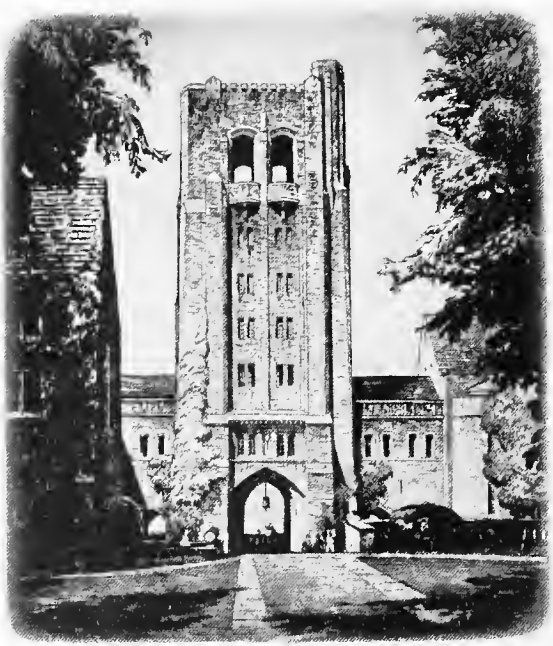

A TREATISE

ON

THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW

VOLUME IV.

A

TREATISE

ON THE SYSTEM OF

EVIDENCE

IN

TRIALS AT COMMON LAW

INCLUDING

THE STATUTES AND JUDICIAL DECISIONS
OF ALL JURISDICTIONS OF THE
UNITED STATES

BY

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VOLUME IV.

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I. Statutes.

The titles and dates of the compilations of statutes referred to in this work, and the years of the latest session laws consulted in its preparation, are shown in the table below. In a few jurisdictions new official revised compilations have been made since the material was originally collected for this work, but the usual (and culpable) lack of a table of cross-references in the new revision to the former numbering has made it impracticable in this work to insert the new numbering in every instance; for Massachusetts, however (where a perfect table is published), and for South Carolina, the citations to the revisions of 1902 have been added. The large number of statutory citations (some nine thousand in all) made any further collation of the new numbering impracticable; and the examination of the session laws, to date of printing, made it reasonably certain that the legislative changes would all be represented, under one or another form of citation:

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

[1] There being no compilation here, and the Evidence Act of 1889 having codified most of the rules, no complete search was made for statutes prior to 1889, except that those of 1873 and 1887, dealing with evidence, were collated with that of 1889.

[2] The Legislatures in most States meet biennially, so that the laws of 1902 were in such cases sometimes the latest. In Alabama the laws of 1903 had not come to hand in January, 1904.

[3] A note on the validity of the Commission's amendments of 1901 will be found in § 488.

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

[1] Governed by Federal and Arkansas statutes, and by Indian law, not here considered.
[2] These laws are not here considered, being chiefly of Spanish origin.

II. Reports.

Most of the citations of decisions rendered since 1893 have been taken from the reports published in the National Reporter System, as they appeared in weekly numbers. For all decisions reported since the beginning of that System, the duplicate citation has been added, to include both the Official Report and the National Reporter, — most of these duplicate citations being furnished through the courtesy of the West Publishing Company, the remainder added by the author from the Blue Books. As the printing progressed, the duplicate citations of the Official Reports appearing from time to time were obtained from the Third Labels and inserted in the proof. Thus it happens that in the earlier parts of the book most of the citations of decisions of 1903 are to the National Reporters only.

The printing of these present volumes began in January, 1904, and occupied a full year; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in bringing the later citations down to the date of their consultation. The point taken was therefore that volume of the different National Reporters which ended nearest to January, 1904; this ranged (dating by the weekly issues) between November, 1903, and March, 1904. Substantially, then, the citations come down to the beginning of 1904. The latest volumes of Reporters consulted were as follows:

Atlantic Reporter, vol. 55.
Federal Reporter, vol. 125.
Northeastern Reporter, vol. 68.
Northwestern Reporter, vol. 96.
Pacific Reporter, vol. 73.
Southern Reporter, vol. 35.
Southeastern Reporter, vol. 45.
Southwestern Reporter, vol. 76.
Supreme Court Reporter, vol. 23.

and of Official Reports not covered by the National Reporter System:

District of Columbia Appeals, vol. 21.
Hawaii, vol. 13.

The latest volumes of English and Canadian Reports consulted were as follows:

England, Law Reports 1903.
Canada (Dominion), vol. 32.
British Columbia, vol. 10, pt. 1.
Manitoba, vol. 12.
New Brunswick, vol. 34.
Newfoundland, vol. 5.
Northwest Territories, vol. 5, pts. 1, 2.
Nova Scotia, vol. 35.
Ontario, Law Reports, vol. 5.
Prince Edward Island, vol. 2.

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

III. Citation of this Treatise.

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

Between the chapters, and between main subdivisions of each chapter, there are from one to five (occasionally more) numbers omitted; so that the series of numbers does not read consecutively at those points. This is not an inadvertence, nor a sign of materials omitted; but merely a mechanical expedient which became indispensable in working upon a bulky manuscript. In the course of inserting the cross-references (some ten thousand), a great number of the references obviously had to be made, during the progress of the work, to portions of the text yet unwritten; and it therefore became necessary to give to these topics reference-numbers beforehand. In order to allow for occasional additions of topics in the course of the work, these blanks were left in the series. A reference to the California Codes will show that this expedient is not without precedent.

EVIDENCE

IN

TRIALS AT COMMON LAW.

PART III: RULES OF EXTRINSIC POLICY.

TITLE II, SUB-TITLE III (*continued*): TESTIMONIAL PRIVILEGE.

TOPIC B: PRIVILEGED COMMUNICATIONS.

SUB-TOPIC I: CONFIDENTIAL COMMUNICATIONS IN GENERAL.

CHAPTER LXXIX.

§ 2285. **General Principle of Privileged Communications.** Looking back at the principle of Privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (*ante*, §§ 2192, 2197), four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation. (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[1]

These four conditions being present, a privilege should be recognized; and not otherwise. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain

[1] 1851, Wigram, V. C., in Russell *v.* Jackson, 9 Hare 387, 391 ("The rule does not rest simply upon the confidence reposed; . . . it seems to rest, not upon the confidence itself, but upon the necessity of carrying it out").

why certain privileges have failed to obtain the recognition sometimes demanded for them. In the privilege for communications between Attorney and Client, for example, all four are present; and the doubt which Bentham has raised as to the policy of that privilege fixes upon the only condition therein open to dispute, namely, the fourth. In the privilege for communications between Husband and Wife, all four conditions are again present; and the chief variance of judicial opinion in defining the privilege (*i. e.* in holding, as some do, that the protection extends to all communications, or, as others do, to confidential communications only) is due to a question as to the fulfilment of the first condition. In the privileges for communications between Jurors and between Informer and Government, the four conditions are clearly present. In the privilege (denied at common law) for communications between Physician and Patient, the fallacy of recognizing it lies in the incorrect assumption that the second condition is generally present. In the privilege (also denied at common law) for communications between Priest and Penitent, the objection to its recognition has probably lain in a tacit denial of the third condition. In the privilege (sometimes urged) for communications sent by telegraph, the reluctance to recognize it has apparently been due to a perception that no one of the four conditions is thoroughly fulfilled. These four conditions must serve as the foundation of policy for determining all such privileges, whether claimed or established.

§ 2286. **Sundry Confidential Communications not privileged; Clerks, Trustees, etc.** In general, then, the *mere fact that a communication was made in express confidence,* or in the implied confidence of a *confidential relation,* does not create a privilege. This rule is not questioned to-day.[1] No pledge of privacy, nor oath of secrecy,[2] can avail against demand for the truth in a court of justice:

1888, *Parnell Commission's Proceedings,* 103d day, Times' Rep. pt. 28, pp. 19 ff.; Mr. *John O'Connor,* M. P., once an active Fenian, was under examination as to his transactions in 1879 with various persons concerned in the Fenian brotherhood; in refusing to speak upon those matters, he said in explanation: "I may as well tell you that I do not intend to admit to you who were associated with me in these transactions. I was bound to these people by an obligation that they accepted in good faith, and I am not going to betray them." . . . *Counsel:* "Did you see Devoy at the end of 1878 or the beginning of 1879?" *Witness:* "I must decline to answer"; *Counsel:* "I submit, my lord, that I have a right to press this question"; President *Hannen:* "I have explained several

[1] With the following cases should be compared those cited *ante,* §§ 2211–2215, involving disclosures of secret *topics,* irrespective of *communications:* 1811, Berkeley Peerage Trial, Sherwood's Abstract, 41 (general principle); 1838, Greenlaw *v.* King, 1 Beav. 137, 145 ("persons in the most closely confidential relation are bound to disclose communications made to them"); 1867, Hopkinson *v.* Burghley, L. R. 2 Ch. App. 447 (letter to defendant, with confidential communication from a third person, held not privileged); 1881, Jessel, M. R., in Wheeler *v.* Le Marchant, L. R. 17 Ch. D. 675, 681 (general principle); 1897, Cox *v.* Montagne, 24 C. C. A. 364, 78 Fed. 845 (general principle).

[2] 1834, R. *v.* Shaw, 6 C. & P. 373 (communication under oath of secrecy to a fellow-prisoner in jail); 1836, R. *v.* Thomas, 7 id. 346 (confession under a promise of secrecy); 1898, Owens *v.* Frank, 7 Wyo. 457, 53 Pac. 282 (communication made in confidence between members of the Masonic order). The rule that a *confession obtained by fraud* is nevertheless admissible (*ante,* § 841) also illustrates the principle.

times that these excuses which are made for not giving evidence are not for a moment tenable in a court of justice. That a man has bound himself by an illegal oath in connection with an illegal association cannot of course be recognized as an excuse. But we have a delicate task to perform, and I do not propose at present to take the measures which are in my power." After a subsequent refusal to answer other questions, *Counsel:* "What is your objection"? *Witness:* "It is an objection to break my oath. It is a regard for an obligation that I respect, even though others may not respect it"; President *Hannen:* "Are you a Protestant or a Roman Catholic?" *Witness:* "A Roman Catholic"; President *Hannen:* "Do you mean to assert that your Church justifies a refusal to give evidence on the ground that you have taken the illegal oath of an illegal society?" *Witness:* "I have not studied the theology of the matter"; President *Hannen:* "Nor the morality?" *Witness:* "I know what my code of honor is, my lord, and I intend to adhere to it."

Accordingly, a confidential communication to a *clerk*,[3] to a *trustee*,[4] to a *commercial agency*,[5] to a *banker*,[6] to a *journalist*,[7] or to any other person not holding one of the specific relations hereafter considered, is not privileged from disclosure.[8]

But this was not always so. In the trials of the 1600s, the obligations of honor among gentlemen (and the English bench and bar were peculiarly

[3] 1824, Webb *v.* Smith, 1 C. & P. 337 (an articled clerk, held compellable to disclose a matter learned in the employer's business, but not "specially entrusted as a matter of secrecy"); 1809, Corps *v.* Robinson, 2 Wash. C. C. 388 (the head clerk of the defendant, compelled to testify to confidential matters; "it has never been considered an objection which the witness can make"). *Contra:* Ia. Code 1897, § 4608 (privilege established for a "stenographer or confidential clerk of any person, who obtains such information by reason of his employment"; the amendment, which practically abolishes this, is quoted *post*, § 2292). Compare the privilege for *trade secrets*, *i. e.* for the facts of the business, as distinguished from communications (*ante*, § 2212).

[4] Jones *v.* Manchester, quoted *infra*. Compare Mr. J. Buller's two statements, quoted *infra*. But a trustee, so far as identified with a *party*, was privileged from discovery, before modern legislation: *ante*, § 2218.

[5] 1894, Shauer *v.* Alterton, 151 U. S. 607, 617, 14 Sup. 442.

[6] 1826, Loyd *v.* Freshfield, 2 C. & P. 325, 329 (clerk of a banker compelled to state the figures of a depositor's balance); 1897, Hanuum *v.* McRae, 17 Ont. Pr. 567, 18 id. 185 (bank manager must attend with the bank's books on subpœna; even the English statute allowing a party to prove them by copy — quoted *ante*, § 1223 — does not create a privilege not to disclose the accounts of customers; though that statute is not in force in Ontario; good opinion by Maclennan, J.).

[7] 1888, Parnell Commission's Proceedings, 52d day, Times' Rep. pt. 14, p. 18 (ruled that a newspaper had no privilege to withhold the name of a contributor); 1895, U. S. *v.* Edwards, U. S. *v.* Shriver, D. C., reported, with Senator Edmunds' brief, in Smith's Digest of Precedents of Privilege of Congress, 1894, pp. 828, 848, 856 ("Such a rule [of privilege] would be in violation of a sound public policy"); 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 ("Considering that Miss C. was a newspaper reporter, . . . the claim scarcely merits comment"); 1897, *Ex parte* Lawrence, ib. 298, 48 Pac. 124 (reporter's refusal to disclose information to a legislative committee, held improper).

The following enactment, as detestable in substance as it is crude in form, will probably remain unique: Md. St. 1896, c. 249 ("No person engaged in, connected with, or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for or published in the newspaper on and in which he is engaged, connected with or employed").

[8] The following statutes are anomalous: Mich. Comp. L. 1897, §§ 8612, 8615 (where an unmarried woman is with child or has "lived with a man and has been considered as his wife," "or for other good reason . . . deemed to be sufficient by the judge of probate, desires to keep the exact date of the marriage a secret, to protect the good name of herself and the reputation of her family," the probate judge may issue "without publicity a marriage license," and "all knowledge of any facts" about it coming to the judge, officials, physicians, and witnesses "shall be deemed to be privileged communications"); Can. Rev. St. 1886, c. 93, § 17 (bridge company's return of bridge-casualties, to be privileged communications); N. Sc. Rev. St. 1900, c. 99, § 307 (railway company's returns of casualties, expenditures, etc., to be "privileged communications, and shall not be evidence in any court whatsoever"). For a taxpayer's *return of property to the assessor*, see *post*, § 2374, under the head of communications to Government, with which perhaps the above Canadian statutes might be classed.

dominated by that standard) were often put forward as a sufficient ground for maintaining silence.[9] By the middle of the 1700s it seemed as though this notion would prevail, at any rate in certain worthy cases.[10] The same point of view is also plain at that time in the treatment of the privilege for attorney and client, which was then supposed to rest upon the honorable obligations of the attorney, rather than upon objective considerations of policy (*post*, § 2290). But a stricter view of justice finally dominated, and in the notorious Duchess of Kingston's Case the older point of view was definitely abandoned and the new one thoroughly promulgated:

1776, *Duchess of Kingston's Case*, 20 How. St. Tr. 586; bigamy; trial by the House of Lords; to prove the first and disputed marriage, the question was asked of Lord Barrington, an old friend of the accused: "Did you ever hear from the lady at the bar that she was married to Mr. Hervey"? Lord *Barrington:* "If anything has been confided to my honor, or confidentially told me, I do hold, with humble submission to your lordships, that as a man of honor, as a man regardful of the laws of society, I cannot reveal it." Then the Duchess released Lord Barrington from every obligation of honor; and the Solicitor-General, not to be outdone, declared that he would ask no more questions; but several lords insisted on their right to continue the questioning; Lord *Camden:* "I hope that your lordships, sitting in judgment on criminal cases — the highest and most important that may affect the lives, liberties, and properties of your lordships — that you shall not think it befitting the dignity of this high Court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties. My lords, the laws of this land — I speak it boldly in this grave assembly — are to receive another answer from those who are called to depose at your bar, than to be told that in point of honor and of conscience they do not think that they acquit themselves like persons of that description

[9] 1613, Countess of Shrewsbury's Case, 12 Rep. 94 (before a council, including the Chancellor, Chief Justices, and Chief Baron; the Countess, being "required to declare her knowledge" concerning the escape of Lady Arabella Stuart, refused, for one reason, because "she had made a rash vow that she would not declare anything in particular touching the said points"; but she was adjudged in contempt, since "rash and illegal vows make not an excuse"; and the subject's very oath of allegiance binds her "without being demanded, to reveal to the king what she knows concerning the premises, upon which great mischief may happen to the king and the realm"; possibly in a civil case the conclusion might have been different); 1673, Jones *v.* Countess of Manchester, 1 Ventr. 197 (the Earl of Manchester, brother to the plaintiff, had the key of a box, held by a stranger, and containing her deeds; the box was in court, but the earl refused to surrender the key, being a trustee for his sister, claiming that "it would be a breach of the trust reposed in him, which he held sacred and inviolable"; but Lord Hale told him, though they could not compel him there to do it, yet the law required it; "for though it is against the duty of a counsellor or solicitor, etc., to discover the evidence which he who retains him acquaints him with, yet a trustee may and ought to produce writings, etc."). Lord Kenyon's allusion (in Wilson *v.* Rastall, 4 T. R. 753, 758) to the testimony of Lord Howard against Lord Russell, in 1683 (9 How. St. Tr. 611), as an example of compelling the revelation of confidences, seems not to be founded on anything in the report of the trial.

[10] 1676, Bulstrod *v.* Letchmere, Freem. Ch. 5 ("the Lord Chancellor made it a doubt if a thing were revealed under the condition of secrecy to one that was not a barrister, whether or no he would oblige him to answer"); 1682, Lord Grey's Trial, 9 How. St. Tr. 127, 175 (information against several persons for carrying off and debauching Lady Henrietta Berkeley; Lady Henrietta testified for the defendant that she left her parents' house voluntarily; on being asked who was with her, she answered, "I shall not give any account of that, for I will not betray anybody for their kindness to me; . . . I will not break my vow to them"; Mr. J. Dolben: "If they ask you of anybody in the information, . . . you must tell if it were any of them, but you are not bound to tell if it were any one else"; L. Henrietta: "No, it was none of them"); 1722, Layer's Trial, 16 id. 93, 245 (Lord North and Grey: "It is a little hard for a man of honour to betray conversation, what passed over a bottle of wine in discourse; but since your lordship requires it, I must submit"); 1767, Buller, Trials at Nisi Prius, 284 (a naked trust does not disqualify the trustee as interested; "however, a trustee shall not be a witness to betray the trust"; citing a ruling of L. C. J. Holt's that a broker of offices should not be received to testify to the occasion of giving a bond, "because it appeared he was privately entrusted to make the bargain by both parties, and to keep it secret").

when they declare what they know"; Duke of *Richmond:* "I do not look on a witness at the bar to be the witness of the counsel or of the prisoner, but the witness of the House"; Lord Barrington still refusing, the Lords adjourned to discuss the point of law, and it was announced to him that "it is the judgment of this House that you are bound by law to answer all such questions as shall be put to you."

1777, *Hotham*, B., in *Hill's Trial*, 20 How. St. Tr. 1362 (to the jury, commenting on the testimony of an informer who disclosed the defendant's secrets): "The defendant certainly thought him his friend, and he [the defendant] therefore did disclose all this to him. Gentlemen, one has only to say further, that if this point of honor was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honor. If the man is a legal witness, you are bound to receive his testimony, giving it, however, that weight only which you think it deserves."

The "point of honor" thus disappeared forever as a motive for recognizing a privilege. But its expiry was undoubtedly viewed with reluctance by many;[11] and traces of its later survival across the water were to be noticed for some time thereafter.[12]

§ 2287. **Same: Telegrams.** That the relation between the telegram-transmitter and the telegram-sender, and the confidence of the communication as between them, are sufficient to establish a privilege against the operator's disclosure has been supported by a few distinguished judicial names:

1874, *Bramwell*, B., in the *Stroud Election Case*, 2 O'M. & H. 107, 112: "I really think that for the public good there ought to be no power of compelling the production of these documents. It is the necessary consequence that persons who correspond by telegram are obliged to repose confidence in the Crown, and I believe it will be for the public good if it is found that that is a confidence that the Crown cannot be compelled to violate. Inconvenience might arise in many cases. It might arise in the case of a confidential communication between attorney and client, or husband and wife; therefore we must look to the general principle."

1890, *Cooley*, J., *Constitutional Limitations*, 6th ed., p. 371, note: "The telegraph is used as a means of correspondence, and as a valuable and in many cases an indispensable substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfils an important public function; and the propriety of his preserving inviolable secrecy in regard to communications is so obvious that it is common to provide statutory penalties for disclosure. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the Courts compelling him to do so?"[1]

[11] 1792, Wilson *v.* Rastall, 4 T. R. 753, 759 (Buller, J.: "The privilege is confined to the cases of counsel, solicitor, and attorney; . . . it is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded").

[12] 1782, Morris *v.* Vanderen, 1 Dall. 64 (testimony of a clerk, who acted as scrivener of deeds for his employer, offered, but withdrawn on objection made); 1792, Mills *v.* Griswold, 1 Root 383 ("what the defendant had told him in confidence," held subject to disclosure; the distinction being between "communications which are voluntary" and those which are "necessary in the course of business, as of a client to his attorney"); 1796, Calkins *v.* Lee, 2 id. 363 (similar).

[1] See also the learned jurist's more elaborate exposition in his article (1879) on Inviolability

These arguments have been adequately met in the following passages:

1869, *Dublin Election Case*, 1 O'M. & H. 270, 271: "Mr. Sanger, the telegraph-officer, when called as a witness to produce the telegrams, said, 'My lord, before I produce these telegrams, I must object to their production. We have always looked upon a telegram as sacred, and we think that this decision of your lordship will shake the confidence of the public in the telegraph.' Mr. Justice Keogh said that the opinion of the telegraph company as to this could make no difference. The telegrams were produced. . . . Mr. Justice Keogh in his judgment said further as to this: 'Telegrams are nothing but electric letters, written by the candidates or their agents to electors. If such letters were in the pockets of the electors, or if copies of them were in desks of the candidates, the petitioners of course would have a right to insist upon their production; and there is no reason why, because they are transmitted along a wire instead of being written on paper with pen and ink, they should have any greater protection.'"

1851, *King*, P. J., in *Henislaw* v. *Freedman*, 2 Pars. Eq. Cas. 274: "If we adopt this [alleged] construction of the law, the telegraph may be used with the most absolute security for purposes destructive to the well-being of society, — a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber, and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they never could be accessible to the public justice, however deep might be the public interest involved in their production. For the result of the principle contended for is that the seal of secrecy is placed on all telegraphic communications, as well in courts of justice as elsewhere, and that they are to be classed with privileged communications, such as those between husband and wife, counsel and client. . . . The law is jealous of extending the circle of persons excused or interdicted from giving testimony. Parents are required to testify against children, children against parents, brothers against brothers, friends against friends. Communications by letter, made under the deepest obligations of friendship, affection or honor, still must be produced, if deemed necessary to the ascertainment of the truth and the administration of justice by the public tribunals. To this great end of social organization, all secondary causes are required to give way."[2]

1879, Mr. *Henry Hitchcock*, in *The Inviolability of Telegrams*, 5 South. L. Rev. N. S. 473, 491: "The offence which this section [of the postal statutes] proscribes is not the disclosure of the contents, nor even primarily the opening or reading of private letters. It consists in taking out of the mail, before its delivery to the person to whom directed, any letter, postal-card, or packet. . . . It is evident, therefore, that the intent and policy of the postal statutes is to protect and assure, not so much the secrecy of private correspondence, as the due fulfilment of a trust voluntarily undertaken by the government in respect of its safe and prompt delivery. It has undertaken this mode of serving the public, and invites the public confidence in such service; therefore it will punish any violation of the confidence so invited, any interference with its execution of that trust, not sanctioned by law. But, in respect of telegrams transmitted by private companies, the United States have undertaken no trust or duty, nor invited any confidence whatever. The postal statutes, therefore, not only do not protect the secrecy of telegrams, directly or by intendment, but they are founded on reasons which, so far as the government is concerned, furnish no argument, even by analogy, for their protection. . . . The argument from the confidential character of telegrams as between the parties to them, and the expressed or implied pledge of secrecy by the telegraph companies, is still less satisfactory. It assumes that the law respects as privileged, without regard to their contents or relevancy to the pending issues, all communications which the parties to them intend

of Telegraphic Correspondence, 18 Amer. Law Reg. N. S. 65.

[2] Similar reasoning is used by Appleton, C. J., in State v. Litchfield, 58 Me. 267, 270 (1870).

shall be secret or confidential. It must amount to this, or to nothing. But it is perfectly well settled that no communication, however confidential, or growing out of personal, social, or business relations however intimate, is for that reason protected from disclosure on the witness-stand, unless it fall within one of the special and limited classes which the law itself makes privileged for reasons of public policy. In truth, all these arguments amount simply to the claim that private telegraphic messages, *as such*, without reference to their contents, constitute a new class of privileged communications. . . . How can it be said that if A, wishing to communicate with B, chooses to transmit his thoughts by electric telegraph instead of by oral or written message, he thereby creates or enters into a relation with B which it is the paramount interest of society itself to protect, by making privileged and inviolable every communication transmitted in that manner, without reference to its contents, even at the expense of the regular administration of justice? Such a rule, if prescribed at all, must be uniform; every communication sent by telegraph must be privileged, as is every communication between attorney and client, or husband and wife. But why should a given message, which, if orally communicated or delivered through the mail, would be subject to compulsory disclosure, become a privileged communication if sent by telegraph? This would be discriminating, not in the interest of the parties concerned, or of society at large, but of the business of the telegraph companies. Public policy, in respect of what communications shall be privileged, has nothing to do with the mode of their transmission, nor with the motive of its selection, nor with the desire of either or both parties for secrecy, but solely with the consequences to society at large of permitting or prohibiting their disclosure in aid of justice. In order, therefore, to support the claim that telegraphic messages, as such, should be held privileged communications, it must be shown that unless they are, the electric telegraph cannot be generally made available as a medium of communication, and also that this consequence would be more injurious to society than the denial to the Courts of this means of attaining the truth. But the former proposition is untrue, as experience demonstrates; and as to the latter, the unquestionable danger of abuse is to be met by applying, not by perverting, sound legal principles. On the other hand, the immensely increased facilities for crime, and the grave obstructions to public justice which would result from placing telegraphic messages, as such, on the list of privileged communications, are forcibly stated by the Court in the cases already cited, of the State *v.* Litchfield and Henislaw *v.* Freedman."

A sufficient answer, when all is said, to those who advocate this privilege, is that the very first condition of a privilege (*ante*, § 2285) is lacking, namely, the intention to keep the message secret in the hands of the transmitter. It is given to him for the sole purpose of being delivered to some one else; and that some one else is not only compellable to disclose it in court, but (for aught that appears) may freely and honorably publish it to others at any time. In short, there is no ultimate and absolute confidentiality in a telegram, but only a mediate and relative secrecy. Since the law need not respect its privacy in its ultimate state, there is no reason for respecting the intermediate stage. Were the telegram addressed to an attorney, in whose hands it would become privileged, the situation would be different; but there the doctrine of agency, as applied to the client's privilege, suffices to protect,[3] without creating a new privilege.

In *England*, the privilege for telegrams was at first repudiated,[4] but after

[3] *Post*, § 2301.

[4] 1869, Coventry Case, 1 O'M. & H. 97, 104 (privilege denied for telegrams sent by a private company); Bridgewater Case, ib. 112, 114; Dublin Election Case, ib. 270, 271 (same; quoted *supra*).

the Government's assumption of telegraphic service in 1868,[5] it was for a while conceded.[6] Subsequently, this attitude was abandoned, and now no privilege appears to be recognized.[7] In *Canada* and the *United States*, no Court has yet given any recognition to the privilege.[8]

It may be added that precisely the same considerations apply to the transmission of messages by *letter-post*. But the Governmental conduct of that service has seemed to complicate that question, and it can better be considered in connection with the privilege for other communications to the Government (*post*, § 2375).

[5] 1868, St. 31 & 32 Vict. c. 110, § 20 (forbids disclosure of telegrams by officials); 1869, St. 32 & 33 Vict. c. 73, § 23 (provides that nothing shall relieve an officer of the post from any liability which before existed for telegraph company to produce communications in a court of law when duly required).

[6] 1874, Taunton Case, 2 id. 16, 72; Stroud Case, ib. 107, 110 (production not required, partly because of lack of power, because the documents "are in the custody of her Majesty," and partly because of policy; quoted *supra*); Bolton Case, ib. 138, 140 (here required only because the contents had been otherwise disclosed).

[7] 1880, Harwich Case, 3 O'M. & H. 61, 62, 44 L. T. N. S. 187 (Lush, J., treated the Bolton case as overruling the prior two, and thought that when the Legislature "transferred the telegraphs to the Post-Office, they intended that the public should be just as well off as they were before"); 1881, *Re* Smith, L. R. Ir. 7 Ch. D. 286 (order for production of telegrams by the Post-Office authorities, granted).

[8] *Can.:* 1861, *Re* New York, Newf. & L. Tel. Co., 2 Morris Newf. 575 (telegraphic messages in the hands of the operator are not privileged, in spite of his oath under the statute forbidding disclosure); 1862, Waddell's Case, 8 Jur. N. S. 181 (Newfoundland; telegraph operator, not privileged from disclosing dispatches, even under a statute forbidding their wilful disclosure); 1888, *Re* Dwight *v.* Macklam, 15 Ont. 148, 154 (careful opinion by Boyd, C.); 1870, Leslie *v.* Hervey, 15 Low. Can. Jur. 9 (a telegraph company is not privileged to withhold dispatches received, in spite of a statute forbidding disclosure; "the right of this third party to compel the disclosure of all facts bearing on the subject-matter of the suit takes precedence, for the time, of the general right, subject to the law's limitations, which belongs to every man to prevent his private affairs being enquired into by others"); *U. S.:* 1880, Woods *v.* Miller, 55 Ia. 168, 7 N. W. 484 (a statute prohibiting the disclosure of telegraphic messages does not prevent their production as evidence under an order of court); 1870, State *v.* Litchfield, 58 Me. 267 (a telegraph company is not privileged to withhold dispatches received); 1880, *Ex parte* Brown, 72 Mo. 83, 91 (telegrams in possession of a telegraph company, not privileged); 1851, Henislaw *v.* Freedman, 2 Pars. Eq. Cas. 274, Pa. Com. Pl. (a telegraph company held not privileged to withhold messages received by it, even under a statute expressly forbidding its operators to disclose dispatches without the consent of sender or receiver; quoted *supra*); 1876, Kehoe's Trial (Molly Maguires), Pa., West's Rep. 128 (statute construed not to privilege telegrams); 1876, Dec. 20, Louisiana Elections, Congressional Record, 44th Cong. 2d sess. vol. 5, pt. 2, pp. 325–330 (the House adopted the following resolution: "That there is nothing in the law rendering a communication transmitted by telegraph any more privileged than a communication made orally or in any other manner whatever"); 1877, Barnes' Case, ib. pp. 452–455, 602–608, 678, 694 (rule applied to enforce production of telegrams in the hands of a telegraph operator at New Orleans); 1882, U. S. *v.* Hunter, 15 Fed. 712 (relevant telegrams must be produced); 1874, National Bank *v.* National Bank, 7 W. Va. 544, 546 (telegraph company not privileged to withhold telegrams from defendant; the whole privilege repudiated).

A statute forbidding disclosure unless "lawfully directed" (*e.g.* Can. Rev. St. 1886, c. 134, § 3) obviously does not create a privilege.

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC II: COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

CHAPTER LXXX.

§ 2290. **History of the Privilege.** The history of this privilege goes back to the reign of Elizabeth, where it already appears as unquestioned;[1] and it

[1] 1577, Berd *v.* Lovelace, Cory 88 (solicitor exempted from examination touching the cause); 1580, Dennis *v.* Codrington, ib. 143 (on a motion to examine one Oldsworth, "touching a

is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante*, § 1364), and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante*, § 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion.

But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one, — a consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client. How significant the "point of honor" was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (*ante*, § 2286). Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. "The first duty of an attorney," it has been said, "is to keep the secrets of his clients."[2] If the "point of honor" was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (*ante*, § 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law. Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser (*post*, § 2291), and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law. The new theory begins to appear

matter in variance, wherein he hath been of counsel, it is ordered he shall not be compelled by subpœna or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties or with either of them by reason of any annuity or fee"); 1580, Kelway *v.* Kelway, ib. 127 (solicitor of plaintiff to be examined for defendant, "upon any interrogatory which shall not be touching the secrecy of the title or of any other matter which he knoweth as solicitor only"); 1642, Onbie's Case, March pl. 136 ("a lawyer who was of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel"; 1654, Roll, C. J., in Waldron *v.* Ward, Style 449 ("He is not bound to make answer for things which may disclose the secrets of his clyent's cause"); 1664, Sparke *v.* Middleton, 1 Keb. 505 (counsel required in testifying to tell only "such things as he either knew before he was of counsel or that came to his knowledge since by other persons"); 1673, Legard *v.* Foot, Rep. temp. Finch 82 (attorney privileged); 1693, Anon., Skinner 404 (counsel privileged).

A few other rulings of the 1600s will be found in the ensuing sections.

[2] 1836, Gaselee, J., in Taylor *v.* Blacklow, 3 Bing. N. C. 249. This conservative character is said to have been the original of Dickens' judicial fossil, Mr. Justice Stareleigh, who presided in Bardell *v.* Pickwick.

in the early 1700s, coexists with the older one for half a century,[3] and then, upon the latter's disappearance, begins for the first time to be much dwelt upon and thoroughly developed. One consequence of this tardy origin was that the detailed rules of this privilege (oldest though it really was) were still in the formative stage in the first half of the 1800s. Another and most unfortunate one was that, by reason of the inconsistency of the two theories, in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debouching into the same channel; and until the domination of the newer one was finally established throughout its boundaries, a turbid and confused volume of rulings abounded. Probably in no rule of evidence having so early an origin were so many points still unsettled until the middle of the 1800s.

The history of the changes of detailed rule that were made necessary by the supervention of the newer theory can better be followed under their separate heads. But it is worth while to sum up here the chief marks of difference. (1) In the first place, under the original theory, the privilege did not at all exempt the *client himself*. The pledge of secrecy had not been taken by him, and therefore the "point of honor" was not his to make.[4] This, to be sure, was a consequence of little practical moment, except in answering a bill of discovery in chancery; for all through that period the party was privileged in common-law courts from testifying in the trial of civil cases (*ante*, § 2217). As the newer theory developed, the client began to be exempted from making discovery of communications relating to the very case at bar; but in this stage the matter still stood as late as the first quarter of the 1800s.[5] Even up to that period it had to be insisted from the bar that "the privilege is that of the client and not of the attorney." The earliest judicial pronouncement in this form appears to have been made before 1700;[6] but it passed unheeded. Mr. Justice Buller, about 1767, repeats that "it is the privilege of the client and not of the counsel or attorney," but complains that "it is mistaking it for the privilege of the witness that has sometimes led judges into the suffering of such a witness to be examined."[7] Then, when Lord Eldon, in 1801, declares it to be "the privilege of the client and the public,"[8] the new theory begins to bear fruit.[9]

[3] The following passage shows the mingling of the two: *Ante* 1726, Gilbert, Evidence, 136: "After the retainer, they are considered as the same person with their clients, and are trusted with their secrets, which without a breach of confidence cannot be revealed, and without such sort of confidence there could be no trust or dependence on any man, nor any transacting of affairs by the ministry or mediation of another; and therefore the law in this case maintains such sort of confidence inviolable."

[4] *Post*, § 2321.

[5] *Post*, § 2294. The much-cited opinion in Greenough *v.* Gaskell, in 1833, which to-day seems to declare nothing but commonplaces, was in that generation a leading case because of its bearing on this stage of development.

[6] L. C. J. North, in Lea *v.* Wheatley, 1679, cited in 20 How. St. Tr. 574, note.

[7] Trials at Nisi Prius, 284.

[8] Wright *v.* Mayer, 6 Ves. Jr. 281.

[9] The persistence of the older notion is seen as late as 1826; Alexander, C. B., in Preston *v.* Carr, 1 Y. & J. 175, 178: "I cannot accede to the proposition which has been contended for, that the privilege of an attorney is the privilege of the client, to the extent that the client himself may avail himself of that privilege to avoid discovering communications which have passed between him and his solicitor."

(2) In the next place, the attorney's exemption was by the original theory limited to communications received since the beginning of the *litigation at bar* and for its purposes only. The point of honor would protect him thus far; but it was gradually falling into disfavor as the 1700s progressed (*ante*, § 2286), and it would not be recognized further than could be helped. "When the cause is ended," says Chief Baron Bowes in 1743, "he is then only to be considered, with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of this Court; for the Court can't determine what is honor, but what is law." [10] Under the influence of the newer theory, an extension of the attorney's exemption of course took place, to include communications made, first, during any other litigation,[11] next, in contemplation of litigation, next, during a controversy but not yet looking to litigation, and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy. But this gradual extension occupied (in England, at least) nearly a hundred years of judicial annals; and the shackles of the earlier precedents were not finally thrown off until the decade of 1870.[12] (3) It followed also, under the original theory, that the privilege could be *waived by the attorney*. Since only the attorney's honor is involved, the Court would not always attempt to judge its standards or to enforce them, if the attorney himself was willing to risk his conscience and his reputation. "The Court can't determine what is honor," said Chief Baron Bowes, in 1743.[13] Sir John Strange, Master of the Rolls, a decade later,[14] when pressed to exclude an attorney's deposition, "who ought not to betray the secrets of their clients," left it to the attorney to do as he pleased; "it is a very right rule; but as he himself has not objected to it, the Court has nothing to do with it." Such liberty, no doubt, was seldom exercised by attorneys; but they clearly had it, under the older theory; and this also took some time in disappearing.

It is plain, then, that the newer theory met the older one at several points of conflict; and it is no wonder that the development of the new and the ousting of the old came to be a process of many decades, and brought a residuum of trouble and confusion into the precedents of the 1800s.

§ 2291. **Policy of the Privilege.** The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory. In short, all four of the ele-

[10] Annesley *v.* Anglesea, 17 How. St. Tr. 1229.

[11] The cases of DuBarré *v.* Livette, Peake N. P. 77 (1791) and Wilson *v.* Rastall, 4 T. R. 753 (1792) seem to have been the first to recognize this. Wilson *v.* Rastall is another of the cases which meant a great deal to their generation, but are now landmarks of forgotten struggles.

[12] In 1873, in Minet *v.* Morgan, L. R. 8 Ch. 361, 366, L. C. Selborne said, in commenting on counsel's citation of the earlier rulings, "The law has now attained to a footing which made me a little surprised to hear the matter reopened now."

[13] Quoted *supra*.

[14] Winchester *v.* Fournier, 2 Ves. Sr. 445, 447.

ments already noted (*ante*, § 2285) as essential to such a privilege are here deemed to exist. The policy has been expounded and defended from all points of view in the following passages:

1743, *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1225; Mr. *Recorder* (arguing for the privilege): "My lord, formerly persons appeared in court themselves; but as business multiplied and became more intricate and titles more perplexed, both the distance of places and the multiplicity of business made it absolutely necessary that there should be a set of people who should stand in the place of suitors, and these persons are called attornies. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and attorney to be so great that it would be destructive to all business if attornies were to disclose the business of their clients. In many cases men hold their estates without titles; in others, by such titles, that if their deeds could be got out of their hands, they must lose their fortunes. When persons become purchasers for valuable considerations, and get a deed that makes against them, they are not obliged to disclose whether they have that deed. Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs. The reason why attornies are not to be examined to anything relating to their clients or their affairs is because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it." *Mounteney*, B.; "Mr. Recorder hath very properly mentioned the foundation. . . . that an increase of legal business, and the inabilities of parties to transact that business themselves, made it necessary for them to employ (and as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them; that this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instructions for the carrying on those causes which they found themselves under a necessity of intrusting to their care."

1833, L. C. *Brougham*, in *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 103: "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers). But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."

1876, *Jessel*, M. R., in *Anderson* v. *Bank*, L. R. 2 Ch. D. 644, 649: "The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of

his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

1833, *Shaw*, C. J., in *Hatton* v. *Robinson*, 14 Pick. 416, 422: "This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."

1895, *Emery*, J., in *Wade* v. *Ridley*, 87 Me. 368, 32 Atl. 975: "An order of men, honorable, enlightened, learned in the law, and skilled in legal procedure, is essential to the beneficent administration of justice. The aid of such men is now practically indispensable to the orderly, accurate, and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts without fear that his statements may be possibly used against him."

1837, *Anon.* ("C."), in The Law Magazine, XVII, 68, *Production of Cases prepared for the Opinion of Counsel:* "[1] One great object of our legal system is that the rights of all persons shall be submitted with equal force to our courts of justice. . . . Let the person be who he may, strong or weak, learned or unlearned, wise or foolish, a man of influence and invested with authority, or destitute of means and utterly helpless, his claims are equally to be laid before the judge with all the power of advocacy of which they are susceptible. To accomplish this object, the first indispensable requisite is, that the client shall state to his legal advisers *all* the facts of his case. Very few clients can perceive wherein their strength lies. They must state *the whole* to the legal adviser, and leave him to form his own judgment. By this means the balance is adjusted. The weakness of the client finds a compensation in his lawyer's strength: the looseness of thought, carelessness and inaccuracy of the one, in the precision and subtlety and judgment of the other; and thus every man's case is brought with nearly equal ability and chance of success under the consideration of the judge. But how will a client venture to lay before his counsel a statement of all the facts of his case, if that very statement may hereafter be evidenced against him? There will be an end to equality, if one person has an advantage over another, because he is sufficiently cunning in the law to know what may, and what may not, be safely revealed to counsel. Such equality never can exist, unless client and counsel are completely identified, and their communications held to be as impervious to judicial investigation, as if they never had been uttered. [2] It is a received axiom, that every man knows the law. The axiom works but little injustice, because every man can ascertain the law by consulting a lawyer. But then the conditiou, upon which this power of ascertaining the law will rest, is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost exteut, or it will not be made. Thus it will be one consequence of the rule, that the law will be in no way open to the community at large; to them it will be a sealed book ; and this axiom, from which every decision, in a greater or less degree, derives its justification in point of morality, will work very grievous injury. . . . [3] We would ask whether the advocates of this rule

have seriously considered the fearful relation which it will create between a lawyer and his client. We are not so utopian as to suppose that, in the long lists of our profession, names will not be found of lawyers treacherous to their clients, of men who '*scire volunt secreta domus atque inde timeri.*' Such lawyers, if this rule is to prevail, will have their clients at their mercy, and may at any moment contrive their ruin. . . Many of our readers will recollect the passage in Mr. Bentham's work upon 'Judicial Evidence,' in which he maintains the propriety of compelling lawyers to disclose the secrets of their clients. In the note upon this passage in Mr. Dumont's very pertinent remark: 'Admit this opinion of Mr. Bentham, it is said, and the accused have no longer counsel; they are surrounded by agents of justice and the police, against whom they ought to be so much the more upon their guard, as no man of a noble or elevated mind would stoop to such an employment. They are so many spies and informers placed round the accused. This is to suppress the defence entirely, . . . [4] Our limits confine us to only one more argument bearing upon the subject before us. Mr. Preston once said, that out of thirty questions submitted for his consideration, not more than one found its way into a court of justice. Indeed, the adjustment of disputes by the opinion of counsel takes place so far more frequently than by a suit or trial, that it may be said to form in this country the practical administration of civil justice. . . . 'The greatest trust,' says Lord Bacon, 'between men and men, is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors they commit the whole, by how much the more they are obliged to all faith and integrity.' The condition upon which alone this counsel can be given requires particular attention. The lawyer must have the *whole* of his client's case, or he cannot pretend to give any useful advice. Upon a partial statement of facts he may judge correctly, and yet give his opinion in favour of a claim, which, if he had known all the circumstances, he would have perceived to be unjust, and which a court of justice upon full investigation at once overthrows. That the whole will not be told to counsel unless the privilege is confidential, is perfectly clear. A man who seeks advice, seeks it because he believes that he may do so safely; he will rarely make disclosures which may be used against him; rather than create an adverse witness in his lawyer, he will refuse all private arbitration, and take the chance of a trial. We submit, that any rule which tends to prevent the settlement of quarrels by such arbitration will work an enormous evil. Our judges ought to pause before they sanction the received rule upon the production of cases, which, as it interferes with the communication between client and counsel, renders it dangerous to adopt this course, so easy and so safe, so free from vexation, and satisfactory to all honourable minds."[1]

Can these plausible reasonings be questioned? Is there lacking no one of those four essential elements (*ante*, § 2285) for a privilege against disclosing communications? Rarely indeed has any question been made of the soundness of this privilege. Nevertheless, how much there is to be said in answer can hardly be appreciated until we have heard the incisive arguments of Bentham, who stands out, with Lord Langdale and Chief Justice Appleton, as the only eminent names enrolled in our annals in radical opposition to the privilege:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. IV, c. 5 (Bowring's ed., vol. VII, pp. 474 ff.): "When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court,

[1] The reasons in favor of the privilege have also been set forth, impartially but forcefully, by Edward Livingston (*circa* 1823), in his Introductory Report to the Code of Evidence (Works, ed. 1872, I, 459–467), in a passage which, next to the one last quoted, is perhaps the best of all treatments of the subject.

might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? [1] Oh, because 'to betray a trust is treachery; and an act of treachery is an immoral act.' . . . If the law adviser, of his own motion, the law neither commanding nor forbidding him, were to offer his testimony for the purpose of promoting the conviction of his client, the imputation of treachery would have, if not a good ground, at any rate a better, a more plausible ground. But the question is not, whether the lawyer shall thus offer his testimony; but, whether the law shall command it, or authorize him, nay force him, to refuse it. . . . [2] But if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be,) the consequence will be, that no such confidence will be reposed. Not reposed? Well; and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be, 'Remember that, whatever you say to me, I shall be obliged to tell, if asked about it.' What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present. . . . [3] 'A counsel, solicitor, or attorney, cannot conduct the cause of his client, (it has been observed) 'if he is not fully instructed in the circumstances attending it; but the client' (it is added) 'could not give the instructions *with safety*, if the facts confided to his advocate were to be disclosed.' Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it. . . . [4. It has been argued[2] by a defender of this privilege that the guilty are entitled to be protected to a certain extent; that supposed policy has been thus phrased:] 'Even in the few instances where the accused has intrusted his defender with a full confession of his crime, we hold it to be clear that he may still be lawfully defended. The guilt of which he may be conscious, and which he may have so disclosed, he has still a right to see distinctly proved upon him by legal evidence. . . . Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity; "let us carve him as a feast fit for the gods, not hew him as a carcass for the hounds."' . . . In reading the above declaration, one is at a loss to discover what it is which the writer is aiming at. Does he really think that, all other things being the same, a system of procedure is the better, for affording to criminals a chance of escape? If this be his serious opinion, there is no more to be said; since it must be freely admitted that, reasoning upon this principle, there is no fault to be found with the rule. If it be your object not to find the prisoner guilty, there cannot be a better way than refusing to hear the person who is most likely to know of his guilt, if it exist. The rule is perfectly well adapted to its end; but is that end the true end of procedure? This question surely requires no answer. But if the safety of the innocent, and not that of the guilty, be the object of the reviewer's solicitude, — had he shown how an innocent man could be endangered by his lawyer's telling all he has to tell, he would have delivered something more to the purpose than any illustration which the subject of carcasses and

[2] By Mr. (later L. C. J.) Denman, in the Edinburgh Review, March, 1824, reviewing the original French edition of Mr. Bentham's treatise. The answering argument, following the above quotation, is by Mr. J. S. Mill, who edited his master's treatise, but is conceived in the best Benthamic spirit and is worthy of the context.

hounds could yield. If he can be content for one moment to view the question with other than fox-hunting eyes, even he must perceive that, to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subjected to examination. . . . The denunciation which follows against hunting down human beings without respect for the laws of the chase, is one of those proofs which meet us every day, how little, as yet, even instructed Englishmen are accustomed to look upon judicature as a means to an end, and that end the execution of the law. They speak and act, every now and then, as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play: in a word, that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance. . . . Whence all this dread of the truth? Whence comes it that anyone loves darkness better than light, except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as the enemy of innocence — as scattering its punishments with so ill-directed and so unsparing a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them, than the most abandoned of malefactors? Whether the law be really in this state, I will not take upon myself to say; sure I am, that if it be, it is high time it should be amended. But if it be not, where is the cause of alarm? In men's consciousness of their own improbity. . . . [5] Thus much in vindication of the proposed rule [abolishing the privilege]. As for its advantages, they are to be sought for not so much in its direct, as in its indirect, operation. The party himself having been, as he ought to be, previously subjected to interrogation, his lawyer's evidence, which, though good of its kind, is no better than hearsay evidence, would not often add any new facts to those which had already been extracted from the lips of the client. The benefit which would arise from the abolition of the exclusionary rule, would consist rather in the higher tone of morality which would be introduced into the profession itself. A rule of law which, in the case of the lawyer, gives an express licence to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessary in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument. We should not then hear an advocate boasting of the artifices by which he had trepanned a deluded jury into a verdict in direct opposition to the strongest evidence; or of the effrontery with which he had, by repeated insults, thrown the faculties of a *bonâ fide* witness into a state of confusion, which had caused him to be taken for a perjurer, and as such disbelieved. Nor would an Old Bailey counsel any longer plume himself upon the number of pickpockets whom, in the course of a long career, he had succeeded in rescuing from the arm of the law. The professional lawyer would be a minister of justice, not an abettor of crime."[3]

1844, Lord *Langdale*, in *Flight* v. *Robinson*, 8 Beav. 22, 36: "I own that it is difficult for me to comprehend how it is possible to apply to such cases the rules which are applied to cases totally different. An innocent man, falsely accused of fraud, will scarcely be desirous of concealing the facts, which he may have stated to his legal adviser for the purpose of obtaining legal protection to which he is justly entitled. A man engaged in a scheme of fraud will be very unwilling to disclose the statement of facts, which he may have made to his legal adviser for the purpose of better enabling him to conceal or to secure and enjoy the fruits of his fraud; and it is a question, which I would willingly submit to the consideration of those who have to decide upon cases of this kind, whether the interests of society and of justice, or the honour and utility of the legal profession, which are

[3] Mr. Bentham's arguments will be found paralleled in the treatise (1860) of his disciple, Chief Justice Appleton of Maine, Evidence, c. X, p. 161.

so closely bound up with those interests, are more or less likely to be promoted, by the author of the fraud being compelled to disclose, or permitted to conceal, the fact of his own admissions contained in such a statement of facts."

At first sight the Benthamic argument seems irresistible. It always comes back to this, that the deterring of a guilty man from seeking legal advice is no harm to justice, while the innocent man has nothing to fear and therefore will not be deterred. In answer to this, nevertheless, three suggestions are to be made, the least weighty of which may be first noticed:

(1) There is in civil cases often *no hard-and-fast line between guilt and innocence,* which will justify us as stigmatizing one or the other party and banning him from our sympathy. In land-titles, for example, the one claimant has perhaps bought in good faith a title resting on a chain of conveyances reaching back to a Government grant, which itself involves a Mexican alcalde's authority; while the other claimant has bought from an occupier who has apparently gained title by adverse possession. The decision of the contested right will depend on some abstract rule of law which produces its effect far back in the tangle of documents, and is wholly irrespective of the personal merits of the claimant's conduct. There *is* no moral right or wrong, in a concrete sense, for either of them. Such was, and still is to some extent, the status of all land-litigation in England, where registration of deeds was practically not observed. We are therefore not necessarily abetting crime or other moral delinquency when we permit the concealment of the party's admissions to his attorney.

(2) Even assuming that the party against whom the law would decide is, by virtue of the illegality (technical or otherwise) of his cause, not to be considered as worthy of aid or encouragement, nevertheless, in a great part of civil litigation, it does not happen that *all the acts and facts on one side have been wholly right* and lawful and all of those on the other wholly wrong and unlawful. There is more commonly a mixture of these qualities, in infinitely varying proportions. Hence we cannot assume that the operation of the supposed deterrent influences upon the client's mind will be as simple as is supposed in Bentham's abstract argument. In other words, it does not commonly happen that A, by reason of the state of his case, will have no fear at all of disclosure, while B, by the same reason, will have all the fear. In a large proportion of cases, each will have something to fear. The consequence would be (if the quantity of unfavorable data in his case be large enough to exercise an influence) that a person who has a partly good cause would often be deterred from consultation by virtue of the bad part or of the part that might possibly (to his notion) be bad. Now the abstinence from seeking legal advice in a good cause is by hypothesis an evil which is fatal to the administration of justice; and even Bentham does not go so far as to question this hypothesis. It should be added that the client's attitude in criminal cases (where we may assume that, if guilty, he is wholly and indivisibly guilty) need not be taken as justifying Bentham's argument in that class of cases; because the communications will there be in effect self-

criminating admissions; and, if they could be obtained from the attorney, the same evils would follow which, as has been seen (*ante*, § 2251), constitute the chief reason for forbidding compulsory self-crimination, — namely, the tendency of the prosecution to degenerate into a reliance upon that mode of proof to the neglect of others. Moreover, it seems more likely that, if the privilege were abolished, guilty persons would no less than before seek legal aid, but would merely refrain from self-criminating confidences; so that the prosecution would not gain at all thereby, while the defendant's adviser would lose the opportunity of exercising that discretion which he sometimes has.

(3) Even assuming, for civil cases, the negative of the foregoing argument — *i. e.* assuming that in any cause one party's case is wholly right and the other's wholly wrong —, still, so far as the wrongdoer is consequently deterred from seeking legal advice, that result is not, as Bentham would have it, an unmixed good; for it does not follow that "a guilty person would not in general derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present." This does not follow except on the assumption that every legal adviser invariably proceeds, on request, to assist, by litigation or otherwise, the unjust causes that may be laid before him by his clients. How far this assumption is true varies no doubt with the individual and the locality. But there are at least many fraternities of the bar among whom are many practitioners who do not pursue such a course. Either they decline the cause utterly, in heinous cases (and even the privilege as it exists would not protect them if they consented to concert with the client a fraud or a crime), or they persuade the client that the cause is hopeless to support, or they secure a settlement with the opponent in which the client's interests are satisfied to the extent that there is any moral justice in them. To guarantee for clients of unjust causes a freedom of consultation with legal advisers cannot be deemed an evil except to the extent that the bar is unprincipled; and in that condition more radical remedies are needed.

(4) The consideration of "treachery," so inviting an argument for Bentham's sarcasms, is after all not to be dismissed with a sneer. It is impalpable and somewhat speculative; but it has a validity nevertheless. It is well emphasized by M. Dumont.[4] If the counsellor were compellable to disclose, "no man," says that very disciple of Bentham, "of a noble or elevated mind would stoop to such an employment."[5] Certainly the position of the legal adviser would be a delicate and disagreeable one; for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the

[4] In the passage above quoted.

[5] V. C. Knight-Bruce, in Pearse *v.* Pearse, 1 DeG. & Sm. 25: "And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a prize to pay for truth itself."

same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist.

After all, the loss to truth is comparatively small, in modern times. It was much greater in the period when the civil party's own privilege of silence was still in force; for then his admissions to his attorney would have constituted a distinct and substantial addition to the available sources of proof. But now that he can be freely interrogated and called to the stand by the opponent and made to disclose on oath all that he knows, it is evident that the disclosure of his admissions made to his attorney would add little to the proof, except so far as the client is a person capable of perjuring himself when interrogated in court.

Nevertheless, the privilege remains an anomaly. Its benefits are all indirect and speculative; its obstruction is plain and concrete. Even the answers to Bentham's argument concede that it is accurate and well-founded in its application to a certain proportion of cases. It is worth preserving for the sake of a general policy; but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[6]

§ 2292. **General Principle; Statutory Definitions.** The phrasing of the general principle, so as to represent all its essentials, but only essentials, and to group them in natural sequence, is a matter of some difficulty. The following form seems to accomplish this: (1) *Where legal advice of any kind is sought* (2) *from a professional legal adviser in his capacity as such*, (3) *the communications relevant to that purpose*, (4) *made in confidence* (5) *by the client*, (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal adviser*, (8) *except the client waives the protection.* These various parts will be taken up in the above order.

It may here be noted that the privilege has in many jurisdictions been embodied in statutes.[1] These have seldom helped to settle any mooted point;

[6] 1828, Best, C. J., in Broad *v.* Pitt, 1 M. & M. 233, 3 C. & P. 518 ("The privilege is an anomaly, and ought not to be extended"); 1831, Shaw, C. J., in Foster *v.* Hall, 12 Pick. 89, 97 ("This rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly").

[1] *Eng.*: for a discussion of the attorney's privilege as affected by the Bankruptcy Act of 1883, see Mr. G. W. Edwards' article in 33 Law Journ. 489 (1898); *Alaska* C. C. P. 1900, § 1036 (like Or. Annot. C. 1892, § 712, par. 2); *Ariz.* Rev. St. 1887, § 2039 (like Cal. C. C. P. § 1881); *Ark.* Stats. 1894, § 2916 (5) ("an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent," is incompetent); *Cal.* C. C. P. 1872, § 1881 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: . . . 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment"; amended by the Commissioners in 1901 by adding: "nor can an attorney's secretary, stenographer, or clerk, be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity; but no communication is privileged under this subdivision when the same was made with the intention that it should be communicated to any person having an interest adverse to the client, or when the same was made in furtherance of a crime or fraud then being perpetrated or in contemplation"); § 1882, added by amend-

but on the other hand they have seldom chanced to disfigure the common-law rule or to unsettle its logical development. Their phraseology is commonly

ment of the Commissioners in 1901 ("Consent to the giving of such testimony as is mentioned in section 1881 is conclusively implied in the following cases: 1, When the person who made any communication mentioned in that section testifies, without objection on his part, as to such communication or any part thereof, the person to whom such communication was made may be examined fully, in the same action or proceeding, as to such communication; 2, When a person employs an attorney to prepare his will, the attorney may, in any proceeding for the probate or revocation of probate of such will, testify, as to the contents of such will if lost or destroyed, and as to all information and instructions received by him from the testator, in the course of the preparation or execution of such will, and relating thereto; 3, When a husband or wife has become incompetent or is dead, the other spouse may, in an action or proceeding to which the guardian or personal representative of such incompetent or deceased person is a party, and with the consent of such guardian or personal representative, testify as to communications made by such incompetent or deceased person, but must not be compelled to so testify; 4, In an action brought by the beneficiary to recover on a policy of life insurance, taken out by the person whose life was insured, a physician or surgeon may, with the consent of the beneficiary, testify as to any information acquired by him in attending the deceased, but must not be compelled to so testify. Nothing in this section contained affects the right of the Court to admit any of the testimony mentioned in section 1881, when no objection is seasonably interposed thereto, or when the Court finds, as an inference from proper evidence, that the consent mentioned in that section has been given or implied"); for the validity of these amendments, see *ante*, § 488; *Colo.* Annot. Stats. 1891, § 4824 (like Cal. C. C. P. § 1881); § 4825 (waiver by consent, allowed, quoted *ante*, § 488); *Ga.* Code 1895, § 5198, par. 2 (communications "between attorney or counsel and client" are excluded); § 5199 ("communications to any attorney, or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof," are inadmissible; "so the attorney cannot disclose the advice or counsel he may give to his client, nor produce or deliver up title-deeds or other papers, except evidences of debt left in his possession by his client; this rule does not exclude the attorney as a witness to any facts which may transpire in connection with his employment"); § 5271, Cr. C. § 1011, par. 5 ("No attorney shall be competent or compellable to testify in any court in this State, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner"; as to an attorney's testimony in general, under this statute, see the cases cited *ante*, § 1911); §§ 3947, 5288 (a witness need not disclose "the advice of his professional advisers, nor his consultation with them"); *Ida.* Rev. St. 1887, § 5958 (like Cal. C. C. P. § 1881); *Ind.* Rev. St. 1897, § 507 ("Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases," shall not be competent); *Ia.* Code 1897, § 4608 ("No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred"); amended by St. 1900, 28th Gen. Ass. c. 125, § 1 (by inserting the word "such" before "person"); *Ky.* C. C. P. 1895, § 606, par. 5 ("No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent"); *La.* Rev. Civ. C. 1888, § 2283 ("No attorney or counsellor at law shall give evidences of anything that has been confided to him by his client, without the consent of such client"); *Minn.* Gen. St. 1894, § 5662 ("There are particular relations [etc., as in Cal. Code] . . . : Second, An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional duty"); amended by St. 1895, c. 31 (by adding "nor can any employee of such attorney be examined without the consent of such client as to any such communication or advice"); *Mo.* Rev. St. 1889, § 8925: ("The following persons shall be incompetent to testify: . . . third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client"); *Mont.* C. C. P. 1895, § 3163 (2) (like Cal. C. C. P. § 1881); *Nebr.* Comp. St. 1899, § 5902 ("The following persons shall be incompetent to testify: . . . fourth, an attorney, concerning any communication made to him by his client during that relation or his advice thereon, without the client's consent in open court or in writing produced in court"); § 5907 ("No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his

ignored by the Courts, as being merely an attempt to name and to embody the common-law privilege.

1. "Where legal advice of any kind is sought"

§ 2294. **Privilege is irrespective of Litigation begun or contemplated; History of the Doctrine.** Under the original theory of the privilege (*ante*, § 2290) the confidences of the client were respected only when given for the purpose of securing aid in litigation, and in the very litigation in which they were

office according to the usual course of practice or discipline"); § 5908 (preceding prohibition not to apply "to cases where the party in whose favor the respective prohibitions are enacted waives the rights thereby conferred"); *Nev.* Gen. St. 1885, § 3404 (substantially like Cal. C. C. P. § 1881); *N. Y.* C. C. P. 1877, § 835, as amended by Laws 1896, c. 564 ("an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment; [L. 1896] nor shall any clerk, stenographer, or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon"); § 836, as amended by L. 1877, c. 416, L. 1891, c. 381, L. 1892, c. 514, L. 1893, c. 295, L. 1899, c. 53 ("The last three sections apply to any examination of a person as witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . client; . . . But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. . . . The waivers herein provided for must be made in open court on the trial of the action or proceeding and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties may prior to the trial stipulate for such waiver and the same shall be sufficient therefor"); *N. C.* Code 1883, § 1349 (on a charge of "fraud upon the State," no answer shall be refused "because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud"); *N. D.* Rev. C. 1895, § 5703 (like Cal. C. C. P. § 1881); § 5704 ("If a person offers himself as a witness," it is a consent to his attorney's examination "on the same subject"); *Oh.* Annot. Rev. St. 1898, § 5241 ("The following persons shall not testify in certain respects: 1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject"); *Okl.* Stats. 1893, § 335 ("The following persons shall be incompetent to testify: . . . Fourth, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent; . . . provided that, if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if [of ?] an attorney, clergyman or priest, physician or surgeon, on the same subject, within the meaning of the last three subdivisions of this section"); *Pa.* St. 1887, Pub. L. 158, § 2, P. & L. Dig., Witnesses § 5 ("Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case the privilege be waived upon the trial by the client"); *S. D.* Stats. 1899, § 6544 (like Cal. C. C. P. § 1881); § 6545 (like N. D. Rev. C. § 5704); *Tenn.* Code 1896, § 5785 ("No attorney or counsel shall be permitted, in giving testimony against a client or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of the suit, before or afterwards, to his injury"); *Tex.* Pen. C. 1895, § 773 ("[All other persons are competent,] . . . except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship"); *Utah* Rev. St. 1898, § 3414 (like Cal. C. C. P. § 1881; adding "nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which had been acquired in such capacity"); *Vt.* St. 1894, § 5273 (officer of prison is not to testify to a communication between prisoner and counsel concerning preparation for trial); *Wash.* C. & Stats. 1897, § 5994 (like Cal. C. C. P. § 1881, inserting "or counselor"); *Wis.* Stats. 1898, § 4076 (like N. Y. C. C. P. § 835); *Wyo.* Rev. St. 1887, § 2589 ("The following persons shall not testify in certain respects: First, an attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject").

given. It is obvious, however, that this limitation would be wholly inconsistent with the modern theory of the privilege (*ante*, § 2291). That theory, however, was slow in making its logic felt. Even after it had become the acknowledged basis of the privilege, the abolition of the earlier limitations was not attained (in England, at least) until after nearly a century of rulings, in the course of which the expansion was gradually taking place.

(1) The first stage of expansion consisted in extending the privilege to the *attorney's testimony* concerning confidences made in *some other litigation*, now ended and not at bar. Up to the end of the 1700s these had generally been regarded as without the privilege,[1] although the broader view had begun to make headway.[2] It was next seen that the principle applied equally to communications made *in contemplation of a suit*,[3] or even *after dispute arisen* though not directly with a view to litigation.[4] Meantime, and while this was still the extreme limit of the orthodox view, it had been ruled that communications made in seeking *legal advice for any purpose* were within the principle of the privilege.[5] Within a short time after Lord Tenterden's death this final step was judicially accepted, and has never since been doubted to be the law.[6]

(2) But this expansion had thus far affected only the compulsion of the attorney. The rule for the *client himself* was passing more tardily through an independent though parallel development. Originally, as already noticed (*ante*, § 2290), the privilege did not protect the client himself from the usual

[1] See the remarks of Bowes, C. B., in 1743, in Annesley *v.* Anglesea, quoted *supra*, § 2290. In the cases of the 1600s, there quoted, the plain inference is the same. In 1792, L. C. J. Kenyon, in Duffin *v.* Smith, Peake N. P. 108, referred to the privilege as covering only communications "for the purpose of his defence." In 1799, the same judge, in Sloman *v.* Herne, 2 Esp. 696, refused to compel an attorney to disclose a communication from clients in another cause, "the parties were virtually the same" being his ground of decision.

[2] It had been advanced in 1743 by Dawson, B., in Annesley *v.* Anglesea, *supra*. The first rulings seem to be the following: 1791, Du Barré *v.* Livette, Peake N. P. 77 (communications excluded, though the suit had ended); 1792, Wilson *v.* Rastall, 4 T. R. 753, 759 (Buller, J.: "In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is closed forever").

[3] 1809, Gainsford *v.* Grammar, 2 Camp. 9 (communications before suit begun, privileged); 1819, Wadsworth *v.* Hamshaw, 2 B. & B. 5, note, Abbott, C. J. (communications as to a dissolution of partnership, not privileged, but only those "related to a cause existing at the time of the communication or then about to be commenced"); 1824, Williams *v.* Mudie, 1 C. & P. 158, Ry. & Mo. 34 (Abbott, C. J., held that "whatever is communicated for the purpose of bringing or defending an action is privileged, but not otherwise; . . . I have considered the subject a great deal, and my mind is made up upon it"); 1828, Broad *v.* Pitt, 3 C. & P. 518, 1 M. & M. 233, Best, C. J. (communications not "made for the purpose of a suit or proceeding intended or apprehended," not privileged; here, the time of a deed's execution).

[4] 1830, Clark *v.* Clark, 1 Mo. & Rob. 3 (L. C. J. Tenterden (Abbott) further expounded his view by recognizing the privilege for consultations "with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it").

[5] 1820, Cromack *v.* Heathcote, 2 B. & B. 4, Dallas, C. J. (communications as to drawing a deed, privileged; "I know of no such distinction as that arising from the attorney being employed or not employed in the cause").

[6] 1833, Greenough *v.* Gaskell, 1 Myl. & K. 88, 101 (L. C. Brougham declared that, for attorneys, "it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation"); 1833, Moore *v.* Terrell, 4 B. & Ad. 870, 876 (Parke, J., declared that Tindal, C. J., Lyndhurst, L. C. B., and himself, were consulted by Brougham, L. C., in deciding Greenough *v.* Gaskell, and approved of it); 1833, Doe *v.* Harris, 5 C. & P. 592 (Parke, J., declared the limitation of Williams *v.* Mudie to have been recently repudiated by the Chancellor, consulting with the Chief Justices and Chief Baron; meaning the case of Greenough *v.* Gaskell); 1846, Pearse *v.* Pearse, 1 DeG. & Sm. 12, 25, 11 Jur. 52 (V. C. Knight-Bruce: "I suppose Cromack *v.* Heathcote to be now universally acceded to; . . . as far as any discovery by the solicitor or counsel is concerned, the question of the existence of any suit, claim, or dispute, is immaterial").

methods of discovery in equity. As the 1700s drew to a close, it came first to be conceded that "the privilege was that of the client." By this time, a recognition began to be given to the logical consequence that he could not be interrogated as to communications made *for the purpose of the litigation at bar;* yet the tradition was apparently still to the contrary.[7] The case of Preston *v.* Carr, in 1826, was the last effort to preserve this tradition.[8] It was thereafter immediately settled, by a series of nearly simultaneous rulings, that communications relative to the cause at bar, or even in contemplation of it, were protected from discovery by the client himself.[9] The question then came to be whether communications made for *other litigations* were also to be privileged. At first even Lord Brougham hesitated to take this step;[10] but Lord Abinger,[11] and then Lord Lyndhurst and his Vice-Chancellor,[12] made the advance. The further extension of the privilege to communications made *in contemplation* of any litigation was then speedily conceded.[13] Here, however,

[7] The early case of Radcliffe *v.* Fursman, in the House of Lords, in 1730 (2 Bro. P. C. 514), much relied upon for the narrower view, is obscurely reported as having compelled the client's discovery of admissions "stated in some case for the opinion of some counsel"; but it was apparently treated by Lord Eldon as practically ignoring the privilege for the client: 1801, Wright *v.* Mayer, 6 Ves. Jr. 280 (L. C. Eldon refused to compel the attorney to produce cases and opinions placed confidentially with him by the client, but intimated that by a motion for production on a bill of discovery against the client himself they could be produced, being "in her power, if in the custody of her attorney"); 1812, Richards *v.* Jackson, 18 id. 472 (L. C. Eldon on a bill of discovery compelled the client to produce his case stated, though not the counsel's opinion, following Radcliffe *v.* Fursman reluctantly; and said that in his experience that had been the practice).

[8] 1826, Preston *v.* Carr, 1 Y. & J. 175 (Alexander, C. B.; the Exchequer compelled the production of two cases stated, apparently for the very litigation in hand).

[9] 1827, Hughes *v.* Biddulph, 4 Russ. 190, L. C. Lyndhurst (letters passed between solicitor and client "in the progress of this cause, and with reference to this cause previously to its being instituted," held privileged); 1827, Vent *v.* Pacey, ib. 193, same judge (letter to a solicitor "with a view to taking the opinion of counsel upon the matter in question and which matter afterwards became the subject of the suit," privileged); 1830, Garland *v.* Scott, 3 Sim. 396 (privilege held to cover communications "passed in the progress of this cause, or with reference to this cause previously to its being instituted"); 1833, Bolton *v.* Liverpool, 1 Myl. & K. 95, 98, L. C. Brougham (a case protected when "laid before counsel in reference to or in contemplation of or pending the suit or action for the purpose of which the production is sought"; preceding cases examined, Hughes *v.* Biddulph approved); 1833, Whitbread *v.* Gurney, 1 Younge 541 (L. C. B. Lyndhurst applied the rule in Bolton *v.* Liverpool); 1837, Nias *v.* R. Co., 3 Myl. & Cr. 355 (L. C. Cottenham; case and opinion concerning the very litigation, but made before bill filed, held privileged).

[10] 1833, Greenough *v.* Gaskell, 1 Myl. & K. 88, 101, L. C. Brougham ("the authorities are that he [the client] must disclose the cases he has laid before counsel for their opinion, unconnected with the suit itself"; while as regards attorneys, "it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation"; though the distinction "seems inconsistent"); 1836, Meath *v.* Winchester, 10 Bligh, N. S. 375 (Lord Brougham, referring to his ruling in Greenough *v.* Gaskell, spoke of the practice theretofore obtaining as "the inveterate and not now to be changed practice in courts of equity," and said that only the case of Radcliffe *v.* Fursman, a ruling of the House of Lords, prevented the overthrow of an illogical limitation now felt by all the judges to be utterly repugnant).

[11] 1836, Knight *v.* Waterford, 2 Y. & C. Ch. 22, 31, 41 (L. C. B. Abinger disapproved of the ruling in Bolton *v.* Liverpool in so far as it refused the privilege for cases stated in litigation prior to or other than the pending one; here intimating that the privilege extended to a brief filed in a suit in 1683).

[12] 1842, Herring *v.* Clobery, 1 Phil. Ch. 91 (L. C. Lyndhurst's principle, quoted *infra*, § 2295, went this far); 1842, Combe *v.* London, 1 Y. & C. Ch. C. 631, 650, Shadwell, V. C. (cases prepared and opinions taken for litigations with other parties were protected, the issues being the same or related); 1843, Hughes *v.* Garnous, 6 Beav. 352 (correspondence in another suit, indirectly involved, held privileged); 1844, Holmes *v.* Baddeley, 1 Phil. Ch. 476, L. C. Lyndhurst (cases and opinions given for another suit with another party concerning the same property, and possibly raising a similar issue, held privileged; overruling Lord Langdale's decision below in 6 Beav. 521).

[13] 1842, Herring *v.* Clobery, *supra;* 1842, Clagett *v.* Phillips, 2 Y. & C. Ch. C. 82, Knight-Bruce, V. C. (communication privileged, if a dispute had arisen which "might terminate in

a stand was made by Lord Langdale, Master of the Rolls, the determined opponent of the privilege; he, with Vice-Chancellor Wigram, succeeded for a short space in restricting it at most to communications made *after dispute arisen*, though irrespective of litigation contemplated.[14] But Lord Chancellor Lyndhurst was already on record, in Herring *v.* Clobery, as favoring the final and broadest expansion to communications seeking *any legal advice* under all circumstances.[15] For another twenty years this final step remained arguable.[16] But logic prevailed; and after Minet *v.* Morgan there was no pretext for doubt as to the law in England.[17] Thereafter, for the client and for the attorney the broad boundaries of the privilege were the same.

In the United States this lengthy controversy seems never to have found echoes. With the exception of one or two early rulings observing some of the original English limitations,[18] the Courts seemed to gravitate naturally to the largest interpretation of the privilege.[19] Mr. Justice Selden, of New

a suit"); 1844, Flight *v.* Robinson, 8 Beav. 22, 38, Lord Langdale, M. R. (cited *infra*). The supposed authority of Radcliffe *v.* Fursman, and the limitation, hitherto obtaining up to the 1830s, in tradition and practice, to consultations concerning the litigation in hand, was carefully discussed and strongly deprecated in 1837 and 1843, in two articles in the London Law Magazine (vol. 17, p. 51, and vol. 30, p. 107) which must have had much influence on professional opinion.

[14] 1843, Walsingham *v.* Goodricke, 3 Hare 122, 125 (Wigram, V. C., after noting that prior decisions recognized the privilege for those communications only which were had after dispute arising, though not in contemplation of litigation, apparently declined to recognize it for those had "before any dispute arose"); 1843, Woods *v.* Woods, 4 id. 83 (Wigram, V. C., repeated his views as expressed in the prior case); 1844, Flight *v.* Robinson, 8 Beav. 22, 38 (Lord Langdale, M. R., restricted the privilege to communications taking place "either in the progress of the suit, or with reference to the suit previously to its commencement"); 1845, Carpmael *v.* Powis, 9 Beav. 16, 20 (Lord Langdale, as to his former denial of the privilege where "no litigation was contemplated," conceded that "this doctrine has been overruled"); 1845, Reece *v.* Trye, ib. 316 (Lord Langdale conceded that the protection was not confined to communications in contemplation of litigation; reluctantly acknowledging that his own view "has not been approved"); 1848, Penruddock *v.* Hammond, 11 id. 59 (similar to Reece *v.* Trye).

[15] 1842, Herring *v.* Clobery, 1 Phil. Ch. 91 (quoted *infra*, § 2295). This view had been advanced many years before, in a ruling little noticed: 1821, Walker *v.* Wildman, 6 Madd. 47 (Leach, V. C.; privilege held to apply not merely to "communications pending an action," but to every communication "for professional assistance").

[16] 1846, Pearse *v.* Pearse, 1 DeG. & Sm. 12, 25, 11 Jur. 50 (V. C. Knight-Bruce declared that it was "not a disputable point" that "the question of the existence or non-existence of any suit, claim, or dispute, is immaterial"; Herring *v.* Clobery declared to state the rule correctly); 1855, Manser *v.* Dix, 1 K. & J. 451, 453 (Page-Wood, V. C., was perplexed by the prior rulings, and was inclined to draw the line at communications made with reference to a dispute, including possible as well as actual disputes, and therefore held as privileged a communication made regarding a supposed defect on the title, as being a consultation "against all possible claimants who may hereafter dispute the title"); 1859, Lawrence *v.* Campbell, 4 Drew. 485 (Kindersley, V. C., declared that "it is not now necessary, as it formerly was, . . . that the communications should be made either during or relating to an actual or even to an expected litigation"); 1866, Jenkyns *v.* Bushby, L. R. 2 Eq. 547 (case and opinion, prepared for defendant's predecessor for litigation as to the same property, held privileged).

[17] 1873, Minet *v.* Morgan, L. R. 8 Ch. 361, 366 (L. C. Selborne reviewed the cases, and approved the broad principle of Pearse *v.* Pearse; "the law has now attained to a footing which made me a little surprised to hear the matter reopened now"); 1889, Lowden *v.* Blakey, L. R. 23 Q. B. D. 332 (Minet *v.* Morgan approved); 1891, O'Shea *v.* Wood, Prob. 287 (modern doctrine approved).

In Canada, the doubt in English practice was reflected in a contemporary ruling: 1865, Macdonald *v.* Putman, 11 Grant Ch. 258, 264 (communications from the client, held not privileged if not made pending or anticipating litigation; otherwise of the attorney; here the then English cases and their uncertainty were considered); 1874, Hamelyn *v.* White, 6 Ont. Pr. 143 (Minet *v.* Morgan followed; Macdonald *v.* Putman practically repudiated).

[18] 1829, Dixon *v.* Parmelee, 2 Vt. 185, 188; 1845, March *v.* Ludlum, 3 Sandf. Ch. 35, 49 (Sandford, V. C., recognizes the privilege as applying "where there is a dispute," though no litigation actual or contemplated).

[19] Besides the following rulings, the doctrine is of course now assumed in almost every opinion

York, alone raised his voice in opposition.[20] The reasons for this contrast, and for the easy acceptance of the broader rule with us, may be guessed without much risk of error. In the first place, there was not the same strong body of direct tradition to be overcome. The profession of the attorneys was in many of our colonies for a long time unrecognized; and there can hardly have been any inheritance of the old principle to stand in the way of the logic of the newer theory. But, more than this, the functions of counsel and attorney not having been with us maintained in separation, the chief occasion for the long-drawn-out English controversy was lacking, — namely, the existence of a complete written statement of facts by the party himself, available against him as an admission, in the form of a "case made for counsel," customarily presented to the latter by the attorney for an opinion before venturing on litigation. This it was which, in English practice, formed the objective eagerly sought after by bills of discovery, and was only protected from disclosure by the bulwark of the present privilege. Most of the rulings in the long list already examined were concerned with demands for the production by the client of this key to his case; and under the rules of discovery (*ante*, §§ 1846, 1857, 2219) most of its parts must have been demandable except as they might fall within the present privilege.[21] It is no wonder that the loss of such an advantage was so stubbornly contested by inquisitive opponents. In the United States, however, no "case" needed to be stated in this written form; for counsel and attorney were one. The client's admissions to his adviser were likely to be made orally; and the chance of extracting from him a repetition of the same admissions by answers to interrogatories was of little value, compared to the opportunity of inspecting the unchangeable writing which he was obliged, in English practice, to commit to the counsel's hands. All that was to be obtained by discovery, under the other practice, was the preëxisting documents of title or obligation, and these were not to be protected by the attorney-privilege.[21] There was thus no appreciable motive for raising the distinctions which marked the successive stages of development in England, nor for struggling so long at each successive outpost in the extension of the privilege. The progress of its logic was unimpeded.

discussing the privilege at large: 1845, State *v.* Marshall, 8 Ala. 302, 306; 1860, Bobo *v.* Bryson, 21 Ark. 387; 1899, Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654 (instructions as to drawing a bill of sale, excluded); 1856, Johnson *v.* Sullivan, 23 Mo. 474, 479; 1831, Foster *v.* Hall, 12 Pick. 89, 97 (see quotation *infra*, § 2295); 1833, Hatton *v.* Robinson, 14 id. 416, 421; 1848, Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 592, Walworth, C.; 1859, Williams *v.* Fitch, 18 N. Y. 546, 551 (conversation relating to an affidavit for reducing an assessment, held privileged; as to the supposed limitation to judicial proceedings, "it appears to be now settled otherwise, and we think with great propriety"); 1871, Britton *v.* Lorenz, 45 id. 51, 57 (rule confirmed); 1874, Yates *v.* Olmsted, 56 id. 632 (same); 1881, Root *v.* Wright, 84 id. 72, 76 (the rule "extends to communications in reference to all matters which are the proper subject of professional employment"); 1834, Beltzhoover *v.* Blackstock, 3 Watts 20, 27 ("It is sufficient if the witness were consulted professionally and acted or advised as counsel"); 1891, Alexander *v.* U. S., 138 U. S. 353, 359, 11 Sup. 350; 1832, Durkee *v.* Leland, 4 Vt. 612; 1856, Coon *v.* Swan, 30 id. 6, *semble*; 1873, Earle *v.* Grout, 46 id. 113, 125, *semble*; 1814, Parker *v.* Carter, 4 Munf. 273, 287.

[20] Quoted *post*, § 2295.

[21] So far as the documents in such a "case" were not created for the purpose of communicating with the attorney, the limits of privilege still are important; they are examined *post*, § 2318.

§ 2295. **Same: General Principle and Policy.** It has been hitherto assumed that the logic of the modern theory of the privilege (*ante*, § 2290) leads inevitably to the broad scope of rule just noticed. But is this its inevitable result? Does the policy of securing subjective freedom of consultation for the client require us to guarantee that freedom as well for non-litigious as for litigious consultation? To argue that every right and obligation is potentially the subject of litigation is natural; but this, though abstractly true and sufficient, is hardly tangible enough to support so broad a claim of expansion. The case against expansion, from this point of view, has been made the most of in the following passage:

1864, *Selden*, J., in *Whiting* v. *Barney*, 30 N. Y. 330, 332: "As law-suits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys; to facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party. . . . If this was the true foundation of the rule, it would follow, that the protection is confined to communications made with a view to the conduct of a suit, or some judicial proceeding, and it goes most forcibly to confirm and strengthen the direct authority to which I have referred, that in the earlier cases, and while the origin of the rule was most likely to be kept in view, the doctrine would seem to have had this application. . . . But, unfortunately, there is another class of cases, still more numerous, which indicate a different doctrine, viz., that the privilege has no special relation to suits in court or judicial proceedings of any kind, but extends to every case where a member of the legal profession is consulted or employed *professionally*. . . . It seems to me, that enough has been adduced, to make it clear that the privilege iu question is not founded upon any idea of the sacredness of confidential communications, whether made to an attorney or to any other person; nor upon any particular policy of the law which distinguishes the *general* business of an attorney from that of any other class in the community; but it was the result of that rule of the common law, which excused parties from testifying in their own cases, and of the necessity, for the convenience of the public, as well as the benefit of suitors, of having the business of the courts conducted by professional men. Whether, therefore, the recent legislation in this State, compelling parties to testify as witnesses in their own suits, shall be deemed to have removed the whole foundation of the rule, and terminated all necessity for its continuance or not, which may admit of some doubt, it follows, from the views here expressed, if correct, that the protection should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated."

The true answer to Mr. Justice Selden's argument is found by recurring to the basis of all privileges for communications (*ante*, § 2285). Their object is to protect the perfect working of a special relation, wherever confidence is a necessary feature of that perfect working. Now it cannot be denied that professional legal advice is as often needed for avoiding litigation as for carrying it on; still less can it be denied that the avowed ideal of the law, and the prudent custom of the profession, is to diminish litigation by so ordering

the affairs of clients that litigation is not needed to correct their plight. It is a truism that much of litigation is due to the very failure of clients to seek legal advice until a resort to the courts cannot be avoided. Thus the relation of client and legal adviser, and the freedom of entering into it, are of at least equal importance for matters that are still in the non-litigious stage; and the promotion of the relation in that stage tends to prevent its necessity in the further and less desirable stage. The best judicial opinion, therefore, when not opposed (as Lord Langdale was) to the privilege as a whole, has not hesitated to accept the reasoning which leads to the broad rule now universally accepted:

1833, L. C. *Brougham*, in *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 102: "If the protection were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defense against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would be insufficient if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry."

1831, *Shaw*, C. J., in *Foster* v. *Hall*, 12 Pick. 89, 98: "We are of opinion that although this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly; yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defect of title by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes not connected with a suit in court."

§ 2296. **Same: Application to Advice sought for Sundry Non-Legal Purposes; Consultation with Prosecuting Attorneys.** Men do not gather grapes of thorns, nor figs of thistles; yet they may enter one and the same field and find diverse fruits. A lawyer is sometimes employed without reference to his knowledge and discretion in the law, — as where he is charged with finding a profitable investment for trust funds. So, too, one not a lawyer is sometimes asked for legal advice, — as where a policeman or a clerk of court is consulted. It is not easy to frame a definite test for distinguishing legal from non-legal advice. Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature,[1] — as where the financial condition of a shareholder is discussed, in the course of a proceeding to enforce a claim against a corporation. But apart from such cases, the most that can

[1] 1855, Maas *v.* Bloch, 7 Ind. 202 (one part of a conversation being privileged, the rest not, the whole was held protected).

be said, by way of generalization, is that a matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege, unless it clearly appears to be lacking in aspects requiring legal advice. Obviously, much depends upon the circumstances of individual transactions.[2]

The difficulty of drawing the line is noticeable in the case of complaints made to *prosecuting attorneys*. Under our system of criminal prosecution, the injured person does not usually, as in England at common law, employ the counsel, nor became liable for the costs; he may be obliged to make oath to the complaint, but he is in the criminal procedure no more than an informer and a witness. There is, therefore, nominally, for him no cause at issue and no need for legal advice. On the other hand, he may become liable for malicious prosecution, and may therefore desire legal advice before incurring any risk. His application to the prosecuting attorney will therefore usually not involve a request for legal advice in his own interest; yet conceivably it may:

1846, *Lockwood*, J., in *Granger* v. *Warrington*, 8 Ill. 299, 308 (malicious prosecution; the defendant, being plaintiff in a suit for the taking of a horse, had gone to the prosecuting attorney of the county and made complaint preparatory to appearing before the grand jury; the attorney advised him that no indictment would lie): "The relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his statements to him with a view to enable the attorney correctly to understand his cause, so that he may manage it with greater

[2] Various instances are as follows: *England:* 1821, Walker *v.* Wildman, 6 Madd. 47 (Leach, V. C.; privilege held not applicable to employment "in matters not professional, as in a treaty for the purchase of an estate"); 1824, Bramwell, *v.* Lucas, 2 B. & C. 745 ("a question for information as to a matter of fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney and where the character or office of attorney has not been called into action," is not privileged; here, a question by a bankrupt whether the state of things was such that he could attend his creditors' meeting without the prospect of arrest); 1836, Turquand *v.* Knight, 2 M. & W. 98 (consultation of an attorney for procuring a loan, held privileged); 1837, Doe *v.* Watkins, 3 Bing. N. C. 421 (communications by a person desiring to obtain a loan and seeking an attorney C., acting for a lender, held privileged; "C. was to assist professionally in raising the money for the applicant"); 1842, Jones *v.* Pugh, 1 Phil. Ch. 96 (bill by a judgment creditor against P. and his mortgagee, a solicitor; the solicitor, having taken mortgages for his clients in his own name, as an "ordinary part of a solicitor's duty to lay out money for his clients," was not compelled to disclose the names of his *cestuis que trustent*); *United States:* 1899, Turner's Appeal, 72 Conn. 305, 44 Atl. 310 (conversations in regard to the amount receivable from an estate, etc., not privileged); 1895, Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165 (the contents of an insurance policy, the collection of the money, etc., as attorney, held privileged); 1904, State *v.* Gosey, 111 La. — , 35 So. 786 (consultation during trial, between a co-indictee, not on trial, and his counsel, as to the former's consenting to take the stand, held privileged); 1823, Wilson *v.* Troup, 2 Cow. 195, 205, 242 (privilege held applicable to an attorney, acting as a general business agent, so far as the communications concerned professional legal services; here, the foreclosure of a mortgage); 1862, Flack *v.* Neill, 26 Tex. 273, 276 (a "voluntary narrative of the circumstances attending a past transaction," held not privileged on the facts); 1800, Heister *v.* Davis, 3 Yeates 4 (privilege held not to cover the vendor's delivery of a bond to the attorney of the vendee and the latter's statement that he was satisfied with the security); 1849, Moore *v.* Bray, 10 Pa. St. 519, 523 (conversation in regard to a confession of judgment to cover liabilities, and a dispute arising therefrom, held privileged); 1896, Mutual Life Ins. Co. *v.* Selby, 19 C. C. A. 331, 72 Fed. 980 (consultation with an attorney in applying for a pension, excluded); 1900, Burraston *v.* Bank, 22 Utah 328, 62 Pac. 425 (attorney employed to "straighten out an account" by a man who could not read; statements not privileged).

skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights. Did, then, Granger employ Curtiss as an attorney, either to investigate a question of law, in which his private interests were concerned, or to commence or to defend a suit in which he was a party? He clearly had no such object. He had no personal interest in the result at which Curtiss should arrive, and he did not expect to compensate him for his advice. Consequently the relation of client and attorney did not arise; and consequently the conversation was not privileged from being disclosed by Curtiss as a witness. Granger can be considered in no other light than a witness on the part of the people, communicating to the law officer of the government, his knowledge in relation to the commission of a supposed crime, and inquiring of that officer whether the facts thus communicated amounted to an offence. We think that no considerations of public policy require that the conversations between Granger and the State's attorney should be regarded as confidential and privileged." [3]

§ 2297. **Same: Application to Advice in Conveyancing.** A deed or other conveyance is drafted sometimes by the parties, sometimes by a real-estate broker, sometimes (as on the Continent, and formerly in England) by a notary or scrivener, and sometimes by an attorney-at-law. Though it necessarily affects rights and obligations, there is not necessarily a contribution of legal advice in its preparation. It is conceivable, therefore, that an attorney may be asked to draft a deed of a certain tenor, without any express reference to his knowledge of the law. On the other hand, he will undoubtedly use that knowledge, and his employer impliedly requests him to use it, in phrasing the instrument. The question thus arises whether the communications then made by his employer, although they may not in terms concern legal aspects of the transaction, are to be regarded as communications made in the course of an employment for legal advice.

This question has naturally received conflicting answers.[1] The tendency at first in England was to make a sharp distinction between services as a con-

[3] The following rulings deal with this situation: 1846, Granger *v.* Warrington, 8 Ill. 299, 308 (injured party's consultation of a prosecuting attorney, with a view to complaint and indictment, held not privileged; quoted *supra*); 1873, Oliver *v.* Pate, 43 Ind. 132, 139 (consultation with a county prosecuting attorney, for instituting a prosecution, held privileged; the Court's reasoning, however, is substantially upon the principle applicable between informers and government officers, *post*, § 2374); 1877, State *v.* Van Buskirk, 59 Ind. 384, 388 (witness' testimony before a grand jury, in the prosecuting attorney's presence, held not a privileged communication to the latter); 1841, Pierson *v.* Steortz, 1 Morris Ia. 136 (consultation with an "acting magistrate," who "frequently gave advice and counsel" and "usually did the business of the defendant," held not privileged; here it concerned an alleged theft of timber); 1898, Cole *v.* Andrews, 74 Minn. 93, 76 N. W. 962 (consulting a county attorney as public prosecutor to institute a prosecution; not privileged); 1884, Vogel *v.* Gruaz, 110 U. S. 311, 314, 4 Sup. 12 (an injured person's consultation with a State's attorney with reference to securing an indictment, held privileged, but partly on the ground of an informer's privilege, *post*, § 2374). Compare the privilege for communications between *government and informer* (*post*, § 2374), which is often here applicable, and the privilege for communications between *witness and grand jury* (*post*, § 2362).

[1] The early cases dealing with "scriveners" are hardly of any significance, inasmuch as the general principle of privilege tended at that time to include all confidential communications (*ante*, § 2286), and as the occupation of "scrivener," as distinguished from attorney-at-law, was then more common: 16—, Morris and Clayton's Case, cited Freem. Ch. 5 ("that they, being but scriveners, should not have that privilege"); 1675, Harvey *v.* Clayton, 2 Swanst. 221, note (discovery of a mortgage; plea, that defendant "is a scrivener and trusted with men's estates," allowed, "for it may be a ruin to the defendant in his trade to discover it, for no man hereafter will employ him"); 1693, Anon., Skinner 404 (L. C. J. Holt: "It seems to be the same law of a scrivener, . . . for he is a counsel to a man, with whom he will advise, if he be intrusted and educated in such way of practice; otherwise of a gentleman, parson, etc.").

veyancer and services as an attorney-at-law.[2] But this was probably due in part to the original limitation of the privilege to communications for the purpose of litigation (*ante*, § 2294); and since this limitation disappeared, the inclination has been to take the larger view of the privilege in the present respect also.[3] In the United States, the drafting of a *will* has almost always been assumed (and naturally) to bring the testator's communications within the privilege.[4] But for *deeds* and other instruments the privilege has been strictly construed, and where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of the instrument have commonly been admitted.[5] The circumstances of each

[2] 1730 (?), South Sea Co. *v.* Dolliffe, cited in 2 Atk. 524; L. C. King (attorney examined concerning the alteration before execution of a covenant drawn by him; demurrer overruled, "for that what he knew was as the conveyancer only"); 1743, Vaillant *v.* Dodemead, 2 Atk. 524, L. C. Hardwicke (attorney compelled to answer "concerning the proving of the deed of assignment"); 1792, Duffin *v.* Smith, Peake N. P. 108 (attorney compelled to testify to the consideration of a bond and mortgage, since it "does not come to his knowledge in the character of an attorney").

[3] 1820, *Re* Aitkin, 4 B. & Ald. 47 (Abbott, C. J.: "Inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client [in employing him for a conveyance] in the party in respect of his being an attorney"); 1828, Broad *v.* Pitt, 3 C. & P. 518 (Best, C. J.: "A man is not acting as an attorney when he is consulted about a deed"); 1833, Doe *v.* Harris, 5 id. 592, 594 (Parke, J., held that "an application to draw a deed" was a professional consultation); 1846, Carpmael *v.* Powis, 1 Phil. Ch. 687, 692 (L. C. Lyndhurst; communications in regard to preparing a conveyance, fixing bids, etc., held privileged; "it is impossible to split the duties in that manner without getting into inextricable confusion; I consider them all parts of one transaction, the sale of an estate, and that a transaction in which solicitors are ordinarily employed by their clients"); 1889, Lowden *v.* Blakey, L. R. 23 Q. B. D. 332 (communication in regard to the drafting of an advertisement stating the result of a lawsuit, held privileged).

[4] The cases are more conveniently examined *post*, § 2314, under another aspect of the principle.

[5] *Ala.:* 1845, State *v.* Marshall, 8 Ala. 302, 306 (application by a negro to an attorney to draw up a petition to the Legislature for freedom, held to be "such as did not require legal skill in its execution," and therefore not privileged); *Colo.:* 1873, Machette *v.* Wanless, 2 Colo. 169, 179 (conversation with an attorney "simply asked to prepare a mortgage," held not privileged); 1887, Caldwell *v.* Davis, 10 id. 481, 492, 15 Pac. 696 ("the only employment of L. by D. was to draw the release and deed"; conversation held not privileged); *Ill.:* 1861, DeWolf *v.* Strader, 26 Ill. 225, 230 (an attorney "acting as scrivener, merely to draw a deed," and not "consulted as counsel or asked for a legal opinion on a state of facts," held not privileged); 1883, Smith *v.* Long, 106 id. 485, 488 (similar); 1886, Hollenback *v.* Todd, 119 id. 543, 546, 8 N. E. 829 (an attorney who drew the client's assignment and was asked and gave his opinion thereon, held privileged); *Ind.:* 1860, Borum *v.* Fouts, 15 Ind. 50, 53 (consultation of an attorney as scrivener, to draw notes and a bond and to reckon interest, held not privileged); 1887, Hanlon *v.* Doherty, 109 id. 37, 44, 9 N. E. 782 (preceding case approved); *Kan.:* 1893, Sparks *v.* Sparks, 51 Kan. 195, 201, 32 Pac. 892 (a mere scrivener of documents, though professionally an attorney, not privileged); 1903, Grimshaw *v.* Kent, 67 id. 463, 73 Pac. 92 (a lawyer drafting a contract; privilege not applied); *Ky.:* 1892, Carter *v.* West, 93 Ky. 211, 19 S. W. 592 ("in this instance the attorney . . . was the legal adviser of the party, and not a mere scrivener; she was relying on him to see that she got a good title," and the privilege was applied); *Md.:* 1882, Crane *v.* Barkdoll, 59 Md. 534, 538 (here the client "employed the attorney to draw the deed and sought his professional advice in reference to it"; held privileged); *Mass.:* 1833, Hatton *v.* Robinson, 14 Pick. 416, 423 (an attorney drawing a conveyance, held not privileged; quoted *supra*); *Mo.:* 1856, Johnson *v.* Sullivan, 23 Mo. 474, 479 (communications to one "employed in his professional capacity to draft a deed," and to one employed "to prepare insolvent papers," held privileged); *Mont.:* 1899, Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590 (a person was attorney, justice of the peace, and notary; a communication by one securing his services in drawing a deed, and not consulting him for legal advice, held admissible); *N. Y.:* 1881, Root *v.* Wright, 84 N. Y. 74, 76 (privilege held applicable to the drawing of a contract where the attorney's advice was sought as to its terms); *Pa.:* 1888, Goodwin G. S. & M. Co.'s Appeal, 117 Pa. 514, 523, 537, 12 Atl. 736 ("a legal scrivener does not become the repository of confidences within the rule of the law," and is not privileged); *Tex.:* 1891, Stallings *v.* Hullum, 79 Tex. 421, 15 S. W. 677 (communications as to a deed's consideration, made to an attorney employed solely as an abstracter of title, held not privileged); *U. S.:* 1839, Linthicum *v.* Remington, 5 Cr. C. C. 546 (facts stated to the attorney at the time of drawing

case must affect the result; but in general a strict construction is the proper one, especially in those cases where attorneys combine the occupation of real estate and insurance brokers or act also as executive officers of a corporate business. The following opinion is typical of the judicial attitude:

1833, *Shaw*, C. J., in *Hatton* v. *Robinson*, 14 Pick. 416, 422: "There are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney, does not render the communications attending it, privileged; and they may be testified to by him, as by any other agent. . . . We cannot perceive that the communications were made to [the attorney, Mr. Ames,] by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum*, the only purpose seems to have been to satisfy Mr. Ames' mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him, that whatever might be the legal character of the act, it was not intended with moral turpitude. It did satisfy him that he was not to be engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none given. We are therefore necessarily brought to the conclusion, that either these disclosures were made without any particular motive, or if there was a purpose, connected with the proposed draft, it was to satisfy Mr. Ames' mind, upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibited from disclosing."

Assuming that legal advice is in fact being expressly sought, as it commonly is, in connection with the drafting, and that the client's communications are therefore within the privilege, the question then arises whether the *contents* and the *execution* of the instrument, thus coming to the attorney's knowledge by his own vision, are privileged from disclosure. This question depends upon another aspect of the principle (*post*, §§ 2308, 2309).

§ 2298. **Same: Application to Advice in a Criminal or Fraudulent Transaction.** It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise; and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client. But the difficulty has been to define the boundaries of this limitation. It has not always been kept in mind that the privilege, in its very fundamentals, presupposes what Bentham so drastically censured, — the furnishing of legal advice to the culpable client, as well as to the worthy one, *i. e.* to a client who, if the law were duly enforced, would lose in the litigation.

a deed as "attorney, counsellor, and conveyancer," held privileged); *Va.*: 1811, Clay *v.* Williams, 2 Munf. 105, 113, 121, per Roane, J. (privilege held applicable to an attorney drafting a bond and advising as to its legal effect); 1814, Parker *v.* Carter, 4 id. 273, 275, 280, 285 (communications made to an attorney employed to draw such a deed as would settle slaves on his daughter to be exempt from creditors, held privileged); *Wis.*. 1877, Getzlaff *v.* Seliger, 43 Wis. 299, 302 (an attorney giving legal advice in the drafting of a mortgage, held subject to the privilege, though he claimed that he was "acting as a notary and not as attorney").

The cases dealing with the mere *fact of execution* of the instrument, apart from conversations at the time, are examined *post*, § 2309.

How, then, can the privilege continue to exist at all, if any exception is to be made by which the confidences of the guilty are to be disclosed? It is possible, of course, to take merely the practical point of view, and to declare that the privilege must at least cease to be a cloak for criminal conspiracy, regardless of its logic, and to contrive an arbitrary limit for this exception. But it seems hardly necessary thus to do violence to the theory of the privilege. Looking at the reasons of policy upon which it rests (*ante*, § 2291), they appear by their natural limits to end with the same conclusion. They predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrongdoers though they have been, because, as already noticed (*ante*, § 2291), the element of wrong is not always found separated from an element of right; because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress; and because the legal adviser cannot habitually be placed in the position of an informer. But these reasons all cease to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*. From that point onwards, no protection is called for by any of these considerations.

Upon this much there has been a fair consensus among all who have declared themselves upon the subject. But certain minor points of detail still remain, if a practical rule for disclosure is to be settled upon. (1) Must not the advice be sought for a *knowingly* unlawful end? (2) Must not that unlawfulness be either a *crime* or a civil wrong involving *moral turpitude*? (3) Must not the attorney have so far abandoned his professional attitude as to have become, by *assent* to the design, a partaker in the client's intended wrong? The judicial attitudes on these questions may be gathered from the following passages:

1743, *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1229;[1] Serjeant *Tisdall* (arguing): "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Mr. *Harward* (arguing): "I take the distinction to be, that where an attorney comes to the knowledge of a thing that is *malum in se*, against the common rules of morality and honesty, though from his client, and necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public." *Mounteney*, B.: "For God's sake then let us consider, what will be the consequence of the doctrine now laid down [by the defendant] and so earnestly contended for, that such a declaration made by any person to his attorney ought not by that

[1] The facts of this celebrated case will be found stated *post*, § 2310.

attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offence; he is desirous and determined, at all events, to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove this, in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both. . . . The declaration now offered to be proved is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known."

1841, *Bronson*, J., in *Coveney* v. *Tannahill*, 1 Hill N. Y. 33, 35, 41: "It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defence; but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as counsel to see, or aid in the transaction. Indeed, I think there can be no such relation as that of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes. . . . Now, if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may, perhaps, be privileged; and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame, or his property, may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness."

1891, *Green*, V. C., in *Matthews* v. *Hoagland*, 48 N. J. Eq. 455, 469, 21 Atl. 1054: "In order that the rule may apply, there must be both professional confidence and professional employment; but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. As I understand the case, the rule, in its different phases and the reasons, may be thus stated: If the client consults the lawyer with reference to the perpetration of a crime, and they coöperate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime; he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the cooperation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offence."

Looking at the reasons for the privilege, and construing it as strictly as

possible, the first of the above three questions should be answered in the affirmative, but the second and the third in the negative. The decisions apparently reach this general result, except in the second respect, where there is an inclination to mark the line at crime and civil fraud.[2] Yet it is diffi-

[2] *England:* 1673, Rothwell *v.* King, 2 Swanst. 221, note (bill charging the suppression of a will; discovery compelled, "for the trust of counsel does not extend to the suppression of deeds or wills"); 1699, R. *v.* Warden of the Fleet, 12 Mod. 337, 341 (an obscure passage, concerning the limits of the privilege for criminal secrets); 1833, Doe *v.* Harris, 5 C. & P. 592, 594 (conveyance in fraud of creditors; the question being proposed, as preliminary to the ascertainment of the privilege, whether the insolvent had "asked his advice for a lawful or an unlawful purpose," Parke, J., would not allow the question; unsound); 1838, R. *v.* Avery, 8 id. 596 (consultation for the purpose of raising money on a forged will; the privilege was denied, but not on this ground); 1846, R. *v.* Hayward, 2 C. & K. 234, 2 Cox Cr. 23, *s. v.* R. *v.* Jones, 1 Den. Cr. 166 (documents sent to an attorney for advice, including a forged will, with the intent that the attorney should see it and act on it; on a prosecution for forgery, production was compelled); 1846, R. *v.* Farley, 2 C. & K. 313, 2 Cox Cr. 82, 1 Den. Cr. 197 (forgery of a will; the defendant's wife had taken another forged will to a solicitor to obtain an advance of money; this was compelled to be produced); 1846, Reynell *v.* Sprye, 10 Beav. 51, 56, 11 Beav. 618 (a letter procured by defendant to be written by his solicitor to show to plaintiff, held not privileged, as being a part of a plan to deceive; the solicitor "acting as *particeps criminis*, and not in the true relationship of solicitor and client"); 1848, R. *v.* Tylney, 1 Den. Cr. 319 (forgery of a will; the document had been placed by the defendant in a solicitor's hands to "enforce her rights under it"; production was required, the question being reserved but never decided); 1850, Follett *v.* Jefferyes, 1 Sim. N. S. 3, 17 (Lord Cranworth, V. C.; communications respecting an attempt to dispose of property in evasion of creditors, held privileged; "such an act *per se* is no fraud, if the disposition is one which the law allows"); 1851, Russell *v.* Jackson, 9 Hare 387, 391 (Wigram, V. C., referring to a testamentary purpose forbidden by law: "The contriving of a fraud is no part of his duty as solicitor, and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law"); 1863, Charlton *v.* Coombs, 32 L. J. Ch. N. S. 284 (the attorney must be privy to the fraud, in order that the privilege should cease; unsound); 1873, R. *v.* Castro, and Tichborne *v.* Lushington, Report of Case, III, 9, 2381, 5211, quoted in L. R. 14 Q. B. D. 162 (general principle affirmed); 1884, R. *v.* Cox and Railton, L. R. 14 Q. B. D. 153, 164 (conspiracy to defraud creditors; communication preparatory to the conspiracy, the solicitor acting in good faith and without knowledge of the fraud, held not privileged); 1887, Postlethwaite *v.* Rickman, L. R. 35 Ch. D. 722, 724 (general principle applied to certain frauds by trustees); 1895, Williams *v.* Quebrada R. L. & C. Co., 2 Ch. 751 (fraud by a corporation upon its bondholders; corporate minute-books and legal opinions in reference to the plan, held not privileged; there is no distinction between crime and civil fraud); 1900, R. *v.* Bullivant, 2 Q. B. 163 (testator's instructions as to a conveyance to be made with intent to evade succession taxes, held not privileged).

Canada: 1864, Mackenzie *v.* Mackenzie, 9 Low. Can. Jur. 87 (testimony as to the client's money or goods in the attorney's hands, held not privileged, where the issue was whether they had been there placed to evade the law); 1873, Ethier *v.* Homier, 18 id. 83 (the privilege does not apply where the advocate is "not only adviser, but also party to the transaction"; here an attorney was compelled to testify whether he wrote a libellous letter at the client's instance).

United States: 1884, State *v.* Barrows, 52 Conn. 323, 325 (the client's statement that she intended to testify differently from what she had already said, held not a confession of intended perjury, and therefore without the rule; general principle expressly reserved from decision); 1902, Supplee *v.* Hall, — id. — , 52 Atl. 407 (validity of a mortgage as against creditors; questions to the mortgagor's attorney as to information acquired in consultations contemplating "some conduct which might render him liable to a civil action by reason of actual or constructive fraud," held privileged); 1893, State *v.* Kidd, 89 Ia. 54, 56 N. W. 263 (sending a false copy of a jury's findings to the attorney, with intent to deceive himself and the Court, held not privileged); 1851, McLellan *v.* Longfellow, 32 Me. 494 (conversations while seeking advice for the drafting of a bill of sale, held privileged); 1870, Higbee *v.* Dresser, 103 Mass. 523, 526 ("a mere suggestion of fraud, in general terms," is not sufficient); 1903, State *v.* Faulkner, — Mo. — , 75 S. W. 116 (communication after the crime was complete; "to assist one criminal in requiring or inducing his confederate in crime to disgorge the price of his crime," held not privileged); 1891, Matthews *v.* Hoagland, 48 N. J. Eq. 455, 465, 21 Atl. 1054 (quoted *supra;* privilege held applicable to a contemplated fraud, as well as a crime, for which the attorney's advice is sought; "it falls within the rule as to crime"; Bank *v.* Mersereau, N. Y., declared to be founded on unsatisfactory authority; R. *v.* Cox and Railton, Eng., approved); 1848, Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 598, Walworth, C. (privilege held applicable to communications concerning a proposed fraud upon creditors; the exception extending only to "a felony or other crime which was *malum in se*"; but "I admit I should have

cult to see how any moral line can properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be. The law, in its endeavor to maintain abstract fundamentals, is already sufficiently callous to concrete failures of justice, and needs rather to cultivate greater sensitiveness in such matters.

2. "From a professional legal adviser in his capacity as such"

§ 2300. **Persons having Legal Knowledge, but not Admitted to Practice.** There is no ground for encouraging the relation of client and legal adviser except when it is formed with one who has been formally admitted to the office of attorney or counsellor as duly qualified to give legal advice. That the person consulted is in fact practising, without formal sanction of the Court, is certainly not sufficient.[1] On the other hand, where a distinct sanction is required for the several grades of Courts within the same sovereignty, a practitioner admitted for a lower Court only is clearly within the privilege for the purpose of litigation before that Court. So, too, a duly admitted practitioner, while acting for a client belonging to his jurisdiction, is within the privilege in whatever other jurisdiction it may be invoked.[2] In the few jurisdictions still maintaining the self-stultifying rule that every citizen, even though not possessing any specific qualifications, is entitled to practise at the bar, it may be supposed that a *de facto* professional practice suffices.[3] Finally, a mere student of law, aspiring to future entrance to the profession, is without the privilege, however much legal skill he may possess in comparison with some of those who are within it.[4]

been much better satisfied if I had found this question an open one"); 1841, Coveney *v.* Tannahill, 1 Hill N. Y. 33, 35, 41 (privilege held not to cover the execution of an instrument in fraud of creditors; quoted *supra*); 1858, M'Mannus *v.* State, 2 Head 213, 216 (questions as to "a contemplated crime," held not privileged); 1891, Alexander *v.* U. S., 138 U. S. 353, 357, 11 Sup. 350 (communication with regard to a crime or fraud, held privileged otherwise than in the trial "for the crime in furtherance of which the communication was made"; this distinction is groundless, upon either principle or precedent, and seems to have been due to a confusion of the old controversy (*ante*, § 2294) as to communications for other litigation); 1875, People *v.* Mahon, 1 Utah 205, 208 (communications relating to a contemplated forgery, held not privileged); 1854, Dudley *v.* Beck, 3 Wis. 274, 283 (fraud; question reserved, whether the mere disclosure of a fraud and the request for aid thereiu is privileged; but here a fraudulent agreement between client and attorney to act together was held not privileged).

[1] 1880, Slade *v.* Tucker, L. R. 14 Ch. D. 824, 827 (communications to a pursuivant of the Herald's College, assisting in a pedigree protest, held not privileged); 1859, Sample *v.* Frost, 10 Ia. 266 (consultation with one who "was receiving business to transact as an attorney and expecting to be admitted and was admitted at the next term," held not privileged); 1879, Scales *v.* Kelley, 2 Lea 706 (licensed practitioner before justices of the peace and the county court, held within the privilege); 1854, Brayton *v.* Chase, 3 Wis. 456 (privilege held not applicable to one not licensed as an attorney, though practising before a justice of the peace). *Contra:* 1887, Benedict *v.* State, 44 Oh. St. 679, 688, 11 N. E. 125 (consultation with one who practised before justices of the peace, but was not admitted to the bar, held privileged; but the Court's remark that nothing was lacking "except the mere form of the admission of the adviser to practice in courts of record" shows a singular notion of the guarantees implied in the professional status).

[2] 1859, Lawrence *v.* Campbell, 4 Drew. 485 (the privilege applies to a Scotch solicitor, residing in London, and acting for a Scotch client resident in Scotland).

[3] 1829, Bean *v.* Quimby, 5 N. H. 94, 97 (communication to one not an admitted attorney, but acting as attorney and legal adviser, held privileged, under a statute permitting any citizen to appear as attorney).

[4] 1851, Barnes *v.* Harris, 7 Cush. 576 (student in an office, not being the attorney's agent or clerk, not privileged); 1890, Schubkagel *v.*

§ 2301. **Attorney's Clerks and other Agents.** It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents for rendering his services.[1] The assistance of these agents being indispensable to his work, and the communications of the client being often necessarily committed them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.[2]

§ 2302. **Client's Belief in the Attorney's Status.** The theory of the privilege (*ante*, § 2291) clearly requires that the client's *bona fide* belief in the status of his adviser as an admitted attorney should entitle him to the privilege. No doubt an intention to employ only such a person is necessary, as well as a respectable degree of precaution in seeking one; but from that point onwards he is entitled to peace of mind, and need not take the risk of a deception, or of a defective professional title.[1]

§ 2303. **Consultation in Attorney's Capacity.** An attorney may often be brought into a discussion upon the law, without any purpose of treating his expression of opinion as a service rendered professionally. Such a conversation is not privileged, because the reason of the privilege designs to secure only the freedom of resort to attorneys where some appreciable interest of the client is to be protected and the advice is sought and given with a view to its protection. On the other hand, an attorney may render his services without charge, if he pleases, and hence the mere circumstance that the advice is given gratuitously does not nullify the privilege.[1] In view of the frequency with which some persons seek to obtain informally and gratui-

Dierstein, 131 Pa. 46, 54, 18 Atl. 1059 ("A law student is in this respect on no higher plane than a blacksmith retained in a like service"); 1816, Andrews *v.* Solomon, 1 Pet. C. C. 337, 359 (Washington, J.: "Not one of these reasons [for the privilege] apply to the student"); 1850, Holman *v.* Kimball, 22 Vt. 555 (a law student having an office of his own, but not yet admitted to the bar; privilege denied).

[1] 1825, Taylor *v.* Forster, 2 C. & P. 195; 1831, Bowman *v.* Norton, 5 id. 177; 1829, Eicke *v.* Nokes, 1 M. & M. 303, *semble;* 1881, Lyell *v.* Kennedy, L. R. 27 Ch. D. 1, 19 ("such agents as every solicitor's clerk may be said to be" are privileged); 1855, Landsberger *v.* Gorham, 5 Cal. 450 (the privilege held applicable to "a person acting in the capacity of an attorney," and apparently an attorney's clerk); 1857, Sibley *v.* Waffle, 16 N. Y. 180, 183, per Bowen, J. Compare the rule as to mere *students of law* (*ante*, § 2300).

The amendments to certain of the statutes (*ante*, § 2292), extending the privilege to the attorney's "clerk, stenographer, or other person employed," were therefore unnecessary. The irresponsible presumption of some who undertake to instruct the profession is shown in a certain editorial remark, when pointing out one of these amendments, that it made "a notable change in the law."

[2] For the case of communications to *third persons in the attorney's presence*, see *post*, §§ 2311, 2312. For the distinction between *clerks* and witnesses or other volunteers, see *post*, § 2317.

[1] Besides the following cases, compare the doctrine as to the client's *belief in the relevancy* of his communication (*post*, § 2310), and as to the admissibility of a *confession procured by trick* (*ante*, § 841): *Admitted:* 1807, Fountain *v.* Young, 6 Esp. 113 (here the person was in fact only a clerk in Newgate); 1890, Hawes *v.* State, 88 Ala. 38, 7 So. 302 (said *obiter*); 1859, Sample *v.* Frost, 10 Ia. 266 (one who was just about to be admitted to the bar); 1851, Barnes *v.* Harris, 7 Cush. 576 (student in a law office). *Excluded:* 1886, People *v.* Barker, 60 Mich. 277, 297, 307, 27 N. W. 539 (confession made to a detective, fraudulently pretending to be an attorney, held privileged); 1893, State *v.* Russell, 83 Wis. 330, 53 N. W. 441 (communication by a woman in prison to the district attorney and his agent, pretending to be her counsel, held privileged); 1856, Coon *v.* Swan, 30 Vt. 6, *semble*.

The following ruling seems peculiar: 1890, Hawes *v.* State, 88 Ala. 38, 7 So. 302 (communications made "to an attorney in ignorance of his professional character," excluded).

[1] 1878, Andrews *v.* Simms, 33 Ark. 771, 773; 1850, Reed *v.* Smith, 2 Ind. 160; 1897, Davis *v.* Morgan, 19 Mont. 141, 47 Pac. 793.

tously valuable legal advice, and the lamentable frequency with which attorneys weakly submit to such an imposition, especially in rural communities, it is often difficult to determine whether the consultation is a professional one, within the privilege. The local habits of life, and the circumstances of the case, must largely determine the ruling.[2] The case of a consultation of the *opponent's attorney* seems rather to fall under another head (*post*, § 2312), as also the case of a consultation by one person not on his own behalf but as *the agent of another* (*post*, § 2317).

§ 2304. **Time of Consultation; Rejection of Retainer by Attorney.** It follows that a communication to an attorney, not in his capacity as such, is without the privilege if made *before* the relation was entered into or *after* it was ended.[1] An interesting question, however, arises when the communication is made *pending negotiations for the retainer*. Here it would seem plain, by the reason of the privilege, that, since the would-be client cannot certainly predict the attorney's acceptance of the employment, the former must be protected in his preliminary statements when making the overtures, even if the overture is refused. It would further be immaterial that the refusal was due

[2] Various instances are as follows: *Eng.:* 1792, Wilson *v.* Rastall, 4 T. R. 753, 758 (letters handed to an attorney, but not in his character as a professional adviser, held not privileged); 1838, Greenlaw *v.* King, 1 Beav. 137, 145, Lord Langdale, M. R. (correspondence with a solicitor, but only as "agent and confidential friend," not privileged); *Can.:* 1889, Rudd *v.* Frank, 17 Ont. 758, 764 (communications as to a friend, held not privileged); *U. S.:* 1893, Patten *v.* Glover, 1 D. C. App. 466, 476 (consultation as a friend, not privileged); 1887, Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13 (consultation held not privileged, where the attorney was "'raided,' not retained"; it must be "the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it"); 1898, O'Brien *v.* Spalding, 102 id. 490, 31 S. E. 100 (consultation as a friend, not privileged); 1902, Harkless *v.* Smith, 115 id. 350, 41 S. E. 634 (one who prepared a deed without compensation and in his own interest, held not the legal adviser of the parties); 1852, Goltra *v.* Wolcott, 14 Ill. 89 (consultation as a friend, not privileged); 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 343 (attorney consulted as a friend by a widow about her husband's affairs, held not privileged); 1896, State *v.* Swafford, 98 Ia. 362, 67 N. W. 284 (a friendly consultation between the defendant and the then prosecutrix's attorney, to contrive means for helping her to get occupation, held not privileged); 1895, Wade *v.* Ridley, 87 Me. 368, 372, 32 Atl. 975 (consultation held professional, on the facts); 1903, People *v.* Pratt, — Mich. —, 94 N. W. 752 (communication to a judge, before examination by the grand jury, with the object of consulting "some one that I have confidence in," held privileged; Grant and Hooker, JJ., diss.); 1886, Romberg *v.* Hughes, 18 Nebr. 579, 26 N. W. 351 (consultation as a friend, not privileged); 1895, Basye *v.* State, 45 id. 261, 63 N. W. 811 (consultation held not professional, on the facts); 1848, Beeson *v.* Beeson, 9 Pa. St. 279, 301 (consultation as a friend, not privileged); 1903, Sargent *v.* Johns, 206 id. 386, 55 Atl. 1051 (similar); 1858, M'Mannus *v.* State, 2 Head 213 (questions as to "abstract legal opinions," without reference to "some act past, or right or interest in existence," held not privileged); 1856, Thompson *v.* Kilborne, 28 Vt. 750, 757 (friendly consultation, held, upon the facts and the local custom, not to be a professional consultation; Chief Justice Redfield rebukes the local profession for their lax habits in conversing without formal retainer upon legal subjects); 1856, Coon *v.* Swan, 30 id. 6 (legal advice given merely "as a neighbor," held not protected); 1873, Earle *v.* Grout, 46 id. 113, 125 (similar); 1861, Dunn *v.* Amos, 14 Wis. 106, 109, 114 (legal advice held not a professional consultation on the facts); 1873, Orton *v.* McCord, 33 id. 205, 211 (legal advice held professional, on the facts); 1900, Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038 (communication at a casual consultation on a railway train, excluded on the facts).

[1] *Eng.:* 1664, Sparke *v.* Middleton, 1 Keb. 505 (cited *ante*, § 2290); 1673, Cuts *v.* Pickering, 1 Ventr. 197; *U. S.:* 1868, Chillicothe F. R. & B. Co. *v.* Jameson, 48 Ill. 281, 283; 1870, People *v.* Barker, 56 id. 299; 1895, Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61; 1895, Harless *v.* Harless, 144 id. 196, 41 N. E. 592; 1901, State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; 1894, Brady *v.* State, 39 Nebr. 529, 532, 58 N. W. 161 (even though the same as one made during the relation); 1896, Home Ins. Co. *v.* Berg, 46 id. 600, 65 N. W. 780; 1816, Yordan *v.* Hess, 13 John. 492, 494; 1895, Turner's Estate, 167 Pa. 609, 31 Atl. 867; 1901, State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

to a disagreement as to fees and to the client's own withdrawal by reason of the fee demanded; for upon none of these matters could he predict the result until his preliminary statement had been made. Obviously, too, if the retainer is accepted, the privilege covers the preliminary statement. On the other hand, if the client continues his communication after the attorney's refusal to act for him, or if the client knowingly attempts to retain one who is already retained by the opponent, he does not need or deserve the protection of the privilege.[2]

3. "The communications relevant to that purpose,"

§ 2306. **Communications, distinguished from Acts; Client's Conduct, Appearance, Abode, etc.** Does the privilege cover only that knowledge of the attorney which is obtained from hearing the client's *utterances*, or also that which comes from seeing the client's *acts?* This question has given rise to a difference of opinion more apparent than real. It is sometimes discussed as if the word "communications" were synonymous with "utterances of words." That is, those who favor its largest answer repudiate the limits of the word "communications," as if it included no more than "utterances"; and yet it is of course conceivable that an act or a bodily condition may be voluntarily disclosed and wittingly made known to the attorney by the client without any utterance of words. The problem is also sometimes discussed, from the point of view of the attorney, as involving the inquiry whether the privileged knowledge of the attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing; and this mode of statement corresponds more closely to the distinction be-

[2] The rulings are not entirely harmonious, but the above applications of the principle are fairly borne out: 1894, Denver T. Co. *v.* Owens, 20 Colo. 107, 125, 36 Pac. 848 (preliminary statement of the case with a view to employing, privileged); 1872, McLean *v.* Clark, 47 Ga. 24, 45, 69 (S. made a proposition to the plaintiff's attorney, declaring that, if it was accepted, S. would employ the attorney; held, that the latter was not S.'s attorney so as to create a privilege in S.'s favor); 1893, Peek *v.* Boone, 90 id. 769, 17 S. E. 66 (consultation with a view to the attorney's employment, whether or not the attorney is ultimately retained, held privileged; here the attorney had declined the employment); 1877, Thorp *v.* Goewey, 85 Ill. 611, 615 (consultation for litigation, the attorney finally not being employed because of a disagreement as to his fee, held privileged); 1891, Theisen *v.* Dayton, 82 Ia. 74, 47 N. W. 891 (statements to an attorney to secure his employment to "keep a mortgage alive," the attorney declining the employment, held not privileged); 1854, Sargent *v.* Hampden, 38 Me. 581, 584 (conversations with a view to a retainer, even though it be afterwards declined, said to be privileged); 1857, Alderman *v.* People, 4 Mich. 414, 422 (privilege applies to communications to "an attorney in fact by a party under an impression that such attorney had consented or agreed to act," "although the attorney himself may not have so understood the agreement"); 1848, Crisler *v.* Garland, 11 Sm. & M. 136 (communications while seeking to retain the attorney, who declined employment, held privileged); 1872, Cross *v.* Riggins, 50 Mo. 335 (communication to an attorney, seeking advice, the attorney declining to give an opinion, held privileged); 1897, Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. 231 (excluded, where the attorney had already refused to accept the employment); 1849, Heaton *v.* Findlay, 12 Pa. St. 304, 310 (communications "preliminary to his engagement as counsel," made in satisfying the counsel of the propriety of his retainer, held not privileged); 1875, Strong *v.* Dodds, 47 Vt. 348, 353 (communication seeking to retain an attorney, who then declines to bring suit, held privileged); 1886, Tucker *v.* Finch, 66 Wis. 17, 21, 27 N. W. 817 (communications seeking to retain an attorney, who declined because of a prior retainer on the other side, held not privileged); 1887, Plano Mfg. Co. *v.* Frawley, 68 id. 577, 584, 32 N. W. 768 (communications after an attorney has given notice that he is retained on the other side, held not privileged).

tween utterances and acts of the client. In the following passages the various judicial attitudes are represented:

Ante 1767, *Buller*, J., Trials at Nisi Prius, 284: "[The privilege does not cover] a fact of his own knowledge, and of which he might have had knowledge without being counsel or attorney in the cause; as, suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution;[1] so, if the question were about a razure in a deed or a will, he might be examined to the question whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head."

1803, *Ellenborough*, L. C. J., in *Robson* v. *Kemp*, 5 Esp. 52, 55: "The act [of destroying a power of attorney] cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is as privileged as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been derived from his situation as an attorney."

1833, L. C. *Brougham*, in *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 104: "[The privilege does not exist] where there could not be said, in any correctness of speech, to be a communication at all, — as where, for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being attorney, but of which fact any other man if there would have been equally cognizant."

1857, *Brown* v. *Foster*, 1 H. & N. 736; *Pollock*, C. B.: "A legal adviser may give evidence of a fact which is patent to his senses"; *Martin*, B.: "With respect to matters which the counsel sees with his eyes, he cannot refuse to answer."

1841, *Bronson*, J., in *Coveney* v. *Tannahill*, 1 Hill N. Y. 33, 35: "This privilege of a client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference in principle between communications made by the client and acts done by him in the presence of the attorney; . . . I will not undertake to say how far the distinction between the communications and the acts of the client may extend"; apparently holding that the execution of a document is an act.

1861, *Woodward*, J., in *Daniel* v. *Daniel*, 39 Pa. 191, 210 (permitting the question, to an attorney, why he could not have had with the testator, his client, any conversation worth repeating): "Communications made to a counsel are privileged; but if a client is too imbecile to make any communications, I never before heard that that fact was incompetent testimony on account of the professional relation, — no more than the shape of the client's head, which is the subject of the next bill. If a lawyer learns from professional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it."

The marked contrast is between the statement of Lord Ellenborough, in Robson *v.* Kemp, and that of Baron Martin, in Brown *v.* Foster. Can they be reconciled? And is either of them consistent with Mr. Justice Bronson's distinction between a communication and an act? The truth is that each is right, under some circumstances, and all are harmonious, when the proper allowance is made. Looking back at the reason of the privilege, it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge. It is designed to influence him when he may be hesitating

[1] This statement is clearly correct on the ground that the request to attest makes the act non-confidential (*post*, § 2315); but its association with the ensuing statements has sometimes given rise to misunderstanding. Buller's notions of the principle were apparently not quite clear.

between the positive action of disclosure and the inaction of secrecy. There is, therefore, by hypothesis, always some voluntary act of disclosure, — some removal of that secrecy which would otherwise have existed as between the client and the attorney. In short, there must be some deliberate communication. On the one hand, then, those data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part — such as the color of his hat or the pattern of his shoe —, and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser — such as the style of his handwriting or the amount of money in the roll of bills from which he pays his retainer —, these are not any part of the communications of the client; in the language of Lord Chancellor Brougham and Mr. Justice Buller, they are "facts of which any other man if there would have been equally cognisant." On the other hand, almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential (*post*, § 2311), the privilege comes into play.

Ordinarily, then, it is true, as Chief Baron Pollock said, that "a legal adviser may give evidence of a fact which is patent to his senses"; that is, of anything which he either sees or even hears, so far as it is otherwise patent, — in other words, is not the subject of a voluntary communication. Yet, in a given case, any of these things *may* be committed to the attorney in such a way as to be within the privilege. It is to be noted, however, that many such acts, which thus become the subject of a communication, may still not be confidentially committed to the attorney, and thus be not privileged (*post*, §§ 2311–2314); and some of the rulings now to be noticed in the ensuing sections can perhaps be attributed to that consideration. Obviously no fixed form of rule can be stated for the present application of the principle. In the ordinary case, it is only the expressed communications of the client that will be privileged.[2]

[2] Sundry examples are as follows: *Eng.:* 1790, Hooper *v.* Harcourt, 1 H. Bl. 534 (after judgment, an attorney was held not compellable to disclose his client's abode for the purpose of his being taken on execution; the application "came too late after verdict"); 1817, Parkins *v.* Hawkshaw, 2 Stark. 239 (to prove the identity of defendant with the obligor of a bond, the defendant's attorney was not allowed to testify to "communications which he had had with the defendant"); *U. S.:* 1898, Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397 (attorney may speak of the client's mental condition as learned at the time of a consultation); 1868, White *v.* Bird, 20 La. An. 188 (attorney held compellable as garnishee to disclose whether he has assets belonging to the client, unless he cannot do so without disclosing matters confided to him by the client); 1861, Daniel *v.* Daniel, 39 Pa. 191, 211 (attorney's opinion of his client's sanity, held not privileged; quoted *supra*); 1894, Turner *v.* Warren, 160 id. 336, 343, 28 Atl. 781 (fact of delivery of papers, date, person, and condition, held not privileged); 1896, State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429 (whether the client was intoxicated when seen in the jail with B., admis-

§ 2307. **Same: Production of the Client's Documents.** The application of the foregoing principle to the case of documents delivered or shown to the attorney is not without difficulty. But, before examining it, a superficially related question, dependent upon other principles, must be disposed of. Is the attorney compellable to *produce in court*, by subpœna or bill of discovery, the documents placed in his possession by the client? This is not a question of compelling the disclosure of the attorney's knowledge; he may know nothing of the contents of the document, nor is he asked to testify about them. Whether the package contains a diamond or a deed is immaterial. But must he produce it?

(1) The answer depends upon the other privileges of the client *irrespective of the present privilege.* The attorney is but the agent of the client to hold the deed; if the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and the attorney is in this respect like any other agent. There is, to be sure, the added consideration of policy, namely, that if the attorney were not compellable when the client was, then the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney; and such a quibble could not be tolerated by any practical system of law. But, apart from this, the doctrine of agency is ample to justify the result. The extent of the client's obligation to produce must therefore be taken as determining the present question; and that obligation has undergone radical change in the history of our law. In the first place, at common law, the client who was a *party opponent* in the suit was not obliged to produce, either at or before the trial, except so far as the rule of profert and oyer extended; but in equity he was obliged to produce any document (except that before trial he could not be obliged to discover the documents affecting his own case alone); and under modern statutes the equitable rule has been made available by motion or subpœna to produce in common-law proceedings (*ante*, §§ 1857–1859, 2219). In the next place, the client who was a *third person* was at common law bound to produce upon subpœna, except when the document was a deed supporting some title of his own (*ante*, §§ 2193, 2211). In the third place, the client was and is in any instance not bound to produce a self-incriminating document (*ante*, § 2264).

It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law, or as a third person claiming title, or as exempt from self-crimination, the attorney having possession of the document is not bound to produce; and such has invari-

sible, since the attorney saw "nothing that was not observable by B. and by all other persons who saw him during the time of his alleged intoxication"); 1882, State *v.* Douglass, 20 W. Va. 770, 779 (testimony that a pistol produced had been received from the defendant's counsel, held admissible; but the counsel's statement, at the time of delivering it, that he had obtained it in consequence of a communication from the defendant, and the counsel's testimony that he had so obtained it, held not admissible; careful opinion by Green, J.).

For rulings as to disclosing the *identity* of the client, see *post*, § 2313.

For rulings as to the disclosure by an attorney *drafting a will* as to the *testator's sanity* or *undue influence*, see *post*, §§ 2314–2315.

ably been the ruling.[1] On the other hand, if the *client would be compellable* to produce, either by motion or by subpœna or by bill of discovery, then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure.[2]

[1] *England:* 1765, R. *v.* Dixon, 3 Burr. 1687 (attorney not required to produce vouchers of his client before the grand jury on a charge of forgery); 1797, Bothomly *v.* Usborne, Peake Add. Cas. 99, 101 (attorney not compellable to produce the client's documents nor to prove their contents, when the client is privileged as a party to the cause); 1821, Laing *v.* Barclay, 3 Stark. 38, 42 (attorney of defendant not required to produce bankruptcy proceedings confidentially deposited with him); 1822, Harris *v.* Hill, ib. 140 (attorney in possession of a privileged third person's document, not compellable to produce); 1831, Nixon *v.* Mayoh, 1 Mo. & Rob. 76 (attorney not compelled to produce the party-opponent's document); 1834, Mills *v.* Oddy, 6 C. & P. 728, 731 ("the attorney is not to produce his client's title-deeds nor to disclose their contents"; here the client was not a party); 1834, Bate *v.* Kinsey, 1 Cr. M. & R. 38 (attorney in possession of documents of the plaintiff, held not compellable to produce them or to disclose their contents); 1834, Doe *v.* Seaton, 2 A. & E. 171, 181 (attorney holding a deed for both vendor and vendee; deed held privileged as to the vendee, although the vendor consented to production); 1840, Doe *v.* Ross, 7 M. & W. 102, 122, *semble* (attorney possessing the title-deed of a third person is not compellable to produce; otherwise, if his client is called and waives the privilege); 1849, R. *v.* Hankins, 2 C. & K. 823, 3 Cox Cr. 434 (perjury in swearing to the signature of an account; the account being in the possession of the attorney, who had a lien thereon, Coltman, J., declined to compel production); 1850, Newton *v.* Chaplin, 10 C. B. 356 (production of a corporate minute-book, placed in the attorney's hands for legal advice by W. C., not a party to the cause, held not compellable, W. C. refusing under his privilege to allow production; Maule, J.: "The privilege of W. C. as to the book was the same in the hands of F., [the attorney,] as if he had kept the book in his own hands"); *United States:* 1807, Lynde *v.* Judd, 3 Day 499 (attorney not compellable to produce the client's document); 1817, Jackson *v.* Burtis, 14 John. 391, 399 (documents left with the attorney by the client's agent, held not demandable on subpœna); 1830, Jackson *v.* Denison, 4 Wend. 558 (counsel held not bound to produce a client's deed); 1831, McPherson *v.* Rathbone, 7 id. 216 (paper delivered by the client to the attorney, held not demandable from the attorney by subpœna); 1841, Bronson, J., in Coveney *v.* Tannahill, 1 Hill N. Y. 33, 35 (quoted *post*, § 2308); 1801, State *v.* Squires, Tyler 147 (attorney held not amenable to compulsory process for the delivery of notes, alleged to be forged by his client, which were deposited with him as attorney; "in contemplation of law they are in the possession of the client"); 1832, Durkee *v.* Leland, 4 Vt. 612, 615, *semble* (see citation *infra*); 1889, Selden *v.* State, 74 Wis. 271, 275, 42 N. W. 218 (letters of husband to wife, deposited by her with her attorney for divorce, not producible). For the question *who is to determine* whether the document is privileged as claimed, see *post*, § 2322.

[2] *England:* 1803, Pearson *v.* Fletcher, 5 Esp. 90 (L. C. J. Ellenborough, on facts similar to those in Bateson *v.* Hartsink, *infra*, compelled the solicitor to produce the proceedings); 1815, Copeland *v.* Watts, 1 Stark. 95 (like Cohen *v.* Templar, *infra*); 1816, Corsen *v.* Dubois, Holt 239 (attorney compelled to produce a bankruptcy commission which was not privileged for his clients the assignees); 1817, Cohen *v.* Templar, 2 Stark. 260 (attorney compellable to produce the document of a third person having no privilege); 1822, Lowe *v.* Firkins, 11 Price 455, 461, 464 (steward of plaintiff, held bound to answer as to documents of his master in his possession; and also bound to produce them on a bill of discovery, though not on a subpœna *d. t.* inasmuch as his custody was the plaintiff's); 1824, Hawkins *v.* Howard, Ry. & Mo. 64 (books of assignees, not parties, held producible by their attorney); 1829, Doe *v.* Thomas, 9 B. & C. 288, 293 (lease placed with the attorney by the party; the attorney held bound to produce on subpœna); 1848, Doe *v.* Langdon, 12 Q. B. 711, 719 (like Cohen *v.* Templar, *supra*); 1853, Volant *v.* Soyer, 13 C. B. 231 (attorney held not bound to produce a title-deed of his client; Jervis, C. J., doubted whether the rule of professional confidence covered documents of the client in general, since the statutory sanction for motions to compel a party's production of documents; Maule, J., placed the ruling on the ground of professional confidence; this ruling was made just after the statutory reform, and illustrates both aspects of the rule); *Canada:* 1863, Livingstone *v.* Gartshore, 23 U. C. Q. B. 166, *semble* (like Cohen *v.* Templar, *supra*); *United States:* 1900, Allen *v.* Ins. Co., 72 Conn. 693, 45 Atl. 955 (production required, where the answer of the client admitted its possession); 1860, Andrews *v.* R. Co., 14 Ind. 169, 174 ("the party himself might have been compelled under the statute to produce the receipts on the trial; he could not defeat that production by passing it into the hands of his attorney," and the attorney was held compellable to testify to contents); 1842, Travis *v.* January, 3 Rob. La. 227, 230 ("the attorney may be as properly called on to produce the papers and documents necessary to establish the rights of the adversary . . . as his client himself could be under our laws"); 1861, Mitchell's Case, 12 Abb. Pr. 249, 262 (attorney must produce the party's documents where the party has no privilege; good opinion by Daly, J.); 1902, Jones *v.* Reilly, 174 N. Y. 97, 66 N. E. 649 ("The privilege was that of the client, not

(2) So much as precedes is the rule for documents *independently pre-existing*. But where the document is itself the client's written communication, *coming into existence merely as a communication to the attorney*, the situation is obviously different. This communication itself is not to be disclosed, whether it was made by the client by word of mouth or by writing. Where the document already had an independent existence, the communication consists in bringing its contents to the attorney's knowledge, and that knowledge is not to be disclosed by his testimony, as will be seen (*post*, § 2308); but the physical possession of the document is distinct from that knowledge, and to compel production of the document is not to compel the disclosure of the communication (*supra*, par. 1). But since a document which is itself a communication is within the privilege, the test is whether the document first came into existence as a part of a communication to the attorney. For example, a client obtains his foreman's report as to an injury in the factory, together with the card of instructions furnished to the injured employee when he first came into the service, and sends these to the attorney, with a letter of his own stating the circumstances of the injury as ascertained by him. Of these, the second is clearly without the privilege, the third is clearly within it, while the first may or may not be.

The application of this distinction is sometimes difficult enough in a particular case. But the situation is often further complicated by two other considerations. In the first place, a communication to the solicitor by an *agent of the client* or by an *agent* of the solicitor is protected by the present privilege, while a communication by a mere stranger is not (*post*, § 2317). Thus the application of the above doctrine, as to documents coming into existence for the purpose of communication to the attorney, becomes particularly difficult when the actual maker of the document is some person other than the client himself, and can only be solved by a reference to the rule as to agents. For this reason the precedents may better be considered in connection with the latter subject (*post*, § 2319). In the second place, the party is not obliged to disclose, by discovery before trial, the testimony of his prospective witnesses (*ante*, §§ 1856, 1857, 1859); and hence, on grounds wholly independent of the present privilege, it may become necessary to distinguish between the written information given beforehand by a witness as such and that furnished by the party's employee as his agent. These various principles so

of the counsel; and when, by change in the law, the client could be compelled by subpœna to produce documents in his possession, the rule that the attorney could not be forced to produce them when in his possession necessarily fell"); 1827, Rhoades *v.* Selin, 4 Wash. C. C. 715, 718 (attorney compellable to produce papers which the client himself was compellable to produce).

Contra, but unsound: 1801, Bateson *v.* Hartsink, 4 Esp. 43 (L. C. J. Kenyon; the solicitor of third persons, the assignees in bankruptcy of the present defendant, was held not compellable to produce the proceedings of the assignees; here they were otherwise obtainable by motion against the assignees; this ruling was virtually repudiated in the later English ones); 1877, Dover *v.* Harrell, 58 Ga. 572 (ejectment; deed placed in the attorney's possession by the defendant for preparing his defence; the attorney held not compellable to produce; this is expressly sanctioned by the local Code, quoted *ante*, § 2292); 1889, Stokoe *v.* R. Co., 40 Minn. 545, 42 N. W. 482 (attorney is not compellable to produce his client's documents); 1897, Davis *v.* R. Co., 70 id. 37, 72 N. W. 823 (documents "intrusted" to the attorney by the client, held privileged).

intermingle in their application that an examination of the precedents can better be made elsewhere (*post*, § 2318).

§ 2308. **Same: Testimony to Contents of Documents.** The client's disclosure of the contents of a preëxisting document will almost always be an act of communication (*ante*, § 2306), *i. e.* a part of the matters voluntarily committed to the notice of the attorney. It is impossible, in the language of Mr. Justice Bronson,[1] to perceive "any solid distinction between the oral statement of a fact to counsel and a communication of the same fact by delivering to him a deed or other written instrument." Unless, therefore, a particular communication of this sort is not confidential (*post*, § 2311), it is within the privilege, and the testimony of the attorney on the stand cannot be required.[2] Nor does it here make any difference that the client would have been compellable

[1] Coveney *v.* Tannahill, N. Y., *infra*.

[2] Sundry examples are as follows: *England:* 1676, Bulstrod *v.* Letchmere, Freem. Ch. 5 ("the defendant being a counsellor at law shall not be bound to answer concerning any writings which he hath seen, nor for anything which he knoweth in the cause as counsellor"); 1693, Anon., Skinner 404 (attorney who had "drawn an indenture of agreement," not compellable "to discover the matter of it"); 1797, Bothomly *v.* Usborne, Peake Add. Cas. 99, 101 (cited *ante*, § 2307); 1826, R. *v.* Upper Boddington, 8 Dowl. & R. 726 (the attorney held mortgage deeds of H., not a party, who claimed his privilege; the attorney was therefore forbidden to testify to their contents, "because the whole of those contents were a confidential communication between a client and his attorney"); 1834, Bate *v.* Kinsey, 1 Cr. M. & R. 38 (cited *ante*, § 2307); 1834, Marston *v.* Downes, 6 C. & P. 381, 1 A. & E. 31 (attorney of a third person cannot prove the contents of the client's title-deeds); 1836, Wheatley *v.* Williams, 1 M. & W. 533 (attorney not allowed to testify whether a paper shown in consultation bore a stamp; "all that appears on the face of such document is a part of the confidential communication"; the passage in Buller's Nisi Prius, *ante*, § 2306, interpreted); 1837, Doe *v.* Watkins, 3 Bing. N. C. 421 (like Marston *v.* Downes, *supra*); 1842, Herring *v.* Clobery, 1 Phil. Ch. 91, L. C. Lyndhurst (testimony as to the client's suggestions of alterations and her execution of the deed with knowledge of its contents, held privileged); 1848, Hibberd *v.* Knight, 2 Exch. 11 (Marston *v.* Downes, *supra*, approved); 1842, Davies *v.* Waters, 9 M. & W. 608, 612 (attorney held privileged from testifying to a deed read by him at a consultation with counsel; to do otherwise "would be in fact seeking to have in evidence what occurs at a consultation between the parties"); *Canada:* 1857, Lynch *v.* O'Hara, 6 U. C. C. P. 259, 265 (he must disclose possession and identity, but not contents); *United States:* 1834, Crawford *v.* McKissack, 1 Port. 433 (an indorsement on the bond in action had been obliterated; the plaintiff's attorney held not compellable to state its tenor); 1867, Donald *v.* Mitchell, 43 Ill. 40, 45 (whether a promissory note, when handed to the attorney for bringing suit, was indorsed, held privileged); 1811, Anon., 8 Mass. 370 (the Court refused to compel the attorney to disclose a document handed to him by the client for use in litigation; "it is in the keeping of his client as much as if it were in his own pocket"); 1869, Gray *v.* Fox, 43 Mo. 570 (testimony of the attorney as to the condition of notes when placed in his hands for litigation, held privileged); 1833, Brown *v.* Payson, 6 N. H. 443, 448 ("the situation and contents of a paper, delivered to an attorney for inspection in the course of employment as attorney," held privileged); 1891, Matthews *v.* Hoagland, 48 N. J. Eq. 455, 464, 21 Atl. 1054 (whether a certificate, obtained from the client, was indorsed when the attorney saw it, held privileged); 1841, Coveney *v.* Tannahill, 1 Hill N. Y. 33, 35 (quoted *ante*, § 2306); 1832, Durkee *v.* Leland, 4 Vt. 612, 615 (a statute made parties compellable to produce, but no notice had been given; held, that the attorney of the party was not compellable to produce, nor, *semble*, to testify about it); 1892, Arbuckle *v.* Templeton, 65 id. 205, 208, 25 Atl. 1095 (action on a note; the defendant had shown the note to the attorney for advice about it; whether the note then bore an indorsement, privileged). *Contra:* 1767, Buller, Trials at Nisi Prius, 284, *semble* (quoted *supra*, § 2306); 1857, Brown *v.* Foster, 1 H. & N. 736 (an account-book was produced in court, and counsel and magistrate examined it; the counsel held not privileged for testimony to an item therein; quoted *supra*, § 2306); 1834, John *v.* John, Wright 584, 586 (action on a note; the note was in defendant's possession, but no notice to produce had been given; by statute a party could notify the opponent to produce documents and the Court could compel production or give judgment by default; the attorney had the notes in court, but refused to produce, whereon the Court obliged him to testify to their contents; here the ruling was wrong, in that it treated his disclosure as not a violation of the privilege; but the result was right, because notice in court was sufficient, where the documents were already there (*ante*, § 1204), and hence production was compellable).

to produce the deed, in chancery or otherwise; for he is also compellable to tell what he knows on other subjects, and yet his communications about them, made to the attorney, are privileged. The communication of the document is distinct from the document itself. It is, however, worth noting that if the communication were made as a part of an expedient to avoid production (as, if the client should show the document to the attorney and then destroy it), the privilege ought not to be conceded.

§ 2309. **Same: Testimony to Possession, Existence, and Execution of Documents.** The existence, the execution, or the place of custody of a document, may be a part of a communication to the attorney, in the sense already noted (*ante*, § 2306), and may also be a confidential one (*post*, § 2312). But ordinarily it will be neither. The signing, for example, of a release or a note in the attorney's presence is not usually intended as an act of disclosure to him, or, if it is, as a confidential one. For lack of both of these elements, then, the Courts have usually declared the attorney's testimony to these acts not to be within the privilege.[1] Upon which ground these rulings have been intended

[1] Additional cases, concerning the *execution of wills*, are for convenience' sake collected *post*, § 2314: *England:* 1712, Lord Say & Seal's Case, 10 Mod. 40 (attorney compelled to testify to a deed's ante-dating; "the time of executing a deed could not be called the secret of his client; it was a thing he might come to the knowledge of without his client's acquainting him"); 1776, Duchess of Kingston's Trial, 20 How. St. Tr. 613 (Lord Mansfield: "Even if he swears to an answer in Chancery, he cannot protect himself from swearing whether that is his client's hand or not, or to his having sworn it, or the execution of a deed; it does not come within the objection to an attorney revealing the secrets of his client"); 1793, Sauford *v.* Remington, 2 Ves. Jr. 189 (L. C. Loughborough, compelled an attorney "to disclose all that did pass in his presence at the execution of the deed, as a witness; so, his having been sent by his client with orders to put the judgment into execution; that is an act; but he is not to disclose the private conversation as to the deed with regard to what was communicated as to the reasons for making it, etc."); 1803, Robson *v.* Kemp, 5 Esp. 52, 55 (circumstances of destruction of a deed, privileged, if known to the witness as attorney; quoted *ante*, § 2306); 1804, Brard *v.* Ackerman, ib. 119 (existence and description of a certain bill in the attorney's possession by professional confidence, held privileged); 1824, Hurd *v.* Moring, 1 C. & P. 372 (attorney compelled to testify to the handwriting of a bill, though his knowledge rested solely on seeing the defendant sign the bail-bond, while engaged in the cause); 1828, Bevan *v.* Waters, M. & M. 235 (like Dwyer *v.* Collins, *infra*); 1834, Bate *v.* Kinsey, 1 Cr. M. & R. 38 (attorney need not disclose whether he has a document in his possession); 1852, Dwyer *v.* Collins, 7 Exch. 639 (action on a bill of exchange; the defendant wished the hill in proving his plea, and in order to lay a foundation for a copy, asked the plaintiff's counsel if he had the bill with him; the objection of "breach of professional confidence," as an excuse for not answering, was overruled); *Canada:* 1848, James *v.* Mills, 4 U. C. Q. B. 366 (whether the attorney has the document in court; not decided); 1857, Lynch *v.* O'Hara, 6 U. C. C. P. 259, 265 (cited *ante*, § 2308); *United States:* 1888, Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273 (that the attorney wrote a note in the client's presence, that the latter signed it, and that money was then paid, held not privileged, being "acts, not communications in professional confidence"); 1878, Cole *v.* Cheovanda, 4 Colo. 17, 21 (like Dwyer *v.* Collins, *supra*); 1877, Raefle *v.* Moore, 58 Ga. 94, 100, 104 (the date of signing certain notes, made on the attorney's advice, held privileged); 1842, Travis *v.* Jannary, 3 Rob. La. 227, 230 (attorney may he compelled to state whether he has documents of the client and what he has done with them); 1876, Brown *v.* Jewett, 120 Mass. 215 (counsel compelled to testify to the signature of client on a note, so long as he did not disclose confidential communications nor hase his testimony thereon); 1889, Stokoe *v.* R. Co., 40 Minn. 545, 42 N. W. 482 (attorney must state whether he possesses the client's document, when the foundation for using a copy is to he laid); 1820, Brandt *v.* Klein, 17 John. 335, 339 (in showing notice to produce a will, it became necessary to prove that the will was at the place of trial; the opponent's attorney was held compellable to testify whether it was in his possession; this not being a fact "communicated as a secret" nor involving "any confidential communication between them"; 1820, Jackson *v.* M'Vey, 18 id. 330 (same); 1841, Coveney *v.* Tannahill, 1 Hill N. Y. 33, 35 ("The attorney may be called to prove the existence of a paper and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents"); 1878, Rundle *v.* Foster, 3 Tenn. Ch. 658 (disclosure of the date of a bill

to stand is not always clear; and the circumstances of each case must be considered. But the principle is not doubtful. It should be noted, however, that where the attorney is an *attesting witness* to the document, the transaction is not a confidential one, and therefore, in another aspect of the principle (*post*, § 2315), he may be called to testify.[2]

§ 2310. **Relevancy or Necessity of the Communication.** The Courts have not always used consistent language in answering the question whether the privilege is limited in some way to communications necessary or material or relevant to some purpose of the consultation. In the following passages, the two typical attitudes are represented:

1743, *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1229; it was proposed to show that the defendant, by supporting a criminal prosecution for murder against the plaintiff, who claimed the defendant's estate and peerage, had tried to put the plaintiff out of the way, and had expressed such plans in an interview with Mr. Giffard, a solicitor; this solicitor had often been employed by the defendant, but for six months had had no affairs of his in hand, and did not expect to be employed again; on May 1 the plaintiff had killed a person, — by accident, as he claimed; on May 2, the defendant, hearing of it, sent for Mr. Giffard and told him to go and conduct the prosecution, not disclosing the defendant's name, and incidentally made certain remarks, now offered in evidence, as to being easy in his title and willing to give £10,000 if the plaintiff could be hanged for the murder; Mr. Prime Sergeant *Malone* (for the defendant): "The mutual confidence between client and attorney requires the preservation of secrecy; and as the client cannot be supposed to be qualified to distinguish what is, or is not necessary to his cause, if he should be mistaken, and entrust his attorney with what the attorney should be of opinion was unnecessary, yet surely his attorney ought not to reveal it. As clients are not versed in law affairs, they must be informed by their attorney, for which purpose they must tell them their whole case, and this necessity creates a confidence between them. . . . There seems to be no difference whether the conversation relates to the principal cause in which the attorney is concerned, or to a collateral action, in which he is not; it is in either case grounded on the confidence that arises from the attorney's being employed, and therefore ought not to be disclosed." *Bowes*, L. C. B.: "Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that everything said by a client to his attorney falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other; and of this the

of sale drawn for the client by the attorney, held compellable, as being not a communication but an act); 1832, Durkee *v.* Leland, 4 Vt. 612, 615 (attorney must disclose whether the document exists and where he last saw it); 1897, Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48, *semble* (date of execution of a mortgage in his presence, held not privileged).

Compare the cases *ante*, § 2297, where the consultation of an attorney as a *conveyancer* is sometimes held not to be within the privilege; under such rulings, not even the express communications of the party are privileged; but under the rulings in the present section it is assumed that the privilege applies to express communications, and the only question is as to the act of execution or the like.

