc. (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.

[1] Johnson *v.* Trinity Church, 11 Allen, 123.

[2] Corser *v.* Paul, 41 N. H. 24; Vail *v.* Strong, 10 Vt. 457; Hersey *v.* Barton, 23 Vt. 685; Brainard *v.* Buck, 25 Vt. 573; McGregor *v.* Wait, 10 Gray, 72; Moore *v.* Smith, 14 S. & R. 388; Jewett *v.* Banning, 21 N. Y. 27; 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.* Belton, 8 Ir. Rep. Eq. 113.

[3] Hayslep *v.* Gymer, 1 A. & E. 163; Edwards *v.* Williams, 3 Miss. 846.

[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.

be sworn as a witness in the case.[1] And in England, in a case[2] 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 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." But silence during an adversary's testimony cannot, in any view, be imputed to a party as an admission.[3]

§ 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.[4] Yet, with business men, the undue retention of an account without exceptions,

Silence on reception of accounts no admission.

[1] "We think the testimony was competent as tending to show an implied admission on the part of the defendant, that the bargain was as stated by the witnesses before the referees. Its force in that direction, and its value, were for the jury. It was subject to rebuttal, explanation, and comment, if an inference prejudicial to the defendant, and not well founded in fact, were likely to be drawn.

"If the defendant did not hear the testimony before the referees, or did not comprehend it, or failed to contradict it then, through forgetfulness or mistake, he could have said so now before the jury. If he did hear and understand it (as might fairly be inferred from the plaintiff's testimony), and allowed it to pass as true, unchallenged on his part at that time, the fact was one which the jury might properly weigh now.

"The cases cited by defendant's counsel, which hold that a failure to contradict testimony given, or assertions made in the progress of judicial proceedings, imports no admission of the truth of such testimony or assertions, all arose before the passage of the statutes allowing parties to be witnesses, and are inapplicable here.

"Before the change in the law of evidence, the remarks of Shaw, C. J., in Commonwealth *v.* Kenney, 12 Metc. 237, were manifestly sound and pertinent on the question of the admissibility of such testimony as was given in the present case. But the ground on which these remarks rested was taken away by the change in the law." Barrows, J., Blanchard *v.* Hodgkins, 62 Maine, 120.

[2] Richards *v.* Morgan, 4 B. & S. 641.

[3] Broyles *v.* State, 47 Ind. 251.

[4] 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.

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.[1] In fine, whenever 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

[1] 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 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.

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]

So of invoices.

§ 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.[4]

Silent admissions may estop.

§ 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 ordinarily calculated to have this effect.[5] The doc-

[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.) 153; Darlington *v.* Taylor, 3 Grant (Penn.), 195; Phillips *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.

[4] 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.

[5] 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.* Kem-

trine, however, does not apply to silence as to a statement of a fact not yet in existence, nor to a matter of future intention.[1]

Extension of estoppels of this class.

§ 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, 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."[2] 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.[3]

ble, 25 N. J. Eq. 66; Beaupland *v.* McKeen, 28 Penn. St. 124; Phillips *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.

[1] 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.

[2] Parke, B., Lyon *v.* Reed, 13 M. & W. 309.

[3] 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 Metc. 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

§ 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]

So as to third parties.

§ 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.[4]

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.

[1] Kerr on Fraud, 298; 1 Story Eq. Jur. § 384; Railroad Co. *v.* Dubois, 12 Wall. 47; Neven *v.* Belknap, 2 Johns. 573; Dewey *v.* Field, 4 Metc. 381; 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. 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. 365, 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.

§ 1146. As we have already observed, falsity, in cases of bilateral admissions, does not affect liability. Hence where parties have agreed to act upon an assumed state of facts, their rights will be made to depend 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]

Party selling cannot set up invalidity of sale against purchaser.

§ 1147. Another illustration of the rule above given is, that a party selling or assigning cannot, unless there be fraud or gross mistake, as against his vendee or assignee, dispute his right to make the sale.[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

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.

[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. 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, Sup. Ct. U. S. October, 1876.

[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.

registration, to pay a call, they cannot be allowed to dispute his title to the shares.[1]

§ 1148. Parties interested in real estate are in like manner precluded from asserting any latent equity they may hold against a *bonâ fide* purchaser or incumbrancer, whom they have permitted to purchase or incumber without notice of their equity, when they were themselves privy to such purchase or incumbrance.[2] 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."[3] 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."[4] 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 inquisi-

Owner of land bound in the same way.

[1] Hart *v.* Frontino, &c., Gold Mining Co. 5 Law Rep. Ex. 111; Re Bahia & Francisco Ry. Co. *v.* Tritten, Law Rep. 3 Q. B. 584; 9 B. & S. 844, *S. C.* See, also, Webb *v.* Herne Bay Improving Com. Law Rep. 3 Q. B. 642, *S. C.*

[2] See cases cited supra, §§ 1143–5. See, also, Gregory *v.* Mitchell, 18 Ves. 328.

[3] Ramsden *v.* Dyson, L. R. 1 H. of L. 129.

[4] Lord Kingsdown, in Ramsden *v.* Dyson, L. R. 1 H. of L. 129; affirming Gregory *v.* Michell, 18 Ves. 328.

tion, 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.[1] Whether estoppels of this class can pass a title, as against the statute of frauds, is a question still open to doubt.[2]

[1] 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.

[2] In Hayes *v.* Levingston, Sup. Ct. of Mich. Oct. 1876, reported in Central Law Journal, Oct. 27, 1876, 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.* Beebe, 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 es-

§ 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 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]

Subordinate in title cannot dispute the title under which he takes, nor bailee that of bailor.

topped 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 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. (1 Otto) 107.

[2] Doe *v.* Baytop, 3 A. & E. 188; Crossley *v.* Dixon, 10 H. L. Cas. 304; Kinsman *v.* Parkhurst, 18 How. 289.

[3] Williams *v.* Heales, L. R. 9 C. R. 171; Bigelow on Estoppel, 350; 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

§ 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.[1] In other words, the estopping act must be contractual as distinguished from non-contractual.[2] "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of 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."[3] Unless, however, there is a change of position produced in the party to whom the representations are (either tacitly or expressly) made, no estoppel is worked.[4] Thus it has been held that a railroad company 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;[5] nor is a party giving a receipt ordinarily estopped by the receipt.[6] It must also be remembered that to the application of this doctrine "there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury.[7] 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must

Other party's action must be affected, and the misleading conduct must be culpable.

v. Vinent, 1 De Gex, M. & G. 315; Knights *v.* Willen, L. R. 5 Q. B. 660.

[1] See cases cited supra, § 1136.

[2] See supra, §§ 1078, 1081.

[3] Carr *v.* R. R. L. R. 10 C. P. 316. Supra, §§ 1144–6.

[4] Infra, § 1155.

[5] 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.

[6] Supra, § 1066.

[7] See Supra, § 1044.

be positive fraud or concealment, or negligence so gross as to amount to constructive fraud.'[1] 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.'[2] 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 or 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 its 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."[3]

A character assumed

§ 1151. We have already[4] 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

[1] 1 Story's Equity, 391.

[2] 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.

[3] Field, J., Brant *v.* Coal Co. Sup. Ct. U. S. 1876, Alb. L. J. Jan. 20, 1877.

[4] Supra, § 1081.

cannot afterwards be repudiated when the basis of another's action.

when the assumption of a character is the consideration for a contract, such assumption binds contractually, and estops the party making it.[1] 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.[2] 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.[3] 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.[4] So a party, recognizing another as his agent as to third parties, cannot afterwards repudiate, as to such parties, the agency;[5] and the same rule applies to the recognition by a husband of a wife.[6]

§ 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

But silence on being told of an unauthorized act does not estop.

[1] Robinson *v.* Kitchin, 21 Beav. 365; *S. C.* 8 De Gex, M. & G. 88. See, also, supra, § 1087.

[2] 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.

[3] 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.*

[4] 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.

[5] Summerville *v.* R. R. 62 Mo. 391.

[6] Johnston *v.* Allen, 39 How. (N. Y.) Pr. 506. See supra, § 84 *n.* 1081.

not authorized, cannot fix you with the heavy liabilities which shares in a joint stock company would create."[1] In other words, in such case the admission is non-contractual, not contractual, and cannot, therefore, estop.[2] 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.[3] 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.[4]

§ 1153. Closely related to the last position is another on which we shall have further occasion to dilate.[5] If I recognize another as holding an official character, this, so far as I am concerned, is such a recognition of his official character as makes it unnecessary for him, in a suit against me in this relation, to prove his official charac-

Admission of official character of a person is *primâ facie* admission of his title.

[1] Lord Hatherley in Bank of Hindustan *v.* Alison, L. R. 6 C. P. 22.

[2] Supra, § 1078–1085.

[3] Challis's case, 19 W. R. 453; L. R. 6 Ch. 266.

[4] 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 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.

[5] See infra, §§ 1315–17; supra, § 739 *a*.

ter.[1] 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.[2] So I cannot, after executing a bond to a corporation, deny the corporate capacity of the corporation to do business.[3] 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.[4] 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.[5]

Letter in possession of a party, not admissible against him.

§ 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.[6] We should, in this relation, keep in mind that the fact that an unanswered letter is found in the custody of a party, is not ordinarily ground for the admission of the letter as evidence against him. 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.[7] "It was a great deal too broad a proposition 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."[8] "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."[9] It is

[1] 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.

[2] Barryman *v.* Wise, 4 T. R. 368.

[3] St. Louis *v.* Shields, 62 Mo. 247.

[4] Supra, § 931.

[5] Curtis *v.* Williamson, L. R. 10 Q. B. 87. See Whart. on Agency, §§ 463–470–2.

[6] Supra, § 1123.

[7] R. *v.* Hevey, 1 Lea. Cr. C. 232; R. *v.* Plumer, R. & R. 264; Doe *v.* Frankis, 11 A. & E. 795; Com. *v.* 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.

[8] Lord Denman, Doe *v.* Frankis, 11 A. & E. 795.

[9] Lord Tenterden, in Fairlie *v.* Denton, 3 C. & P. 103.

otherwise, however, when the party addressed in any way invited the sending to him of the letter;[1] or when there is any ground

[1] R. *v.* Cooper, L. R. 1 Q. B. D. 19.

The importance of this case (R. *v.* Cooper) invites a fuller statement than that given in the text: —

"The defendant was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts, and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of *carte de visite* papers, and adding, 'Trial paper and instructions, 1*s.*,' and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post-office like the other letters; but, having been stopped by the post-office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence, and it was held that under the circumstances the letters were rightly received in evidence.

It was argued for the prisoner that the letters were not admissible in evidence, inasmuch as they never reached the hands or were in the possession of the prisoner, and that there was no evidence of the sending or identity of these letters, but that the senders ought to have been called. It was further urged that if these letters are admissible, the prosecution might always manufacture evidence against a prisoner after he was in custody. To this it was replied by Lord Coleridge, C. J., that it has often been held that when a letter is put in course of transmission, the postmaster general holds it as the agent of the receiver. Reg. *v.* Jones, 1 Den. Cr. C. 551; 19 L. J. (M. C.) 162; Reg. *v.* Buttery, cited 4 B. & Ald. 179. For the crown it was argued that if the prisoner had been indicted in respect of any specific one of the letters in question, no doubt the sender ought to have been called; but here it was otherwise. Even apart from the authorities, which show generally that the postmaster is the agent of the person to receive a letter, here the terms of the advertisement expressly made him so. At any rate it was insisted the letters must be admissible under the last count. Under that count he might have been guilty of an attempt, and for that they are clearly material. By the majority of the court it was held that the letters were admissible. The ground on which this decision can be best sustained is that the letters were invited by the defendant, and were in the hands of the postmaster as his agent. R. *v.* Cooper (1876), L. R. I. Q. B. D. 19.

to infer he acted on the letter.[1] 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.[2] Where such tacit recognition is claimed, the whole conversation or correspondence which constitutes the recognition must be given.[3]

Admissions made without the intention of being acted on, or without being acted on, do not estop; and so as to third parties.

§ 1155. We must again, in closing the question of estoppels by silence and by conduct, recur to the fundamental distinction already laid down,[4] 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 being acted on, or which, if acted on, have not operated to change for the worse the condition of the party so acting.[5] 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.[6] 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.[7] 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.[8]

[1] Dewett *v.* Piggott, 9 C. & P. 75; R. *v.* Horne Tooke, 25 How. St. 120; R. *v.* Watson, 2 Stark. 140; Smiths *v.* Shoemaker, 17 Wall. 630. Sup. § 175.

[2] 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.

[3] Mattocks *v.* Lyman, 16 Vt. 113.

[4] Supra, §§ 1078–85.

[5] 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.* Alison, L. R. 6 C. P. 227; Nourse *v.* Nourse, 116 Mass. 101; and see cases cited supra, § 1150.

[6] Supra, § 923.

[7] Sandys *v.* Hodgson, 10 A. & E. 472.

[8] Stimson *v.* Farnham, L. R. 7 Q. B. 175; Standish *v.* Ross, 3 Ex. R. 527;

V. ADMISSIONS BY PREDECESSORS IN TITLE.

§ 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.[1] Declarations of this class

Predecessor's admissions admissible against successor.

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*.

[1] 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 Patteson, J.; De Whelpdale *v.* Milburn, 5 Price, 485; Carr *v.* Mostyn, 5 Ex. R. 69; Gery *v.* Redman, L. R. 1 Q. B. Div. 173; Trimleston *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; 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; 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.

are to be received, not only as proof of the property which the declarant enjoyed in the premises, but as evidence of any fact which is not foreign to the statement 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] As a condition of admissibility, it has been said not to be necessary that the declarant should be dead,[9] though the better view is to restrict the admissi-

156; Gaither *v.* Martin, 3 Md. 146; Keener *v.* Kauffman, 16 Md. 296; Comstock *v.* Smith, 26 Mich. 306; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Horn *v.* Ross, 20 Ga. 210; Meek *v.* Holton, 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; Wright *v.* Carillo, 22 Cal. 595; McFadden *v.* Wallace, 38 Cal. 51.

[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.

[5] R. *v.* Birmingham, 5 B. & S. 763; R. *v.* Exeter, L. R. 5 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 Metc. 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, 9 Wright (Penn.), 473; Cumberl. Valley R. R. *v.* McLanahan, 59 Penn. St. 23; Grubb *v.* Grubb, 74 Penn. St. 25; Davis *v.* Jones, 3 Head, 603.

[8] 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. Supra, § 237.

[9] Walker *v.* Broadstock, 1 Esp. 458,

bility of declarations of living predecessors, in suits against strangers, to cases where such declarations are part of the *res gestae*.[1]

§ 1157. The principle we have just noticed has its most stringent application to cases in which a burden descends with an estate. As against third parties, such burden is open to impeachment. But by those taking under the party by whom the burden is imposed, it cannot, so long as they hold the estate, be disputed. Whoever, as successor or purchaser, takes the estate of another, takes such estate charged with all the incumbrances to which it has been subjected by the predecessor from whom such successor takes. If the former owner of the estate, therefore, 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.[2] The same rule holds

Burdens and limitations pass with estate.

per Thomson, B.; Doe *v.* Rickarby, 5 Esp. 4, per Ld. Alvanley. In Papendick *v.* Bridgewater, 5 E. & B. 166, Walker *v.* Broadstock was questioned.

[1] 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*.

[2] 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; 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, 23 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; Hale *v.* Monroe, 28 Md. 98; Van Blarcom *v.* Kip, 26 N. J. L. 351; McCanless *v.* Reynolds, 67 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.

So acts and declarations of the owner manifesting an intent to devote the property to such public use are proper evidence to prove a dedication, and the acceptance may be proved by long

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 be received to contradict the tenor of a deed,[2] unless, as has been heretofore seen, there be such ground laid of fraud or mistake as would lead a chancellor to reform the instrument.[3] Nor are they evidence if they rest merely on hearsay.[4] 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.[5]

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.

[2] Doe *v.* Webster, 12 A. & E. 442; Pain *v.* McIntier, 1 Mass. 69. Supra, §§ 920, 1019, and cases cited infra, § 1160.

[3] Supra, § 1019.

[4] Trimlestown *v.* Kemmis, 9 Cl. & F. 784, affirming unanimous opinion of judges.

[5] Ibid.

Nor are they admissible unless self-disserving;[1] 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.[2]

§ 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 bind his executor or administrator.[3] 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.[4]

Executors are so bound by their decedent.

§ 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 under a subsequent lease;[5] and generally, what a landlord admits is, if relevant to the issue in a suit against the tenant, evidence against the tenant.[6]

Landlord's admissions 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 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,[7] or for any other purpose which casts a burden on the successor as privy in estate to his predecessor.[8] But such declarations, as we have

Tenancy and other burdens may be so proved.

[1] Supra, § 237; infra, § 1169.

[2] Eckert *v.* Cameron, 43 Penn. St. 120.

[3] 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 Oh. 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.

[4] Continental Ins. Co. *v.* Delpeuch, 3 Weekly Notes, 277.

[5] Crease *v.* Barrett, 1 C., M. & R. 932.

[6] See Crane *v.* Marshall, 16 Me. 27.

[7] Doe *v.* Pettett, 5 B. & A. 223.

[8] Bridgman *v.* Jennings, 1 Ld. Ray. 734; Woolway *v.* Rowe, 1 A. & E. 114; Davies *v.* Pierce, 2 T. R. 53; Rogers *v.* Moore, 10 Conn. 13; Blake

seen, cannot be received for the purpose of contradicting the averments of deeds executed by the declarant, unless fraud or mistake be set up.[1] 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.[2]

Admissions of party holding subordinate title do not affect principal.

§ 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,[3] though in the common law action of ejectment, from the technical peculiarities of that action, the admissions of the tenant in possession can be produced against the landlord.[4] So admissions of a tenant for life do not bind the remainder man.[5] Nor can the declarations of a tenant for years, by admitting an incumbrance, be received against the owner of the fee.[6]

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.[7] 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.[8] Declarations of an escaped or non-

v. Everett, 1 Allen, 248; Stearns *v.* Hendersass, 9 Cush. 497; Hyde *v.* Middlesex, 2 Gray, 267; Plimpton *v.* Chamberlain, 4 Grav, 320; 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.

[1] 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.

[2] Jackson *v.* Miller, 6 Cow. 751; Hawley *v.* Bennett, 5 Paige, 104; Heaton *v.* Findlay, 12 Penn. St. 304. Supra, §§ 1078–1085.

[3] Scholes *v.* Chadwick, 2 M. & Rob. 507; Papendick *v.* Bridgewater, 5 E. & B. 166. See Tickle *v.* Brown, 4 A. & E. 378; Taylor's Ev. § 714; Hanley *v.* Erskine, 19 Ill. 265.

[4] Doe *v.* Litherland, 4 A. & E. 784.