[2] The cases of wills are placed *post*, § 2315; the following are cases of deeds: 1793, Sandford *v.* Remington, 2 Ves. Jr. 189, quoted *supra*; 1803, Robson *v.* Kemp, 5 Esp. 52, quoted *post*, § 2315; 1841, Mackenzie *v.* Yeo, 2 Curt. Eccl. 866, 868.

In Robson *v.* Kemp, *supra*, as again reported in 4 Esp. 233, 236, Lord Ellenborough is made to say that an attorney "from his situation is bound to prove the execution of a deed"; but this is inconsistent with other statements of his in the report in 5 Esp. 52, as quoted *ante*, § 2306. The two reports appear to represent the same trial; but in any event the document was the same, and was attested by the attorney; so that the remark reported in 4 Esp. was plainly made of that "situation," and was in that application correct.

Court may judge, from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. . . . But where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney"; *Mounteney*, B.: "If this original principle be kept constantly in view, I think it cannot be difficult to determine either the present question or any other which may arise upon this head; for upon this principle, whatever either is, or by the party concerned can naturally be supposed, necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained, — that the attorney shall inviolably keep secret. On the other hand, whatever is not, nor can possibly by any man living be supposed to be, necessary for that purpose, that the attorney is at liberty, and in many cases — as particularly, I think, in the present case — the attorney ought to disclose." *Dawson*, B.: "Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed. I will suppose an unknowing man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to the suit; he looks them over, and finds not half of them to be relative thereto. I apprehend the attorney is not compellable to disclose the contents of any one of those deeds; neither do I think it necessary; . . . and I think the Court must in this case be satisfied, first, that what came to this man's knowledge was not necessary to his client's affairs; and in the next place, that the client could not think it necessary. . . . The motive for carrying on the prosecution against the plaintiff is said to be, because he has a right to the estate the defendant was in possession of. Can any man think that this was necessary to tell the attorney, or that the defendant could have thought it so? What was necessary, or what a man might have thought necessary, ought not to be disclosed. But if the defendant in this case has gone anything further, he has trusted him, not as an attorney, but as an acquaintance."

1849, *Bell*, J., in *Moore* v. *Bray*, 10 Pa. St. 519, 524: "It seems, however, to have been thought [by counsel here] that, because the facts disclosed, in reference to the consideration of the assignment of the mortgage, were unessential to the conduct of the suit, and the communications regarded by the counsel in the light of casual conversations, they are not entitled to protection. But this is a mistake. It is true, the rule does not embrace the disclosure of collateral facts, made during accidental conversations, held irrespective of the professional character of the recipient. But the circle of protection is not so narrow as to exclude communications a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment. To found a distinction on such a ground, would be to measure the safety of the confiding party by the extent of his intelligence and knowledge, and to expose to betrayal those very anxieties which prompt those in difficulty to seek the ear of him in whom they trust, in season and out of season."

It should be clear, on the one hand, that the actual necessity of making a particular statement, or the materiality to the cause of a particular fact, cannot determine the answer; for the client cannot know what is necessary or material, and the object of the privilege (*ante*, §§ 2291, 2302) is that he should be unhampered in his quest for advice. On the other hand, when he knowingly departs from that purpose and interjects other matters not relevant to it, he is in that respect not seeking legal advice and the privilege does not design to protect him (*ante*, § 2296). The test is, therefore, not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation, but whether the statement is made as *a part of the*

purpose of the client to obtain advice on that subject. Some such rule would seem to have been in the minds of all the judges, in spite of the occasional apparent inconsistency of their utterances.[1]

4. "Made in confidence"

§ 2311. **Communications must be Confidential; Confidentiality not presumed; Presence of a Third Person; Sundry Applications of the Principle.** The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure (*ante*, § 2291) ceases when the client does not appear to have been desirous of secrecy. "The moment confidence ceases," said Lord Eldon, "privilege ceases."[1] This much is universally conceded.[2] No express request for secrecy, to be sure, is necessary;[3] but the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential; and the mere relation of attorney and client does not raise a presumption of confidentiality.[4]

[1] The rulings are as follows: *England:* 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1229 (quoted *supra*); 1791, Cobden *v.* Kenrick, 4 T. R. 431 (after the attorney had secured a settlement, though before it was paid, the client said to him that "he was glad it was settled, for he had only given £10 in cash, etc."; this was held not privileged; the difference is "whether the communications were made by the client to his attorney in confidence as instructions for conducting his cause, or a mere *gratis dictum*"); 1840, Gillard *v.* Bates, 6 M. & W. 547 ("The test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed"); *United States:* 1877, State *v.* Mewherter, 46 Ia. 88, 93 (consultation with an attorney respecting a suit with H.; threats against H.'s life, made during the consultation, held not privileged, since they "in no manner pertained to the business of the professional consultation"); 1847, Aiken *v.* Kilburne, 27 Me. 252, 262 (the privilege "does not depend upon the importance or materiality of the communications in the defence of that suit"); 1883, Snow *v.* Gould, 74 id. 540, 543 ("The privilege does not concern extraneous or impertinent communications"); 1901, National Bank *v.* Delano, 177 Mass. 362, 58 N. E. 1079 (privilege applies to statements made to the attorney as such, even as to facts not expressly made the subject of the request for advice); 1892, Liggett *v.* Glenn, 2 C. C. A. 286, 51 Fed. 381, 4 U. S. App. 438, 474 (questions as to a fee-contract with the attorney, excluded; if the relation of legal adviser exists, the communications need not concern precisely the topic of advice); 1849, Moore *v.* Bray, 10 Pa. St. 519, 524 (incidental or unnecessary parts of a consultation are equally privileged; quoted *supra*).

Whether the privileged and the unprivileged parts of a conversation can be *separated*, for the purpose of proving the latter alone, must depend upon the circumstances of each case: 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 343 (where the last part of a conversation was held separable).

[1] 1819, Parkhurst *v.* Lowten, 2 Swanst. 194, 216.

[2] 1833, Greenough *v.* Gaskell, 1 Myl. & K. 98, 104 (not privileged "where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure"); 1865, Hager *v.* Shindler, 29 Cal. 47, 63; 1884, Johnson *v.* Patterson, 13 Lea 626, 649 (principle enforced, even under a statute not expressly using the word "confidential"). This is apparently accepted even under those statutes (*ante*, § 2292) which, like the California Code, describe the privilege without using the word "confidential."

[3] 1839, Wheeler *v.* Hill, 16 Me. 329, 333 (it is not necessary that there should have been "any particular circumstances or injunctions of secrecy").

[4] *Eng.:* 1878, Gardner *v.* Irvin, L. R. 4 Exch. D. 49, 53 ("It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor; the letters must be professional communications of a confidential character for the purpose of getting legal advice"); 1891, O'Shea *v.* Wood, Prob. 237, 286 (foregoing passage approved; "letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged, there must be a professional element in the correspondence"); *Can.:* 1874, Hamelyn *v.* White, 6 Ont. Pr. 143 (that it is a communication between solicitor and client, held sufficient); 1897, Hoffman *v.* Crerar, 17 id. 404 (preceding case followed, with hesitation); 1901, Clergue *v.* McKay, 3 Ont. L. R. 478 (Hoffman *v.* Crerar repudiated; the communication must also be stated to be "confidential and of a professional character"; modern English cases reviewed).

Add the following, which seem reasonable: 1870, People *v.* Atkinson, 40 Cal. 284 (the privilege is presumed, if the attorney fails to

These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand.[5] One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person*, not being the agent of either client or attorney.[6] Here, even if we might predicate a desire for confidence by the client, the policy of the privilege would still not protect him, because it goes no further than is necessary to secure the client's subjective freedom of consultation (*ante*, § 2291), and the presence of a third person (other than the agent of either) is obviously unnecessary for communications to the attorney as such, — however useful it may be for communications in negotiation with

recollect whether the specific communication was during confidential relations); 1881, Carroll *v.* Sprague, 59 id. 655, 660 (same; provided it is shown that the confidential relation actually existed for the transaction in question).

[5] *England:* 1797, Bothomly *v.* Usborne, Peake Add. Cas. 99, 101 ("the preparation of the agreement was not an act of confidence"; and the drafting attorney was allowed to prove the contents); 1829, Eicke *v.* Nokes, 1 M. & M. 303 (receipt of a copy of a bill, held not privileged); 1849, Doe *v.* Hertford, 13 Jur. 632 (map given by the owner to an attorney employed to effect a sale, held not privileged; "he is authorized to show the map to all the world"); *United States:* 1865, Hager *v.* Shindler, 29 Cal. 47, 62 (the attorney being by arrangement a grantee for the purpose of raising money for the client, the latter's communications for this independent purpose were held not privileged, as being "foreign to the object for which the attorney was retained"); 1896, Ruiz *v.* Dow, 113 id. 490, 45 Pac. 867 (instructions regarding the delivery of a deed, admitted); 1886, Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99 (an instruction to an attorney to prepare a deed expressing a trust, held not privileged; otherwise, of a parol declaration of trust); 1874, Burnside *v.* Terry, 51 Ga. 186, 191 (instructions to an attorney, intended for communication to the opponent as the basis of a contract, and by the latter accepted as such, held not privileged); 1873, Burnham *v.* Roberts, 70 Ill. 19, 21 (bill in chancery, sworn but never filed, excluded, as a communication by the client; unsound); 1885, Scott *v.* Harris, 113 id. 447, 455 (communications directing the attorney to make certain statements to legatees interested, held not privileged); 1863, Mulford *v.* Mueller, 3 Abb. App. Dec. 330 (that S. acted under C.'s direction in collecting a judgment, and that C. directed him to pay to X. and not to M., held not privileged); 1892, Rosseau *v.* Bleau, 131 N. Y. 177, 183, 30 N. E. 52 (delivery of a deed by the client to the attorney, for the purpose of the latter's delivery to another person, held not privileged); 1849, Heaton *v.* Findlay, 12 Pa. St. 304, 310 (communication of facts to be embodied in a letter sent to the sheriff, held not privileged); 1884, Henderson *v.* Terry, 62 Tex. 281, 285 (communication to a third person, made through the attorney, held not privileged); 1892, Aultman *v.* Ritter, 81 Wis. 395, 398, 21 N. W. 569 (receipt of a check from the client, with which to pay certain charges, held not privileged); 1893, State *v.* Kidd, 89 Ia. 54, 56 N. W. 263 (copy of special findings of a jury, and letter of request to return, sent to the attorney, held not confidential); 1894, Toms *v.* Beebe, 90 id. 612, 58 N. W. 925 (conversation held not privileged, under the Code wording); 1895, Caldwell *v.* Meltveldt, 93 id. 730, 61 N. W. 1090 (collection of a note and execution of deed to reconvey mortgaged property, held not privileged); 1882, Lange *v.* Perley, 47 Mich. 353, 357, 11 N. W. 193 (communications with a county attorney, one of a committee of three to obtain a settlement with a defaulting official's sureties, held not privileged on the facts); 1900, Lorimer *v.* Lorimer, 124 id. 631, 83 N. W. 609 (consultation as to a provision for a woman now claiming as wife, held privileged); 1851, Fraser *v.* Sutherland, 2 Grant Ch. 442, 446 (communications to the solicitor, intended to be laid before creditors, held not privileged).

[6] 1889, Sharon *v.* Sharon, 79 Cal. 633, 677, 22 Pac. 26, 131 (communication "on a public street and in the presence of and mostly with a third party," held not privileged); 1859, Goddard *v.* Gardner, 28 Conn. 172 (consultation in the presence of the attorney's son, who was in no way assisting in the cause; the son held compellable); 1880, Pulford's Appeal, 48 id. 247, 249 (principle approved); 1877, Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502, 504 (presence of a third person, held to destroy the privilege); 1886, House *v.* House, 61 Mich. 69, 27 N. W. 858, *semble* (similar); 1895, People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (similar); 1876, Bowers *v.* State, 29 Oh. St. 542, 546 (presence of the mother of the prosecutrix in a rape case, during the consultation, held not to destroy the privilege); 1897, Hummel *v.* Kistner, 182 Pa. 216, 37 Atl. 815 (by a client to the attorney during the drawing of a deed and in the grantee's presence, held not privileged). *Contra:* 1899, Butler *v.* Fayerweather, 33 C. C. A. 625, 91 Fed. 458 (that others were present at the execution of a will does not take away the privilege of the drafting attorney as to the contents and execution then communicated to him; unsound)

the third person.[7] It follows, of course, *a priori*, that communications *to the third person* in the presence of the attorney are not within the privilege.[8]

§ 2312. **Communications to Opponent or his Attorney or in Opponent's Presence; Joint Attorney.** There may be a relative, not an absolute, confidence. The chief instance occurs when the *same attorney acts for two parties* having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person.[1] Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other. On the other hand, a communication to the *opposing party's* attorney, as such, is clearly without the privilege, since no confidence is reposed, nor, if reposed, could be accepted.[2] But between these two extremes occur a number of situations, shading into each other. It is necessary to examine these situations separately, with their respective solutions:[3]

[7] The distinction, sometimes taken, that in such cases the attorney alone is still bound to secrecy is unsound: 1892, Blount *v.* Kimpton, 155 Mass. 378, 29 N. E. 590 (here the plaintiff and defendant were present with the attorney, and the attorney was prevented from testifying to the former's communications; "as between the client and attorney, they are still confidential, though made in the presence or hearing of a third party"); 1899, Hartness *v.* Brown, 21 Wash. 655, 59 Pac. 491 (the presence of a third person does not render the attorney compellable to disclose).

[8] 1863, Gallagher *v.* Williamson, 23 Cal. 331 (communications between the client and other persons present, held not privileged; otherwise, of confidential communications directly to the attorney at the same meeting); 1892, Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871 (communication to a third person in the attorney's presence, held not privileged); 1841, Coveney *v.* Tannahill, 1 Hill N. Y. 33, 37 ("What was done and said between the plaintiff and Tannahill in the way of business cannot be turned into a confidential communication between attorney and client merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to him"). For the compellability of a *third person overhearing* the communication to disclose it, see *post*, § 2326.

[1] This is universally conceded: 1803, Robson *v.* Kemp, 5 Esp. 233, 235 (an attorney who had prepared a deed from father to son, acting for both, was not compelled to disclose, for the assignees in bankruptcy of the father, adversary to the son); 1837, Doe *v.* Watkins, 3 Bing. N. C. 421 (attorney for borrower and lender); 1881, Root *v.* Wright, 84 N. Y. 72, 76; 1886, Kaut *v.* Kessler, 114 Pa. 603, 610, 7 Atl. 586; 1889, Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921 (conversations with a joint attorney, declared privileged as against third persons; but here the attorney was held to be acting for one party only).

[2] *Offers of compromise* may of course be excluded, but not by reason of any privilege: *ante*, § 1061.

[3] The rulings, however, cannot well be arranged under the appropriate heads, inasmuch as their reasoning is often loosely or obscurely stated; they are as follows: *England:* 1778, Captain Baillie's Trial, 21 How. St. Tr. 1, 359, 385 (Mr. Murphy declined to relate a confidential conversation had by him, as counsel for the defendant, with the opposite party; but the opposite party waived objection, and the witness was ordered to testify; in fact, Mr. Murphy's motives for refusing seem not to have been above suspicion); 1806, Spenceley *v.* Schulenhurgh, 7 East 357 (the defendant's attorney, held compellable to testify to the contents of a notice served on him by the plaintiff; "in the disclosure of this there could be no breach of confidence"); 1833, Griffith *v.* Davies, 5 B. & Ad. 502 (conversation between the plaintiff and the defendant, at which the defendant's attorney was present, held not privileged); 1833, Ripon *v.* Davies, 2 Nev. & M. 310 (conversation between the defendant and his attorney, and the plaintiff, after action begun, held not privileged); 1834, Marston *v.* Downes, 6 C. & P. 381, 382 (the mortgagor's conversation with the mortgagee's attorney, the former having his own attorney for the raising of the money, held not privileged); 1838, R. *v.* Avery, 8 id. 596, 598 (forgery of a will, with intent to defraud W.; the defendant having applied to S., a solicitor for W., to act as solicitor in raising the money, Patteson, J., with some doubt, compelled S. to disclose the communication); 1838, Desborough *v.* Rawlins, 3 Myl. & Cr. 515 (communication by an agent representing an adverse interest to the solicitor and his client, held not privileged); 1843, Shore *v.* Bedford, 5 M. & Gr. 271 (defendant's communication in the plaintiff's presence to the plaintiff's attorney, held not privileged); 1846, Reynell *v.* Sprye, 10 Beav. 51, 55 (case and opinion procured by the defendant for the defendant and the plaintiff, both being interested in an estate, admitted); 1847,

(1) First, then, a communication by A to X as the common attorney of A and B, who afterwards become party opponents, is not privileged, as

Tugwell *v.* Hooper, ib. 348 ("This gentleman, who had become a trustee for two parties, could not act separately as the solicitor for one against the other having an opposite interest" and then acquire information in the trust matters and conceal it from one *cestui* on the pretext of being solicitor for the other); 1847, Weeks *v.* Argent, 16 M. & W. 817 (attorney for the payee, held compellable to disclose the consideration for a note signed by the maker in the presence of the payee and their two attorneys); 1848, Chant *v.* Brown, 7 Hare 79, 88 (a solicitor having afterwards become devisee and thus a party to the suit, the privilege did not cease as to prior communications made to him as solicitor, and discovery of them could not be obtained from him as a party; apparently unsound); 1851, Gore *v.* Bowser, 5 DeG. & Sm. 30, 34 (communication by a solicitor with the opposite party, not privileged); 1852, Cleave *v.* Jones, 7 Exch. 421, 426 (action for money advanced by the attorney; the client's account, rendered to the attorney, held privileged against the latter; unsound); 1865, Talbot *v.* Marshfield, 2 Dr. & Sm. 549 (certain cases and opinions taken by trustees under a will, held in part privileged, in part not, as against the residuary legatees); 1869, Ross *v.* Gibbs, L. R. 8 Eq. 522, 524 (communications between mortgagor and mortgagee and an attorney acting on their joint behalf, held not privileged for the latter against the former, if made before litigation was begun by the former); 1883, Mason *v.* Cattley, L. R. 22 Ch. D. 609 (action by *cestuis* against trustees; the latter's communications before action brought, held not privileged); 1900, Ainsworth *v.* Wilding, 2 Ch. 315, 320 ("a mere record of what takes place in chambers, in the course of a hostile action, in the presence of parties on both sides, is not privileged").

United States: Ala.: 1846, Brazier *v.* Fortune, 10 Ala. 516 (incidental remark, made during a consultation in the presence of the opposing attorney also, held privileged, by a majority; unsound); 1856, Parish *v.* Gates, 29 id. 254, 260 ("by selecting the same attorney, and making their communications in the presence of each other, each party waived" the confidence); *Cal.:* 1889, Bauer's Estate, 79 Cal. 304, 312, 21 Pac. 759 ("When two persons address a lawyer as their common agent," the privilege ceases as between them); 1896, Murphy *v.* Waterhouse, 113 id. 467, 45 Pac. 866 (conversations between the parties where a lawyer is present as the adviser of one or of both, not privileged as between them); 1902, Harris *v.* Harris, 136 id. 379, 69 Pac. 23 (communications with the opponent, not privileged); *D. C.:* 1894, Olmstead *v.* Webb, 5 D. C. App. 38, 51, 55 ("The object of the rule ceases . . . when the client or his representatives charge him [the attorney], either directly or indirectly, with fraud or other improper or unprofessional conduct"); *Ga.:* 1858, Corbett *v.* Gilbert, 24 Ga. 454, 459 (conversation between the plaintiff and the defendant in an attorney's presence, admitted); *Ill.:* 1873, Burnham *v.* Roberts, 70 Ill. 19, 21, *semble* (bill in chancery made by the attorney for a while also attorney for B, excluded); 1885, Lynn *v.* Lyerle, 113 id. 128, 134 (communications when "both parties were present and what each said was communicated to the other as well as to the attorney," held not privileged); 1888, Tyler *v.* Tyler, 126 id. 525, 541, 21 N. E. 616 (similar); 1888, Griffin *v.* Griffin, 125 id. 430, 17 N. E. 782 (similar); 1900, Funk *v.* Mohr, 185 id. 395, 57 N. E. 2 (an attorney allowed to testify to the construction put by him on a contract made by him for one party with the other); *Ind.:* 1859, Mave *v.* Baird, 12 Ind. 318 (privilege not applicable where the attorney is sued by the client for negligent management and disobedience of instructions); 1863, Bowers *v.* Briggs, 20 id. 139 (privilege held applicable where C and D, as sureties on a note by B, consulted the attorney of A, who had begun suit on the note, to inquire as to confessing judgment; the consultation being independent of A and yet with a view to advise in the interest of C and D); 1875, Scranton *v.* Stewart, 52 id. 68, 79 (the wife's consultation of the husband's attorney regarding personalty purchased by the proceeds of her realty, held to make him her attorney); 1887, Hanlon *v.* Doherty, 109 id. 37, 44, 9 N. E. 782 (conversation with a joint attorney, both parties being present, held not privileged); 1888, Colt *v.* McConnell, 116 id. 256, 19 N. E. 106 ("When both parties are present," there is no privilege); *Ia.:* 1895, Wyland *v.* Griffith, 96 Ia. 24, 64 N. W. 673 (an agreement between plaintiff and defendant, made in the presence of the latter's attorney, not privileged); *Kan.:* 1893, Sparks *v.* Sparks, 51 Kan. 195, 201, 32 Pac. 892 (an attorney drafting a deed for both parties and in the presence of both; not privileged); *Ky.:* 1901, Taylor *v.* Roulstone, — Ky. —, 61 S. W. 354 (joint attorney; communications not privileged as between the parties); 1902, Smick *v.* Beswick, — id. —, 68 S. W. 439 (statements by the clients of a joint attorney, in each other's presence, in a controversy between them, held admissible); *Mass.:* 1902, Thompson *v.* Cashman, 181 Mass. 36, 62 N. E. 976 (communications to a joint attorney, not privileged, as between the parties); *Mich.:* 1886, Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805 (communication with a joint attorney in each other's presence, held not privileged); *Minn.:* 1901, Shove *v.* Martine, 85 Minn. 29, 88 N. W. 254 (communications to a joint attorney, not privileged as between the parties); *Mo.:* 1858, Hull *v.* Lyon, 27 Mo. 570, 576 (consultation by M., under whom the defendant claimed, with the common attorney of M. and plaintiff, both parties being present, held privileged as against the plaintiff; no precedent cited); *Nebr.:* 1886, Clay *v.* Tyson, 19 Nebr. 530, 26 N. W. 240 (communication to an attorney already employed in adverse interests, and nevertheless knowingly employed by the plaintiff, held not privileged;

between A and B; since there was no secrecy between them at the time of communication. (2) A communication by A to X as A's attorney, X afterwards becoming A's party-opponent (as, in a suit for fees or for negligence) is not privileged; since there was no secrecy as between them at the time of communication.[4] (3) A communication by A to X as A's attorney, X being then also the attorney of B, now become the party-opponent, is ordinarily privileged, because of the relation of X towards A. Nor does the fact of A's knowledge that X is already B's attorney, nor the fact of B's being already adversely interested, destroy the privilege; for, although X ought not to undertake to act for both in any matter where there is a possibility of adverse interests, none the less is A protected by reason of the relation. In practice, difficulty often will arise here in distinguishing this situation from that of (1) *supra* and that of (5) *infra*, in either of which the privilege exists. For example, when a *cestui* employs the attorney for the trustee to report upon the investments, does the case fall under (1) or (3)?[5] Again, a mortgagor communicates with the mortgagee's attorney, who has threatened to foreclose, in regard to obtaining a second mortgage; does the case fall within (3) or (5)?[6] (4) In the foregoing case, if A consults X as his attorney, with the express purpose of inducing him, while B's attorney, to act adversely to B, the communication would clearly cease to be privileged; for, by a former part of the principle (*ante*, § 2298), the privilege cannot cover communications designed to achieve a fraud. (5) X being the attorney of B, the party-opponent, A consults X as B's attorney (as, when B is suing A upon a note, and A comes to ask for delay); here, the privilege clearly does not exist, for there is no relation of legal adviser on X's part to A. (6) In the same situa-

but here the employment was merely to close up accounts, and not for litigation); 1891, Nelson *v.* Becker, 32 id. 99, 48 N. W. 962 (communication to one already employed, unknown to the client, by the opponent, held privileged); 1898, David Adler & S. C. Co. *v.* Hellman, 55 id. 266, 75 N. W. 877 (communications with both parties present, not privileged); 1903, Jahnke *v.* State, — id. —, 94 N. W. 158 (communication by one of two joint defendants under arrest, to their joint attorney, held privileged); *Nev.:* 1895, Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290 (communications to attorney of both parties, not privileged); *N. J.:* 1884, Gulick *v.* Gulick, 38 N. J. Eq. 402, 39 id. 516 (communication to an attorney who was the joint adviser of both parties, held not privileged); 1896, Roper *v.* State, 58 N. J. L. 420, 33 Atl. 969 (an interview between the plaintiff and the defendant, the former's counsel being present, held not privileged for the defendant); *N. Y.:* 1864, Whiting *v.* Barney, 30 N. Y. 330, 343 ("Both parties being present, there was nothing confidential in the communication"; three judges dissenting on various grounds); 1871, Britton *v.* Lorenz, 45 id. 51, 57 ("Where the communications are made in the presence of all parties to the controversy, they are not privileged . . . as to either of these parties"); 1877, Hebbard *v.* Haughian, 70 id. 54, 61, *semble* (an attorney not privileged as to directions given him at a transaction with both parties); 1891, Hurlburt *v.* Hurlburt, 128 id. 420, 424, 28 N. E. 651 (like Britton *v.* Lorenz); 1901, Doheny *v.* Lacy, 168 id. 213, 61 N. E. 259 (communications to a joint attorney, not privileged as between the parties); *N. C.:* 1888, Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264 ("a communication made to counsel by two defendants is not privileged from disclosure in a subsequent suit between the two"); *Pa.:* 1888, Goodwin G. S. & M. Co.'s Appeal, 117 Pa. 514, 522, 537, 12 Atl. 736 (conversations with a joint attorney, in each other's presence, held not privileged); 1898, Kremer *v.* Kister, — id. —, 40 Atl. 1008 (an agreement between parties and counsel at a former trial regarding the verdict, held not privileged); *Tex.:* 1873, Allen *v.* Root, 39 Tex. 589, 593, 597 (a communication from the opponent in the suit, held not privileged); *Va.:* 1888, Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215 (a conversation with the opponent held not privileged).

[4] Chant *v.* Brown, Cleave *v.* Jones, Eng., Nave *v.* Baird, Ind., *supra*.

[5] Tugwell *v.* Hooper, Mason *v.* Cattley, R. *v.* Avery, Eng., Scranton *v.* Stewart, Ind., *supra*.

[6] Marston *v.* Downes, Ross *v.* Gibbs, Eng., Bowers *v.* Briggs, Ind., Clay *v.* Tyson, Nebr., *supra*.

tion, B is also present; this is also not within the privilege, for the additional reason of lack of confidentiality (*ante*, § 2311). So, too, if A's attorney Y be also present, the case is no different. (7) X being the attorney of A, and the opponent B being also present, A's communication to X is not privileged, for the reasons already noted (*ante*, §2311).

Of these various situations, those of (6) and (7) are the commonest subject of rulings. Upon these there can be no doubt or practical difficulty, for the principle of confidentiality (*ante*, § 2311) disposes of them.

§ 2313. **Identity of Client or Purpose of Suit.** The identity of the attorney's client, or the name of the real party in interest, will seldom be a matter communicated in confidence; for the procedure of litigation ordinarily presupposes a disclosure of these facts. Furthermore, so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to know the identity of his opponents. He cannot be obliged to struggle in the dark against unknown forces. He has by anticipation the right, in later proceedings, if desired, to enforce the legal responsibility of those who may have maliciously sued or prosecuted him or fraudulently evaded his claim. He has as much right to ask the attorney "Who pays your fees?" as to ask the witness (*ante*, § 966), "Who maintains you during this trial?" Upon the analogy of the principle already examined (*ante*, § 2298), the privilege cannot be used to evade a client's responsibility for the use of legal process; and if it is necessary for that purpose to make a plain exception to the rule of confidence, then it must be made.

On the other hand, the litigant is not entitled to ask any more than serves to fix the client's identity. A communication as to the nature of the title claimed, or the capacity in which suit was brought, or the ultimate motive of the litigation, is equally protected with others, so far as any policy of the privilege is concerned. Here, however, as always, there may have been in the nature of the communication nothing confidential, — as where the claim put forward in former litigation is inquired of; and in such cases the privilege falls away. Such seems to be the correct distinction for this much-mooted class of cases. There is not entire harmony in the rulings; but no doubt much ought to depend upon the circumstances of each case.[1]

[1] *England*: 1721, Gynn *v.* Kirby, 1 Stra. 402 (the attorney for the plaintiff was summoned to produce his client, where the defendant claimed that the client was fictitious); 1740, R. *v.* Watkinson, 2 id. 1122 (a solicitor not compelled to speak to the identity of a client signing an answer in chancery; but the reporter adds, "*quære*, for this was to a fact in his own knowledge and no matter of secrecy committed to him by his client"); 1776, Duchess of Kingston's Trial, 20 How. St. Tr. 613 (*contra* to the preceding case; cited *ante*, § 2309); 1823, Studdy *v.* Sanders, 2 Dowl. & R. 347 (testimony to the identity of parties in two causes, not privileged, "because it was a fact easily cognizable to the witness and to many other persons, without any confidence on the subject being reposed in him"); 1824, Foote *v.* Hayne, 1 C. & P. 545, 546 (in proving the defendant's conduct, the fact that he had on a certain day applied to counsel to retain him was held privileged); 1829, Levy *v.* Pope, 1 M. & M. 410 (who was the party employing him, held not privileged); 1834, Beckwith *v.* Benner, 6 C. & P. 681, 682 (an attorney allowed to be asked whether the defendants, charged as executors, had employed him in that character); 1841, Jones *v.* Jones, 9 M. & W. 75, Parke, B. (an attorney may disclose the client's name for

§ 2314. **Execution of a Will or Deed; Temporary Confidentiality.** It has already been noticed (*ante*, § 2309) that the fact of *execution* of a *deed* has commonly been declared to be without the privilege, partly because it was not a subject of communication at all, and partly because, if a communication, it was not impliedly a confidential one. On the other hand, the *contents* of the deed are generally within the privilege (*ante*, § 2308). No further examination of the principle as applied to deeds is here necessary.

But for *wills* a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain.[1] That it appropriately explains the client's

identification); 1855, Forshaw *v.* Lewis, 1 Jur. N. S. 263 (letters merely showing "the existence of the relation of attorney and client," held not privileged); *Canada:* 1848, Beamer *v.* Darling, 4 U. C. Q. B. 249 (trespass for causing an arrest under a writ; the attorney compelled to testify who employed him to sue out the writ); Ont. Rules of Court 1897, § 143 (a solicitor must on demand disclose the name and abode of the plaintiff); Man. Rev. St. 1902, c. 40, Rule 178 (every solicitor of record for a claimant shall on demand disclose "the profession or occupation and the place of abode" of the plaintiff); *United States:* 1880, Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164, 168 (whether suits were defended on instructions from M., held not privileged); 1869, Satterlee *v.* Bliss, 36 Cal. 489, 507 (disclosure of "the character in which the client employed him," held compellable; doubting Chirac *v.* Reinicker, U. S., *infra*); 1857, Martin *v.* Anderson, 21 Ga. 301, 308 (an attorney held compellable to answer whether A. was his client in the cause, or had given him instructions to sue, or was dead, or was a fictitious person); 1867, Stephens *v.* Mattox, 37 id. 289, 291 (ejectment; the plaintiff's attorney held compellable to state whether the plaintiff had employed him, but not to state whether the employment was to sue for the plaintiff individually or as administrator); 1898, Alger *v.* Turner, 105 id. 178, 31 S. E. 423 (whether he had authority from A. as client to begin a suit, not privileged); 1828, Cormier *v.* Richard, 7 Mart. N. S. La. 177 (that the attorney was employed to resist a claim on a certain ground, held "not a secret confided to the attorney, since he was to spread the opposition on the record"); 1860, Shaughnessy *v.* Fogg, 15 La. An. 330 ("the attorney may be interrogated as to who is his client; he may also be asked through whose agency or in what manner and at what time he was retained"); 1839, Wheeler *v.* Hill, 16 Me. 329, 333 (disclosure by the attorney "that B. employed him," held compellable, but nothing as to the purpose of instituting the suit); 1841, Gower *v.* Emery, 18 id. 79, 83 (disclosure compelled of the fact of employment by B. and S.); 1882, Alden *v.* Goddard, 73 id. 345, 348 (the privilege does not forbid testimony to the client's signing a bill in equity, in which he stated his place of residence); 1833, Brown *v.* Payson, 6 N. H. 443, 448 ("there is no right in any one to employ an attorney in court and say that the attorney is privileged from disclosing who sent him there"); 1878, Harriman *v.* Jones, 58 id. 328 (similar); 1846, Levers *v.* Van Buskirk, 4 Pa. St. 309, 316 (privilege held not applicable to the attorney's testimony that the same title was in question in a former trial); 1848, Beeson *v.* Beeson, 9 id. 279, 281, 301 (an attorney held compellable to testify who as the real party in interest employed him); 1853, Miller *v.* Weeks, 22 id. 89, 92 (an attorney held not compellable to testify that the plaintiff was a mere trustee for W. & Co. who were the real bringers of the suit; no precedent cited); 1826, Chirac *v.* Reinicker, 11 Wheat. 280, 294 (trespass for mesne profits; to prove the real party in interest in the prior ejectment suit, a question as to the defendant's retainer, as landlord of the premises, of certain counsel, was held privileged, as involving "a disclosure of the title and claim set up"; though a question merely as to the fact of retainer was intimated to be without the privilege); 1901, U. S. *v.* Lee, 107 Fed. 702 (an attorney compelled to disclose the name and residence of one who had retained him for the defence, but not that person's interest in the defence); 1852, Wetherbee *v.* Ezekiel, 25 Vt. 47 (information as to two actions being "commenced for the same cause of action," held privileged); 1901, Williams *v.* Blumenthal, 27 Wash. 24, 67 Pac. 393 (the authorization of the attorney to settle a claim, held not privileged); 1881, Moats *v.* Rymer, 18 W. Va. 642, 645 (the fee agreed to be received by the attorney, being material to affect his credit as a witness for his client, held not privileged).

[1] 1883, Snow *v.* Gould, 74 Me. 540, 543 ("That which may be private at a time may

relation with an attorney *drafting a will* seems almost equally clear. It follows, therefore, that after the *testator's death* the attorney is at liberty to disclose all that affects the execution and tenor of the will.[2] The only question could be as to communications tending to show the invalidity of the will, *i. e.* from which a circumstantial inference could be drawn that the testator was insane or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will. But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and therefore could not possibly be said to have communicated them.[3] As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence

not be private at an after-time"; holding that a client's letter to an attorney instructing divorce proceedings was not privileged, after divorce obtained, in a controversy between the attorney and the client concerning compensation).

[2] 1851, Russell *v.* Jackson, 9 Hare 387, 392 (Wigram, V. C., held that "in the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting"; here allowing disclosure of a secret trust in devisees); 1901, Nelson's Estate, 132 Cal. 182, 64 Pac. 294 (the attorney drawing a will, admitted to testify to his instructions; testator's employment of him operating as a waiver); 1894, Olmstead *v.* Webb, 5 D. C. App. 38, 50 (the attorney drafting a will, allowed to testify that he conformed to the testator's instructions; Russell *v.* Jackson followed); 1898, O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100 (probate of a will; the attorney drawing it may after the testator's death testify to "what passed between her when he read over to her" the will; the statute of 1887, Code § 5271, does not change this); 1892, Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726 (the testator's instructions to the attorney for drawing the will, held not privileged, since after the testator's death "the case does not fall within the reason of the rule"); 1836, Graham *v.* O'Fallon, 4 Mo. 338 (the attorney drawing a will, allowed to testify to the drafting, the reading over, and the contents; no principle stated); 1861, Daniel *v.* Daniel, 39 Pa. 191, 211 (quoted *ante*, § 2306); 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 184, 192 (legitimacy and inheritance; a testator's statements to his attorney, in the preparation of a will, concerning the children's legitimacy, the will describing them as natural children, held not privileged, partly because the protection of the client under the privilege was not affected by corroboration of the will, and partly because the assertions in the will indicated that the statements were not confidentially intended; Clifford, J., diss.); 1898, Fayerweather *v.* Ritch, C. C., 90 Fed. 13, *semble* (an attorney preparing a will may testify to its contents as executed, because otherwise perhaps "the whole object of a testator's action would be destroyed"); s. c. on appeal, 1899, Butler *v.* Fayerweather, 33 C. C. A. 625, 91 Fed. 458 (an attorney compellable at common law, *semble*, to disclose the contents of a lost will and the fact of due execution, where he drew but did not attest it); 1903, Downing's Will, 118 Wis. 581, 95 N. W. 876 (attorney drafting a will, held not privileged as to the facts of execution). *Contra:* 1893, Gurley *v.* Park, 135 Ind. 440, 442, 35 N. E. 279 (testimony to sanity, by the attorney drawing the will, privileged); 1888, Loder *v.* Whelpley, 111 N. Y. 239, 248, 18 N. E. 874 (the attorney drafting a will under instructions from the testator, held privileged as to conversations bearing on the issue of undue influence, etc.; "he acts in that capacity, although, asking no questions and without advising, he does nothing more than to reduce those directions to writing"); 1898, Fayerweather *v.* Ritch, C. C., 90 Fed. 13 (under N. Y. St. 1893, c. 295, which amended the Code, quoted *ante*, § 2292, in consequence of the ruling in Coleman's Will, cited *post*, § 2315, the privilege still does not apply to the testimony of the drafting attorney to the execution and contents of a will, even where he is not an attesting witness, because the document "ceased to be confidential when it was executed"; overruled on appeal); s. c. on appeal: 1899, Butler *v.* Fayerweather, 33 C. C. A. 625, 91 Fed. 458 (an attorney not attesting the will, but drawing it, held not compellable under the N. Y. Code as amended, to disclose the contents or execution of a lost will).

Still other rulings reach the conclusion stated above, in the text, on the ground that either executor or heir has the *right of waiver* on behalf of the deceased: *post*, § 2329. Some of the rulings above cited meant perhaps to proceed on that principle.

[3] This is pointed out in Daniel *v.* Daniel, Pa., quoted *ante*, § 2306.

of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will.

§ 2315. **Same: Attorney as Attesting Witness.** When the attorney is made a witness to *attest the execution* of a document (and not merely to draft it), there is no confidence contemplated, and therefore no privilege for the occasion when the attorney is called upon to fulfil the function thereby assumed. He cannot be an attesting witness and yet not attest:

1803, *Ellenborough*, L. C. J., in *Robson* v. *Kemp*, 5 Esp. 52, 54: "If an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney."

1888, *Ruger*, C. J., in *Coleman's Will*, 111 N. Y. 220, 226, 19 N. E. 71: "An examination of the will itself, as well as the evidence of all of the witnesses present on the occasion of the execution, concur in establishing the fact that the testator requested both Hughes and Northrup to sign the attestation clause of his first as well as of his second will, as witnesses thereto. That request implies not only information as to the necessity of such signatures to the validity of the instrument executed, but also knowledge of the obligations which they assumed in respect to the proof thereof after his death. He must have been aware that his object in making a will might prove to be ineffectual unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. . . . It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not."

Accordingly, it has always been held that an attorney who signs in attestation of a *deed* is compellable to testify.[1] The same consequence ensues for a *will*,[2]

[1] *Eng.*: 1778, Doe *v.* Andrews, Cowp. 845 ("by attesting an instrument, a man pledges himself to give evidence of it, whenever he is called upon"); 1793, Sandford *v.* Remington, 2 Ves. Jr. 189 (deed; cited *ante*, § 2309); 1803, Robson *v.* Kemp, 5 Esp. 52 (destroyed power of attorney; the attorney's attestation requires disclosure of "all that passed at the time respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed"); 1830, Grindall *v.* Grindall, K. B., Butterworth's Rep. 63, Lord Tenterden, C. J.; 1833, Greenough *v.* Gaskell, 1 Myl. & K. 98, 104 (not privileged "where the attorney made himself a subscribing witness and thereby assumed another character for the occasion, and adopting the duties which it imposes became bound to give evidence of all that a subscribing witness can be required to prove"); 1841, Mackenzie *v.* Yeo, 2 Curt. Eccl. 866, 868 ("the witnessing the execution of a deed being no part of the duty of a solicitor," he is not privileged for what he knows as witness); *U. S.*: 1848, Bank of Utica *v.* Merserean, 3 Barb. Ch. 528, 596 (an attorney attesting a power of attorney, held compellable to testify to matters connected with the execution of the instrument, but not to conversations as to the purpose of the judgment to be confessed by the power).

[2] 1895, Wax's Estate, 106 Cal. 343, 347, 39 Pac. 624; 1895, Mullin's Estate, 110 id. 252, 42 Pac. 645; 1898, O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100 (repudiating the theory of waiver, Code § 5271 prohibiting a waiver); 1894, Taylor *v.* Pegram, 151 Ill. 106, 114, 37 N. E. 837 (an attorney also drawing the will; allowed to speak as to undue influence); 1893, Pence *v.* Waugh, 135 Ind. 143, 153, 34 N. E. 860 (an attorney also drawing the will; not privileged as to proof of the will, including sanity); 1900, Kern *v.* Kern, 154 id. 29, 55 N. E. 1004 (contents of a lost will, in an issue between heirs and devisees, the attorney being

not only as to the tenor and the act of execution, but also as to the circumstances affecting sanity and influence; for, since the intention at large negatives confidence, no discrimination can be made, as already noticed (*ante*, § 2314), for particular facts which now turn out to invalidate the will. It may be added that this generally accepted result can hardly be reached through predicating a *waiver by the testator*,[3] for there cannot be a waiver of that which never came into existence; the true explanation is that no confidence was intended to be instituted. On the other hand, if it could be assumed that there had been a confidence and therefore a privilege, it could then still be maintained, in testamentary contests, that both executor and heir have the right of waiver (*post*, § 2329).

5. "By the client"

§ 2317. **Privilege not applicable to Knowledge acquired by the Attorney from Third Persons, unless as Agents of the Client; Who are Agents.** 1. The privilege is designed to secure subjective freedom of mind for the client in seeking legal advice (*ante*, § 2291). It has no concern with other persons' freedom of mind, nor with the attorney's own desire for secrecy in his conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular *third person* for the benefit of the client.[1]

a subscribing witness, held not privileged; distinguishing Gurley *v.* Park, *ante*, § 2314); 1894, Denning *v.* Butcher, 91 Ia. 425, 434, 59 N. W. 69 (attorney also drawing the will; not privileged as to "all facts and circumstances attending its execution," including sanity); 1901, Coates *v.* Semper, 82 Minn. 460, 85 N. W. 217 (attorney drafting and witnessing a will, allowed to be asked whether he made the contents known to testatrix); 1888, Coleman's Will, 111 N. Y. 220, 226, 19 N. E. 71 (an attorney attesting a will, held not privileged as to the testator's conduct and conversation at the time of execution, on the theory of waiver; quoted *supra*); 1889, Alberti *v.* R. Co., 118 id. 77, 85, 23 N. E. 35 (preceding case approved); 1893, McMaster *v.* Scriven, 85 Wis. 162, 167, 55 N. W. 149 (the attorney who had also drawn the will, allowed to speak of "any matter in relation to the will and its execution," including the maker's mental condition).

[3] As suggested in Mullin's Estate, Cal., Coleman's Will, N. Y., *infra*.

[1] *England:* 1806, Spenceley *v.* Schulenburgh, 7 East 357 (L. C. J. Ellenborough said that the privilege extended only "to confidential communications from his client, and not to communications from collateral quarters"); 1835, Sawyer *v.* Birchmore, 3 Myl. & K. 572 (Pepys, M. R.; letters communicated to the solicitor "from collateral quarters," held not privileged); 1860, Marsh *v.* Keith, 1 Dr. & Sm. 342, 348, 6 Jur. N. S. 1182 (Kindersley, V. C.; plea that the knowledge had been acquired "by virtue of the solicitor's employment as solicitor," held insufficient, since it might have been obtained "without any communication from or consultation with the client"); 1863, Ford *v.* Tennant, 32 Beav. 162, 168 (Romilly, M. R., held the privilege to cover communications with "all other persons with whom the solicitor must communicate in order to conduct the cause," but not to "information derived from third parties, from strangers, or from the opponents of the client"; repudiating the *obiter dictum* in Greenough *v.* Gaskell covering all communications "either from a client or on his account or for his benefit"); *United States:* 1854, Patten *v.* Moor, 29 N. H. 163, 166 (an attorney present at the execution of a mortgage by M. and G. to the client P., the latter not being present, held compellable to testify to the execution, since the facts were "not communicated or confided to him by his client, although he became acquainted with them while engaged in his professional duty as the attorney or counsel of his client"); 1803, Baker *v.* Arnold, 1 Caines 258, 266, *semble;* 1821, Johnson *v.* Daverne, 19 John. 135 (an attorney held compellable to testify to his client's signature, if he "became acquainted with it in any other way [than by the client's communication], though it was subsequent to his retainer"); 1834, Bogert *v.* Bogert, 2 Edw. Ch. 399, 403; 1844, Crosby *v.* Berger, 11 Paige 377, Walworth, C. ("information derived from other persons or other sources, although such

2. On the other hand, the client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege. This of course includes communications through an *interpreter*,[2] and also communications *through a messenger* or any other *agent of transmission*,[3] as well as communications *originating with the client's agent* and made to the attorney.[4] It follows, too, that the communications of the *attorney's agent* to the attorney are within the privilege, because the attorney's agent is also the client's sub-agent and is acting as such for the client.[5]

§ 2318. **Documents of the Client existing before Communication; General Liability to Production by Discovery, distinguished.** At this point it is necessary to recall certain principles of discovery, otherwise established, which complicate the application of the foregoing principle as to agents'

information is derived or obtained while acting as attorney or counsel, is not privileged") ; 1832, Rogere *v.* Dare, Wright 136. *Contra:* 1894, Freeman *v.* Brewster, 93 Ga. 649, 21 S. E. 165 (the privilege held to cover not only all statements by the client, but also "all facts knowledge of which he obtained concerning his client's case pending his employment"; Code § 5271 seems not literally to justify this).

The question *who is the client* arises here, but is usually a question of fact: 1851, Warde *v.* Warde, 15 Jur. 758; 1859, Shean *v.* Philips, 1 F. & F. 449; 1858, Allen *v.* Harrison, 30 Vt. 219 (information given by one who was a nominal party only, held not a professional consultation on the facts). Compare the cases cited *ante*, § 2312.

[2] 1791, Du Barré *v.* Livette, Peake N. P. 77 (conversation had through an interpreter with the attorney, the client being a Frenchman and the attorney not understanding French, held privileged; the interpreter was here the prohibited witness); 1792, Wilson *v.* Rastall, 4 T. R. 753, 756 (L. C. J. Kenyon said, "In Madam Du Barré's case, I said at the trial that the interpreter was the organ of the attorney"); 1814, Parker *v.* Carter, 4 Munf. 273, 287.

[3] 1821, Walker *v.* Wildman, 6 Madd. 47 (the privilege held applicable to communications "through the intervention of a third person"); 1834, R. *v.* Brewer, 6 C. & P. 363, 365 (Park, J.; a letter by an accused in jail, requesting a friend to consult a solicitor, held not privileged); 1839, Bunbury *v.* Bunbury, 2 Beav. 173 ("The necessity which arises of transmitting such communications through another party renders it privileged"; but here the communication was held not "professional or confidential"); 1849, Reid *v.* Langlois, 1 McN. & G. 627, 638 (letters by the defendant to his agent for communication to the legal adviser, held privileged, irrespective of the necessity of employing an agent); 1851, Glyn *v.* Caulfield, 3 id. 463, 473 (preceding case approved); 1862, Hooper *v.* Gumm, 2 J. & Hem. 602, 606 (similar); 1876, Anderson *v.* Bank, L. R. 2 Ch. D. 644, 649 (Jessel, M. R.: "He may employ a third person to write the letter, or he may send the letter through a messenger, or he may give a verbal message to a messenger").

[4] 1845, Carpmael *v.* Powis, 9 Beav. 16, 20, on appeal in 1 Phil. Ch. 687 (communication "from the brother of the client as representing her," and as the medium of communication, held privileged; nor, so far as the solicitor is concerned, is it essential that an agent was a necessity under the circumstances); 1851, Russell *v.* Jackson, 9 Hare 387, 391 (the privilege is the same for the agent's communications "as if had with the principal"); 1862, Hooper *v.* Gumm, 2 J. & Hem. 602, 606 (agent's letters to the solicitor, protected); 1887, Fire Ass'n *v.* Flemming, 78 Ga. 733, 3 S. E. 420 (client's agent's correspondence, protected); 1855, Maas *v.* Bloch, 7 Ind. 202 (client's agent's conversation with the attorney, held privileged); 1891, Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483 (husband as the agent of the wife to consult; privilege recognized); 1895, Frank *v.* Morley's Estate, 106 Mich. 635, 64 N. W. 577 (where M. employed the attorney on F.'s behalf to draw a petition for F., a communication by M. in F.'s presence was held not privileged); 1879, Scales *v.* Kelley, 2 Lea 706 (communications by the client's wife and daughter seeking to engage counsel for the client, held privileged).

[5] 1844, Steele *v.* Stewart, 1 Phil. Ch. 471, 475 (communications by the solicitor's agent to the client, and also to the solicitor, held privileged; here there was a necessity, the witnesses being in India and an agent being sent to collect evidence); 1850, Goodall *v.* Little, 1 Sim. N. S. 155, 163 (letters between the solicitor and an attorney, in a local jurisdiction, employed by the solicitor, held privileged); 1863, Ford *v.* Tennant, 32 Beav. 162, 168 (cited *supra*); 1876, Jessel, M. R., in Anderson *v.* Bank, L. R. 2 Ch. D. 644, 649.

communications. The principles of discovery are those already considered in detail (*ante*, §§ 1856–1859, 2219).

(*a*) In the first place, a document of the client existing before it was communicated to the attorney is not within the present privilege so as to be exempt from production (*ante*, § 2307). But a *document* which has *come into existence as a communication* to the attorney, being itself a communication, is within the present privilege (*ante*, § 2307). Documents of the latter sort are therefore *exempt from production* under a bill of discovery;[1] while documents of the former sort are not exempt from production under a bill of discovery or the modern statutory motion to produce,[2] although at common law the party as such would not have been compellable to produce. That is to say, at common law, he was protected in the first instance as party and in the second instance as client; while in chancery and under statutes he has ceased to be protected as party but is still protected as client. Only those documents, therefore, which he has created as a communicating client are now privileged. The application of this distinction would in any case lead obviously to certain fine discriminations; but when the principle of agent's communications (*ante*, § 2317) additionally comes into play, it will be seen that the various documents which may be made by agents on behalf of clients present infinitely varied openings for the doubt whether or not they came into existence in the ordinary course of the client's affairs or only with the intention of furnishing information to the attorney. Of this difficulty, the cases of reports of accidents by railway officers are a typical instance.[3]

(*b*) Secondly, the ordinary rule of discovery, by which a party, by *answers to interrogatories*, must disclose all facts on a bill of discovery, is subject to one limitation, namely, that the party need not before trial discover the *names of his witnesses*, nor the *tenor of their testimony* proving the facts of his own case (*ante*, § 1856). A prospective witness' communication may therefore be exempt from discovery before trial on this ground,[4] while it would not be exempt merely as a communication to the attorney.[5] The application of this distinction also may lead in particular cases to some doubt.

§ 2319. **Same: Conflict of the foregoing Principles, illustrated.** The result, in England, of the combined application of the foregoing principles (*ante*, §§ 2317, 2318) has led often to confusion of judicial language, in the following ways:[1]

[1] 1852, Cleave *v.* Jones, 7 Exch. 421, 426 (an account made out by the client for the attorney's use in preparing a case for counsel, held privileged); 1878, Southwark & V. W. Co. *v.* Quick, L. R. 3 Q. B. D. 315, 318, 323 ("If a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor," even though the latter did not suggest its preparation, and even though he did not ultimately receive it; here applied to exclude certain notes of interviews with expected witnesses, experts, etc.).

[2] 1886, Chadwick *v.* Bowman, L. R. 16 Q. B. D. 561 (copies, procured by a solicitor from third persons, of letters written by the client, held not privileged, the originals not having "come into existence for the purposes of the action").

[3] *E. g.* Woolley *v.* R. Co., *post*, § 2319; Lyell *v.* Kennedy, ib., is the great modern case.

[4] 1826, Preston *v.* Carr, 1 Y. & J. 175 (letters from witnesses, not compelled to be discovered).

[5] Cases cited *ante*, § 2317.

[1] The rulings are as follows: *England:* 1831, Whitbread *v.* Gurney, 1 Younge 541, Exch.

(1) In applying the privilege for communications of *clients and their agents* or their attorneys' agents, the more clearly the communicator is a stranger

(L. C. B. Lyndhurst; letters between the parties themselves, with reference to their defence, held not privileged); 1833, Greenough *v.* Gaskell, 1 Myl. & K. 98, 102 (excluding book-entries, letters, and papers, made and received as solicitor acting for a client); 1835, Curling *v.* Perring, 2 id. 380 (Pepys, M. R., held that letters by a solicitor of the defendant to a person not a party but a material witness were privileged); 1836, Storey *v.* Lord Lennox, 1 Myl. & Cr. 525, 537 (documents obtained by the party himself in correspondence with third persons preparatory to litigation; L. C. Cottenham declined to express an opinion); 1840, Dartmouth *v.* Holdsworth, 10 Sim. 476 (solicitor's letters to a witness, held not privileged, unless shown to have been confidential); 1841, Smith *v.* Fell, 2 Curt. Eccl. 667, 670 (conversations by B. with F.'s solicitor, in F.'s presence and at F.'s request, relating to B.'s information on the matter for which the solicitor was employed, held privileged); 1841, Mackenzie *v.* Yeo, 2 Curt. Eccl. 866, 870 (memorandum of a communication by a subscribing witness to the solicitor, had before litigation begun but after legal advice sought, held not privileged; "there is no confidence between him and his client in this matter"; but letters from another attorney to the same solicitor, both being employed about the same cause, were held privileged); 1844, Maden *v.* Veevers, 7 Beav. 489 (documents made "in contemplation of litigation," but not for or by a legal adviser, not privileged); 1850, Balguy *v.* Broadhurst, 1 Sim. N. S. 111 (documents procured by the solicitor for the purpose of defence, held not privileged on that ground merely); 1850, Goodall *v.* Little, ib. 155, 161 (Lord Cranworth, V. C.; letters written by one co-defendant to another, with a view to enable the addressee to consult the solicitor upon them, held not privileged); 1851, Glyn *v.* Caulfield, 3 McN. & G. 463, 473 (L. C. Truro; letters written after suit begun, by and to the defendants, shareholders in a company, to and by other shareholders and directors, for the purpose of being communicated to legal advisers, held not privileged; Goodall *v.* Little approved); 1853, Wright *v.* Vernon, 1 Drew. 344, 350 (Kindersley, V. C.; extracts from a parish register "obtained by the defendants to enable them to conduct their defence," not privileged; but a statement of the supposed pedigree, made for instruction of counsel, held privileged); 1857, Lafone *v.* Falkland Islands Co., 4 K. & J. 34 (Page-Wood, V. C.; report of an agent of the defendant, made in consequence of the solicitor's instructions to procure evidence, held privileged, as "procured for the purpose of being communicated to the solicitor" and to be used as evidence); 1857, Betts *v.* Menzies, 3 Jur. N. S. 885 (Page-Wood, V. C.; correspondence between co-defendants, held not privileged); 1858, Colman *v.* Trueman, 3 H. & N. 871 (breach of contract of sale; correspondence between the vendors, their broker, and their consignors, after the alleged breach, held not privileged; yet, per Pollock, C. B., "it would be monstrous if an attorney could not write to a stranger for information respecting the suit, without being liable to have his correspondence called for"); 1859, London Gaslight Co. *v.* Chelsea, 6 C. B. N. S. 411, 424 (dispute as to gas supply; the defendants' officers' reports and records of consumption, etc., held not privileged, as not being "mere proofs collected by the defendants' attorney for the purpose of establishing their defence"); 1862, Jenkyns *v.* Bushby, L. R. 2 Eq. 547 (Kindersley, V. C.; letter by one defendant to another, with directions to send it on to their solicitor, held privileged); 1863, Walsham *v.* Stainton, 2 Hem. & M. 1, 4 (Page-Wood, V. C.: "Where the solicitor, in order to enable himself to advise on the matter, calls in some other person to assist and give his opinion," the privilege applies; here applied to schedules made by an accountant); 1863, Ford *v.* Tennant, 32 Beav. 162 (cited *ante*, § 2317); 1863, Chartered Bank *v.* Rich, 4 B. & S. 73 (letters between the plaintiff and its agents abroad, after dispute arisen, referring to the evidence and other information affecting proceedings against the defendant, held privileged, as "matters which would have been done by an attorney but for the distance of the place occasioning the necessity of employing an agent"); 1865, Nicholl *v.* Jones, 2 Hem. & M. 588, 596 (shorthand notes, taken by the defendant, in prior litigation between the defendant and other persons, held not privileged; except as to "observations and notes made thereon"); 1867, Baker *v.* R. Co., L. R. 3 Q. B. 91 (reports by a medical agent and another, after visiting the injured person at the defendant's request, but apparently before claim filed, held not privileged); 1869, Ross *v.* Gibbs, L. R. 8 Eq. 522 (Stuart, V. C.; reports from an agent of defendant, sent to collect evidence for the suit, held privileged, though the agent was not a legal adviser); 1869, Woolley *v.* R. Co., L. R. 4 C. P. 602, 608 (reports as to an accident, made by the defendant's inspector in the course of his duty, held privileged, irrespective of litigation begun or anticipated; otherwise of reports from scientific men consulted as to the causes of the accident "with a direct view to litigation"; on the first point this ruling is unsound); 1870, Cossey *v.* R. Co., 5 id. 146 (a medical officer's report, made to the defendant after claim filed by an injured person, and in consequence thereof, held privileged, as made "with a view to litigation or impending litigation"); 1872, Fenner *v.* R. Co., L. R. 7 Q. B. 767 (reports made by a freight manager of the defendant, after claim for injury filed, and in consequence thereof, held not privileged); 1872, McFarlan *v.* Rolt, L. R. 14 Eq. 580 (documents passing between the defendant's solicitor and D., a person said to be "acting on behalf" of the defendant, before dispute arising, held privileged); 1874, Skinner *v.* R. Co., L. R. 9 Exch. 298 (a medical officer's

to the parties, the more plainly he falls without the privilege; while the more markedly the relation of agent appears, the clearer the privilege is. On the

report, made to the defendant after claim by an injured person and in consequence thereof, held privileged; otherwise for a report made in the ordinary course of duty, "whether before or after action brought"; approving Cossey *v.* R. Co.); 1875, Hutchinson *v.* Glover, L. R. 1 Q. B. D. 141 (letters between the defendant and a third person, relating to information as to claims against the defendant, and written in consequence of letters of complaint from the plaintiff's attorney, held not privileged); 1876, Bustros *v.* White, ib. 423 (letters between the plaintiffs and their agents, relative to the plaintiffs' claim, held not privileged); 1876, M'Corquodale *v.* Bell, L. R. 1 C. P. D. 471 (communication by the representative of a third person to the plaintiff's solicitor, held privileged, on the ground that "documents obtained by a party or his solicitor with a view to and in contemplation of litigation either pending or anticipated, are protected"); 1876, Pacey *v.* R. Co., L. R. 2 Exch. D. 440 (report of the defendant's medical officer, made after claim filed but before action brought, and based on an inspection consented to, held privileged); 1876, Anderson *v.* Bank, L. R. 2 Ch. D. 644, 647 (Jessel, M. R.; report by the defendant's agent, to the defendant, at the latter's request, without any suggestion to the former that it was for submission to a legal adviser, held not privileged; approved on appeal; Ross *v.* Gibbs repudiated; L. J. James declared that all that had been written as to the reason for the privilege would be "puerile nonsense if there had been that law . . . that any communication made by a person with a view to litigation, whoever the person is, must be protected"; L. J. Mellish discriminated between information from the defendant's own agent, as here, and information from indifferent persons as prospective witnesses); 1877, Friend *v.* R. Co., L. R. 2 Exch. D. 437 (report of a medical man, examining an injured plaintiff under an order of Court obtained by the defendant, held privileged, as being made for the information of their solicitor); 1878, The Theodore Körner, L. R. 3 P. D. 162 (reports of surveyors of shipping, made to the plaintiff in order to prepare for making a claim against the ship for an injury to goods, held privileged); 1878, Southwark & V. W. Co. *v.* Quick, L. R. 3 Q. B. D. 315 (cited *ante*, § 2318); 1881, Wheeler *v.* LeMarchant, L. R. 17 Ch. D. 675, 681 (documents by third persons are protected "where they have come into existence after litigation commenced or in contemplation and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation or of obtaining evidence to be used in such litigation or of obtaining information which might lead to the obtaining of such evidence"; but not, as here, a report from a surveyor as to the state of property, asked by the solicitor as preliminary to legal advice, but not with reference to litigation or actual dispute; in short, that "communications between a solicitor and a third person in the course of his advising his client" are not as such privileged); 1882, Nordon *v.* Defries, L. R. 8 Q. B. D. 508 (shorthand notes, taken by the defendant in another action between the same parties touching the same subject, and in part for the purpose of informing counsel in subsequent litigation, held privileged; approving M'Corquodale *v.* Bell); 1883, The Palermo, L. R. 9 P. D. 6 (copies of depositions of the crew of the plaintiff's ship, taken at the instance of the solicitor for the purpose of litigation, held privileged); 1883, Kennedy *v.* Lyell, L. R. 23 Ch. D. 387, 402, 407, 27 id. 1, 26; s. c. on appeal, Lyell *v.* Kennedy, L. R. 9 App. Cas. 81, 87, 93 (the party's knowledge or belief, derived from reading a brief of facts or other report of facts ascertained by the solicitor and furnished to the party, held privileged; "as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also"; "a man ought not to be called upon to state what his belief is, founded upon information, which information is privileged"; furthermore, documents obtained by a defendant, "at the instigation of a solicitor," "for the purpose of defending himself against various claimants," and placed in his solicitor's hands, are privileged; "a collection of records may be the result of professional knowledge research and skill; . . . it is the solicitor's mind, if that be so, which has selected the materials; . . . you cannot have disclosure of them without asking for the key to the labor which the solicitor has bestowed in obtaining them"; here, copies of burial certificates and other records, of inscriptions on tombstones, and photographs of houses, were held privileged); 1885, Pearce *v.* Foster, L. R. 15 Q. B. D. 114, 118 (documents "brought into existence for the purposes or in the course of communications between solicitor and client" held privileged); 1884, Bristol *v.* Cox, L. R. 26 Ch. D. 678, 682 (reports by committees of the corporation, made in contemplation of and reference to the litigation in hand, held privileged; "this corporation cannot in its corporate capacity either think or write or act except by certain machinery which is so to speak extraneous of itself"); 1885, Rawstone *v.* Preston Co., 30 id. 116 (shorthand notes of evidence and speeches at a prior arbitration on another matter between the same parties, held not privileged); 1886, Chadwick *v.* Bowman, L. R. 16 Q. B. D. 561 (cited *ante*, § 2318); 1887, Robson *v.* Worswick, L. R. 38 Ch. D. 370 (shorthand notes taken by the defendants, in prior litigation between the defendants and other persons, held not privileged, because taken in open court); 1887, Young *v.* Holloway, L. R. 12 P. D. 167 (letters sent to the client by third persons to be communicated to her solicitor to help the cause, held privileged; also anonymous letters sent to the solicitor, "with a view to the conduct of the action," but not on his express

other hand, in applying the rule of discovery exempting *prospective witnesses'* statements (*ante*, § 2318, *b*), the more clearly the person is an indifferent witness, the more plain is the exemption from discovery; while the more marked his capacity as a mere agent of the party, the plainer the liability to disclose. The two principles thus pull in opposite directions. What helps to apply the one exemption will tend to disfavor the other. Whether the judicial intention is to invoke the one or the other is not always plain to see. A ruling which is sound enough from the one point of view would be unsound from the other; and it becomes difficult to determine whether the ruling harmonizes or conflicts with either principle.[2]

(2) Furthermore, under both of these principles, the circumstance that *litigation has begun*, or not, is commonly important. That is, whether under the one principle (the exemption from discovery) the person is to be deemed to have written as prospective witness will often be determined by the circumstance that litigation has begun or not; and whether under the other principle (the privilege for communications to an attorney) he is to be deemed to have written as the client's agent for communication to the attorney, will also often be dependent on the same circumstance. But, on the other hand, the privilege at large was (in England) until 1870 in a state of controversy involving the very same circumstance (*ante*, § 2294), *i. e.* whether the privilege was restricted to litigious communications or not. Thus the rulings which helped to repudiate that restriction for the privilege at large helped at the same time to confuse the discussion of it in its present relation to the boundaries of ordinary discovery.[3]

request or inquiry; Bowen, L. J., thought that the solicitor's employment was an implied invitation on his client's behalf to send information); 1893, Learoyd *v.* Halifax J. S. B. Co., 1 Ch. 687 (shorthand writer's notes of a private examination of witnesses by the solicitor, at the instance of the plaintiff, a trustee in bankruptcy, with a view to possible litigation, held privileged; Anderson *v.* Bank and Wheeler *v.* LeMarchant discussed); 1895, *Re* Strachan, 1 Ch. 439, 444 (the privilege does not extend to documents filed with a master in lunacy); 1898, Calcraft *v.* Guest, 1 Q. B. 759 (documents prepared for former litigation over the same rights, privileged; "Wheeler *v.* LeMarchant was right, and Minet *v.* Morgan [*ante*, § 2294] was right too"); 1900, Ainsworth *v.* Wilding, 2 Ch. 315, 322 (notes made by a solicitor pending suit; opinion not clear); 1900, R. *v.* Bullivant, 2 Q. B. 163 (Wheeler *v.* LeMarchant followed).

Canada: B. C.: 1896, Van Volkenburg *v.* Bank of B. N. A., 5 Br. C. 4 (letters between bank managers; Anderson *v.* Bank, *supra*, followed); *Ont.:* 1875, Toronto G. R. Co. *v.* Taylor, 6 Ont. Pr. 227 (expert opinions on a patent, not procured in contemplation of the present litigation, not privileged); 1876, Merchants' Bank *v.* Moffatt, ib. 348 (correspondence between the plaintiff's agents, written at the advice of the solicitor, held privileged); 1883, Guelph C. Co. *v.* Whitehead, 9 id. 509 (documents procured by the defendant's solicitor from third persons, for use in the cause, held privileged); 1883, Canada C. R. Co. *v.* M'Laren, 8 Ont. App. 564 (railway engine-driver's report in a repairs-book; question not decided); 1887, Betts *v.* Grand Trunk R. Co., 12 Ont. Pr. 86, 634 (report of an investigation made by the defendant's officers immediately after the accident, held not privileged; following Wheeler *v.* LeMarchant, *supra*); 1892, Donahue *v.* Johnston, 14 id. 476 (correspondence between the defendant and a third person, written at the advice of the defendant's solicitor to obtain information, after litigation threatened by the plaintiff, held privileged); 1895, Hunter *v.* Grand Trunk R. Co., 16 id. 385 (similar reports, made for the benefit of the defendant's solicitor in the suit, held privileged); 1902, Platt *v.* Buck, 4 Ont. L. R. 421 (letters between P. and his attorney, given to the defendant by P.'s executor, and plaintiff and defendant both claiming title under P.; held not privileged).

[2] The cases of Storey *v.* Lord Lennox, Mackenzie *v.* Yeo, London Gaslight Co. *v.* Chelsea, Ross *v.* Gibbs, Woolley *v.* R. Co., and Anderson *v.* Bank, *supra*, illustrate this.

[3] Balguy *v.* Broadhurst, Goodall *v.* Little, Cossey *v.* R. Co., Anderson *v.* Bank, and Wheeler *v.* LeMarchant, *supra*, illustrate this. As late as 1898, an English judge (in Calcraft *v.* Guest, *supra*) thought it worth while to explain that

(3) Finally, the proper limits of the principle of agents' communications (*ante*, § 2317) are withal apparently too intricate to permit of a definite rule which will solve all concrete cases. In 1835, in Curling *v.* Perring, the Master of the Rolls applies the privilege to a solicitor's correspondence with a witness; in 1841, in Mackenzie *v.* Yeo, the contrary is done; forty years later, in Anderson *v.* Bank and Wheeler *v.* LeMarchant,[4] the same inconsistency prevails, and the line between a mere witness and an agent of the solicitor appears to be ignored. Young *v.* Holloway and Learoyd *v.* Halifax Co., ten years later, leave the distinctions still unsatisfactory. Certainly, the exact bearings and effect of all the different principles involved have not yet been clearly stated by any judge. Whenever such a statement shall have been made and generally sanctioned, the proper course will be to leave its application to the trial judge. As it is, the long series of reported precedents has accomplished little in the way of definition.

In the United States, it is noticeable that these bearings of the privilege have received very little development, — probably in part for the reasons elsewhere noted (*ante*, § 2294).[5]

§ 2320. **Communications by the Attorney to the Client.** That the attorney's communications to the client are also within the privilege was always assumed in the earlier cases,[1] and has seldom been brought into question.[2] The reason for it is, not any design of securing the attorney's freedom of expression, but the necessity of preventing their use as constituting admissions of the client (*ante*, § 1071), or as leading to inferences of the tenor of the client's communications, — although in this latter aspect, being hearsay statements, they could seldom be available at all (*ante*, § 1063).

6. "Are at his instance permanently protected"

§ 2321. **Privilege is the Client's, not the Attorney's, nor the Party's; Who may Claim.** Under the original theory of the privilege, it was the attorney's, not the client's (*ante*, § 2290). But under the modern theory (*ante*, § 2291),

"Wheeler *v.* LeMarchant was right, and Minet *v.* Morgan [*ante*, § 2294] was right too."

[4] The proposition of Jessel, M. R., that for third persons' communications to solicitors the test is whether they are made after litigation begun or contemplated seems unsound; for it ignores the necessity of a request, implied or expressed, sufficient to make the person the solicitor's agent; compare Young *v.* Holloway.

[5] 1880, Pulford's Appeal, 48 Conn. 247, 249 (bill of particulars, prepared for the party by O., and handed by him to the attorney; O. and the party held compellable to produce it); 1877, Williams *v.* Young, 46 Ia. 140, 143 (attorney not privileged as to his deposit of the client's money with a third person); 1901, State *v.* Herbert, 63 Kan. 516, 66 Pac. 237 (testimony by a witness in the county attorney's hearing is not privileged); 1874, *Re* Aspinwall, 7 Ben. 433 (the privilege extends to information received on behalf of the client from persons to whom the client has referred the attorney for such information); 1898, Lalance & G. M. Co. *v.* Haberman M. Co., 87 Fed. 563 (while communications with a witness are not privileged, a scientific expert engaged to help in presenting the case is in effect an assistant counsel; and the privilege exists for communications between legal counsel and himself, so long as he does not become a witness; the opinion clearly explains the reasons); 1899, Hartness *v.* Brown, 21 Wash. 655, 59 Pac. 491 (deed by W. to the plaintiff; W. consulted an attorney about the deed, and the attorney sent for the plaintiff; communications by the plaintiff excluded, because made to W.'s attorney about a matter of joint interest).

[1] *Ante*, § 2294.

[2] 1840, Jenkinson *v.* Andrews, 5 Blackf. 465 (whether the attorney had informed the client of the meaning of an affidavit, held privileged).

it is plainly the client's, not the attorney's; and this is now a commonplace, never disputed.

But it is as client, *not as party to the cause*, that he is entitled; for the reason of the privilege applies to all clients as such, whether or not they are parties when the disclosure is sought from them. Hence, the privilege equally forbids disclosure by the attorney of a client not in any way concerned in the cause.[1] Conversely, when the client is not a party, then on general principles (*ante*, § 2196) the party cannot invoke the privilege;[2] and, if the privilege is erroneously refused, the party cannot appeal on the ground of this error.[3]

§ 2322. **Inference from Claim of Privilege; Judge to determine Privilege.** If a client-party claims the privilege, *no inference* should be drawn against him as to the unfavorable nature of the information sought.[1] Whatever the reasoning may be for other privileges (*ante*, §§ 2243, 2272), it is plain that here the drawing of such an inference would virtually disclose the communication, and it is this very disclosure against which the privilege protects.

The claim of privilege being made, the *trial judge determines* whether the facts justify the allowance of the claim.[2] This follows from the general principle of the judicial function (*post*, § 2550). Its application is usually of no difficulty, except sometimes in determining what weight to give to the party's oath in answering a bill of discovery.[3]

§ 2323. **Protection continues, though Relation of Client and Attorney be ended.** The subjective freedom of the client, which it is the purpose of the privilege to secure (*ante*, § 2291), could not be attained if the client under-

[1] 1792, Wilson *v.* Rastall, 4 T. R. 753, 760, per Buller, J.; 1811, R. *v.* Withers, 2 Camp. 578, L. C. J. Ellenborough (communications by a third person, privileged, "although he be not in any shape before the court"); 1848, Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 596; 1880, Bacon *v.* Frisbie, 80 N. Y. 394, 400 (nor, when the client objects, can the communication be disclosed under instructions to use it only against a party not the client); 1876, Bowers *v.* State, 29 Oh. St. 542, 546 (prosecutrix in a rape case, held privileged as to consultations with her attorney).

[2] 1826, Merle *v.* Moore, 2 C. & P. 275 (Best, C. J.; action by an assignee in bankruptcy against the debtor's fraudulent vendee; the bankrupt's attorney being called by the plaintiff, it was held that the defendant could not invoke the privilege, since the bankrupt alone could object); 1899, McCooe *v.* R. Co., 173 Mass. 117, 53 N. E. 133 (counsel may not object for the party, even where the client is the party in the case); 1890, Dowie's Estate, 135 Pa. 210, 19 Atl. 936 ("It is the privilege of the client to object, and not of a stranger, [though he be the party to the cause,] even if the testimony objected to was a privileged communication"). *Contra:* 1880, Bacon *v.* Frisbie, 80 N. Y. 394, 401.

For this general principle as applicable to all privileges, see *ante*, § 2196.

[3] 1847, Weeks *v.* Argent, 16 M. & W. 817, per Parke, B. *Contra:* 1884, State *v.* Barrows, 52 Conn. 323, 326. Compare the cases cited *ante*, § 2196.

[1] 1864, Lord Chelmsford, in Wentworth *v.* Lloyd, 10 H. L. C. 591. *Contra:* 1899, McCooe *v.* R. Co., 173 Mass. 117, 53 N. E. 133.

[2] 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 342; 1901, Press Publishing Co. *v.* Lefferts, 67 N. J. L. 172, 50 Atl. 342; 1901, People's Bank *v.* Brown, 50 C. C. A. 411, 112 Fed. 652 (and the witness may "by way of preliminary investigation be subjected to such interrogation as may be necessary").

[3] 1853, Volant *v.* Soyer, 13 C. B. 231 (the attorney's statement that a document is privileged should ordinarily suffice); 1881, Lyell *v.* Kennedy, L. R. 27 Ch. D. 1, 21 (per Cotton, L. J.; in answers to interrogatories of discovery, "the Court must be satisfied, clearly satisfied, either from admissions or from other documents, that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which he puts it forward"); 1842, Reynolds *v.* Rowley, 3 Rob. La. 201, 204 (the Court may refuse to accept the attorney's statement).

stood that, when the relation ended, or even after the client's death, the attorney could be compelled to disclose the confidences; for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate. It has therefore never been questioned, since the domination of the modern theory,[1] that the privilege continues even after the end of the litigation or other occasion for legal advice,[2] and even after the death of the client. It follows, also, on another aspect of the principle (*post*, § 2324), that even after the death of the attorney the client could not be compelled to disclose the communications. The doctrine of *waiver* belongs in another place (*post*, § 2327).

7. "From disclosure by himself or by the legal adviser"

§ 2324. **Testimony by the Client or the Attorney.** The privilege being for the protection of the client in his subjective freedom of consultation (*ante*, §§ 2291, 2321), it would plainly be defeated if the disclosure of the confidences, though not compellable from the attorney, was still obtainable from the *client*. Accordingly, under the modern theory,[1] it has never been doubted that the client's own testimony is equally privileged.[2]

That the *attorney* himself is prohibited, whether he is willing or not, is of course the fundamental assumption of the modern theory.[3]

§ 2325. **Indirect Disclosure by the Attorney.** Clearly the privilege could not permit an evasion by receiving the voluntary extrajudicial disclosures of the attorney. Supposing them to be somehow admissible in spite of the Hearsay rule, they would be equally a violation of the privilege with his voluntary disclosures on the stand. If his disclosure has taken the form of handing a confidential document to a third person, the objection is equally forcible and the question is not complicated with the Hearsay rule. On the other hand, the attorney must be credited with some authority for negotiating with the opposing party, and in the course of such negotiations it becomes necessary to make communications and to deliver documents or copies which, apart from the rule as to compromise-admissions (*ante*, § 1061), may afterwards with propriety form the subject of proof as part of the transactions between the parties; indeed, to refuse to examine them would often

[1] Under the original theory, as already noticed in § 2290, the privilege might be thought to end with the ending of the relation.

[2] 1815, Cholmondeley *v.* Clinton, 19 Ves. Jr. 261, 268, per L. C. Eldon; 1878, Bullock *v.* Corry, L. R. 3 Q. B. D. 356 ("The rule is, once privileged, always privileged"); 1885, Pearce *v.* Foster, L. R. 15 id. 114, 118; 1899, Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987.

The doctrine of *waiver* is examined *post*, § 2327.

For the question of professional ethics, whether an attorney will be restrained from going over to the *service of the opponent*, see the following: 1815, Earl Cholmondeley *v.* Lord Clinton, 19 Ves. Jr. 261, and notes to Sumner's edition; 1821, Beer *v.* Ward, 1 Jac. 77; 1821, Bricheno *v.* Thorp, ib. 300.

[1] But not under the earlier theory: *ante*, § 2290.

[2] 1898, Birmingham R. & E. Co. *v.* Wildman, 119 Ala. 547, 24 So. 548; 1877, State *v.* White, 19 Kan. 445; 1856, Hemenway *v.* Smith, 28 Vt. 701, 707; and the cases cited *ante*, § 2319, assume this.

[3] Distinguish the question whether it is allowable for him to testify, at the client's request, *on behalf of the client* (*ante*, § 1911). In the Georgia Code that question and the present privilege are confusedly dealt with in the same paragraph.

be to sanction the breaking of faith with the opponent. How can these opposing considerations be reconciled?

The judicial rulings are in confusion, and no clear appreciation of the significance of the dilemma is shown.[1] The following distinctions may perhaps furnish a solution: (1) Since the attorney has implied authority from the client (*ante*, § 1063) to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) *voluntarily* made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation (*e. g.* in serving notices), are receivable, as being made under an implied authority to disclose the confidences when necessary in the opinion of the attorney; unless it appears that the attorney has acted in bad faith towards the client. (2) All other *voluntary* disclosures are inadmissible, except so far as the special circumstances show an implied authority of disclosure from the client over and above the general authority to conduct litigation. (3) All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (*post*, § 2326) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent the overhearing of third persons; and the risk of insufficient precautions is upon the client. This principle applies equally to documents.

§ 2326. **Third Persons Overhearing.** The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial liability and should be strictly construed, it would be improper to

[1] *England:* 1833, Cocks *v.* Nash, 6 C. & P. 154 (a deed was not producible, being in a trustee's hands for the plaintiff and therefore privileged; but a copy furnished by the trustee to the defendant and proved correct by the trustee was admitted); 1842, Lloyd *v.* Mostyn, 4 Dowl. Pr. N. S. 476 (the attorney refusing to produce by claim of privilege, proof was allowed by a copy already made by the attorney and furnished to the opponent under a judge's order; *semble*, Parke, B., declared the same rule applicable to a copy of a document stolen from the attorney); 1852, Enthoven *v.* Cobb, 17 Jur. 81 (communication of a privileged document to another party and a solicitor, having a common interest, held "not made to allow an unlimited communication"); 1868, R. *v.* Leverson, 11 Cox Cr. 152 (letter to the prosecutrix' attorney, coming somehow to the hands of the defendant's attorney, not allowed to be read); 1880, R. *v.* Downer, 14 id. 486, 487 (solicitor's letter to a railway company, making claim for lost articles, held not privileged as involving facts communicated in confidence); 1898, Calcraft *v.* Guest, 1 Q. B. 759 (copy of a privileged document obtained by accidental transfer of possession, admitted); *United States:* 1899, Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952 (letter to a party's attorney, handed by the latter to the opponent's attorney, excluded); 1887, Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456 (letter from a client to the attorney, produced by a third person, held not privileged); 1892, Liggett *v.* Glenn, 2 C. C. A. 286, 51 Fed. 381, 4 U. S. App. 438, 472 (the communication being a letter or other writing, although it may pass, by loss or otherwise, into a third person's or the adversary's hands, it cannot be used); 1888, Hicks' Estate *v.* Blanchard, 60 Vt. 673, 15 Atl. 401 (action on a note; the defendant not allowed to use a copy of the specifications of claim obtained from the plaintiff's attorney). In Perry *v.* State, 4 Ida. 224, 38 Pac. 658 (1895), where the attorney's exclamation, when found digging up money, "That is my client's money," was admitted as "part of an act," the opinion is confused and useless.

extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge,[1] is not within the protection of the privilege.[2] The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy (*ante*, § 2325).

8. "Except the client waive the protection."

§ 2327. **Waiver in general; Voluntary Testimony as a Waiver.** The privilege is designed to secure the client's confidence in the secrecy of his communications (*ante*, § 2291); hence, the privilege is not violated by receiving such disclosures as the client by his own will permits to be made. There is no analogy whatever between a rule of conditional exclusion in the nature of privilege (*ante*, § 2196) and an absolute rule of disqualification (*ante*, § 477). Yet the common juxtaposition of the two classes of rules in statutory enactments — due in part to the indiscriminate use of the term "competent," long ago denounced by Bentham — has from time to time made it necessary for the Bench to correct this elementary misunderstanding on the part of the Bar. In respect to the present privilege, it has always been recognized that a waiver may be made;[1] although only since the domination of the modern theory (*ante*, § 2290) has it been perfectly plain that the waiver, like the privilege, belongs solely to the client (*ante*, § 2321), and not to the attorney.[2]

What constitutes a waiver by implication? Judicial decision gives no clear answer to this question.[3] In deciding it, regard must be had to the double

[1] The fallacious distinction, here sometimes taken, that when the third person is present to the client's knowledge, that person may disclose, but not the attorney, has been already noticed (*ante*, § 2311).

[2] 1889, Cotton *v.* State, 87 Ala. 75, 6 So. 396 (conversation between the accused and his attorney, in the jailer's presence, held not privileged, as to the jailer's testimony); 1894, Denver T. Co. *v.* Owens, 20 Colo. 107, 125, 36 Pac. 848, *semble;* 1895, Perry *v.* State, 4 Ida. 224, 38 Pac. 658 (third person overhearing); 1885, State *v.* Sterrett, 68 Ia. 76, 25 N. W. 936 (third person overhearing); 1859, Hoy *v.* Morris, 13 Gray 519 (a "mere bystander," casually overhearing, and not an agent of the attorney, held not within the privilege; good opinion); 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (third person, known to the client to be present); 1829, Jackson *v.* French, 3 Wend. 337 (third person going with the client); 1874, Cary *v.* White, 59 N. Y. 336, 338; 1899, Butler *v.* Fayerweather, 33 C. C. A. 625, 91 Fed. 458 (execution and contents of will).

[1] 1778, Captain Baillie's Trial, 21 How. St. Tr. 1, 341, 360, 408; 1826, Merle *v.* Moore, Ry. & Mo. 390; 1883, Passmore *v.* Passmore's Estate, 50 Mich. 626, 16 N. W. 170. In Georgia, where the attorney is disqualified on behalf of the client, as well as privileged, the client of course cannot waive the disqualification: *ante*, § 1911.

[2] In 1816, in Fenwick *v.* Reed, 1 Meriv. 114, 122, L. C. Eldon was undecided whether the attorney's executor could waive; but this doubt would not arise to-day.

[3] Some of the Codes cited *ante*, § 2292, lay down a rule. Judicial decisions are as follows: *Eng.:* 1654, Waldron *v.* Ward, Style 449 (counsel in the cause, being examined to prove a death, was not allowed to be examined by the opponent on privileged matters); 1841, Mackenzie *v.* Yee, 2 Curt. Eccl. 866, 876 (a direct examination to matters within the privilege is a waiver permitting cross-examination on those matters); *Can.:* 1868, Forsyth *v.* Charlebois, 12 Low. Can. Jur. 264, *semble* (calling the attorney as a witness amounts to a waiver for all matters touched on in the direct examination); *U. S.:* 1873, Rowland *v.* Plummer, 50 Ala. 182, 194, *semble* (the client's taking the stand, held a waiver as to the attorney's testimony to those facts); 1897, Louisville & N. R. Co. *v.* Hill, 115 id. 334, 22 So. 163 (by using the same conversation for his own purposes, the client was held to waive the privilege); 1855, Landsberger *v.* Gorham, 5 Cal. 450 (direct testimony held on the facts not to amount to a waiver on a certain subject); 1884, State *v.* Barrows, 52 Conn. 323, 325 (witness' voluntary testimony to a preliminary statement

elements that are predicated in every waiver, *i. e.* not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final. As a fair canon of decision, the following distinctions may be suggested:

(1) The client's offer of his *own testimony* in the cause *at large* is not a waiver, for the purpose either of cross-examining him to the communications or of calling the attorney to prove them; otherwise the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand. (2) The client's offer of the *attorney's testimony* in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness; but otherwise it is a waiver; for, considering that the attorney ought in general not to be used as a witness (*ante*, § 1911), the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities, and if he has seen fit to furnish him knowledge as a witness, he should deny himself the right to invoke the attorney's function as an adviser. (3) The client's offer of his *own testimony* as to *specific facts* about which he has happened to communicate with

to her attorney, held not a waiver for the whole consultation); 1897, Takamori *v.* Kanai, 11 Haw. 1 (malicious proaecution; advice of counsel as furnishing probable cause; the client's calling the counsel, held a waiver); 1873, Bigler *v.* Reyher, 43 Ind. 112 (the client's taking the atand, held not to be a waiver, for the purpose either of calling the attorney or of cross-examining the client); 1873, Oliver *v.* Pate, ib. 132, 142 (similar; but voluntary testimony to the communication is a waiver, permitting the attorney to be called); 1874, Barker *v.* Kuhn, 38 Ia. 392, 395, *semble* (like State *v.* White, Kan., *infra*); 1877, State *v.* White, 19 Kan. 445, 447 (the client's taking the stand is not in itself a waiver of the privilege); 1878, Wilkins *v.* Moore, 20 id. 538, 540 (same); 1869, Woburn *v.* Henshaw, 101 Mass. 193, 200 ("If the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness"); 1874, Montgomery *v.* Pickering, 116 Mass. 227, 231, 237 (calling the attorney is not in itself a waiver of the privilege; nor is the client's own testimony); 1892, Blount *v.* Kimpton, 155 id. 378, 29 N. E. 590 (same, on the first point); 1857, Alderman *v.* People, 4 Mich. 414, 423 (accomplice taking the stand for the State under promise of immunity waives his privilege; "he should be allowed no privileged communications; these he has voluntarily surrendered"); 1889, People *v.* Gallagher, 75 id. 512, 515, 42 N. W. 1063 (an accomplice, testifying for the State, waives "all privilege as regards the crime in question"); 1890, State *v.* Tall, 43 Minn. 276, 45 N. W. 449 (the client's testimony to a specific fact is a waiver of the privilege as to the communication of that fact to his attorney); 1888, Jones *v.* State, 65 Miss. 179, 3 So. 379 (taking the stand is not in general a waiver; but here an accomplice, who had become State's evidence, was held to have waived and to be subject to cross-examination to his statements to counsel); 1860, King *v.* Barrett, 11 Oh. St. 261, 263 (Code applied; in a civil case the client's voluntary testimony is a waiver of the privilege on the same subject); 1877, Duttenhofer *v.* State, 34 id. 91 (in a criminal case the accused's voluntary testimony ia not a waiver; the Code provision not being applicable to criminal cases); 1888, Hunt *v.* Blackburn, 128 U. S. 464, 470, 9 Sup. 125 (privilege held waived by "entering upon a line of defence which involved what transpired between herself and Mr. W. [the attorney]"); 1871, Chahoon *v.* Com., 21 Gratt. 822, 835 (one of three joint defendants, by taking the stand at the instance of the State and testifying to a communication between counsel and another defendant, held not to waive the privilege by implication); 1881, Tate *v.* Tate, 75 Va. 522, 533 (the client's testimony, not relating to the "privileged matter," held not a waiver, even where on cross-examination the communications were testified to).

the attorney is not a waiver, for the same reason as in (1), *supra;* but his offer of the *attorney's testimony* as to such specific facts is a waiver, for the same reason as in (2), *supra.* (4) The client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former. (5) The client's offer of his own or the attorney's testimony as to a *part of any communication* to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of Completeness (*ante*, § 2113).

§ 2328. **Waiver by Joint Clients, Agents, Assignees.** A waiver at one stage of a trial should be final for all further stages;[1] and a waiver at a *first trial* should suffice as a waiver for a later trial, since there is no longer any reason for preserving secrecy. Where the consultation was had by *several clients jointly*, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements.[2] Where the consultation was had by an *agent* of the client, it is ordinarily the client alone who may waive;[3] but it has been already noticed that for certain extrajudicial purposes the attorney himself must be regarded as authorized to waive secrecy on behalf of his client (*ante*, § 2325). Where the client's interest has been *assigned*, it seems proper to say that the privilege is transferred to the assignee, for the purpose of waiver, so far as the communications affect merely the realization of the transferred interest; but it remains with the client so far as they affect any liability or right remaining in him.[4]

§ 2329. **Waiver by a Deceased Client's Representative.** That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in the interest of that estate, to waive the privilege of concealing confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It has, indeed, seldom been maintained for the present privilege; but the denial of this waiver in another field, by some

[1] 1902, Green *v.* Crapo, 181 Mass. 55, 62 N. E. 956 (waiver for a hearing before the Probate Court prevents claim of privilege on a hearing before a Supreme Court justice).

[2] There are few rulings: 1848, Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 596 ("Where the privilege belongs to several clients, I do not think any one of them, or even a majority, contrary to the expressed will of the others, can waive the privilege"); 1871, Chahoon *v.* Com., 21 Gratt. 822, 835 (C. J. S., and R. S., being jointly indicted for conspiracy, met for consultation with counsel; each had a counsel, but C.'s was absent; L. was counsel for R. S.; at the trial, R. S. having testified to a statement of C. at the meeting, C. called L. to testify to C.'s statement; but L. claimed the privilege; held, that L. could not testify without a waiver by all three, J. S. having in fact made no waiver; this seems unsound).

[3] 1891, Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483 (here the agent was deceased).

[4] The few rulings on this point do not take this distinction: 1831, Bowman *v.* Norton, 5 C. & P. 177 (similar facts to Merle *v.* Moore, § 2321, *supra;* Tindal, C. J., would not allow the assignees, as such, to waive the privilege on the bankrupt's behalf); 1838, Benjamin *v.* Coventry, 19 Wend. 353 (waiver may be by the client A, even though by assignment A's interest in the cause has passed to B; Bronson, J., diss.).

Courts (*post*, § 2391), demands here the more emphatic repudiation of such a fallacy:

1851, *Turner*, V. C., in *Russell* v. *Jackson*, 9 Hare 387, 393: "In the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it. . . . That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin, and in such a case as the present. In the one case the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interests. In the other case the question is to which of two parties claiming under the client the property in equity belongs, and it would seem to be a mere arbitrary rule to hold that it belongs to one of them, rather than to the other."

1889, *Collins*, J., in *Layman's Will*, 40 Minn. 372, 42 N. W. 286: "There is an abundance of authority for saying that, upon the decease of the only person who could, in his life-time, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its objects, and thus bring it into direct conflict with the reason upon which it is founded. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting. The testimony called for was quite necessary in order to determine the weight which ought to be given the witness' opinion as to the mental condition of the testator, and his disclosures in no way reflected upon the character or reputation of the deceased. The testimony when given served to protect the estate, and tended to aid in a proper disposition of it. The issue in the case was as to the mental soundness of a person under whom each litigant claimed, and, whatever the result, the interest and the estate of the deceased were not prejudicially affected. It is not an action in which the success of an adverse third party must prove detrimental to the property. Neither of these litigants can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and important evidence of the character above described upon the only question involved in the dispute, namely, the sanity of the deceased."

1900, *Barker*, J., in *Brooks* v. *Holden*, 175 Mass. 137, 55 N. E. 802: "To allow the executor or administrator of the deceased client to waive the privilege, and to call the attorney to testify as to a privileged communication, in a suit involving the client's estate, no more militates against the principle of public policy involved, than to allow the client himself to waive the privilege. Nor does it tend to weaken the protection which the rule gives for the benefit of the client as an individual. The executor or administrator acts with reference to the question of waiver as the personal representative of the deceased client, and solely in the interest of his estate."

This view is accepted with practical unanimity. It is further generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee.[1]

[1] *Eng.:* 1849, Doe *v.* Hertford, 13 Jur. 632 (waiver by heir and executors, against third persons, held proper, per Erle, J.); 1851, Russell *v.* Jackson, 9 Hare 387, 392 (in a contest between the next of kin and devisees, the privilege was held to belong to neither as against the other; quoted *supra*); 1838, Greenlaw *v.* King, 1 Beav. 137, 145, *semble*, per Lord Langdale, M. R. (waiver by the executor, allowable); *Can.:* 1893, Magee *v.* R., 3 Exch. Can. 304, 327 (he must disclose "all that passed at the time relating to such execution"); *U. S.:* 1865, Fossler *v.* Schriber, 38 Ill. 173 (the "only heir" of the client, held competent to waive the privilege; and even if there were other heirs not parties, "the Court would presume their concurrence"); 1885, Scott *v.* Harris, 113 id. 447, 454, *semble* (in a controversy between legatees and

grantees, the privilege ceases); 1897, Winters *v.* Winters, 102 Ia. 53, 71 N. W. 184 (an heir, devisee, or other representative, but not a stranger, may waive; and hence, in a will contest, either party in interest may waive); 1900, Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802 (representative of a deceased client may waive; quoted *supra*); 1889, Layman's Will, 40 Minn. 372, 42 N. W. 286 (the attorney who prepared a will, permitted to testify as to the testator's sanity, in probate proceedings; quoted *supra*); 1897, Glover *v.* Patten, 165 U. S. 394, 17 Sup. 411 (privilege ceases "between devisees under a will," "between heirs or next of kin"). *Contra:* 1885, Westover *v.* Ins. Co., 99 N. Y. 56, 59, 1 N. E. 104 (neither an executor, nor any one else, may waive the privilege after the party's death; said *obiter*).

Compare the testamentary cases decided on other grounds, *ante*, §§ 2314, 2315.

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC III: COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

CHAPTER LXXXI.

1. In general.

§ 2332. **Policy of the Privilege.** The policy which should lie at the foundation of every rule of privileged communications (*ante*, § 2285) is amply satisfied in the present privilege. The communications originate in confidence; the confidence is essential to the relation; the relation is a proper object of encouragement by the law; and the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth. There seems therefore to be no reason for objecting to the recognition of the present privilege:

1853, *Commissioners on Common Law Procedure*, Second Report, 13: "The question how far communications of married persons *inter se* should be matter of testimony in courts of justice stands on a very different ground [from that of compelling one to testify to facts against the other]. So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute. . . . [Hence,] all communications between them should be held to be privileged."

1871, *Freeman*, J., in *State* v. *McAuley*, 4 Heisk. 424, 432: "If this could be permitted, it would tend to destroy that bond of mutual confidence and unquestioning trust that is essential to the peace and happiness of the most sacred of all domestic relations. No man would be willing to have his wife called on in a court of justice to detail the facts of which she gains a knowledge by reason of the fact that she is the companion of his privacy and has unlimited freedom of access to all the occurrences that transpire in his home and around the fireside."

1898, *Taylor*, C. J., in *Mercer* v. *State*, 40 Fla. 216, 24 So. 154: "Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between

them to be incompetent matter for either of them to expose as witnesses. The reason of the old rule for rendering interested witnesses incompetent to testify at all in any case to which they were parties was because their interest was supposed to be such a strong incentive to perjury, and, where husband or wife was interested in a cause, both of them were excluded as incompetent witnesses for any purpose, because of their unity of interest; they, in the eye of the law, being regarded as one person, and whenever either was interested both were considered to be equally interested; and the incentive to perjury from such interest was considered to be as strongly operative upon the one as upon the other. But the reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society."

§ 2333. **History of the Privilege.** The privilege for communications between husband and wife is apparently, in time of origin, the second of such privileges to be enforced at common law, and yet the last to be definitely recognized and distinguished. In the second half of the 1600s an instance of its application is found;[1] and yet the explicit statement of the privilege, as a distinct one from any other rule, did not come in England until the statutory reforms of the Common Law Procedure Act, just as the second half of the 1800s was beginning.[2] The explanation of the paradox is that until that time the present privilege for communications between husband and wife had not been plainly separated from the other privilege of husband or wife not to testify to any facts against the other. This latter privilege was fully established by the end of the 1600s (*ante*, § 2227). But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures (*ante*, § 2228). In other words, the true policy of the present privilege was perceived, and yet it was not enforced in the shape of any rule distinct from the old-established privilege of each not to testify against the other as a party or interested in the suit. That the two are distinct is plain; for the privilege not to testify against the other is broader in the respect that it excludes testimony to any adverse facts even though they have been learned wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony adverse in its tenor and adverse to a party to the cause or to one in an equivalent position. Nevertheless, the privilege against adverse testimony remained for a long time alone in its recognition; and not unnaturally, for two reasons. In the first place, in the great majority of instances in which it was desired to make a wife reveal her husband's communications, he was an adverse party, and his long-established privilege against her adverse testimony served equally to protect him against that sort of her adverse testimony as against any other. In the second place, the other instances where it might be desired that she should reveal his communications would ordinarily be those in which he himself desired her

[1] 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 628 (a husband's oath to the wife's request to him to commit forgery, not admitted against her as witness).

[2] As late as 1852, Mr. J. Erle, in Stapleton *v.* Crofts, 18 Q. B. 367, 374, believed that "as no protection was given to conjugal confidence in respect of the wives of witnesses not parties," the rule must be regarded as "not yet established."

testimony in his behalf, and this was of course prevented by her disqualification (*ante*, § 600). Thus there remained only one situation, and that the least common one, in which the two existing rules of disqualification and privilege did not already suffice to dispose of the evidence, namely, the situation in which the husband was not a party but an indifferent person and yet his communications to his wife were material to the cause and were offered to be proved by her. In view of the rarity of this situation under the system of married women's disabilities then prevailing, it is not to be wondered that at common law the question was not forced upon the consideration of the judges, and that the recognition of the present privilege as a rule independent of any other was so belated. Not until the marital disqualification and the marital privilege against adverse testimony were proposed to be abolished or modified did the existence of this third aspect of the subject begin to be perceived.[3] Accordingly, when the legislators in the various jurisdictions took the first steps, in the period from 1840 to 1870, to reform the other two rules, by abolishing or restricting the disqualification and the other privilege, they invariably preserved by express enactment the present privilege for communications. So this privilege, hitherto existing rather in principle than in rule, practically begins its existence and is defined in its terms by the legislation of that period.

§ 2334. **Marital Disqualification and Anti-Marital Privilege, distinguished; Statutory Enactments.** (1) That the *disqualification* of husband and wife to testify the one *on the other's behalf* (*ante*, §§ 600–620) is distinct from the privilege of either against the other's disclosure of communications ought to be plain enough. The judicial confusion of them is nevertheless frequent; and the occasional legislative commingling of them in the same sentence of the same enactment has given rise to much of this confusion. Perhaps the commonest error is to ignore the husband's *right to waive* the privilege (*post*, § 2340), *i. e.* when he offers the wife to prove his communications to her, the erroneous tendency is to treat the disclosure as absolutely prohibited in spite of his consent. A disqualification, of course, cannot be waived; but it is of the essence of this privilege (as of every privilege) that it may be; and yet the communications, when offered by the privileged person, are even yet repeatedly excluded, in apparent ignorance of the distinction. Another practical difference is that the *disqualification affects only a party's* or interested person's husband or wife (*ante*, § 607), while the privilege is equally valid for the communications of a husband or wife not a party nor interested.[1] Still another difference is that the disqualification may cease upon the *death or divorce* of the husband or wife (*ante*, § 610), while the present privilege cannot (*post*, § 2341).

(2) The distinction between the present privilege for communications and the privilege against *adverse marital testimony* in general (*ante*, §§ 2227–

[3] Compare Mr. J. Erle's remark, *supra*.

[1] 1878, Winchester F. Ins. Co. *v.* Foster, 90 Ill. 121, 125. *Contra* (but the words of the extraordinary Illinois statute permit of this ruling): 1877, Galbraith *v.* McLain, 84 Ill. 379, 383.

2245) has already been noticed in dealing with the history of the rules (*ante*, § 2333). One of the practical differences between them is that the former applies only where the testimony is adverse, *i. e.* where the other spouse is either a party or in an equivalent position (*ante*, § 2234), while the latter may be invoked by any spouse however indifferent to the cause.[2] Another difference is that the former may cease with the death or divorce of the spouse against whom the testimony may be offered (*ante*, § 2237), while the latter is perpetual (*post*, § 2341). Another and still more important difference is that the former prohibits the spouse's adverse testimony regardless of the source of knowledge, while the latter covers only knowledge obtained through the confidence of the marriage relation. The two privileges have practically nothing in common, either in policy or in rule; and their complete separation needs repeated emphasis before the possibility of confusion can be cleared away.[3]

The *statutory enactments* dealing with the present privilege are commonly united in the same enactment with the marital disqualification and the other marital privilege, and their interpretation cannot be always accurately made without comparing the entire enactment.[4] The ensuing examination of the present privilege is made with reference to these statutes.[5] In a few instances the phrasing of the local statute is peculiar and determining; but certain types of enactment are common to many jurisdictions, and in only one or two respects do the different types represent any substantial difference of policy or rule.

2. Scope of the Testimony Privileged.

§ 2336. **Knowledge obtained in Confidence, Express or Implied.** The essence of the privilege is to protect confidences only. This is inevitably required by the very nature of this class of privileges (*ante*, § 2285). The purpose is to insure subjectively the free and unrestrained secrecy of communication, divested of any apprehension of compulsory disclosure; and if the communication is not intended to be a secret one, the privilege has no application to it. The chief question must be, for the present privilege, merely whether *confidence* or secrecy is to be *presumed to have been intended*, in all marital communications, until the contrary appears, or whether the burden of showing the intention of secrecy should be upon the person claiming the privilege. It would seem proper to hold that all marital communications are by implication confidential, and that the contrary intention must be made to

[2] 1873, Moore *v.* Wingate, 53 Mo. 398, 409; 1878, Willis *v.* Gammill, 67 id. 730, 731.

[3] See the opinion of Taylor, C. J., in Mercer *v.* State, Fla., partly quoted *ante*, § 2332.

[4] The statutes have therefore been collected in one place (*ante*, § 488).

[5] In the following cases, sundry interpretations are made of the effect of the local statutes: 1897, People *v.* Warner, 117 Cal. 637, 49 Pac. 841 (privilege applies to criminal cases); 1900, Hyde *v.* Gannett, 175 Mass. 177, 55 N. E. 991 (privilege still obtains in offering evidence under St. 1896, c. 445, quoted *ante*, § 1576, admitting certain hearsay evidence); 1897, Hopkins *v.* Grimshaw, 165 U. S. 342, 17 Sup. 401 (the privilege is not abolished by the statute; yet the dictum that the last proviso in § 877 merely qualifies the preceding section, and applies only to spouses who are parties, seems unsound).

appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, this implication of confidence seems more consonant with the facts of life. Such is practically the general judicial attitude, in spite of apparent differences of phrasing:

1830, *Carr*, J., in *Robin* v. *King*, 2 Leigh 140, 144: "Suppose it proved that the declarations were so made [in the family's presence] and no secrecy enjoined; would it follow that the husband wished or expected they should be divulged? Are we to say that every word spoken in the thoughtless, careless confidence of the domestic circle is free for public disclosure unless secrecy be enjoined? Is not the converse of this proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should from our decisions have cause to fear that after they were in their graves their reputation might be injured and their children ruined by the declarations they had made in the bosoms of their families? This freedom from restraint or apprehension in the intercourse of one's own fireside seems to me so necessary to the quiet and repose of society that I am fearful of trenching upon it in the slightest degree."

1833, *Daniel*, J., in *Hester* v. *Hester*, 4 Dev. 228, 230: "The sanctity of such [confidential] communications will be protected. Persons connected by marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband that the operation should be according to the truth of the fact as established by his declaration. Suppose a husband to disclose to his wife that he has given to one of their children a horse, can she not after his death prove that as against the executor? . . . The same reason equally applies when from the subject of the conversation it is obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so."

1872, *Sargent*, J., in *Clements* v. *Marston*, 52 N. H. 31, 38 (allowing the wife to testify to the expenditures made by her for her husband on account of the defendant's intestate and to conversations in her presence between the latter and the husband): "This violation of marital confidence must be something confided by one to the other simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances. In this case the wife acted as the husband's agent and kept his money and knew how it was expended; but all the communications made to her were made to her as such agent, just as he would have made the same communications to any other agent doing the same business. There was no confidential communication between them as husband and wife, but simply the ordinary communications between principal and agent; and the communications would be no more confidential than those between any other principal and agent. . . . Allowing the wife to testify for or against her husband, in any case where a stranger would have been a competent witness, seems to be the rule now; and, in that view of the case, nothing should be excluded except something that is strictly confidential, and not only so but communicated in strict marital confidence."

1878, *Green*, President, in *White* v. *Perry*, 14 W. Va. 66, 80: "Where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or of society which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties to such act or declaration not affecting the character or person of her husband."

The circumstances which will negative this implication of secrecy must of course vary with the particular case. Commonly, the *presence of a third person* within hearing will negative a marital confidence; so, too, the *intended transmission* of the communication to a third person. But fixed rules are scarcely possible.[1]

[1] The following citations include those rulings which construe the statutes expressly making a requirement of confidentiality, as well as those which apply the principle of confidentiality to various situations; the statutes are collected *ante*, § 488: *Alabama:* 1874, Sumner *v.* Cooke, 51 Ala. 521 ("the line of separation . . . is incapable of expression definite enough for a rule"); 1881, Gordon *v.* Tweedy, 71 id. 202, 210 (certain deed-transactions, allowed to be disclosed); 1885, Owen *v.* State, 78 id. 425, 432 ("any transaction or communication between husband and wife which does not on its face appear to have been intended to be public or to become so," is privileged); *Arkansas:* 1874, Spivey *v.* Platon, 29 Ark. 603, 607 (a wife's testimony to sundry transactions by the husband with third parties, admitted); 1884, Nolen *v.* Harden, 43 id. 307, 315 (a wife admitted to testify to the delivery by her husband of a bag of gold to a bailee and the bailee's delivery to her); *Connecticut:* 1888, Spitz's Appeal, 56 Conn. 184, 187, 14 Atl. 776 (promises made by the husband on borrowing money from the wife, held "no more privileged than a promissory note would have been"); *Illinois:* 1871, Reeves *v.* Herr, 59 Ill. 81, 85 (the privilege is not confined to "subjects which are confidential in their nature"; but includes "any matter which came to her knowledge in consequence of the family relation"; here, an admission by the opponent in conversation with the husband); *Indiana:* 1872, Mercer *v.* Patterson, 41 Ind. 440, 444 (the husband's statements to a third person in the wife's presence, not privileged); 1873, Griffin *v.* Smith, 45 id. 366 (same); 1876, Denbo *v.* Wright, 53 id. 226 (same); 1878, Floyd *v.* Miller, 61 id. 224, 235 (same); 1881, Smith *v.* Smith, 77 id. 80, 82 (the husband's intoxication, not within the privilege); 1882, Schmied *v.* Frank, 86 id. 250, 257 (statements made between them in regard to a purchase by one as agent, not privileged; "the authority given by the wife to the husband to transact her business is not confidential nor intended to be private; . . . it is intended to be known, and would be worthless unless known"); 1883, Sedgwick *v.* Tucker, 90 id. 271, 281 (wife's testimony to agreements with the husband as to property interests, admitted); 1886, Beitman *v.* Hopkins, 109 id. 177, 9 N. E. 720 (privilege not applied to the wife's testimony to the husband's agreement to convey land to her); 1887, Stanley *v.* Stanley, 112 id. 143, 13 N. E. 261 (a wife allowed to testify to the husband's intoxication, not being under the circumstances a confidential fact); 1897, Reynolds *v.* State, 147 id. 3, 46 N. E. 31 (the privilege not applied to statements made in a third person's presence, after a robbery, as to the identity of an assailant); *Iowa:* 1883, State *v.* Middleham, 62 Ia. 150, 17 N. W. 446 (exclamations to others in the defendant's presence, as to the defendant's murder of his stepson, admitted, as not made to the defendant); 1897, Allbright *v.* Hannah, 103 id. 98, 72 N. W. 421 (conversation between the wife and her father, in the husband's presence, admitted); 1901, Hertrich *v.* Hertrich, 114 id. 643, 87 N. W. 689 (the statute excludes "any" communication); Wright *v.* Wright, — id. —, 87 N. W. 709 (communications "explanatory of transactions," held admissible); *Kansas:* 1893, Chicago K. & N. R. Co. *v.* Ellis, 52 Kan. 41, 47, 33 Pac. 478 (agreement of conveyance between husband and wife, excluded); 1899, Eagon *v.* Eagon, 60 id. 697, 57 Pac. 942 (communications are privileged, even though not confidential); *Kentucky:* 1841, McGuire *v.* Maloney, 1 B. Monr. 224 (the wife's testimony to the execution of an instrument with attesting witnesses, admitted; the transaction being "designedly public at the time, and from its nature must have been intended to be afterwards public"); 1899, Hilbert *v.* Com., — Ky. —, 51 S. W. 817 (dying declaration to the spouse, admissible); 1903, Arnett *v.* Com., — id. —, 71 S. W. 635 (a husband's dying declaration to his wife may be proved by her, as not being confidential, under Civ. C. § 606); *Maine:* 1859, Walker *v.* Sanborn, 46 Me. 470, 473 (the privilege does not cover an agreement between the husband and a third person made in the wife's presence); *Massachusetts:* 1861, Dexter *v.* Booth, 2 All. 559 ("private conversations," held to include the husband's ratification, in private, of a purchase made by wife); 1866, Bliss *v.* Franklin, 13 id. 244 (the privilege applied to communications by the wife as agent, showing good faith in the husband's prosecution of the defendant); 1873, Jacobs *v.* Hesler, 113 Mass. 157, 160 (conversation in the presence of their young children not paying any attention, held "private"); 1874, Raynes *v.* Bennett, 114 id. 424, 427 (similar to Dexter *v.* Booth, *supra*); 1875, Drew *v.* Tarbell, 117 id. 90 (similar); 1876, Brown *v.* Wood, 121 id. 137 (conversation promising to repay money borrowed, excluded); 1881, Fay *v.* Guynon, 131 id. 31, 33 (conversation in the presence of the wife's sister, who heard a part, admitted); 1887, Com. *v.* Jardine, 143 id. 567, 10 N. E. 250 (exclamations of pain made in the wife's presence, admitted); 1887, Com. *v.* Hayes, 145 id. 289, 293, 14 N. E. 151 (a wife's instructions to the husband as agent, excluded); 1890, Com. *v.* Cleary, 152 id. 491, 25 N. E. 834 (a husband's prohibition to the wife to sell liquors, excluded); 1891, Lyon *v.* Prouty, 154 id. 489, 28 N. E. 908 (the privilege not applied to the husband's communication to his wife in the presence of a daughter fourteen years old,

In many jurisdictions this fundamental element of confidence is not expressly named in the statutory enactment; it privileges "any communica-

who was not shown to have heard it); 1900, Fuller *v.* Fuller, 177 id. 184, 58 N. E. 588 (the privilege applied to an ordinary private conversation); *Michigan:* 1874, Herrick *v.* Odell, 29 Mich. 47, 49 (the privilege does not cover admissions by the husband to a third person, in the wife's presence); 1884, Hunt *v.* Eaton, 55 id. 362, 366, 21 N. W. 429 (the privilege does not cover contracts between them as to separate property, when the parties are competent in that class of litigation); 1896, Hagerman *v.* Wigent, 108 id. 192, 65 N. W. 756 (delivery of a mortgage by a wife to her husband, with instructions to deliver it to the plaintiff after her death, admitted, because involving "an expectation on her part that the communication would be disclosed"); 1897, McKenzie *v.* Lautenschlager, 113 id. 171, 71 N. W. 489 (alienation of the wife's affections; testimony by the husband excluded); 1903, Chaddock *v.* Chaddock, — id. — , 95 N. W. 972 (deed transaction; no point decided); *Minnesota:* 1886, Leppla *v.* Tribune Co., 35 Minn. 310, 29 N. W. 127 ("communication," in the statute, includes "all conversations between husband and wife, though on subjects not confidential in their nature"); 1895, Newstrom *v.* R. Co., 61 id. 78, 63 N. W. 253 (same; "except perhaps those which from their very nature were evidently intended to be communicated to others"); *Mississippi:* 1870, Whitfield *v.* Whitfield, 44 Miss. 254, 262 (a widow allowed to testify to her husband's management of slaves, as "facts not in their nature confidential"); 1895, Saffold *v.* Horne, 72 id. 470, 18 So. 433 (conversations between the husband and the deceased opponent, admitted); *Missouri:* 1874, Darrier *v.* Darrier, 58 Mo. 222, 234 (letter from a husband to the wife on a matter of business unspecified, held not a "confidential communication"); 1899, Long *v.* Martin, 152 id. 668, 54 S. W. 473 (communications in a third person's presence, admitted); *New Hampshire:* 1843, Pike *v.* Hayes, 14 N. H. 19, 22 ("facts which came to her knowledge from other sources, and not by means of her situation as a wife," admiesible); 1859, Aiken *v.* Gale, 37 id. 494, 500 (knowledge acquired "through confidential communications from her husband," inadmissible); 1872, Clements *v.* Marston, 52 id. 31, 38 (quoted *supra*); *New Jersey:* 1876, Wood *v.* Chetwood, 27 N. J. L. 311 (husband and wife as trustees; their communications respecting the trust property, held not confidential; a trustee "can have no secrets or confidences respecting the trust property"); *New York:* 1838, Ratcliff *v.* Wales, 1 Hill 63 (criminal conversation; like the next case); 1861, Chamberlain *v.* People, 23 N. Y. 85, 89 (divorce; the wife's testimony to her intercourse with a third person, not privileged); 1888, Parkhurst *v.* Berdell, 110 id. 386, 393, 18 N. E. 123 ("not all communications made between husband and wife when alone" are included; but only such as are "expressly made confidential" or are "of a confidential nature or induced by the marital relation"); *North Carolina:* 1833, Hester *v.* Hester, 4 Dev. 228 (the husband's remarks of dissatisfaction with his will and of an intention to call in neighbors to help him revise it, held not confidential; quoted *supra*); 1851, Gaskill *v.* King, 12 Ired. 211, 215 (a wife's testimony to the husband's handing her a deed and telling her to record it for A. when she pleased, admitted); 1893, Toole *v.* Toole, 112 N. C. 152, 156, 16 S. E. 912 (communication in a third person's presence, admitted); 1895, State *v.* Brittain, 117 id. 783, 23 S. E. 433 (confession of incest by a wife to a husband, excluded); *Ohio:* 1849, Cook *v.* Grange, 18 Oh. 526, 531 (the privilege covers all matters, whether confidential or not; here held to cover a contract made between the husband and a third person); 1855, Stober *v.* McCarter, 4 Oh. St. 513, 523 (preceding case limited to a divorcee's testimony; the survivor may testify to non-confidential facts, other than conversations; the rule for conversations left undecided); 1877, Duval *v.* Davey, 32 id. 604, 609 (the statute does not exclude the husband's testimony to defamatory words uttered to the wife in his presence); 1878, Bean *v.* Green, 33 id. 444, 447 (the wife's testimony in action for loss of support by furnishing liquor to the husband, admitted); 1881, McCague *v.* Miller, 36 id. 595 (a spouse may testify to the "known presence, hearing, or knowledge of such third person"); 1881, Stevenson *v.* Morris, 37 id. 11, 19 (a wife's testimony to the husband's directions, when alone with her, as to a trespass, excluded); 1883, Sessions *v.* Trevitt, 39 id. 259, 267 (testimony admissible, where a third person was present, even though he has died); *Pennsylvania:* 1846, Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 374 ("the rule is the same, in its spirit and extent, as that which excludes confidential communications made by a client to an attorney"; here admitting the wife's testimony to the husband's transactions with a tenant); 1867, Hitner's Appeal, 54 id. 110, 111, 117 (reconciliation being a fact sufficient to avoid a deed of separation, a widow was not allowed to testify to cohabitation with the deceased husband after separation; Thompson and Agnew, JJ., diss.); 1868, Peiffer *v.* Lytle, 58 id. 386, 392 (communications about an advancement, admitted); 1881, Robb's Appeal, 98 id. 501, 503 ("ordinary business transactions and conversations in which others have participated," not included); 1887, Brock *v.* Brock, 116 id. 109, 113, 9 Atl. 486 (certain business communications, excluded); 1887, Adams *v.* Bleakley, 117 id. 283, 292, 10 Atl. 884 (certain transactions, admitted); 1895, Seitz *v.* Seitz, 170 id. 71, 32 Atl. 578 (an avowal by the husband to the wife of his marital misconduct and of his intention to persist in it, admitted); 1898, Dumbach *v.* Bishop, 183 id. 602, 39 Atl. 38 (transactions between the wife, husband, and a third person, received); *Rhode Island:* 1879, Campbell *v.* Chace, 12 R. I. 333 (privilege held applicable to communications

tion." Some Courts, however, have construed this phrase in the spirit of the correct principle, and have implied a limitation to confidential communications. Others have literally applied the words of the statute, which is thus allowed to create an intolerable anomaly in the law of privileged communications. No justification for such an extension of the privilege has ever been attempted, and it must be supposed that this broad statutory phrasing originated in inadvertence. It is proper enough to maintain (as already noticed) that all marital communications should be presumed to be confidential until the contrary appears; but if the contrary appears, there is no reason for recognizing the privilege.

made in the presence of a third person); *South Carolina:* 1868, Moseley *v.* Eakin, 15 Rich. 324, 339 (the former statute of 1866 excluding "communications," held to "preserve the principles of the common law" and to mean "confidential communications"): *Tennessee:* 1851, Brewer *v.* Ferguson, 11 Humph. 565, 566 (the widow of the testator not admitted for contestants of his will to prove his "conduct and conversation" evidencing insanity; "the law will presume the trust and confidence from the relation"); 1858, Kimbrough *v.* Mitchell, 1 Head 539 (a wife not admitted to prove a husband's ill-usage leading to his quarrel with a third person); 1860, Queener *v.* Morrow, 1 Coldw. 123, 128 (a wife's statements to her husband in a third person's presence, admissible); 1866, Allison *v.* Barrow, 3 id. 414, 416 (same); 1869, German *v.* German, 7 id. 180, 181 (unspecified "statements and conversations," excluded); 1871, State *v.* McAuley, 4 Heisk. 424, 432 (transactions between the husband and a third party, held not provable by the wife who had been present; preceding cases not cited); 1878, Patton *v.* Wilson, 2 Lea 101, 112 (the wife's testimony that she saw documents and money in the husband's possession, excluded); 1879, Orr *v.* Cox, 3 id. 617, 621 (privilege confined to "facts coming to their knowledge through the mutual relation"); after the trial of this case the statute of 1879, Code 1896, § 5596, was enacted; 1882, Washington *v.* Bedford, 10 id. 243, 246 (the wife's testimony to the husband's giving her money, etc., excluded); 1895, Phœnix Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270 ("all secret confidential disclosures and communications between the husband and wife, the publication of which would betray conjugal confidence and trust and tend to produce discord in the family are prohibited" from disclosure, and "all transactions and conversations had between the husband and wife in relation to their own affairs, not in the presence of some third person," are also prohibited; yet "matters and conversations that occur between husband and wife and third persons or in the presence of third persons, and are not intended to be secret or of a confidential character," are admissible; and, further than this, the facts of each case must largely control; here excluding conversations and payments alleged to concern a resulting trust, and the delivery of a deed by husband to wife); 1898, Young *v.* Hurst, — id. —, 48 S. W. 355 (the rule in Ins. Co. *v.* Shoemaker applied to exclude the wife's testimony as to the husband's gift to her of money and a chattel, but admitting it as to her husband's statements to third persons concerning the title); *Texas:* 1891, Mitchell *v.* Mitchell, 80 Tex. 101, 116, 15 S. W. 705 (the meaning of "confidential" must be determined "by the subject-matter of the communication, or by the circumstances under which it is made, or by both"; here, certain letters were excluded); *United States:* 1839, Stein *v.* Bowman, 13 Pet. 209, 221 (a husband's admissions to the wife that he had committed perjury, excluded); *Utah:* 1903, Van Alstine's Estate, 26 Utah 193, 72 Pac. 942 (the communication must be confidential); *Virginia:* 1830, Robin *v.* King, 2 Leigh 140 (a widow not admitted to prove the husband's disclaimers of title, "made in the presence of the family"; quoted *supra*); 1873, Murphy *v.* Com., 23 Gratt. 960, 965 (assault; the injured person's admission to his wife that the defendant struck in defence only, excluded, though the two were then living apart); *Vermont:* 1835, Williams *v.* Baldwin, 7 Vt. 503 (a husband's possession of a letter, and its contents, provable by the wife); 1855, Smith *v.* Proctor, 27 id. 304, 308 (services rendered by a third person to the husband; the wife admitted); 1895, Wheeler *v.* Campbell, 68 id. 98, 34 Atl. 35 (a wife may testify to conversations between the husband and a third person); *Washington:* 1901, Sackman *v.* Thomas, 24 Wash. 660, 64 Pac. 819, *semble* (the statute does not apply to conversations on business matters, but only to confidential communications); *West Virginia:* 1878, White *v.* Perry, 14 W. Va. 66, 80 (the wife admitted to prove certain transactions of sale by the husband; quoted *supra*); *Wisconsin:* 1870, Cook *v.* Henry, 25 Wis. 569, 571 (authority to the wife to sell household goods, not a confidential communication); 1890, Bigelow *v.* Sickles, 75 id. 427, 429, 44 N. W. 761 (the husband's testimony to the wife's conduct with an adulterer, admitted); 1890, Smith *v.* Merrill, ib. 461, 462, 44 N. W. 759 (note written by a wife to an adulterer in the husband's presence, but kept by her; his testimony to it, excluded); 1897, Lanctot *v.* State, 98 id. 136, 138, 73 N. W. 575 (letters from a husband to the wife, revealing his identity, excluded).

§ 2337. **Communications, not Acts.** The privilege has for its object the security from apprehension of disclosure, — a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, *i. e.* utterances, not acts, — the reasoning being analogous to that which establishes a similar limitation for communications between attorney and client (*ante*, § 2306). Nevertheless, the statute in some jurisdictions extends the privilege to "transactions," or to knowledge of any fact acquired in the marital relation; and there is at first sight some plausibility in this extension. The confidence, it may be argued, which the husband or wife desires, and the freedom from apprehension which the privilege is designed to secure, must be supposed to be equally as desirable for conduct as for utterances. For example, a husband intending a secret journey must be equally desirous to prevent the disclosure of his preparations of accoutrement as of his communications of plan. To be obliged, under pain of disclosure by legal process, to remain dumb as to his destination is no more incongruous with marital confidence than to be obliged to conceal his valise and his railroad-ticket and his travelling garb from the wife's inspection. Must not the confidence be as desirable for the latter as for the former? And is not every act of domestic privacy, equally with every utterance, done in reliance upon a supposed confidence in the maintenance of that privacy? In short, in the preposterously extreme logic of one Court, must not the law "assume that no husband will commit a crime in the presence of his wife except in the confidence induced by the marital relation?"[1] The difficulty with this argument is that it proves too much. It requires quite as effectually that the same privilege be extended to the testimony of a son or a brother or a parent or a servant. It amounts merely to this, that every man would of course much prefer that no member of his family should, without his consent, be allowed to disclose the private doings of the household. This is natural enough; but it is not at all what the principle of privileged communications has ever assumed as its goal (*ante*, § 2285). The privilege concerns solely the relation of husband and wife; it cares nothing for the family as such, — nothing for parent and child, nothing for brother and sister, nothing for master and servant. It is the peculiar interest of the marital relation, and of that alone, which requires unrestricted confidence; and therefore that relation alone is protected and those confidences alone which spring from that relation are protected. Domestic conduct, therefore, may doubtless be private and confidential, but the confidence is towards the family at large, and not towards the wife in particular. It is only so far as there has been a special confiding of it to the wife (or husband) that it comes within the privilege.

It follows, therefore, on the one hand, that the privilege does not apply to domestic conduct as such. On the other hand, it is equally true that any particular act or conduct may in fact become the subject of a special con-

[1] Ross, C. J., in French *v.* Ware, 65 Vt. 338, 347, 26 Atl. 1096.

fidence in the wife alone, *i. e.* may become a communication to her. For example, the husband, bringing home a package of valuables, and calling his wife's attention, "Note that I place this in the fourth desk-drawer," in effect communicates to her not only the words but also the act of placing the package. While his domestic acts are ordinarily not to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication. To formulate a precise test would perhaps be impracticable. It is clear, however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him; for it is done for the sake of the doing, not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written. One of the many aspects of this principle is illustrated in the following passage:

1882, *James*, J., in *U. S.* v. *Guiteau*, 12 D. C. 498, 547: "The exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color or blindness or the loss of an arm of one of the parties is a communication. The rule which is supposed to have been violated was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose. It was provided in order that matters should not come to the light which would not do so at all without a disturbance and disregard of the bond of peace and confidence between the married pair. Therefore it has not been applied to any matter which the husband for example has elected to make public, by doing or saying it in presence of third persons along with his wife; and it cannot be applied to that which, whether he will or no, he inevitably exhibits to the world as well as to his wife. Some diseases a husband may conceal, and he may choose whether to reveal them or not. . . . But sanity or insanity are conditions which are not of choice; and when the disease of insanity exists, the exhibition of it is neither a matter of voluntary confidence nor capable of being one of the secrets of the married relation."

Apart from the statutes above mentioned, whose wording requires a broader scope, the privilege is commonly accepted as applying to utterances only.[2]

[2] Compare also some of the rulings cited *ante*, § 2236: *California:* 1898, Poulson *v.* Stanley, 122 Cal. 655, 55 Pac. 605 (delivery of a deed, not a "communication"); *District of Columbia:* 1882, U. S. *v.* Guiteau, 12 D. C. 498, 547 ("whether in your association with him you ever saw anything that would indicate that he was a man of unsound mind," allowed; quoted *supra*); *Georgia:* 1869, Williams *v.* Phillips, 39 id. 597, 605 (similar to the next case); 1869, Jackson *v.* Jackson, 40 Ga. 150, 153 (privilege covers "any fact which came to her knowledge by reason of the confidential relation of husband and wife"); 1869, McIntyre *v.* Meldrim, ib. 490, 491 (similar); 1872, Davis *v.* Weaver, 46 id. 626, 629 (similar); 1878, Goodrum *v.* State, 60 id. 509, 511 (a husband not allowed to testify that a wife did not complain to him of an assault; "the wife ought to feel . . . as secure that her silence will not be disclosed, to her detriment or disadvantage, as that what she says will not be repeated"); 1879, Stanford *v.* Murphy, 63 id. 411, 416 (testimony by the wife to a note deposited with her by the husband, excluded; the privilege covers "facts ascertained by reason of such confidential intercourse"); *Illinois:* 1896, Griffith *v.* Griffith, 162 Ill. 368, 44 N. E. 820 (acts of self-abuse by the husband, observed by the wife, held privileged); *Indiana:* 1882, Perry *v.* Randall, 83 Ind. 143 (action for money lost by the plaintiff in the defendant's house and found and kept by the defendant; the defendant's wife not admissible to testify to the defendant's conduct in dealing with the money in her presence); 1893, Polson *v.* State, 137 id. 519, 524, 35 N. E. 907 (the fact of imparting a loathsome disease, not privileged); 1897, Beyerline *v.* State, 147 id. 125, 45 N. E. 772 (that the wife, testifying, had been taken by the neck by the husband and

§ 2338. **Exceptions and Distinctions.** (1) Under a few *statutes*, by express words or by construction, the communications may exceptionally be disclosed, commonly in cases involving the commission of an injury by one spouse upon the other.[1]

(2) At *common law*, where exceptions were recognized to the rule forbidding one spouse to testify against the other, *i. e.* in the case of certain *injuries done by one to the other* (*ante*, § 2239), it would seem that the present rule suffered also an exception, and properly.

(3) At common law, before any statutory recognition of the present privilege had taken place, the wife's correspondence with the husband was always admitted in actions for *criminal conversation* (*ante*, § 1730). So far as it was admitted for the plaintiff, the husband's offer of it might be treated as a waiver; but so far as admitted for the defendant, it must have implied the recognition of an exception, and properly.[2]

compelled to forge a signature, admitted, partly because not a communication, partly because not confidential, partly because a crime); *Indian Territory:* 1899, German-American Ins. Co. *v.* Paul, 2 Ind. T. 625, 53 S. W. 442 (that his wife had given him property, admitted); *Iowa:* 1861, Romans *v.* Hay, 12 Ia. 270 (the privilege does not cover the fact of desertion); 1882, Hanks *v.* Van Garder, 59 id. 179, 182, 13 N. W. 103 (the privilege does not cover a husband's transfer of a claim to the wife); *Kansas:* 1900, State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443 (issue whether a wife's mortgage was executed in fear of threats to prosecute her husband; her testimony that she had heard that he was threatened, admissible, though the source of her hearing was a communication from the husband); *Kentucky:* 1871, English *v.* Cropper, 8 Bush 292 (the privilege does not cover facts known "from other means of information than such as result from the marriage relation"); 1877, Elswick *v.* Com., 13 id. 155, 156 (same); 1890, Com. *v.* Sapp, 90 Ky. 580, 585, 14 S. W. 834 (same; a wife admitted to testify to the husband's attempt to poison her); *Massachusetts:* 1868, Baldwin *v.* Parker, 99 Mass. 79, 83 (the fact of a communication, not merely its tenor, is privileged); *Missouri:* 1880, Holman *v.* Bachus, 73 Mo. 49, 51 (the privilege covers an act of payment which might be explained by the conversation accompanying); 1893, McFadin *v.* Catron, 120 id. 252, 274, 25 S. W. 506 (preceding case approved); 1895, Harlan *v.* Moore, 132 id. 483, 492, 34 S. W. 70 (the privilege does not cover mere "acts" of a spouse); 1897, Shanklin *v.* McCracken, 140 id. 348, 41 S. W. 898 (testimony of the wife, that M. handed her husband a package, which he opened and handed back to M., and that she saw that it contained deeds, admitted); *New Hampshire:* 1899, Noyes *v.* Marston, 70 N. H. 7, 47 Atl. 592 (in Pub. St. § 20, the restriction of "violation of marital confidence" applies to "statement, etc.," as well as to "any matters," in spite of the lack of a comma after "matter"); *Ohio:* 1849, Cook *v.* Grange, 18 Oh. 526, 531 (the privilege covers "all transactions which occurred during marriage"); 1855, Stober *v.* McCarter, 4 Oh. St. 513, 523 (preceding case limited to a divorcee's testimony; the survivor's testimony may include facts, other than conversations, occurring during coverture which do not violate deceased's confidence or injure his reputation); 1884, Holtz *v.* Dick, 42 id. 23, 26 (husband allowed to testify to wife's handwriting); *Utah:* 1903, Van Alstine's Estate, 26 Utah 193, 72 Pac. 942 (condition of the husband as to intoxication in his wife's presence, held not a communication); *Vermont:* 1893, French *v.* Ware, 65 Vt. 338, 344, 26 Atl. 1096 (battery; complaints by the injured husband as to bodily pains, the fact of his inability to labor, and a perusal of accounts with others; the first held privileged, the others not; confidential are "matters of confidence" and "transactions affecting the character," including "direct testimony to the act of a crime"; opinion unsound); *Wisconsin:* 1897, Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575 (adultery; to prove the defendant's name and identity, letters to his wife bearing the name J. L., and signed as husband, were excluded).

[1] *Ind.* . 1883, Doolittle *v.* State, 93 Ind. 272 (criminal cases "where the wife is the injured party"; based on a comparison of Rev. St. § 1889, par. 2, "the party injured by the offence committed," with the general provision making the rules in criminal cases the same as in civil cases); 1895, Jordan *v.* State, 142 id. 422, 424, 41 N. E. 817 (same); *Mo.:* 1889, Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663 ("in the present case, S. attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed," and an exception to the privilege was recognized for fraud); 1896, Moeckel *v.* Heim, 134 id. 576, 36 S. W. 226 (fraud; the husband, as alleged, having persuaded his wife to sign a note, the conversations between them were testified to); 1902, Rice *v.* Waddill, 168 id. 99, 67 S. W. 605 (a husband's letters to his wife, showing a fraudulent scheme to deprive her of property, admitted against his grantees).

[2] 1896, Horner *v.* Yance, 93 Wis. 352, 67

(4) The wife's statements *in her husband's presence* are receivable against him as his admissions implied by silent assent (*ante*, § 2232); yet if the interview was private, the present privilege seems to forbid this; for, even regarding the statements as adopted and made by him, they are still private and confidential.[3]

3. Persons Prohibited and Entitled.

§ 2339. **Third Persons Overhearing; Documents obtained by Third Persons.** (1) A *third person overhearing* a confidential communication may testify to it,[1] for the same reason recognized in the privilege for a client's communications with his attorney (*ante*, § 2326).

(2) For *documents* of communication coming into the *possession of a third person*, a distinction should obtain, analogous to that already indicated for a client's communications (*ante*, §§ 2325, 2326); *i. e.* if they were obtained from the addressee by voluntary delivery, they should still be privileged (for otherwise the privilege could by collusion be practically nullified for written communications); but if they were obtained surreptitiously or otherwise without the addressee's consent, the privilege should cease.[2]

§ 2340. **Who may Claim the Privilege; Waiver.** (1) The privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate (*ante*, § 2332); it thus belongs to the *communicating one*, and the other one — the addressee of the communication — is therefore not

N. W. 720 (but it is difficult to reconcile this with the local statute, § 4072).

[3] 1871, R. *v.* Hilditch, 12 Cox Cr. 131, Cox, J. ("what a wife says in the presence of her husband is admissible, and what she writes to him, if received and recognized by him, is equivalent to a statement made verbally by her in his presence"; a letter found on his person, here doubtingly held admissible).

[1] 1834, R. *v.* Simons, 6 C. & P. 540; 1889, Gannon *v.* State, 127 Ill. 507, 518, 21 N. E. 525; 1900, State Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443; 1872, Com. *v.* Griffin, 110 Mass. 181; 1862, State *v.* Center, 35 Vt. 378, 382, 386 (proved by a police-officer who was in the next room).

[2] The rulings are not harmonious; compare the rulings on confession obtained by trick (*ante*, § 841): 1872, R. *v.* Pamenter, 12 Cox Cr. 177 (letter to a wife, given to a constable to post, but retained by him, excluded); 1902, Ward *v.* State, 70 Ark. 204, 66 S. W. 926 (a defendant, in jail, gave to his wife a letter, partly to her and partly to N., and the letter was taken from her; held, that the part to her was inadmissible, and, by a majority, that the part to N. was admissible); 1880, State *v.* Hoyt, 47 Conn. 540 (letters of the defendant to his wife, admitted from one who had obtained possession of them); 1898, Mercer *v.* State, 40 Fla. 216, 24 So. 154 (a husband's letter to his wife, obtained somehow by the defendant; excluded, regardless of the persons by whom it was possessed); 1893, Wilkerson *v.* State, 91 Ga. 729, 738, 17 S. E. 990 (a letter from a husband to the wife, given by her to her paramour, excluded); 1878, State *v.* Buffington, 20 Kan. 599, 613 (a letter from the defendant to his wife, handed by her to the prosecuting witness, admitted; "it is privileged only while it remains in their custody and control, or while it remains within the custody and control of their agents or representatives"); 1893, Scott *v.* Com., 94 Ky. 511, 23 S. W. 219 (a letter by a husband to the wife, obtained from her by a third person, whether by force or otherwise, privileged); 1892, State *v.* Ulrich, 110 Mo. 350, 364, 19 S. W. 656 (a husband's letters to the wife produced from her custody, excluded); 1877, Geiger *v.* State, 6 Nebr. 545, 549 (a letter from a husband to the wife, found by a third person in the husband's house, admitted; "the Court will not take notice how they are obtained"); 1902, People *v.* Truck, 170 N. Y. 203, 63 N. E. 281 (the defendant's wife permitted to prove her receipt from him in jail of two letters, and her mailing of them, the wife not being aware of the contents or of the addresses); 1887, Bowman *v.* Patrick, 32 Fed. 368 (letters from a husband to a wife, found among his papers by the husband's administrator, and by him delivered to the party, excluded); 1889, Selden *v.* State, 74 Wis. 271, 274, 42 N. W. 218 (letters by a husband to a wife, deposited by her with her attorney for a divorce, held not producible by the latter in a prosecution of the husband for perjury; addresses and postmarks on the envelopes, equally excluded).

entitled to object;[1] unless, as already noticed (*ante*, §§ 2338, par. 4), the latter's silence is desired to be treated as an assent and an adoption of the statement, which thus makes it doubly a communication and doubly privileged.

(2) The spouse possessing the privilege may of course *waive* it. The waiver may be found in some extrajudicial disclosure,[2] or in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure,[3] — for, as already noted (*ante*, § 2327), the principle of waiver cannot depend solely upon the interpretation of conduct implying willingness to waive.

Nevertheless, in a few Courts the doctrine of waiver appears to be ignored entirely.[4] This confusion of a disqualification with a privilege has been already adverted to (*ante*, § 2334); it is entirely unjustifiable (except as required by the express words of some perversely-phrased statute), and is so radical an error of principle that no further argument would cure such a misapprehension.

4. Cessation of the Privilege.

§ 2341. **Death; Divorce; Separation; Invalid Marriage.** The privilege is intended to secure such a guarantee against apprehension of disclosure as will induce absolute freedom of communication; and this can only be attained by continuing the protection in spite of the termination of the marital relation:

1859, *Stephens*, J., in *Lingo* v. *State*, 29 Ga. 470, 483: "Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets; and the protection which the law holds over the dead is the very source of greatest security to all the living."

(1) Hence, it has always been conceded that the *death* of the person communicating does not terminate the privilege.[1] In this respect, the present

[1] 1900, Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005; 1888, Stickney *v.* Stickney, 131 U. S. 227, 237, 9 Sup. 677, *semble* (cited *post*, § 2341). *Contra* (that the privilege belongs to both): 1890, People *v.* Mullings, 83 Cal. 138, 143, 23 Pac. 229; 1891, People *v.* Wood, 126 N. Y. 249, 271, 27 N. E. 362, *semble*. *Undecided:* 1882, Perry *v.* Randall, 83 Ind. 143, 146, *semble*.

[2] 1894, People *v.* Hayes, 140 N. Y. 484, 495, 35 N. E. 951 (letters from a wife to a husband, given by him to his mistress and by her to the district attorney, not privileged for the husband).

[3] The statutes cited *ante*, § 488, sometimes provide for this: 1898, Driver *v.* Driver, — Ind. —, 52 N. E. 401 (divorce; husband's use of his own communications to the wife, treated as a waiver of privilege as to his letters on the same subjects); 1897, Kelley *v.* Audrews, 102 Ia. 119, 71 N. W. 251 (presence of the wife in Court at a former trial when the husband disclosed the communications in question, not a waiver of the privilege for the second trial); 1898, Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947 (examination of wife by opponent as to communications waives the privilege as to such communications); 1899, Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67 (alienation of wife's affections; whether plaintiff's testimony to wife's language to him is a waiver, allowing her to testify to similar matters, undecided).

The following ruling is unsound; compare § 2276, *ante:* 1891, Connolly *v.* Murrell, 14 Ont. Pr. 187 (the husband may at any time claim the privilege, even after making partial disclosure).

[4] 1877, Chapman *v.* Holding, 60 Ala. 522, 533, *semble;* 1900, Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455. *Undecided:* 1882, Perry *v.* Randall, 83 Ind. 143, 146, *semble*.

[1] 1824, Doker *v.* Hasler, Ry. & Moo. 198

privilege differs not only from the marital disqualification (*ante*, § 610) but also from the marital privilege against adverse testimony (*ante*, § 2237), so that, even where those two have been terminated by death or have been abolished by statute, the present privilege remains for enforcement. (2) In the same way, the privilege does not terminate with *divorce* or separation.[2] (3) But the application of the privilege to a communication made between husband and wife *living in separation*,[3] or between persons living in *unlawful cohabitation*,[4] cannot be conceded; for here the policy of the privilege does not apply (*ante*, § 2332), since the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence.

(a widow not admitted to prove a conversation between herself and the testator); 1895, Emmons *v.* Barton, 109 Cal. 662, 669, 42 Pac. 303; 1879, Brooks *v.* Francis, 10 D. C. 109; 1852, Farmers' Bank *v.* Cole, 5 Harringt. 418; 1859, Lingo *v.* State, 29 Ga. 470, 483; 1869, Jackson *v.* Jackson, 40 id. 150, 153; 1895, Goelz *v.* Goelz, 157 Ill. 33, 41, 41 N. E. 756; 1895, Gillespie *v.* Gillespie, 159 id. 84, 90, 42 N. E. 305; 1898, Geer *v.* Goudy, 174 id. 514, 51 N. E. 623; 1872, Mercer *v.* Patterson, 41 Ind. 440, 444; 1873, Griffin *v.* Smith, 45 id. 366; 1900, Shuman *v.* Supreme Lodge, 110 Ia. 480, 81 N. W. 717 (statute applied); 1901, Hertrich *v.* Hertrich, 114 id. 643, 87 N. W. 689; 1841, McGuire *v.* Maloney, 1 B. Monr. 224; 1858, Short *v.* Tinsley, 1 Metc. Ky. 397, 401; 1890, Com. *v.* Sapp, 90 Ky. 580, 584, 14 S. W. 834; 1901, Murphy *v.* Murphy, — Ky. —, 65 S. W. 165 (privilege held not applicable to a widow's testimony to the testator's declarations in a will contest; Du Relle, J., diss.); 1902, Manhattan L. I. Co. *v.* Beard, 112 id. 455, 66 S. W. 35 (privilege held applicable to a widow's testimony in a suit on the husband's insurance policy); 1903, New York Life Ins. Co. *v.* Johnson, — id. —, 72 S. W. 762 (widow's testimony in favor of the deceased's estate, excluded); 1859, Walker *v.* Sanborn, 46 Me. 470, 472; 1861, Dexter *v.* Booth, 2 All. 559; 1886, Maynard *v.* Vinton, 59 Mich. 139, 152, 26 N. W. 401; 1895, Newstrom *v.* R. Co. 61 Minn. 78, 63 N. W. 253; 1895, Buckingham *v.* Roar, 45 Nebr. 244, 63 N. W. 398; 1842, Babcock *v.* Booth, 2 Hill N. Y. 181, 187; 1842, Osterhout *v.* Shoemaker, 3 id. 513, 519; 1872, Southwick *v.* Southwick, 49 N. Y. 510; 1846, Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 374; 1871, State *v.* McAuley, 4 Heisk. 424, 432.

In some of the above cases the testimony was excluded even when it favored the deceased, partly because of the erroneous view already noticed (*ante*, § 2334, par. 1), partly because of a too strict view of the principle of waiver (*ante*, §§ 2329, 2340); a correct solution is seen in the following cases: 1888, Stickney *v.* Stickney, 131 U. S. 227, 237, 9 Sup. 677 (a widow held to be "at liberty, though not compellable, to state the directions given by her to her husband respecting the investment of her money"); 1897, Smith *v.* Cook, 10 D. C. App. 488, 492; Posey *v.* Hanson, ib. 497, 509 (the widow allowed to disclose communications with the deceased husband in a suit against her involving the title to property).

[2] 1885, Owen *v.* State, 78 Ala. 425, 428; 1888, Long *v.* State, 86 id. 36, 41, 5 So. 443; 1884, Nolen *v.* Harden, 43 Ark. 307, 315; 1890, People *v.* Mullings, 83 Cal. 138, 143, 23 Pac. 229; 1896, Griffith *v.* Griffith, 162 Ill. 368, 44 N. E. 820 (divorced wife not allowed to testify for the plaintiff in an action by the second wife for divorce); 1898, Geer *v.* Goudy, 174 id. 514, 51 N. E. 623; 1882, Perry *v.* Randall, 83 Ind. 143; 1901, Evans' Estate, 114 Ia. 240, 86 N. W. 283; 1872, Anderson *v.* Anderson, 9 Kan. 112, 115; 1890, Com. *v.* Sapp, 90 Ky. 580, 584, 14 S. W. 834; 1888, Hitchcock *v.* Moore, 70 Mich. 112, 116, 37 N. W. 914; 1886, Leppla *v.* Tribune Co., 35 Minn. 310, 29 N. W. 127; 1900, State *v.* Kodat, 158 Mo. 125, 59 S. W. 73; Ratcliff *v.* Wales, 1 Hill N. Y. 63; 1861, Chamberlain *v.* People, 23 N. Y. 85, 89; 1849, Cook *v.* Grange, 18 Oh. 526, 529; 1887, Brock *v.* Brock, 116 Pa. 109, 113, 9 Atl. 486; 1900, Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455; 1858, Kimbrough *v.* Mitchell, 1 Head 539, 540; 1870, Cook *v.* Henry, 25 Wis. 569, 571.

[3] *Contra:* 1884, Holtz *v.* Dick, 42 Oh. St. 23, 26 (a wife's letters to a husband, while living separate from him, admitted on common-law principles; "that rule has not been limited by the present legislation, but enlarged").

[4] 1831, Wells *v.* Fisher, 1 Moo. & Rob. 99 (here the man was a second husband, but the first husband, who had been supposed dead, had returned from foreign parts).

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC IV: COMMUNICATIONS BY AND TO JURORS.

CHAPTER LXXXII.

§ 2345. **General Principles involved.** The doctrine of privilege for confidential communications, when applied to jurors in their deliberations, found itself side by side with two other and totally distinct doctrines. To the natural risks of entanglement, add that one of these doctrines is not a principle of evidence at all, and that the other is a now discarded principle which at one time had great vogue in other relations; and it is easy to see that much obscurity of rule has resulted, together with much difference of judicial opinion. As the common formula has run, "a juror's testimony or affidavit is not receivable to impeach his own verdict." But this rule of thumb is in itself neither absolutely correct as a statement of the acknowledged law, nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth, and has no intrinsic signification whatever. It resembles the popular notion in times of stringency that "the country needs more money," or the old tradal fallacy that a people's money ought to be spent within its own borders and not paid to foreign merchants for foreign goods, — both of which have a certain plausibility, and yet can only be exposed by a consideration of independent and fundamental economic principles which combine under certain circumstances to produce the facts that give plausibility to the popular dogmas. The dogma that a juror may not impeach his verdict is, then, in itself neither correct in law nor reasonable in principle; but it has reference to a group of rules deducible from three general and independent principles, which must be examined separately:

1. *Privileged communications.* The juror's subjective freedom of expression in consultation must be guaranteed. Hence the evidential principle of privileged communications (*ante*, § 2285) genuinely applies to the deliberations of a jury, so as to forbid any one of them to reveal the communications of another during retirement, without the latter's consent.

2. *Parol evidence* (*Integration*). The verdict of a jury is a written act, like a will or a contract or a judgment reduced to writing, and the "parol evidence" rule (*post*, § 2401) governs it, in a special application adapted to its circumstances. The results of this principle's application fall under four heads: *a.* The *negotiations* and *motives* preceding and leading up to the final act of uttering the verdict are immaterial and cannot be used to vary or set aside the verdict as uttered; *b.* The precise scope of the *issues* upon which the verdict is founded is always open to ascertainment; *c.* The failure to observe those forms of *behavior* which are essential to the validity of jurors' actions is always open to establishment; *d.* The incorrectness of the *foreman's declaration* or of the *clerk of court's record*, in not representing the actual terms of the verdict as finally assented to by the jury as a body, may always be established, for the purpose of correcting the record, by proceedings taken at a proper time; provided always that this permissible process is to be distinguished from the things prohibited by the rule of (*a*), above.

3. *Self-stultifying testimony.* In so far as the rule of 2, *c*, above, is attempted to be carried out by using a juror's testimony to prove his own misbehavior, this would be forbidden by the principle *nemo turpitudinem suam allegans audietur* (*ante*, § 525), if there were any such principle. But that principle of evidence has long ago disappeared from every other part of our law, and it should not survive for the present purpose.

The foregoing principles have application as well to *grand jurors* as to petit jurors, but naturally with some differences of result. The chief difference is that under the principle of 1, above (privileged communications), the communications of witnesses to the jurors, as well as of the jurors among themselves, are included, and a special development of the principle becomes necessary.

So also the award of *arbitrators* is governed by the same principles, the chief difference occurring in the application of 2, *b*, above, because of the arbitrators' combination of the functions of judge and jury.

A. PETIT JURY.

1. Privileged Communications Rule.

§ 2346. **Scope of the Principle.** The requirements of the general principle of privileged communications (*ante*, § 2285) are fully satisfied for communications between jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to the due attainment of the jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and the most careful protection; and the injury from

disclosure would certainly overbalance the benefits thereby gained.[1] It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow-juror disclosed upon the witness-stand against his consent.[2]

Nevertheless this principle has in practice not played a frequent part, and for three reasons: (a) The communications between jurors are seldom relevant in any way upon another trial;[3] (b) even when they are desired to be used on motions for a new trial, they are usually excluded by virtue of the parol evidence rule in some aspect; when they are not so excluded, they are still usually without the privilege because they involve misconduct, which is perhaps not protected by the principle of the privilege;[4] (c) even when the privilege would apply, the juror himself waives it by making voluntary affidavit.

It remains, however, to notice the practical differences between the application of the present principle, *i. e.* the genuine privilege, and the ensuing one, *i. e.* the parol evidence rule: (1) Under the parol evidence rule, the juror's testimony is excluded only when it is offered to prove facts nullifying the verdict, on a motion for a new trial. But under the privileged communications rule, the juror's testimony would be excluded for any purpose whatever, — for example, where upon another trial he was a witness and his bias was offered to be shown by his expressions during retirement with the former jury. Thus the genuine privilege may have a larger scope than the parol evidence rule. (2) Under the parol evidence rule, the juror's testimony is excluded (by the prevailing rule) in proving either his own misconduct or a fellow-juror's; but under the privileged communications rule the former is obviously not excluded, where the juror makes voluntary affidavit. Contrariwise, in the few jurisdictions which do not accept the rule prohibiting proof of misconduct, the juror might still be prevented from disclosing a fellow-juror's communications unless the latter consented. (3) Under the parol-evidence rule, the prohibitions, so far as they exist at all, are absolute and independent of the juror's consent; but under the privileged communications rule there is nothing left to prohibit if the privileged juror once consents.

2. Parol Evidence Rule.

§ 2348. **General Principle.** The principle of the Parol Evidence rule (the constitution of legal acts) is later examined in detail (*post*, §§ 2400–2478);

[1] 1834, Johnson, J., in M'Kain *v.* Love, 2 Hill S. C. 506 ("We know from experience that, in questions admitting of any doubt, the only possible means of arriving at unanimity of opinion amongst many is by a free interchange of thought, and to deny it to a jury would be to defeat the object of trial by jury").

[2] 1873, R. *v.* Kahalewai, 3 Haw. 465, 470 (rule applied); 1824, State *v.* Powell, 7 N. J. L. 244, 248 (knowledge of the condition of the body, acquired as a coroner's juror upon the same death, not privileged).

In 1757, Admiral Byng having been condemned to death by a court-martial, whose decision many thought harsh, a bill was presented to release from their oath of secrecy the members of the court-martial, so that an investigation might be had; this bill Lord Mansfield and Lord Hardwicke both opposed, and their arguments are analogous to those urged against the disclosure of a jury's deliberations and reasonings (Cobbett's Parl. Hist. 803–822, Campbell's Lives of the Chancellors, VI, 273).