[5] Hill *v.* Roderick, 4 Watts & S. 221; Pool *v.* Morris, 29 Ga. 374.

[6] Supra, § 237.

[7] See Vandyke *v.* Bastedo, 15 N. J. L. 224; Renshaw *v.* The Pawnee, 19 Mo. 532.

[8] Outcalt *v.* Ludlow, 32 N. J. L.

arrested debtor have been held admissible in an action against the sheriff for escape, or for a false return, though such declarations, 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 declarations as to such equities, as he would be to the admission of any other legal evidence, going to establish such equities.[2] 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.[3]

Indorser's declaration inadmissible against indorsee.

§ 1163 *a*. Of this principle 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 such note, is chargeable with the self-disserving admissions of his indorser or assignor that the note was without consideration, or is paid, or is infected with other vices, when such admissions are part of the *res gestae*, or when the declarant is dead.[4] On the other hand, where the note is received

239; King *v.* Wilkins, 11 Ind. 347; Ross *v.* Hayne, 3 Greene (Iowa), 211. 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.

[1] Sloman *v.* Herne, 2 Esp. 695; Rogers *v.* Jones, 7 B. & C. 89.

[2] 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; 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. 343; Vennum *v.* Thompson, 38 Ill. 143; Ritchy *v.* Martin, Wright (Oh.), 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.

[3] Tousley *v.* Barry, 16 N. Y. 497.

[4] 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 Oh. St. 1; Blount *v.* Riley, 3

bonâ fide, without notice, and before it is due, by the indorsee, he cannot be charged with such admissions.[1] Declarations of an indorser *after* parting with the note are clearly inadmissible.[2]

In suits against strangers, declarant, if living, should be called.

§ 1163 *b*. Where the declaration, in a suit against strangers, relates to facts which the declarant himself can prove, and he is living at the time, he should be called to prove them.[3]

Bankrupt assignee affected by bankrupt's admissions.

§ 1164. A bankrupt or insolvent assignee, also, is open to be prejudiced, in a suit against him, by the admissions of his assignor made before the act of bankruptcy, or before the assignment, as the case may be;[4] but it is otherwise as to declarations made after such period.[5] 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 cred-

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 denying the position in the text, see Bailey *v.* Wakeman, 2 Denio, 220; Paige *v.* Cagwin, 7 Hill, 361.

[1] 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; Lister *v.* Boker, 6 Blackf. 439; Sharp *v.* Smith, 7 Richards. 3; Glanton *v.* Griggs, 5 Ga. 424; Porter *v.* Rea, 6 Mo. 48. Infra, § 1199.

[2] Camp *v.* Walker, 5 Watts, 482.

[3] Hedges *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.

[4] Coole *v.* Braham, 3 Exch. R. 185; Jarrett *v.* Leonard, 2 M. & S. 265; Brown *v.* McGraw, 20 Miss. 267; Gallagher *v.* Williamson, 23 Cal. 331; Norton *v.* Kearney, 10 Wisc. 443; though see Bullis *v.* Montgomery, 3 Lansing, 255.

[5] 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.

itor.[1] And such declarations, even when made coincidently with the assignment, cannot be admitted to defeat its plain provisions.[2]

§ 1165. It is scarcely necessary to add that, as a general rule, the declarations of a former party in interest, made after he has parted with his interest, cannot be received to affect the title of a *bonâ fide* grantee, donee, or successor.[3] The same limitation applies to the dec-

Inadmissible when made after title is parted with.

[1] Phœnix *v.* Ins. Co. 5 Johns, R. 412. See Bullis *v.* Montgomery, 3 Lansing, 255.

[2] Vance *v.* Smith, 2 Heisk. 343.

[3] 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; Gillinghan *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; Wilcox *v.* Waterman, 113 Mass. 296; Somers *v.* Wright, 114 Mass. 171; Perkins *v.* Barnes, 118 Mass. 484; Warshauer *v.* Jones, 117 Mass. 345; 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; 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.* McClnney, 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; Savery *v.* Spaulding, 8 Iowa, 239; Gray *v.* Earl, 13 Iowa, 188; Roebke *v.* Andrews, 26 Wisc. 311; 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; Bilberry *v.* Mobley, 21 Ala. 277; Cleaveland *v.* Davis, 3 Mo. 331; Garland *v.* Harrison, 17 Mo. 282; Weinrich *v.* Porter, 47 Mo. 293; 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,

larations 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 depreciatory declarations are inadmissible if made after the gift.[3] *A fortiori* a grantor's subsequent declarations cannot be received to dispute, as against *bonâ fide* purchasers, the averments of his deed.[4]

Exception in case of concurrence or fraud.

§ 1166. It is otherwise, however, when the grantor's admissions are made in presence of the grantee, and not dissented from by the latter.[5] So, also, "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. But this exception cannot be extended to a mere constructive possession. The possession is a fact, and how

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. 140; Perkins *v.* Barnes, 118 Mass. 484; distinguishing Sweetzer *v.* Bates, 117 Mass. 466.

[3] 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.

[4] 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.

[5] Lark *v.* Linstead, 2 Md. Ch. 162; Myers *v.* Kinzie, 26 Ill. 36; Wiler *v.* Manley, 51 Ind. 169; Wilson *v.* Woodruff, 5 Mo. 40.

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*."[1] The same result necessarily follows when there is a fraudulent collusion between grantor and grantee;[2] and where, as has been seen, the assignor remains in possession after the assignment, actually, and not only constructively,[3] or there be circumstances independently of the declaration, showing some complicity or acquiescence or common purpose of fraud between the assignor and the assignee.[4]

§ 1167. To infect a grantee or vendee, however, 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*.[5] 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.[6] When such dec-

Declarations of fraud cannot infect innocent vendee.

[1] Sharswood, J., Pier *v.* Duff, 63 Penn. St. 63.

[2] Waterbury *v.* Sturtevant, 18 Wend. 353, as qualified in Cuyler *v.* McCartney, 40 N. Y. 228; Reitenbach *v.* Reitenbach, 1 Rawle, 362; Wilbur *v.* Strickland, 1 Rawle, 458; Hartman *v.* Diller, 62 Penn. St. 43. Infra, §§ 1194, 1205.

[3] 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 Wisc. 487.

[4] Downs *v.* Belden, 46 Vt. 674; Cuyler *v.* McCartney, 40 N. Y. 228; Hartman *v.* Diller, 62 Penn. St. 37; 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; Johnson *v.* Quarles, 46 Mo. 423.

"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.

[5] 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.* McDowell, 15 Ill. 10; Pinner *v.* Pinner, 2 Jones L. 398; Hodge *v.* Thompson, 9 Ala. 131; Mahone *v.* Williams, 39 Ala. 202; Carrollton Bk. *v.* Cleveland, 15 La. 616; Enders *v.* Richards, 33 Mo. 598; Zimmerman *v.* Lamb, 7 Minn. 421; Bogert *v.* Phelps, 14 Wisc. 88; Selsby *v.* Redlon, 19 Wisc. 17.

[6] Bridge *v.* Eggleston, 14 Mass. 245; Jackson *v.* Myers, 11 Wend. 553;

larations are made after the assignment, they are inadmissible, except under the conditions above stated.[1]

Inadmissible when self-serving.

§ 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.[2] But declarations not self-disserving may become admissible when part of the *res gestae*, or when offered to rebut contemporaneous statements.[3]

So the declarations must be against particular interest.

§ 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. On the other hand, where a tenant in tail is by law regarded as representing the inheritance, his acts and declarations may bind the parties in remainder.[4] It has, however, been held that slight evidence of ownership will be sufficient to receive such declarations; and a learned

Savage *v.* Murphy, 8 Bosw. 75; McDowell *v.* Goldsmith, 6 Md. 319; Hunter *v.* Jones, 6 Rand. 541; Satterwhite *v.* Hicks, Busb. L. 105.

[1] Dennison *v.* Benner, 41 Me. 332; Ellis *v.* Howard, 17 Vt. 330; Horrigan *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.

[2] 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, 22 Ark. 143.

[3] 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.

[4] See 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.*

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 Oh. St. 119; De Voss *v.* Richmond, 18 Grat. 338; Continental Ins. Co. *v.* Kasey, 25 Grat. 268; 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; Doe *v.* Robinson, 24 Miss. 688. 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 an agent's language is *primâ facie* correct, and is evidence against the principal without calling the interpreter.

ground that the representations made by the agent, within the apparent scope of the agent's authority, were fraudulent. If he reaps the fruits, he is liable for the misconduct by which these fruits were produced.[1] To a corporation, which can only contract through agents, this rule is of necessary application.[2] Such fraudulent representations, 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.[3] But such 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]

Such representations bind.

§ 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

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.* Mountefiori, 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] 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' Bk. *v.* McKee, 2 Barr, 321; Spalding *v.* Bk. 9 Barr, 28. See cases cited supra, § 735.

[3] Whart. on Neg. § 164 *et seq.*

[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.

[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.

his principal, by all representations he may make within the apparent scope of his duties, 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.[1] His admissions are bilateral; in other words, they are part of the contract made by his principal, and as such, bind the principal.

ing though unauthorized.

§ 1172. An apparent exception to the above rule arises from the peculiar relation of applicants for insurance to ageuts 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. "In the case before us," says Miller, J., when the question came before the supreme court of the United States in 1871,[2] a paper is offered in evidence against the plaintiff containing a misrepresentation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement; and that as they had no part in the mistake which he made, or in the making of the instrument which

Applicant for insurance may contradict written statement made by agent.

[1] Barwick *v.* Eng. Joint St. Co. P. R. 2 Exc. 259; Maddock *v.* Marshall, 18 C. B. (N. S.) 829; Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Burnham *v.* R. R. 63 Me. 298; Lobdell *v.* Baker, 1 Metc. (Mass.) 193; Mundorff *v.* Wickersham, 63 Penn. St. 87. See Whart. on Agency, §§ 122, 460.

[2] Ins. Co. *v.* Wilkinson, 13 Wall. 222.

did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation. If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this 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."[1] In other words, in cases of this class, a party is note stopped by representations made in his behalf by a person who, though nominally his agent, is really the agent for the other contracting party.[2]

[1] 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 Oh. 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.

[2] See, as qualifying the above conclusion, Jennings *v.* Ins. Co. 2 Denio, 75; Brown *v.* Ins. Co. 18 N. Y. 385, overruled by subsequent New York cases, cited above.

In Maher *v.* Ins. Co., of which an abstract is given in the Alb. L. J., Jan. 20, 1877, the plaintiff applied to a local insurance agent of defendant for insurance upon a building occupied as a dwelling, grocery, and saloon. The agent knew the building, and the use which was made of it. A policy of insurance was issued which contained a clause setting forth that the building was occupied as a dwelling. Plaintiff, doubting the validity of the policy, appealed to the agent to have it so changed that there would be no doubt as to its validity, and was told that the wording in the policy properly described the building, and the general agent afterward told plaintiff the same thing. In an action for loss, the defendant set up the misdescription in the policy as to the use of the house, as a defence, avoiding it. Held,

§ 1173. Indeed, whenever an agent makes a business arrangement or does an act representing his principal, what he does or says 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

Agent's admissions receivable when part of the *res gestae*.

that plaintiff having been, by the acts of defendant's agents, misled as to the effect of the provision in the policy, and prevented from changing such policy, the defendant could not take advantage of such provision, or exclude evidence of the declarations of its agents. In the same case, on the above condition of facts, the complaint asked for a reformation of the policy to correspond with the intention of the insurer, and a judgment for plaintiff upon it as reformed. It was held, that evidence of the transaction between plaintiff and the agents of defendant was admissible to establish the intention of the parties as to the terms of the contract. And it was further ruled, that an action for the reformation of a contract, and a recovery thereon, could be brought, and it was not irregular to try such action before a judge and jury. By a condition of the policy it was provided that fraud or false swearing should vitiate the policy. The plaintiff in his proof of loss, that he was required by the policy to make, swore that the insured building was occupied as a dwelling-house, and for no other purpose whatever. Held, that the defendant knowing to the contrary, was not and could not be deceived by the false statement, and therefore could not take advantage of the same after having received the proof of loss without question. Ibid. Decided Nov. 14, 1876. Reported below, 6 Hun, 353.

The following is part of a comprehensive review of the authorities, by Cooley, J., in a recent case in Michigan: "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 Work *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.

party. Whenever the agent's acts are so admissible, then his declarations, explanatory of these acts, are admissible; nor in proving such declarations is it necessary that he should be himself called.[1]

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.

[1] Bree *v.* Holbrook, Doug. 654; Fitzherbert *v.* Mather, 1 T. R. 12; Biggs *v.* Lawrence, 3 T. R. 454; Fairlee *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 Metc. (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; Saudford *v.* Handy, 23 Wend. 260; Thalhimer *v.* Brinkerhoof, 6 Cow. 90; McCotter *v.* Hooker, 4 Seld. 497; Price *v.* Powell, 3 Comst. 322; 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; 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. 27 Iowa, 433; Simmons *v.* Rust, 39 Iowa, 241; Pennix *v.* McAdoo, 68 N. C. 370; McComb *v.* R. R. 70 N. C. 178; South. Exp. Co. *v.* Duffey, 48 Ga. 358; 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 Wisc. 55; Owens *v.* Northrup, 30 Wisc. 482.

"But sometimes the declarations of an agent, which are part of any *res gestae* which is the subject of inquiry, are received against the principal. The principal constitutes the agent his representative in the transaction of certain business; whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents; and when the acts of the agent will bind the principal, his declarations respecting the subject matter will also bind him, if made at the same time and constituting part of the *res gestae*. They are then in the nature of original evidence and not of hearsay, and are the ultimate fact to be proven, and not an admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time. 1 Greenleaf Evidence, § 113; Luby *v.* R. R. 17 N. Y. 131." Earl, C., Anderson *v.* R. R. 54 N. Y. 340. See, also, Toledo R. R. *v.* Goddard, 25 Ind. 185.

"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

§ 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. Thus the admission 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,[1] and so of the admissions of a captain of a vessel at the time of carrying off a slave;[2] and of the declarations of the servants of a railroad company at the time of a collision;[3] 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.[4] It is essential, however, 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.[5]

So in torts.

the act done which they are supposed to characterize, and have been well calculated 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] Gerke *v.* Steam Nav. Co. 9 Cal. 251.

[2] Price *v.* Thornton, 10 Mo. 135.

[3] Toledo R. R. *v.* Goddard, 25 Ind. 185.

[4] Packet Co. *v.* Clough, 20 Wall. 540; Burnside *v.* R. R. 47 N. H. 554.

[5] On this point may be studied an authoritative opinion by Strong, J., in the supreme court of the United States (Packet Co. *v.* Clough, 20 Wall. 541), which, after reaffirming the rule above given, proceeds: —

"And there is nothing in any of the decisions cited by the defendants in error inconsistent with such a rule. The case of The Enterprise, cited from 2d Curtis, was a suit in admiralty, for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestae*. But the decision was rested upon the ground that the admiralty rule is different from the rule at common law. The case of Burnside *v.* The Grand Trunk Railroad Co., cited from 47 New Hampshire, simply decides that the statements of the general freight agent as to the condition of goods delivered to him for transportation, made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of contract not executed, and, while it remained unexecuted, the agent had power to vary it;

§ 1175. We have already noticed,[1] 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

Authority to make non-contractual admissions must be express.

had, in fact, complete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority. But in the present case the declarations admitted were not made in the transaction of which the plaintiffs complain, or while it was pending. They refer to nothing present. They are only a history of the past. It is argued they were made before the voyage, upon which Mrs. Clough entered, was completed. True, they were, but they were not the less mere narration. The accident was past. The injury to Mrs. Clough was complete. The only wrong she sustained, if any, had been consummated two days before. We cannot think the fact that she had not arrived at her port of destination is at all material. If she had left the steamer before the declarations were made, it is not claimed, as certainly it could not be, that they were admissible. Now, suppose two persons were injured by the negligence which the plaintiffs assert, and one of them had left the boat before the captain's declarations were made, clearly they would have been inadmissible in favor of the person whose voyage had been completed. This is not denied. Yet the connection between them and the accident would be as close in that case as in this. Can they be admissible in the one case and not in the other? Assuredly not. We must hold, therefore, that there was error in admitting in evidence the statement of the captain of the steamboat made two days after the wrong was done of which the plaintiffs complain." Strong, J., Packet Co. *v.* Clough, 20 Wall. 540.

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 Wisc. 388; Mich. Cent. R. R. *v.* Gongaz, 55 Ill. 503; Mich. Cent. R. R. *v.* Coleman, 28 Mich. 446; Osgood *v.* Bringolf, 32 Iowa, 265; Treadway *v.* R. R. 40 Iowa, 527; Patterson *v.* R. R. 4 S. C. 153; Griffin *v.* R. R. 26 Ga. 111; East Ten. R. R. *v.* Duggan, 51 Ga. 212; 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.

[1] Supra, § 1170.

non-contractual admissions, made after the contract is executed. Of these admissions, two incidents are to be noticed: (1.) Being non-contractual and unilateral,[1] they are not conclusive on the principal; and, (2) they cannot be put in evidence unless express 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 it may have some relation to the business, in which the person making that assertion was employed as agent."[2] . . . . Peculiarly is this the case with

[1] See supra, § 1083.

[2] 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; Wharton on Agency, § 160; 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; 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.

regard to admissions made by an agent as to the character of a past act as to which his principal is charged with liability.[1]

So as to torts.

§ 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*, or, as they are called in the Roman law, Aquilian torts.[2] (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.[3] (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;[4] though, when they are unilateral[5] (*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 passen-

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; Smith *v.* Wallace, 25 Wisc. 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.

[1] 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; Pemigewassett Bk. *v.* Rogers, 18 N. H. 255; Austin *v.* Chittenden, 33 Vt. 553; Robbinson *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; Mobile R. R. *v.* Ashcraft, 48 Ala. 15. See more fully, Wharton on Agency, § 160.

[2] See Wharton on Negligence, §§ 8, 786, for an expansion of this distinction.

[3] See supra, § 1170.

[4] Infra, § 1205.

[5] See supra, § 1079.

ger), 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.[1] 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.[2] "I think, therefore, upon principle and authority, that the declarations of the brakesman and section master made at the time, and under the circumstances when made, were not a part of the *res gestae*, but mere hearsay, and ought to have been excluded. There was no reason why the brakesman and section master should not have been examined as witnesses, and their declarations not being made at such times and under such circumstances as make them a part of the *res gestae* were mere hearsay."[3] So the admission of a brakeman, after an accident, imputing negligence to the engineer, cannot be received.[4]

§ 1177. We have already noticed the important distinction between contractual and non-contractual admissions by an agent. When a declaration is made coincident with a contract, then the declaration binds the declarant as part of the contract. When, however, a declaration is made as elucidating the character of a past transaction, then this declaration does not bind in the way of an estoppel, but simply operates as an admission, to be received for what it is worth, against the party making it. Its effect, as we have seen,[5] is rather to relieve the opposite party from proving the fact admitted, than to give evidence of such fact. It is rather, there-

General agent may make non-contractual admissions.