[3] They might be relevant to impeach the juror as a witness in a later trial; *e. g.* as attempted in Phillips *v.* Marblehead, 148 Mass. 326, 330, 19 N. E. 547 (1889).

[4] *Post*, § 2354.

and a jury's verdict is one of the most important acts illustrating the application of that principle. To consider its application here is to separate the subject from its natural place, but is unavoidable.

That principle is that where the existence and tenor of a legal act — *i. e.* an utterance to which legal effects are attached — are in issue, the outward utterance as finally and formally made, and not the prior and private intention, is taken as exclusively constituting the act (*post*, §§ 2404, 2425); and therefore where the act is required (as judicial proceedings are) to be made in writing, the writing is the act (*post*, § 2450). But this assumes that there was an act; nothing therefore prohibits the investigation of the circumstances to determine whether an act of the alleged tenor was consummated by the will of the parties (*post*, § 2408). Moreover, if any formalities are essential to the validity of the act, their absence may of course be shown (*post*, § 2456). Finally, even when an act of the tenor alleged appears to have been done by written utterance, the failure of the written utterance to correspond with the private intention is good ground, in a proper proceeding, for judicial revision and correction of the writing, so far as there is no impolicy in unsettling the transaction and risking controversial uncertainty (*post*, §§ 2413, 2417).

In applying this principle to a jury's verdict, the subject naturally falls under four heads:

a. The *jurors' deliberations* during retirement, their expressions, arguments, motives, and beliefs, represent that state of mind which must precede every legal act and is in itself of no legal consequence. The verdict, as finally agreed upon and pronounced in court by the jurors, must be taken as the sole embodiment of the jury's act. Hence it stands, irrespective of what led up to it in the privacy of the jury-room, — precisely as the prior negotiations of the parties to a contract disappear from legal consideration when once the final agreement is reduced to writing and signed. The difference is that the parties need not have reduced their transaction to a single memorial (*i. e.* by integration) unless they wished to, while the law requires the verdict thus to be made; but the effect is the same, when the act is once done.

b. The *issues* submitted to a jury must be known before the scope of the verdict can be completely determined, because a general verdict purports only to state the net fact of a decision *pro* or *con*, and the subject of law and fact, upon which the decision is given, must still be sought in the pleadings, the testimony, and the instructions, — precisely as a written contract may by the parties' express intention cover only a part of a transaction and leave the rest to be determined from other materials (*post*, § 2430). Hence, properly, the issues covered by a verdict may always be established, in order to determine the scope of the judgment, and by a juror's testimony, if needed. Here, however, certain discriminations, as will be seen, come into play.

c. The jury's *failure to obey essential formalities of conduct* may invalidate the verdict, — just as the parties' failure to observe the required formality of recording a deed or attesting a will or stamping a contract (under the revenue

law) or making a memorandum (under the statute of frauds) may invalidate a transaction otherwise perfect (*post*, §§ 2454–2456). The transgression of these rules of formality may therefore of course be established as a ground for invalidating the verdict. What these formalities shall be is determined by the policy applicable to jury-trials, and is in no sense a question of evidence. There is, however, a rule of evidence, now generally but improperly accepted, that the fact of informality, so far as it involves improper conduct by the jurors, shall not be proved by one of the jurors themselves. This rule has nothing to do, in principle, with the trial rules of informality, nor with the parol evidence rule permitting informalities to be established.

d. The *correction of a mistake* in the jury's uttered verdict, occurring between the time of the act of voting or assenting in the jury-room and the final entry of the verdict by the clerk in court, may properly be made, upon the same principle that a deed may be reformed in equity for mutual mistake, so as to make it correspond with the expressed agreement of the parties as informally reached before the execution of the deed (*post*, § 2417), or that a judgment-roll may be corrected *nunc pro tunc* to correspond with the proceedings as originally contained in the pleadings or the clerk's minutes (*post*, § 2450). This process, however, has constantly to be distinguished from the improper attempt to violate the principle of (*a*) above by giving effect to the motives or beliefs of the jurors leading up to their final act of voting or assent.

From the general principle of the parol evidence rule, therefore, may be adequately deduced all the detailed rules that control the methods of correcting or setting aside the jury's verdict. So far as the privileged communications rule incidentally forbids anything which the parol evidence rule would permit, its effect will be noticed under the appropriate head. The effect of the supposed rule against self-stultification (*nemo turpitudinem suam*) will also thus be noticed. The rules defining the informalities fatal to a verdict will be assumed to be already prescribed by the law of trials.

§ 2349. (*a*) **Jurors' Motives, Beliefs, Misunderstandings, Intentions, and the like, as Immaterial.** For the reason already stated (*ante*, § 2348, par. *a*), the verdict as uttered is the sole embodiment of the jury's act, and must stand as such without regard to the motives or beliefs which have led up to their act. The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow:

1872, *Cleasby*, B., in *Duke of Buccleuch* v. *Metropolitan Board*, L. R. 5 E. & I. App. 418, 434:[1] "As soon as the award is made, it must speak for itself. It must be applied, as

[1] This opinion is dealing with an arbitrator's award, but its reasoning is expressly applied to jurors' verdicts, and it contains the soundest statement of the principle.

in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award. In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. . . . The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it. The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in a case of a difference in the evidence of what was intended, which is to govern and influence the award. Or it may be farther illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jurymen give a general verdict. Could the twelve jurymen be called as witnesses to shew to what extent they had severally acted upon the direction given, or against it, so as to vitiate the verdict by shewing that some jurymen included in it matters they could not properly include? I submit not, and that the verdict must speak for itself. . . . The state of the arbitrator's or judge's mind is of no importance, except so far as it is embodied in some judicial act done by him. His mind may fluctuate and change more than once until the decision is delivered, and then, whether it be upon an interlocutory or final matter, the case is so far bound."

1802, *Tyler*, J., in *Robbins* v. *Windover*, 2 Tyl. 11, 13: "The common law requires that the twelve jurors shall unite in a verdict. Whoever considers the variety and intricacy of causes they have to determine, the difficulty of bringing twelve persons of different habits and modes of thinking, and of unequal abilities, fortuitously elected, to concur in opinion, will perceive the wisdom of the Legislature in directing that their deliberations should be secret; for it was to be expected, that in bringing about a union of sentiment in the panel, the subject under consideration would be presented in various lights; that futile objections would be met with inconclusive arguments, theory opposed to practice, and legal science to common sense; that the reputations of witnesses would be scanned, the character of parties too often adverted to, and the whole investigation illustrated by relations of what each juror had heard or known in cases supposed similar; that the warmth of debate would excite an obstinacy of opinion, and a reluctant and tardy assent to the verdict, perhaps drawn from some one, which, on after reflection, might leave in the juror's mind a doubt of its rectitude. It would be of dangerous tendency to admit jurors by affidavit to detail these deliberations of the jury room, to testify to subjects not perfectly comprehended at the time, or but imperfectly recollected. From a natural commiseration for the losing party, or a desire to apologize for the discharge of an ungrateful duty, after the juror had been discharged from office, he would be too apt to intimate, that if some part of the testimony had been adverted to, or something not in evidence omitted, his opinion would have been otherwise, whilst others of the panel, with different impressions or different recollections, might testify favourably for the prevailing

party. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated."

1836, *Turley*, J., in *Hudson* v. *State*, 9 Yerg. 407, 410: "To establish the principle that jurors may file affidavits showing upon what particular parts of testimony they may have found their verdict, with a view of granting new trials if the Court shall be of opinion that the testimony thus made the basis of the verdict was not legal, and therefore ought not to have been received, would be casting obstacles in the way of criminal trials that would render it almost impossible ever to bring them to a conclusion."

1839, *Shaw*, C. J., in *Murdock* v. *Sumner*, 22 Pick. 156: "The general rule is that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention, and habits of thought, may entertain different views of the evidence and of the instructions of the Court in point of law. But the verdict, in which they all concur, must be the best evidence of their belief both as to the fact and the law, and therefore must be taken to be conclusive."

Accordingly, it is to-day universally agreed that, on a motion to set aside a verdict and grant a new trial, the verdict cannot be affected, either favorably or unfavorably, by the circumstance that one or more jurors *misunderstood* the judge's *instruction*, or were influenced by an *illegal paper* or by an *improper remark* of a fellow-juror, or *assented* because of *weariness* or illness or importunities, or *assented* under an *erroneous belief* that the judge would use clemency or have the legal right to vary the sentence, or had been *influenced* by *inadmissible evidence*, or had decided upon grounds which rendered newly-discovered evidence immaterial, or had *omitted to consider* important evidence or issues, or had miscalculated accounts by errors of fact or of law, — or that any other motive or belief, leading to their decision, had existed prior to their final assent and vote.[2]

[2] *Eng.*: 1754, Canning's Trial, 19 How. St. Tr. 283, 669 (the jury having brought in a verdict of "guilty of perjury, but not wilful and corrupt," and the Court refusing to receive it, the jury retired and brought in a verdict of "guilty of wilful and corrupt perjury"; and, upon a motion for a new trial, based on two jurors' affidavits, the foreman of the jury "was sent for by the Court," and stated that two of the jurors would not consent to the second verdict unless the jury recommended the accused for mercy, whereon they all agreed on that basis; and the motion, being argued before five of the superior judges among others, was overruled); 1770, R. *v.* Almon, 5 Burr. 2686 (a juror's affidavit, that he had understood the judge's direction to be that certain evidence was conclusive, and that "if he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant," was excluded; Aston, J.: "A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted"); 1832, Ramadge *v.* Ryan, 9 Bing. 333, 338 (a juror having been charged with expressions of bias before the trial, the foreman's affidavit that "the verdict was not occasioned by the practice of that individual" was excluded, the Court "observing that the affidavits on the other side applied only to the conduct of the juror before he entered the jury-box"); *Can.*: 1900, Fraser *v.* Drew, 30 Can. Sup. 241 (misunderstanding the evidence); *Ark.*: 1881, St. Louis I. M. & S. R. Co. *v.* Cantrell, 37 Ark. 519, 523, 527 (juror's affidavit as to the effect of the Court's instruction upon his vote, excluded); *Cal.*: 1854, Amsby *v.* Dickhouse, 4 Cal. 103 (juror's affidavit that he was dissuaded from a contrary verdict by a fellow-juror's improper conduct, excluded); 1860, People *v.* Wyman, 15 id. 70, 75 (that the verdict was not "a fair expression of the opinion of the jury," excluded); 1865, People *v.* Hughes, 29 id. 258, 263 (that two jurors would not have agreed to a verdict but for fear of being shut up over night, excluded); *Colo.*: 1890, Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78 (jurors' affidavits not received to show "improper arguments advanced by their fellow-jurors"); 1891, Wray *v.* Carpenter, 16 id. 271, 27 Pac. 248 (jurors' affidavits as to the "theory or ground upon which they rendered their verdict," excluded); *Conn.*: 1852, Haight *v.* Turner, 21 Conn. 593, 596 (juror's affidavit that the jury had considered certain evidence contrary to the Court's instruction, excluded); *Fla.*: 1878, Coker *v.* Hayes, 16 Fla. 368, 392 (juror's affidavit not received to show that he assented to

The following discriminations, however, must be made: (1) Many Courts reach this result by merely pronouncing the shibboleth that "a juror cannot

the verdict "because of the discontent of many of the jurors at his not agreeing with them"); *Ga.:* 1850, Bishop *v.* State, 9 Ga. 121, 125 (juror's affidavit that he was induced to agree "by the persuasion of his fellow-jurors and by their misrepresentations as to the effect of the verdict," excluded); 1853, Clark *v.* Carter, 12 id. 500, 503 (juror's affidavit that he misunderstood the case in arriving at his verdict, excluded); 1855, Mercer *v.* State, 17 id. 146, 174 (juror's admissions that he yielded to the verdict only "because he could not control the rest of the jury," excluded); 1859, Coleman *v.* State, 28 id. 78, 84 (similar); 1867, Rutland *v.* Hathorn, 36 id. 380, 384, 386 (similar); 1873, Kiug *v.* King, 49 id. 622 (similar); 1885, Coleman *v.* Slade, 75 id. 61, 72 (like Clark *v.* Carter, *supra*); *Haw.:* 1859, Howland *v.* Jacobs, 2 Haw. 155 (juror's affidavit as to fellow-jurors' improper reasons for the verdict, excluded); 1873, R. *v.* Kahalewai, 3 id. 465, 469 (affidavits of jurors and third persons as to the language of jurors during deliberation, indicating bias, excluded); *Ill.:* 1841, Smith *v.* Eames, 4 Ill. 76, 81 (jurors' affidavits as to their understanding of the judge's instructions, excluded); 1878, Niccolls *v.* Foster, 89 id. 386 (jurors' affidavits not admitted to show "what the jury thought and did in their retirement"); *Ind.:* 1846, Ward *v.* State, 8 Blackf. 102 (juror's affidavit as to his "particular view of the testimony," excluded); 1858, Elliott *v.* Mills, 10 Ind. 368, 371 (jurors' statements that they "unintentionally overlooked" a credit in defendant's favor, excluded); 1864, Hughes *v.* Listner, 23 id. 396 (juror's affidavit that he yielded his verdict only to avoid further confinement, excluded); 1872, Withers *v.* Fiscus, 40 id. 131 (jurors' affidavits not admissible to show that they had made a mistake in calculating the interest); *Ind. T.:* 1903, Langford *v.* U. S., — Ind. T. —, 76 S. W. 111 (juror's affidavit as to his reason for consenting, excluded); *Ia.*. 1849, Lloyd *v.* McClure, 2 G. Gr. 139, 142 (jurors' affidavits not admitted to show "what items they had allowed and what rejected," in an action on an account); 1851, Abel *v.* Kennedy, 3 id. 47 (not admitted to show that "the reading of the deposition [after retirement] did not influence their verdict"); 1856, Cook *v.* Sypher, 3 Ia. 484, 486 (juror's affidavit that "the verdict was not voluntary on his part," excluded); 1859, Butt *v.* Tuthill, 10 id. 585 (obscurely reported); 1863, Davenport *v.* Cummings, 15 id. 219, 228 (jurors' affidavits that they understood by an instruction that "a preponderance of evidence was not required," excluded); 1863, Jack *v.* Naber, ib. 450, 452 (jurors' affidavits that they "misunderstood the testimony," excluded); 1866, Wright *v.* Tel. Co., 20 id. 195, 212 (principle of the prior cases approved; quoted *post*, § 2353); 1871, Cowles *v.* R. Co., 32 id. 515, 518 (juror's affidavit that he found his verdict upon certain evidence alone, excluded); 1877, Brown *v.* Cole, 45 id. 601 (juror's affidavit that he had assented solely because of illness, excluded); 1878, Ward *v.* Thompson, 48 id. 588, 594 (jurors' affidavits as to their misunderstanding of the rule of damages, excluded); 1878, State *v.* McConkey, 49 id. 499, 504 (jurors' affidavits that they erroneously rejected evidence before them, excluded); 1884, Fox *v.* Wunderlich, 64 id. 187, 20 N. W. 7 (juror's affidavit that he assented to the verdict in order to shorten his confinement, excluded); 1885, Wilkins *v.* Bent, 66 id. 531, 24 N. W. 29 (jurors' affidavits that they erroneously deducted a certain amount, excluded); 1894, State *v.* Beste, 91 id. 565, 60 N. W. 112 (juror's affidavit that another juror argued that the defendant ought to have taken the stand, excluded); 1895, State *v.* Lauderbeck, 96 id. 258, 65 N. W. 158 (like sundry prior cases); 1896, State *v.* Whalen, 98 id. 662, 68 N. W. 554 (jurors' affidavits as to the influence upon them of an illegal reading of law books by another juror, excluded); 1896, Kassing *v.* Walter, — id. — , 65 N. W. 832 (jurors' affidavits that they erroneously reckoned interest, admitted for the purpose of argument); 1898, Christ *v.* Webster City, 105 id. 119, 74 N. W. 743 (jurors' affidavits as to a misunderstanding of instructions, excluded); *Kan.:* 1874, Perry *v.* Bailey, 12 Kan. 539, 544 (juror's affidavit not admissible to show "a matter resting in the personal consciousness"; quoted *post*, § 2353); 1885, State *v.* Burwell, 34 id. 312, 8 Pac. 470 (foreman's affidavit that he "would not have signed the verdict had he known its real meaning," excluded); 1885, State *v.* Clark, ib. 289, 8 Pac. 528 (jurors' affidavits that documents illegally read by them influenced the verdict, excluded); 1892, State *v.* Plum, 49 id. 679, 31 Pac. 308 (jurors' affidavits that they consented only to avoid a hung jury, excluded); *Ky.:* 1808, Taylor *v.* Giger, Hardin 595, 598 (jurors' affidavits not admissible "to explain the train of reasoning or the grounds either of law or fact assumed by them"; here, to show an improper consideration of future damage by a continuing trespass); 1826, Doran *v.* Shaw, 3 T. B. Monr. 411, 415 (preceding rule applied to exclude proof of being influenced by the sheriff's directions); *La.:* 1860, State *v.* Millican, 15 La. An. 557 (juror's testimony not received to show the jury's misunderstanding of the judge's charge); 1876, State *v.* Frugé, 28 id. 657 (juror's testimony that a juror had used fallacious arguments, excluded); 1879, State *v.* Wallman, 31 id. 146 (juror's testimony that he had consented only in the belief that a petition for clemency would secure a commutation of sentence, excluded); 1886, State *v.* Bird, 38 id. 497 (similar); 1886, State *v.* Bates, ib. 491 (similar); 1889, State *v.* Morris, 41 id. 785, 6 So. 639 (juror's affidavit and statements that he consented only because of illness and a desire to be released, held inadmissible); *Me.:* 1831, Bishop *v.* Williamson, 8 Me. 162, *semble* (juror's testimony as to misunderstanding the evidence, held inadmissible); 1868, Heffron *v.*

impeach his verdict," and do not appreciate the vital distinction between impeaching it in the manner of the present rule and impeaching it in the manner

Gallupe, 55 Me. 563, 566 (jurors' depositions as to the influence of a paper illegally introduced before them, excluded); 1874, Greeley *v.* Mansur, 64 id. 211, 213 (juror's affidavit that by reason of illness he did not understand the deliberations in the jury-room, excluded); *Md.:* 1766, Bladen *v.* Cockey, 1 H. & McH. 230, 235 (juror's testimony that "he gave his verdict because the witness A gave such evidence as he credited," said to be improper, because parol proof should not be used "to lessen the weight of the record"); 1831, Bosley *v.* Ins. Co., 3 G. & J. 450, 473 (jurymen's depositions that they charged the plaintiff with interest to a certain time in estimating damages, excluded); *Mass.* (here the rule of Pierce *v.* Woodward, *infra,* was afterwards repudiated in Hanuum *v.* Belchertown): 1809, Whitney *v.* Whitman, 5 Mass. 405 (the Court refused to examine jurors as to whether they had been influenced by a paper illegally delivered to them; "the Court must he governed by the tendency of the paper apparent from the face of it"); 1827, Hix *v.* Drury, 5 Pick. 296, 302 (jurors not examinable to the effect of papers accidentally delivered; "although the jury may think that they were not influenced by such paper, it is impossible for them to say what effect it may have had on their minds"); 1828, Pierce *v.* Woodward, 6 Pick. 206 ("Where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found"; new trial granted because "the principle [of damages upon which they proceeded was incorrect"); 1829, Ferrill *v.* Simpson, 8 Pick. 359 (juror's testimony admitted to show "that a misapprehension at the trial, in regard to a certain line, had no influence upon the verdict"; the Court's discretion being invoked); 1830, Parrott *v.* Thacher, 9 id. 426, 431 ("Where there are distinct grounds upon which the verdict may be given, perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one and sufficient upon another; and if it appears that they did not agree [unanimously] upon either of the grounds, I do not see how their verdict can stand"); 1832, Dorr *v.* Fenno, 12 Pick. 520, 526 (preceding case and its language, approved; "this is, however, a discretionary power, which the Court will exercise very sparingly and with great caution"; here the principle was held to permit an inquiry into the jury's principle of computing interest; but an inquiry into their mode of agreeing upon damages by striking an average was treated as involving an act of misbehavior and therefore not ascertainable through the jurors themselves); 1837, Hannum *v.* Belchertown, 19 Pick. 311 (jurors' depositions not admitted to show that they had obeyed the rule permitting double damages; Dorr *v.* Fenno approved, but its principle impliedly repudiated); 1839, Murdock *v.* Sumner, 22 id. 156 (jurors' affidavits not admitted to show that they made a mistake of law in believing themselves bound to accept the opinion of an expert witness; quoted *supra*); 1854, Boston & Worcester R. Co. *v.* Dana, 1 Gray 83, 91, 105 (jurors' affidavits not admitted to show that they had averaged damages, on the principle of Dorr *v.* Fenno); 1867, Bridgewater *v.* Plymouth, 97 Mass. 382, 390 ("the affidavits or testimony of a part of the jury cannot be received to show that they misunderstood the instructions of the judge or that they were induced by misapprehension to assent to the affirmation of the verdict"; preceding cases not noticed; moreover the principle laid down in Hannum *v.* Belchertown, *supra,* was there applied even to the entire jury's unanimous testimony); 1871, Woodward *v.* Leavitt, 107 id. 453, 459, 471 (jurors' affidavits held not admissible to show that a juror B., alleged to have been prejudiced, did not take part in the discussion nor vote on the side of the alleged bias; Dorr *v.* Fenno and Ferrill *v.* Simpson disapproved, in this respect; yet their doctrine is accepted so far as it allows a questioning as to the grounds of verdict by the judge before the final delivery and affirmance of the verdict); 1887, Warren *v.* Spencer Water Co., 143 id. 155, 165, 9 N. E. 527 (juror's subsequent declarations, or even his testimony, to the reasons for and manner of arriving at a verdict, held inadmissible); 1893, Harrington *v.* R. Co., 157 id. 579, 580, 32 N. E. 955 (Woodward *v.* Leavitt approved); *Minn.:* 1868, Knowlton *v.* McMahon, 13 Minn. 386 (jurors' affidavits not received to show that the officer in charge "sought to, and did, influence the verdict"); 1870, State *v.* Stokely, 16 id. 249, 255 (juror's affidavit that "he would not have concurred in the verdict" had not his health compelled his release from confinement, excluded); *Mo.:* 1883, State *v.* Fox, 79 Mo. 109, 112 (some one threw a rope with a hangman's noose into the jury-room; juror's testimony as to the effect of this incident, excluded); 1893, State *v.* Schaefer, 116 id. 96, 22 S. W. 447 (jurors' affidavits that the evidence was misunderstood by them, excluded); 1896, State *v.* Burk, 132 id. 363, 34 S. W. 48 (jurors' affidavits that they consented to the verdict on the understanding that the Court would reduce the sentence, excluded); *Mont.:* 1895, Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273 (juror's affidavit that he consented to the verdict because he was ill and desired to be released, excluded); *Nebr.:* 1888, Harris *v.* State, 24 Nebr. 803, 40 N. W. 317 (jurors' affidavits not admissible to impeach a verdict in a matter "which essentially inheres in the verdict itself"; following the rule in Wright *v.* Tel. Co., Ia.); *N. H.:* 1827, Tyler *v.* Stevens, 4 N. H. 116 (jurors' affidavits that they had "misunderstood the directions by the Court," excluded); 1829, Page *v.* Wheeler, 5 id. 91 (following Whitney *v.* Whitman, Mass.); 1833, State *v.* Hascall, 6 id. 352, 363 ("They state generally that they were influenced by nothing except the law and evidence given at the trial; but this we cannot consider"); 1850, State *v.* Pike, 20 id. 344 (juror's affidavit that the absence of a certain paper, improperly

of rule *c* (*post*, § 2352). (2) In consequence of the foregoing indiscrimination, a few Courts have occasionally received testimony of the juror's state of mind

withheld, did not affect the jury's opinion of its contents or affect, admitted; State *v.* Hascall not cited); 1852, Folsom *v.* Brown, 25 id. 114, 123 (like Griffin *v.* Auburn, *infra*; jurors' affidavits here excluded); 1855, Leighton *v.* Sargent, 31 id. 119, 122, 137 (jurors' affidavits as to their consultations and how they determined the amount of damages, excluded); 1856, Walker *v.* Kennison, 34 id. 257 (jurors' affidavits that a fellow-juror misrepresented the testimony, etc., excluded); 1879, Griffin *v.* Auburn, 59 id. 286 (jurors' admissions, after verdict, as to having considered the question of costs, excluded); *N. J.*: 1792, Randall *v.* Grover, 1 N. J. L. 151 (juror's affidavit stating the "insufficiency of the evidence to justify the verdict," excluded); 1798, Jessup *v.* Cook, 6 id. 434, 439 (juror's affidavit that the jury divided a debt between the partners, offered to show that new evidence was material; Court equally divided); 1872, Hutchinson *v.* Consumers' Coal Co., 36 id. 24 (jurors' affidavits "to explain the reasons or motives of the jurors, or any of them, for giving or consenting to the verdict," inadmissible); *N. Mex.*: 1895, U. S. *v.* Biena, 8 N. Mex. 99, 42 Pac. 70 (juror's affidavit that the verdict was based upon the testimony of one L., subsequently convicted of perjury, apparently held admissible; the true solution here would have been to grant a new trial on the sole fact of L.'s perjury, if on a material point, without regard to its probable influence on the jury); *N. C.*: 1878, State *v.* Smallwood, 78 N. C. 560 (like State *v.* Best, *infra*); 1884, State *v.* Royal, 90 id. 755 (juror's affidavit that the verdict was influenced by the defendant's failure to call his son as a witness, excluded); 1887, Jones *v.* Parker, 97 id. 33, 2 S. E. 370 (jurors' affidavits that they did not understand the judge's charge and did not concur in the verdict, excluded); 1888, Johnson *v.* Allen, 100 id. 131, 5 S. E. 666, 670 (affidavits based on jurors' statements as to the mode of reckoning damages, excluded); 1892, State *v.* Best, 111 id. 638, 15 S. E. 930 (jurors' affidavits that they assented only on the supposition that a recommendation to mercy would save from the death penalty, excluded); 1896, Purcell *v.* R. Co., 119 id. 728, 26 S. E. 161 (like Johnson *v.* Allen, *supra*); *Oh.*: 1858, Holman *v.* Riddle, 8 Oh. St. 384, 389 (jurors' affidavits that they misunderstood the judge's charge, excluded); *R. I.*: 1850, Handy *v.* Ins. Co., 1 R. I. 400 (jurors' affidavits that they misunderstood the judge's charge, excluded; "the proper time . . . is immediately after the verdict is returned, while the jury may be polled"); 1859, Tucker *v.* South Kingston, 5 id. 558, 560 (similar affidavits, excluded); *S. C.*: 1855, Smith *v.* Culbertson, 9 Rich. L. 106, 111 (juror's affidavit "that his assent was forced, or was given under some misconception," said to be inadmissible); 1890, State *v.* Senn, 32 S. C. 392, 11 S. E. 292 (jurors' affidavits as to "the manner in which the verdict was reached," held inadmissible); 1894, State *v.* Bennett, 40 id. 308, 18 S. E. 886 (juror's affidavit that he consented only on the erroneous supposition that the recommendation to mercy would secure pardon or commutation, excluded); 1897, State *v.* Aughtry, 49 id. 285, 26 S. E. 619, 27 S. E. 199 (jurors' statement of their misunderstanding of the charge, not received); *Tenn.*: 1821, Crawford *v.* State, 2 Yerg. 60 (two jurors' affidavits admitted, that they had consented to a verdict of guilty for the sole reason that they believed that a new trial would be granted or that the Governor would by pardon act upon the recommendation to mercy which they made a condition of assenting to the verdict); 1836, Hudson *v.* State, 9 id. 407 (juror's affidavit that he had founded his verdict upon a fact improperly presented to the jury by a witness re-examined in open court after the trial, excluded; in effect repudiating Crawford *v.* State on this point; quoted *supra*); 1842, Norris *v.* State, 3 Humph. 333, 338 (preceding case approved; jurors' affidavits that they had misunderstood the judge's charge as to believing a witness, held not admissible); 1844, Saunders *v.* Fuller, 4 id. 514 (same ruling on similar facts); 1847, Cochran *v.* State, 7 id. 544, 547 (similar to Crawford *v.* State, *supra*); 1850, Nelson *v.* State, 10 id. 518, 532 (jurors' affidavits that they supposed a verdict of murder in the second degree to carry a possibility of sentence less than death, received on the facts, in consequence of the trial judge's conduct); 1856, Larkins *v.* Tarter, 3 Sneed 681, 686 (jurors' affidavits as to the influence of improper remarks of counsel, excluded); 1869, Galvin *v.* State, 6 Coldw. 283, 286 (juror's affidavit that he consented to the verdict only on the erroneous supposition that the Court could fix a punishment less than death, excluded; Nelson *v.* State treated as exceptional); 1872, Wade *v.* Ordway, 1 Baxt. 229, 234 (jurors' affidavits that they misunderstood the judge's statements, excluded); 1873, Dunaway *v.* State, 3 id. 206, 208 (affidavits of the entire jury as to basing their verdict upon a state of facts not in issue, excluded); 1875, Richardson *v.* McLemore, 5 id. 586, 589 (juror's affidavit as to the influence of part of the charge, excluded); 1880, Roller *v.* Bachman, 5 Lea 153, 159 (jurors' affidavits as to misunderstanding the charge and miscalculating the statutory period of limitation, excluded); 1891, Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074 (juror's affidavit not received to show a misunderstanding of the judge's charge); *Tex.*: 1846, Campbell *v.* Skidmore, 1 Tex. 475 (juror's affidavit as to the influence of the judge's charge, excluded); 1856, Kilgore *v.* Jordan, 17 id. 342, 346 (jurors' affidavits that they misapprehended the law, excluded); 1858, Little *v.* Birdwell, 21 id. 597, 602, 612 (jurors' affidavits that evidence withheld from them would have influenced their verdict, excluded); 1865, Johnson *v.* State, 27 id. 758, 769 (jurors' affidavits that they misconstrued the judge's charge, excluded); 1888, Wills Point Bank *v.* Bates, 72 id. 137, 10 S. W.

in support of the verdict, — applying that part of the rule of thumb (rule *c*) which receives jurors' testimony to disprove misconduct and thus to support the verdict.[3] There is of course no justification for this; the principle of the present rule accepts the jury's utterance as the final and exclusive expression

348 (jurors' affidavits as to their understanding of the facts, excluded); 1895, McCulloch *v.* State, 35 Tex. Cr. 268, 33 S. W. 230 (similar to Johnson *v.* State; "this practice is getting entirely too common, and the lower courts should take occasion to correct it"); 1903, Blackwell *v.* State, — id. — , 73 S. W. 960 (that the jurors misunderstood the testimony, excluded); *U. S.:* 1806, Ladd *v.* Wilson, 1 Cr. C. C. 305 (jurors' affidavits that "a mistake was made by the foreman in calculating upon the principles agreed on by the jury," said to be "dangerous," and the practice of receiving them not to be sanctioned); 1890, Glaspell *v.* R. Co., 43 Fed, 900, 907, Thomas, J. (jurors' affidavits as to their method of reckoning the damages, offered to show that an erroneous instruction was not followed and was therefore harmless, excluded); 1890, Fuller *v.* Fletcher, 44 id. 34, 39 (jurors' affidavits not admissible to show that they were or were not influenced by certain motives); 1892, Mattox *v.* U. S., 146 U. S. 140, 142, 147, 13 Sup. 50 (rule of Perry *v.* Bailey, Kan., and Woodward *v.* Leavitt, Mass., approved; quoted *post*, § 2352); *Utah:* 1891, People *v.* Flynn, 7 Utah 378, 26 Pac. 1114 (jurors' affidavits not admitted to show a misunderstanding of the judge's charge); *Vt.:* 1865, Sheldon *v.* Perkins, 37 Vt. 550, 557 (juror's affidavit, after separation, that a verdict was based on a particular ground, excluded; if the ground of the verdict is material, "the proper course is to suggest it to the Court so that it may be learned from the jury in open court while they are together and under the control and direction of the judge"); *Va.:* 1791, Cochran *v.* Street, 1 Wash. 79 (jurors' affidavits that four of them were opposed to the verdict, but yielded in the belief that they were legally bound to abide by the majority's view, admitted and a new trial ordered; the ensuing cases practically overrule this); 1822, Shobe *v.* Bell, 1 Rand. 39 (jurors' affidavits that they yielded only in order to avoid further detention, not considered); 1849, Harnsbarger *v.* Kinney, 6 Gratt. 287, 300 (jurors' affidavits that they misunderstood the judge's instruction, excluded); 1854, Koiner *v.* Rankin, 11 id. 420, 431 (similar; "they will not readily be received to invalidate the verdict"); 1857, Bull *v.* Com., 14 id. 613, 626 (jurors' affidavits that one of them agreed to the verdict only on the understanding that all should unite in a request for a pardon, excluded); 1872, Read *v.* Com., 22 id. 924, 947 (affidavits of admissions of two of the jurors that they had decided because of the defendant's failure to explain certain evidence, excluded); 1879, Danville Bank *v.* Waddill, 31 id. 469, 482 (like Harnsbarger *v.* Kinney, *supra*); 1879, Steptoe *v.* Flood, ib. 323, 343 (two jurors' affidavits that the jury did not pass upon a document's genuineness, contrary to the wishes of these two, who were "persuaded against our judgments to agree to the verdict," excluded); 1899, Street *v.* Broaddus, 96 Va. 823, 32 S. E. 466 (jurors' affidavits that certain elements of damage were not allowed for, excluded); *W. Va.:* 1872, Lewis *v.* McMullin, 5 W. Va. 582 (juror's affidavit that the verdict would have been for defendant, if certain evidence had been believed, excluded); 1883, Reynolds *v.* Tompkins, 23 id. 229, 234 (jurors' affidavits that they misunderstood the judge's charge, excluded); 1884, Probst *v.* Bravenlich, 24 id. 356, 360 (jurors' affidavits as to the items of claim entering into their consideration, excluded); 1892, State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982 (juror's affidavit that his absence from the jury-room did not influence his verdict, not received); 1895, State *v.* Cobbs, 40 id. 718, 22 S. E. 310 (jurors' affidavits that they misunderstood the law as to the effect of a verdict of murder in the first degree, in respect to the Court's discretion in sentencing, excluded); *Wis.:* 1891, Schultz *v.* Catlin, 78 Wis. 611, 614, 47 N. W. 946 (juror's affidavits that they misunderstood the judge's charge, excluded).

[3] 1892, Fulton Co. *v.* Phillips, 91 Ga. 65, 16 S. E. 260 (jurors' affidavits admitted to "sustain the verdict," by showing that they did not read and were not influenced by a verdict in a former case contained in the pleading); 1903, Davis *v.* Huber Mfg. Co., 119 Ia. 56, 93 N. W. 78 (affidavit as to the items of claim allowed); 1894, Ewers' Adm'r *v.* National I. Co., 63 Fed. 562, Paul, J. (jurors' affidavits admitted to show that a fellow-juror's prejudice had no influence on them); 1877, Zickefoose *v.* Knykendall, 12 W. Va. 23, 27, 35 (that the juror could not have been biassed because he voted at first against the party for whom he was said to be biassed, allowed; this would probably not be followed, since State *v.* Cartwright, *post*, § 2353). In California the cases originally exhibiting this view have been overruled: 1888, People *v.* Goldenson, 76 Cal. 352, 19 Pac. 161 (juror's affidavit that a paper did not influence him, held admissible); 1890, People *v.* Murray, 85 id. 350, 361, 24 Pac. 666 *semble* (same); 1892, People *v.* Murray, 94 id. 212, 29 Pac. 494 (preceding cases approved; De Haven and Harrison, JJ., diss.; Garoutte, J., concurred in the judgment); 1894, People *v.* Stokes, 103 id. 193, 37 Pac. 207 (preceding cases repudiated; "A juror is not allowed to say, 'these matters had no influence upon my mind when casting my vote in the jury-room'; . . . there are intimations [!] in the cases of People *v.* Goldenson and People *v.* Murray tending to oppose the foregoing views, but they do not express the law"); 1895, People *v.* Azoff, 105 id. 632, 39 Pac. 59 (approving the preceding case).

of their views and declines to investigate for any purpose their prior and preliminary states of mind. (3) The jurors' *motives* or *beliefs*, as ineffective to control the uttered verdict, are to be distinguished from the facts that may properly be considered under rules *b* and *d*, *post*; though the distinction is sometimes a subtle one. (4) Where the jurors' belief is offered as material *for any other purpose* than that of controlling the verdict upon a motion for a new trial, it may be considered, so far as no other rule of evidence prevents, — as, for example, on a prosecution for corruptly rendering a verdict contrary to his belief.[4] (5) Where the jurors' belief is so embodied in their *inquiries to the judge*, and in his answers, that a case of misinstruction by the judge is presented, this can of course be made a ground for invalidating the verdict;[5] but here it is not because of their belief, but because of his instructions.

§ 2350. **Same: Examining the Jury before Discharge, to Ascertain the Grounds of Verdict.** The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired takes place *before their discharge* and separation, or before the recording of the verdict. Accordingly, some Courts, chiefly in New England, concede the propriety of examining the jurors while still in their box, after verdict pronounced, and of ascertaining the particular issues on which a general verdict is founded or the detailed propositions of fact or of law which entered into the verdict; so that it may then and there be set aside if for the issue upon which it rested there is not in the judge's opinion sufficient evidence, or if they proceeded on a palpable mistake of law.[1] This process of making more precise the details of their finding has the same purpose as the expedient of a special verdict or a special finding on interrogatories, and is related in principle to rule *b*, *post*. There can be no doubt that in the traditional English practice this was common,[2] and it doubtless continues there. Under the system in the United

[4] The following ruling is therefore erroneous, for the Opinion rule (*ante*, § 1963), upon which it was made, would present no obstacle: 1861, Hatch *v.* Lewis, 2 F. & F. 467, 475 (action against attorneys for negligent management of the plaintiff's case whereby he was convicted; to show that the conviction would not have occurred had the defendant called certain witnesses, the jurymen at the former trial were not allowed to be asked what verdict they would have rendered, on the ground of the Opinion rule).

[5] The first of the New York rulings *infra* is apparently erroneous: *Wis.*, 1892, McBean *v.* State, 83 Wis. 206, 53 N. W. 497 (the jury sent to the trial judge a message, "If we bring in a verdict of guilty, can we depend on the clemency of the Court?" to which the judge answered "Yes," on which a verdict of guilty was brought in; this was allowed to be shown, the judge's answer being equivalent to an instruction in open court, and therefore an error demanding a new trial); *N. Y.*: 1825, Sargent *v.* ———, 5 Cow. 106, 120 (affidavits of two jurors, that the jury considered, and supposed that the judge had so permitted them, in estimating damages for seduction, the expense of maintaining the child, admitted, on the theory that "this is in effect equivalent to a misdirection of the judge," misleading the jurors; but this decision was reached "not without some hesitation"); 1826, *Ex parte* Caykendoll, 6 id. 53 (jurors' affidavits as to a mistake in reckoning damages, arising from a misreading of the written contract, excluded; preceding case distinguished, as "equivalent to a positive misdirection of the judge," the counsel having there laid down in his argument a rule of law which the judge did not expressly deny); *Tenn.*: 1850, Nelson *v.* State, 10 Humph. 518 (cited *ante*, § 2349).

[1] Parrott *v.* Thacher, Woodward *v.* Leavitt, Mass., and cases in N. C., R. I., and Vt., *supra*, § 2349.

[2] Thayer, Preliminary Treatise on Evidence, pp. 145, 155, and the following later case: 1697, Ash *v.* Ash, Comberb. 357 (Holt, C. J.: "The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power; but I did rectify that mistake, for the

States, in which the judges tend to degenerate into mere umpires, it is not likely to be often seen; but there is no reason why such a control of the verdict should not be exercised, for it merely assumes to remedy the verdict's aberrations before it has become a recorded finality and before the crucial line has been passed which must somewhere always be recognized in order that there may be an end of controversy. At the same time, this expedient is practically not of frequent utility, because the misapprehensions which it is designed to cure can seldom become the subject of suspicion and investigation by the parties until the jurors after their discharge have by public conversation disclosed the nature of the mistake.

§ 2351. (*b*) **Issues of the Trial, as Material; Judge's Instructions, as considered by the Jury.** (1) The tenor of the issues at the trial, as submitted to the jury, may be material for the purpose of *ordering a new trial in the same cause*. These issues will be ascertainable in part from the pleadings, which of course speak for themselves, and in part from the *judge's instructions*. An erroneous statement of the issue by the judge, or of the law applicable to the issue, being sufficient to justify a new trial, by the rules of new trials, may of course be proved; and there is no reason why it may not be proved by the testimony of one or more of the jurors. This will not be a frequent case, for other materials for proof are usually at hand; but there is no objection to it in principle, for the fact to be proved is separate from the jury's deliberations upon the issue, and the process does not consist in putting their deliberations in conflict with their verdict. The line between this and the preceding principle may be seen closely drawn in the distinction already noted (*ante*, § 2349, par. 5).[1]

(2) The tenor of the issues as submitted to the jury may also become important, *upon a different trial* for a related claim, as determining the scope of matters adjudicated at the first trial. Our system of general verdicts does not adequately provide for the precise statement of details of claim covered by the jury's award. In cases of continuing trespasses, of consequential damages, of repeated libels, of running accounts, and the like, the matters actually included in the verdict depend as much upon the instructions as upon the pleadings, and do not always even then become precise. In particular, an affirmative finding, *i. e.* for the plaintiff, may leave it uncertain whether the jury has in fact passed at all upon some of the items of the plaintiff's claim. In such a case it is therefore proper to prove what issues were submitted to the jurors; and, as a part of the criteria of definition, the *judge's instructions* limiting the matter for their consideration may be proved, and of course by jurors as well as by any one else who heard them. In so doing, the offer sometimes is to show that the *jury did or did not* "*consider*" a certain item. This offer, though incorrect in form, may practically be sufficient; for though the jury's belief and reasoning upon the issues, as distinct from the Court's

jury are to try causes with the assistance of the judges, and ought to give reasons when required, that if they go upon any mistake, they may be set right").

[1] In revising an arbitrator's award the same question arises, though the solution is slightly different (*post*, § 2358).

definition of the issues, is immaterial, upon the principle already examined (*ante*, § 2349), yet where no attempt is being made to overthrow the original verdict, the jury's understanding of the issues is merely a convenient though loose mode of ascertaining the issues as actually submitted.[2]

§ 2352. (*c*) **Irregularities and Misconduct, as material; Jurors Impeaching their Verdict; History of the Rule.** The deliberations of a jury must be conducted with strict regard to certain formalities of conduct during retirement, — formalities which, though not vital in a particular case, yet are indisputably wholesome as requirements of general policy. They are mere outward marks or conventions, but they are the more technically strict because the impossibility, under the principle already examined (*ante*, § 2349), of regarding jurors' actual motives and reasonings, makes it the more necessary to depend upon the conventional canons of behavior for confidence in the verdict. Like the analogous formalities of other legal acts, already mentioned (*ante*, § 2348, par. *c*; *post*, § 2456), they are not inherent logical elements, but formal marks of precaution. A particular will may have been genuine and deliberate, though not executed in the presence of attesting witnesses; but the propriety of attestation as a fixed general rule cannot be doubted. So a particular jury's verdict may be a just and well-reasoned one, when the jurors during retirement have separated or talked with the parties or drunk intoxicating liquors; yet as a general rule it is proper to invalidate verdicts marked by such conduct.

Now the law of trials in general, and of verdicts in particular, must prescribe these requisite formalities of conduct for the jurors, and define those informalities and irregularities which *per se* invalidate the verdict. What those shall be is thus elsewhere in the law predetermined. The principle of the

[2] Compare with the following examples those cited *ante*, § 2349, par. 5, and *post*, § 2358 (arbitrators' awards); *N. H.*: 1870, Smith *v.* Smith, 50 N. H. 212, 219 (jurors' statements that they did not include in the former verdict in trespass certain fences, etc., now in issue in trespass, excluded; but here the judge's instructions were not offered to be shown, and the offer also included other doubtful matters; moreover the Court held that "it appears here that the whole matter was in point of fact submitted to the jury; . . . thus it appears that the issues presented by the declaration were in fact tried"); *N. Y.*: 1848, Brownell *v.* McEwen, 5 Denio 367 (affidavits of individual jurors, *pro* and *con*, as to having considered, in an action for seduction, the breach of promise of marriage and other claims as covered by the amount awarded, held inadmissible; but the Court further declared that proof of their unanimous consideration of the point would have been admissible); *Pa.*: 1817, Haak *v.* Breidenbach, 3 S. & R. 204 (continuing trespass by overflow; a former verdict for the same trespass being pleaded, and the plaintiff replying that the former verdict was confined to a different period, the testimony of one of the prior jurors was received that "the jury was directed by the Court not to include that period of time in estimating the damages, and that they therefore only included the damages subsequently to the 4th August, 1786"); 1841, Leonard *v.* Leonard, 1 W. & S. 342 (account rendered; plea, former judgment for the defendant in assumpsit for the same claim; the plaintiff was then allowed to prove by a prior juror that "the verdict was given in pursuance of the instruction of the Court exclusively on the ground that the agreement was fraudulent, and that the respective claims of the parties were not considered"); 1873, Follansbee *v.* Walker, 74 Pa. 306, 309 (assumpsit by F. and W.; plea of former judgment for the defendants on a suit by F. for the same promise; replication, that the former suit alleged a promise by F. alone and that the defendant there claimed that the promise if any was to F. and W. jointly, and that the judge charged the jury, on this preliminary issue, that if they believed the defendant's allegation the verdict must be for the defendant and another action must be brought on the promise to F. and W. jointly; on this issue, testimony of the prior jurors was admitted that that jury "decided only on the preliminary question submitted by the Court, whether the transaction was with the firm of W. and F.").

parol evidence rule (*ante*, § 2346, par. *c*; *post*, § 2456) then enters and declares that the lack of such formalities, for this as for every other legal act (whatever the respective required formality may be), is always proper to establish as a ground for declaring the act void. Whatever misconduct of the jury, therefore, is an irregularity fatal to the verdict may always be proved.

But by whom? Naturally, by one or more of the jurors themselves, who will commonly be the sole witnesses, — at least to misconduct during retirement. Should the misconduct consist in improper utterances, the privilege proper (*ante*, § 2346) would apply, if the juror to be informed against should claim it. But if he does not, and if he is even willing by affidavit to avow his utterance, all question of privilege ceases. In that case, and in all cases of misconduct other than utterances, what is there to prevent the use of jurors' testimony in proof, as well as any other person's? Nothing in the world, except a curious doctrine of evidence once and temporarily in vogue, long ago discarded in every other relation, and now here persisting through the sponsorship of Lord Mansfield's great name, — the doctrine that a witness shall not be heard to allege his own turpitude; *nemo turpitudinem suam allegans audietur.*

The gradual appearance of this doctrine in the early 1700s, and its rapid spread under the earnest patronage of Lord Mansfield in the last quarter of the 1700s, has already been traced in another connection (*ante*, § 525). Its chief application was to forbid the drawer of commercial paper from proving usury or other illegal consideration, and to forbid similar occasional sorts of testimony; but, after two generations of controversy, these important aspects of it, together with the principle at large, were utterly repudiated, both in England and America (*ante*, §§ 525–531). Besides this, however, it led in Lord Mansfield's hands to the rule prohibiting married parents to testify to non-access in proof of bastardy (*ante*, § 2063); and here, the relation of the original principle having been early lost sight of, the rule survived. Furthermore, however, it received application, at his hands, to the present subject, — the testimony of a juror to his own misconduct.[1] Here it thrived, — apparently because new supposed reasons of policy were found, which buoyed up Lord Mansfield's rule long after the general repudiation of that favorite maxim, which had for him served apparently as its only justification.

The curious feature of his doctrine is that it came, in all these three of its chief applications, as an innovation upon the prior practice. Having no sound basis of policy (as its modern repudiation now testifies), it had also no basis of precedent. This appears abundantly for the other two rules already mentioned (*ante*, §§ 525, 2063). It is also true for the present rule. Up to Lord Mansfield's time, and within half a decade of his decision in Vaise *v.*

[1] 1785, Vaise *v.* Delaval, 1 T. R. 11, K. B. (two jurors' affidavits of a decision based upon chance were rejected; L. C. J. Mansfield: "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means").

Delaval, the unquestioned practice had been to receive jurors' testimony or affidavits without scruple. There were of course variances of ruling as to the sufficiency of this or that misconduct to invalidate a verdict; but the proof of it was received equally from jurors and others, without discrimination.[2] If corroboration were needed, it is found in the early American practice, where many rulings were made upon the jurors' affidavits of misconduct.[3] But Vaise *v.* Delaval, with the prestige of the great Chief Justice, soon prevailed in England,[4] and its authority came to receive in this country an adherence almost unquestioned.

[2] In Prior *v.* Powers, *infra*, the sole case of doubt, the affidavit was not actually rejected; moreover, the last clause of the ruling is inconsistent with the practice of the times: 1590, Metcalfe *v.* Deane, Cro. El. 189 (complaint having been made to the judge of the jury's having re-summoned one of the witnesses during retirement, "he examined the inquest, who confessed all the matter," and a new trial was awarded); 1595, Vicary *v.* Farthing, ib. 411 (foregoing case cited, in dealing with a jury's inspection of a written document handed them by the party); 1623, Heylor *v.* Hall, Palmer 325 (the solicitor having handed certain depositions to the jurors when about to retire, they were examined on oath whether more had been read to them after retirement than had been read in court, and how they had been inclined to give their verdict before reading the depositions; apparently the verdict was held bad); 1665, Prior *v.* Powers, 1 Keb. 811 (a new trial, on the ground that the verdict was obtained by lot, was denied, "because it appeared only by pumping a juryman, who confessed all; but, being against himself, it was not much regarded; also the Court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves"); 1675, Lord Fitzwater's Case, Freeman K. B. 415 (verdict set aside because determined by lot; the jurors' affidavits must have been received, but no question was made); 1696, Dent *v.* Hertford, 2 Salk. 645 ("a new trial was granted upon affidavit that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced"); 1719, Mellish *v.* Arnold, Bunbury 51 (new trial granted because damages were determined by lot; the affidavits "were made by persons who heard the jurymen talk of the matter, and the jurymen did not think fit to make any affidavit to clear themselves"); 1734, Parr *v.* Seames, Barnes, 3d ed., 438 (on a motion to set aside a verdict because determined by "hustling halfpence in a hat," "this matter not appearing upon the oath of any of the jurors, but by affidavit that two of them had confessed the same," the Court stayed judgment "to give plaintiff an opportunity to procure affidavits from some of the jurors"); 1735, Philips *v.* Fowler, ib. 441, Comyns 525 ("it being disclosed to defendant by two of the jurors" that lots had been cast, "defendant moved to set aside the verdict upon an affidavit of the fact made by the two jurors"; "the fact as to the jurors determining by chance being undisputed, the verdict was set aside"); 1744, Norman *v.* Beamont, Willes 484, 487 (in admitting an affidavit of a juror as to his disqualification, the Court added: "In cases of this sort where the objection could not appear of record, we always admitted of affidavits, — as in respect to a misbehaviour of any of the jury, or any declaration made by any of them either before or after the verdict to show that a juryman was partial"); 1779, Aylett *v.* Jewel, 2 W. Bl. 1299, C. P. (new trial not granted on the affidavit of the attorney that "some of the jury had confessed to him" that the verdict had been reached by lot; "there being no affidavit by the jurymen, or any other that was cognizant of this transaction, but merely this hearsay affidavit, the Court, *absente* De Grey, C. J., thought it too dangerous to call a verdict in question that had been so deliberately given, upon so loose and slight a suggestion").

[3] 1793, Talmadge *v.* Northrop, 1 Root 522 (cited *infra*); 1792, Bradley *v.* Bradley, Pa., 4 Dall. 112 (jurors' affidavits "that the jury had misbehaved by hearing testimony which was not delivered in open court," admitted); 1805, Smith *v.* Cheetham, 3 Caines 57 (constable's affidavit, based partly on jurors' admissions, that damages had been reached by average, admitted; general principle of receiving jurors' affidavits to show misconduct, sanctioned; Kent, C. J., diss.); 1805, Grinnell *v.* Phillips, 1 Mass. 530, 542, per Sewall, J. (jurors' testimony admissible to prove "overt acts which may be the subject of legal inquiry," such as "gross misbehavior or legal impropriety of conduct sufficient to destroy the credit of a verdict"; *semble*, Thacher, J., *contra*). Compare also the early cases in New York, Virginia, and elsewhere, admitting such affidavits even in cases under the principle of § 2349, *ante*.

[4] 1807, Owen *v.* Warburton, 1 B. & P. N. R. 326 (juror's affidavit, not receivable to show a decision by lot; quoted *post*, § 2353); 1839, Straker *v.* Graham, 7 Dowl. Pr. 223, 4 M. & W. 721 (juror's affidavit that a verdict was reached by tossing up, held inadmissible; Alderson, B.: "It is entirely against policy to allow a juryman to make an affidavit of anything which passes in agreeing to a verdict"; quoted *post*, § 2353); 1843, Burgess *v.* Langley, 5 M. & Gr. 722 (affidavit of the attorney as to declarations in open court, by one juror in the others' hearing, just after verdict rendered, that they had reached a verdict by lot, excluded; Cresswell, J.: "Had

§ 2353. **Same: Policy of the Rule.** What is to be said in support of this supposed rule, which distinguishes so sharply between the testimony of the juror himself and that of any other person? The question, it is to be remembered, is not whether certain conduct constitutes a fatal irregularity, or whether it can be proved at all, but whether a juror alone is to be forbidden to prove it:

1807, *Mansfield*, C. J.,[1] in *Owen* v. *Warburton*, 1 B. & P. N. R. 326, 329: "The affidavit of a juryman [to the jury's misconduct] cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him."

1839, *Straker* v. *Graham*, 4 M. & W. 721; an attorney's affidavit that a juror had admitted the drawing of lots for a verdict was offered: Serjt. *Atcherley* (for admission): "The affidavit of the juryman himself is rejected because the conduct which he admits is such as would render him liable to punishment"; L. C. B. *Abinger:* "No; it is because otherwise no verdict would be safe"; *Parke*, B.: "When the jury have openly concurred in a verdict in open court, which ought to be their binding decision on the case, it would be most dangerous and lead to the greatest fraud and abuse to set it aside on such statements as that which is made in this case."

1811, *Yeates*, J., in *Cluggage* v. *Swan*, 4 Binn. 150, 155: "I frankly confess that I feel the utmost repugnance to such testimony, although I am fully aware, that I thereby exclude almost the only evidence, which the case naturally admits of. But, by admitting it, I as readily perceive that I should open a door to the exercise of the most pernicious arts, and tampering with jurors; and that the practice would be replete with dangerous consequences. Jurors, who would have been sworn or solemnly affirmed to give a verdict according to evidence, come with a bad grace into a tribunal of justice to prove their own dishonorable conduct, and affix a stigma on their companions who may be unheard in their defence. Besides, in the language of some of the cases, I cannot see how such testimony could be heard by the Court, without proceeding against the jurors criminally. Should this happen, will it not justly be deemed entrapping the jurors whose affidavits have been used? And will it not expose others implicated in the charge, to the temptations naturally incident to persons in a state of accusations? But above all, I greatly fear that the practice, if adopted, would tend to an inquisition over the consciences of jurors, as to the grounds and reasons of their verdict, and bring questions of fact more frequently before the Court for their decision than is consistent with sound policy. I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict."

As to these various reasons, it is unnecessary to refute the argument drawn in Owen *v.* Warburton from a fantastic imagination of what an occasional scheming juryman might conceivably try to do. As well abolish appeals, because a wicked judge might give a wrong reason for a decision against a party whom he favored, so that there might be a new trial. Nor need

the statement made in the affidavit come from the officer who had charge of the jury we might have attended to it; but it has long been decided that the affidavit of a juryman as to the mode in which the jury arrived at their verdict cannot be received").

[1] This of course was not Lord Mansfield (Murray), but a judge of the next generation.

the original notion of Lord Mansfield, rejecting self-stultifying testimony, be further noticed. Of the remaining arguments, this much can be said, that they prove, if anything, much more than the rule in question. That is, they prove that certain facts of misconduct, such as the casting of lots or the communication of a juror's personal knowledge, should not as facts be considered at all, for the purpose of overturning the verdict, but should rather be regarded, under the principle already examined (*ante*, § 2349), as part of the motives and methods of deliberation leading up to the verdict, and therefore as immaterial. So far as any argument can be founded on the uncertainty that results from investigating the jury's deliberations, it rests virtually on the assumption that their methods or grounds of decision should be ignored, and that is another principle entirely. Whether a given piece of conduct during retirement should be classed as a formal and fatal irregularity (which may be proved) or as an erroneous ground of the verdict (which may not be proved) is often an arguable question (as noticed *post*, § 2354); but that is very different from the question whether, conceding that it is a fatal irregularity, the juror alone is to be prohibited from proving it. Finally, it must be pointed out that while Lord Mansfield's own statement of the rule obliged the proof of the misconduct to depend solely on the testimony of "some person having seen the transaction through a window or by some such other means," his successors have committed an absurdity which he would hardly have condoned. A bailiff or other court officer, who may have been present at the jury's deliberations, may by universal concession (*post*, § 2354) prove their misconduct, though it is a gross breach of duty (except in one or two jurisdictions) for him to attend or overhear. Thus, not only does the rule tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings; but the law, furthermore, while with one hand it sanctimoniously puts away the juryman who reports his own misconduct done during the privacy of retirement, yet with the other hand it inconsistently invites to the same witness-stand the bailiff whose shameless disregard of his duty, in intruding upon that privacy, forms his only qualification as a witness and the sole tenor of his testimony. If there cannot be any principle in this rule, it should at least possess logic.

In the following passages, its defects have been sufficiently exposed:

1805, *Livingston*, J., in *Smith* v. *Cheetham*, 3 Caines 57, 59: "With proper submission to his lordship [Mansfield], it appears the best and highest evidence of which the case admits. If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged? Are not criminals in England every day convicted and even executed on their own confession? And is not our State prison filled in the same way? . . . If we ask for stronger proofs, and at the same time adopt Lord Mansfield's rule of shutting the months of the jurors, we may as well at once close the door on all inquiries of the kind, and leave them to act and decide as they please."

1821, *Whyte*, J., in *Crawford* v. *State*, 2 Yerg. 60, 67: "[The observation of Chief Justice Mansfield in Owen *v.* Warburton, is] 'It was singular indeed that the only evidence the case admits should be shut out,' and yet that decision excluded it. It might be added, that it is also the best evidence the case admits of; the jury from their recluse and retired situation are not subject to inspection, nor their proceedings to observation, at least of

that kind to admit of a correct account to be given of them by an indifferent person. They themselves are alone adequate to a development of their own conduct and proceedings. In Vaux *v.* Delavel, Lord Mansfield says, the Court must derive their knowledge from other sources. What source ? The law contemplates their seclusion; the only alternative is the ignominious eavesdropper. Surely the jurors who fill this important office are not to be put on a level with those who by their own conduct have debased themselves. But it is said in the argument, the receiving the affidavit of jurors is against public policy; it would expose them to the being tampered with, the effect of which would be numerous applications to set aside verdicts. The like objection applies to every witness — the possibility of being practiced upon. But this does not produce the effect; the danger is imaginary; jurors in general are above attacks of this kind; and for the honor of human nature, I think there are few that would be found capable of making the attempt. Again, it is said, public policy forbids that a man should attempt to invalidate what he has himself done; a juror to defeat, to contradict, to impeach the verdict he has given. We have seen that this was not the public policy of the period of our law before the time of Lord Mansfield, . . . and in England at this day a man may come forward as a witness in all the above cases [of alleged turpitude], except as a juror to impeach his verdict, which we have seen does not constitute the rule here; and which is not the better opinion in my humble judgment, as it is in opposition to all the other analogies of law. . . . A verdict under such circumstances is to be approached with great caution and great circumspection; but it is not altogether intangible, and beyond the reach of the redressing power of the Court; if it were, I for one would think it a defect in the administration of the justice of the country, and a defect in the policy of the law."

1866, *Cole*, J., in *Wright* v. *Telegraph Co.*, 20 Ia. 195, 210: "While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance which, under the circumstances, justifies us in laying down the following as the true rule: That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as, that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average, or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself,[2] as, that the juror did not assent to the verdict; that he misunderstood the instructions of the Court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast. That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it. While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberation, conversations, debates, and judgments of the jurors themselves; and the effect or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to be concluded thereon by his solemn assent to and rendition of the verdict (*veredictum* — a true declaration). To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow-jurors; and to hear such proof

[2] This is the principle of § 2349, *ante*.

would have a tendency to diminish such practices and to purify the jury-room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . . While it is certainly illegal and reprehensible in a juror, to resort to lot or the like to determine a verdict, which ought always to be the result of a deliberate judgment, yet such resort might not evince more turpitude tending to the discredit of his statement than would be evinced by a person not of the jury, in the espionage indicated by Lord Mansfield and necessary to gain a knowledge of the facts to enable him to make the affidavit. At all events the superior opportunities of knowledge and less liability to mistake, which the juror has over the spy, would entitle his statement to the most credit. And if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a Court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to credit. Nor does the consideration of the affidavits of jurors, for the purposes stated, contravene sound public policy. It is true, however, that public policy does require that when a juror has discharged his duty and rendered a verdict, such verdict should remain undisturbed and unaffected by any subsequent change of opinion upon any fact or pretext whatever; and, therefore, a juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a Court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate discharge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful."

1874, *Brewer*, J., in *Perry* v. *Bailey*, 12 Kan. 539, 544: "As to all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others, and subject to contradiction, — 'overt acts,' as the Massachusetts Court expresses it, — it seems to us that the interests of justice will be promoted, and no sound public policy disturbed, if the secret of the jury-box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigaut. If the jury has been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the modern rule is to let the verdict stand, and simply punish the offending juror. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict also should be set aside. Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to induce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve. It is useless to tamper with one, for the eleven may be heard."

§ 2354. **Same: State of the Law in Various Jurisdictions; Qualifications of the Rule.** The doctrine of Lord Mansfield was so rapidly accepted that most of the Courts had committed themselves upon the subject long before the opinion of Mr. Justice Cole of Iowa, in 1866, was delivered. The exposition of Mr. Justice White, in Tennessee, in 1821, which had accurately pointed

out the true nature of the innovation, seems to have received no consideration from other Courts. Except in six jurisdictions, where the rule of Iowa is accepted,[1] the rule of Lord Mansfield seems now too firmly settled in most jurisdictions to be repudiated by judicial decision.[2]

[1] Iowa, Kansas, Nebraska, Tennessee, Texas (criminal cases), and Federal Courts; in Ohio there is some doubt; in nearly a dozen Codes there is one express exception.

[2] The various rulings and statutes are as follows; certain distinctions made in some of them are noticed later in the text above: *Arkansas:* 1853, Stanton *v.* State, 13 Ark. 317, 319 (juror's affidavit as to a fellow-juror's absence from the room, said to be "subject to many serious objections"); 1855, Pleasants *v.* Heard, 15 id. 403, 408 (jurors' affidavits that damages were determined by average, held inadmissible, as well as jurors' admissions out of doors after verdict); Gantt's Dig. § 1971, Mansfield's Dig. § 2298, Sandels & Hill's Dig. 1894, § 2269 ("a juror cannot be examined to establisb [in criminal cases] a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot"); 1874, Wilder *v.* State, 29 id. 293, 298 (statute applied to exclude jurors' testimony as to a bailiff's undue influence); 1879, Fain *v.* Goodwin, 35 id. 109, 113 (statute applied to exclude an affidavit as to jurors acting upon personal knowledge); 1887, Ward *v.* Blackwood, 48 id. 396, 3 S. W. 624 (juror's affidavit that damages were determined by drawing lots, excluded, following Pleasants *v.* Heard, *supra*); 1894, Smith *v.* State, 59 id. 132, 26 S. W. 712 (juror's affidavit not received to show the taking of evidence after retirement); *California:* 1854, Amsby *v.* Dickhouse, 4 Cal. 103 (juror's affidavit as to improper remarks during retirement, exclnded); 1855, Wilson *v.* Berryman, 5 id. 44, 46 (computing damages by average; jurors' affidavits excluded); 1862, Practice Act, § 193, C. C. P. 1872, § 657 (where "any one or more of the jurors have been induced to assent" to a verdict by "a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors"); 1863, Donner *v.* Palmer, 23 Cal. 40, 47 (statute applied to a verdict based upon guessing the face of a coin); 1864, Turner *v.* Water Co., 25 id. 398, 401 ("as the law now stands, there are certain irregularities fatal to a verdict which may be proved by the affidavits of the jurors, and certain other irregularities equally fatal which can only be proved in the manner authorized by the common law"; here, the reckoning of damages by average was held improper, but not a "chance verdict," and therefore not provable by jurors' affidavits); 1864, Boyce *v.* Stage Co., ib. 460, 474, 477 (preceding opinion approved and the same ruling made; the history of the above statute explained); 1882, People *v.* Gray, 61 id. 164, 183 (jurors' affidavits as to intoxication, excluded); 1891, People *v.* Deegan, 88 id. 602, 26 Pac. 500 (same); 1893, Dixon *v.* Pluns, 98 id. 384, 33 Pac. 268 (jurors' affidavits admitted to show determination of damages by average; Turner *v.* Water Co., *supra*, repudiated on this point); 1893, Weinburg *v.* Somps, ib., 33 Pac. 341 (same); 1895, People *v.* Azoff, 105 id. 632, 39 Pac. 59 (jurors' affidavits that papers were illegally transmitted to them, excluded); 1901, Siemsen *v.* Electric R. Co., 134 id. 494, 66 Pac. 672 (jurors' affidavits to prove misconduct in visiting the premises in question, excluded); *Colorado:* C. C. P. 1895, § 217 (juror's affidavit receivable to show a "determination by chance"); 1890, Knight *v.* Fisher, 15 Colo. 176, 25 Pac. 78 (jurors' affidavits offered to show a determination of damages by average; question reserved); 1895, Heller *v.* People, 22 id. 11, 43 Pac. 124 (jurors' affidavits not received to show intoxication and other misconduct of fellow-jurors); *Connecticut:* 1824, State *v.* Freeman, 5 Conn. 348 (jurors' affidavits as to a fellow-juror's communication of personal knowledge on a fact not in evidence and not admissible, excluded; repudiating the earlier local practice to the contrary, as indicated in Talmadge *v.* Northrop, 1 Root 522, in 1793); 1824, Meade *v.* Smith, 16 id. 346, 356 (foregoing case approved); 1844, State *v.* Fasset, ib. 457, 466 (rule applied to grand jurors' testimony as to illegal testimony before them); *Delaware:* 1881, Crossdale *v.* Tantum, 6 Houst. 218 (jurors' affidavits not received to show a determination of damages by average); *Florida:* 1897, Kelly *v.* State, 39 Fla. 122, 22 So. 303 (general principle against impeachment, applied); *Georgia:* 1811, State *v.* Doon, R. M. Charlt. 1 (Lord Mansfield's doctrine in Vaise *v.* Delaval, approved *obiter*); 1850, Bishop *v.* State, 9 Ga. 121, 125 (general principle that jurors cannot "impeach their own verdict," conceded *obiter*); 1853, Clark *v.* Carter, 12 id. 500, 503 (same); 1859, Brown *v.* State, 28 id. 199, 200, 217 (juror's affidavit that a fellow-juror gave private testimony to them, excluded); 1860, McElven *v.* State, 30 id. 869, 871 (same); 1867, O'Barr *v.* Alexander, 37 id. 195, 200, 203 (juror's affidavit as to the jurors' drinking of whiskey, excluded); 1869, Hoye *v.* State, 39 id. 718, 723 (like Brown *v.* State, *supra*); 1877, Monghon *v.* State, 59 id. 308 (juror's affidavit to a fellow-juror's improper bias during retirement, excluded); 1877, Oatis *v.* Brown, ib. 711, 717 (like Brown *v.* State, *supra*); 1893, Hill *v.* State, 91 id. 153, 16 So. 976 (like Monghon *v.* State, *supra*); 1892, McTyier *v.* State, ib. 254, 18 So. 140 (apparently similar); 1893, Cornwall *v.* State, ib. 277, 18 So. 154 (apparently similar); 1895, Carr *v.* State, 96 id. 284, 22 So. 570 (jurors' affidavits that newspaper reports were read, excluded); 1897, Bolden *v.* R. Co., 102 id. 558, 27 S. E. 664 (general principle affirmed); *Hawaii:* 1882, Kapohaku *v.* Koa, 6 Haw. 326 (juror's affidavit as to another juror's conversation with an officer during the deliberations, admitted); *Idaho:* Rev. St. 1887, § 4439, subdiv. 2, Code Civ. Pr. 1901,

It remains to notice certain discriminations and qualifications.

(1) What *kinds of misconduct* of jurors shall constitute an irregularity sufficient to avoid the verdict is to be determined by the law of jury-pro-

§ 3524, subdiv. 2 (like Cal. C. C. P. § 657); 1893, Flood *v.* McClure, 3 Ida. 587, 32 Pac. 254 (jurors' affidavits that damages were determined by average, held admissible under the statute, such a verdict being a "determination of chance"; the California rulings upon the like statute, repudiated); 1895, Griffiths *v.* Montandon, 4 id. 377, 39 Pac. 548 (rule of the California Code, as adopted in the Idaho statutes, § 4439, and interpreted in Boyce *v.* Stage Co., Cal., applied, notwithstanding erroneous punctuation in the Idaho Code; here applied to misconduct in taking a private view); *Illinois:* 1820, Sawyer *v.* Stephenson, 1 Ill. 24 (juror's affidavit of personal knowledge communicated by another juror after retirement, admitted; no question raised); 1823, Forester *v.* Guard, ib. 74 (similar facts, affidavit excluded); 1860, Martin *v.* Ehrenfels, 24 id. 187, 189 (unspecified misconduct; jurors' affidavits excluded); 1863, Reins *v.* People, 30 id. 256, 266, 274 (similar to Forester *v.* Guard, *supra*); 1867, Allison *v.* People, 45 id. 37, 39 (jurors' affidavits, and others' affidavits founded on jurors' statements, not admitted to show misconduct in permitting the constable to join in their discussions); 1868, Peck *v.* Brewer, 48 id. 54, 62 (like Martin *v.* Ehrenfels, *supra*); 1871, Chicago *v.* Dermody, 61 id. 431, 435 (general principle affirmed); 1873, Bertholf *v.* Quinlan, 68 id. 297, 303 (similar); 1878, Reed *v.* Thompson, 88 id. 245, 247 (similar; applying it to the determination of damages by average); 1885, Roy *v.* Goings, 112 id. 656, 667 (similar, forbidding a questioning of the jurors upon rendering the verdict); 1893, Sanitary District *v.* Cullerton, 147 id. 385, 389, 35 N. E. 723 (jurors' affidavits of unspecified misconduct, excluded); *Indiana:* 1840, Drummond *v.* Leslie, 5 Blackf. 453 (affidavit or admission of jurors that damages were determined by average, excluded); 1846, Dunn *v.* Hall, 8 id. 32, 34 (same); 1851, Bennett *v.* State, 3 Ind. 167, 170 (jurors' affidavits not received to show an improper agreement as to the balloting); 1861, McCray *v.* Stewart, 16 id. 377 (general principle affirmed); 1867, Haun *v.* Wilson, 30 id. 296, 298 (like Drummond *v.* Leslie, *supra*); 1876, Stanley *v.* Sutherland, 54 id. 339, 356 (jurors' statements or affidavits as to fellow-jurors' communication of personal belief, excluded); 1883, Jones *v.* State, 89 id. 82, 87 (jurors' affidavits that a book had been improperly read, held inadmissible); 1884, Long *v.* State, 95 id. 481, 485 (similar); 1887, Taylor *v.* Garnett, 110 id. 290, 11 N. E. 309 (jurors' affidavits excluded, as in Stanley *v.* Sutherland, *supra;* prior doctrine confirmed in a careful opinion by Zollars, J.); 1890, Houk *v.* Allen, 126 id. 569, 25 N. E. 897 (jurors' affidavits that a verdict was obtained by majority-agreement, excluded); *Iowa:* 1851, Abel *v.* Kennedy, 3 G. Gr. 47 (jurors' affidavits, held inadmissible, when alone offered as the basis of the motion, to prove their misconduct): 1856, Forshee *v.* Abrams, 2 Ia. 571, 578 (jurors' affidavits as to misconduct in determining damages by average, apparently held admissible under Code § 1810; but jurors held not compellable to make affidavits); 1856, Cook *v.* Sypher, 3 id. 484, 486 (jurors' affidavits said *obiter* to be inadmissible in general to impeach their verdict); 1857, State *v.* Grady, 4 id. 461 (like Forshee *v.* Abrams, *supra*, on the point of non-compellability); 1858, Manix *v.* Malony, 7 id. 81, 83 (juror's affidavit held admissible to show a determination of damages by average); 1858, Ruble *v.* McDonald, ib. 90 (same, for a verdict reached by lot); 1859, Schanler *v.* Porter, ib. 481 (like Manix *v.* Malony, *supra*); 1860, Stewart *v.* R. Co., 11 id. 62, 65 (jurors' affidavits held admissible to show the reading of a paper illegally in their hands); 1860, State *v.* Accola, ib. 246 (similar); 1861, Crumley *v.* Adkins, 12 id. 368 (like State *v.* Grady, *supra*); 1863, Shepherd *v.* Brenton, 15 id. 84, 89 (preceding cases approved); 1866, Wright *v.* Tel. Co., 20 id. 195, 212 (jurors' affidavits held admissible to prove misconduct and irregularity; quoted *supra*); 1873, Bingham *v.* Foster, 37 id. 339 (jurors' affidavits that fellow-jurors gave personal testimony during retirement, excluded; erroneously applying the rule in Wright *v.* Tel. Co., *supra*); 1874, Dunlavey *v.* Watson, 38 id. 398, 402 (similar); 1888, Griffin *v.* Harriman, 74 id. 438, 38 N. W. 139 (similar); 1896, State *v.* Whalen, 98 id. 662, 68 N. W. 554 (jurors' affidavits that a law-book was unlawfully read and expounded by a juror, admitted; this is correct, but of course inconsistent with the preceding three rulings); *Kansas:* 1874, Perry *v.* Bailey, 12 Kan. 539, 543 (juror's affidavit to show overt acts of misconduct in general, held admissible; here, to show a fellow-juror's intoxication; quoted *supra*); 1879, Johnson *v.* Husband, 22 id. 277, 285 (jurors' affidavits admitted to show a determination of damages by average); 1885, State *v.* Clark, 34 Kan. 289, 8 Pac. 528 (jurors' affidavits that certain documents were illegally read and considered by the jury, admitted); 1889, Atchison T. & S. F. R. Co. *v.* Bayes, 42 id. 609, 22 Pac. 741 (jurors' affidavits admitted to show another juror's improper statements of personal knowledge); 1896, State *v.* McCormick, 57 id. 440, 46 Pac. 777 (like the preceding case); 1898, Wichita *v.* Stallings, 59 id. 779, 54 Pac. 689 (jurors' affidavits admitted to show a determination of damage by averaging; Doster, C. J., diss., on the ground that "the method by which a conclusion of fact is reached by the jury" is not within the principle); *Kentucky:* 1808, Taylor *v.* Giger, Hardin 595, 597 (jurors' affidavits not admissible to show "misbehavior in themselves and their fellow-jurors"); 1826, Doran *v.* Shaw, 3 T. B. Monr. 411, 415 (preceding rule approved); 1821, Steele *v.* Logan, 3 A. K. Marsh. 394, 396 (jurors' affidavits that a

cedure; given such irregularities, and the present rule applies. Of this sort, plainly, are the acts of intoxication, separation, private view, consultation of

fellow-juror gave personal testimony during retirement, excluded, on the principle that they were inadmissible to prove "anything which may have transpired in the jury-room whilst consulting of their verdict"); 1830, Johnson *v.* Davenport, 3 J. J. Marsh. 390, 393 (preceding rule approved); 1896, Pittsburg Coal Co. *v.* Withers, — Ky. — , 37 S. W. 584 (jurors' affidavits of unspecified tenor, excluded); *Louisiana:* 1823, Campbell *v.* Miller, 1 Mart. N. S. 514, 518 (juror's affidavit not admitted to show a fellow-juror's communication of personal evidence after retirement): 1877, Hawkins *v.* Publishing Co., 29 La. An. 134, 139 (juror's affidavit to his receipt of a bribe, through the court crier, during the jury's presence in court, apparently treated as admissible, but not "decided authoritatively"); 1878, State *v.* Beatty, 30 id. 1266 (juror's statements as to a fellow-juror's offer of a bribe during retirement, excluded); 1880, State *v.* Nelson, 32 id. 842 (juror's testimony to misconduct, apparently in reading law-books, excluded); 1883, State *v.* Chretien, 35 id. 1031 (general principle affirmed that jurors may not impeach their verdict); 1890, State *v.* Richmond, 42 id. 299, 7 So. 459 (juror's affidavit as to improper separation, excluded); 1903, State *v.* Riggs, 110 La. 509, 34 So. 655 ("an overt act can be shown by the testimony of a juror"; here, intimidation of a juror; following Mattox *v.* U. S., Fed., and Perry *v.* Bailey, Kan.); *Maine:* 1867, Heffron *v.* Gallupe, 55 Me. 563, 566 (juror held not admissible to prove irregularity or misconduct during the jury's deliberations; except perhaps "such gross misconduct" as a party's attempt to bribe, etc.); 1876, State *v.* Pike, 65 id. 111, 117 (juror's affidavit that a legal report was read to the jury, excluded); 1890, Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91 (juror's testimony that he communicated personal knowledge during retirement, excluded); *Massachusetts:* 1832, Dorr *v.* Fenno, 12 Pick. 520, 525 ("The rule is now perfectly well-settled in both countries, and may be laid down to be that the testimony of jurors is inadmissible to show their own misbehavior, but may be received to explain or contradict other evidence tending to impeach their conduct"; here not received to show a determination of damages by averaging); 1837, Hannum *v.* Belchertown, 19 id. 311, 313 (same; doubling damages under a statute requiring double damages); 1852, Cook *v.* Castner, 9 Cush. 266, 278 (like the next case); 1853, Folsom *v.* Manchester, 11 id. 334, 337 (misconduct of a juror in stating his personal knowledge privately to the others; excluded); 1854, Boston and Worcester R. Co. *v.* Dana, 1 Gray 83, 91, 105 (like Dorr *v.* Fenno); 1855, Chadbourn *v.* Franklin, 5 id. 312, 315 (taking a private view of the locality in issue; excluded); 1885, Rowe *v.* Canney, 139 Mass. 41, 29 N. E. 219 (unspecified improper utterance by one juror to another; excluded); 1888, Com. *v.* White, 147 id. 76, 80, 16 N. E. 707 (juror's testimony to another's expressions of opinion during trial and to threats by him and the foreman, excluded; the rule applying equally to misconduct out of the court-room, if during the pendency of the trial); 1892, Com. *v.* Meserve, 156 id. 61, 30 N. E. 166 (jurors' affidavits, and testimony of others as to admissions out of court, about a juror's giving of personal testimony during retirement, excluded); *Michigan:* 1896, Merriman's Appeal, 168 Mich. 454, 462, 66 N. W. 372 (jurors' affidavits to their own misconduct, excluded; here the misconduct was unspecified, except that it included expressions of bias); *Minnesota:* 1853–7, St. Martin *v.* Desnoyer, 1 Minn. 156, 159 (jurors' affidavits not admitted to show damages determined by average); 1879, State *v.* Mims, 26 id. 183, 2 N. W. 494, 683 (unspecified misconduct; jurors' affidavits excluded); 1880, Bradt *v.* Rommel, ib. 505, 5 N. W. 680 (similar); 1891, State *v.* Lentz, 45 id. 177, 47 N. W. 720 (jurors' affidavits as to the reading of newspaper reports and the misstatements of a juror as to the law, excluded); 1897, Rush *v.* R. Co., 70 id. 5, 72 N. W. 733 (general principle applied); *Mississippi:* 1839, Prussel *v.* Knowles, 4 How. 90, 95 ("the rule is well settled that a juror shall not impeach his verdict"); *Missouri:* 1862, Pratte *v.* Coffman, 33 Mo. 71, 77 (jurors' testimony to misconduct, held generally inadmissible, with exceptions for serious cases where a foundation has been laid by other evidence; here, not received to show the improper reading of law-books); 1866, Sawyer *v.* R. Co., 37 id. 240, 263 (juror's affidavit that the damages were determined by average, excluded); 1867, State *v.* Coupenhaver, 39 id. 430 (similar ruling, as to a verdict by majority vote); 1877, State *v.* Branstetter, 65 id. 149, 156 (jurors' affidavits that a sentence was determined by average, excluded; repudiating the qualification intimated in Pratt *v.* Coffman, *supra*); 1877, State *v.* Alexander, 66 id. 148, 163 (juror's affidavit as to his improper communication with the judge, excluded); 1878, Philips *v.* Stewart, 69 id. 149 (juror's affidavit that damages were determined by average, excluded); 1883, State *v.* Dunn, 80 id. 681, 694 (principle applied to misconduct in the manner of reaching the verdict); 1884, State *v.* Cooper, 85 id. 256, 261 (principle applied to misconduct in giving personal testimony during retirement); 1888, State *v.* Rush, 95 id. 99, 8 S. W. 221 (like the preceding case); 1892, Easley *v.* R. Co., 113 id. 236, 20 S. W. 1073 (principle applied to misconduct in taking a private view); 1894, State *v.* Wood, 124 id. 412, 27 S. W. 1114 (like State *v.* Branstetter, *supra*); *Montana:* C. C. P. 1895, § 296, subdiv. 2 (like Cal. C. C. P. 657); 1893, Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185 (statute applied to admit jurors' affidavits that damages were determined by average; Turner *v.* Water Co., Cal., *supra*, not followed in its interpretation of "determination of chance"); *Nebraska:* 1888, Harris *v.* State, 24 Nebr. 803, 40 N. W. 317 (juror's misconduct in procuring law-books, etc., and

witness or party, acceptance of bribes, and reading of illegal documents. But there are some kinds of behavior which, though commonly classed as mis-

reading from them, allowed to be proved by other jurors' affidavits; rule in Perry *v.* Bailey, Kan., followed, as "much more reasonable and promotive of justice"); 1892, Johnson *v.* Parrotte, 34 id. 26, 51 N. W. 290 (jurors' admissions that he had given personal testimony and that he was prejudiced, excluded); 1895, Gran *v.* Houston, 45 id. 813, 64 N. W. 245 (jurors' affidavits as to conversations in the jury-room showing prejudice and improper motives, excluded); 1903, Falls City *v.* Sperry, — id. — , 94 N. W. 529 (expressions of personal knowledge); *New Hampshire:* 1827, Tyler *v.* Stevens, 4 N. H. 116 (general principle of exclusion laid down); 1851, State *v.* Ayer, 23 id. 301, 321 (same); 1879, Dodge *v.* Carroll, 59 id. 237 (jurors' affidavits that damages were determined by average, excluded); 1882, Knight *v.* Epsom, 62 id. 356, 361 (like the preceding case, which however is not cited); 1888, Clark *v.* Manchester, 64 id. 471, 13 Atl. 867 (like the preceding case); 1890, Palmer *v.* State, 65 id. 221, 19 Atl. 1003 (general principle held to exclude a juror's expressions of bias); *New Jersey:* 1790, Brewster *v.* Thompson, 1 N. J. L. 32 (a juror's affidavit that the verdict was reached by lot, excluded); 1823, Den *v.* M'Allister, 2 id. 46, 51 (jurors' affidavits stating a communication to them of private knowledge by a fellow-juror, excluded, because "it is a high misdemeanor" and "criminates the jurors themselves"; Rossell, J., diss.); 1842, Kennedy *v.* Kennedy, 18 id. 450, 454 (principle affirmed); 1849, Deacon *v.* Shreve, 22 id. 176, 181 (jurors' affidavits as to a private meeting with the parties, held inadmissible, as also testimony to the jurors' admissions of the fact during a recess of court; otherwise, if the juror's statement had been "part of the transaction and while the alleged payment was being made"); 1893, Peters *v.* Fogarty, 55 id. 386, 26 Atl. 855 (general principle affirmed); *New York:* 1809, Dana *v.* Tucker, 4 John. 487 (damages determined by average; "the better opinion is, and such is the rule adopted by the Court, that the affidavits of jurors are not to be received to impeach a verdict"; Smith *v.* Cheetham, *ante*, § 2352, not mentioned; Kent, C. J., who there dissented, was still on the bench, and Livingston, J., the champion of the contrary view in the earlier decision, had retired); 1825, Sargent *v.* ———, 5 Cow. 106, 120 (Dana *v.* Tucker approved; Smith *v.* Cheetham treated as overruled); 1843, Clum *v.* Smith, 5 Hill 560 (jurors' affidavits not received to show misconduct in separating and obtaining information outside); 1875, Williams *v.* Montgomery, 60 N. Y. 648 (jurors' affidavits of unspecified misconduct, excluded); *North Carolina:* 1821, State *v.* M'Leod, 1 Hawks 344 (unspecified misconduct; jurors' affidavits excluded); 1883, State *v.* Britain, 89 N. C. 481, 504 (jurors not allowed to be examined to show undue influence by the deputy-sheriff); 1886, Lafoon *v.* Shearin, 95 id. 391, 394 (juror's affidavit that he gave personal testimony after retirement, excluded); *North Dakota:* Rev. C. 1899, § 5472, par. 2 (like Cal. C. C. P. § 657); *Ohio:* 1841, Hulet *v.* Barnett, 10 Oh. 459 (jurors' affidavits that the jury took evidence from the constable after retirement, excluded); 1853, Farrer *v.* State, 2 Oh. St. 54, 73, 77 (jurors' affidavits held admissible to show misconduct in reading newspapers, etc., but only in an "exceptional case," and after a foundation laid "by other means than the affidavits of the jurors themselves"); *Oregon:* 1853, Cline *v.* Broy, 1 Or. 89 (juror's affidavit that damages were determined by average, excluded); *Pennsylvania:* 1811, Cluggage *v.* Swan, 4 Binn. 150, 155 (juror's affidavit that the verdict was reached by lot, held inadmissible, per Yeates, J.; Tilghman, C. J., and Brackenridge, J., expressing no opinion; quoted *supra*); 1821, Ritchie *v.* Holbrooke, 7 S. & R. 458 (juror's affidavit of another juror's having admitted consulting privately with a party to the cause, held admissible; Tilghman, C. J., distinguishing Cluggage *v.* Swan as involving the juror's own misconduct); 1835, White *v.* White, 5 Rawle 61, 63 (jurors' affidavits "are inadmissible to inculpate their fellows or themselves"; here, to prove damages reckoned by average); 1893, Smalley *v.* Morris, 157 Pa. 349, 27 Atl. 734 (preceding cases approved); 1900, Stull *v.* Stull, 197 id. 243, 47 Atl. 240 (verdict reached by lottery; jurors' affidavits excluded); *Rhode Island:* 1891, Luft *v.* Linganie, 17 R. I. 420, 22 Atl. 942 (jurors' affidavits not received to show determination of damages by average); *South Carolina:* 1814, Price *v.* M'Ilvain, 3 Brev. 419 (jurors' declarations or affidavits not receivable to prove a fellow-juror's statement of personal knowledge and expression of bias after retirement); 1834, M'Kain *v.* Love, 2 Hill 506 (juror's testimony to a fellow-juror's statement, after retirement, of personal belief as to a witness' character, admitted, but on the ground that such communication of personal belief was not improper in respect to a witness's character); 1855, Smith *v.* Culbertson, 9 Rich. L. 106, 111 (jurors' affidavits that the verdict was reached by lot, held inadmissible; good opinion by Wardlaw, J.); 1856, State *v.* Tindall, 10 id. 212 ("We never listen to the affidavit of a juryman ascribing misconduct to himself or fellows in the jury-room"; here, the reading of papers improperly before them during retirement); *South Dakota:* Stats. 1901, § 6306, par. 2 (like Cal. C. C. P. § 657); 1891, Gaines *v.* White, 1 S. D. 434, 441, 47 N. W. 524 (unspecified misconduct; statute applied); 1891, Ulrick *v.* Dakota L. & T. Co., 2 id. 285, 294, 49 N. W. 1054 (jurors' affidavits that damages were determined by average, excluded; following Boyce *v.* Stage Co., Cal.); 1897, Thompson Co. *v.* Gunderson, 10 id. 42, 71 N. W. 764 (jurors' affidavits not received to show an improper separation); *Tennessee:* 1821, Crawford *v.* State, 2 Yerg. 60 (jurors' affidavits admissible "to exhibit to the Court matter for setting aside the

conduct constituting an irregularity, ought perhaps rather to fall under the head of methods of reasoning and grounds of verdict, and thus to be governed by the other principle (*ante*, § 2349):

(*a*) The determination of a *verdict by lot* or other chance, and the estimation of *damages by average*, seem to be of this sort.[3] Under the rule of Lord

verdict they themselves have rendered"; quoted *supra*); 1833, Boohy *v.* State, 4 id. 111 (juror's affidavit that a fellow-juror had stated his own knowledge after retirement, admitted); 1836, Hudson *v.* State, 9 id. 407, 411 (preceding case approved on this point); 1839, Elledge *v.* Todd, 1 Humph. 43 (juror's affidavit that the verdict had been reached by averaging, held admissible); 1842, Norris *v.* State, 3 id. 333, 337 (preceding cases approved on this point); 1872, Wade *v.* Ordway, 1 Baxt. 229, 236, 244 (juror's affidavit that another juryman had taken a private view and communicated his observations, admitted); *Texas:* 1846, Mason *v.* Russell, 1 Tex. 721, 726 (jurors' affidavits, not admitted to show unspecified "irregularities of their proceedings, while out and considering of their verdict"); 1848, Cannon *v.* State, 3 id. 31 (same general principle affirmed); 1852, Burns *v.* Paine, 8 id. 159 (same principle implied); 1852, Handleigh *v.* Leigh, ib. 129 (like the next case); 1888, International & G. N. R. Co. *v.* Gordon, 72 id. 44, 11 S. W. 1033 (juror's affidavit that damages were determined by average, excluded); C. Cr. P. 1895, § 817, par. 8 (new trial allowable "where from the misconduct of the jury the Court is of opinion that the defendant has not received a fair and impartial trial, and it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and a verdict may in like manner in such cases be sustained by such affidavit"); 1895, Mitchell *v.* State, 36 Tex. Cr. 278, 33 S. W. 367, 36 S. W. 456 (jurors' affidavits that fellow-jurors had stated their personal knowledge after retirement, admitted); 1896, Ray *v.* State, 35 id. 354, 33 S. W. 869 (similar); *United States:* 1851, U. S. *v.* Reid, 12 How. 361, 362, 366 (jurors' affidavits that they read a newspaper report of the evidence during retirement but were not influenced by it; question not decided; "it would perhaps hardly be safe to lay down any general rule upon this subject"); 1890, Hyman *v.* Eames, 41 Fed. 676, Hallett, J. (jurors' affidavits as to a fellow-juror's statements of personal knowledge during retirement, admitted, to corroborate evidence of prejudice expressed before trial); 1890, Fuller *v.* Fletcher, 44 id. 34, 39, Gray, J. (jurors' affidavits admitted to show that a paper was not read by them); 1892, Mattox *v.* U. S., 146 U. S. 140, 142, 147, 13 Sup. 50 (jurors' affidavits that newspaper comments were read to them during retirement and that the bailiff made statements concerning the cause, admitted; rule of Woodward *v.* Leavitt, Mass., and Perry *v.* Bailey, Kan., approved); 1893, Consolidated 1. M. Co. *v.* Trenton H. I. Co., 57 Fed. 898, Green, J. (juror's affidavit not admitted to show a determination of damages by average); *Utah:* Rev. St. 1898, § 3292, par. 3 (like Cal. C. C. P. § 657); 1893, Homer *v.* Inter-Mountain A. Co., 9 Utah 193, 33 Pac. 700 (jurors' affidavits not received to show the jurors' improper reading of a book of accounts); 1895, People *v.* Ritchie, 12 id. 180, 42 Pac. 209 (juror's testimony "cannot be received to defeat his own verdict," — here, by showing an unauthorized view; the statute not applying to criminal cases, nor permitting self-impeachment other than on the specified charge of resorting to chance); 1903, Black *v.* R. M. B. Tel. Co., 26 id. 451, 73 Pac. 514 (preceding case approved); *Vermont:* 1802, Robbins *v.* Windover, 2 Tyl. 11 (juror's affidavit that fellow-jurors "related certain matters and things, in relation to the issue, to others of the panel after the cause was submitted to them, not witnessed on the trial of the cause in court," excluded; 1865, Sheldon *v.* Perkins, 37 Vt. 550, 557 (jurors' affidavits not admissible to show "any impropriety in the conduct of the jury or improper mode of arriving at the verdict"); 1893, Carpenter *v.* Willey, 65 id. 168, 26 Atl. 488 (jurors' affidavits that damages were determined by average, excluded); *Virginia:* 1812, Com. *v.* McCaul, 1 Va. Cas. 271, 275, 302 (juror's affidavit as to his separation from the jury, admitted; no question raised on this point); 1851, Thompson *v.* Com., 8 Gratt. 637, 650 (jurors' affidavits as to determining a sentence by average; not decided, "because it has never yet been so maturely considered and solemnly adjudged in Virginia . . . as to render it a settled question in causes either civil or criminal"); 1884, Moses *v.* Cromwell, 78 Va. 671, 675 (jurors' affidavits that damages were determined by average, not admitted); 1889, Elam *v.* Commercial Bank, 86 id. 92, 9 S. E. 498 (jurors' affidavits as to unspecified misconduct, excluded); 1893, Taylor *v.* Com., 90 id. 109, 17 S. E. 812 (general principle affirmed); *West Virginia:* 1876, Chesapeake & O. R. Co. *v.* Patton, 9 W. Va. 648, 662 (juror's affidavit that damages were determined by average, excluded); 1889, Bartlett *v.* Patton, 33 id. 71, 10 S. E. 21 (jurors' affidavits that a fellow-juror gave personal testimony after retirement, excluded); *Wisconsin:* 1864, Edmister *v.* Garrison, 18 Wis. 594 (jurors' affidavits to unspecified misconduct, excluded); 1867, Shaw *v.* Fisk, 21 id. 368 (jurors' affidavits that they were incompetent by ignorance of English, and had to have an interpreter in the jury-room, excluded on the latter point); 1894, Peppercorn *v.* Black River Falls, 89 id. 38, 61 N. W. 79 (jurors' affidavits that they took a private view, admitted, the rule applying only to "matters taking place during their retirement"); *Wyoming:* 1895, Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23 (jurors' affidavits that a paper was illegally introduced and read in the jury-room, excluded).

[3] They were so considered by Baron Parke,

Mansfield, the result is of course the same in either class of cases; but under the Iowa rule the effect would be to exclude under the other principle (*ante*, § 2349) what would otherwise be admissible under the present one. The curious circumstance is that the single exception made to the prohibitive rule by the Codes following the California Code is directed to this kind of misconduct, *i. e.* the very one of all upon which no exception should exist. Moreover, of the usual rule (excluding jurors' testimony upon this point) it may be said that since a determination by lot can hardly ever be established by other than jurors' testimony, it becomes a mere pretence to declare a certain irregularity fatal and yet to exclude all practical means of proving it;[4] so that the franker plan would be to decline to recognize it as falling under the class of irregularities of conduct. The only substantial reason for treating it as such is that it virtually signifies that the jury never deliberated at all, — which however is seldom the fact.

(*b*) The *communication of a juror's personal knowledge during retirement* is of course improper, since the juror ought to offer himself upon the stand as a witness (*ante*, § 1800). Nevertheless, his use and his fellows' use of that information during their deliberations is rather to be regarded as affecting the grounds of their verdict, and thus as falling under the other principle (*ante*, § 2349).

(2) Under the Iowa rule, a juror's *expressions of personal knowledge* and of *bias*, uttered during retirement, are provable. But the genuine privilege for confidential communications (*ante*, § 2346) ought to exclude them, when offered from any one but the juror himself voluntarily. The object of the privilege is to enable the jurors to speak out freely; and if a juror has stated that he knows the plaintiff to be a villain or that he will always vote against a money-lender like the defendant, surely it is precisely such statements which he is entitled to prevent from being afterwards disclosed without his consent. The only opposing argument could be that the privilege ought not to cover statements by the juror involving his own breach of duty; yet there is no such limitation for the other classes of privileged communications, and none should exist here.

(3) The usual rule of exclusion, on Lord Mansfield's theory of forbidding self-stultification, (*a*) ought equally to prohibit his own affidavit of his own *expressions of disqualifying bias uttered before entering or after leaving the panel;*[5] and (*b*) it ought equally to prohibit his own proof of his misconduct during the trial but *outside the jury-room*[6] and (*c*) it ought equally to prohibit a juror's proof of similar misconduct in a *fellow-juror*, since the prin-

in Straker *v.* Graham, and by Chief Justice Doster, in Wichita *v.* Stallings (Kansas).

[4] 1894, Field, C. J., in Wright *v.* Abbott, 160 Mass. 395, 397, 36 N. E. 32 ("Either the law that a verdict must be set aside if determined by lot is nugatory, because the fact cannot be proved; or there must be a possible means of proving it").

[5] 1851, People *v.* Baker, 1 Cal. 404, 406 (juror's affidavit that he had expressed an opinion before trial, excluded).

[6] *Contra:* 1868, Heffron *v.* Gallupe, 55 Me. 563, 566 (juror's obtaining evidential papers from a party by calling at his house, admitted); 1901, Pierce *v.* Brennan, 84 Minn. 422, 86 N. W. 417; 1901, Hempton *v.* State, 111 Wis. 127, 86 N. W. 596.

ciple regards the jurors as a single body and the shibboleth of "impeaching the verdict" applies equally to the impeachment of a fellow-juror's conduct.[7]

(4) On the other hand, the same usual rule ought to admit a juror's testimony *in support of a verdict* attempted to be impeached by other testimony, whether the juror's testimony goes to deny or explain *expressions of bias before the trial*,[8] or to deny or explain *misconduct during retirement*.[9] The Iowa rule leads to the same result. Moreover, this object of disproving bias alleged to have existed before trial may be attained by showing the juror's expressions and conduct during retirement, as an evidential fact relating back and negativing the supposed prior bias.[10] But where the object is to determine the grounds or motives of the verdict as in themselves important for sustaining it (for example, to show that a certain illegal paper or erroneous charge did not influence the verdict), here the other principle (*ante*, § 2349) applies to forbid this.[11] The distinction is that in the former case the juror's expres-

[7] 1841, Cain *v.* Cain, 1 B. Monr. 213 (juror's affidavit of a fellow-juror's expressions of bias since the finding, excluded).

[8] 1883, Irvin *v.* State, 19 Fla. 872, 890; 1886, Hughes *v.* People, 116 Ill. 330, 337, 6 N. E. 55; 1887, Spies *v.* People, 122 id. 1, 264, 12 N. E. 865, 17 N. E. 898; 1824, Haskell *v.* Becket, 3 Me. 92; 1824, Taylor *v.* Greeley, ib. 204; 1871, Woodward *v.* Leavitt, 107 Mass. 453, 459, 471.

[9] *Ark.:* 1853, Stanton *v.* State, 13 Ark. 317, 319; 1855, Pleasants *v.* Heard, 15 id. 403, 408; *Cal.:* 1888, People *v.* Goldenson, 76 Cal. 352, 19 Pac. 161; 1892, People *v.* Murray, 94 id. 212, 29 Pac. 494; 1894, People *v.* Stokes, 103 id. 193, 37 Pac. 207, *semble;* 1895, People *v.* Azoff, 105 id. 632, 39 Pac. 59; *Ill.:* 1871, Chicago *v.* Dermody, 61 Ill. 431, 435; 1878, Reed *v.* Thompson, 88 id. 245, 247; *Ind.:* 1827, Barlow *v.* State, 2 Blackf. 114; 1865, Alexander *v.* Thomas, 25 Ind. 268; 1867, Haun *v.* Wilson, 28 id. 296, 298; 1883, Jones *v.* State, 89 id. 82, 88; *Ky.:* 1902, Howard *v.* Com., — Ky. —, 69 S. W. 721 (juror's affidavit "may always be received to sustain the verdict"); *La.:* 1898, State *v.* Favre, 51 La. An. 434, 25 So. 93 (juror's disqualification by a previous bet on the trial); *Mass.:* 1827, Hix *v.* Drury, 5 Pick. 296, 302; 1871, Woodward *v.* Leavitt, 107 Mass. 453, 459, 466; *Minn.:* 1853–7, St. Martin *v.* Desnoyer, 1 Minn. 156, 160; *Mo.:* 1874, State *v.* Underwood, 57 Mo. 40, 52 (tampering by outsiders); 1888, State *v.* Rush, 95 id. 99, 8 S. W. 221; *Mont.:* 1896, State *v.* Gay, 18 Mont. 51, 44 Pac. 411; *N. H.:* 1833, State *v.* Hascall, 6 N. H. 352, 362; 1843, Tenney *v.* Evans, 13 id. 462 (jurors' affidavits received, "in exculpation of themselves and in support of the verdict," "where evidence has been introduced *aliunde* to impeach the verdict"; here the affidavits to rebut bias stated that the juror in question had expressed no opinion on retirement until after the others; good opinion); 1845, State *v.* Howard, 17 id. 171, 187 (to repel evidence of bias expressed before trial, jurors' affidavits were admitted that they had at first, during retirement, proposed a finding of murder in the second degree, instead of the verdict for the first degree as finally rendered); 1851, State *v.* Ayer, 23 id. 301, 303, 321 (juror's testimony denying and explaining alleged expressions of bias, held admissible); 1864, Boynton *v.* Trumbull, 45 id. 408 (reaching a verdict by lot); 1882, Knight *v.* Epsom, 62 id. 356; 1890, Palmer *v.* State, 65 id. 221, 19 Atl. 1003; *N. J.:* 1842, Kennedy *v.* Kennedy, 18 N. J. L. 450, 453 (jurors' affidavits received to disprove a determination of damages by average); Nevins and Elmer, JJ., diss.); *N. Y.:* 1808, Hackley *v.* Hastie, 3 John. 252; 1809, Dana *v.* Tucker, 4 id. 487 (damages determined by average); *S. D.:* 1897, Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764; *Tex.:* 1848, Cannon *v.* State, 3 Tex. 31; *U. S.:* 1799, U. S. *v.* Fries, 3 Dall. 515, 517 (juror admitted to disprove expressions of prejudice alleged to have been uttered after being summoned); *Vt.:* 1857, Downer *v.* Baxter, 30 Vt. 467, 475; 1882, State *v.* Cartwright, 20 W. Va. 32, 41 (jurors' affidavits in exculpation said to be inadmissible both in "reason and the theory of crimiual proceedings"; yet "the practice has been" to receive them); 1882, State *v.* Robinson, ib. 713, 756 (jurors' testimony admissible "to disprove or explain any such separation, misconduct, or irregularity; but their testimony will not be received to show by what motives they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect upon their minds in producing the verdict"); 1892, State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982. *Contra:* 1822, Coster *v.* Merest, 3 B. & B. 272, C. P. (to rebut affidavits that prejudicial papers had been seen by the jury, affidavits of all the jurymen, denying that they had seen them, were rejected; no authority cited).

[10] As in Tenney *v.* Evans, State *v.* Howard, N. H., *supra*, note 9, on the principle of §§ 387, 950, *ante*.

[11] Yet a few Courts, misunderstanding the principle, have admitted this; the rulings are noted *ante*, § 2349. Compare State *v.* Robinson, W. Va., *supra*, note 9.

sions are not considered in their aspect as establishing motives for the verdict, but merely as part of his whole conduct going to determine the question of his former bias.

(5) The usual rule, upon Lord Mansfield's theory of forbidding self-stultification, (*a*) does not exclude the juror's testimony to the *misconduct of a party* or a *court officer*;[12] though a few Courts, taking literally the phrase about "impeaching a verdict" have reached a contrary conclusion;[13] and it is true that, so far as the third person's misconduct involves also the juror's own misconduct, the latter would be prohibited. (*b*) Nor does the rule of thumb interpose to prohibit a *court officer* from testifying to the juror's misconduct,[14] — in spite of the plain inconsistency of principle, already noted (*ante*, § 2353). But, apart from that inconsistency, it would seem that the genuine privilege for confidential communications (*ante*, § 2346) should suffice to protect jurors completely against the disclosure of their utterances by a third person present at their deliberations, especially when his presence is unlawful.

(6) So far as any of the foregoing facts may be proved at all by jurors, they should be proved by the juror's own testimony under oath, either by affidavit or on the stand, and not by his *hearsay statements* reported by others.[15]

§ 2355. (*d*) **Mistake in Announcing or Recording the Verdict.** The act of assent to the terms of a document is constituted by the act of signing. The act of assent to a verdict is constituted by the express answer to the clerk at the polling in open court, or by the silence which implies an assent.[1] This outward act is final. Just as the act of the party to a deed is judged and determined by his outward conduct, so the act of a juror is judged and determined by the jury's polling, irrespective, on the one hand, of motives or beliefs which may have led up to the verdict's terms (*post*, § 2413), and, on the other hand, of the deliberations and utterances of the juror during retirement (*post*, § 2425). The very purpose of the formality of

[12] 1895, Heller *v.* People, 22 Colo. 11, 43 Pac. 124 (bailiff's misconduct); 1858, Spurck *v.* Crook, 19 Ill. 415, 426 (juror may testify to improper conduct of the party in furnishing evidence after the hearing in court or to other acts of corruption or impropriety by the party); 1868, Knowlton *v.* McMahon, 13 Minn. 386 ("perhaps" they are admissible to show "the misconduct of the prevailing party"); 1850, Nelms *v.* State, 13 Sm. & M. 500, 508 (Clayton, J., diss.; officer's misconduct).

[13] 1893, Sanitary District *v.* Cullerton, 147 Ill. 385, 392, 35 N. E. 723 (officer's misconduct); 1891, Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199 (bailiff's misconduct); 1883, State *v.* Brittain, 89 N. C. 481, 504 (jurors not allowed to be examined to show the deputy-sheriff's undue influence).

[14] 1855, Wilson *v.* Berrymen, 5 Cal. 44, 46 (sheriff); 1890, Houk *v.* Allen, 126 Ind. 569, 25 N. E. 897; 1894, Wright *v.* Abbott, 160 Mass. 395, 36 N. E. 62 (deputy-sheriff); 1880, Bradt *v.* Rommel, 26 Minn. 505, 5 N. W. 680 (sheriff); 1864, Boynton *v.* Trumbull, 45 N. H. 408 (officer).

[15] 1839, Straker *v.* Graham, 7 Dowl. Pr. 223; 1903, People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339; 1891, Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445; this is universally accepted. Whether the juror is *orally examinable* in court is sometimes said to lie in discretion; 1903, State *v.* King, 88 Minn. 175, 92 N. W. 965.

Distinguish the offer of a juror's expressions of bias before or during trial as *ground for disqualification to serve*; for here his utterances are themselves the disqualifying facts to be proved, and the Hearsay rule is not violated (*ante*, § 1770).

[1] For the manner of polling, the right to a poll, and the sort of expression that is equivalent to a dissent at the polling, see the following cases: 1852, Nichols *v.* Suncook Mfg. Co., 24 N. H. 431; 1903, Smith *v.* Paul, 133 N. C. 66, 45 S. E. 348.

polling is to afford an opportunity for free expression, unhampered by the fears or the errors which may have attended the private proceedings:

1805, *Sewall*, J., in *Grinnell* v. *Phillips*, 1 Mass. 530, 542 (rejecting an affidavit "that he thought it his duty to coincide with the rest of the jury, but in his mind he had never approved of the verdict or consented to it"); "He is not to be believed or heard. The record of a verdict implies a unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact. Besides, the secret or mental act of a juror can never be a subject of legal inquiry; and, from the necessity of the case, his conduct before the court is the best and only evidence that can be admitted of his assent to a verdict delivered in his presence."

(1) Hence, the fact that the verdict as delivered was *by one or more individual jurors not assented to* by them in the jury-room, or is different from the one there informally assented to by them, is no ground for later correcting or setting aside the verdict. Much less is the fact that the juror in his own mind was mistaken or unwilling in the assent which he confessedly gave in the jury-room; for here he has doubly committed himself to the verdict as delivered.[2] It may be added that this principle is to be discriminated from

[2] The rulings seldom distinguish between the above two cases; but the principle is best illustrated and tested by the former of the two. The rulings are unanimous: 1753, Lawrence *v.* Boswell, Sayer 100 (at the rendering of the verdict in open court, no objection was made by any juror; held, that five of them "shall not now be received to say that they did not acquiesce"); 1876, Torque *v.* Carrillo, 1 Ariz. 336, 25 Pac. 526 (juror's affidavit that he "did not agree to the verdict," excluded, where the verdict had been read aloud by the clerk and the jury had replied that it was their verdict); 1844, Meade *v.* Smith, 16 Conn. 346, 351, 356 (the foreman, before delivering the verdict, handed to the judge a paper stating that "the jury have agreed on a verdict handed in; the minority, however, desiring to have it understood that they come in silent"; the verdict was then read aloud and no dissent made by any juror; the jurors' affidavits were excluded, and the facts were further held not to avoid the verdict); 1853, McCombs *v.* Chandler, 5 Harringt. 423 (juror's affidavit that he "did not agree to the verdict and did not answer when polled," excluded); 1811, State *v.* Doon, R. M. Charlt. 1 (two jurors' affidavits that they "did not in fact agree to the verdict which was rendered," excluded); 1880, Hill *v.* State, 64 Ga. 453, 466 (juror held to have signified his assent, when polled; his "affidavit afterwards taken," excluded); 1871, Garretty *v.* Brazell, 34 Ia. 100, 104 (jurors' affidavits that the findings "were not assented to by all of the jury," excluded); 1895, Hallenbeck *v.* Garst, 96 id. 509, 65 N. W. 417 (juror's affidavit that his ballot for "plaintiff" was wrongly read out as "defendant" by the foreman in the jury-room, not admitted, since he did not there dissent and did afterwards answer for the defendant with the others when polled in court); 1830, Johnson *v.* Davenport, 3 J. J. Marsh. Ky. 390, 392 (juror's affidavit that he did not consent to the verdict, though on the calling of the clerk "So say you all," he made no dissenting expression, held not admissible); 1837, Cire *v.* Rightor, 11 La. 140 (the jurors were polled and answered "verdict for Rightor"; affidavit of two jurors, "that they were mistaken in their verdict, that when they rendered it they were under the impression it granted the land to the plaintiffs," excluded); 1848, State *v.* Caldwell, 3 La. An. 435 (affidavit of two jurors "that they were overawed by abuse and threats from other jurors and forced to render a verdict contrary to their judgment," excluded); 1851, State *v.* Brette, 6 id. 652, 657 (preceding case approved); 1885, State *v.* Price, 37 id. 215, 218 (apparently like State *v.* Caldwell, *supra*); 1805, Grinnell *v.* Phillips, 1 Mass. 530, 542, per Sewall, J. (affidavit that "he thought it his duty to coincide with the rest of the jury," but had not really approved the verdict, excluded; quoted *supra*); 1817, Bridge *v.* Eggleston, 14 id. 245, 247 (similar); 1890, State *v.* McNamara, 100 Mo. 100, 13 S. W. 938 (juror's affidavit that he intended to find a verdict of carrying concealed weapons, and not of shooting with intent to kill, excluded); 1819, Clark *v.* Read, 5 N. J. L. 486 ("Some time after the jury was dismissed, one of the jurors swore that he was not agreed to the verdict, previous to judgment being rendered"; excluded); 1805, Suttrell *v.* Dry, 1 Murph. 94 (juror's affidavit "that he did not consent to the verdict," excluded); 1888, State *v.* Harper, 101 N. C. 761, 7 S. E. 730 (certain jurors' "surrender of convictions" to the majority, not allowed to be shown, where at the polling in court they were unanimous); 1858, Boetge *v.* Landa, 22 Tex. 105, 107 (on the polling of the jury, one juror denied his assent; the jury then retired again, and upon returning to court, this juror assented with the others when polled; his subsequent affidavit that he had been coerced

that of certain cases under the prior principle (*ante*, § 2349) about the grounds of a verdict (though the result is the same) for there the assent is conceded and the motive for the assent is the fact offered to be shown, while here the assent itself is desired to be negatived.

(2) But where the error at the time of announcement of the verdict is a *unanimous one*, by all the jury, the situation is a different one. When the verdict as announced or delivered is different unanimously from the verdict as assented to in the jury-room at the time of voting, the case is the same as that of a deed which by mutual or common mistake does not conform to the original agreement as avowedly made by the parties to the deed. Just as such a deed may be reformed in equity, upon satisfactory proof of the error (*post*, § 2417), so such a verdict may be corrected to represent the verdict actually agreed upon by the jury as a whole. The same reasons of policy here also permit a departure from the general rule that formal acts of assent are conclusive; for a unanimous or mutual error can safely be inquired into and easily established, while an individual error opens a wide door for vacillation and uncertainty. As individuals, they must be judged by their open acts; but as an entire jury they may be trusted to correct that which is merely an error in the transmission of their act from the jury-room to the court-room:

1839, *Trotter*, J., in *Prussel* v. *Knowles*, 4 How. Miss. 90, 96 (action of trespass against the defendant and six others, including Allen and McDonald; verdict for the plaintiff; after verdict announced and entered, when all but one juryman had left the court, he stated, on suggestion from the counsel and the judge, that the jury had intended not to include in their finding either Allen, who was dead, or McDonald, who was not concerned; "the Court then directed the verdict to be changed so as to correspond with this statement; immediately after this, the whole panel came into court and confirmed the statement of the juror"; this alteration was approved on appeal): "[In a case cited] it was decided that the Court might send the jury back to re-consider their verdict, if it appears to be a mistaken one. This is constantly done; sometimes upon an intimation from the judge and more frequently from a suggestion of one of the parties or his counsel. It is highly conducive to justice to suffer mere slips of the jury to be remedied. Can there be any distinction in principle, between the case at bar, and that of sending the jury back before they are divested of the case by a manual delivery of the papers to the clerk? Does the naked fact of their separation before the discovery of the error deprive the Court of this salutary power? . . . In the case before us, the jury had a right to find some of the defendants guilty, and others not; and if they thought McDonald not guilty, he was entitled to the benefit of their verdict, and ought not to be deprived of it by a mistake which occurred at the time of delivering it. Nor was the Court bound to send the case to a new jury."

1860, *Bigelow*, C. J., in *Capen* v. *Stoughton*, 16 Gray 364 (admitting the jurors' testimony to show that "after agreeing on a verdict for the petitioners and filling up a blank form accordingly, the jury by mistake signed the form of verdict for the respondents"): "The evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased, and they had actually agreed on their verdict. The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly

to assent was excluded); 1891, Letcher *v.* Morrison, 79 id. 240, 14 S. W. 1010 (affidavits of certain jurors that the verdict was reached by a majority only, excluded).

in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived. . . . No considerations of public policy require that the uncontradicted testimony of jurors to establish an error of this nature should be excluded. Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove dangerous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake, of a merely formal and clerical character, which the Court ought to interfere to correct, in order to prevent the rights of parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case."

It has occasionally been said that this correction must be claimed before the jury are discharged;[3] but this seems unsound, because such errors are seldom ascertained until after the jury have separated and conversed out of court; and if the error is satisfactorily established, there can hardly be any fixed time to limit its correction. Subject to this qualification, it is universally conceded that a unanimous error of the jury in delivering the verdict as already unanimously agreed on in the jury-room may be shown for the purpose of correcting it to correspond, or, when this is not safely to be done, of ordering a new trial.[4]

[3] 1835, Bridgewood *v.* Wynn, 1 Harr. & Woll. 574 (affidavits of two of the jurors that the verdict was by mistake given for the defendant instead of the plaintiff, the jury being "misled by the circumstance of the defendant beginning the case" and thinking that they were finding for the plaintiff, held not sufficient, "the jury as such being now separated"); 1853, Breck *v.* Blanchard, 27 N. H. 100, 103 (the jury having rendered a signed and written but informal verdict, and having been discharged with the understanding that the foreman should afterwards draw up a formal verdict, a further inquiry of the jurors, and the affidavits of some of them, as to their non-assent to the verdict as first signed and read aloud, was refused; "there must be a limit fixed, beyond and after which no such inquiry can be made; and we think that time is well settled to be the time when the verdict is recorded").

[4] *England:* 1731, Parker *v.* Thornton, 21 Vin. Abr. 484, "Trial," T, g, pl. 12 (new trial granted "upon an affidavit of eleven of the jury that they had agreed on a verdict for the plaintiff, and 5*s.* damages, but by mistake the foreman gave a verdict for the defendant"); s. c., *s. v.* Baker *v.* Miles, Cooke 66 (98); 1757, Cogan *v.* Ehden, 1 Burr. 383, L. C. J. Mansfield and others (there being two different issues, and the foreman having given in a "general verdict for the defendant upon both issues," affidavits of eight of the jury were received that "it was the meaning and intention of the whole jury" to find the former issue for the defendant, and the latter for the plaintiff, and that this mistake was discovered by them an hour afterwards, but not till the judge was gone to his lodgings; the Court holding, first, that the intent of the whole jury was sufficiently proved, and, next, that it indicated "a mistake, arising from the jury's being unacquainted with business of this nature, and from the associate's omission in not asking the jury particularly how they found each respective issue and in not making the jury fully understand their own finding"); 1845, Bentley *v.* Fleming, 1 C. B. 479 (the judge's substitute having failed to take the answers separately to three issues submitted by the judge, and the colloquy in court showing that the verdict recorded for the plaintiff was probably a misrepresentation of the jury's findings, a new trial was ordered); *United States:* 1808, Taylor *v.* Giger, Hardin Ky. 595, 597, *semble* (jurors' affidavits admissible to show "that there was in truth no verdict," as by a mistaken announcement); 1830, Johnson *v.* Davenport, 3 J. J. Marsh. 390, 394 (preceding case apparently doubted); 1822, Little *v.* Larrabee, 2 Me. 37 (jurors' affidavits that they had "misunderstood the legal terms in which they had drawn up their verdict and that they had returned a verdict for the demandant instead of one for the tenant, which last was their sole intention," admitted; the verdict was not corrected, but a new trial granted); 1860, Capen *v.* Stoughton, 16 Gray 364 (a mistake of the entire jury in filling up the wrong blank form, allowed to be shown; quoted *supra*); 1839, Prussel *v.* Knowles, 4 How. Miss. 90, 95 (jurors' testimony admitted to correct a mistake in the delivery of the verdict; quoted *supra*); 1893, Peters *v.* Fogarty, 55 N. J. L. 386, 26 Atl. 855 (jurors' depositions as to a mistaken announcement by the foreman of a verdict for the defendant, "the jury having agreed upon a verdict for the plaintiff," admitted; procedure for correcting the record, explained); 1875, Dalrymple *v.* Williams, 63 N. Y. 361, 363 (jurors' affidavits

(3) It follows, for the same reason, that an error in the *clerk's entry* of the verdict, making it to appear different from the verdict as actually pronounced by the foreman and assented to by the other jurors, may be shown,[5]

that "the verdict as agreed upon by them was in favor of defendant W. and against the other defendant, . . . and that the announcement of the foreman [against both defendants] was made through mistake and inadvertence," admitted; "it is in the nature of an attempt to correct a clerical mistake"); 1824, Cohen *v.* Dubose, Harp. Eq. 102 (the foreman wrote a verdict for "two hundred and four dollars with interest," the agreement having been for $244 with interest; the jurors discovering the error in omitting the word "forty," the verdict was rewritten with the correct sum, but this time the words "with interest" were inadvertently omitted; this was allowed to be shown by jurors' testimony, on a bill to correct the verdict); 1890, Murphy *v.* Murphy, 1 S. D. 316, 320, 47 N. W. 142 (jurors' affidavits offered that they had agreed on a verdict for the defendant for $2, but through a misunderstanding as to the proper form of stating their verdict, due to the existence of set-off claims, they handed in a verdict for $690 "over and above the amount claimed in the complaint," believing that this would net $2 for the defendant; excluded, on the words of the statute; the Court nevertheless admitting that the plaintiff's purpose was in fact to correct a formal error, and was "just and right and highly salutary and reasonable"; this case falls fairly on the line between the present principle and that of § 2356, *post*, but it also illustrates the unfortunate effect of patchwork statutes); 1885, Burlingame *v.* Central R. Co., 23 Fed. 706, Wheeler, J. (a verdict for $3500 was allowed to be corrected to $3500 with interest, by reassembling the jurors on the second day after the verdict and ascertaining from their unanimous answers that the original verdict as handed in did not represent their consensus); 1896, Pelzer Mfg. Co. *v.* Hamburg-Bremen F. I. Co., 71 Fed. 826, Simonton, J. (jurors' testimony that "the jury, with the full purpose and intention to find a verdict upon both policies set out in the complaint, inadvertently and by mistake brought in their verdict upon one policy only," held admissible, the case being that the jury had actually voted and agreed and the error came in reducing the verdict to writing; Capen *v.* Stoughton, Mass., followed); 1896, Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., 22 C. C. A. 283, 76 Fed. 479 (allowing the correction of a clerical error by the foreman in announcing the verdict). *Contra:* 1889, McKinley *v.* Bank, 118 Ind. 375, 21 N. E. 36 (answers to interrogatories by special findings; after verdict and before judgment, jurors' affidavits were offered to show that "by inadvertence and mistake the word 'yes' was written and returned as the answer," instead of "no"; excluded, on the ground that it was an impeachment of the verdict; clearly unsound; Elliott, C. J., diss.).

Distinguish the case of a *directed verdict*, where the jury's unwillingness to assent to it is immaterial: 1828, Saville *v.* Farnham, 2 Man. & R. 216 (the judge having directed a verdict for the defendant, a juror's affidavit that "the jury gave no verdict at all" was excluded); 1898, Turney *v.* Barr, 75 Ia. 763, 38 N. W. 550 (jurors' affidavit that they did not deliberate on their verdict, but merely signed a written verdict by order of the Court, excluded, partly on the present principle, but partly also because the offer was made on an application for *habeas corpus* and not a motion for a new trial).

[5] *England:* 1599, Madox *v.* Dawson, Cro. El. 678 (the "note given by the jury to the clerk" was resorted to for amending a verdict erroneous in form "by the mis-entry of the clerk"); 1634, Eliot *v.* Skypp, Cro. Car. 338 (the clerk returning the postea with a verdict for the plaintiff in 10*s.* and for the defendant in 19*l.*, the return was amended "because that issne was tried before Justice Berkley and he well remembered that the jury found" for the plaintiff in 10*s.* of freehold rent, etc.); 1751, R. *v.* Simons, Sayer 35, 19 How. St. Tr. 680, 684 (the jury having found a verdict of guilty, a new trial was asked upon affidavits of the twelve jurors, substantially coinciding, that they had agreed to find the defendant guilty of "putting the said three ducats into the prosecutor's pocket," and that "the deponent apprehended that he and the rest of the jury had given such a verdict," "but the deponent hath since been informed that the verdict recorded finds the defendant guilty on the third count in the indictment," which alleged a putting into the pocket with intent to make it believed that the prosecutor had robbed the defendant, "whereas the deponent and the rest of the jury did not find that the same was done with such intent or any intent whatever"; these affidavits were considered by the King's Bench, no doubt of their propriety being expressed, and a new trial granted; which was said to be the first precedent of a new trial for a criminal offence); 1841, Roberts *v.* Hughes, 9 M. & W. 399 (juror's affidavit received as to "what passed on the delivery of their verdict," to show a mistaken entry of it; "the rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room on the grounds upon which they found their verdict"); *United States:* 1855, Castro *v.* Gill, 5 Cal. 40, 42 (affidavits of several jurors, held not sufficient to overthrow the correctness of the record of the verdict); 1818, Jackson *v.* Dickenson, 15 John. 309, 317 (affidavits of five jurors, admitted to show that a mistake in recording the verdict was made, in omitting the answer to a question by the Court).

The following ruling is not law, in its limitation of time: 1818, Davis *v.* Taylor, 2 Chitty 268 (affidavits based on conversations with jurymen that "the verdict was entered by mistake,"

just as any judicial record may be corrected *nunc pro tunc* (*post*, § 2450). Whether the verdict as entered should be corrected, or a new trial be ordered, would depend on whether under the circumstances the precise tenor of the verdict as pronounced could be satisfactorily ascertained.

§ 2356. **Same: Explaining the Verdict's Meaning; Mistake as to its Legal Effect; Retiring to Reconsider.** (1) When the jury *brings in its verdict*, the judge, in his just and usual control of the proceedings, may *refuse to accept it* as final, and may require the jury to retire again to make the verdict more specific or more clear. This procedure is a traditional part of jury-trial (*ante*, § 2350); and in principle it is equivalent to holding the first utterance of the foreman as tentative and informal only. It is not that the jury adds explanations to the verdict; there *is* no verdict as yet; and they retire to restate it and to give it a final form:

1832, *Morton*, J., in *Dorr* v. *Fenno*, 12 Pick. 520, 526: "It sometimes happens that the verdict first returned by the jury is not entirely certain, or does not precisely meet the issue joined, or some of the issues do not appear to be definitely found; in such cases, before the verdict can be drawn in form, it is not only proper but necessary to ascertain from the jury the real meaning of their finding, that when the verdict is affirmed it may with certainty express the intent of the jury, or that the jury may again be sent out for further deliberation if any material question appears not to have been determined by them." [1]

No doubt this practice of questioning upon the delivery of verdict might be abused, for the purpose of browbeating a jury out of their sincere verdict. This was sometimes done in the older days, notably in Erskine's celebrated scene:

1784, *R.* v. *Dean of St. Asaph's*, 18 How. St. Tr. 1203, 1230; seditious libel; the great legal controversy at this time was whether the jury could lawfully find, not only upon the fact of publication, but also upon the fact of criminal intent, and here Mr. Justice Buller had charged the jury that they could not find upon the latter; the jury returned a verdict of "Guilty of publishing *only*"; then the judge endeavored to have the jury withdraw the word "only," on the theory that it went beyond their function, which concededly they did not intend to do; *Buller*, J.: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment?" A *Juror*: "Certainly." Mr. *Erskine*: "Is the word 'only' to stand as part of your verdict?" A *Juror*: "Certainly." Mr. *Erskine*: "Then I insist it shall be recorded." *Buller*, J.: "Then the verdict must be misunderstood. Let me understand the jury." Mr. *Erskine*: "The jury *do* understand their verdict." *Buller*, J.: "Sir, I will not be interrupted!" Mr. *Erskine*: "I stand here as an advocate for a brother citizen, and I desire the word 'only' may be recorded." *Buller*, J.: "Sit down, sir! Remember your duty, or I shall be obliged to proceed in another manner." Mr. *Erskine*: "Your lordship may proceed in what manner you think fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct." In the end, the jury accepted the judge's statement of what their verdict ought to be.

But there is nowadays, in this era of judicial self-abnegation, no likelihood of the abuse repeating itself.

excluded; "it must be whilst the jury are together").

[1] *Accord:* 1839, Prussel *v.* Knowles, 4 How. Miss. 90, 95; 1885, Cattell *v.* Dispatch Pub. Co., 88 Mo. 356.

(2) *After the verdict*, however, has once been pronounced by the jury and accepted by the judge, it is final, as regards its meaning and effect; and *no statements by the jurors*, whether on affidavit or on examination, either unanimously or individually, can be resorted to for *explaining or changing its meaning or legal effect*. This must be so by virtue of the general principle that a legal act is to be construed by the words used in it, and not by the private meaning or intention of the person uttering them (*post*, § 2413). To resort to the jurors' motives, beliefs, or intentions, would be to violate the general principle already examined (*ante*, § 2349); and would be equally improper for the purpose of altering the uttered terms of the verdict (as here) as for the purpose of repudiating it altogether (as there). In the former application of the principle (*ante*, § 2349), the motive or ground of decision was sought to be shown as an improper one, invalidating the whole verdict; in the present application, though preserving it, yet as changing its effect; but, in either case, principle requires that the verdict as uttered be a finality in its terms. It may be so uncertain or inconsistent as to be incapable of application, and therefore void. But in any case its meaning and effect must be drawn from its terms alone:

1770, *Mansfield*, L. C. J., in *R.* v. *Woodfall*, 5 Burr. 2661, 2667 (the jury brought in a verdict, on a charge of seditious libel, of "guilty of the printing and publishing only"; on a subsequent motion to omit the word "only" and enter up a verdict of guilty, a juror's affidavit of what he intended by the verdict was rejected). "Where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors or bystanders may be received, upon a motion for a new trial or to rectify a mistake in the minutes; but an affidavit of a juror never can be read as to what he then thought or intended. . . . No argument can be urged for omitting the word 'only' which does not prove that it can have no effect though inserted; and therefore it is a question of law upon the face of the verdict. . . . The question is whether any meaning can be put upon the word 'only,' as it stands upon the record, which will affect the verdict. . . . It is impossible to say with certainty what the jury really did mean. Probably they had different meanings. If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by the verdict. . . . If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favor of a *venire de novo*."

This principle has ever been conceded;[2] although its application is sometimes difficult to distinguish from that which permits the correction of a unanimous mistake in delivering or recording the verdict (*ante*, § 2355).

[2] *England:* 1738, Palmer *v.* Crowle, Andrews 382 (the defendant having paid 23*l.* 7*s.* into court, and the law being that this was regarded as part payment received, a verdict for 23*l.* 17*s.* was rendered; the jurors' affidavits that the jury by mistake gave that verdict, intending only to give 10*s.* over and above the 23*l.* 7*s.* were held insufficient to call for a correction or a new trial); 1772, Clark *v.* Stevenson, 2 W. Bl. 803 (action against an executor; the jury rendered a verdict for $1,000; but "after some interval," to a question by the judge, gave an answer of fact inconsistent with this verdict; a new trial was refused, "for the danger that might happen if a subsequent declaration of the jury might be let in to explain a general verdict given upon full consideration"); 1788, Jackson *v.* Williamson, 2 T. R. 281 (trespass for personalty; a verdict having been rendered and entered for £30, the entire jury's affidavits that they meant this to be for damages additional to the value of the goods, and that they had supposed that the clerk would add the two together, were excluded; the Court holding that "if any doubt had arisen, as to the meaning of the jury, if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial; it was too late now"); 1855,

(3) From the foregoing principle must be distinguished also that by which the precise *scope of the issues* submitted to the jury may be investigated in order to determine whether a particular issue is *res judicata* (*ante*, § 2351). In such cases it is sometimes said that the jurors may testify to the matters which they considered and intended to include; but this loose form of statement, which is in apparent violation of the present principle, signifies properly nothing more than that certain issues were in fact submitted to their consideration.

3. Arbitrators' Awards.

§ 2358. **Foregoing Principles applied to Arbitrators' Awards.** The arbitrator appointed to make an award includes in his functions that of a jury; he hears evidence, and investigates and determines the facts in issue. But he has also a judge's function, in that he determines the rules of right governing his decision. Furthermore, in combining these functions, his procedure makes more difficult the discrimination between the two. To his function as jury, the foregoing principles apply, subject to such modifications as are involved in the peculiar nature of his authority:

Raphael *v.* Bank of England, 17 C. B. 161 (the questions being put by the judge to the jury on an issue of *bona fide* purchase of a bank-note, whether the purchaser had been notified and had the means of knowing that it was stolen, and these questions being answered in the affirmative, jurymen's affidavits that they did not suppose that these answers, as given in open court, were to be taken by the judge as equivalent to a verdict for the plaintiff and that they would not have concurred in such a verdict, were held inadmissible, chiefly on the ground that they amounted in effect to stating that the jury were prepared to disobey the rule of law as contained in the instructions of the judge relative to the meaning of *bona fides*); *United States:* 1872, Anderson *v.* Green, 46 Ga. 361, 374, 375 (jurors' affidavits, or their examination after verdict returned, as to whether "they intended to find defendant individually liable," held improper; "to justify such a course, the verdict must at least be so ambiguous as to convey no definite meaning upon one or more of the issues involved"); 1856, Conner *v.* Winton, 8 Ind. 315 (verdict "for the plaintiff one cent, and costs to the defendant"; juror's affidavit that the verdict meant the defendant to pay costs, excluded); 1860, Sinclair *v.* Ronsh, 14 id. 450 (similar); 1888, Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453 (a verdict finding "for the plaintiff, $1000, jointly"; jurors' testimony and affidavits that the effect of this was mistaken, in that they intended to sever the damages and charge $500 against each defendant, excluded); 1880, Stevens *v.* Montgomery, 27 Minn. 108, 6 N. W. 456 (testimony of all the jury, through the foreman, two days after discharge, that a verdict for $27.50 was intended to be a verdict for the full claim of $91.84 less a counterclaim of $27.50, excluded; but apparently this was merely a case of mistaken announcement, falling under § 2355, *ante*); 1852, Folsom *v.* Brown, 25 N. H. 114, 123 (jurors' affidavits not admissible to show a misapprehension as to the effect of the verdict upon the costs); 1808, Schenck *v.* Stevenson, 2 id. 386 (affidavit of one of a jury of inquiry, as to the "items allowed by the jury," excluded, as being "nothing less than calling on the juror to disclose to this Court the ground and foundation of the verdict"; Rossell, J., diss.); 1879, Lindauer *v.* Teeter, 41 id. 255, 259 (juror's affidavit, in replevin, with a verdict for the plaintiff and damages for $225, not admitted to show that they intended to find that "of the goods in dispute, so much of them as were of the value of $225 only, belonged to the plaintiff"); 1828, People *v.* Columbia Common Pleas, 1 Wend. 297 (jurors' affidavits that their verdict finding a fraudulent judgment was supposed by them to have the effect of allowing recovery for a limited sum and not of denying recovery entirely, not received); 1833, Hutchinson *v.* Sandt, 4 Rawle 234 (an inquisition of lunacy found H. unsound in mind "for the space of five years last past and upwards"; at a trial in ejectment, the inquisition having been admitted, two members of the jury of inquest were offered to prove that "at the time of signing the inquisition they did not mean to overreach the period of five years"; excluded); 1893, Smalley *v.* Morris, 157 Pa. 349, 17 Atl. 734 (jurors' affidavits, as to a verdict for $1500 on a note, that they all supposed that they were awarding a sum equal to the amount of the note in suit less a credit of $1500, excluded); 1888, Tarbell *v.* Tarbell, 60 Vt. 494, 15 Atl. 104 (five jurors' affidavits that they had disallowed certain items, intending to deduct them, but did not deduct them, as appeared in the special verdict, excluded); 1871, Howard *v.* McCall, 21 Gratt. 205, 212 (affidavits of six jurors that they intended the verdict to entitle the defendant to the allowance of a certain credit, excluded).

1870, *Blackburn*, J., in *Duke of Buccleuch* v. *Metropolitan Board*, L. R. 5 Exch. 221, 229: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute, and no other. And from this it follows that if that limited authority has not been pursued and the arbitrator has awarded something beyond the authority, the award is *pro tanto* void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part. And I think, both on authority and principle, this is a matter which may be pleaded as a defence to an action. In old times the only way of enforcing an award was by action upon it, and the only mode of resisting the enforcement of the award was by pleading to that action, and consequently all the old authorities, to the effect that an award is void for an excess of jurisdiction, are authorities that it may be shewn in evidence at the trial under a proper plea. . . . Now, in cases where an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority, then, inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied; nor can the Court, even in the exercise of its equitable jurisdiction, set aside the award, unless it can be shewn there was misconduct or some other equitable ground for interference; and in the case of the verdict of a compensation jury, inasmuch as the *certiorari* is taken away, there is no remedy at law at all unless there be excess of jurisdiction. But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. Were this otherwise, no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else. . . . Of course any attempt to annoy an arbitrator by asking questions tending to shew that he had mistaken the law [upon matters within his authority], or found a verdict against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire. I wish to guard against being supposed to express an opinion that a juryman might be asked on what grounds he and his fellows gave their verdict; that involves very different considerations."

In applying the foregoing principles of the Parol Evidence rule, *mutatis mutandis*, the following results would be reached:

a. The evidence and the facts forming the *grounds for the award* are immaterial and cannot be used to invalidate the award, and this upon the general principle (*ante*, § 2349). Thus, the arbitrator's mistake of fact or improper consideration of evidence, or his misapplication of the law, or his motives or intentions, in deciding the facts, are immaterial.[1] Moreover, his errors of law, in framing as judge the law to be applied by himself as juror, are immaterial, because there is by the nature of the proceeding no appeal from him in his capacity as judge.

[1] 1800, Habershon *v.* Troby, 3 Esp. 38 (arbitrator held not examinable to the evidence before him, in a suit for malicious arrest in the proceeding which had been submitted to arbitration; partly because "the arbitrator might have proceeded to cut the knot, rather than to unloose it according to the strict rules of law, from a wish to do complete justice between the parties"); 1868, Duke of Buccleuch *v.* Metropolitan Board (quoted *ante*, § 2349); 1895, *Re* Christie & T. Junction, 22 Ont. App. 21, 33, per Osler, J.); 1845, Withington *v.* Warren, 10 Metc. 431, 433 ("he could not be received thus by his parol testimony to contradict his formal award in writing"); 1849, Bigelow *v.* Maynard, 4 Cush. 317, 321; 1902, Corrigan *v.* Rockefeller, 67 Oh. 354, 66 N. E. 95 (arbitrator's written statement of reasons for award, excluded).

b. The *scope of the issues* submitted to him defines the limit of his authority to award; hence, the award as made may always be invalidated by the circumstance that it exceeds that scope. In a jury trial, this is ascertainable from the pleadings and the judge's instructions; and the scope of a verdict and a judgment may always be examined in that respect (*ante*, § 2351). In an award, the terms of the contract of submission serve in part the corresponding purpose. But, furthermore, since the judge's and jury's functions are united in the arbitrator, and since he does not by distinct instructions to himself define the issues which he submits to himself, the ascertainment of the issues which he has actually investigated and decided may have to be made by inquiring of him *whether he considered certain issues*, in order to learn whether those issues, as considered, are within the scope of his authority. Such inquiries, however, must be distinguished from an inquiry as to the grounds of fact *believed* by him, within the scope of the issues actually submitted; for the latter inquiry would fall within the prohibition of *a*, above. This distinction between the scope of authority assumed by him and the grounds of belief reached by him is plain enough; but, the similarity of the concrete questions put to the arbitrator, properly for the one purpose and improperly for the other, has naturally led to some confusion of judicial language and an apparent conflict of rulings.[2]

c. That an arbitrator's *misconduct* is material to invalidate the award cannot be doubted. Whether he himself can be received to prove his own misconduct depends upon the same principle applicable to jurors. The sound doctrine (*ante*, §§ 2352–2354) admits them to testify.[3] That there is, in the arbitrator's function as *judge*, nothing which should make it improper to testify (apart from the question of impeaching his award) has been elsewhere noticed (*ante*, § 1912).[4]

d. That the arbitrator by inadvertence *incorrectly stated the award* as reached by him could properly be shown, on the same principles as for verdicts (*ante*, §§ 2355–2356), and with the same limitations, *mutatis mutandis*.

The principles applicable to arbitrators might be equally applicable to *other officials* exercising similar functions.[5] But the arbitrator is to be distinguished

[2] The opinion of Lord Blackburn (above quoted) sufficiently clears up the principles involved. The following cases illustrate them: 1868, *Re* Dare Valley R. Co., L. R. 6 Eq. 429 432, 435 (damages for land taken; Giffard, V. C. held the arbitrator's testimony admissible "if there is a mistake in point of subject-matter, — that is, if a particular thing is referred to an arbitrator and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded"; and admitted the arbitrator's "paper of reasons for his award"); 1868–1871, Duke of Buccleuch *v.* Metropolitan Board, L. R. 3 Exch. 307, 314, 324, 327, 329 (damages for land taken; held that the arbitrator's testimony was admissible to show that the "sum awarded includes an amount for something over which he had no jurisdiction"; Bramwell, B., diss., with hesitation); 5 id. 221, 225, 229, Exch. Ch. on appeal (Blackburn, J., delivered an opinion collating prior cases and approving the ruling below; quoted *supra*); on appeal, L. R. 5 E. & I. App. 418, 421, 433, 442, 449, 457, 462; 1858, Spurck *v.* Crook, 19 Ill. 415, 426 (arbitrators may testify that certain evidence was given or that "certain matters were or were not examined or acted upon by them or that there is a mistake in the award"). Compare Morse on Arbitration (1872), cc. X and XXI.

[3] But, as with jurors, their hearsay admissions will not suffice: 1891, Whiteley and Roberts' Arbitration, 1 Ch. 558, 567.

[4] For the once supposed *privilege* of an arbitrator not to be harassed by questions as to his award, see *post*, § 2372.

[5] 1889, Phillips *v.* Marblehead, 148 Mass.

from the *referee* (from whose rulings an appeal may lie),[6] from the *master in chancery*, and from the officer known in New England practice as *auditor*. It is sufficient here to note that differences of function and procedure may produce differences of result in the application of the Parol Evidence rule.

B. GRAND JURY.

1. Privileged Communications Rule.

§ 2360. **History and General Principle.** That the proceedings of the grand jury, in taking testimony and in deliberating, must be held in privacy, has been the customary practice from early times. The traditional and peculiar form of oath administered to the grand jurors testifies to this:

"The foreman, by himself, lays his hand on the book, and the marshal administers to him the following oath: 'My lord, or sir (as the foreman's name may be), you, as the foreman of this grand inquest for the body of the county of A, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the king's counsel, your fellows', and your own, you shall keep secret; You shall present no one for envy, hatred, or malice; but you shall present all things truly as they come to your knowledge, according to the best of your understanding: So help you God.' The rest of the grand jury, by three at a time, in order, are sworn in the following manner: 'The same oath which your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your part: So help you God.'"[1]

But the legal privilege of the jurors to hold their inquiries and deliberations in secret seems not to have been established until a comparatively late period. Under the last Stuart, attempts were frequently made to control the verdicts of petit juries in political causes, — though in this respect the efforts were rather survivals of the earlier Tudor and Stuart methods than original innovations.[2] As a part of this general effort, the control of the grand jury of indictment, by requiring the publicity of their proceedings, was also attempted, and for the time successfully. The colloquy on this notable occasion is interesting as expounding the reasons which were then advanced to justify the grand jury's privacy of investigation:

1681, *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 771; Sir F. Withins moved, after the charge to the grand jury, that the evidence be heard in court; and L. C. J. Pemberton declared that he would grant the motion; the jury then desired to have a copy of their oath, which was given them, and they withdrew; after returning shortly, the following colloquy ensued: *Foreman:* "My lord Chief Justice, it is the opinion of the jury that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do if it be done in court"; L. C. J. *Pemberton:* "Look ye, gentlemen of the jury, it may very

326, 330, 19 N. E. 547 (board of selectmen, condemning land).

[6] 1899, Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990.

[1] 8 How. St. Tr. 771.

[2] In 1616, L. C. J. Coke, when the grand jury did not satisfy him in his effort to indict for premunire those persons who went to Chancery to prevent the enforcement of common-law judgments, "caused them to be called by the poll, and perceiving that 17 of the 19 were agreed to return *ignoramus*, seemed much offended, and said . . . he would have a more sufficient jury, and evidence given openly at the bar" (Campbell's Lives of the Chancellors, II, 363).

probably be, that some late usage has brought you into error that it is your right; but it is not your right in truth. . . . What you say concerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say"; *Foreman:* "My lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in anything, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's, and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand anything of law"; Mr. *Papillon* [a juror]: "If it be the ancient custom of the kingdom to examine in private, then there is something maybe very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been. Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty;" L. C. J. *Pemberton:* "The king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it;" *Foreman:* "My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right; but if the Court overrule, we must submit to it."

This attempt was never repeated, and the investigations of grand jurors were thereafter invariably made in privacy. But, owing perhaps to this ruling and to the earlier uncertainty of the law, the inviolability of the proceedings, when their disclosure was sought upon some later occasion, appears to have remained without defined limits in English precedents for a century or more.[3] At some early period in our own practice, the principle received a tacit though firm acceptance. In most of the statutes regulating criminal

[3] 1613, Scarlet's Case, 12 Co. 98 (indictment for fraudulently procuring himself to be sworn on the jury with malicious intent to indict innocent men; it appeared that the judges had discovered the fraud through noticing the number of "honest men" indicted and demanding then of the jurors on what testimony they had proceeded; whereon Scarlet's testimony appeared to have been the foundation); 1641, Dr. Micklethwart's Case, Clayt. 84, pl. 140 ("The judge would not suffer a grand juryman to be produced as a witness to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions. See, if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such case"); 1641, Mass. Body of Liberties (Whitmore's ed.), § 61 ("No magestrate, juror, officer, or other man, shall be bound to informe present or reveale any private crim or offence, wherein there is no perill or danger to this plantation or any member thereof, when any necessarie tye of conscience binds him to secresie grounded upon the word of God, unlesse it be in case of testimony lawfully required"; repeated in the revisions of 1660 and 1672, under "Jurors"); 1817, Watson's Trial, 32 How. St. Tr. 107 (Mr. Solicitor-General: "My lord, I apprehend it is not competent for my learned friend to ask him what he deposed before the grand jury"; Mr. Wetherell: "I ask him only to facts, — the day of his attendance, and whether he produced the note [of the speeches]"; Ellenborough, L. C. J.: "On that subject I have a considerable doubt").

procedure it was recognized; though the statement of its limitations is found to have various phrasings.[4]

[4] The following list does not include statutes which merely prescribe that the jurors must keep secret their proceedings, for those do not have direct bearing on the rule of evidence; nor the statutes providing that the juror "shall not be questioned for anything he may say" during deliberation, for those refer to a civil or criminal liability for his utterances: *Ala.* Code 1897, § 4805 (a grand juror may testify that a witness privileged against prosecution for an offence testified to before the grand jury has so testified); *Alaska* C. Cr. P. 1900, § 27 (like Or. Annot. C. 1892, § 1257); *Ariz.* P. C. 1887, § 1418 (grand juror may be examined to a witness' testimony to ascertain "whether it is consistent with that given by the witness before the court," or on the charge of a witness' perjury); *Ark.* Stats. 1894, § 2055 (disclosure compellable of the testimony of an examined witness "for the purpose of ascertaining its consistency with the testimony given by the witness on trial" or on a charge of the witness' perjury); *Cal.* P. C. 1872, § 926 ("Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any Court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the Court or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor"); *Fla.* Rev. St. 1892, § 2813 (a grand juror is not allowed "to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question"); § 2814 (a grand juror is compellable to testify whether a witness' testimony "is consistent with or different from the evidence given by such witness before such court," and also to disclose testimony on a charge of perjury); *Ga.* Code 1895, § 5198, par. 3, § 5199 (communications "among grand jurors," excluded, but they "shall disclose everything which occurs in their service, whenever it becomes necessary"); *Ill.* Rev. St. 1874, c. 38, § 412 ("No grand juror or officer of the court or other person shall disclose that an indictment for felony is found or about to be found against any person not in custody or under recognizance, except by issuing process for his arrest, until he is arrested; nor shall any grand juror state how any member of the jury voted or what opinion he expressed on any question before them"); *Ind.* Rev. St. 1897, § 1754 (a grand juror may be required to disclose a witness' testimony "for the purpose of ascertaining whether it is consistent with that given by the witness before the court," or on his trial for perjury); *Ia.* Code 1897, § 5267 ("Every member of the grand jury must keep secret the proceedings of that body and the testimony given before it, except as provided in the next section, nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against a person not in custody or under bail, otherwise than by presenting the same in court or issuing or executing process thereon, until such person has been arrested"); § 5268 (disclosure of a witness' testimony may be made to ascertain its consistency or to prove perjury); § 5269 ("No grand juror shall be questioned for anything he may say or any vote he may give in the grand-jury room relative to a matter legally pending before it," except for perjury); *Kan.* Gen. St. 1897, c. 102, §§ 110, 111 (a grand juror shall not disclose the evidence or name of a witness except when lawfully required as a witness; he may be required to testify whether testimony of an examined witness "is consistent with or different from the evidence given by such witness before such court," and to disclose such testimony on a charge of perjury); § 112 (he is not obliged or allowed to disclose the vote or expressed opinion of any grand juror); St. 1901, c. 233 (no person shall disclose any evidence or witness' name, in an inquisition in liquor cases, "except when lawfully required to testify as a witness in relation thereto," until the person charged has been arrested); *Ky.* C. Cr. P. 1895, § 113 (similar to Tenn. Code § 7043); *La.* Rev. L. 1897, § 2141 (a grand juror may testify to another's neglect of duty); C. Pr. 1894, §§ 530, 531 (the vote of a sick or deceased juror after adjournment may be ascertained by the testimony of himself or another juror); *Me.* Pub. St. 1883, c. 134, § 8 (no grand juror or court officer shall disclose an indictment until after arrest, "nor shall any grand juror state how any member of the jury voted, or what opinion he expressed, on any question before them"); *Mass.* Pub. St. 1882, c. 213, § 13, Rev. L. 1902, c. 218, § 13 (a grand juror is not allowed to state "in what manner he or any other member of the jury voted" or "what opinion was expressed in relation to such question" before them); *Mich.* Comp. L. 1897, § 11887 (a grand juror may be required to testify "whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court," and also his testimony on a charge of perjury therein; but not to disclose the vote or expression of opinion of any juror); *Minn.* Gen. St. 1894, § 7216 (may be required by Court to disclose testimony "for the purpose of ascertaining whether it is consistent with that given by the witnesses before the court," or on a perjury charge); *Miss.* Annot. Code 1892, § 2381 (a grand juror, "except when called as a witness in court," shall not disclose the proceedings; "nor shall any grand juror disclose the name or testimony of any witness who has been before it"); *Mo.* Rev. St. 1899, § 2506 (grand juror compellable to disclose whether a witness' testimony "is consistent with or different from the evidence given by such witness

What those limitations ought to be must depend upon the reasons for the principle; and these reasons find exposition in the following passages:

1846, *Ruffin*, C. J., in *State* v. *Broughton*, 7 Ired. 96: "By the policy of the law, grand juries act in secret; and, with a view of sustaining that policy, it is prescribed that a grand juror shall, amongst other things, swear, that 'the State's counsel, your fellows', and your own, you shall keep secret.' The whole sense in which those words are to be received, or the duration of the secrecy imposed, we do not find accurately stated by any ancient writer on the common law. There are some reasons for the rule, which are obvious enough; and as far as the public interests can be subserved by it, the secrecy ought to be kept, not only while the grand jury continues empanelled, but it ought also to be subsequently observed. The principal ground of policy is, no doubt, to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may deliberate and decide without an apprehension of any detriment from an accused or any other person, but be free 'true presentment to make.' Therefore it is clear, that at no time nor upon any occasion ought a grand juror to make known who concurred in or opposed the presentment; as the power to do so would or might in some degree impair that perfect freedom from external bias, which a grand juror ought to feel. It is probable, likewise, that another ground is, that it might lead to the escape of criminals, if their friends or others on the grand jury were at liberty to make known the institution and progress of an inquisition into their guilt. But as that reason can operate only while the accused is at large, it would seem, that, as far as the rule depends on that, it would not be obligatory after his arrest. We think, too, that, in furtherance of justice, the law may have intended to forbid a grand juror from giving aid to one indicted, and thus found to be probably guilty, in his efforts to defeat the prosecution, by publishing the evidence before the grand jury, and thus enabling him to counteract it, perhaps by foul means, after he knew where the case pinched. That would be betraying 'the State's counsel,' which is necessarily opened to the grand jury. But that is the immunity of the public, and not the privilege of the witness; and, therefore, it would seem that the rule should create an obligation on the conscience of the juror and be

before such court," or to disclose testimony on charge of perjury); § 2507 (a grand juror is not compellable nor allowable to disclose votes or opinions expressed); *Mont.* P. C. 1895, § 1789 (like Cal. P. C. § 926); *Nev.* Gen. St. 1885, § 4095 (like Cal. P. C. § 926); *N. M.* Comp. L. 1897, § 988 (a grand juror may be required to disclose testimony to ascertain "whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof"); *N. Y.* C. Cr. P. 1881, § 266 (disclosure is compellable of the testimony before grand jury, to ascertain its consistency with testimony in court or to prove perjury of the witness); *N. D.* Rev. C. 1895, §§ 8021, 8022 (like Cal. P. C. § 926); *Oh.* Rev. St. 1898, § 7205 (a grand juror is not to testify to the tenor of vote or expression of opinion of any juror); *Okl.* Stats. 1893, §§ 5057, 5058 (like Cal. P. C. § 926); *Or.* Annot. C. 1892, § 1257 (substantially like Cal. P. C. § 926, beginning at "may be required," etc.); *S. D.* Stats. 1899, §§ 8482, 8483 (like Cal. P. C. § 926); *Tenn.* Code 1896, § 7043 (a grand juror may be examined as to a witness' testimony to "ascertain whether it is consistent" with his testimony at trial, or to prove testimony charged as perjured); *Tex.* C. Cr. P. 1895, § 404 (the grand juror's oath is to be: "The State's counsel, your fellows', and your own, you shall keep secret, unless you are required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand-jury room in a criminal case shall be under investigation"); *Utah* Rev. St. 1898, § 4721 (like Cal. P. C. § 926); *Wash.* C. & Stats. 1897, § 6820 ("No grand-jury juror shall be allowed to state or to testify in any court in what manner he or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them"); *Wis.* Stats. 1898, § 2553 (no grand juror or court officer shall disclose an indictment before arrest, if the Court so order); § 2554 ("No grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question"); § 2555 (grand jurors "may be required by any Court to testify whether the testimony of a witness examined before such jury is consistent with or different from the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense"); *Wyo.* Rev. St. 1887, § 3234 (like Oh. Rev. St. § 7205).

enforced by a Court, when the public justice may be advanced by it, and that it cannot be urged by the witness himself, when it would defeat justice, and thus encourage witnesses before that body to commit perjury, by false statements or the suppression of the truth. For it is obvious, that if grand jurors are, through all time and to all purposes, prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming ; for, besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests. It would be extraordinary were witnesses thus enabled to perjure themselves without responsibility."

1849, *Thacher*, J., in *Sands* v. *Robinson*, 12 Sm. & M. 704, 710: "It would certainly be a great breach of duty for a grand juror, while the inquest was in session, to disclose the business of that body, by means whereof persons accused and not yet arrested, might make their escape, or take other measures to defeat the course of public justice. Indeed, in a certain state of case, a grand juror might thereby render himself liable to a criminal charge as an accessory, after the fact, in the commission of a crime. So, as many charges are confided to that body against individuals, which, for want of sufficient proof, or from want of foundation in fact, do not mature to a presentment or indictment, common prudence and charity, and a regard for the peace of society, and innocent men's reputations, imperatively should close the mouths of grand jurors, as to their proceedings, after the expiration of their session. It is the interest of all good citizens to observe this rule, in order to secure freedom of deliberation and opinion, which would be to a great extent impaired if the occurrences of a session were afterwards made the subject of comment and loose and malicious conversation. Indeed, thus a grand juror might well subject himself to an action of slander. But the policy of the law was never designed to injure or punish the innocent, or to obstruct the course of justice; nor can that rule be upheld, by which a grand-jury room shall be converted into an occasion for the safe and irresponsible utterance of false and malicious slander against upright and honorable citizens. Hence it will be seen that so much depends upon time and circumstances, that the competency of a grand juror to testify is peculiarly a matter of discretion with the Court to discriminate as to it."

1858, *Bigelow*, J., in *Com.* v. *Mead*, 12 Gray 167: "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made."[5]

These reasons are obviously fourfold in their bearing. (*a*) The *grand jurors themselves* are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion. (*b*) The *complainants* and the *witnesses* summoned are to be secured in freedom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the State may secure willing witnesses. (*c*) The *guilty accused* is not to be provided with such clues as will enable

[5] For another exposition of the reasons for secrecy, see Edward Livingston's Introductory Report to the Code of Criminal Procedure (Works, ed. 1872, I, 370).

him to flee from arrest or to suborn false testimony or tamper with witnesses. (*d*) The *innocent accused*, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused.

Of these four classes of reasons, the third and the fourth disappear practically from consideration as a ground of privilege for witnesses. (*c*) The third disappears, in regard to the accused's opportunity of escape, as soon as he either escapes or is arrested, and cannot therefore have any bearing upon later stages of the proceeding. It affects merely the grand jurors' obligation not to give extrajudicial information between the times of their session and of the arrest. This reason also disappears, in regard to the accused's opportunity of tampering with the witnesses or suborning others in defence, as soon as the indictment is returned; for the indictment must bear the witnesses' names indorsed. Modern criminal procedure disregards the danger of subornation, and acknowledges that the accused is in fairness entitled to know before trial who are to be the witnesses against him (*ante*, §§ 1850–1854). (*d*) The fourth reason aims chiefly to prohibit the grand juror's extrajudicial disclosure of the details of the charges against persons found innocent. It can have little or no application to compulsory disclosure in court; first, because the bill is returned "*ignoramus*" or "not found," and thus the fact of the charge is necessarily published upon the records, and, secondly, because the only mode in which such a disclosure would practically be relevant would be an attempt to impeach a witness who testifies to the person's innocence by his former testimony before the grand jury to the person's guilt, and this implies that the person's doings have become so far a relevant matter of public investigation that it would be vain to secure any further technical privacy for the charges.

Thus the only reasons which remain as the possible foundation of any privilege in subsequent testimony are the first and the second. The effect of these may now be examined.

§ 2361. (*a*) **Privilege of Grand Jurors; Secrecy of Vote and Opinion.** The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehensions of injury from the persons charged by them, demands a guarantee that by no legal process will the disclosure of their votes and expressions of opinion in the jury room be compelled.[1] This rests upon precisely the same footing as the privilege of petit jurors (*ante*, § 2346) or that of husband and wife (*ante*, § 2332). It forbids that any grand juror shall be compelled to disclose his own utterances or permitted to disclose the utterances of his fellows. On principle, this privilege, like all others (*ante*, § 2196), may be waived by the person entitled to it. In practice, the privilege has little occasion to be exercised, because the utterances protected by it can seldom be relevant upon any issue.

[1] 1884, *Ex parte* Sontag, 64 Cal. 525, 2 Pac. 402; 1870, Elbin *v.* Wilson, 33 Md. 135, 144 (witness not allowed to be impeached by questions as to his conduct as grand juror in endeavoring to have the appellee indicted for perjury); 1879, Gordon *v.* Com., 92 Pa. 216, 220 (votes may not be disclosed).

§ 2362. (*b*) **Privilege of Witnesses before Grand Jury; General Principle.** The witnesses and complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony. The policy is analogous to that of the privilege for informers in general (*post*, § 2374). The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouthpiece of the disclosure. Nor is it the State's; for the State's interest is merely the motive for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the privilege must therefore be that of the witness, and rests upon his consent.

But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:

1858, *Bigelow*, J., in *Com.* v. *Mead*, 12 Gray 167: "But when these purposes [as above quoted] are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula.* After the indictment is found and presented, and the accused is held to answer and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defence, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist. The case at bar furnishes a good illustration of the truth of this remark. No possible injury to the interests or rights of the government that we can see could happen by a disclosure of the testimony given by the witness before the grand jury. . . . On the other hand, it is clear that the rights of the accused might be greatly affected and his peril much increased, if he can be shut out from showing the fact that an important witness against him is unworthy of credit, or that his testimony before the jury of trials is to be taken with great caution and doubt, because on a previous occasion, when called to testify on oath, he had given a different account of the same transaction from that which he has stated in his evidence at the trial."

1893, *McSherry*, J., in *Izer* v. *State*, 77 Md. 110, 26 Atl. 282: "If witnesses who testify falsely before the grand jury are free from all the penalties of perjury merely because of the juror's oath of secrecy, the object designed to be effected by that clause of his oath would be perverted, and a measure intended to promote the public welfare would be transformed into a means to defeat the ends of justice. The law does not permit the obligation of secrecy which has been imposed for one purpose to be availed of for a totally different one. The grand juror's oath of secrecy cannot, therefore, be interposed to obstruct the administration of justice."

But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused. (1) Supposing the grand

jury to *indict* J. S. on Doe's testimony, it is plain that secrecy is no longer of any avail, for Doe will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill-will) which his testimony on the open trial does not equally tend to produce. If, on the other hand, he now testifies falsely, or if he testifies truly but formerly falsely, he is in no way a person who ought to have any privilege. The privilege therefore has no longer any reason to exist. (2) Supposing, on the contrary, that the grand jury, after hearing Doe's testimony, nevertheless *discharge* J. S., there may now be a motive for Doe to desire secrecy, — as when on a subsequent trial it is desired to impeach Doe as a witness by showing his biassed utterances against J. S. before the grand jury. But here the privilege ought also to cease, for another reason, namely, that the chance that such a disclosure will be called for is too small a contingency to have any effect *a priori* in rendering Doe unwilling to make complaint or give testimony before the grand jury. Doe naturally will have expected that J. S. would be indicted. Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the same reasons noted in par. (1), *supra*. Furthermore, in the other rare contingencies in which his testimony before the grand jury might become relevant (*post*, § 2363, par. 2), justice requires in any case that Doe should not be exempted from disclosure.

There remain, therefore, on principle, no cases at all in which, after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally accepted to-day. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required "whenever it becomes necessary in the course of justice." Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle.

§ 2363. **Same: Instances of the Cessation of the Privilege.** The instances in which the privilege ceases to operate, by virtue of the foregoing reasons, may be grouped according to the purpose for which the testimony is offered to be used:

(a) *Using the testimony as a self-contradiction in impeachment of the witness.* It is now universally conceded that a witness may be impeached, in any subsequent trial civil or criminal, by self-contradictory testimony (*ante*, § 1017) given by him before the grand jury.[1] In the same way, a party to

[1] To the statutes cited *ante*, § 2360, add the following cases: *Eng.:* 1842, R. *v.* Gibson, Car. & M. 672 (cross-examination of a witness to his prior testimony before the grand jury, allowed); *Md.:* 1896, Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089; *Mass.:* 1858, Com. *v.* Mead, 12 Gray 167 (quoted *supra*); 1870, Way *v.* Butterworth, 106 Mass. 75; 1899, Com. *v.* Chance, 174 id. 245, 54 N. E. 551; *Mich.:* 1895, People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540 (applying the statute); *Mo.:* 1889, State *v.* Thomas, 99 Mo. 235, 255, 259, 12 S. W. 643 (statute applied); *N. H.:* 1873, State *v.* Wood, 53 N. H. 484, 487, 493; *N. Y.:* 1847, People *v.* Hulbut,

the cause, not taking the stand as a witness, may be impeached by his *admissions (ante,* § 1048) made in testifying before the grand jury.[2] The occasional statutory sanction for the former of these uses cannot be construed to prohibit the latter, which goes upon the same reasoning. Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed by the statutory omission to mention them, — else the integrity of common-law principles would tend to be diminished in direct ratio to the ignorance or unskilfulness of the Legislature which attempted in any respect to make a declaratory statute.

(b) *Perjury.* A witness' testimony before a grand jury may always be used upon a prosecution for perjury therein.[3]

4 Denio 133 (statutory rule confirmed); *Or.:* 1887, State *v.* Moran, 15 Or. 262, 14 Pac. 419; 1895, State *v.* Brown, 28 id. 147, 41 Pac. 1042; *Ill.:* 1846, Granger *v.* Warrington, 8 Ill. 299, 310; 1886, Bressler *v.* People, 117 id. 422, 436, 8 N. E. 62 (after an accused is put on trial, there is no reason against publicity "if the ends of justice require it"); *Ind.:* 1838, Burnham *v.* Hatfield, 5 Blackf. 21 (plaintiff's admissions, when before the jury); 1853, Perkins *v.* State, 4 Ind. 222 (witness' corroborative statements before the jury); 1873, Burdick *v.* Hunt, 43 id. 381, 389 (witness' self-contradiction); 1877, State *v.* Van Buskirk, 59 id. 384, 388 (preceding cases approved); *Ia.:* 1901, State *v.* McPherson, 114 Ia. 492, 87 N. W. 421 (disclosure by the clerk of the grand jury, as to prior testimony of a witness, in impeachment, held admissible, on common-law principles); *Me.:* 1874, State *v.* Benner, 64 Me. 267, 282 (disposing of the prior contrary intimation in State *v.* Knight, 43 id. 1, 128); *Pa.:* 1879, Gordon *v.* Com., 92 Pa. 216, 219; *Tex.:* 1901, Wooley *v.* State, — Tex. Cr. — , 64 S. W. 1054 (referring to prior cases); *Va.:* 1874, Little *v.* Com., 25 Gratt. 921, 930, *semble.*

The early *Connecticut* doctrine was very strict; this was the more absurd because the local practice of permitting the accused's presence at the grand jury's sessions utterly nullified the ground of the privilege. On the present point, however, the privilege seems always to have been denied, and would certainly to-day be denied: 1844, State *v.* Fasset, 16 Conn. 457, 467 (grand juror not admitted to prove certain evidence given to them); 1888, State *v.* Coffee, 56 id. 410, 16 Atl. 151 (preceding opinion doubted as to the unqualified nature of its expressions).

The following early doubt in *New Jersey* would to-day be repudiated: 1800, Imlay *v.* Rogers, 2 N. J. L. 347 (two judges *pro*, and two judges *con*).

[2] 1895, Jenkins *v.* State, 35 Fla. 737, 18 So. 182 (accused's testimony as a witness before the jury; admitted, under a statute in part like the Missouri statute, though the accused had not taken the stand at the trial; the statutory specified cases for permitted use "do not exclude an inquiry in other cases sanctioned by the law"); 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158 (disclosure of the testimony of the defendant, who had not taken the stand, allowed; R. S. 1894, § 1731, not excluding any uses before recognized, but confirming and adding others); 1899, Steele-Smith G. Co. *v.* Potthast, 109 Ia. 413, 80 N. W. 517 (party's admissions); 1890, New Hampshire F. I. Co. *v.* Healey, 151 Mass. 537, 24 N. E. 913 (party's admissions); 1846, State *v.* Broughton, 7 Ired. 96 (accused's testimony before the grand jury as a witness, making criminating statements; quoted *ante,* § 2360); 1813, U. S. *v.* Charles, 2 Cr. C. C. 76, *semble* (an accused's confessions when a witness); 1887, U. S. *v.* Kirkwood, 5 Utah 123, 13 Pac. 234 (accused's confessions in testifying before the jury; the statute held not to contain any express prohibition of this); 1892, People *v.* Reggel, 8 id. 21, 28 Pac. 955 (similar).

In *Connecticut* the usual result is reached, but is attainable on peculiar grounds due to local practice: 1888, State *v.* Coffee, 56 Conn. 410, 16 Atl. 151 (the accused by local practice being permitted to attend the session of the jury, his confession to some of the jurors, made informally, was allowed to be proved by them, as not being "a part of the secrets of the cause," nor obtained by them as "a part of their duty"). The ruling in *Missouri* would presumably be contrary to the sound doctrine: 1855, Tindle *v.* Nichols, 20 Mo. 326 (cited *infra,* note 6). The present law in *Texas* seems to be sound: 1898, Gutgesell *v.* State, — Tex. Cr. — , 43 S. W. 1016 (the Code exception is exclusive of others; hence, an accused's testimony as a witness before the grand jury cannot be used against him as an admission, if he is not a witness on his trial; unsound); 1900, Spangler *v.* State, 41 id. 424, 55 S. W. 326 (preceding case approved); 1901, Wisdom *v.* State, — id. — , 61 S. W. 926 (admitting testimony to a confession, and repudiating any limitations "after the hearing before that body has been terminated"; explaining Gutgesell *v.* State, *supra,* and prior cases; Henderson, J., diss.); compare the peculiar rule in this State for confessions (*ante,* §§ 852, 1039).

[3] This is usually declared in the statutes (*ante,* § 2360). Add the following rulings: 1844, R. *v.* Hughes, 1 C. & K. 519, 528, Tindal, C. J. (perjury before the grand jury; another witness before them admitted to prove the defendants' testimony; "it is for the purposes of public justice"); 1867, People *v.* Young, 31 Cal. 563;

(c) The *mere fact* that a certain person *was a witness*[4] or a *complainant*[5] before the grand jury may always be used, for the simple reason that the names of witnesses and of complainants are necessarily given publicity in the usual procedure of finding or rejecting indictments.

(d) Where a plaintiff seeking redress for *defamation* or *malicious prosecution* desires in his proof the testimony of witnesses, other than the defendant, before the grand jury, the privilege should not apply.[6] Where the suit is for defamation uttered by the defendant in the course of testimony before the grand jury, much less should the privilege apply;[7] for otherwise the right of action would be a vain pretence of the law, the sole means of establishing it being denied. It may be, however, that the utterance is privileged from liability by the substantive law of torts; in that event it is the substantive law, and not the law of evidence, that forbids its proof.

(e) Where the witness is sought to be impeached at a subsequent trial upon other issues, by *expressions of bias* in his testimony before the grand jury, the privilege does not necessarily apply. But here, if anywhere after the grand jury's session is ended, the privilege may conceivably be held to continue.

(f) So far as the privilege exists and continues, it prohibits disclosures, not only by the grand jurors themselves, but also by the *State's officers* and others who may be present, lawfully or unlawfully, at the private sessions; for the witness has no control over these persons' presence and their secrecy is as essential as that of the grand jurors to his security.[8]

1893, Izer *v.* State, 77 Md. 110, 26 Atl. 282; 1838, Crocker *v.* State, Meigs 127.

[4] 1886, *Ex parte* Schmidt, 71 Cal. 212, 12 Pac. 55 (like the next case); 1888, People *v.* Northey, 77 id. 618, 19 Pac. 865, 20 Pac. 129 ("The fact that a person was called, sworn, and examined as a witness before a grand jury does not come within the rule of secrecy; if it did, it is violated whenever an indictment is returned with the names of the witnesses indorsed on it or inserted at its foot"); 1853, Com. *v.* Hill, 11 Cush. 137, 140 (to prove that no variance between the indictment and proof existed, a grand juror was allowed to testify, in impeachment of one who testified to his prior testimony before the grand jury, that he was not a witness at all before that jury); 1903, *Re* Archer, — Mich. — , 96 N. W. 442 (grand jurors' report to the judge that a witness on appearing refused to exhibit his books, held not privileged, in proceedings for contempt).

[5] 1823, Freeman *v.* Arkell, 1 C. & P. 135 (that a certain person was the prosecutor on a bill ignored by them); 1846, Granger *v.* Warrington, 8 Ill. 299, 310 (malicious prosecution; name of the complainant required to be disclosed; but the Court offer the unsound reason that no oath of secrecy was then locally required of grand jurors); 1834, Huidekoper *v.* Cotton, 3 Watts 56 (malicious prosecution, the bill having been returned "ignoramus"; "so far is our law from forbidding the grand jury from disclosing the name of the prosecutor that it is provided that . . . if they return that the prosecutor shall pay the costs, they shall name who is the prosecutor"). Such statutes exist in many jurisdictions, requiring a prosecutor to be named.

[6] 1879, Hunter *v.* Randall, 69 Me. 183, 189 (malicious prosecution; plaintiff allowed to prove what witnesses testified before the grand jury on the then complaint against the plaintiff for perjury). *Contra:* 1855, Tindle *v.* Nichols, 20 Mo. 326 (under a statute permitting the jury to testify in contradiction of a witness or on his trial for perjury, and forbidding them "except when lawfully required," the disclosure is forbidden in all other but the specified cases; here, in an action for slander charging the plaintiff with perjury before the jury, on a plea of truth; this is clearly unsound, as well as unjust; compare par. (a) *supra*); 1858, Beam *v.* Link, 27 id. 261 (similar ruling, in an action for malicious prosecution by procuring the plaintiff to be indicted; but here the local substantive law would apparently have exempted the defendant from liability in any case).

[7] 1849, Sands *v.* Robinson, 12 Sm. & M. 704, 711 (a grand juror allowed to testify to utterances by a witness before them, in an action against the witness for defamatory utterances, the previous disclosure of the topic not making it necessary to preserve secrecy, and the utterances not being absolutely privileged from suit). Compare the rulings upon an *informer's privilege* (*post*, § 2374).

[8] 1844, State *v.* Fasset, 16 Conn. 457, 470 (disclosure by "others who were present and

2. Parol Evidence Rule.

§ 2364. **Grounds for Indictment; Illegal Evidence; Required Number of Votes; etc.** The finding of an indictment by the grand jury, like the verdict of a petit jury, is a legal act and a part of a judicial record; and the Parol Evidence rule therefore applies to all attempts to invalidate it. The principles upon which depends the application of that rule to verdicts have been already examined (*ante*, §§ 2348–2356); and it will be sufficient here to note briefly, under the same heads, the effect of those principles *mutatis mutandis*, upon the grand jury's legal act of finding an indictment.

(*a*) The *motives*, *reasons*, and *grounds* upon which the indictment was based cannot be availed of to invalidate it (*ante*, § 2349). This much is generally conceded.[1] But suppose that there is a limitation of the grand jury's sources of investigation in the shape of a rule that they may receive only such kinds of evidence as would be receivable on a trial before a petit jury. Such a rule is a plain obstruction of justice, reprehensible in policy. But if it exists, it logically obliges the Court to permit the indictment to be invalidated by the fact of the jury's reception of illegal evidence. In an ordinary trial, the record of proceedings, containing the exceptions, furnishes the means of establishing the fact, and the fact, when established, may be used to invalidate the verdict. But in the grand jury's proceedings, if the rule is to be enforced at all, as it is for petit juries, the fact must be allowed to be shown by the grand jurors or others present. If, then, any community is willing to accept so deleterious a rule of criminal procedure, its enforcement in the only feasible way must be permitted by showing the facts.[2] Upon the recognition of such a rule the various jurisdictions are divided.[3]

have not taken this oath," not permitted); 1895, Jenkins *v.* State, 35 Fla. 737, 18 So. 182 (State's attorney); 1836, McLellan *v.* Richardson, 13 Me. 82, 86 (county attorney); 1899, People *v.* Thompson, 122 Mich. 411, 81 N. W. 344 (prosecuting attorney's stipulation as to testimony, not admitted on plea of abatement to indictment); 1839, Clark *v.* Field, 12 Vt. 485 (State's attorney). *Contra*, but unsound: 1877, State *v.* Van Buskirk, 59 Ind. 384, 388 (prosecuting attorney held not subject to the grand jurors' rule, because he "is not bound by any such oath of secrecy"; yet here, where he was allowed to impeach a witness, a juror would equally have been allowed); 1874, Little *v.* Com., 25 Gratt. 921, 931 (third person present).

[1] 1902, Hall *v.* State, 134 Ala. 90, 32 So. 750 (jurors' testimony not admissible to show that the grand jury were brought to find a true bill only after several contrary votings, followed by repeated urgings of the prosecuting attorney and the judge); 1895, Owens *v.* Owens, 81 Md. 518, 32 Atl. 247 (inquiry of the foreman of a grand jury why a bill was dismissed, not allowed); 1847, People *v.* Hulbut, 4 Denio 133 (illegal liquor-selling, on an indictment in five counts charging five offences; grand jurors not allowed to testify that only one offence was testified to before them, mainly on the theory that the indictment "like other records, imports absolute verity," and cannot be disputed "unless it be done upon motion" to quash or to strike out counts).

In Pennsylvania an unwise rule as to the jury's methods of investigation has led naturally to a variation from the present principle: 1889, Com. *v.* Green, 126 Pa. 531, 17 Atl. 878 (grand juror's testimony admitted, on a motion for quashing the indictment, to show that the indictment was founded on testimony of witnesses and not on their own "knowledge and observation," a procedure which under the local law was forbidden and constituted "a breach of privilege on the part of the grand jury").

[2] 1881, U. S. *v.* Farrington, 5 Fed. 343, Wallace, J. (for quashing an indictment, the proceedings may be inquired into with reference to the sufficiency or legality of the evidence; "whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations").

[3] See the following typical cases: 1871, State *v.* Beebe, 17 Minn. 241; 1871, U. S. *v.* Brown, 1 Sawyer 531; 1902, State *v.* Comer, 157 Ind. 611, 62 N. E. 452.

(*b*) Where the question is as to the *issues* covered by the indictment (as when a former conviction for the same offence is pleaded), it may be necessary to ascertain the precise charge made by the testimony before the grand jury, so as to define the charge covered by the indictment. This is permissible on the general principle (*ante*, § 2351).[4]

(*c*) Where the *misconduct* of the jurors, or the *irregularity* of their proceedings, constitutes by the law of criminal procedure a ground for invalidating the indictment, the fact may properly be proved by the testimony of a grand juror, on the general principle (*ante*, § 2352);[5] though a Court acknowledging the rule against a petit juror's impeaching his own misconduct should equally apply it here.

(*d*) That *less than the required number assented* to the verdict of a petit jury cannot be shown (*ante*, § 2355). Does the same consequence follow for a grand jury's indictment? For the petit jurors, the reason is that their outward assent, express or implied, at the time of polling, is the sole effective conduct constituting assent. This act of assent is in reality individual as well as joint, whether there is an individual polling or not. But the grand jurors are not polled; nor do they individually subscribe the indictment; nor is the tenor of each indictment brought home to them individually by public reading, as is that of a petit jury's verdict. There is, to be sure, some opportunity of dissent, but hardly a practical one. There is no formal outward act of assent in the sense in which there clearly is for petit jurors. Virtually, then, the time of the act of assent is carried back to the time of voting in the jury room. It is therefore consistent with principle to allow the absence of such assent by the requisite number to be shown.[6] Some Courts are found to maintain the opposite view, following the analogy of a petit jury's verdict.[7] So long as the present procedure is followed, the former view seems inevitably sound. But the proper course would be to poll the grand jurors upon each indictment after the manner of a petit jury, and thus to satisfy the requirements of principle, for it is undeniably poor policy to hold out any inducement (as the present rule does) to ferret among the grand jurors and ascertain the tenor of their votes, and to make necessary the quashing of an indictment which ought never to have been received in the beginning.

[4] 1859, Rocco *v.* State, 37 Miss. 357, 369 (on a plea of former conviction for the same offence of illegal liquor-selling, a grand juror's testimony to the parties and evidence before them on the indictment was received, applying a statute).

[5] 1858, Shattuck *v.* State, 11 Ind. 473, 477 (propriety of the indictment with reference to irregularities of proceeding before the grand jury; grand juror's testimony held admissible); 1815, U. S. *v.* Coolidge, 2 Gall. 364 (testimony of court officers that a witness before the grand jury was not duly sworn, admitted).

[6] The leading opinion, fully expounding the principle and policy, is found in Low's Case, 4 Me. 439 (1827). To this add the following: 1888, State *v.* Coffee, 56 Conn. 410, 16 Atl. 151 (suggested as "one possible exception"); 1878, People *v.* Shattuck, 6 Abb. N. C. 33 (on a motion to quash, the number of votes may be shown).

[7] 1702, Colonel Bayard's Trial, 14 How. St. Tr. 478, New York (here the counsel for the defendant makes a good argument); 1878, Spigener *v.* State, 62 Ala. 383, 386 (neither jurors' testimony, nor that of others, admitted to show that less than twelve jurors assented to the bill; good opinion by Stone, J.); 1902, Hall *v.* State, 134 id. 90, 32 So. 750 (like Spigener *v.* State, *supra*); 1867, State *v.* Oxford, 30 Tex. 428 (that an indictment was not found by the requisite twelve can be shown only by the records of the court, and not by the testimony of the jurors; "our Code but follows the principles of the common law").

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC V: STATE SECRETS AND OFFICIAL DOCUMENTS.

CHAPTER LXXXIII.

§ 2367. **Several Principles discriminated.** The principle of privilege which protects from disclosure, through the testimony of governmental officers, the secrets of State and communications of informers to official prosecutors, is in practice superficially related to certain other principles, not resting upon testimonial privilege in general or upon this kind of privilege in particular. In order to discriminate the precise scope of these different principles, it is necessary to consider them together here. The necessity is the greater because some of them, being plainly valid, have in some courts been misused to give an unwarrantable scope to the present privileges for State secrets and informers' communications. By comparing their boundaries, the true and limited scope of the testimonial privileges can best be understood.

There are, then, seven distinct principles which in superficial features tend often to be counfounded. (*a*) There is a doctrine of the *substantive law*, that the chief Executive and subordinate executive officers are in some respects *exempt from liability for torts* of violence and defamation. (*b*) There is a question of *constitutional law*, whether the chief Executive is corporally *exempt from the legal process of the Judiciary* for any purpose whatever. (*c*) There is a question of *testimonial privilege* at large, whether the Executive is exempted from the ordinary *duty to give testimony;* this is usually united with the preceding question, yet is distinct in theory. (*d*) There is a question of *testimonial privilege of attendance in court*, whether executive and other officers are exempted from the general duty to attend, though still liable testimonially to give evidence by deposition while remaining at their offices. (*e*) There is a doctrine, analogous to the foregoing privilege, that *official records are irremovable* and cannot be required to be taken, in the original, from their place of official custody to the court-room. (*f*) There is a genuine *communications-privilege*, permitting secrecy for communications by *informers to official prosecutors*. (*g*) There is a genuine *topical privilege* for facts constituting *secrets of State*, and this, by improper exten-

sion, has often been made to include a bastard *communications-privilege* for *communications between officials of the government.*

These various doctrines may now be examined in the above order.

§ 2368. (*a*) **Tortious Non-Liability of the Executive.** The chief Executive and subordinate executive officers have unquestionably some exemptions from liability for harm done in the course of their official acts. A sheriff, for example, is not liable for the death of a person hanged by him in pursuance to a lawful order of execution. In general, two classes of officials are distinguished in applying this principle. A subordinate or ministerial official, *i. e.* one who acts under the orders of a superior official, is absolutely exempted from liability if the harm done by him is done solely in the implicit obedience of an order lawful upon its face; conversely, he is not exempt, if he varies from the order, though in good faith. A superior official, *i. e.* one who is given by the law a discretionary authority and exercises his judgment independently and without looking higher for orders, is exempted from liability, because the nature of his responsibility requires that he should exercise his judgment free from apprehension of the harassment of subsequent litigation. Some Courts exempt such an official only when he has acted in good faith; but sound policy requires an absolute exemption, not in order to protect the malicious official, but in order that the upright official may be exempted from the burden of defending himself from a charge of malice. In the following passage this doctrine is exemplified:

1888, Chief Justice *Cooley*, Torts, 2d ed., * 376: "If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the State which the Legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The Legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. . . . If we take next the case of executive officers, the rule will be found to be the same. The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The Executive in these particulars exercises his discretion, and he is not responsible to the Courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent. Taking next the case of the judicial department, the same rule still applies. For mere neglect in judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. . . . For all duties the time, manner, and extent of the per-

formance of which are left to the wisdom, integrity, and judgment of the officer himself, it is conceded that, as a general rule, the only liability of the officer is to the criminal law, in case he shall wrongfully and maliciously neglect to perform his duties, or shall perform them improperly. Duties of this nature are usually spoken of as duties in the exercise of discretionary and judicial powers, and it is deemed a conclusive answer to any private action for an injury resulting from neglect or unfaithful performance to say that where a matter is trusted to the discretion or judgment of an officer, the very nature of the authority is inconsistent with responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and then make its exercise a wrong." [1]

The foregoing principle of substantive law comes, at two points, into apparent contact with the ensuing principles here to be considered. In the first place, a chief Executive who has ordered a *trespass* — for example, a Governor who has ordered the military to fire upon a mob — may appeal to the foregoing principle to exempt him from civil or criminal liability. At the same time and in the same litigation the question may arise whether he is constitutionally subject to judicial process compelling him to appear (*post*, § 2369), and whether he is privileged from testifying at all (*post*, § 2370), and, if not, whether he is privileged from attendance at court (*post*, § 2371). All of these questions are independent of each other; yet they have sometimes been confused. In the second place, an officer who has in an official report made a *libellous statement* may appeal to the principle of substantive law to privilege him from liability. If he is thus legally exempt and pleads his exemption, no question of testimonial privilege arises. Yet some Courts have preferred to attain the same end, not by recognizing a plea of substantive law, but by declaring a privilege of testimonial secrecy (*post*, § 2375), — thus defeating the action indirectly by suppressing the means of proof. Yet the testimonial and the tortious privileges should be strictly discriminated.

§ 2369. (*b*) **Constitutional Exemption of the Executive from Judicial Process.** Whether the apportionment of functions between Executive and Judiciary, in coördinate independent supremacy, signifies that the Executive can never be corporally subjected to the compulsory process of the Judiciary, is an interesting question, but solely one of constitutional law. The distinction between this question and the foregoing one (of exemption from tortious liability) is obscured when it is sought (for example) to sue the Governor of a State for a trespass done by the military under his order and at the same time to summon or to enjoin him by subpœna or to arrest him upon execution-process. But in a suit against him after expiration of his office, his supposed exemption from judicial process has clearly disappeared, and yet a proper plea claiming exoneration from tortious liability for executive acts would present that question nakedly and plainly, and would still defeat the action.

Whether, then, he has during office, as Executive, a constitutional immunity from compulsory process, after the analogy of the sovereign of a monarchy, is a large question independent of all others. Chief Justice

[1] Compare the following opinions: 1774, Mansfield; 1841, Hill *v.* Bigge, 3 Moore P. C. Mostyn *v.* Fabrigas, Cowp. 161, 175, L. C. J. 465, 4 St. Tr. N. S. 723, Lord Brougham.

Marshall, in Aaron Burr's trial,[1] raising the question in connection with the process of subpœna, noted that "a difference of opinion may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen," but did not attempt to force the issue. Since his time, the theory has received some attention, with differing judicial views, in determining the judicial power to enforce by mandamus the performance of ministerial duties by the Executive.[2] In the following passage the principle has been convincingly expounded, in its application to testimonial process:

1877, *Agnew*, C. J., in *Hartranft's Appeal*, 85 Pa. 433, 455: "The first point to be noticed is the argument that he is exempt from a subpœna because he is a coördinate branch of the State government. What is coördination or equality of rank, under the Constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not coexist in unity, as essential parts of the same common whole. . . . From the very nature of coördination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if it can be obstructed by the other. For example, *the Judiciary cannot control or interfere with the discretion of the Governor in the exercise of an executive function.* And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the Legislative or Executive can oppose or obstruct the exercise of an appropriate judicial power the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial, and punishment of offenders against the law. On the true principles of constitutional coördination, therefore, the Governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repository of the power conferred by the people themselves. . . . The appropriate function of the Judiciary being the detection, trial, and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear that the Governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this."

§ 2370. (*c*) **Testimonial Privilege of the Executive not to be a Witness.** The public (in the words of Lord Hardwicke) has a right to every man's evidence.[1] Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief Executive of a State? There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle (*ante*, § 2192) of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption

[1] Quoted *post*, § 2371.

[2] The following authorities exhibit the arguments: 1878, People *v.* Governor, 29 Mich. 320; 1888, Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162; Merrill on Mandamus, ed. 1892, §§ 92–96.

Note that a foreign *ambassador*, as his sovereign's personal representative, and, by treaty sometimes, a *consul* also, is exempt from process: *post*, § 2372.

[1] *Ante*, § 2192.

which would be irrespective of the nature of the person's knowledge and would rest wholly on the nature of the person's occupation. This duty, and its equal application to the Executive and subordinate officers, has perhaps never been doubted. But it tends to become confused with three other distinct principles.

In the first place, the amenability of the Executive to *compulsory process* (just examined) is a different question. It may be held that the person is thus exempt, and yet that the duty exists. That the enforcement of it is constitutionally impossible is still consistent with its existence. Indeed, the specific or direct enforcement of it is never possible, for if a subpœnaed witness be willing to lie in jail perpetually for contempt, no judicial power can actually effect any testimonial utterance. Neither the corporal nor the constitutional impossibility of enforcing the performance of the duty prevents us from recognizing and declaring its existence. Such, in effect, was the attitude of Chief Justice Marshall and Chancellor Zabriskie in their dealings with this problem. Such is presumably the attitude of the Department of State in its definition of a consul's duty, under a treaty expressly exempting consuls from compulsory process but not exempting them from testimonial duties.[2]

In the second place, this testimonial duty to disclose one's knowledge may coexist with exemption from *attendance in court* as a witness, — the duty to testify (*ante*, § 2192) and the duty to attend for the purpose of testifying (*ante*, § 2204) being plainly separable. The official's exemption from attendance is later examined (*post*, § 2371).

In the third place, this general testimonial duty of disclosure is compatible with definite exceptions to it for certain *official topics*, upon which secrecy may be preserved. The scope of this exception, by way of testimonial privilege, is elsewhere examined (*post*, §§ 2174–2176).

Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations. The exemptions that exist are defined by other principles.

§ 2371. (*d*) **Testimonial Privilege of the Executive and Subordinate Officers, not to attend Court.** That an exemption from attendance in court may be sometimes properly recognized has already been noticed in its general principle (*ante*, § 2204). This exemption is conceded sometimes on the ground of illness, sometimes on the ground of the excessive inconvenience of travelling a long distance (*ante*, §§ 2205–2207). Whenever it applies, the testimonial duty at large — *i. e.* to disclose one's evidential knowledge — nevertheless continues, and may be exacted and performed by the taking of a deposition, which is then admissible on the ground of necessity (*ante*, §§ 1401–1418), instead of oral testimony.

The question now is whether the requirements of official business, demanding continual presence at the seat of office, bring within this principle

[2] *Post*, § 2372.

the chief Executive or subordinate executive officers. That the principle does apply to exempt them, within certain limits, cannot be doubted. Such an exemption was at common law in England conceded to the monarch, though to no other person;[1] and the dignity of the position seems here to have been a sufficient reason (apart from the monarch's immunity from compulsory process). In the United States the exemption must be placed upon grounds of public convenience, — a more inclusive consideration. In Chief Justice Marshall's notable exposition of the principle, it will be observed that his concession of this mere exemption from attendance does not involve any concession of an exemption from the Executive's general testimonial duty to furnish evidence or of a judicial inability to enforce the performance of that duty:

1807, *Aaron Burr's Trial*, Robertson's Rep., I, 121, 127 ff., 136, 181, 255, on motion for a *subpœna duces tecum* to the President of the United States to attend and bring certain correspondence with General Wilkinson, material to aid the defence, the counsel for the prosecution did not deny that the President was "as amenable to that process as any other citizen," but claimed that "if his public functions disable him from obeying the process, that would be a satisfactory excuse *pro hac vice*," and that the papers here asked for were State secrets and irrelevant; in granting the motion, and holding the papers relevant and not State secrets, the general principle of the President's amenability to process *ad testificandum* was thus expounded by *Marshall*, C. J.: "The exceptions [to the accused's right to process] furnished by the law of evidence, with one reservation, so far as they are personal, are of those [persons] only whose testimony could not be received. The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the Court. Of the many points of difference which exist between the First Magistrate in England and the First Magistrate in the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the Court will only mention two. (1) It is a principle of the English Constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the Constitution of the United States, the President, as well as every other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. (2) By the Constitution of Great Britain the crown is hereditary, and the monarch can never be a subject. By that of the United States, the President is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every one. In this respect, the First Magistrate of the Union may more properly be likened to the first magistrate of a

[1] 1613, Countess of Shrewsbury's Case, 12 Co. Rep. 94 (before a Council including the Chancellor, Chief Justices, and Chief Baron; the Countess being required to declare her knowledge concerning Lady Arabella Stuart's escape, declined, for one reason, on the ground of her "privilege of nobility, *sc.*, to answer only when she was called judicially before her peers"; the Council denied that nobility had "such privilege as is alledged," and the liability of a peer to be examined in Chancery, common-law Courts, and the Star-Chamber, was pointed out); 1854, Parke, B., in Attorney-General *v.* Radloff, 10 Exch. 84, 94 ("It is clear that the Sovereign cannot be a witness, because there is no means of compelling her attendance"); 1861, Willes, J., in *Ex parte* Fernandez, 10 C. B. N. S. 3, 39 ("Every person in the kingdom, except the sovereign," is bound to give evidence). In L. C. J. Campbell's Lives of the Chancellors, III, 215, 4th ed., the learned author sets forth the authorities. Compare also the cases cited *ante*, § 1674 (certificate of the King).

In Lady Daburgaveny's Case, cited 6 Co. Rep. 53 *a*, it would seem that there had been a ruling that peers were not subject to examination upon oath, at least as *parties in wager of law*. Distinguish also the question whether a peer was obliged to take an *oath* or could merely affirm (*ante*, § 1825).

State, — at any rate, under the former Confederation ; and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum*. If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this Court. If upon any principle the President could be construed to stand exempt from the general provisions of the Constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting ; and, if it should exist at the time when his attendance on a court is required, it would be sworn on the return of the subpœna, and would rather constitute a reason for not obeying the process of the Court than a reason against its being issued. In point of fact, it cannot be doubted that the people of England have the same interest in the service of the executive government — that is, of the cabinet council — that the American people have in the service of the Executive of the United States, and that their duties are as arduous and as unremitting; yet it has never been alleged that a subpœna might not be directed to them. It cannot be denied that to issue a subpœna to a person filling the exalted station of the Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpœna may issue to the President, the accused is entitled to it of course ; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpœnas is to be looked for in the conduct of a Court after those subpœnas have issued, — not in any circumstance which is to precede their being issued." To this subpœna, President *Jefferson* responded, without attendance, by a letter to the prosecuting counsel, in which he offered to be examined at Washington by deposition, but explained his non-attendance at Court as follows : " As to our personal attendance at Richmond, I am persuaded the Court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case; as it would, should we receive a similar one to attend the trials of Blennerhasset and others [co-conspirators] in Mississippi Territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the Constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any coördinate authority."

1871, *Zabriskie*, C., in *Thompson* v. *R. Co.*, 22 N. J. Eq. 111, 113 : " The subpœna was directed to the Governor by his individual name, and not as Governor. Every person, whatever his office or dignity, is bound to appear and testify in courts of law when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of the government may be, and in many cases are, a sufficient excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse, and whether the official engagements are sufficient must be determined from the circumstances of each case. . . . There is no reason why the Governor should not be called upon to testify as to the time when the engrossed bill was delivered to him. . . . But I will make no order on him for that purpose. . . . Such order ought not to be made against the Executive of the State, because it might bring the Executive in conflict with the Judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the Court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an order; and in his case, the Court would hardly entertain proceedings to compel him by adjudging him in contempt. . . . If the Governor, without sufficient or lawful reasons, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal."

That this exemption from attendance exists for the chief Executive of a State cannot be doubted. Perhaps also it exists for members of Congress during sessions. Whether it exists for subordinate executive officials may be doubted.[2] By statute, in a few jurisdictions, specific officials have been exempted, — presumably those whose official duties are most likely to be seriously interfered with by frequent calls for attendance to give evidence.[3]

That the Court should determine whether a proper excuse exists in each case seems the sounder rule, for the reasons elsewhere noted (*post*, § 2376), though they do not apply as strongly to this exemption; and Chief Justice Marshall apparently reserves this power. But no decisive judicial opinion has here been expressed.[4] For any officer other than the chief Executive, it seems hard to believe that a Court would abdicate its normal authority to determine all questions of privilege.

[2] In the following rulings, the distinctions of §§ 2368, 2369, 2370, and 2371, *ante*, are not always observed: 1871, Thompson *v.* R. Co., 22 N. J. Eq. 111 (a Governor is liable to attend; but no process of compulsion will issue; quoted *supra*); 1815, Gray *v.* Pentland, 2 S. & R. 23, 28, 32 (whether a Governor is compellable on subpœna *d. t.* to attend and produce a paper in his official custody, not decided); 1877, Hartranft's Appeal, 85 Pa. 433 (grand jury's subpœna to the Governor and other officers, to attend and testify as to a riot; on a written answer alleging that public duties elsewhere prevented their attendance, an attachment was refused, partly on the ground that the Governor could not be summoned, partly on the principle of Thompson *v.* R. Co., *supra*; the opinion is confused; Agnew, C. J., and Sterrett, J., diss.); 1800, U. S. *v.* Cooper, Whart. St. Tr. 659, 660 (Peters, J., acceded to a request to address a letter to the Speaker requesting him to have process served on a member of Congress; but Chase, J., refused, and "ordered process without such letter," but declared that if compulsion became necessary he would continue the case till the session of Congress was over; ultimately the attendance appeared to have taken place by waiver; Peters and Chase, JJ., "refused to permit a subpœna to issue directed to the President of the United States"; no reasons were given); 1803, Marbury *v.* Madison, 1 Cr. 137, 142, 144 (clerks of the department of State, and the Attorney-General, held liable to attend on a subpœna); 1806, Smith's and Ogden's Trial, Lloyd's Rep. 2, 7, 13, 89 (a subpœna having issued for James Madison and two other heads of Federal departments, who responded that the President had signified to them that their "official duties cannot at this juncture be dispensed with," the Court of two judges divided, without reasons given, as to issuing an attachment); 1807, Burr's Trial, Robertson's Rep. I, 121 (quoted *supra*).

[3] *Can.*: *B. C.* St. 1899, c. 62, § 22 (no land registrar need attend as a witness, but may be examined on commission); *Man.* Rev. St. 1902, c. 148, § 21 (a district registrar of land titles need not attend as witness without the town, except after certain notice); *U. S.*: *Ida.* St. 1899, Feb. 10, § 6 (attendance "cannot be enforced" of a "State or county officer or judge" at a trial in other than the county of residence); *Ind.* Rev. St. 1897, § 432 (a State or county officer, judge, practising physician, or attorney-at-law, cannot be compelled to attend); *Ky.* Stats. 1899, § 235 (commissioners, officers, and servants, of State charitable institutions may testify at trials without the county by deposition, without attendance); *Tenn.* Code 1896, §§ 5624, 5628 (privileged not to attend Court are the following: an officer of U. S., an officer of this State or of a county, a clerk of another Court of record, a member of General Assembly in session or clerk or officer thereof, a practising physician or attorney, a jailer or prison-keeper of another county); *Va.* Code 1887, § 413 (no officer or employee of the treasurer, auditor, or second auditor is compellable to leave his office to testify as to the genuineness of coupon tendered in payment of State dues); *Wash.* C. & Stats. 1897, § 2658 (a superintendent of a State insane hospital is not required to attend as witness in a civil suit; nor in a criminal case, unless the judge of the court of trial shall require his attendance "upon being satisfied of the materiality of his testimony"); *Wis.* Stats. 1898, § 582 (a superintendent of a State insane hospital is not compellable to attend, except on certain specified conditions).

Add also the statutes exempting *custodians of official records*, *post*, § 2373. For *attorneys at law*, see *ante*, § 2206.

[4] The possibilities of abuse that lie in conceding to the officer himself the determination of the necessity are suggested in the following passage from the opinion of Agnew, C. J., in Hartranft's Appeal, cited *supra*, n. 2 (loc. cit. p. 457): "The argument *ab inconveniente* that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on the way to California, at the time of these riots, is an apposite example."

§ 2372. **Same: Ambassadors, Consuls, Judges.** (1) An *ambassador*, being the personal representative of the foreign sovereign, is concededly immune from compulsory process; but this immunity rests also on a sound public policy, and is therefore by common custom of international law extended to *ministers* and (to some indefinite extent) to the persons of their official households. As a practical consequence, such officers are also exempt from attendance in court as witnesses.[1]

(2) A *consul*, not being a diplomatic officer, does not by common custom of international law possess this immunity from compulsory process. But by treaty it has in many instances been expressly conceded.[2] Distinguish, however, first, this exemption from process or attendance and the duty to furnish evidence; for the two may properly coexist, and are recognized as coexistent for consuls abroad in the instructions of the Department of State;[3]

[1] 1663, Earl of Clarendon's Trial, 6 How. St. Tr. 291, 340 (the House discussing the sources of certain information, it was objected, "possibly a foreign ambassador, and no oath can be given him"); 1856, Dubois' Case, Wharton, Digest of International Law, I, 668, Lawrence's Wheaton's International Law, 393, Dana's Wheaton, § 226, note 129 (the Netherlands minister held exempt from summons; see Sen. Exec. Doc. 21, 34th Cong. 3d Sess.); 1881, Guiteau's Trial, I, 136 (Sr. Camacho, the Venezuelan minister, testified to what he saw of the murder; and the District Attorney announced that, although the minister was "entitled under the law governing diplomatic relations to be relieved from service by subpœna or sworn as a witness in any case," yet his Government had "instructed him to waive his rights").

For the admissibility, under the Hearsay rule, of an *ambassador's deposition*, see *ante*, §§ 1384, 1407.

[2] 1854, *Re* Dillon, 7 Sawyer 561 (the consul of France was summoned by subpœna *d. t.* in favor of a defendant in a criminal case; the treaty of 1853 with France, art. 2, provided for immunity of consuls from appearance in court as witnesses; held, that the constitutional provision entitling an accused to compulsory process did not override the treaty provision, the Constitution having given merely the same right to process which had before existed for the prosecution only, and therefore having given it subject to the established exemption for foreign ambassadors; and the subsequent addition of consuls to the exempt class, by treaty, was no new exemption but merely an enlargement of the class already exempt; official documents in a cousular office were held privileged, here under express provision of the treaty of 1853 with France; the party summoning must show that the desired document is not an official one); 1854, Dillon's Case, Wharton's Digest of International Law, I, 665 (Mr. Marcy, Secretary of State, opposed the privilege in the preceding case, on the ground that the constitutional right was subject to such exemptions only as existed specifically at the Constitution's adoption, and the treaty exemptions of consuls were thus not included); 1855, Portuguese Consul's Case, Wharton, *supra*, I, 775 (a Portuguese consul, assuming that the most-favored-nation clause gives him the French treaty-privileges, is exempted from process as a witness, except when required by an accused in a criminal case; per Marcy, Secretary); 1862, Hanoverian Consul's Case, Wharton, *supra*, I, 776 (a trading consul of Hanover held not exempt; per Seward, Secretary; no reason stated); 1867, Janssen's Case, Wharton, *supra*, I, 777, Sen. Ex. Doc. 1, spec. sess. 1867 (consul's exequator may be revoked for failure to obey summons, when he is not privileged by treaty); 1891, U. S. *v.* Trumbull, 48 Fed. 94 (the Chilian vice-consul, under the existing treaty with Chili, which by the most-favored-nation clause secured the immunity for consuls under the treaty of 1853 with France, held exempt from compulsory process as witness on behalf of the prosecution; the constitutional guarantee invoked in Dillon's case not being applicable; here the testimony was asked against persons charged with violating the neutrality laws by aiding the insurrectionary party which by the time of the trial had become the lawful Government represented by the witness); 1894, Mason's Case, U. S. For. Rel. 1899, p. 304 (U. S. consul in Germany summoned; held, not privileged, unless by the most-favored-nation clause of Treaty 1871, art. V, the U. S. obtains the benefit of other treaties by Germany); 1899, Guenther's Case, ib. 302 (similar); 1899, Clancy's Case, ib. 566, 583 (similar; Nicaragua treaty of 1867, art. X, applied; but "information which came to him in his official capacity" is privileged); 1899, Baiz *v.* Malo, 27 N. Y. Miscell. 685 (under treaties with Colombia giving most-favored-nation privileges, the French treaty-provision with the United States applies and exempts consuls from attendance); 1900, Bruni's Case, U. S. For. Rel. 1900, p. 705 ("a consul engaged in business [in Guatemala] is amenable to summons, etc., only for causes apart from his official functions; he cannot be summoned to give evidence of any matter of his consular business, nor to produce to the Court any part of the consular archives").

[3] See the cases *infra*, note 4.

secondly, a genuine privilege of secrecy (even where no exemption from attendance exists by treaty) for the official archives of the consulate[4] and the official facts known to the consul;[5] for the privilege for secrets of State (*post*, § 2375) may well be deemed to apply (in the absence of international courts of justice) to all matters of international concern.

(3) A *judge* of a superior court seems to have been regarded as exempt from attendance at common law.[6] But the exemption cannot be put upon any broader ground, so as to negative either the general duty to furnish evidence (*ante*, § 2270) or the amenability to compulsory process (*ante*, § 2371). Whether, on grounds other than privilege, a judge should be prohibited (not merely exempted) from testifying in the very cause over which he is presiding, is a distinct question, elsewhere examined (*ante*, § 1909).

§ 2373. (*e*) **Irremovability of Official Records.** On the general principle of the public inconvenience and danger involved in removing official records from their usual place of custody (*ante*, § 2182), the Court may refuse to compel the production of the originals in evidence:

[4] 1894, Mason's Case, U. S. For. Rel. 1899, p. 304 (charges of under-valuation filed in U. S. consul's office in Germany; treaty provision of 1871, art. V, that consular archives shall be inviolable, applied); 1899, Guenther's Case, U. S. For. Rel. 1899, p. 302 (similar); 1899, Clancy's Case, ib. p. 566, 583 (similar; U. S. consul in Nicaragua; consular archives held inviolable, irrespective of treaties; but "personal books and papers of the counsel" are not privileged); 1900, Bruni's Case, U. S. For. Rel. 1900, p. 705 (quoted *supra*); 1903, Kessler *v.* Best, C. C., 121 Fed. 439 (documents being "part of the archives of the German consulate," privileged; no authority cited).

[5] Clancy's Case, Bruni's Case, *supra*.

[6] 1620, Declaration of Grievances, Cobbett's Parl. Hist. 1, 1206 (the Lords having sent for several members of the Commons to testify in the investigation into abuses of royal patents, it was objected in the Commons that the members were virtually judges upon the grievances, and therefore not liable to be sworn; Sir E. Coke arguing that "the judges of the Common Pleas, or of any court, are never sworn as witnesses in any case, albeit they know of something concerning it and can testify in it; but if their knowledge be asked, they answer it without an oath; that no judge of the Star Chamber can be served with a subpœna *ad testificandum* in that court"; but finally the members volunteered their oaths out of courtesy); 1692, Knowles' Trial, 12 How. St. Tr. 1179 ff. (Holt, C. J., and Eyre, J., having quashed an indictment against a person claiming to be a peer, were summoned before the House of Lords to explain their reasons, the proceeding being by express vote not regarded as charging them, but only for information; they declined to make any explanation at that place, as being privileged); 1838, R. *v.* Gazard, 8 C. & P. 595 (perjury; the grand jury inquired whether they "ought to examine" the chairman of the quarter sessions to prove the testimony, the chairman "having expressed a desire not to be examined as a witness"; Patteson, J.: "It is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court"; an *amicus curiæ* having referred to a contrary instance, Patteson, J., replied: "I think it is wrong, and that it ought not to be done"); 1858, R. *v.* Harvey, 8 Cox Cr. 99, 103 (Byles, J., said that he should refuse to appear if subpœnaed to produce his notes of testimony, but that the rule did not apply to inferior magistrates); 1880, Anon., 24 Sol. J. 398 (master of the Supreme Court, summoned to prove testimony before him on a charge of perjury; objection waived); Tex. C. Cr. P. 1895, § 779 ("When it is proposed to offer the testimony of a judge in a cause pending before him, he is not required to testify if he declares that there is no fact within his knowledge important in the cause"). The admissibility of a *judge's notes*, under the Hearsay rule, is still another question: *ante*, § 1666.

It was at one time thought that an *arbitrator* had some such privilege: 1808, Ellis *v.* Saltau, 4 C. & P. 327, note (an arbitrator being called to prove that he had exceeded the limits of his submission, "Mansfield, C. J., told the witness that he need not be examined unless he chose it, thinking that an arbitrator was not to be afterwards worried as a witness"). But this notion was entirely unfounded. It is now thoroughly understood that an arbitrator is not, by reason of that office, either disqualified or privileged (*ante*, § 1912); and that the only prohibitions applicable concern the facts which may be proved as to his award, these facts being determined by the principles of the parol-evidence rule as applied to awards (*ante*, § 2358).

1794, *Per Curiam*, in *Delaney* v. *Philadelphia*, 1 Yeates 403 (refusing a subpœna *d. t.* against the surveyor-general): "We ought not to issue a subpœna with such a clause in the present instance; otherwise the surveyor-general, or any other public officer, might be obliged to take any original public papers from his office to the farthest counties in the State, and the same papers might be demanded in different counties at the same time."[1]

This rule of the common law has been supplemented in some jurisdictions by express statutes.[2]

Distinguish, however, (1) the *illegality* of removing such records; for this of itself is no ground for refusing to receive them (*ante*, § 2183); (2) the propriety of receiving an *original* always, in preference to a copy; for, apart from the prohibition of the present rule (which leaves much to the Court's discretion) the original of a document is always receivable (*ante*, § 1186);

[1] *Accord: England:* 1788, R. v. King, 2 T. R. 234 (application for an information against assessing-officers; the rule that, in granting an information against magistrates for misconduct, there should be a production of their proceedings before the Court was conceded; but, by exception, on the score of "public inconvenience," the order to bring the assessment books by *certiorari* was quashed; "every person is entitled to take copies, so that no injury can arise to the party from our refusing a *certiorari*; but on the contrary very great public inconvenience would ensue from permitting it to issue"); 1788, Atherfold v. Beard, 2 T. R. 610 (action on a wager as to the collection of taxes; revenue officers treated as not bound to produce the public books, chiefly on the ground of inconvenience); *United States:* 1887, Stevenson v. Moody, 85 Ala. 33, 35, 4 So. 595 ("except in special cases," a public record's original cannot be required for production; here said of probate record-book); 1886, *Re* Lester, 77 Ga. 143 (a mayor, who was *ex officio* the presiding judge of a Court of record; held not subject to subpœna *d. t.* to bring his docket to be used as evidence); 1870, Dunham v. Chicago, 55 Ill. 357 ("books and documents, public records, in the custody of public officers"; the Court has power to order production, but will not do so where certified copies will answer as well; "public convenience and safety" being the reason); 1901 Delaware Surety Co. v. Layton, — N. J. Eq. — 50 Atl. 378 (Secretary of State enjoined from removing official documents out of the State); 1832, Peney v. Gilliland, Wright Oh. 38 (justice's docket; "strong circumstances must be shown to induce a Court to order the removal of the book"); 1794, Delaney v. Philadelphia, 1 Yeates 403 (subpœna *d. t.* to the surveyor-general to bring official papers, refused; quoted *supra*); 1840, Devling v. Williamson, 9 Watts 311, 317 ("To permit a person other than [the custodian] . . . to take them [out of the office] is a most dangerous and pernicious practice"; they should be taken out only by a custodian upon *subpœna* or special order); 1879, Corbett v. Gibson, 16 Blatchf. 334 (production of official documents in custody of a major-general, not required, since copies could be obtained and used).

In a few cases the Court has exercised its power to require production: 1815, Treasurer v. Moore, 3 Brev. 550 ("A sheriff's books are public property, and whoever may be in possession of them is bound to produce them when called for by legal authority, even though as evidence against himself"); 1856, Bashford v. Barstow, Wis., Pamph. Rep. p. 289 (the Court required the Secretary of State to bring original election returns, bearing evidence of forgery, from another room in the same building).

[2] *Cal.* C. C. P. 1872, § 1950 (no record of any sort of which a transcript is receivable may be removed from the office of custody, except on order of Court "in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office"); *Kan.* Gen. St. 1897, c. 97, § 2 ("no public officer herein named," viz., a probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or other public officer, or "other custodian of public records shall be compelled to attend any court, officer, or tribunal sitting more than one mile from his office" with the records in his custody); *N. Y.* C. C. P. 1877, § 866, Laws 1895, c. 946 (regulation of the use of records, by a qualified prohibition of removal); *Oh.* Rev. St. 1898, § 5250 (the custodian of irremovable official documents is not compellable to attend, on certain conditions); *Okl.* Stats. 1893, § 4278 (no public officer or other custodian of public records is to be compelled to attend with official records "more than one mile from his office"); *Pa.* St. 1823, Pub. L. 233, § 1, P. & L. Dig., Evidence, 29 (documents in the offices of the secretaries of the Commonwealth and of the land-office, of the surveyor-general, auditor-general, and State treasurer, are producible on proper process); *Wash.* C. & Stats. 1897, § 5996 ("no public officer having the possession or control of public records or papers which are required by law to be kept in any particular office or place shall be compelled to produce the same").

(3) the admissibility of *copies*, whenever the original is not removable; for this raises the question whether a specific kind of record is required to be produced in the original (*ante*, § 1218); the few instances of such required production — for example, on a plea of *nul tiel record* — are thereby made exceptions to the present rule.

§ 2374. (*f*) **Privilege for Communications by Informers to Official Prosecutors.** A genuine privilege for communications, on the fundamental principle of privilege (*ante*, § 2285), must be recognized for the communications made by informers to official prosecutors, because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out immunity from a compulsory disclosure of the informant's identity:

1794, *Hardy's Trial*, 24 How. St. Tr. 8; the witness had reported the existence and doings of secret political societies: "I did not do it of myself, but by advice; a gentleman recommended me by all means to make a report. It was not to a magistrate"; Mr. *Erskine:* "Then to whom was it?" Objection was made. "I submit he must state the name of the person to whom he communicated it; then have I not a right to subpœna that person? I will then ask [this witness], When did you tell it him? At what place? Who were present? Then I ask that person, Is it true? . . . And if he were to say, I never saw his face [the witness'] till I saw him in court, would not that shake the credit of the witness with any man of understanding? I apprehend it would." Mr. *Attorney-General* [opposing]: "What is the principle upon which the Court says, You shall never ask where he got that information? . . . A court of justice does not sit to catch the little whispers or the huzzas of popularity; it proceeds upon great principles of general justice. It says that individuals must suffer inconveniences rather than great public mischief should be incurred; and it says that if men's names are to be mentioned who interpose in situations of this kind, the consequence must be that great crimes will be passed over without any information being offered about them, or without persons taking that part which is always a disagreeable part to take but which at the same time it is necessary should be taken for the interest of the public. . . . Nobody will deny but that it is a hard case; but it has become a settled rule, because private mischief gives way to public convenience"; *Eyre*, L. C. J.: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not unnecessarily be disclosed. . . . [As to (1) the person reported to,] I cannot satisfy myself that there is any substantial distinction between the case of this man's going to a justice of the peace or going to a magistrate superior to a justice of the peace, or to some other person who communicated with a justice of the peace. . . . [As to (2) the person above advising a report,] I am of opinion the principle extends to that question, because the disclosing who the friend was that advised him to go to a magistrate is a thing which puts that friend in a situation into which he ought not to be put, and into which it is inconvenient to general justice that he should be put. . . . My apprehension is that, among those questions which are not permitted to be asked, are all those questions which tend to the discovery of the channels by whom the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make a disclosure than it is to whom he made the disclosure in consequence of that advice, [or] than it is to ask any other question respecting the channel of communication or all that was done under it"; *Buller*, J.: "My lord chief

justice and my lord chief baron both say the principle is that the discovery is necessary for the purpose of obtaining public justice; and if you call for the name of informer in such cases, no man will make a discovery, and public justice will be defeated. Upon that ground, therefore, it is that the informer for the purpose of a public prosecution shall not be disclosed."

1888, *Parnell Commission's Proceedings*, 20th day, Times' Rep. pt. 6, p. 28; the Times had charged the Irish Land League with complicity in crime and agrarian outrage; part of its case was that, in spite of the League's avowedly peaceable purpose, there were inner circles of conspirators who used the League to advance criminal purposes; one of the police inspectors had testified that there was such an inner circle of criminals; on cross-examination he was asked by Mr. *Reid:* "You now say that you obtained this information from an informer?" *A.* "Yes." *Q.* "Give me the name of the informer." *A.* "I will not." *Q.* "I must press you." *A.* "I repeat to my Lords that I cannot do any such thing." *A. L. Smith*, J.: "I always understood that a police-constable is not bound to state the name of a person from whom he received information"; Mr. *Reid:* "We are wanting to get to the bottom of this matter. Here is a police-constable who states that the Land League has an inner circle, according to his information. I am entitled to find out who gave him the information, otherwise we are at the mercy of an anonymous informer whom we are not allowed to ascertain, whose name even we are not allowed to find out. We may be able to prove him to be the greatest liar in the three kingdoms. I submit that I am entitled to have the name." Sir *H. James* (opposing): "My lords, we have to ask you to consider the entire question. I gather we may assume that Inspector Davis has some good reason for refusing to give this information. This man's life might not be safe." President *Hannen:* "When this sort of question arose before, I suggested that the question might be asked why the witness refused to give an answer. . . . It will be for us to say whether the excuse he gives will be a sufficient reason in our opinion, and whether we should or should not exercise the power we have of calling upon the witness to answer the question."

1872, *Gray*, C. J., in *Worthington* v. *Scribner*, 109 Mass. 487, 488: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the Government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government."

This privilege is well established,[1] and its soundness cannot be questioned. But it is subject to certain limitations, inherent in its logic and its policy:

[1] *England:* 1790, R. *v.* Akers, 6 Esp. 126, note (information for obstructing a customs officer; the defendant not allowed to inquire the name of the person informing of the smuggling); 1794, Hardy's Trial, 24 How. St. Tr. 8 (quoted *supra*); 1817, R. *v.* Watson, 2 Stark. 116, 135, 32 How. St. Tr. 102 (a shorthand reporter of seditious speeches, not allowed to be asked as to delivering his notes to the Under-Secretary of State; L. C. J. Ellenborough "said that a communication to a member of the Government was a communication to Government"); 1845, R. *v.* O'Connell, 1 Cox Cr. 403, 5 State Tr. N. S. 1, 208 (a witness for the Crown was not allowed to ask "at whose suggestion" he came over to Ireland, even on cross-examination); 1845 (?), R. *v.* Candy, cited 15 M. & W. 176 (the witness was allowed to be asked whether he was the informer; Rolfe, B.: "That was tried before me; the principle was rather followed than violated by asking that question of B., because it was perfectly clear and admitted that he was the informer, and it went to exclude the notion of anybody else being an informer"); 1846, Attorney-General *v.* Briant, 15 M. & W. 169 (information for penalties; the question, "Did you give the information?" was not allowed; "in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person; . . . the

(1) The privilege applies only to the *identity* of the informant, not to the contents of his statement as such, for, by hypothesis, the contents of the communication are to be used and published in the course of prosecution. Much less does the privilege apply to prevent merely the proof of contents which have already been *de facto* disclosed, — as in an action against the informant for libel. To deny production in such a case is in effect to declare that the libel is privileged from liability. If that is indeed the judicial belief and the law, it should be frankly declared; if not, the action should not be defeated by an evasion which pretends to keep secret that which is not secret.[2]

(2) If the identity of the informer is *known and admitted*, then there is

principle of the rule applies to the case where a witness is asked if he himself is the informer"); 1848, R. *v.* O'Brien, 7 State Tr. N. S. 1, 123 (an informer was told by some one, not an official, to attend a treasonable meeting, but refused to name him on account of supposed danger of assassination; not compelled); 1888, Parnell Commission's Proceedings, 20th day, Times' Rep. pt. 6, p. 28 (quoted *supra;* another instance occurs on the 35th day, pt. 9, p. 241); 1890, Marks *v.* Beyfus, L. R. 25 Q. B. D. 494, 498 (malicious prosecution; on testimony by the director of public prosecutions that the original proceeding had been instituted by himself, he was held privileged from naming his informants or producing their written statements; following Attorney-General *v.* Briant, *supra*); *Canada:* 1884, Bradley *v.* McIntosh, 5 Ont. 227, 232 (libel; an anonymous letter sent by the defendant to the Attorney-General concerning the plaintiff was refused production by the head of the department; production not compelled); 1893, Humphrey *v.* Archibald, 20 Ont. App. 267 (police-officer sued for malicious prosecution, and refusing to disclose his informants, held privileged; "it is not the privilege of the witness, but is adopted on the grounds of public policy on account of its importance to the public"); *United States:* 1899, Smith *v.* Smith, 2 Penne. (Del.) 365, 45 Atl. 848 (communications by a citizen to a letter carrier as to addressees and other matters relating to mail delivery, not protected); 1839, State *v.* Soper, 16 Me. 293 (larceny of logs; questions as to the employees giving information to the owner, leading to a search by him, excluded on the facts; the informants being in fear of mob violence in case of disclosure); 1872, Worthington *v.* Scribner, 109 Mass. 487 (action for falsely informing the U. S. Treasury that the plaintiff was a fraudulent impostor; interrogatories to the defendant as to his giving such information, held privileged from answer; quoted *supra*); 1900, Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887 (slander; defendant's communications of his suspicions to detective officers, not admitted to show malice, because privileged; this seems unsound); 1839, Howard *v.* Thompson, 21 Wend. 319, 335 (libel, for a letter by a postmaster to the Secretary of the Treasury charging with fraud the plaintiff a customs inspector; intimated *obiter* that the letter was privileged; Gray *v.* Pentland, *infra*, approved); 1815, Gray *v.* Pentland, 2 S. & R. 23, 28, 32 (libel, for a deposition made by defendant before a justice, charging the defendant, clerk of a court, with unfitness, and forwarded to the Governor; on a subpœna *d. t.* to the Governor and Secretary, they refused to attend, and evidence of the document's contents was offered; held inadmissible, since to allow such proof "would be a check on representations to the competent authority"; this is unsound, because both the name and the contents were already disclosed); 1837, Yoter *v.* Sanno, 6 Watts 164, 166 (preceding ruling approved); 1807, Burr's Trial, Robertson's Rep., II, 508, 520, 525 (a motion was made that "a communication confidentially made to the President, respecting the conduct of certain persons holding places of trust and confidence, but who have not hitherto been prosecuted or even suspected, should be produced"; Chief Justice Marshall in this instance ordered production of the letter, because it did not appear that the President objected to production; but the Chief Justice, while recognizing a privilege, did not indicate the limits of it, nor whether it here rested on the present ground or on that of State secrecy; the arguments of counsel *pro* and *con* are useful); 1827, U. S. *v.* Moses, 4 Wash. C. C. 726 ("the officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the detection and apprehension"); 1884, Vogel *v.* Gruaz, 110 U. S. 311, 316, 4 Sup. 12 (Worthington *v.* Scribner, *supra*, followed, in holding a communication privileged when made to a State's attorney with reference to securing an indictment); 1902, King *v.* U. S., 50 C. C. A. 647, 112 Fed. 988 (answers as to an accomplice-witness' immunity from prosecution under a promise from the government attorney, held not privileged as involving State secrets); 1816, Morris *v.* Creel, 2 Va. Cas. 49 (subpœna *d. t.* upon the clerk of the Executive Council, for "a certain memorial to the Executive," submitted "for public purposes, to enable the council to determine upon the conduct of executive officers"; attachment refused, because the clerk ought not to produce without the Council's order).

[2] For this reason Gray *v.* Pentland, *supra*, seems erroneous.

reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof.[3]

(3) The privilege applies to communications to such officers only as have a *responsibility or duty* to prevent public wrongs, and not to officials in general.[4]

(4) The privilege applies only to communications concerning *third persons' misdoings.* For example, a person's own statement of his own *taxable property*[5] or his own *unfinished inventions*,[6] to the proper official, may be protected by some express statute (based, to be sure, on an analogous principle), but not as an informer's disclosure under this rule.

(5) Even where the privilege is strictly applicable, the *trial Court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony; the reasons for this qualification have been thus set forth:

1863, *R.* v. *Richardson*, 3 F. & F. 693; murder by poison; a policeman, having testified to finding poison on a search of defendant's premises in consequence of information received, refused under police regulations to give the names of his informants; *Cockburn*, C. J., "ordered him immediately to answer the question, observing that in this case it was most material to the ends of justice that it should be stated"; and it then appeared that the informants were "two girls who were not called as witnesses for the prosecution"; the Chief Justice afterwards commenting strongly on the failure to produce them; the *Reporters* add: "Though in this particular case it was not so, yet it might be in similar cases that the information was given by or derived from the really guilty party with a view to divert suspicion from himself and fix it on an innocent person; or again, it might be (and in this case it was so) that the information was derived from the accused herself and was accompanied by a statement showing her innocence. . . . The effect of applying the supposed rule in such cases, it is manifest, would be to enable prosecutors or policemen to produce such portions of evidence as they might please, and to withhold the witnesses the whole of whose evidence might demonstrate the innocence of the accused. It is extraordinary that it should ever have been supposed that (in ordinary cases at all events) there ever was such a rule; and the latest writer on the subject, Mr. Best, entirely ignores it except in political cases. And it may deserve consideration whether ever in such cases it applies where the question is asked, not merely with a view to elicit the name for purposes of observation or credit, etc., but when (as in the present instance) the party who gave the information must have been in a position to disclose something further as to the facts of the case."

[3] R. *v.* Candy, *supra*, illustrates this.

[4] Note that a communication not protected by this privilege may be protected by the privileges for communications to an *attorney* (*ante*, § 2296) or to a *grand jury* (*ante*, § 2363), and *vice versa*.

[5] 1900, *Re* Joseph Hargreaves, Limited, 1 Ch. 347 (financial misdoings of a corporation; the corporation balance-sheets, filed with the income-tax commissioner, were refused production by that officer, on the ground of public policy and also of the prohibition of disclosure in his oath required by the income-tax statute; held privileged from discovery on the facts; Wright, J.: "It seems to me it must be a matter of public concern that persons should have confidence in the secrecy of that procedure [of the Inland Revenue Board]"); 1902, Bowman *v.* Montcalm Circuit Judge, — Mich. — , 89 N. W. 334 (in a proceeding to lower an assessment, the taxpayer may not compel the disclosure of the sworn assessment-lists of other persons; the statute providing that "no such statement shall be used for any other purpose" than enforcing the act).

[6] U. S. Rev. St. 1878, § 4902 (caveat of an incomplete invention "shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof"); 1891, Edison El. L. Co. *v.* U. S. El. L. Co., 45 Fed. 55, 59 (statute held not applicable to an ordinary application pending. Compare the rulings upon *trade secrets* (*ante*, § 2212).

1890, *Lord Esher*, M. R., in *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494, 498: "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail." [7]

§ 2375. (*g*) **Privilege for Secrets of State and Official Communications.** What, then, yet remains, in the shape of official privilege? Eliminating the foregoing principles, is there still a genuine testimonial privilege which is to protect public officers from the disclosure of certain kinds of facts or communications received through their official duties? Some such privilege undoubtedly exists. But the scope of that privilege has not yet been defined with certainty.

So far as the tenor of the precedents has gone, they may be grouped into several classes. First, several rulings (all of them in England), in actions against an official for *defamation* contained *in an official report*, privilege the defendant from producing the defamatory writing, *i. e.* practically accord to him an exoneration from liability by refusing the means of proof.[1] Next,

[7] 1893, Burton, J., in Humphrey *v.* Archibald, 20 Ont. App. 267, 269 (similar to Marks *v.* Beyfus, *supra*).

[1] 1816, Wyatt *v.* Gore, Holt 299, 302 (libel against the lieutenant-governor of Upper Canada, by the surveyor-general thereof; the defendant's consultation with the attorney-general, held privileged; Gibbs, C. J.: "No office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed"); 1820, Home *v.* Bentinck, 2 B. & B. 130, 134 (leading case; libel by a lieutenant-colonel, who was engaged in a mining company, against one of a court of inquiry appointed by the commander-in-chief to inquire into the plaintiff's conduct in the mining adventure and reporting his misconduct; the military secretary of the commander was held privileged, for the defendant, not to produce the minutes of the court of inquiry containing the alleged libel, nor was a copy obtained from the commander's office received; on the ground that the report was made under lawful orders, was confidential, and contained the names of witnesses and tenor of their evidence, and thus was privileged as an informer's report); 1822, Earl *v.* Vass, 1 Shaw 229, 236 (libel, for a letter by H. to the customs commissioners and the Treasury Office, in relation to the fitness of the plaintiff, nominee to a customs comptrollership; the commissioners were held privileged not to produce the correspondence; the application was *ex parte*, the opinion by L. C. Eldon, citing Home *v.* Bentinck; the Scotch Court had ordered production by a vote of 3 to 2); 1832, Blake *v.* Pilfold, 1 Mo. & Rob. 198 (libel of a post-office employee; defendant's letter of complaint to the secretary of the postmaster-general, offered as the libellous statement, held not privileged, because not written by a public officer); 1860, Beatson *v.* Skene, 5 H. & N. 838, 853 (leading case; libel on an army-officer; letters to the Secretary of War and minutes of a court of inquiry, the Secretary of War having been subpœnaed to produce but having attended and objected on the ground of "prejudice to the public service," held privileged on that ground); 1863, Gugy *v.* Maguire, 13 Low. Can. 33, 49 (libel, for a communication to the Government by the defendant, a police superintendent; on a subpœna *d. t.* to the provincial secretary for the document, in order to prove the plaintiff's case, and on objection on the ground of "injury to the public service," production was held not compellable, because "the disclosure is to divulge *inter arcana imperii*, which no judge can dare to undertake"; Mondelet, J., diss.; an absurdity was given to the ruling by the fact that the secretary had already sent a copy of the document to the plaintiff); 1864, M'Elveney *v.* Connellan, 17 Ir. C. L. 55, 69 (libel, for a report by defendant as inspector-general of prisons to the Lord Lieutenant of Ireland; motion to produce the report and the minutes of testimony taken before defendant, not granted, the Lord Lieutenant having stated that "in his opinion it would be injurious to the public service to produce the report"; the principle covering "official communications, or communications made to an official person in the discharge of a public duty, whenever it is plain that the duty in compliance with which they have been made requires an unreserved communication in relation to the matter of it"); 1869, Stace *v.* Griffith, L. R. 2 P. C. 420, 425, 428 (libel for a letter of complaint to the colonial secretary of St. Helena; Lord Chelmsford said *obiter* that in Anderson *v.* Hamilton, *infra*, n. 2, "the rule is correctly laid down"); 1873, Dawkins *v.* Rokeby, L. R. 8 Q. B. 255, 267 (leading case; libel, for testimony against the plaintiff by the

several similar precedents (all but one in England), in actions against officials for *other kinds of wrong* done to the plaintiff by *official acts*, have protected the defendant from disclosure of his acts or his written admissions, — thus again indirectly effecting his exoneration in substantive law by refusing the means of proof.[2] Again, several precedents (representing England, the United States Federal Court, and two State Courts) have declared a *privilege of secrecy in general* for *official documents* in an officer's possession, particularly (so far as any definition has been attempted) for communications between officials; and in these precedents no question whatever of international politics or military defence was involved.[3] Besides these, an occasional precedent has applied

defendant, his general, at a military court of inquiry; held, that the proceedings and testimony were privileged; the opinion confusing the two questions of defamation-privilege in the substantive law and evidence-privilege); 1888, Hennessy *v.* Wright, L. R. 21 Q. B. D. 509 (libel by the governor of Mauritius; dispatches, etc., between the governor or royal commissioner and the Secretary of State for Colonies or between the first two, directed by the Secretary of State not to be produced "on the ground of the interest of the State and of the public service," held privileged, approving Beatson *v.* Skene, *supra;* the personal appearance or affidavit of the Secretary to claim privilege not being here necessary). *Contra* (but practically repudiated by the foregoing cases): 1804, Robinson *v.* May, 2 J. P. Smith 3 (libel; defendant's letter of information to the Admiralty Commissioners, produced); 1859, Dickson *v.* Wilton, 1 F. & F. 419 (libel, for a letter by defendant as colonel reporting to the field-marshal about the plaintiff, and inclosing the report of a court of inquiry and other documents; "a clerk from the War Office was called to produce the letter, but submitted on behalf of the Secretary of War whether the proceedings ought to be produced"; Campbell, L. C. J.: "You must produce the letter," and both letter and documents were produced; that the Secretary did not attend to object personally is not mentioned as the ground of the ruling, and the distinction of this ruling on that ground in subsequent decisions does not affect the meaning of this ruling when made).

[2] 1816, Anderson *v.* Hamilton, 2 B. & B. 156, note (action for imprisonment against the Governor of Heligoland; correspondence between the Governor and the Secretary of State for Colonies, with the plaintiff's letter to the Secretary giving rise to the correspondence, held privileged, first, because "it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance"; secondly, because no extract material alone to the case could be received, "for the plaintiff must be entitled to the whole or none" — a ruling absurd in two respects, first, because it was not shown or even claimed that international secrets were in fact mentioned in the letters, and secondly, in that even the innocuous and separable parts were held inadmissible); 1817, Cooke *v.* Maxwell, 2 Stark. 183 (action for arrest of person and destruction of property in Africa; plea, that the plaintiff was illegally trading in slaves and defendant had acted as governor under the law; to prove the defendant's responsibility, the plaintiff called the military officer who had acted, and asked whether the defendant had given him the orders; upon objection that public policy prevented disclosure, Bayley, J., apparently agreed, but allowed oral testimony to the fact of the order; "the law will not work injustice"; this was indeed beating the devil around a stump); 1875, The Bellerophon, 44 L. J. Adm. 5 (action for injury by collision with a Government vessel; its commander's report to the Admiralty Office, held privileged, following Beatson *v.* Skene, *supra*). The following ruling is practically of this sort: 1877, Hartranft's Appeal, 85 Pa. 433 (grand jury's subpœna to the Governor, Secretary, Adjutant-General, General, and Major, to testify as to a riot; on application for attachment, the respondents answered that their knowledge was obtained by official communications and its disclosure would be "detrimental to the public service"; the testimony was held privileged, approving Beatson *v.* Skene; the opinion inextricably confuses the present subject with the privilege against attendance; Agnew, C. J., and Sterrett, J., diss., quoted *ante*, § 2369).

[3] *England:* 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 495 (the Crown having obtained treasonable letters, imputed to the defendant, by intercepting the mails under a statute, it was resolved to be "inconsistent with the public safety," to allow any inquiry as to the special warrants issued for the purpose or the methods used in obeying them; many Lords dissenting; it was also resolved that a clerk of the Secretary's office, asked as to the skill of a fellow-clerk in unsealing letters and re-sealing with counterfeit seals, should not be examined "touching any transaction any way relating to the government, which came to his knowledge by reason of his being employed in the secretary's office"); ib. pp. 494, 543, 587, 629, 672 (the key by which Crown detectives deciphered alleged cipher letters was not allowed to be disclosed, as "tending to the discovery of their art," and thus destroying their usefulness); 1839, R. *v.* Russell, 7 Dowl. Pr. 693 (papers "of a public nature and in the possession of Lord John Russell in his

the privilege to refusing disclosure of matters involving "secrets of State" in *military* or *international affairs*.[4] Furthermore, the supposed rule of these

public character as Secretary of State," held not producible); 1841, Smith *v.* East India Co., 1 Phill. 50, 11 L. J. Ch. 71, L. C. Lyndhurst (bill for freight; correspondence on the subject between defendant's directors and the royal commissioners, held privileged on account of the company's governmental duties; without such a privilege "the effect would be to restrain the freedom of the communications and to render them more cautious, guarded, and reserved"); 1856, Wadeer *v.* East India Co., 25 L. J. Ch. 345, 8 DeG. M. & G. 182, 187, 190 (bill for delivery of notes of Governor-General of India; discovery refused of political communications between defendant and its Indian governments; privilege held to cover "State papers, dispatches, minutes, or documents of any such description which relate to the carrying on of the government and are connected with the transaction of public affairs"; placed on the usual ground of the possibility of their affecting "the question of peace or war"; decided by LL. J. Turner and Knight-Bruce, overruling the contrary decision of Romilly, M. R., who had said that "official documents in many cases are privileged, but in some cases they are not"); *New Jersey:* 1871, Thompson *v.* R. Co., 22 N. J. Eq. 111 (subpœna *d. t.* upon the Governor for the engrossed copy of a private statute; held that he might withhold "any paper or document in his possession, or any part of it, if in his opinion his official duty requires him to do so"; here the Governor did place the document at the Chancellor's disposal); *United States:* 1800, U. S. *v.* Cooper, Whart. St. Tr. 659, 662 (libel on the President; production of unspecified official documents, not compelled); 1872, U. S. *v.* Six Lots of Ground, 1 Woods 234, 236 (correspondence between the attorney-general and a district attorney as to dismissing a writ of error, held confidential); 1895, *Re* Huttman, 70 Fed. 699 (Federal deputy collector of internal revenue not compellable to testify in a State court to statements made by an applicant for a liquor-dealer's tax-stamp, the statements being made for record in the office; on the ground that a State court in a prosecution under a State law has no jurisdiction to compel a Federal officer's disobedience to a Federal regulation, equivalent to law, forbidding such disclosure; on this point compare the principle of jurisdiction, *ante*, § 6); 1896, *Re* Hirsch, 74 id. 928 (unlawful liquor-selling by C.; the payment of a liquor-tax being admissible to show an intent to sell liquor, the deputy-collector of Federal internal revenue was ordered to produce a document in his custody in which C. applied for a license and declared his intention of selling liquor; held, that no privilege existed, in the absence of statute, requiring the secrecy of such declarations); 1897, *Re* Weeks, 82 id. 729 (habeas corpus for a U. S. collector imprisoned for contempt in refusing to produce evidence for the Court of Vermont as to the payment of a liquor-tax by a defendant in that court; on being asked whether X. had paid him for obtaining a tax-stamp, he replied that he could not remember but had the means of ascertaining, "whereupon he was asked to ascertain and state the fact, which he refused to do because his means of knowledge of it had come to him solely in his official capacity," and because his superior's instructions forbade disclosure; held, that although by law the official records were open to public inspection, the official could not be compelled to give evidence; "the Federal government . . . cannot be required to provide evidence for the State Courts"); 1899, *Re* Comingore, 96 id. 552 (a Treasury regulation forbade revenue-collectors from producing records or furnishing copies; held, in a State action for taxes against a distiller, that his reports to the Federal collector were privileged not to be disclosed by the latter, on the grounds partly that the State could not control a Federal official, partly that the document was an official "quasi-confidential" document designed solely to aid in the collection of Federal revenue); 1900, Boske *v.* Comingore, 177 U. S. 459, 20 Sup. 701 (the preceding ruling affirmed on appeal); 1903, *Re* Lamberton, Ark. Dist., 124 id. 446 (deputy collector of internal revenue, held privileged from testifying whether he had seen a Federal license to sell liquor public posted in a certain house; applying the principle of Boske *v.* Comingore); *Vermont:* 1839, Redfield, J., in Clark *v.* Field, 12 Vt. 485 ("I apprehend that the true doctrine, in regard to requiring a witness to disclose State secrets, is that the Court will exercise its discretion in each particular case"); 1902, Nye *v.* Daniels, 81 id. 75, 53 Atl. 150 (a postmaster held privileged not to disclose whether the plaintiff sent a registered letter, on the theory that a postal regulation prohibiting such a disclosure had the force of law; the fallacy of the Court appears in the proviso of the U. S. Rev. St. § 161, authorizing such regulations provided they be "not inconsistent with law").

For rulings under statutes concerning *assessment-lists* and *unfinished inventions*, see *ante*, § 2374.

[4] 1817, R. *v.* Watson, 2 Stark. 116, 148 (sedition; a clerk of the War department, after testifying that a plan found in defendant's possession was a plan of the interior of the Tower of London, was asked on cross-examination whether another plan, printed and purchasable, was a correct plan of the Tower, but "the Court held that it might be attended with public mischief to allow an officer of the Tower to be examined as to the accuracy of such a plan"); 1807, Aaron Burr's Trial (cited *post*, § 2376; here the correspondence desired might have involved international relations with Spain and France); 1875, Totten *v.* U. S., 92 U. S. 105 (no action can be maintained on a contract with the Government for secret service as a spy during war; "the secrecy which such contracts impose precludes any action for its enforcement").

foregoing precedents has been embodied in broad form in several statutes, by legislators who perhaps did not perceive the possible scope of their phrasing.[5] To these classes must be added the rulings refusing to compel disclosure of the *votes* or *speeches of a member of the House* of Commons or of Congress,[6] or to compel disclosure of the *proceedings of the House* of Commons;[7] the former being in effect (like the rulings in libel actions) virtually an indirect enforcement of the member's non-liability for his utterances, and the latter resting merely on a traditional fiction of secrecy once much cherished by the British House. Finally, there are a few rulings (none of them important, except perhaps Marbury *v.* Madison) in which the existence of a *privilege* in the large scope predicated by the modern English rulings is *negatived*.[8]

[5] *Ont.* Rev. St. 1897, c. 73, § 27 ("Where documents in the official possession, custody, or power of a member of the Executive Council or the head of a department of the public service of this province," and the officer having the documents is called as a witness, "he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to produce the documents on the ground that they are privileged"; the objection to have the same effect as if the superior officer had made it); *P. E. I.* St. 1889, § 29 (like Ont. R. S. 1897, c. 73, § 27); *Cal.* C. C. P. 1872, § 1881, par. 5 ("A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure"); *Colo.* Annot. St. 1891, § 4824 ("A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the Court, would suffer by the disclosure"); *Ga.* Code 1895, §§ 3947, 5288 ("official persons" cannot be called on "to disclose any State matters of which the policy of the State and the interest of the community require concealment"); *Ida.* Rev. St. 1887, § 5958 (like Cal. C. C. P. § 1881); *Ia.* Code 1897, § 4609 (like Cal. C. C. P. § 1881); *Minn.* Gen. St. 1894, § 5662 (like Cal. C. C. P. § 1881); *Mont.* C. C. P. 1895, § 3163 (5) (like Cal. C. C. P. § 1881); *Nebr.* Comp. St. 1899, § 5909 (like Cal. C. C. P. § 1881); *Nev.* Gen. St. 1885, § 3407 (like Cal. C. C. P. § 1881); *N. D.* Rev. C. 1895, § 5703 (like Cal. C. C. P. § 1881); *S. D.* Stats. 1899, § 6544 (like Cal. C. C. P. 1881); *Utah* Rev. St. 1898, § 3414 (like Cal. C. C. P. § 1881); *Wash.* C. & Stats. 1897, § 5994 (substantially like Cal. C. C. P. § 1881).

[6] 1804, Plunkett *v.* Cobbett, 5 Esp. 136 (libel on plaintiff's conduct in parliament in Ireland; a witness called to prove the plaintiff's expressions in parliament, held privileged from disclosing the tenor of the speeches, though not from stating the fact of speaking there); 1852, Chubb *v.* Salomons, 3 C. & K. 75 (Pollock, C. B., after consulting the other judges of the Exchequer, refused to compel a member of the House of Commons to relate whether the defendant voted in the House, without the permission of the House that he might testify; an officer of the House was then examined, the House having given permission); 1822, Law *v.* Scott, 5 H. & J. 438, 458 (slander; testimony to a vote in the Senate rejecting the plaintiff's nomination; question apparently not decided).

[7] 1818, Commons Journal, vol. 73, p. 389, May 26, quoted in 3 C. & K. 77 (in consequence of the case of R. *v.* Merceron, 2 Stark. 366, in which the shorthand reporter of the House had been examined without its leave, "Resolved, that all witnesses examined before this House or any committee thereof are entitled to the protection of this House in respect of anything that may be said by them in their evidence"); 1839, Stockdale *v.* Hansard, 9 A. & E. 1, 212, per Patteson, J. (Commons proceedings are in theory secret until the House permits publication); 1868, Wason *v.* Walter, L. R. 4 Q. B. 73, 95, *semble*, per Cockburn, C. J. (similar). Compare the following: Can. Rev. St. 1886, c. 11, §§ 5–8.

[8] *Eng.*: 1775, Maharajah Nundocomar's Trial, 20 How. St. Tr. 1057 (records of the Governor and Council of the East India Company, required to be produced, though the "safety of the State" was urged in opposing production); 1813, Lee *v.* Birrell, 3 Camp. 337 (defendant for penalty; to prove the defendant a collector of the property tax, the commissioners' clerk was summoned to produce the records; on objection that he had taken an official oath of secrecy, L. C. J. Ellenborough, said that the giving of evidence in court was an implied exception to the oath, and compelled production); *U. S.*: 1843, Capt. McKenzie's Case, 2 Pars. Eq. Cas. 227, Pa. Com. Pl. (letters rogatory in an action for libel; testimony by officers of a court-martial to the votes given for and against the plaintiff therein charged, held not privileged; the Court, however unwilling "to establish a precedent which might in any way weaken the naval arm of the government, saw in all this no legal bar to the adduction of evidence to which a citizen is entitled under the laws"); 1803, Marbury *v.* Madison, 1 Cr. 137, 143 (mandamus to the Secretary of State to deliver commissions to justices of the peace; the commissions were alleged to have been duly made out and sealed, but unlawfully withheld; clerks of the department of State being summoned to prove the fact, they claimed a privilege not to disclose the

It may be said, then, that the extent to which this privilege has gone (beyond "secrets of State" in the military or international sense) is by no means clearly defined; and, furthermore that it has not become a matter of precedent or even of debate in more than a few jurisdictions. Its scope and bearing are therefore open to careful examination in the light of logic and policy. What are the reasons which have been advanced for this privilege, and how do they bear testing? They are sufficiently represented in the following passages:

1640, *Earl of Strafford's Trial*, 3 How. St. Tr. 1427, 1441; Parliament was now striking at Charles I by prosecuting his chief political adviser; Sir Henry Vane having testified, as a member of the King's Council, that the defendant Strafford "did say at the Council Board" that he would help his Majesty Charles I with force to reduce the kingdom, if Parliament remained obstinate, Lord *Clarendon* remarks: "The ruin that this last act [of producing this testimony] brought to the King was irreparable; for . . . it was matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more engaged to servile applications. It banished forever all future freedom from that board and those persons from whom his Majesty was to expect advice in his greatest streights; all men satisfying themselves 'that they were no more obliged to deliver their opinions there freely, when they might be impeached in another place for so doing'; and the evincing this so useful doctrine was without doubt more the design of those grand managers [of the prosecution] than any hope they had of receiving further information thereby."

1820, *Dallas*, C. J., *Home* v. *Bentinck*, 2 B. & B. 130, 162: "What is the ground upon which these cases [of informers] stand, except it be the ground of danger to the public good, which would result from disclosing the sources of such informations? For no person would become an informer if his name might be disclosed in a court of justice and if he might be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us — [a report by a court of inquiry to a commander-in-chief] — on the broad rule of public policy and convenience, that these matters, secret in their natures and involving delicate inquiry and the names of persons, stand protected? Now what is this proceeding but consulting with those who are bound to give the advice which is required as to the exercise of a public duty? And whether the case be that of the attorney-general of a province advising a governor, or an officer present at a court of inquiry directed to be held by the commander-in-chief, it is equally a case of advice and information given for the regulation of a public officer."

1860, *Pollock*, C. B., in *Beatson* v. *Skene*, 5 H. & N. 838, 853: "We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. As an instance, we would put the case of a British minister at a foreign Court writing in that capacity a letter to the Secretary of State for Foreign Affairs in this country, containing matter injurious to the

transactions of the office, and the Attorney-General being summoned for the same purpose made the same claim; held that they must answer, the facts not being confidential; the Court said, "they had no doubt he ought to answer; there was nothing confidential required to be disclosed. If there had been, he was not required to answer it. . . . But the fact whether such commissions had been in the office or not could not be a confidential fact; it is a fact which all the world have a right to know"; good argument by Mr. Lee).

reputation of a foreigner or a British subject; can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice."

1888, *Field*, J., in *Hennessy* v. *Wright*, L. R. 21 Q. B. D. 509, 512: "There are two aspects of this question. First, the publication of a State document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a court of justice at the instance of any suitor who thought proper to say '*fiat justitia ruat cœlum*,' an order for discovery might involve the country in a war. Secondly, the publication of a State paper may be injurious to servants of the Crown as individuals; there would be an end of all freedom in their official communications if they knew that any suitor, that as in this case any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice."

Of these reasonings three things are to be said:

(1) The brunt of the argument is that *an official should be secured from liability* based on his official communications made in the course of duty. Nobody can dispute this general principle. But it signifies nothing for the law of evidence. It signifies an exoneration from tortious or criminal liability. Whether and how far such exoneration should be conceded is a question of substantive law, and is now solved by that law liberally in favor of officials. But wherever that law has declined to concede an exoneration, and has predicated liability, all this reason for protection ceases, by hypothesis. It is a mockery to reserve, against righteous claims, a privilege of testimonial secrecy. This much seems plain. All the argument based upon hardship to officials may therefore at once be conceded; but for the purpose of testimonial privilege all such cases are irrelevant, being duly safeguarded by other means.

(2) The remainder of the argument consists in invoking secrecy for *acts of pending international negotiations or military precautions against foreign enemies.* This, too, may be conceded. There ought to be a protection for "secrets of State," in this narrow sense. But, this done, what remains? In only three or four of the precedents has there been even a pretence that the matters actually preserved from disclosure concerned international facts of negotiation or defence. If they do not, then this reason is insufficient; for it is vain to claim secrecy on the ground that something else might have been asked for, which is in fact not asked for.

(3) The question is then reduced to this, Whether there are any matters of fact, in the possession of officials, concerning *solely the internal affairs* of public business, civil or military, which ought to be privileged from disclosure when material to be ascertained upon an issue in a court of justice? Most emphatically, there are not. In any community under a system of representative government and removable officials, there can be no facts

which require to be kept secret with that solidity which defies even the inquiries of a court of justice. "To cover with the veil of secrecy," said Patrick Henry,[9] "the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country." Such a secrecy cannot even be legitimately desired. It cannot be desired for any but the purposes of partisan politics or personal self-interest. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with government lands, or the orders of the War Department in colonial dependencies (and in all of these departments, in the last generation, instances susceptible of such a claim of privilege have occurred), the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained, — a character which appears to have been advanced only when it happens to have served the interests of some individual to obstruct investigation into facts which might fix him with a just liability.

It is urged, to be sure (as in Beatson *v.* Skene), that the "public interest must be considered paramount to the individual interest of a suitor in a court of justice." As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. "Necessity," as Joshua Evans said,[10] "is always a suspicious argument, and never wanting to the worst of causes." What is the necessity for secrecy in such matters? To justify a privilege, it must be, on settled principles (*ante*, §§ 2192, 2285), a secrecy indispensable to induce freedom of official communication or efficacy in the transaction of official business, and it must further be a secrecy which has remained and would have remained inviolable but for this compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion. The leading case of Beatson *v.* Skene is a sufficient example, *ex quo disce omnes*. The plaintiff, Skene, was a general of cavalry; at the close of the Crimean war he was superseded in command, and resigned; an investigation into the state of the corps was made by General Shirley,

[9] Elliot's Debates, III, 170.

[10] Arguing in Home *v.* Bentinck.

whose secretary and commissioner the defendant Beatson was; the defendant reported to his superior that the plaintiff had stirred up mutiny in the corps, and afterwards so testified as a witness before a military court of inquiry held to investigate General Shirley's alleged libel on the plaintiff; for this testimony the plaintiff's suit for libel was brought, and he sought production, in his proof, of the court's minutes of the defendant's testimony, and of the plaintiff's own letters to the Secretary of War. Now a plea of privilege in the substantive law might immediately have disposed of the matter. Since it did not, the case placed the defendant in the position of having uttered an unjustifiable libel on the plaintiff. To refuse the production of the desired documents was therefore virtually to deprive the plaintiff of his means of proving a just claim. And yet to protect the defendant, as the Court did, by placing this refusal on the ground of the secrecy of State affairs was to lay hold of the merest fiction, — first, because the topic involved was only one of the plaintiff's personal conduct in his own cavalry corps; next, because the whole subject and its details had long and notoriously been the theme of military and public gossip, and was in its inception known to scores of persons; and, again, because the very Court which appealed to this inviolable secrecy for withholding the notes of the testimony permitted a person who had been present at the military court to prove publicly the same oral testimony of the defendant which was recorded in the suppressed minutes! With such pharisaic shams and resounding incongruities is the rule replete in almost every instance.[11] Rested upon such fictions, and applied in such a spirit, it tends to become merely a technical advantage on the side of that party who happens to be interested as an official and to be in possession of important proof. Let John Doe sue a neighbor for encroaching on his boundary line, and he may compel the neighbor to produce the documents which vindicate Doe's just claim. But let him sue a colonial officer of the Philippine Islands for exploiting his land or imprisoning his person, — let him sue a postmaster for destroying his business by refusing the use of the mails, or a revenue collector for the illegal impounding of goods, — let him be the complainant against any government official for any oppressive conduct, and the same discovery of the facts is refused by law, provided only that the wrongdoer is sufficiently strong in interest with his superiors to induce them to invoke the privilege of official secrecy. The time has not yet come, with us, when such deliberate combination for the oppression of citizens by officials is rife. But the possibilities of such abuse are plainly latent in this supposed privilege. There is needed only the willingness to exercise them. The liquor-tax cases show how simple the expedient would be, *mutatis mutandis*, in a thousand cases, and how effective as an obstruction to justice and a refuge for cowardly oppressors. Rules of law much more innocent in appearance have been made to serve evil purposes upon a large scale. "No nation" (in the words of a great American

[11] *E. g.*, Gugy *v.* Maguire, Hartranft's Appeal, and other cases *ante*, especially those of the Federal liquor-tax receipts.

jurist[12]), "ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible only because the means of publicity had not been secured." The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is too solidly entrenched in precedent. More than once have plain warnings been given us of the potency of its abuse for partisan and selfish ends:

1807, Mr. *Botts*, arguing, in *Aaron Burr's Trial*, Robertson's Rep. II, 517: "I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of State secrecy. It never can conduce to public utility, though it may furnish pretexts to men in power to shelter themselves and their friends and agents from the just animadversion of the law, — to direct their malignant plots to the destruction of other men while they are themselves secure from punishment. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, every thing that is done in a public way by their public functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability; and with the exception of what relates to negotiations with foreign nations, or what is called the diplomatic department, there ought to be nothing suppressed or concealed. . . . I will again predict that, if a secret inquisitorial tribunal be established by your decision now, . . . if you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression. If these things be established, to go down to posterity as precedents, the inevitable consequences will be that, whenever any man in the United States becomes an object of the vengeance or jealousy of those in power, he may easily be ruined. A wicked executive power will have nothing to do to effect his destruction but to foment divisions in this country, to encourage and excite accusations by its officers, to deny the use of all public documents that may tend to the justification of the accused, or to render the attainment of exculpatory evidence dependent on the arbitrary whim of its prosecuting officers, and he will be condemned to sink without the smallest effectual resistance."

1863, *Mondelet*, J., in *Gugy* v. *Maguire*, 13 Low. Can. 33, 38 (upon a Provincial Secretary's refusal to produce the report of a superintendent of police); "It has been pretended, as in the case of Home *v.* Bentinck, that it is necessary for the interest of the public that secrecy should be had in such and similar matters. . . . I cannot, I ought not, for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine, — a doctrine which prostrates to the ground that liberty, that protection to life, honour, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! A doctrine which reduces the judge on the Bench to an automaton, who, like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit it may be his misfortune to be tainted with, or of any unprincipled member of society, whoever he is or may be, who is desirous of, or has interest in being screened, or of screening others, from the responsibility his misdeeds have subjected them to. If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure. I cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous. And it must more glaringly appear so, when we come to reflect that an

[12] Edward Livingston, Works, I, 15.

attempt is made to give it currency, and to fasten it on the judges of the land, under constitutional responsible government. Such a pretension reminds me of what was so often done in France, under the old régime, by means of the maxim then looked upon as sacred by the government. The following will, much better than I could myself, illustrate this branch of the subject: 'Vainement les Parlemens et les autres Cours souveraines élevaient une voix courageuse contre cet intolérable abus; la Cour ne répondait qu'en lançant de nouvelles lettres de cachet, ou par cette maxime, "qu'il ne faut pas soumettre à l'inspection des tribunaux le secret de l'administration et l'exécution des ordres du roi"; d'où l'on concluait qu'il n'existait aucun recours contre les ordres donnés par ses ministres.' . . . I never can, and I trust never shall acknowledge as a true one, the paradoxical proposition, that under the protection of the freest and best constitution in the world, and the most solemn imperial statute guaranteeing our rights, an action may be instituted against any one who has caused damage to his fellow subject, but that it will be in the power of a secretary, or of any member of the government, to deprive the injured of the evidence which he may adduce to entitle him legally to a verdict or a judgment. . . . [It is] a dangerous, monstrous pretension."

1877, *Agnew*, C. J., in *Hartranft's Appeal*, 85 Pa. 433, 458: "There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law, — to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty? Who were innocent? By the 22d section of the Declaration of Rights, it is declared that the 'military shall in *all cases*, and *at all times*, be in *strict subordination* to the *civil* power.' The military took many lives — the multitude some. Did the military act under the authority of the civil power? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the Governor, as commander-in-chief, command their presence, and aid in quelling the violence of the mob? Or was his authority assumed by unauthorized persons? These are questions which the Governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common-law proceeding. They are not State secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The rights of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeoparded. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent Governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right — an inference which his absence in California very naturally raises — and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no State secret as to them, but its concealment is a crime against society, which no one who knows the Governor would attribute to him, if aware of his duty. . . . In every respect of personal and official duty, the State has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights."

§ 2376. **Same: Who determines the Necessity for Secrecy.** So far as the privilege has any legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. If it extends only (as its just limits prescribe) to matters involving international negotiations or military precautions against a foreign enemy, the presence of such matters in the documents or communications sought to be disclosed must by some

authority be predetermined, before the privilege can be deemed applicable. If it extends to the larger scope indicated by the English rulings, still the existence of a necessity for secrecy must be in each instance declared. Who shall make this determination? Obviously, and by analogy with other privileges, the Court (*ante*, §§ 2193, 2271, 2322, *post*, § 2550). But the judge, urges the learned incumbent of that office, in Beatson *v.* Skene,[1] "would be unable to determine it without ascertaining what the document was," — surely an unavoidable process; "which inquiry," however, it is added, "cannot take place in private," — a singular assumption. It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? It is ludicrous to observe a chief magistrate, as in Beatson *v.* Skene, solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread abroad by the hundred tongues of scandal. By the doctrine of judicial notice, to be sure, he could not judicially know anything that was not already notorious; by a sarcastic perversion of that doctrine, the perusal of the documents in Beatson *v.* Skene might have been urged upon the Court.

The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to designing officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge:

1807, *Aaron Burr's Trial*, Robertson's Rep. I, 121, 127, 186, 255; II, 536, treason; a subpœna *duces tecum* was issued by Chief Justice Marshall to President Jefferson, to attend and bring certain correspondence with General Wilkinson said to be material to the defence; as to the argument that reasons of State might forbid the disclosure, *Marshall*, C. J., said: "There is certainly nothing before the Court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety; . . . if it does contain any matter which it would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will of course be suppressed. . . . Everything of this kind, however, will have its due consideration on the return of the subpœna. . . . I admit, in such a case, much reliance must be placed on the declaration of the President; . . . perhaps the Court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The President may himself state the particular reasons which may have induced him to withhold a paper, and the Court would unquestionably allow their full force to those reasons."[2] President

[1] *Ante*, § 2375, note 1.

[2] He also held (II, 513, 536) that the President's delegation of discretion to the prosecuting counsel was not lawful.

Jefferson, while forwarding the desired letter, added the following: "With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that for the advantageous conduct of their affairs some of these proceedings at least should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication."

1863, *Mondelet*, J., in *Gugy* v. *Maguire*, 13 Low. Can. 33, 38 (upon a provincial secretary's refusal to produce the report of a superintendent of police): "[Conceding that the privilege may exist,] are you to compare the discretion, the unbiassed mind, the position of the judge who is alike independent of the Crown and of the People, who is free from party spirit, who knows or should know no one, to the biassed mind — naturally, necessarily, biassed mind — of a politician, not independent as the judge is, but dependent upon a party, who knows or must know, the contending parties, and may have the most cogent reasons for supporting one party, in preference to another; who has to bear, and does bear the external pressure which the judge is or should be inaccessible to; whose interest it may be, under the flimsy pretence, under the transparent veil of pretended public interest, to screen some petty minion in office? The comparison cannot hold for a moment. In the case of the judge, you have sacred guarantees; in that of a politician, you have none. External pressure will curb down the politician, whilst you will behold the judge more erect than ever, calmly and firmly resisting and baffling its baneful influence. Clearly then, manifestly, should it be left to the judge on the Bench, in his discretion, to determine the question, instead of allowing a secretary, or any member of the government, to silence him, to interfere with the administration of justice, and to become the judge? . . . This very case, this very flimsy, unfounded pretence, this unjustifiable refusal of the honorable secretary to prove the letter, which, through the instrumentality of the assistant provincial secretary, one of the acknowledged channels of communication with the department of the secretary, and actually, in most cases of importance, the medium of such communication, has been made public, shews up, in its true light, the danger, were it even legal or constitutional (which it is not), of the exorbitant pretension now set up. The honorable Judge, who presided at the trial, had it in his power, and at a mere glance at it, with his well known clear mind and sound judgment, had he thought proper to do so, might have seen through the transparency of the objection raised by the honorable secretary and the respondent. Such a letter, if proved, injurious to the public service! In what respect? How could the fact that the respondent had libelled the appellant, supposing he has, be injurious to the public service? . . . It is manifestly laying down the rule, that a secretary, or other public functionary, member of the government, will be at liberty to say that white is black, and that he must be believed."[8]

[8] What the English ruling to-day would be is uncertain: 1860, Beatson *v.* Skene, 5 H. & N. 838, 853 (the executive officer's claim of injury to public interests determines the recognition of the privilege; unless perhaps where he merely sends a subordinate to make objection without such explanation; Martin, B., diss.); 1888, Hennessy *v.* Wright, L. R. 21 Q. B. D. 509, 515, 521 (disapproving Beatson *v.* Skene, on this point); 1884, Bradley *v.* McIntosh, 5 Ont. 227, 232, 236 (the officer determines). Compare some remarks by the judges in *Re* Joseph Hargreaves, Limited, 1900, 1 Ch. 347.

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

CHAPTER LXXXIV.

SUB-TOPIC VI: COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

SUB-TOPIC VII: COMMUNICATIONS BETWEEN PRIEST AND PENITENT.

Sub-topic VI: COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

§ 2380. **History and Policy; Statutes.** It was early understood, in the precedents of English law, as soon as the secrecy of private confidence in general was finally settled to be no justification for a legal privilege (*ante*, §§ 2286, 2290), that confidences given to a physician stand upon no better legal footing than others:

1776, *Duchess of Kingston's Trial*, 20 How. St. Tr. 573; bigamy; Mr. Hawkins, a physician, who had attended the accused and her alleged husband, was asked: "Do you know from the parties of any marriage between them?" Ans.: "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honor." L. C. J. *Mansfield:* "If all your lordships will acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege, where it is a material question in a civil or criminal cause to know whether parties were married or whether a child was born, to say that his introduction to the parties was in the course of his profession and in that way he came to the knowledge of it. . . . If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

This has ever since been accepted by English judges[1] (in spite of an occasional and proper dispensation by courtesy[2]); and would probably have

[1] 1792, Wilson *v.* Rastall, 4 T. R. 753, 760, per Buller, J. ("It is much to be lamented that the law of privilege is not extended" to medical persons; this judge's views on the subject were anachronistic, as noted *ante*, § 2285); 1822, Garrow, B., in Falmouth *v.* Moss, 11 Price 455, 470; 1823, R. *v.* Powell, 1 C. & P. 97, Parke, B. (a surgeon attending an accused indicted for the murder of her bastard child, held not entitled to refuse testimony to her confession); 1838, Greenlaw *v.* King, 1 Beav. 137, 145, per Lord Langdale, M. R.; 1851, in Russell *v.* Jackson, 9 Hare 387, 391, per Wigram, V. C.; 1876, Jessel, M. R., in Anderson *v.* Bank, L. R. 2 Ch. D. 644, 650, *obiter;* 1881, the same judge in Wheeler *v.* Le Marchant, 17 id. 675, 681, *obiter.*

[2] 1825, Gardner Peerage Case, Le Marchant's Rep. 65, 88, 133 (names of women whose periods of gestation were testified to).

been acknowledged as a common-law principle in every American court.[3] But in New York in 1828[4] came a statutory innovation, establishing a privilege; and the legislation of other States, accepting in this respect (as in so many others) the model constructed by the distinguished leaders of legal reform in that epoch-making movement in New York, embodied the privilege in other statutes —, Missouri following next in 1835; until at the present day in one half of our jurisdictions the privilege is a settled part of the law.[5]

[3] 1793, Sherman *v.* Sherman, 1 Root 486 (divorce for adultery; a doctor's testimony compelled, though "all he could testify came to his knowledge in confidence").

[4] *N. Y.* Rev. St. 1828, II, 406 (Part III, c. VII, art. 9, § 73); in the second edition, in 1836, in an Appendix to the Revisers' Reports, vol. III, p. 737, is found their reasoning in justification, quoted *post.* In 1849 the Commissioners on Practice and Pleadings embodied the rule in the new Code of Civil Procedure (§ 1710, part 4).

[5] *Alaska* C. C. P. 1900, § 1038 (like Or. Annot. C. 1892, § 712, par. 4, omitting "regular," and substituting for "without the consent," "against the objection"); *Ariz.* St. 1899, March 16, No. 65 ("A physician or surgeon practising under the laws of the Territory of Arizona cannot without the consent of his patient be examined in civil or criminal cases as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient"); Rev. St. 1901, § 2535, par. 6 ("A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney"; see also P. C. § 1111, par. 4); *Ark.* Stats. 1894, § 2919 ("No person authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon"); *Cal.* C. C. P. 1872, § 1881, par. 4 ("A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient"; amended by the Commission of 1901 by adding: "but this subdivision does not apply in an action between a physician or surgeon and his patient in which the treatment of the patient by the physician or surgeon is in issue; and provided that in an action brought under sections 376 and 377 [for death by wrongful act] a physician or surgeon is competent to testify as to the cause of the death of the deceased"; for the validity of this amendment, see *ante*, § 488); § 1882 (implied waiver; quoted *ante*, § 2292); *Colo.* Annot. Stats. 1891, § 4824 ("A physician or surgeon duly authorized to practice his profession under the laws of this State shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient"); § 4825 (waiver by consent; like Or. Annot C. 1892, § 713); *D. C.* Code 1901, § 1073, U. S. St. 1896, c. 245, May 25 ("In the Courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representatives to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity; provided, that this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of or inflicting injuries upon a human being, and the disclosure shall be required in the interest of public justice"); *Hawaii* Civil Laws 1897, § 1418 ("No physician or surgeon shall, without the consent of his patient, divulge in any civil suit, action, or proceeding (unless the sanity of the patient be the matter in dispute) any information which he may have acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient"); *Ida.* Rev. St. 1887, § 5958 (like unamended Cal. C. C. P. § 1881); *Ind.* Rev. St. 1897, § 507 ("Physicians, as to matter communicated to them, as such, by their patients, in the course of their professional business, or advice given in such cases," shall not be competent); *Ia.* Code 1897, § 4608 (quoted *ante*, § 2292); *Kan.* Gen. St. 1901, § 4771, par. 6 (like Okl. Stats. § 335); *Mich.* Comp. L. 1897, § 10181 ("No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, which information was necessary in order to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon"); *Minn.* Gen. St. 1894, § 5662 ("A regular physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient"); *Mo.* Rev. St. 1889, § 8925 ("The following persons shall be incompetent to testify: . . . fifth, a physician or surgeon, concerning any information which he may have acquired from any patient

What is to be said in favor of such an innovation upon the common law? The privilege has been supported, in the home of its origin, in the following passages:

1836, *Commissioners on Revision of the Statutes of New York*, III, 737: "The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when

while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon"); *Mont.* C. C. P. 1895, § 3163 (4) (like unamended Cal. C. C. P. § 1881); *Nev.* Gen. St. 1885, § 3406 (like unamended Cal. C. C. P. § 1881, omitting "in a civil action," and adding: "provided, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall give such consent, and any such witness shall give testimony, then such physician or surgeon, defendant, may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting"); *N. Y.* C. C. P. 1877, § 834 ("a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity"); § 836 (including amendments added by St. 1897–1899; the preceding section not to apply if "expressly waived upon the trial or examination" by the patient; moreover, except for "confidential communications and such facts as would tend to disgrace the memory of the patient," express waiver by the personal representative of the deceased suffices, or, in testamentary controversies, by the executor, surviving husband, widow, heir, or next of kin; quoted in full, *ante*, § 2292); *N. C.* Stat. 1885, c. 159 ("No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician or to enable him to do any act for him as a surgeon; provided that the presiding judge of a superior court may compel such disclosure if in his opinion the same is necessary to a proper administration of justice"); *N. D.* Rev. C. 1895, § 5703 (like Cal. C. C. P. § 1881, unamended, omitting "in a civil action" and "licensed"); § 5704 ("If a person offers himself as a witness," it is a consent to the physician's examination "on the same subject"); *Oh.* Annot. Rev. St. 1898, § 5241 ("The following persons shall not testify in certain respects: . . . a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject"); 1903, Metropolitan Life Ins. Co. *v.* Howle, 68 Oh. 614, 68 N. E. 4 (statute applied); *Okl.* Stats. 1893, § 335 ("The following persons shall be incompetent to testify: . . . Sixth, a physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient; provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; (*sic?*) also, if [also of ?] an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section"); *Or.* Annot. C. 1892, § 712, par. 4 (like Cal. C. C. P. § 1881, unamended); § 713 ("If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon, on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section"); *Pa.* St. 1895, June 18, Pub. L. 195, § 1 ("No person authorized to practice physics or surgery shall be allowed, in any civil case, to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without his consent"); *S. D.* Stats. 1899, § 6544 (like Cal. C. C. P. § 1881, unamended, omitting "licensed"); § 6545 (like N. D. Rev. C. § 5704); *U. S.*: 1884, Connecticut L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 254, 5 Sup. 119 (the privilege given by the New York statute is to be applied in trials in the Federal Courts in New York); *Utah* Rev. St. 1898, § 3414 (like Cal. C. C. P. § 1881, unamended, omitting "licensed"); *Wash.* C. & Stats. 1897, § 5994 (like Cal. C. C. P. § 1881, unamended, substituting "regular" for "licensed"); § 6940 ("[Witnesses are competent in criminal as in civil cases;] but no regular physicians or surgeons, clergymen or priest[s], shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character"); *W. Va.* St. 1897, c. 44 (quoted *ante*, § 488); *Wis.* Stats. 1898, § 4075 ("No person duly authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon"); *Wyo.* Rev. St. 1887, § 2589 (like Oh. Rev. St. 1898, § 5241).

life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance."

1871, *Miller*, J., in *Edington* v. *Ins. Co.*, 67 N. Y. 185, 194: "It is a just and useful enactment introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sickbed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship."[6]

To test these arguments, let us refer to the fundamental canons which must be satisfied by every privilege for communications (*ante*, § 2285). The questions must be asked: Does the communication originate in a confidence? Is the inviolability of that confidence vital to the due attainment of the purposes of the relation of physician and patient? Is the relation one that should be fostered? Is the expected injury to the relation, through disclosure, greater than the expected benefit to justice? A negative answer to any one of these questions would leave the privilege without support. In truth, all of them, except the third, may justly be answered in the negative:

(1) In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense. Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of pathology in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed; the few that are not openly ascertainable are at least explained to intimates. No statistical reckoning is needed; these facts are well enough known.

(2) Even where the disclosure is actually confidential, it would none the less be made though no privilege existed. People would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession, and long-concealed ailments were then for the first time brought forth to receive the blessings of cure? And how is it to-day in those jurisdictions where no privilege exists, — does the medical profession in one half of the Union enjoy, in a marked way, an afflux of confidence contrasting with the scanty revelations vouchsafed in that other half where no privilege protects? If no difference appears, then this reason for the privilege falls away; for it is undoubted that the rule of privilege is intended

[6] Mr. Wm. A. Purrington, in Hamilton and Godkin's System of Legal Medicine (1900), 2d ed., I, 625–632, expounds the supposed reasons for the privilege.

(*ante*, § 2285), not to subserve the party's wish for secrecy as an end in itself, but merely to provide secrecy as a means of preserving the relation in question, whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation.

(3) That the relation of physician and patient should be fostered, no one will deny. But (4) that the injury to that relation is greater than the injury to justice — the final canon to be satisfied — must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to-day are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by every one — except the appointed investigators of truth. The extreme of farcicality is often reached in litigation over personal injuries, — in the common case, a person injured by a street-car amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all! Upon such a foundation of vain imaginations is the privilege reared. The injury to justice by the repression of the facts of corporal injury and disease is a hundred fold greater than any injury which might be done by disclosure. And furthermore, the few topics — such as venereal disease and abortion — upon which secrecy might be seriously desired by the patient come into litigation ordinarily in such issues (as when they constitute cause for a bill of divorce or a charge of crime) that for these very facts common sense and common justice demand that the desire for secrecy shall not be listened to.

There is but one form in which the argument for the privilege can be put with any semblance of plausibility, and in that form it doubtless commonly presents itself to the view of medical men jealous for their profession. This argument is that, since the secrets of the legal profession are allowed to be inviolable, the secrets of the medical profession have at least an equal title to consideration. This, to be sure, is no more than analogy; and nothing is more fallible than an argument from analogy. But, leaving aside the consideration that the privilege for communications to attorneys stands itself on none too firm a foundation (*ante*, § 2291), and leaving aside the primary tests (just examined) by which every privilege must be judged, and answering the argument as it is put, — the answer is that the services of an attorney are sought primarily for aid in litigation, actual or expected, while those of the

physician are sought for physical cure; that hence the rendering of that aid would result directly and surely in the disclosure of the client's admissions, if the attorney's privilege did not exist, while the physician's curative aid can always be rendered irrespective of making disclosure; and, finally, that thus the absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent, while the physician, being called upon only rarely to make disclosures, is not consciously affected in his relation with the patient. The function of the two professions being entirely distinct, the moral effect upon them of the absence of the privilege is different.

Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth, — truth which ought to have been disclosed and would never have been suppressed for the sake of any inherent repugnancy in the medical facts involved. Nine-tenths of the litigation in which the privilege is invoked consist of actions on policies of life insurance, where the deceased's misrepresentations of his health are involved; actions for corporal injuries, where the extent of the plaintiff's injury is at issue; and testamentary actions, where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except to perpetrate a wrong upon the opponent. In the first two of these, the advancement of fraudulent claims is notoriously common; nor do the culpable methods of some insurance or railway companies, whatever they may have been or still are, justify the infliction of retaliatory punishment, indirectly and indiscriminately, by means of an unsound rule for the suppression of truth.[7] In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely; the actually injured person would still seek medical aid, the honest insured would still submit to medical examination, and the testator would still summon physicians to his cure. There is nothing to be said in favor of the privilege, and a great deal to be said against it.[8] The adoption of it in any other jurisdictions is earnestly to be deprecated.

§ 2381. (*a*) **Confidentiality of Communications; (1) Implied Confidence; Burden of Proof; Third Persons' Testimony.** In the foregoing privileges for communications, the fundamental assumption has been that the communications, in order to deserve protection, must be confidential in their origin. This principle obtains equally for the present privilege.

When the confidential nature of the communication has been expressly stated at the time of making it, the application of the privilege is plain. But is *confidentiality to be implied from the mere relation* of physician and patient? Or is it to be implied only according to the circumstances of each

[7] See the comment of Earl, J., in Renihan *v.* Dennin, 103 N. Y. 573, 580, 9 N. E. 320.

[8] Mr. Albert Bach, in the Medico-Legal Journal, X, 33, 40 (1892), "The Medico-Legal Aspect of Privileged Communications," has stated forcibly the objections to the privilege.

case, including the nature of the ailment and the occasion of consultation? The latter solution seems the natural one. Some Courts, however, have declared that the mere relation of physician and patient implies a confidentiality for all communications;[1] and this assumption is tacitly made in other Courts. Nevertheless, there is a general and sound doctrine, occasionally enforced, that the claimant of the privilege has the *burden of establishing* in each instance all the facts necessary to create the privilege;[2] and it would seem to be a consequence of this that the circumstances indicating confidentiality must also be established.

As with the other privileges, however, the privilege forbids compulsory disclosure by that person only to whom the confidence was extended. It therefore does not exempt a *third person*, overhearing the communication, from testifying to it;[3] except so far as the third person is an agent of the physician.[4]

§ 2382. **Same: (2) Professional Character of the Consultation.** The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative treatment; for it is that relation only which the law desires to facilitate.

Hence, the person consulted must be a *professional physician*, in the usual sense of the word. This does not include a veterinary surgeon;[1] nor a pharmacist;[2] nor a dentist,[3] although the modern recognition of dental science as strictly a branch of medical science might here have justified the opposite conclusion. A practitioner of any branch or school of medical science, recognized as such by the reputable medical profession, is included; some of the statutes define the privileged class as "licensed" practitioners. A surgeon is in any case within the definition. How far the class should be extended, in these days of pretentious and successful quackery, may become difficult to determine.

The consultation with such a person must be had in his *professional character at the time.* A consultation, therefore, for some purpose other than that of ultimate curative or alleviative treatment is not privileged;[4] nor is a

[1] 1881, Masonic M. B. Ass'n *v.* Beck, 77 Ind. 203, 210; 1902, Munz *v.* R. Co., — Utah —, 70 Pac. 852 (physician sent by a railroad company to the injnred person; privilege held applicable; Rolapp, J., diss.).

[2] 1902, Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975; 1879, Edington *v.* Ætna Life Ins. Co., 77 N. Y. 564, 571 (the proponent of the evidence is not required to negative the privilege; "the party objecting must in some way make it appear, if it does not otherwise appear, that the information is within the statutory exclusion"); 1887, People *v.* Schuyler, 106 id. 298, 304, 12 N. E. 783 (preceding case approved); 1902, Griffiths *v.* R. Co., 171 id. 106, 63 N. E. 808; 1902, Green *v.* R. Co., ib. 201, 63 N. E. 958.

[3] 1894, Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361 (undertaker's employees, allowed to testify to a conversation with the physician in the ambulance).

[4] 1884, Raymond *v.* R. Co., 65 Ia. 152, 21 N. W. 495 (a physician attending with his partner, not allowed to disclose the patient's statement made to his partner); 1886, Renihan *v.* Dennin, 103 N. Y. 573, 578, 9 N. E. 320 (a physician called in for consultation by the regular physician is within the privilege).

[1] 1898, Hendershot *v.* Tel. Co., 106 Ia. 529, 76 N. W. 828 (treating a horse).

[2] 1877, Brown *v.* R. Co., 66 Mo. 597 (a drug-clerk, asked what medicines he had sold the plaintiff).

[3] 1875, People *v.* De France, 104 Mich. 563, 62 N. W. 709.

[4] 1895, Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523 (admitted, where the physician called upon the patient for a money matter); 1889, Hoyt *v.* Hoyt, 112 N. Y. 493, 515, 20 N. E. 402 (physician's testimony as to interviews had with a testator to ascertain his opinion of his daughter's mental condition, held not privileged); 1879, Edington *v.* Ætna Life Ins. Co., 77 N. Y. 564, 570 (that "the witness attended

communication made at some time when the professional relation is not pending.[5] An autopsy after decease is of course not privileged.[6]

A communication made to a physician invited to the inspection or consultation *at the opponent's instance* is not privileged, because it is not usually made for the purpose of curative treatment, and because a confidence cannot be implied in the absence of an invitation on the part of the communicating person.[7]

§ 2383. (*b*) **Communications Necessary for Prescription.** The privilege is intended (and by most statutes is declared) to protect only those communications which are necessary for obtaining the benefits of the professional relation, — in other words, for enabling the physician to prescribe remedies.[1] No doubt the patient's belief of what was necessary should be the test. The burden of showing necessity should in any case be upon the claimant of the privilege.[2]

the assured for some disease" does not raise a presumption "that he discovered that disease or learned its nature while attending him professionally"); 1880, Grattan *v.* Ins. Co., 80 id. 281, 296 (professional character, found on the facts); 1899, Brnendl's Will, 102 Wis. 45, 147, 78 N. W. 169 (examination of patient with reference to her mental competency as being fit for release from guardianship, held not within the statute).

[5] 1901, Herries *v.* Waterloo, 114 Ia. 374, 86 N. W. 306 (opinion based on information acquired when not employed as physician, not privileged); 1903, Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54; 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730 (communications during trial, but after the relation of physician had ended, exclnded).

[6] 1897, Harrison *v.* R. Co., 116 Cal. 156, 47 Pac. 1019.

[7] 1892, Freel *v.* R. Co., 97 Cal. 40, 45, 31 Pac. 730, *semble* (a physician sent by the opponent to examine, held not privileged); 1894, Nesbit *v.* People, 19 Colo. 441, 461, 36 Pac. 221 (examination by a physician agreed on between the defendant and the prosecution, held not privileged); 1902, State *v.* Height, 117 Ia. 650, 91 N. W. 935 (information obtained by a physician examining the defendant, while in jail, for the prosecution, held not within the privilege); 1888, People *v.* Glover, 71 Mich. 307, 38 N. W. 874 (rape; a physician's examination of the defendant in jail, at the district attorney's instance, held not privileged); 1890, People *v.* Kemmler, 119 N. Y. 580, 585, 24 N. E. 9 (a physician's opinion of an accused's mental condition, obtained by watching him in jail at the instance of the district attorney, held not privileged); 1893, People *v.* Sliney, 137 id. 570, 33 N. E. 150 (a physician sent by the district attorney to examine the defendant for insanity; the defendant's admissions not privileged); 1896, People *v.* Hoch, 150 id. 291, 44 N. E. 977 (an examination of the defendant for insanity, made by the witness as an expert for the prosecution, held not privileged).

[1] 1877, Collins *v.* Mack, 31 Ark. 693 (by a woman after a childbirth, that the father had never promised to marry her, held not privileged); 1897, Redfield's Estate, 116 Cal. 644, 48 Pac. 794 (mental condition learned while treating for consumption; may be "necessary," etc.); 1901, Black's Estate, 132 id. 392, 64 Pac. 695 (testamentary capacity; preceding case approved); 1890, Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973 (incidental facts, not necessary to be disclosed for the purpose of the treatment, held privileged); 1884, Raymond *v.* R. Co., 65 Ia. 152, 21 N. W. 495 (injured person's statement that he "stepped off the car while it was in motion and thus fell," held privileged; this seems unsonnd); 1895, Kansas C. F. S. & M. R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646 (injnred person's statements as to the facts leading up to the injury, held not privileged); 1890, Briesenmeister *v.* Supreme Lodge, 81 Mich. 525, 531, 45 N. W. 977 ("all disclosures by the patient . . . respecting his ailments" are privileged, whether they are necessary for prescribing or not; said *obiter*); 1891, Cooley *v.* Foltz, 85 id. 47, 48 N. W. 176 (patient's statements about the litigation, held not privileged); 1897, People *v.* Cole, 113 Mich. 83, 71 N. W. 455 (by the complainant in a bastardy action, to the attending physician, as to the father of the child); 1874, Harriman *v.* Stowe, 57 Mo. 93, 95, *semble* (plaintiff's statement to the physician that she had fallen through a trap-door left insecure, held admissible); 1839, Hewitt *v.* Praine, 21 Wend. 79 (seduction; defendant's admission, when asking for drugs for an abortion, that the woman was the plaintiff's daughter, held not privileged); 1898, Nelson *v.* Oneida, 156 N. Y. 219, 50 N. E. 802 (a disease discovered while treating for another disease, held privileged); 1902, Green *v.* R. Co., 171 id. 201, 63 N. E. 958 ("information of how the accident happened," held not necessary for snrgical treatment; three judges diss.); 1897, Kenyon *v.* Mondovi, 98 Wis. 53, 73 N. W. 314 (statute applied).

[2] 1878, Campau *v.* North, 39 Mich. 606, 609; 1894, Lincoln *v.* Detroit, 101 id. 245, 249, 59 N. W. 617 (claimant of the privilege must show the necessity); 1876, Edington *v.* Mutnal Life Ins. Co., 67 N. Y. 185, 194 (evidence of

§ 2384. (*c*) **Information, Active and Passive.** Communications are the subject of the protection. But communication may be made by exhibition, or by submission to inspection, as well as by oral or written narration or utterance. The invitation to the physician to prescribe assumes that he will first obtain the data for the prescription; and since the usual method of obtaining these involves the physician's own observation as well as the patient's narration, the invitation to prescribe is an implied communication of all the data which the physician may by any method seek to obtain as necessary for the prescription.[1] It is therefore well settled that the data furnished passively, through submission to inspection, are equally within the privilege, — and this whether the patient was himself aware or not of the existence of the specific data discovered. It might be doubtful whether the data of insanity are thus privileged, where the physician is called for another purpose, because here the foregoing principle — that the data must be necessary for prescription — would seem not to be satisfied; but so far as the present principle is concerned, they fall within it.[2]

the "necessity," is not required, "as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing"); 1879, Edington *v.* Ætna Life Ins. Co., 77 id. 564, 570 (the Court must be able "upon the evidence to say that such information was necessary"; the mere relation does not suffice; preceding ruling not noticed); 1887, People *v.* Schuyler, 106 id. 298, 300, 12 N. E. 783 (foregoing ruling approved); 1889, Feeney *v.* R. Co., 116 id. 375, 380, 22 N. E. 402 (first Edington case approved; second one ignored).

The Court ought ultimately to determine (*ante*, § 2322) whether a necessity existed: *Contra:* 1903, State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979 (in general, the physician must be the judge of the necessity; except as to matters "apparent to the ordinary observer").

[1] Compare the same question in other privileges (*ante*, §§ 2306, 2337).

[2] *Cal.:* 1901, Nelson's Estate, 132 Cal. 182, 64 Pac. 294 (capacity to make a will; attending physician's testimony inadmissible); *Ind.:* 1881, Masonic M. B. Ass'n *v.* Beck, 77 Ind. 203, 210 (like Heuston *v.* Simpson, *infra*); 1883, Excelsior M. A. Ass'n *v.* Riddle, 91 id. 84, 88 (same, under a revised phrasing of the statute); 1884, Penn M. L. Ins. Co. *v.* Wiler, 100 id. 92, 100 (same); 1887, Williams *v.* Johnson, 112 id. 273, 13 N. E. 872 (same); 1888, Heuston *v.* Simpson, 115 id. 62, 17 N. E. 261 (the statute applies "whether the knowledge is communicated by the words of the patient or is gained by observation"); 1889, Morris *v.* Morris, 119 id. 343, 21 N. E. 918 (same; applied to insanity); 1893, Gurley *v.* Park, 135 id. 440, 442, 35 N. E. 279 (sanity, in a will case, privileged); 1902, Aspy *v.* Botkins, 160 id. 170, 66 N. E. 462 (vacuum-ray photograph taken by the physician in the course of treatment, excluded): *Ia.:* 1895, Prader *v.* Accident Ass'n, 95 Ia. 159, 63 N. W. 601 (privilege covers all information obtained by observation); *Mich.:* 1870, Briggs *v.* Briggs, 20 Mich. 34, 41 (privilege includes "whatever was disclosed to any of his senses and which in any way was brought to his knowledge for that purpose"); 1879, Fraser *v.* Jennison, 42 id. 206, 225, 3 N. W. 882 (same; applied to a testator's mental condition); 1901, Rose *v.* Supreme Court, 126 id. 577, 85 N. W. 1073 (opinion based on the patient's appearance alone, excluded); *Mo.:* 1882, Gartside *v.* Ins. Co., 76 Mo. 446 ("information acquired by a physician from inspection, examination, or observation of the person of the patient," is equally privileged; leading opinion by Norton, J., with a good argument by Mr. Jacob Klein); *N. Y.:* 1871, Sloan *v.* R. Co., 45 N. Y. 125, 128 (existence of a disease, held within the privilege); 1876, Edington *v.* Mutual Life Ins. Co., 67 id. 185, 194 (the statute includes "such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearances and symptoms"); 1879, Edington *v.* Ætna Life Ins. Co., 77 id. 564, 571 (the exclusion affects only "such information as a physician may acquire of secret ailments by an examination of the person"; but not of the fact that the patient "has a fever or a fractured leg or skull or is a raving maniac"; the remaining judges apparently did not concur in the details of the opinion); 1880, Grattan *v.* Ins. Co., 80 id. 281, 297 ("though the patient had been dumb, it would make no difference; the communication to his sense of sight is within the statute, as much so as if it had been oral and reached his ear"; the first Edington case cited, and the second ignored on this point); 1883, Grattan *v.* Ins. Co., 92 id. 274, 287 (preceding case approved); 1886, Renihan *v.* Dennin, 103 id. 573, 579, 9 N. E. 320 (Grattan case approved); *Wis.:* 1900, Shafer *v.* Eau Claire, 105 Wis. 244, 81 N. W. 409 ("all that he discovered by examination of her person," held privileged).

But it is the tenor only of the communication that is privileged. The mere *fact of making a communication*, as well as the *date* of a consultation and the *number of consultations*, are therefore not privileged from disclosure, so long as the subject communicated is not stated.[3]

§ 2385. (*d*) **Criminal Cases, Malpractice.** The privilege, in general, applies as well in criminal as in civil cases; unless the statute expressly limits it to the latter.[1] But in two classes of instances the privilege, though apparently applicable, exhibits its inherent impropriety so plainly that Courts have sometimes sought, by main force, to set limits and prevent its evil effects, namely, in cases where the physician is himself a *partaker in the criminal transaction*, and in cases where the physician has acted *on behalf of the victim* of a crime. Courts have chosen various methods, more or less reasonable, of escaping from the dilemma.[2] All that can be said is that an ill-advised initial principle is sure to tempt judges, sooner or later, to do violence to it.

[3] *Ia.:* 1900, Nelson *v.* Ins. Co., 110 Ia. 600, 81 N. W. 807 (that he was consulted and that he prescribed; not privileged); *Mich.:* 1887, Brown *v.* Ins. Co., 65 Mich. 306, 316, 32 N. W. 610 (the fact of the physician's treatment for typhoid fever, held not privileged, under the particular circumstances); 1890, Briesenmeister *v.* Supreme Lodge, 81 id. 525, 532, 45 N. W. 977 ("the fact that he attended the insured professionally, and the dates and number of his visits," held not privileged); 1891, Cooley *v.* Foltz, 85 id. 47, 48 N. W. 176 (similar to the preceding case); 1893, Dittrich *v.* Detroit, 98 id. 248, 57 N. W. 125 (same); 1897, Lammiman *v.* R. Co., 112 id. 602, 71 N. W. 153 (for what disease he had treated the party, excluded); 1899, Jones *v.* P. B. L. Assur. Co., 120 id. 211, 79 N. W. 204 (that the person had consulted a physician for a certain illness, excluded); *Minn.:* 1903, Price *v.* Standard L. & A. Ins. Co., — Minn. —, 95 N. W. 1118 (the fact of treatment and number of visits, admissible; "this doctrine, looking at the question in a logical way, comes very near trespassing on the statute"); *Nebr.:* 1902, Sovereign Camp *v.* Grandon, 64 Nebr. 39, 89 N. W. 448 (the fact that a physician was called is not within the privilege); *N. Y.:* 1892, Patten *v.* Ins. Ass'n, 133 N. Y. 450, 452, 31 N. E. 342 (whether P. was a patient of the doctor and was attended as such and was sick, and how many times and when he attended P., held not privileged); *Wis.:* 1899, McGowan *v.* Supreme Court, 104 Wis. 186, 80 N. W. 603 (that he treated the person for a disease, excluded).

This distinction is often of some practical significance; for example, in life insurance cases, the insured's allegation of complete health during a certain period may be disproved by the fact that a physician was often consulted; and in personal injury cases, the fact that a certain physician was consulted may give rise in effect to an unfavorable inference because he was not called for the plaintiff, although no inference could technically have been drawn from the plaintiff's claim of privilege if the defendant had sought to call and examine the physician (*post*, § 2386).

[1] 1894, People *v.* Lane, 101 Cal. 513, 516, 36 Pac. 16; 1895, People *v.* West, 106 id. 89, 39 Pac. 207.

[2] *Ind.:* 1897, Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (a disclosure by a physician attending a miscarriage, allowed in a prosecution for the abortion, the privilege not being intended "to shield one who is charged with perpetrating an unlawful act upon the patient"); 1903, Seifert *v.* State, 160 id. 464, 67 N. E. 100 ("a request to a physician to commit a crime is not privileged"; applied to a woman consulting for an abortion); *Ia.:* 1882, Guptill *v.* Verback, 58 Ia. 99, 12 N. W. 125 (the act of producing a miscarriage in order to save the mother's life being not criminal, a physician's advice as to the best means of "getting rid of a child" was held presumably "made for a lawful purpose"; this ruling, as regards the presumption, is unsound); 1896, State *v.* Smith, 99 id. 26, 68 N. W. 428 (causing a miscarriage; privilege applied); 1901, State *v.* Grimmell, 116 id. 596, 88 N. W. 342 (murder by abortion; the privilege does not apply to the testimony of a physician, called by the prosecution, who attended the deceased just before her death; whether a formal waiver is necessary, and by whom, not stated; compare § 2382, *ante*); *N. Y.:* 1880, Pierson *v.* People, 79 N. Y. 424, 432 (murder by poisoning; a physician's information acquired while attending the deceased for the poison, admitted for the prosecution, as not within the spirit of the privilege; but no "general rule applicable to all cases" was ventured); 1886, People *v.* Murphy, 101 id. 126, 4 N. E. 326 (abortion; testimony of the physician attending after the operation, not admitted); 1893, People *v.* Harris, 136 id. 423, 437, 448, 33 N. E. 65 (defendant, a physician, told a physician attending the deceased that he had twice performed operations for abortion on her; not privileged, the statutory privilege not being intended to "shield a person charged with the murder of his patient").

The same temptation exists to save an innocent physician who, when charged with malpractice, might otherwise be stifled by the privilege;[3] but the doctrine of waiver (*post*, § 2389) usually assists him here.

§ 2386. (*e*) **Whose is the Privilege; Claim of Privilege; Inference from Claim.** The privilege is plainly that of the *patient*, not of the physician; and the latter therefore cannot claim it if the patient abandons it.[1] Although in the first instance it is commonly the physician who as witness declines to answer, still the claim of privilege must formally be made, in analogy to the other privileges (*ante*, § 2196) by the patient, if he is before the Court; if he is not, then technically he should be given an opportunity to claim before the examination is proceeded with. The privilege, furthermore, is that of the patient as such, not of the party; hence, the claim should be made by the patient himself, in accordance with the analogy of other privileges (*ante*, §§ 2270, 2321),—though this rule is seldom observed in practice. The privilege, furthermore, may be claimed by the *representative* of a deceased patient, as his personal successor;[2] but not by a mere assignee of a contract-interest.[3]

When the privilege is claimed by a patient who is a party, *no inference* as to the facts suppressed can be drawn,[4]—following here the analogy of the other privileges (*ante*, §§ 2272, 2322).

§ 2387. (*f*) **Termination of the Privilege; Death.** The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure; it is therefore to be preserved even after the death of the patient,[1]—following the analogies of the other similar privileges (*ante*, §§ 2323, 2341).

§ 2388. **Same: Waiver, in general; Express and Implied Waiver.** The privilege may be waived,[1] like all other privileges. It is astonishing to find that this question could ever have been regarded as debatable. Nothing but a confusion of fundamental ideas could ever create any doubt.[2]

[3] 1900, Cramer *v.* Hurt, 154 Mo. 112, 55 S.W. 258 (action for loss of a wife's services by the defendant's malpractice; the defendant allowed on the facts, as of necessity, to testify for himself). *Contra:* 1903, Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462 (action for malpractice; the plaintiff held privileged to withhold the testimony of other physicians attending her after the defendant; the ground of the ruling does not appear; but it is at any rate a mockery of justice).

[1] 1901, Burgess *v.* Sims Drug Co., 114 Ia. 275, 86 N. W. 307; 1835, Johnson *v.* Johnson, 14 Wend. 636, 641; 1897, Boyle *v.* Relief Assoc., 95 Wis. 312, 70 N. W. 351 (showing that "shall not be compelled" is equivalent to "shall not be allowed"; Newman, J., diss.). Compare the theories of attorneys' privilege (*ante*, § 2290).

[2] *Post*, § 2391.

[3] *Contra:* 1876, Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185, 194 (assignee of an insurance policy may assert the privilege of the insured).

[4] 1901, Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303; 1890, McConnell *v.* Osage, 80 Ia. 293, 45 N. W. 550 (refusing to allow the question on cross-examination whether the patient was willing to let the physician speak); 1899, Lane *v.* R. Co., 21 Wash. 119, 57 Pac. 367.

Perhaps it is sound to distinguish between failing to call the witness and claiming the privilege when the opponent calls him: 1891, Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176 (plaintiff's failure to produce her physicians, held "a legitimate fact for the jury").

[1] 1876, Edington *v.* Ins. Co., 67 N. Y. 185, 194; 1880, Grattan *v.* Ins. Co., 80 id. 281, 298; 1885, Westover *v.* Ins. Co., 99 id. 56, 1 N. E. 104; 1900, Davis *v.* Supreme Lodge, 165 id. 159, 58 N. E. 891 (physician's certificate of death, recorded with the board of health, excluded on the ground of privilege); 1903, Beglin *v.* Ins. Co., 173 id. 374, 66 N. E. 102 (Davis *v.* Supreme Lodge followed).

[1] 1879, Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 671, 3 N. W. 173; 1879, Scripps *v.* Foster, 4 ib. 742, 748, 3 N. W. 216; 1884, Groll *v.* Tower, 85 Mo. 249, 255 (repudiating the apparently contrary assumption in Harriman *v.* Stowe, 57 id. 93); 1886, Carrington *v.* St. Louis, 89 id. 212, 1 S. W. 240; 1886, Blair *v.* R. Co., ih. 337, 1 S. W. 367.

[2] Compare the theory of Privilege (*ante*, §§ 2192, 2196, 2197).

That the waiver must be in *express* language is not necessary, upon any principle. But this is sometimes by statute required.[3] Distinguished, however, this statutory waiver, which is valid only within certain limits, and the ordinary principle that a rule of evidence will not be enforced if the opposing counsel fails to make objection when the witness is examined (*ante*, § 18); thus, whether or not the statutory waiver was permitted to be made by the attorney for the witness or party before or during trial,[4] still the counsel's failure to object to the compulsion of the witness' answer would render futile any exception to the answer.[5]

That a waiver may be irrevocably made by *contract* before litigation begun has generally been conceded by the Courts.[6] It should certainly be sanctioned, unless made under conditions of duress or fraud which would have rendered the contract in other respects voidable.

Coming now to waivers *implied from conduct*, it is to be noticed that these depend, as already observed for other privileges (*ante*, §§ 2327, 2340), on two considerations — the interpretation of the actual conduct, and the fairness of the situation created by that conduct. A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield (in Lord Mansfield's phrase concerning an infant's exemption from liability). The question then arises, What sorts of conduct, by inference or by fairness, should be treated as a waiver of the privilege to keep secret the communications to a physician?

§ 2389. **Same: Waiver by Bringing Suit; by Testifying; by Former Waiver.** (1) In the first place, the *bringing of an action* in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its

[3] *E. g.*, in New York, by the amendment of 1891.

[4] *E. g.*: 1889, Alberti *v.* R. Co., 118 N. Y. 77, 23 N. E. 35.

[5] This distinction was ignored in the following case: 1889, Hoyt *v.* Hoyt, 112 N. Y. 493, 515, 20 N. E. 402.

[6] 1902, Keller *v.* Ins. Co., 95 Mo. App. 627, 69 S. W. 612 (waiver in a policy held valid, and effective also against "all who come within its terms," — here, a beneficiary); 1876, Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185, 194 (undecided); 1896, Foley *v.* Royal Arcanum, 151 id. 196, 45 N. E. 456 (an express waiver, in an insurance-application, as to the testimony of any attending physician, sanctioned, on the theory that a waiver of the statutory right is not against public policy); 1900, Holden *v.* Ins. Co., 165 id. 13, 58 N. E. 771 (stipulation of waiver by the insured in his application, held not sufficient under the statutory amendment of 1891); 1901, Fuller *v.* Knights of Pythias, 129 N. C. 318, 40 S. E. 65 (waiver in an insurance application, held binding on the beneficiary); 1888, Adreveno *v.* Mutual R. F. L. Ass'n, 34 Fed. 870, Thayer, J. (waiver of the privilege by the insured in a policy is valid, and binds also one claiming under him after death). Compare such a waiver for another privilege (*ante*, § 2275).

origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But, stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim; I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the Court will forbid his testimony." If the utter absurdity of this statement (which is virtually that of every such claimant) could be heightened by anything, it would be by the circumstance (frequently observable) that the dreaded disclosure, which the privilege prevents, is the fact that the plaintiff has suffered no injury at all. In actions for *personal injury*, the permission to claim the privilege is a burlesque upon logic and justice. In actions upon *insurance policies*, where fraudulent misrepresentations as to health are in issue, the insured's initial conduct in volunteering a supposedly full avowal of his state of health has put him in the position of abandoning any desire to be secretive towards the insurer on that subject, and of giving the insurer in fairness the right to ascertain the truth; and a waiver should be predicated by the nature of the action. Yet here the injury to justice by denying a waiver is not so considerable; for in fairness (that is, to honest applicants, who have nothing to fear) the insurer ought immediately to make his extrinsic investigations among prior attendant physicians (which commonly he does not do), instead of waiting till more premiums have been paid and the insured has left the world;[1] so that here the moral inequities are more nearly balanced, and no particular harm is done by the privilege — except to the logic of the law. In *testamentary* causes, there is ordinarily no conduct amounting to waiver, — although it is otherwise unsound (*ante*, §§ 2381, 2384) to treat the data of sanity and insanity as having been consciously confided, in any sense of the word, to the physician. So far as judicial rulings go, only actions *against a physician for malpractice* have been deemed to involve a waiver.[2]

(2) The *party's own voluntary testimony*, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue; the reasons here being merely somewhat stronger than those above noted.[3] Courts have rarely conceded this;[4] though statutes have often en-

[1] This is recognized by the insurers in the now frequent issuance of policies which are made incontestable after a short period; *i. e.* the insurer virtually has to make his inquiries within that period or not at all. But so far as these policies are contestable (*e. g.* for "wilful misrepresentations"), the statement still applies.

[2] 1894, Beckwell *v.* Hosier, 10 Ind. App. 5, 37 N. E. 580 (patient's action for malpractice, held a waiver, permitting the defendant to testify); 1900, Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258 (an action by a wife for personal injury by malpractice by a physician is a waiver of privilege as to professional confidence; but not an action by a husband for loss of services of the injured wife). Compare the cases cited *ante*, § 2385.

[3] 1891, Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111 (malpractice on the plaintiff's wife; the plaintiff's use of the testimony of himself, his wife, and her mother, held a waiver).

[4] *Contra:* 1887, Williams *v.* Johnson, 112 Ind. 273, 13 N. E. 872 (the plaintiff's testimony that she had called Dr. H. and he had "pre-

acted it.[5] Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege.

(3) A waiver at a *former trial* has been held not to affect the privilege at a later trial.[6] This is clearly unsound; for the original disclosure takes away once for all the benefit aimed at by privilege; to enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only.[7]

§ 2390. **Same: Waiver by Calling the Physician.** (1) To request a physician to *attest one's will* is by implication to request him to bear testimony, if called on, to all facts affecting the validity of the will, and is therefore a waiver.[1] (2) To call a physician to the stand, and *examine him as a witness* to one's physical condition as formerly communicated to him, is a waiver of the privilege in regard to his knowledge of the physical condition asked about;[2] no reasoning could pretend to maintain the contrary. (3) To call a physician as a witness to one's physical condition is a waiver of the privilege as to the knowledge acquired by *other physicians* of the same condition. This is generally not conceded in the judicial rulings;[3] but it cannot be escaped, if regard is had to the foundation of the privilege. What further

scribed for her back and side," held not to permit the opponent to call Dr. H. to testify that he had found no injury; this was a gross error; it practically permitted the plaintiff to invoke the physician's credit falsely, with a guarantee against the exposure of her lie); 1890, McConnell *v.* Osage, 80 Ia. 293, 45 N. W. 550 (plaintiff's direct testimony to her previous condition of health and sickness, naming her physician, held not a waiver permitting the calling of the physician to contradict her); 1901, Burgess *v.* Sims Drug Co., 114 id. 275, 86 N. W. 307 (testifying on cross-examination to the subject of the desired testimony of the physician is not a waiver, because not voluntary); 1902, Green *v.* Nebagamain, 113 Wis. 508, 89 N. W. 520 (a party's own testimony to the same injury, held not a waiver).

[5] *Ante*, § 2380.

[6] 1901, Burgess *v.* Sims Drug Co., 114 Ia. 275, 86 N. W. 307 (testifying to the same subject, or calling the same physician, at a former trial, held not a waiver); 1883, Grattan *v.* Ins. Co., 92 N. Y. 274, 288 (questioning the physician on a former trial, held not a waiver).

[7] 1887, McKinney *v.* R. Co., 104 N. Y. 352, 355, 10 N. E. 544 (*contra* to the preceding ruling; "after its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect; . . . the consent, having been once given and acted upon, cannot be recalled").

[1] 1895, Mullin's Estate, 110 Cal. 252, 42 Pac. 646.

[2] 1893, Wheelock *v.* Godfrey, 100 Cal. 587, 35 Pac. 317 (calling the physician, held on the facts a waiver); 1897, Lissak *v.* Crocker Est. Co., 119 id. 442, 51 Pac. 688 (calling the physician to testify to an examination, held a waiver); 1902, Sovereign Camp *v.* Grandon, 64 Nebr. 39, 89 N. W. 448 (cross-examination of the physician to the injury; held a waiver). Statutes (*ante*, § 2380) often declare this in terms.