[1] See authorities, supra, § 1174.

[2] Va. & Tenn. R. R. Co. *v.* Sayers, 26 Grattan, 329.

[3] Christian, J., Va. & Tenn. R. R. Co. *v.* Sayers, 26 Grattan, 351.

[4] Michigan Cent. R. R. *v.* Coleman, 28 Mich. 446; and see other cases cited supra, § 1174.

[5] Supra, § 1075.

fore, a dispensation from proof, than proof itself. That a principal may thus admit has been already abundantly illustrated; and what he can do in his own person, he can do through an agent. Attorneys, for instance, are in constant habit of admitting, as we will presently see, certain portion of the opponent's case; and the judicious exercise of this power is as beneficial to the principal as it is conducive to a prompt and rational discharge of juridical business. When admissions are so made by an agent authorized thus to speak for the principal, they bind the principal as much as if they were made by himself. A corporation may be represented by a manager, whose express office it may be to make admissions of this class; and in such case his admissions bind his principal. 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] So, generally, power to an agent to admit, necessarily transfers the agent's admissions to the principal.[3]

[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 in 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; An-

§ 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,

§ 1180. So far as concerns dispositive or contractual representations, the power of an agent (who is not a general agent for all purposes) to bind his principal in this way ceases when the particular business is transacted.

derson *v.* Sanderson, 2 Stark. 204; 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.* 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 Wisc. 388.

agent's power of representation ceases.

His representations, made during the negotiation, conclude his principal, as we have seen, when they are part of the consideration of the contract. His admissions (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; Fairlee *v.* Hastings, 10 Ves. 125; Stiles *v.* Danville, 42 Vt. 282; Lobdell *v.* Baker, 1 Metc. (Mass.) 193; Stiles *v.* R. R. 8 Metc. 44; Lowell *v.* Winchester, 8 Allen, 109; Hubbard *v.* Elmer, 7 Wend. 446; Jex *v.* Board of Education, 1 Hun (N. Y.), 159; Stewartson *v.* Watts, 8 Watts, 392; 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; 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 Metc. 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. 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; Penna. R. R. Co. *v.* Books, 7 P. F. Smith, 339. The declarations of officers of a corporation rest upon the same principles as apply to other agents." Ibid.; Huntington R. R. *v.* Decker, 3 Weekly Notes, 121.

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; Sweetland *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

back on the general rule, that non-contractual admissions (in other words, admissions not forming part of the consideration of a contract) 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]

§ 1181. A servant, as distinguished from an agent, as is elsewhere shown,[3] is regarded by the law as so far a mechan-

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 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.* Hastings, 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 Metc. 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; Mobile R. R. *v.* Ashcraft, 48 Ala. 15; Price *v.* Thornton, 10 Mo. 135; Ready *v.* Highland Mary, 20 Mo. 264.

"The general rule on this subject is very clearly and succinctly stated by Mr. Justice Rogers, in Hough *v.* Doyle, 4 Rawle, 294. 'When it is proved that one is the agent of another, whatever an agent does, or says, or writes, in the making of a contract, as agent, is admissible against the principal, because it is part of the contract he made for his principal, and which, therefore, binds him; but it is not admissible as the agent's account of what passes. For example, the declaration of a servant employed to sell a horse is evidence to charge the master with warranty, if made at the time of the sale; if made at any other time, the facts must be proved by the servant himself. 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.' 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. And, indeed, admitting that these declarations could be used for such purpose, the inference attempted to be drawn from them was a very strained one. This sustains the first, third, and fifth assignments." Sharswood, J., Pennsylvania Railroad Co. *v.* Plank Road Co. 71 Penn. St. 355.

[3] Wharton on Agency, § 536.

ical 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.[1] 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 the cable, may be put in evidence;[2] 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.[3]

Admissions of servant are subject to same restrictions.

§ 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.[4] 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.[5]

§ 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. Hence the

Agency must be established by proof *aliunde*.

[1] Wharton on Agency, § 159 *et seq.*; Wecks *v.* Barron, 38 Vt. 420; Black *v.* R. R. 45 Barb. 40.

[2] Reed *v.* Dick, 8 Watts, 479.

[3] Aikin *v.* Bemis, 3 Wood. & M. 348.

[4] 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; Mobile R. R. *v.* Ashcraft, 48 Ala. 15.

[5] 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.

rule is settled that such declarations cannot be received until there be proof of the agency *aliunde*.[1] 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.[2] An error in this respect, however, is cured, if after the declarations are received the agency is proved satisfactorily by independent evidence.[3]

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, reciprocal admissions are made 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 or of gross mistake.[4] It

[1] Fairlee *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. 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; Mapp *v.* Phillips, 32 Ga. 72; Wilcoxen *v.* Bohanan, 53 Ga. 219; Craighead *v.* Wells, 21 Mo. 404; Coon *v.* Gurley, 49 Ind. 199; 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.

[2] Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

[3] Rowell *v.* Klein, 44 Ind. 291. See Pinnix *v.* McAdoo, 68 N. C. 56.

[4] 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 Metc. 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.*

"It has been repeatedly held that

is otherwise, however, with 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 the signature to a bond, 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

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 Monr. 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, 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; 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.

[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.

operative against the party in future proceedings in same case.[1] But mere conversational admissions by an attorney, thrown off collaterally, cannot bind his client, the attorney being a special, not a general agent;[2] nor are such admissions receivable when made tentatively, for purposes of compromise.[3] So oral and less formal admissions by counsel at a former trial are not evidence on a subsequent trial.[4] And in any view, an attorney's power thus to admit ceases when he withdraws from the case.[5]

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.[6] Hence such admission may subsequently be used against such party by a stranger.[7]

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.[8]

[1] Holderness *v.* Baker, 44 N. H. 414.

[2] Doe *v.* Richards, 2 C. & K. 216; Patch *v.* Lyon, 9 Q. B. 147; Watson *v.* King, 3 C. B. 608.

"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 Ev. § 186; Beck, J., Treadway *v.* The S. C. & St. P. P. R. Co. 40 Iowa, 526.

[3] Saunders *v.* McCarthy, 8 Allen, 42. Supra, § 1090.

[4] Colledge *v.* Horn, 3 Bing. 119; R. *v.* Coyle, 7 Cox C. C. 74; Wilkins *v.* Stidger, 22 Cal. 231.

[5] Janeway *v.* Skerritt, 30 N. J. L. 97.

[6] See supra, § 836 *et seq.*

[7] 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."

[8] 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

§ 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] The employment must be proved to include the particular suit as to which admission is made.[2]

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 as tantamount to the admissions of the attorney himself.[3] The power of attorneys and their assistants, in this relation, is discussed at large in another work.[4]

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.[5] So far as concerns errors in fact, the statements of counsel, when made in the client's presence, and as

Attorney's admissions may be recalled before judgment.

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 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.;* Judg. 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] Whart. on Agency, § 582; Wagstaff *v.* Wilson, 4 B. & Ad. 339; Moffit *v.* Witherspoon, 10 Ired. L. 185.

[3] 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.

[4] Whart. on Agency, § 579.

[5] Supra, §§ 276, 283; Weber, Hefftter's ed. 65.

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]

§ 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 action as well as from words.[7]

Referee's admission bind principal.

§ 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] but it is otherwise when there is simply a loose engagement

[1] L. 1, C. de error advoc.

[2] See Mitchell *v.* Cotten, 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.* Twitchell, 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.

[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. 70; Trustees *v.* Cokely, 5 Ind. 164; Reynolds *v.* Roebuck, 37 Ala. 408.

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]

VII. ADMISSIONS BY PARTNERS AND PERSONS JOINTLY INTERESTED.

Admissions of persons jointly interested receivable against each other.

§ 1192. When several persons are jointly interested in a common enterprise, the admissions of one of them, as a party to the record, 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 evidence against the coöbligor, though the joint answer of the defendants had traversed the

[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; Patton *v.* Ohio, 6 Oh. 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.

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] So, also, statements made by one joint proprietor of a theatre have been admitted against his co-proprietors.[2]

§ 1193. It is scarcely necessary to add that such declarations, to be admissible, must relate to the matter of joint business; mere community of interest will not be enough to sustain such admissibility.[3] 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.[4] But acts and declarations of tenants in common in each other's presence are admissible to settle their respective rights.[5]

§ 1194. This is eminently the case in all suits brought for or against partners, wherever a settled partnership is first established,[6] though such admissions must be as to mat- So of partners.

[1] Crosse *v.* Bedingfield, 12 Sim. 35.

[2] Kemble *v.* Farren, 3 C. & P. 623.

"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.

[3] 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.

[4] Wells *v.* Turner, 16 Md. 133.

[5] Crippen *v.* Morss, 49 N. Y. 63.

[6] 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; Adams *v.* Funk, 53 Ill. 219; 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. Monr. 428.

ters within the scope of the partnership,[1] and cannot be received to prove the partnership.[2] Even the admissions of a silent partner, not made a party in the case, may be thus used against his associates.[3]

As to acknowledgment to take case out of statute of limitations.

§ 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.[4]

Power ceases at dissolution.

§ 1196. After dissolution of the partnership, the power to bind by admissions ceases,[5] though it may be kept alive by special agreement.[6] 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 which is still unclosed, is admissible as *primâ facie* evidence

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.

[1] Ibid.; Wells *v.* Turner, 16 Md. 133; Hahn *v.* Savings Co. 50 Ill. 456.

[2] Ibid.; infra, § 1200; Edwards *v.* Tracy, 62 Penn. St. 378; Cross *v.* Langley, 50 Ala. 8.

[3] 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; Mamlock *v.* White, 20 Cal. 598.

[4] Taylor's Agency, §§ 537, 675.

[5] 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; 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. Monr. 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.

[6] Burton *v.* Issit, 5 B. & Ald. 267; Ide *v.* Ingraham, 5 Gray, 106.

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 covenanter, 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 is not conditioned 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 of

[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; Tullock *v.* Dunn, R. & M. 416; Brannon *v.* Hursell, 112 Mass. 63; Elliott *v.* Dudley, 19 Barb. 326; Slaymaker

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 codistributees or co-devisees against another, even though the declarant should be a party to the case.[6]

Executors as against executors; indorsers against indorsees.

§ 1199 *a*. The admission of an heir cannot prejudice the executor;[7] nor that of a tenant for life, the remainder man.[8] Nor are the declarations of an administrator admissible against a special administrator, appointed to act during the administrator's absence from the country.[9] Nor do the admissions of an executor bind a subse-

v. Gundacker, 10 S. & R. 75; 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; 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.

[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.

[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; Hauberger *v*. Root, 6 W. & S. 431; 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; Blakey *v*. Blakey, 33 Ala. 616; Prewett *v*. Coopwood, 30 Miss. 369; Turner *v*. Belden, 9 Mo. 787; Hambright *v*. Brockman, 59 Mo. 52.

[7] 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.

[8] Hill *v*. Roderick, 4 Watts & S. 221; Pool *v*. Morris, 29 Ga. 374. Supra, § 1161.

[9] Rush *v*. Peacock, 2 M. & Rob. 162. See McArthur *v*. Carrie, 32 Ala. 75.

quent administrator *de bonis non*.[1] Nor can the admission of an indorser of negotiable paper prejudice another *bonâ fide* indorser,[2] though it is otherwise as to joint indorsers.[3] 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,[4] provided such admissions were before the assignment.[5]

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 a *petitio principii*, 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.[6] This is familiar law when partnership is sought to be proved by the admission of a putative partner;[7]

[1] Pease *v.* Phelps, 10 Conn. 62.

[2] Russell *v.* Doyle, 15 Me. 112; Washburn *v.* Ramsdell, 17 Vt. 299; Baker *v.* Briggs, 8 Piek. 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*.

[3] 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.

[4] Supra, § 1163 *a*.

[5] Ibid.

[6] Supra, § 1194; Gray *v.* Palmers, 1 Esp. 135; Catt *v.* Howard, 3 Starke R. 3; Buckingham *v.* Burgess, 1 McLean, 549; Burnham *v.* Sweatt, 16 N. H. 418; Burke *v.* Miller, 7 Cush. 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.

[7] 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; Buckuam *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; Clawson *v.* State, 14 Oh. St. 234; Pierce *v.* McConnell, 7 Blackf. 170; Wiggins *v.* Leonard, 9 Iowa, 194; Metcalf *v.* Conner, Litt. (Ky.) Cas.

and even a statement by one partner, that certain indebtedness incurred by himself is for the firm, is inadmissible to charge the firm.[1] 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.[2] 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.[3]

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.[4] It is otherwise, however, in cases in which such partner could be called as a witness.[5]

After death, admissions by survivor cannot bind estate of associates, nor the converse.

§ 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.[6] For the same reason, the declarations of the executor or the administrator of the deceased party cannot affect the survivor.[7]

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,

497; McCorkle *v.* Doby, 1 Strobh. 396; White *v.* Gibson, 11 Iredell L. 283; Scott *v.* Dansby, 12 Ala. 714; Clark *v.* Huffaker, 26 Mo. 264; Berry *v.* Lathrop, 24 Ark. 12.

[1] Elliott *v.* Dudley, 19 Barb. 326; White *v.* Gibson, 11 Ired. L. 283.

[2] Gray *v.* Palmers, 1 Esp. 135.

[3] Ellis *v.* Watson, 2 Stark. R. 453, Abbott, C. J

[4] Lucas *v.* De la Cour, 1 M. & Sel. 249; Starke *v.* Kenan, 11 Ala. 818; Danforth *v.* Carter, 4 Iowa, 230.

[5] Carlyle *v.* Plumer, 11 Wisconsin, 96.

[6] Supra, § 1180, 1196; Story on Partnership, § 324 *a;* Atkins *v.* Tredgold, 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.

[7] Slater *v.* Lawson, 1 B. & Ad. 396; Hathaway *v.* Haskell, 9 Pick. 24.

to prove their fraud and falsity.[1] 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.[2] But if the admissions are non-contractual, they can be rebutted.[3]

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.[4]

In torts, co-defendants' admissions not reciprocally applicable, but otherwise when concert is proved.

§ 1204. In actions for tort, whether based on *culpa* or on *dolus*, joinder of defendants does not involve co-action on part of such defendants; and hence in such cases, the plaintiff, unless there be proof of such co-action, cannot use the admission of one defendant against the other.[5] 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.[6] Such statements as are part of the *res gestae* are of course receivable.[7] Hence, though the declarations 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*.[8]

§ 1205. Wherever conspiracy is shown (which is usually in-

[1] Taylor's Ev. § 679; citing Phillips *v.* Clagett, 11 M. & W. 84; Rawstone *v.* Gandell, 15 M. & W. 304.

[2] Supra, § 1083–4.

[3] Supra, § 1088.

[4] Very *v.* Watkins, 23 How. 469.

[5] 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.

[6] 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; 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, § 702.

[7] Supra, § 258.

[8] 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.

ductively 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.[1] "The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all."[2]

Admission of co-conspirators receivable against each other.

§ 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 conspiracy, 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.[3] 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

[1] R. *v.* Stone, 6 T. R. 528; Nudd *v.* Burrows, 91 U. S. (1 Otto) 426; Lee *v.* Lamprey, 43 N. H. 13; Apthorp *v.* Comstock, 2 Paige, 482; Ormsby *v.* People, 53 N. Y. 472; 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; Bryce *v.* Butler, 70 N. C. 585; Bushnell *v.* Bank, 20 La. An. 464. For criminal cases see Whart. Cr. Law, § 702.

"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.

[2] 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, Deakers *v.* Temple, 5 Wright (Penn.), 234; McKinley *v.* McGregor, 3 Whart. R. 397; Bredin *v.* Bredin, 3 Barr, 81. See, also, R. *v.* O'Connell, Arm. & T. 475.

[3] See supra, §§ 171–5, 1180. R. *v.* Hardy, 24 How. St. Tr. 451; U. S. *v.* White, 5 Cranch C. C. 33; State *v.* Pike, 51 N. H. 105; Lynes *v.* State, 36 Miss. 617; Stradly *v.* State, 5 Cold. 300; Clinton *v.* Estes, 20 Arkansas, 216.

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.[1] It is of course understood, that to entitle the declarations of a co-conspirator to admission, the conspiracy must be first proved *aliunde*.[2]

VIII. ADMISSIONS BY REPRESENTATIVE AND PRINCIPAL.

§ 1207. Where a party to a suit is a mere trustee, or one whose name is used only for purposes of form, the admissions of such a party must be received at common law for what they are worth, when offered on trial by the opposing interest.[3] But where a court of common law applies chancery remedies, the meddling of such nominal party will be prohibited,[4] 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.[5] Under such circum-

Admissions of nominal party cannot prejudice real party.

[1] R. *v.* Blake, 6 Q. B. 126. To the same general effect, see R. *v.* O'Connell, Arm. & T. 257.

[2] See supra, § 1183; and see Com. *v.* Crowninshield, 10 Pick. 497; Com. *v.* Ingraham, 7 Gray, 46; Clawson *v.* State, 14 Oh. St. 234; State *v.* Daubert, 42 Mo. 239.

[3] Bauerman *v.* Radenius, 7 T. R. 663; 2 Esp. 653; Alner *v.* George, 1 Camp. 392; Gibson *v.* Winter, 5 B. & Ad. 96; Franklin Bk. *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.

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."

[4] Welsh *v.* Mandeville, 1 Wheat. 233.

[5] 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

stances 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.[1] The termination of the nominal party's interest in the suit, prior to such release, deprives the release of all validity.[2] 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.[3] 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;[4] and that admissions by an assignor, made before the assignment, the assignor being the nominal party to the suit, are receivable against the assignee.[5]

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 case.[6] 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.[7] Clearly an admission by a guardian in one suit cannot be used against the infant in another suit.[8] Nor can a parent's admissions as to general liability be received to prejudice an infant child.[9]

Public officer's admissions

§ 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

443, admissions of a party, who was executor and legatee under a will, were admitted to show the testator's insanity.

[1] 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.

[2] Supra, §§ 1165–8.

[3] Supra, §§ 1083, 1168; Wallace *v.* Kelsall, 7 M. & W. 273; Farrar *v.* Hutchinson, 9 A. & E. 641.

[4] Carr *v.* Casey, 20 Ill. 637.

[5] Moriarty *v.* R. R. L. R. 5 Q. B. 320.

[6] Cowling *v.* Ely, 2 Stark. 366; Morgan *v.* Thorne, 7 M. & W. 408; Sinclair *v.* Sinclair, 13 M. & W. 640; Eccles *v.* Harrison, 6 Ec. & Mar. Cas. 204; Mertz *v.* Detweiler, 8 Watts & S. 376. See supra, § 767; and see, as qualifying above, Tenney *v.* Evans, 14 N. H. 343.

[7] Taylor's Ev. §§ 673, 700.

[8] Eccleston *v.* Speke, 3 Mod. 258; Hawkins *v.* Luscombe, 2 Swanst. 392.

[9] Balt. City R. R. *v.* McDonnell, 43 Md. 534.

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.[1] It is necessary, however, to impose liability on the constituent, that these declarations should be within the apparent scope of the officer's authority.[2] 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.[3] But if the officer be still living, such evidence would be inadmissible, as hearsay.[4] He must be called as a witness, if he has relevant evidence to give.[5] When so called, his testimony is subject to the rule which forbids the contradiction of records by parol.[6]

may bind constituent.

Admission of representative, before clothed with representative authority, does not bind constituent.

§ 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 admissions, if made before acceptance of such office, cannot bind the constituent.[7]

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.[8]

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 interests are involved in the defence of the suit, there the self-disserving coincident contractual admissions of the principal are evidence against the surety.[9] Such admissions are re-

[1] Supra, § 1170. Sharon *v.* Salisbury, 29 Conn. 113.

[2] 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.

[3] Blackmore *v.* Boardman, 28 Mo. 420. Supra, § 226.

[4] Morrell *v.* Dixfield, 30 Me. 157.

[5] Corinna *v.* Exeter, 13 Me. 321.

[6] See supra, § 920.

[7] 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, 2 M. & Rob. 257; Moore *v.* Butler, 48 N. H. 161. See Hanson *v.* Parker, 1 Wils. 257. See supra, § 766.

[8] Hueston *v.* Hueston, 2 Ohio St. 488. Supra, § 1180.

[9] Perchard *v.* Tindall, 1 Esp. 394; Ingle *v.* Collard, 1 Cranch C. C. 134; Hinckley *v.* Davis, 6 N. H. 210; Bayley *v.* Bryant, 24 Pick. 198; Amherst

ceivable against the surety in all cases in which they qualify and explain acts of which proof would be received.[1] But the principal's non-contractual admissions, made after breach of the contract, cannot be received to affect the surety.[2] Nor are the principal's admissions, made before the creation of the debt, evidence against the surety.[3]

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;[4] and those of the indemnifying creditor in a suit against the sheriff for process executed under the creditor's direction.[5] But in such cases, the interest of the beneficial party, whose admissions are put in evidence, must cover the whole of the claim

Bank *v.* Root, 2 Metc. (Mass.) 522; 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.

[1] 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 *quære* under statutes enabling principal to be called.

[2] 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; Longenecker *v.* Hyde, 6 Binn. 1; Blair *v.* Ins. Co. 10 Mo. 559. See Griffith *v.* Turner, 4 Gill, 111; Stetson *v.* Bank, 2 Ohio St. 167; and supra, § 770.

[3] Dawes *v.* Shed, 15 Mass. 6; Cheltenham *v.* Cook, 44 Mo. 29; Longenecker *v.* Hyde, 6 Binn. 1.

[4] 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.

"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.

[5] 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.

represented by the nominal party. If the nominal party represents two or more beneficiaries, then the admission 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.[1]

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.[2] 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,[3] though not when in collusion or in fraud of creditors.[4]

Husband's declarations against his interests admissible.

§ 1215. 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;[5] but it is otherwise when such declarations lose their self-disserving quality, and their object appears to have been family support against creditors;[6] or the support in any way of his wife's interests;[7] or when

[1] 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.

[2] 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*.

[3] Supra, § 238; Day *v.* Wilder, 47 Vt. 584; Sharp *v.* Maxwell, 30 Miss. 589; Cook *v.* Burton, 5 Bush, 64.

[4] 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.

[5] Townsend *v.* Maynard, 45 Penn. St. 198; Backmann *v.* Killinger, 55 Penn. St. 414.

[6] 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.

[7] Thomas *v.* Madden, 50 Penn. St. 261. See Hanson *v.* Millett, 55 Me. 184.

the admissions are made after his interest in the property has ceased.[1] But his agency for his wife cannot be proved by his admissions so as to charge her.[2] Nor can the wife's title be prejudiced by the husband's declarations in her absence, or without proof that he was her agent.[3]

Wife when entitled to act juridically may admit.

§ 1216. So far as a married woman is entitled by law to do business on her own account, so far is she liable to bind herself by admissions.[4] But the admissions of a woman made *before* marriage cannot bind her husband to pay her antenuptial debts;[5] 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.[6]

Her admissions hind her husband when she is authorized to act for him.

§ 1217. A man may constitute his wife his agent, and if so he is bound by her admissions in the scope of the agency.[7] 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.[8] Her admissions, also, must be within the

[1] Gillespie *v.* Walker, 56 Barb. 185.

[2] Second Bank *v.* Miller, 2 Thomp. & C. (N. Y.) 104; Whitescarver *v.* Bonney, 9 Iowa, 480.

[3] 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 Wisc. 38.

[4] 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.

[5] Ross *v.* Winners, 1 Halst. (N. J.) 366. See Sheppard *v.* Starke, 3 Munf. 29; Churchill *v.* Smith, 16 Vt. 560.

[6] Hollinshead *v.* Allen, 17 Penn. St. 275; Claussen *v.* La Franz, 1 Iowa, 226.

[7] 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; 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.

[8] 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.*

range of the delegated authority, as otherwise they are inadmissible.[1] 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 make admissions of an antecedent contract for the hire of the shop."[2] When she is competent to act through an attorney, she is bound by his admissions.[3]

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 can be put in evidence against her trustees in suits in which they are the parties.[4]

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, will bind her representatives after her death.[5]

§ 1220. So far as concerns divorce cases, the policy of the law

Sells, 3 N. & M. 422; Gilson *v.* Gilson, 16 Vt. 464; Butler *v.* Price, 115 Mass. 578; Benford *v.* Zanner, 40 Penn. St. 9; Continental Ins. Co. *v.* Delpuch, 3 Weekly Notes, 277.

[1] 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; 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.

[2] Meredith *v.* Footner, 11 M. & W. 202.

[3] Wilson *v.* Spring, 64 Ill. 18, quoted supra, § 1184.

[4] See supra, § 1213. McLemore *v.* Nuckolls, 1 Ala. (Sel.) Cas. 591.

[5] See supra, §§ 1156 *et seq.*; Crane *v.* Gough, 4 Md. 316.

precludes the granting of a divorce on the mere admissions by either party of adultery.[1] 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.[2] It has been also intimated that the wife's oral confession of guilt to a third party may be received as cumulative proof.[3] 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 otherwise in proof,[4] or coming simply cumulatively.[5] 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 lived 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.[6] 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*;[7] 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, consid-

Admissions of adultery closely scrutinized.

[1] 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.

[2] Ld. Cloncurry's case, Macq. Pr. in H. of L. 606.

[3] Ld. Ellenborough's case, Ibid. 655. But see Wiseman's case, Ibid. 631.

[4] Dundas's case, Ibid. 610.

[5] Boydell's case, Ibid. 651.

[6] Miller's case, Ibid. 620–623; Taylor's Ev. § 696.

[7] Mortimer *v.* Mortimer, 2 Hagg. Const. 316; Taylor's Ev. § 696.

ered sufficient to establish her guilt, though they were intercepted before reaching the party addressed, and though their avowal of adultery was only indirect.[1]

[1] Grant *v.* Grant, 2 Curt. 16; Caton *v.* Caton, 7 Ec. & Mar. Cas. 15; Fausett *v.* Fausset, 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.

CHAPTER XIV.

PRESUMPTIONS.

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II. Psychological 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 object.[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] Hence, a presumption of fact, to be valid, must rest on a fact in proof.[3] Presumptions, therefore, in this sense

Presumption of law is a juridical postulate; presumption of fact is an argument from fact to fact.

[1] See this illustrated infra, § 1237.

[2] Windscheid's Pandekt. i. § 138.

[3] "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, 2 Otto, 284. In R. *v.* Burdett, 4 B. & Ald. 161, Abbott, C. J., said: "A presump-

are to be regarded rather as among the effects of proof, than as proof itself.

§ 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, *presumtiones hominis;* which presumptions 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 all materials from which a conclusion is to be inferred. Both *testes* and *instrumenta* are to be weighed by the standard of logic, adapted to the case as it comes up, and not by that 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

tion 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 Tanner *v.* Hughes, 53 Penn. St. 289; McAleer *v.* McMurray, 58 Penn. St. 126; O'Gara *v.* Eisenlohr, 38 N. Y. 296; Richmond *v.* Aiken, 25 Vt. 324; 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.

[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.

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.[1] But the presumptions there noticed deal, not with the effect of evidence, but the mode of determining the 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,[2] the actor, when plaintiff, or the excipient, when exceptions are made in the way of confession and avoidance, 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.[3] 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 determine.[4] 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, but not for determining what is to be the weight of proof when in.[5] 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,[6] and reason is to be largely influenced by what we call

[1] Tit. 22, 3 *De probationibùs et praesumtionibus.*

[2] Supra, § 357.

[3] Supra, § 367. See L. 25, h. t.

[4] Endemann's Beweislehre, § 24, p. 86, — a work which I have freely used in the preparation of this chapter.

[5] Gell, noct. art. iii. c. 16.

[6] Supra, §§ 1–6; and see particularly supra, § 278.

presumptions of fact. But of arbitrary presumptions of law, assigning to evidence, when admitted, an unreasonable and untruthful meaning, the jurists give no instance.[1] 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*.[2]

§ 1230. Hence, by the classical Roman law, what we now call presumptions were at the highest only *praesumtionis facti* or *hominis*. The power of inference was to be logically exercised in each case in the concrete.[3] The 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*.[4]

§ 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 science, 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.[5] 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

Prevalent classification of scholastic origin.

[1] Endemann, *ut supra*, § 24, p. 87. Mr. Fitzjames 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."

[2] See fully supra, § 457.

[3] See Durant, I. c. nr. 19; Endemann, Beweislehre, § 19.

[4] See Quinct. V. c. 8.

[5] See the topic in the text expanded in an article in the Forum, 1875, p. 201 *et seq.*

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.[1] In like manner, to every act which might

[1] 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 *differentia* 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 *differentia* 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 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,

be the object of litigation they attached other attributes. Every man was presumed to act from a routine motive. Every act was presumed to have been done with a routine intent.

§ 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

Scholastic derivation of *praesumtiones juris et de jure.*

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 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.

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 two 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.

§ 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 (our most authoritative commentator on this topic) 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 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 so far abandoning the Roman standards which restricted the term *praesumtio* to such assumptions 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

[1] See Mill's Logic, i. 389.

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 *de juris et de jure* are gradually disappearing. This, indeed, is admitted by Mr. Best,[1] 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.[2] The consequence is that our courts, even while holding to the old phraseology, are so far contracting the range of presumptions *de juris et de jure* that while the class is still said to exist, no perfect in dividuals of the class can befound. The unimpeachability of records is one of the last survivors of these presumptions, and 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 oppression.[3]

§ 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,[4] are resolvable into the following classes: — In modern Roman law distinction is denied.

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.

[1] Best's Ev. § 307.

[2] He cites to this Ph. & Am. Ev. 460; 1 Ph. Ev. 10th ed.

[3] See striking illustrations of this in Windsor *v.* McVeigh, U. S. Sup. Ct. 1876, quoted supra, § 796.

[4] 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.*

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.[1]

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 presumptions *de juris et de jure*, but which are really among the necessary 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

[1] See this point discussed supra, §§ 851–53.

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 much 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 prominent maxims of this kind are the presumption of innocence, 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. *Pater est quem nuptiae demonstrant.* This is a presumption of law; and this presumption holds good even in cases where such paternity is highly improbable, if it should be possible. So we can conceive of cases in which it is highly improbable that an accused person should be 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 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,

[1] See Hamilton *v.* People, 29 Mich. 193.

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 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 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, 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 this we have the following illustrations: Children born in matrimony, in the Roman law, by a provision already noticed by us, are to be deemed legitimate

until the contrary is proved. A person, of whom nothing has been heard for seven years, is inferred to be dead until the contrary be proved. When a father and son die in a common danger, the son, if an adult (*pubes*), is inferred to have survived, if not adult, to have been survived by the father. These inferences are in the codes of several countries made positive rules of law; the object being to settle by statute points as to which otherwise there might be doubt. Of presumptions either established or destroyed by statute, our own legislation gives numerous instances. The presumption of fact 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. And 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 on trial where a defendant declines to testify in his own behalf.[1]

Fallacy arising from ambiguity of terms "law," "legal," and "presumption."

§ 1239. The difficulties we have just noticed are largely owing, the reader must have already noticed, to the ambiguity of the terms employed, — an ambiguity which it is one of the objects of the present chapter to clear. The ambiguity in the term "presumption," already discussed by us, is thus noticed by Mr. Mill:[2] "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

[1] As to the statute of frauds, see supra, §§ 851-53.

[2] Mill's Logic, ii. 442.

which jurisprudence itself applies, irrespective of 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,[1] 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,[2] "are those which have their seat in an animate being by virtue of the qualities by which it is animate; . . . . as for instance, the sensations 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;[3] though this, as we have seen, is an axiom of law rather than a presumption.[4] That the axiom contains an untruth is conceded. No man, in a civilized community, knows the law either inten-

[1] See supra, § 852.

[2] Evidence, § 12.

[3] 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.

[4] Supra, § 1236.

sively 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;[1] but predicated it 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?[2] 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

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 Mis. 379.

[1] "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."

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.

[2] Austin's Lectures, 2d ed. i. 498. This is adopted by Hunt, J., in Upton *v.* Tribilcock, 91 U. S. (1 Otto) 45. See South Ottawa *v.* Perkins, Sup. Ct. U. S. Oct. 1876.

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."[1] 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 be known by him, for it is his duty, when he undertakes to abide in a community, to know what it prohibits, for 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.[2] So, also, there are different grades of requisite knowledge proportionate to the duties assumed. Thus a person not claiming to be a legal specialist is only liable, when the question comes up in a civil issue, for a lack of that knowledge of law common to non-specialists of his class.[3] 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.[4] So a knowledge of the legal bearings of the rules of their respective associations is imputed to the members of a stock ex-

[1] Pascal, 4th Prov. Letter.

[2] Beauchamp *v.* Winn, L. R. 6 H. L. 223; Ireland *v.* Livingston, L. R. 5 Eng. App. 395; Brent *v.* State, 43 Ala. 297; Kostenberger *v.* Spotts, 3 Weekly Notes, 249. Infra, § 1242.

[3] Whart. on Neg. §§ 414, 510, 520, 749; Miller *v.* Proctor, 20 Ohio St. 442.

[4] See cases cited at large in Whart. on Agency, § 596 *et seq.*

change,[1] and to the members of a club;[2] and parties taking under a lease are presumed to know the title which they accept;[3] and those executing instruments to know what such instruments mean.[4] 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.[5] 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 be irreconcilable to some clear legal principle."[6] 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."[7]

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,

[1] Stewart *v.* Canty, 8 M. & W. 160; Mitchell *v.* Newhall, 15 M. & W. 389.

[2] Raggett *v.* Musgrave, 2 C. & P. 556.

[3] Butler *v.* Portarlington, 1 Con. & L. 24.

[4] Lewis *v.* R. R. 5 H. & N. 867; Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Clem *v.* R. R. 9 Ind. 488. Infra, § 1243.

[5] See Kostenbader *v.* Spotts, 3 Weekly Notes, 249.

[6] Lord Denman, C. J., O'Connell *v.* R. Leahy's Rep. 28.

[7] 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.

the law treats him as if he was 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.[1] Independent of 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.[2] An underwriter, for instance, in cases where he is not misled by the insured, is assumed to be familiar with Lloyd's Shipping List.[3] A merchant, also, dealing in a particular market, is taken to be acquainted with the custom of that market.[4] So a party is assumed to have read the contents of an instrument executed by him.[5] But a party buying a railway ticket will not be assumed to have notice of conditions printed on its back in small type.[6]

Presumption of innocence.

§ 1244. In criminal issues, that the defendant should be presumed to be guilty 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·

[1] See cases cited in Wharton's Criminal Law, 7th ed. §§ 83, 83 *a*.

[2] 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, 8 Blackf. 144; Burritt *v.* Dickson, 8 California, 113. Supra, § 1029; infra.

[3] Mackintosh *v.* Marshall, 11 M. & W. 116.

[4] 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; Duncan *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.

[5] Androscoggin Bk. *v.* Kimball, 10 Cush. 373. 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.

[6] Malone *v.* R. R. 12 Gray, 388; Parker *v.* R. R. 25 W. R. 97. See Georgia R. R. *v.* Rhodes, 56 Ga. 168.

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.[1]

In civil issues preponderance decides.

§ 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 one of its subalterns. The subaltern is so far presumed to be innocent that he is not put on the defence until at least a *primâ facie* case of negligence is made out by the plaintiff.[2] 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;[3] 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.[4] 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.[5]

§ 1246. It has just been said that the doctrine, that a reason-

[1] See Whart. Cr. L. § 707 *a*, where this point is discussed.

[2] See supra, § 359.

[3] 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.

[4] See infra, § 1265.

[5] Supra, §§ 357–8. Ross *v.* Hunter, 4 T. R. 33; Ireland *v.* Livingston, L. R. 5 Eng. Ap. 575; Timson *v.* Moulton, 3 Cush. 269; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) Ch. 7; Horan *v.* Weiler, 41 Penn. St. 470.

able doubt of guilt is to work an acquittal, does not apply to civil issues. If it did, in cases in which guilt 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. Independent of this point, the doctrine, that reasonable doubt should produce an acquittal, sprang from the hardship of a system which inflicted capital punishment on all felonies; and is in any view only defensible 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 right to vindication by legal 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]

§ 1247. Love of life may be assumed when necessary to de-

[1] Cooper *v.* Slade, 6 H. of L. Cas. 772; Magee *v.* Mark, 11 Ir. R. (N. S.) 449; Scott *v.* Ins. Co. 1 Dillon C. C. 105; Knowles *v.* Scribner, 57 Me. 497; Ellis *v.* Buzzell, 60 Me. 209; Matthews *v.* Huntley, 9 N. H. 150; Folsom *v.* Brown, 5 Foster, 122; Schmidt *v.* Ins. Co. 1 Gray, 529; Gordon *v.* Parmelee, 15 Gray, 413; Young *v.* Edwards, 72 Penn. St. 267; Darling *v.* Banks, 14 Ill. 46; McConnell *v.* Ins. Co. 18 Ill. 228; Byrket *v.* Monohon, 7 Blackf. 83; Washington Ins. Co. *v.* Wilson, 7 Wisc. 169; Ætna Ins. Co. *v.* Johnson, 11 Bush, 587; Kincade *v.* Bradshaw, 3 Hawks, 63; Sloan *v.* Gilbart, Law & Eq. R. Ap. 5, 1876; Wightman *v.* Ins. Co. 8 Robt. (La.) 442; Hoffman *v.* Ins. Co. 1 La. An. 216; Smith *v.* Smith, 5 Oregon, 186. 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 Green (Iowa), 231; Forshee *v.* Abrams, 2 Iowa, 571; Ellis *v.* Lindley, 38 Iowa, 461; 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; 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 reasonable doubt. Woodhull, J., in an elaborate and able opinion, to which reference may be made as exhibiting with peculiar fulness the view opposed to that in the text, cites as authorities for this conclusion, Thur-

termine 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]

Love of life presumed.