[3] 1884, Penn. Mutual L. Ins. Co. *v.* Wiler, 100 Ind. 92, 102 (calling physician A is not a waiver of the privilege as to the same subject for physicians B and C); 1897, Baxter *v.* Cedar Rapids, 103 Ia. 599, 72 N. W. 790 (several physicians having examined the plaintiff, the calling of one does not waive the privilege as to the others); 1885, Dotton *v.* Albion, 57 Mich. 575, 577, 24 N. W. 786 (the calling of one physician to prove the plaintiff's good health before the injury, held not to permit the calling of other physicians to negative her good health before the injury); 1891, Mellor *v.* R. Co., 105 Mo. 455, 16 S. W. 849 (plaintiff's calling of C, who attended him for the injury, held not to permit the calling of S., who had preceded C. in attending for the same injury); 1888, Hope *v.* R. Co., 110 N. Y. 643, 17 N. E. 873, 40 Hun 438 (calling one of three physicians who had visited the plaintiff at separate times for the same injury; held not a waiver as to the other two; Earl and Finch, JJ., diss.); 1895, Morris *v.* R. Co., 148 id. 88, 42 N. E. 410 (where two physicians were called in attendance for a joint examination, the plaintiff, by putting one on the stand, also waived the privilege as to the other; in effect overruling Record *v.* Saratoga Springs, 120 id. 646, 24 N. E. 1102); 1902, Metropolitan St. R. Co. *v.* Jacobi, 50 C. C. A. 619, 112 Fed. 924 (following Hope *v.* R. Co.).

reason is there for secrecy, if the patient has thrown it aside by permitting one physician to testify? The unfairness of allowing a party to play fast and loose with medical testimony in this shifty manner is obvious to the untechnical intelligence. (4) The sending of a physician's certificate, as part of the "*proofs of death*," by the beneficiary of a contract of life insurance or the representative of the insured, is a voluntary disclosure of the physician's knowledge though made in pursuance of contract, and is therefore a waiver.[4]

§ 2391. **Same: Waiver by Deceased Patient's Representative.** The *personal representative* of the deceased may waive the privilege. One who is entrusted with the management of the deceased's property may surely be trusted to protect the memory and reputation of the deceased, in so far as it is liable to injury by the disclosure of his physical condition when alive. It is incongruous to hold that the person who manages the litigation of the deceased's property-interests has no power to waive rules of evidence for the purpose of advancing those interests. The power of an *heir* may also be conceded, if we remember that the heir, first, is at least equally interested in preserving the ancestor's reputation, and, secondly, has an equal moral claim to protect the deceased's property-rights from unwarranted diminution. The futility, under the circumstances, of predicating any privilege is the more apparent when (as in the usual case) the issue turns upon the fact of insanity, which is so bruited publicly in the litigation that the pretence of preserving secrecy is a vain one. Except in two or three jurisdictions,[1] it is usually agreed that the deceased's representative (and probably also the heir) may waive the privilege.[2]

[4] 1900, Nelson *v.* Ins. Co., 110 Ia. 600, 81 N. W. 807 (physician's affidavit, sent with proofs of death, received as an admission of the beneficiary); 1891, Buffalo L. T. & S. D. Co. *v.* Knights T. & M. M. A. Ass'n, 126 N. Y. 450, 454, 27 N. E. 942 (physician's certificate of cause of death, sent with proofs of death, receivable as the party's admission).

Distinguish the following ruling: 1900, Davis *v.* Supreme Lodge, 165 N. Y. 159, 58 N. E. 891 (physician's certificate of death, required by law, excluded; N. Y. City Charter, Laws 1897, c. 378, § 1172, making admissible the records of the board of health, does not repeal the Code section; Gray and Landon, JJ., diss.); 1903, Beglin *v.* Ins. Co., 173 id. 374, 66 N. E. 102 (preceding case followed).

For the question how far these "proofs" may be used as *admissions* or otherwise, see *ante*, § 1073.

[1] *Cal.:* 1893, Flint's Estate, 100 Cal. 391, 395, 34 Pac. 863 (no waiver, following the N. Y. construction; here, not for an heir as against a devisee); 1897, Harrison *v.* R. Co., 116 id. 156, 47 Pac. 1019 (following the New York rulings); *Ia.:* 1900, Shuman *v.* Supreme Lodge, 110 Ia. 480, 81 N. W. 717 (contest between beneficiaries of insurance; the privilege held to apply; compare the Iowa cases *infra*); *N. Y.:* 1885, Westover *v.* Ins. Co., 99 N. Y. 56, 1 N. E. 104; 1888, Loder *v.* Whelpley, 111 id. 239, 246, 18 N. E. 874.

[2] *Ind.:* 1881, Masonic M. B. Ass'n *v.* Beck, 77 Ind. 203, 210 (said *obiter;* waiver by deceased's representative, allowable); 1884, Penn. M. L. Ins. Co. *v.* Wiler, 100 id. 92, 101 (same; beneficiary of an insurance policy, held to have the right of waiver); 1889, Morris *v.* Morris, 119 id. 343, 21 N. E. 918 (administrator allowed to waive); *Ia.:* 1894, Denning *v.* Butcher, 91 Ia. 425, 436, 59 N. W. 69 (waiver by an executor allowable; here, by calling as a witness); 1897, Winters *v.* Winters, 102 id. 53, 71 N. W. 184 (a physician may testify to the deceased's mental condition; whether on the ground that either heir or alleged devisee has the right to waive the privilege as representative, or that the statute does not apply where the proceedings are not adverse to the estate, as in a will contest, is expressly not decided, both grounds being approved); *Mich.:* 1879, Fraser *v.* Jennison, 42 Mich. 206, 225, 3 N. W. 882 (testamentary contest; waiver by an executor allowed); *Mo.:* 1884, Groll *v.* Tower, 85 Mo. 249, 255 (personal injury; waiver by a representative, allowed); 1889, Thompson *v.* Ish, 99 id. 160, 12 S. W. 510 (testamentary contest; a residuary legatee allowed to waive; "all claiming under the deceased" may waive).

Sub-topic VII: COMMUNICATIONS BETWEEN PRIEST AND PENITENT.

§ 2394. **History; No Privilege at Common Law.** It is perhaps open to argument whether a privilege for confessions to priests was recognized in common-law courts during the period before the Restoration. The only available data appear to be an indecisive incident in the Jesuit trials under James I,[1] and a statute of much earlier date and of ambiguous purport,[2] together with the general probabilities to be drawn from the recognition of Roman ecclesiastical practices prior to Henry VIII.[3] But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege.[4] A single judge, to be sure, distinctly declared for the privilege;[5] and several took occasion to avow that in their

[1] 1606, Garnet's Trial, 2 How. St. Tr. 218, 255 (Garnet was Superior of the Jesuits, and on his trial refused certain answers because "he was bound to keep the secrets of confession"; "whereupon the earl of Nottingham asked him, if one confessed this day to him that to-morrow morning he meant to kill the king with a dagger, if he must conceal it? Whereunto Garnet answered that he must conceal it"; but the questioners did not attempt to compel a disclosure of the confessional's secrets).

[2] St. 9 Edw. II, c. 10 (Articuli Cleri); quoted and commented on in 2 Co. Inst. 629.

[3] Mr. Badeley's pamphlet, written about 1860 (a copy of which has not been accessible), rested the privilege on the supposed demonstration that it was recognized directly in the canon law, and implicitly in the English authorities of the 1600s; but his data seem to have been adequately explained away by Mr. Hopwood, in his learned article on Confessions in Criminal Causes (1865; Juridical Society's Papers, III, 129, 137). The arguments of Mr. Badeley are in part reproduced in a note to R. *v.* Hay, 2 F. & F. 4.

[4] 1693, Anon., Skinner 404 (L. C. J. Holt declared communications with an attorney or scrivener were with the protection of a counsellor; "for he is counsel to a man, with whom he will advise, if he be intrusted and educated in such way of practice; otherwise, of a gentleman, parson, etc."); 1791, R. *v.* Sparkes, cited in Peake N. P. 77 (the confession of a papist to a protestant clergyman was admitted by Buller, J.); 1792, Buller, J., in Wilson *v.* Rastall, 4 T. R. 753, 759 ("I take the distinction to be now well settled that the privilege extends to those three enumerated cases [of counsel, solicitor, and attorney] at all times, but that it is confined to these cases only"); 1802, Butler *v.* Moore, Ire., McNally, Evidence, 253 (title to property under a will; on the question whether the testator by having conformed to the Roman church had become incapable of devising his estates, a Roman clergyman was asked by the heir "what religion did Lord Dunboyne profess at the time of his death?"; Smith, M. R., declined to recognize the privilege claimed by the witness on the ground of "confidential communications made to him in the exercise of his clerical functions"); 1823, R. *v.* Radford, cited by Mr. Moody, arguing in R. *v.* Gilham, Moo. Cr. C. 197 (confession to a clergyman, excluded; but probably not because of the privilege, but on the principles of confessions); 1828, R. *v.* Gilham, *ubi supra* (confession to a mayor, made after exhortations by a clergyman, admitted); 1828, Broad *v.* Pitt, 3 C. & P. 518, Best, C. J. ("The privilege does not apply to clergymen, since the decision the other day in the case of Gilham. I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them"); 1838, Greenlaw *v.* King, 1 Beav. 137, 145, *obiter*, per Lord Langdale, M. R. (privilege denied); 1851, Wigram, V. C., in Russell *v.* Jackson, 9 Hare 387, 391, *obiter* (privilege denied); 1860, R. *v.* Hay, 2 F. & F. 4 (a Catholic priest objected to reveal from whom he received the watch charged as stolen, claiming that he "received it in connection with the confessional"; Hill, J.: "You are not asked at present to disclose anything stated to you in the confessional"; and committed the witness for contempt, on his continued refusal to answer); 1865, Nash's Life of Lord Westbury, II, 104 (Lord Westbury, in the controversy over the "Road Murder," declared that no such privilege existed); 1876, Jessel, M. R., in Anderson *v.* Bank, L. R. 2 Ch. D. 644, 651, *obiter* (privilege denied); 1881, the same judge in Wheeler *v.* LeMarchant, 17 id. 675, 681, *obiter* (same); 1893, Normanshaw *v.* Normanshaw, 69 L. T. Rep. 468, Jeune, P. J. (divorce for adultery; an answer compelled as to the respondent's admissions to the vicar; "each case of confidential communication should be dealt with on its own merits, but . . . it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law").

[5] 1846, Alderson, B., in Attorney-General *v.* Briant, 15 L. J. Exch. 265, 271 (on R. *v.* Gilham being cited: "That case was not well argued; there was a statute upon the subject, which was not referred to; I think the words are: 'Let confessors beware that they do not

discretion they would not compel disclosure in practice.[6] But the privilege cannot be said to have been recognized by the common law, either in England or in the United States.[7]

§ 2395. **Statutes recognizing the Privilege.** In two jurisdictions of Canada and in more than one half of the jurisdictions of the United States the privilege has been sanctioned by statute.[1] In the application of these statutes, it

disclose that which they receive from prisoners, excepting in treason'; the exception proves the rule"; this statute's meaning is explained by Mr. Hopwood, in the article cited *supra*); 1853, R. *v.* Griffin, 6 Cox Cr. 219, Alderson, B. (the chaplain of a workhouse, who had visited the accused "as her spiritual adviser to administer the consolations of religion" was held privileged, on the ground that by analogy to the attorney's privilege, which secures "proper legal assistance," so the accused should have "proper spiritual assistance"; yet the judge added: "I do not lay this down as an absolute rule; but I think that such evidence ought not to be given").

[6] 1828, Best, C. J., in Broad *v.* Pitt, quoted *supra*, n. 1; 1874, R. *v.* Castro (Tichborne Case), Charge of C. J., 1, 648 (a priest refused to disclose subject-matter of a confession, and was not compelled to speak).

[7] It was early denied in Massachusetts: 1818, Com. *v.* Drake, 15 Mass. 161 (lewdness; defendant's penitential confessions to fellow-members of his church, admitted); but was recognized in an inferior court in New York: 1820 *circa*, People *v.* Phillips, 1 West. L. J. 109, Anthon's Law Student, 217.

[1] *Newf.* Consol. St. 1892, c. 57, § 5 ("A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character"); *Que.*: C. C. P. (ed. 1886) § 275 ("[A witness] cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser"); *Alaska* C. C. P. 1900, § 1037 (substantially like Or. Annot. C. 1892, § 712, par. 3); *Ariz.* Rev. St. 1901, § 2535, par. 5; P. C. § 1111, par. 3 (like Cal. C. C. P. § 1881, unamended); *Ark.* Stats. 1894, § 2918 ("No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination"); *Cal.* C. C. P. 1872, § 1881, par. 3 ("A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs"; amended by the Commission of 1901 by adding: "nor as to any information obtained by him from a person about to make such confession and received in the course of preparation for such confession"; for the validity of this amendment, see *ante*, § 488); § 1882 (implied waiver; quoted *ante*, § 2292); *Colo.* Annot. Stats. 1891, § 4824 (like Cal. C. C. P. § 1881, unamended); § 4825 (waiver by consent; quoted *ante*, § 2380); *Hawaii* Civil Laws 1897, § 1418 ("No clergyman of any church or religious denomination shall, without the consent of the person making the confession, divulge in any action, suit, or proceeding, whether civil or criminal, any confession made to him in his professional character according to the uses of the church or religious denomination to which he belongs"); *Ida.* Rev. St. 1887, § 5958 (like Cal. C. C. P. § 1881, unamended); *Ind.* Rev. St. 1897, § 507 ("Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches," shall not be competent); *Ia.* Code 1897, § 4608 (quoted *ante*, § 2292); *Kan.* Gen. St. 1901, § 4771, par. 5 (like Okl. Stats. § 335); *Ky.* C. C. P. 1895, § 606 (5) ("Nor shall a clergyman or priest testify to any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person confessing"); *Mich.* Comp. L. 1897, § 10180 ("No minister of the gospel or priest of any denomination whatsoever shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination"); *Minn.* Gen. St. 1894, § 5662 (like Cal. C. C. P. § 1881, unamended); *Mo.* Rev. St. 1889, § 8925 ("The following persons shall be incompetent to testify: . . . fourth, a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination"); *Mont.* C. C. P. 1895, § 3163 (3) (like Cal. C. C. P. § 1881, unamended); *Nebr.* Comp. St. 1899, § 5902 (". . . The following persons shall be incompetent to testify: . . . fifth, a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession"); § 5907 (quoted *ante*, § 2292); *Nev.* Gen. St. 1885, § 3405 (like Cal. C. C. P. § 1881, unamended); *N. Y.* C. C. P. 1877, § 833 ("a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules or practice of the religious body to which he belongs"); *N. D.* Rev. C. 1895, § 5703 (like Cal. C. C. P. § 1881, unamended); § 5704 ("If a person offers himself as a witness," it is a consent to the priest's examination "on the same subject"); *Oh.* Annot. Rev. St. 1898, § 5241 ("The following persons shall not testify in certain respects: . . . 2. A clergyman or priest, concerning a confession made to him in

has been held, following the dictates of principle, that the privilege applies only to communications made in the understood pursuance of that church discipline which gives rise to the confessional relation,[2] and, therefore, in particular to confessions of sin only, not to communications of other tenor;[3] that it includes only the communications, and not information otherwise acquired;[4] and that it exempts the penitent also, as well as the priest, from disclosure.[5]

§ 2396. **Policy of the Privilege.** Even by Bentham, the greatest opponent of privileges, this privilege has, in the following argument, been conceded, to justify recognition:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. II, c. VI (Bowring's ed. vol. VII, pp. 367 ff.): "To form any comparative estimate of the bad and good effects flowing from this institution, belongs not, even in a point of view purely temporal, to the design of this work. The basis of the inquiry is, that this institution is an essential feature of the catholic religion, and that the catholic religion is not to be suppressed by force. . . . I set out with the supposition, that, in the country in question, the catholic religion was meant to be tolerated. But with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion; prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment; and so, in the case of inferior misdeeds, combated by inferior punishments. Such would be the consequences to penitents; to confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution, if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of this kind, some would stand firm under the persecution, others would sink under it. To the former, supposing arrangements on this head efficient and consistent, it would have the effect of imprisonment — a most severe imprisonment for life. . . . The

his professional character, in the course of discipline enjoined by the church to which he belongs"); *Okl.* Stats. 1893, § 335 ("The following persons shall be incompetent to testify: . . . Fifth, a clergyman or priest concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession . . . provided that, if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if [of?] an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section"); *S. D.* Stats. 1899, § 6544 (substantially like Cal. C. C. P. § 1881, unamended); § 6545 (like N. D. Rev. C. § 5704); *Utah* Rev. St. 1898, § 3414 (like Cal. C. C. P. § 1881, unamended); *Vt.* St. 1896, No. 30 ("No priest or minister of the gospel shall be permitted to testify in any court in this State to statements made to him by any person under the sanction of a religious confessional"); *Wash.* C. & Stats. 1897, § 5994 (like Cal. C. C. P. § 1881, unamended); § 6940 (quoted *ante*, § 2380); *Wis.* Stats. 1898, § 4074 (like N. Y. C. C. P. § 833, adding "without consent thereto by the party confessing"); *Wyo.* Rev. St. 1887, § 2589 (like Oh. Rev. St. 1898, § 5241).

[2] 1895, State *v.* Brown, 95 Ia. 381, 64 N. W. 277 (the defendant met the minister on the train, and communicated his story without any purpose of obtaining advice or assistance; held not privileged); 1835, People *v.* Gates, 13 Wend. 311, 323 (admissions "not in the course of discipline," held not privileged).

[3] 1877, Gillooley *v.* State, 58 Ind. 182; 1901, Hills *v.* State, 61 Nebr. 589, 85 N. W. 836 (bigamy; defendant's memorandum of instructions, given to a clergyman, who was to communicate to the first wife the reasons stated therein for influencing her to abandon the prosecution, admitted).

[4] 1880, Toomes' Estate, 54 Cal. 509, 515 (a priest's testimony to a testatrix' mental condition just before death, admitted, because covering, not a confession, but only the testatrix' "proper condition of mind to make a confession"). Compare R. *v.* Hay, 2 F. & F. 4, cited *ante*, § 2394.

[5] 1880, Massé *v.* Robillard, 10 Rev. Légale 527 (under the statutory privilege in Quebec, the penitent himself cannot be compelled to disclose the communications of the priest).

advantage gained by the coercion — gained in the shape of assistance to justice — would be casual, and even rare; the mischief produced by it, constant and all-extensive. Without reckoning the instances in which it happened to the apprehension to be realized, the alarm itself, intense and all-comprehensive as it would be, would be a most extensive as well as afflictive grievance. . . . If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from future misdeeds of the like nature, — repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past, — such are the well-known consequences of the institution; though in a proportion which, besides being everywhere unascertainable, will in every country and in every age be variable, according to the degree and quality of the influence exercised over the people by the religious sanction in that form, and the complexion of the moral part of their character in other respects. But, without any violation of this part of his religious duty, and even without having succeeded so far as to have produced in the breast of the misdoer any permanent and efficacious repentance, modes are not wanting in which it may be in the power, as it naturally will be in the inclination, of a conscientious and intelligent confessor, to furnish such information as shall render essential service to the interests of justice. I mean, by ministering to the prevention of such individual misdeeds as, though meditated, are as yet at a stage short of consummation; or of such others as, though as yet not distinctly in contemplation, are in a way to present themselves to the same corrupted mind. Who the misdoer is, the confessor knows better than to disclose; as little will he give any such information as may lead to the arrestation of the delinquent, under circumstances likely to end in his being crushed by the afflictive hand of the law. But, without any such disclosure, he may disclose what shall be sufficient to prevent the consummation of the impending mischief. . . . Warnings of this kind, if I understand aright, have not unfrequently been given, — warnings, which might have been given and would have been given in better times, — might (had they been given) have operated as preventives to the most grievous public calamities."[1]

The propriety of the privilege may be tested by the four canons already laid down for privileged communications (*ante*, § 2285). (1) Does the communication originate in a confidence of secrecy? It is so commonly understood. The ecclesiastical rules, to be sure, do provide in some measure that the penitent cannot obtain absolution unless he makes reparation, which may involve an open repetition of the confession; and this, it may be argued, indicates that ultimate secrecy is not an assumption of the confessional. Whether in theory or in practice such is the case, must be a question of fact as to actual ecclesiastical rules. In any event the ultimate disclosure in that manner must be supposed to rest upon the priest's discretion according to the needs of each case. Thus, in effect, it may be assumed that a permanent secrecy, subject only to an optional variation by the priest, is an essential of any real confessional system as now maintained. In so far as it may not be, in the discipline of any particular church, the privilege cannot apply. (2) Is confidentiality of communication essential to the relation? In other words, would penitential confessions, under such a system as the above, continue to be made if they were liable to be demanded for disclosure in a court of justice when needed? In so far as such confessions concern crimes and wrongs, they

[1] In the following place also the arguments are considered: *circa* 1823, Edward Livingston, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 467).

would certainly, in some indefinite but substantial measure, be discontinued, and the penitential relation be to that extent annulled. (3) Does the penitential relation deserve recognition and countenance? In a State where toleration of religions exists by law, and where a substantial part of the community professes a religion practising a confessional system, this question must be answered in the affirmative. Historically, the failure to recognize the privilege during three centuries in England has probably been due to a reluctance to concede this affirmative answer. The disabilities of adherents of the Roman Church in England and Ireland — the only church actually enforcing a confessional system — also involved a disfavor to that system. In the United States, these disabilities and that disfavor do not exist; they have now disappeared in their original home. The privilege therefore satisfies this canon. (4) Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice? Apparently it would. The injury is plain; it has been forcibly set forth by Bentham. The benefit would be doubtful. Even assuming that confessions of legal misdeeds continued to be made, the gain would be merely the party's own confession. This species of evidence, as already noticed in other connections (*ante*, §§ 2251, 2291), ought in no system of law to be relied upon as a chief material of proof; for it tempts prosecutors to lack of diligence and thoroughness in the investigation of the entire case against an accused. In criminal cases, it would be impolitic to encourage a resort to this too facile channel of confessions. In civil cases, the ordinary process of discovery upon oath would be a sufficient equivalent. On the whole, then, this privilege has adequate grounds for recognition.

PART IV: PAROL EVIDENCE RULE (CONSTITUTION OF LEGAL ACTS).

CHAPTER LXXXV.

INTRODUCTORY.

§ 2400. **Parol Evidence Rule, not a Rule of Evidence.** "Few things," wrote Professor Thayer, "are darker than this, or fuller of subtle difficulties"; and this condition of the law all members of the profession will concede. Two circumstances appear to be responsible for it, — first, an inherent necessity for certain distinctions, simple in themselves but subtle and elusive in their application, and, secondly, the unfortunate prevalence of a terminology in which the subject cannot possibly be discussed with entire accuracy and lucidity. With these two features as marked as they are, it is not strange that the so-called parol evidence rule is attended with a confusion and an obscurity which make it the most discouraging subject in the whole field of Evidence. Rather is it surprising that, in spite of these obstacles, so much has actually been achieved of consistency and of definiteness in the law as it stands. What is chiefly needed to-day, for clarifying the subject and rendering manageable its mass of rules, is, first of all, a systematic arrangement of all the connected principles in their due relation, and, secondly, a simple and accurate nomenclature which shall replace the present absurdly incorrect usage and thus make intelligible discussion possible. No one can attempt to re-state the law, except with a due sense of temerity. But the present condition of the subject is beyond endurance; unless improved, it threatens within a generation to result in an irrational and incurable chaos. In the following

treatment the object will be, while preserving as much as possible the language of present usage, to set forth the rules systematically and to discuss them in their proper terms, and thus to assist the future development to proceed along natural and harmonious lines.

But at the outset certain discriminations must be kept in mind:

(1) First and foremost, *the rule is in no sense a rule of evidence,* but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process, — the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all (*ante,* § 2). But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all, the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; a ruling (for example) that on a plea of self-defence, in an action of battery, no evidence of the plaintiff's insulting words is to be received, would become the legitimate progeny of the law of evidence. This employment of terms of evidence for rulings of substantive law, by reason of the constant dramatic presentation of the latter in the course of a trial, is an old and natural failing of the profession, and has been already noticed at the outset of the general subject of Evidence (*ante,* § 2). But in the present department it has risen to a dominating influence of confusion, because there existed in this branch of the law no systematic terminology capable of holding its ground against the usurpation. Let us dismiss, then, once for all, any notion that the parol evidence rule, in any of its aspects,[1] is concerned with any precautions or limitations based on probative value, or indeed with any regulation of evidence in the legitimate sense of that word. This must be the first step to a clear understanding of the working of the rule.[2]

(2) Next, *the matter excluded* by the rule is *not inherently or even most commonly anything that can be properly termed "parol."* That word (in spite of its numerous other derived applications) signifies and implies essentially the idea "oral," *i. e.* matter of speech, as contrasted with matter of writing.[3] Now, so far as the phrase "parol evidence rule" conveys the impression that what is excluded is excluded because it is oral — because somebody spoke or

[1] Except, perhaps, the statute of frauds and the rule for interpreting by declarations of intention, where there is a possible question.

[2] 1903, Archbald, J., in Pitcairn *v.* Hiss Co., 125 Fed. 110 ("According to the modern and better view, the rule which prohibits the modification of a contract by parol is a rule, not of evidence, but of substantive law. . . . The writing is the contractual act, of which that which is extrinsic, whether resting in parol or in other writings, forms no part"). Compare Professor Thayer's exposition, in his Preliminary Treatise, p. 390.

[3] It is necessary to abandon the improper use of "verbal" as synonymous with "oral." The former signifies "relating to words," whether written or oral; the latter signifies "spoken," whether words or sentences.

acted other than in writing, or is now offering to testify orally —, that impression is radically incorrect. When the prohibition of the rule is applicable, what is excluded may equally be written as oral, — may be letters and telegrams as well as conversations; and where the prohibition is applicable on the facts to certain written material, nevertheless for the very same transaction certain oral material may not be prohibited. So that the term "parol" not only affords no necessary clue to the material excluded, but is even positively misleading. It must be understood to be employed in a purely unnatural and conventional sense.[4]

(3) There is *no one and undivided parol evidence rule.* There are at least four distinct principles or bodies of doctrine. They concern a common subject — legal acts —, but their content and details are separate and distinct. The case lies very much as if we possessed one term "action" for all the various forms of remedial procedure. It is true enough that they all may be looked upon as mere species of the general notion of a remedy, but it would be by all conceived impossible to discuss the details of mandamus, certiorari, injunction, capias, replevin, bill in chancery, action on the case, scire facias, subpœna, and the rest, with no better word-materials than the one word "action." Yet this is not far from the impossible task which has been attempted with the term "parol evidence rule." There is no one generalization for that rule, — at least none which has any practical consequence. The four general groups of doctrine which go to make up the whole have each a separate set of rules; the chief problem in their application is to ascertain which kind of rule is involved in the case in hand, and to keep one from being mistaken for another.

(4) *The parol evidence rule is not the only rule which concerns the use of written things.* There are several other rules, with which it has nothing to do, that have also something to say about writings, — the chief of which are the rule about Producing Documentary Originals (*ante,* §§ 1177–1282) and the rule about Authenticating Documents (*ante,* §§ 2129–2169). These are rules of Evidence in the genuine sense, and the term "parol" is often naturally employed (especially with the former) in discussing them. But they are of no kith or kin with the Parol Evidence rule proper, as here involved, *i. e.* the rule of substantive law. Their difference from the present rule is plain enough; but the false nomenclature of the latter has sometimes caused a relation between them to be suspected.

(5) Finally, it needs to be insisted, in opposition to the popular and natural view which tends to thrust itself forward at trials, that *a writing has no efficacy per se,* but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing, — simply nothing. It

[4] How unnatural it is may be seen from the phrase "written parol contract," used in contrast to "sealed contract," in Briggs *v.* Partridge, 64 N. Y. 357.

must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. Granting that there is a writing before us: Has it been brought home to anybody as his act? Was it meant to supersede other materials? Was it essential to the transaction? What external objects does it apply to? These are questions which cannot be answered without looking away from the writing to other data; and until they are answered the efficacy of the writing is merely hypothetical. There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it. So far as the parol-evidence rule is concerned with writings at all, it concerns these questions of the relation between the writing and other data, and it points out what other data are essential and available for the proper use of the writing. It conduces, then, to a sound understanding of the rule if we dispel wholly that natural notion which falsely attributes to a writing some mystic independence and automatism.

In short, then, (1) the parol-evidence rule is not a rule of evidence; (2) nor is it only a rule for things parol; (3) nor is it a single rule; (4) nor is it all of the rules that concern either parol or writing; (5) nor does it involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.

§ 2401. **Parol Evidence Rule, a group of Rules defining the Constitution of Legal Acts; Four Subdivisions of the Subject.** What, then, *is* the Parol Evidence rule? It concerns the constitution of legal acts. This requires a brief notice of the nature of legal acts.

Only a small part of conduct is legal conduct, *i. e.* conduct having legal effectiveness. The nature and effect of such conduct as will be given legal effect is therefore a question of general consequence in all departments of the law. Leaving aside the field of crimes (which deal with the relation between State and individual) and of torts (which deal with irrecusable or involuntary civil relations), we are here concerned with voluntary relations, *i. e.* those relations which may be created, defined, transferred, or extinguished by will of the parties. The conduct which is allowed to have such effect is a *legal act.*[1]

For the purpose of specific varieties of legal effects — sale, contract, release, and so on —, there are specific requirements, varying according to the subject. But there are also certain fundamental elements, common to all, and capable of being generalized. These elements present problems which run through all

[1] "There is a very important class of acts in which the legal result follows because that result was itself contemplated and desired as one of the consequences of the act. From the fact that legal results are in contemplation in this class of acts, the Germans call them *Rechtsgeschäfte*, Frenchmen call them *actes juridiques*. English lawyers have not yet agreed upon any name for them. The terms 'juristic acts' and 'acts in the law' have been suggested" (Markby, Elements of Law, 3d ed., § 235); "It has been defined, by a high authority [Puchta], as an 'act the intention of which is directed to the production of a legal result.' . . . A better definition [by Windscheid] is 'a manifestation of the will of a private individual directed to the origin, termination, or alteration of rights.' A juristic act has also been well described [by Ihering] as 'the form in which the subjective will developes its activity in creating rights, within the limits assigned to it by the law'" (Holland, Jurisprudence, 3d ed., c. 8).

the varieties of legal acts, and must therefore be analyzed and discussed in union. Their principles, when applied to specific kinds of acts, usually give substantially similar results; and, when they do not, it is merely because special circumstances call for local variances. It is therefore impossible to solve these problems adequately as a peculiarity of any one kind of act, since they do not peculiarly belong there, and do not take their significance from any one variety. For example, whether a mistake due to signing a document unread can avoid the effect of the document is not a question solvable separately for deeds, wills, simple contracts, and negotiable instruments; it is a question common to all, and solvable only in comparison. So, too, the question whether an oral promise to give money, made at the same time with a written one, is legally effective, is not essentially one question for deeds, another for promissory notes, and another for wills; whatever variation there is must be a variation from a common principle underneath all. Again, whether the word "dollars" may be considered to signify the lawful money of the United States or the money of the unlawful Confederate States, is the same kind of a question for bills of exchange, for ordinary contracts, and for wills, — a question of some general principle of interpretation. Even when the answer is different for different kinds of acts, it appears in all cases as a variation from some general doctrine. What has to be done, therefore, is to compare under one head the principles common to all legal acts, and to take account of the specific variations for specific kinds of acts. This is what the "parol evidence" rule does in our law.

These principles fall into four groups, marking the four possible elements of every legal act: (A), The Enaction, or Creation, of the act; (B), its Integration, or embodiment in a single memorial, when desired; (C), its Solemnization, or fulfilment of the prescribed forms, if any; and (D), the Interpretation, or application of the act to the external objects affected by it. Of these four, the first and the fourth are necessarily involved in every legal act; the second and the third may or not become practically important, but are always possible elements.

A. The Enaction, or Creation, of an act is concerned with the question *whether any legal act at all*, or a *legal act of the alleged tenor*, has been consummated; or, if consummated, whether the circumstances attending its creation authorize its *avoidance* or *annulment*. Under the first head arise the questions whether a writing is anything more than a preparatory draft, whether it has been completed by delivery, whether its tenor is to be judged by its actual words or the intended words, and the like. Under the second head arise the questions whether it can be avoided because of mistake, fraud, or duress, affecting the motive leading to its enaction.

B. The Integration of the act consists in embodying it in a *single utterance* or *memorial*, — commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors; and, in the latter case, either wholly or partially. Thus the question in its usual form is whether a particular document is the one deemed

by law to be the sole memorial of the act, or how far a particular document was intended by the parties to cover certain subjects of transaction between them and therefore to deprive of legal effect all their other utterances.

C. The Solemnization of the act concerns the *forms* which are *required by law* to attend it in order to give it legal effect. This always becomes a question of some particular subject in the law, because there is no universal formality required in common for all acts. Thus the formalities of attestation, seal, registration, and the like, are essential for some but not for other acts. Writing is naturally the most important and most common instance of a required formality. The resort to writing may sometimes be an instance of Integration and sometimes of Solemnization, but either may exist without the other.

D. The Interpretation of an act is the *application of it to external objects*, in the process of defining and enforcing the right or obligation affected by its terms. The words of a legal act are merely the symbols by which the actor indicates the external objects which the act is expected to affect — a parcel of land or a barrel of sugar or John Doe the legatee. The connection between these words and their possible objects must be judicially established before the terms of the act can be given the effects expected by the parties. In this process of Interpretation, the main questions concern the standard of meaning to be adopted and the data which may be used in determining that meaning.

For these four elements in the act, the principles are independent of each other, — so independent, indeed, that they sometimes appear to be contradictory; and the chief inherent difficulty in their application arises from the necessity of distinguishing which element and which principle is really involved.

In the present exposition, it is impossible to do more than trace the general principles into their main details. Not only is the subject properly one of substantive law, instead of evidence; but it involves logically an application to many particular branches of the substantive law. Nothing short of separate treatises would suffice for a complete collection of precedents. For example, the statute of frauds, with its myriad rulings, is involved; and the doctrine of collateral agreements as applied to negotiable instruments, the doctrine of mistake and misrepresentation as a motive for a deed or contract, the doctrine of judicial records as unimpeachable, — these and numerous other applications of the principle, would require for their complete exposition far more scope than is appropriate in a treatise upon the law of evidence. The purpose in this chapter is to collect in systematic form the various applications of the principles and to examine in as much detail as is necessary those particular topics which have hitherto been commonly discussed as a part of the law of evidence and not of the substantive law.[2]

[2] No attempt has been made to collect all of the precedents on any of the topics; but in those topics commonly appropriated to the law of evidence the greatest part of the English cases and a large portion of the American cases are believed to be here collected.

A. CREATION OF LEGAL ACTS (VOIDNESS AND VOIDABLENESS).

§ 2404. **General Principle; Subject, Terms, and Delivery; Intent and Expression.** A legal act — that is, here, an act regarded as capable of having legal effects in civil relations other than tort — may be analyzed from two points of view. With reference to its *tenor*, it involves three elements, — its Subject, its Terms, and its Stages of Utterance. With reference to the *mental condition* of the *actor* himself, it involves two elements, Volition and Expression.

1. In the former aspect, it is clear that each of these three elements raises its own set of questions. (*a*) The act must be *jural*, as to its *subject*. Thus, on the one hand, an act which concerns merely relations of courtesy, or duties of morality, or other non-jural subjects, will receive no legal effects. On the other hand, acts which concern transactions prohibited by some policy of law — such as gambling or cheating — will equally be left without legal effects. (*b*) The act must be *definite* as to its terms. This excludes all acts whose terms are so uncertain or unintelligible that they are incapable of enforcement. Within these limits, the terms of the act will be whatever the actor has used. (*c*) The act must be *final* in its *utterance*. It does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance, there is no act. The necessity for a delivery of a document, and the nature of a delivery, are here the most usual questions in practice. — These three elements, then, are all essential to any legal act, and no others are essential to all legal acts.

2. In the second aspect, it is clear that there must be both Volition and Expression; for an unexpressed volition would receive no legal effect, and an expression without some sort of volition would be equally ignored. But the volition and the expression may not correspond, and thus the usual problem is to define the *relation that must exist between volition* (or *intention*) *and expression*, in each one of the three elements of (1), above, in order to make the act legally effective. For example, Doe and Roe go through the form of marriage, Doe secretly intending it in jest, but Roe seriously; here the *subject* is jural in Doe's expression, but not in his volition; which shall prevail? Again, Doe by mistake of absent-mindedness writes in a contract "$100," instead of "$10," and hands it to Roe; here the *terms*, in expression, are different from the terms in volition; which is to prevail? Again, Doe writes a check payable to bearer and places it in his desk, and the check is stolen and handed to Roe; here, in expression — that is, in outward appearance — there has been *finality* of *utterance*, but not in Doe's volition; shall the former or the latter be decisive? This is the world-old legal problem, inevitably faced in the history of every jurisprudence, — the problem of the competition between the external and the internal standards, the objective and the subjective

points of view. It is useless to prescribe either that the internal will alone or that the external expression alone shall be decisive. Probably no developed system of law has ever practically enforced either the one or the other standard exclusively. It is rather a question of the relation between the two elements, *i. e.* not whether the legal act shall be only as willed or only as expressed, but what sort of volition is sufficient in order to make the actor responsible for a given expression; and this must depend more or less on varying experience in different epochs and communities and in different kinds of transactions. The modern test, for bilateral acts, will be found, with fair uniformity, to predicate some relation of reasonable consequence (judged by the community's standard) between the outward expression and the inward volition; because in bilateral acts the just reliance of the other party to the transaction upon the first party's outward expression must be the salient consideration. For unilateral acts — chiefly wills — more of a concession can be made, and is made, to the actual volition, so far as it is ascertainable.

Such, then, are the elements and the problems with which we are concerned in defining the creation of legal acts in general.

§ 2405. **History of the Principle.** The two chief problems that have most commonly occupied practical jurisprudence have been that of the finality of the utterance (*ante*, § 2404, (1) *c*) and that of the correspondence between intent and expression (*ante*, § 2404 (2), *i. e.* how far a *formal delivery* of a document is essential and decisive, and how far an *unexpressed intent* can be allowed to overthrow the outward act.

As might have been expected, the progress has been from a strict formalism to a liberal and flexible practicality. The mark of primitive legal standards, throughout all, is formalism, — a characteristic already noted here in its effects upon other parts of the law (*ante*, §§ 2032, 575, 1815). It must be kept in mind, for appreciating the traditions against which the modern law has had to struggle:

1885, Professor *Andreas Heusler*, Institutions of Germanic Private Law, I, 70, 74: "Without such formalism the [primitive] people could not perceive their law; it would be to them but a buried treasure; and thus to them form is itself law. They resort to form for its own sake, and because in it alone is law perceived. To us, because we cannot in thought put ourselves back to that stage of intellectual development, this stiff domination of form is too apt to appear as an intolerable fetter of the free exercise of the will. But, when these things prevailed, there was no such attitude towards them. . . . The Frankish period is the flourishing period of this symbolism. Thus, in the process of commendation, the act of placing the clasped hands of the ward or the vassal in the opened hands of the lord symbolizes the submission to the wardship or the suzerainty; the acts of pointing and crooking the fingers in the Saxon release ("*digitis incurvatis abnegationem facere*"), symbolizes the surrender of claim to the transferred property; the handing of twig and turf, the delivery of seisin of land; the grasping of altar-cloth or bell-rope, the taking possession of church and chapel; the widow's act of laying the house-key or the cloak on the bier or the tomb of the deceased husband, her surrender of the entire marriage-estate to the husband's creditors; the handing over of a lock of hair from head and beard, the transfer into household service; the delivery of hat or glove, the transfer of ownership; the lending of staff, scepter, spear, or pennon, the granting of a fief. . . . But by the time of the [Germanic] codes [1200–1300] this symbolism is already in decay.

Writing is the sworn enemy of all symbolic representation. A people who do not write feel the need of making the law visible by external and perceivable symbols, and thereby of providing expression for acts and volitions as legal acts and legal volitions. But as soon as acts come to be put into writing, this formalism becomes first a luxury, then a burden, and finally is repudiated entirely."

The persistence of this formalism, however, even under the regime of writing, is equally notable in the first stages of Anglo-Norman history. In its present relations, it has left its mark in the technical rule concerning delivery of a deed:

1895, Sir *F. Pollock*, and Professor *F. W. Maitland*, History of the English Law, II, 83–86, 190: "[In Bracton's time] a livery of seisin either on the land or within the view was necessary. Until such livery had taken place there was no gift; there was nothing but an imperfect attempt to give. . . . But this change of possession and the accompanying declaration must be made in very formal fashion. . . . A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife also may be delivered. . . . When, under Roman influence, the written document comes into use, this also can be treated as a symbol. It is delivered in the name of the land; the effectual act is not the signing and sealing, but the delivery of the deed, and the parchment can be regarded as being as good a representative of land as a knife or a glove would be. Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the ground and thence it is solemnly lifted up or 'levied' (*levatio cartæ*); Englishmen hereafter will know how to 'levy a fine.' . . . The written document, which few have the art to manufacture, is regarded with mystical awe; it takes its place beside the *festuca*. The act of setting one's hand to it is a *stipulatio;* it is delivered over as a symbol along with twig and turf and glove."

Thus it comes down to the succeeding centuries that the technical and unvarying symbol of finality is a delivery of the deed. "Delivery," says Chief Baron Gilbert, in the early 1700s,[1] "is necessary to the essence of a deed, and the deed takes effect from the delivery; so that unless the delivery be proved, there is no perfect proof of the deed." The first signs of flexibility are seen in the concession that a prepared deed (an "escrow," or mere scroll), placed in the hands of a second person for subsequent handing to the grantee, is not yet effective.[2] Yet even here the formalism — now becoming dead bark — encases the rule, and the requirement of delivery is merely made abstract, so as not to have inherent connection with the maker's own hand. This concession, moreover, is still refused for a draft deed placed directly in the grantee's hands in anticipation of some future event which shall make it effective; there can be no escrow to a grantee, it was said.[3] At the same

[1] 5th ed., p. 99.

[2] 1432, Y. B. 10 H. VI, 25. Later, the rule comes to be analyzed and philosophized: 1523, Y. B. 14 H. VIII, 17, 6 and 7 (Brudnel, J.: "If I deliver a deed [to a second person] to be delivered to another [third person] as my deed, then if he takes it [from the second person] without delivery, though he has the deed, he will have no action; for in these cases the act which makes them perfect was not accomplished nor performed").

[3] 1612, Thoroughgood's Case, 9 Co. Rep. 137 ("If A makes a writing to B and seals it and delivers it to B as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed; for the law respects the delivery to the party himself, and rejects the words which

time there had already begun an effort to refine this technicality, and to deny effectiveness to a manual transfer even to the grantee himself, if it purported to be, not a true delivery, but only a draft or escrow.[4] But the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception; and it has been reserved for very modern times to repudiate this last relic of primitive formalism.[5]

Passing to the problem of intent as competing with expression, it is equally plain that the primitive legal conception was strictly formalistic:

1885, Professor *Andreas Heusler*, Institutions of Germanic Private Law, I, 60: "A strictly formal system of law knows no contrast between the will and the utterance, and no possibility of a contradiction between the two. This is thoroughly the conception of the Germanic law. The utterance is the law's embodiment. No more, and yet no less, than what is uttered can bind or loose. Hence the minute precision with which obligations of debt were written out. . . . Hence the legal proverbs, 'one man one word,' 'the word stands,' 'words make the bargain,' and the like. A necessary result is that mistake in contractual relations receives but scanty consideration. . . . All that a man does is judged alone by its external manifestations and its objective effect, not by his inward motive. The law concedes nothing either to good or to bad faith, as long as it is concerned with the legal consequences of conduct."

In the field of legal acts the application of this notion to writings plays but a small part until the rise and spread of the seal, in the 1100s and 1200s; for until then the contents of the document seldom enter into the inquiries of a trial.[6] But it is amply illustrated by the formalism of all oral transactions and pleadings:

1892, Professor *Heinrich Brunner*, Germanic Legal History, II, 347: "Plea and answer of the parties were, in the formalism of legal procedure, bound to legal forms. Their utterances must contain the precise formal catchwords. Every assertion of the parties is treated on the principle of strict and literal interpretation. . . . The party is bound to the spoken word. If he has made some faulty utterance, still he cannot correct his speech."

1892, Mr. *Henry C. Lea*, Superstition and Force, 4th ed., 78–9: "[In Lille, until 1351,] the minutest regulations were enforced as to this ceremony [of the oath of denial]. . . . The slightest error committed by either party lost him the suit irrecoverably. The royal ordinance [abrogating the older rules] declares that the oath was 'in strange language and peculiar words, not easy to remember or to pronounce,' and yet that if either party 'failed in form or words, or by weakness of tongue misspoke or forgot his words, or lifted his hand more than required by the regular manner, or did not hold firmly his sack in his palm, or failed to preserve and follow various other trifling and vain things and rules belonging to the oath, according to the trial mode of the city when done by parol, he has lost his whole cause.'"

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of English Law, I, 190: "The old procedure required of a litigant that he should appear before the court in his own person and conduct his own cause in his own words. . . . The extreme captiousness of the

will make the express delivery to the party upon the matter no delivery"); Sheppard, Touchstone, IV, p. 58.

[4] 1601, Hawksland *v.* Gatchel, Cro. El. 835 ("There is not any difference where it is delivered to the party himself *as* an escrow and where to a stranger; . . . when it is first delivered *as* an escrow, though to the party himself, it is clear that it is not his deed until it be performed; . . . for if upon the delivery the words spoken by the obligor purport that it shall not be his deed, it is clear it is not").

[5] The authorities are examined *post*, § 2408.

[6] See *post*, § 2426.

old procedure is [in the 1100s] defeating its own end, and so a man is allowed to put forward some one else to speak for him, — not in order that he may be bound by that other person's words, but in order that he may have a chance of correcting formal blunders and supplying omissions. What the litigant himself has said in court, he has said once for all, and he is bound by it; but what a friend has said in his favor he may disavow. . . . Perhaps the main object of having a [professional] pleader is that one may have two chances of pleading correctly."[7]

This strictness of spirit is slow in changing. The chief statutes of jeofails, removing by degrees the primitive crudities which made difficult the amendment of pleadings, are strewn along the statute-book from 1341 to 1711,[8] and did not even then cease to be needed. The persistence of the older notions, in their application to oral utterances, is seen markedly in the struggle against the modern doctrine of interpretation,[9] for the "meaning" of words and the "intent" of the speaker were not distinguished, and both alike were supposed to be determinable from the uttered words alone. "The sense and signification of the words must be expounded by the law," [10] and "the intent of a man is uncertain, and a man should plead such matter as is or may be known to the jury." [11] With regard to its present application to the mistaken use of words, modern policy confirms primitive tradition in binding a man, irrespective of his mistakes, to those precise utterances which another party has taken at their face value; but this is a rationalized rule, and falls far short of the early formalism which inexorably and invariably pledged the man upon his spoken word.

If this was the strictness of formalism for acts contained in winged words, it might be assumed to have been at least as marked for written acts. But in one aspect the history seems to have begun to change at an early stage, — namely, the doctrine of mistake as applied to the contents of the writing. That a man who could not read had sealed a document which had been incorrectly read over to him, was recognized, before the 1400s, as sufficient to relieve him from liability.[12] When it is remembered that as yet the mass of the community could not read, this rule is seen to be almost the normal rule, to which the contrary case would be the exception; indeed the rule is in form laid down for "lay people," that is, those who were not

[7] This general feature has been elaborately demonstrated by Professor Brunner in his Wort und Form in altfranzösischen Prozess, 1868 (Sitzungsber. d. K. Akad. d. Wiss. b. Wien, vol. 77, p. 655; translated, in 1871, in the Revue critique de législation et de jurisprudence, vol. 21, pp. 22 ff.; reprinted in Brunner's Forschungen z. Geschichte des deutschen u. französischen Rechts (1894), 260, 266); Professor Heusler, in his Institutionen des deutschen Rechts (1885; I, 45) has also acutely analyzed it; see also Professor Siegel's Deutsche Rechtsgeschichte (1895), p. 545.

[8] Blackstone, Commentaries, III, 407.

[9] *Post*, § 2462.

[10] *Ante* 1726, Gilbert, Evidence, 4th ed., 79.

[11] 1465, Y. B. 4 Edw. IV, 8, 9.

[12] 1371, Y. B. 44 Ass. 30 (here the general principle appears to be already conceded); 1374, Y. B. 47 Edw. III, 3, 5 ("To every deed there ought to be writing, seal, and delivery, and when a thing is to pass from those who have no understanding except by hearing, there ought to be a reading to them; . . . it would be very unfair if the [other] party's own deceit should help him, for it is a principle of our law, *fraus et dolus nemini patrocinantur*; . . . and for the reason that the law does not favor fraud or trickery, it wishes also that no one shall be prejudiced by his ignorance and error in his deed, for in the one party was *bona fides*, and in the other *dolus malus*"); 1422, Y. B. 9 H. V, 15, 3; 1494, Y. B. 9 H. VI, 59, 8 (here Strange, J., seems to have doubted, on the ground that "he has acknowledged the delivery into the hands of the person").

"clerks" and therefore not skilled in reading. How did such an anomalous rule develop? The course of it would seem to have been somewhat as follows: At the time of the Conquest, the form of most transactions still lay "*in pais*," *i. e.* livery of seisin or the like. Comparatively few transactions were in writing.[13] When writing was used, the terms were none the less orally stated, to be proved, if need arose, by the witnesses called in for the transaction; the witnesses' oath controlled, and the terms of the writing played only a minor part.[14] It was thus not a question likely to arise whether the party could read the writing, or whether it had been read over to him beforehand; it *could* not be so read over to him, considering that by the traditional procedure the words were not written on the parchment by the scribe till after formal delivery of it by the maker.[15] But by the 1200s the seal comes into general use, for authenticating documents; legal writings become more common; and the other rule develops, that the terms of a sealed writing shall be indisputable as representing the actual transaction.[16] This development, however, begins while the great mass of the community are still illiterate. They have seals, and can now bind themselves indisputably by affixing the seal, yet they cannot read what they have sealed. They are even bound by a seal stolen and used by the thief.[17] This combination of rules immediately raises the present problem, and presents itself as an intolerable consequence. Hence, almost at the very outset, comes the rule that a layman, not being a "clerk," is not bound by a document sealed by him but erroneously read over to him by another person. The present part of the parol evidence rule thus appears as a natural alleviation and a practically contemporary consequence of the other part of that rule (*post*, § 2425) making the terms of the document indisputable as to the actual transaction. Had printing come into use a century earlier than it did, and had the mass of the community thus earlier ceased to be illiterate, the present rule might not have arisen. As it was, the rule appears almost full-fledged by the 1400s. Perhaps in the earlier cases, the inclination was to restrict it to instances of fraud by the other party to the document, and the Latin maxims used by the judges suggest that they had borrowed something from an alien and more advanced system. But by the 1500s it appears to be conceded that a false reading by a stranger is equally fatal to the deed; and the only controversy then remaining is whether the deed may be valid as to the part correctly

[13] "To all appearance, writing has hardly been used for any legal purpose [in 1066] except when land is to be conveyed or a last will made. . . . When making a feoffment, it was possible for the giver to impose conditions or to establish remainders, and all this by word of mouth; it is probable, however, that a charter was executed if anything elaborate was to be done" (Pollock & Maitland, Hist. Eng. Law, II, 191, 193).

[14] *Post*, § 2426, where this part of the history is examined.

[15] 1877, Brunner, Die frankisch-romanische Urkunde als Wertpapier, Zeitschr. für Handelsrecht, XXII, 64, 505, 530, republished in his Forschungen z. Geschichte d. deutschen u. französischen Prozess (1894), 524, 612 ("im juristischen Sinne erfolgt das *scribere cartulam* nach der Uebergabe des Pergaments"). So also Brunner, Deutsche Rechtsgeschichte, I, 397; compare Bresslau, Urkundenlehre, 778; Posse, Privaturkunden, 135.

[16] This part of the rule is examined *post*, § 2426.

[17] Schroeder, Deutsche Rechtsgechichte, 701; Schultze, Urkundenbeweis (cited *post*, § 2426), 118; 1187–89, Glanvil, X, 6, § 8; Holmes, Common Law, 272. By the time of Britton (65 *b*), about 1300, this is relaxed.

read while void as to the part falsely read.[18] For literate persons, there seems never to have been any doubt; and the doctrines of mutual mistake and the like (*post*, § 2417) are the product of equity and modern rationalism.

1. Subject, Tenor, Delivery.

§ 2406. (*a*) **Subject must concern Legal Relations; Transactions of Jest, Friendship, Charity, and Pretence.** Conduct which is to be given legal effects must be jural in its subject (*ante*, § 2404, par. (1) *a*), *i. e.* must concern legal relations, not relations of friendship or other non-legal relations.[1] The father who promises to bring home a box of tools for his boy is not bound in contract, though the same promise to his neighbor may be binding. The friend who promises to come to dinner is not legally liable, though he who agrees with a restaurant-keeper to dine there is under a contract of liability. Barristers could not, as late as Blackstone's time, recover for their fees, because the client's payment was theoretically "*quiddam honorarium*,"[2] *i. e.* the transaction was looked upon as outside of the field of legal relations. In all such cases, therefore, the conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was *understood by the parties not to have legal effect.*

Ordinarily, the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a *member of the family*,[3] and to a writing representing merely a family understanding.[4] It is of course also applicable to the signature of an *attesting witness*.[5] When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers; but a just policy would seem to concede this only when the pretence is a morally justifiable one (as, to calm a lunatic or to console a dying person),[6] and not when it is morally

[18] 1523, Y. B. 14 H. VIII, 25, 7; 1582, Thoroughgood's Case, 2 Co. Rep. 9; 1615, Pigot's Case, 11 id. 27.

[1] 1811, Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54, 105 ("It is said they [marriage engagements] must be serious; so surely must all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect. . . . [But] it is not to be presumed *a priori* that a man is sporting with such dangerous playthings as marriage engagements").

[2] Commentaries, III, 28.

[3] 1870, Bundy *v.* Hyde, 50 N. H. 116, 122 ("The relationship of debtor and creditor depends upon the simple question whether the parties understood that relationship to exist").

[4] 1872, Earle *v.* Rice, 111 Mass. 17 (husband and wife signed a document providing that her land should be sold and the proceeds handed to trustees for her life and then for her children; her land having been sold and the proceeds given to trustees, it was allowed to be shown, for the wife, that this document was made between husband and wife merely as a memorandum of moral obligation, not as a legal transaction).

[5] 1892, Tombler *v.* Reitz, 134 Ind. 9, 14, 33 N. E. 789 (that a name indorsed on a note was signed as witness only, allowed to be shown); 1898, Isham *v.* Cooper, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760 (parol evidence admitted to show that initials were signed to a paper, not as a party to the contract, but merely to attest an interlineation); 1844, Garrison *v.* Owens, 1 Pinney 473 (that a name has been signed as attesting witness, admitted).

For the case of a *surety*, see *post*, § 2438.

[6] 1896, Church *v.* Case, 110 Mich. 621, 68 N. W. 424 (a mortgage for $6,000 given by a son who had received the land in return for an agreement to support the mother; a showing allowed that no consideration had been received for the mortgage, and that it was given as a mere form, to satisfy the jealous relatives, and to safeguard the interests of the grantor; the mortgage decreed void); 1900, McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 311 (the plaintiff's wife was losing her mind, and importuned him to execute deed to her, which he did "to satisfy her mind"; he then retained it

beyond sanction.[7] In all these cases a common understanding for all parties is here assumed to exist; when the intent of one party is different from his outward act as understood by the other, the question becomes a different one, and involves the other part of the principle (*post*, § 2414).

Conduct, furthermore, will be denied legal effect when it falls within a class of facts prohibited by some policy of the law. The act is then commonly said to be void on grounds of *public policy*, — for example, trading with an enemy in war, selling public offices, engaging to render champertous legal services, stifling a public prosecution, ousting a court's jurisdiction, wagering, restraining trade, and scores of other transactions. Such acts are jural, but not lawful. These prohibitions, however, concern the validity of particular kinds of acts, and not legal acts in general or uniformly, and therefore need be referred to here only to note their place in the theory of legal acts.

§ 2407. (*b*) **Terms must be Definite; Terms implied from Conduct; Document void for Uncertainty.** It is clear that the terms of the act need not be in express words; the terms may be *implied from conduct*, as in the case of the commoner contracts of service. *Usage* may thus by implication furnish the terms, — subject to the limitations of another principle (*post*, § 2440).

When express words are employed, they must be in themselves definitely intelligible, so that the act may be capable of enforcement (*ante*, § 2404, par. (1), *b*). It is common learning that a deed or a will is often held *void for uncertainty*. Lord Bacon, giving his classical instance of a grant to "*J. D. et J. S. et heredibus*," calls this a "patent ambiguity . . . by matter within the deed," such as "shall make the deed void for uncertainty." So, too, Mr. Elphinstone's example, "I give my dog Ranger to my nephew John or Thomas,"[1] illustrates the same kind of uncertainty. A blank, an illegible word, an unknown language, — these various instances show how an act which is impossible to comprehend and therefore to enforce cannot be deemed a legal act. This doctrine is more particularly involved in dis-

without recording, and later it was taken from his papers without his knowledge and recorded; this was allowed to be shown to defeat it).

Sometimes, the illustrations of this principle, that a transaction which is a *sham* is without the scope of legal acts, are hard to distinguish from those cases where the transaction is in substance a legal one but the understanding is that it shall be merely *nominal*; here, in effect, one party agrees to hold the other party harmless, and this involves rather the rule about varying a document's terms; these cases are collected *post*, § 2435, but the following will serve as an example: 1896, Gumz *v.* Giegling, 108 Mich. 295, 66 N. W. 48 (that the defendant W. indorsed a note given to the plaintiff for a debt of the defendant G., on the plaintiff's representation that it was a mere matter of form, to induce G. to pay, and that no claim should be made upon the defendant W.; treated as involving the principle of § 2443, *post*, and not allowed to exonerate the defendant).

[7] 1900, Southern St. R. Adv. Co. *v.* Mfg. Co., 91 Md. 61, 46 Atl. 513 (instrument of advertising contract, allowed to be shown to have been signed merely for exhibition to other advertisers to induce them to pay the stated rates; this seems unsound); 1856, Conner *v.* Carpenter, 28 Vt. 237, 240 (written contract of sale and hire of horses; that it was "understood to be a sham, and to be only to keep off the creditors of the plaintiff from attaching the property," held not sufficient to permit the party "to thus escape from his contract"); 1898, Grand Isle *v.* Kinney, 70 id. 381, 41 Atl. 130 (that a party was not to pay anything under a contract signed to deceive the State engineer, excluded).

[1] Juridical Soc. Papers, III, 266.

tinguishing it from the interpretation of "latent ambiguities" (*post*, § 2472); it is enough here to notice its correct place in the theory of legal acts.[2]

So, far, then, as concerns the precise terms of an act, they will be — if intelligible — whatever the actor has made them. There are no other requirements. When, however, the terms as expressed do not correspond to the terms as intended, we are brought to the other question, — that of Intention (*post*, § 2415).

§ 2408. (*c*) **Act must be final**; (1) **Delivery, as applied to Deeds**; **Conditions Precedent**; **Escrows.** A legal act does not come into existence as such until its utterance is final and complete (*ante*, § 2404, par. (1) *c.*).[1] All transactions require an appreciable lapse of time for their fulfilment; most important transactions in writing are consummated only after successive inchoate acts of preparation, drafting, and revision. Moreover, the written terms may be prepared with a precision which leaves nothing to alter (as it turns out), and still may be for a while retained for reflection or submitted for suggestion, without as yet any final adoption. Until some finality of utterance takes place, there is no legal act. Whenever, therefore, certain conduct or writing is put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act.[2]

(1) But where shall the line be drawn? The earlier law (*ante*, § 2405) drew the line formally for deeds — *i. e.* sealed instruments — at the stage technically known as "delivery." The mark of finality was the *delivery of the deed.* But it is clear that there can be no fixed and invariable mark of finality; or, in the older phraseology, what amounts to a delivery depends upon the circumstances of the case. No specific manual act is decisive. On the one hand, it is well accepted that the *handing* of the deed to a *third person* is not necessarily final; the document may still be withdrawn, or (less correctly) "revoked."[3] On the other hand, the *maker's retention* of the document does not necessarily negative the act's finality; this, too, may be deemed unquestionable law since Mr. Justice Blackburn's masterly exposition.[4] Again, that specific variety of delivery to a *third person* which con-

[2] Mr. Justice Holmes' classification (Common Law, 310) of certain contracts under this head seems doubtful; "suppose that A agreed to buy and B to sell 'these barrels of mackerel,' and that the barrels turn out to contain salt; . . . the promise is meaningless; . . . two of its essential terms are repugnant, and their union is insensible." On the contrary, the words are in themselves certain in meaning; it is only in their application to external objects that they become impossible, and the question is not as to a mistake or uncertainty in the terms of the contract, but as to the materiality of an assumption of fact exterior to the contract, *i. e.* a condition rendering it void or voidable, and falling under the principle of § 2423, *post.*

[1] For a German statement of the theory, see Schultze, Urkundenbeweis (cited *post*, § 2426), pp. 70, 88, 104.

[2] 1866, Wilde, P. J., in Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109 ("The truth is that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper binding and of full effect"); 1871, Dixon, C. J., in Walker *v.* Ebert, 29 Wis. 194, 197 ("It must always be competent for the party proposed to be charged upon any written instrument to show that it is not his instrument or obligation").

[3] Compare the following cases: 1847, Merrills *v.* Swift, 18 Conn. 257; 1813, Maynard *v.* Maynard, 10 Mass. 456; 1849, Blight *v.* Schenck, 10 Pa. 285; 1857, Cook *v.* Brown, 34 N. H. 460; 1901, Fred *v.* Fred, — N. J. Eq. — , 50 Atl. 776. The case of an escrow is one variety of this sort of delivery.

[4] *Eng.:* 1826, Doe *v.* Knight, 5 B. & C. 671 (the question "whether when a deed is duly signed and sealed and formally delivered with apt words of delivery, but is retained by the

sists in naming a condition precedent to be performed, and making the act final except for the happening of the condition — the usual meaning of "*escrow*" —, has long been recognized as leaving the act incomplete;[5] though here it may well be that the document cannot be withdrawn, since nothing but the condition remains to complete the act.[6] A conditional delivery *in escrow to the grantee*, however, has come down to us traditionally as a complete act, the condition being deemed vain.[7] But this is an arbitrary distinction; no reason and no policy justifies it. In England, the older rule, as handed down in Coke's treatises, has for more than two generations been repudiated.[8] In the United States, it has been generally trenched upon so far as to recognize an escrow to a co-obligor as incomplete.[9] In other respects, it is maintained

party executing it, that retention will obstruct the operation of the deed," was answered in the negative); 1856, Gudgen *v.* Besset, 6 E. & B. 986 (action for rent; whether *indebitatus assumpsit* or covenant was the proper action depended on whether a written and sealed lease in the plaintiff's possession was in force; the understanding between the parties that the tenant should go into possession but that the lease as signed and sealed and nominally delivered should be kept by the lessor till the payment of a certain sum of money was held to have prevented the operation of the document); 1866, Xenos *v.* Wickham, 2 H. L. C. 296 (insurance policy, signed by the defendant-insurer, but left in his custody according to trade usage; held that it was not "essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument"; Blackburn, J.: "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it; the mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient"; L. C. Chelmsford: "The question is one more of fact than of law"); *Can.:* 1899, Zwicker *v.* Zwicker, 31 N. Sc. 333, 29 Can. Sup. 527, 532 (following Lord Blackburn, in Xenos *v.* Wickham); *U. S.:* 1861, Stevens *v.* Hatch, 6 Minn. 64 (19); 1869, Fisher *v.* Hall, 41 N. Y. 416.

Distinguish the much-mooted but wholly separate question whether the *grantee's assent is necessary* for the passing of title: 1866, Xenos *v.* Wickham, *supra;* 1847, Merrills *v.* Swift, 18 Conn. 257; 1860, Welch *v.* Sackett, 12 Wis. 243; 1880, Jones *v.* Swayze, 42 N. J. L. 279.

Whether delivery is necessary for the *gift, pledge,* or *sale of a chattel* is a question, not of legal acts in general, but of the requisites of a specific kind of act.

[5] *Ante,* § 2405.

[6] Cases cited *supra,* note 3. As to the *time of an escrow's taking effect* by relation, see the following opinions: 1809, Belden *v.* Carter, 4 Day 66; 1841, Foster *v.* Mansfield, 3 Metc. 412; 1848, Hall *v.* Harris, 5 Ired. Eq. 303; 1860, Welch *v.* Sackett, 12 Wis. 243.

[7] *Ante,* § 2405. This technical rule does not apply except where the deed's delivery is made dependent on a specific condition; the mere manual handing of a finished writing to the grantee does not of itself invoke this rule: 1898, Curry *v.* Colburn, 99 Wis. 319, 74 N. W. 778 (that a deed was handed to the grantee to take to his attorney for inspection, allowed to be shown).

[8] *Eng.:* 1821, Johnson *v.* Baker, 4 B. & Ald. 440 (delivery of a deed of covenant by a debtor to a creditor, on condition of obtaining other creditors' signatures, held invalid); 1829, Hudson *v.* Revett, 5 Bing. 368 (deeds of lease and release and of trust for the benefit of creditors, signed, sealed, and delivered by the debtor in prison to the creditors' agent, with a blank for the amount of a certain claim, which was afterwards filled in, according to the understanding, by the creditors' agent; Best, C. J.: "This position about delivery as an escrow is merely a technical subtlety; . . . I decide the case on this, that either it was no deed at all until the sums were written in, and that then the jury were warranted in presumiag a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in which were to give it all its effect"); 1843, Bowker *v.* Burdekin, 11 M. & W. 128, 146 (conveyance in fraud of creditors, by one partner to take effect upon the execution by the other two partners; Parke, B.: "I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution"); 1856, Gudgen *v.* Besset, *supra,* note 4; 1866, Xenos *v.* Wickham, *supra,* note 4; 1875, Watkins *v.* Nash, L. R. 20 Eq. 262; *Can.:* 1882, Confederation L. Ass'n *v.* O'Donnell, 10 Can. Sup. 92 (policy forwarded to the agent on conditions, and handed by him to the applicant to read, without countersigning or exacting the conditions; held not valid on the facts; two judges diss.).

[9] 1808, Pawling *v.* U. S., 4 Cr. 219, 222 (a bond delivered as an escrow by a surety to the obligor, conditioned on the signatures of others, is not valid if the condition is unperformed).

by the authority of the older decisions in most jurisdictions.[10] But it is being gradually cut away, sometimes by subtly re-casting the definition of a delivery;[11] and the solid establishment of the contrary rule (*post*, § 2410) for contracts and writings in general (*i. e.* other than sealed instruments — bonds and land-deeds) will ultimately efface this last tradition of formalism.[12]

There is, therefore, no invariable mark of finality for a deed, — whether it be the act of writing,[13] or of sealing, or of manually delivering, or of publicly recording.[14] Subject to certain usual presumptions of conduct, the circumstances of each case must control.[15]

§ 2409. **Same**: (2) **Delivery, as applied to Negotiable Instruments.** The English custom of merchants, in respect to the rules for written instruments, represented the advanced ideas of Mediterranean, Flemish, and Hanseatic mercantile law. As early as the 1200s and 1300s, when the common law of the King's courts was still dealing with the raw material of the more primitive Germanic system of a feudal, pastoral, and agricultural life, the mercantile notions were already in a more modern stage, and furnished some of the lessons for the progress of the former.[1] Thus it happened that no formal rule about delivery or escrow-delivery found a place in the law of negotiable instruments, when that law came into the ordinary courts for recognition. In particular, for the acts of *making*, *drawing*, or *accepting*, no one formal piece of conduct has been deemed invariably necessary or decisive.[2] So also, for the act of *indorsement*, a manual transfer may, on the one hand, be decisive even without writing,[3] while, on the other hand, it may not be in it-

[10] Cases cited in Jones, Real Property (1896), § 1303.

[11] 1888, Price *v.* Hudson, 125 Ill. 284, 287, 17 N. E. 817 (Shope, J.: "It is not competent to control the effect of a deed by parol evidence when it has once taken effect by delivery; but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered; unless the grantor, or those claiming under him, are estopped in some way from asserting the non-delivery of the deed"); 1896, Stanley *v.* White, 160 id. 605, 43 N. E. 729 (a deed manually placed with the grantee, on condition that it should not take effect until all the heirs of M. S. signed it, would be ineffective until the condition was fulfilled; but where the mutually understood intention was to give title immediately on delivery, subject to the condition subsequent that other heirs should sign, the non-performance of the condition cannot be set up to defeat the absolute terms of the deed. Of course, a *condition subsequent* is not effective: *post*, §§ 2410, 2435.

[12] The effectiveness of an *escrow* against *one ignorant of the condition* raises the question of Intention (*post*, § 2420).

[13] For the case of a *blank*, to be filled later, see *post*, § 2410.

[14] Even *registration* or *recording* does not of itself and invariably complete the act, though it is of course a strong circumstance of presumption; compare the following opinions: 1862, Derry Bank *v.* Webster, 44 N. H. 264; 1854, Mitchell *v.* Ryan, 3 Oh. St. 377; 1859, Smith *v.* South Royalton Bank, 32 Vt. 341.

[15] Whether an instrument is a *deed* or a *will* depends upon the intent of the maker as to the *time of its operation;* whether this intent goes to the existence of the instrument and therefore depends on conduct of the maker exterior to the instrument, or whether it is a part of the terms of the grant and must therefore be determined by the contents of the instrument, is an interesting question; the former view is accepted in Pollock *v.* Glassell, 2 Gratt. 439, 455 (1846), in a useful opinion by Baldwin, J., collecting precedents.

[1] The history is more fully noticed *post*, § 2426.

[2] 1822, Bayley, B., in Cox *v.* Troy, 5 B. & Ald. 474 (with reference to the completion of an acceptance, "I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the communication of what is so written, that binds the acceptor"; holding void a bill on which the drawee's signature had been placed and then erased by him before return to the payee's agent); and cases cited in Ames' Cases on Bills and Notes, I, 135, note, 157–166, 207 ff.

[3] 1861, Harrop *v.* Fisher, 10 C. B. N. S. 196 ("If by mistake, accident, or fraud, a bill has been omitted to be indorsed upon a transfer, when it was intended that it should be, the party may be compelled by a court of equity to make the indorsement").

self decisive, even when coupled with the writing.[4] Furthermore, a manual delivery to a third person on a condition precedent may leave the instrument incomplete;[5] and the doctrine that a deed-escrow to the grantee is binding, in spite of the condition (*ante*, § 2408), never found any orthodox place in this part of the law,[6] though in some jurisdictions the analogy of deeds has naturally been given recognition.[7] For purchasers for value without notice, the principle of Intention may affect these results (*post*, § 2420).

§ 2410. **Same**: (3) **Delivery, as applied to Contracts in general; Conditions Precedent and Subsequent; Assent of Third Persons; Blanks; Dates.** Sealed instruments — otherwise known as deeds — were the chief legal documents, in the earlier history of our legal system, and for a long time the only ones whose contents were indisputable.[1] Other writings thus came down to us without the tradition of delivery as a formal and arbitrary mark of the finality of the act. It has therefore long been well understood, for other writings, that the finality of the writing as a legal act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition, and, in particular, that this is so whether the writing (or escrow) is provisionally handed to the grantee himself or to any one else. The case of Pym *v.* Campbell, in England,[2] is commonly taken as the leading one. In the United States, the

[4] 1836, Brind *v.* Hampshire, 1 M. & W. 365 (indorsement is effected, "either by the actual delivery . . . or by some binding engagement"); 1841, Marston *v.* Allen, 8 id. 494 (indorsement followed by a placing in the custody of the indorser's agent, not sufficient).

[5] 1875, Chipman *v.* Tucker, 38 Wis. 43 (that a note was delivered to a third person with an agreement not to deliver to the payee unless a certain vote of mortgagors took place, and that the custodian delivered it without such a vote, allowed to invalidate the note).

[6] *Eng.*: 1840, Adams *v.* Jones, 12 A. & E. 455 (bill accepted by the defendant for F. as payee, and indorsed in blank and delivered by F. to the plaintiff as agent for R. only; defendant's plea denying title in the plaintiff, held good); 1848, Bell *v.* Ingestre, 12 Q. B. 317 (indorsement of bills sent by mail to plaintiff, on the express condition that certain other bills should be returned by post, but they were not; "they were delivered to them as mere trustees"; "on a plea traversing the indorsement of a bill, its delivery with intent to transfer an interest is put in issue"); *U. S.*: 1899, Burns & S. L. Co. *v.* Doyle, 71 Conn. 742, 43 Atl. 483 (acceptance of a bill delivered with the condition that it should not operate until a cottage was completed and money became due, admitted); 1899, Mehlin *v.* Mutual R. F. L. Ass'n, 2 Ind. Terr. 396, 51 S. W. 1063 (handing of a note to payee's agent, to be delivered to payee on certain conditions only; allowed); 1893, Robertson *v.* Rowell, 158 Mass. 94, 32 N. E. 898 (agreement to leave a note with payee as incomplete until indorsement by a third person; admitted); 1895, McCormick Co. *v.* Faulkner, 7 S. D. 363, 64 N. W. 163 (condition enforced that notes should not become operative till signed by a third person); 1894, Burke *v.* Dulaney, 153 U. S. 228, 234, 14 Sup. 816 (admitting proof of an agreement that a note was left in the payee's hands "to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question").

[7] 1877, Stewart *v.* Anderson, 59 Ind. 375; and cases cited *pro* and *con* in Ames' Cases on Bills and Notes, II, 99, note.

The question whether a *conditional acceptance* is valid (*i. e.* an acceptance, final as such, but expressly subject to the contingency of a *condition subsequent*) is a different one; see Ames' Cases on Bills and Notes, II, 152–154.

[1] *Post*, § 2426.

[2] 1856, Pym *v.* Campbell, 6 E. & B. 370 (purchase of an invention; a writing formally complete and signed, and delivered to plaintiff, was offered by the plaintiff; the defendant was allowed to show that, upon a meeting of all persons concerned except A., "it was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should then be drawn up and signed, which, if A. approved of the invention, should be the agreement, but, if A. did not approve, should not be one; A. did not approve of the invention when he saw it"; Erle, J.: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the

doctrine is not only completely accepted,[3] but has even been applied to sealed instruments other than deeds of land[4] in jurisdictions still bound by precedent to the older rule for deeds (*ante*, § 2408). The only opportunity for doubt arises, not from any question as to the correct theory, but from the difficulty of distinguishing in practical application the present principle and that other one (*post*, § 2435), also a part of the parol evidence rule, which denies validity to any oral part of an act when the act has been reduced completely to writing. By the other principle, a *condition subsequent*, which of course forms a part of the act which it qualifies, must be contained in the writing, in order to be enforced, and an oral one is therefore ineffective. But by the present principle, the act is not an act until the final moment

terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible"); 1856, Davis *v.* Jones, 17 C. B. 625 (agreement for a lease, allowed to be invalidated by the fact that by agreement no obligation was to arise until repairs had been completed and then a date inserted in the instrument); 1861, Wallis *v.* Littell, 11 C. B. N. S. 369 (similar ruling for agreement of assignment of a lease, conditioned on the landlord's assent; Erle, C. J.: "It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation"); 1897, Pattle *v.* Hornibrook, 1 Ch. 25 (allowing proof that the plaintiff signed a lease as lessee, and subsequently the defendant signed it, but handed it to his solicitor and told him "not to complete" until two additional persons signed as responsible lessees).

[3] 1899, Hurlburt *v.* Dusenbery, 26 Colo. 240, 57 Pac. 860 (agreement not to be effective until a third person advanced money, admitted); 1896, Stanley *v.* White, 160 Ill. 605, 43 N. E. 729 (cited *ante*, § 2408); 1902, Sutton *v.* Griebel, 118 Ia. 78, 91 N. W. 825 (agreement of subscription; an agreement that the defendant might withdraw, if he substituted another subscriber, before the meeting of the subscribers for final arrangement, allowed to be shown); 1881, Wilson *v.* Powers, 131 Mass. 539 (document by the payee of a note, purporting to extend time to the maker, and thus to discharge the sureties, allowed to be shown to have been delivered to the maker with a condition to become binding only upon assent of the sureties); 1902, Nichols *v.* Rosenfeld, 181 id. 525, 63 N. E. 1063 (effect of a temporary custody of finished documents before final delivery, discussed); 1897, Cleveland Ref. Co. *v.* Dunning, 115 Mich. 238, 73 N. W. 239 (that an order was given conditionally on the consent of a third person which was not given, allowed); 1900, Ada Dairy Ass'n *v.* Mears, 123 id. 470, 82 N. W. 258 (that a contract was signed, but not to be binding until the signer had seen a third person and verified a statement of the promisee's agent, admitted); 1873, Benton *v.* Martin, 52 N. Y. 570, 573 (general principle stated, in a clear opinion by Folger, J.); 1894, Blewitt *v.* Boorum, 142 id. 357, 37 N. E. 119 (the present doctrine and that of deeds, distinguished); 1893, Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698 (that an agreement signed by defendant was not to bind until the plaintiff had procured twenty other signatures, admissible); 1895, Manufacturers' Furn. Co. *v.* Kremer, 7 S. D. 463, 64 N. W. 528 (contract delivered to the promisee on condition that it should not be binding till other signatures were obtained); 1888, Ware *v.* Allen, 128 U. S. 590, 595, 9 Sup. 174 (contract to pay money; the fact that "before the paper was signed or agreed upon, it was distinctly understood that it was to be of no effect, unless upon consultation with H. or A. or both of them the defendants were assured that the proceeding was lawful," and that H. and A. were consulted and did not assure them but declined to approve, held to invalidate the instrument); 1898, Tug R. C. & S. Co. *v.* Brigel, 30 C. C. A. 415, 86 Fed. 818 (that an agreement should not be binding until approved by the signer's attorney, admissible); 1901, Reiner *v.* Crawford, 23 Wash. 669, 63 Pac. 516 (contract to sell stock, delivered on condition that the seller's agent at S. had not sold it before the buyer's arrival at S.; condition allowed to be shown); 1897, Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885 (stock subscription; agreement that it should not be binding till a certain number subscribed, admissible).

Curiously, the only Court that insists on adopting here, for writings in general, the analogy of the old escrow-rule for deeds is a Court which had already repudiated that rule (*ante*, § 2409, *infra*, note 4) for notes and bonds: 1903, Findley *v.* Means, — Ark. —, 73 S. W. 101.

[4] 1893, State *v.* Wallis, 57 Ark. 64, 73, 20 S. W. 811 (agreement that a bond should not bind until another person signed, admitted); 1894, Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. 119 (contract under seal, delivered not to be binding till the plaintiff had acquired the interest of a third person; admitted, distinguishing between this and the special prohibition of escrow of deeds to the grantee).

The principle seems also to be generally accepted for *insurance policies:* 1897, Joyce, Insurance, I, §§ 90–102; and cases cited *ante*, § 2408.

appointed, and that moment may by the parties be made to depend upon some future event, which thus becomes a condition precedent to the legal existence of the act. Theoretically, these two things are entirely distinct, but in particular negotiations it may become difficult to determine judicially which of them the parties were providing for. In such cases, opposite results may turn upon an apparently trifling difference of phrase.[5]

It follows, from the present principle, that a writing signed and delivered, but left with a *blank part*, may or may not be final, according to circumstances; and that whether the filling up of the blank by a third person completes the instrument and makes it effective depends upon whether this circumstance was agreed upon beforehand as the decisive one.[6] It also follows that the *date* of a document's execution may be established by proving the actual time of the conduct, regardless of any statement of date contained in the writing;[7] because the time of finality of the utterance, as a legal act. is something essentially independent of and exterior to the writing itself. It may also be suggested that the much-mooted questions, in the specific field of contracts, whether the *acceptance of a contractual offer*,[8] or the *revocation* of such an offer,[9] must be communicated, are dependent (in part, at least) upon this principle that the finality of an act varies according to circumstances and cannot be prejudged by any invariable test.

§ 2411. **Same: (4) Publication, as applied to Wills.** The formal rule of delivery was never applied to wills, — partly, no doubt, because their history was distinct from that of other written acts, and partly because the notion of delivery does not naturally suggest itself for unilateral acts. Yet the element of finality of utterance must somehow be marked, and the term "publication" came to be used for that purpose. But this test, concededly, was flexible. Apart from the statutory formality of attestation, no arbitrary or uniform mark of finality was ever fixed upon in the law of wills. Thus, for all wills between the statute of Henry VIII (1540) and the statute of Charles II (1678), and for wills of personalty from the latter date until the

[5] The cases of doubt are placed *post*, § 2435. Compare the instructive case of Stanley *v.* White, 160 Ill. 605, 43 N. E. 729, cited *ante*, § 2408.

[6] 1829, Hudson *v.* Revett, 5 Bing. 368 (a deed may be prepared leaving a blank, and prescribing this to be filled by a specified person, and will then have effect from the time when the blank is filled in; quoted *ante*, § 2408). The following ruling is therefore unsound: 1811, Weeks *v.* Maillardet, 14 East 568 (contract to sell certain machinery "as per schedule annexed"; the parties signed, sealed, and delivered duplicate originals, lacking any schedule, and separated; held, that a schedule afterwards written in by one G. P., a subscribing witness, in accordance with the understanding and expectation of the parties, was no part of the deed).

[7] 1804, Hall *v.* Cazenove, 4 East 477, 482 (date of delivery); 1866, Reffell *v.* Reffell, L. R. 1 P. & D. 139 (a will's date of 1855, shown to be a mistake for 1865; thus effecting a revocation of a will of 1858); 1898, Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509 (date of execution of undated paper attached to a deed); 1892, Saunders *v.* Blythe, 112 Mo. 1, 6, 20 S. W. 319 (deed); 1893, Vaughan *v.* Parker, 112 N. C. 96, 100, 16 S. E. 908 (deed); 1895, Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426 (deed).

[8] 1879, Household F. & C. A. Ins. Co. *v.* Grant, L. R. 4 Exch. D. 216; 1857, Hallock *v.* Ins. Co., 26 N. J. L. 268; 1871, White *v.* Corlies, 40 N. Y. 467 ("A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other; nor does an act which in itself is no indication of an acceptance become such because accompanied by an unevinced mental determination").

[9] 1880, Byrne *v.* Van Tienhoven, L. R. 5 C. P. D. 344; 1887, Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284.

statute of Victoria in England (1837) and the corresponding statutes in the United States, the problem constantly arose whether a particular testamentary writing had been finally acted upon by the decedent; and this question depended entirely upon the circumstances.[1] But under the statutory solemnity of attestation (*post*, §§ 2421, 2456) this question practically disappeared; for the attestation serves as an unquestionable mark of finality.[2]

2. Intent and Mistake, as applied to Subject, Terms, and Delivery, of an Act.

§ 2413. **Intent and Mistake, in general; Modern Test of Reasonable Consequences, applied to Expressed Intent.** The elements of an act, in themselves considered, being its subject, its terms, and its final utterance (*ante*, § 2404, par. 1), it is obvious that these must all be preceded and brought into being by some sort of volition or intent.[1] The result, however, that is thus brought into outward being does not always correspond with the inward intent; and the problem thus arises (*ante*, § 2404, par. 2) how far either the expression or the intent shall be treated as legally paramount the one to the other. The primitive law (*ante*, § 2405) looked only at the expression. Juristic speculation of the metaphysical sort tended in modern times at first to regard the intent as vital. But in truth neither can be exclusively the standard; it is a question of adjusting the due relation between the two; and this is the trend of the last half-century in law and in juristic thought.

In order to solve the problem, it is indispensable that the different possible meanings of the words "intent" or "intention" be kept apart, and that the distinction between "volition" and "intention," in the proper sense of the words, be established:

Circa 1832, Mr. *John Austin*, Jurisprudence, Campbell's ed., Sect. XVIII, XIX, §§ 602–617: "In order that we may settle the import of the term 'intention,' it is necessary to settle the import of the term 'will.' For, although an intention is not a volition, they are inseparably connected. . . . These expressions, and others of the same import, merely signify this: Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements. . . . For example: If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I

[1] 1814, Nichols *v.* Nichols, 2 Phillim. 180 (a paper drawn merely as an example of conciseness in testamentary language was held not to be a will); 1853, Boling *v.* Boling, 22 Ala. 826 (certain unfinished papers, held not a will of personalty; "the final action, the settled purpose of mind to pass his property, did not then exist"; here the paper was olographic, but undated and unsigned).

[2] Temp. Geo. II, *circa* 1730, Allen *v.* Hill, Gilbert 257, 261 ("The design [of the statute requiring attestation] was that the will may appear to be compleat, and not a preparation only; for by taking the names of the witnesses to his paper, the testator has shown that he has compleated his will").

[1] 1568, Brett *v.* Rigdon, Plowd. 340, 343 ("The making of a testament consists of three parts, as do all other human acts which are done with discretion [*i. e.* sound mind], viz., inception, progression, and consummation. . . . But there is one same thing annexed to each of these parts, and that is the intent of the party, for every one who does any act with discretion has an intent in the inception of it, . . . and in the progression and consummation of it the same intent also subsists; so that one same intent runs through all the parts and continues in the doing of them").

wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end. . . . Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled volitions. And as these are the only volitions, so are the bodily movements, by which they are immediately followed, the only acts or actions properly so called. . . . Most of the names which seem to be names of acts, are names of acts coupled with certain of their consequences. For example: If I kill you with a gun or pistol, I shoot you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an act, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it at your head or body and pull the trigger. These I will. The contact of the flint and steel, the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are consequences of the act which I will. I will not those consequences, although I may intend them. But in common language the words 'will' and 'intend' are often confounded. . . . To desire the act is to will it. To expect any of its consequences is to intend those consequences. The act itself is intended as well as willed. For every volition is accompanied by an expectation or belief that the bodily movement will immediately follow the wish. And hence (no doubt) the frequent confusion of will and intention. Feeling that will implies intention, numerous writers upon jurisprudence (and Mr. Bentham amongst the number) employ 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply will."

It may be assumed, then, that there must at least be a volition of some sort preceding every legal act. But it is also apparent that the act, as expressed and apprehensible to the world at large, or to the other party in particular, may not be such an act as was intended. In those cases, then, where a volition was exercised, but the outward consequences were not produced according to intention, are we to say that because there was a volition, the person is necessarily to be fixed with all the consequences, of whatever sort they be? Or are we to say that, because there was no intention of certain consequences, the person is necessarily not to be fixed with them? We are to accept neither solution in this absolute form. The latter solution is not fair to the community dealing with the person. The former solution is not fair to the person himself. No practical system of law could be content with either, applied in rigid uniformity. The established doctrine of tortious responsibility suggests an analogy and provides a solution. We are to fix the person with such expressed consequences as are the reasonable result of his volition. In other words, *the act as legally effective will be determined, in respect to the three elements of subject, terms, and finality, by that expression of it which results, to the other person in the transaction, as the consequence, reasonably to have been anticipated under all the circumstances, of the volition of the actor.* This avoids on the one hand the impracticality of the merely external standard, so far as it would have held the person liable for an apparent act which was not the reasonable consequence of his conduct; and, on the other hand, it avoids the impracticality of the merely internal standard, so far as it would have exonerated the person from an unintended consequence which he ought to have foreseen and might have avoided. In short, it adapts, to the general doctrine of legal acts, the test of *negligence, i. e.* responsibility

resting on a volition having consequences which ought reasonably to have been foreseen.

Such, without doubt, is the general principle of the modern law. Whatever may happen to be said, here and there, broadly declaring an actual and precise intent either to be necessary or to be immaterial, nevertheless, whenever the precise problem is presented, modern judicial good sense has usually accepted this median rule, for all sorts of legal acts:[2]

1886, Professor *T. E. Holland*, Jurisprudence, 3d ed., 99: "It was laid down by Savigny that, in order to the production of a juristic act, the will and its expression must be in correspondence. This view is in accordance with the *prima facie* interpretation of most of the relevant passages in the Roman lawyers, and is still predominant in Germany, but certainly cannot be accepted as universally true. An investigation into the correspondence between the inner will and its outward manifestations is in most cases impossible, and where possible is in many cases undesirable. . . . Is it the case that a contract is not entered into unless the will of the parties are really at one? Must there be, as Savigny puts it, 'a union of several wills to a single, whole, and undivided will?' Or should we not rather say that here, more even than elsewhere, the law looks, not at the will itself, but at the will as voluntarily manifested? When the law enforces contracts, it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise. If, for instance, one of the parties to a contract enters into it, and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless. Not only will the dishonest contractor be unable to set up his original dishonest intent as an excuse for non-performance, but should he, from any change of circumstances, become desirous of enforcing the agreement against the other party, the latter will never be heard to establish, even were he in a position to do so by irrefragable proof, that at the time when the agreement was made the parties to it were not really of one mind. . . . The language of systems of positive law upon the point is generally ambiguous, nor is this to be wondered at. The question is practically a new one. The process of giving effect to the free acts of the parties to a contract, rather than to the fact that certain rigidly defined formalities have been complied with, has lasted so long that legal speculation has only recently begun to analyse the free act itself into its two factors of an inner will and an outward expression, and to assign to one or to the other a dominant place in the theory of contract. Just as the Romans used, without analysing them, the terms '*velle*,' '*consensus*,' '*sententia*,' so the modern Codes, though some appear to look rather to the inner will, others rather to its outward expression, as a rule employ language which is capable of being interpreted in either direction. The same may be said of the English cases. In these one constantly meets with such phrases as 'between him and them there was no *consensus* of mind,' 'with him they never intended to deal'; but one also meets with much that supports the view of the question which we venture to hope may ultimately commend itself to the Courts as being at once the most logical and the most favourable to the interests of commerce. . . . In other words:[3] the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' *i. e.* a judge or jury, would put upon such acts. This luminous principle at once sweeps away the ingenious speculations of several generations of moralists, while it renders needless long lists of subtle distinctions which have been drawn from decided cases."

[2] For tortious responsibility, its phrasing was first broadly given in the epoch-making book of Mr. Justice Holmes, The Common Law (pp. 110, 161).

[3] This principle is here put forward by the learned author for contracts only.

1859, *Pollock*, C. B., in *Cornish* v. *Abington*, 4 H. & N. 549, 555: "The word 'wilfully,' in the rule as laid down in Pickard *v.* Sears, means nothing more than 'voluntarily.' Lord Wensleydale, perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

1871, *Blackburn*, J., in *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 607: "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman *v.* Cooke.[4] If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

1840, *Denman*, L. C. J., in *Trueman* v. *Loder*, 11 A. & E. 588 (action on a contract of sale in the name of one Higginbotham; the plaintiff was allowed to show that H., though carrying on business in his own name, had been held out by the defendant as his agent, so that the business was virtually the defendant's, done in H.'s name): "Some cases were quoted in which the question whether an agent or a partner bound himself only, or his principal or firm, has been held to depend on his intention to deal for himself or for the principal or partnership. But on examining all those cases, it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or his firm. The world would know him in two different characters; and each party dealing with him was bound to inquire in which he appeared on any particular occasion. But here is the case of one exclusively an agent for another, and in that light only regarded by the customer. Having full authority so to represent himself, he forms the design in his own mind to divert one of his numerous contracts from its expected destination to some purpose of his own. But that design cannot operate to oust the opposite party of those rights against the principal, which both the principal and agent had by their conduct concurred in persuading him that he possessed. Suppose a landed proprietor to send his steward habitually to the neighboring fairs and markets to make sales and purchases for him in matters connected with the management of his estate; that the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for his employer, by his direction and on his credit; could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing deprive the vendor of his recourse against the master? Certainly not."

1884, *Elliott*, J., in *Indianapolis* v. *Kingsbury*, 101 Ind. 201, 213: "We fully agree with counsel for the appellees that an essential element of dedication is the intent of the owner to devote his land to a public purpose, and we unhesitatingly affirm that without such an intention it is impossible that there should be a valid dedication. But the intention to which Courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is the intention which finds expression in con-

[4] 2 Exch. 663.

duct, and not that which is secreted in the heart of the owner, that the law regards. Acts indicate the intention, and upon the intention clearly expressed by open acts and visible conduct the public and individual citizens may act. Nor is it to mere secret agreements or arrangements unknown to public officers and to purchasers of lots that Courts are to look. What they do look to, and what good conscience and fair dealing require they should regard, is the conduct of the landowner; that is open to the scrutiny and knowledge of the community and its members." [5]

The foregoing principle, it will be noticed, throws useful light on the time-honored but misused distinction between *void* acts and *voidable* acts. The *voidness* of an act (or, more correctly, of conduct which has never become a legal act) is seen to be a quality *purely relative, i. e.* an instrument may be void, as against the grantee or payee, yet valid as against the indorsee or the grantee's grantee. It may even be valid as against one of two grantees, though void as against the other, or valid for one clause and void for the next, — consequences thoroughly accepted in the modern judicial rulings (*post,* §§ 2415–2420, *passim*). The conception, so often met with, that voidness, when conceded for one person, necessarily involves voidness in the absolute sense, *i. e.* for every other person,[6] is therefore unfounded and unpractical, since the test of reasonable consequences will differ for different persons affected by the conduct.

As a part of the same erroneous conception, the *relative quality* of an act, as valid for one person while invalid for another, has been associated exclusively with the term *voidable.* But this is the confounding of two separate ideas in the same term. A voidable act is one which may be annulled at the actor's option (*post,* § 2423), but is valid till annulled; while a void act is of itself null, and requires no further act exercising an option, — the practical differences being, first, that the voidable act remains valid if the option is

[5] The following opinions further illustrate this principle: 1898, Fox *v.* R. Co., 70 Conn. 1, 38 Atl. 871 (transfer of bonds; the transferor was not allowed to be asked, "Was it your intention to convey the coupons?" because it called for "the actual, secret, unmanifested intention of H., which under the circumstances was of no legal significance; the real question was as to his manifested intention, and this could be ascertained only from the contract, read in the light of the circumstances under which it was made"); 1880, Stoddard *v.* Ham, 129 Mass. 383 (the plaintiff sold goods to L., believing without good ground that he was only agent for the defendant, and the defendant bought the goods from L.; the defendant was held not liable; "a party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention"); 1893, Hobbs *v.* Massasoit W. Co., 158 id. 194, 33 N. E. 495 ("the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party"; per Holmes, J.); 1854, Lennig *v.* Ralston, 23 Pa. 137 (under a statute giving extra damages for dishonor of a bill drawn in Pennsylvania upon a foreign drawee, the defendant was held liable upon a bill bearing the word "Philadelphia" but actually completed by the defendant's partner in England; "it bore the dress of a bill of exchange drawn in Pennsylvania, and, upon the principle that every one is presumed to intend to produce all the consequences to which his acts naturally and necessarily tend, the presumption is that the defendants intended that the purchasers should receive it under the belief that it was a bill drawn in Philadelphia"). For the state of juristic opinion in Germany, see Der Irrthum bei nichtigen Verträgen, Rudolf Leonhard, Berlin, 1882, *passim;* and the references in Holland, Jurisprudence, 3d ed., c. 8, p. 101, note 1.

[6] *E. g.:* 1824, Parker, C. J., in Somes *v.* Brewer, 2 Pick. 184, 191: "Between the grantor and the grantee in such cases, the technical difference between 'void' and 'voidable' is wholly immaterial. Whatever may be avoided may in good sense, to this purpose, be called void. . . . But in regard to the consequences to third persons the distinction is highly important, because nothing can be founded upon a deed which is absolutely void; whereas from those which are only voidable fair titles may flow."

never exercised, and, secondly, that its invalidity must be pleaded affirmatively.[7] Now the relative quality — *i. e.* of affecting one person though not another — is concededly true of voidable acts. But that it is not their inherent mark may be perceived from two circumstances; on the one hand, that a voidable act may continue to be voidable in the hands of a third person, so far as he is a transferee with notice (*i. e.* the voidability, like the voidness, may absolutely affect the act under certain circumstances), and, on the other hand, that some acts ordinarily voidable are by modern doctrine (*e. g.* the contracts of a lunatic[8]) valid for even the immediate promisee, if he did not and could not know of the avoiding circumstance.

The result is, then, that the distinction between relative and absolute validity must be separated from the idea of voidness and voidableness. The only place for the former contrast is between acts permitted and acts prohibited by public policy (*ante*, § 2414). So long as an act does not fall within the classes absolutely prohibited and made null, *its validity is always relative*, depending on the foregoing principle of reasonable consequences as governing intent.

The application of that principle is now to be examined. It comes to be applied under each of the three elements (*ante*, § 2404) of a legal act, namely, (*A*) its subject, (*B*) its terms, and (*C*) its finality.

§ 2414. (*A*) **Jural Subject of an Act; Secret Intent not to be Bound.** The result of the foregoing principle, as applied to the requirement that an act must be jural in its subject (*ante*, §§ 2404, par. (1), *a*, § 2406) is plain. When the first party has so conducted himself that the natural outward import of his act is a legal transaction, it is immaterial what his own actual intent was, — whether to jest, or to do a charity, or otherwise to be without legal consequences. This rule has been applied to *marriage ceremonies*, to *household services*, and to a variety of transactions.[1]

In the other aspect (*ante*, § 2406), however, in what concerns the prohibitions of *public policy against transactions* of certain kinds, making them void, this is obviously independent of the will of the parties. They cannot

[7] 1765, Zouch *v.* Parsons, 3 Burr. 1794, 1805 (L. C. J. Mansfield: "An infant, or they who stand in his place, cannot plead '*non est factum*' and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed").

[8] 1892, Imperial Loan Co. *v.* Stone, 1 Q. B. 599; Harriman, Contracts, § 409.

[1] *Eng.*: 1727, Osborn *v.* Guy's Hospital, 2 Str. 728 (services as a friend, not as a broker, in transacting stock affairs); 1813, Taylor *v.* Brewer, 1 M. & S. 290 (a promise that "such remuneration shall be made as shall be deemed right"; this was held "merely an engagement of honor," "throwing the plaintiff upon the mercy" of the defendant); *U. S.*: 1876, Day *v.* Caton, 119 Mass. 513 ("The circumstances of each case would necessarily determine whether silence, with a knowledge that another was doing valuable work for his benefit and with the expectation of payment, indicated that consent which would give rise to a contract"); 1863, Keller *v.* Holderman, 11 Mich. 248 (check for an old watch, given as a jest); 1870, McClurg *v.* Terry, 21 N. J. Eq. 225, 227 (marriage in jest); 1851, Perkins *v.* Hersey, 1 R. I. 493 ("It is not necessary for you to consider that there was an express promise made and accepted in terms; but if his conduct was such as to induce her to believe that he intended to marry her, and she acted upon that belief, . . . that will raise a promise"); 1890, Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 275, 10 Sup. 730 (an assurance to "do what was right"); 1845, Andrus *v.* Foster, 17 Vt. 556 (household services of a child; "it is incumbent upon her to show that at the time it was expected by both parties that she should receive such compensation, or that the circumstances under which the services were performed were such that such expectation was reasonable and natural").

be allowed to control or evade the prohibition in any manner; hence, the nature of the transaction, as being *usurious* or the like, may always be shown, and the parol evidence rule interposes no obstacle.[2]

§ 2415. (*B*) **Terms of an Act; (*a*) Signing a Completed Document by Mistake; (1) Individual Mistake not known to or induced by the Second Party.** In applying the general principle (*ante*, § 2413) to the second element of an act, namely, its terms or contents (*ante*, § 2404, par. 1, *b*), the doctrine of reasonable consequences calls for several important distinctions in order to solve the various forms of practical problems. In the first place, a distinction may arise between *negotiable instruments* and other documents, for in the former a new person, entering posterior to the original circumstances, may by the law acquire original rights; and thus the rule may have a different result according as the second party is the immediate or the subsequent holder of the instrument. Furthermore, specific kinds of contracts are in experience often accompanied by inattention or by imposition — such as bills of lading and insurance policies —, and the principle of reasonableness may be affected by this feature of practical life. In the second place, and running through all kinds of legal acts, a distinction is necessary (based on the principle of reasonable consequences) between *individual* and *mutual mistake* (*i. e.* by one party alone and by both parties), and also between *unilateral mistakes* which are *known to the second party* and those which are *not known* to him. In the third place, a distinction is necessary between signing a specific and *complete document* under mistake as to its actual terms, and signing a paper which is *blank* or *unfinished* or is capable of being altered. These various distinctions are to be noted separately under each head.

(*a*) *Signing a Completed Document by Mistake;* (1) *Individual Mistake, not known to or induced by the Second Party.* Where a legal act is executed by *signing* a specific and *complete* document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequences plainly requires this result. That the signer did not intend to execute such terms is immaterial; and whether the lack of intent was due to a failure to read it over, or to some other cause, is immaterial. In other words, his individual innocent mistake or deliberate secret dissent cannot be shown. Such may be taken to be the general rule.[1] As

[2] 1767, Collins *v.* Blantern, 2 Wils. 347 (usury); 1781, Lowe *v.* Waller, 2 Doug. 736 (usury); and cases cited in Ames' Cases on Bills and Notes, I, 400, note, 416, note, 464, note, 574, note.

[1] *Eng.:* 1860, Lewis *v.* R. Co., 5 H. & N. 867 (Pollock, C. B., sanctioned a ruling "that if a person signs a contract [without reading], and will not venture to deny that he was aware it was a contract, and that he saw the 'conditions,' and there is no evidence to detract from the apparent result, he is bound by it"); *U. S.:* 1903, Georgia Med. Co. *v.* Hyman & Co., 117 Ga. 851, 45 S. E. 238 ("that ignorance [of the contents] was due to his own negligence"); 1884, Black *v.* R. Co., 111 Ill. 351, 358 ("When a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound"; whether hero the plaintiff was misled by the defendant's representations that a release of liability was a free pass, held a question of fact); 1894, State National Bank *v.* Butler, 149 id. 575, 36 N. E. 1005 (defendant held liable as partner, to the payee of a partnership note, the

exceptions to this rule, there may be two classes of cases. 1. Where a document was drafted and *prepared by the second party*, and contains also parts which physically constitute virtually a separate document and are not included in the scope of the first party's signature, it may be proper, in order to protect against imposition, to exonerate him if he misunderstood the extent of the terms to which his signature apparently applied. This may be the case for an *insurance application*.[2] 2. Where a person is *illiterate*, or *blind*, or *ignorant of the alien language* of the document, his case, again, is to be tested by the doctrine of reasonable consequences as applied to the circumstances. In other words, he is of course not bound as against the second party if that party himself misrepresented the contents (*post*, § 2416), nor is he bound against a transferee of a chose in action, who can be in no better position; but if the instrument is negotiable, and has come to the hands of a *bona fide* holder for value, then the signer is liable if under the circumstances he had not taken proper precaution to ascertain the contents, *i. e.* if he was negligent.[3]

partnership agreement having been signed by the defendant in ignorance of its contents and in reliance upon the statements of her brother, who was a partner); 1903, Johnson *v.* Richardson, 67 Kan. 521, 73 Pac. 113 (release of liability for injuries); 1858, Diman *v.* R. Co., 5 R. I. 130 (the defendant, being solicited to increase or renew his subscription to stock of the plaintiff railroad company, having formerly been a subscriber to 10 shares of a total value of $1000, took the subscription-book from the agent, intending to renew his old subscription, and wrote 20 shares and $2000, and handed the book to the agent; on later discovering his mistake, the subscription as written was held binding; "grant that he designed, and at the time expressed his design, of renewing only his old subscription, . . . and permitted his hand to write what his will did not direct," yet this "necessarily imported, in such a personal act, negligence or carelessness on his part"); 1896, Coates *v.* Early, 46 S. C. 220, 24 S. E. 305 (the plaintiff sent the defendant a sample card of needles containing 25, and a blank order for "needle cards"; the defendant filled out an order for five thousand needle cards; held, that the defendant could not show that he thought that he was ordering five thousand needles, instead of five thousand cards of needles).

For individual mistake as a *bar to specific performance*, see *post*, § 2417.

[2] 1895, Yoch *v.* Ins. Co., 111 Cal. 503, 44 Pac. 189 (application for insurance, containing the words "less than 15 rooms," and signed by the insured; the insured was allowed to testify that he did not read the application nor know that the words were there; the ordinary rule was held not to apply where "the instrument contains no words of obligation and the clause invoked by the signer does not purport to be a statement by him or in answer to a question put to him"); 1875, Hartford L. Ins. Co. *v.* Gray, 80 Ill. 28, 31 (insurance application; the signature being proved, "it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that it is his act, and hence that the burden is upon those who assert the contrary"); 1903, Gwaltney *v.* Provident S. L. Assur. Co., 132 N. C. 925, 44 S. E. 659 (insurance policy handed to the insured on the street; failure to read, allowed to be shown). The following opinion collects numerous cases: 1902, Bostwick *v.* Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246 (insurance policy signed without reading).

[3] The earlier rule, as laid down in Thoroughgood's Case (*ante*, § 2405), seems to have made it a formal test whether the illiterate demanded a reading and obtained a false one; but the modern rule is more flexible: *Eng.*: 1869, Foster *v.* Mackinnon, L. R. 4 C. P. 704 (when a document is falsely read over to a blind or illiterate person, "then, at least if there be no negligence, the signature so obtained is of no force"); *U. S.*: 1871, Puffer *v.* Smith, 57 Ill. 527 (similar to Walker *v.* Ebert, Wis., *infra*); 1896, Green *v.* Wilkie, 98 Ia. 74, 66 N. W. 1046 (note signed by an illiterate person on false representations that it was a note of an entirely different tenor from the one agreed, held invalid in the hands of a *bona fide* holder for value; "the rule we apply is not the usual one in which innocent holders of negotiable paper are protected against fraud in the inception of a note; in such cases there is a note, but the *bona fides* of it is questioned; in this case the note has never existed in the sense of the minds of the parties meeting, and there is no negligence to render the defendant liable on other grounds"); 1881, Trambly *v.* Ricard, 130 Mass. 259 ("The fact that the plaintiff was an unlettered person, who could not read and write, is of controlling importance; . . . a party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery"); 1903, New

Where the document has been *not signed*, but merely *taken into possession* —as a bill of lading or a notice —, it is less easy to fix upon a definite test. For formal *bills of lading*, there is a tendency to lay down a general rule that the shipper's acceptance of the manual custody of the document from the carrier is conclusive;[4] though even here it is in Illinois always left to the jury as a question of fact in each case.[5] But for *tickets, receipts, and notices*, the circumstances of each case are usually investigated (as a question of law, however), and the decision turns upon varying considerations of good sense and experience.[6]

§ 2416. **Same: (*a*) Signing a Completed Document; (2) Individual Mistake known to or induced by the Second Party.** Where the party's error as to the contents of his signed document is *known to the second party*, the first party may, of course, by the general principle (*ante*, § 2413), insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter. In other words, the actual and therefore the reasonable consequence of his volition to express himself in certain terms was precisely what the second party understood to be that expression. 1. The ordinary instance is that of *fraudulent misrepresentations* of the document's terms by the second party;[1] and, in

York C. & H. R. R. Co. *v.* Difendaffer, — C. C. A. —, 125 Fed. 893 (contract signed by an illiterate person, without seeking explanation from the other party or from third persons, held binding); 1871, Walker *v.* Ebert, 29 Wis. 194, 196 ("the party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character and has no intention of signing it, and who is guilty of no negligence in affixing his signature or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included").

[4] 1868, Grace *v.* Adams, 100 Mass. 505 (a consignor of a package held to assent to the terms of a bill of lading taken by him without reading; "it was his duty to read it; the law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents and was willing to assent to its terms without reading it; . . . the defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper").

[5] In Illinois, the mere acceptance of the bill of lading, or even the reading of it, is treated as *per se* inconclusive: 1873, Anchor Line *v.* Dater, 68 Ill. 369 ("the shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone"); 1895, Chicago & Alton R. Co. *v.* Davis, 159 id. 53, 42 N. E. 382; 1893, Wabash R. Co. *v.* Harris, 55 Ill. App. 159, 162 ("It was necessary to show that he accepted it with a full understanding on his part of the condition or limitation, and actually intended to assent to it; and these were questions for the jury").

[6] 1848, Rice *v.* Mfg. Co., 2 Cush. 80 (regulations for mill hands, given to an applying employee, who thereupon went to work; held that the plaintiff was bound "if she had read the regulations, or if she had received from the operatives in the mill or from other sources general information as to their contents, and was content to waive further inquiry"); 1891, Fonseca *v.* Cunard S. Co., 153 Mass. 553, 27 N. E. 665 (the plaintiff held to have assented to the conditions of a passenger ticket, printed on two large quarto pages, received by him but not signed nor read, the circumstances being such that "the passenger taking it should have understood that it was a contract containing stipulations"; the case of a check or pasteboard ticket distinguished, because it does not "purport to be a contract"); 1870, Blossom *v.* Dodd, 43 N. Y. 264 (a passenger held not to have assented to terms printed in small type on the face of a baggage receipt given to him at a time and place which made it illegible and given without oral notice of its tenor).

[1] 1896, Bank of Guntersville *v.* Webb, 108 Ala. 132, 19 So. 14 (as between the parties, a deposit-slip signed without reading, upon the faith of misrepresentations by the other party as to the contents, is not binding); 1879, Kilmer *v.* Smith, 77 N. Y. 226 (conveyance containing an undertaking to pay a mortgage debt; the parties not having orally understood this as a term, and the defendant having inserted it deliberately with the intent of deceiving the plaintiff, though the plaintiff signed it without noticing the clause, the clause was struck out); 1881, Albany C. S. Instit. *v.* Bnrdick, 87 id. 40 (facts and ruling similar to Kilmer *v.* Smith, *supra*).

particular, a false reading to a person illiterate, blind, or alien.[2] Where the instrument is negotiable, and a *bona fide* holder later receives it, the question becomes one of negligence at large, *i. e.* whether, with reference to the possible consequences to people in general of signing documents, the person signing used such caution as was reasonable; and this principle will be the same for illiterate[3] as for literate[4] persons, though the decision of it might be different in the two cases. 2. Where the first party's error is merely *known to* the second party, *without fraudulent means* by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him;[5] the only difference ought to be that in this case the first party should be satisfied with having the document reformed, while in the case of fraud he ought to be entitled to repudiate the entire transaction, by way of penalty upon the trickster. 3. Where the first party's error was *not known* to the second party, but was *induced by the latter's own conduct*, here also the first party may not be bound; for in such case it may well be that the terms actually expressed did not come to be expressed as the natural consequence of the first party's volition, but were due rather to the second party's own conduct. In that event the latter is not entitled to charge the former with them; in the contrary event the case becomes the ordinary one of individual mistake, which is immaterial (*ante*, § 2415). This distinction in practical application may lead, of course, to fine shades of interpretation of conduct.[6]

[2] Cases cited *ante*, § 2415, note 3, and the following: 1900, Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864 (release of right of action by a workman); 1901, Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. 638.

[3] Cases cited *ante*, § 2415, note 3.

[4] 1869, Foster *v.* Mackinnon, L. R. 4 C. P. 704 (C. brought to the defendant, who was aged, a bill of exchange, stating that it was a guarantee, and the defendant, seeing only the back of the paper, and believing it to be a guarantee of a sort formerly signed, wrote his name; an instruction that the defendant was not liable to a *bona fide* holder if he signed it on fraudulent representations "in the belief that it was a guarantee and if the defendant was not guilty of any negligence in so signing the paper," was held correct; "it was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange; it was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album").

[5] 1885, Loomis *v.* Day, 52 Conn. 483 (the plaintiff was held entitled to the correction of certain bonds whose terms made them redeemable in 20 years, instead of in 10 years as by the vote of the town-meeting; the plaintiff's treasurer having signed the bonds without reading them, but the defendant knowing of the error; good opinion by Loomis, J.); 1883, Shelton *v.* Ellis, 70 Ga. 297 (the plaintiff printed some schedules of railroad-fares, in which by mistake a certain fare was printed as $21.25 instead of $36.70; the defendant, knowing of the error, bought from an agent of the railroad a quantity of tickets at the erroneous price; the plaintiff was held entitled to have the tickets impounded); 1888, Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161 (similar situation for a mortgage; "a party who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement as made"); 1903, Story *v.* Gammell, — Nebr. —, 94 N. W. 982; 1890, Wanner *v.* Landis, 137 Pa. 61, 20 Atl. 950 (the plaintiff signed a deed on the representation that its contents affected only a tenancy in common, but it in fact included a release of dower; the defendant purchased at a public sale, but after notice of the error given by the plaintiff; the deed was held invalid as to the dower).

[6] *Eng.:* 1869, Mackenzie *v.* Coulson, L. R. 8 Eq. 368 (the defendants, desiring to secure an insurance against particular average by rust, engaged F. to secure insurance; F., acting through H., who acted through S., whose clerk W. negotiated, procured from the plaintiffs a memorandum which expressly excepted particular average, but in filling out the policy this clause was inadvertently omitted, and the plaintiffs signed the policy without reading it or knowing of the omission, and the policy on being transmitted to the defendants was accepted by them as being in accordance

§ 2417. **Same: (*a*) Signing a Completed Document; (3) Mutual Mistake; General Principle.** Concerning mutual mistake and its effect on the terms of the legal act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake — including individual mistake — will suffice to *bar a bill for specific performance*, is a distinct one; it involves merely the choice of remedies, not the terms of the valid act.[1] In the next place, the question whether an act may be avoided for a *mistaken assumption of fact external to the contract*, is a distinct one, belonging under the principle of avoidability (*post*, § 2423). This kind of question arises for all varieties of acts, — for example, a will or a gift is made to a younger son on the erroneous assumption that the elder one is deceased; or a deed is made of land seen by the parties and accurately described in the deed, on the erroneous assumption that it contains forty acres, though in fact it contains only thirty acres; or a deed attempting merely to release dower employs, by error of law, terms which effect a transfer of the wife's estate sole.[2] In all such instances the present principle is not involved. This is to be seen in three respects; for one thing, the terms of the act itself are not the subject of error; they are precisely as intended, and the error is as to a fact exterior to the instrument; for another thing, there is no variance between the oral understanding and the subsequent document; the question would be precisely the same had no writing been used, — as when a horse,

with their intention; held, (1) that the policy as signed and sent by the plaintiffs was a mere proposal, and became a contract only when accepted; (2) that the defendant was not responsible for the erroneous transcription by S.'s clerk; and (3) that the plaintiffs' own carelessness made them responsible for the terms of the instrument as transmitted by them and accepted by the defendant); *U. S.:* 1887, Palmer *v.* Ins. Co., 54 Conn. 488, 9 Atl. 248 (the parties having agreed to renew a policy of insurance, the defendant wrote into the new policy, without calling the plaintiff's attention, a new clause of co-insurance, and the plaintiff signed it without reading; "the rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read"); 1896, Marshall *v.* Westrope, 98 Ia. 324, 67 N. W. 257 (defendant and plaintiff, negotiating for a sale, differed as to the medium of payment; the defendant, having said that he would consider the matter and make a final proposition, sent by mail a draft-contract signed by himself containing his original terms, which the plaintiff after reading signed, in the supposition that the terms represented his own original terms; held, that the only agreement made "was the one expressed in writing," and that even if the plaintiffs wished to cancel it, "their own negligence in signing the contract would seem to be a bar"); 1878, Moran *v.* McLarty, 75 N. Y. 25 (plaintiff held not entitled to the reformation of an instrument containing a guaranty clause, which was to have been a part of the agreement by the defendant's understanding but not by the plaintiff's, the plaintiff having partially read the instrument and then signed it without noticing the clause).

[1] 1746, Joynes *v.* Statham, 3 Atk. 388; 1794, Rich *v.* Jackson, 6 Ves. Jr. 334, note (L. C. Hardwicke: "Parol evidence of the conduct of the parties, the manner of conducting the transaction, the unfairness and hardship, may afford a good ground to leave the party in the condition in which he puts himself at law, to make what he chooses to make of it; but ought not to make this Court give him any aid"); 1801, Townshend *v.* Stangroom, 6 Ves. Jr. 328, 333 (L. C. Eldon; holding it not true "that because parol evidence [of unilateral mistake] should not be admitted at law, therefore it shall not be admitted in equity upon the question whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution"); compare the cases and citations in Ames' Cases on Equity Jurisdiction, 374 ff.

[2] The following cases will serve as examples: 1871, Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 318 (where the mistake is only as to the legal effect of intended words, reformation will not be granted); 1889, Newton *v.* Tolles, 66 N. H. 136, 19 Atl. 1092; 1875, Bush *v.* Hicks, 60 N. Y. 298, 301 (a deed reformed in which the descriptive words of the boundaries were the intended ones, but the description covered more land than was intended).

sold orally, proves to have been dead at the time of the sale; and, finally, in these cases the problem varies for different kinds of acts, for the rules about materiality of error as applied to the case of a testator or donor are different from those which apply to deeds and contracts.

The kind of mutual mistake involved in the present principle is purely a mistake as to the *actual words intended to form part of the act,* just as in the cases of individual mistake already considered (*ante*, §§ 2415–2416). This sort of mutual mistake can rarely occur in oral acts, but it is common enough in written acts. The case is the simple one of an oral agreement which, when reduced to writing for signature, contains terms varying from the actual understanding of the parties, but is nevertheless signed by them both in ignorance of the variance. No one appears ever to have doubted that in such cases the instrument should be judicially amended to represent the actual agreement.[3] The only uncertainty has been in the theory of this proceeding. The important aspect of theory is that the amendment ought not to be conceived as a change or correction of the actual agreement. The erroneous instrument itself is not the actual agreement; *that* is found in the parties' common supposition of what the instrument contained, because, on the general principle (*ante*, § 2413), the terms of the act, for either party, are such as were reasonably caused by him to be apprehended by the other, and these clearly the instrument itself does not represent. "Neither party," in the language of Mr. Justice Holmes, "has purported or been understood to express assent to the conveyance as it stands."[4] Hence the frequent emphasis of judicial opinion upon this theory of the process:

1869, *James*, V. C., in *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368: "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."

1858, *Ames*, C. J., in *Diman* v. *R. Co.*, 5 R. I. 130: "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express [to all the world] what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract."

1879, *Rapallo*, J., in *Whittemore* v. *Farrington*, 76 N. Y. 452: "The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed that they were executing or accepting."

1894, *Torrance*, J., in *Park Bros. & Co.* v. *Blodgett & C. Co.*, 64 Conn. 28, 29 Atl. 133: "The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by mutual mistake; . . . and the instrument, if corrected,

[3] The doctrine goes back to the beginnings of modern equity: 1750, Baker *v.* Paine, 1 Ves. Sr. 456 (bill for account on a sale of goods, with a deduction for certain charges; but "it appeared by the minutes and the calculations made by themselves at the time that this was contrary to the intent and a mistake by the drawer"; L. C. Hardwicke held that "these minutes must be taken to be the agreement of the parties, and if any material variation (as is admitted by the defendant), the articles must be rectified").

[4] 1891, Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228.

will place both parties just where they intended to place themselves in their relations to each other."

There is therefore an insidious fallacy in the language of an early and much quoted decision [5] which places this doctrine upon the ground of enforcing *specific performance of contracts, i. e.* of assuming that there are two acts of contract, the prior one including by implication an oral agreement to reduce the oral transaction to written form. But written contracts are not necessarily preceded by oral ones; the moment of assent, and thus of the beginning of obligation, to the terms as finally settled upon may be the moment of signature of the writing, — as in numerous negotiations by mail; and in such instances it is equally possible (though not common) for an erroneous term to be inserted in the draft at the last moment. The correction of erroneous instruments therefore does not rest necessarily upon any assumption that a prior completed oral contract is being enforced. This fallacious assumption has, however, led practically, in a few jurisdictions, to the anomalous doctrine that a term *omitted* from the writing *by mutual mistake* (as distinguished from a term inserted by mistake) cannot be inserted in amendment, if the contract is one *required by the statute of frauds to be in writing*.[6] If it had been appreciated that the process of reformation consists in making the instrument state what the parties supposed that it represented — in short, in making it represent what they *are* doing, not what they have already agreed to do, this anomaly would not have been accepted. For example, if the parties, for the first and last time, met and signed a document in ink which proved to be a disappearing ink and became straightway invisible, the Court could undoubtedly cause the terms to be indelibly restored according to the parties' understanding of what the paper contained; here the process is in effect precisely the ordinary one known as "reformation," and yet there is no writing as required by the statute. The theory of reformation is that the instrument already *is* subjectively — *i. e.* to the parties — what they supposed it to be, and therefore that the statutory requirement of writing is, subjectively at least, satisfied; and that the "reformation" is needed only to make the instrument appear to all the rest of the world as it appeared (and therefore legally was) to the parties when they signed it.

The really complicated and troublesome questions concerning mutual mistake, as commonly so called, are those of the character first mentioned, namely, questions as to the materiality of some expressed term or unexpressed assumption. These are questions common to all contracts, written or unwritten, and involve the theory of avoidability (*post*, § 2423).

[5] 1825, Washington, J., in Hunt *v.* Rousmanier, 1 Pet. 1: "The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisprudence, and if the instrument which is intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and a court of equity will in the exercise of its acknowledged jurisdiction afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it and to the manifest intention of the parties."

[6] 1869, Glass *v.* Hulbert, 102 Mass. 24 ("From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms").

§ 2418. **Same: (*a*) Signing a Completed Document; (3) Mutual Mistake, as affecting Bona Fide Holders for Value.** The theory of reformation is to make the instrument state, objectively and in appearance to others, what it did subjectively state to the parties themselves. The one party is not bound to the other by the purporting tenor of the act, because the other party shared the error. But as against third persons, who are not sharers of the same supposition, and who are authorized by the substantive law to rely upon the instrument as defining the rights acquired by it, the tenor of the instrument controls, as a necessary result of the general principle (*ante*, § 2413) that the actor is responsible for the reasonable consequences of his act. In other words, an instrument may be reformable as against one person, but not as against another; the only condition being, in the latter case, that the transaction is one by which subsequent transferees may acquire rights not wholly dependent on the title (*i. e.* the legal acts) of their transferors. This will of course be the case with *commercial paper*. It should also be recognized for *deeds*.[1] The theory of the law is well illustrated in the circumstance that the same deed may at the same time be reformable as against one of the original parties to it, though not as against another.[2]

§ 2419. **Same: (*b*) Signing a Document having Blanks, or capable of Alteration; Writing One's Name not as a Signature.** (1) When a document as signed contains a *blank space*, and the blank is afterwards filled in by another person, the liability of the maker to be charged with the terms thus filled in is determined by the general principle of reasonable consequences (*ante*, § 2413). As against the *person filling the blank*, the maker is of course chargeable for such terms as accord with his own authority or consent,[1] and is not chargeable with any other terms. But even against *third persons* who may by substantive law rely on the instrument as the foundation of their rights, the maker may be chargeable, by the test of reasonable consequences; because an improper insertion by the immediate transferee may be (in the circumstances) a consequence which a prudent man might well have apprehended. For negotiable instruments,[2] as well as for deeds,[3] this principle

[1] 1862, Garrard *v.* Frankel, 30 Beav. 445 (the plaintiff and the defendant agreed for a lease by the former to the latter at 230*l.*, but the plaintiff, in filling out the blanks, wrote by mistake 130*l.* for 230*l.*; the defendant signed the lease with knowledge of the discrepancy; held, (1) that the defendant might give up the lease, but if she retained the lease, could do so only at a rent of 230*l.*; but (2) that B., who had advanced money to the defendant on an assignment of the lease, was to be treated as a purchaser for value without notice and have a lien on the house for the amount of the advances, whether the defendant retained or gave up the lease); 1891, Holmes, J., in Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228 ("As things stand, a purchaser without notice could hold him to the words which he has used").

[2] 1862, Garrard *v.* Frankel, *supra;* 1876, Wilcox *v.* Lucas, 121 Mass. 22 (W. sold his share of mining land to L. and A., and, by mistake in supposing certain ore land not to be within the share, an intended reservation of rights was omitted; reformation was ordered as to L., who shared the mistake, "to prevent him from relying on the grant," but not as to A., who did not share the mistake).

[1] 1829, Hudson *v.* Revett, 5 Bing. 368 (quoted *ante*, § 2408).

[2] 1853, Montague *v.* Perkins, 22 L. J. C. P. 187 (defendant held liable on an acceptance in blank, filled up and negotiated by the payee twelve years later; "he must be taken to have intended the natural consequence of his act"); and cases cited in Ames' Cases on Bills and Notes, I, 526, note.

[3] 1890, State *v.* Matthews, 44 Kan. 596, 25 Pac. 36 (the grantor executed a deed with a blank for the grantee's name, and left it with M. to negotiate with a proposed grantee; M. filled

seems to have settled into a rule of thumb, where the blank is expressly left for the purpose of later completion and the document is *handed away*. But where the document, though expressly left incomplete, is *retained* by the maker and later leaves his custody without his consent,[4] or where the blank is a mere superfluous space left uncancelled in an otherwise complete instrument,[5] the act is treated as not negligence *per se*, and the question turns upon the circumstances of each case.

(2) Where after execution a document has been *altered* and is acquired by a third person in its altered condition, the same principle serves as a test;[6] here the question seems always to be open upon the circumstances of each case.

(3) Where the person charged had not signed any document at all, but had *written his name alone, i. e.* for some other purpose than as a signature to a preceding written statement, it is natural to find the Courts holding him not responsible, as a matter of law.[7] Only rarely could the circumstances here justify leaving the question of negligence to the jury.

in his own name, and recorded the deed, then mortgaging the land to T., on the faith of the record; T. was held to obtain a good title); 1889, Dobbin *v.* Cordiner, 41 Minn. 165, 42 N. W. 870 (a deed executed by a married woman without reading it, on her husband's false representations, was left blank as to grantee and description of property, and the husband filled it with a grantee's name and a description of the wife's property; the *bona fide* grantee was held to obtain a good title, on the ground of the wife's "culpable negligence").

[4] 1839, Van Amringe *v.* Morton, 4 Whart. 382 (a deed executed and acknowledged, with a blank for the grantee's name, locked by the grantor in a drawer of which the key was given to his brother, who abstracted the deed, filled out the name of a grantee and delivered it, was held not effective, there being no negligence or default in the maker).

[5] 1827, Young *v.* Grote, 4 Bing. 253 (defendant held liable for checks signed by him in blank, left in his wife's custody, and so filled out by her direction that a blank space before the amount could be filled in to make 50*l.* into 350*l.*; "we decide here on the ground that the banker has been misled by want of proper caution on the part of his customer"; "the checks, left by him to be filled up by his wife, when filled up by her become his genuine orders"); 1854, Barker *v.* Sterne, 9 Exch. 684 ("whether the better ground for supporting that decision is that the drawer is responsible for his negligence . . . or that the rest of the world must judge of the authority to fill it up by the paper itself and not by any private instructions, it is unnecessary to inquire"); 1875, Halifax Union *v.* Wright, L. R. 10 Exch. 183 (the ruling in Young *v.* Grote approved, as "perhaps only an application of one of those general principles . . . that a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own").

[6] *Eng.:* 1859, Ingham *v.* Primrose, 7 C. B. N. S. 82 (defendant held liable on an acceptance delivered to M. without consideration to be discounted, returned to the defendant by M. after failing to obtain discount, then torn in two pieces by the defendant and thrown into the street, and picked up by M. in the defendant's presence, and afterwards negotiated by M.; "the case appears to turn on the question whether the act of tearing the bill in two pieces, being manifest on the face of it, is such an act as *prima facie* ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation; . . . it was properly a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose"); *U. S.:* 1870, Wait *v.* Pomeroy, 20 Mich. 576 (defendant held not liable on a note from which, before indorsement to the plaintiff, had been detached a memorandum at the foot, conditioning payment on delivery of a machine; "no one is bound to guard against every possibility of felony"); 1870, Harvey *v.* Smith, 55 Ill. 224 (similar note, bearing the condition in pencil, which was erased before transfer; the defendant held guilty of "gross carelessness," and an instruction that he was liable if the erasure could have been made "without leaving any trace which could be detected by a prudent and careful man," held proper); 1875, Brown *v.* Reed, 79 Pa. 370 (defendant signed an agreement to pay over the proceeds of machines sold by him as agent, the words being so printed that, on separating the paper vertically, one half bore the signature and a form of promissory note; "whether there was negligence in the maker was clearly a question of fact for the jury").

[7] 1869, Foster *v.* Mackinnon, L. R. 4 C. P. 704 ("It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album"); 1870, Caulkins *v.* Whisler, 29 Ia. 495 (the defendant wrote his

§ 2420. (*C*) **Delivery of a Document; Deed or Negotiable Instrument delivered to Bona Fide Holder contrary to Intent of Maker.** The third element of every act, its finality of utterance (*ante*, § 2404, par. 1, *c*, § 2408) — usually marked by the delivery of the instrument — is equally governed, in respect to the competition between intent and expression, by the principle of reasonable consequences (*ante*, § 2413). Whether the act has been completed, or delivered, is not to be determined by the actual intention of the actor, but by the inquiry whether his conduct produced as a reasonable consequence the appearance of finality to the other person.

Where the other person is an *immediate party to the transaction*, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases, the first party is of course not to be charged with the document.[1] But where the other party is a *subsequent transferee* in good faith, and the document is of that sort which permits third persons to acquire independent rights under it, the conduct of the first party, in so dealing with it that as a reasonable consequence it appeared to have been delivered, may charge him, even when he has not actually intended to consummate its delivery. For *commercial paper* there is no doubt, whether the document has been manually handed away subject to a condition,[2] or whether it has been retained after preparation but unlawfully abstracted from the maker's custody;[3] though in the latter case it would of course be rare that the conduct would be deemed negligent, while in the former case the manual transfer would as a rule be made at peril. For *deeds*, an *escrow to the grantee* would be treated as absolute, by the Courts accepting the modern doctrine (*ante*, § 2408), if the grantee was reasonably led to suppose that the delivery was absolute, in spite of the grantor's private intent to the contrary;[4] and even in those Courts which preserve the traditional arbitrary

name upon a blank piece of paper and gave it to S. to be sent to S's employer so as to identify the defendant's signature when orders for machines were sent to them bearing his name as sales-agent; S. filled in with the words of a note; the defendant was held not liable, because not "so far in fault in the transaction that he ought to be required to bear the loss resulting from the crime").

[1] The cases in §§ 2408–2410, *ante*, illustrate this.

[2] 1841, Marston *v.* Allen, 8 M. & W. 494 (indorsed bill placed in the custody of the indorser's agent and by him transferred in fraud, held binding); 1860, Fearing *v.* Clark, 16 Gray 74 (defendant held liable on a note wrongfully negotiated by the custodian in escrow; "it is essential that there should have been a delivery of the note by the maker, to take effect as a contract; . . . but this rule is qualified and limited as between the maker and a *bona fide* holder"); and cases cited in Ames' Cases on Bills and Notes, I, 573, note.

[3] 1878, Baxendale *v.* Bennett, 3 Q. B. 525 (the defendant held not liable on a bill of exchange, written by him, with an acceptance to his own order, but without a drawer's name, this being then stolen from his desk and negotiated after filling in the drawer's name; Bramwell, L. J.: "The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime; . . . I confess I think he has been negligent, . . . but then this negligence is not the proximate or necessary cause of the fraud; a crime was necessary for its completion"; Brett, L. J.: "It was not negligence, for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act"); 1870, Burson *v.* Huntington, 21 Mich. 415, 431 (holding invalid a note which had been signed by the maker, left on a table pending the obtaining of a surety and the delivery of the payee's deed, and thence taken forcibly by the payee and transferred to the plaintiff).

[4] 1856, L. C. J. Campbell, in Gudgen *v.* Besset, 6 E. & B. 986, 992 ("I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended and agreed by both parties that the delivery should operate only as the delivery of an escrow").

rule making absolute an escrow to the grantee (*ante*, § 2408), there is a tendency to rest the result on the ground of negligence, where a *bona fide* third party's interests are involved.[5] Where the escrow has been made to a *third person*, the principle of reasonable consequences, and the analogy of all the preceding rules, require that the grantor should be bound, to one subsequently holding it, by a delivery made without observance of the condition and contrary to his intent; and such is the rule of most Courts to-day.[6] But the metaphysical error that a specific actual intent is an indispensable feature of every act (*ante*, § 2413), and the failure to perceive (what the foregoing topics amply illustrate) that the very same conduct may constitute a valid legal act as against one person, though at the same time not as against another person, *i. e.*, that nullity is a relative term only, has induced some Courts to refuse to accept this rule, and to deny title to the subsequent holder.[7]

§ 2421. **Unilateral Acts; foregoing Principles applied to Wills and Ballots.** (1) A *will* is a unilateral act, *i. e.* there is no second party who acts upon the faith of it as a part of the transaction. Is there then the same reason to require the enforcement, for wills, of the general principle of intent (*ante*, § 2413), namely, that the terms of the act shall be such as were by the actor caused to be expressed as a reasonable consequence to the other party dealing with him? It would seem not. (*a*) So far as the *terms of the will* are concerned, it is clear that the law does not attempt to apply that principle in its stringency. The signing of a specific document as a will does not, as it does with bilateral acts (*ante*, § 2415), conclude all consideration of the signer's intent to enact those terms into the will; the question of intent is still open. Nevertheless, since the maker is deceased, and the ascertainment of his actual intent is always an elusive and jeopardous inquiry, some practical rule of thumb must if possible be adopted, taking some tangible circumstance of outward conduct as the mark of intent. Such a circumstance, for one, is the

[5] 1879, Ordinary *v.* Thatcher, 41 N. J. L. 403 (guardian's bond delivered to the county surrogate as agent for the probate judge, the obligee; a delivery in escrow, conditionally on another surety's signature, held absolute; though the old doctrine was invoked, the opinion proceeded upon the ground that "if the matter is left in doubt as to the character of the delivery of this instrument, such doubt should be resolved in favor of the innocent person to secure whom the bond was given, rather than to the advantage of these defendants, whose carelessness has at all events produced this situation").

[6] 1849, Blight *v.* Schenck, 10 Pa. St. 285, 294 (escrow delivered by the third person without performance of conditions prescribed by the grantor, held effective in favor of a *bona fide* grantee, "who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be"); 1892, Hubbard *v.* Greeley, 84 Me. 340, 24 Atl. 799 ("Escrows are deceptive instruments; they are not what they purport to be; they purport to be instruments which have been delivered, when in fact they have not been delivered; . . . they are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used; . . . [the maker] ought to be responsible for the use that may in fact be made of it").

[7] 1903, Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68 (yet modifying the doctrine to some extent on lines of negligence); 1859, Smith *v.* South Royalton Bank, 32 Vt. 341 (Bennett, J.: "The deed not having been delivered, it was a nullity and void, or, more properly speaking, never existed; . . . there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a void and a voidable instrument; . . . let the principle be as it may in regard to commercial paper, no question can be made as to a void deed"). The authorities are collected in Jones, Real Property, §§ 1315 ff.

reading over of the will to or by the testator; and there may be other circumstances which mark his knowledge of the document's contents. Given his knowledge and his ensuing act of signature, and further inquiry must cease, — subject only to those varying circumstances of fraud which may here and there arise. Such apparently is the judicial attitude to-day:

1866, *Wilde*, P. J., in *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109: "The following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that, subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as he knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole." [1]

(*b*) So far as concern the *finality* of the act — that which corresponds to delivery in deeds — the question was once an open one, as already noticed (*ante*, § 2411); whether an intent to consummate execution existed, was a question of the circumstances of each case. But the formality of attestation has indirectly put such questions at rest; for this formality, indispensable to almost all wills, effectually marks the final adoption of the document as a testamentary utterance; [2] and no one has ever suggested that such a thing as an attestation in escrow would be judicially sanctioned. Only for holographic wills, so far as these are still recognized, can the question of finality be now raised.[3]

(2) *Ballots* of election furnish the only other important type of unilateral act. Here again, theoretically, the general principle (*ante*, § 2413) does not

[1] *Accord:* 1873, Harter v. Harter, L. R. 3 P. & D. 11; 1891, Boehm's Goods, Prob. 247; 1901, Garnett-Botfield v. same, Prob. 335; 1896, Sheer v. Sheer, 159 Ill. 591, 43 N. E. 334 (the testator had personally requested the witnesses to sign the document he produced as his will; the Court listened to evidence as to its non-conformity with the instructions and as to his probably not having read the final draft; but decided that the presumption arising from his act of signing was not overthrown); 1834, Downey v. Murphy, 1 Dev. & B. 82 ("It should have been left to the jury to say whether . . . the presumption, from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed, by its contents, and by the circumstances relied on by the defendant").

Consequently, *words inserted by mistake* may be struck out, though (perhaps inconsistently) words omitted by mistake will not be inserted: 1891, Boehm's Goods, *supra* (bequest of 10,000*l.* each to two daughters F. and G.; the name of F. having been inserted by mistake instead of G., it was struck out, though the Court would not replace it by the name of G.); 1901, Garnett-Botfield v. same, *supra;* 1991, Schott's Goods, Prob. 190; 1902, Brisco v. Baillie Hamilton, Prob. 234; 1902, O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

[2] See the quotation *ante*, § 2411.

[3] But the actual *date* of a will is always open to inquiry (*ante*, § 2410).

necessarily govern, and the voter's intent — for example, in voting by mistake for an unintended person — might be open to inquiry. But the difficulties of investigation and the possibilities of cajolery and fraud are too great to permit this. Practical needs oblige us to take the written expression of the ballot as the sole and definite element of the voter's act:

1863, *Selden*, J., in *People* v. *Pease*, 27 N. Y. 72, 84: "It is proper to ask him for whom he intended to vote; not however, on the ground that his intention as an independent fact could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote; *Denio*, C. J.: "It is only the intention of the voter as expressed by the ballot — interpreted, if necessary, as all written evidence may be — by proof of the concomitant circumstances — which can be taken into consideration on the trial. If the elector who deposited the vote should swear ever so strongly that he intended it to be for a particular candidate, it could not be allowed to him, unless it appeared upon the other competent evidence that his name was actually written or printed upon it." [4]

3. Voidable Acts.

§ 2423. **Motive as making an Act Voidable, Mistake, Fraud, Duress, Infancy, and Insanity.** The distinction between acts void and voidable is well enough established, and the specific conditions of avoidability are for the most part settled in the law. It is here necessary merely to ascertain the part played by this doctrine in the so-called parol evidence rule.[1]

That an act is voidable assumes that it *is* an act, — in other words, that all the requirements of an act, as already examined, are satisfied. So far, then, as an act is held to be voidable, it must be for some other reason than one of the foregoing elements, that is, some reason which concedes that the act is jural and lawful in its subject, intelligible and definite in its terms, and final in its utterance, and that in all these respects there existed in the actor an intention to do the act, or a volition having consequences equivalent to intention. The inquiry, therefore, is, What is the distinction between these elements, the lack of which leaves the act void, and those other elements which merely make the act voidable?

The other elements are all reducible finally to a single consideration, namely, that of motive, — *i. e.* the relation between the actor's state of mind and some fact external to himself and his act.[2] This consideration of Motive falls under three general heads:

1. When the fact creating the motive is somewhere mentioned in the *terms of the act*, it is commonly spoken of as a *Condition*. Conditions may be

[4] *Accord:* 1875, Beardstown *v.* Virginia, 76 Ill. 34, 48 (that a ballot was cast by mistake, held inadmissible); 1898, Tutt *v.* Hawkins, 53 Nebr. 367, 73 N. W. 692 (that ballots were improperly printed in distinguishing between full and unexpired terms, excluded); 1896, State *v.* Steinborn, 92 Wis. 605, 66 N. W. 798 (a voter's intent to vote for a different person, excluded).

How an *ambiguous ballot* may be interpreted is a different question (*post*, § 2461). Whether the ballots, not the *election officer's certificates*, are the ultimate subject of inquiry is another question (*ante*, § 1351).

[1] Whether an act may be void or voidable as to one person, but not to another, has already been considered (*ante*, § 2413).

[2] "It is not true, then, as it is sometimes said, that the law does not concern itself with the motives for making contracts. On the contrary, the whole scope of fraud outside the contract is the creation of false motives and the removal of true ones" (Holmes, The Common Law, 326).

established by *express stipulation* in the act, or by *implication* of law. Of the latter sort may be, for example, in contracts, a warranty of a horse's pedigree; in deeds, a description of land as containing specified buildings; in wills, a recital (incorrectly) of the death of an elder son as the reason for devising to a younger one.[3]

2. When the fact creating the motive is *not* mentioned *in the terms of the act*, the recognized grounds of avoidance are of two general sorts, *Error* and *Compulsion*. (*a*) *Error* may exist either by the inducement of the second party, or without it. (1) Error *induced by the second party* may involve a fact misrepresented *fraudulently* or *innocently*. In both cases, the fact must have been material as a motive to induce the act; but the right to avoid is much narrower in scope in the latter case than in the former. In both cases, however, the avoidance is due to a fact external to the legal act itself,[4] and this marks the distinction between void and voidable acts. (2) Error *not induced by the second party* will involve either mutual or individual mistake. Where the mistake is *mutual* — for example, where the parties agree to buy and sell a specific lot of land, supposing it to contain forty acres, and in fact it contains thirty-four acres only, but the price is made proportionate to forty acres, and the terms of the deed do not mention the area —, the question is whether this mistaken mutual motive will authorize either the total avoidance of the act, or at least its judicial reformation on equitable lines. This is one of the chief sources of controversy in the so-called doctrine of mutual mistake; and it has been already noticed (*ante*, § 2417) that this is entirely distinct in its problem from the doctrines of mutual mistake as to the actual contents of a document signed. So, too, a mutual erroneous assumption as to the legal effect of words intentionally used belongs under the present head. The practical problem here is a difficult one, and the rules are by no means uniform in acceptance; but in nature it is a problem common to all legal acts, whether oral or written.[5] Where the mistake is *individual* only — for example, in the above case, if one party alone entertained the mistake as to area —, it is generally conceded that the act cannot be avoided. (*b*) *Compulsion*, or duress, so far as it means a coercion to choose between the signing of a document and the suffering of some harm, whether corporal or otherwise, signifies that the act has been consummated because of the motive of fear of

[3] Under this head falls Mr. Justice Holmes' well-known illustration (Common Law, 310) of a sale of "this barrel of mackerel," the barrel turning out to contain salt. Here the question is merely whether the mackerel contents are by implication an essential term and therefore a condition, just as when land is described by metes and bounds and by area and the two are inconsistent. In both cases the terms of the contractual act in themselves are perfectly intelligible and valid, and it is only in application to the external objects that they prove inaccurate; hence it seems not the real explanation to hold (Common Law, 311) that the act is "meaningless," and therefore void; rather, it is sensible and valid, but it rests upon the assumption of the external correctness of an essential term, and is therefore voidable.

[4] 1751, Pitcairn *v.* Ogbourne, 2 Ves. Sr. 375 ("The present evidence [of fraud] is offered not to contradict the import of the bond on the face of it; . . . it is admitted the written instrument is as it was designed to appear at the original transaction").

[5] For ordinary parol contracts, but little recognition seems to be given to such mutual mistake as a ground of avoidance (Harriman on Contracts, 2d ed., § 418). But in equity the term "mutual mistake" is so often employed without discrimination that the legitimate doctrine as to the terms of the writing (*ante*, § 2417) has often been used to extend to the present cases.

that harm. Since motive alone is thus involved, it follows that compulsion, like fraud, merely makes the act voidable. In fact, then, compulsion is always of this nature, and there is no clear distinction of principle between "equitable" and "legal" duress so-called. The only conceivable case in which duress could go to deny the very existence of the act is that of the physical seizure of the person's hand, and a forcible movement of his pen, by another person, for there the first person's volition (*ante*, § 2413) is lacking.[6]

3. A peculiar variety of the foregoing doctrine is found in the avoidability of acts of *infants* and *lunatics*. Here a rule of thumb is adopted, by which the person's age or disease serves of itself virtually to raise a fixed presumption of fraud or compulsion, and thus to create the option to avoid, regardless of any inquiry whether there was in the individual case deceit or duress. The general probability of it is regarded as sufficient. At the same time there has always been a tendency, in one or another court, to break from the fixed rule, and to treat such persons' contracts, especially after performance on one side, as voidable then only when in fact there was in the particular case fraud or duress. It may be added that the earlier doctrine that a lunatic's contracts are void, not merely voidable, is referable to the natural opportunity for doubting whether his mental condition, as respects legal acts, is that of total absence of real volition or merely of an unintelligent apprehension of the proper motives of his conduct; for, if the former be the case, it is logical to treat his act as void. — The voidness of a *married woman's* acts at common law was a pure anomaly; either it had no reason at all (as modern legislation practically pronounces), or it was based on an apprehension of imposition, in which view the rule of voidability should have been applied. The invalidity of acts *ultra vires* of a *corporation* does not involve the present principle, but rather that of prohibited acts (*ante*, § 2414); for the law's prohibitions of such acts by corporations are of the same nature as its prohibition of gaming or trading contracts by natural persons.

B. INTEGRATION OF LEGAL ACTS (VARYING THE TERMS OF A DOCUMENT).

§ 2425. **General Theory of the Rule against Varying the Terms of a Writing.** When parties negotiate at a distance, by letters and telegrams, — first an offer, then a declination, then a revision of the offer, then a halt upon an important term, afterwards an offer of its concession in return for the concession of some prior term now to be changed, and finally an acceptance of

[6] 1887, Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596 (Holmes, J.: "No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; . . . there sometimes still is shown an inclination to put all cases of duress upon this ground; but . . . it is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable; . . . the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action; but if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different"). Compare the article of Professor J. B. Ames, Specialty Contracts and Equitable Defences, 1895, Harvard Law Review, IX, 49.

this concession, and thus an end of the negotiations, — where are the terms of this contract to be found? Obviously, in this congeries of letters and telegrams, as mutually modifying and complementing each other. The whole of the contract is not in any one document. Nor, on the other hand, does the whole of any one document (probably) represent a part of the contract, because some of its terms have been impaired and replaced by other documents in the series. Nor can it be said that there is a series of legal acts, each one independent, successively modifying the preceding ones; for each letter and telegram is merely tentative and preparatory, and there exists no legal act (*ante*, §§ 2401, 2404) until the final assent is given. That assent, when it comes, adopts and vivifies the entire mass, which until then was legally inchoate only. The process is not unlike the fall of cards in the play of a trick at whist; the total effect cannot be determined till the last card has fallen, and no one card exhibits in itself the effect of the trick; yet, when all are played, the second card may prove to be the decisive factor and may remain unimpaired by any later play.

On the other hand, if instead of leaving the net effect of the negotiations to be gleaned from the mass of writings, a single document is finally drawn up to replace them and to embody their net effect, and is signed or otherwise adopted by the parties, this document will now alone represent the terms of the act. Instead of leaving the wheat mingled with the chaff, the wheat has been definitely selected and set apart in a single mass. The wheat existed there, no less before than now, but it has now been placed in a single receptacle by itself.

This process of embodying the terms of a legal act in a single memorial may be termed the Integration of the act, *i. e.* its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, have no longer any legal effect; they are replaced by a single embodiment of the act. In other words: *When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*

This principle, perfectly well settled in our law, has several aspects which it is necessary here to notice:

(1) In the first place, it is *not a rule of evidence*, because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact (*ante*, § 2). It is a rule of substantive law, because it deals with the question where and in what sources and materials are to be found the terms of a legal act (*ante*, § 2401). This understanding of the rule is plain enough in the modern judicial utterances, in spite of the frequent loose employment of the word "evidence" — a faulty habit, but easily enough succumbed to when applying the rule at trials:

1813, *Gibbs*, J., in *Pickering* v. *Dowson*, 4 Taunt. 779, 786: "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and cor-

rects the representations; and whatever terms are not contained in the [written] contract do not bind the seller, and must be struck out of the case."

1824, *Abbott*, C. J., in *Kain* v. *Old*, 2 B. & C. 627, 634: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract (though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination). But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract."

1846, *Parke*, B., in *Knight* v. *Barber*, 16 M. & W. 66 (the plaintiff and the defendant had made an oral agreement for the sale of shares; on the same afternoon the defendant signed a memorandum, which was then handed to the plaintiff, reciting the sale, the price, etc.; it was held that this memorandum should have borne a stamp): "With respect to the first point made by Mr. Baines [for the plaintiff], that there was a distinct parol contract between these parties before the memorandum was signed, if that memorandum was afterwards made and signed by the defendant, and was intended to contain the terms of the contract and to be acted upon by the plaintiff, it became, when it was so acted upon, the real contract between the parties. The parol agreement goes for nothing, if it was intended that it should be reduced into writing and this is afterwards done."

1875, *Blackburn*, J., in *Angell* v. *Duke*, 32 Law T. Rep. N. S. 320: "It is a most important rule that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties. Where there is a collateral contract, the written contract does not contain the whole of the terms."

1880, *Van Fleet*, C., in *Van Syckel* v. *Dalrymple*, 32 N. J. Eq. 233: "What was said during the negotiation of the contract or at the time of its execution must be excluded, on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned."[1]

(2) In the next place, this rule has no necessary relation to any rule of law *requiring* acts to be done with a *particular formality*, such as *writing*. On the one hand, a contract may be entirely in written form, prescribed by law, and yet the terms may be scattered through many writings and not integrated in a single document; for example, a will of personalty under the statute of Charles II (against frauds and perjuries) had to be in writing, and yet the ecclesiastical Courts constantly dealt with valid wills which were made up from numerous separate writings of all sorts.[2] On the other hand, even where no form of writing is prescribed, the rule of integration applies if the parties have in fact embodied their act in a single memorial.[3]

[1] In the following passages the theory is concisely stated: 1781, L. C. Thurlow, in Irnham *v.* Child, 1 Bro. Ch. C. 92 ("The rule is perfectly clear that where there is a deed in writing, it will admit of no contract that is not part of the deed"); 1859, Pollock, C. B., in Harris *v.* Pickett, 4 H. & N. 1, 7 ("The rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement"); 1859, Martin, B., in Langton *v.* Higgins, 4 H. & N. 401, 408 ("Where two parties enter into a contract and put it into [a single] writing, that writing determines the terms of the bargain"); 1861, Hoar, J., in Kelly *v.* Cunningham, 1 All. 473 ("The writing is the contract of the parties, in the view of the law, and supersedes all the previous parol agreements"); 1878, Depue, J., in Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 581 ("The written contract shall be regarded as the sole repository of the intentions of the parties").

[2] See the cases cited *post*, § 2454.

[3] 1845, Pollock, C. B., in Eden *v.* Blake, 13 M. & W. 614, 618 ("Whatever be the value of the goods sold, whether it be such as calls for a memorandum in writing, under the statute of frauds, or not, if there has been a memorandum in writing, it cannot be altered by extrinsic evidence").

(3) As a consequence of the same principle, it is to be noted that, in theory, the rule of Integration would apply equally to an act embodied in *oral form*, *i. e.* to a single oral pronouncement.[4] Such a transaction is entirely unlikely in fact; it can be imagined, perhaps, in a contract by heliograph or by unwritten electric telegraph. But it serves to illustrate and emphasize the principle that the essence of the present rule is the embodiment of the act in a single utterance, and that the rule applies to acts as acts, independently of whether the form be written or oral.

(4) Finally, the notion of Integration is not that any *additional terms* are involved in that process, but merely that the terms are contained in a different material or embodiment; and therefore the act is complete and binding when finally assented to before integration, even if it is an agreed condition that the act shall be so reduced or integrated.[5]

§ 2426. **History of the Rule.** Looking back to find the origin and development of this rule, the precise inquiry, then, is this: The modern rule being that when the parties have embodied a transaction in a single document, the writing is indisputable as to the terms of the transaction, how far back in our history does this rule go, and what were the circumstances of its origin and development?

It might have been supposed that this great principle of our law had come down to us as a continuous tradition from the earliest days. The indisputability of the terms of a writing seems to harmonize with that rigid formalism of primitive days which is elsewhere in the law constantly observable (*ante*, § 2405). Resting though it does now on a rational foundation of experience and policy, did it not nevertheless exist, even at the very beginning, as a natural part of the earlier system? Curiously enough, its history is quite the contrary. Our primitive system knew it not. Only towards the end of the middle ages does it come into being; and only in fairly modern times does it gain complete recognition. Its history falls, by a rough division, into three periods: I, from primitive times till the vogue of the seal, in the 1200s; II, then, on English soil, till the statute of frauds and perjuries, in 1678; III, and thence, its modern recognition.

I.[1] In the primitive Germanic notions, at the time of the barbarian inva-

[4] 1854, Mr. (later Justice) Blackburn, arguing, in Brown *v.* Byrne, 3 E. & B. 703 ("It may be convenient first to answer a question, put from the Bench, as to whether there is a distinction between written and verbal contracts. There *is* a difference; but in this respect there is none. If the parties met for the first and last time, and made a contract entirely by [oral] words, these words would, if proved, have precisely the same construction as if they had been written down"); 1885, Mulkey, J., in Gilbert *v.* McGinnis, 114 Ill. 28, 28 N. E. 382 ("The rule here stated [as to interpolating a usage] is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case").