§ 1248. Good faith in a contracting party has been frequently declared to be a rebuttable presumption of law.[2] So far, however, as concerns the direct application of the 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

Good faith presumed.

tell *v.* Beaumont, 1 Bing. 339; Butman *v.* Hobbs, 35 Me. 227; Shultz *v.* Ins. Co. 2 Ins. L. J. 495. The conclusions given in the text, on the other hand, are vindicated with much effect 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.

To the same general effect is the following: "In civil cases the jury determine facts according to the weight of evidence, and not by its sufficiency to produce conviction of the absolute certainty of the conclusion arrived at. In most cases of conflicting evidence, such a degree or amount of proof would not be attainable, and to require it would be tantamount to a denial of justice. If the evidence is sufficient to satisfy the mind and conscience of a common man, and so convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest (1 Stark. Evid. 514), it is all that the law requires, though such conviction may come short of absolute certainty. There is nothing peculiar in the determination of a question of fraud that makes it an exception to the general rule. Where there is evidence of fraud, its existence must be determined like any other fact." Williams, J., Young *v.* Edwards, 72 Penn. St. 267.

[1] Continental Insurance Co. *v.* Delpeuch, 3 Weekly Notes, 277. See Terry *v.* Ins. Co., cited infra, § 1252, note.

[2] See Best's Evidence, §§ 346–7; Greenwood *v.* Lowe, 7 La. An. 197; Richards *v.* Kountze, 4 Neb. 200; Bumpus *v.* Fisher, 21 Tex. 561. Supra, § 366.

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]

Ambiguous instrument to be construed in a

§ 1249. Yet in one conspicuous relation the doctrine that the 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

[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] 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. Ap. 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.

sense consistent with good faith.

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 applies to cases where an act or fact is fairly susceptible of two interpretations, one lawful and the other unlawful.[2] So, when it is doubtful which of two deeds of the same date was first executed, priority will be imputed to the instrument which, by having precedence, will best support the intention of the parties.[3]

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 reasoning, is subject.[4] 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.[5] So, 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 con-

[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' Bk. *v.* Merchants' Bk. 6 Metc. 13; Foster *v.* Rockwell, 104 Mass. 167; Whart. on Agency, § 248; 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.

[2] Kenton County Court *v.* Bank Lick Co. 10 Bush, 529.

[3] Taylor *v.* Horde, 1 Burr. 107.

[4] See Story's Confl. of Laws, § 76.

[5] 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 Oh. St. 413; Kenyon *v.* Smith, 24 Ind. 11; Smith *v.* Whitaker, 23 Ill. 367; 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.

tract should be construed according to the usages and laws of such place.[1]

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 only to be received 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 of an 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, in determining veracity, the degree of recognition the document has received, and the depositary from which it is taken.[2] The Roman authorities on this point speak unhesitatingly. Truth and genuineness, they insist, are not equivalent, though genuineness or falsification affords inferences of truth or falsehood. But this conclusion is a *praesumptio hominis*, or logical conclusion, as distinguished from a *praesumptio legis*, or arbitrary legal conclusion.[3]

Sanity generally presumed.

§ 1252. All persons who have reached years of discretion are regarded *primâ facie*, by a rebuttable presumption of law (*presumptio juris*), to be sane.[4] Hence the burden of proof, when the issue is on a contract, is on the party

[1] 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.

[2] See supra, § 194–5.

[3] 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.

[4] 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

disputing sanity.[1] In respect to testamentary capacity, it has been held that the burden is on the party setting up the will;[2] though this burden is removed by incidental and implied proof of capacity at time of signing.[3] 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.[4]

§ 1253. It has frequently been said to be a presumption of law that chronic insanity is presumed to continue;[5] but that such presumption does not exist as to fitful

Insanity presumed to continue.

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; Runyan *v.* Price, 15 Ohio St. 1; Lilly *v.* Waggoner, 27 Ill. 395; 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. § 13 *et seq.*

[1] 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, 3 Rand. (Va.) 399; Myatt *v.* Walker, 44 Ill. 485. In Terry *v.* Ins. Co. 1 Dillon, 403, 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. But see supra, § 1247. For burden of proof see supra, § 356.

[2] 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.

[3] Davis *v.* Rogers, 1 Houst. 44.

[4] Frank *v.* Frank, 2 M. & Rob. 314, quoted supra, § 356, note.

[5] 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; Prinsop *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 P. C. C. R. 163; Breed *v.* Pratt, 18 Pick. 115; Hix *v.* Whittemore, 4 Metc. 545; Sprague *v.* Duel, 1 Clarke, N. Y. 90; Titlow *v.* Titlow, 54 Penn. St. 216; State *v.* Spencer, 1 Zab. 196; Carpenter *v.*

and exceptional attacks.[1] 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 one of fact, varying with the particular case.[2]

Insanity may be inferred from circumstances.

§ 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; 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.[6] Letters addressed to the alleged lunatic are inadmissible unless acted on by him.[7]

§ 1255. It will be inferred that a person of ordinary intelli-

Carpenter, 8 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 Wisc. 425; State *v.* Reddick, 7 Kans. 143.

[1] Hall *v.* Warren, 9 Ves. 605; White *v.* Wilson, 13 Ves. 87; Lewis *v.* Baird, 3 McLean, 56; Hix *v.* Whittemore, 4 Metc. 545; State *v.* Reddick, 7 Kans. 143; People *v.* Francis, 38 Cal. 183.

[2] 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.

[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. R. 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.

[4] Supra, § 812.

[5] Wright *v.* Tatham, 1 Ad. & El. 313; 7 Ad. & El. 313; 4 Bing. N. C. 489; Lancaster Bk. *v.* Moore, 78 Penn. St. 407, overruling Rogers *v.* Walker, 6 Barr, 371. Supra, § 812.

When the insanity of the defendant is relied on in defence to an indictment for murder, evidence of the defendant's subsequent acts or conduct is not admissible to prove the existence of that condition 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 unsoundness of so permanent a nature as necessarily to reach back beyond that time. Commonwealth *v.* Pomeroy, 117 Mass. 143.

[6] Supra, §§ 451 *et seq.*

[7] Wright *v.* Tatham, cited supra, § 175.

gence, on being advised of danger, will take ordinary care for self-preservation. Thus it has been held in Pennsylvania,[1] that in the absence of evidence to the 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.[2] 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.[3]

Prudence in avoiding danger will be 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.[4] 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.[5] Such presumption does not apply to acts done in the husband's absence.[6] 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.[7]

Supremacy of husband presumed.

§ 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 directions.[8] If

Wife in housekeeping in-

[1] Pennsylvania Railroad Co. *v.* Weber, 76 Penn. St. 157.

[2] Though see, *contra*, Wilcox *v.* Rome, &c. Railroad Co. 39 N. Y. 358. In Weiss *v.* R. R. 2 Weekly Notes, 214, 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.

[3] See Whart. on Negligence, §§ 310, 315.

[4] See 1 Hale, 45, 47; R. *v.* Manning, 2 C. & K. 887, and cases cited in Whart. Cr. Law, 7th ed. § 67.

[5] Marshall *v.* Oakes, 51 Me. 308.

[6] Com. *v.* Butler, 1 Allen, 4.

[7] McLain *v.* Smith, 17 Mo. 49.

[8] Lane *v.* Ironmonger, 13 M. & W. 368; Freestone *v.* Butcher, 9 C. & P.

ferred to be her husband's agent.

she leaves his house voluntarily and causelessly this presumption ceases.[1] If she has been, without cause, expelled from his house, she is by law presumed to have authority to bind him for necessaries.[2]

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 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,[3] such is the case with the particular consequences we have to discuss. In this sense we may speak of such consequences being presumedly intended.[4] 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.[5] He who publishes a libel is

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.

[1] Johnston *v.* Sumner, 3 H. & N. 261; Biffin *v.* Bignell, 7 H. & N. 877.

[2] Bazeley *v.* Forder, L. R. 3 Q. B. 562; Wilson *v.* Ford, L. R. 3 Exc. 63.

[3] See supra, §§ 6–12, 482, 954.

[4] 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.

[5] Baltazzi *v.* Ryder, 12 Moo. P. C. 168.

presumed to do so intentionally, though the presumption may be rebutted by proof of coercion or fraud on part of the plaintiff.[1] We *infer*, under such circumstances, intent; but we infer it (even when a party is examined as to his motives) [2] from the facts of the particular case. The process is induction from facts, not deduction from arbitrary law.[3]

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;[4] 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.[5] In actions of trover, also, the jury will be advised to presume a conversion from unexplained evidence of a demand and refusal.[6] And where a complex business fraud is proved, an intention to defraud will be inferred.[7]

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.[8] In some cases, *e. g.* where a code is adopted in place

[1] See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[2] Supra, §§ 482, 954.

[3] Infra, § 1261.

[4] 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.

[5] Doe *v.* Crago, 6 Com. B. 90. See Trent *v.* Hunt, 9 Ex. R. 24, per Alderson, B.

[6] 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.

[7] Doeblin *v.* Duncan, N. Y. Ct. of App. Nov. 1876; Beam *v.* Macomber, 33 Mich. 127.

[8] See Sedgwick Stat. Law, 228, n.;

of the common law, or in consolidation of prior statutes, the presumption vanishes.[1] Nor will it be presumed that a legislature intended a construction in conflict with reason,[2] or public duty.[3]

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.[4] Either the argument which treats such inferences as presumptions of law is based on a *petitio principii*, or its major premise is false. We are told, for instance, that it is a presumption of law that intentional hurt done to another is malicious.[5] Now this is either a *petitio principii*, in telling us 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.

§ 1262. The fallacy of turning an inference of fact, in respect to intent, 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: There-

Potter's Dwarris on Stat. 156; Cooley's Const. Lim. 168, 172–7. Supra, § 980 *a*.

[1] Nunnally *v.* White, 3 Metc. (Ky.) 584.

[2] Farnum *v.* Blackstone, 1 Sumn. 46; Wickham *v.* Page, 49 Mo. 526; Necnan *v.* Smith, 50 Mo. 525. Supra, § 980 *a*; infra, § 1309.

[3] Bennett *v.* McWhorter, 2 W. Va. 441.

[4] Whart. Cr. Law, 7th ed. § 714.

[5] See State *v.* Hessenkamp, 17 Iowa, 25.

fore 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]

§ 1263. 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 action for libel, a conclusive presumption of malice."[4] 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.[5]

[1] See supra, §§ 851, 1231, as to the scholastic origin of the fallacy now discussed.

[2] See supra, § 1237.

[3] 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.

[4] 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.

[5] Bromage *v.* Prosser, 4 B. & C. 247; Spill *v.* Maule, L. R. 4 Ex. 232; Whitefield *v.* R. R. 1 E., B. & E. 115;

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.[1] Here, again, we have the same dilemma. Either the ruling, if it means that he that 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.[2] 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.

Presumption against spoliation.

§ 1264. From the vexed question of intent we proceed to another line of rulings, as to which logical inferences have been too often spoken of as absolute 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 interests 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.[3]

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

[1] Tapp *v.* Lee, 3 Bos. & Pul. 371. See Pontifex *v.* Bignold, 3 M. & Gr. 63.

[2] See those cases enumerated in detail in Whart. Cr. Law (7th ed.), §§ 2118, 2133.

[3] 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;

So a spoliation of papers, by a neutral vessel when captured, has been held to give a strong inference of hostile purpose.[1] 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;[2] 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.[3] And generally, even in respect to spoliation, the presumption is not universal, but varies in force with the concrete case.

§ 1265. Yet when testimony has been mutilated, suppressed, or destroyed, the party so mutilating, if he would make use of it, must show that the original character of the testimony was not thereby affected.[4] Thus where shortly after the commission of an offence, the agents of the prosecution made some changes in the *indicia* remaining on the site of the offence, it was held incumbent on the prosecution to show the character of these changes.[5] So proof of the forgery of false testimony is admissible against the party by whom the fabrication is made.[6] The same presumption of disfavor is drawn where an infant heir to an estate is kidnapped and sent abroad,[7] and against all forms of attempted suppression of or tampering with evidence.[8] Thus, if an accounting party parts with or de-

Against party mutilating or tampering with evidence.

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.

[1] The Hunter, 1 Dods. Adm. 480; The Pizarro, 2 Wheat. 227.

[2] Armory *v.* Delamirie, 1 Str. 505; 1 Smith's L. C. 301; Mortimer *v.* Craddock, 7 Jurist, 45.

[3] Claunes *v.* Perrey, 1 Camp. 8.

[4] 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.

[5] State *v.* Knapp, 45 N. H. 148.

[6] See Com. *v.* Webster, 5 Cush. 316. The guards to be put on this species of presumption are discussed fully in Whart. Cr. Law (7th ed.), § 715.

[7] Annesley *v.* Anglesea, 17 How. St. Tr. 1140.

[8] 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.

stroys his books, the strongest inferences, consistent with the rest of the case, will be made against him.[1] But these inferences also vary with the case.

So against withholding of evidence.

§ 1266. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence in all cases in which it could be produced.[2] Thus, under the English Poaching Act, proof that the defendants were found on a highway, at six A. M. with a bag full of hares and rabbits, and with nets and stakes, or with nets that were wet, has been held to be sufficient for magistrates to convict them of having obtained the game by unlawfully being upon land in pursuit of game, or having used the nets for unlawfully taking game, without actual proof of defendants' being upon the land or using the nets;[3] there being under the circumstances, so it was argued, a reasonable presumption against the men, unless they could give some explanation of the appearances against them.[4] And where the plaintiff's identity is disputed, it has been held,[5] 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

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; Revel *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.

[1] Gray *v.* Haig, 20 Beav. 231.

[2] 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. See Durgin *v.* Danville, 47 Vt. 95.

"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; Shoenberger *v.* Hackman, 37 Penn. St. 87; Mordecai *v.* Beal, 8 Porter, 529.

[3] 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.

[4] Powell's Evidence (4th ed.), 73.

[5] Brown *v.* Shock, 77 Penn. St. 471.

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."

§ 1267. When, on the refusal of a party to produce on trial papers which have been called for, the opposite party introduces parol evidence of the contents of the papers,[1] then, if there be doubt, the probable interpretation most unfavorable to the suppressing party will be adopted.[2] The non-calling of a witness, however, will not justify an arbitrary presumption of suppression.[3] "The mere non-production of written evidence," says Sir W. D. Evans,[4] "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." So 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.[5] Nor where the deficiency of evidence arises from negligence, can the party who is accountable for it be benefited by it. Thus, 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.[6]

[1] Supra, § 153.

[2] 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.

[3] Scovill *v.* Baldwin, 27 Conn. 316.

[4] 2 Ev. Pothier, 337, cited in text in Best's Ev. 414.

[5] Wentworth *v.* Lloyd, 10 H. of L. Cas. 589.

[6] Powell's Evidence (4th ed.), 89; 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

§ 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. Thus in an action for penalties for alleged frauds on the revenue (a civil case),[1] the court below instructed the jury that it was a rule, that where a party has proof in his power, which, if produced, would render material facts certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defence. "If then," continued the court, "you conclude that, unexplained and uncontroverted by any testimony, the pending proof would enable you to find against the defendants for the claim of the government or any material part of it, you will then take all this testimony in view of the principles stated, that of presuming against the party who fails to produce proofs in his possession." The supreme court, Mr. Justice Field delivering the opinion, reversed the judgment on this point, saying, "The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *primâ facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors. Their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into an argument to show the error of the instruction. The error is palpable on its statement, and the authorities condemn it. The instruction sets at naught established principles and justifies the criticism of counsel, that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what by law was intended

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.

[1] Chaffee *v.* U. S. 18 Wall. 516.

for their protection — the right to refuse to testify — into the machinery for their sure destruction."[1]

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.[2]

§ 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 inference of fact, more or less strong, according to the circumstances, of guilt.[3] It should be at the same time remembered that there are many circumstances (*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.[4] When such is the case, the inference cannot be logically applied.

Against party fleeing from justice.

III. PHYSICAL PRESUMPTIONS.

§ 1270. Boys under fourteen, and girls under twelve, are by the English common law presumed incapable of matrimonial consent; and this presumption is irrebuttable.[5] The same limit is prescribed by the Roman law, and by the Council of Trent.[6]

Infants presumed incapable of matrimony.

§ 1271. Children under seven are presumed irrebuttably to be incapable of crime;[7] between seven and fourteen the presumption is rebuttable by proof that the defendant is *capax doli*.[8] A boy under fourteen is presumed incapable of

And so of crime.

[1] See Clifford *v.* U. S. 4 How. C. C. 242; and cases cited in prior section.

[2] Roe *v.* Harvey, 4 Burr. 2484; Bate *v.* Kinsey, 1 C., M. & R. 41; Sutton *v.* Davenport, 27 L. J. C. P. 54.

[3] Whart. Cr. Law (7th ed.), § 714; People *v.* Rathbun, 21 Wend. 509; Revel *v.* State, 26 Ga. 275; State *v.* Williams, 54 Mo. 170.

[4] Golden *v.* State, 25 Ga. 527; State *v.* Phillips, 24 Mo. 475; and see observations in Whart. Cr. Law (7th ed.), § 714.

[5] Bishop Mar. & Div. § 148; 1 Black. Com. 436.

[6] Whart. Confl. of Laws, § 147.

[7] See authorities in Whart. Cr. Law, § 58; and see, also, State *v.* Goin, 9 Humph. 175; Godfrey *v.* State, 31 Ala. 323; R. *v.* Owen, 4 C. & P. 236.

[8] Com. *v.* Mead, 10 Allen, 398;

rape, as principal in the first degree;[1] or of an assault with intent to ravish.[2]

How far competent in civil relations.

§ 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.[3] An infant, of any age, may, through his guardian or *prochein ami*, recover damages for a negligent injury.[4] 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;[5] 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;[6] and they may avoid such conveyance when of age.[7] 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.[8] The contracts of an infant, it is scarcely necessary to add, may be ratified on his attaining majority.[9]

1 Green Cr. R. 402; R. *v.* Smith, 1 Cox C. C. 260.

[1] 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, § 1134.

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.*

[2] R. *v.* Eldershaw, 3 C. & P. 396, per Vaughan, B.; R. *v.* Philips, 8 C. & P. 736, per Patteson, J.

[3] Marsh *v.* Loader, 14 C. B. N. S. 535.

[4] Wharton on Neg. § 322.

[5] 1 Will. on Ex. 14–16.

[6] See King *v.* Bellord, 1 Hem. & M. 343.

[7] Tucker *v.* Moreland, 10 Pet. 59; Bool *v.* Mix, 17 Wend. 120; Stafford *v.* Roof, 9 Cow. 626.

[8] Blake *v.* Concannon, 4 Ir. R. C. L. 323.

As to the imputability to an infant of contributory negligence see 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, n.

As to how far infant shareholders

[9] Baylis *v.* Dineley, 3 M. & S. 477; Oliver *v.* Houdlet, 13 Mass. 237; Reed *v.* Batchelder, 1 Metc. 559; Gillett *v.* Stanley, 1 Hill, 122.

§ 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.[1] The inference, however, rises in strength with circumstances indicating the improbability of there being two persons of the same name at the same place at the same time.[2] Names, also, with other circumstances, are facts from which identity can be presumed.[3] Where a father and son bear the same name, the name, if used without any addition, is presumed to indicate the father.[4]

Presumption of identity from name.

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.

[1] See cases cited supra, § 701; Jones *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.

[2] 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. 202; 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.

[3] 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.

[4] 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.

§ 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.[1] By the English common law, at the close of a continuous absence abroad of seven years, during which time nothing is heard of the absent person, death is presumed, as a presumption of law open to be rebutted by proof or counter presumptions.[2] This view is accepted in most of the United States.[3] 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.[4] It is otherwise when the party would have reached the limits beyond which life, according to ordinary observation, is improbable,[5] though even when one hundred years is reached, the conclusion is not absolute.[6] With other circumstances [7] (*e. g.*

Death presumed after unexplained absence of seven years.

[1] Wharton's Confl. of Laws, § 133.

[2] 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.

[3] 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 Metc. 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.

[4] 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.

[5] 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; Sprigg *v.* Moale, 28 Md. 497. See Montgomery *v.* Bevans, 1 Sawyer, 653; Manby *v.* Curtis, 1 Price, 225.

[6] Beverly *v.* Beverly, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756; Burney *v.* Ball, 24 Ga. 505.

[7] See infra, § 1277.

non-claimer of rights, or exposure to peculiar sickness or other calamity, or advanced years), death at a far earlier period may be inferred.[1]

The presumption before us, it should be remembered, when not governed by statute, is one of logic varying with the circumstances of the particular case.[2] 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.[3] 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.[4] 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.[5] So where a term was for sixty years, the court took into consideration the possibility of the termor living after its expiration.[6] 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

[1] R. *v.* Harborne, 2 A. & E. 544; *S. C.* 4 Nev. & Man. 344; Beasney's Trusts, in re, L. R. 7 Eq. 498; Selick *v.* Booth, 1 Y. & C. 117; Main, in re, 1 Sw. & Tr. 11; Allen *v.* Lyons, 2 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.

[2] 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.

[3] Doe *v.* Michael, 17 Q. B. 276. See Jones *v.* Waller, 1 Price, 229; Doe *v.* Davies, 10 Q. B. 314. See supra, § 238.

[4] Weale *v.* Lower, Pollex. 67, per Ld. Hale; Napper *v.* Sanders, Hutt. 119; Ld. Derby's case, Lit. R. 370.

[5] Benson *v.* Olive, 2 Str. 920; Wanby *v.* Curtis, 1 Price, 225.

[6] Beverley *v.* Beverley, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756.

four elder brothers, the jury were 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 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

[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. 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. (7th ed.) § 2632; 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 Piek. 515; Innis *v.* Campbell, 1 Rawle, 373. See cases cited in Whart. Cr. Law, § 2632.

[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, 11 Law Rep. Eq. 236; 6 Law Rep. Ch. Ap. 356, and 40 L. J. Ch. 602, *S. C.;* 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, 4 Law Rep. 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,

this view is accepted by a preponderance of authority in the United States.[1]

Fact of death inferred from other facts.

§ 1277. It has been incidentally observed that, independent of 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.[2] 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;[3]

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.

[1] White *v.* Mann, 26 Me. 370; Smith *v.* Knowlton, 11 N. H. 197; Stouvenel *v.* Stephens, 2 Daly (N. Y.), 319; 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. (Sup. Ct. Mo. 1876) 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 has not been heard from, avoids any acts done by his representatives without judicial authority. Mayhugh *v.* Rosenthal, 1 Cinciu. 492.

[2] 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 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.

[3] 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.

exposure to peculiar perils, to which the death will be imputed if the party has not been subsequently heard from;[1] ignorance, as to such person, after due inquiry, of all persons likely to know of him if he were alive;[2] 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.[3] 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.[4] 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.[5]

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.[6]

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,[7] and are conclusive

[1] 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.

[2] Pancoast *v.* Addison, 2 Har. & J. 350. See Bentham's Trust, 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.

[3] 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 Wisc. 217; Anderson *v.* Parker, 6 Cal. 197; Ewing *v.* Savary, 3 Bibb, 235. Supra, § 223.

[4] Hancock *v.* Ins. Co. 62 Mo. 26. See Doe d. Lloyd *v.* Deakin, 4 B. & 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.

[5] Keech *v.* Rinehart, 10 Penn. St. 240; Smith *v.* Smith, 49 Ala. 156. Supra, § 223.

[6] See Whart. on Hom. § 640; Udderzook's case, Ibid. Appendix.

[7] See fully supra, § 810; Thomp-

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."[1] Such letters, also, are conclusive as to parties and privies.[2] 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.[3] 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.[4]

son *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.

[1] 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.

[2] 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.

[3] Supra, § 810.

[4] Ibid.; Thompson *v.* Donaldson, 3 Esp. 63; Beamish, in re, 9 W. R. 475; Jochumsen *v.* Suffolk Bk. 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 administration 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,

§ 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.

§ 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 they deemed probable. Presumptions of law of this class, we need scarcely say, are no longer recognized.[3] The question of survivorship must be determined by all the facts in the particular case.[4] Hence in Massa-

Presumption of survivorship in a common disaster one of fact.

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 entirely disconnected 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 proceedings 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 cases 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 capable of proof otherwise.' See, also, Moons *v.* De Bernales, 1 Russ. 301." Miller, J., Carroll *v.* Carroll, 60 N. Y. 123.

[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.

[3] Phene's Trusts, in re, L. R. 5 Ch. 150; Barnett *v.* Tugwell, 31 Beav. 232; Coye *v.* Leach, 8 Metc. (Mass.) 371; Smith *v.* Croom, 7 Fla. 81.

[4] Sillick *v.* Booth, 1 Y. & C. 117, 126; Moehring *v.* Mitchell, 1 Barb.

chusetts, 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.[1] In an English case, somewhat similar in character, the court, unable to reach a satisfactory conclusion, advised a compromise, which was effected.[2]

§ 1281. The rule that the *actor*, who seeks under such circumstances 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 (assisted 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.[3] The same conclusion was afterwards reached,[4] where the husband and wife and their two children perished at sea in the same storm;[5] and where[6] a husband and wife were killed in a railway collision, their dead bodies being found together two days after death.

§ 1282. Upon a critical survey of the cases, we may conclude the law to be as follows:[7] (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

Ch. 264; Pell *v.* Ball, 1 Cheves Ch. 99; Smith *v.* Croom, 7 Fla. 81.

[1] Coye *v.* Leach, 8 Metc. 371.

[2] R. *v.* Hay, 2 W. Bl. 640. See Fearne's Posth. Works, 38.

[3] Underwood *v.* Wing, 4 De G., M. & G. 633.

[4] Wing *v.* Angrave, 8 H. of L. Cas. 183.

[5] See, also, to same effect, Robinson *v.* Gallier, 2 Wood's C. C. 478; *S. C.* in South. L. R. Oct. 1876.

[6] Wheeler, in re, 31 L. J. P. M. & A. 40.

[7] See Whart. & St. Med. Jur. 3d ed. § 1045.

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 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 reliable 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; Biceard *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 the proposition, that there is no presumption of law in favor of a condition, is not convertible with the proposition, that there is a presumption of law against such condition. There is indubitably no presumption of law in favor of the change of an established legal relation, and consequently a party seeking to assail such relation 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 before suit instituted, 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 that the

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. 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

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

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.* 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, 40 Vt. 615; Martin *v.* Ins. Co. 20 Pick. 389; Randolph *v.* Easton, 23 Pick. 242; Kilburn *v.* Bennett, 3 Metc. 199; Brown *v.* King, 5 Metc. 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; 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, 12 Q. B. 460.

[2] Covert *v.* Gray, 34 How. (N. Y.) Pr. 450.

cannot, therefore, speak of a legal presumption of continuance when, if we are to draw any inference that would be permanently 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]

§ 1286. So when occupancy is proved, whether of real or per-

[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.

A partnership, also, is presumed to continue for a reasonable period, until the contrary is shown. Alderson *v.* Clay, 1 Stark. 405; Clark *v.* Alexander, 8 Scott N. R. 161.

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.

[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 Metc. 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.

sonal property, we may infer, for the like purpose, as a pre-
Occupancy presumed to be continuous.
sumption of fact, that the occupation is continuous; the inference varying with the person occupying, the 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
Habit presumed to be continuous.
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]

[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, § 149.

[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;

On the other hand, when a series of acts of a particular person are in evidence, a litigated act imputed to him may be tested by comparison with the acts proved to emanate from him.[1] It has also, as we have seen,[2] 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;[3] and of purposes once deliberately formed.[4] The habit, also, of a writer, in using words in a particular sense, may be shown in certain cases of latent ambiguity.[5]

§ 1288. Coverture, once proved, is inferred to continue, this being a presumption of fact, varying with the concrete case.[6]

Continuance of coverture.

§ 1289. The same inference is applied to solvency,[7] and to insolvency, each of which is presumed (as a presumption of fact) to continue until the contrary is proved.[8] An adjudication of bankruptcy may, within a limited range of time, afford an inference of insolvency.[9]

Solvency and insolvency.

§ 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 had a certain price a year ago, be presumed to have the

Value to be inferred from circumstances.

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.

[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.

[2] Supra, § 38.

[3] See supra, §§ 1252, 1253.

[4] Whart. on Homicide, § 440.

[5] Supra, § 962.

[6] Erskine *v.* Davis, 25 Ill. 251.

[7] Wallace *v.* Hull, 28 Ga. 68.

[8] 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 Wisc. 402; Ramsey *v.* McCanley, 2 Tex. 189. The presumption of insolvency from a return of *nulla bona* is elsewhere noticed. Supra, § 834.

[9] Safford *v.* Grout, 120 Mass. 20.

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 factitious 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]

§ 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 ordinarily be inferred from the record of a tax assessment. This is the act of a third party, who must be called if obtainable.[11]

Foreign law presumed to correspond with our own.

§ 1292. In a previous chapter it has been shown[12] that the settled rule is that foreign states, whose jurisprudence is derived from the same common source as

[1] Campbell *v.* U. S. 8 Ct. of Cl. 240; Kansas Stockyard Co. *v.* Couch, 12 Kans. 612; Waterson *v.* Seat, 10 Fla. 326. 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. 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.

[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 Wisc. 533.

[7] Cliquot's Champagne, 3 Wall. 114; Kermott *v.* Ayer, 11 Mich. 181; Sisson *v.* R. R. 14 Mich. 489; Comstock *v.* Smith, 20 Mich. 338.

[8] Gouge *v.* Roberts, 53 N. Y. 619.

[9] Perkins *v.* People, 27 Mich. 386.

[10] Supra, § 449.

[11] Flint *v.* Flint, 6 Allen, 34; Kenderson *v.* Henry, 101 Mass. 152; Raynes *v.* Bennett, 114 Mass. 424.

[12] See supra, § 314.

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.[1]

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 presume that winter is cold and summer is warm; though this is open to proof that in an exceptional season the winter is comparatively mild and the summer is comparatively cool. It may be that in a particular winter, even in a northern climate, we may have no snow-storms; yet 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 in it 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.[2] 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 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.[3]

[1] Supra, § 314 *et seq.* And see Com. *v.* Kenney, 120 Mass. 387.

[2] See cases supra, § 363.

[3] Hawks *v.* Inhabitants, 110 Mass. 110. As to inferences from system, see §§ 39, 268, 448, 1346; Mill's Logic, ch. xiv.

§ 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;[1] the spreading of fire in inflammable material;[2] 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;[3] and the effect of water in extinguishing fire.[4]

Physical sequences to be presumed.

§ 1295. So also we may assume, as a presumption of fact, that animals, as a general rule, will act in conformity with their nature.[5] Thus it is probable that cattle will stray;[6] that horses will take fright at extraordinary noises and sights;[7] and that certain kinds of dogs will worry sheep.[8] The habits and temper of animals, however, it is said,

So of probable habits of animals.

[1] Collins *v.* Middle Level Com. L. R. 4 C. P. 279.

[2] 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.

[3] 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.

[4] Metallic Comp. Co. *v.* R. R. 109 Mass. 277.

[5] See Carlton *v.* Hescox, 107 Mass. 410; Rowe *v.* Bird, 48 Vt. 578.

[6] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

[7] 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 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.

[8] 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,

cannot be shown by proof of habits or temper of particular animals of the same species.[1]

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.[2] 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;[3] that a sudden alarm, resulting in injury, will be produced by a shock of any kind given to a crowd;[4] and that persons in fright will act instinctively and convulsively.[5]

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*.[6] If a marriage is shown to have taken place, then the law presumes regularity, until the contrary be proved.[7] This "presumption

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.

[1] Collins *v.* Dorchester, 6 Cush. 396; Hawks *v.* Charlemont, 110 Mass. 110. See, however, Darling *v.* Westmoreland, 52 N. H. 401.

[2] See Whart. on Neg. § 108.

[3] 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; Bizzell *v.* Booker, 16 Ark. 308.

[4] Scott *v.* Shepherd, 2 W. Black. 892; Guille *v.* Swan, 19 Johns. 381; Fairbanks *v.* Kerr, 70 Penn. St. 86.

[5] 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.

[6] Supra, § 84; Harrod *v.* Harrod, 1 K. & J. 15; R. *v.* Brampton, 10 East, 302; Redgrave *v.* Redgrave, 38 Md. 93.

[7] In an English prosecution for bigamy, in 1876, it was alleged that the first marriage was invalid, having been contracted under these circumstances: While the parish church was under repair, divine service had been several times performed by a clerk in holy orders in a chamber at a private hall, and the marriage of the prisoner with his wife was solemnized there. There was no evidence that the chamber at the hall was licensed for the perform-

of law," as was said by Lord Lyndhurst,[1] and approved by Lord Cottenham,[2] "is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability."[3] 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, has 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.[4] In short, wherever a marriage has been solemnized, the law strongly presumes that all legal requisites have been complied with.[5] It has been said, however, that this presumption will not be allowed to operate in suits for damages against alleged adulterers.[6] 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.[7]

ance of divine service or marriage. Held, that the presumption was that the place was duly licensed, and that the marriage was valid. Lush, J., said: "The fact of the marriage service having been performed by a person acting in a public capacity is *primâ facie* evidence as to the person's legal capacity to perform the service. So the fact of its having been performed in a place by a person acting in such capacity is also *primâ facie* evidence that the place was properly licensed for marriages. The presumption covers both the person and the place."

[1] Morris *v.* Davies, 5 Cl. & Fin. 163.

[2] Piers *v.* Piers, 2 H. of L. Cas. 362.

[3] 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.

[4] Sichel *v.* Lambert, 15 C. B. N. S. 781.

[5] Smith *v.* Huson, 1 Phill. 294.

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.

[6] Catherwood *v.* Caslon, 13 M. & W. 261; though see Rooker *v.* Rooker, 33 L. J. Pr. & Mat. 42.

[7] Lapsey *v.* Grierson, 1 H. L. Ca.

§ 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

Legitimacy a presumption of law.

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.

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 fact 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 improbability of the story." London Spectator, Dec. 2, 1876.

But the question is not one of presumption in the sense 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,

judicial separation, presumed to be legitimate, no matter how soon the birth be after the marriage;[1] though this presumption may be overcome by proof that the father was incapable, on ground either of impotence or absence, of being father of the child.[2] When access is proved, it requires the strongest evidence of non-intercourse to justify a judgment of illegitimacy.[3] Separation, however, by a court of competent jurisdiction, even though there be no divorce, destroys the presumption, and the children born to the woman after the separation are *primâ facie* illegitimate.[4]

§ 1299. 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.[5] "In every case," so is the rule declared by the English house of lords, "where a child

1 Sim. & St. 153; Head *v.* Head, 1 Sim. & S. 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; Strode *v.* Magowan, 2 Bush., 621; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Whitman *v.* State, 34 Ind. 360; Dinkins *v.* Samuel, 10 Rich. S. C. 66. As to presumptions in case of children born ten months after non-intercourse, see supra, § 334.

[1] Stegall *v.* Stegall, 2 Brock. 256.

[2] 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.

[3] Head *v.* Head, 1 Sim. & S. 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, H. 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.

Mr. Fitzjames 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."

[4] Sidney *v.* Sidney, 3 P. Wms. 275; St. George's *v.* St. Margaret's, 1 Salk. 123.

[5] Bury *v.* Phillpot, 2 Mylne & K. 349; Head *v.* Head, 1 Sim. & S. 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.

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." [1]

§ 1300. In the Roman law we have the well known maxim, *Pater est quem nuptiae demonstrant.*[2] 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 present authority,[3] "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." [4] To this point are several modern judicial decisions.[5] The time of conception is determined, by 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.[6] German jurists have continued to maintain the *minimum* of 182 days.[7] 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.[8]

§ 1301. Business men, in the negotiation of bills and notes,

[1] Banbury Peerage Case, 1 Sim. & S. 153. See Plowes *v.* Bossey, 2 Dr. & Sm. 145; Atchley *v.* Sprigg, 33 L. J. Ch. 345.

[2] L. 5, D. (ii. 4.)

[3] Windscheid, Lehrbuch des Pandektenrechts, 3d ed. Düsseldorf, 1873, § 56 *b.*

[4] L. 11, § 9, D. (xlviii. 5); L. 29, § 1, D. (xxii. 3); L. 6, D. l. 6.

[5] Seuff. Archiv. i. 162; ii. 254; viii. 229; x. 267; xii. 36; xix. 36.

[6] L. 12, D. i. 5; L. 5; L. 3, § 11, D. xxxviii. 16.

[7] Windscheid, *ut supra.*

[8] See cases reported at large in 2 Whart. & Stille Med. Jur. § 40 *et seq.* Supra, § 334.

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 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] Yet it must be remembered that the presumptions just stated are simply presumptions of fact, of value mainly in determining on which side lies the burden of proof.

Paper presumed to be regularly negotiated.

§ 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.[4] 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

Burden on party assailing judicial records.