[5] 1894, Sanders *v.* Pottlitzer B. F. Co., 144 N. Y. 209, 39 N. E. 75 (defendant and plaintiff had settled by letters and telegrams upon the terms of their contract, and had mutually assented, the intention being also to embody the terms thereupon in a single document; the defendant then refused to execute the document unless a new condition was inserted; held, that the understanding that the contract should be embodied in a single document did not involve the addition of any substantive terms to the obligation, and that the contract could therefore be enforced in spite of its not having been so embodied).

[1] The materials for this first part of the story are to be gleaned from the following works: 1877–8, Ficker, Beiträge zur Urkundenlehre; 1885, Heusler, Institutionen des deutschen Pri-

sions and under the Merovingian and Carlovingian monarchies, there was certainly no notion of the indisputability of the terms of a document. This is explained, and was indeed predetermined, by the character of the civilization of those peoples. When the Germanic tribes spread west and south, and absorbed the Roman territories in Gaul, Spain, and Northern Italy, they brought with them two marked traits, — an ignorance of letters, and a legal system of formal oral transactions. They found writing in use among the Romanized peoples, and (in Italy at least) an advanced habit of transaction by notarial documents; and this they in part fell in with. But it remained alien to their own ideas; and after the dissolution of the Carlovingian empire and the subsidence of Romanesque influence (say, by the 900s), the alien element that had found entrance was excised, and the development of their native system proceeded on its own main lines.[2] The document, then, even in its most definite type (*carta*), is in the Germanic system merely one of the symbols that entered into the formalism of the transaction, and, like the wand, the glove, and the knife, has an efficacy independent of its written tenor, — which indeed could mean nothing to the parties who employed it:

"In the legal affairs of a people who, from the lowest churl to the great Emperor Charles, were unskilled alike in reading and in writing, the written document could have but a precarious position, and its acceptance into legal practice was opposed by all sorts of obstacles, — in particular, by an almost ineradicable distrust of everything written, which they feared with the fear of a man who stands weaponless and helpless. For us moderns a written document is quite another thing than for the Germanic tribes, confronted with it yet not comprehending it. Nowadays, our documents of debt, or the like, we write ourselves, or at least sign them after perusal; we are masters of them, and we know that the thing we have written or signed is precisely what it is, and no fearsome mysterious thing. Quite otherwise with the Germanic peoples, confronted with the alien practice of legal writings, upon their invasions of Roman regions. The grantor of land, the borrower of money, could neither read nor write the document which might be executed in his name; he could but mark his cross at the bottom, and hope that all was right. Thus we hear, even in the early 1200s, a certain bailiff of the abbey of Pruem, in a litigation with the abbey before Henry IV, scornfully protesting, when the abbey produces a royal charter against him, that a partisan scribe could indite whatever he might please to

vatrechts; 1887, Posse, Die Lehre von Privaturkunden; 1889, Bresslau, Handbuch der Urkundenlehre für Deutschland und Italien, I, 476–555; 1887–92, Brunner, Deutsche Rechtsgeschichte (based upon earlier separate essays by the same author, especially his Rechtsgeschichte der römischen und germanischen Urkunden); 1903, Brunner, Grundzüge der deutschen Rechtsgeschichte (confirming his earlier results); 1895, A. S. Schultze, Zur Lehre vom Urkundenbeweise, Zeitschrift für das privat- und oeffentliches Recht, XXII, 70; 1898, Déclareuil, Les preuves judiciaires dans le droit franc du V^e^ au VII^e^ siècle, Nouv. revue hist. du droit fr. et etrang., XXI, 220, 747, 757 (independently reaching results in harmony with the German scholars); 1902, Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 361, 698. All these scholars are in substantial agreement upon the historical facts to be referred to; Ficker and Bresslau having contributed most to establish the correct story of the great fact, the relation of the seal and the attesting witnesses to the effect of the document. Pertile (Storia del diritto italiano, ed. 1900, VI, pt. 1, pp. 417–419) is in accord as to most points, yet does not notice the importance of the seal; but in Italy the early vogue of notaries gave a different turn to the story of its local law. Stouff (Etude sur la formation des contrats par l'écriture dans le droit des formules du V^e^ au XII^e^ siècle; Nouvelle revue hist. de droit, XI, 249; 1887) ignores entirely the historical place of the seal; but Bresslau and Posse had not at that date published their researches copiously confirming Ficker's.

[2] Ficker, I, 83–88; Brunner, R. G., I, 399, II, 420; id., Grundz., 41, 119; Pollock & Maitland, II, 88–190.

invent (*'irridens testamenta, dicens quod penna cuiuslibet quelibet notare posset, non ideo suum jus amittere deberet'*). So too, in even a later age, there was an almost proverbial verse [8] which ran, 'On parchment, scribes may place with ease Exactly what their own minds please.' It is, in short, easy to imagine the mistrust which must in those days have attached itself to the written document. . . . The truth is that the legal value of the *carta* consisted in this, that by means of it the legal transaction was completed. . . . The grantor of a piece of land could transfer it in the ancient national form of *sale* and *vestitura*, or he could now accomplish the transfer by means of the document (*per cartam venditionis*), and the *traditio per cartam* effected the transfer of ownership, just as before this the *sale* had done. . . . Thus the *traditio cartæ* was itself a formal act. The act of delivery of the document was performed by the maker grasping the still blank parchment, lifting it from the earth (in land transfers at least, by Frankish usage), calling upon the witnesses to grasp it with him, handing it to the scribe to fill out the writing, and, after signatures affixed, delivering it to the grantee." [4]

In this stage, then, the *carta* merely plays a convenient part, first, by enabling the formal delivery of the land to be made symbolically away from the premises, and, next, by preserving against future forgetfulness the names of the witnesses.[5] The important and unquestionable fact is that the tenor of the writing *does not legally and bindingly establish anything.*[6] If the truth of its statement is disputed — the amount of money loaned, the area of land conveyed, the conditions of tenure annexed —, the terms of the transaction may and must be proved by calling the witnesses to it, regardless of any contradiction of the writing.[7] The attendant witnesses continued to be, as they had been, the main reliance for the proof of a disputed transaction. The procedure for disputing by the witnesses' oaths the correctness of the document was elaborate and well-settled, and its ultimate settlement might turn upon a wager of battle. How long was the persistence of this subsidiary status of the document, and how continuous the connection between Germanic usage and early Anglo-Norman legal ideas, may be seen from the following record of English litigation two hundred years after the Conquest:

1292, *Anon.*, Year Book 20 Edw. I, 258 (Horwood's ed.): "A brought the mordancester against B, on the death of his father, for tenements in C; and he prayed the assise. — B. 'There ought not to be an assise: for see here your father's charter, by which he enfeoffed us and put us in good seisin. Judgment if there ought to be an assise.' — A. 'I admit perfectly that the charter is the deed of my father; but I tell you that he gave you the tenements by that charter upon these terms, viz., that you should hold it for one month, and that at the end of the month you should espouse his daughter Emma; and that if you did not, the land should revert to him and his heirs. Now, he died within the month, and at the end of the month you would not marry his daughter; therefore we pray judgment if there ought not to be an assise.' — B. 'You have admitted the charter, which is simple and unconditional. Judgment if there ought to be an assise.' — A. 'Whatever the words of the charter may be, such was the covenant between my father

[8] Konrad von Würzburg, Schwanritter, l. 571.

[4] Heusler, I, 86.

[5] Ficker, I, 85; Bresslau, I, 729, 730.

[6] Ficker, 82 ff.; Posse, 63; Brunner, R. G., I, 393, II, 420; id., Grundz., 76, 119, 159; Heusler, I, 91; Déclareuil, 757; Bresslau, 483, 500, 799; Schultze, 101; Schroeder, 361, 698; Pertile, I, pt. 1, p. 417, pt. 2, p. 192; Glasson, Hist. du droit et des inst. de la France, III, 503.

[7] "That the probative value of a document lay only in its witnesses may be gathered from the fact that the word *urkunde* meant nothing else than 'witness'": Schroeder, 361; so Brunner, R. G. II, 391.

and his friends and your friends; ready, etc.' — B. 'The reverse. — Therefore to the country.' — The Jurors said that such was the contract even as A said; and that his father died within the month. — They were asked if he died seised in his demesne as of fee. — The Jurors. 'We pray your assistance.' — The Justice. 'And inasmuch as it is found that the estate of B was conditional, which condition was not specifically performed, by reason of the default of B, and therefore his seisin was null.' "[8]

II. The *rise of the seal* brings a new era for written documents, not merely by furnishing them with a means of authenticating genuineness (*ante*, § 2161), but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses. The vogue of the seal and of the transaction-witness wax and wane, the one relatively to the other.[9] This legal value of the seal was the result of a practice working from above downwards, from the King to the people at large. It is involved, in the beginning, with the Germanic principle that the King's word is undisputable. Who gives him the lie, forfeits life. The King's seal to a document makes the truth of the document incontestable. This leads, along another line, to the modern doctrine of the verity of judicial records, — to be noticed later. Here, for private men's documents, its significance is that the indisputability of a document sealed by the King marked it with an extraordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. First, a few counts and bishops acquire seals; and then their courtesies are sought in lending the impress and guarantee of their seal to some document of an inferior person, as serving him in future instead of witnesses.[10] Finally, the ordinary freeman comes usually to have a seal; and his seal too makes a document indisputable — at least, by himself. This extension of the seal begins in the 1000s, and is completed by the 1200s.[11] Thus the old regime of proof by transaction-witnesses disappears by degrees; by the 1300s they are almost superfluous.[12] This means that when a transaction has been made by writing, the parties rely for their future proof no longer on witnesses called in at the time of the transaction, but on the opponent's seal found affixed to the document, which thereby makes its terms indisputable by him as representing the actual terms of the transaction between the parties.[13]

[8] Another case of a similar sort is cited by Professor Thayer (Preliminary Treatise on Evidence, 105) from Forsyth, who cites from Jocelyn de Brakelonde. About the 1300s, the following passage also is found: Mirror of Justices, *ubi infra*, pp. 75, 115, 152, 163 ("a charter is vicious if it testifies that a gift has been made, whereas as yet there has been no delivery of seisin").

[9] Ficker, I, 94, 95, 106, 107, 115; Bresslau, 510–549; Brunner, R. G., I, 393, II, 420, 523.

[10] Ficker, 94; Posse, 130; *ante*, § 2161.

[11] Ficker, 91, 97; Posse, 129; Bresslau, 534 ("by the second half of the 1200s even ordinary burgers seal their documents"); Holmes, The Common Law, 272; Pollock and Maitland, II, 221 ("at the date of the Conquest the Norman duke has a seal, and his cousin the late King of England had a seal; . . . before the end of the thirteenth century the free and lawful man usually had a seal").

[12] Ficker, 95–97; Bresslau, 545. The course of thought is seen in the attribution of the qualities of a witness to the seal, as in a much quoted passage of the Schwabenspiegel, c. 34, § 2: "Hilfet ein toter geziuge [*i. e.* die briefe] als wol dir als ein lebendiger" (Schultze, 119).

[13] Ficker, 82–91; Bresslau, 546 ("there is therefore no counter-proof allowable against the statements of fact [*den sachlichen Bericht*] in a sealed document"); id. 539 ("as a first principle of the law for documentary proof in Germany after the 1200s, it may be considered . . . [exceptions excepted] that the sealing was an indispensable requirement for the legal evidential force of a document, no matter who was its

The tool for shaping the new doctrine had now been supplied; and it remained to develop and extend the doctrine. Here it must be remembered that in Anglo-Norman times people are still, on the whole, unfamiliar with writing, and that the chief varieties of transaction — namely, those affecting land — are still practised with oral forms;[14] the essential, working conception is the livery of seisin, not the charter. Whatever virtue there is in the writing is testimonial only. It furnishes one sort of proof; but it is not a necessary kind of proof, and the main thing is something done apart from the writing. "This indenture" merely "witnesseth"; and the now time-worn phrase was once the actual conception.[15]

So long as this notion of the operative element of transactions persisted, it must oppose a constant obstacle to the progress of the idea of an indisputable sealed document. Since the writing is not the vital thing, why yield to its terms? And so for two centuries or more the extension and adaptation of the new idea is slow. For mercantile contracts, the advance seems to have been settled by the 1300s.[16] But for land-transactions there was more tardy progress. By that time, charters (*i. e.* deeds) were becoming necessary accompaniments;[17] but they were not yet indisputable in every respect. For example, Littleton, about 1466, tells us[18] that where the deed is in terms absolute but the livery of seisin was made with an oral condition, still the condition is enforceable, because "nothing of the tenements passeth by the deed, for that the condition is not comprised"; and again, that though, for a condition attached to the transfer of a freehold, some writing must be shown, yet "a man may be aided upon such a condition by the verdict of twelve men taken at large,"[19] — just as the twelve men, in the case (above cited) of two centuries before, aided the plaintiff by a verdict directly contradicting the deed.[20]

author"); Schroeder, 701; Schultze, 103, 118. This was long ago noted by Mr. Justice Holmes for English law: 1881, The Common Law, 272. Space does not suffice to note the very interesting stages of progress, pointed out by Ficker and Bresslau, by which this result was reached. The indenture or chirograph of the Anglo-Saxons was one of the intermediate expedients for securing genuineness and conclusiveness. But the seal proved its superiority for the latter purpose, and finally prevailed.

[14] Pollock & Maitland, II, 83, 93, 202, 217 (quoted *ante*, § 2405).

[15] The word *urkunde* signified, by etymology, "witness": note 7, *supra*. This was the usual conception still in the 1300s and 1400s; see the citation *supra*, n. 12, *infra*, n. 19; and the following: Circa 1300, Mirror of Justices, b. II, c. 27, Seld. Soc. Pub. VII, 75 ("escritz tesmonials de contracts," *i. e.* deeds); b. III, c. 23, ib. 107, 152 ("by way of aid for men's memory are writings, charters, and muniments very necessary for to testify the conditions and the points of contracts"); 1466 (?), Littleton's Tenures, sect. 365, 371 ("unescript south seale provent mesme la condition"); 1881, Holmes, The Common Law, 270 ("a writing was a more general way of establishing a debt in Glanvill's time than witnesses; . . . [it was] only another, although more conclusive, mode of proof"); and it persists as a phrase to the time of Sheppard's Touchstone, in the 1600s: c. IV. p. 50 ("a deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed").

[16] 1368, Y. B. 41 Edw. III, 10, 6 (quoted *infra*, note 30).

[17] Pollock & Maitland, II, 82, 91.

[18] Tenures, sect. 359.

[19] Ibid., sect. 366. Compare the following, in 1523: Y. B. 14 H. VIII, 17, 6 and 7 (Brudnel, J.: "Such things as pass by parol, are as well by parol as written on condition; for every grant of a chattel is good on condition without writing; for a deed is nothing but a proof and testimonial of the agreement of the party, — as a deed of feoffment is nothing but a proof of the livery, for the land passes by the livery; but when the deed and the livery are joined together, that is a proof of the livery").

[20] In a later day, this tradition is thus expounded: *Ante* 1726, Gilbert, Evidence, 84

On the other hand, Littleton in the very same treatise[21] is mentioning as "common learning" that a plea of condition, except in some special cases, shall not defeat a freehold "unless he showeth the proof in writing." The 1400s were evidently a transition period. By the time of Coke's commentary upon Littleton and of Sheppard's Touchstone — by the 1600s, on the whole — the modern rule of indisputability is established for all transactions affecting realty.[22]

No doubt by that time the surrounding circumstances had facilitated, and judicial reflection and conscious policy had stimulated, the natural growth of the newer rule. In the first place, the community had become *more generally lettered*, and this in its turn had resulted from the spread of the printing process in the late 1400s. Reading and writing were no longer the mysterious arts of a few. It was natural to hold that a man was bound by his written version of the transaction, when he might easily guard himself against the writing's being deficient in some of the agreed terms;[23] and it was the more natural to rely wholly upon the writing since the dying out of old methods (due in part to jury-trial) had made transaction-witnesses not commonly available. In the second place, *mercantile custom* had already pointed the way in advance. The Lombards in London (and doubtless also — somewhat later — the Flemings and the Hansas) were employing the commercial forms which had developed with the revival of commerce in the preceding three centuries. These mercantile documents of debt had already invented the device of indisputability, — to some extent, no doubt, preserving in tradition the expedients of the advanced Roman law. Such models can be seen to have had some influence upon English ideas.[24] In the third place, the rigid

("Things that lie in livery may be pleaded without deed; . . . so a man may plead a demise, without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good whether there were any indenture or not. . . . [Livery of seisin] is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony, . . . therefore if the defendant *pleads* the livery and seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without showing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only. But the jury are not estopped on the *general issue* from finding such a conditional feoffment, for the jury are men of the neighborhood that are supposed to be present at the solemnity . . . and by consequence may exhibit the condition on the feoffment. But since the use of the solemnities before men of the country hath ceased . . . therefore the statute of frauds and perjuries hath enacted that no . . . [estates] shall be assigned, granted, or surrendered unless it be by deed or note in writing").

[21] Sect. 365.

[22] Yet, even in Sheppard's day, relics remain, as where he says (c. IX) that if the words of livery are to one effect and the deed to another effect the deed is void; though if the livery is *secundum formam chartæ*, any additional words of oral livery are void.

[23] *E. g.*, Babington, J., in 1430, Y. B. 8 H. VI, 26, 15, repudiating proof of an oral condition to qualify a deed: "And it will be adjudged my own folly that I did not wish to have it written in." The contrast between this effect of the spread of letters, and the effect on the doctrine of intention or mistake (*ante*, § 2405), is worth noticing; in the latter aspect, it bound a man to what was *in* the deed; in the present aspect, it kept out what was *not* in the deed.

[24] As early as the 1200s, this leaven is seen working; "Note that by the law merchant a man cannot wage his law against a tally": 1222, Y. B. 20 Edw. I, p. 68; and the same rule for a sealed confession of debt is put forward as late as 1460 as a "custom of London": Y. B. 39 H. VI, 34, 46, cited in Thayer, Preliminary Treatise, 394. Further illustrations are furnished in Pollock & Maitland, II, 212, 222. For this doctrine of the foreigners' commercial law, see Baldus, Consilia I, no. 48 ("Stabiles et firmæ debent esse scripturæ mercatorum, — juxta illud vulgare dictum 'quod scripsi scripsi,' quia scriptura mercatorum et campsorum habetur pro sententia et sua fide transit in rem judicatam"), quoted in Goldschmidt, Handb. des Handelsrechts, (1891) 3d ed., I, 1, p. 389, note; see also ib. 306; Franken, Das Französische Pfand-

control of the jury influenced the judges, indirectly, by leading them to keep from the jury all alleged oral transactions which might be misused by them to overturn the words of the writing. The safety of written proof was supposed to be at stake. If the parties were allowed to put in averments extraneous to the writing, it must go to the jury, and there was no telling what the jury might do; but if the judges took exclusive charge, they could better control the situation. This reasoning is not much reported till later times,[25] but it was plainly there.[26] Finally, a general policy of regard for the *trustworthiness of writing*, as against the shiftiness of mere testimonial recollection, was beginning to be consciously avowed, irrespective of any discrimination against the jury. This is a distinctly modern attitude, but it emerges as one of the considerations that finally tended to fix the rule. "Thus you would avoid a matter of record by simple surmise," says Paston, J., in 1430.[27] Coke, of course, furnishes such reflections in plenty, by the time of the 1600s; "it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give but it should be controlled by collateral averments."[28] Thus a judicial legislative policy comes to reënforce the other influences.

But, meantime, what of the theory of the rule? At the outset, in the Anglo-Norman times, as already noticed, it arises merely as a testimonial rule; the writing replaces the transaction-witnesses as a mode of proof. But in its modern shape it is a constitutive rule (*ante*, § 2425). The writing itself is operative; the writing *is* the act, not merely one of the possible ways of proving the act. By what sequence of ideas was this transition of theory effected?

(1) At first, the new principle appears merely as a *waiver of ordinary proof*, permitting the substitution of another. The man who has sealed a document is not allowed to bring his transaction-witnesses or his compurgators to prove what the transaction really was; he has in advance waived this right. Such was the notion on the Continent;[29] and such was the first con-

recht (1879), 258; Pertile, VI, pt. 1, 421. The part played by foreign mercantile custom in developing other aspects of our law is well illustrated in Mr. Hazeltine's essay on The Gage of Land in Mediæval England (1904, Harvard Law Review, XVIII, 36, 43).

[25] The examples cited *supra*, note 8, show how the earlier juries might make short work of deeds. A passage in Thayer, Prelim. Treat. 105, further illustrates this. It must be noted, too, as indicated in the quotation from Gilbert, *supra*, note 20, that "the use of the solemnities of livery before men of the country" was dying out, and that so long as the vital thing had been this livery, the matter might well be left to them; but there was no reason for considering a transaction of writing as within their province.

[26] 1610, Altham's Case, 8 Co. Rep. 155 ("It was resolved that the said foreign or collateral averment out of the said deed [setting up a prior inconsistent agreement] was not of any force or effect in the law. For every deed consists upon two parts, *scil.*, matter of fact, and upon the construction in law; matter of fact is to be averred by the party and triable by the jurors; the other, being matter in law, is to be discussed by the judges of the law"); 1659, Lawrence *v.* Dodwell, 1 Lutw. 734 (Powell, J.: "The averment should be gathered from the words of the will; it is not safe to admit a jury to try the intent of a testator"); 1708, Strode *v.* Russell, 2 Vern. 621 (in chancery; "We will consider how far it shall be allowed and how far not, after it is read; and this is not like the case of evidence to a jury, who are easily biased by it, which this Court is not").

[27] Y. B. 8 H. VI, 26, 15.

[28] 1591, Lord Cheyney's Case, 5 Co. Rep. 68*a*; 1605, Countess of Rutland's Case, ib. 26 (quoted *infra*, note 38).

[29] Ficker, I, 93.

ception in England. This waiver is commonly spoken of as an "estoppel." *i. e.* a conception which concedes that the truth might be as alleged, and that ordinarily the party would have a right to prove it in the usual way, but that here he is "stopped" from that proof, by his own sealed act. "It does not lie in your mouth to say the obligation is not good."[30] The merely subjective effect of the seal in this respect is well illustrated by a controversy surviving in Littleton's time;[31] some lawyers thought, where a feoffment had been made, and a deed-poll given (*i. e.* in the single name of the feoffor, not sealed by both and indentured), naming a condition to the feoffment, that the feoffor could not take advantage of the condition; that is, because it could be used only by way of estoppel, and the feoffee was not estopped by a deed which he had not sealed; the effect being to refuse efficacy to the condition though named in the deed.[32]

(2) Alongside of this theory, but playing gradually a more important part, was the theory that a transaction of one "nature" cannot be overturned by *anything of an inferior "nature."* This is the real lever which helps on the progress to the modern idea. But it appears early, and apparently as a borrowing from the Roman law.[33] It has broad aspects, and is responsible for some other rules, now mostly abandoned, — such as the rule that the oral payment of a bond is no discharge.[34] But in its present relations it serves to introduce and emphasize the operative notion of a writing. Once concede the possibility that a sealed document may be indisputable, and then this other idea will expand and reënforce the former in every direction. In particular, the sealed instrument will "discharge" and "determine" any prior transactions, whether really separate and distinct in time, or practically contemporaneous. In other words, the sealed instrument will not merely *prove* the transaction, but rather, by replacement, will now *be* the transaction. This theory was struggling for ascendency in the 1400s. For example, in 1422, where the plaintiff sues for money given on account, and the defendant asks for profert of the deed of acknowledgment given by him, and argues that the deed superseded everything else, just as a bond for 20*l.* would have discharged a prior simple contract for the same, the plaintiff, replying, concedes

[30] 1368, Y. B. 41 Edw. III, 10, 6. So also in 1460: Y. B. 39 H. VI, 34, 46: "If I bring a writ of debt, and count that the defendant bought of me a horse for 10*l.*, and he wishes to wage his law, I may estop him by the specialty proving the said contract; the same law of a receipt,— if he wishes to plead, 'never received,' and tenders his law, he will be estopped of his law by the specialty proving the receipt," but some were of contrary opinion. In the neat phrase of Mr. Justice Holmes (The Common Law, 262), "if a man *said* he was bound, he *was* bound."

[31] Tenures, sect. 375.

[32] This notion of estoppel is illustrated in Pollock & Maitland, II, 205–222, *passim*. It is still seen in Sheppard's day: Touchstone, c. 14 (in deeds, "an estoppel doth bar and conclude either party to say or except anything against anything contained in it").

[33] It has been noted, in Pollock & Maitland, II, 219, as occuring in Bracton and elsewhere, *e. g.* Y. B. 33–5 Edw. I, pp. 331, 547 (1306). In the Digest, it appears in *de solutionibus*, 46, 3, 80, and also in *de diversis regulis*, 50, 17, 35 (Ulpian: "Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est; ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu tollitur").

[34] 1542, Waberley *v.* Cockerel, Dyer 51 (payment of a bond is no discharge; "although the truth be that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact").

the case put, "for the contract and the bond are two different contracts, and by the greater I am discharged from the less; but in the case of this receipt of money, and the deed which proves its receipt, there is but one contract," *i. e.* a contract by delivery of the money, the deed being merely evidence.[35] Again, in 1460, "if I make a contract [of loan] by deed indented, I shall not be compelled to count on the indenture; for the contract is not 'determined' by the indenture, but continues [as independent], and a man may elect how he will bring his action," [36] — although if he had chosen to bring it on the deed, its terms could not have been disputed.[37] Here appears plainly enough the idea of the indisputability of the document coexisting with the idea that the transaction is something independent of the document and is merely proved by it; and yet the notion that the document "determines" and merges the whole transaction is winning its way. For two centuries to come this mode of speech — that the writing "dissolves," "discharges," "determines," or "destroys" all other prior or coexisting transactions — is predominant in expounding the theory of the rule.[38] The way is thus prepared for the modern idea of operativeness, forming the third stage of the rule's history.

III. However, one step still remains to be taken. As yet — say, in the 1500s — this theory is applicable to "matter of a higher nature," *i. e.*, specialties, sealed documents, and *not to writings as such.* How and when did this last extension of ideas occur?

The Statute of Frauds and Perjuries, in 1678, seems to note the modern epoch's full beginning. The result was predetermined by the influences already mentioned; this statute appears, of course, as the mark rather than the cause of the final development. But still its literal scope was limited, as to the kinds of transactions and documents; and it had a really causal influence of its own, as a plain example leading the Courts to complete the process by expanding and familiarizing the general idea for all writings whatever.

That example was furnished by the first and third sections, in which the estate was spoken of as "*put in writing*" and as "assigned, granted, or surrendered, . . . by *deed or note in writing.*" Here were two notable features,

[35] Y. B. I H. VI, 7, 31; cited in Thayer, Prelim. Treat. 394.

[36] Y. B. 39 H. VI, 34, 46; cited in Thayer, *ubi supra.*

[37] Again: 1439, Y. B. 18 H. VI, 17, 8 (where a lease is by deed, and action brought on it, "the foundation of my action, which is a specialty, is so high in its nature that it cannot be destroyed by anything except a thiog of as high a nature as it is, such as a release").

[38] 1605, Countess of Rutland's Case, 5 Co. Rep. 26 ("every contract or agreement ought to be dissolved by matter of as high a nature as the first deed; . . . also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory"); *Circa* 1610; Burglacy *v.* Ellington, Brownl. 191 (title to land by deed of bargain and sale, alleged to be void for usury; plea that the buyer orally agreed that the seller could keep the rents; the counsel for the deed's validity "put that maxim that everything must be dissolved by that by which it is bound, and his whole argument depended upon that"; notice that he was evidently relying on the phrase of Ulpian, quoted *supra,* note 33); 1696, L. C. J. Holt, in Falkland *v.* Bertie, 2 Vern. 334, 339 ("the last will . . . must be admitted sufficient to repeal all former wills, and much more to control all parol declarations"); *ante* 1726, Gilbert, Evidence, 279 (a release under seal is a good discharge of an account, for "any deceit or mistake in former payments is but matter in *pais,* and therefore not of as high a nature as the deed; and in giving evidence, everything must be contradicted by a matter of the same notoriety as that whereby it is proved").

practically novel in this relation. The legal act was to be constituted, not merely proved, by the document, and the document might be an ordinary writing, not necessarily a "deed," *i. e.*, under seal. It is true that these features were not absolutely without precedent. There had been already two other statutes, — one in 1535, requiring a transfer by bargain and sale to be "made by writing,"[39] and the other in 1540, permitting freedom of devise of lands by "last will and testament in writing."[40] But the former statute had required the writing to be a deed, "indented and sealed," so that in this respect it involved no novelty; and the latter statute was as yet so little conceived from the modern point of view that in its construction the Courts had preserved rather the old testimonial idea, and had virtually treated the testator's oral utterance as merely evidenced by the writing.[41] The contrast between this attitude of the 1500s and the attitude of a century later is seen in the corresponding provision (sect. 5) of the statute of frauds, which requires devises of land to "be in writing and signed, . . . or else they shall be utterly void and of none effect." The lingering of the old, also, and its meeting with the new, are to be seen in the same statute's provisions about trust estates; for the creation of these (by sect. 7) "shall be manifested and *proved* by some writing signed, . . . or else they shall be utterly void and of none effect," while their assignments (by sect. 9) "shall likewise *be* in writing signed, . . . or else they shall likewise be utterly void and of none effect." The contrast between the two ideas is further apparent in the phrases of sect. 4 ("unless the agreement, . . . or some note or memorandum thereof, shall be in writing"), which distinctly signified that the contract and the writing might be separate things.

The significance of the statute for the present purpose, then, was in the main, first, that it abolished the practice of creating estates of freehold by oral livery of seisin only, and, secondly, that it permitted the required document (for leases) to be a writing without seal.[42] By the former, it emphasized the constitutive (as opposed to the testimonial) nature of the document; by the latter, it extended the conception of constitutive documents beyond sealed ones to include all writings. The scope of these provisions was limited; but their moral and logical influence was wide and immediate. The statute now began to be appealed to, in all questions of "parol evidence," as setting an example and typifying a general principle.[43]

The important consequence was that for that great mass of transactions

[39] St. 27 H. VIII, c. 16.

[40] St. 32 H. VIII, c. 1, § 1.

[41] Sheppard's Touchstone, 406 ("If the notary do only take certain rude notes or directions from the sick man, which he doth agree unto, and they be afterwards written fair in his life-time, and not showed to him again, or not written fair until after his death, these are good testaments of lands").

[42] These effects have been clearly analyzed in Mayberry *v.* Johnson, 3 Green N. J. Eq. 116.

[43] *E. g.*: 1696, Falkland *v.* Bertie, 2 Vern. 333 (proof of the testator's parol intention contrary to the legal effect of his will was excluded; L. C. J. Holt said that "the great uncertainty there is of proof in this case shows how necessary it was to make the statute against frauds and perjuries"); 1708, Strode *v.* Russell, 2 Vern. 621 ("No parol proof or declaration ought to be admitted out of the will to ascertain it; . . . and now since the statute of frauds and perjuries, this is stronger, because by that statute all wills are to be in writing"). Compare also Chief Baron Gilbert's remarks, about the same period, quoted *supra*, note 20.

which were not affected by the statute, but were none the less put in writing voluntarily by the parties, though not sealed — *i. e.* transactions for which by the older idea the writing would merely have been "evidence" —, the writing now came to be treated and spoken of as the constitutive thing. The modern view had come into complete existence; and the period of this seems to be about the end of the 1600s.[44] There are still recurring traces of the older theories;[45] but the modern result is practically achieved. The Chancellor's Court seems to have been slow to accept the full doctrine, — partly, no doubt, because of the older idea that it had something to do with the untrustworthiness of juries,[46] but also partly because that Court was still invoked as having a discretionary power to relieve against fixed rules of law.[47] But this inconsistency of practice soon disappeared; and the transition-period of four hundred years was accomplished. A legal transaction when reduced in writing was now to be conceived of as constituted, not merely indisputably proved, by the writing, — and this whether the writing was a requirement of law or merely voluntary, and whether it was sealed or unsealed. The reminiscence of the older idea, in the use of the term "parol evidence," to designate that which was legally inoperative, still persisted as a convenient term of discussion; but the correct legal theory, whenever it has been forced into consideration, has not failed to be avowed.

It remains to notice the development of the older conception in one other direction but to the same end. The King's word, it has been seen, was incontestable, and this quality attached itself to his sealed sanction of documents.[48]

[44] 1719, Lilly's Practical Register, 48, as quoted in Viner's Abridgment, "Contract," G. 18 ("If an agreement made by parol to do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for the non-performance of this agreement, it must be brought upon *the agreement reduced into writing*, and not upon the parol agreement; for both cannot stand together, because *it appears to be but one agreement*, and that shall be taken which is the latter and reduced to the greater certainty by writing; for *vox emissa volat litera scripta manat*").

[45] As in the passages from Lilly and Gilbert, *supra*, and in Benson *v.* Bellasis, *infra*.

[46] See Strode *v.* Russell, *supra*, note 26.

[47] 1673, Tyler *v.* Beversham, Rep. temp. Finch 80 (deed of conveyance of a farm; the oral agreement was much considered, and apparently became decisive); 1673, Feilder *v.* Studley, ib. 90 (covenant in deed, not enforced); 1673, Cheek *v.* Lisle, ib. 98; 1674, Garnan *v.* Fox, ib. 172; 1681, Fane *v.* Fane, 1 Vern. 30 ("One may aver a trust of personal estate," here upon testimony to the testator's intention); 1681, Lee *v.* Henley, ib. 37 (a scrivener's mistake in a settlement of land, in the nature of a will, was not allowed to be corrected); 1684, Beachinall *v.* Beachinall, 1 Vern. 246 (a deed of marriage-settlement, proved to have been "not drawn according to the agreement," was ordered by L. C. Nottingham to be "left out of the case"; but this decree was reversed by L. Keeper Guilford, to the extent of letting the deed be "given in evidence" at the trial at law); 1681–5, Benson *v.* Bellasis, 1 Vern. 15, 369 (deed of marriage-jointure; a parol agreement "made on the marriage" was set up; L. C. Jeffries said that "the jointure-deed is an evidence that all the precedent treaties and agreements were resolved into that"; but afterwards he increased the jointure "on evidence of her father and uncle that B., [the husband,] when he proposed the treaty of marriage, offered to settle £500 per annum jointure; . . . but note, there was no [written] covenant or agreement proved whereby he bound himself to make a jointure of that value"); 1686, Harvey *v.* Harvey, 2 Ch. Cas. 180 (aimilar agreement of marriage-settlement allowed to overturn a deed); 1689, Towera *v.* Moor, 2 Vern. 98 (a testator's instructions were not received to show a mistake in a will; "we cannot go against the act of Parliament"; but in case of a surrender made [on the roll] by a steward of a copyhold, "if there be any mistake there, that is only a matter of fact, and the Courts of law will in that case admit an averment that there is a mistake, etc., either as to the lands or uses"); 1706, Hill *v.* Wiggett, ib. 547 (good example of the overturning by parol of auch a copyhold-transfer).

[48] *Supra*, note 10.

But, long before this, it was also conceived to sanction the indisputability of his judges' reports of their judicial doings.[49] Their *recordatio* (recollection or relation), oral though it be, is made indisputable. The progress of this doctrine is traced in the following passage:

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of the English Law, II, 666: "The distinction that we still draw between 'courts of record' and courts that are 'not of record' takes us back to very early times when the King asserts that his own word as to all that has taken place in his presence is incontestible. This privilege he communicates to his own special court; its testimony as to all that is done before it is conclusive. If any question arises as to what happened on a previous occasion, the justices decide this by recording or bearing record (*recordantur, portant recordum*). Other courts, as we have lately seen, may and, upon occasion, must bear record; but their records are not irrefragable; the assertions made by the representative doomsmen of the shire-moot may be contested by a witness who is ready to fight. We easily slip into saying that a court whose record is incoutrovertible is a court which has record (*habet recordum*) or is a court of record, while a court whose record may be disputed has no record (*non habet recordum*) and is no court of record. In England, only the King's court — in course of time it becomes several courts — is a court of record for all purposes, though some of the lower courts 'have record' of some particulars, and sheriffs and coroners 'have record' of certain transactions, such as confessions of felony. In the old days, when as yet there were no plea rolls, the justices when they bore record relied upon their memories. From Normandy we obtain some elaborate rules as to the manner in which record is to be borne or made; for example a record of the Exchequer is made by seven men, and, if six of them agree, the voice of the seventh may be neglected. In England at a yet early time the proceedings of the royal court were committed to writing. Thenceforward the appeal to its record tended to become a reference to a roll, but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices; and as duplicate and triplicate rolls were kept there was always a chance of disagreement among them. A line is drawn between 'matter of record' and 'matter in pays' or matter which lies in the cognizance of the country and can therefore be established by a verdict of jurors."

As the art of keeping the written records developed, and the practice of indisputability became trite, it might have been supposed that the constitutive feature of these writings would have developed early. But it is late in appearing; the record is usually said to "import absolute verity";[50] but no further progress is for a long time made. And naturally enough; for any other theory, however necessary, is here palpably artificial. When a seller orally names a price and then writes it in a contract, it is easy to conceive of the writing as displacing the oral utterance and constituting alone the act. But when a counsel files a pleading or makes a motion, or a jury renders a verdict, it is plain that the clerk's act of writing is an actually separate thing from any of these. Only for the utterances of the judge himself is it entirely

[49] Brunner, Schwurgerichte, 189; Rechtsgeschichte, II, 523; Wort und Form im altfranzösischen Prozess, republished in his Forschungen z. Geschichte des deutschen und französischen Prozess, 269 (quoting the maxim, "Ne contre recort ne puet en riens fère").

[50] 1628, Coke upon Littleton, 260*a* ("*Recordum* is a memoriall or remembrance in rolles of parchment of the proceedings and acts of a Court of justice. . . . And the rolles, being the records or memorialls of the judges of Courts of record, import in them such incontrollable credit and veritie as they admit no averment, plea, or proofe to the contrarie; . . . and the reason hereof is apparent, for otherwise [as our old authors say, and that truly] there should never be any end of controversies, which should be inconvenient").

natural to think of the record as *per se* his own act. Nevertheless, in the end, the most practical and easily handled notion is that which identifies the record with the proceedings. This theory has finally prevailed,[51] and the notion of a constitutive writing is now extended to include the record of a judicial proceeding.[52]

1. Integration of Unilateral Acts.

§ 2427. **Official Documents (Surveys, Appointments, Assessments, etc.).** The reduction of an act to a writing, so as to bring it under the present rule (*ante*, § 2425), may be made as well for a unilateral act (*i. e.* an act involving a single party only) as for a bilateral act (*i. e.* an act involving two or more parties). In either case, it is a question of the nature of the act and of the party's intention to embody it solely in the writing.

Of ordinary *acts of private persons*, there are few that are integrated. A *notice* or *demand* would be a not uncommon instance; for example, if orally a party should give notice of a lease's termination or forfeiture, or should demand a payment, and then should follow this by the same notice in written form, the latter would presumably merge and replace the former, and the terms of the writing would be decisive, so far as concerned the sufficiency of the act of notification.[1] Other instances are rare.[2]

Of *acts of officials*, there are occasional instances of integration, though they come infrequently into litigation. It may be said that where the act is not by law required to be integrated, the Courts are not inclined to discover a voluntary integration. For example, the *appointment of a sheriff's deputy*[3] or the *enlistment of a recruit*[4] have been allowed to be proved as oral acts, even though a writing was also made. On the other hand, the *levy of an assessment* has been treated as embodied solely in the book-entry.[5]

Both the foregoing classes of cases must be distinguished from cases involving the application of two other principles, superficially similar, namely, compulsory integration (*post*, § 2453) and conclusive testimony (*ante*, § 1345):

(1) Where by law an act is *required to be done in writing, i. e.* is ineffective

[51] 1774, L. C. J. Mansfield, in Jones *v.* Randall, Cowp. 17 ("The minutes of the judgment are the solemn judgment itself"); 1846, Nisbet, J., in Bryant *v.* Owen, 1 Ga. 355, 367 ("The record is tried by inspection; and if the judgment does not there appear, the conclusion is that none has been rendered").

[52] The history of the two other chief instances of the application of the principle, negotiable instruments and records of corporate proceedings, is beyond the present purview.

[1] Though so far as concerned the state of mind of the party notified, both sources of his information would be equally material.

[2] The following is an example: 1820, Thistlewood's Trial, 33 How. St. Tr. 757 (high treason; inquiry was made as to certain proclamations prepared by the defendant; the latter dictated the words to H., who wrote them down, but owing to a difference of opinion as to the phrasing, the writing was not completed; the Court doubted as to the propriety of any inquiry as to the words spoken in dictation, and intimated that the contents of the document alone were to be regarded).

[3] 1895, Pentecost *v.* State, 107 Ala. 81, 18 So. 146 ("It was like a receipt").

[4] 1869, Wilson *v.* McClure, 50 Ill. 366 (that substitutes were received into the service of the army; the officer's entry of it not necessary to be proved).

[5] 1903, Allen *v.* McKay, 139 Cal. 94, 72 Pac. 713 (the assessment-roll, completed and certified by the assessor, "is the only evidence of his acts and intentions"); 1897, Dresden *v.* Bridge, 90 Me. 489, 38 Atl. 545 (assessment to "S. J. B., Est. of"; evidence of the assessor's intention to assess the tax to the executor, excluded).

unless so done, the writing is of course the only permissible subject of proof. It is immaterial what the person intended; his act must be in the writing and must be judged by the writing alone (*post*, § 2453).

(2) Certain official documents are sometimes made *preferred conclusive testimony*, and it is difficult to distinguish whether that principle or the present one is involved.[6] For example, the question may be whether a sheriff's record of prisoners received is conclusive,[7] or whether a State auditor's books are conclusive,[8] and here the mere principle of conclusive testimony is concerned. But when the question is whether an official survey is conclusive as to boundary lines,[9] it is in fact an inquiry as to the terms of the government's grant as defined by the grantor's agent; the written survey therefore constitutes the surveyor's act, and is not merely a testimony to some independent fact. In general, then, where an official writing represents the act itself of the officer, it is an instance of the present principle of integration; but where the official writing states another person's acts or some external happening, it is an instance of testimony; how far, in the latter case, it is preferred and is made conclusive has been already examined under that head (*ante*, §§ 1345–1353). The practical differences in the effect of the two rules have also been there pointed out (*ante*, § 1346), but may here be compared. (a) If a conclusive testimonial writing *never was made*, then the fact to be proved may be otherwise evidenced, — for example, where an officer's jurat (or certificate of an oath made before him) has not been recorded on the document, the fact of the swearing may be otherwise evidenced;[10] though if the written jurat had been the sole embodiment of an official act, the failure to write it would be the failure to act at all, and hence no other proof could have been made. (b) If a conclusive testimonial writing was made but is *lost*, its preferential nature is at an end, and any other testimony to the fact in issue may be received in its stead;[11] but if a written legal act is lost, the proof must be of its contents, because the very fact to be proved is the writing itself. Thus, while these marked differences result, there remains the common feature that, by both principles, the oral utterance of the official cannot be proved, nor can the terms of the writing (if available) be

[6] Compare the additional cases cited *ante*, §§ 1335, 1339, 1345–1352.

[7] 1898, Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409 (sheriff's calendar of prisoners kept, not conclusive).

[8] 1878, State *v.* Newton, 33 Ark. 276, 284 (action on an official bond; the State Auditor's booke held not conclusive under a statute making them "sufficient evidence").

[9] 1814, Ringgold *v.* Galloway, 3 H. & J. 451, 461 (an official survey being lost, a junior survey of the same estate was admitted; in the absence of loss, the former would be conclusive); 1897, Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893 (U. S. survey, held conclusive as to "the actual locations of the bouudary lines of sections," etc.); 1895, Reuseus *v.* Lawson, 91 Va. 226, 21 S. E. 347 ("Such [extrinsic] declarations of the surveyor are not admissible, because the policy of the law forbids that his solemn acts, done in the discharge of his official duty, should be annulled by his subsequent doclarations").

Whether a *ship-survey* is conclusive is a question of contract.

[10] 1895, Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213.

[11] 1855, People *v.* Clingan, 5 Cal. 389 (a certificate of election being lost, testimony was admitted both of its contents and of the fact of election as known to others); 1847, Dutchess Co. Bank *v.* Ibbotson, 5 Denio 110 (a notary's certificate of demand and notice, made evidence by statute; if lost, its contents cannot be proved; the notary's testimony in some other form must be obtained); 1846, Lloyd *v.* McGarr, 3 Pa. St. 475, 482 (similar).

contradicted by his oral utterance; yet this is due in the one instance to the conclusiveness of the written testimony, and in the other instance to the operative character of the writing as an act.

2. Integration of Bilateral Acts.

§ 2429. **No Integration at all; Casual Memoranda.** The mere circumstance that *some* writing has been made by parties, for the better recollection of the terms of their transaction, does not of itself make that writing the sole memorial of the transaction, even to the extent covered by the writing. There may have been no integration at all, in spite of the written notes; *i. e.* no attempt to make the writing embody the transaction or any part of it (*ante*, § 2425), but merely to furnish an aid to the writer's recollection or a written admission for the other party's satisfaction. The essential idea remains for it, that the writing is something distinct from the transaction itself. There can hardly be any precise test; the circumstances of each case, as indicating the parties' intent, must control.[1]

§ 2430. **Partial Integration; General Test for applying the Rule; "Collateral Agreements."** The most usual controversy arises in cases of partial integration, *i. e.* where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to *so much of the transaction as is so embodied, but not to the remainder.*

It is of course incorrect to assume that what was not so embodied was in truth a part of that same transaction; it may have been a totally distinct transaction, merely coinciding in time. For example, a banker, at an interview with a promoter, who comes from a distant city and compresses all their affairs into a short interview, may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage, and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent to sell another piece. In such instances,

[1] *Eng.:* 1803, Dalison *v.* Stark, 4 Esp. 163 (action for goods sold; the plaintiff called his selling agent, who had taken the order, and it appeared that "the order was given to him verbally by the defendant, and that he had put it down in writing to assist his own recollection, merely as a memorandum; it was not made by the buyer, nor was his name signed"; held, that the writing was not the contract); 1814, Ramsbottom *v.* Tunbridge, 2 M. & S. 434 (a memorandum of a lease handed to a purchaser by an auctioneer after the knocking down; held, not an integration); 1820, Doe *v.* Cartwright, 3 B. & Ald. 326 (a memorandum of tenancy, drawn up and assented to, but conditional on getting a surety, and never signed; held, not controlling); 1835, R. *v.* Wrangle, 2 A. & E. 514 (employer and employee went to a clerk, who entered the terms of hiring in writing, which however was not read or shown to them or signed by them; held not integrated); 1838, Allen *v.* Pink, 4 M. & W. 140 ("Bought of G. P. a horse for the sum of 7*l.* 2*s.* 6*d.*, G. P.," held to be intended "merely as a memorandum of the transaction or an informal receipt for money, not as containing the terms of the contract itself"); *U. S.:* 1900, Atwater *v.* Cardwell, — Ky. —, 54 S. W. 960 (a mere temporary memorandum, held not indisputable); 1895, Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249 (a "mere informal memorandum," held not indisputable); 1897, Burditt *v.* Howe, 69 Vt. 563, 38 Atl. 240 (a series of letters, held not to have been made the sole memorial of the contract).

the transactions are so clearly distinct, that each one, if integrated, will certainly be embodied in a writing wholly distinct from the others and regardless of whether the others are reduced to writing at all; and no controversy can plausibly arise. But in those instances in which a negotiation concerns one general subject — such as the purchase of a single lot of land having buildings on it — and yet several more or less separable features of bargain, the relation between the writing and the whole bargain is usually difficult to ascertain, and forms a perpetually recurring controversy. To say that the question is whether the parties intended to embody "the whole of the transaction" or only a part, is therefore hardly correct; because by hypothesis the writing *does* represent the whole of what was finally done on the subject covered by it; and because to assume that the subject not covered was a "part" of the transaction covered would be inconsistent, and would involve holding that the writing which embodies the transaction does not embody that "part" of it. More correctly, the inquiry is whether the writing was intended to cover *a certain subject* of negotiation; for if it was not, then the writing does not embody the transaction on that *subject;* and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect "parts" of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing.

In searching for a general test for this inquiry, three propositions at least are capable of being generally laid down:

(1) Whether a particular subject of negotiation is embodied by the writing *depends wholly upon the intent of the parties* thereto.[1] In this respect the contrast is between voluntary integration and integration by law (*post,* § 2450). Here the parties are not obliged to embody their transaction in a single document; yet they may, if they choose. Hence it becomes merely a question whether they have intended to do so.

(2) This intent must be sought where always intent must be sought (*ante,* §§ 42, 1714, 1790), namely, in the *conduct and language* of the parties and the *surrounding circumstances.* The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears

[1] This intent must of course be judged by an external standard: *ante,* § 2413.

evidence on both sides;[2] his decision here, *pro* or *con*, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that *if* they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that *if* they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place. In this anomalous process, it merely happens that some of the conduct and other data which are at first resorted to *evidentially* on the question of intent are usually identical with the conduct that may subsequently be treated as legally *inoperative;* but this is a mere coincidence. The two vital differences are, first, that they are looked at for different purposes, and secondly, that they may be dealt with by different branches of the tribunal.

(3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges,[3] and is in contrast with the looser and incorrect inquiry (*post*, § 2431) whether the alleged extrinsic negotiation contradicts the terms of the writing.

§ 2431. **Same: Incorrect Tests; (*a*) "Varying the Terms of the Writing"; (*b*) "The Writing is the Sole Criterion"; (*c*) Fraud, in Pennsylvania.** (*a*) It is not uncommon to speak of the present rule as a rule against "*varying the terms of the writing.*" No doubt that is precisely the effect of applying the rule. But it can never serve as a test to determine in the first instance whether the rule is applicable. The applicability and the effect of the rule are distinct things. To employ this phrase as a test is to reason in a circle; for it is to attempt to decide whether something conceded to be different from the writing ought to be excluded, by showing that it *is* different. All the

[2] Of course, not always in form; but he considers the data *pro* and *con*. Sometimes, but erroneously, the question of intent is left to the jury.

[3] The following will serve as examples: 1815, Yeats *v.* Pim, Holt 95 (sale of bacon, warranted to be prime singed; a custom to claim a breach at the time of inspection or waive it, excluded; "by requiring a warranty, he is to be understood as excepting against all terms but such as are stipulated in the bargain"); 1819, Bayley, J., in Webb *v.* Plummer, 2 B. & Ald. 746, 750 ("Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain. But if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone"); 1851, Maule, J., in Dickson *v.* Zizinia, 10 C. B. 602, 610 ("We should not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for"); 1892, Bretto *v.* Levine, 50 Minn. 168, 52 N. W. 525 (deed of land and store, including "all the shelving in the building"; an agreement to sell part of the stock also, admitted; "if the clause had mentioned one or more articles of personal property, as chairs, of such a nature that there could be no doubt that they constituted a part of the realty so as to pass under a deed of the property, the result would probably be different").

phrases about transactions that "vary," or "contradict," or are "inconsistent," involve the same futility. The fundamental question is as to the intent of the parties to restrict the writing to specific elements or subjects of negotiation (*ante*, § 2431, par. 3); and if that intent existed, then the other subjects of negotiation can be established, even though they be (as they always are) different from the writing:

1854, Mr. (later Justice) *Blackburn*, arguing, in *Brown* v. *Byrne*, 3 E. & B. 703: "The parties may by express words or by implication agree to exclude the incident which the general law would annex if they were silent; and it is exactly the same where the incident is annexed by custom or local law. . . . Then the question is, not whether the custom if admitted will vary or be inconsistent with the contract as it would stand without the custom; but whether it is impliedly excluded by the tenor of the instrument. The other mode of enunciating the proposition has been used by high authorities, but evidently is inaccurate. No one ever did or ever will seek to annex an incident by proof of a custom except for the express purpose of varying the contract from what it would be if the custom were not proved." *Coleridge*, J. (for the Court): "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."

1873, *Grove*, J., in *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482, 488: "In one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effect of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary."

(*b*) It has occasionally been laid down that, in ascertaining, in the first instance, the parties' intent to embody or not in the writing certain subjects of negotiation, "*the writing is the sole criterion*," *i. e.* no search for data of intent can be made outside the four corners of the document:

1892, *Depue*, J., in *Naumberg* v. *Young*, 44 N. J. L. 331: "In what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? . . . The only safe criterion of the completeness of a written contract as the full expression of the terms of the parties' agreement is the contract itself. . . . If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something has been left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible." [1]

Such a proposition, however, is untenable, both on principle and in practice. Its fallacy is indicated by what has been already noticed (*ante*, § 2430). The problem being to ascertain whether the parties intended a certain writing to cover certain subjects, the relation between the writing and those subjects and their conduct is necessarily involved; and all these matters must be considered. When two parties are found playing a game of chess, it cannot be told whether this is the sole and decisive game, or merely one of

[1] So also, but less rigid in statement, the following exposition: 1901, Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011 (Start, C. J.: "In considering whether or not a particular writing is an incomplete contract, within the rule stated, the controlling question is whether it appears upon the face of the writing that the parties intended it to be the exclusive evidence of their agreement. While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed").

a series, by watching that particular game. Whether a piece of land which we see a surveyor marking out is the entirety of the owner's estate cannot be determined by looking merely at the boundaries of that piece; if we look far enough, we may find that it is only a part of a larger survey. Whether a certain box of cards represents the whole catalogue of a man's library cannot be determined by the mere contents, nor by the circumstance that they are all in one box, nor yet by the circumstance that they are arranged alphabetically and include titles from A to Z; for perhaps he has also a separate catalogue of French and German books, or perhaps he has separate catalogues for law books and for general literature, or possibly he has taken out all the cards for books sent to the bindery. The conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one. The odd feature of it is that it is never enforced in practice by its theoretical advocates.[2]

(*c*) In *Pennsylvania*, the application of the rule seems to be governed by a test so anomalous that it may almost be said to destroy the essence of the rule in that jurisdiction. That test is *fraud;* although it would seem that every attempt knowingly to invoke the letter of a writing against the actual oral understanding of the parties (however different from the written terms) could properly be considered as fraudulent:

1884, *Paxson*, J., in *Phillips* v. *Meily*, 106 Pa. 536, 543: "The English rule that parol evidence is inadmissible to vary the terms of a written instrument does not exist in this State; . . . the cases in this State in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: "1st, where there was fraud, accident, or mistake in the creation of the instrument itself; and 2d, where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed." [3]

The application of the general principle to various specific kinds of transactions and documents may now be examined.

§ 2432. **Receipts and Releases; Bills of Lading.** A *receipt* — *i. e.* a written acknowledgment, handed by one party to the other, of the manual custody of money or other personalty —, will in general fall without the line of the rule; *i. e.* it is not intended to be an exclusive memorial, and the facts may be shown irrespective of the terms of the receipt.[1] This is because usually a

[2] See a good illustration of this in Naumberg *v.* Young, the case quoted *supra.*

[3] A clue to the numerous rulings in Pennsylvania may be found in the following cases: 1886, Thomas *v.* Loose, 114 Pa. 35, 45, 6 Atl. 326; 1902, Sutch's Estate, 201 id. 305, 50 Atl. 943; and cases cited *post,* § 2442, note 1. The development and present state of the Pennsylvania rule has been carefully examined in an article by Mr. Stanley Folz, "Oral Contemporaneous Inducing Promises to affect Written Instruments in Pennsylvania," 1904, American Law Register, LII, 601.

[1] *Eng.:* 1788, Buller, J., in Straton *v.* Rastall, 2 T. R. 366, 371 ("Equity distinguishes between the persons who join in a receipt and him who actually receives the money; and the receipt is not conclusive against him [the defendant], as he was only a surety and in fact received no part of the consideration-money"); 1832, Singleton *v.* Barrett, 2 Cr. & J. 368; *U. S.:* 1898, Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756; 1902, Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692; 1897, Mounce *v.* Kurtz, 101 Ia. 192, 70 N. W. 119; 1896, Missouri P. R. Co. *v.* Lovelace, 57 Kan. 195, 45

receipt is merely a written admission of a transaction independently existing, and, like other admissions, is not conclusive (*ante*, § 1058). But where the writing is itself the very act, as where it grants a discharge or *release* of a claim, or embodies a new obligation, it obviously falls within the rule, and its terms cannot be overthrown:

1832, *Tenterden*, C. J., in *Graves* v. *Key*, 3 B. & Ad. 313 (admitting the circumstances of payment of a bill, so as to show an indorsed receipt not to be a satisfaction): "A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence (except as to the person who may have been induced by it to alter his condition). A receipt therefore may be contradicted or explained."

1836, *Cowen*, J., in *M'Crea* v. *Purmort*, 16 Wend. 460, 473: "A release cannot be contradicted or explained by parol, because it extinguishes a preëxisting right. But no receipt can have the effect of destroying *per se* any subsisting right; it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not extinguish the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment; but it *is* the extinguisher itself."

1897, *Buck*, J., in *Ramsdell* v. *Clark*, 20 Mont. 103, 49 Pac. 591: "Whether a receipt possesses any contractual feature or not must often be determined from its entire language, and also, at times, from the language in connection with the circumstances under which it was given. If A, to whom B is indebted in the undisputed sum of $200, is paid by the latter $100, and signs a receipt for the sum of $200, or, mentioning the sum paid, acknowledges payment in full of the debt, nevertheless A, in an action against B for the unpaid balance, without showing any fraud, mistake, or other excuse for having signed the receipt, can contradict it by extrinsic evidence, and show that only $100 was paid. It would only be evidence of B's having paid the debt, just as an oral admission proved against A would be. If, however, B has been indebted to A on an account the amount of which has been in dispute between them, a receipt by A definitely specifying the entire account, and acknowledging a sum received as payment in full of the same, would possess a contractual feature; and, in order to contradict or vary the terms of it by extrinsic evidence in so far as it would be a contract, A would be required to observe the rules of law applicable to contracts, and could not treat it in evidence against him as if it were of no greater weight than a mere oral admission on his part."

Which of these characters a given document possesses must of course depend on the particular case; but it is well understood that a document which is a receipt may in some instances be indisputable as being also in effect a release or a contract.[2]

Pac. 590; 1897, Equitable Secur. Co. *v.* Talbert, 49 La. An. 1393, 22 So. 762 (even when acknowledged notarially); 1897, Joslin *v.* Giese, 59 N. J. L. 130, 36 Atl. 680; 1903, Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. 113; 1896, Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710 ("have this day settled all accounts"); 1830, Keene *v.* Meade, 3 Pet. 1, 7 (entry in a cash-book, acknowledging an advance of money, held not to exclude proof of the payment by parol); 1893, Riddle *v.* Hudgins, 7 C. C. A. 335, 58 Fed. 490, 19 U. S. App. 144, 150.

The following utterance may therefore be regarded as overruled: 1808, Alner *v.* George, 1 Camp. 392 (L. C. J. Ellenborough: "A receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding upon him").

[2] 1884, Goss *v.* Ellison, 136 Mass. 503 (a receipt for $51 "as full payment, as per claim," held conclusive, because equivalent to a "settlement and satisfaction of the claim" for tort thus discharged); 1897, Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591 (quoted *supra*); 1880, Goodwin *v.* Goodwin, 59 N. H. 548 (a receipt for $2,500, "in consideration of which I hereby waive all right to contest said will or the proof thereof and all claim I have or might have as heir of said deceased" was held to exclude the oral agreement concerning the precise claims re-

§ 2433. **Recital of Consideration in a Deed.** By an application of principle similar to the foregoing, a recital of consideration received, when it occurs in a deed of grant, is usually intended merely as a written acknowledgment of the distinct act of payment, being there inserted for convenience. Hence it is not an embodiment of an act *per se* written, and may be disputed like any other admission (*ante*, § 1058). But the statement of a consideration may, on the other hand, sometimes be itself an operative part of a contractual act, — as when in the same writing the parties set out their mutual promises as considerations for each other; here the word "consideration" signifies a term of the contract, and hence the writing alone can be examined:

1895, *Cooper*, C. J., in *Baum* v. *Lynn*, 72 Miss. 932, 18 So. 428 (in a deed I. recited that, whereas L.'s guardian had loaned money to I., I., in consideration of a full release from such loans, and of ten dollars paid in hand, conveyed, etc.; the fact that a release of the guardian's liability to L. was also a part of the consideration was excluded): "Judge Robertson [in a case cited] illustrates his own views by noting the difference between the mere statement of a fact (*e. g.* the admission of the receipt of the purchase price) and the vesting, creating, or extinguishing a right (*e. g.* by the execution of a release), in the following language: 'A party is estopped by his deed. He is not to be permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations; and, by analogy, the acknowledgment in a deed is not conclusive of the fact. This is but a fact, and testing it by the rationality of the rule we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by proof, because it extinguishes a preëxisting right. But no receipt can have the effect of destroying *per se* any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguishment itself.' The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject-matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the conveyance was a mere recited consideration for

leased thereby); 1898, Jackson *v.* Ely, 57 Oh. 450, 49 N. E. 792 (receipt for money, with statement of settlement in full, treated as a memorial not to be varied); 1898, Cassilly *v.* Cassilly, ib. 582, 49 N. E. 795 (receipt for money, including release of a claim in an estate, not variable by parol); 1897, Allen *v.* Mill Co., 18 Wash. 216, 51 Pac. 372 (receipt, held not explainable on the facts). The *presumption of payment* arising from a receipt is another question (*post*, § 2518).

The application of the above doctrine to a *bill of lading* may be seen in the following cases: 1871, The Delaware, 14 Wall. 579; 1898, Tallassee F. M. Co. *v.* R. Co., 117 Ala. 520, 23 So. 139; McClain, Cases on Carriers, 233–248. Its application to a *passenger ticket* may be seen in the following: 1893, Mann B. C. Co. *v.* Dupre, 4 C. C. A. 540, 54 Fed. 646; Hutchinson, Carriers, §§ 568 ff.; Professor J. H. Beale, Tickets, Harvard Law Review, I, 17.

the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests."

In general, then, it may be said that a recital of consideration received is, like other admissions, disputable so far as concerns the thing actually received;[1] but that, so far as the terms of a contractual act are involved, the writing must control, whether it uses the term "consideration" or not.[2]

§ 2434. **Warranty in a Sale; Insurance Warranties.** When a document embodies terms of a sale, it is the more natural to suppose that the document would cover such warranties, if any, as accompanied the sale, because the warranty is certainly a part of the contract and not a separate obligation. But when obviously only some of the terms of the bargain are represented in the document, and there must have been others — such as the time of delivery — left unembodied in it, it is possible to regard a warranty as equally without its purview. The decision will thus depend almost entirely on the circumstances of each transaction; and generalizations can hardly be made. In most instances, however, Courts are found treating the writing of sale as

[1] Some of the rulings, of course, may be open to argument: 1789, *R. v.* Scammonden, 3 T. R. 474 (pauper settlement; the deed of purchase reciting a consideration of 28*l.*, it was allowed to show that 30*l.* was in fact the amount received); 1896, Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; 1892, Guidery *v.* Green, 95 Cal. 630, 635, 30 Pac. 786; 1881, Feltz *v.* Walker, 49 Conn. 93 (the plaintiff's assignor, B., buying land, had it conveyed to the defendant's name, and took a bond and mortgage from the defendant for $3,250, the sole consideration for the bond being the land thus conveyed to the defendant for B.; held that the bond could be enforced only to the extent of appropriating the land in satisfaction); 1897, Droop *v.* Ridenhour, 11 D. C. App. 224, 238; 1895, Reese *v.* Strickland, 96 Ga. 784, 22 S. E. 323; 1897, Thompson *v.* Cody, 100 id. 771, 28 S. E. 669; 1895, Stewart *v.* R. Co., 141 Ind. 55, 40 N. E. 67; 1893, Hill *v.* Whidden, 158 Mass. 267, 274, 33 N. E. 526; 1902, Galvin *v.* R. Co., 180 id. 587, 62 N. E. 961 (release of claim for personal injury, reciting a money consideration; a promise of employment by the releasee, allowed to be proved); 1880, Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161; 1895, Fitzpatrick *v.* Hoffman, 104 id. 228, 62 N. W. 349; 1897, Ford *v.* Savage, 111 id. 144, 69 N. W. 240; 1895, Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143; 1836, M'Crea *v.* Purmort, 16 Wend. 460, 467 (summing up the cases in England and the United States; pointing out that the acknowledgment of a consideration is merely a receipt); 1895, Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222; 1898, Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333; 1892, Velten *v.* Carmack, 23 Or. 282, 289, 31 Pac. 658 (consideration in a deed to a married woman, shown to have been a gift to her by the grantor); 1895, Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; 1896, Van Lehn *v.* Morse, 16 Wash. 219, 47 Pac. 435; 1897, Don Yook *v.* Milling Co., ib. 459, 47 Pac. 964.

[2] 1902, Arnold *v.* Arnold, 137 Cal. 291, 70 Pac. 23 (deeds of transfer by one partner to another, containing mutual covenants as a part of the consideration; other consideration excluded); 1895, Sandage *v.* Mfg. Co., 142 Ind. 148, 41 N. E. 380 (rejecting the fact that for a supplementary contract dealing with a prior contract buying a patent the consideration was a release of the guaranty in the prior one); 1900, Schrimper *v.* R. Co., — Ia. —, 82 N. W. 916; 1897, Thompson *v.* Bryant, 75 Miss. 12, 21 So. 655 (the assumption of the seller's share of his liability as partner for firm debts, excluded as contractual); 1887, Parker *v.* Morrill, 98 N. C. 232, 3 S. E. 511 (agreement of accounting between a ward P. and her guardian B., by which "in consideration of one dollar to us paid by B., the receipt of which is hereby acknowledged," the ward grants to B. the sum of money due, and "do forever release and discharge said B." from his bond, the money to be applied by B. to certain named uses; the plaintiff ward offered to show an oral agreement by which B. additionally promised to devise property to the ward, and to prove that "only upon this promise and agreement did the plaintiff agree to sign the written agreement"; excluded, as "a consideration not mentioned or referred to in it"); 1900, Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825; 1881, Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620 (sale of land, in consideration of

the sole memorial of the transaction as to warranties;[1] occasionally, on the circumstances, they permit extrinsic warranties to be valid.[2] The enforcement of an *implied warranty* of fitness seems to involve a similar question.[3]

mortgage and bond; a further consideration of certain personalty, excluded).

Note that as between "good" and "valuable" consideration, on which the line of descent may depend, it is said that the nature of it cannot be determined by oral facts, though the amount of it may be: 1902, Groves *v.* Groves, 65 Oh. St. 442, 62 N. E. 1044.

[1] *Eng.:* 1805, Hodges *v.* Drakeford, 1 B. & P. N. R. 270 (action on a warranty that the trade of a shop bought by the plaintiff reached a certain amount; the writing of assignment held to control); 1810, Powell *v.* Edmunds, 12 East 6, 10 (sale of timber described by number and kind of trees; an oral warranty as to the weight excluded); 1813, Pickering *v.* Dowson, 4 Taunt. 779, 785 (warranty of a ship, excluded); 1814, Meyer *v.* Everth, 4 Camp. 22 (bought-note of a sugar sale, naming "50 hogsheads of H. sugar loaves, at 155 s. free on board of a British ship, acceptance at 70 days"; an oral warranty of quality like sample, excluded); 1815, Gardiner *v.* Gray, ib. 144 (aimilar); 1824, Kain *v.* Old, 2 B. & C. 627 (bill of sale of ship, containing warranties of title and of further assurance: a parol warranty of copper-bolting, excluded); 1831, Bradshaw *v.* Bennett, 5 C. & P. 48, 49 (sale of property held on three lives; the auctioneer's statement at the sale that one of the persons was dead, *semble*, not admissible); 1838, Chanter *v.* Hopkins, 4 M. & W. 399 (sale of a smoke-consuming furnace; oral warranty of suitability for a brewery, excluded); *Can.:* 1897, Saults *v.* Eaket, 11 Man. 597 (warranty of a binder, excluded on the facts); *U. S.:* 1898, Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795 (building contract in great detail; oral warranty of the architect's plans, excluded); 1897, Maxwell *v.* Willingham, 101 Ga. 55, 28 S. E. 672 (agreement to buy a tract of "about 150 acres"; oral warranty by seller that it contained no more than 150, excluded); 1898, Barrie *v.* Smith, 105 id. 34, 31 S. E. 121 (oral warranty of the moral quality of Balzac's works, excluded); 1903, Bullard *v.* Brewer, — id. — , 45 S. E. 711 (sale of a horse); 1889, Conant *v.* Bank, 121 Ind. 324, 22 N. E. 250 ("We will furnish the following machinery for a 100-barrel mill, of 24 hours, set up in your mill building"; warranty of grade, excluded); 1898, Younie *v.* Walrod, 104 Ia. 475, 73 N. W. 1021 (written agreement to buy land, vendor to furnish abstract, etc.; oral agreement as to time of furnishing abstract, etc., excluded); 1902, Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867 (machinery; warranty excluded); 1894, McCray R. & C. S. Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320 (refrigerator sale; oral warranty excluded; prior cases distinguished); 1895, Zimmerman M'f'g Co. *v.* Dolph, 104 id. 281, 62 N. W. 339 (oral warranty, additional to the written warranty, excluded); 1885, Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1 (bill of sale of logs; warranty excluded); 1896, Miller *v.* Electric Co., 133 Mo. 205, 34 S. W. 585 (a contract for boilers of a certain horse-power; collateral oral agreement excluded); 1895, Quinn *v.* Moss, 45 Nebr. 614, 63 N. W. 931 (a guarantee that cigars sold should be "union made," excluded); 1882, Naumberg *v.* Young, 44 N. J. L. 331 (lease of a building for the purposes of a button factory, an engine and boiler passing as fixtures; oral guarantee that the engine and boiler were in thorough repair, excluded); 1890, DeWitt *v.* Berry, 134 U. S. 312, 10 Sup. 536 ("If a contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty"); 1891, Seitz *v.* Refrig. Co., 141 id. 510, 12 Sup. 46 (sale of refrigerating machine, mentioning only size and price; warranty excluded); 1892, Van Winkle *v.* Crowell, 146 id. 42, 48, 13 Sup. 18 (machinery furnished; oral warranty excluded); 1893, Wilcox *v.* Cate, 65 Vt. 478, 26 Atl. 1105 (boiler-engine lease; oral warranty excluded); 1894, Milwaukee B. Co. *v.* Duncan, 87 Wis. 120, 125, 58 N. W. 232 (boiler-sales; oral warranty excluded); 1895, Case Plow Works *v.* N. & S. Co., 90 id. 590, 63 N. W. 1013 (a written warranty as to quality of wheels; an oral warranty as to manner of securing spokes in hubs rejected); 1896, Caldwell *v.* Perkins, 93 id. 89, 67 N. W. 29 (contract to sell fixtures and stock of merchandise; agreement to include furniture and tools, excluded).

Where the written warranty, whose existence is disputed, is said to have been lost, the oral transaction may of course, on another principle (*ante*, § 102), be used as evidence of its existence and terms: 1898, Ingram *v.* Music House, 51 S. C. 281, 28 S. E. 396.

[2] *Can.:* 1895, Gordon *v.* Waterous, 36 U. C. Q. B. 321, 332 (oral warranty here admitted); 1884, Ellis *v.* Abell, 10 Ont. App. 226, 242, 246 (good opinion by Burton, J.; oral warranty here held admissible by a divided court); *U. S.:* 1879, Chapin *v.* Dobson, 78 N. Y. 74 (written sale of machinery described; oral guarantee that it should work satisfactorily and, if not, might be returned, admitted; "it is one thing to agree to sell or furnish machines of a specific kind, as of such a patent or of a particular designation, and another thing to undertake that they shall operate in a particular manner"); 1885, Eighmie *v.* Taylor, 98 id. 288 (transfer of lease of oil wells; warranty of capacity offered; "if upon inspection of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagement, . . . it constitutes the contract between them. . . . If Chapin *v.* Dobson be near the border line in the application of the exception to the facts, there can be no question of the soundness of the doctrine").

[3] 1814, Meyer *v.* Everth, 4 Camp. 22 (cited *supra*, note 1); 1895, Case Plow Works *v.* N. & S. Co., 90 Wis. 590, 63 N. W. 1013 (a written

The insurer's *oral waiver* of the *insured's written warranty* is also commonly determined upon the same principle.[4]

§ 2435. **Agreements not to Sue, or not to Enforce, or to hold Conditional only.** (*a*) Where an obligation is embodied in a single document, the very essence of the obligation is its validity and enforcement. Hence an agreement, alleged to have been a part of the transaction, that the obligation should *not be used as binding* or enforceable can never be permitted to be shown, for the writing necessarily determines that very subject to the contrary; in the ordinary phrase, it is necessarily inconsistent with the writing. But here some distinctions are necessary. (1) By the general principle of legal acts (*ante*, § 2406), *no legal obligation* is created by a document which concerns merely *transactions of friendship* or the like. Hence a difficulty to determine whether that or the present principle should control, *i. e.* whether the understanding not to enforce the document signifies that it never became a legal act at all, or that it was a legal act which is still not to be observed in its terms; the former sort of agreement can be established, the latter not.[1] (2) Where the obligation is a *negotiable instrument*, different considerations may control; these are separately examined (*post*, § 2443). (3) Where an agreement *not to sue* is made *subsequent to the original and written agreement*, it is of course an independent transaction and may be established (*post*, § 2441). But such an independent agreement could not in a common-law trial defeat the claim; it could only create a separate cause of action for its breach, to be pursued by a separate suit. If, however, the damages in such a separate suit would be precisely equivalent to the amount recovered in the present suit, a Court of chancery, to avoid circuity of action, would enjoin the present suit; and that situation would be presented when the agreement was to *refrain forever* from suit, but not when it was to refrain for a *limited time*. In the former instance, therefore, the independent subsequent agreement could be availed of in chancery for that purpose, or in the original suit at law wherever equitable defences are permissible in common-law actions.[2]

(*b*) An extrinsic agreement providing a *condition qualifying the operation* of a written obligation is of course equally ineffective; for an obligation

warranty of wheels "against defects in material and workmanship" excludes an implied warranty of suitability for the purposes intended; distinguishing Merriam *v.* Field, 24 Wis. 640).

[4] 1872, Dewees *v.* Ins. Co. 35 N. J. L. 366 (stipulation in an insurance policy that the property shall not be used for any other purpose than that described; the insurer's knowledge of such actual use at the time of the contract, excluded); 1878, Franklin Ins. Co. *v.* Martin, 40 id. 568, 574 (same; leading case, dealing with the further question of reforming the policy in equity); 1895, Knudson *v.* Grand Council, 7 S. D. 214, 63 N. W. 911; 1903, Maupin *v.* Scottish U. & N. I. Co., 53 W. Va. 557, 45 S. E. 1003.

[1] Examples are found in the following cases, which should be compared with the cases cited *ante*, § 2406: 1898, Western Mfg. Co. *v.* Rogers, 54 Nebr. 456, 74 N. W. 849 (sale of goods with note; oral agreement that buyer took on commission only, excluded); 1897, Ellison *v.* Gray, 55 N. J. Eq. 581, 37 Atl. 1018 (a promise that a certain requirement in a contract was "all right," meaning that it would not be binding, excluded); 1857, Towner *v.* Lucas, 13 Gratt. 705 (oral agreement between obligee and surety of a bond, to abstain from enforcement of it and to give a written indemnity, excluded); 1896, Lowenfeld *v.* Curtis, — C. C., — 72 Fed. 105 (a clause in a theatrical contract as to the prior submission to the play-owner of the personnel of the cast; the fact that the submission was not intended to be required, excluded).

[2] Harriman on Contracts, 2d ed., § 508, citing Ford *v.* Beech, 11 Q. B. 852; Guard *v.* Whitehouse, 13 Ill. 7; Chicago *v.* Babcock, 143 id. 358, 32 N. E. 271.

absolute is plainly exclusive of a condition. So far as the present principle is concerned, there is no doubt. But by the general principle of delivery (*ante*, § 2410), no conduct becomes effective as a legal act if its consummation is suspended until the happening of a condition precedent; and hence such a condition, precedent to the existence of the obligation, may always be established, and has the effect of destroying the apparent obligation of the writing embodying the draft of the act. The difficulty is to distinguish whether, in a given case, the condition is such a precedent one, or whether it is a subsequent one such as the present principle forbids recognizing. Here some subtlety of construction may be required.[3]

§ 2436. **Agreements of Counter-Claim, Set-off, Renewal, or Mode of Payment.** For the same reason as in the foregoing class of cases, an agreement concerning the *mode* or *medium of payment* of an obligation cannot be established, where the document in any respect deals with that subject; but documents bear such variances of detail in those matters that no fixed rule can be laid down.[1] An agreement of *renewal*, though it might be construed as virtually affecting the length of term of an obligation,[2] seems really to concern a new and different obligation. An agreement of *counter-claim* or *set-off*, provided it is not in form or essence a mere qualification of the mode of payment specified in the document, may properly be established, for it concerns a separate obligation.[3]

§ 2437. **Agreement to hold a Deed Absolute as Security only; Agreement to hold in Trust.** When a document of transfer of property is absolute in its terms, may an extrinsic contemporary agreement to *hold the property as security only* be established? This question has generally been answered in the affirmative;[1] though in one or two jurisdictions the contrary view is

[3] Compare with the following the cases cited *ante*, §§ 2408, 2410, especially the Illinois rulings: 1890, Beard *v.* Boylan, 59 Conn. 181, 22 Atl. 152 (action for a debt; the defendant setting up a composition agreement with creditors, signed by the plaintiff, the plaintiff was not allowed to show that the writing was signed on an agreement that "it should be void unless so signed by all the creditors etc.," this being treated by the Court as a condition subsequent); 1898, Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 (sealed contract to manufacture; oral agreement on delivery that it was to be binding only on condition that the promisor obtained a city contract, excluded); 1898, Houck *v.* Wright, — Miss. —, 23 So. 422 (written contract for a piano; oral condition that the order might be countermanded within 30 days in case of a flood, etc., excluded); 1896, Nebraska Expos. Ass'n *v.* Townley, 46 Nebr. 893, 65 N. W. 1062 (condition to liability on a stock-subscription contract, excluded); 1880, Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233 (mortgage payable April 1, 1873; agreement that "the mortgage should not be due and payable during the mortgagor's life, provided the mortgagor kept the interest paid up and put the property in repair and kept it so," excluded); 1896, Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359 (agreement that if a debt was not indulged a lease should be void, excluded); 1898, Shea *v.* Leisy, 85 Fed. 243 (bond and mortgage to pay in four years; agreement to cancel on a lesser payment upon conditions, excluded).

[1] 1819, Campbell *v.* Hodgson, Gow 74 (agreement between acceptor and payee that the latter should not demand payment if he should reimburse himself from the effects of J., excluded; otherwise, so far as the reimbursement amounts to payment). Compare also the cases cited *ante*, § 2435, and, for negotiable instruments, *post*, § 2443.

[2] 1902, Armington *v.* Stelle, — Mont. —, 69 Pac. 115 (agreement of renewal of a lease, excluded). For the renewal of negotiable instruments, see *post*, § 2443.

[3] *Contra:* 1845, St. Louis Perp. Ins. Co. *v.* Homer, 9 Metc. 39 (agreement that a sum found to be due under an insurance policy should be set off and applied in satisfaction of a note, excluded); 1837, Eaves *v.* Henderson, 14 Wend. 190 (agreement that a book account and the purchase of goods should serve as a set-off to a note for $28.84, excluded). For negotiable instruments, see *post*, § 2443.

[1] These cases apply their conclusion alike to transfers of realty and of personalty: *Can.:*

maintained,[2] and though in any event the terms of a particular document may require the contrary result.[3] But the theory upon which the prevailing view rests has varied decidedly. By some Courts it has been placed on the ground (*post*, § 2439) of fraud,[4] by others on the doctrine (*ante*, § 2433) of consideration,[5] or both of those;[6] and again it is said to involve merely the "object" of the parties,[7] — whatever that may signify. Still others suggest a distinction between chancery and law,[8] and between a proceeding in ejectment and other remedies.[9] But none of these theories seem to be adequate, — for one reason, to name no others, because the rule of exclusion may sometimes become applicable on the facts of a given case.[10] The apparent obstacle, which invokes the rule, is the absolute terms of the transfer, together with the circumstance that the traditional form of mortgage at common law — a condition of defeasance — seems to be plainly at war with the terms of such a deed. But that traditional form is a form merely, not recognized in modern law as literally valid. The essence of a security is an

1852, Le Targe *v.* De Tuyll, 3 Grant U. C. 369 (best opinion, by Blake, C.); 1852, Holmes *v.* Matthews, ib. 379, 384; 1892, McMicken *v.* Ontario Bank, 20 Can. Sup. 548, 575; *U. S.*: 1898, Hieronymus *v.* Glass, 120 Ala. 46, 23 So. 674; 1895, Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; 1903, Clark *v.* Ducheneau, — Colo. — , 72 Pac. 831 (that a note was given only as security for performance of another contract, allowed); 1893, Shad *v.* Livingston, 31 Fla. 89, 97, 12 So. 646; 1888, Okuu *v.* Kaiaikawaha, 7 Haw. 34 (in a common-law court); 1894, Helbreg *v.* Schumann, 150 Ill. 12, 21, 37 N. E. 99; 1896, Trogdon *v.* Trogdon, 164 id. 144, 45 N. E. 575; 1895, Bever *v.* Bever, 144 Ind. 157, 41 N. E. 944 (a reservation of a life estate shown to have been intended as a mortgage); 1895, Libby *v.* Clark, 88 Me. 32, 33 Atl. 657; 1872, Campbell *v.* Dearborn, 109 Mass. 130; 1895, Riley *v.* Bank, 164 id. 482, 41 N. E. 679 (stock-shares); 1897, Dixon *v.* Ins. Co., 168 id. 48, 46 N. E. 436 (insurance policy); 1868, Bowker *v.* Johnson, 17 Mich. 42; 1896, Pinch *v.* Willard, 108 id. 204, 66 N. W. 42; 1897, Kellogg *v.* Northrup, 115 id. 327, 73 N. W. 230; 1898, Germain *v.* Lumber Co., 116 id. 245, 74 N. W. 644; 1893, Winters *v.* Earl, 52 N. J. Eq. 52, 588, 28 Atl. 15; 1898, Vanderhoven *v.* Romaine, 56 id, 1, 39 Atl. 129; 1891, Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307; 1896, Stith *v.* Peckham, 4 Okl. 254, 46 Pac. 664; 1898, Weiseham *v.* Hocker, 7 id. 250, 54 Pac. 464; 1893, Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931; 1897, Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340; 1897, Gettelman *v.* Assur. Co., 97 Wis. 237, 72 N. W. 627 (insurance policy).

[2] 1894, Eckford *v.* Berry, 87 Tex. 415, 28 S. W. 937; 1897, Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762. So, too, apparently, in Kentucky, after much vacillation: 1824, Thompson *v.* Patton, 5 Litt. 74; 1830, Edrington *v.* Harper, 3 J. J. M. 353; 1839, Thomas *v.* McCormack, 9 Dana 108; 1898, Munford *v.* Green, 103 Ky. 140, 44 S. W. 419 (repudiating the remark in Seiler *v.* Bank, 86 id. 131).

[3] 1891, Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961 (sale of logs; that the transfer was merely in satisfaction of a chattel mortgage and the vendee was to pay only what remsined after the debt and expenses were deducted, excluded on the facts).

[4] 1895, Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222 ("The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing by way of defence the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent").

[5] 1888, Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106 (Elliott, J.: "The facts pleaded do not impeach the conveying qualities of the mortgage; they simply impeach its consideration"); 1886, McMillan *v.* Bissell, 63 Mich. 66, 70, 29 N. W. 737 ("The agreement for the defeasance, whether written or unwritten, is no more than one of the conditions upon which the deed was given, and therefore constitutes a part of the consideration for the conveyance").

[6] 1851, Russell *v.* Southard, 12 How. U. S. 139, 148 (said by Curtis, J., to involve in effect "both fraud and a vice in the consideration").

[7] 1878, Brick *v.* Brick, 98 U. S. 514 (transfer of shares of stock, shown to be a pledge only; "the rule does not forbid an inquiry into the object of parties in executing and receiving the instrument").

[8] Considered in the following cases: 1865, Newton *v.* Fay, 10 All. 505, 507; 1896, German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490.

[9] German Ins. Co. *v.* Gibe, Ill., *supra*.

[10] Thomas *v.* Scutt, N. Y., *supra*.

agreement to deal with the property so as to extinguish a certain debt, and no otherwise. In other words, the act of transfer and the user of the property transferred are distinct legal ideas; or, put still differently, the kind of estate — according to the category of fee simple, life estate, and the like — is a different thing from the quality of the estate, *i. e.* trust or security. The simple question is, then, whether the parties, under all the circumstances, appear to have intended the document to cover merely the kind of estate transferred, or to cover all possible aspects of the transfer, including that of the quality of the estate, *i. e.* its subjection to an equity of redemption; in the latter case, no extrinsic agreement can be considered.

By the same reasoning is to be determined the question whether an extrinsic *agreement to hold in trust* can be established. So far as the present rule is concerned, there would seem to be no objection; and this would be so also for agreements equivalent to a trust, for example, an agreement to reconvey on demand.[11] But by the statute of frauds (*post*, § 2454) such an agreement not in writing may be unenforceable; and thus, for a different reason, the agreement may still be unavailable; unless the doctrine of resulting trusts be held to remove the objection of the statute of frauds.[12]

§ 2438. **Agreement to hold as Surety or Agent only.** (1) Where a document is executed by A and B, apparently as equal principals, B may of course establish, as against A, an extrinsic agreement that between themselves B should be *surety only*, because the document does not embody the transaction between A and B, but only the transaction between them and the obligee.[1] But may B avail himself of an extrinsic agreement between himself and the obligee to treat B as surety only? On the analogy of the foregoing doctrine (*ante*, § 2437), it would seem that he may.[2] It is true that the execution is general and not limited in form; yet it may be said that the agreement does not dispute the existence and tenor of the obligation, but merely affects the use to which it may be put by the holder.

(2) Where a document is executed by "*A, agent for B*," or by "A, treasurer of B. Co.," whether A or B shall be liable, and whether A may avail himself of an agreement not to hold him personally, seems to be essentially a question of the proper interpretation of the terms used.[3]

(3) Where, however, a document is executed by A without any indication of agency in the document, and it is desired to establish an agreement between A and B that B shall as *undisclosed principal* be a party, for the purpose either of charging or entitling B or of exonerating A, the applica-

[11] 1885, Hutchins *v.* Hutchins, 98 N. Y. 56, 63.

[12] The cases are cited in Ames' Cases on Trusts, 1st ed., pp. 291, 295–320.

[1] The cases are cited in Brandt, Suretyship, 2d ed., §§ 29, 30.

[2] The following case is opposed: 1897, Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713 ("J. B. has rented his farm . . . to the said T. A. H. and S. R. H. for one year"; an agreement that S. R. H. was to be surety only, not admitted against the lessor).

The agreement must of course, on the principle of § 2415, *ante*, be one known to and shared by the party holding the obligation. Where the document is a negotiable instrument, special considerations apply: *post*, § 2443.

[3] 1893, Mathews *v.* Mattrass Co., 87 Ia. 246, 54 N. W. 225; and cases collected in Wambaugh, Cases on Agency, 658–664, 723–728, and Cook, Corporations, 4th ed., 1898, § 722.

bility of the present rule is directly involved. Here several distinctions have been taken. (*a*) In the first place, where the unnamed principal is *unknown* to the obligee, it is proper to give force to the contract between principal and agent for the purpose of charging or entitling the principal, though not of exonerating the agent;[4] unless in the particular case the document plainly was intended to deal otherwise with the transaction.[5] (*b*) In the second place, where the unnamed principal was *known* to the obligee but nevertheless not named in the document, the rule *may* here equally permit the agreement to be available for the former purpose above mentioned; yet the ordinary inference will be that the named parties intended the document to be exclusive of all other parties, unless a contrary intention be made to appear. The general state of the law is sufficiently outlined in the following passage:

1896, *Wolverton*, J., in *Barbre* v. *Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378: "The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question, among American authorities, — the one affirming, and the other denying; but the case is one of first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit, so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive, or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presump-

[4] 1841, Higgins *v.* Senior, 8 M. & W. 834, 844 (Parke, B.: "[To allow an unnamed principal to be entitled or charged] in no way contradicts the written agreement; it does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it binds also another, by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement").

[5] 1848, Humble *v.* Hunter, 12 Q. B. 310 (rule not applicable to a charter-party wherein the alleged agent described himself as "owner" of the ship). The following further distinction seems sound: 1871, Fleet *v.* Murton, L. R. 7 Q. B. 126, 130 (broker's contract expressly as broker for undisclosed principal; custom to undertake personal liability in case the principal is not disclosed, admitted); 1873, Hutchinson *v.* Tatham, L. R. 8 C. P. 482, 486 (similar).

tion thus created is a disputable one, and that the intention of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing. — The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible." [6]

§ 2439. **Fraud.** The doctrine of extrinsic fraud as sufficient to make a legal act voidable has already been considered (*ante*, § 2423). But what is the bearing of the present rule? When a transaction has been reduced to a single document, how is it that fraud can be established extrinsically? A simple answer seems to be that since the present rule depends (*ante*, § 2430) on the intent of the parties to embody one or more subjects of transaction exclusively in the document, it is impossible to suppose that the subject of fraud was intended thus to be covered, since by hypothesis the party upon whom the fraud is practised does not know of it and therefore could not have had such an intent. But, if this be true, what becomes of that other application of the rule, well established for most transactions (*ante*, § 2434), that warranty-representations extrinsic to the document cannot be availed of? Fraud is always a matter of false representations; and how is it that extrinsic representations are as warranties to be ignored but as fraud to be admitted? The explanation seems to be that the vital additional element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document, and that hence the rule does not forbid considering it wherever it is the vital element of the claim. In other words, in an action of *deceit*, or in a proceeding of *rescission of contract* wherever this by the law depends upon the promisor's conscious falsity, the present rule interposes no obstacle; although in an action of contract upon an alleged warranty as a part of it, or in a proceeding of rescission for breach of warranty or innocent misrepresentation, the same representations could not be considered.[1]

It may be added that the term "fraud" must here be understood in its legitimate narrow sense, *i. e.* a misrepresentation of a *present* or *past fact;* for, although a much looser significance has been occasionally intimated,[2] yet it is obvious that an intent not to perform a promise (*i. e.* a misrepresentation as to a future fact), or a subsequent failure knowingly to perform an extrinsic agreement not embodied in the writing, cannot in strictness be legally included in the term "fraud." It seems to be a disregard of this distinction

[6] The authorities are collected in Wambaugh, Cases on Agency, 627–657, 673–723. The distinction sometimes made between sealed contracts and simple contracts (Briggs *v.* Partridge, 1876, 64 N. Y. 357) ought to have no place here.

[1] 1814, Meyer *v.* Everth, 4 Camp. 22 (deceit); 1889, State *v.* Cass, 52 N. J. L. 77, 18 Atl. 972 (fraudulent representations as to speed, in the sale of a horse; "as an additional warranty, that is, an addition to the contract, the present representations were clearly inadmissible; so soon, however, as they displayed such features as went to show that through them the contract had been fraudulently induced, and so was unenforceable for that reason at the election of the defrauded party, the rule excluding parol testimony to enlarge a written contract became inoperative").

[2] 1840, Story, J., in Bottomley *v.* U. S., 1 Story 135, 152 ("I know of no case where parol evidence is not admissible to establish fraud, even in the most solemn transactions and conveyances").

that is in part responsible for the anomalous attitude of the Pennsylvania Court (*ante*, § 2431) towards the general rule.[3]

§ 2440. **Trade Usage and Custom.** Where the parties have not intended to make the document embody the transaction upon a particular topic, its terms may be as well supplied by implied extrinsic agreement as by express extrinsic agreement. In other words, that *usage* or *custom of a trade* or *locality*, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the document was not intended to cover the topic affected by the custom. The test is on principle the same as for express extrinsic agreements; except that in the case of the custom the ordinary presumption is in favor of its implication, because the topics covered by the writing will usually be those which do not concern some known and usual term but vary in each particular transaction:

1836, *Parke*, B., in *Hutton* v. *Warren*, 1 M. & W. 466, 475: "[The inclusion of customs into written contracts] 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 a contract with reference to those known usages."

1854, *Coleridge*, J., in *Brown* v. *Byrne*, 3 E. & B. 703: "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding; evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."

1837, *Story*, J., in *The Schooner Reeside*, 2 Sumn. 567: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs, in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be

[3] The unsoundness of that theory of fraud is well expounded in an opinion by Allen, P., in Towner *v.* Lucas (1857), 13 Gratt. 705, 716.

to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

The application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service.[1]

§ 2441. **Novation, Alteration, and Waiver; Subsequent Agreements.** The general rule now under consideration rests on the assumption that a specific

[1] The following will suffice as examples; distinguish the cases cited *post*, §§ 2462, 2464 (usage to interpret the words in a document): *Eng.*: 1779, Wigglesworth *v.* Dallison, 1 Doug. 201 (lease for 21 years; custom for the tenant to take crops sown before expiration of the lease, admitted); 1800, Ougier *v.* Jennings, 1 Camp. 505, note (policy on a ship from Newfoundland to Portugal "beginning the adventure from the loading thereof"; usage admitted to include an intermediate loading before the voyage to Portugal); 1808, Vallance *v.* Dewar, 1 Camp. 503 (policy on a ship "at and from any port or ports in Newfoundland"; usage admitted to include an intermediate voyage after arrival in Newfoundland and before starting homeward); 1816, Yates *v.* Pym, 6 Taunt. 446 (written sale of bacon; trade usage requiring inspection of defects before a certain time, excluded); 1832, Blackett *v.* Ins. Co., 2 Cr. & J. 244, 249 (policy on a ship, tackle, apparel, etc.; a usage of underwriters not to pay for boats hung outside the ship on the quarter, excluded, since the policy was "upon the face of it, upon the *whole* ship, on *all* her furniture, and *all* her apparel"); 1838, Bottomley *v.* Forbes, 5 Bing. N. C. 121 (a charter-party provided for the payment of freight on cotton, "cotton to be calculated at 50 cubic feet per ton"; cotton after unloading expands so that the cubic measurement at loading and unloading differ greatly; a usage to measure at the shipper's warehouse was admitted); 1843, R. *v.* Stoke-upon-Trent, 5 Q. B. 303 (contract to work "from the 11th day of November next until the 11th November 1817"; a custom in that branch of manufacturing "to allow holidays at certain fixed times of the year," on the ground that "its notoriety makes it virtually part of the contract"); 1848, Syers *v.* Jonas, 2 Exch. 111, 116 (usage in the tobacco trade that sales should be conditioned on correspondence with sample, admitted; "such usage is admissible whenever it is not expressly or impliedly excluded by the tenor of the written instrument"); 1854, Brown *v.* Byrne, 3 E. & B. 703 (bill of lading agreeing to pay "freight ⅌ d. per pound, with 5 per cent primage, and average accustomed," and saying nothing about time of payment or discount; a local custom to allow 3 mos. discount, admitted); 1859, Martin, B., in Langton *v.* Higgins, 4 H. & N. 401, 408 (sale of goods in writing, and issue as to time of delivery to pass title; "they cannot add to the writing by showing that at the time the contract was made they had been accustomed to do something further"); *U. S.*: 1903, Withers *v.* Moore, 140 Cal. 591, 71 Pac. 697 (custom as to alteration of coal prices, excluded); 1841, Kilgore *v.* Bulkley, 14 Conn. 362, 391 (note falling due on a date which was Sunday; local usage admitted to show that in such cases the note was payable on the Saturday before; clear opinion by Storrs, J.); 1885, Gilbert *v.* McGinnis, 114 Ill. 28, 28 N. E. 382 (sale of corn, with an agreement by the buyer to make "advances" of money; a custom among grain merchants to make such an advance only upon a note by the seller for the amount advanced, excluded); 1890, Scott *v.* Hartley, 126 Ind. 239, 25 N. E. 826 (sale of grain at "50½ net"; a custom to deduct freight paid by the consignee, excluded); 1893, Destrehan *v.* Lumber Co., 45 La. An. 920, 924, 13 So. 230 (custom of measuring, etc., allowed, to supply the contract on matters not covered by the writing); 1900, Menage *v.* Rosenthal, 175 Mass. 358, 56 N. E. 579 (salesman's contract to travel "throughout the New England States"; custom to stay and work in New York "whenever trade is in town," excluded); 1898, Germain *v.* Lumber Co., 116 Mich. 245, 74 N. W. 644 (custom as to taking away logs, not admitted on the facts); 1895, Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 112, 114 ("sold 2000 tons, seller paying brokerage at 10 cents per ton"; evidence of a custom to pay brokerage on only the amount delivered, not the amount contracted for, was rejected); 1895, Richards Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806 (a contract specifying the prices for laying bricks; local usage admitted as to the method of ascertaining the quantities laid); 1897, Hansbrough *v.* Neal, 94 id. 722, 27 S. E. 593 (custom admitted to fix the value of services).

From the foregoing rule are to be distinguished three other classes of questions in which usage becomes material: (*a*) The question of *contract*, whether a particular usage may be implied into a contract, supposing it not to have been reduced to writing; and the doctrine that a local custom will not be added by implication alone to the terms of a contract, where a definite rule of law obtains to the contrary (Barnard *v.* Kellogg, 1870, 10 Wall. 383); (*b*) The question of *standard of interpretation*, whether a term used in a transaction, written or oral, is to be interpreted by a *usage not known to both parties* (*post*, § 2464); (*c*) The further question of *interpretation*, whether a usage adopted by both parties can be allowed *to displace the general meaning of a word* when contrary to the usage (*post*, § 2462); the cases involving this question are often apt to be confused with cases involving the rule here under consideration about varying the terms of a document.

transaction has been embodied exclusively in a single document. All distinct and separate transactions may therefore be established and availed of, whenever they are in themselves valid. Now a transaction *subsequent in time* must always be a separate transaction. The rule of exclusion can only apply to negotiations contemporaneous in time, or prior but incomplete. Where a document, for example, is executed on July 1, it may be held to embody the final and exclusive result of negotiations before and up to the time of execution; but a transaction on August 1 must be a separate one and therefore can never be excluded, so far as the effect of the document of July 1 is concerned. It may be that some rule of form (*post*, § 2454) will sometimes make the transaction of August 1 invalid in itself (as when a writing is required by the statute of frauds, or where a parol release will not discharge a sealed contract); but the present rule can interpose no obstacle. In particular, any subsequent agreement *altering, waiving, discharging*, or *otherwise novating* a prior transaction is not excluded by reason of the prior transaction having been reduced to writing:

1833, *Denman*, C. J., in *Goss* v. *Lord Nugent*, 5 B. & Ad. 58: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. But the Statute of Frauds has made certain regulations as to contracts for the sale of lands."

The application of this principle varies in practice according to the nature of the particular legal right and the actual separation of the transactions in time.[1]

§ 2442. **Miscellaneous Applications of the Rule to exclude or admit "Collateral" Agreements.** It does not seem possible to generalize further than on

[1] The following rulings will serve as examples: 1773, Milton *v.* Edgworth, 5 Bro. P. C. 313 (the rate of interest on a mortgage loan made in writing may be reduced by subsequent oral agreement); 1892, Gnidery *v.* Green, 95 Cal. 630, 634, 30 Pac. 786 (oral agreement that another instrument should be substituted for the one in question, admitted); 1892, Chicago B. & O. R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380 (agreement not to ride in stock-car; a practice of the railroad to permit it, admitted as a waiver); 1837, Eaves *v.* Henderson, 14 Wend. 190 (though a contemporary agreement to apply other claims in set-off of a note was excluded, a subsequent agreement to accept them in payment was admitted); 1896, Harris *v.* Murphy, 119 N. C. 34, 25 S. E. 708 (contract for work and labor in raising a barge; a subsequent alteration admitted); 1896, Dunklee *v.* Goodnough, 68 Vt. 113, 34 Atl. 427 (subsequent agreement relating to the mode of payment; admitted); 1899, Keating *v.* Pacific S. W. Co., 21 Wash. 415, 58 Pac. 224 (the plaintiff signed shipping-articles as seaman; on boarding the vessel, he found a sail unseaworthy; he had then the right to abandon the voyage, and a parol agreement by the ship not to use the defective sail was a new contract which could be availed of).

the preceding topics. The application of the rule, resting as it does upon the parties' intent, can be properly made only after a comparison of the kind of transaction, the terms of the document, and the circumstances of the parties. Even in the foregoing classes of transactions, it is rarely that the circumstances of a particular case cannot justify a special result contrary to the ordinary one. Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed, — the general principle. Other than in relation to some of the foregoing topics which have broad and uniform bearings, individual rulings can have little value as precedents unless the entire detail of the documents and circumstances is set forth; and an abbreviation of them is therefore more likely to mislead than to profit. The application of the rule should in almost all instances be left (*ante*, § 16) to the trial judge's determination.[1]

[1] The following citations may serve to illustrate the variety of application of the rule: *England:* 1769, Preston *v.* Merceau, 2 W. Bl. 1249 (in an action for rent on a house-lease "for 21 years at 26*l.* per annum," the lessor, who owned the house only, was not allowed to prove a further agreement by the defendant to pay the ground rent of 2*l.* 12*s.* 6*d.* a year); 1808, Higginson *v.* Clowes, 15 Ves. Jr. 516 (auction-sale in writing of lots of land, the purchaser "to take the timber at a fair valuation"; the auctioneer's oral statement at the sale that the timber of each lot was to be valued separately, excluded); 1838, Ellis *v.* Thompson, 3 M. & W. 445, 452 (sale of lead, "deliverable in the river Thames"; "the question of reasonable or not reasonable time is collateral to the contract"); 1845, Eden *v.* Blake, 13 id. 614 (at an auction sale the catalogue described an article as silver, but the auctioneer before selling announced publicly that it was only plated; the defendant bought but refused to accept; held, that the oral declaration of the auctioneer could be received, subject to the jury's finding that the catalogue was understood by the buyer not to be the exclusive basis of the purchase; "the sole question is, what were the terms upon which this article was sold? Are they in writing? . . . It is for the jury to say whether the contract existed in the printed particulars alone or partly in them and partly in parol"); 1871, Morgan *v.* Griffith, L. R. 6 Exch. 70 (lease of grass land; oral agreement by the landlord to destroy the rabbits, held "collateral to the lease") 1875, Angell *v.* Duke, 32 Law T. Rep. N. S. 320 (lease of premises, with the furniture on the premises; an agreement by the lessor to put in more furniture, excluded); 1894, Grimston *v.* Cunningham, 1 Q. B. 125 (written agreement to employ an actor; oral agreement to give him certain parts, excluded); *United States: Ala.:* 1897, Brewton *v.* Glass, 116 Ala. 629, 22 So. 916 (written agreement to build waterworks, etc.; oral agreement to give bond for faithful performance, excluded); *Ark.:* 1898, Rector *v.* Bernaschina, 64 Ark. 650, 44 S. W. 222 (written agreement to board "three persons"; oral agreement specifying the three, excluded); *Cal.:* 1897, Bradford S. Co. *v.* Joost, 117 Cal. 204, 48 Pac. 1083 (agreement as to the use of collateral security); 1897, Wolters *v.* King, 119 id. 172, 51 Pac. 35 (written agreement for commissions; oral agreement as to time of payment received); *Colo.:* 1896, United States M. A. Ass'n *v.* Kittenring, 22 Colo. 257, 44 Pac. 595 (oral agreement different from terms of policy; excluded); *Fla.:* 1897, Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736 (papers not purporting to contain the whole agreement; other evidence admitted); *Ida.:* 1897, First Nat'l Bank *v.* Bews, 5 Ida. 678, 51 Pac. 777 (mortgage of building, etc.; oral agreement of mortgagees to insure for $25,000, excluded); *Ind.:* 1855, Noble *v.* Epperly, 6 Ind. 468, 471 (replevin; written agreement between the parties affecting an alleged partnership; their true intent in making the agreement allowed to be shown, on the facts); 1859, Draper *v.* Vanhorn, 12 id. 352 (treated as similar); 1859, Williams *v.* Dewitt, 12 id. 309, 312 (writing containing terms of arbitration, held exclusive); 1896, Smith *v.* McClain, 146 id. 77, 45 N. E. 41 (the fact rejected that a quit-claim deed transferring the interest of heirs to an estate was intended merely as a partition, and therefore merely severed unity of possession without conferring additional title); 1898, Lowry *v.* Downey, 150 id. 364, 50 N. E. 79 (exchange of land by deeds; oral agreement by one party to pay off an incumbrance on the land conveyed, admitted); *Ia.:* 1894, Lerch *v.* Times Co., 91 Ia. 750, 60 N. W. 611 (written lease; oral agreement to put in a steam-heating apparatus, excluded); 1897, Beeson *v.* Green, 103 id. 406, 72 N. W. 555 (deed containing assumption of mortgages; grantee not allowed to deny the agreement); *Kan.:* 1899, Milich *v.* Packing Co., 60 Kan. 229, 56 Pac. 1 (contract between next of kin and one charged with

§ 2443. **Rule applied to Negotiable Instruments; General Principle.** The general principle of Integration (*ante*, § 2425) — in other words, the rule

deceased's death, the former releasing and agreeing to procure a release from another, the latter agreeing to pay; parol agreement by the latter to employ the former, excluded); *Ky.*: 1898, Sutton *v.* Lumber Co., — Ky. —, 44 S. W. 86 (written agreement for hauling lumber; agreement to furnish right of way, excluded); 1898, Vansant *v.* Runyon, — id. — , 44 S. W. 949 (lumber-contract; agreement as to mode of advances, excluded); *Me.*: 1898, Gould *v.* Excelsior Co., 91 Me. 214, 39 Atl. 555 (written agreement for cutting, peeling, and driving poplar timber; oral agreement as to who should scale it, received); *Md.*: 1900, Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390, 45 Atl. 456 (defendant bought of plaintiff a furnace with the written guaranty that it "will save 12 per cent in cost of fuel over present method of making steam"; oral agreement that the "saving of 12 per cent" was to be determined by a comparative test "measured by the number of tons of coal consumed before the Hawley furnace was put in with the coal consumed after it was put in"; held admissible); *Mass.*: 1843, Brockett *v.* Bartholomew, 6 Metc. 396 (the understanding of all the parties to a lease, that the amounts payable included the price for the stock of goods agreed by the writing to be purchased, excluded); 1876, Carr *v.* Dooley, 119 Mass. 294 (deed of land; oral agreement by the vendor to pay for an adjacent sewer in the course of construction, admitted); 1887, Graffam *v.* Pierce, 143 id. 386, 9 N. E. 819 (deed of two houses and lease of a hall, by defendant to plaintiff; an oral agreement by defendant to put hard-pine flooring into the hall, admitted); 1888, Ayer *v.* Mfg. Co., 147 id. 46, 16 N. E. 754 (sale of soap; vendor's agreement to advertise it, admitted); 1892, Durkin *v.* Cobleigh, 156 id. 108, 30 N. E. 474 (deed of land described as bounded on a street; the vendor's oral agreement to build the street, and to put in water connections, admitted as "an independent collateral agreement which need not be included in the deed"); 1896, Rackemann *v.* Impr. Co., 167 id. 1, 44 N. E. 990 (agreement by a vendor of land not to sell adjoining lots at a less price, admitted); *Mich.*: 1894, Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774 (sale of land; agreement to return one third of the proceeds of the crop, excluded); 1895, Hutchison Mf'g Co. *v.* Pinch, 107 id. 12, 64 N. W. 729, 66 N. W. 340 (agreement to pay for machinery when the mill "gives good results"; parol condition as to the power of the machinery, excluded); 1896, Harrison *v.* Howe, 109 id. 476, 67 N. W. 527 (a lease allowed sub-leasing for "business purposes"; an agreement not to sub-lease for a saloon, excluded); 1897, Patek *v.* Waples, 114 id. 669, 72 N. W. 995 (written stipulation for discontinuance without costs; oral agreement to pay counsel fees, admitted); *Minn.*: 1896, Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081 (a contract to give a credit on specified terms; agreement to give similar credits on other terms held admissible); *Miss.*: 1898, Maxwell *v.* Chamberlin, — Miss. —, 23 So. 266 (written agreement conveying property subject to a lien; oral agreement by the grantee to assume the debt secured, excluded); *Nebr.*: 1898, Sylvester *v.* Paper Co., 55 Nebr. 621, 75 N. W. 1092 (agreement concerning personal services in a printing establishment); *N. J.*: 1896, McTague *v.* Finnegan, 54 N. J. Eq. 454, 35 Atl. 542 (agreement as to inheritance and support); *N. Y.*: 1897, Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041 (a contract of sale of stock and fixtures contained nothing about the price, except the figures "$2500"; extrinsic agreement as to the price, admitted); *Oh.*: 1895, Tuttle *v.* Burgett, 53 Oh. St. 498, 42 N. E. 427 (in a contract in covenant form to furnish support, an agreement that the promisee would live at a certain place was excluded); *S. D.*: 1896, Roberts *v.* Machine Co., 8 S. D. 579, 67 N. W. 607 (commission-agent's contract); *Tenn.*: 1896, Hines *v.* Wilcox, 96 Tenn. 148, 33 S. W. 914 (memorandum of lease dealing only with the obligations of the tenant; oral promise of the landlord to put in repair, admitted); 1896, Lewis *v.* Tumley, 97 id. 197, 36 S. W. 872 (deed of sale; provision for the transfer of insurance policies, admitted); *Tex.*: 1895, Jones *v.* Risley, 91 Tex. 1, 32 S. W. 1027 (building contract; agreement as to powers of engineer, rejected); *U. S.*: 1895, The Poconoket, 67 Fed. 267 (agreement as to the vesting of title of a vessel, the construction-agreement being silent, admitted); 1895, Harman *v.* Harman, 17 C. C. A. 479, 70 Fed. 894, 896 (lease of land in writing; parol agreement by the lessor to devise the lands to the lessees on his death, on condition that they improved the land and paid an annual rent, admitted); 1897, Godkin *v.* Monahan, 27 id. 410, 83 Fed. 116 (written agreement to cut, bank, and deliver timber; oral agreement by the other party to furnish a place for banking, excluded); 1898, Reid *v.* Diamond P. G. Co., 29 id. 110, 85 Fed. 193 (written agreement for sale at a certain price; oral agreement for reduction of price in case of a fall in the market, excluded); 1902, Sun P. & P. Ass'n *v.* Edwards, 51 id. 279, 113 Fed. 445 (contract of employment of a superintendent of printing, mentioning salary and powers, held to exclude an additional oral agreement by the appointee to furnish compositors and other employees); *Utah*: 1897, Moyle *v.* Congreg. Soc., 16 Utah 69, 50 Pac. 806 (agreement as to the effect of an assignment of a contract, excluded); *Vt.*: 1897, Pictorial League *v.* Nelson, 69 Vt. 162, 37 Atl. 247 (contract to send cuts, etc.); *Va.*: 1895, Witz *v.* Fite, 91 Va. 446, 22 S. E. 171 (whether the giving of a higher security merges other securities); *W. Va.*: 1895, Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611 (sale of fruit-land; oral agreement to allow the buyer to take fruit from adjoining land of the seller till the trees bought should bear fruit, excluded); 1895, Wilfong *v.* Johnson, ib. 283, 23 S. E. 730 (agreement to furnish support, as a consideration for a conveyance); *Wis.*: 1897, Oliver *v.* Hail, 95

against "varying the terms" of a document — takes on an altogether peculiar aspect when applied to agreements collateral to a negotiable instrument.

The first characteristic feature of such a document, as being the embodiment of an obligation capable of transfer without hindrance, is, not merely that all the essential terms of the obligation — persons, amount, and time, — *must* be therein contained in writing (*post*, § 2451), but that certain others than these essential terms *must not* be. The advantages of unhindered transfer, due to the certainty and precision of its terms and the independence of a transferee's rights, can be attained only by limiting the scope of the obligation to a few elemental attributes. Its contents therefore are both predetermined and limited, if it is to possess the character of negotiability at all:

1789, *Eyre*, L. C. B., in *Minet* v. *Gibson*, 2 H. Bl. 569: "Everything which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty and creates a debt or duty by its own proper force (whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom) appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise anything better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument demands that the simplicity of it should be protected, and that it should never be entangled in the infinitely complicated transactions of particular individuals into whose hands it may happen to come."

1846, *Gibson*, C. J., in *Overton* v. *Tyler*, 3 Pa. St. 346: "A negotiable bill or note is a courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and, though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it, and destroy it."

That it *must* contain some things is therefore not so important for the present purpose as that it must *not* contain other things.

The other important consideration, tending to affect the present principle, is that the largest part of the terms of the obligation of a negotiable instru-

Wis. 364, 70 N. W. 346 (time of payment, excluded); 1897, Morgan *v.* S. M. L. V. Co., 97 id. 275, 72 N. W. 872 (conveyance subject to mortgage; grantee's agreement to pay mortgage, allowed to be shown).

The peculiar *Pennsylvania* rule (*ante*, § 2431) is illustrated in the following cases: 1895, Dixon-Woods Co. *v.* Glass Co., 169 Pa. 167, 32 Atl. 432 (written contract to give the plaintiff possession of defendant's premises for the purpose of building; parol agreement at the time to provide certain room for storage, excluded); 1897, Dickson *v.* Mfg. Co., 179 id. 343, 36 Atl. 246 (agreement as to time, the original contract of employment being silent, excluded); 1897, Beaver *v.* Slear, 182 id. 213, 37 Atl. 991 (a note for one day not mentioning interest, but legally subject to interest after maturity; an agreement as to the payment of interest during life, admitted); 1898, Myerstown Bank *v.* Roessler, 186 id. 431, 40 Atl. 963 (agreement not to assign a mortgage in a certain way, admitted).

For proving a *document's date* erroneous, see *ante*, § 2410.

For proving the parties' "*understanding*" as to the terms of a contract, see *ante*, § 1971 (Opinion rule) and *post*, § 2465 (Interpretation).

For the use of an *account stated*, as embodying an agreement, see *ante*, § 1071.

ment is *annexed to it by the law*, without expression in the document. The rules of presentment and demand, of acceptance and dishonor, of transfer of title and obligations by indorsement, of primary and secondary liability — all of the terms, except the individually variant ones of person, amount, time, and perhaps place, are prescribed and annexed by the law. Moreover, they form a systematic whole, and are implied as a whole if at all.

What is the situation, then, of parties who wish to employ a negotiable instrument for the sake of some one or more specific attributes, but wish also to *modify for their own case some of the other generic consequences ordinarily implied* as a part of the whole? They cannot specify these modifications in the instrument without destroying all its negotiable qualities, including those which they desire to secure.[1] On the other hand, by making no specific modification, they will be fixed with consequences which they do not desire. For example, A is desirous of obtaining the use of B's credit in buying from C, but B owes nothing to A; if B draws a bill of exchange on A, payable to C, and A accepts it, this will secure the purpose of adding B's credit and liability to the obligation and C will consent to receive it; then if A fails to pay at maturity, and B is obliged to pay, the normal consequence, by implication of law, is that B recovers the amount from A. Here no modification of the law's annexed incidents is necessary for carrying out all parts of their desired transaction. But suppose that C will not consent to receive A as the primary obligor, but insists on having B in that relation; then this purpose can be accomplished by drafting the bill in A's name as drawer and B's name as drawee and acceptor, or by drafting a note in B's name as maker, with A's name as payee and indorser. But in these two cases, if B, the primary obligor, is compelled by C to pay, there remains to him, as acceptor or maker, no claim for reimbursement by A, or, if A is compelled to pay C, then A as indorser or drawer has a claim for reimbursement against B, — at least so far as the law's annexed incidents prescribe. Here, then, an agreement by A to reimburse or not to sue B must be made, and this agreement can find no place in the document, though it modifies the fixed implications of the instrument. Will the parol evidence rule refuse to recognize that agreement as enforceable? It is a platitude of the law that it will not; an accommodation bill or note is never allowed to be used against the accommodating party by the accommodated one.

The law, then, it is plain, has recognized the dilemma. It perceives that parties must constantly wish to employ a negotiable instrument for the sake of one or more of its special attributes while discarding others; it concedes that commercial transactions are variant in their exigencies, while the normal incidents of a negotiable instrument are fixed; and it does not force parties into the alternative of employing either all or none of them. It therefore

[1] The importance of this consideration is seen in an analogous situation under a statute requiring a certain document to cover named terms and no others: 1860, Chapman *v.* Callis, 2 F. & F. 161 (written bill of sale of a ship, under the Merchant Shipping Act 1854, held not to displace a prior agreement to assume the vendor's liabilities; "the parties could not have put this term of their agreement in the bills of sale").

concedes that by special agreement the parties may discard or alter a specific implied incident, so far as its operation would affect themselves.

But the applicability of the present rule in a given case is always a question of the parties' intention (*ante*, § 2430). Now, while the extent of this agreement to discard or modify would thus ordinarily be a mere question of fact as to intention, still the parties' choice of a negotiable instrument necessarily signifies the adoption of *some* essential implied feature of such an instrument, — else they would have used some other form of document; hence, they cannot be allowed to avail themselves of an *agreement which would render that choice practically meaningless*. Moreover, the written tenor of the obligation — as to person, time, and amount — varies with each document as the parties choose; hence the writing is clearly the final embodiment of the obligation in these respects. For testing the application of the rule, therefore, the following two canons may be laid down:

(*a*) As regards the *variable*, or *expressed*, terms of the obligation in the document, no extrinsic agreement can be availed of to avoid their enforcement; but, (*b*) As regards the *fixed*, or *implied*, terms of the obligation, an extrinsic agreement can be availed of, if the transaction in hand is such, as a whole, that for one purpose of it the form of a negotiable instrument, or some particular feature of it, would be essential or peculiarly convenient, while for another and separate part of the transaction a different contract would be feasible and consistent.

These two canons may now be applied to the kinds of agreements most commonly arising, — the purpose here being not to consider the state of the law in detail,[2] but merely to illustrate the application of the general principle to this class of documents.

§ 2444. **Same: (*a*) Agreements affecting the Express Terms of the Document.** (1) An extrinsic agreement as to the *mode of payment*,[1] or the *amount* of payment,[2] must be, by the foregoing test, ineffective, since the parties have expressly dealt with those matters in the instrument; and although an agreement to concede a *credit* or *counter claim*, as offsetting the obligation of the instrument, would be a separate transaction and therefore valid, yet the distinction between the two may sometimes be hard to draw.[3]

(2) An extrinsic agreement as to the *time of payment* is for the same reason ineffectual,[4] although an agreement of *renewal*, which may practically be

[2] See a note collecting the authorities, appended to American Gas & V. M. Co. *v.* Wood, (1897) 90 Me. 516, 38 Atl. 548, in 43 L. R. A. 449.

[1] 1896, Stein *v.* Fogarty, 4 Ida. 702, 43 Pac. 681 (agreement that a promissory note should be payable in labor, excluded); 1895, Mumford *v.* Tolman, 157 Ill. 258, 41 N. E. 617 (excluding a parol agreement that a note was payable only out of certain dividends).

[2] 1895, Loudermilk *v.* Loudermilk, 93 Ga. 443, 21 S. E. 77 (agreement not to collect more than a limited sum on a note, excluded).

[3] 1897, Phelps *v.* Abbott, 114 Mich. 88, 72 N. W. 3 (agreement to credit on a note a sum to be found due the maker, excluded); 1902, Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303 (agreement that any deposit made in the payee bank by the maker should be credited against the note, held admissible); 1896, Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80 (agreement that notes should be paid by an account-counterclaim, admitted).

[4] 1819, Woodbridge *v.* Spooner, 3 B. & Ald. 233 (agreement between maker and payee that a note payable on demand should not be payable till the death of the maker, excluded); 1895, Getto *v* Binkert, 55 Kan. 617, 40 Pac. 925

equivalent, is in theory an agreement for an independent transaction and should be recognized.[5] An agreement subjecting the obligation of the instrument to any *condition* or contingency, whether in time or otherwise, is ineffective, because the terms of a negotiable instrument are expressly unconditional;[6] if it be said that the law would not permit the condition to be inserted and that thus it must be extrinsic if at all, the answer is (according to the second canon above stated) that there would then have been no peculiar necessity for resorting to the form of a negotiable instrument.

(3) An agreement *not to enforce* or *sue upon the instrument at all* must be equally ineffective;[7] the only doubt here arising from the necessity of dis-

(agreement fixing a different time of payment, excluded); 1894, Van Etten *v.* Howell, 40 Nebr. 850, 59 N. W. 389 (that a note due in a certain time should not be collected till a certain suit was decided, excluded); 1857, Brown *v.* Wiley, 20 How. 442, 447 (bill of exchange payable May 1, 1855; agreement between the parties that it should not be presented for acceptance until a certain other draft had been provided for, excluded). *Contra:* 1808, Dow *v.* Tuttle, 4 Mass. 414 (note payable one year from Feb. 16, 1804; an agreement that "payment should not be demanded until the expiration of five years," held to be "a collateral promise" and actionable, and said to be "in chancery a sufficient ground for injunction").

[5] *Contra:* 1811, Hoare *v.* Graham, 3 Camp. 57 (agreement by indorsees with indorsers that the note should be renewed when due, excluded, as an "incongruous parol condition"); 1898, New London Cred. Syndicate *v.* Neale, 2 Q. B. 487 (agreement to renew a bill of exchange if not paid at maturity, excluded). Cases *pro* and *con* are cited in Ames' Cases on Bills and Notes, II, 124, note.

[6] *Eng.:* 1817, Free *v.* Hawkins, Holt N. P. 550, 8 Taunt. 92 (agreement, between plaintiff as indorsee and defendant as indorser of a note indorsed as security for the maker, not to enforce payment till after the sale of the maker's effects, held not receivable); 1830, Moseley *v.* Hanford, 10 B. & C. 729 (note payable on demand; stipulation that the note should not be payable till the payee delivered possession of premises and rendered account, excluded); 1835, Foster *v.* Jolly, 1 C. M. & R. 703 (action by the payee against the maker, on a note payable 14 days after date; agreement that it should not be enforced in case the plaintiff's principal obtained a verdict against the defendant's brother-in-law, excluded; L. C. B. Abinger: "The maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you upon a contingency'"); 1836, Adams *v.* Wordley, 1 M. & W. 374 (action by the drawer against the maker of bills payable in 6 and 12 months; agreement that until the plaintiff should recover on a certain note he should not require payment of the bills, excluded; Parke, B.: "You seek by a parol contemporaneous agreement to alter the absolute engagement entered into by the bills"); *U. S.:* 1853, Harlow *v.* Boswell, 15 Ill. 56 (note payable 12 months after date "or as soon as I can sell $50 worth" of goods; an oral agreement that the note should not become due until $50 of goods were sold was excluded); 1896, Murchie *v.* Peck, 160 id. 175, 43 N. E. 356 (agreement that payment of a note be dependent upon the sale of property by the maker, excluded); 1895, Northern Trust Co. *v.* Hiltgen, 62 Minn. 361, 64 N. W. 909 (excluding an agreement that a note should not be valid if the maker performed a certain contract); 1894, Wilson *v.* Wilson, 26 Or. 251, 38 Pac. 185 (agreement that a note should not be paid except on a specified condition, excluded); 1902, Levy & Cohn M. Co. *v.* Kauffman, 52 C. C. A. 126, 114 Fed. 170 (oral agreement that an acceptance of a draft be on condition that the payee should advance other money to other parties, excluded); 1895, Gurney *v.* Morrison, 12 Wash. 456, 41 Pac. 192 (an agreement that notes given for the benefit of a corporation to be formed should not be binding after its formation, excluded). Other cases are cited in Ames' Cases on Bills and Notes, II, 133, note. *Contra:* 1899, Quin *v.* Sexton, 125 N. C. 447, 34 S. E. 542 (that a note for 12 months was not to be paid until a note of K. was paid, allowed to be shown).

The only doubt in these cases can arise from the occasional necessity of distinguishing the principle of § 2409, *ante*, which permits a condition precedent to the existence of the obligation, *i. e.* an *escrow*, to be valid.

Sometimes an agreement to hold the instrument as *security* (which by the principle of § 2437, *ante*, would be valid) presents in appearance an agreement resembling the present sort: 1897, Clinch Co. *v.* Willing, 180 Pa. 165, 36 Atl. 737 (notes given for the purchase of land; an agreement that the land held as security should first be sold and the proceeds applied before proceeding against the maker, enforced).

[7] 1874, Davis *v.* Randall, 115 Mass. 547, 551 (agreement between an indorsee and an acceptor for accommodation that the indorsee would not enforce payment, excluded; "the acceptance of the defendant was an absolute promise to pay"); 1895, First Nat'l Bank *v.* Foote, 12 Utah 157, 42 Pac. 205 (that a note was signed on the assurance that it would not be enforced, excluded). *Contra:* 1858, Norman *v.* Norman, 11 Ind. 288 (agreement to hold merely as a receipt a note given by the defendant's son to his father's executrix for money received by the former as an advancement, admitted, as an agreement which would have "entitled in equity to a cancellation of the instruments"). This

tinguishing between this rule and another rule (*ante*, § 2406), which concedes that a document intended merely as a friendly memorandum is without legal effect. On the other hand, an agreement by an *accommodated party*, who appears on the face of the document as the obligee (*e. g.* the payee of a note), not to enforce it against the nominal obligor who accommodates him, is of course effective.[8] The distinction between the two is apparent from what has been already said (*ante*, § 2443). In the former instance, there being no purpose of further negotiation of the obligation, the form of a negotiable instrument was wholly unnecessary, if the transaction had been what the defendant claims, for a receipt or some other memorandum would have served equally well. But in the latter instance, the essential purpose being to negotiate the obligor's credit with other parties, a negotiable instrument was indispensable, and the transaction between the original parties was necessarily extrinsic to that instrument. It may be added that the explanation, advanced by high authority, that the avoidance of circuity of action is the ground of this distinction,[9] seems not to suffice, for it serves only to determine whether a valid agreement which would secure an injunction in equity would suffice as an equitable defence in a common law suit, and it leaves undetermined the question whether the agreement can be recognized at all under the parol evidence rule, even in equity.

(4) An agreement between one *co-maker* and the *payee*, to hold the *former as surety* only, seems at first sight to be a mere condition qualifying the face of the instrument, and therefore ineffective; but, as in the case of accommodation paper, it may be that the negotiation of the instrument requires several parties having primary liability; hence the surety would have to appear as co-maker and not as a drawer, and the suretyship agreement would have to be extrinsic. Such an agreement is generally given effect.[10]

(5) The question whether one who signs as "*agent*"[11] or "*president*"[12] or "*guardian*"[13] is personally liable seems to be mainly a question of interpretation; for if no such word had been inserted, the agreement would be in-

ruling, as well as a few similar ones cited in Ames' Cases on Bills and Notes, II, 99, note, are probably due to a misapplication of the distinction above-mentioned in the text.

[8] 1836, Thompson *v.* Clubley, 1 M. & W. 212 (indorsee's accommodation; the agreement that "no claim or demand should at any time be made against the defendant" was objected to as "contradicting the written contract of acceptance, which purported to be an absolute engagement to pay the bill"; but it was held a "collateral agreement, and not part of the original contract").

[9] Professor Ames, in his Cases on Bills and Notes, Summary, II, 804.

[10] 1809, Leeds *v.* Lancashire, 2 Camp. 205 (as between the original parties, two signers of a promissory note were allowed to show that they signed merely as guarantors of the maker); 1849, Bank *v.* Mumford, 6 Ga. 44, 52, 61, 66 (Nisbet, J., diss.); 1863, Ward *v.* Stout, 32 Ill. 399, 409; 1870, Rose *v.* Williams, 5 Kan. 483, 489 ("It is simply pleading and proving a fact outside and beyond the terms of the contract"); 1838, Harris *v.* Brooks, 21 Pick. 195 ("It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption"); 1845, Garrett *v.* Ferguson, 9 Mo. 125; and cases cited in Brandt, Suretyship, 1891, 2d ed., §§ 29, 30. *Contra:* 1895, McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480 (a married woman pledged land to pay a note signed by her husband and others; the fact that they were agreed to be sureties only, and that she knew it, was excluded, on the ground of the pledgor being a married woman; three judges dissenting).

[11] 1850, Hicks *v.* Hinde, 9 Barb. 528; 1893, Frankland *v.* Johnson, 147 Ill. 520, 523, 35 N. E. 480, and cases cited in Ames' Cases on Bills and Notes, II, 224, note. Compare § 2438, *ante*.

[12] 1847, Kean *v.* Davis, 21 N. J. L. 683, 688; Cook, Corporations, 4th ed., 1891, § 722.

[13] 1901, Andrus *v.* Blazzard, 23 Utah 233, 63 Pac. 888.

effectual, as totally destroying the validity of the instrument; while if the signature had been of the principal, ward, or company, "by" the representative, the representative would not have been liable; the question thus becomes one of the construction of the document.

It may be added that by the principle of novation (*ante*, § 2441), any of these agreements which when contemporaneous with the instrument's execution are ineffective, may of course be effective when *made subsequently*, as a separate transaction; and further, that by the nature of negotiable instruments, these extrinsic agreements, so far as recognized at all, are effective, naturally, against only the parties assenting to them, and not against *holders for value without notice* before maturity.

§ 2445. **Same**: (*b*) **Agreements affecting the Implied Terms of the Instrument.** The application of the rule to cases falling under the second class above-mentioned (§ 2443) may now be considered.

(1) An extrinsic agreement *not to transfer* an instrument payable "to order" cannot be effective;[1] for the term "to order" imports negotiability, and there is no purpose which the term could serve if that element were discarded.

(2) An extrinsic agreement, between drawer and payee, *not to enforce the drawer's secondary liability* on the bill, is plainly a discarding of the implied terms of a drawer's contract. Nevertheless, since there are several varieties of transactions for which such a form of draft would be peculiarly appropriate without involving the nominal drawer's liability — such as payment by a seller's agent to his principal, or payment by a buyer's agent to the seller, or assignment of a claim without guaranty of the amount collectible —, the agreement ought to be given effect.[2]

(3) For the same reason, an extrinsic agreement between *indorser* and *indorsee*, cutting down the indorser's implied liability, either by *denying recourse* altogether, or by placing both as co-sureties for a prior party, or by limiting liability to a *warranty of genuineness* of prior signatures, is effective;[3] because the act of indorsement is necessary for the purpose of trans-

[1] 1903, Black *v.* Bank, 96 Md. 399, 54 Atl. 88 (agreement with a payee not to negotiate notes, excluded); 1895, Waddle *v.* Owen, 43 Nebr. 489, 61 N. W. 731 (agreement between drawer and payee of a bill to the payee's order that the payee should merely collect and not negotiate it, excluded; "having deliberately inserted words importing negotiability, the drawer cannot be heard to urge a contemporaneous oral agreement contrary to the plain terms of the bill").

[2] 1840, Roberts *v.* Austin, 5 Whart. 313 (payment by a buyer's agent to the seller); 1850, Hicks *v.* Hinde, 9 Barb. 528 (similar); 1896, Montgomery *v.* Page, 29 Or. 320, 44 Pac. 689 (agreement between maker and indorser to be co-sureties only). *Contra:* 1895, Bryan *v.* Duff, 12 Wash. 233, 48 Pac. 936 (the defendant being indebted to the plaintiff, and H. being indebted to the defendant, the latter drew a bill on H. to the plaintiff's order; an agreement between the plaintiff and the defendant that the former would not hold the latter liable for the drawee's default, excluded; Dunbar, J., diss., on the ground that this was virtually an agreement to take the bill in absolute payment of the plaintiff's claim). Other cases *pro* and *con* are cited in Ames' Cases on Bills & Notes, II, 218, 224, note.

[3] 1828, Pike *v.* Street, M. & M. 226 (oral agreement that the indorsee should not sue the defendant as indorser, received); and cases *pro* and *con* cited in Ames' Cases, id., II, 135, note; 1870, Denton *v.* Peters, L. R. 5 Q. B. 475 (agreement by an indorsee to hold merely as agent for collection); and cases cited in Ames' Cases, id., II, 185, note; 1870, Ross *v.* Espy, 66 Pa. 481 (agreement between the plaintiff indorsee and the defendant indorser, that they should be merely sureties for the maker, admitted as a defence, the defendant having paid into Court one half of the amount; "the agreement . . . was a

ferring title, and yet the transfer of title may be only one feature of several transactions, the remaining features of which cannot be embodied in the instrument without impairing its credit, — such as a purchase of a claim on speculation as to the obligor's credit, or a transfer to an agent for collection. A distinction, however, is in some jurisdictions here taken between an indorsement in full and an *indorsement in blank;* and in the latter case the agreement, either when denying recourse,[4] or when limiting the liability to that of guarantor,[5] is treated as invalid; but it is difficult to see what ground there is on principle for this distinction.

(4) The extrinsic agreement made with an *anomalous indorser* — *i. e.* one who, not being the maker, drawer, drawee, or payee, writes his name upon the back of a negotiable note before delivery to the payee or before indorsement by him — should on the same principle be given effect; and this is generally conceded.[6]

§ 2446. **Rule binding upon the Parties to the Document only.** It is commonly said that the parol evidence rule, in the present aspect, is binding upon only those persons who are parties to the document. This form of statement suffices in most instances to reach correct results; but it is not sound on principle. The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes (*ante*, § 2425). Hence, so far as that effect and those purposes are concerned, they must be found in that writing and nowhere else, no matter who may desire to avail himself of it. But so far as other effects and purposes are concerned, the writing has not superseded their other conduct, nor other persons' conduct, and it may still be resorted to for any other purpose for which it is material, either by other persons or by themselves. For example, where the issue is as to title by adverse possession of a right of way, and the deed has not reserved such a right, a conversation between grantor and grantee, the former conceding the way, would be available as affecting the permissory nature of the grantee's possession;[1] because the deed embodied only the title as constituted by grant, and did not cover the act of permissory user. So, too, a creditor, attacking a mortgage-deed as

flat bar to Espy's right to recover more than the one-half of the money"); and cases cited in Ames' Cases, id., II, 245, note.

The further question may then arise whether, on an indorsement *expressly made without recourse*, an extrinsic *waiver* even of the *implied warranty of genuineness* may be effective: 1902, Carroll *v.* Nodine, 41 Or. 412, 69 Pac. 51.

[4] 1865, Harrison *v.* McKim, 18 Ia. 485 (leading opinion, by Wright, C. J.; Cole, J., diss.); 1895, Iowa V. S. Bank *v.* Sigstad, 96 id. 491, 65 N. W. 407 (rule applied to a blank indorsement of a note containing a full indorser's contract on the face of it); 1881, Martin *v.* Cole, 104 U. S. 30 (leading opinion, by Matthews, J.). *Contra:* 1895, True *v.* Bullard, 45 Nebr. 409, 63 N. W. 824.

[5] 1872, Beattie *v.* Browne, 64 Ill. 360 ("It cannot be a parol contract where the payee indorses a note in blank, for there is in legal contemplation written over his name the extent and character of his undertaking"); 1896, Hately *v.* Pike, 162 id. 241, 44 N. E. 441 (indorsement in blank; oral agreement to sign as guarantor not admitted; explaining prior cases, and distinguishing the contrary rule for a stranger's indorsed signature); 1856, Prescott Bank *v.* Caverly, 7 Gray 217 (agreement by indorsee with indorser that the latter signed only as guarantor of identity, not received); and cases cited *pro* and *con* in Ames' Cases, id., II, 233, note.

[6] 1875, Boynton *v.* Pierce, 79 Ill. 145; 1895, Richardson *v.* Foster, 73 Miss. 12, 18 So. 573; 1903, Elliott *v.* Moreland, — N. J. L. —, 54 Atl. 224; and cases cited in Ames' Cases on Bills and Notes, I, 269, note.

[1] 1855, Ashley *v.* Ashley, 4 Gray 197.

fraudulent, may establish the debtor's fraudulent extrinsic agreement with the mortgagee,[2] because the agreement is here invoked not as effecting a transfer but as constituting fraud; for a creditor claiming under the deed could not avail himself of the agreement to enlarge the terms of the transfer. Again, an oral promise by an employer to concede certain moneys to an employee could not be availed of to enlarge the employee's rights, where a written contract covered the subject; but in a prosecution for embezzlement, where the employee's criminal intent in taking the money is the issue, the extrinsic agreement of the employer may be availed of as affecting the employee's honest belief that he was entitled.[3] Again, to overthrow the words of a will, the testator's extrinsic declarations of testamentary intent cannot be used, because here the object is to give testamentary effect to that which the will has superseded for that purpose; but if the object be merely to use these declarations evidentially as indication of the testator's plan, to prove the probable contents of a lost will, they may be used for this distinct purpose.[4] The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances for the very purpose for which the writing has superseded them as the legal act.

Nevertheless, owing to the inaccurate phrasing of the doctrine as commonly laid down — that the rule does not apply to others than the parties to the document — the precedents are often arbitrary and confused, and cannot be reconciled by any general distinctions.[5]

[2] 1894, Jewett *v.* Sundback, 5 S. D. 111, 119, 58 N. W. 20.

[3] 1898, Walker *v.* State, 117 Ala. 42, 23 So. 149.

[4] Cases cited *ante*, §§ 1735–1737.

[5] 1848, *Re* Clapton, 3 Cox Cr. 126 (embezzlement of funds by a servant; the memorandum of agreement covering the nature of his duties, required to be produced); 1896, Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354 (agreement of sale; between assignees of buyer and seller, not claiming under them, an oral agreement admitted); 1895, Roof *v.* Pulley Co., 36 Fla. 284, 18 So. 597 (assignee of property and note); 1900, Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291; 1901, Central Coal & C. Co. *v.* Good, — Ind. T. —, 64 S. W. 677 (breach of contract to pay for lumber furnished for a railroad; defendant claimed that plaintiff had failed to perform and had thus caused him damage; testimony by another contractor as to the part of the construction to be done by him, held admissible, irrespective of the terms of this contract); 1903, Livingston *v.* Heck, — Ia. —, 94 N. W. 1098 (action against the purchaser from T. of cattle sold to T. by the plaintiff, and mortgaged back to the plaintiff; the oral agreement between T. and the plaintiff, permitting a sale free from the mortgage, admitted); 1899, Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17 (mortgage from S. to defendant, expressly excluding intoxicating liquors, and an assignment of the mortgage by defendant to plaintiff; that the transaction in truth covered intoxicating liquors, allowed to be shown); 1895, Libby *v.* Land Co., 67 N. H. 587, 32 Atl. 772 (garnishor against a stock-subscriber as garnishee, whose parol agreement to pay 25% only of face value of stock was not received); 1893, Plainfield F. N. Bank *v.* Dunn, 58 N. J. L. 404, 27 Atl. 908 (action against indorser; oral agreement with J., not a party to the written agreement, to extend time of payment, admitted); 1897, Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292 (mechanic's lien for labor done by the plaintiff upon a building owned by the defendant and leased by R.; the lease of R. containing a clause against alterations without the lessor's consent, on penalty of forfeiture, the defendant gave a written consent; held, that since the sole purpose of this writing was to avoid the lessee's forfeiture, it did not exclude the oral transactions at the time relative to the defendant's consent, for the purpose of determining whether the statutory consent to the plaintiff's labor had been given; a good example of the principle); 1902, Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523 (action for goods sold to defendant through her agent S., the issue being whether S., was general selling-agent or not; the plaintiff having introduced a bill of sale of the store from S. to defendant, in which defendant appointed S. to remain as general selling-agent, the defendant was allowed to show that the sale was a mortgage only, and thus S. remained owner; unsound, because the document was offered as creating the plaintiff's right; the Court erroneously saying that it was "not offered for the

§ 2447. **Burden of Proof; Who must Produce the Document.** If a document has by the parties' intent been made the sole embodiment of the transaction, then all proof of the transaction involves proof of the document (*ante*, § 2425); and proof of the document involves a production of the original document or an accounting for its absence (*ante*, § 1179). But obviously the latter requirement depends upon the assumption first above made, namely, that the parties *have* embodied the transaction in writing. The question then arises, On whom is the burden of proof to show that they have or have not done so? This question, in turn, has two branches.

(1) In an action on a contract, for example, *must the plaintiff show* that the contract is *not* a written one, or must the defendant rather show that it *is* a written one? The practical difference will be, when it is a written one, that the plaintiff must produce or account for it, in the former view; while in the latter view, the defendant must produce or account for it, in order to prove its terms, and this requirement may be difficult to fulfil. The correct solution here seems to favor the plaintiff. In other words, there is no presumption that the transaction was reduced to a single document; therefore if the plaintiff does not involuntarily disclose such a document as a part of his case, the opponent must raise the objection and establish the fact, if he wishes to invoke the operation of the rule. The practical justification for this is that, though some document may exist, it remains uncertain whether the documents covered the precise transaction in issue, and until the opponent, by production, has demonstrated that it does, it is fairer that no assumptions should be made:

1818, *Burrough*, J., in *Stevens* v. *Pinney*, 3 B. & Ald. 349, 355 (action for work and labor): "The distinction in this case turns on the proof of the existence of the original agreement having been given by the defendant's witness instead of the plaintiff's. The latter had fully made out his case [by evidence of oral hiring], and nothing whatever was proved as to whether there had been such an agreement or not. It was therefore incumbent on the defendant to show that there had been a legal instrument of that description, or to give the plaintiff notice to produce it."[1]

purpose of asserting any rights thereunder"); 1901, Myers *v.* Taylor, 107 Tenn. 364, 64 S. W. 719 (plaintiff claimed lumber under a sale from M., who claimed by purchase of it from defendant's land, and this purchase was denied by defendant; M. was not allowed to testify to his contract irrespective of the writing; this ruling seems unsound); 1896, Johnson *v.* Portwood, 82 Tex. 235, 34 S. W. 596, 787 (agreement of sale on terms; a third person claiming a lien on the vendee's interest was allowed to show other oral terms for the sale); 1901, O'Shea *v.* R. Co., 44 C. C. A. 601, 105 Fed. 559 (the plaintiff was injured by the joint negligence of defeudant and C., and executed an instrument to C. in form acknowledging satisfaction; held, that as against the defendant, though a joint tortfeasor, the plaintiff might show that the instrument was understood to be merely a covenant not to sue C.); 1903, Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377 (a landlord suing for rent was allowed to show, in spite of his deed transferring the premises, an oral agreement with the grantee that the grantor should retain the right to the rents).

[1] *Eng.*: 1818, Stevens *v.* Pinney, 3 B. & Ald. 349, 8 Taunt. 327 (work and labor; on the defendant's side it appeared that there was a writing covering the subject; held, that it was for the defendant to prove; therefore, he should have given notice to produce, before proving the contents, *i. e.* before being able to invoke its controlling effect); 1827, Littledale, J., in Reed *v.* Deere, 7 B. & C. 261 ("If indeed a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written instrument, the latter must produce it"); 1840, Magnay *v.* Knight, 1 Man. & G. 944 (action for services; general rule applied; production required of the defendant, and the defendant held not to cure his position by having given notice; since the document being unstamped was unavailable); 1860, Cox *v.* Conveless, 2 F. & F. 139 (the cross-examination may be interposed,

(2) But may not this rule be modified where the fact of a writing *appears from the plaintiff's own witnesses?* In other words, if, even before the defendant has proved the precise terms of the writing, it appears that there was *some* writing connected with the transaction, may it not then be presumed against the plaintiff that this writing covered the transaction in issue, so as to shift to him the burden of showing, by production, that it does *not* cover the transaction? Here a distinction is to be taken between the direct and the cross-examination. It is generally conceded that, when the fact of writing appears on *direct examination*, the plaintiff must produce or account for it before he can go any further.[2] But whether the same rule will be applied where the same fact has been made to appear by the defendant on the *cross-examination* of the plaintiff's witness has been the subject of variant rulings and much controversy in English practice. The argument against applying the same rule has been thus stated:

1829, *Tindal*, C. J., in *Fielder* v. *Ray*, 6 Bing. 332: "It has been argued that if it be shown that a contract is evidenced by writing, it is immaterial whether this appear on cross-examination of the plaintiff's witnesses or in the course of the defendant's evidence. But there is this difference in the case, — that if it appear by the [direct] testimony of the plaintiff's witness, the absence of the writing is an inherent defect in his cause which it is incumbent on him to get over; whereas if it appears from the defendant's witness, it is an objection which the defendant must substantiate by the production of the instrument in the regular way. Otherwise this inconvenience might follow, that the plaintiff might, on a mere assertion of the defendant, be non-suited for the non-production of a written instrument, which if it had been produced might turn out not to apply to the contract in question."

This reasoning does not seem adequate, although a few rulings have accepted it.[3] To place the burden on the plaintiff equally in such cases seems

and, on denial of any writing, evidence of its existence may be offered by the opponent, to prevent the proponent from proving the transaction orally); *U. S.:* 1866, Patterson *v.* Mining Co., 30 Cal. 360, 365 (allegation by the defendant of a sale; on the defendant's evidence, the sale appeared to be in writing; production by him required); 1867, King *v.* Randlett, 33 id. 318, 321 (same, the plaintiff alleging a sale); 1895, St. Louis A. & T. H. R. Co. *v.* Bauer, 156 Ill. 106, 40 N. E. 448 (testimony as to a railroad rule; the opponent was required to object and discover whether it was in writing, before the rule would be applied). *Contra:* 1823, Allen *v.* Potter, 2 McC. 322 (assumpsit for the value of articles bought but not delivered, etc.; in the defendant's evidence, it appeared that a bill of sale existed; production required from the plaintiff).

[2] *Eng.:* 1818, Stevens *v.* Pinney, 2 J. B. Moore 349 (action for work and labor; held, that if a writing had appeared, as a part of the plaintiff's case, to cover the matter, the plaintiff must produce it; but where he proved his case without involving it, then it was for the defendant to show its existence and give notice to produce it); 1824, Sinclair *v.* Stevenson, 1 C. & P. 582 (negotiations for a lease or sale); 1825, Cotterill *v.* Hobby, 4 B. & C. 465 (case, for injury to a reversioner's interest, the plaintiff's evidence of his interest referring to a written agreement; held, that he should produce it); 1842, Parton *v.* Cole, 6 Jur. 370 (but here the judge first looked at the document); *Can.:* 1855, Doe *v.* Blanche, 3 All. N. Br. 180 (written agreement for possession); *U. S.:* 1877, Com. *v.* Goodwin, 122 Mass. 19, 34 (whether a building was insured; production not required because no written contract was mentioned); 1867, Hatch *v.* Pryor, 42 N. Y. 441, 443 (agreement to pay a note); 1842, Eubanks *v.* Harris, 1 Speer 183, 192 (agreement as to a boundary).

[3] 1810, Doe *v.* Morris, 12 East 237 (action of ejectment, turning upon whether the landlord had a right to end the lease; on cross-examination of the plaintiff's witness, it appeared that there was a lease in writing; held, that it was for the defendant to put it in, not the plaintiff); 1810, Doe *v.* Pearson, ib. 239, note (ejectment against a tenant, turning upon the time of notice to quit; the plaintiff's witness disclosed that there was a written agreement; held, that the plaintiff was not bound to produce it); 1829, Reid *v.* Batte, M. & M. 413 (assumpsit for an entablature put on the front of a house; on cross-examination it appeared that there was a

more satisfactory, because his own witness' testimony has sufficed to show that there was *some* writing, and because a distinction between the direct and the cross-examination would tend to increase petty manœuvring and the suppression of facts. Such was the view of the majority of English judges.[4]

Here certain questions may properly be distinguished: (a) When the document is *void for want of a legal stamp*, or does not fulfil the requirement of the *statute of frauds*, it may be ineffective as a legal act, and therefore the party who is bound to produce it if he relies upon it may fail (*post*, § 2456); and thus the incidents of the burden of proof may indirectly have other consequences. (b) Where the plaintiff desires to prove a *fact independent of the document* — as when he relies upon a person's acts and not upon his written appointment, to prove his agency or official incumbency [5] —, there is of course no burden of producing the document; whether the purpose in hand is really the proof of the document or of the independent fact depends upon the principle of documentary originals, already examined (*ante*, §§ 1242–1250). (c) Where the parties have by mutual consent *waived the resort to the written transaction* and agreed to rest upon the oral facts, the question arises whether by stipulation or judicial admission a rule of substantive law or of evidence may be waived (*post*, § 2592).

3. Integration required by Law.

§ 2450. **At Common Law**; (1) **Judicial Records.** The integration of a transaction (*ante*, § 2425), *i. e.* its reduction to a single document, is either voluntary or compulsory. In the former instance it may or may not be made, as the party or parties to the act may choose; but when made, the legal consequences already noticed will follow, and the document supersedes all other utterances. In the latter instance — compulsory integration — the law insists, independently of the parties' choice, that the transaction be embodied in a single document, and when this is done, the same legal consequences attach.

written contract for the inside work on the house, but that the present claim was sued on as an extra; held that the plaintiff need not produce the contract).

[4] *Eng.:* 1800, Brewer *v.* Palmer, 3 Esp. 213 (action for use and occupation; on cross-examination, it appeared that there had been an agreement in writing; Eldon, C. J., said that "the plaintiff was bound to show what that contract was; it might contain some clauses which might prevent the plaintiff from recovering, and others for the benefit of the defendant, which he had a right to have produced"); 1816, Jeffery *v.* Walton, 1 Stark. 267; 1828, Vincent *v.* Cole, M. & M. 257 (assumpit for building a party-wall; on cross-examination it appeared that there was a written contract for the building of the house but that the party-wall claim was sued on as extra; held, that the plaintiff must first produce the document, so that it could be seen whether it covered the claim in question); 1828, R. *v.* Rawden, 8 B. & C. 708 (in proving a tenancy, the cross-examination showed a written instrument to have been made; the prover held bound to produce it); 1832, R. *v.* Padstow, 4 B. & Ad. 208; 1844, Buxton *v.* Cornish, 12 M. & W. 426 (Abinger, L. C. B.: "The practice has prevailed in Westminster Hall ever since I have known it, and before every judge for the last quarter of a century"); *Ire.:* 1841, Bridge *v.* M'Carthy, 4 Ir. L. R. 157; 1845, Thunder *v.* Warren, 8 id. 181 (requiring the plaintiff to give notice to produce); *Can.:* 1873, Betts *v.* Venning, 14 N. Br. 267, 269 (on cross-examination, here); 1852, Farley *v.* Graham, 9 U. C. Q. B. 438; *U. S.:* 1826, Boone *v.* Dyke, 3 T. B. Monr. 530, 531; 1868, Littlejohn *v.* Fowler, 5 Coldw. 284, 286 (contract for cutting timber; the existence of a writing appearing on cross-examination of the plaintiff's witness, other testimony was excluded). The following ruling stands by itself: 1854, Campbell *v.* Moore, 3 Wis. 767 (peculiar facts; Court's discretion discussed).

[5] For example: 1895, Newby *v.* Security Co., 110 Ala. 663, 17 So. 940.

The instances of compulsory integration are few. At common law the only instances appear to be those of judicial records, corporate records, and negotiable instruments. By statute have been added testaments and a few miscellaneous documents.

(1) The theory of *judicial records* is that the judgment roll, as finally made up, embodies in itself alone the entirety of the controversy as adjudicated, and thus supersedes the miscellaneous mass of oral and written pleading, motions, and orders, which have gone to make up the proceedings. The history of this theory has already been examined (*ante*, § 2426). Its principle is to-day well established in the law:

1814, *Ellenborough*, C. J., in *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565, 567: "The judgment roll imports incontrovertible verity as to all proceedings which it sets forth; and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. . . . Every part of the record, as long as it remains on the files of the Court, must be taken to speak absolute verity."

1842, *Hubbard*, J., in *Sayles* v. *Briggs*, 4 Metc. 421, 423 (in an action for malicious prosecution, to show the acquittal in the previous proceeding, the plaintiff produced the written complaint only, and wished to show orally the issuance of warrant, the arrest, the arraignment, and the discharge; no record or minutes had been made): "A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment; and the design is, not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests; and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction. They are received as the truth itself, and no averment can be made against them nor can they be varied by parol. . . . It is argued that this testimony should be received from necessity, as there is no way by which the plaintiff can obtain redress, and that this is the best evidence which now exists. But in my judgment it will be productive of far less mischief for an individual to suffer from the neglect or misfortune of an officer in not making a judicial record than to establish a precedent that the record itself or a part of it may be proved by parol, — that it may speak one language to-day and another to-morrow, depending on the different witnesses who are called or on their changing recollections. And without prescribing a rule for a case where a magistrate might by the act of God be deprived of the opportunity of making even any minutes of proceedings before him from which a record could be made (if such a case should ever occur), we are of opinion that the want of a judicial record cannot be supplied by parol evidence; and that the rules which apply to the admission of testimony to prove the contents of a lost record, or to the introduction of minutes by which the record may be extended, have no real bearing on a case like the present, where no such loss ever took place and no such minutes ever were made. A party who is to be affected by the record will in the exercise of ordinary care see that it is correctly made up; and if the officer should neglect or refuse to perform his duty, he can be compelled by mandamus to make a true record."

1854, *Merrick*, J., in *Wells* v. *Stevens*, 2 Gray, 115, 119: "It has been argued in behalf of the plaintiff [offering to show orally a claim of appeal not in the record] that the evidence offered by him should have been received, because otherwise he can obtain no redress for the loss of the right of which he complains that he has been unjustly deprived; and also because a magistrate ought not to be allowed to shield himself from responsibility for an act of wrong or oppression by an additional violation of duty in neglecting or wilfully refusing truly to record the proceedings of a case tried before him. But the rejection of

such evidence is an obvious and inevitable consequence of the incontrovertible verity which the law, for reasons lying (as it has been said) at the foundation of all well-ordered jurisprudence, attaches to judicial records. Judges and magistrates are responsible to the government from which they derive their authority, but not to individuals, for the negligent performance or wilful violation of official duty."

It is not within the present purview to trace in detail the state of the law of records, involving as it does a separate body of law, contained in a mass of variant statutes and local differences of practice. But it is worth while to notice the logical consequences of this general principle as applied at common law.

(*a*) In the first place, the record being the sole embodiment of the judicial proceedings, no other materials or utterances, oral or written, can be set up in competition with it. In other words, but less correctly, the record is *conclusive*.[1] This is so even though the record has *not been made up*;[2] for herein appears the compulsory nature of the rule, as distinguished from voluntary integration (*ante*, § 2430). It *must* be made up; and if it is not, then in legal theory there is yet no judgment or other proceeding; and it is always in the power of litigating parties to prevent hardship by compelling the proper officer to make up the record. Furthermore, if the record has been made up and is then lost or destroyed, the proof of the proceedings consists in proof of the contents of the record,[3] — though if copies are unavailable, other materials may be resorted to.[4] Finally, though the record is in the sole embodiment of the transaction, yet in an appropriate proceeding the Court may amend it so

[1] 1874, *Ex parte* Gillehrand, *re* Sidebotham, L. R. 10 Ch. App. 52 (when they "purport to contain a full record of what took place at the trial, they must be taken as the sole materials on which the Court of Appeal can proceed," unless by agreement); 1863, Michener *v.* Lloyd, 16 N. J. Eq. 38, 40 (order of a Court directing payment; oral evidence of "what passed at the time of making the order," excluded); 1841, People *v.* Gray, 25 Wend. 465 (minutes or other record of a criminal trial, not contradictable as to the plea entered); 1846, Ward *v.* Saunders, 6 Ired. 382, 385 (theoretically, the enrolled memorial of all the documents in a cause is the record, not the original documents themselves; here an objection to the originals' not having been enrolled was held waived by consent to use the originals); 1869, Coyne *v.* Souther, 61 Pa. 455, 457 (entry of satisfaction of judgment in docket by clerk, conclusive in favor of purchaser at sheriff's sale).

The principle that a *judgment* is conclusive upon the parties is a different thing (*ante*, § 1347). The present question is not what external facts are established by the judgment, but what were the actual terms of the judgment itself.

[2] 1842, Kendall *v.* Powers, 4 Metc. 553 (a record cannot be affected by parol; in an action for false imprisonment, the defendant justice was not allowed to show that a waiver of appeal, not in the record, had been made); 1842, Sayles *v.* Briggs, ib. 421, 423 (proceedings in a prosecution alleged as malicious; quoted *supra*); 1854, Wells *v.* Stevens, 2 Gray 115 (trespass against a magistrate for committing to prison without allowing an appeal; the plaintiff not allowed to show orally that he claimed an appeal, no claim being contained in the record of the magistrate; quoted *supra*); 1863, Hackett *v.* King, 6 All. 58, 60 (warrant and arrest, not provable by parol); 1866, Fleming *v.* Clark, 12 id. 191, 198 (whether a trial Court had refused to allow exceptions; an agreement of counsel, for a *habeas corpus* hearing, as to this fact, excluded; "the rulings of the Superior Court can appear only by its own records"); 1841, People *v.* Gray, 25 Wend. 465 (original minutes of a trial during session, not made up as required by statute, are not the record).

[3] 1843, Gore *v.* Elwell, 9 Shepl. 442, 444 (lost writ and return are to be proved by evidence of the record's contents, not of the parol acts); 1894, Burden *v.* Taylor, 124 Mo. 12, 22, 27 S. W. 349 (tax-collector's testimony to supply want of recitals of proceedings in a tax-deed; only the record of the proceedings, or copies of them where destroyed, receivable); 1876, Mandeville *v.* Reynolds, 68 N. Y. 528, 533 (where a judgment roll is lost, the proof is to be of the contents of the lost roll, and *semble* not of anything but its contents).

[4] 1859, Conger *v.* Converse, 9 Ia. 554, 557 (lost execution; docket-entries as preferred to oral evidence; question not decided); 1821, Cook *v.* Wood, 1 McC. 139 (on the loss of records of Court, its journals were received).

as to remove errors;[6] and thus the theory is preserved while practical injustice is avoided.

(*b*) Of the various books kept in a court, which of them is *deemed to be this record?* Here the practice and the phraseology have come to vary so much in different jurisdictions that uniformity of ruling is not attainable. But on principle there is one final and comprehensive document, termed the *judgment-roll*, for each litigation; in this are set forth all the proceedings from beginning to end; and this is theoretically *the* record:

1768, Sir *William Blackstone*, Commentaries on the Law of England, III, 317: "The record is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or oyer prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had, all entered *verbatim* on the roll, and also the issue or demurrer and joinder therein."[6]

This roll then is primarily the record, and supersedes all intermediate books of docket, minutes, entries, and the like, as well as the original papers containing the pleadings of the parties.[7] If however the time has not yet elapsed when the roll can be made up, the clerk's temporary *minutes and entries*, together with the original papers of the parties, constitute the *record ad interim*;[8] this relaxation being conceded to practical necessity. Moreover, in *inferior courts* — typically, that of a justice of the peace — in which by tradition (*ante*, § 2426) the doctrine of incontrovertible records never

[5] The following cases exemplify the rules on this subject: 1856, Weed *v.* Weed, 25 Conn. 337, 343 (where the analogy with reformation of deeds in chancery is noted); 1862, Frink *v.* Frink, 43 N. H. 508, 514; 1897, Jacks *v.* Adamson, 56 Oh. 397, 47 N. E. 48 ("all sources of information that are competent under general rules"; here the testimony of the ex-judge of probate to the fact of an order of sale); 1897, State *v.* Fiester, 32 Or. 254, 50 Pac. 561; 1873, *Ex parte* Lange, 18 Wall. 163, 167.

[6] Examples of records set out in full are given in the Commentaries, Appendix to Book III.

[7] 1807, Ayrey *v.* Davenport, 2 B. & P. N. R. 474 (the book of entries of judgments is not evidence of a judgment); 1805, Lee *v.* Meecock, 5 Esp. 177 (a day-book from the judgment-office, containing copies of the entries of judgments, etc., not admitted; "an office copy of the judgment ought to be produced," if not the docket itself; 1901, Baxter *v.* Pritchard, 113 Ia. 422, 85 N. W. 633 (record book, not judgment docket, is the judicial record).

But this strictness of the common law is not always observed; compare the following opinions: 1897, Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. 312 (whether the judgment-book suffices instead of the judgment-roll); 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 573 (clerk's "sealing-docket"; its nature well explained); 1902, Amundson *v.* Wilson, 11 N. D. 193, 91 N. W. 37 (whether a judgment-docket suffices to establish a judgment, instead of the record book).

[8] 1839, Prudeu *v.* Alden, 23 Pick. 184, 187 (the clerk first records the doings briefly "in a minute-book, called the docket, from which a full, extended, and intelligible record is afterwards to be made up; but until they can be made up, these short notes must stand as the record"); 1848, Read *v.* Sutton, 2 Cush. 115, 123 ("The docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record"; excluding testimony of the clerk and the judge as to the non-making of an order of judgment); 1861, McGrath *v.* Seagrave, 2 All. 443 ("minutes may be introduced when the record has not been drawn out *in extenso*, as containing the elements of a record, and in truth for the time being constituting the record itself"; here a docket entry, together with the original papers, was received where "every essential fact appears . . . without resorting to parol proof").

How much depends on local custom may be seen by the following case: 1850, Willard *v.* Harvey, 24 N. H. 344, 348 (the custom in this State had been not to extend the record of a judgment from the minutes and original papers until a resort to the judgment in another proceeding was needed, and then the clerk made a copy "of the record supposed to exist in legal intendment, and certified as such [copy], without the labor of first making an original"; so that "the record thus extended is deemed by the Court an original record," and is conclusive; corrections can be made only by process of amendment).

obtained, the final enrolment was never customary at common law. Hence the justice's docket or minutes, with the original papers, represent in the first instance the proceedings;[9] and though the legal theory persevered that these courts do not possess records at all, in the strict sense,[10] yet the practical features of a record are usually attributed to these books, so as to exclude proof of oral transactions.[11]

(*c*) What are *the transactions* which in legal theory *form part of the record?* Obviously many things are said and done, and many documents used, not only out of court but in court, which do not in strictness form a part of the proceedings in the controversy, and hence do not need to appear in the record, — hence may be established without regard to the contents of the record. This involves the whole theory of trials and appeals. It is enough to note that the application of the present principle is dependent on that theory;[12] for example, whether the date of a writ or declaration is disputable depends on the theory of terms of court and times of filing of pleadings,[13] and further to note that so far as the purpose is not to rely on the judicial proceeding and therefore on the record, but to prove the parties' conduct in other aspects, the record is not involved and therefore does not control.[14]

It remains to distinguish some other principles often invoked in the proof

[9] 1860, State *v.* Bartlett, 47 Me. 396, 401 (original complaint and warrant with return, admitted); 1882, Folsom *v.* Cressey, 73 id. 270 (citation and return, etc., in poor-debtor's Court; "such inferior Courts are not required to make up full and formal records, and their doings may be shown by their minutes and the original papers, or certified copies"); 1825, Com. *v.* Bolkom, 3 Pick. 281, 282 (a Court of Sessions licensing innholders does not act judicially; its minutes are therefore admissible); 1836, Davidson *v.* Slocomb, 18 id. 464, 466 ("the minutes of the justice [of the peace] are not technically a record; but they contain all the material parts which the record would comprise if it were made up at large and in the usual form"; here used because the justice had died before extending them); 1897, State *v.* Rice, 49 S. C. 418, 27 S. E. 452 (conviction of a crime; the trial justice's book admitted as the record).

[10] 1824, Dyson *v.* Wood, 3 B. & C. 449 (for a court not of record, the judgment must be pleaded or denied as a fact, and not the memorandum or docket that may have been kept; while for a court of record, though the record itself is pleaded or denied, it merely "imports," or not, a judgment).

[11] 1772, Fisher *v.* Lane, 2 W. Bl. 834 (minute-book of the Mayor's Court of London; in proving its judgment on foreign attachment, in defence to an action, the omission in the minutes of a record of summons, etc., held fatal, and semble not to be supplied by parol); 1833, Boomer *v.* Lane, 10 Wend. 525 (parol evidence of a justice's judgment, not admissible).

[12] The following rulings will show the scope of the inquiry: 1878, Williams *v.* Goodell, 60 Ga. 482 (that a notice had not been served; the opponent's testimony excluded, the record of proceedings being the proper source); 1897, Pritchett *v.* Davis, 101 id. 236, 28 S. E. 666 ("homestead papers," not the record in the Court, are the original, in proving the setting-apart); 1831, Frost *v.* Shapleigh, 7 Greenl. 236 (writ of attachment never returned and thus not matter of record; the attachment proved orally); 1824, Craufurd *v.* State, 6 H. & J. 231, 234 (a bond filed in the Orphan's Court; non-delivery allowed to be shown); 1893, Munro *v.* Meech, 94 Mich. 596, 54 N. W. 290 (that the former suit was not tried on its merits, admitted); 1825, Judge of Probate *v.* Briggs, 3 N. H. 309 (Probate Court; record held conclusive as to the filing of a claim); 1850, Brackett *v.* Hoitt, 20 id. 257, 260 (the case made by the presiding judge for determination on appeal is a part of the record); 1826, Wolfe *v.* Washburn, 6 Cow. 261, 265 (minutes of a justice as to a claim of set-off, held no part of the records and therefore contradictable).

[13] 1761, Morris *v.* Pugh, 3 Burr. 1242 (whether a writ in trover was dated before the demand and refusal; the *nisi prius* record spoke of it as "of Easter term"; held, that the presumption that it was filed on the first day of the term could be rebutted by the writ itself); 1826, Granger *v.* George, 5 B. & C. 149 (the declaration's statement of the time of action begun is disputable); 1828, Lester *v.* Jenkins, 8 id. 339 (so also for a writ); 1826, Johnston *v.* Darrah, 8 N. J. L. 282, 285 (the time of recording an execution may be shown).

[14] 1832, Loury *v.* Cady, 4 Vt. 504, 505 (the fact of attachment may be proved, between sheriff and receipters, by the receipt; the attachment-writ itself not required).

of records, — genuinely principles of evidence. (1) The doctrine about *producing the original* of a document, or accounting for its absence, permits copies to be used when the original is not obtainable; the application of this to the production of the original judicial record is elsewhere dealt with (*ante*, §§ 1215–1217). (2) The copy thus used must be verified by a witness; but the hearsay verification of the official custodian, in the shape of a *certified copy*, may be used, under an exception to the Hearsay rule, without calling the officer to the stand in person (*ante*, §§ 1677–1681). (3) The doctrine of the completeness requires in many cases that the *whole of a document* be produced (*ante*, § 2110). (4) The rules of authentication often have a special application in the proof of *genuineness* of a judicial record (*ante*, §§ 2158–2164). (5) The conclusiveness or admissibility of a *sheriff's return* involves sometimes the present principle and sometimes certain distinct ones (*ante*, §§ 1347, 1664).

§ 2451. **Same: (2) Corporate Acts and Records; (3) Negotiable Instruments.** (2) Whether the *acts* of a *corporation* must at common law be integrated in a written record is a question which has given rise to a great variety of opinions and of practice,[1] though the modern tendency is to apply no different rule to corporate than to natural persons.[2] Whether the *proceedings* of a corporate meeting are subject to the same rule is a distinct question, and the analogy of judicial records here makes for preserving the same compulsory rule;[3] but again the modern tendency is to leave the transaction without legal restriction.[4] Where such a record *is* made, the principle of voluntary integration (*ante*, § 2430) may of course be applied, and the record made to control.[5]

It may be added that for corporate records analogous subordinate questions arise as for judicial records, — for example, concerning the particular book or

[1] 1827, Bank *v.* Dandridge, 12 Wheat. 64, 67, 69 (Story, J.: "In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal; but . . . the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now as a general proposition be supported; . . . we do not admit as a general proposition that the acts of a corporation, although in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence or to give them an obligatory force"; Marshall, C. J., dissents at 91).

[2] Cases cited in Cook, Corporations, 1898, 4th ed., §§ 721, 725.

[3] 1824, Taylor *v.* Henry, 2 Pick. 397, 401 (an unrecorded adjournment, not provable orally; "if a fact of this kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner; this goes to the foundation of our system of civil society"); 1827, Manning *v.* Fifth Parish, 6 id. 6, 16 (agreement as to church property; a vote of a parish corporation, not provable in parol); 1896, Dennis *v.* Mfg. Co., 19 R. I. 666, 36 Atl. 129 (parol proceedings not admissible; but an exception to the rule is conceded). For a learned opinion to the contrary, see that of Story, J., in Bank *v.* Dandridge, *supra*, 12 Wheat. 64, 82; Marshall, C. J., dissents at 113.

[4] 1896, Boggs *v.* Ass'n, 111 Cal. 354, 43 Pac. 1106 (if no record is kept, the parol proceedings suffice); 1897, Zalesky *v.* Ins. Co., 102 Ia. 512, 70 N. W. 187, 71 N. W. 433 (similar); 1901, Green *v.* Lancaster Co., 61 Nebr. 473, 85 N. W. 439 (county board's administrative acts — here, an accord and satisfaction of a claim — need not be by written record) 1892, Winnepesaukee C. M. Ass. *v.* Gordon, 67 N. H. 98, 29 Atl. 412 (religious camp-meeting: acts provable by parol, no charter, rule, or vote to record them being shown); and cases cited in Cook, Corporations, § 714.

[5] 1897, State *v.* Main, 69 Conn. 123, 37 Atl. 80 (destruction of trees having a contagious disease; to show that certain alleged regulations of the State Board of Agriculture had not been adopted, evidence that the record of their adoption had been subsequently interlined was rejected); 1894, Roland *v.* District, 161 Pa. 102, 106, 28 Atl. 995, 1007 (school-directors; the record must be used, if there is one).

paper which constitutes the record,[6] and the correction of records *nunc pro tunc* by special proceeding.[7]

(3) A *negotiable instrument* is by common-law custom required to be integrated into a single document. The only feature in which this appears to have been left doubtful at common law was the acceptance, which (even though distinguished from a promise to accept) was by some thought to be effective though not contained in the bill; but this anomaly was cured by statute.[8] The peculiarity of the general rule in its application to negotiable instruments is that it not only requires the essential features of the negotiable obligation to be included, but also requires the exclusion of other terms of the transaction. Hence the peculiar aspect of the rule of voluntary integration when applied to the remaining parts of the transaction, as already examined (*ante*, §§ 2443–2445). Whether, as a matter of theory, those consequences should be deemed to belong under the present head, as due to the element of compulsory integration, may be open to argument.

§ 2452. **Under Statutes**: (1) **Wills**; (2) **Ballots**; (3) **Insurance Policies.** (1) By the statute of Henry VIII (*post*, § 2454), a *will* of land was required to be in writing, and by the statute of frauds of Charles II a will of personalty was practically (through the restrictions of section 19 on nuncupative wills) required also to be in writing. But under neither of these provisions was any integration required, *i. e.* any reduction of the testamentary acts into a single document. Hence, wills of land, from 1540 to 1678, and wills of personalty, down to 1837 in England, might be contained in several writings, more or less fragmentary and inconsistent, and yet valid as written testamentary utterances taking effect as a single will upon the testator's death. In the practice of the ecclesiastical Courts up to the last moment of this régime might be found frequent instances of the lack of any rule of integration.[1]

Nor was the change effected by any express legislative statement. But the formality of attestation, indirectly but practically, produced an equivalent result. By the statute of frauds (in 1678) wills of land, and by the statute of wills (in 1837) all kinds of wills, were required to be executed with the formality of attestation. This formality ousted the earlier loose practices, and in effect compelled testators to place all their testamentary provisions in a single document:

1866, *Wilde*, P. J., in *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109: "The Wills Act [of 1837, requiring signature and attestation] has worked a great change in the testamen-

[6] 1876, Fraser *v.* Charleston, 8 S. C. 318, 337 (transfer-book of a corporation is secondary to the share-certificate, in showing the fact of a transfer); 1869, Iowa & M. R. Co. *v.* Perkins, 28 Ia. 281, 283 (corporation subscription-book, not the memoranda containing the actual signatures, treated as the original contract, the officer being the agent to prepare it).

[7] 1897, Everett *v.* Deal, 148 Ind. 90, 47 N. E. 219 (town board's records).

[8] Cases cited in Ames' Cases on Bills and Notes, I, 168, 186, notes; 1704, St. 3 & 4 Anne, c. 9, §§ 4, 5; 1821, St. 1 & 2 Geo. IV, c. 78, § 2; 1878, St. 41 & 42 Vict. c. 13, § 1; Crawford, Negotiable Instruments Law, §§ 220–233; 1875, Scudder *v.* Union Nat'l Bank, 91 U. S. 406, 410.

[1] 1783, Blackwood *v.* Damer, 3 Phillim. Eccl. 458, note; 1830, Taylor *v.* D'Egville, 3 Hagg. Eccl. 202; 1830, Bragge *v.* Dyer, ib. 207; 1830, King's Proctor *v.* Daines, ib. 218, 231 (showing the looseness of practice then obtaining in the ecclesiastical Court).

tary law, as administered by the ecclesiastical Courts on this head. Under that [prior] law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the Court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former." [2]

Under this requirement, to be sure, the document containing testamentary act need not be a *physically single* and undivided paper; but the physically separate pieces must at least form a single grammatical or literary structure.[3] Nevertheless, it remains true in theory that no statute compels the testator to integrate in a single document; if the formality of attestation is observed, he may have any number of documents. The only aspect in which the theory can have any practical consequence is in the difference between a will and a codicil. In effect, a codicil is a document, separate perhaps in existence and time, which is made appurtenant to a will, and goes to modify it and to make up with it one entire testamentary act. A will, on the other hand, is an independent document complete in itself, superseding and integrating all other testamentary acts.[4] Hence, for example, a document which is strictly a will must be held to revoke by implication all parts of a prior will, though a codicil would revoke only such parts as were inconsistent with it. Possibly, however, this aspect of the distinction may better be explained by denominating each codicil a separate testamentary act, altering or novating the prior act, — as contracts are novated (*ante*, § 2441), and this would leave it practically true in every aspect that the formality of attestation has in effect compelled the integration of testamentary acts.

(2) By statute an electoral *ballot* is now almost universally required to be integrated into a single document; although even under the system of the common law there was seldom any opportunity of casting a written vote in any other way.[5]

(3) By statute in several jurisdictions all parts of a transaction of *insur-*

[2] So also in this country: 1895, Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831 (under modern statutes, "the true inquiry is not as to the completeness of the paper, but as to the finality of the intent and purpose of the testatrix, manifested by the observance of the formalities of execution required by the statute").

[3] 1801, Smart *v.* Prujean, 6 Ves. Jr. 560, 565 (L. C. Eldon: "The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake. . . . The true question is, if these papers were found in the bureau with the will, can I say, from the contents of the will, these two papers are the papers referred to?"); 1830, Dillon *v.* Harris, 4 Bligh. N. S. 321, 358 (will devising property to a son so long as he keeps a certain "solemn engagement, . . . which engagement signed by him I have put into the hands of my said trustees"; a certain engagement not admitted, because not sufficiently identified); 1858, Allen *v.* Maddock, 11 Moore P. C. 427; 1881, Gould *v.* Lakes, L. R. 6 P. D. 1; 1894, Garnett's Goods, Prob. 90; 1895, Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831 ("The validity of the instrument as a will is unaffected because of the fact that it is composed of or written on several separate sheets, if they are connected and coherent in sense and by an adaptation of the several parts"). Compare Burge *v.* Hamilton, 1884, 76 Ga. 568, 619.

[4] 1799, Arden, M. R., in Crosbie *v.* Macdonal, 4 Ves. Jr. 10 ("There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both, in the Ecclesiastical Court; the last is the will; from the nature of the instrument it revokes the other. . . . But if it does purport to be coupled with another instrument, it is as much a part of that instrument as if it was written upon the same paper").

[5] Compare §§ 1967, 2421, *ante*.

ance must be embodied in a single document;[6] and the construction of this type of statute illustrates neatly the distinction between the doctrine of Integration (*ante*, § 2425) and that of Written Formality (*post*, § 2454); because even written parts of the transaction not embodied in the policy will by this rule be ignored.[7] It is also to be noted that these statutes go further than any other application of the rule, in that they require a physical, and not merely (as for wills) a grammatical or literary integration.

§ 2453. **Conclusive Certificates, distinguished.** The principle of Integration, by which the document becomes the very embodiment of the transaction, must be distinguished from the principle of Conclusive Testimony (*ante*, §§ 1345–1353), by which a particular person's written report is taken as conclusive and no contrary testimony is allowed to overthrow it. The common result of both principles, though by different reasonings, is that the terms of the writing are decisive. But the practical difference between the two principles appears when the writing itself is lost and cannot be produced; for here, by the former principle, the terms of the writing must nevertheless be proved (*ante*, § 2450) because it is the sole embodiment of the transaction; while by the latter principle the conclusive testimony is merely preferred to others, and therefore when it becomes unavailable the preference ceases, and other testimony may be used (*ante*, § 1346).

There are but few genuine instances, of the principle of conclusive testimony, and these not universally conceded; the chief of these are a *magistrate's report of testimony* at a preliminary examination (*ante*, § 1349), the *enrolled copy of a legislative act* (*ante*, § 1350), and the *election-judges' certificate of votes* (*ante*, § 1351). There are a few other instances (*ante*, § 1352) in which the principle is involved in appearance only; for example, the conclusiveness (in some jurisdictions) of a notary's certificate of a *married woman's voluntary acknowledgment* of a deed at a privy examination is in reality an instance of the binding effect of a judicial proceeding, and depends upon the law of judgments. In all the foregoing cases, the difference between the rule of conclusiveness of testimony and the rule of judicial records is seen in this feature, that the judicial record represents and is in legal theory the transaction itself of the Court, while in the former instances the certificate is the officer's report of somebody else's doing or of some external happening. Obviously, in such instances the theory of integration cannot apply, because the writing of the officer cannot be the embodiment of the act of some other person, but can only be testimony about it. In the case of a deposition, on the other hand (*ante*, § 802), the written deposition signed by the deponent *is* the embodiment of his testimony, while the caption-certificate is the officer's report of what happened in his presence.

[6] Mass. St. 1894, c. 522, § 73 (every insurance policy must have the application attached thereto, "and unless so attached the same shall not be considered a part of the policy or received in evidence"); 1897, Joyce, Insurance, I, §§ 186–187, 190 (citing other statutes).

[7] 1896, Considine *v.* Ins. Co., 165 Mass. 462, 43 N. E. 201 (both the unattached application and the insured's oral utterances, excluded); 1902, Albro *v.* Ins. Co., C. C., 119 Fed. 629 (Considine *v.* Ins. Co. followed).

Further to be distinguished are statutory rules of substantive law which, in the guise of rules of conclusive evidence, practically declare certain facts legally immaterial, — for example, the rule that a tax-officer's recitals, in his deed, of the due performance of certain prior proceedings shall be conclusive evidence of these facts (*ante*, § 1353). Such a rule, so far as constitutionally valid, is no rule of evidence, but merely a rule declaring certain facts legally immaterial to avoid or produce a certain result.

C. SOLEMNIZATION OF LEGAL ACTS.

§ 2454. **Writing as a Formality; Statute of Frauds.** When it is required that a transaction, to have legal effect, must be in writing, the requirement is one of *form* or solemnity. The principle of solemnization differs from the two preceding ones in that it does not inquire whether the act was done at all, nor whether it was embodied in a single utterance, but merely whether its form of utterance was sufficient. Stamp, seal, attestation, writing, — all these are different varieties of formality; but the fundamental and most common one, in all modern systems of law, is writing.

That the rule of Written Formality is independent of the rule of Integration, just examined, is plain. For example, a will of land, during the century after it was first required to be in writing (*ante*, § 2452), was in all that time not required to be in a single document. So, too, of insurance applications under modern statutes (*ante*, § 2452). On the other hand, when the parties have reduced their transaction to a single writing, the rule of Integration applies (*ante*, § 2425), although the transaction might have been valid without any writing. Whenever, then, the question is whether a transaction, to be valid, must be in writing, not merely oral, it is a question of Written Formality. This question is presented when the parties have used no writing, and is a distinct one from that which arises after the transaction has been done in writing, *i. e.* from the question of "varying the writing" already dealt with.

What transactions, then, are required by law to be done in writing, as a condition of legal validity? At common law, none, it would seem. The historical surroundings of the common law in its origins were unfavorable to such a requirement (*ante*, § 2426). Even for dealings with land, livery of seisin persisted for centuries as a sufficient formality; and only where livery was impossible, namely, for incorporeal rights, was the requirement of a written deed of grant developed, and even here some sort of symbolic seisin, in the way of attornment or view or the like, was needed to complete the title.[1] Judicial records, another example of the modern necessity of writing, began as the mere recollection of the judge (*ante*, § 2426); and negotiable instruments, the one full and indubitable instance of compulsory writing, were a distinct borrowing from international mercantile custom. In modern times, numerous local statutes have insisted on the formality of writing for

[1] Pollock and Maitland, History of the English Law, II, 82, 93, 139.

specific miscellaneous transactions.[2] Yet it may be said that, in general, apart from statutes, and apart from one special doctrine (*post*, § 2455), no legal act was required to be in writing.[3]

Even among statutes, there are few of wide scope. These date back to the innovating provisions of the 1500s, by which bargains and sales,[4] as well as wills,[5] of land must be in writing. The next and greatest measure of this kind was the statute of frauds and perjuries, in 1678, which extended the formality of writing to the remaining most important transactions in land and to many classes of contracts and of dealings with personalty.[6] This is

[2] The following will serve as examples: 1800, White *v.* Wilson, 2 B. & P. 116, 119 (the statute requiring agreements for wages of crews to be in writing, and the articles in this case having noted the wages of the mate at 6*l.* a month, a further oral agreement that the mate should have the average price of a negro slave sold on the ship's account was excluded, because the statute required writing); 1814, St. 54 Geo. III, c. 144, §§ 3–5 (contracts of marine insurance to be in writing); 1851, Greeley *v.* Quimby, 22 N. H. 335, 338 ("As the law required that the return of the selectmen laying out the road should be in writing, no other proof can be substituted for it, so long as it is in existence and within the power of the party to produce"); 1826, Fox *v.* Lambson, 8 N. J. L. 275, 276 (manumission being required to be done in writing, etc., other evidence of manumission was excluded).

[3] 1900, Johnson *v.* Griswold, 177 Mass. 34, 58 N. E. 157 (where no statute controls, an official resignation may be oral); and cases cited *ante*, § 2427. The case of corporate records (*ante*, § 2451) was perhaps an exception.

[4] 1535, St. 27 H. VIII, c. 16 ("no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, . . . by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record . . . ").

[5] 1540, St. 32 H. VIII, c. 1, § 1 (gives liberty to devise all lands "as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life"); 1603, Molineux *v.* Molineux, Cro. Jac. 144 ("a will cannot refer to words only, without writing; but it ought to be a will in writing for all").

[6] 1678, St. 29 Car. II, c. 3, § 1 ("all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, *made* or created by livery and seisin only, or *by parol, and not put in writing and signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect . . "); § 3 ("no leases, estates, or interests . . . [in land] shall . . . be assigned, granted, or surrendered, unless it be *by deed or note in writing, signed* by the party so assigning . . . "); § 4 ("no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, *unless the agreement* upon which such action shall be brought, *or some memorandum or note thereof, shall be in writing, and signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized"); § 5 ("all devises and bequests of any lands or tenements . . . shall be *in writing, and signed* by the party so devising the same, or by some other person in his presence and by his express directions, and shall be *attested and subscribed in the presence* of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect"); § 7 ("all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be *manifested and proved by some writing signed* by the party . . . , *or else* they shall be *utterly void* and of none effect"); § 9 ("all grants and assignments of any trust or confidence shall likewise be *in writing signed* by the party granting or assigning . . . *or else* shall likewise be *utterly void* and of none effect"); § 17 ("*no contract* for the sale of any goods . . . *shall be allowed to be good*, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that *some note or memorandum in writing of the said bargain be made and signed* by the parties to be charged by such contract, or their agents thereunto lawfully authorized"); § 19 ("no nuncupative will shall be good . . . that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will, or to that effect"); § 20 "after six months passed from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will").

not the place to follow out in detail the requirements of this statute and those which have adopted its provisions in the United States. But it is necessary here to examine its provisions so far as they bear on the theory of the parol evidence rule, and to discriminate its relation to the principles already considered.

The provisions of the statute fall into two classes, — those of Sections 1, 3, 5, 7, and 9, and those of Sections 4 and 17. (*a*) The terms of the first group deal plainly with the *formality* of the act. It must be "put in writing," and otherwise it "shall be utterly void." Such a transaction, then, if not in writing, is of no legal effect. The writing is constitutive, not merely evidential. But if it *is* put in writing, according to the statute, is the writing the exclusive memorial of the transaction, — in other words, is there compulsory integration, under the principle already considered (*ante*, §§ 2450–2452)? Not necessarily, — that is, not in consequence of the statute. The requirement of signature, in all those five sections, will tend to induce parties to reduce their transaction in its entirety into a single document, but this is only an indirect consequence of the statute, — as already noticed in the case of wills (*ante*, § 2452). The embodiment in a single writing is voluntary, not compulsory. For example, if the owner of a farm by a single negotiation makes leases and crop-contracts of various parts of it,[7] the statute would be apparently satisfied by a series of signed letters between the parties.[8] Furthermore, if the transaction covered matters both within and without the statute, such as a lease of land and a sale of tools, and the former was embodied in a single writing, there is nothing in the statute to render the latter part of the transaction invalid; and if a Court should refuse to give effect to the oral part, it would be solely because of the principle of voluntary integration, leading the Court to believe that by the intent of the parties the document was the sole memorial of the entire transaction.[9] Thus, so far as the Sections 1, 3, 5, 7, and 9, of the statute are concerned, the question whether the transaction satisfies the statute by being "in writing" is essentially distinct from the further question whether by the other rule (of integration) the transaction has been so embodied in a single document as to exclude other writings or oral utterances which passed in the course of the negotiations.

(*b*) The terms of the second group — Sections 4 and 17 — differ radically in theory of formality, but their relation to the principle of integration is the same. They differ, in theory of formality, from Sections 1, 3, 5, 7, and 9, because they equire only a "note or memorandum in writing" *of* the "agreement" or "bargain." In other words, the writing *is not* the contract, but is distinct from it and is merely the party's admission that such a contract was

[7] The case of a transfer of freehold estates would be different, because a sealed deed is there required: Browne, Statute of Frauds, 5th ed., § 6.

[8] This point does not appear to have been decided, so far as the citations in Browne, *ubi supra*, show.

[9] A good example of this is seen in Bretto *v.* Levine, 50 Minn. 168, 52 N. W. 525 (1892), cited *ante*, § 2430. Compare also Lowrey *v.* Downey, Ind., Brockett *v.* Bartholomew, Carr *v.* Dooley, Durkin *v.* Cobleigh, Mass., Harman *v.* Harman, U. S., Long *v.* Perine, W. Va., cited *ante*, § 2442.

made. This difference is plain, and is generally conceded,[10] and shows its practical results in various ways. For example, the written admission may be made subsequently to the contract;[11] it may even in terms attempt to repudiate the contract;[12] it may be a letter to a third person.[13] Practically, to be sure, the effect is the same, so far as the necessity of a writing is concerned; for it must mention and cover all the essential terms, if not all the terms whatever, of that part of the transaction covered by the statutory requirement;[14] and these terms so written, of course, cannot be overthrown or varied by other written or oral utterances;[15] so that the parties are in this respect in the same plight practically as under Sections 1, 3, 5, 7, and 9, in spite of the difference of theory. But what of the rule of integration? Is there any difference in that respect? By no means. For example, under Sections 4 and 17, a series of letters or other documents will suffice to satisfy the statute, and yet the terms of the transaction may be scattered through the negotiation and not embodied in a single document.[16] Again, if a transaction includes matters both within and without the statute, the satisfaction of the statute for the former may be made, and then the remainder though not in writing may be enforced.[17] In short, the parties may satisfy the statute without embodying their entire transaction in a single writing, or with embodying the statutory part of it in writing and the remainder orally. Thus the question whether any particular writing is the sole embodiment of their transaction is a distinct one, and depends upon the intent of the parties. Here, then, as under the other Sections of the statute, the principle of Integration is found to be independent of the principle of Written Formality.

§ 2455. **Same: Discharge and Alteration of Specialties, etc.** (1) Although writing was in general at common law no necessary formality to any transaction (*ante*, § 2454), yet in one respect it was made necessary by the application of a peculiar doctrine, whose Roman origin and mediæval vogue have been already noticed (*ante*, § 2426), namely, the doctrine that an *act of a higher "nature" cannot be altered* or annulled by anything of an "*inferior nature.*" The result of this was that where the parties had chosen to adopt the "higher" form in their original transaction, a form equally "high" could alone suffice to dispose of it. This notion was seen in the rules that a sealed covenant could not be discharged by a transaction *in pais*,[1] and that an assumpsit was dischargeable by parol, unless broken, and then only by sealed deed,[2] and in the controversies whether payment before maturity could dis-

[10] Browne, *ubi supra*, §§ 115 *a*, 135, 136, 344; 1852, Leroux *v.* Brown, 12 C. B. 801, 824 (oral contract made in France, and there valid, not enforced in England, since the 4th section did not make contracts void, but only affected the remedy by requiring a specific kind of evidence); 1883, Maddison *v.* Alderson, L. R. 8 App. Cas. 467, 474; 1902, Vaughan Williams, L. J., in *Re* Holland, 2 Ch. 360, 375 ("The statute of frauds does not deal with the validity of the agreement; it deals only with the evidence to prove the agreement"); 1875, Townsend *v.* Hargreaves, 118 Mass. 325, 334.

[11] Browne, *ubi supra*, § 352 *a*.

[12] Ib. § 354 *a*.

[13] Ib. § 354 *a*.

[14] 1804, Wain *v.* Warlters, 5 East 10, 19; 1878, Grafton *v.* Cummings, 99 U. S. 100; Browne, *ubi supra*, §§ 331 ff.

[15] Browne, *ubi supra*, §§ 417, 418.

[16] Ib., § 348. Compare the cases cited in Ames' Cases on Trusts, 2d ed., p. 179, note.

[17] Ib. §§ 117, 117 *a*.

[1] 1606, Blake's Case, 6 Co. Rep. 43 *b*.

[2] 1676, Milward *v.* Ingram, 2 Mod. 43.

charge a bond,[3] and whether a parol extension of time to the principal of a bond would discharge the surety.[4] Most of these questions are now governed by a rational policy irrespective of the scholastic technicality of the traditional maxim.[5] It is enough here to note the place they hold in the general theory of legal acts.

(2) Under the statute of frauds, a not dissimilar question arises, when a transaction covered by the statute is duly made in writing and then an *oral alteration* is afterwards made. This oral alteration makes a new transaction together with the terms of the original transaction. Yet the result is that the new transaction as a whole is no longer in writing as required by the statute, but is partly oral and partly written; and thus, although the mere alteration is in itself not expressly required to be in writing, yet the transaction as a whole is now unenforceable.[6]

Neither of the foregoing doctrines involves the rule of Integration. By that rule, as already noticed (*ante*, § 2441), the reduction of a transaction to a single document makes it exclusive and controlling for that transaction only, and hence any subsequent transaction of discharge, novation, or alteration may be availed of to vary the original document.[7] Whatever there is, therefore, to prevent the parties from availing themselves of the subsequent transaction is the result of one of these rules of Written Formality, and not of the rule of Integration.

§ 2456. **Other Formalities than Writing; Signature; Seal; Attestation; Registration; Stamp.** It remains here to note, for the sake of completeness, the remaining formalities receiving the sanction of modern law.[1] These formalities, so far as required, take their place with the rule for writing, in some of the sections of the statute of frauds, as an inherent element of form in the validity of the transaction. Like all other requirements of form, they are arbitrary, in the sense that the act may be sufficient in its terms (for example, to constitute a contract or a release), and may be fully proved by evidence, and yet remains legally ineffective. Nevertheless, they are not arbitrary, to the extent that they rest on a conscious policy of avoiding certain general dangers or abuses, and that they enforce a rigid rule merely for the sake of this policy.

(1) A *signature* is required by the statute of frauds, for all of the transactions in which writing is required; and obviously the signature is a formal requirement over and above that of writing alone.[2] A signature, however, was not required at common law for a deed.[3]

[3] 1790, Sturdy *v.* Arnaud, 3 T. R. 599.

[4] 1821, Davey *v.* Prendergass, 5 B. & Ald. 187.

[5] Compare the cases cited in Professor Ames' Cases on Trusts, 2d ed., p. 128, note, and his article on Specialty Contracts in the Harvard Law Review, IX, 49, 55 (1895), and in Professor Williston's article on Discharge of Contracts, in the Columbia Law Review, IV, 455 (1904).

[6] 1833, Goss *v.* Lord Nugent, 5 B. & Ad. 58; 1840, Marshall *v.* Lynn, 6 M. & W. 109, 114; 1895, Browne, Statute of Frauds, 5th ed., §§ 410 ff.

[7] Goss *v.* Lord Nugent, quoted *ante*, § 2441.

[1] An interesting exposition of the development of formalism in primitive and modern Germanic law will be found in Heusler, Institutionen des deutschen Rechts, I, 68 ff.

[2] 1895, Browne, Statute of Frauds, §§ 10, 106, 355.

[3] 1698, Cromwell *v.* Grunsden, 2 Salk. 462; 1845, Parks *v.* Hazelrigg, 7 Blackf. 536.

(2) A *seal* was essential at common law for the chief sorts of documents.[4] The origin of the significance of the seal, in its relation to the use of writings, has already been noticed (*ante*, § 2426). What the form of a seal should be was long a subject of elaborate discussion.[5]

(3) The *attestation* of a document was originally not a formality to the validity of the document, but merely a precaution desirable for securing testimony to the transaction (*ante*, § 2426); the noting of the names of the witnesses on the document was thus only a memorandum for future usefulness. But the statute of frauds (*ante*, § 2454) introduced, for wills, the act of attestation as a formality. This formality includes two things, first, the presence of the witnesses at the act of signature by the testator, and, secondly, the signature of the document by the witnesses. The two together thus constitute an intrinsic element in the validity of the document.[6] It may be noted that whatever questions are thus raised — for example, whether the document must bear a written recital of the witnesses' presence, or whether, if their signatures are borne, the fact of presence may be otherwise established[7] — do not involve the principle of integration (*ante*, § 2425), but only the principle of formality.

(4) The *registration* of a document may be made an essential formality of its validity, apart from and additionally to its service as a constructive notice of the document's validity. But this quality is seldom attributed to it unless by express statutory declaration.[8] Under the modern (or Torrens) system of registration of title, no doubt this is the actual result.[9] It may be noted that by this modern system the document of title would seem also to furnish one of the rare instances (*ante*, § 2452) of a compulsory integration.

(5) A *stamp* has by some legislation been made formally necessary to the validity of a document; the policy of such laws being to compel indirectly the payment of a tax. So far as a rule of evidence may be involved, the subject has been elsewhere briefly examined (*ante*, § 2184). It may be here noted that in one respect the rule of integration is affected by the stamp-requirement; for, though a transaction has been embodied in writing, yet the writing if unstamped cannot be given any legal effect, either as superseding the oral transaction or as altering a previous written one, and consequently the party on whom lies the burden of proof of integration (*ante*, § 2447) must fail in the establishment of that part of his case.[10]

[4] Pollock and Maitland, History of the English Law, II, 218–222.

[5] *Eng.:* 1871, Re Sandilands, L. R. 6 C. P. 411; 1886, National Provincial Bank *v.* Jackson, L. R. 33 Ch. D. 1; *U. S.:* 1810, Warren *v.* Lynch, 5 John. 239, Kent, C. J. 1851, Pillow *v.* Roberts, 13 How. 472; 1845, Corrigan *v.* Trenton D. F. Co., 1 Halst. Ch. 52; 1865, Bates *v.* R. Co., 10 All. 251; and a note in Gray's Cases on Real Property, III, 644.

[6] See *ante*, §§ 1287, 1292, for its relation to the rule of evidence requiring the calling of an attesting witness.

[7] 1846, Pollock *v.* Glassell, 2 Gratt. 439, 463 (examining the cases upon wills and powers).

[8] 1835, Doe *v.* Ford, 3 A. & E. 649 (annuity deeds on premises of less than a certain value being by statute void unless registered, the defendant was allowed to plead the non-registration in avoidance, although a covenant in the deed declared the premises to be of a value sufficient to satisfy the statute); Jones, Real Property, § 1382.

[9] See the treatises of Olmstead, Niblack, and Sheldon, and articles in the Harvard Law Review, VI, 302, 369, 410; VII, 24.

[10] 1818, Stevens *v.* Pinney, 8 Taunt. 327 (Dallas, J.: "It turned out to be unstamped, and therefore inadmissible in evidence, and consequently not amounting to an agreement";

D. INTERPRETATION OF LEGAL ACTS.

§ 2458. **General Nature of Interpretation; Standard and Sources of Interpretation.** The process of Interpretation is a part of the procedure of *realizing a person's act in the external world.* It is, in a sense, the completion of the act; for without it the utterance, whether written or oral, must remain vain words. If a person could be content with proclaiming his contracts at the top of a mountain, or nailing his deeds to the garden gate, he would not need to be concerned with the process of interpretation. But deeds and contracts and wills, if they are not to remain empty manifestoes, must be enforced. They must be applied to external objects. Somewhere possession must be yielded, or goods delivered, or money transferred; and in order that the law may enforce these changes in external objects, the relation between the terms of the legal act and certain specific external objects must be determined, as an indispensable part of the process. In short, the interpretation of the terms of a legal act is an essential part of the act considered as capable of legal realization and enforcement.[1] The only difference is that the actor alone creates the terms of his act, while the interpretation of it, being a part of the enforcement, comes into the hands of the law.

The process of interpretation, then, though it is commonly simple and often unobserved, is always present, being inherently indispensable.[2] The method of it consists in *ascertaining the actor's associations or connections between the terms of the act and the various possible objects of the external world.* Those terms may be dramatic or verbal. The lantern of Paul Revere, and the twenty-one guns of a warship's salute, are as much the subject of interpretation as the words of a will. In all cases, the process is that of applying the symbol or word to external objects. Since men cannot go forth and instantaneously transform, with the *presto* of a magician, the existing to the desired state of things, they must embody their desire in marks which will serve to point out the effects desired, and then wait for the law, or for some one's voluntary obedience to it, to produce the realization of the effects thus pointed out in advance. The process of interpretation may be compared to a wireless telegraph station. A vessel approaches the coast and

Park, J.: "It was not in fact an existing agreement"); 1829, Fielder *v.* Ray, 6 Bing. 332 (action for work and labor in printing; the defendant offered to show that there was an agreement in writing, but as it was unstamped, it could not he used, and the objection was held to fail). *Contra:* 1827, Reed *v.* Deere, 7 B. & C. 261 (the plaintiff sued on a written agreement to arbitrate; when it appeared that a later agreement had been made, held that the fact that it put an end to the first could be considered, though it was itself not admissible to sue upon because unstamped).

[1] 1789, Answer of the Judges to the House of Lords, 22 How. St. Tr. 301 ("Your lordships ask us, 'whether the sense of the letter be matter of law or matter of fact?' We find a difficulty in separating the sense of the letter from the letter. The paper without the sense is not a letter").

[2] Such remarks as the following illustrate the occasional perversity on this subject: Hartford I. M. Co. *v.* Cambria M. Co., 80 Mich. 491, 499, 45 N. W. 351 (1890): "There should be interpretation only when it is needed."

perceives the station-pole standing straight above the cliffs. Until the current can be intercepted, it is but a dumb rod of metal; it sends no message and accomplishes no purpose. It may have any one of various attunements; and it will tell nothing until a similar attunement be established by the vessel. To ascertain that attunement, the particular country where it is fixed must be known, and then the authorized records of its methods and signals must be consulted. Not until then can the station's message be made actual to the vessel.

Such is the process of interpretation. The analogy of the telegraph-station illustrates the important distinction between the two great divisions of the process. The first question must always be, What is the *standard* of interpretation? The second question is, In what *sources* is the tenor of that standard to be ascertained? Sometimes one or the other of these questions may interpose no difficulty; but both must always be settled.

(1) The *standard* of interpretation, as involved in legal acts, is the personality whose utterances are to be interpreted. There are practically four different available standards. First, there is the standard of the normal users of the language of the forum, the *community at large*, represented by the ordinary meaning of words. Next, there is the standard of a *special class of persons* within the community, — the followers of a particular trade or occupation, the members of a particular religious sect, the aliens of a particular tongue, the natives of a particular dialect, who use certain words in a sense common to the entire class, but different from that of the community at large. Thirdly, there is the standard of the *specific parties* coöperating in a *bilateral act*, who may use words in a sense common to themselves and unknown to any others. Finally, there is the standard of an *individual actor*, who may use words in a sense wholly peculiar to himself; and here the question will naturally arise whether he may insist on his individual standard in the interpretation of the words of a contract, or even of a unilateral act such as a will. The first inquiry in interpretation, then, is to determine which of these standards is the proper one for the particular act to be interpreted; and for this purpose certain working rules have to be formulated.

(2) The *sources* for ascertaining the tenor of the standard form the second object of inquiry. Since interpretation consists in ascertaining the associations between the specific terms used and certain external objects, and since these associations must be somehow knowable in order to proceed, the question is where they are to be looked for. So far as the standard of interpretation is solely the normal one of the community, the inquiry is a simple one; the usage of the community (as represented in dictionaries and elsewhere) is the source of information. But that standard (as will be seen) is rarely the exclusive one. The mutual standard of parties to a bilateral act, and for wills the individual standard of the testator, is constantly conceded to control; and it then becomes necessary to search among the prior and subsequent utterances of the party or parties to ascertain their usage, or fixed associations with the terms employed. In resorting to these data, the question then

arises whether there is any prohibitive rule of law which limits the scope of search and forbids the use of certain data. These rules, if any, form the second part of the law of interpretation.

Before proceeding, however, to these two parts of the subject in their order, it is necessary to fix upon a terminology and to avoid misunderstanding in the use of words. When we seek to ascertain the standard and sources of interpretation, and thereby to discover the actor's association of words with external objects, what is the term, in one word, which describes the object of the search? Is it the person's "meaning"? Or is it his "intention"? Over this difference of phraseology has persisted an endless controversy, which, like that of the two knights and the shield at the cross-roads, is after all resolvable mainly into a difference of epithets only.[3]

§ 2459. **Same: "Intention" and "Meaning," distinguished.** The distinction between "intention" and "meaning" is vital. The distinction is independent of any question over the relative propriety of these names; for there exist two things, which must be kept apart, yet never can be unless different terms are used. The words "will" and "sense" may be taken as sufficiently indicative of these two things and free from the ambiguity of the other terms.

Will and Sense, then, are distinct. Interpretation as a legal process is concerned with the Sense of the word used, and not with the Will to use that particular word. The contrast is between that Will, or volition to utter,[1] which, as the subjective element of an act, makes a person responsible for a particular utterance as his, and that Sense or meaning which involves the fixed association between the uttered word and some external object. It has already been seen (*ante*, § 2413) that by the general canon of legal acts, the person's actual will or intent to utter a given word can seldom be considered for legal purposes. If he has exercised a volition to utter something, then he is responsible for such utterance as is in external appearance the utterance he intended, — whether or not he actually intended it. On the other hand, the sense of his word as thus uttered — his fixed association between that symbol and some external object — may usually be given full effect, if it can be ascertained. The rules for the two things may be different. The law has thus constantly to emphasize the contrast between the prohibitive rule applicable to the creation of an act (*ante*, § 2413), and the present permissive rule applicable to its interpretation. Judges are desirous, when investigating the sense of the words as uttered by the person, of emphasizing that they do not violate the rule against inquiring whether he

[3] The word "meaning" has been favored by Mr. Nichols, in his article on Extrinsic Evidence in the Interpretation of Wills (Juridical Society Papers, II, 352), and before him by V. C. Wigram, in his treatise on Extrinsic Evidence in Aid of the Interpretation of Wills (who however often uses the words interchangeably). The word "intention" has been favored by Mr. Hawkins, in his article on Principles of Legal Interpretation (Jurid. Soc. Pap. II, 298, reprinted in Thayer, Prelim. Treat. on Evidence, App. C.), who declares the opposite usage to involve "a fallacy of no small importance." Mr. Phipson has compared the views of these and other writers in the Law Quarterly Review for July, 1904. Professor Thayer's treatment of the subject is found in his Preliminary Treatise, pp. 412, 480.

[1] Examined *ante*, § 2413.

actually intended to utter those words. Hence the reiteration of the contrast between "intention" and "meaning":

1789, *Kenyon*, L. C. J., in *Hay* v. *Coventry*, 3 T. R. 83, 86: "We must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used."

1833, *Parke*, J., in *Doe* v. *Gwillim*, 5 B. & Ad. 122, 129: "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he used."

1833, *Denman*, L. C. J., in *Rickman* v. *Carstairs*, 5 B. & Ad. 663: "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used."

The common terminology of these judicial explanations is unfortunate, because "meaning" has a suggestion of the state of the person's mind as fixed on certain objects, and "intention" bears the same suggestion. The constant exclusion of the state of the person's mind in one aspect, and yet its consideration in another aspect, are thus apparently contradictory and irreconcilable. But the terms "will," or "volition," and "sense," serve to avoid this ambiguity. They emphasize the distinction that the will to utter a specific word is one thing, and the fixed association of that word is another thing. Thus the Creation of the act and its Interpretation as created are kept distinct.

The analogy of other symbols than words will best illustrate how common and fundamental is this difference in other affairs, and how instinctively it is appreciated and applied. Suppose a foreign vessel to be coasting the shore and entering various harbors where the Government maintains a uniform system of harbor-buoys in various colors and shapes, indicating respectively channels, sandbars, sunken rocks, and safe anchorages; here the significance of each kind of buoy is known to be the same in every harbor under Government control. But suppose the vessel to enter a harbor or inlet under the control of an individual or a city having a peculiar and different code of usage for the buoys; here it is immaterial whether a red buoy under the Government system signifies a channel or a sandbar; the vital question for the vessel now is what a red buoy signifies under the code of the local authority, and all other systems of meaning are thrown aside as useless. This illustrates that though, in interpreting a person's (for example, a testator's) words, we are concerned with *his* individual meaning, as distinguished from the customary sense of words, still we are not dealing with his state of mind as to volition, but with the associations affixed by him to an expressed symbol as indicating to others an external object. That is to say, the local harbor authorities may have "intended" to put a green buoy instead of a red buoy, or to have put the red buoy at another spot; they may have made a "mistake," just as the testator may have intended to use other words; but in both cases the state of mind as to volition, or mistake, is a wholly different thing from the fixed association, according to that individual's standard, between the expressed symbol and some external object. To illustrate

another aspect of the subject, suppose a game of chess to be played by B with his guest A. If the two are of the same nation, their standards of interpretation — for example, as to the character of each chessman, the allowable moves, and the effect of a move — will be the same. But some nations differ from others in one or more of these respects; so that if, for example, B's national rules allowed a rook to threaten diagonally on the board, A as guest would accept and accommodate himself, as best he might, to this standard of operation. But, though this much might be conceded to B as host, in the adoption of his standards for giving meaning to his acts of moving the chessmen, yet it would remain true that his private intent or volition, as distinguished from the significance of his acts of moving, would be immaterial; so that, for example, his intent to have touched and moved a different piece, or to have placed the piece on a different square, would not be taken into consideration. So, again, if A and B engage in a shooting match, with two targets of 100 yards' and 500 yards' distance, it may be that, after the shooting, A and B will discover that they have not agreed which prize is to be associated with which target, or whether the victory at the 500-yard target is to count for more than the victory at the 100-yard target, and they may have to repeat the match after coming to a common understanding. But in no case would A think of claiming that B, who has hit the 100-yard bull's-eye, could not win because he was really aiming at the 500-yard target and hit the other by mistake only; nor could A have a second trial, on missing the 500-yard target, because by mistake he shot at the 100-yard target.

A person, then, who wills to utter words is like a man placing a buoy, or moving a chessman, or shooting at a target. His will or intent or volition as to the terms of the particular utterance is one thing; his sense or meaning attached to the terms actually uttered is a different thing. Whatever may be the rules for the former element of his act, the rules for the latter element are independent of them.

1. Standard of Interpretation.

§ 2461. **General Principle; Four Standards, — Popular, Local, Mutual, Individual.** The standard of interpretation, which forms the first part of the inquiry (*ante*, § 2458), is the association between words and objects considered with reference to the persons fixing that association. It has already been noted (*ante*, § 2458), that the possible standards fall roughly into four classes, — the standard of the community, or *popular* standard, meaning the common and normal sense of words; the *local* standard, including the special usages of a religious sect, a body of traders, an alien population, or a local dialect; the *mutual* standard, covering those meanings which are peculiar to both or all the parties to a transaction, but shared in common by them; and the *individual* standard of one party to an act, as different from that of the other party or parties, if any. These standards, from the

first-mentioned to the fourth, increase in intension (as the logicians have it), while they decrease in extension. The possible meanings are more and more; for the local and the mutual and the individual standards each add to the one or a few normal meanings; while the number of persons involved in each standard becomes fewer.

The main question is, of course, whether one or more of these standards is exclusive of the others, or whether they are all available at the same time. The answer is, first, that, in general, they are all available coincidently; and, secondly, that where the transaction involves more than one party, the standard must be common to all.

In the first place, then, *all the standards are provisional only*, and therefore *each may in turn be resorted to* for help. The search is for the sense of a word or phrase as used, and the object is therefore to find the standard actually employed by the party. Now, as a member of the community, he presumably uses words in the normal sense of the community; this standard will therefore be *prima facie* accepted. But if it appears that, as a resident of a special village, he used the sense of that village, then this local standard may be substituted for the other. Still further, if it appears that the parties to a specific contract have a special mutual sense, or that a testator has a special individual sense, the mutual or the individual standard may replace the normal or the local standard. Thus for any particular word or phrase one standard, provisionally applicable, may be finally replaced by another; and for a given document, its various parts may be interpreted by different standards. The single condition is that before the standard *prima facie* applicable can be replaced, *it must be made to appear probable that the party was actually using the other standard.* No one standard, then, is absolute and essential.

In the second place, *no person* taking part in a transaction *can invoke a standard which is not at least common to all parties.*[1] For example, the contract of a person dealing with a wheat broker and using words in the normal sense cannot be judged by the usage of the wheat trade, unless that standard appears to have been adopted by him as well as by the other party. Or a person issuing a negotiable instrument, and understanding its terms in a mutual sense with the payee, cannot expect to enforce it against a holder for value without notice. So, too, in a purely bilateral transaction, the private sense of one party cannot be imposed upon the other party. The standard, then, must at least be common to all parties to the transaction, and here the nature of the transaction in the substantive law will control.

Before following the application of this general principle, however, it is necessary to dispose of a supposed rule which, if valid, would seriously qualify the first part of the principle above stated; namely, the rule against "disturbing a clear meaning," — in other words, a rule which forbids de-

[1] Compare the theory as stated by Mr. Justice Holmes, in The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 ("Each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances and therefore cannot complain if his words are taken in that sense").

parting from the normal standard even where it can be proved to have been not the standard actually employed.

§ 2462. **Rule against "Disturbing a Clear Meaning," or, Forbidding Explanation except of Ambiguities; History and General Principle.** The history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism. The marked features of primitive formalism have been already noticed in other aspects (*ante*, § 2405). The word of a man is in itself almost a magic formula. The wrong word produces its evil effects in spite of the good will of the party; without the right word, nothing will move, however plainly he seek to express himself.[1] When the brother of Ali Baba forgot the word "sesame," he was powerless to open the door of safety. This inherent potency of words was for primitive minds, as it now is for children, no mere fairy tale, but a reality of life. These notions come down into Coke's time shorn of their first crudeness. But they explain nevertheless the scholastic technicality of those later days. A word was still a fixed symbol. Its meaning was something inherent and objective, not subjective and personal. A man who wrote a document dealt with words as he might deal with a blunderbuss or a carpenter's tool. They had their uses; and he must understand and choose the proper word for the purpose in hand, just as he must take the risk of not handling the gun or the adze in the proper fashion. "*Rerum enim vocabula immutabilia sunt, homines mutabilia*," sufficiently illustrates the attitude of the times.[2]

This attitude was of course, from the point of view of intellectual development, bound to change gradually. But progress was retarded, in the English judicial world, by three circumstances (with others) particular to that sphere. One of these was the prejudice (for such it may be termed) in favor of the legal heir, — an instinct naturally strong in a nation whose greatest and most explanatory fact was its dependence upon landed wealth and a system of primogeniture. When a will was to be construed, its effective interpretation was no great matter of concern to the judges, for they would rather than not that its provisions should fail. Until the middle of the 1500s, there was not even liberty to alienate land at all by will;[3] and, for long after this period, the will, as an instrument of disinherison, continued to be judicially disparaged.[4] Thus in one way, through the lack of a liberal and sympathetic search for testators' meanings, the spirit of rational interpretation was hindered. Another circumstance was the tendency of the judges to keep the construction of writings out of the jury's hands and reserve it for themselves; for, though as a practice this dated far enough back, still it came to be justified consciously, and was thought to be a safeguard against the

[1] Compare the passages in Brunner and Heusler, cited *ante*, §§ 2426, 2456.

[2] This is from Dig. XXXIII, 10, 7, § 2, *de sup. leg.*; but appears transmogrified by Coke as "*nomina sunt mutabilia, res autem immobiles*" (6 Co. Rep. 65 *a*).

[3] St. 32 H. VIII, quoted *ante*, § 2454.

[4] 1599, Wild's Case, 6 Co. Rep. 16 *b*; 1814, Doe *v.* Dring, 2 M. & S. 448, 454 (L. C. J. Ellenborough, construing "all my effects" to signify only personalty: "The rule of law is peremptory that the heir shall not be disinherited, unless by plain and cogent inference arising from the words of the will"; though "such a decision may and perhaps will disappoint" the testator's intention).

fate of a deed with the jury, "who might construe or refine upon it at pleasure." [5] Still a third consideration was the practice and the interests of conveyancers. This branch of the profession had accumulated a store of esoteric learning, which labelled each word and phrase with its traditional meaning. This learning would lose half of its mystery and its value if the rigidity of these terms should disappear. The instinct was to treasure the shibboleths of conveyancing; and the pressure of this body of practitioners against any liberality of interpretation must have been heavy.[6]

At the period of the end of the 1700s, then, there is found in the law a settled tradition, bolstered up in artificial survival by considerations such as the above, that the words of a legal document inherently possess a fixed and unalterable meaning. The law had prescribed it. No man, in a document, could think himself entitled to mean what he pleased. Some of the judicial utterances seem now obstinate enough in their blindness:

1554, *Brook*, J., in *Throckmerton* v. *Tracy*, Plowd. 160 (after hearing Saunders lay down three rules for deeds, of which the third was: "The words shall be construed according to the intent of the parties, and not otherwise," he proceeds to repudiate this heresy in the following ingenuous utterance): "The party ought to direct his meaning according to the law, and not the law according to his meaning; for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence. For if a man was assured that whatever words he made use of, his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was his meaning."

This notion was barely beginning to give way by the end of the 1700s. Interpretation by local usage, for example, to-day the plainest case of legitimate deviation from the normal standard, was still but making its way.[7] The individual usage of a testator was in the eyes even of Hardwicke and Thurlow, and of course of Kenyon and Eldon (those reactionaries and mainstays

[5] *Ante*, § 2426; and the following, said in 1736, of parol evidence to construe deeds and wills: "A distinction has been taken between evidence that may be offered (1) to a jury and (2) to inform the conscience of the Court [of equity], namely that in the first case no such evidence should be admitted, because the jury might be inveigled thereby, but that in the second it could do no hurt" (Bacon's Abridgment, II, 309).

[6] 1821, L. C. Eldon, in Smith *v.* Doe, 2 B. & B. 473, 599 ("The greatest men who have sat in Westminster Hall, I am persuaded, in many instances, if matters had been *res integræ*, would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority"); Lord Redesdale, ib. 612 ("I do conceive it is of the utmost importance that your lordships should guide your judgment by that criterion, whenever it can be applied; for otherwise, my lords, all property must be in hazard").

[7] 1592, Wing *v.* Earle, Cro. El. 267 ("If one sells land and is obliged that it contain 20 acres, this shall be according to the law, and not according to the custom of the country"); 1692, Lethulier's Case, 2 Salk. 443 ("'warranted to depart with convoy' must be construed according to the usage among merchants"; but Holt, C. J., was *contra*, for "we take notice of the laws of merchants that are general, not of those that are particular usages"). In 1795, in Withnell *v.* Gartman, 6 T. R. 388, 395, 397, it was argued, though unsuccessfully, that "no usage can be let in to explain a private deed"; but in the same year it was laid down by Lawrence, J., in St. Cross *v.* Walden, 6 T. R. 338, 344, interpreting the term "quarters of wheat," that "when a word is used having a legal meaning, it must be understood to be used in its legal acceptation"; here a bushel was by statute prescribed to contain 8 gallons, but a local measure contained 9 gallons.

of conservatism), heretical enough.[8] One of the judicial contemporaries of the great Tory Chancellor was strongly of opinion that to seek a testator's actual meaning would be "a very dangerous rule to go by, because it would be to say that the same words should vary in construction."[9] As late as 1821 the Chief Justice of the Common Pleas conceded frankly that "if not in a majority of wills, yet certainly in a great number, the construction is contrary to the probable intent."[10] And yet to give effect to a more flexible principle was to threaten the "landmarks of property," as the Bar was repeatedly warned.[11]

But the law of England was merely passing through the same stages as the law of Rome.[12] It was impossible that it could remain perpetually immovable in the old ruts. And so it emerged into the 1800s with a growing spirit of liberality which could not help conceding something, yet was hampered by the stern tradition. It now conceded that the sense of words is not fixed by rules of law; that the extreme of the old rule had disappeared. But it insisted that when the meaning is "plain" — that is, plain by the standard of the community and of the ordinary reader —, no deviation can be permitted. That is, it preserved the old theory to the extent of legally fixing the meaning for the party, however wrongly, unless the wrongness was glaringly plain on the face of the case:

1833–43, *Tindal*, C. J., in *Attorney-General* v. *Shore*, 11 Sim. 592, 615: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the

[8] *Ante* 1726, Gilbert, Evidence, 80 ("for the operation and effect of a contract cannot be determined but by the rules of law; . . . and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure"); 1749, L. C. Hardwicke, in Goodinge *v.* Goodinge, 1 Ves. Sr. 231 ("though it has been allowed to ascertain the person or thing, as where two were of the same name, yet not to show that the testator meant to use general words in this or that particular sense"); 1784, L. C. Thurlow, in Shelburne *v.* Inchiquin, 1 Bro. P. C. 338, 342 ("If the words themselves are intelligible, there is no instance where parol evidence has been admitted to explain them into a more vulgar sense. . . . If words have in themselves a positive precise sense, I have no idea of its being possible to change them"); 1795, L. C. J. Kenyon, in Lane *v.* Stanhope, 6 T. R. 345, 354 ("Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord King and other judges have said, removing landmarks").

[9] Le Blanc, J., in Doe *v.* Dring, 2 M. & S. 448, 455 (1814).

[10] Dallas, C. J., in Pocock *v.* Lincoln, 3 B. & B. 27, 46. "On one occasion the counsel asserted that it was the duty of the Court to find out the meaning of the testator. 'My duty, sir, to find out his meaning!' exclaimed Lord Alvanley, 'Suppose the will had contained only these words, "*Fustum funnidos tantaraboo*"; am I to find out the meaning of his gibberish?'" (Law and Lawyers, II, 74).

[11] Le Blanc, J., in Doe *v.* Lyford, 4 M. & S. 550, 556 (1816); Kenyon, L. C. J., in Lane *v.* Stanhope, *supra*.

[12] The same controversy is seen in Dig. XXXIII, 10, 7, § 12, *de sup. leg.*

instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar, idiomatic meaning, in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. . . . But I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed."

1862, Lord *Chelmsford*, in *Beacon L. & F. Ass. Co.*, 1 Moore P. C. N. S. 73, 98: "In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain."

1871, *Malins*, V. C., in *Kilvert's Trusts*, L. R. 12 Eq. 183, 186: "There is one rule without exception in construing a will, — which is that wherever a bequest, whether made to a person or a charity, is perfect and unequivocal in all its parts, no parol evidence is admissible to explain it."

1839, *Catron*, J., in *Bradley* v. *Steam Packet Co.*, 13 Pet. 89, 105: "To control an instrument's construction by oral proof of the objects of the contracting parties and the purposes of the contract would lead to the dangerous result of construing every writing not by its face, not by the language employed, but by matters extrinsic, variant in each case, as human testimony should make it."

1891, *Holmes*, J., in *Goode* v. *Riley*, 153 Mass. 585, 28 N. E. 228: "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would open too great risks, if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church. An artificial construction cannot be given to plain words by express agreement." [13]

Such is the rule still surviving to us, in many Courts, from the old formalism, namely, the rule that you cannot *disturb a plain meaning*.

As to this position, the answer, of course, must consider both theory and policy. (1) That the *theory* of it is unsound, ought not to be doubted. There can be, in the nature of things, no absoluteness of standard in interpretation. An advanced communism might conceivably bring men to such a level of intellectual uniformity that their thoughts would be expressed in invariably identical symbols. But till that day comes, the varieties of indi-

[13] The learned justice later repeated his view, in 1899, in an acute essay, in 12 Harvard Law Review 417, 420 (The Theory of Legal Interpretation).

vidual expression and sense must be unquenchable. So long as men are allowed to grant and contract freely, and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective, and individual. Mr. Justice Brook once thought it "barbarous" that a man should be "assured that whatever words he made use of, his meaning only should be considered." But as the law of to-day has broken with his premise, so it must break with his conclusion. The ordinary standard, or "plain meaning," is simply the meaning of the people who did *not* write the document. The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth, there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document:

1696, *John Locke*, Letter to the Bishop of Worcester (Works, IV, 85): "Your lordship says, 'Peter, James, and John are all true and real men.' Answer: Without doubt, *supposing* them to be 'men,' they are true and real men, *i. e.* supposing the name of that species belongs to them. And so three bobaques are all true and real bobaques, supposing the name of that species of animals belongs to them. For I beseech your lordship to consider, whether in your way of arguing, by naming them Peter, James, and John, names familiar to us, as appropriated to individuals of the species 'man,' your lordship does not at first *suppose* them 'men' and then very safely ask, whether they be not all true and real 'men'? But if I should ask your lordship, whether Weweena, Chuckerey, and Cousheda, were true and real men or no? your lordship would not be able to tell me, until I have pointed out to your lordship the individuals called by those names. . . . Your lordship, in your fore-cited words, says, 'here lies the true idea of a person'; and in the foregoing discourse speaks of 'nature,' as if it were some steady, established being, to which one certain precise idea necessarily belongs to make it a true idea: whereas, my lord, in the way of ideas, I begin at the other end, and think that the word 'person' in itself signifies nothing; and so, no idea belonging to it, nothing can be said to be the true idea of it. But as soon as the common use of any language has appropriated it to any idea, then that *is* the true idea of a 'person,' and so of 'nature.' But because the propriety of language, *i. e.* the precise idea that every word stands for, is not always exactly known, but is often disputed, there is no other way for him that uses a word that is in dispute, but to define what *he* signifies by it; and then the dispute can be no longer verbal, but must necessarily be about the idea which he tells us he puts it for."

1827, *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. VI, c. IV (Bowring's ed., vol. VII, p. 556, note): "The refusal to put upon the words used by a man in penning a deed or a will the meaning which it is all the while acknowledged he put upon them himself, is an enormity, an act of barefaced injustice, unknown everywhere but in English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery. Lawyers putting upon it their own sense? Yes, *their* own sense. But which of all possible senses is *their* own sense? They are as far from agreeing with one another, or each with himself, as with the body of the people. In evident reason and common justice, no one will ought to be taken as a rule for any other; no more than the evidence in one cause is a rule for the evidence to different facts in another cause."

(2) As to the argument of *policy*, the case is somewhat different. There is much to be said for the traditional rule, — though not all that is said is sound. For example, Chief Justice Tindal, in his apprehensions that under any other rule "no lawyer would be safe in advising upon the construction of

a written instrument, nor any party in taking under it," [14] apparently assumes that under the traditional rule an ideal facility and certainty of interpretation can be had. He retires (in Professor Thayer's words) "into that lawyer's Paradise, where all words have a fixed, precisely ascertained meaning, and where, if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text, and answer all questions without raising his eyes. Men have dreamed of attaining for their solemn muniments of title such an absolute security." But it is a dream of the impossible; and the dominance of either the old or the new rule will make little practical difference in the certainty of a given instrument. In the very case of Lady Hewley's Charities, for which Chief Justice Tindal laid down his rule of exclusion, even the admitted data were so voluminous and complex that the excluded material was comparatively a trifle. The real strength of the argument is rather found in the practical statement of Mr. Justice Holmes [14] that "it would open too great risks [*i. e.* of incredible pretences] if evidence were admissible to show that when they said 'five hundred feet' they agreed that it should mean one hundred inches, or that 'Bunker Hill Monument' should signify the Old South Church." Now the interesting feature of this illustration is that in important instances the very opposite fact is daily and hourly illustrated, — in the private cipher-codes of commercial houses. By these agreements words *are* employed in a sense totally alien, and sometimes exactly opposite, to the ordinary meaning. In one of the printed cable codes now in use, for example, "Innovate" is made to mean "Do this only as a last resort"; and "Invective" is made to mean "We all unite in sending you our heartiest congratulations"! No doubt some brokers who are particularly apprehensive of the interception of their messages are accustomed to agree that "buy" shall mean "do *not* buy." There are, then, abundant instances in which not only there is no "great risk," but there is an absolute necessity, of accepting proof of these private conventions; and these instances shatter the whole argument for the rule as a rule. The fallacy of the person who declared that "He was open to conviction, but he would like to meet the person who could convince him," is here reversed; for the judicial attitude thus illustrated is that "We are not open to conviction, because we are afraid that somebody will sometimes convince us." The truth is that whatever virtue and strength lies in the argument for the antique rule leads not to a fixed rule of law, but only to a general maxim of prudent discretion. In the felicitous alliteration of that great judge, Lord Justice Bowen, it is "not so much a canon of construction as a counsel of caution." [15] The distinguished Master of the Rolls, Sir George Jessel, once declared to counsel that "nobody could convince him that black [selvedge] was white"; and yet the Court of Appeals reversed his judgment because they were after all convinced of that precise proposition.[16] To say that it

[14] Quoted *supra*.
[15] 1890, *Re* Jodrell, L. R. 44 Ch. D. 590; quoted *infra*.
[16] 1880, Mitchell *v.* Henry, cited *post*, § 2463.

would be difficult to convince him, and upon the evidence to fail to be convinced, would have been a rational attitude. But that is very different from an arbitrary rule declaring *a priori* that the judicial mind is legally not open to conviction.

There is, then, neither in theory nor in policy any basis for an absolute rule declaring that when a word has a "plain meaning," *i. e.* by the popular standard, neither the local nor the mutual nor the individual standard can be substituted. Such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing. Before examining the state of the decisions on the subject, it is worth while to notice the utterances of judges who have plainly championed the modern and more liberal rule:

1854, *Coleridge*, J., in *Brown* v. *Byrne*, 3 E. & B. 703: "Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence [of a local usage] be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning *are* used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean 'twelve hundred,' 'a week' 'a week only during the theatrical season,' 'a day' 'a working day.'"

1860, *Blackburn*, J., in *Myers* v. *Sarl*, 3 E. & E. 306 (admitting trade usage): "I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . I take to be the true rule of law upon the subject that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the instrument relates, that meaning is *prima facie* to be attributed to it; unless upon the construction of the whole contract enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds."

1890, *Lindley*, L. J., in *Re Jodrell*, L. R. 44 Ch. D. 590, 609, 614: "I do not propose to deal with decided cases at all. It may be that there were expressions in the documents then before the Court which made the judges come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms — whether in deeds, wills, or mercantile documents. They may be valuable guides; but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed before. Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you." *Bowen*, L. J.: "It seems to me that the only weight one can give to such language [as the so-called rule against disturbing a clear meaning] is to treat it not so much as a canon of construction as a counsel of caution, to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because,

forsooth, the language has not been framed according to some measure or standard of correct expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it. As soon as you once arrive at your journey's end, you have no more to do than to give effect to the true construction as you see it." [17]

1880, *Doe*, C. J., in *Tilton* v. *American Bible Society*, 60 N. H. 377, 382 (dealing with a bequest to "the Bible Society"): "The question is not whether a plea of misnomer of a party is sustained by proof, nor whether there is a variance between the evidence and the name of a third person set forth in pleading. The question is not by what name any Bible society was known to others, but which one of several Bible societies was intended by the testator. . . . Evidence showing what name was given to a Bible society in its charter, what name it used or recognized as its own, and by what name or names it was known to others, tends to prove a name by which the legatee *might* have been known to the testator, and a name which he *might* have used in his will to express his intention. But the society intended by him, and identified by competent evidence, is the legatee, by whatever name described in the will, and notwithstanding any other name or names by which it may have been invariably or usually known to others. . . . A person known to a testator as A. B., and to all others as C. D., may take a legacy given to A. B."

§ 2463. **Same: Application of the Rule to Wills, Deeds, Contracts, etc.** The traditional rule is found in application almost side by side with the liberal rule. The former is nowadays perhaps less frequently enforced in England. In the United States it is often invoked under the guise that no peculiar and individual meaning can be shown unless there is an "ambiguity." There are nevertheless abundant instances of the liberal rule's recognition.

(1) In *wills*, the traditional rule has found application chiefly to proper names of places and persons and to such terms as "estate" and "money." [1]

[17] 1902, Miles *v.* Wilson, 1 Ch. 138, 142 (approving the similar language of L. C. Halsbury in *Re* Jodrell).

[1] *England:* 1816, Doe *v.* Chichester, 4 Dow 65, 93 (devise of "my estate of Ashton," Ashton being a parish; the testator had inherited from his mother and his father different properties, that from his mother lying chiefly in Ashton parish and also in others, and that from his father in Youlston; the testimony of his steward and others that the testator "used in speaking of his property which he had derived from his father to call it his Youlston estate, and that in describing the estate derived by him from his mother he used to designate that by the general name of his Ashton estate," and certain accounts tendered to him, entitled "J. Cleave's account for Ashton estate," including properties in other parishes than Ashton, were excluded); 1820, Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 76, 81, 111 (limitation "to the use of the right heirs of S. R. forever"; held to be ambiguous, as applicable equally to right heirs at the time of the remainder created or at the time of its taking effect, and therefore to permit resort to other indications, in the deed or the circumstances, of the grantor's meaning; careful opinion by Plumer, M. R.); 1847, Reynolds *v.* Whelan, 16 L. J. Ch. 434 (bequest to "W. R., one of my farming men"; there were two persons named W. R., one an ordinary farming servant, recently employed, the other a man of all work, forty years in the testator's service; K. Bruce, V. C., held that the latter could be accurately described as a "farming man" and took the bequest; otherwise, if he could not be so described); 1854, Mostyn *v.* Mostyn, 5 H. L. C. 154 (there were five children, R. H. M., J. H. M., S. J. M., T. M., and M. M. D.; after bequests to "R. M.," and "J. H. M.," there was a bequest over to "S. M., J. M., and M. D., all of them late of Calcott Hall"; held that the name "J. M." could not be applied to the fourth child T. M.; no clear principle stated); *United States:* 1877, Dunham *v.* Averill, 45 Conn. 61 (bequest to the "American and Foreign Bible Society"; there was a society so named and also an American Bible Society; declarations of intent to give to the former, which was called by him by the name in the will, excluded); 1843, Tucker *v.* Seaman's Aid Society, 7 Metc. 188 (bequest to "the Seaman's Aid Society"; in fact there was in Boston a "Seaman's Aid Society" and a "Seaman's Friend Society"; the circumstances that the testator was well acquainted with the latter and was ignorant of the former, and that he had used the term "Seaman's Aid Society"

A special form of it occurs for words having in the law of inheritance a precise meaning, such as "child" or "son." In Coke's day, the rule had been that a devise to a "son" named could be taken by a bastard, if the person had been reputed by that name.[2] Later, the rule seemed to form that whenever a word of relationship was used, the law's meaning could be overthrown when a different sense clearly appeared from the will and when there were no persons who corresponded exactly to the law's meaning. The individual opinions of Lord Justice Bowen and others have in later times practically repudiated these two qualifications; but the English decisions cannot be said to have fully accepted this result; they must at any rate be viewed as a developing series, and not as a consistent whole.[3]

on the honest representation of one B., the draftsman, who knew only of the former and who gave its name to the testator on the erroneous supposition that the testator had the former society in mind, were held insufficient to give the bequest to the latter; the Seaman's Friend Society "cannot take, because the name and description are not those by which they have ever acted or been known or designated; and because the Seaman's Aid Society is the one precisely named and described in the will"; this ruling is erroneous, but may be accounted for by the apparent reliance of the Friend Society claimant on the declarations of intention, which were as such clearly inadmissible); 1864, American Bible Society *v.* Pratt, 9 All. 109 (bequest of deposit in the "Dedham Bank"; there existed a Dedham Bank and a Dedham Institution for Savings, the latter commonly known as the Dedham Savings Bank; that the testator had a deposit in the latter, excluded; the ruling markedly illustrates the impropriety of the supposed rule); 1814, Mann *v.* Mann, 1 John. Ch. 231, 236 (bequest of all the rest of the "moneys," held to mean cash only, and not notes, bonds, and mortgages).

[2] 1607, Sir Moyle Finch's Case, 6 Co. Rep. 65*a* ("If a grant be made to a bastard by the sirname of him who, as is supposed, begot him, it is good, if he be known by such name; so if a remainder be limited 'Rich. filio Rich. Marwood,' it is good although he be a bastard, if in vulgar reputation and knowledge he be known by such a name"); 1737, Rivers' Case, 1 Atk. 410 (devise to "his two sons Charles and James R."; though illegitimate, they were given the estate; "anything that amounts to a *designatio personæ* is sufficient").

[3] *England:* 1778, Green *v.* Howard, 1 Bro. C. C. 31 (L. C. Thurlow, refusing to apply a bequest to "my own relations" to include second cousins: "The sense of the words, as fixed by legal authority, is not to be altered by the langnage held on any occasion by the testator, or by his behavior"); 1800, Cartwright *v.* Vaudry, 5 Ves. 530 (a testator had four daughters; one of them was illegitimate, but at the time this was known to none but himself; L. C. Loughborough declined to include her under a devise to "children," though he had "no doubt of the intention"; the special circumstances made this ruling an outrage on the name of justice); 1812, Wilkinson *v.* Adam, 1 Ves. & B. 422, 457; 1816, Beachcroft *v.* Beachcroft, 1 Madd. Ch. 430 (good opinion by V. C. Plumer); 1831, Fraser *v.* Pigott, 1 Younge 354; 1836, Blackwell *v.* Bull, 1 Keen 176, 181 (Langdale, M. R.: "The word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect"); 1870, Grant *v.* Grant, L. R. 5 C. P. 727 (devise to "my nephew, J. G.;" there were two relations of that name, one the son of a brother, the other of a wife's brother, and the term "nephew" was held not to be necessarily restricted to the former class of persons); 1873, Hill *v.* Crook, L. R. 6 E. & I. App. 265, 282 (general principle approved; the gift was here applied to illegitimate children, because the terms of the will were held to describe them as such; the absurdity of the doubt in this case was that the parties had been formally married, but the wife was a deceased wife's sister and the union technically illegal); 1875, Dorin *v.* Dorin, L. R. 7 E. & I. App. 569 (power to a woman to dispose of property "amongst our children"; the testator had two illegitimate children by her, then married her, made this will the day after the marriage, had no other children, and treated these two as his; held, that "children" was to be interpreted as "legitimate children" and could not be applied to the above children; a ruling which shames common sense, and, to the perversity of the English law denying legitimation by subsequent marriage, adds the harshness of preventing the parent from supplying by will the deficiencies of the law); 1878, Ellis *v.* Houstonn, L. R. 10 Ch. D. 236, 240 (Malins, V. C., applied the rule, summing up the authorities; only where no legitimate children appear can illegitimate ones take under the term "children"; as to Dorin *v.* Dorin, *supra*, he admitted that "in common with most persons, it is a result which anybody may regret"); 1887, *Re* Horner, L. R. 37 id. 695 (bequest to "my sister Charlotte, the wife of Thomas Horner," and after her death "amongst her children"; C. was only cohabiting with T. H., as the testator knew; held that "children" signified the illegitimate children of C.; "you are to ascertain the sense in which the testator used the words which you find there"); 1890, *Re* Jodrell, L. R. 44 id. 590

The liberal rule, on the other hand, has been applied even to the extreme of principle, and the results show how practical and just it can be.[4] Moreover, in its application to words of relationship, it would seem to be the commoner one to-day in the United States.[5]

(bequest to "relatives," held to include "all those the testator had before treated as relatives," whether legitimate or not; "you may put yourself as much as you can into his position, and diving so into the mind of the person who has made the instrument"; quoted *ante*, § 1362); 1894, *Re* Fish, 2 Ch. 83 (gift to his "niece Eliza Waterhouse"; there was no niece E. W., but there was a legitimate and an illegitimate grandniece, each named E. W.; no evidence to show testator's meaning was admitted, and the clause was applied to the legitimate E. W. as the one nearest described; the opinion shows insufficient acquaintance with the precedents and is wholly unsound); 1902, Miles *v.* Wilson, 1 Ch. 138, 142 (cited *ante*, § 2462). *Canada:* 1849, Doe *v.* Taylor, 1 All. 525, 534 ("my grandson"); *United States:* 1829, Gardner *v.* Heyer, 2 Paige 11 (bequests to the testator's children; he had only illegitimate children; held that, there being no legitimate children, the term could be applied under the circumstances to the illegitimate ones); 1895, Flora *v.* Anderson, 67 Fed. 182, 188 ("issue," not allowed to be interpreted to include illegitimate issue).

[4] *England:* 1791, Parsons *v.* Parsons, 1 Ves. Jr. 266 (annuity to a brother "Edward P.," and then to his children; at the date of the will, a brother Samuel P. alone survived, with children, but a brother Edward P. had already died without children; since the "testator had been in the habit of calling his brother Samuel by the name of 'Edward' and 'Ned,'" the annuity was given to Samuel); 1801, Druce *v.* Denison, 6 Ves. Jr. 385 (bequest of "my personal estate"; a paper drawn up by him at the time, indicating that he included in that term certain choses in action of his wife, was admitted by L. C. Eldon); 1825, Doe *v.* Jersey, 3 B. & C. 870 (devise of "all that my Briton Ferry estate"; held that these words "denote a property or estate known to the testatrix by the name of her B. F. estate, and not an estate locally situate in a parish or township of B. F.," and that for determining its scope the stewards' accounts, rendered to the testatrix, of the lands therein entered as "B. F. estate" should be considered); 1841–1848, Blundell *v.* Gladstone, 11 Sim. 467; on appeal, 1 H. L. C. 778, 1 Phillips 279 (to "the second son of Edward Weld, of Lulworth"; there was no such person as E. W. of L., but J. W. was in possession of L., and there had been a brother E. W.; J. W. had two sons, E. J. W., commonly called E. W., and T. W.; held, that on the evidence the description should be applied to the second son of J. W. and not the second son of E. J. W.; Patteson, J.: "It was contended . . . that where one person, and one only, fully and accurately answers the whole description, the Court is bound to apply the will to that person. Such may be conceded to be a general rule of law and of construction, . . . but it has exceptions"); 1844, Lee *v.* Pain, 4 Hare 201, 251 (1. a bequest to "Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden"; there were no such persons as ordinarily known; but there were Mrs. Washbourne, formerly Miss Bowden, and her daughter, Miss Washburne, and the testatrix "had been repeatedly known, when speaking of the claimants, to call them by the name of Bowden, and on the mistake being pointed out, she acknowledged it"; the legacy was given to Mrs. and Miss W.; 2. a bequest to "Miss Sarah Jameson, of Clapham Common"; there was a Mrs. S. J. of that place, and also a daughter named Frances Anne J., who after the testatrix's death married Mr. Winter; the testatrix knew both mother and daughter; the legacy was given to the daughter); 1847, Ryall *v.* Hannum, 16 Beav. 536 (bequest to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of G., single woman, and who formerly lived in my service"; this was given to the natural son John of a certain Elizabeth Abbott, who had by marriage another name at the time of the will, on proof that the father of the child was reputed to be the testator's son, that the testator had not heard that it was a daughter, and that he had shown an interest in it); *United States:* 1883, Smith *v.* Kimball, 62 N. H. 606 (bequest to the "Meredith Institution," given to the Kimball Union Academy of Meriden, on proof that the testator's relatives had gone to that school, that he had shown great interest, and that he had said, at the time of execution, that the Meredith Institution was at Meriden; see the quotation *ante*, § 2462); 1820, Thomas *v.* Stevens, 4 John. Ch. 607 (bequest to "Cornelia Thompson" given to "Caroline Thomas," on proof that the claimant was a favorite of the testatrix, and "was the person intended," and that no person named Cornelia Thompson had made claim); 1790, Powell *v.* Biddle, 2 Dall. 70 (bequest to a friend "Samuel Powell (son of Samuel Powell, of the city of Philadelphia, carpenter"); on proof that a person named William Powell was the son of the testator's deceased daughter by one Samuel Powell a carpenter, that he was well known to the testator, and that "the testator usually, by mistake or by way of nickname, called him Samuel," the bequest was given to William, though the same carpenter had also a son named Samuel, the son of a second wife and not acquainted with the testator).

[5] 1902, Kohl *v.* Frederick, 115 Ia. 517, 88 N. W. 1055 ("inherit," shown to be used in a non-legal sense); 1891, Rohb's Estate, 37 S. C. 19, 28, 39, 16 S. E. 241 (devise to "such persons as shall be entitled under the law"; illegitimacy prevented the inheritance by certain related persons; declarations of the testator, speaking of sisters and nieces, received, as showing his usage of the terms in the will).

(2) In *deeds* and *contracts*, the traditional rule finds constant and dominant application in excluding the mutual standard, *i. e.* the agreement of the *parties themselves* upon a special sense for their words.[6] It has been sometimes, in early cases, allowed to exclude even the local standard, *i. e.* the *usage* of a *trade* or *locality*.[7]

The liberal rule, on the other hand, is to-day conceded, practically everywhere, to permit resort in any case to the *usage* of a *trade* or *locality*, no matter how plain the apparent sense of the word to the ordinary reader; and

[6] *England:* 1827, Taylor *v.* Briggs, 2 C. & P. 525 (the question being whether "cotton in bales" meant an ordinary bag or a cubical compress, the local usage was admitted, but not "what was said at the time" between the parties; Abbott, C. J.: "That sort of evidence is of too dangerous a nature to be relied on"); 1847, Caine *v.* Horsfall, 2 C. & K. 349 (contract between a merchant and a captain in the African trade to pay the latter "6 per cent on the net proceeds of the homeward cargo"; the plaintiff claiming that the defendant should not deduct bad debts in reckoning net proceeds, Rolfe, B., ruled that "evidence might be admissible to prove their meaning, not in this particular contract, but in all mercantile dealings or to show that they have a different meaning when used in the African trade"); *Canada:* 1893, Troop *v.* Union Ins. Co., 32 N. Br. 135, 140 (marine policy); *United States:* 1895, Balfour *v.* Fresno C. & I. Co., 109 Cal. 221, 41 Pac. 876 (general principle applied to a contract); 1900, Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247 ("new and useful improvements," in a patent contract, not allowed to be shown by mutual understanding to include later inventions); 1897, Harrison *v.* Tate, 100 Ga. 383, 28 S. E. 227 (notes for title to land; the parties' construction excluded, because no ambiguity appeared); 1901, Ralya *v.* Atkins, 157 Ind. 331, 61 N. E. 726 (contract for the sale of a patent; collecting the authorities; the parties' construction is admissible if the terms are ambiguous); 1895, Hamill *v.* Woods, 94 Ia. 246, 62 N. W. 735 ("When the language of a guarantee is not so clear as to indicate its meaning conclusively, parol evidence is admissible to show the circumstances . . . to the end that the intent of the parties to it may prevail"; collecting the authorities); 1891, Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228 (quoted *ante*, § 2462); 1893, Reynolds *v.* Bostou Rubber Co., 160 id. 240, 245, 35 N. E. 677 ("When the description of granted premises is clear, extrinsic evidence is not admissible to control it; but when it is uncertain, such evidence may be resorted to, and the acts of adjoining owners showing a practical construction adopted and acted upon are of great weight"); 1899, Violette *v.* Rice, 173 id. 82, 53 N. E. 144 (evidence of a particular sense of words by particular parties, not admitted, to determine the sense of the word "services" in a theatrical contract); 1900, Menage *v.* Rosenthal, 175 id. 358, 56 N. E. 579 (parties' conduct or admissions, receivable only when the meaning of the contract is doubtful); 1890, Hartford I. M. Co. *v.* Cambria M. Co., 80 Mich. 491, 45 N. W. 351 (mining location involving the "east half" and "west half" of a lot; "the circumstances of the case held not to alter the regular meaning of "half" from its signification of quantity merely, there being "no possible ambiguity about these descriptions"); 1897, Brown *v.* Schiappacassee, 115 id. 47, 72 N. W. 1096 (lease with license; circumstances not received to show that the lease was incidental only to the license); 1895, Armstrong *v.* Granite Co., 147 N. Y. 495, 42 N. E. 186 (that the parties used the term "minerals and ores" in a limited sense, not admitted, except for the purpose of reforming the instrument); 1902, Uihlein *v.* Matthews, 172 id. 154, 64 N. E. 792 (intention of the parties to a quit-claim deed not to release a party-wall restriction established by a prior deed, not allowed to be shown; Bartlett, J., diss.); 1900, Abraham *v.* R. Co., 37 Or. 495, 60 Pac. 899 (conveyance "for all legitimate railroad purposes"; parties' understanding that this included the purpose of a hotel or eating-house, excluded); 1898, First National Bank of Nashville *v.* R. Co., — Tenn. — , 46 S. W. 312 (promise to use honds to pay "for the floating debt secured by pledge of income bonds"; that the promisor used these words as applying to certain holders of the debt, excluding others, not admitted); 1897, Barber *v.* R. Co., 166 U. S. 83, 17 Sup. 488 (circumstances may be consulted "to explain ambiguities of description," but not "to control the construction or extent of devises therein"); 1902, Dennis *v.* Slyfield, 54 C. C. A. 520, 117 Fed. 474 (an option to ship "any or all of this lumber," not allowed to be made an obligation to ship all of it, by the parties' understanding); 1903, Ocean S. S. Co. *v.* Ætna Ins. Co., 121 Fed. 882 (applied to marine insurance contracts); 1896, Owen *v.* Henderson, 16 Wash. 39, 47 Pac. 215 (the "west half" of a lot; a special alignment, as shown by former transactions of the parties, excluded). Compare the cases cited *post*, § 2465.

[7] 1856, Sigsworth *v.* McIntyre, 18 Ill. 126, 129; 1834, Allen *v.* Kingsbury, 16 Pick. 238 (deed calling for a boundary "to an oak-tree marked, thence on the heirs of J. K. to another oak-tree marked"; the commissioners' practice to follow a curved line conforming to the contour of the land and marked by monuments, excluded; "evidence of usage is never to be received to overturn the clear words of a deed"; 1807, Winthrop *v.* Ins. Co., 2 Wash. C. C. 7, 10 ("usage can only be resorted to where the law is doubtful and unsettled"); and the early English cases cited *ante*, § 2462.

some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words and the injustice of attempting to enforce a supposed rigid standard.[8] Furthermore, the notion, so frequently observed in the interpretation of wills, that the ordinary legal definition of a word cannot be superseded, is seldom insisted upon in the face of commercial usage.[9] Yet the liberal rule is seldom so far conceded as to allow the *parties' special mutual sense* to be considered;[10] perhaps the

[8] *England:* 1832, Smith *v.* Wilson, 3 B. & Ad. 728 (covenant in a lease of a rabbit warren, "that at the expiration of the term they the plaintiffs would leave on the warren 10,000 rabbits or conies, the defendant paying 60 *l.* per thousand for the same, and for any more than that number at that rate, the number to be estimated by two indifferent persons"; breach, that the plaintiff left 19,200 rabbits, but the defendant would not pay for them; it appeared that the appraiser's estimate was 1600 dozen, and the defendant was allowed to prove that by the customary meaning of the locality, "the term 'thousand,' as applied to rabbits, meant '100 dozen'"); 1836, Bold *v.* Rayner, 1 M. & W. 346 (sale of goods on shipboard; the sale notes interchanged by the parties read, the one "from the Speedy or Charlotte," the other "ex Speedy and Charlotte"; the Speedy was lost, but the Charlotte arrived; a usage that, where two vessels are named, the goods may be delivered from either at seller's option was admitted; counsel objected that by the sold note both must arrive; Parke, B.: "Yes, if you read it strictly *and;* but the evidence was that custom reads it *or*"; L. C. B. Abinger: "The Court must look at each contract, and say whether in its whole spirit and meaning *and* did not mean *or* in the understanding of the parties"); 1846, Grant *v.* Maddox, 15 id. 737 (theatrical engagement for "three years at a salary of 5, 6, and 7 pounds per week in those years respectively"; the professional usage that "actors were never paid during the time of vacation," admitted as interpreting the term "years"); 1860, Myers *v.* Sarl, 3 E. & E. 306 (building contract, providing for a "weekly account of the work done"; trade usage admitted to show that "weekly account" was restricted to a particular part of the work, even though "the words have a plain general meaning"; quoted *ante*, § 2462); 1880, Mitchell *v.* Henry, L. R. 15 Ch. D. 181, 24 Sol. J. 690 (trademark infringement; the plaintiff's registered description named a worsted having a "white selvage"; part of the warp being a "dark gray or black mohair," the goods had a dark appearance, and Jessel, M. R., declaring "that is a black selvage and not a white selvage," and that "no amount of evidence would convince him that black was white," declined to give effect to the plaintiff's testimony that the plaintiff's selvage "was what was perfectly well known in the trade as a white selvage"; on appeal, this was reversed, on the ground that "the question is not whether the selvage *is* white, but whether it is *what the trade know* as a white selvage"); *United States:* 1895, Leavitt *v.* Kennicott, 157 Ill. 235, 41 N. E. 737 (a theatrical contract employing "at a weekly salary of $40 per week"; usage admitted to show that "per week" signified the weeks of the theatrical season only, not of the calendar year); 1898, McChesney *v.* Chicago, 173 id. 75, 50 N. E. 191 ("Sec. 23, 38, 14," interpreted by usage to mean "range 38, township 14"); 1896, Coulter Mfg. Co. *v.* Grocery Co., 97 Ia. 616, 66 N. W. 875 ("prices guarantied against market price to date of shipment"; usage admitted, even though the words were not apparently obscure or technical); 1898, Brody *v.* Chittenden, 106 id. 524, 76 N. W. 1009 (whether certain jewelers' tools' etc., were included under a mortgage of "furniture"; usage of the trade allowed); 1886, Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158 ("The fact that the white arsenic was colored with lamp-black was immaterial; it still remained the substance known as white arsenic, though no longer white in appearance"); 1897, Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814 (warranty of a horse as "sure foal-getter"; evidence of the usual percentage of foal-getting from "sure foal-getters," received; here, 60 per cent); 1891, Farnum *v.* R. Co., 66 N. H. 569, 29 Atl. 541 (authority for "noiseless steam motor"; technical application of that term to motors not operating without certain noise, held admissible); 1843, Hinton *v.* Locke, 5 Hill N. Y. 437 (contract to pay 12 *s.* per day for labor; trade usage admitted to show that "day" signified "ten hours"); 1891, Reed *v.* Tacoma Ass'n, 2 Wash. 198, 26 Pac. 252 (deed running a line "west"; the custom of the government surveyors, who had surveyed this land, to run lines not due west, but a little north of west, was admitted to show the meaning of "west").

[9] 1868, Thorington *v.* Smith, 8 Wall. 1 (a contract to pay in "dollars" may be construed on the facts to mean dollars of the unlawful Confederate Government); 1898, Higgins *v.* Cal. P. & A. Co., 120 Cal. 629, 52 Pac. 1080 (a contract to pay "fifty cents per ton for each and every gross ton" of asphaltum, etc., the statute providing that "twenty hundred weight constitute a ton;" the trial Court found that the parties used "gross ton" as meaning 2240 pounds; good opinion by Temple, J.).

For examples of the earlier contrary rule in the 1700s, see *ante*, § 2462.

[10] 1790, Calverley *v.* Williams, 1 Ves. Sr. 210 (auction sale of "the lands in the possession of Groomhridge"; the buyer, having taken the seller's schedule and tallied the land described in it, completed the purchase; but it was then discovered that seven acres more were in fact "in the possession of G."; held, that "the understanding of these parties applied to the lands

only settled instances are those of a secret cipher,[11] and of the designation of a party to a deed by a surname misused or misspelled according to the ordinary standard.[12] The reason for this hesitation is twofold, and is appreciable enough. In the first place, the existence of a special trade usage is much more credible and more definitely provable than a special usage of the parties to a specific transaction; the use of a regular cipher-code is almost the only instance of a tangible usage of the latter sort. In the second place, the parties' mutual "understanding" as to the sense of particular words or phrases is perilously akin to an "understanding" that certain terms not written shall prevail in place of the written terms, and this would be plainly a violation of the rule, already considered (*ante*, §§ 2430, 2442), against "varying the terms of the writing." Hence a judicial tendency to confuse the two rules. But neither of these is a sufficient reason for erroneously stating the present principle (*ante*, § 2462). Rather let the principle be acknowledged that the sense to be enforced is the special sense, if any, which the parties have fixed upon; but let there be the most convincing proof that they have distinctly and mutually so agreed, and let this process of interpreting their actual words not be made a cloak for evading the other rule against substituting their extrinsic for their written terms.

It may be added that the same considerations often apply to interpretation by the special usage of a *trade* or *locality*. So far as this usage merely interprets a particular word or phrase existing in the document, the present principle permits this (as indicated above). But so far as the usage endeavors to intrude into the document, or set up in rivalry with it, additional terms, it may violate the other rule against varying the written terms (*ante*, § 2440). The precedents, therefore, under that and the present rule are sometimes hard to distinguish.

§ 2464. **Usage of Trade or Locality, when to apply.** The usage of a trade or locality or sect or dialect being always eligible to supersede the ordinary or popular sense of words (*ante*, § 2463), it remains merely a question for the par-

specifically described" in the schednle, and that the buyer therefore was not entitled to the seven acres). Cases *contra* are cited *supra*, note 6.

For instances where the parties' understanding is allowed, there being an "ambiguity," see *post*, § 2465.

[11] N. Br. St. 1881, c. 14, § 3 (a telegraphic word or term agreed upon "as meaning between them some other word" etc., or as having "any other than the ordinary or apparent meaning," shall be taken "to be the word" etc. so agreed); 1899, Penn Tobacco Co. *v.* Leman, 109 Ga. 428, 434 S. E. 679 ("O. K." in a contract, allowed to be explained, because the parties agreed "these letters should have definite meaning as between themselves"); 1902, Powers *v.* Com., — Ky. —, 70 S. W. 644 (military officer's telegram, "all right," allowed to be shown by him to have a special meaning according to a secret code previously agreed upon).

[12] 1896, Hicks *v.* Ivey, 99 Ga. 648, 26 S. E. 68 (a grant to "Pulling"; deed from "Pullen"; the identity of persons allowed to be shown); 1895, De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526 (that the grantee's name in a deed, being "H. K."; was used to indicate a partnership doing business under that name, allowed to be shown); 1815, Jackson *v.* Hart, 12 John. 77, 84 (a State land patent being in issue, "parol evidence would be admissible to prove that 'George Houseman' and 'George Hosmer' are the same person; but certainly it is not explaining a latent ambiguity to prove that a grant to 'George Houseman,' a real person, was intended for another person of the name of 'George Hosmer'"); 1893, Marmet Co. *v.* Archibald, 37 W. Va. 778, 788, 17 S. E. 299 (corporation contracting by an assumed name); and additional instances cited *post*, § 2529 (presumption of identity of person from identity of name).

Compare the doctrine as to a *bill or note* in a fictitious or wrong name: cases cited in Ames' Cases on Bills and Notes, I, 347, note; ib. 428, note.

ticular case whether the parties have in fact spoken according to that standard. Where all the parties are members of the same trade or other circle of persons, little difficulty can arise; the only requirement is that the special sense alleged should be in fact a usage, or settled habit of expression, and not merely the expression of a few persons or of casual occasions.[1] But when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear. For this purpose, his *actual knowledge* of the particular sense as applicable to the transaction would suffice; otherwise it must appear to be so generally known in the community that his actual individual knowledge of it may be inferred.[2] The application of the general principle will then be a mere question of the probabilities of meaning for each case.[3] Where the usage is not that of a trade, but of a *locality*, the form of it may be common reputation[4] or commonly-used documents.[5] When *initials* or other abbreviations are to be interpreted, the local usage or repute is of course receivable,[6] even for electoral ballots;[7] though

[1] For the mode of proving usage, see note 9, *infra*.

[2] 1863, Russian Steam-Nav. T. Co. *v.* Silva, 13 C. B. N. S. 610, 617 ("where the performance has reference to a particular trade, [it] necessarily involves an obligation on the party to make himself acquainted by due inquiry with the usages of that trade"); 1881, Holt *v.* Collyer, L. R. 16 Ch. D. 718, 721 ("beerhouse" as used in an ordinary lease, not interpreted by trade meaning); 1896, Wheelwright *v.* Dyal, 99 Ga. 247, 25 S. E 170 (lumber trade usage held not broad enough); 1872, Howard *v.* Ins. Co. 109 Mass. 385 (warranty in a New York policy not to load above a certain quantity of "coal" at Cardiff; certain "patent fuel" having been so loaded, held that the usage not to include it under the term "coal" must be "known beyond Cardiff, and known so generally that the parties may fairly be presumed to have made their contract in view of its existence"); 1896, Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598 (excluding a custom among carpenters not so general as to be probably known to the opponent); 1872, Walls *v.* Bailey, 49 N. Y. 463, 473 (collecting the cases); 1895, Armstrong *v.* Granite Co., 147 id. 495, 42 N. E. 186 (excluding usage as to the meaning of "minerals" "about there," *i. e.* in the C. valley, as not a settled one for the region); 1895, Rickerson *v.* Ins. Co., 149 id. 307, 43 N. E. 856 (insurance of premises "No. 160 Mott St." containing two buildings; custom to describe a rear building specifically when intended, rejected); 1864, Lowe *v.* Lehrman, 15 Oh. St. 179, 185 (good opinion by Welch, J.); 1899, Shores Lumber Co. *v.* Stitt, 102 Wis. 450, 78 N. W. 563 (actual knowledge is not necessary).

[3] The following rulings will illustrate the application: 1811, Uhde *v.* Walters, 2 Camp. 16 (policy of insurance to any port "in the Baltic"; evidence admitted of the nautical and mercantile understanding to include the Gulf of Finland in the Baltic, though geographers name them as distinct); 1836, Clayton *v.* Gregson, 5 A. & E. 302 ("level" in a mining contract); 1903, Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612 (contract for elm strips of specified dimensions; a usage to determine measurements at the time of sawing, held binding); 1900, Wood *v.* Allen, 111 Ia. 97, 82 N. W. 451 ("dry goods"); 1857, Ford *v.* Tirrell, 9 Gray 401 (contract to build a stone wall at 11 cents a foot; to determine whether the inner or the outer face should be taken as the basis, usage was considered); 1896, St. Paul & M. Trust Co. *v.* Harrison, 64 Minn. 300, 66 N. W. 980 ("breeder" in a stallion-warranty); 1898, Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816 (mining usage employed to interpret a lease); 1899, Halsey *v.* Adams, 63 N. J. L. 330, 43 Atl. 708 (trade meaning of "reduce" in an insurance contract); 1872, Walls *v.* Bailey, 49 N. Y. 463, 468 (contract for plastering at a price "per square yard"; local usage admitted to determine whether "yard" included space actually plastered or total superficial area of walls including windows and doors); 1864, Lowe *v.* Lehman, 15 Oh. St. 179, 184 (contract to furnish brick at $6.25 "per thousand"; whether this signified the number furnished or used or the like, allowed to be shown by trade usage); 1870, Hearn *v.* Ins. Co., 3 Cliff. 318 ("at and from the port," in a marine insurance policy).

[4] 1895, Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334 (the fact that certain property described in a tax list was well known by that description and in common understanding applied to specific property, admitted).

[5] 1894, Hanlon *v.* R. Co., 40 Nebr. 52, 58, 58 N. W. 590 (maps in accepted use by community at time of deed, received to interpret an uncertain line).

[6] 1897, Smith *v.* Brackett, 69 Conn. 492, 38 Atl. 57 (insolvency docket); 1898, State *v.* Howard, 91 Me. 396, 40 Atl. 65 (record of tax-payers; "R. D. M. L.," etc., explainable by interpretation); 1897, Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72 (technical abbreviations of the wheat trade); 1898, State *v.* White, 70 Vt. 225, 39 Atl. 1085 (record of tax-payers; "R. L. D." and "$25," interpreted by usage of office).

[7] 1879, Clark *v.* Board, 126 Mass. 282, 286 (the application of ballot-names, by interpreta-

here the real doubt, if any, apparently involves the question whether in point of form (*ante*, § 2454) the terms of the vote or other act have been sufficiently embodied in writing.

Whether a usage, instead of interpreting the document's words, introduces additional terms into the transaction and thereby violates the rule against *varying a written transaction*, is a different question (*ante*, § 2440), as also the question of *implied contract* whether a usage has been so adopted as to form a term of the transaction.[8] So, too, the question must be distinguished whether and when *expert opinion* may be availed of to prove the technical meaning of a word (*ante*, § 1955).[9]

§ 2465. **Parties' Mutual Understanding; Identifying a Description.** There is no reason, in the nature of things, why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense; because what we are seeking, in interpretation, is their actual standard, and the popular standard is merely taken provisionally, as presumably theirs (*ante*, § 2461). It can thus be, in theory, only a question of fact in each case whether the parties *were* using a special mutual sense. But in practice two rules intervene to obstruct the simple application of this principle. One is the rule against varying the terms of a contract by setting up other terms in competition with it (*ante*, §§ 2430, 2442). This rule makes it often difficult to accept the parties' understanding as a source of interpreting the written words without virtually substituting extrinsic terms.[1] The other is the supposed rule against disturbing a "plain meaning" by any other meaning, or, as sometimes phrased, against using extrinsic evidence unless the terms are ambiguous. This rule, as affecting the present sort of data, has already been considered (*ante*, § 2363); and its policy, though unsound, is often deemed controlling. But, assuming these two rules to be not obstructive in a particular case, the general principle has full sway:

tion, to particular persons, as when the initial only is thereon marked, may be made by the proper tribunal, but not by a board of ministerial election officers); 1868, People *v.* Cicott, 16 Mich. 283, 308, 309, 317 (*contra*, on the first point; but Christiancy, J., and Cooley, C. J., approve the orthodox rule; "it has the merit of harmonizing with the rules applied to other written instruments, which I think is no slight recommendation; it is always objectionable and mischievous to lay down different rules for classes of cases which all come within the same reasons"). Compare the application of the Opinion rule, *ante*, § 1967.

[8] The following ruling illustrates the distinction: 1892, Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 190, 13 So. 209 (custom of brakemen in coupling, as varying from a rule of contract; not available unless acted on by both so as to alter the contract).

[9] For other rules as to the *mode of evidencing a usage*, see *ante*, §§ 379, 1954 (number and kind of instances) and § 2053 (number of witnesses).

[1] The following rulings illustrate the distinction: 1840, Doe *v.* Webster, 4 Perry & D. 270, 274 (deed of land "with the appurtenances"; a certain lot was an appurtenance, but the original offer of sale had expressly excepted it; the purchaser's admissions, after the sale, that he had not bought it were excluded; "this evidence went to contradict the deed, not to apply the words of it to any particular thing"); 1872, McCormick *v.* Huse, 66 Ill. 319; 1876, Black *v.* Bachelder, 120 Mass. 171 (advertising contract, "payable as convenient"; an understanding that this signified "payable after sales made through the circulation of the advertisement," excluded, as a "construction of the contract in direct violation of its terms"); 1903, Trustees *v.* Jessup, 173 N. Y., 84, 65 N. E. 949 (contract to make "a roadway;" the parties' understanding that the roadway should be of wooden piers, not a solid embankment, excluded).

Similarly, the parties' understanding cannot avail to evade the effect of an obligation in point of law: 1843, Brockett *v.* Bartholomew, 6 Metc. 396 (whether certain payments were applicable only to the rent of premises).

1868, *Wells*, J., in *Stoops* v. *Smith*, 100 Mass. 63 (the defendant having agreed to pay the plaintiff "for inserting business card in 200 copies of his advertising chart," the defendant, refusing to pay, offered to show that the chart, as understood between them, meant a chart of cloth, to be posted up in two hundred public places near Worcester, and that no chart had been so made and posted): "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used, and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation. The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars 'for inserting business card,' etc. In applying this stipulation, if the defendant had a business card distinctively known and recognized as such, there would be no difficulty in giving effect to the contract. But the identification of that card would involve the whole principle of admitting parol evidence for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared, and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract. The same considerations render the evidence offered by the defendant competent for similar purposes. The term 'his advertising chart' requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was to be an 'advertising chart.'" [2]

The application of the principle has long been seen in the interpretation of *descriptions in deeds*,[3] because there is there always some concrete and

[2] See also a good opinion by Barbour, J., in Bradley v. Steam Packet Co. (1839), 13 Pet. 89, 101–103.

[3] *Eng.*: 1787, Buller, J., in Doe v. Burt, 1 T. R. 701, 704 ("Where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it. . . . But whether parcel or not of the thing demised is always matter of evidence"); *Can.*: 1849, Doe v. Pitt, 1 All. N. Br. 385 ("all those certain pieces of marsh land"); *U. S.*: 1896, Derrick v. Sams, 98 Ga. 397, 25 S. E. 509 ("land purchased by H. of D." identified by evidence); 1893, Thompson v. Smith, 96 Mich. 258, 267, 55 N. W. 886 (mortgage of "block B"; that the mortgagor told the mortgagee that certain lands were not to be included was excluded; but other deeds etc., were admitted to show their usage as to the term "block B"); 1895, Calloway v. Henderson, 130 Mo. 77, 32 S. W. 34 (a farm described as "the farm known as the property of the late G. R.," allowed to be identified); 1896, Diggs v. Kurtz, 132 id. 250, 33 S. W. 815 ("lot No. 312"; no boundaries named and no plot referred to; oral agreement as to boundaries, admitted); 1897, Axford v. Meeks, 59 N. J. L. 502, 36 Atl. 1036 ("my place at Riverside," interpreted by considering the facts of the "place"); 1816, Jackson v. Goes, 13 John. 518, 524 ("The identity of the grantee, as well as of the thing granted, must generally speaking partake more or less of a latent ambiguity, explainable by testimony dehors the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee"); 1839, Fish v. Hubbard, 21 Wend. 651 ("A location on

local object, fully known to the parties but unknown to the Court, and in every such case it is obvious that "the words used must be translated into things and facts";[4] the parties to the deed almost always use terms of description which are peculiar to themselves.

But the universal application of the principle to *contracts and other documents* has also gradually been perceived. There is no transaction whatever in which, for some idea or other, the parties do not use words in a sense of their own. Having themselves locked up the idea in the words, themselves must furnish the key to unlock it. The antiquated notion (*post*, § 2470) that a document must be construed solely within its four corners, no matter how puzzling the problem, served for a time to retard the full appreciation of sound doctrine. But it was well settled by the middle of the 1800s in England; the case of Macdonald *v.* Longbottom, in which "your wool" was to be interpreted, served to mark the period of full conviction.[5] In the United States the principle has also received ample sanction and illustration.[6]

application of the description of parcels must always be made by evidence *aliunde*"); 1897, Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570 (facts to identify a grantee "I. C. McDowell" with one "Thomas C. McDowell," admitted).

[4] Holmes, J., in Doherty *v.* Hill, 144 Mass. 468, 11 N. E. 581.

[5] 1778, Cooke *v.* Booth, Cowp. 819 (whether a clause "under the same rents and covenants" should be construed inclusive or exclusive of the clause of renewal; Aston, J.: "As there have been four successive renewals, the lessor himself has put his own construction upon the covenant, and therefore is bound by it"); 1816, Birch *v.* Depeyster, 1 Stark. 210 (contract mentioning a captain's "privilege"; conversation between the parties beforehand, admitted "to show in which sense it was used on the present occasion"); 1821, Smith *v.* Doe, 2 B. & B. 473, 597 (marriage settlement containing a power to make leases which should include "a power of re-entry for non-payment of the rent"; the issne was whether leases made in alleged pursuance of the settlement were valid, their powers of re-entry being not absolute, but conditional on extension of time for payment and on inability to distrain; held, by a majority, that the usual and accustomed form of the leases of that estate could be considered in construing the clause in the settlement); 1839, Doe *v.* Benjamin, 9 A. & E. 644, 652 (whether a document agreeing to "take a lease" was a mere agreement or a present lease; Coleridge, J.: "The Courts have come to some inconsistent conclusions in cases of this kind; but from the main body of them the principle results that we must look to the intention of the parties, and that by considering the terms of the particular instrument, with reference, I agree, to the state of facts existing at the time"); 1846, Smith *v.* Jeffryes, 15 M. & W. 561 (sale of "60 tons of ware potatoes"; there were two qualities, "Regent's wares" and "kidney wares," and the seller offered to deliver the latter; the parties' express understanding that "Regent's wares" were signified was excluded; this case really rests on a misapplication of the principle of § 2466, *post*); 1859, Macdonald *v.* Longbottom, 28 L. J. Q. B. 297, 1 E. & E. 977 (purchase of "your wool"; a prior conversation admitted to interpret this phrase as used by the parties; L. C. J. Campbell: "Where there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract"); 1859, Symonds *v.* Lloyd, 6 C. B. N. S. 691, 696 ("In order to ascertain the intention of the parties, it is necessary to look to that which was the subject of the communication at the time or which was afterwards done"); 1859, Mumford *v.* Gething, 7 C. B. N. S. 305, 321 (contract "in consideration of my entering your employ"; the circumstances and understanding of the parties were received, showing that the employee was already a clerk in the employer's warehouse and had now additionally been employed as salesman to take the Midland district, and that "your employ" thus applied to the latter service only; Erle, C. J.: "[It was admissible] for the purpose of showing the circumstances under which such wide words were used, and of applying them according to the intention of the parties"); 1900, Bank of New Zealand *v.* Simpson, App. Cas. 182 (Macdonald *v.* Longbottom approved); 1902, *Re* Huxtable, 2 Ch. 793 (bequest of 4000*l.* to C., "for the charitable purposes agreed upon between us"; testatrix' agreement with C., admitted to define the charitable purposes; though not to establish that the income alone was to be given to such purposes).

[6] Compare the cases cited *supra*, note 1; 1895, Solary *v.* Webster, 35 Fla. 363, 17 So. 646 (bond reciting the settlement of previous claims; identification of the claims, permitted); 1896, Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194 ("cords" of wood; mutual understanding of the length of a cord, admitted); 1899, Kentucky Cit. B. & L. Ass'n *v.* Laurence, 106 Ky. 88, 49

§ 2466. **Individual Party's Meaning**; (1) **Deeds and Contracts.** When a person takes part in a bilateral act — *i. e.* a transaction in which other persons share — he must accept a common standard; he cannot claim to enforce his individual standard of meaning (*ante*, § 2461). The other party or parties are entitled to charge him with the common standard. This was long ago discussed and worked out as a general principle of casuistry: (?)

1785, Dr. *William Paley*, Principles of Moral and Political Philosophy, b. III, pt. I, c. V, "Promises": "Temures promised the garrison of Sebastia, that if they would surrender, *no blood should be shed*. The garrison surrendered; and Temures buried them all

S. W. 1059 (agreement to assume liabilities of a company "as shown by their books"; evidence received to show what "books" were meant); 1896, New England D. M. & W. Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112 (though by the statnte the goods sold must be designated in the memorandum, the interpretation of such a phrase as "2000 lbs. F. C." is merely an application of the words to a specific object, and may be shown by the understanding of the parties); 1897, Clark *v.* Lowe, 113 Mich. 352, 71 N. W. 638 (guarantee of an undivided third of indebtedness; agreement as to the exact amount, admitted); 1895, Pfeifer *v.* Ins. Co., 62 Minn. 536, 64 N. W. 1018 (indorsement cancelling a policy on two horses, so as to "cover one horse only"; evidence admitted as to which horse was actually understood); 1896, Ripon College *v.* Brown, — id. — , 68 N. W. 837 (deed subject to certain mortgages "which . . . agrees to assume"; the ambiguous "which" interpreted by the parties' understanding); 1902, Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558 (circumstances of the parties, admitted to show their meaning by the word "incumbrances" in a warranty-deed); 1894, Streppone *v.* Lennon, 143 N. Y. 626, 37 N. E. 638 (agreement to "do brick-work"; usage and the parties' language, admitted to show whether this meant to include providing the bricks); 1895, Brady *v.* Cassidy, 145 id. 171, 39 N. E. 814 (goods on hand," interpreted by the parties' understanding); 1896, Lupton *v.* Lupton, 117 N. C. 30, 23 S. E. 184 ("one-half of boat" in a sale; circumstances identifying the boat, admitted); 1857, Barnhart *v.* Riddle, 29 Pa. 92, 97 ("Courts take the language employed and apply it to the surrounding circumstances, exactly as they believe the parties applied it"); 1898, Cooper *v.* Potts, 185 id. 115, 39 Atl. 824 (assignment of "all money due or to become due by M"; parties' understanding as to claims covered, received); 1902, Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617 (contract to erect a "freight and passenger depot"; circumstances considered for determining the mutnal meaning); 1877, Reed *v.* Ins. Co., 95 U. S. 23 (insurance of a vessel, "the risk to be suspended while vessel is at Baker's Island loading"; held, that "a reference to the actual condition of things at the time, as they appeared to the parties themselves," was allowable in interpreting these words, and that their sense included the case of being at the Island with the purpose of loading, though before the loading had actually begun); 1893, Lonergan *v.* Buford, 148 id. 581, 588, 13 Sup. 684 (contract reserving "2000 steers heretofore sold"; the previous contract of sale admitted to identify them); 1896, Sanders *v.* Munson, 20 C. C. A. 581, 74 Fed. 649 (shipping contract; "about April 10th"; parties' prior conduct, admitted); 1898, The Barnstable, 84 Fed. 895 (agreement to pay "the insurance on the vessel"; that the sense of this, as covering all kinds of risks, was communicated to the maker by the broker beforehand, admitted); 1901, American Bonding & T. Co. *v.* Takahashi, 49 C. C. A. 267, 111 Fed. 125 (contract for payment of money to a certain person as "trustee"; attendant negotiations considered, to interpret and apply the term); 1902, Sun P. & P. Ass'n *v.* Edwards, 51 id. 279, 113 Fed. 445 (contract to employ in a printing establishment; prior conversations admitted to interpret "what kind of a printing establishment was contemplated by the contract"); 1896, Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715 (a lease exempting from injury by "reasonable use"; declarations of the parties admitted to show what uses were understood): 1898, Brown *v.* Markland, 16 id. 360, 52 Pac. 597 (conveyance of mining property subject to claims; circumstances resorted to for interpreting); 1895, Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 313 (a conveyance of "all right" possessed by the grantor, interpreted by the facts); 1896, Richardson *v.* Bank, 94 Va. 130, 26 S. E. 413 (a receipt for property "left" by H., explained by the circumstances); 1897, Anderson *v.* Jarrett, 43 W. Va. 246, 27 S. E. 348 ("the old fence between" F. and S.; Brannon, J.: "You have a right to use oral evidence to apply this bill [reciting the agreement], like a deed, physically to the ground"); 1897, Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869 (guaranty of "account of B."; evidence that this meant a future account only, admitted). The following illustrates an occasional aberration: 1896, Holman *v.* Whitaker, 119 N. C. 113, 25 S. E. 793 (mortgage of a "one-horse wagon"; the mortgagor had four such; evidence that the mortgagee was working for the mortgagor and driving such a wagon of the latter's, and did not know that he had others, excluded).

Distinguish such a case as the following: 1889, Fudge *v.* Payne, 86 Va. 306, 309, 10 S. E. 7 (sale of lands "generally known as 'the loop'"; *semble*, a mutual understanding, different from the "generally known" sense would not be enforced; this is an instance of the parties having themselves expressly excluded their own sense of the words).

alive. Now Temures fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it."

The principle is applicable, not only to *deeds* and *contracts*,[1] but also to all bilateral transactions, including *notices* and *demands*,[2] — though not of notices having a purely individual significance,[3] to which rather the principle for wills (*post*, § 2467) would apply.

There is, however, a qualification to be made. The person using words is to be treated from the point of view of the reasonable man, not only in determining the actual tenor of his act (*ante*, § 2413), but also in interpreting it. As a reasonable man, he must be charged with knowing that the standard to be applied is the mutual one, because he has willed to take part in a bilateral transaction. As a reasonable man, however, he may have good reason to believe that the specific mutual meaning — *i. e.* of the other party as well as himself — is one thing, whereas in fact it is a different thing. The common instance is that of a *name corresponding to two objects*, one of which is signified by the one party and the other by the other party. Here each party is entitled to be charged with only that sense of the word which under the circumstances he had good reason to believe was employed by the other party. As in the "Peerless" case,[4] if the seller is ignorant that there is a second "Peerless," and could not reasonably be expected to know it, he is entitled to be charged with the "Peerless" in his own sense; and so of the other party; and thus, the senses of promise and consideration being different, the contract fails. But if the seller had known of the second "Peerless"

[1] 1897, Gamble *v.* Mfg. Co., 50 Nebr. 463, 69 N. W. 960 (holding that a business-habit of an individual must be actually made known to the other party); 1896, Rickerson *v.* Ins. Co., 149 N. Y. 307, 43 N. E. 856 (premises "known as 160 Mott St." insured; it contained two buildings; the insurer's testimony that he intended to insure only one, correctly rejected; but the Court did not point out that such intention would have been admissible if it had represented the mutual understanding); 1903, Butte & B. C. M. Co. *v.* Montana O. P. Co., 58 C. C. A. 634, 121 Fed. 524 ("tailings," in a mining contract); 1897, Anderson *v.* Jarrett, 43 W. Va. 246, 27 S. E. 348 ("the old fence" between F. and S., agreed upon as a line; the defendant's interpretation as to which "old fence" was excluded). Other instances are cited *ante*, §§ 1967, 1971, in connection with the application of the Opinion rule to proof of a party's intent.

[2] 1837, Lawless *v.* Grogan, 1 Dru. & Walsh 53, 64 (L. C. Plunket: "When a notice is relied upon for the purpose of forfeiture, . . . [it must appear] that the intention of the landlord to insist on the forfeiture, and the information as to the facts which were peculiarly within the knowledge of the landlord, were fully brought home to the tenant"); 1877, Locke *v.* R. Co., 46 Ia. 109, 111 (whether the plaintiff conductor was negligent in running the train over a weak bridge; the sense of a notice received by him from the superintendent was held to be, not that which the latter meant, but "what did the dispatch mean when read by the conductor in the light of the surrounding circumstances").

[3] 1803, Holsten *v.* Jumpson, 4 Esp. 189 (trover for household furniture, taken by the defendant on execution against the plaintiff's mother, and claimed by the plaintiff as her own; the defendant having put in a written demand by the mother for all the articles "belonging to her which had been seized," the plaintiff was allowed to show that this demand "was made of the effects of the mother herself, and were not those for which the action was brought").

[4] 1864, Raffles *v.* Wichelhaus, 2 H. & C. 906 (the plaintiff sold to the defendant cotton to arrive "ex Peerless from Bombay"; the defendant refusing to accept, it appeared that there were two ships Peerless from Bombay, the plaintiff meaning the one to sail in December and the defendant the one to sail in October, and neither apparently knew that the other meant a different ship; a plea by the defendant alleging that the defendant meant the October ship, and that no cotton was delivered from that ship, was held good). Compare the explanation of this case in Holmes, Common Law, 309.

and also known that the buyer was aware of it, he might be charged with a sale of that cargo, if in fact the buyer was using that sense. The general principle of reasonable consequences (*ante*, § 2413) governs the interpretation of this class of cases.[5]

§ 2467. **Individual Party's Meaning; (2) Wills.** A unilateral act may be interpreted by the individual standard of the actor (*ante*, § 2461); that is, after resorting to the ordinary sense of words, and the local sense of words, for provisional assistance, we are still entitled to supplant all these by the individual usage, if it appears to have been different from the others. The will is the typical and almost the only instance of a unilateral act. The sense of the testator is therefore to be the ultimate criterion of interpretation:

1870, *Blackburn*, J., in *Grant* v. *Grant*, L. R. 5 C. P. 727, 729 (quoting a passage from his own treatise on Sales): "The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills, and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used."

This principle is to-day universally conceded.[1] Only two particulars need to be noted as corollaries in its application. (*a*) The sense of the words must be sought in a usage or *habit* of the testator, for it would be impossible to attempt to ascertain the momentary or casual meanings which might have occurred to him. Hence, although all the circumstances and utterances of

[5] Examples are as follows: *Eng.:* 1846, Alderson, B., in Smith *v.* Jeffryes, 15 M. & W. 561 ("If I buy 60 tons of potatoes, surely the seller may deliver me kidney [*i. e.* one of several grades] potatoes"); 1900, Folck *v.* Williams, App. Cas. 176 (cipher cablegram; where a message is fairly ambiguous, the party seeking to charge the other one fails, because the former cannot show his interpretation to be the only reasonable one); *U. S.:* 1869, Kyle *v.* Kavanagh, 103 Mass. 356 (contract for the sale of land "in Waltham on Prospect Street"; there being two Prospect streets in Waltham, and each party signifying a different one, the buyer was held not bound); 1895, Stoddard Mfg. Co. *v.* Miller, 107 Mich. 51, 64 N. W. 948 (an order reading "Please ship me wone rite stele weel for a drill Two square feeting schafts. 4 ten hoe drills also some note blanks for drills"; the sender was allowed to show that he meant "shafts *for* 10-hoe drills"); 1832, Hazard *v.* Ins. Co., 1 Sumner 218 (in a marine insurance policy the parties lived respectively in Boston and New York, and the term "coppered ship" had a different meaning in the two places; Story, J., ruled that if neither party knew of the difference of sense of the word in the other place, neither would be bound, and that the jury were to determine the fact).

[1] 1856, Kell *v.* Charmer, 23 Beav. 195 (bequest "to my son W. the sum of i. x. x.; to my son R. C. the sum of o. x. x."; the testator having "in the course of his business used certain private marks or symbols to denote prices or sums of money," this usage was resorted to, and showed that the sums of 100*l.* and 200*l.* were signified); 1808, Leigh *v.* Leigh, 15 Ves. Jr. 92 (devise of a remainder to "the first and nearest of my kindred, being male and of my name and blood"; upon a consideration of all the circumstances, including the remainder of the will, it was held that this description was not meant to apply to a next of kin who had by license changed his name from "Smith" to "Leigh"); 1829, Gohlet *v.* Beechy, 3 Sim. 24 (a sculptor bequeathed all his "marbles, busts, and models" to P. D. and B.; by a codicil he bequeathed his "tools in the shop, bankers, mod tools for carving," to the plaintiff; the models were valuable, the tools for modelling were not; Shadwell, V. C., held "mod" to mean "models," upon the testimony of a sculptor that he "understood it to be a contraction of the word 'models,'" and of three sculptors that "in their opinion the testator by the word 'mod' meant 'models'"); 1903, Reformed Presb. Church *v.* McMillan, 31 Wash. 643, 72 Pac. 502 (bequest to the "Society for Disabled Ministers of the Reformed Presbyterian Church of Illinois," given to the "Reformed Presbyterian Church of North America, General Synod," which had a fund for disabled ministers). Numerous additional examples are collected *ante*, § 2463.

the testator may be searched (*post*, § 2470), as forming a mass of data in which the habit will appear, yet no one utterance can be emphasized as the sole and decisive embodiment of his usage.[2] (*b*) The *time* of the usage must be the time of the will's final sanction; for the will is in fact a standing expression from the date of its formal execution to the date of the testator's death without revoking it;[3] hence a broad range of search. But where a will is in effect left with blanks at the time of execution, any subsequent document is virtually an addition of terms to the will, not an interpretation of existing terms, and hence, if not formally executed, cannot be considered.[4]

But three other rules, which constantly operate to obscure the full application of this principle, must be distinguished. (1) The rule against disturbing a *plain meaning* (*ante*, §§ 2462–2463), so far as it is recognized, will of course prevent the resort to the testator's individual meaning.[5] (2) The rule against *express declarations of intention* (*post*, § 2471) operates to limit the sources of investigation to some extent. (3) The ignoring of the rule

[2] 1850, Doe *v.* Hubbard, 15 Q. B. 227, 248 (devise of "all those two cottages or tenements, the one occupied by my son J. H., the other occupied by my granddanghter"; there were two cottages which had been subdivided into five residences, two of them only occupied by the persons mentioned; the scrivener's testimony as to "what the testator said about the two cottages" was excluded; L. C. J. Campbell: "This was not confined to an inquiry into the meaning which the testator *usually* affixed to the expression 'his two cottages,' but was calculated to bring out an answer, which could not be admissible evidence, with regard to his intentions in making the will, irrespective of the language of the will itself"). Compare the principle of the rule *post*, § 2471, against declarations of intention.

[3] 1871, Castle *v.* Fox, L. R. 11 Eq. 542, 550 (devise of "all my mansion and estate called Cleeve Conrt"; the testator had hought additional lands, appnrtenant thereto, between the execution of the will and his death, and these were held to pass; Malins, V. C.: "The question is, not what was known by that name when he made his will, but what was known by that name and treated by him as coming under that description at any time during his life; . . . [the Wills Act] enacts that every will shall be constrned, with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention should appear").

[4] 1844, Clayton *v.* Nugent, 13 M. & W. 200 (will containing a list of devisees indicated by the letters K, L, M, N, etc., and stating that a "key and index to initials is in my desk"; the will was dated 1820, and a key dated 1828 and found in the desk, was excluded). Compare Kell *v.* Charmer, *supra*, note 1.

[5] That rule was the foundation of some of the opinions in the case of Lady Hewley's Charities, thongh it was not involved; 1833–1843, Attorney-General *v.* Shore, also on appeal *s. v.* Shore *v.* Wilson, 7 Sim. 309, note, 11 id. 592, 615, 5 Cl. & F. 355 (Lady Hewley, a Presbyterian, in 1704, deeded to charities for the assistance of "poor and godly preachers of Christ's holy gospel," etc.; the trustees having become Unitarians at a later period, a bill was filed to remove them and order the trnst's administration for the henefit of persons described in the deed; for this purpose evidence of the founder's personal belief on points of theology was excluded, by apparently all the judges, but evidence of the theological tenets of the sect to which she belonged, and of the usage of that sect, was admitted, by a majority of the judges; the case as a whole is an extreme example of poor judicial treatment; for the opinions though lengthy are obscure, and such is their confusion and indefiniteness of views that the decision settled no principle, and even its actual tenor has been variously stated by commentators). A similar question was presented in the following case: 1885, Hinckley *v.* Thatcher, 139 Mass. 477, 480, 1 N. E. 840 (bequest to "the Authorized Agents of the Home and Foreign Missionary Societies"; testator's religious opinions, as involved in "his acts in connection with churches and religious societies and the usages of those churches and societies," considered; whether they could have been considered, apart from such acts and usages, not decided). In neither of the foregoing cases should there have been any hesitation. Compare the following case: 1835, Attorney-General *v.* Pearson, 7 Sim. 290, 308 (grant of land, in 1701–1726, for a meeting-house, by Presbyterians, for "the worship and service of God"; the trustees and the majority of the congregation having later ceased to be Trinitarian in belief, a bill to restrain the use of the land for non-Trinitarian tenets was brought, asking a decree of inquiry as to the tenets of the founders, for interpreting the terms of the trust, and the "tenets in general" of the founders were considered, by Shadwell, V. C.).

falsa demonstratio non nocet (*post*, § 2476) sometimes prevents the testator's meaning from being fully enforced.

2. Sources of Interpretation.

§ 2470. **General Principle: All Extrinsic Circumstances may be Considered.** It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases (*ante*, § 2462), but also that all aids to the meaning must be found in the document itself. It is the document that "speaks," and if the document does not speak for itself, we cannot make other things speak instead of it, — such was the notion. The purely relative nature of words — their necessary association with external objects — was as yet not conceived. They were tangible tools, which must do their own work or remain ineffective. The writing fixed the will of the writer, and to look away from the writing was suggestive only of deviation and uncertainty. "The construction of wills," says Lord Coke,[1] "ought to be collected from the words of the will in writing, and not by any averment [*i. e.* circumstances] of evidence out of it," and then he recurs to the old apprehension (*ante*, § 2462) of uncertainty for legal advisers and landed estates, "for it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give, but it should be controlled by collateral averments out of the will." A hundred years later, Lord Holt,[2] a conservative by nature, protests in like strain against the newer spirit: "If we once travel into the affairs of the testator, and leave the will, we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer, he shall not know how to expound it. Men's rights will be very precarious upon such construction. We must not depart from the will to find the meaning of it in things out of it." Holt was here dissenting, and his extreme ideas were already becoming obsolete. But even after another century had passed, and the antiquated notions had been thoroughly discredited, the echo of conservatism is heard in Lord Eldon's remark that, "generally speaking, you must construe instruments by what is found within their four corners."[3]

The stages of progress may be marked off somewhat as follows: (1) Even in Coke's time it was conceded that in case of an equivocation (*post*, § 2472) or double-meaning description, outside data could be sought, because "no inconvenience can arise if an averment [of extrinsic data] in such case be taken; for he who sees such will cannot be deceived by any secret invisible averment, for he ought at his peril to inquire."[4] This was at first the sole specific exception.

[1] 1591, Lord Cheyney's Case, 5 Co. Rep. 68 *a*.

[2] 1702, Cole *v.* Rawlinson, 1 Salk. 234, 2 Ld. Raym. 831.

[3] 1821, Smith *v.* Doe, 2 B. & B. 473, 602. So, too, in 1801, Rooke, J., in Coker *v.* Guy, 2 B. & P. 565, 569: "Every agreement must receive its construction from its own terms, without the introduction of any evidence *dehors* the instrument, unless there be some latent ambiguity."

[4] Lord Cheyney's Case, *supra*. In 1708, in Strode *v.* Russell, 3 Ch. Rep. 169, Lord Cowper put it that "where the words stand *in equilibrio* and are so doubtful that they may be taken one way or the other, there it is proper to have evidence read to explain them."

(2) Little by little it began to be seen that there might be other necessary instances of resort to "things extrinsical" (in Lord Holt's phrase). Lord Cowper and Lord Hardwicke were breakers of new ground in this respect.[5] Their work was continued by Lord Thurlow, whose ruling in Fonuereau *v.* Poyntz was considered a dangerous innovation; it not only cost himself much intellectual perturbation, but was for some time afterwards regarded by many as discreditable to his reputation, and was explained away as imperfectly reported.[6] As late as the beginning of the 1800s there were judges who still thought that the only proper exception was an equivocation,[7] and there was a reactionary ruling which refused to recognize even that much relaxation for a sealed instrument.[8] But in general, by that time, the weight of opinion conceded what Lord Thurlow had laid down, not that only for an equivocation, but also for any real and insurmountable uncertainty of meaning, resort to extrinsic circumstances for light was permissible.[9] The commonest case, of course, was that in which the words of the document turned out not precisely or naturally to fit any external object over which the testator had disposal; and consolation was here obtained, for the apparent stretching of principle, by a plausible play upon words: "If you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity.[10] This conjuring phrase, which appears again and again in a defensive spirit, helped to liberalize the practice, and thus to prepare the way for a broader

[5] 1749, Lord Hardwicke in Goodinge *v.* Goodinge, 1 Ves. Sr. 231 ("That rule is laid down much too large by Holt; for in several cases it is admitted it must be allowed, — namely, where the description or thing is uncertain (not only where two of the same name), it must be admitted to show that the testator knew such a person and used to call her by a nickname"). But even he was unwilling to advance rapidly, and he once criticised his predecessor, Lord Cowper, who had occasionally generalized too liberally; "I was never satisfied with this rule of Lord Cowper's, of admitting parol evidence in doubtful cases" (Ulrich *v.* Litchfield, 2 Atk. 372).

[6] 1785, Fonnereau *v.* Poyntz, 1 Bro. C. C. 472 (bequest of "the sum of 500*l.* stock in long annuities"; this expression would ordinarily signify an income of 500*l.* per year; but L. C. Thurlow allowed the value of the estate to be considered, whence it appeared that she had only 120*l.* a year long annuities, and the bequest was therefore held to mean 500*l.* capital laid out in such stock; the ruling was treated as an inroad upon the rule "which will not admit of an instrument being construed *aliunde*," and which prescribes that "where the words used by a testator are sensible, they must be taken as they stand"; "the only question is, how to preserve the law, and yet to decide according to the intention of the testatrix," and was justified by Lord Thurlow "because the words she had used in the description are upon the whole of the context uncertain"). There were by this time some sufficient precedents for such a statement of the rule, — for example, in 1750, Hampshire *v.* Pierce, 2 Ves. 216, by Strange, M. R.

[7] 1816, Doe *v.* Chichester, 4 Dow 65, 93 (Gibbs, C. J.: "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know of only one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances").

[8] 1821, Doe *v.* Benson, 4 B. & Ald. 588 (lease by parol from "Lady-day"; the local usage to signify "old Lady-day," instead of the new or legal Lady-day, *i. e.* March 25, was admitted; but Doe *v.* Lea, 11 East 312, was approved, because "there the letting was by deed, which is a solemn instrument, and therefore parol evidence was inadmissible to explain the expression 'Lady-day' there used, even supposing that it was equivocal").

[9] 1822, Plumer, M. R., in Colpoys *v.* Colpoys, Jacob 451, 456 ("The admission of extrinsic circumstances to govern the construction of a written instrument is in all cases an exception to the general rule of law, which excludes everything *dehors* the instrument. . . . It must be the case of an ambiguity which cannot otherwise be removed, and which may by these means be clearly and satisfactorily explained").

[10] L. C. Thurlow, in Shelburne *v.* Inchiquin, 1 Bro. C. C. 338, 341; Plumer, M. R., *ubi supra*, declaring that "where there is a latent ambiguity raised by extrinsic circumstances, it may be got rid of in the same manner." Bacon had already resorted to this phrase in his Maxim (XXV) on Ambiguities; "*nam quod ex facto oritur ambiguum verificatione facti tollitur.*"

principle. Meantime the same progress and conflict was reflected in the judicial opinions in the United States.[11]

(3) The truth had finally to be recognized that words always need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. "Words *must* be translated into things and facts."[12] Instead of the fallacious notion that "there should be interpretation only when it is needed,"[13] the fact is that there must always be interpretation.[14] Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a travelling out of the document, a comparison of its words with people and things. The deed must be applied "physically to the ground."[15] Perhaps the standard of interpretation will limit our search; perhaps the obligation (as some Courts maintain) to enforce the ordinary standard as against the mutual or the individual standard (*ante*, § 2462), or to enforce the mutual as against the individual standard (*ante*, § 2466), will render certain data immaterial. But these restrictions are independent of the present principle. Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words, — that is, their associations with things. In the field of wills, where there is none but the individual standard of meaning to be considered, this principle is seen in unrestricted operation; and its full sanction has often been judicially avowed:

1831, Sir *James Wigram*, V. C., Extrinsic Evidence in Aid of the Interpretation of Wills, Proposition 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

[11] 1839, Bradley *v.* Steam Packet Co., 13 Pet. 89, 99 (question as to the length of validity of a contract "for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac Creek"; the circumstances preceding the contract were admitted; Barbour, J.: "The rule which admits extrinsic evidence for the purpose of applying a written contract to its proper subject matter extends beyond the mere designation of the thing on which the contract operates, and embraces within its scope the circumstances under which the contract concerning the thing was made, when without the aid of such extrinsic evidence such application of the written contract to its proper subject matter could not be made"; four judges dissenting).

[12] Holmes, J., quoted *ante*, § 2465.

[13] Quoted *ante*, § 2458.

[14] 1835, Coleridge, J., in Doe *v.* Holtom, 4 A. & E. 76, 82 ("Some extrinsic evidence is necessary for the explanation of every will; if the word 'Blackacre' be used, there must be evidence to show that the field in question is Blackacre"); 1892, Jeune, J., in Paton *v.* Ormerod, 66 Law T. Rep. 381 ("Parol evidence of existing facts and circumstances outside the will is admissible, and in truth is in every case necessarily, though informally, admitted in order to apply the terms of the will to that to which they are intended to refer").

[15] Brannon, J., in Anderson *v.* Jarrett, cited *ante*, § 2465.

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."

1833, *Parke*, J., in *Doe* v. *Martin*, 4 B. & Ad. 770, 785: "It may be laid down as a general rule that all facts relating to the subject matter and object of the devise . . . are admissible to aid in ascertaining what is meant by the words used in the will."

1842, *Sugden*, L. C., in *Attorney-General* v. *Drummond*, 1 Dr. & W. 356 (interpreting a deed containing the words "Christian" and "Protestant dissenter"): "The Court is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed or will (it matters not whether it was one or the other) was executed. . . . The Court therefore has not merely a right, but it is its duty to inquire into the surrounding circumstances, before it can approach the construction of the instrument itself."

1886, *Blackburn*, J., in *Allgood* v. *Blake*, L. R. 8 Exch. 160: "The general rule is that in construing a will the Court is entitled to put 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 [*i. e.* sense] 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. As said in Wigram on Extrinsic Evidence, 'The question in expounding a will is, not what the testator meant — as distinguished from what his words express, — but simply, what is the meaning of his words.' But we think that the meaning of words varies according to the circumstances of and concerning which they are used."

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 445: "It had become possible for Wigram to lay it solidly down, over seventy years ago, that, with the exception of direct statements of intention, no extrinsic fact, relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence, could be shut out."

It remains now to notice whatever qualifications there may be of this general principle.

§ 2471. **Exception for Declarations of Intention.** When the search is made for data which will exhibit the sense in which a word is used in a particular writing, not only the external objects (property, persons, localities, and the like) will assist, but also the *other utterances of the party* as embodying his usage. Just as a collation of various passages in the epistles of Paul will serve to expound his sense of the word "faith," so a collation of any person's utterances is useful and necessary for determining the sense of his words in a particular document, — as in Doe *v.* Jersey,[1] where the sense of the words "my Briton Ferry estate" was ascertained by examining the testator's rental-books, in which were entered under that name the lands which he so termed. This kind of data is common and natural enough; but it is worth while emphasizing that among the "circumstances" to be investigated are included, not only the corporal objects surrounding the party, but also his utterances, written and oral, as applied to those objects.

Among this latter class, however, there is one forbidden variety, namely, *expressions of intention* dealing with the subject of the document. For example, if there is a devise to "Benjamin Franklin, of Boston, my nephew,"

[1] Cited *ante*, § 2463, note 4.

and there is no nephew but one John Franklin, a letter of the testator to that nephew, declaring an intent to devise to him his property, would not be considered. This rule has never been questioned.[2] What is the reason for it? The reason is certainly not to be found in any prohibitory rule of evidence, for such declarations are admissible under the Hearsay exception (*ante*, §§ 1725, 1735). Nor is it that these declarations are not useful, for together with others they would certainly help to throw light on the question whether (as in the above example) the name "Benjamin Franklin" was by the testator habitually applied to designate the nephew. The true reason is found in another rule, already considered, — the rule which prohibits setting up any extrinsic utterance to compete with and overthrow the words of a document which solely embodies the transaction (*ante*, § 2425). The effect of that rule is to deny any legal effect to just such declarations.[3] It is true that where the act is required by statute to be in written form — as, a will — there is the additional reason that the oral utterance would fail to fulfil that formality.[4] But, even without such a statutory requirement, the other rule would be adequate to prohibit. When a transaction has been even voluntarily embodied in a single document, no other utterance of intent or will on the same subject can be given legal effect. Hence, such a declaration is excluded from consideration even in the process of interpretation, not because it would not for that purpose be useful, but because it would be improper for the other purpose. There being two conceivable purposes for which it could be used, the one proper, the latter improper, it is excluded because of the fear that the latter would dominate and that the temptation to abuse would be too strong. This conclusion might have been declined; and certainly the rule as it stands does not obey the principle (*ante*, § 13) that a fact relevant for one purpose but not for another may still be received for the former. Nevertheless, the rule is intelligible and its policy rational. It rests on an attempt to insure an observance of the Integration rule (*ante*, § 2452) even at the cost of losing some useful data for the process of Interpretation.[5] This explanation of it was long ago made clear in the following passage:

1860, Mr. *F. M. Nichols*, Extrinsic Evidence in the Interpretation of Wills, Juridical Society Papers, II, 352: "There is a kind of evidence to which both of these reasons [securing certainty of title and preventing fraudulent proof], and the analogy of the law requiring the will to be in writing, must strongly apply; I mean, of course, the species

[2] It may be noted that, through the loose meaning of "intention," a judge who is referring only to the present exception appears sometimes to be contradicting the general principle of § 2470, *ante*; *e. g.*, Woods, J., in Patch *v.* White, 117 U. S. 210, 6 Sup. 617 (1886): "If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the [*sc.* declarations of] intention of the testator, unless it be necessary to explain a latent ambiguity."

[3] 1850, Patteson, J., in Doe *v.* Hubbard, 15 Q. B. 227, 243 (such declarations "would in truth have established a verbal will contrary to the written words").

[4] 1568, Brett *v.* Rigdon, Plowd. 340 ("No will is within the statute but that which is in writing, which is as much as to say that all which is effectual and to the purpose must be in writing, without seeking aid of words not written").

[5] Professor Thayer has said (Preliminary Treatise on Evidence, 444) that "while it partakes of the character of both [a rule of construction and a rule of interpretation], it must hold its place as a rule of evidence." But this statement hardly represents its true foundation.

of evidence which we have called direct evidence of intention; and which, if admitted, would consist for the most part of declarations and informal written memoranda of the testator, and of instructions given by him to the persons employed in the preparation of the formal instrument. Evidence so nearly allied in character to that furnished by the will itself, presents an aspect of rivalry to the will, which raises a prejudice against its reception. It may be fairly presumed to be the intention of the author that the solemn instrument, in its complete and final form, should supersede and extinguish all the informal and deliberative expressions of intention which preceded or accompanied its making. Again, evidence of this kind presents peculiar facilities to fraud. It may be easily imagined or invented, and when fraudulently produced is difficult of detection. If a witness swears that a deceased testator, in a private interview, explained to him the sense in which he wished some clause of his will to be understood, such evidence, however false, cannot possibly be disproved. The same policy of the law which precludes such evidence from directly governing the rights of the parties ought, it may be argued, to prevent it from indirectly influencing those rights by means of interpretation. On the other hand, it cannot be denied that testimony of this kind presents the most obvious, and possibly in some cases the only satisfactory, means of ascertaining the true meaning of an ambiguous or obscure expression. The practice of our own law has, nevertheless, made us familiar with its exclusion in all but some exceptional cases; and it can scarcely be said that this prohibition leads to any great inconvenience or hardship."

The application of the rule is a matter of little difficulty. In its ordinary form, for wills, what it does is to exclude the fact that the draftsman made a *mistake, i. e.* it prevents the testator's oral or written instructions, or other expressions of intent, from being set up to overthrow or replace the words of the will.[6] In short, it excludes everything that would be excluded by the rule of Integration already considered (*ante*, §§ 2425–2447). Its difficulties, if any, arise only under its exceptions.

§ 2472. **Same: (1) Exception for Equivocation, or Latent Ambiguity.** The foregoing exception to the general rule has itself an exception, namely, that declarations of intention, though ordinarily excluded from consideration, are receivable to assist in *interpreting an equivocation*, — that is, a term which, upon application to external objects, is found to fit two or more of them equally. This rule dates at least as far back, in recognition, as Lord Coke's time; the only difference being that it was then the sole permissory exception to a general prohibitory rule against looking at any extrinsic circumstances (as noticed *ante*, § 2470), while now it is a permissory exception to a prohibitory rule which is itself an exception (*ante*, § 2471) to a general permissory rule.

[6] 1832, Miller *v.* Travers, 8 Bing. 244 (devise of estates "in the county of Limerick and in the city of Limerick"; the testator had no estate in that county, but considerable estates in the County of Clare; his draft will, containing the words "counties of Clare and Limerick," and the scrivener's mistake in changing this, were not allowed to be proved; "the only mode of proving the inteution of the testator is by setting up the draft of the will against the executed will itself," and this would be improper); 1896, Jackson *v.* Alsop, 67 Conn. 249, 34 Atl. 1106 (the words of a devise being unambiguous, expressions of intention were excluded); 1896, Defreese *v.* Lake, 109 Mich. 415, 67 N. W. 505 (the expressed intention of the testator, excluded for construing the kind of estate given); 1896, Emery *v.* Haven, 67 N. H. 503, 35 Atl. 940 (whether a wife's will was intended by her to be an execution of a power left her by her husband; an express subsequent written statement that it was not, excluded); 1814, Jackson *v.* Sill, 11 John. 201 (devise "to my wife the farm I now occupy"; declaration of intent not admitted to show that this included seven acres actually occupied by S. under a lease); 1896, Fuller *v.* Weaver, 175 Pa. 182, 34 Atl. 634 (a deed-description of premises).