[1] Goodman *v.* Simonds, 20 How. U. S. 343; 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; Ellicott *v.* Martin, 6 Md. 509; Paton *v.* Coit, 5 Mich. 505; 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, Bills, § 16, 78; Walker *v.* Sherman, 11 Metc. (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 Wisc. 107; Beall *v.* Leverett, 32 Ga. 105; New Orleans Can. *v.* Templeton, 20 La. An. 141. See Loomis *v.* Mowry, 8 Hun, 311.

[4] Supra, § 830.

to be defeated by the mere suggestion of a possible irregularity. This principle, however, ought not to 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 is averred, all the facts necessary to constitute jurisdiction will

[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.* Loyd, 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.* Litherherry, 4 McLean, 442; Segee *v.* Thomas, 3 Blatch. 11; 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; 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; McNorton *v.* Akers, 24 Iowa, 369; Merritt *v.* Baldwin, 6 Wisc. 439; Bunker *v.* Rand, 19 Wisc. 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. 2 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; 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.

be presumed;[1] where successive decisions are inconsistent with a general order of court, a reversal of that order will be presumed;[2] and where a writ is duly returned, it will be presumed that it was duly served;[3] 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;[4] and that there have been due stamps.[5] 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.[6] It is scarcely necessary here to repeat that judicial records are presumed to have been correctly made.[7] When regular, they cannot, except in cases of fraud or non-jurisdiction, be collaterally impeached.[8] If erroneous, the court of the record must be applied to for relief.[9]

But patent defects cannot in this way be supplied.

§ 1304. We must again recall the caution that the presumption before us goes simply to the burden of proof, and cannot, except in cases of ancient records, on principles to be hereafter discussed,[10] supply the proof of averments necessary to make a record complete.[11] Hence the presumption will not be allowed to operate so as to dispense with a check specifically prescribed by statute;[12] nor to cure process on its face defective;[13] nor to confer jurisdiction on a court when the record itself shows that the proceedings were so irregular that the court had no jurisdiction.[14]

[1] Ray *v.* Rowley, 4 Thomp. & C. 43; 1 Hun, 614.

[2] Bohun *v.* Delessert, 2 Coop. 21.

[3] Bastard *v.* Trutch, 3 A. & E. 451; 5 N. & M. 109; Bosworth *v.* Vandewalker, 53 N. Y. 597; Drake *v.* Duvenick, 45 Cal. 455.

[4] R. *v.* Whiston, 4 A. & E. 607; R. *v.* Whitney, 5 A. & E. 191; 6 N. & M. 552.

[5] 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.

[6] 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.

[7] 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 Ld. Tenterden.

[8] Supra, §§ 981, 982.

[9] Supra, § 983.

[10] Infra, § 1347.

[11] See supra, §§ 824, 830, 981.

[12] U. S. *v.* Jonas, 19 Wall. 598.

[13] Supra, § 795.

[14] Galpin *v.* Page, 18 Wall. 365; Com. *v.* Blood, 97 Mass. 538. Supra, § 804.

§ 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.[1] 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.[2]

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.[3] 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 command, were posted on its walls, the inference was proper that the placards had been posted by order of the commander.[4]

So as to military courts.

§ 1307. The law also assumes that proper official care is taken of public records and files.[5]

So as to keeping of records.

§ 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.[6] As to such tribunals, the facts

Otherwise as to presumption of jurisdic-

[1] 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 Oh. 439; Coil *v.* Willis, 18 Oh. 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.

[2] Gibbs *v.* Pike, 9 M. & W. 351; 1 Dowl. P. C. 409, cited in Taylor's Ev. § 78.

[3] Slade *v.* Minor, 2 Cranch C. C. 139.

[4] Bruce *v.* Nicolopulo, 11 Ex. R. 129.

[5] 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.

[6] R. *v.* Hulcott, 6 T. R. 583; R. *v.*

tion of justices, and special courts.

necessary to jurisdiction must be shown.[1] 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.[2] 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.[3]

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.[4] 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. 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.[5]

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, for it has to be

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.

[1] 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.

[2] 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.

[3] Bailey, ex parte, 3 E. & B. 607.

[4] 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.

[5] Gosset *v.* Howard, 10 Q. B. 411, 455–459.

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.[1] When, however, a statute prescribes certain conditions as the prerequisites of corporate action, it must appear from this record that these conditions existed.[2]

§ 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,[3] and to the entries made by deceased business men.[4] 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.

§ 1312. We have already observed that dates stated in a document are only *primâ facie* true, and may be disputed even by parties.[5] But, until disproved, such dates are assumed to be correct. "This has been held to apply to letters,[6] bills of exchange and promissory notes,[7] and the indorsements on them,[8] and also to bankers' checks.[9] So, a deed is presumed to have been executed,[10] and delivered,[11] on the day it is dated." "And where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties;[12] 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

Dates inferred to be correctly averred.

[1] 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, 12 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 Metc. 479; Bassett *v.* Porter, 10 Cush. 418; Endres *v.* Lloyd, 56 Ga. 592; Louisville *v.* Hyatt, 2 B. Mon. 177.

[2] Clark *v.* Wardwell, 55 Me. 61.

[3] Supra, § 1131.

[4] Supra, § 238.

[5] Supra, § 977.

[6] 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.

[7] Anderson *v.* Weston, 6 Bing. N. C. 296.

[8] Smith *v.* Battens, 1 Moo. & R. 341. Supra, § 977.

[9] Laws *v.* Rand, 3 C. B. N. S. 442.

[10] Anderson *v.* Weston, 6 Bingh. N. C. 296, 300.

[11] Stone *v.* Grubbam, 1 Rol. 3, pl. 5; Oshey *v.* Hicks, Cro. Jac. 263; Best's Ev. § 402.

[12] Taylor d. Atkyns *v.* Horde, 1 Burr. 106.

will be presumed.[1] 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." [2]

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.[3] Thus if secondary evidence be offered to prove the contents of a document, the inference, until the contrary is shown, is that the document was duly stamped,[4] unless there is evidence that the document remained without a stamp for some time after the execution, in which case the *onus* is shifted, and lies upon the party who relies on the document.[5] So when an incorporated land company makes a partition of its lands, it will be presumed, after twenty years, that there was a due notification to parties of its procedure, and that its acts were regular.[6]

§ 1314. So generally if a contract is on its face regularly executed, the burden of proof is on those who assail such regularity.[7] Thus where certain formalities are requisite to the validity of an act done by a joint stock company, as to which act

[1] Per North, C. J., in Barker *v.* Keets, 1 Freem. 251.

[2] Brice *v.* Smith, Willes, 1, and the cases there cited; Richards *v.* Bluck, 6 C. B. 441. Supra, § 979; Best's Ev. § 364.

[3] 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; and Brighton Railway Company *v.* Fairclough, 2 Man. & G. 674; Van Rensselaer *v.* Vickery, 3 Lansing, 57; Diehl *v.* Emig, 65 Penn. St. 320; State *v.* Lawson, 14 Ark. 114; Sadler *v.* Anderson, 17 Tex. 245. Supra, § 739 *a*. As to alteration of document, see supra, §§ 629, 630.

[4] Hart *v.* Hart, 1 Hare, 1; Pooley *v.* Goodwin, 4 A. & E. 94; R. *v.* Long Buckley, 7 East, 65; Closmedene *v.* Carrel, 18 C. B. 36. Supra, §§ 697–9.

[5] Marine Insurance Co. *v.* Haviside, L. R. 5 E. & I. 624; 42 L. T. P. C. 173; Powell's Evidence, 4th ed. 83.

[6] 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.

[7] 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.

there is evidence showing acquiescence by the stockholders, a compliance with these formalities will be *primâ facie* inferred.[1] 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.[2] So also, it will be presumed that attesting witnesses really and regularly witnessed the execution of the document to which their signatures are attached.[3] Missing links, also, as we will presently see, may be presumed, especially when these links are the formal execution, by trustees or agents, of powers conferred on them.[4]

[1] Grady's case, 1 De Gex, J. & S. 504; British Prov. Ass. Co., in re, 1 De Gex, J. & S. 488.

[2] 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.

[3] See supra, § 739. That parol evidence may prove delivery, see supra, § 1016.

[4] Infra, §§ 1347–57.

"The maxim, *Omnia præsumuntur 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. Spilsburg *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 exe-

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 those 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.[1] As officers, in the sense above stated, have been regarded trustees under a turnpike act;[2] justices of the peace;[3] soldiers engaged in recruiting;[4] constables and policemen;[5]

cution. Wright *v.* Rogers, 17 W. R. 833." Powell's Ev. 83.

[1] 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.* Gorden, 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; Bank U. S. *v.* Dandridge, 12 Wheat. 70; Minor *v.* Tillotson, 7 Pet. 100; Sheets *v.* Selden, 2 Wallace, 177; Mech. Bk. *v.* Union Bk. 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 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 Oh. St. 610; Druse *v.* Wheeler, 22 Mich. 439; Shelbyville *v.* Shelbyville, 1 Metc. (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.

[2] Pritchard *v.* Walker, 3 C. & P. 212.

[3] Berryman *v.* Wise, 4 T. R. 366.

[4] Walton *v.* Gavin, 16 Q. B. 48.

[5] Berryman *v.* Wise, 4 T. R. 366; Butler *v.* Ford, 1 C. & M. 662.

weigh-masters of particular markets;[1] attorneys;[2] post officers and their employees,[3] and masters in chancery and commissioners.[4] 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.[5] The rule which has just been stated applies though the suit be brought in the name of the officer,[6] and though the title be directly put in issue by the pleading.[7]

§ 1316. This presumption, however, does not apply to special private agents,[8] 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 formal authorization as against the principal.[9] 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.[10] Nor does the rule affect special officers, such as executors and administrators, whose appointment is to be proved by record.[11]

[1] McMahan *v.* Leonard, 6 H. of L. Cas. 970; Hays *v.* Dexter, 13 Ir. L. R. N. S. 106.

[2] Pearce *v.* Whale, 5 B. & C. 38.

[3] R. *v.* Rees, 6 C. & P. 606.

[4] Marshall *v.* Lamb, 5 Q. B. 115; R. *v.* Newton, 1 C. & Kir. 480.

[5] 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 Spear, 150.

[6] 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.*

[7] 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.

[8] Short *v.* Lee, 2 Jac. & W. 468; Best's Ev. § 357.

[9] 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.

[10] Supra, § 1153.

[11] 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

§ 1317. Whether to a person exercising a profession the same rule applies, has been much discussed. 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.[1] The converse position, though open to much greater difficulty, has been held true,[2] 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.[3] At common law the same rule has been held as to surgeons in all cases in which the slander assumes that the plaintiff was a surgeon.[4] But where the issue is, directly or indirectly, whether the plaintiff was entitled to exercise a particular profession, then he must prove his title.[5]

So of person exercising a profession.

§ 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.[6] So when a duty is undertaken, and time requisite for the

Action of officers and other functionaries presumed to be regular.

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.

[1] 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.

[2] Radford *v.* McIntosh, 3 T. R. 632.

[3] Berryman *v.* Wise, 4 T. R. 366. See McGahey *v.* Alston, 2 M. & W. 206; McMahan *v.* Leonard, 6 H. of L. Cas. 970.

[4] Gremare *v.* Valon, 2 Camp. 144; Cope *v.* Rowlands, 2 M. & W. 160.

[5] 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.

[6] 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. 154; 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;

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.[1] The presumption just given is not limited to officers of state. 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]

People *v.* Bank, 4 Bosw. 363; Smith *v.* Hill, 22 Barb. 656; Wood *v.* Terry, 4 Lansing, 80; Plank Road *v.* Bruce, 6 Md. 457; Davis *v.* Johnson, 3 Munf. Va. 81; Ward *v.* Barrows, 2 Oh. 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; 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; Morean *v.* Branham, 27 Mo. 351; Sadler *v.* Anderson, 17 Tex. 245.

[1] 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; Dana *v.* Kemble, 19 Pick. 112; Todemier *v.* Aspinwall, 43 Ill. 401; Philips *v.* Morrison, 3 Bibb, 105; Forman *v.* Crutcher, 2 A. K. Marsh. 69.

[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 Otto, 283, 284, 285.

[4] Supra, § 1304; Welsh *v.* Cochran, 63 N. Y. 181.

§ 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 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.[1] And this is in full harmony with the general rule 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, the conduct of such officer is *primâ facie* presumed to be right.[2] 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.

Burden of proof is on party charging public officer with misconduct.

§ 1320. We have already had occasion to observe[3] 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 where 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,

Regularity of business men presumed.

[1] Bruce *v.* Holden, 21 Pick. 187; Clapp *v.* Thomas, 5 Allen, 158; Phelps *v.* Cutler, 4 Gray, 137; McMahon *v.* Davidson, 12 Minn. 357; State *v.* Melton, 8 Mo. 417.

[2] 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 Green (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.

[3] Supra, §§ 1243, 1301.

[4] Farrar *v.* Beswick, 1 Moo. & R. 527, per Parke, B.

[5] Byles on Bills (8th ed.), 2, 108.

is inferred to have been accepted within a reasonable time after its date, and before it came to maturity.[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]

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.[4] 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.[5]

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;[6] if a servant is hired, it is presumed to be for the usual period of service;[7] when marriage is promised, the engagement will be presumed to be to marry within a reasonable time.[8]

[1] 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; Leuckhart *v.* Cooper, 7 C. & P. 119; Cunningham *v.* Fonblanque, 6 C. & P. 44; Best's Ev. § 404.

[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] 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.

[5] 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.

[6] 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.

[7] Best's Ev. § 400.

[8] Phillips *v.* Crutchley, 3 C. & P. 78; 1 Moore & P. 239.

§ 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 proof of the reception of the letter by the person to whom it is addressed.[1] Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.[2] In cases of registered letters the presumption is peculiarly strong;[3] in cases of ordinary letters, where there is no mail delivery, there is no presumption at all,[4] and delivery must be substantially proved.[5] The rule as to letters,

Mailing letter *primâ facie* proof of devery.

[1] Saunderson *v.* Judge, 2 H. Bl. 509; Ron *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.

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.

[2] 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.

[3] Best's Ev. § 403.

[4] Bilbgerry *v.* Branch, 19 Grat. 393; James *v.* Wade, 21 La. An. 548.

[5] "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 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;

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] 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

it is evidence tending, if credited by the jury, to show the receipt of such letters. 'A fact,' says Agnew, J., Tanner *v.* Hughes, 33 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 defendant." Shelburne Bk. *v.* Townsley, 102 Mass. 177, Ames, J.

letter addressed, "Mr. Haynes, Bristol." [1] The same inference from regularity may be drawn as to the delivery of telegraphic dispatches; [2] though ordinarily the original message should be produced.[3]

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 period for such delivery.[4]

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.[5] The post-mark, however, is not, it is said, evidence of the date of forwarding.[6]

[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] Com. *v.* Jeffries, 7 Allen, 548; U. S. *v.* Babcock, 3 Dillon, 571.

[3] Howley *v.* Whipple, 48 N. H. 487; cited at large supra, § 76.

[4] 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 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 and 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

[5] Powell's Evidence, 4th ed. 88; R. *v.* Johnson, 7 East, 65; Fletcher *v.* Braddyl, 3 Stark. R. 64; 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.

[6] 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] So where a letter is put in a box from which it is an unvariable practice of a letter carrier to take letters at fixed periods, mailing will be presumed.[2]

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.[3] 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 minutes, 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.[4] In case of a denial, by the party addressed, of reception, then the case goes to the jury as a question of fact.

Letters delivered presumed to have been received.

§ 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

Letters in answer to one mailed to the writer presumed to be genuine.

The British and 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 and 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] Skilbeck *v.* Garbett, 7 Ad. & El. N. S. 846.

[3] See cases cited supra, § 1323; New Haven Bk. *v.* Mitchell, 15 Conn. 206. See Crandall *v.* Clark, 7 Barb. 169.

[4] Dana *v.* Kemble, 19 Pick. 112.

not receive the letter, and that the reply mailed in response was not genuine.[1]

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.[2]

Presumption from habits of forwarding letters.

§ 1330. Testimony by a clerk that it was his invariable custom to carry certain classes of letters to the post-office, of which class the letter in question was one, though he had no recollection as to such letter specifically, has been held sufficient to let a copy of the letter in evidence, after notice to the other side to produce.[3] 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.[4] 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.[5]

VI. PRESUMPTIONS AS TO TITLE.

Presumption in favor of possession.

§ 1331. Possession, as to personal as well as real property, is so far a presumption of title that the burden of proof is on the party by whom such possession is assailed.[6]

[1] Connecticut *v.* Bradish, 14 Mass. 296; Chaffee *v.* Taylor, 3 Allen, 598; Johnson *v.* Daverner, 19 Johns. 134.

[2] Howley *v.* Whipple, 48 N. H. 488.

[3] Thallhimer *v.* Brinckerhoff, 6 Cow. 96.

[4] Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Londesborough, 12 C. B. 252; Toosey *v.* Williams, 1 Moo. & M. 129; Patteshell *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.

[5] Skilbeck *v.* Garbett, 7 Q. B. 846; Hetherington *v.* Kemp, 4 Camp. 193; Ward *v.* Ld. Londesborough, 12 Com. B. 252; Spencer *v.* Thompson, 6 Ir. Law R. (N. S.) 537, 565.

[6] 2 Wms. Saund. 47 f; Best's Ev. § 366; Webb *v.* Fox, 1 T. R. 397; 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 Oh. St. 231; Caldwell *v.* Evans, 5 Bush, 380; Park *v.* Harrison, 8 Humph. 412;

§ 1332. Even as to real estate, possession, or reception of rents from the person in possession, is so far *primâ facie* evidence of seisin in fee, as to throw upon a contesting party the burden of proving a superior title.[1] Possession, also, is sufficient title to sustain a suit for trespass;[2] 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.[3] Proof of payment of taxes is admissible in order to strengthen the presumption.[4] 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.[5]

As to realty.

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.

It has frequently been said that the possessor of property is presumed to have rightfully acquired title; and for this is 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, 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. The question is one of inference from the facts in the concrete.

[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.* Derringer, 78 Penn. St. 271; Ward *v.* McIntosh, 12 Oh. St. 231; Hunt *v.* Utter, 15 Ind. 318; Smith *v.* Hamilton, 20 Mich. 433; Crow *v.* Marshall, 15 Mo. 499. As to presumption of regularity of tax sales, see infra, § 1353.

[2] Elliott *v.* Kent, 7 M. & W. 312; where it was said that in such case the presumption was conclusive.

[3] Hawkins *v.* County, 2 Allen, 251.

[4] Hodgdon *v.* Shannon, 44 N. H. 572; Durbrow *v.* McDonald, 5 Bosw. 130.

[5] Alexander's Succession, 18 La. An. 337.

§ 1333. A mere tortious possession, however, obtained by violence, 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]

Such possession must be independent.

§ 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]

§ 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]

So as to personalty.

§ 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 the possession of a negotiable promissory note, indorsed in blank, is such presumptive evidence of ownership as to sustain a suit.[7] The possession

[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.

[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] Elliot *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. 393. See Crandall *v.* Schroeppel, 4 Thomp. & C. 78; 1 Hun, 557; Rubey *v.* Culbertson, 35 Iowa, 264; Penn *v.* Edwards, 50 Ala. 63. See fully for other cases infra, §§ 1362, 1363.

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 leading.[3]

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 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]

§ 1337. Even a stranger, 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 showing that the writing was not given in acknowledgment of a debt due.[10]

[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.

[10] 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.

§ 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."[1] 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 presum tions and quieting titles, as the means of maintaining peace, order, and economy 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,[2] 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 of being weakened and impaired by lapse of time, should be strengthened, until they shall become incontrovertibly confirmed by it."[3] The presumptions which are thus favored, it should at

Policy of the law is favorable to presumptions from lapse of time.

[1] 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, 644. 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. Cr. L. § 144 *a*, and passage from Demosthenes there cited.

[2] 4 Watts, 294.

[3] "The application of this doctrine to chamber surveys," so the same opinion goes on to say, "is a striking

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,[1] 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.[2] The presumption, however, may be rebutted by showing that the road and the adjoining land belonged to different proprietors;[3] or that there was an adverse proprietorship in a stranger.[4] But the use of a private right of way gives no presumption of ownership of the soil.[5]

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.* Impsen, 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.

[1] Supra, § 44.

[2] 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.

[3] Headlam *v.* Hedley, Holt, N. P. R. 463.

[4] Doe *v.* Hampson, 4 C. B. 269.

[5] Smith *v.* Howden, 14 C. B. (N. S.) 398.

§ 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.[1] 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.[2] This presumption, however, yields to proof that the wall is built on land parts of which were separately contributed by each proprietor.[3] 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.[4]

So of hedges and walls.

§ 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,[5] but not the right of abridging the width or interfering with the course of the stream,[6] belongs to the owner of the adjacent land.[7] On the other hand, as to navigable rivers and arms of the sea, the soil *primâ facie* is vested in the sovereign and the fishery *primâ facie* is public.[8]

Soil under water presumed to belong to owner of land adjacent.

§ 1342. Alluvion is presumed to belong to the owner of the land upon which it is formed.[9] The same rule

So of alluvion.

[1] Guy *v.* West, 2 Sel. N. P. 1296, per Bayley, J.

[2] 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.

[3] Matts *v.* Hawkins, 5 Taunt. 20; Murly *v.* McDermott, 8 A. & E. 138; 3 N. & P. 256.

[4] Callis on Sewers, 4th ed. 74; D. of Newcastle *v.* Clark, 8 Taunt. 627, 628, per Park, J.

[5] See Marshall *v.* Nav. Co. 3 B. & S. 732.

[6] Bickett *v.* Morris, 1 Law Rep. H. L. Sc. 47.

[7] 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.*

[8] 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,

[9] Banks *v.* Ogden, 2 Wall. 57; Saulet *v.* Shepherd, 4 Wall. 508; Granger *v.* Swart, 1 Woolw. 88; The

)lds as to alluvion on the sea-shore; though it has been ruled at where the sea retreats suddenly, leaving uncovered a tract land, the title to this tract belongs to the state.[1] It is scarcely ecessary to add that presumptions in all cases of title of this ass are controlled by the specific limitations of deeds.[2]

§ 1343. A tree is presumed to belong to the owner of the nd from which its trunk arises, though its roots extend into an adjacent estate.[3] When the tree grows a boundary, it has been argued that the property in ie tree is presumed to be in the owner of that land in hich it was first sown or planted.[4] The weight of authority, owever, in such case, is that the tree is owned in common by ie land-owners.[5]

Tree presumed to belong to owner of soil.

§ 1344. *Primâ facie*, the ownership of subjacent minerals is imputed to the owner of the surface.[6]

So of minerals.

§ 1345. But this presumption readily yields to proo of a rant of the minerals to a stranger.[7] The right, so it has een held, is one of the ordinary incidents of property in nd, and is not founded on any presumption of a grant or an asement.[8]

§ 1346. A common system of title,[9] or a unity of grant, gives a

chools *v.* Risley, 10 Wall. 91; Deerld *v.* Arms, 17 Pick. 41; Trustees *v.* Dickinson, 9 Cush. 544.

[1] Att'y Gen. *v.* Chambers, 4 De G. J. 55; Emans *v.* Turnbull, 2 Johns. 22; St. Clair *v.* Lovingston, 23 Wall. 7.

[2] See 3 Wash. on Real Est. 4th ed. 20 *et seq.*

[3] Claflin *v.* Carpenter, 4 Metc. 580; Hoffman *v.* Armstrong, 48 N. Y. 201.

[4] Holder *v.* Coates, M. & M. 112, er Littledale, J.; Masters *v.* Pollie, Roll. R. 141; *contra*, Waterman *v.* Soper, 1 Ld. Ray. 737; Anon. 2 Roll. R. 255.

[5] 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.

[6] 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.

[7] 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. St. 341; Armstrong *v.* Caldwell, 53 Penn. St. 287. See Yale's Title to California Lands.

[8] 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.

[9] Supra, § 44.

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.[1] 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[2] to the lateral support of the other.[3] The right, however, does not justify the imposition of an additional weight by the erection of new buildings.[4] And the right, either to support or drainage, may be sustained when both proprietors take the property as it stands, from a common grantor.[5] 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.[6]

Easements may be presumed from unity of grant.

[1] 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.

[2] See Smith *v.* Thackeray, 1 Law Rep. C. P. 564; 1 H. & R. 615, *S. C.* As to these limits, see Thurston *v.* Hancock, 12 Mass. 226.

[3] 2 Roll. Abr. 564, Trespass, J. pl. 1; Taylor's Ev. § 106.

[4] 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.

[5] 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. See 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.

[6] Suffield *v.* Brown, 3 New R. 340; 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.

§ 1347. Where a title, good in substance, is held, and when 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] But a grant of public lands will not be presumed from uninterrupted possession of only ten years;[4] nor will this presumption be made in behalf of a party with whose case the presumption is inconsistent.[5]

Grants will be so presumed.

§ 1349. By the English common law, if a party, and those

[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; Burr *v.* Galloway, 1 McLean, 496; Clements *v.* Machboeuf, Sup. Ct. U. S. 1876; Hill *v.* Lord, 48 Me. 83; Brattle *v.* Bullard, 2 Metc. 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, § 1852.

[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 Wisc. 79; 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 R. N. S. 63; Roe *v.* Ireland, 11 East, 280; Goodtitle *v.* Baldwin, Ibid. 488; Att. 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.

[4] Walker *v.* Hanks, 27 Tex. 535; Biencourt *v.* Parker, 27 Tex. 558.

[5] Sulphen *v.* Norris, 44 Tex. 204.

Grant of incorporeal hereditament presumed after twenty years.

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)[1] 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.[2] By Lord Tenterden's Act,[3] 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.[4] 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 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."[5] The same presumption, as to the grant of an incorporeal hereditament, based on enjoyment for twenty years, has been sustained in this country.[6] But there

[1] Bailey *v.* Appleyard, 3 N. & P. 257.

[2] See Reed *v.* Brookman, 3 T. R. 151; 1 Brown & Hadley, Com. 424.

[3] 2 & 3 Will. 4, c. 71.

[4] 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.

[5] Best's Evidence, § 377.

[6] 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 Metc. 363; Sibley *v.* Ellis, 11 Gray, 417; Ingraham *v.* Hutchinson, 2 Conn. 584; Emans *v.* Turn-

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.[1] 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.[2]

§ 1350. It should also be remembered that the grant, to be 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.[3] 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

bull, 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, 10 S. & R. 383; and approved, in 1875, by Agnew, C. J., in Carter *v.* Tinicum Fishing Co. 77 Penn. St. 315; quoted infra, § 1352.

[1] 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.

[2] Bethum *v.* Turner, 1 Greenl. 111; Tickham *v.* Arnold, 3 Greenl. 120.

[3] 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.

establish acquiescence.[1] But the acquiescence of the owner may be established inferentially.[2] Thus, after 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.[3]

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.[4] 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 it is an inference which there is no one who can rebut. "It may, therefore, 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 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."[5]

[1] Chasemore *v.* Richards, 7 H. of L. Cas. 349.

[2] Gray *v.* Bond, 2 B. & B. 667.

[3] Winterbottom *v.* Derby, L. R. 2 Ex. 316.

[4] 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.

[5] Washburn 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

§ 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.[1] The presumption in such case is one of fact, for the jury, under the instructions of the court.[2] And among the circumstances which will sustain such a presumption is to be considered such acquiescence by adverse interests as approaches an estoppel.[3]

§ 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,[4] or when after long continued possession there is conduct equivalent to an estoppel, which may be imputed to the party from whom the deed is presumed.[5] In such

So of intermediate deeds and other procedure.

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."

[1] 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.

[2] Doe *v.* Cleveland, 9 B. & C. 844; Doe *v.* Davies, 2 M. & W. 503; Foulk *v.* Brown, 2 Watts, 214; Carter *v.* Tinicum Fishing Co. 77 Penn. St. 310.

[3] Doe *v.* Helder, 3 B. & Ald. 790; Kingston *v.* Leslie, 10 S. & R. 383; Foulk *v.* Brown, 2 Watts, 214.

[4] 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, 17 Pick. 255; White *v.* Loring, 24 Pick. 319; Ryder *v.* Hathaway, 21 Pick. 298; Brattle *v.* Bullard, 2 Metc. 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.

[5] Sergeant, J., Foulk *v.* Brown, 2 Watts, 214; and 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 Car-

case, possession will justify the presumption, provided it be exclusive and continuous.[1] Hence it has been held in England,

ter; 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 surrender 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 lapse of time, some compensation or release to have been made; thus length of time does not operate as a positive bar, but as furnishing evidence that the demand is satisfied. But it is evidence from which, when not rebutted, the jury is bound to draw a conclusion, though the courts 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 for the peace and security of society. Justice cannot be satisfactorily done where parties and witnesses are dead,

[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 that he has had uninterrupted enjoyment of the premises for twenty years, without molestation from the feoffor, the jury will be entitled to presume, in his favor, that the necessary formalities of a livery of seisin took place.[1] So, as we have seen, under

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 retained 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 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 enjoyment for twenty-one years is a title which cannot be afterwards disputed. Such enjoyment, without evidence to explain how it begun, 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 much shorter time, we have the presumptions of a deed, grant, release, payment of money, 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, 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.

[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.

similar conditions, the formalities of deeds will be presumed to have been duly executed, when this does not contradict the deeds themselves.[1]

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 could rightfully presume the execution of ancient deeds of partition;[2] of ancient wills, so far as the curing of defects of execution;[3] of powers to agents to make conveyances;[4] of deeds by agents shown to have had due power to convey;[5] of deeds of conveyance by trustees to beneficial owner.[6] 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,[7] to the due execution of deeds and wills;[8] to the existence of the proper preliminaries to ancient deeds by land companies;[9] to the passage of acts of the legislature, when constitutional and appropri-

[1] Supra, § 1313.

[2] 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.

[3] Hill *v.* Lord, 48 Me. 83; Maverick *v.* Austin, 1 Bailey, 59; Morrill *v.* Cone, 22 How. 82.

[4] Stockbridge *v.* West Stockbridge, 14 Mass. 257; Tarbox *v.* McAtee, 7 B. Mon. 279.

[5] 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."

[6] 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.

[7] Doe *v.* Mason, 3 Camp. 7, per Lord Ellenborough; Doe *v.* Bingham, 4 B. & A. 672, which was on 53 G. 3, c. 141. See Lond. & Brigh. Ry. Co. *v.* Fairclough, 2 M. & Gr. 674.

[8] Supra, § 1313.

[9] Supra, § 1313.

ate;[1] to the adoption of by-laws, when such by-laws are necessary to explain a usage of long standing;[2] and to the proof of death of remote ancestors without issue.[3] To tax and administration sales this presumption is peculiarly applicable.[4] But there must be possession taken under the sale, or otherwise time exercises no curative effect.[5]

Links in record will in the same way be supplied.

§ 1354. We have already noticed[6] 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.[7]

§ 1355. It is otherwise (apart from the statute of limitations) when in judicial procedures the defects go to want of jurisdiction

[1] Lopez *v.* Andrews, 3 Man. & R. 329; R. *v.* Exeter, 12 A. & E. 532; Eldridge *v.* Knott, Cowp. 215; McCarty *v.* McCarty, 2 Strobh. 6.

[2] R. *v.* Powell, 3 E. & B. 377; May. of Hull *v.* Horner, 1 Cowp. 110, per Lord Mansfield.

[3] 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.

[4] Austin *v.* Austin, 50 Me. 74; Colman *v.* Anderson, 10 Mass. 105; Pejobscot *v.* Ransom, 14 Mass. 145; Lackawanna Iron Co. *v.* Fales, 55 Penn. St. 90; Heft *v.* Gephart, 65 Penn. St. 510. See, as to presuming missing links, infra, § 1354.

[5] Coxe *v.* Derringer, 78 Penn. St. 271. See *S. C.* 3 Weekly Notes, 97.

[6] Supra, § 1304.

[7] 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.* Derringer, 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; Hille-

or other fatal blemish.[1] But ordinarily a title, sustained by uninterrupted enjoyment, will not be permitted to fail because the record does not set forth every minor detail necessary to make the proceedings perfect.[2] Thus a deed of apprenticeship, under which the parties acted, will be presumed to have been regularly executed;[3] and so defects in the recording of ancient deeds may be explained by parol.[4] Wherever, also, an administrative record is executed, such record will *primâ facie* be regarded as regular.[5]

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.[6]

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."[7]

brant *v.* Burton, 17 Tex. 138. As to sales by administrators, see Pejobscot *v.* Ransom, 14 Mass. 145.

[1] Hathaway *v.* Clark, 5 Pick. 490; Lytle *v.* Colts, 27 Penn. St. 193; Nichol *v.* McAlister, 52 Ind. 586.

[2] See cases cited supra, § 645.

[3] R. *v.* Hinckley, 12 East, 361; R. *v.* Whiston, 4 A. & E. 607; 6 N. & M. 65, *S. C.;* R. *v.* Witney, 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.*

[4] Booge *v.* Parsons, 2 Vt. 456; Bettison *v.* Budd, 21 Ark. 578.

[5] 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.

[6] Gibson *v.* Doeg, 2 H. & N. 615. As to other presumptions of license, see Seneca *v.* Zalinski, 15 Hun, 571.

[7] Tindal, C. J., Doe *v.* Cooke, 6 Bing. 179; though see Little *v.* Wing-

§ 1358. It need scarcely be added that the presumption of such conveyances is rebuttable by counter-proof.[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 depositary, 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] Burden on party assailing documents of over thirty years old.

The same rule applies in the Roman law.[4] But where a system of registry is established by law, no archives can be considered as giving this *primâ facie* genuineness, except those which the statute indicates. 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]

VII. PRESUMPTION OF PAYMENT.

§ 1360. Independent of 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.

field, 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.*

[1] Hurst *v.* McNiel, 1 Wash. C. C. 70; Nieto *v.* Carpenter, 21 Cal. 455; Chiles *v.* nonley, 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.* Hodson, 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. 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. Monr. 409.

[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. 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.[5] It should be remembered that the period of twenty years may be made to give way to a positive statute defining limit.[6]

Presumption from lapse of time to be distin-

§ 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

[1] Kinsler *v.* Holmes, 2 S. C. 483. See, however, Daly *v.* Erricson, 45 N. Y. 786.

[2] 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] 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.

[6] 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, 2 Weekly Notes, 433. 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

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 the 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 to have 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]

Distinguished from stay by limitation.

§ 1362. Payment, as has been already incidentally noticed, may be of course circumstantially shown.[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

Payment may be inferred from facts.

was not able to specify with certainty what amount plaintiffs had received, because he had not been able to inspect 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.* Janes, 28 Wisc. 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. 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, 203, as showing rebuttability of such presumptions.

document 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 *primâ facie* proof of payment.[4]

[1] Gibbon *v.* Featherston, 1 Stark. R. 225; Shepherd *v.* Currie, 1 Stark. R. 454; Brambridge *v.* Osborne, 1 Stark. R. 454; 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.* Culbertson, 35 Iowa, 264; Somervail *v.* Gillies, 31 Wisc. 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, §§ 1125, 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. 374; 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 alleges 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 Potbier 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 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

§ 1363. Payment, also, *pro tanto*, may be inferred from the fact that money or securities were paid by the debtor to the creditor.[1] Such presumption may be rebutted by proof that the payment was on other accounts.[2] 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.[3] A presumption of payment has been made

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 hoarded 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] 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.

[2] Haines *v.* Pearce, 41 Md. 221; Mechanics *v.* Wright, 53 Mo. 153. See Waite *v.* Vose, 62 Me. 184.

[3] 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; Vail *v.* Foster, 4 Comst. 312; Jewett *v.* Plack, 43 Ind. 368; Matteson *v.* Ellsworth, 33 Wisc. 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,

from the drawing of lines across the instrument proving indebtedness;[1] from an entry of credit on such instrument;[2] from an intermediate settlement of accounts;[3] and from a remittance by mail when such mode of payment is authorized by the creditor, though not otherwise.[4] 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 opulent, and the creditor in needy circumstances.[5]

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;[6] circumstances making it inconvenient to the parties to pay or receive the debt,[7]

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.

[1] Pitcher *v.* Patrick, 1 Stew. & P. 478.

[2] Graves *v.* Moore, 7 T. B. Mon. 341. See supra, §§ 229, 1115.

[3] Hedrick *v.* Bannister, 12 La. An. 373.

[4] See Boyd *v.* Reed, 6 Heisk. 63. See supra, § 1323.

[5] 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.

[6] Farmers' Bk. *v.* Leonard, 4 Harr. (Del.) 536.

[7] McLellan *v.* Crofton, 6 Greenl. 307; Crooker *v.* Crooker, 49 Me. 416; Eustace *v.* Goskins, 1 Wash. (Va.) 188.

any intermediate recognition by the debtor;[1] and mistake in the acceptance of a security.[2]

§ 1365. Receipts, if for the same debt, or in full of all demands, are *primâ facie* evidence of payment;[3] 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.[4] 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.[5]

Receipts proof of payment, but may be rebutted.

[1] Delaney *v.* Robinson, 2 Whart. R. 503; Eby *v.* Eby, 5 Penn. St. 435; Reed *v.* Reed, 46 Penn. St. 242.

[2] Wemet *v.* Lime Co. 46 Vt. 458. See cases cited supra, § 1363.

[3] 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.

[4] 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.

[5] 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. 283; 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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