The reason for the present exception to that exception is plain enough. The original prohibitory exception is based on the risk of allowing an extrinsic utterance of intent to come into competition with the terms of the document on the same subject, and perhaps to prevail against them (*ante*, § 2471). Now in the case of an equivocation this risk does not exist. Since the term of the document describes equally two objects, and since it was used to designate one only, there can be no competition with the words of the document by declarations which merely expand and make more specific those words. The sense of the words can be interpreted without restriction, because the data offered cannot be used for any purpose but that of interpretation. Hence the reason for the original prohibitory rule falls away, and the general principle of interpretation resumes its full range:

1836, *Parke*, B., in *Doe* v. *Needs*, 2 M. & W. 129: "The characteristic of all these cases is that the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will." [1]

The typical illustration of the present exception is found in the much-quoted passage of Lord Coke:

1591, *The Lord Cheyney's Case*, 5 Co. Rep. 68 *a*; devise to his son H. and the heirs of his body, and then to T. C. and the heirs male of his body, on condition "that he or they or any of them" shall not alienate; proof by witnesses that it was "the intent and meaning of the testator" to include under "he or they" his son H., as well as T. C., was excluded; "he should not be received to such averment out of the will"; "but if a man has two sons, both baptized by the name of John, and conceiving that the elder, who had been long absent, is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living, — in this case the younger son may in pleading or in evidence allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he at the time of the will named his son John the younger, and the writer left out the addition of the younger."

This exception finds frequent application. The only point of controversy which it may present is whether a particular term is on the facts an equivocation, *i. e.* whether, in applying it to external objects, the two (or more) which appear to correspond must *precisely* fit the description in the document, in order to invoke this exception. Here there is room for either strict or liberal construction; and the rulings do not differ except in exemplifying one or the other attitude. It may be added that the exception is applicable not only to *wills*,[2] but also to *deeds* and *contracts*; but in the latter kinds of

[1] So also: 1833, Parke, J., in Richardson *v.* Watson, 4 B. & Ad. 787, 800 ("Such evidence is admissible to show, not what the testator intended, but what he understood to be signified by the words used in the will").

[2] *England:* 1750, Hampshire *v.* Pierce, 2 Ves. 216 (bequest of 100*l.* to "the four children of my late cousin E. B.," and of 300*l.* to "the children of my late cousin E. B."; in fact, E. B. had six children, two by one husband P., and four by another husband B.; evidence that "the testatrix meant the four children by the last husband B." was admitted to interpret the former bequest, but not the latter; the former

documents, since the standard of interpretation must be a mutual one (*ante*, § 2466), it is naturally less frequent to find a mutual declaration of intention available for the purpose.[3]

It is the subject of the present exception which Lord Bacon designated by his much-abused term "latent ambiguity." He also terms it by its more specific name "equivocation," but, with the exception of a single application (*post*, § 2474), the two were to him synonymous. By the standard of his time, this was the only exception for which any extrinsic circumstances

being ambiguous, but not the latter); 1750, Jones *v.* Newman, 1 W. Bl. 60 (devise to "John Cluer of Calcot"; there appearing to be two persons, father and son, of that name, "parol evidence that the testatrix intended to leave it to J. C. the son" was admitted); 1820, Doe *v.* Westlake, 4 B. & Ald. 57 (gifts to a brother Thomas W., to the daughter of a brother Richard, and then a devise to "Matthew W., my brother, and to Simon W., my brother's son"); each of the three brothers had a son Simon; declarations of the testator that he intended the devise for Simon the son of Richard were excluded; but this seems erroneous, for "my brother" was not exclusively applicable to Matthew, even on the face of the will); 1836, Doe *v.* Needs, 2 M. & W. 129 (devise to "George Gord, the son of Gord"; there were two Gords, John and George, each having a son George, and each of these sons was elsewhere explicitly named in the will; the devisor's declarations of intention were admitted); 1840, Doe *v.* Allen, 12 A. & E. 451 (devise to "John A., the grandson of my said brother Thomas," the property to be charged with payments to "each and every the brothers and sisters of the said John A."; there were two grandsons of Thomas named John; one had three brothers and four sisters, the other had one brother and one sister, at the time of the will's making; the testatrix' declarations of intention were admitted, on the ground that the statement of the numbers of brothers and sisters was "not part of the description of the devisee"; but the correct ground would have been that the statement, though certainly part of the description, did not imply the present existence of plural brothers and sisters but included equally a person who might thereafter have more than one of each); 1870, Grant *v.* Grant, L. R. 5 C. P. 727 (devise to "my nephew Joseph Grant"; there were two relations of that name, one being the son of the testator's brother, the other the son of his wife's brother, the testator being ignorant of the former's existence and being in the habit of terming the latter his nephew; declarations of intention were offered, but were expressly not passed upon, the Court having doubts; but these doubts were unnecessary); 1877, *Re* Wolverton Mortgaged Estates, L. R. 7 Ch. D. 197 (bequest to be void upon marriage with "Thomas Fisher, of Bridge Street, Bath"; there was at the time in Bridge Street a Thomas Fisher, married, and his son Henry Tom Fisher, unmarried and "often at his father's house"; the legatee having married the latter, evidence of the testator's intention was admitted as for an ambiguity, because "there appear to be practically two Thomas Fishers living in Bridge Street"); *United States:* 1882, Chambers *v.* Watson, 60 Ia. 339, 14 N. W. 336 (devise of "60 acres, Se 25, toon 7; 40 acres, se 24, toon 6," not naming any range; the testator's declarations at the time of execution, admitted); 1864, Bodman *v.* American Tract Society, 9 All. 447 (bequest to "the American Tract Society"; there being two societies of that name, the testator's intention, as proved by the draftsman, was admitted); 1895, Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893 (figures in a will which might mean $5.00 or $500, allowed to be explained by the testatrix' instructions); 1879, Bartlett *v.* Remington, 59 N. H. 364 (bequest "in trust for Sarah," shown to be intended for Sarah Sturoc); 1880, Tilton *v.* American Bible Society, 60 id. 377 (bequest to "the Bible Society"; claims being made by the New Hampshire Bible Society and the American Bible Society, it was treated as a latent ambiguity).

[3] Not all of these rulings distinctly declare declarations of intention admissible; a clear appreciation of the distinction between "intention," or meaning, and declarations of intention, is indeed often wanting: 1893, Hallidy *v.* Hess, 147 Ill. 588, 35 N. E. 380 (deed describing land by bounds, and terming it "section 8"; there being in the county several sections 8 in the various townships, "parol evidence" was admitted); 1894, Tewkshury *v.* Howard, 138 Ind. 105, 37 N. E. 355 (deed describing land as the S. E. ¼ of S. 36, T. 25, R. 11, without county or State mentioned; parol evidence admitted); 1854, Sargent *v.* Adams, 3 Gray 72, 79 (lease of "the Adams House"; issue whether it passed the five stores in the building so known; held, a latent ambiguity, upon which the intention of the parties could be resorted to); 1897, Illinois C. R. Co. *v.* Le Blanc, 74 Miss. 650, 21 So. 760 ("fractional 38 acres in said S. E. ¼ of N. E. ¼, assessed to J. J. Carter"; other deeds, etc., admitted to identify the section, township, and range in which Carter owned 38 acres); 1898, Ladnier *v.* Laduier, 75 id. 777, 23 So. 430 (deed omitting State and county of land in description; extrinsic facts admitted). The following case is therefore erroneous: 1901, Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973 (deed of "80 acres of the E. ½ of the N. E. of Sec. 13," not mentioning any township or range; held, a patent ambiguity, void for uncertainty, and not aidable by parol; the opinion is apparently ignorant of the principle applicable).

whatever could be consulted (*ante*, § 2470). When he allowed, in case of equivocation, an averment (*i. e.* extrinsic proof) of "intention," he was plainly using this word as signifying "meaning" or "sense," and not as specifically confined to "declarations of intention." Nevertheless, as the scope of interpretation expanded, and the use of words changed, his exposition came to fit in well enough with the modern exception to the exception against declarations of intention. It has thus served as a frequent authority; and though it has rightly been termed an "unprofitable subtlety,"[4] and has unnecessarily confused the subject with artificial distinctions, its tenor must be kept in mind, as explaining much in modern opinions:

Circa 1597, Sir *Francis Bacon*, Maxims, rule XXV (Works, Spedding's ed., 1861, vol. XIV, p. 273): "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I. D. *et* I. S. *hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. . . . But if it be *ambiguitas latens*, then otherwise it is. As I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S. and North S., this ambignity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass. . . . Another sort of *ambiguitas latens* is correlative unto this: for this ambiguity spoken of before is, when one name and appellation doth denominate divers things; and the second is, when the same thing is called by divers names. As, if I give lands to Christ-Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for the variance is matter in fact. But the averment shall not be of the intention, because it does not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance; and therefore the averment must be a matter that doth induce a certainty, and not of intention; as to say that the precinct of 'Oxford' and of 'the University of Oxford' is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford."

§ 2473. **Same: Blanks and Latent Ambiguities.** A document may be void for intrinsic indefiniteness of terms (*ante*, § 2407); or it may be, though definite, impossible to enforce extrinsically, because there are no objects existing upon which its terms can operate. These are simple principles, well established in their sphere; but in concrete application both of them require discrimination from the foregoing principle concerning equivocations.

(1) Is a *blank space* an equivocation? It certainly fits two or more objects equally; and where it represents merely an insufficient term in an at-

[4] Thayer, Preliminary Treatise on Evidence, 424; the learned author examines the history of Bacon's maxim at pp. 425, 471.

tempted description it may be treated as an equivocation; because the writer has fixed upon an object, but his words do not carry the description far enough. On the other hand, where a blank space represents a failure to make a final expression of will, the act is incomplete; to supply declarations of intention would be to set up a rival will; there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular document whether a blank space is an equivocation.[1]

(2) Where the words and phrases of a document are *in themselves indeterminative* (as where a devise is made of "one of my seven houses"), there is again a case of failure to make a final expression of will; the actor has failed to make his selection, and his act is incomplete. On the general principle of legal acts (*ante*, § 2407), the document is (in the part in question) ineffective and void for uncertainty. This is Lord Bacon's *ambiguitas patens;*[2] it cannot be interpreted, for there is nothing to interpret.[3] But the terms may in effect indicate a final expression of will by leaving to some other person an *election* to take whichever object he wishes, — as in a devise of "any one of my seven houses"; here there is certainty of expression, and the act of another person is made a condition precedent.[4] Where the words are

[1] *Eng.:* 1741, Baylis *v.* Attorney-General, 2 Atk. 239 (bequest "to the ward of Bread Street, according to Mr. — his will"; "parol evidence of the intention of the testator, where there is only a blank," excluded); 1790, Hunt *v.* Hort, 3 Prec. Ch. 311 ("my other pictures to become the property of Lady "; L. C. Thurlow declined to "supply a blank by parol evidence"); 1799, Price *v.* Page, 4 Ves. Jr. 679 (bequest to " Price the son of Price"; declarations of intent to give to a particular Price, admitted; "this is only that the testator did not know the Christian name"); 1877, De Rosaz' Goods, L. R. 2 P. D. 66 (an executor named as "Percival of Brighton, Esq., the father"; applied to William Percival Boxall, who answered the description); *U. S.:* 1897, Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290 (lease of "lot No. — in assessor's subdivision of Whiting's block No. 8"; the identity of the lot provable by parol, since "it is perfectly clear from the lease, considered within itself, that certain particular premises had been selected by the parties"); 1902, Engelthaler *v.* Engelthaler, 196 id. 230, 63 N. E. 669 (the will devised a homestead to the testator's wife for life, and further devised it after her death without naming any person; evidence of the testator's intention to devise it to his son F. E. was excluded).

The following curious case, which seems to belong here, should be compared with the citations in § 2467, *ante:* 1897, Dennis *v.* Holsapple, 148 Ind. 297, 47 N. E. 631 ("Whoever shall take good care of me, and maintain, nurse, clothe, and furnish me [etc.] . . . during the time of my life yet when I shall need the same, shall have all of my property," etc.; a letter of the testatrix to H., calling her to come and care for the testatrix and referring to the above provision in her will, admitted to show the testatrix' intention).

[2] See the quotation *ante*, § 2472. This is the problem satirized in Alexander Pope's Report of the Case of Stradling *v.* Styles, wherein it appeared that the testator had bequeathed "all my black and white horses" and the question was whether his six pyed horses passed (Works, Elwin & Courthouse's ed., X, 430).

[3] 1802, Doe *v.* Joinville, 3 East 172 (devise to "my brother and sister's family"; held void for uncertainty); 1901, Hanna *v.* Palmer, 194 Ill. 41, 61 N. E. 1051 (deed granting a part of the "west half of the northest quarter . . . containing one acre more or less," held void for uncertainty); 1896, Wilkins *v.* Jones, 119 N. C. 95, 25 S. E. 789 (description of land in a deed, held not too vague).

So, too, a case of apparent equivocation may, after declarations of intention are considered, turn out to be a case of failure to make a definite choice; 1833, Richardson *v.* Watson, 4 B. & Ad. 787 (devise of "the close in K. aforesaid now in the occupation of the said J. W."; the declarations of intention showed that the testator supposed that he had but one such close, but in fact he had two; the devise held void for uncertainty, and not subject to election).

So, too, the terms may be void for repugnancy, or one repugnant term may override the other: 1839, Saunderson *v.* Piper, 5 Bing. N. C. 425 (a bill of exchange read "two hundred pounds," and in the place for figures, "£245"; held, as against the acceptor, that his declarations indicating an intention to accept for £245 were inadmissible, on the theory of patent ambiguity, and that the verdict should be for £200; Coltman, J., diss.); and cases cited *post*, § 2477, note 8.

[4] Bacon, Maxim XXV (in a part of the passage not quoted *supra*); 1900, *Re* Cheadle, 2 Ch. 620.

on the face of the document not final, but the extrinsic facts happen to make them certain — as where the devise is to "one of the children of A," and A has but one child —, the terms would seem to be void for uncertainty, whether the devisor knew the facts or not.[5]

(3) Where the terms of the document are definite, but the extrinsic facts make them *impossible of execution* — as where a devise is of "my house on Cedar street," and in fact the testator has no such house —, the act is again void, — not however for lack of finality in expression, but merely for impossibility of enforcement.[6]

(4) Where the terms of a document contain an *erroneous description*, and under the principle of *falsa demonstratio* (*post*, § 2476) some part of it can be ignored as non-essential, the remainder may still become too vague and thus be void for uncertainty, on the principle of (2) above; for example, where a devise is made of "the house No. 19 Cedar street," and there is no house at No. 19 Cedar street, but only at No. 13 Cedar street, it might be possible to ignore the number as non-essential, but what remains would then be too uncertain, "the house on Cedar street"; whereas if there had been an additional term of description, "the house which my son lives in at No. 19 Cedar street," the remainder, ignoring the number, would have been sufficiently definite.[7]

§ 2474. **Same: (2) Exception for Erroneous Description.** Does the exception for equivocations extend also to misdescriptious? For example, a devise is made to "J. S., eldest son of R. S.," and there are two persons, each of whom fulfils one part but not the whole of the description, one person being the eldest son of R. S., though not named J., and the other being a son of R. S. and named J., but not the eldest son; are declarations of intention proper to consider? There are among the earlier rulings some which can be wrested into precedents upon this point.[1] But the attitude towards inter-

[5] Wigram, Extrinsic Evidence, § 79, suggests the contrary solution, where the testator knows the facts; "it is the form of expression only, not the intention, which is ambiguous." The following case shows the distinction between this and equivocation: 1887, Phelan *v.* Slattery, 19 L. R. Ire. 177 (bequest to "my nephew," there being at least five such persons; the testator's instructions to his solicitor, admitted, because "the description is alike applicable to not only T. D. but to one or more other nephews").

[6] 1818, Beaumont *v.* Field, 2 Chitty 275 (deed of all the lands "now in the occupation of the widow K. and son"; at the time no lands were so occupied, the widow K. having been dead two years; held, that a verdict refusing to enforce the deed for uncertainty was good); 1834, King *v.* Badeley, 3 Myl. & K. 417 (devise over in case "certain contingent property" should vest in his children; there being no contingent interests in the children, the testator's declarations of his meaning were excluded).

[7] Examples of this are given in §§ 2476, 2477, *post*.

[1] Bacon's Maxim (quoted *ante*, § 2472) seems at first sight to deal with it, in the concluding passage, but his notion is really a distinct one. Omitting some intervening cases, the course of rulings in the half-century before Miller *v.* Travers was as follows: 1790, Baugh *v.* Read, 1 Ves. Jr. 256 (similar to Selwood *v.* Mildmay, *infra*, the actual stock here being not so much as described; per L. C. Thurlow: "where a testator uses certain words which *prima facie* give a clear account, the same fact that enables you to prove that there is a latent ambiguity enables you to prove what was his intention"); 1792, Delmore *v.* Robello, 1 Ves. Jr. 412 (bequest to "all the children of his two sisters Reyne and Estrella"; before the date of the will, a sister named Reyne had become a nun and lived at Genoa, and another sister Rebecca living at Leghorn, with Estrella, had children; declarations of intention that he meant to provide for the children of his sisters at Leghorn were excluded, on the theory that this was not a latent ambiguity); 1796, Thomas *v.* Thomas, 6 T. R. 671 (devise "to my granddaughter Mary Thomas of Lleechlloyd in Merther parish"; one M. T.

pretation by extrinsic circumstances was down to the end of the 1700s so different from the modern attitude (*ante*, § 2470), and the rule for equivocations then held a relation to the rest of the law so different from its present one (*ante*, § 2472), that it is hardly possible to build up any doctrine to-day from the earlier rulings. However, in 1832, in the much-considered case of Miller *v.* Travers, the doctrine was plainly laid down that such a second exception existed:

1832, *Tindal*, C. J., in *Miller* v. *Travers*, 8 Bing. 244: "The cases to which this construction [*Ambiguitas verborum latens verificatione suppletur*] applies will be found to range themselves into two separate classes. . . . The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

Such being the language of the opinion in Miller *v.* Travers — a ruling which appears neither then nor subsequently to have met with anything but approval —, it was a singular fate which led to the repeal of the second part of the rule by the citation of the authority of the very case itself. An eagle pierced with an arrow winged by its own pinion, — such was the treatment of

was in fact only a great granddaughter and lived in another parish, and one Elinor Evans, elsewhere named in the will, was a granddaughter and lived in M. parish; though the devise was ultimately held void for uncertainty, yet declarations of the testator were admitted, made on reading the will, that there was a mistake in the name but there was no need to rectify it, as the place of abode would suffice to describe the devisee; the jury found that no such mistake in fact had been made); 1797, Selwood *v.* Mildmay, 3 Ves. Jr. 306 (bequest of "part of my stock in the 4 per cent. annuities of the Bank of England"; the testator had sold his 4 per cents and at the time of execution owned only "long" annuities; the attorney's testimony was received that the testator's instructions were based on the wording of a former will executed before selling the 4 per cents); 1797, Walpole *v.* Cholmondeley, 7 T. R. 134, 145 (the testator made a will in 1752, and another in 1756, and a third by codicil in 1776; in the third he confirmed "his last will and testament dated Nov. 25, 1752"; it was offered to be shown by the scrivener of the third will that upon asking for the testator's prior will the testator referred him to M., who produced that of 1752; that the codicil of 1776 was then drafted by the scrivener in the belief that the will of 1752 was the last one, and that the recital of its date was not read over to the testator, etc., etc.; this was excluded, on the ground that there was no latent ambiguity); 1815, Stockdale *v.* Bushby, 19 Ves. Jr. 381 (bequest to "my namesake Thomas S., the second son of my brother J. S., over and above his equal share with his brothers, 1000 *l.*"; there was no son Thomas, but the second son was William, and was given the legacy; the testator's declarations of intention to give the second son 1000*l.* more than the others being admitted); 1821, Still *v.* Hoste, 6 Madd. 192 (bequest to "Sophia Still, daughter of P. S."; there were two daughters, neither of them named Sophia; the scrivener's testimony to the testator's instructions and a mistake in copying them was admitted).

Miller *v.* Travers in the closely ensuing case of Doe *v.* Hiscocks.[2] The latter ruling rested, of course, on some misconception of the former one, — though how this could arise is incomprehensible. Doe *v.* Hiscocks was thereafter followed almost implicitly,[3] and may be said to represent the law of England to-day;[4] though some judges have expressed their dissatisfaction with the result.[5] In the United States, the question has seldom been raised, and no distinct rule can be predicated,[6] — chiefly because of the frequent ignoring of the distinction between "intention" or meaning, as a general canon of interpretation, and "declarations of intention" as a specific subject of exception.

That the principle of the exception should include this class of cases can hardly be doubted. The description applies in part only to each object, and yet one of the two (or more) is obviously signified; there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event, and there is thus no competition between the words and the extrinsic utterance; it is simply a question which words shall be ignored as the un-essential part of the description:

[2] 1839, Doe *v.* Hiscocks, 5 M. & W. 363 (devise to "my grandson John H., eldest son of the said John H."; in fact, there were two sons, Simon, the oldest by a first marriage, and John, the oldest by a second marriage; held that this was not an equivocation, but a misdescription, since J. fulfilled the name but not the relationship, and S. *vice versa*, and that the testator's instructions and declarations were not admissible; several cases being cited as concededly opposed to this view, it was added that "these cases seem to us at variance with the decision in Miller *v.* Travers, which is a decision entitled to great weight," and "we are prepared on this point, the point in judgment in Miller *v.* Travers, to adhere to the authority of that case"). The facts excluded in Miller *v.* Travers have been already noted (*ante*, § 2471, n. 6). The error in Doe *v.* Hiscocks consisted in not perceiving that the facts excluded in Miller *v.* Travers had been there offered for a very different purpose from that of the facts offered in Doe *v.* Hiscocks; the opinion excluding the facts in Miller *v.* Travers expressly sanctioned the purpose sought by the offer in Doe *v.* Hiscocks.

[3] 1846, Lindgren *v.* Lindgren, 9 Beav. 358 (similar to Selwood *v.* Mildmay, *supra*, n. 1; the latter held not to have been overruled by Miller *v.* Travers or Doe *v.* Hiscocks); 1853, Bernasconi *v.* Atkinson, 10 Hare 345 (devise to "my first cousin Vincent B., the son of my late uncle Peter B."; there existed a George Vincent B., son of another uncle Joseph B., and a Frederick B., son of the uncle Peter B.; the former visited the testator, but the latter did not; the Court considered the circumstances and habits of the persons, to ascertain the essential part of the description, but would not consider declarations of intent; following Doe *v.* Hiscocks); 1860, Drake *v.* Drake, 8 H. L. C. 172 (a description fitting two persons, each in part only; the testator's instructions to the draftsman, excluded); 1874, Charter *v.* Charter, L. R. 7 H. L. 364 (the facts are stated *post*, § 2477; declarations of intention were conceded by all the judges to be inadmissible, on the authority of Doe *v.* Hiscocks, Bernasconi *v.* Atkinson, and Drake *v.* Drake, though Lord Selborne added, "why the law should be so, . . . when evidence of the same kind is admitted in what Lord Bacon describes as cases of equivocation, I am not sure that I clearly understand").

[4] 1894, Chappell's Goods, Prob. 98 ("declarations of the testator . . are probably not admissible").

[5] 1874, Lord Selborne, in Drake *v.* Drake, *supra;* 1877, Hannen, J., in De Rosaz' Goods, L. R. 2 P. D. 66, 71.

[6] 1887, Decker *v.* Decker, 121 Ill. 341, 12 N. E. 750 (quoting with approval the above language of Tindal, C. J.); 1889, Ehrman *v.* Hoskins, 57 Miss. 192 (devise of "property deeded to B. by Knox," with a description of bounds, etc., and afterwards a devise of the testator's "present home by this will devised"; the former description in one point, and the phrase "present home," applied to a lot deeded by one French, the home being partly on each, and the testator living in the part on the F. lot; declarations of intention were excluded); 1897, Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642 (bequest to "Lucy May Gordon, granddaughter"; there was a granddaughter Mary Jane Gordon; evidence received of a conversation between the testatrix and the scrivener in which the former insisted that a granddaughter named May was intended); 1902, Willard *v.* Darrah, 168 id. 660, 68 S. W. 1023 (quoted *supra*); 1899, Van Nostrand *v.* Board, 59 N. J. Eq. 19, 44 Atl. 472 (bequest to "the Domestic Missionary Society," given to the "Board of Domestic Missions of the Reformed Church in America," on consideration of testator's membership in that church, his habitual use of "the Domestic Missionary Society" in referring to that Board, and his expressed intent; treated as an equivocation).

1902, *Brace*, P. J., in *Willard* v. *Darrah*, 168 Mo. 660, 68 S. W. 1023 (the devise was to "my well-beloved nephews J. and W. W."; the testator had two grandnephews so named and also two grandsons so named, the latter being his intimates and the former being personally unknown to him; evidence of his repeated declarations that he had bought this land for them and that he had instructed the scrivener in their favor was admitted). "The devise is 'to my well-beloved nephews John and William Willard'; and it is found from the indirect parol evidence that there are two sets of brothers, each named John and William Willard, — the plaintiff and his brother, 'well-beloved' grandsons of the testator, and two grandnephews, not 'well beloved' of him, and having no legal or moral claim on his bounty. As to each of these sets of brothers the description contained in the will is partly correct and partly incorrect. It is correct as to the Christian and surnames of each set. It is correct as to neither in the superadded description of relationship to the testator, as the word "nephew," *simpliciter*, cannot be held to include grandnephews and the inapplicability in this case is re-enforced by the word 'beloved' prefixed thereto. So that the description in the will, when it comes to be applied to those only who can possibly have been intended, is just as equivocal in point of fact as if these additional words of description had been omitted, as in the first case supposed. The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers, but it is morally and legally certain that it was intended to apply to one or the other, thus bringing the case within the rule established by the second class of cases, in which direct or extrinsic parol evidence, including expressions of intention, is admissible. Such evidence was therefore admissible in this case, in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the will to the objects of the testator's bounty, to prevent the fourth clause of the will from perishing, and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the will, but to let in light by which that intention, rendered obscure by outside circumstances, may be more clearly discerned, and the will of the testator, in its entire scope, effectuated according to his true intent and meaning."

§ 2475. **Same: (3) Exception for "Rebutting an Equity" (Legacies, Advancements, and Disinheritance).** Wherever in the interpretation of a will, a certain term or legal effect is implied by a general rule of law (and not as a matter of inference from the specific words or phrases of a particular will), the source of such an implication is something external to the will; therefore the reason for excluding declarations of intention (*ante*, § 2471) — namely, their rivalry with the words of the will, and the risk of their abuse — falls away, and the declarations may be considered. For example, when a testator names an executor, the rule of presumption, that the residue of personalty is by implication bequeathed to him, is a general and artificial rule independent of the particular will. So, too, the counter-presumption that a specific legacy to the executor negatives the implication of a bequest of the residue. Hence, if the rule is to be merely a presumption — *i. e.* if a contrary intent may be established —, the ascertainment of the actual intent may include all useful data, including the testator's circumstances and declarations:

1821, *Plumer*, V. C., in *Hurst* v. *Beach*, 5 Madd. 351: "Where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed; in like manner, evidence is received to repel the presumption raised against the executor's title to the residue from the circumstance of a

legacy given to him; and to repel the presumption that a portion [for a child] is satisfied by a legacy."

Accordingly such has long been the practice in dealing with the artificial rules as to a bequest of the residue to an executor,[1] a gift of advancement to a child[2] or a husband,[3] and is capable of application to any general and artificial rule of inference as distinguished from a specific inference founded on a particular document.[4]

In more recent times an analogous situation has come to be presented under that class of statutes which requires that a child's intestate share be distributed to him, in spite of a testamentary disposal to other persons, unless it is made to appear that the child was "*intentionally omitted*" *from the will.* Here the rule of the statute is again merely one of presumption, artificially raised for all wills, independently of a particular document, and corresponding precisely (though reversely in tenor) to the rule which took the residue from the next of kin and gave it to the executor, unless a contrary intent appeared. Hence, unless the statute expressly requires the intent to be ascertained from the will alone,[5] the testator's declarations may be considered with the other data.[6]

§ 2476. **Falsa Demonstratio non nocet; General Principle.** It is not necessary, and it is not humanly possible, for the symbols of description, which we call words, to describe in every detail the objects designated by the symbols. The notion that a description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted (*ante*, § 2458). For example, a devise of "the house owned by me at No. 19 Cedar Street, Millville, Massachusetts," is obviously a mere shorthand indication of some simple but essential attributes of the house. How many stories, rooms, doors, windows, closets, has it? What is the color of paper on the respective walls, the kind of wood in the floors, the number of steps on each stair-flight, the pattern of the window frames? These and a hundred

[1] 1723, Rachfield *v.* Careless, 2 P. Wms. 158; 1734, Brown *v.* Selwin, Cas. t. Talbot, 242; 1791, Nonrse *v.* Finch, 2 Ves. Sr. 344, 357; 1794, Clennell *v.* Lewthwhite, 2 Ves. Jr. 465, 644. The earlier doctrine about executors was changed by St. 1 W. IV, c. 40. Compare the following: 1816, Langham *v.* Sanford, 2 Meriv. 6; 1891, *Re* Applebee, 3 Ch. 422, 428.

[2] 1790, Ellison *v.* Cookson, 2 Ves. Sr. 100, 107; 1897, Finch *v.* Garrett, 102 Ia. 381, 71 N. W. 429; 1894, Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

[3] 1790, Clinton *v.* Hooper, 2 Ves. Sr. 173, 181.

[4] Compare the following: 1897, Wentworth *v.* Read, 166 Ill. 139, 46 N. E. 777 (intent to charge legacies on realty; no extrinsic declarations admissible); 1898, Ingersoll *v.* Hopkins, 170 Mass. 401, 49 N. E. 623 (will in contemplation of marriage; extrinsic facts excluded; St. 1892, c. 118, construed).

[5] As in Michigan: 1898, Carpenter *v.* Snow, 117 Mich. 489, 76 N. W. 78.

[6] 1897, Hawhe *v.* R. Co., 165 Ill. 561, 46 N. E. 240; 1899, *Re* O'Connor, 21 R. I. 465, 44 Atl. 591; 1889, Coulam *v.* Doull, 133 U. S. 216, 231, 10 Sup. 253 ("Since under the statute that evidence opens up a question as to the testator's intention which but for the statute could not have arisen, and which by the statute is not required to be determined by the will, we cannot perceive why the disposal of it should be so limited"; applying the Colorado statute, and examining prior cases); 1896, Atwood's Estate, 14 Utah 1, 45 Pac. 1036. *Contra:* 1895, *Re* Salmon's Estate, 107 Cal. 614, 40 Pac. 1030.

Distinguish the following question, arising under such a statute: 1898, Callaghan's Estate, 119 Cal. 571, 51 Pac. 860 (will leaving property in A. to grandchildren; the Code, § 1307, would allow them to have an equal share if in the will the testator had "omitted to provide" for them; to show that they had in effect been omitted, evidence that the testatrix did not own or claim any property in A. at the time of making the will, excluded, because there was an express provision).

other details would go to fill out the description. Without them, it is imperfect, in an absolute sense. Yet no one would insist that the devise was void for uncertainty, for lack of the addition of these details. Why? Because the features mentioned do happen to suffice to fulfil the purpose of interpretation, namely, to enable us to find the object designated, and to select it with fair certainty from others. Certainty, in other words, is a relative term; it signifies that the few terms employed are the essential ones for the purpose. Had they not been in themselves sufficient, we might even have looked at extrinsic declarations of intention (*ante*, § 2472).

Conversely, then, an *excessive* description is not inherently fatal, if the essential terms of it can be ascertained. A devise of "my yellow house at No. 19 Cedar Street" may lead us to a white house at that place; and if we can surely believe, under all the circumstances, that the street number of the house, not the color of the paint, is the essential term, we are to apply the devise to that house. Just as we found that the omitted terms were not essential to applying the description, so we may find that some of the inserted terms are not essential. Each description of a single object must be conceived of as a single utterance, — just as one cipher cable word may represent a message of forty words. We are doing it no violence by ignoring the non-essential terms; for neither the omission nor the insertion of non-essential terms alters its essence as a whole. By conceiving clearly the singleness of each description as a symbol of a single object, we appreciate that the imperfections of either omission or insertion do not destroy its character as a single effort at the designation of a single object. And so we come to the maxim *Falsa demonstratio non nocet.*

The practical problem in a particular case of course is to ascertain which specific term is the essential one. But the important point of principle is that the process of ascertaining it, and then of ignoring the others in the application of the description, is entirely consistent with the general process of interpretation. Ever since the time of Bacon (to go no further back) this has been understood and accepted:

Circa 1597, Sir *Francis Bacon*, Maxims of the Law, XXIV (Works, Spedding's ed., vol. XIV, p. 267): "*Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.* There be three degrees of certainty, — presence; name; and demonstration or reference: whereof the presence, the law holdeth of greatest dignity; the name, in the second degree; and the demonstration or reference, in the lowest; and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy. And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this; this is a good gift, notwithstanding I call him by a wrong name; but so had it not been if I had delivered the horse to a stranger to the use of I. S. where I meant I. D. So if I say unto I. S., Here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby; this is a good gift notwithstanding I named it amiss. . . . Now, for the second part of this rule, touching the name and the reference; for the explaining thereof it must be noted what things sound in name or in demonstration, and what things sound in demonstration or addition; as first, in lands the greatest certainty is, where the land hath a proper name and cognizance; as, 'the manor of Dale,' 'Grandfield,' etc.: the next is equal to that, when the land is set forth by

bounds and abuttals, as 'a close of pasture abutting on the east part upon Emsden Wood, on the south upon, etc.' . . . Therefore if I grant my close called Dale, in the parish of Hurst, in the county of Southampton; and the parish likewise extendeth into the county of Berkshire, and the whole close of Dale lieth in the county of Berkshire; yet because the parcel is specially named, the falsity of the addition hurteth not; and yet this addition did sound in name; but, as was said, it was less worthy than a proper name."

1861, *Caton*, C. J., in *Myers* v. *Ladd*, 26 Ill. 415, 417: "If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that the horses were in the pasture or on the road. The description of the horses being sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate, and describe it as my dwelling house in which I now reside, situate in the city of Ottawa, I shall not avoid the deed by showing that my residence was outside the city limits. So if a deed describe lands by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is, that where there are two descriptions in a deed, the one, as it were, superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone."

In applying the principle there is no inherent difficulty. The process consists in looking at all the circumstances (*ante*, § 2470) that can throw light on the sense of the words of description and their relative essentiality; and the terms thus found to be the essential ones are applied, unless they are too uncertain (*ante*, § 2473) and therefore void. But the superficial bearing of other rules has tended often to create confusion, and to obstruct the full operation of the present one:

(1) The supposed rule against *disturbing a "plain meaning"* (*ante*, § 2462). When the present rule is to be applied, a part of the description being found erroneous but non-essential, three situations may be distinguished. First, only one object may be eligible to answer the description; this is the common case (illustrated above by Bacon's examples), about which no difficulty can arise. Secondly, two or more objects may be eligible, the description being in one part imperfect for one, in another part for the other; this is a frequent case, and the rule is equally well settled.[1] Thirdly, two or more objects may be eligible, one of which perfectly answers the description, the others imperfectly in some respects. Now in this situation the rule against disturbing a plain meaning (if such a rule be recognized) will of course oblige us to apply the description to the first object, even though it could be made to appear that a part of the description was non-essential and that the essential terms of it were actually used to designate one of the other objects. So far, then, as such a rule is recognized, it prevents the due operation of the present principle.[2]

(2) The rule against overthrowing the terms of a document by reason of a

[1] The only question here is whether declarations of intention may be considered: *ante*, § 2474.

[2] The cases are collected *ante*, § 2462; see especially Tucker *v.* Seaman's Aid Society, Mass.

mistake (*ante*, § 2421), or, what is the same thing, by declarations of a contrary intention (*ante*, § 2471), is a legitimate one, and must be observed. Hence, if a devise is of "my white house at No. 19 Cedar Street," and it is proposed to show that the word "white" was by mistake inserted for "green," this proposal must be rejected as improper. Now, in many of the instances of this sort,[3] that has been the form of the proposal, and the Court's necessary rejection of it has therefore seemed to be a discountenancing of the present principle that *falsa demonstratio non nocet*. By approaching the problem from the wrong point of view, the party has prevented the document from being rightly dealt with. The words cannot be overthrown from within (as it were), by attacking the terms of the document; but, taking them as they are, they can be interpreted from without, and the imperfect surplusage of description will not prevent the application of its essential terms. Hence, in such cases as above, if the attempt is made to interpret the description by looking at the testator's circumstances, and if the circumstances are that he had one house only on Cedar Street, that it was numbered 19, and that it was in former days painted white, we may then be willing to conclude that the color-term in the description is entirely subordinate and non-essential, and that the now green house at No. 19 Cedar Street is the identical object which the testator was attempting to describe in the words "my white house at No. 19 Cedar Street." In so doing, we make no assumptions whatever as to how the word "white" came into the will, whether by a draftsman's mistake or otherwise; we merely interpret what is found in the document, and we conclude that the description as a whole was used of a particular house. The occasionally improper method of approaching the problem, then, explains most of the rulings in which the present principle seems to be inoperative.

(3) When, in applying the present principle, the imperfect surplusage is ignored, the remainder must of course be sufficiently definite to be capable of application; else it would be void for uncertainty (*ante*, § 2473). The question, then, often arises whether, in a will, a *term may be implied* which would be necessary, and also sufficient, to remove that uncertainty. For example, in a devise of "a four-story house at No. 19 Cedar Street," it may appear that the testator owns no house at No. 19, but does own a four-story house at No. 219 on that street; assuming, then, that the house-number is non-essential, the remaining terms are "a four-story house on Cedar Street"; but this is obviously by its vagueness incapable of application. Now it may be assumed that the testator would not have devised a house not owned (or believed by him to be owned) by himself;[4] but the fact remains that the terms of a will are merely "a" four-story house. Is there, then, any stretch of reasoning by which, though not directly inserting the words "owned by me," we may construe the word "a" or "house" as signifying "one of mine," or the like? This is the point of controversy on which many rulings turn; and the general

[3] Particularly in Kurtz *v.* Hibner, Ill., cited *post*, § 2477.

[4] In Roman custom, on the contrary, this indirect mode of gift was not uncommon: Just. Instit. II, 20, 4: "Non solum autem testatoris vel heredis res, sed et aliena legari potest; ita ut heres cogatur redimere eam et præstare, vel, si non potest redimere, æstimationem dare."

opinion is that no such implication is permissible. Such rulings, however, do not involve any doubt of the principle *falsa demonstratio non nocet;* they merely decline to imply into the will, for the purpose of being interpreted, words which are not there.

§ 2477. **Same: Application to Deeds and Wills.** (*a*) In its application to *deeds* of land, the foregoing principle has long been recognized without hesitation; and numerous presumptive canons of interpretation have been formed, as to the prevalence of monuments over distances, and the like, for those parts of a description which deal particularly with the metes and bounds. The principle is also frequently exemplified in other kinds of descriptive terms.[1] Probably the reason why there has not here been the confusion which has marked some of the testamentary cases is that, with deeds, no one would ordinarily think of proposing to overturn its words on the ground of individual mistake, the standard necessarily being a mutual one (*ante,* § 2466); and thus the problem is usually approached from the proper point of view.[2] The principle is of course equally applicable to contracts[3] and all bilateral transactions.

[1] 1898, Cowen *v.* Truefitt, 2 Ch. 551 (deed of rooms on 2d floor of Nos. 13 and 14, Old Bond St., with free ingress "through the staircase and passage of No. 13"; there was a staircase in No. 14 but none in No. 13; held that the words "of No. 13" might be rejected as *falsa demonstratio,* and the deed made effectual by the only staircase); 1897, Gordon *v.* Kitrell, — Miss. — , 21 So. 922 (an assessment of "east fractional section 12, township 6, range 6, W," and a deed of "lot 6, McLeod's subdivision, west side of river, section 12, township 6, range 6, W"; identity of the two parcels shown); 1844, Hathaway *v.* Power, 6 Hill N. Y. 453 (a deed of "all that certain tract or parcel of land situate in township number 11 in the third range of townships, . . . it being 160 acres of land, in lot number 14," held to convey all of lot 14, though it contained 185 acres; "the number of acres . . . can only be regarded as an attempted designation of quantity which turns out to be erroneous"); 1896, Higdon *v.* Rice, 119 N. C. 623, 26 S. E. 256 (example of erroneous courses, distances, etc., applied); 1896, Davidson *v.* Shuler's Heirs, ib. 582, 26 S. E. 340 (to locate a chestnut-tree corner, evidence of the one actually marked, admitted, although the description "a chestnut, S. E. corner of G. W.'s lot" became erroneous, and read "N. E. corner, etc."); 1900, Wiseman *v.* Green, 127 id. 288, 37 S. E. 272 (Furches, J.: "The deed contains the following calls: 'Beginning on the southeast bank of Toe river, two rods below the mill house, and runs west, north, east, and south, to the beginning, so as to include the mill and site and two acres of land, it being and including the land sold as the excess of the homestead of A. Wiseman.' It appears from the survey and the evidence in the case that the land contained in the calls of this deed does not include the saw mill, nor the grist mill, nor the mill site. But, if the first call 'west' is reversed, and read 'east,' instead of 'west,' the description in the deed, 'beginning on the southeast bank of the Toe river, two rods below the mill house,' will include both the saw and grist mill and mill site. . . . It seems to us that common sense, justice, law, and the precedents of this Court sustain the ruling of the Court, and the finding of the jury that 'west' was a mistake, and should have been written 'east.' This being so, the Court does not change the deed, but only puts a legal construction upon it, which creates no new rights, nor does it affect the rights of others"); 1900, Silliman *v.* Whitmer, 196 Pa. 363, 46 Atl. 489 (deed describing land erroneously as to county, admitted); 1895, Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724 (where the fourth side of a lot was said to be bounded by a lot owned by C. H. C., and this, on being shown incorrect, was rejected, and a lot owned by K. and F. taken as boundary); 1858, Fancher *v.* DeMontegre, 1 Head 40 (deed-land described as "Grant No. 4795 to J. R."; that the grant was really No. 4794 to T. B. E., held immaterial, the land being otherwise sufficiently identified); 1892, Rushton *v.* Hallett, 8 Utah 277, 30 Pac. 1014 (deed reserving "the street heretofore deeded to said city"; a street had been laid off but not deeded; the description was applied to that street, the error being "matter of description only").

For cases involving the use of an *erroneous surname* of a person, see *ante,* § 2465.

[2] The following case illustrates how a Court may be misled in this way: 1899, Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70, 24 So. 888 (deed; described by a line "to a stake at the northwest corner," etc.; the fact that there was a stake at the northeast corner but none at the northwest corner, and that the word "northwest" had by mistake been inserted instead of "northeast," excluded).

[3] 1891, New York Life Ins. Co. *v.* Aitkin, 125 N. Y. 661, 26 N. E. 732 (D. and his wife mortgaged to the plaintiff; then D. conveyed to G., who covenanted to pay the mortgage; then

(*b*) Many early English rulings upon *wills* recognize the principle, and some of them show a surprising approximation to the modern attitude;[4] in the cases of later times there seems to have been a consistent observance of the principle.[5] But in the rulings in the United States there has occurred, in

G. and his wife conveyed to the defendant, who covenanted to pay "a certain mortgage made and executed by the party of the first part to the N. Y. Life Ins. Co. bearing date the 3d day of December, 1868, to secure the sum of $4000"; the defendant being charged with the mortgage made by D. and his wife, the description in the defendant's covenant was applied under the circumstances to D.'s mortgage, in spite of the error of describing it as G.'s).

[4] 1607, Sir Moyle Finch's Case, 6 Co. Rep. 65 *b* (a deed held good, for "although the grantor's christian name was mistaken, yet forasmuch as there was a sufficient certainty to ascertain the name of the grantor, *sc.* Abbot of W., for that reason the grant was adjudged good; for in this lease it is true *nihil facit error nominis cum de corpore constat;* but otherwise it is of a writ"); 1629, Chamberlaine *v.* Turner, Cro. Car. 129 (devise of "the house or tenement wherein W. N. dwelleth, called The White Swan, in Old street"; it appeared that W. N. occupied only the entry and three rooms, while other persons occupied the remainder; the devise was held to pass the entire house); 1636, Blague *v.* Gold, Cro. Car. 447, 473 (devise of a house "called the Corner-House, in Andover, in the tenure of B. and H."; in fact the corner-house was not in H.'s tenure, but the adjoining house was; held, that the corner-house passed; "and the addition '*in tenura H.*,' although it be not in his tenure and is a mistake, yet it is but surplusage, and although false, shall not vitiate the devise").

[5] 1723, Beaumont *v.* Fell, 2 P. Wms. 141 (bequest of 500 *l.* to "Catherine Earnley"; Gertrude Yardley claimed it, and the facts were that the testator had usually called her "Gatty" and of course would pronounce her surname "Yarnley," that he spoke so low that the draftsman could hardly understand, and finally that he had declared that he would do well for her in his will; the Master of the Rolls declared that this would not have been considered, for a devise of land, but being a chattel bequest "makes it a different case," even "after making the statute of frauds, provided there is a will in writing"); 1749, Door *v.* Geary, 1 Ves. Sr. 255 (bequest to the wife of "£700 capital East India stock in which he was then interested, possessed of, or intitled unto"; he had no East India stock, but had in his name £700 of Bank stock which had belonged to the wife; L. C. Hardwicke applied the bequest to the latter; "why is this a greater mistake than the devise of a black, having only a white horse, where the word 'black' should be rejected?"); 1784, Thomas *v.* Steward, 7 T. R. 140, note (devise to "Thomas Thomas, eldest son of Thomas Thomas of Chatham"; there was an eldest son Thomas, dead before the making of the will, and a second son Richard; on hearing evidence of the circumstances as known to the testatrix, a verdict was given for Richard); 1812, Garvey *v.* Hibbert, 19 Ves. Jr. 125 (bequest to "the three children of D. D., the sum of 600 *l.* each"; D. D. had four children, all born before the date of the will; and the bequest was applied to all; "the ground on which the Court has proceeded is that it is a mere slip in expression; the meaning is all children, or all servants; and the Court conceiving the intention to be to give to each child so much, strikes out the specified number"); 1813, Goodtitle *v.* Southern, 1 M. & S. 299 (devise of "all that my farm, lands, and hereditaments called Trogues-farm, situate within the parish of Darley in the county of Derby, now in the occupation of A. Clay"; two of the closes of Trogues-farm were not in the occupation of Clay, but were held to pass; "the defective description of the occupation will not alter the devise"); 1820, Doe *v.* Huthwaite, 3 B. & Ald. 632 (devise to "G. H. eldest son of J. H.," and in default, etc., to "S. H. second son of J. H.," and in default, etc., to "J. H. third son of J. H.," and in default, etc., to "C. H. youngest son of J. H."; in fact, S. H. was the third son, and J. H. was the second son; issue directed to ascertain whether the name or the relative age of the devisees was the essential part of the description); 1844, Newbolt *v.* Pryce, 14 Sim. 354 (bequest to "John N., second son of Rev. W. S. N., vicar of S."; there was a W. R. N., vicar of S., and he had three sons, G. D. N., R. H. N., and John P. N., the last being the third; the bequest was given to John P. N.; and the fact of the testatrix' "habit of calling one of the sons by the name of John" was held admissible); 1844, Lee *v.* Pain, 4 Hare 201, 249 (bequest to "the three sisters of the late Miss J. S."; she had four sisters surviving; Wigram, V. C., held that "where a legacy is given to the three children of A, A having four, five, or any larger number of children at the date of the will, the Court will reject the word 'three' upon the presumption of mistake, and all the children of A will be entitled"); 1853, Bernasconi *v.* Atkinson, 10 id. 345 (cited *ante*, § 2474); 1856, The Clergy Society, 2 K. & J. 615 (bequest to "The Clergy Society . . . in London"; several societies considered, but none found to be the precise probable objects of the testatrix' words; the money therefore distributed by the Court upon its own scheme *cy pres*); 1874, Charter *v.* Charter, L. R. 7 H. L. 364 (appointment of "my son Forster Charter, as the executor," and devise of "all my messuages" to him, he to allow maintenance to the testator's wife "as long as they reside together in the same house"; the circumstances were that an elder son, William Forster C., and a younger son, Charles C., survived, and that the former had had disputes with his father and lived 100 miles away, and was known as "William," while the latter lived in his father's house on intimate terms; the

a few jurisdictions, more or less apparent confusion of precedents, due chiefly to one or another of the three considerations already noted (*ante*, § 2476). In particular, the case of Kurtz *v.* Hibner, in Illinois, has been the centre of much discussion, and serves well enough to illustrate both the principle and the misunderstandings about it.[6] On the whole, a sound result is reached in the great majority of rulings.[7]

probate to William Forster having been revoked, this decree was sustained by an evenly divided vote, one half of the law lords apparently believing that the term of description "resides in the same house" was essential and prevailed over the name).

[6] 1870, Kurtz *v.* Hibner, 55 Ill. 514 (devise to E. of the "W. ½ of the S. W. ¼ of Sect. 32, T. 35, R. 10, containing 80 acres," and to J. of the "S. ½ of the E. ½ of the S. ¼ Sect. 31, in T. 35, R. 10, containing 40 acres"; the circumstances were excluded that the testator owned no 80-acre tract in S. 32, but did own such in S. 33, and that he owned a 40-acre tract in S. 32, but — presumably — not in S. 31, and that E. had been long in occupation of the 80-acre tract under a promise to devise it, and further that the draftsman of the will had by mistake inserted 32 for 33, and 31 for 32; the Court's ruling was clearly right, as excluding declarations of intent and the mistaken drafting, on the principle of §§ 2421, 2471, *ante;* and the opinion intimates that, had the will contained any other term of description identifying it, as in Riggs *v.* Myers, Mo., "my estate" or the like, the case could have been treated as one of misdescription and the erroneous term omitted; the opinion having been criticised by Redfield, C. J., the editor, in a note in 10 Am. Law Reg. N. S. 93, it was defended by Caton, J., not the writer of the opinion, in ib. 353, and was justified expressly on the above-named ground, that "if in this case the word 'my' had been used, instead of 'the,' in connection with the description, then indeed there would have been something in the will to construe, . . . an additional description by which the Court might have determined the subject of the devise after having eliminated '32'; . . . the fundamental error of the editor consists in his assuming that necessarily the testator designed to devise land to which he had a present existing title"; the ruling in Kurtz *v.* Hibner, thus explained, therefore stands for two propositions, (1) that if a description does not fit any object exactly, the circumstances may be considered and any part of the description which appears erroneous and unessential may be ignored; (2) that, in settling what is the description to be taken for this purpose, the words "being my property" cannot be read into the will by implication; on the first point, all the later cases in Illinois, except apparently Bishop *v.* Morgan, are in accord; on the second point, they all assume the same doctrine, but seem not expressly to meet the question; see further a comment by Julius Rosenthal, Esq., in the Chicago Legal News, Mar. 18, 1871).

[7] *Illinois:* 1876, Bishop *v.* Morgan, 82 Ill. 351 (devise of "S. E. ½ of Sec. 10, . . . containing 40 acres more or less," the testator really owning only the S. E. ¼ of the N. E. ¼; the fact of his ownership of the latter, excluded, on the supposed authority of Kurtz *v.* Hibner; Dickey, J., and Sheldon, C. J., diss., on the ground that the clause "containing 40 acres" supplied a sufficient description; the dissent is clearly correct); 1878, Emmert *v.* Hayes, 89 id. 16 (devise of "my estate of 195 acres in T. 3, etc.," the testator not owning anything in the section named; this fact was admitted and the devise applied; "where there are two descriptions, one superadded to the other, and one description being complete and sufficient of itself and the other, subordinate and superadded, incorrect, the incorrect feature is rejected as surplusage"; this ruling follows out the implication of Kurtz *v.* Hibner; the above language is reproduced from the opinion in Myers *v.* Ladd, Ill., quoted *ante*, § 2476); 1885, Bowen *v.* Allen, 113 id. 53 (devise of "my house and lot in the town of P., Ill., the north ⅔ part of lot 19 block no. 10, railroad addition"; held, that if the fact appeared that the testatrix owned no house and lot in lot 19, but did own one in lot 12, the description would be applied; "in Kurtz *v.* Hibner, had the will described the property as his farm in the township and he had held no other in the township, then a different result would have been reached"); 1887, Decker *v.* Decker, 121 id. 341, 12 N. E. 750 (devise of "my real estate," including "20 acres off the W. ½ of the N. E. ¼ of the N. E. ¼ of S. 33, T. 18, R. 11," the testator really owning only the N. W. ¼ of the N. E. ¼; doctrine of the two preceding cases followed, in applying the description, treating the erroneous part as immaterial); 1892, Bingel *v.* Volz, 142 id. 214, 31 N. E. 13 (devise of "70 acres off the S. side of the N. ½ of the N. W. ¼ of S. 16, T. 5, R. 6," the testator really owning only the S. W. ¼, not the N. W. ¼; this fact, and the error of the draftsman in not following the instructions, excluded; though "if the description, after rejecting the repugnant element, were sufficient to describe accurately the land, it might be adopted"; practically following Kurtz *v.* Hibner exactly, and not inconsistent with the three immediately foregoing cases; the error of the opinion consists in expressly reviving the authority of Bishop *v.* Morgan, which had practically been overruled by the three cases succeeding it); *Indiana:* 1865, Cleveland *v.* Spillman, 25 Ind. 95 (devise of "my land, being the S. ½ of the N. E. ¼, T. 36, R. 3, S. 12," but the testator owned only the N. W. ¼; the devise was applied to that land, by treating the erroneons part of the description as immaterial); 1881, Judy *v.* Gilbert, 77 id. 96 (devise of "N. E. ¼ of the S. E. ¼ of T. 29, R. 37, S. 11"; but the testator owned only the N. E. ¼ of the

From the foregoing class of cases should be distinguished those in which an insufficient description (as in a deed naming a section, without range or

S. W. ¼; the mistake of the draftsman, not allowed to be shown); 1885, Funk *v.* Davis, 103 id. 281, 2 N. E. 739 (devise of "N. W. ¼ of T. 27, R. 28, S. 3," the testator owning only the N. E. ¼; there being in the will no words such as "my land," the devise was not applied to the N. E. ¼; Jndy *v.* Gilbert followed, but on correcter reasoning; Cleveland *v.* Spillman distinguished on the above ground); 1889, Sturgis *v.* Work, 122 id. 134, 22 N. E. 996 (devise of the "W. ½ of the S. W. ½, etc.," the testator owning only the N. E. ½; the fact of this ownership excluded; the correct principle was conceded, but no other sufficient descriptive item was found, and the words "being my property" were refused to be implied); 1895, Rook *v.* Wilson, 142 id. 24, 41 N. E. 311 ("My real estate, to wit, the S. E. ¼ of the S. E. ¼" of a certain section; the only land owned by the testator was the N. E. ¼ of the S. E. ¼; these facts were considered and the description applied to the latter piece); 1897, Hartwig *v.* Schiefer, 147 id. 64, 42 N. E. 471, 46 N. E. 75 ("my life insurance policy amounting to $1000"; there was only one policy, payable to the wife, and, if dead, to her children; the wife was dead; facts admitted to identify it as having been treated by him as his, though running to his children); 1899, Whiteman *v.* Whiteman, 152 id. 263, 53 N. E. 225 (will reciting a former will of Oct. 18, 1890, and purporting to be a codicil thereto; the fact that no such former will existed, except one of Feb. 1890, destroyed after being incorporated in the codicil, admitted, on the theory of "latent ambiguity"); *Iowa:* 1873, Fitzpatrick *v.* Fitzpatrick, 36 Ia. 674 (devise of "W. ½ of the N. E. ¼ of S. 23 in T. M. township," the testator owning only the E. ½; declarations of intention excluded; "in all the cases . . . the language of the will, after rejecting the false description, has been sufficient to show what property or person was intended; . . . we cannot presume that the testator intended to assert his ownership of the thing bequeathed"; Eckford *v.* Eckford, *infra*, seems to ignore the tendency of the first quotation above); 1887, Christy *v.* Badger, 72 id. 581, 34 N. W. 427 (devise of "a small farm in Wayne Co., Ia., near the Missouri line"; rule of Fitzpatrick *v.* Fitzpatrick, *supra*, followed); 1887, Covert *v.* Sebern, 73 id. 564, 35 N. W. 636 (devise to "my stepson H. S. Covert"; there was only a stepson named John Harvey C.; the mistake of the scrivener allowed to be proved, to identify the devisee); 1892, Eckford *v.* Eckford, 91 id. 54, 58 N. W. 1093 (devise of "S. E. ¼ of T. 14, R. 98, S. 17," in a will beginning "I own the following estate"; the testator in fact owning only the S. W. ¼ in that section; held, that to omit the erroneous item of description was here impossible, because "there must be a sufficient general description in the will to lead to an identification after the particular description is written out"; the ruling is unsound in its application of the principle); *Kansas:* 1898, Wilson *v.* Stevens, 59 Kan. 771, 51 Pac. 903 ((1) a will giving to a child Ollie; the fact was received that a daughter Viola was called Ollie in the family; (2) a will giving to a child "Florence Stevens," living "at Wichita"; the fact was received that there was a son living south of Wichita, and that the son's name Alonzo might have been the word understood by the scrivener as "Florence"); 1900, Zirkle *v.* Leonard, 61 id. 636, 60 Pac. 318 ("All the land I now have in the N. W. ¼ of S. 20, T. 13, R. 17, containing about 72 acres"; he owned only in the S. W. ¼; the description was applied to the latter); *Missouri:* 1855, Riggs *v.* Myers, 20 Mo. 997 (devise of "my estate," naming "the S. W. ¼ of S. 4, in T. 60, of R. 38, in Holt Co., Mo., with the privilege of using the water of the Big Spring"; the facts being that the testator owned no land in T. 60, but did own quarter-sections in T. 59, the land in T. 59 was given, being sufficiently identified by the terms "my estate" and "Big Spring"); 1897, Gordon *v.* Burris, 141 id. 602, 43 S. W. 642 (bequest to "Lucy May Gordon, granddaughter"; the fact was received that there was a granddaughter Mary Jane G., called "May" by the testatrix); *New Hampshire:* 1855, Winkley *v.* Kaime, 32 N. H. 268 (devise of "36 acres more or less in lot 37 in the 2d division in Barnstead," the testator really owning only lot 97; the description was applied to the latter; "by rejecting the words and figures 'in lot 37,' it will stand '36 acres in the 2d division in B., being the same I purchased of J. P.'"); 1883, Smith *v.* Kimball, 62 id. 606 (cited *ante*, § 2462); *New Jersey:* 1899, Congregational Home Missionary Soc. *v.* Van Arsdale, — N. J. Eq. —, 42 Atl. 1047 (plaintiff allowed to take a bequest to the "Home Missionary Society of America"); 1900, Kerrigan *v.* Conelly, — id. — , 46 Atl. 227 (bequest to "Woodstock College in Howard Co., Md.," applied to W. College in Baltimore Co., there being no other W. College in Maryland); *Pennsylvania:* 1903, Amberson's Estate, 204 Pa. 397, 54 Atl. 484 (bequest to "the Foreign Missionary Society," held to signify "the Missionary Society of the Methodist Episcopal Church"); *United States:* 1886, Patch *v.* White, 117 U. S. 210, 6 Sup. 617, 710 (will "touching worldly estates wherewith it has pleased Almighty God to bless me in this life," and disposing "of the same" by a devise of "lot no. 6, in square 403," with improvements, in Washington; the testator owned lot 3 in square 406, but not lot 6 in square 403, and the former had improvements, but the latter not, and all his other lots were otherwise disposed of in the will; held, a case of false description, so that the lot could be identified by omitting the erroneous numbers; four judges diss.); *Virginia:* 1897, Wildberger *v.* Cheek's Ex'r, 94 Va. 517, 27 S. E. 441 ("all the residue . . among all my nieces and nephews; they are the following": naming several, but omitting some; the testator's feelings towards the omitted ones, received to see whether the "all" should be regarded, or the enumeration); *Washington:* 1899, Gorkow's Estate, 20 Wash. 563,

township) creates an equivocation (*ante*, § 2472); those in which the misdescription suffices merely to deprive of the right to the remedy of specific performance; and those in which the misdescription arises on the face of the document, through inconsistencies or uncertainties which require to be reconciled or qualified as between each other.[8]

§ 2478. **Sundry Rules; Interpretation of Statutes.** (1) In the course of judicial experience, numerous *presumptive rules* have naturally developed themselves, concerning the probable meaning of various words, phrases, and grammatical constructions. They are in effect definitions of that ordinary usage of language which, by the general principle (*ante*, § 2461), is always the first to be applied, as representing the probable usage of the writer. These specific rules vary with the nature of the document and the transaction. In a complete treatise on Interpretation, they would find a place; but they are not included in the present purview.

(2) A *statute* is an act of expression by a legislative body; and, as a legal act, it presents the same problems as to intention, integration, form, and interpretation, as other legal acts. In general, the foregoing principles and problems recur, *mutatis mutandis*;[1] but the subject cannot be dealt with in the present survey.[2]

56 Pac. 385 (bequest to "Otto, the child of Martha K.," held to apply to Arthur K.); *West Virginia:* 1896, Ross' Ex'r *v.* Kiger, 42 W. Va. 402, 26 S. E. 193 (bequest to "the M. E. Church school situated in Buckhannon"; also to "the M. E. Church Foreign Missionary Society"; the facts were admitted, (1) as to the first, there being no such-named institution in B., but one known as the "West Virginia Conference Seminary at B.," that the testatrix had frequently given money to the latter, that it was controlled by Methodist Episcopalians and was often spoken of as "the Methodist school at B.," and that there was no other Methodist school there; (2) as to the second, there being no such-named society, but one known as the "Missionary Society of the M. E. Church," that the testatrix was a member of the M. E. Church and had contributed to its support); *Wisconsin:* 1878, Sherwood *v.* Sherwood, 45 Wis. 357 (devise of "lot 9 in block 20 in Oshkosh"; the correct principle conceded, but here, there being no other words "being my land," or the like, in the will, the devise was ineffective; otherwise, if the will had said "my lot 9," or "the lot which I purchased of B.").

[8] *E. g.:* 1833, Doe *v.* Galloway, 5 B. & Ad. 43 (deed of "all that part of the park called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of Richard Smallbones, in a direct line across the said park etc."; held, that the land passing was not merely the part in the occupation of R. S.); 1895, Lassing *v.* James, 107 Cal. 348, 40 Pac. 534 (where the terms of a covenant were contradictory, evidence of a mistake in not striking out one of them was considered). Compare the rule as to applying the written part of a policy when it conflicts with the printed part; *e. g.:* 1845, Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 794; 1839, Saunderson *v.* Piper, 5 Bing. N. C. 425 (cited *ante*, § 2473, note 3).

[1] This is illustrated in Endlich, Interpretation of Statutes, 1888, §§ 28–30, 357–371, 507–510.

[2] The question of the conclusiveness of the enrolled copy of a statute has been dealt with *ante*, § 1350.

BOOK II: BY WHOM EVIDENCE MUST BE PRESENTED (BURDEN OF PROOF, AND PRESUMPTIONS).

TITLE I: GENERAL THEORY.

CHAPTER LXXXVI.

§ 2483. **Production of Evidence by the Parties.** The apportionment of the task of producing evidence is one of the most characteristic features of the Anglo-American system. It is placed wholly upon the parties to the litigation; it is not required or expected of the judge. In this respect the emphasis is in contrast to the Continental system. Whether the political notions of self-help, self-government, and *laissez faire* have ultimately here a common source and analogy would be an interesting question. The Anglo-American feature shows itself, in other aspects, in its frequent relegation of the judge to the position of an umpire (*ante*, § 1845), in its abstinence from rules for preferred kinds of witnesses (*ante*, § 1286), and in its reliance upon cross-examination by the opponent (*ante*, § 1367). The Continental feature shows itself in its exaltation of the trial judge's function (as *Untersuchungsrichter* or *juge d'instruction*), and in its multiplication of artificial rules of measurement for aiding the judge in estimating the evidence (*ante*, § 2032, *post*, § 2490). Certainly the vital importance of the burden of proof means something very different for the parties, in our system of procedure, from its meaning in the other. It is this feature, together with that of the jury, which is responsible for the peculiar double aspect of the burden of proof (*post*, § 2487).

§ 2484. **Evidence sought by the Judge ex mero motu; Questions to Witnesses by the Judge.** So extreme has been the emphasis upon this feature of the production of proof, that even the judge's right to call forth evidence

has been at times questioned by the Bar. That he has no burden of doing so is plain in the law; but that he has no right to cause the evidence produced by the parties to be supplemented, where he believes this necessary, has never been conceded, — and never will be, so long as the Bench retains a true conception of its constitutional function and a due sense of self-respect:

1794, Mr. *Edmund Burke*, Report of Committee on Warren Hastings' Trial, 31 Parl. Hist. 348: "It is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth."

1894, Lord *Esher*, M. R., in *Coulson* v. *Disborough*, 2 Q. B. 316, 318: "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before."

The trial judge, then, may *call a witness* not called by the parties,[1] or may consult any source of information on topics subject to *judicial notice*,[2] or may *put additional questions* to a witness called by the parties,[3] — without derogating from the general principle that the risk and burden of producing evidence is upon the parties themselves.

§ 2485. **Burden of Proof; (1) First Meaning; Risk of Non-Persuasion of the Jury.** Since, then, the risk and burden of producing evidence falls upon the parties themselves, how is it to be apportioned between them? In short, *which party has the "burden of proof"?*[1]

In every attempt to explain the principles of the law as to burden of proof and presumption, two things at least present themselves for consideration, — the general process, logical and legal, involved in determining the parties by whom evidence is to be produced, and the significance and usage of various terms employed and the incidental problems of each part of the process. The difficulties of such an attempt, almost insuperable,[2] arise not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which

[1] 1894, Coulson *v.* Disborough, 2 Q. B. 316 (quoted *supra*); 1886, Selph *v.* State, 22 Fla. 537, 548 (a judge may "of his own accord, when the interests of justice demand it," call and examine witnesses; the word "not" is apparently omitted by error in the printed opinion); 1852, Hoskins *v.* State, 11 Ga. 92, 97 (the trial judge's right of "directing the necessary proofs to be adduced," conceded); 1898, Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053 (here, a physician who had made an examination under order of Court previously made on motion). So, too, where he sits without a jury: 1883, Badische A. & S. Fabrik *v.* Levinstein, L. R. 24 Ch. D. 156, 167 (under Ord. 56, Rules of 1883, quoted *ante*, § 1674).

[2] *Post*, § 2569.

[3] 1877, Sparks *v.* State, 59 Ala. 82, 87 (distinction drawn between the right to propound questions openly to a witness and the impropriety of privately consulting a witness to discover or suggest further testimony); 1884, Littleton *v.* Clayton, 77 id. 571, 575; and cases cited *ante*, § 784.

[1] For an acute and comprehensive examination of the subject of this chapter, see chapters 8 and 9 in Professor Thayer's Preliminary Treatise on Evidence, the publication of which may truly be regarded as epoch-making. Professor Austin Abbott's article in the University Law Review, II, 59, is also enlightening.

[2] The following remark will be thought singular, in view of the condition of the precedents on this subject: "Every student of the law fully understands the exact import of the phrase 'burden of proof'" (1897, State *v.* Thornton, 10 S. D. 349, 73 N. W. 196).

our law has so long suffered. At the outset, then, it will be more satisfactory to analyze the logical and legal situation considered in itself and independently of the various usages and terms that chiefly cause the confusion.

(1) *Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. This does not mean that B is absolutely safe though he does nothing, for he cannot tell how much it will require to persuade M; a very little argument from A might suffice; or, if M is of a rashly speculative tendency, the mere mention of the proposition by A might without more effect M's action; so that it may be safer in any case for B to say what he can on his side of the question; and thus in fact he, as well as A, has more or less risk, in the sense that there are always chances of A's persuading M, no matter how trifling his evidence and argument. But nevertheless the risk is really upon A, in the sense that if M, after all said and done, remains in doubt, and therefore fails to pass to the point of action, it is A that loses and B that succeeds; because it is A who wishes the action taken and needed as a prerequisite to accomplish the persuasion of M. The risk of non-persuasion, therefore, *i. e.* the risk of M's non-action because of doubt, may properly be said to be upon A. This is the situation common to all cases of attempted persuasion, whether in the market, the home, or the forum. So far as mere logic is concerned, it is perhaps questionable whether there is much importance in the doctrine of burden of proof as affecting persons in controversy.[3] The removal of the burden is not in itself a matter of logical necessity. It is the *desire to have action taken* that is important. In the affairs of life there is a penalty for not sustaining the burden of proof, — *i. e.* not persuading M beyond the doubting point, — namely, that M will not take the desired action, to which his persuasion is a prerequisite.

Thus, in practical affairs generally, the burden of proof (in the sense of risk of non-persuasion) signifies that upon a person desiring action from M will fall the penalty of M's non-action unless M can be persuaded beyond

[3] "In Logic, then, when we speak of the burden of proof, we are not speaking of some merely artificial law, with artificial penalties attached to it. . . . No penalty follows the misplacement of the burden of proof, except the natural consequence that the assertion remains untested, and the audience therefore (if inquiring) unconvinced. . . . There is no 'obligation' on any one to prove an assertion, — other than any wish he may feel to set an inquiring mind at rest or to avoid the imputation of empty boasting. It is a natural law alone with which we are here concerned, — the law that an unsupported assertion may, for all that appears, be either true or false" (Professor Alfred Sidgwick, Fallacies, 163).

the doubting-point as to the truth of the propositions prerequisite to his action. What, then, is the difference, if any, between this risk of non-persuasion in affairs at large and the same risk in litigation? In litigation, the penalty is of course different; the action which is desired of M is the verdict of the jury, the decree, order, or finding of the judge, or some other appropriate action of the tribunal. But so also the action differs in other affairs, according as M is an investor with money to lend, or an employer with a position to fill, or a friend with a favor to grant. Is there no other and more radical difference? The radical difference in litigation, as distinguished from practical affairs at large, is as to the *mode of determining the propositions of persuasion which are a prerequisite* to M's action. In affairs at large, these are determined solely by M's notion of the proper grounds for his action, — depending thus on the circumstances of the situation as judged by M. In litigation, these prerequisites are determined, first and broadly, by the *substantive law*, which fixes the groups of data that enter into legal relations and constitute rights and duties, and, secondly and more in detail, by the *laws of pleading and procedure*, which further group and subdivide these larger groups of data, and assign one or another sub-group to this or that party as prerequisites of the tribunal's action in his favor. Thus, if A were endeavoring to persuade M to assist him with money because M's brother B had cruelly assaulted and beaten A, M might conceivably exact of A that the latter first prove to him — *i. e.* persuade him — not merely that B had beaten A, but further that B had not done this in self-defence or by A's consent or in ejecting A from B's premises or otherwise for some reason, legally justifiable or not. In a legal tribunal, on the other hand, the substantive law will define and limit, in the first place, the reasons to be regarded as justifiable, and will thus narrow the total of facts that can in any event be involved; and, in the second place, the law of pleading will further subdivide and apportion these facts. It will inform A that he need persuade the tribunal of two facts only, namely, that A was beaten and it was B who beat him;[4] and that, upon persuading the tribunal of these facts, its action will be taken in his favor, and A's risk of the tribunal's non-action will thereupon cease. It will inform B that at this point the risk of non-action will turn upon him, in the sense that he needs the tribunal's action in order to relieve himself from the consequences of its previous action, and that this action (by way of reversing its provisional action in A's favor) will depend upon his persuading the tribunal as to certain specified facts by way of excuse or justification. Perhaps the same law of pleading may further apportion to A a third set of facts to be the subject of a replication, in case B succeeds in obtaining action in his favor on his plea.

But the groupings defined by the substantive law and the further subdivision by the law of pleading do not necessarily end the process of apportionment by law. Even within a single pleading there are instances in which

[4] Assuming, of course, that there is no controversy as to whether inadvertence or the like is a proper subject for the general issue or for an affirmative plea.

the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent. In criminal cases, for example, though there is no affirmative pleading for the defence, it is put upon the defendant, in some jurisdictions, to prove the excuse of self-defence; in many jurisdictions in which payment need not be affirmatively pleaded to a contract-claim, the burden of proving payment is nevertheless put upon the debtor; and so in many other instances. The difference of effect between an apportionment under this method and an apportionment by requiring a pleading is merely that, in the latter method, all questions of burden of proof might conceivably be disposed of before trial or the entering into evidence;[5] while by the other method the apportionment is not made until the trial proper has begun. The other method is less simple in the handling; but it has come more into vogue under the loose modes of pleading current in modern times in many jurisdictions.[6]

§ 2486. **Same; Test for this Burden; Negative and Affirmative Allegations; Facts peculiarly within a Party's Knowledge.** The characteristic, then, of the burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages, and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations, then, is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the *party having the affirmative allegation.*[1] But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove;[2] a common instance is that of a promisee alleging non-performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential.

The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in

[5] Though in practice not usually at the present time; see Langdell's Discovery under the Judicature Acts, Harvard Law Review, XI, 157, 205.

[6] The result is that what were properly questions of pleading are often discussed in terms of the burden of proof; *e. g.* 1896, Hopson *v.* Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312 (indexed under "Burden of Proof"; it is said, of a plea in abatement, "the burden of sustaining the plea was upon the defendant"); 1895, Goodell's Ex'rs *v.* Gibbons, 91 Va. 608, 22 S. E. 504 (where the question of pleading affirmatively the statute of limitations is discussed indifferently in terms of pleading and of burden of proof).

[1] 1842, Greenleaf, Evidence, § 74; Ga. Code 1895, § 5160 (on the party "asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential"); 1898, People *v.* Boo Doo Hong, 122 Cal. 606, 55 Pac. 402 (unlawful practice of medicine; the burden placed on the defendant to show a license; citing Greenleaf).

[2] *E. g.*, Carmel N. G. & I. Co. *v.* Small, 150 Ind. 427, 50 N. E. 476 (action to recover money from an officer not legally elected).

the different situations. Thus, in most actions of tort there are many possible justifying circumstances, — self-defence, leave and license, *volenti non fit injuria*, and the like; but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ("false words," in the old nomenclature), it might have been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. Thus, no one principle will serve in torts as a guiding rule for the various cases. In criminal cases, the innovation, in some jurisdictions, of putting upon the accused the burden of proving his insanity has apparently also been based on an experience in the abuses of the contrary practice. In claims based on written instruments, experience has led in most jurisdictions to a statutory provision, requiring the execution by the defendant to be specially traversed or else taken for admitted, — a step which stops short of changing the burden of proof, but well illustrates the considerations affecting its incidence. The controversy whether a plaintiff in tort should be required to prove his own carefulness, or the defendant should be required to prove the plaintiff's carelessness, has depended in part on experience as to a plaintiff being commonly careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available.

This last consideration has often been advanced as a special test for solving a limited class of cases, *i. e.* the burden of proving a fact is said to be put on the *party who presumably has peculiar knowledge* enabling him to prove its falsity if it is false.[3] But this consideration furnishes no working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as one to be kept in mind in apportioning the burden of proof in a specific case.

There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given case. The logic of the situation does not demand such a test; it would be useless to attempt

[3] 1842, Greenleaf, Evidence, § 79; 1896, Lehman *v.* Knapp, — Ala. —, 20 So. 674.

to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific cases, resting for their ultimate reasons upon broad and undefined reasons of experience and fairness.

§ 2487. **Burden of Proof; (2) Second Meaning; Duty of producing Evidence to the Judge.** So far as concerns the principles examined above, the matter may have come before any kind of tribunal. The inquiry peculiarly concerns the procedure in legal controversies; but the settlement of it was not affected by the nature of the tribunal. The tribunal might be a judge, or a jury, or both, so far as regards apportioning the risk of non-persuasion. Nothing has been said, or need be, about a distinction between judge and jury. But we come now to a peculiar set of rules which have their source in the bipartite constitution of the common-law tribunal. Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.[1] The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them. It operates somewhat as follows:[2]

(*a*) The party having the risk of non-persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence; and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of non-persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non-persuasion (*ante*, § 2485), is a distinct one, for it is a *duty towards the judge*, and the judge rules against the party if it is not satisfied; there is as yet no opportunity to get to the jury and ask if they are persuaded. The judge, then,

[1] *Post*, § 2550; Thayer, Preliminary Treatise, c. 5.

[2] See on this part of the subject a useful article by the late Professor Austin Abbott, entitled "Two Burdens of Proof," in the Harvard Law Review, VI, 125, and his article cited *ante*, § 2485.

requires that at least enough evidence be put in to be worth considering by the jury.[3]

(*b*) Suppose, then, that the proponent has satisfied this duty towards the judge, and that the judge has ruled that sufficient evidence has been introduced. The duty has then ended. Up to that point the proponent was liable to a ruling of law from the judge which would put an end to his case. After passing this point he is now *before the jury*, bearing only his risk of non-persuasion (*ante*, § 2485). There is now no duty on either party, with reference to any rule of law in the hands of the judge, to produce evidence. Either party may introduce it, and doubtless both parties will do so; but there is nothing that requires either to do so under penalty of a ruling of law against him. The proponent, however, still has his burden of proof in the sense of the risk of non-persuasion of the jury; *i. e.* should the jury be in doubt after hearing the evidence of the proponent, either with or without evidence from the opponent, the proponent fails to obtain their verdict upon that issue, and the opponent remains successful. In this second stage of the trial, with the evidence before the jury, the only burden operating is that which concerns the jury, — the risk of non-persuasion; and not that which concerns the judge, — the duty of producing evidence.

(*c*) Suppose, however, that the proponent is able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim, — evidence such that the jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, *i. e.* unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason, — a verdict which would later have to be set aside as against evidence. The matter is thus *in the hands of the judge again*, as having the supervisory control of the proof; and he may now, as applying a rule of law, *require the opponent to produce evidence*, under penalty of losing the case by direction of the judge. Thus, a duty of producing evidence, under this penalty for default, has now arisen for the opponent. It arises for the same reasons, is measured by the same tests, and has the same consequences as the duty of production which was formerly upon the proponent. There are, however, two ways in which it may be invoked by the judge, differing widely in terms and in appearance, but essentially the same in principle. (*c'*) In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas. The judge's ruling will be based on a survey of this mass of evidence as a whole; and it will direct the jury on that issue to render a verdict on that *mass of evidence* for the proponent. The propriety of this has sometimes been doubted by Courts who do not believe the process to be precisely analogous to that of directing a nonsuit for the proponent or

[3] The detailed rules for determining this sufficiency of evidence are examined *post*, §§ 2494, 2495.

of enforcing a presumption, as shortly to be explained (*post*, § 2495); but the better authority gives ample recognition to this process. (*c''*) Another mode under which this process is carried out employs the aid of a fixed rule of law, *i. e.* a *presumption*, applicable to *inferences from specific evidence to specific facts forming part of the issue*, rather than to the general mass of evidence bearing on the proposition in issue. If it is a part of the proponent's case, for example, to prove that a person is deceased, and he has offered evidence that the person has been absent, unheard from, for seven years or more, and there is no other evidence on the subject, then the proponent may ask that the jury be directed, if they believe this fact of absence, to take as true the proposition that the person is deceased; if that, moreover, were the only proposition at issue, then the direction would be to find a verdict for the proponent if this fact of absence were believed. The result is the same as in the preceding form of the process (*c'*), *i. e.* the opponent loses as a matter of law, in default of evidence to the contrary; in other words, the presumption creates for the opponent a duty of producing evidence, in default of which he loses as a matter of legal ruling, the matter not being open for the jury, and the risk of non-persuasion, which applies only to the jury's deliberations, having ceased to affect the proponent. This particular form of the process, however (*c''*), happens to have become known as a "presumption." The term "presumption" has been the subject of much confused usage. The particular ambiguity which we need here to guard against is the confusion between the inference itself — *i. e.* the propriety of making the inference from the evidence to the *factum probandum*[4] — and the effect of the inference in the hands of the judge. So far as "presumption" means anything for the present purpose, it signifies a ruling as to the duty of producing evidence. "The essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions."[5]

(*d*) Keeping in mind, then, that a presumption signifies a ruling of law, and that to this extent the matter is in the judge's hands and not the jury's, what is the effect upon the legal situation of the opponent if he does respond to this duty and *comes forward with other evidence* against the fact presumed? When he has thus fulfilled his duty under the ruling of law, he puts himself out of the hands of the judge and his ruling, and finds himself back again in the hands of the jury. He is precisely where the proponent was in the first place when he fulfilled the duty, then his, of producing evidence and succeeded in getting from the judge to the jury. The case is now open again as to that specific issue, *i. e.* free from any liability to a ruling of law against either side, and is before the jury, where the original proponent (as ever, when the issue is open

[4] This is one of the earlier uses of "presumption"; it is in effect an equivalent of "inference (*ante*, §§ 25, 38)." Such are Coke's "presumptions, whereof there be three sorts, viz., violent, probable, and light or temerary" (Co. Litt. 6, *b*). This is what is usually meant by "presumption of fact" (*post*, §§ 2490, 2491).

[5] Thayer, *ubi supra*, 339.

to the jury) has the burden of proof in the sense of the risk of non-persuasion of the jury. The important thing is that there is now *no longer in force any ruling of law by the judge* requiring the jury to find according to the presumption. "All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. . . . The main point to observe is that the rule of presumption has vanished;"[6] because its function was as a legal rule to settle the matter only provisionally, and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied.[7]

(*e*) Are there any further stages in this possible shifting of the duty of producing evidence? It is conceivable that the proponent may be able to invoke other presumptions, though this is not common. But may not the opponent go further than to produce evidence sufficient to remove the presumption? May he not only get the issue opened before the jury again, but also go further and raise what may be termed a *counter-presumption* in his favor, so that the proponent will find himself in his original position at the opening of the trial, namely, subject to the duty of producing sufficient evidence to go to the jury, under penalty, in case of default, of suffering a ruling against him by the judge as a matter of law? This result is possible in principle, and there are instances of it, though rare. For example, a plaintiff, in an action for the burning of his property by the defendant railway-company's negligence, created a presumption of negligence by showing the setting of the fire by sparks from the defendant's locomotive; the duty of producing evidence was thus put upon the defendant, who not only removed it, producing evidence sufficient to go to the jury, but by showing the proper construction, equipment, and inspection of the locomotive was held to have raised a presumption that it had not been negligent, and thus to be entitled to a ruling by the judge against the plaintiff, taking the case from the jury.[8]

The important practical distinction between these two senses of "burden of proof" is this: The *risk of non-persuasion* operates when the case has come *into the hands of the jury*, while the *duty of producing evidence* implies a liability to a *ruling by the judge* disposing of the issue without leaving the question open to the jury's deliberations.[9]

[6] Thayer, *ubi supra*, 346.

[7] The following passage from Professor Abbott's article, already mentioned, will serve to illustrate the general situation involved in this duty of producing evidence: "To use a homely illustration, a civil jury trial may be compared to a game of shuffle-board. The first and nearest to the player is the field of mere scintillas; if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way, or may disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities."

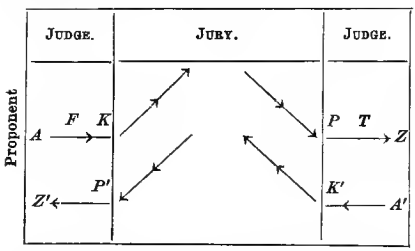
[8] 1895, Menomenie R. S. & D. Co. *v.* R. Co., 91 Wis. 447, 65 N. W. 176; the opinion particularly distinguishes previous cases in which the defendant had merely removed the presumption against him by evidence sufficient to go to the jury, but had not raised a counter-presumption requiring a ruling of the judge in his favor.

[9] The various possible stages in the foregoing process may be illustrated by a diagram; the

§ 2488. **Same: Tests for ascertaining this Burden.** The term "burden of proof" is used commonly as applying equally to the two preceding kinds of situations, and often is applied in both senses in the same judicial opinion. Apart, therefore, from the difficulty of some of the problems of law germane to each situation, peculiar confusion is added by the unfortunate ambiguity of the terms of discussion. There is at this day a fairly widespread acceptance and understanding, in judicial utterances, of the distinction between the two things themselves, the risk of non-persuasion of the jury, and the duty of going forward with evidence sufficient to satisfy the ruling of the judge. The law which regulates respectively this risk and this duty is in most respects either generally settled or is the subject of local differences of decision whose lines of dispute are not difficult to discern. The main source of difficulty lies in the interchangeable use of the term "burden of proof," which forces the judges from time to time to distinguish, explain, and even repudiate former judicial utterances employing analogous language but dealing with distinct situations; and thus there is an appearance (and to some extent, a reality) of confusion in the precedents on the subject.

As to the tests for determining this second burden of proof, it has already been pointed out that (*a*) for the one burden (the risk of non-persuasion of the jury) the substantive law and the pleadings, primarily, serve to do this, and, subsidiarily, a rule of practice, within the stage of a single pleading, may

particular usefulness of the graphic method being that it shows in small compass the relation of the stages and the vital distinction between the judge's and the jury's situation for the two kinds of burdens:



Let A = the starting-point of the proponent having the risk of non-persuasion on a given issue;

A' = the starting-point of the opponent on the issue;

Z = the point of complete persuasion or proof for the proponent;

Z' = the corresponding point for the opponent. The proponent then finds, as soon as he begins his production of evidence, that at any point between A and K he is subject to a ruling of the judge defeating him for lack of sufficient evidence. After reaching K, and obtaining a judicial ruling in his favor as to sufficiency of evidence, he is now free from his duty of producing evidence to the judge, and has only his risk of non-persuasion of the jury. But he may be able to reach with his evidence the point P, and invoke again the control of the judge, thus shifting to the opponent the duty of producing evidence. This may be done either by some general rule of presumption that is applicable, or by a specific ruling of the judge upon the mass of evidence adduced. If the duty is thus created for the opponent, he starts from point A' to sustain it. Until he has by some evidence reached point K', he is liable to a judicial ruling defeating him on that issue. If he can reach point K', the duty and liability of satisfying the judge disappears, and he is in the field of the jury again. Here, however, the risk of non-persuasion of the jury is still, as before, upon the proponent for that issue; but neither party has any duty to satisfy the judge. Further, however, the opponent may succeed in reaching point P', at which the judge, either by a general rule of counter-presumption or by a specific ruling on the mass of evidence, will order a verdict for the opponent, unless the proponent comes forward with more evidence. Thus the proponent again has the liability to produce some evidence, and must again attain point K, in order to come into the field of the jury once more. The process, however, seldom reaches these advanced stages.

If the parties cease all production of evidence while the case is between points K and P or K' and P', *i. e.* when the risk of non-persuasion of the jury comes to be the only and final stage, there are rules for the jury's guidance, namely, the rules for preponderance of evidence and reasonable doubt (*post*, §§ 2497, 2498).

further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases. (*b*) For the other burden (the duty of going forward with evidence to satisfy the judge) there is always, at the outset, such a duty for the party having the first burden, or risk of non-persuasion, until by some rule of law (either by a specific ruling of the judge upon the particular evidence, or by the aid of an appropriate presumption, or by matter judicially noticed) this line is passed. Then comes the stage in which there is no such duty of law for either party (although, if the proponent has invoked some presumption, this stage is immediately passed over). Then, either by a ruling on the general mass of evidence, or by the aid of some applicable presumption, the duty of law arises anew for the opponent. Finally, it may supposably, by similar modes, be later re-created for the proponent. There is therefore no one test, of any real significance, for determining the incidence of this duty; at the outset the test is furnished by ascertaining who has the burden of proof, in the sense of the risk of non-persuasion of the jury, under the pleadings or other rules declaring what *facta probanda* are the ultimate facts of each party's case; a little later, the test is whether the proponent has by a ruling of the judge (based on the sufficiency of the evidence, or a presumption, or a fact judicially noticed) fulfilled this duty; later on, it will be whether the proponent, by a ruling of the judge upon a presumption or the evidence as a whole, has created a duty for the opponent; and still later, whether, for the purposes of the judge's ruling, the opponent has satisfied this duty. It has been suggested[1] that "the test ought in strict accuracy to be expressed thus, namely: which party would be successful if no evidence at all, or no more evidence (as the case may be), were given?" But it is obvious that this is not a test, in any sense of being a useful mode for ascertaining the unknown from the known; it is simply defining and re-stating in other words the effect of this duty of producing evidence; it says "the burden of proof, in this sense, means that the party liable to it will lose as a matter of judicial ruling if no evidence or no more evidence is given by him"; and this does not solve the main problem of determining in a given case which is the party thus liable to these consequences.

§ 2489. **Shifting the Burden of Proof.** (*a*) The *first burden* above described — the risk of non-persuasion of the jury — *never shifts*, since no fixed rule of law can be said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes beforehand the issuable facts respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's; and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's. The other

[1] 1849, Best, Evidence, § 268.

party and himself will of course have their turns in proving their respective *facta probanda* (though under a strict system of pleading these turns of proof will be more clearly fixed before trial, and may occur at different stages and not the same stage of the cause); and the putting-in of evidence may therefore "shift" in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not "shift" in any real sense; for each may once for all ascertain beforehand from rules of law the *facta probanda* apportioned to him, and this apportionment will always remain as thus fixed, to whatever stage the cause may progress.

(*b*) The *second kind of burden*, however — the duty of producing evidence to satisfy the judge, — *does have* this characteristic referred to as *a "shifting."* It is the same kind of duty for both parties, but it may rest (within the same stage of pleading and upon the same issue and during one burden of the first sort) at one time upon one party and at another time upon the other. Moreover, neither party can ascertain absolutely beforehand at what time it will come upon him[1] or cease to be upon him, or by what evidence it will be removed or created, — except so far as a presumption has by a rule of law been laid down as determining the effect attached to certain facts. Moreover, in a distinctive sense, this kind of burden "shifts" and the other does not, in that during the unchanged prevalence of the first kind of burden for one party, the second kind may be shared in turn by one and the other, though the first — the risk of non-persuasion of the jury, should the case be left in their hands — has not come to an end.[2]

§ 2490. **Presumptions; Legal Effect of a Presumption.** The whole situation is complicated, quite apart from any ambiguity of terms, by the operation of presumptions upon specific fragments of the issue under a single pleading, in combination with the established practice of leaving to the jury for a general verdict the whole of the issues under a pleading. For example, suppose that the whole of the plaintiff's case and the whole proposition as to which he has the burden of proof in the first sense and the whole of the issue under the pleadings is that A is dead without heirs; suppose that the plaintiff has offered testimony that A has been for seven years absent from home and unheard from, and that there is also testimony in contradiction of these facts from the defendant and also testimony from both sides as to the existence of heirs. Here it is obvious that the case is not in the hands of the judge to order a verdict for the plaintiff, first, because the death of the plaintiff, assuming the presumption from absence to determine this, is not the only proposition essential to the plaintiff's case, and, secondly, because he cannot pass upon the truth of the plaintiff's contradicted testimony as to absence and therefore it cannot then be known whether the fact exists on which the presumption operates; and thus the case is still in appearance in the hands of the jury.

[1] Except that it comes first upon the proponent having the burden of proof in the former sense.

[2] The following opinion explains the distinction: 1884, Zollars, J., in Carver *v.* Carver, 97 Ind. 497, 510.

Nevertheless, the matter is still in the hands of the judge (in theory of law, at least) as much as it ever was; that is to say, the presumption or rule of law still operates, so that the fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of any explanatory facts to the contrary from the defendant. This rule of law is still applied, notwithstanding the additional elements in the case; for the judge will instruct the jury that if they find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then by a rule of law they are to take for true the fact of death, and are to reckon upon it accordingly in making up their verdict upon the whole issue. The situation here is even simpler than it is in perhaps the majority of issues in litigation; so that the theoretical effect of presumptions as legal rulings affecting the duty of producing evidence tends to be lost sight of, in that the issue does go to the jury and the case of the opponent of the presumption is apparently not brought to an end by a ruling of the judge. Nevertheless, in theory this legal effect is merely postponed, and will have due place if the jury understands the instructions and does its duty.[1]

§ 2491. **Same: Presumptions of Law and of Fact.** The distinction between presumptions "of law" and presumptions "of fact" is in truth the difference between things that are in reality presumptions (in the sense explained above) and things that are not presumptions at all. A presumption, as already noticed, is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it. But, the legal consequence being removed, the inference, as a matter of reasoning, may still remain; and a "presumption of fact," in the usual sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact, regarded as not having this necessary legal consequence. "They are, in truth, but mere arguments," and "depend upon their own natural force and efficacy in generating belief or conviction in the mind."[1] They have no significance so far as affects the duty of one or the other party to produce evidence, because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best, — just as it may to other evi-

[1] 1903, Walker, J., in Cogdell *v.* R. Co., 132 N. C. 852, 44 S. E. 618: "The Court was requested to charge that there was a presumption that the deceased had exercised care, which the Court refused to give, but charged the jury that there was an inference that due care was exercised. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

[1] Greenleaf, Evidence, § 44.

dence. There may be a preliminary question whether the evidence is relevant and admissible as having any probative value at all; but, once it is admitted, the probative strength of the evidence is for the jury to consider. So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term "presumption" to such facts, however great their probative significance. The employment here of the term "presumption" is due simply to historical usage, by which "presumption" was originally a term equivalent, in one sense, to "inference";[2] and the distinction between presumptions of fact and of law was a mere borrowing of misapplied Continental terms.[3] There is in truth but one kind of presumption; and the term "presumption of fact" should be discarded as useless and confusing.

Nevertheless, it must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule:

1771, *R.* v. *Almon*, 5 Burr. 2686, 2688 (purchase of a libel imprinted with the defendant's name and bought in his shop); Lord *Mansfield:* "This being *prima facie* evidence of a publication by the master himself, it stands good till answered by him; and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. . . . [It] must stand *till* contradicted or explained or exculpated by some other evidence, and if not contradicted, explained, or exculpated, would be in point of evidence sufficient or tantamount to conclusive. . . . If it be sufficient in point of law, and the juryman believes it [*i. e.* the fact of purchase], he is bound in conscience to give his verdict according to it"; Mr. Justice *Aston* "laid down the same maxim as being fully and clearly established, 'that *prima facie* evidence (if believed) is binding *till* contrary evidence be produced.'"[4]

It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary.[5] For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of pro-

[2] *Ante*, §§ 25, 38; compare the passage from Coke, cited *ante*, § 2487, n. 4; so Abbott, C. J., as late as 1820, in R. *v.* Burdett, 4 B. & Ald. 161: "A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning." Compare Professor Thayer's account (p. 317 ff.) of the progress in various instances from the mere suggestion of such inferences to the creation of rules of law attached to them. The following case shows the word in the correct sense: 1810, Davis *v.* Curry, 2 Bibb 238, 239 ("Two questions are presented by this case; first, whether color and possession afford such a presumption of slavery as to throw the burthen of proof upon the person claiming right to freedom").

[3] See Thayer, *ubi supra*, p. 343.

[4] 1846, Smith *v.* Asbell, 2 Strobh. 141, 147 ("Presumptions . . . are artificial rules which have a legal effect independent of any belief, and stand in the place of proof *until the contrary be shown*").

[5] 1899, Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70 (where such language to the jury is justified as necessary to explain the case to a jury); 1900, Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237.

ducing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances.[6] This much is a plain consequence in our mode of jury trial; and the fallacy has arisen through attempting to follow the ancient Continental phraseology, which grew up under the quantitative system of evidence (*ante*, § 2032) fixing artificial rules for the judge's measurement of proof.

§ 2492. **Same: Conclusive Presumptions.** In strictness, there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case;[1] and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.[2] The term has no place in the principles of evidence (although the history of a "conclusive presumption" often includes a genuine presumption as its earlier stage[3]), and should be discarded.

§ 2493. **Same: Conflicting Presumptions; Counter-Presumptions.** Presumptions are sometimes spoken of as "*conflicting*." But, in the sense above examined, presumptions do not conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time

[6] 1901, Sharpe, J., in Alabama G. S. R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673 (repudiating an instruction that the jury must find negligence if the fire was set by the defendant's locomotive: "In actions of this kind the communication of fire to the property of another by an engine of a defendant railroad company is, when nothing appears to the contrary, presumed to have been the result of negligence on the part of the defendant. The presumption so arising is not a conclusive one, so as to preclude the defendant to rebut it; *nor does it take the place of actual evidence of negligence further than to cast upon the defendant the burden of showing by evidence* that at the time of the occurrence it was in the exercise of ordinary care in respect to the construction, equipment, and management of the engine. When, by proof, it has so repelled the presumption, the burden shifts to the plaintiff, who must go forward anew with actual evidence to disprove that of the defendant, either directly or inferentially, by showing that a carefully constructed, equipped, and managed engine would not have set fire to the property. When there is no evidence of negligence other than that supplied by the presumption referred to, and the presumption has been, to its full extent, repelled by undiscredited evidence, the jury should find for the defendant, if they believe the evidence, and the Court should so charge, if requested in writing to do so"); 1878, Baker, J., in Graves *v.* Colwell, 90 Ill. 612, 616 ("[When contrary evidence has been introduced and the conflicting evidence is being weighed by the jury], in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character").

[1] 1870, Willard, A. J., in State *v.* Platt, 2 S. C. 150, 154 ("Where several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the other, is to say in effect that one alone is really requisite").

[2] The various uses of the term have been examined in detail *ante*, §§ 1345–1354 (conclusive testimonial preferences).

[3] *Post*, § 2522.

upon a given party. If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears; he may then by his evidence succeed in creating another presumption which now puts the same duty upon the other party, who may in turn be able to dispose of it satisfactorily. But the same duty cannot at the same time exist for both parties, and thus in strictness the presumptions raising the duty cannot conflict. There may be successive shiftings of the duty, by means of presumptions successively invoked by each; but it is not the one presumption that overturns the other, for the mere introduction of sufficient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions; and the ultimate key to the situation is very often found by ascertaining the incidence of the burden of proof in the other sense, *i. e.* the ultimate risk of non-persuasion.[1]

A *counter-presumption* is merely that presumption which is available for the opponent when he has not only fulfilled the duty of producing evidence against a presumption, but has gone further and evidenced additional facts which create a new presumption in his favor, and thus restored to the original proponent the duty of producing evidence. This situation is of rare occurrence.[2]

§ 2494. **Same: Prima Facie Evidence; Sufficient Evidence for the Jury; Scintilla of Evidence.** The term "*prima facie* evidence" or "*prima facie* case" is used in two senses, and it is often difficult to detect which of these is intended in the passage in hand. (1) In discussing presumptions, the term "*prima facie*" is sometimes used as *equivalent to the notion of a presumption*, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence.[1] In other words, the term is thus applied to the stage of the case already noted in a preceding section (*ante*, § 2487) as (*c'*) and (*c''*), namely, where the proponent, having the burden of proving the issue (*i. e.* the risk of non-persuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself

[1] Compare the presumption of innocence (*post*, § 2511) and the presumption of marriage (*post*, §§ 2505, 2506), which furnish the chief field for "conflicting" presumptions. Some good instances of these situations are worked out by Professor Thayer, *ubi supra*, pp. 343–350.

[2] Compare the example cited *ante*, § 2487, note 8.

[1] *E. g.:* 1883, Bowen, L. J., in Abrath *v.* R. Co., L. R. 11 Q. B. D. 440, 455, 32 W. R. 50, 53 ("If he [the plaintiff] makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails"); 1810, Mansfield, C. J., in Banbury Peerage Case, 1 Sim. & St. 153 ("In every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question"); 1849, Best, Evidence, § 273 ("The burden of proof is shifted . . . by every species of evidence strong enough to establish a *prima facie* case against a party"); 1895, State *v.* Sattley, 131 Mo. 464, 33 S. W. 41 ("the *prima facie* case is sufficient and conclusive, unless rebutted by the other evidence in the case").

to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. Though this usage for the term is less usual, and being ambiguous, is objectionable, yet it serves to subsume under one name the similar legal effects (c') and (c'') produced by a specific presumption or by a ruling on the mass of evidence in the particular case.

(2) But the phrase "*prima facie*" is also, and clearly enough, found used in a very different sense, representing the stage already noted (*ante*, § 2487) as (a), namely, where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case. This sufficiency of evidence to go to the jury (the significance of which is that the proponent is no longer liable to a nonsuit or to the direction of the verdict for the opponent) is also often referred to as a *prima facie* case.[2] In this sense the phrase is used to emphasize the insufficiency of evidence which is indeed admissible, so far as the various rules of evidence might have excluded it, but yet, being all the evidence offered by the proponent, is not enough in quantity to be worth submitting to the jury.[3] The difference between the two senses of the term is practically of the greatest consequence; for, in the latter sense, it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the former sense it signifies that he has further succeeded in creating it anew for his opponent.[4] Some of the chief occasions of its use, and therefore of an unfortunate obscurity in the significance of the rulings, are in the proof of execution of attested documents,[5] or of the identity of the person signing them,[6] or of the authentication of ancient writings,[7] where it is often difficult to determine whether the effect of the ruling is merely that the document may be read or amounts to directing the jury to take it for genuine.[8]

[2] For example: 1832, Story, J., in Crane *v.* Morris, 6 Pet. 598, 621 (referring to evidence of a deed: "Whenever evidence is offered to the jury which is in its nature *prima facie* proof, . . . whatever just influence it may derive from that character, the jury have a right to give it; . . . the law has submitted it to them to decide for themselves"). In the following Irish case, the obscurity of the legal phrase was brought out by a question from an intelligent juror: 1848, R. *v.* O'Doherty, 6 State Tr. N. S. 831, 873 (Pennefather, B., charging the jury, in a prosecution for publishing an article with seditious intent: "The publishing them is certainly *prima facie* evidence against him, as being the registered proprietor [of the newspaper]"; a juror: "There is a difference of opinion among the jurors; some hold that, from your lordship stating there being *prima facie* evidence of the prisoner's guilt, we should at once go to find him guilty; others receiving the phrase thus, that your lordship did not mean to convey that it was sufficient [to require that finding]"; Pennefather, B.: "I did not mean, gentlemen, to direct you or tell you that in point of law, because he was the publisher and proprietor of the paper, he therefore necessarily knew the contents. I did not mean to convey that. But I told you that it was evidence that he did know the contents, and that you were to form your judgment upon the whole of the case, reading the documents and the evidence").

[3] As in Benoit *v.* R. Co., 154 N. Y. 223, 48 N. E. 524 (1897), where it was ruled, the plaintiff having to show the defendant's *scienter* of a horse's unmanageable disposition, that a single instance of its having run away, though admissible evidence, was not sufficient evidence to go to the jury.

[4] The following opinion notices the distinction: 1876, Cushing, C. J., in King *v.* Hopkins, 57 N. H. 334, 359.

[5] *Post*, § 2520.

[6] *Post*, § 2529.

[7] *Post*, § 2521.

[8] The following case has been greatly responsible for the confusion of usage; its language is of no service nowadays: 1820, R. *v.* Burdett, 3 B. & Ald. 717–758 (arguments of counsel); 4 id. 95–183 (opinions of the judges); Best and Holroyd, JJ., use the term "presumptive evidence" as equivalent to "circumstantial evidence," and their ruling is merely that there was sufficient of it to go to the jury; Bayley, J., held that

The question is thus presented, in determining this sufficiency of evidence to go to the jury, whether there are any detailed *tests to control or to guide the judge* in his ruling. The ruling will, in truth, depend entirely on the nature of the evidence offered in the case in hand; and it is seldom possible that a ruling can serve as a precedent. It has been ruled, for instance, that to show a *scienter* of a horse's unmanageable disposition, a single instance of its having run away is, though admissible, not sufficient evidence for the jury;[9] mere identity of name has been thought both sufficient and insufficient evidence of identity of person;[10] but even these can hardly be taken as fixed precedents. There is no virtue in any form of words. There was an old phrase that a "mere scintilla of evidence" was sufficient;[11] but this has been abandoned by most Courts.[12] Other varieties of phrasing have sometimes been attempted.[13] In some Courts it is said that the test for the ruling is the same as it would be on a motion after verdict to set aside the verdict as being against the overwhelming weight of evidence.[14] Even if this were so,

"in order to warrant a presumption, a *prima facie* case must at least be made out," meaning the same as above, but on the facts he thought that there was not here sufficient evidence, adding "if they did draw that presumption, they acted, not upon justifiable inference, but upon unwarrantable conjecture"; Abbott, C. J., used the same meanings; "a presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; . . . if the [jury's] conclusion is a reasonable inference from the premises, we ought not to disturb their verdict").

[8] 1897, Benoit *v.* R. Co., 154 N. Y. 223, 48 N. E. 524. So also: 1899, Creamer *v.* McIlvain, 89 Md. 343, 43 Atl. 935 (like Benoit *v.* R. Co.); 1899, Weigand *v.* Refining Co., 189 Pa. 248, 42 Atl. 132 (one former kick by a mule, not sufficient evidence of viciousness, on the facts).

[9] *Post*, § 2529.

[11] The phrase is mentioned, to be repudiated, in the 1800s: 1857, Toomey *v.* R. Co., 3 C. B. N. S. 146, 150; 1857, Wheelton *v.* Hardisty, 8 E. & B. 232, 262, 277; 1868, Ryder *v.* Wombwell, L. R. 4 Exch. 32; but it is difficult to find any prior time when it was ever a recognized test in England.

[12] 1898, James *v.* Crockett, 34 N. Br. 540, 548; 1887, Bartelott *v.* International Bank, 119 Ill. 259, 269, 9 N. E. 898; 1898, Offutt *v.* Expos. Co., 175 id. 472, 51 N. E. 650 (scintilla rule disapproved; evidence "tending to prove" suffices; Bartelott case approved); 1899, Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679; 1900, Schoepflin *v.* Coffey, 162 id. 12, 56 N. E. 502; 1901, Cogdell *v.* R. Co., 129 N. C. 398, 40 S. E. 202; 1873, Philadelphia & R. R. Co. *v.* Yeager, 73 Pa. 121, 124; 1876, Commissioners of Marion Co. *v.* Clark, 94 U. S. 278, 284: 1897, Taft, J., in Ewing *v.* Goode, 78 Fed. 442 ("The preliminary question for the Court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that defendant was unskillful or negligent, and that his want of skill or care caused injury. In the Courts of this and other States the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the Court must submit the issue thus made to the jury, with the power to set aside the verdict, if found against the weight of the evidence. In the Federal Courts this is not the rule. According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the Court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant. Hence our inquiry is: Does the case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant, or injury caused thereby?"); 1903, New York C. & H. R. R. Co. *v.* Difendaffer, — C. C. A. — , 125 Fed. 893 (Marion County *v.* Clark followed). There is a collection of authorities for various jurisdictions in Thompson on Trials, §§ 2246 ff. The opinion of Brannon, J., in Ketterman *v.* R. Co., 48 W. Va. 606, 37 S. E. 683 (1900) is a valuable one.

[13] 1893, Catlett *v.* R. Co., 57 Ark. 461, 468, 21 S. W. 1062 ("evidence legally sufficient to warrant a verdict"); 1893, Ohio & M. R. Co. *v.* Dunn, 138 Ind. 18, 27, 36 N. E. 702, 37 N. E. 546 ("evidence from which when undisputed" a finding would be justified); 1897, State *v.* Couper, 32 Or. 212, 49 Pac. 959 (either "no competent evidence at all bearing upon the subject," or "so weak that a verdict against the defendant would necessarily be attributable to passion, prejudice, or partiality"); 1898, Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059 (must be more than to raise "a mere surmise or suspicion"); 1900, Ketterman *v.* R. Co., 48 W. Va. 606, 37 S. E. 683.

[14] 1874, Brett, J., in Bridges *v.* R. Co., L. R. 7 H. L. 213; 1894, Fornes *v.* Wright, 91 Ia. 392, 59 N. W. 51; 1893, Market & F. N.

it would not afford any more concrete and tangible guide. But it seems unsound,[15] on principle, to assert such an identity, for two reasons, — in the first place, because the mass of evidence in the two situations is very different (for after verdict the defendant's evidence has to be considered with the rest), and in the next place, because the setting aside of a verdict leads merely to a new trial, while the ruling of insufficiency leads usually to the direction of a verdict for the opponent (*post*, § 2495), and therefore a total quantity of the proponent's evidence which would justify the former might be more than would justify the latter.[16] Perhaps the best statement of the question is this: "[The proposition] cannot merely be, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" [17]

§ 2495. Same: Direction of a Verdict, Motion for a Nonsuit, and Demurrer to Evidence. It remains to ask what shall be the form and effect of this ruling of the judge that the proponent's evidence is insufficient to go to the jury? It is commonly said that he "ought to withdraw the question from the jury, and direct a nonsuit or a verdict for the defendant if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant," [1] *i. e.* decide against the proponent having the risk of non-persuasion on that particular issue, whether he be plaintiff or defendant. There are, however, three distinct forms of ruling, which raise different questions.

1. The *nonsuit*, which has several other applications, may be employed for the present purpose. Its marked feature is that it does not lead to a judgment against the proponent, and (in England) that the proponent's consent is necessary. But the local rules for nonsuit have been so widely varied by modern statutes and practice that generalizations are hardly possible as to its service for the present purpose.[2]

Bank *v.* Sargent, 85 Me. 349, 351, 27 Atl. 192; 1893, Haines *v.* Trust Co., 56 N. J. L. 312, 314, 28 Atl. 796; 1893, Holland *v.* Kindregan, 155 Pa. 156, 160, 25 Atl. 1077 (scintilla rule; but treated as equivalent to the Federal rule); 1893, Evans *v.* Chamberlain, 40 S. C. 104, 106, 18 S. E. 213 ("any pertinent evidence"); 1887, Northern Pa. R. Co. *v.* Bank, 123 U. S. 727, 733, 8 Sup. 266; 1893, Elliott *v.* R. Co., 150 id. 245, 246, 14 Sup. 85; 1892, Monroe *v.* Ins. Co., 3 C. C. A. 280, 52 Fed. 777; 1893, Colorado C. C. M. Co. *v.* Turck, 4 id. 313, 54 Fed. 262; 1894, Laclede F. B. M. Co. *v.* Hartford Co., 9 id. 1, 60 Fed. 351 (not merely if "some evidence"); 1896, Mount Adams & E. P. I. R. Co. *v.* Lowery, 20 id. 596, 74 Fed. 463 (containing a full survey of cases).

[15] *Accord:* 1899, Serles *v.* Serles, 35 Or. 289, 57 Pac. 634 (citing cases); 1897, Wright *v.* Express Co., 80 Fed. 85. See a useful article in the Western Reserve Law Journal for October, 1898.

[16] 1862, Chapman, J., in Denny *v.* Williams, 5 All. 1, 5; 1871, Brooks *v.* Somerville, 106 Mass. 271, 275 (approving Denny *v.* Williams).

[17] 1874, Brett, J., in Bridges *v.* R. Co., L. R. 7 H. L. 213.

Other examples of rulings are as follows: 1900, Granby *v.* Ménard, 31 Can. Sup. 14; 1895, Howard *v.* State, 108 Ala. 571, 18 So. 813; 1891, Ambler *v.* Whipple, 139 Ill. 311, 322, 28 N. E. 841; 1902, Kansas C. F. S. & M. R. Co. *v.* Perry, 65 Kan. 792, 70 Pac. 870; 1897, Fitzgerald *v.* R. Co., 154 N. Y. 263, 48 N. E. 514; 1897, State *v.* Satterfield, 121 N. C. 558, 28 S. E. 491.

Distinguish here the questions whether the evidence is sufficient under the present rule and whether it is sufficient under the rule of *conditional relevancy* (*ante*, § 1871); on this point, compare Reed *v.* Clark, 47 Cal. 194, 200 (1873).

[1] 1878, Lord Blackburn, in Dublin, etc. R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155.

[2] The following opinions are useful for the orthodox theory: 1853, Willard, J., in People *v.* Cook, 8 N. Y. 67, 74; 1892, Magruder, C. J., in Joliet A. & N. R. Co. *v.* Velie, 140 Ill. 59, 29 N. E. 706. The following cases illustrate some of the considerations that may enter:

2. The *direction of a verdict* is the appropriate and most usual form of the ruling.[3] Two main questions here arise: (*a*) Is there any reason why an order directing a verdict for insufficiency of evidence may not be made *in favor of the opponent* (*i. e.* usually, the defendant)? (*b*) Is there any reason against making it *in favor of the proponent* (*i. e.* usually, the plaintiff)?

(*a*) It is almost universally conceded that the direction of a verdict *for the opponent* is in general a proper form of ruling. That much, and no less, is the very thing that is signified by this part of the judge's function in the trial.[4] In making the decision, however, the truth of the proponent's testimony must be assumed;[5] for only the jury could have the right to decide to the contrary upon that material. Moreover, the sufficiency of evidence which will defeat such a motion may be found in the opponent's own evidence (which he himself cannot gainsay),[6] just as the insufficiency of facts which will justify such a direction may be found in the opponent's evidence, provided it is undisputed.[7]

(*b*) That a verdict may also be directed *for the proponent* is accepted by the majority of Courts, though it is more plausibly open to dispute.[8] The usual situation is that of a plaintiff who has produced a mass of evidence sufficient to throw upon the defendant the liability of producing some evidence to the contrary, and if this duty is not sustained, it is the judge's function to make the decision (*ante*, § 2487). The only objection here can be that the judge must not reach his decision by assuming the plaintiff's testimony to be true (because that is the jury's province); yet where the testimony is undisputed, or where in some other way that assumption is unnecessary, this objection disappears. A less common situation is that of a defendant having an affirmative plea (for example, payment of a note, or contributory negligence in personal injury); but here also a verdict may be ordered for the defendant, provided the result can be reached upon undisputed testimony of the defendant, or upon testimony of the plaintiff, which

1898, Williams *v.* R. Co., 155 N. Y. 158, 49 N. E. 672 (where the testimony at a second trial was so different that it appeared to be manufactured to suit the decision in the former appeal, a non-suit was held improper); 1898, Foskett & B. Co. *v.* Swayne, 70 Conn. 74, 38 Atl. 893 (applied to a cause tried by a judge without a jury).

[3] This has an equivalent, in some of the Southern States and elsewhere, in a *motion to exclude all of the evidence*, — an anomalous and misleading term.

[4] The leading case is usually regarded to be Commissioners of Marion Co. *v.* Clark, 94 U. S. 278, 284 (1876; opinion by Clifford, J.).

The contrary rule in a few States is based on some misapprehension of the jury's function; *e. g.:* 1868, Littlejohn *v.* Fowler, 8 Coldw. Tenn. 284, 288; 1898, Gannon *v.* Gaslight Co., 145 Mo. 502, 46 S. W. 968; 1903, Dalton *v.* Poplar Bluff, 173 id. 39, 72 S. W. 1068. This fallacy is dealt with in the following opinions: 1896, Norris *v.* Clinkscales, 47 S. C. 448, 25 S. E. 797; 1900, Ketterman *v.* R. Co., 48 W. Va. 606, 37 S. E. 683.

[5] 1885, Meadows *v.* Ins. Co., 67 Ia. 57, 24 N. W. 591.

[6] 1898, Gagnon *v.* Dana, 69 N. H. 264, 39 Atl. 982.

[7] 1900, Lonzer *v.* R. Co., 196 Pa. 610, 46 Atl. 937.

[8] 1899, Brown *v.* Drake, 109 Ga. 179, 34 S. E. 309; 1900, Marshall *v.* J. Grosse C. Co., 184 Ill. 421, 56 N. E. 807; 1853, People *v.* Cook, 8 N. Y. 67, 74; 1890, Delaware L. & W. R. Co. *v.* Converse, 139 U. S. 469, 472, 11 Sup. 569; 1894, Union P. R. Co. *v.* McDonald, 152 id. 262, 284, 14 Sup. 619; 1903, Leach *v.* Burr, 188 id. 510, 23 Sup. 393 ("the power of a Court to direct a verdict for one party or the other is undoubted"). *Contra:* 1897, Anniston National Bank *v.* Committee, 121 N. C. 109, 28 S. E. 134; 1897, Eller *v.* Church, ib. 269, 28 S. E. 364. Perhaps Neal *v.* R. Co., N. C., *infra*, displaces these.

the latter must concede to be true.[9] It is maintained by most Courts that in a *criminal case* there can be no direction of a verdict for the prosecution;[10] and this conclusion is supposed (but erroneously) to follow from the rule of persuasion beyond a reasonable doubt (*post*, § 2497).

3. The *demurrer to evidence* is a form of raising an objection of law, which has a history of its own in its original use.[11] But the term and the form came to be used, in some American jurisdictions, as the practical equivalent for the foregoing process, — the motion to direct a verdict for insufficiency of evidence. The chief effect of this has been to introduce a certain confusion into the rulings which deal with the subject of waiver, now to be noticed.

§ 2496. **Same: Waiver of Motion by Subsequent Introduction of Evidence.** When an opponent, at the close of the proponent's case in chief, has made a motion asking in effect for the direction of a verdict, how is the opponent's situation affected by his subsequent conduct, with respect to a *waiver* of the motion? (1) In the first place, the opponent cannot claim a ruling by the judge, as a matter of right, if he makes the motion at the close of the proponent's case in chief *without then resting his own case.* At that point, he is only invoking the Court's discretion; not until the entire evidence is closed may he demand a ruling as of right.[1] (2) In the next place, it follows that the opponent *waives no right by going on to put in his own evidence* after the judge's refusal to rule against the proponent for insufficiency of evidence at the close of the proponent's case in chief. The opponent *may* therefore *renew the motion* at the close of the whole case on both sides, and is entitled to the benefit of the ruling, if in his favor at that time.[2] (3) Conversely, however, he cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion, if he does *not renew* the motion at the close of all the evidence, or if at the time of the

[9] 1900, Neal *v.* R. Co., 126 N. C. 634, 36 S. E. 117 (contributory negligence; Douglas and Clark, JJ., diss.); this case therefore qualifies the following ruling: 1898, Cable *v.* R. Co., 122 id. 892, 900, 29 S. E. 377 (contributory negligence). The following cases illustrate the distinction: 1900, Haven *v.* Mo. R. Co., 155 Mo. 216, 55 S. W. 1035 (case of contributory negligence not taken from the jury where plaintiff and another witness testified to facts which if true sustained her case); 1896, American Exchange Bank *v.* N. Y. B. & P. Co., 148 N. Y. 698, 43 N. E. 168 (where the person having the burden proves his facts by a cross-examination of the opponent's witness, the judge may direct the issue to be found for the former, because the only question that can arise is that of the credibility of the witness, and the opponent cannot dispute that).

[10] 1899, People *v.* Warren, 122 Mich. 504, 81 N. W. 360 (collecting cases); 1895, Sparf *v.* U. S., 156 U. S. 51, 177, 15 Sup. 273. *Contra:* 1873, Com. *v.* Magee, Pa., 12 Cox Cr. 549. Compare the following: 1897, Agnew *v.* U. S., 165 U. S. 36, 50, 17 Sup. 35 ("In criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused"); 1902, McKnight *v.* U. S., 54 C. C. A. 358, 115 Fed. 972; 1902, U. S. *v.* German, 115 Fed. 987; and the cases cited *post*, §§ 2501, 2512–2514.

[11] 1793, Gibson *v.* Hunter, 2 H. Bl. 187; 1873, Trout *v.* R. Co., 23 Gratt. 619; Thayer, Preliminary Treatise, 234.

[1] 1892, Columbia & P. S. R. Co. *v.* Hawthorne, 144 U. S. 202, 12 Sup. 591.

[2] 1889, Weber *v.* Kansas City C. R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587.

In a few States this right of the opponent to proceed to introduce his own evidence, after the motion refused, was formerly denied, probably on the analogy of a demurrer to evidence; but this has usually been changed by statute; *e. g.*, Barabasz *v.* Kabat, Md., *infra;* 1896, State *v.* Groves, 119 N. C. 822, 824, 25 S. E. 819; 1898, Purnell *v.* R. Co., 122 id. 832, 835, 29 S. E. 953; compare N. C. St. 1899, c. 131.

final motion the ruling *correctly refuses* to order a verdict for insufficiency;[3] the Court is at that time entitled to decide upon a survey of the whole evidence; and this survey naturally renders any prior error immaterial. This is sometimes put upon the ground of waiver; but it is rather a necessary consequence of the discretionary nature and limited scope of the first ruling.

§ 2497. **Measure of Persuasion: (1) Proof beyond a Reasonable Doubt; Rule for Criminal Cases.** After the tribunal having the function of deciding upon facts, *i. e.* the jury, has retired to reach and frame its decision, a question arises as to the nature or degree of its persuasion. Here, it is to be noticed, we are no longer concerned with the incidence of the duty or burden of proof as between the parties to the cause, but merely with the tribunal's own duty and conduct as to its *standard of persuasion.*

Now the logical notion involved in the situation is that the tribunal must be persuaded to believe the affirmation of the burden-bearer before it can be asked to act as desired, but that this persuasion or conviction in the mind of the tribunal may have more than one degree or quality of positiveness; and an attempt is made by the law to define the degree of positiveness of persuasion which must exist in order to justify action in the shape of a verdict for the burden-bearer. The attempt to define these qualities of persuasion has great difficulties; and many useless refinements and wordy quibbles have marked the countless and more or less unsuccessful attempts.

In *criminal cases* a rule has grown up that the persuasion must be *beyond a reasonable doubt.*[1] This precise distinction seems to have had its origin no earlier than the end of the 1700s, and to have been applied at first only in capital cases, and by no means in a fixed phrase, but in various tentative forms. "A clear impression," "upon clear grounds," "satisfied," are the earlier phrases; and then "rational doubt," "rational and well-grounded doubt," "beyond the probability of doubt," and "reasonable doubt" come into use. Then, in Mr. Starkie's classical treatise, "moral certainty, to the exclusion of all reasonable doubt," is given vogue.[2] From time to time, various ill-advised efforts have been made to define more in detail this elusive and undefinable state of mind. One that has received frequent sanction and has been quoted

[3] 1892, Joliet A. & N. R. Co. *v.* Velie, 140 Ill. 59, 63, 26 N. E. 1086; 1893, Ames & Frost Co. *v.* Strachurski, 145 id. 192, 195, 34 N. E. 48; 1900, Barabasz *v.* Kabat, 91 Md. 53, 46 Atl. 337 (good opinion by Pearce, J.); 1901, New York P. & N. R. Co. *v.* Jones, 94 id. 24, 50 Atl. 422; 1889, Weber *v.* Kansas City C. R. Co., Mo., *supra*; 1903, Klockenbrink *v.* R. Co., 172 id. 678, 72 S. W. 900; 1902, Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194; 1892, Columbia & P. S. R. Co. *v.* Hawthorne, U. S., *supra;* 1894, Union Pacific R. Co. *v.* Daniels, 152 id. 684, 687, 14 Sup. 756; 1902, McCrea *v.* Parsons, 50 C. C. A. 612, 112 Fed. 917; 1903, Walton *v.* Wild Goose M. & T. Co., 60 C. C. A. 155, 123 Fed. 209. *Contra:* 1898, Purnell *v.* R. Co., 122 N. C. 832, 29 S. E. 953 (construing a statute; the original error may be reviewed).

In Illinois, there is a local question whether the motion to direct a verdict must be *in writing*, under a statute requiring instructions to the jury to be in writing: 1893, Ames & Frost Co. *v.* Strachurski, *supra* (undecided); but it is plain that the two are different things.

[1] In Georgia alone, it seems, this test does not obtain: Ga. Code 1895, § 5145, Cr. C. § 987 (in criminal cases "a greater strength of mental conviction" than preponderance of testimony is necessary).

[2] For the historical data above summarized, see an article by Judge May of Boston, in the American Law Review, X, 642, 656, the author of the treatise on Criminal Law, and Thayer's Preliminary Treatise, pp. 551–558.

innumerable times is that of Chief Justice Shaw of Massachusetts, on the trial of Dr. Webster for the murder of Mr. Parkman:[3] "[Reasonable doubt] is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. . . . The evidence must establish the truth of the fact to a reasonable and moral certainty, — a certainty that convinces and directs the understanding, and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt."

Many others, in varying forms, convey the same notion in more or less well-chosen words; and each Court has its stores of precedents of instructions approved and disapproved.[4] Nevertheless, when anything more than a

[3] 1850, Com. *v.* Webster, 5 Cush. 295, 320. Another is this: 1875, Gray, C. J., in Com. *v.* Costley, 118 Mass. 1; "Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis, except that which it tends to support. It is proof to a 'moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

[4] The following list represents almost all the jurisdictions; from Alabama is given the material of two or three years' rulings, merely to illustrate what a futile grist of profuse jargon is permitted by some Courts to be ground out annually in the name of truth and justice: 1895, Jackson *v.* State, 106 Ala. 12, 17 So. 333; Thomas *v.* State, ib. 19, 17 So. 460; Bonner *v.* State, 107 id. 97, 18 So. 226; Howard *v.* State, 108 id. 571, 18 So. 813; 1896, Peazler *v.* State, 110 id. 11, 20 So. 363; Allen *v.* State, 111 id. 80, 20 So. 490; Barnes *v.* State, ib. 56, 20 So. 565; Crawford *v.* State, 113 id. 661, 21 So. 214; 1897, Mitchell *v.* State, 114 id. 1, 22 So. 71; Yarbrough *v.* State, 115 id. 92, 22 So. 534; Pickens *v.* State, ib. 42, 22 So. 551; Newell *v.* State, ib. 54, 22 So. 572; Koch *v.* State, ib. 99, 22 So. 471; 1898, Bryant *v.* State, 116 id. 445, 23 So. 40; Titus *v.* State, 117 id. 16, 23 So. 77; Bones *v.* State, ib. 138, 23 So. 138; Walker *v.* State, ib. 42, 23 So. 149; Burks *v.* State, ib. 140, 23 So. 530; Nicholson *v.* State, ib. 32, 23 So. 792; Dennis *v.* State, 118 id. 72, 23 So. 1002; 1895, Jones *v.* State, 61 Ark. 88, 32 S. W. 81; 1896, Lewis *v.* State, 62 id. 494, 36 S. W. 689; 1897, People *v.* White, 116 Cal. 17, 47 Pac. 771; People *v.* Ashmead, 118 id. 508, 50 Pac. 681; People *v.* Hubert, 119 id. 216, 51 Pac. 329; 1896, Boykin *v.* People, 22 Colo. 496, 45 Pac. 419; 1898, Gantling *v.* State, 40 Fla. 237, 23 So. 857; 1896, Hanye *v.* State, 99 Ga. 212, 25 S. E. 307; 1896, Burney *v.* State, 100 id. 65, 25 S. E. 911; 1897, Campbell *v.* State, ib. 267, 28 S. E. 71; 1898, Spalding *v.* People, 172 Ill. 49, 49 N. E. 993; 1897, Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; 1897, Hauk *v.* State, 148 id. 238, 46 N. E. 127; 1898, Shields *v.* State, 149 id. 395, 49 N. E. 351; 1898, McIntosh *v.* State, 151 id. 251, 51 N. E. 354; 1897, State *v.* Van Tassel, 103 Ia. 6, 72 N. W. 497; 1897, State *v.* Debolt, 104 id. 105, 73 N. W. 499; 1898, State *v.* Marshall, 105 id. 38, 74 N. W. 763; 1899, State *v.* Novak, 109 id. 717, 79 N. W. 465; 1898, Stevens *v.* Com., — Ky. — , 45 S. W. 76; 1898, State *v.* Bazile, 50 La. An. 21, 23 So. 8; 1898, People *v.* Swartz, 118 Mich. 292, 76 N. W. 491; 1896, Webb *v.* State, 73 Miss. 456, 19 So. 238; 1896, Cherry *v.* State, — id. —, 20 So. 837; 1897, Powers *v.* State, 74 id. 779, 21 So. 657; 1898, Lipscomb *v.* State, 75 id. 559, 23 So. 210; Herman *v.* State, ib. 340, 22 So. 872; 1896, State *v.* Blue, 136 Mo. 41, 37 S. W. 796; State *v.* Goforth, ib. 111, 37 S. W. 801; 1898, State *v.* Duncan, 142 id. 456, 44 S. W. 263; 1899, State *v.* Garrison, 147 id. 548, 49 S. W. 508; 1895, State *v.* Gleim, 17 Mont. 17, 41 Pac. 998; 1898, State *v.* Clancy, 20 id. 498, 52 Pac. 267; 1895, Collins *v.* State, 46 Nebr. 37, 64 N. W. 432; 1896, Barney *v.* State, 49 id. 515, 68 N. W. 636; 1897, Davis *v.* State, 51 id. 301, 70 N. W. 984; 1897, Morgan *v.* State, 51 id. 672, 71 N. W. 788; 1897, Johnson *v.* State, 53 id. 103, 73 N. W. 463; 1898, Carrall *v.* State, ib. 431, 73 N. W. 939; Whitney *v.* State, ib. 287, 73 N. W. 696; Bartley *v.* State, ib. 310, 73 N. W. 744; Maxfield *v.* State, 55 id. 44, 74 N. W. 401; 1898, State *v.* Mandich, 24 Nev. 336, 54 Pac. 516; 1896, Terr. *v.* Lermo, 8 N. M. 566, 46 Pac. 16; Terr. *v.* Padilla, ib. 510, 46 Pac. 346; 1897, People *v.* Barker, 153 N. Y. 111, 47 N. E. 31; 1896, State *v.* Rogers, 119 N. C. 793, 26 S. E. 142; 1903, State *v.* Wilcox, 132 id. 1120, 44 S. E. 625; 1898, Patzwald *v.* U. S., 7 Okl. 232, 54 Pac. 458; 1897, State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619; 1895, Isaac *v.* U. S., 159 U. S. 487, 16 Sup. 51; 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512; 1896, Emery *v.* State, 92 Wis. 146, 65 N. W. 848; Frank *v.* State, 94 id. 211, 68 N. W. 657; 1897, Hoffman *v.* State, 97 id. 576,

simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. "No man can measure with a rule he does not understand; neither can juries determine by rules obscure in themselves and made yet more obscure by attempted definition."[5] The effort to perpetuate and develop these unserviceable definitions is a useless one, and serves to-day chiefly to aid the purposes of the tactician. It should be wholly abandoned.[6] Yet its defence has been attempted by an able judge:

1899, *Marshall*, J., in *Buel* v. *State*, 104 Wis. 132, 80 N. W. 78: "Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse rather than to enlighten the jury. It is said that scholastic attempts to explain the meaning of such words, which are more easily understood than explained, are liable to lead such men as commonly make up our juries to think that the ordinary processes of reasoning, by which they are accustomed to come to conclusions in the ordinary affairs of life, are not suitable to the jury room in a criminal case, but that some other process of reasoning is to be adopted which they are to gather from the language of the trial judge, and that they are thereby really weakened in their ability to come to a just conclusion; that it would be better to leave them to exercise their own intelligence in regard to language so plain that it is not easy to make it plainer by explanation. Mr. Justice Newman said, in Hoffman *v.* State:[7] 'It needs be a skillful definer who will make the meaning of the term ("beyond a reasonable doubt") more clear by the multiplication of words,' while the writer expressed the view, in Emery *v.* State,[8] that the due administration of justice in many cases requires a careful explanation of the term to be given to the jury, and that without it justice is liable at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by courts, discredited. In State *v.* Sauer,[9] Mitchell, J., expressed the opinion that 'most attempts at explaining the meaning of a "reasonable doubt" are made by the use of expressions that themselves need explanation more than the term sought to be explained by them, and that the better way is to omit such attempts, but that if such attempts be indulged in it would be better to adopt those definitions that have received general approval by Courts.' In People *v.* Stubenvoll,[10] Champlin, J., speaking for all the members of the Court, said: 'We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt.' In Judge

73 N. W. 52; 1899, Emery *v.* State, 101 id. 627, 78 N. W. 145.

[5] Judge May, in the article above cited, which contains some just remarks upon the doctrine.

[6] The following is a model treatment of the subject: 1901, Lenert *v.* State, — Tex. Cr. —, 63 S. W. 563 ("The jury sent word to the Court . . . that they desired an additional charge upon the meaning of 'reasonable doubt.' . . . Thereupon the Court told the jury verbally 'that the two words "reasonable doubt" were words of common use, and the jury could understand them as easily as the Court, and the Court had a reasonable doubt as to whether or not he could under the law charge them as to their meaning.' We see no error in this action of the trial Court calculated to injure the rights of the appellants").

[7] 97 Wis. 576, 73 N. W. 52.

[8] 101 Wis. 627, 78 N. W. 145.

[9] 38 Minn. 438, 38 N. W. 355; this was one of the great judicial minds of the passing generation.

[10] 62 Mich. 329, 28 N. W. 883.

Thompson's work on Trials,[11] it is said that 'all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by men in the jury box.' Many more instances might be given where judges of appellate Courts and text writers have discouraged all attempts at explanation of what is a reasonable doubt, from the standpoint of a juror. Nevertheless the fact remains that trial judges, at least in important criminal trials, generally take great pains to explain the term so that the commonest understanding can grasp its meaning. The practice in that regard has grown up from frequent observations of the necessity of it. It is considered here that it is proper in all cases to make a careful explanation of the term, and that where the prosecution relies wholly on circumstantial evidence it is the better practice to do so, taking the utmost care, however, to use only expressions that have been approved, particularly by this Court."

It is generally and properly said that this measure of reasonable doubt need not be applied to the specific detailed facts, but only to the *whole issue*;[12] and herein is given opportunity for much vain argument whether the strands of a cable or the links of a chain furnish the better simile for testing the measure of persuasion.

§ 2498. **Same: Proof by Preponderance of Evidence; Rule for Civil Cases.** In *civil cases* it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a "preponderance of evidence" in favor of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases — "satisfied," "convinced," and the like — have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial time.[1]

But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy sug-

[11] II, § 2469.

[12] 1893, Jamison *v.* People, 145 Ill. 357, 380, 34 N. E. 486; 1896, Keating *v.* People, 160 id. 480, 43 N. E. 724; 1897, Williams *v.* People, 166 id. 132, 46 N. E. 749; 1899, Kossakowski *v.* People, 177 id. 53, 563 N. E. 115; 1902, Henry *v.* People, 198 id. 162, 65 N. E. 120; 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158; 1895, State *v.* Gleim, 17 Mont. 17, 41 Pac. 998; 1897, Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788; 1903, Horn *v.* State, — Wyo. — , 73 Pac. 705 (good opinion by Potter, J.). *Contra:* 1899, State *v.* Cohen, 108 Ia. 208, 78 N. W. 857; 1902, State *v.* Flemming, 130 N. C. 688, 41 S. E. 549; 1900, State *v.* Young, 9 N. D. 165, 82 N. W. 420.

The general rule for reasonable doubt ought to apply equally to *misdemeanors:* 1894, Vandeventer *v.* State, 38 Nebr. 592, 595, 57 N. W. 397.

[1] 1896, O'Connor M. & M. Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; 1896, American Oak Extr. Co. *v.* Ryan, ib. 337, 20 So. 644; 1897, Alabama M. R. Co. *v.* Marcus, 115 id. 389, 22 So. 135; 1897, Louisville & N. R. Co. *v.* Hill, ib. 334, 22 So. 163; 1898, Morrow *v.* Campbell, 118 id. 330, 24 So. 852 ("clear and convincing proof," not required); 1898, Moore *v.* Heineke, 119 id. 627, 24 So. 374; 1896, Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866 ("convince the minds" of the jury, held improper); 1898, Sams A. C. Co. *v.* League, 25 Colo. 129, 54 Pac. 642; Ga. Code 1895, §§ 5144, 5145 (phrase defined); 1896, Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161 (not a "clear preponderance"); 1896, French *v.* Day, 89 Me. 441, 36 Atl. 908 ("clear preponderance and convincing proof," held too strong, as understood by "the common mind"); 1898, Sanborn *v.* Gerald, 91 id. 366, 40 Atl. 67; 1898, First National Bank of Omaha *v.* Goodman, 55 Nebr. 409, 75 N. W. 846; 1896, Moore *v.* Stone, — Tex. Civ. App. — , 36 S. W. 909 ("by a preponderance of proof to your reasonable satisfaction," held improper); 1898, Sigafus *v.* Porter, 28 C. C. A. 443, 84 Fed. 430; 1898, Curran *v.* Stange Co., 98 Wis. 598, 74 N. W. 377; 1898, Knopke *v.* Ins. Co., 99 id. 289, 74 N. W. 795.

gests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case.[2] Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. (1) It is sometimes said that, in general, wherever in a civil case a *criminal act is charged* as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated.[3] (2) Nor is such a doctrine better established for individual kinds of cases. It does not apply to an action for a *statutory penalty*;[4] nor to a plea of truth to an action for a *defamatory charge of crime*;[5] nor to a plea of *arson* by the insurer in an action on a policy of fire insurance;[6] nor in *disbarment* proceedings;[7] nor in an action for *support* charging the defendant as the father of a *bastard*;[8] nor in an action for *seduction*,[9] nor a proceeding for *divorce* on the ground of adultery;[10] nor in proceedings for *contempt*[11] or for an *injunction*.[12] But a stricter standard, in some such phrase as "clear and convincing proof," is commonly applied to measure the necessary persuasion for a charge of *fraud*;[13] for the existence and contents of a *lost will*;[14] for an *agreement to bequeath* by will;[15] for *mutual mistake* sufficient to justify *reformation of an instrument*;[16] and for a few related classes of cases.[17]

[2] Compare Judge May's article, above cited, in which the rule for civil cases is judiciously discussed.

[3] 1897, Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195 (forgery); 1894, Grimes *v.* Hilliary, 150 Ill. 141, 146, 36 N. E. 977 (left undecided; though previous rulings in this State had adopted the criminal rule; prior decisions apparently doubted; but the criminal rule held not applicable to a defendant's malicious destruction of a note, the malice not being essential to recovery); 1897, Nebraska Nat'l B'k *v.* Johnson, 51 Nebr. 546, 71 N. W. 294 (action to recover the proceeds of money stolen by the defendant).

[4] 1900, Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812; 1891, Sparta *v.* Lewis, 91 Tenn. 370, 374, 23 S. W. 182 (municipal ordinance forbidding battery).

[5] 1898, Hearne *v.* DeYoung, 119 Cal. 670, 52 Pac. 150; 1893, Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010; Ind. Rev. St. 1897, § 378; 1872, Ellis *v.* Buzzell, 60 Me. 209, 213 (leading case); 1897, Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433. The supposed doctrine *contra* is criticised by Judge May in 10 Amer. Law Rev. 642.

[6] 1895, Blackburn *v.* Ins. Co., 116 N. C. 821, 21 S. E. 922; 1898, First National Bank *v.* Commercial Assur. Co., 33 Or. 43, 52 Pac. 1050. *Contra:* 1852, Darling *v.* Banks, 14 Ill. 46; 1856, McConnels *v.* Ins. Co., 18 id. 228. The *contra* cases are criticised by Judge May in 10 Amer. Law Rev. 642.

[7] 1899, *Re* Wellcome, 23 Mont. 450, 59 Pac. 445. *Contra:* 1900, *Re* Evans, 22 Utah 366, 62 Pac. 913.

[8] 1900, Bell *v.* State, 124 Ala. 94, 27 So. 414; 1872, People *v.* Christman, 66 Ill. 162; 1870, Knowles *v.* Scribner, 57 Me. 495 (leading case); 1893, Dukehart *v.* Caughman, 36 Nebr. 412, 414, 54 N. W. 680.

[9] 1894, Nelson *v.* Pierce, 18 R. I. 539, 28 Atl. 806.

[10] 1898, Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46; 1896, Lindley *v.* Lindley, 68 Vt. 421, 35 Atl. 349.

[11] 1896, Drakeford *v.* Adams, 98 Ga. 722, 25 S. E. 833 (proceedings by a receiver for contempt for not turning over moneys).

[12] 1895, State *v.* Collins, — N. H. —, 44 Atl. 495 (injunction against a liquor-nuisance).

[13] 1897, Kansas M. O. M. Ins. Co. *v.* Rammelsberg, 58 Kan. 531, 50 Pac. 446 (requiring something more than a mere preponderance); 1900, Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024 ("convincing," not merely preponderating); 1896, Laloue *v.* U. S., 164 U. S. 255, 17 Sup. 74 (pension application); 1897, U. S. *v.* American Bell Tel. Co., 167 id. 224, 17 Sup. 809 ("clear, unequivocal, and convincing"; revocation of a patent for fraud); 1897, Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69 ("clear and satisfactory evidence"). *Contra:* 1897, Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435 (overruling Claflin Co. *v.* Rodenberg, 101 id. 213, 13 So. 272).

[14] The cases are collected *ante*, §§ 2052, 2106.

[15] 1875, Mundy *v.* Foster, 31 Mich. 313, 322 ("should be proved in the clearest manner and the evidence ought to be above suspicion").

[16] 1871, Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 317; 1900, Seitz Brewing Co. *v.* Ayres, 60 N. J. Eq. 190, 46 Atl. 535; 1892, Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330 (collecting many forms of phrasing).

[17] 1901, Rowe *v.* Hibernia S. & L. Soc., 134 Cal. 403, 66 Pac. 569 (identifying separate prop-

The application of the phrase "preponderance of evidence" is apt to lead the judicial discussion close to the danger line of the fallacious quantitative or numerical theory of testimony (*ante*, § 2033).[18] Although that theory has been generally repudiated in our law, yet there is often a lurking recurrence to it in the statement that an uncontradicted witness must be believed,[19] *i. e.* his testimony constitutes *per se* a preponderance. The unsoundness of this conception has already been noticed (*ante*, §§ 1013, 2033, 2034).[20]

erty acquired after marriage); 1903, Gritten *v.* Dickerson, 202 Ill. 372, 66 N. E. 1090 (impeaching a notary's certificate of acknowledgment; see other cases cited *ante*, § 1347, 1352); 1899, Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953 ("clear, convincing, beyond reasonable coutroversy," required for correcting a mistake in a decree).

[18] *E. g.*: 1902, West Chicago S. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718; 1896, People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 549 (though not in a criminal case).

[19] 1890, Quock Ting *v.* U. S., 140 U. S. 420, 11 Sup. 734 ("Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the Court; but that rule admits of many exceptions"); 1902, Ray, J., in U. S. *v.* Lee Huen, 118 Fed. 442, 457 ("The general rule is that uncontradicted evidence, free from inherent improbability, when given by disinterested witnesses, and in no way discredited, is conclusive"; yet in the very same opinion the Court inconsistently but correctly says: "It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested or which shall bind the conscience of the Court as to the conclusiveness of the evidence in a given case").

[20] For the relative value of *circumstantial* and *testimonial* evidence, see *ante*, § 26.

TITLE II: BURDENS AND PRESUMPTIONS IN SPECIFIC ISSUES.

CHAPTER LXXXVII.

§ 2499. **Introductory.**[1] In applying the foregoing principles to the different kinds of propositions presented for proof in litigation, it will be found that the rulings are constantly ambiguous in the language, in dealing with the three chief questions arising under those principles. Sometimes the ruling involves the first "burden of proof," *i. e.* the *risk of non-persuasion of the jury* (*ante*, § 2485); this is, in strictness and usually, a question of Pleading rather than of Evidence. Sometimes the ruling involves the second "burden of proof," the *duty of producing evidence to the judge*, in its initial aspect, *i. e.* whether there is *sufficient evidence* to satisfy that duty and enable the party to go to the jury (*ante*, § 2494). Sometimes it involves the same burden in its ulterior aspect, *i. e.* whether there is a *presumption*, which *shifts*

[1] EXPLANATORY NOTE. In this Chapter, the preceding one, and the three ensuing ones, no attempt has been made to secure all the authorities, for the reasons already stated in the Preface. The subjects are on the border line between Evidence and Procedure, and would require constant excursus into the latter field; most of the rulings on the topics of the present Chapter turn on minute and voluminous details of the particular case, and the judicial language is often ambiguous and dangerous to state concisely; some years of additional labor would be required for a complete presentation of the material.

the duty to the opponent to come forward with evidence (*ante*, § 2487). Any topic of proof may give rise to all three of these questions; and it is often impossible to determine which effect the ruling is intended to have, except after a detailed analysis of the whole opinion, — and sometimes not even then. Moreover, many rulings, though using the language of presumptions, do not mean to do anything more than declare the admissibility of circumstantial evidence (*ante*, § 2491). This difficulty of interpretation must be kept in mind in any consideration of the precedents.

§ 2500. **Sanity**: (1) **Testamentary and other Civil Causes; Suicide.** (*a*) It seems to be generally conceded that the burden of proof as to a *testator's sanity* is on the proponent of the will,[1] in the sense that, when the case goes to the jury, he has the risk of non-persuasion; the testator's sanity is a fact essential to the proponent's claim. But there is a difference of views as to the duty of going forward with evidence. According to one view, the evidence of execution with due formalities, introduced by the proponent, may suffice to raise a presumption of sanity, so as to require the opponent to introduce evidence of insanity. By another view, the evidence of execution does not raise this presumption, and the proponent therefore has the duty of coming forward, as in any other case, with some evidence (it may be but slight) of his *factum probandum, i. e.* sanity.[2]

[1] Except in Indiana.

[2] The subject is further complicated, in many jurisdictions, by the variety of modes of trial for a will's validity, and by the presumptive effect sometimes given to the preliminary finding, on a later contest in the nature of an appeal, in a chancery or a jury court, as also by the *prima facie* effect occasionally given to the oath of the attesting witnesses: *Eng.:* 1857, Sutton *v.* Sadler, 3 C. B. N. S. 87 (leading case); *Can.:* 1883, Doe *v.* Gilbert, 22 N. Br. 576, 581; 1890, Harrison's Will, 30 id. 164, 184; 1890, Doe *v.* Savoy, ib. 227, 231; 1856, Brocklebank's Will, 2 Morris Newf. 88, 92; *Conn.:* 1893, Barber's Appeal, 63 Conn. 393, 27 Atl. 973 (evidence of execution shifts the burden to the contestant; subject, however, to the peculiarity that the attesting witnesses must be called by the proponent and asked as to capacity); *Ill.:* 1894, Taylor *v.* Pegram, 151 Ill. 106, 118, 37 N. E. 837 (the burden is on the contestant, provided the attesting witnesses have spoken to capacity); 1897, Harp *v.* Parr, 168 id. 459, 48 N. E. 113 (the introduction of proper subscribing-witness testimony to execution is sufficient to shift the burden; here one subscribing witness and the scrivener were called, and a certificate of testimony at the probate was presented); 1898, Slingloff *v.* Bruner, 174 id. 561, 51 N. E. 285; 1898, Egbers *v.* Egbers, 177 id. 82, 52 N. E. 285 (bill to set aside probate; the burden of non-persuasion is said to be on the complainant-contestants, and yet the first duty of production to be on the will's proponents; the opinion is confused); 1899, Entwistle *v.* Meikle, 180 id. 9, 54 N. E. 217; 1900, Johnson *v.* Johnson, 187 id. 86, 58 N. E. 237 (the *prima facie* case made out by the attesting witnesses' testimony does not fail when one of the witnesses is impeached; "credible," under the statute, meaning merely "competent"); 1901, Huggins *v.* Drury, 192 id. 528, 61 N. E. 652; 1901, Thompson *v.* Bennett, 194 id. 57, 62 N. E. 321; 1903, Baker *v.* Baker, 202 id. 595, 67 N. E. 410 (approving Egbers *v.* Egbers); *Ind.:* 1896, Blough *v.* Parry, 144 Ind. 463, 43 N. E. 562 (treating Kenworthy *v.* Williams, 5 id. 375, as overruled, and disapproving the dictum in Durham *v.* Smith, 120 id. 465; the burden is on the contestant, but may shift); 1896, Young *v.* Miller, 145 id. 652, 44 N. E. 754 (the contestant has the burden of establishing insanity; monomania, if shown, raises a presumption of general incapacity and makes a "*prima facie* case"; but when the evidence is closed on both sides, the contestant still has the risk of establishing incapacity, and an instruction requiring a preponderance of evidence from the contestee is erroneous); 1898, Roller *v.* Kling, 150 id. 159, 49 N. E. 948 (action to set aside a probated will; the burden of convincing the jury by preponderance of evidence is on the applicant, though evidence of prior persistent insanity may raise a presumption in his favor); 1901, Morell *v.* Morell, 157 id. 179, 60 N. E. 1092; *Ky.:* 1893, Johnson *v.* Stevens, 95 Ky. 128, 23 S. W. 957; *La.:* 1894, Bey's Succession, 46 La. An. 773, 787, 15 So. 297; *Mass.:* 1854, Crowninshield *v.* Crowninshield, 2 Gray 524 (leading case); 1902, Richardson *v.* Bly, 181 Mass. 97, 63 N. E. 3; *Mich.:* 1892, Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637, 93 id. 234, 53 N. W. 153, 17 L. R. A. 494 (leading case); 1896, Moriarty *v.* Moriarty, 108 id. 249, 65 N. W. 964; *Miss.:* 1896, Sheehan *v.*

(*b*) For *deeds*, however, it is common to find the fact of insanity treated in the nature of an affirmative plea of avoidance, placing the ultimate risk of non-persuasion on the contestant, though the duty to produce evidence may shift.[3]

(*c*) *Suicide* is generally conceded to be a circumstance from which (with others) insanity may be inferred (*ante*, § 228); but it ought not to create a presumption or shift the duty of producing evidence, though the judicial language is here sometimes ambiguous.[4]

§ 2501. **Same**: (2) **Criminal Causes.** In proving the commission of a *crime*, the criminal intent being material, the accused's sanity is, by the orthodox view, a part of the case of the prosecution; and the burden of proving it, in the sense of the risk of non-persuasion (*ante*, § 2485), is on the prosecution; the measure of persuasion required being, as in other elements of a crime, persuasion beyond a reasonable doubt (*ante*, § 2497); and, as an incident of this view, the general presumption of sanity suffices for the prosecution's duty to produce evidence, and the duty of producing evidence of insanity is thrown upon the accused. A variation of this view, held by a few Courts, fixes a mere preponderance of evidence as the measure of persuasion required, instead of persuasion beyond a reasonable doubt. But another view, based on judicial experience in dealing with the issue of insanity in criminal trials, and adopted by an increasing number of Courts, is that the accused has the burden of proving insanity, in the sense that he has the risk of persuading the jury to that effect, at least by a preponderance of evidence, and also, of course, has the duty of producing evidence.[1]

Kearney, — Miss. — , 21 So. 46 ("Now, when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity, and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof, properly understood"); *Mo.*: 1892, Maddox *v.* Maddox, 114 Mo. 35, 46, 21 S. W. 499; 1897, Gordon *v.* Burris, 141 id. 602, 43 S. W. 642 (after proof of execution, the contestant must produce "substantial evidence" of the invalidating ground in order to get to the jury); 1898, Fulbright *v.* Perry Co., 145 id. 432, 46 S. W. 955 (proponent raises a presumption of sanity by testimony to execution and by that of the subscribing witnesses to sanity); *Nebr.*: 1896, Murray *v.* Hennessey, 48 Nebr. 608, 67 N. W. 470 (the burden of establishing capacity rests on the proponent of the will for probate, and also a preliminary duty to offer some evidence of this; after opposing evidence, the general burden of establishing remains on the proponent); *N. H.*: 1894, Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47 (burden of non-persuasion is on the executor, no matter how specific the issues, and carries the right to close in argument); *N. Y.*: 1862, Delafield *v.* Parish, 25 N. Y. 9, 29, 73, 97; *Or.*: 1903, Mendenhall's Will, 43 Or. 542, 73 Pac. 1033; *U. S.*: 1903, Leach *v.* Burr, 188 U. S. 510, 23 Sup. 393; *Va.*: 1903, Gray *v.* Rumrill, — Va. — , 44 S. E. 697; *Wash.*: 1902, Higgins *v.* Netherby, 30 Wash. 239, 70 Pac. 489.

[3] 1867, Myatt *v.* Walker, 44 Ill. 485; 1896, Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. 507; 1893, Jones *v.* Jones, 137 N. Y. 610, 612, 33 N. E. 479; 1898, Artrip *v.* Rasnake, 96 Va. 277; 31 S. E. 4; 1903, Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211.

[4] Compare the following: 1838, Duffield *v.* Morris, 2 Harringt. 375, 382 ("it stands as a fact, together with all the other acts of the deceased's life," but creates no presumption); 1897, Grand Lodge *v.* Wieting, 168 Ill. 408, 48 N. E. 59 ("the act of self-destruction, the manner and mode thereof, and all attending circumstances" may be considered); 1901, Brashears *v.* Orme, 93 Md. 442, 49 Atl. 620; 1901, Modern Woodmen *v.* Kozak, 63 Nebr. 146, 88 N. W. 248; 1893, Connecticut M. L. Ins. Co. *v.* Akens, 150 U. S. 468, 475, 14 Sup. 155 (death by self-destruction being shown, the plaintiff is "entitled to the benefit of the presumption that a sane man would not commit suicide"); 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 336, 353 (admissible); 1894, Bachmeyer *v.* M. R. F. L. Assoc., 87 Wis. 325, 340, 58 N. W. 399. Cases are collected in a note to 59 Am. Dec. 496.

[1] These different views are represented re-

§ 2502. **Undue Influence and Fraud**; (1) **Testamentary Execution.** In the proof of *undue influence*, negativing the capacity of a *testator*, there is a difference of judicial opinion, as in the case of insanity (*ante*, § 2500), but here it goes back to the main burden of persuasion; *i. e.* by one opinion, the voluntariness of the testator's act is a part of the proponent's case, and with the jury he has the risk of non-persuasion; by the other view, the fact of undue influence is treated as in the nature of a defensive plea of the contestant, and therefore to be proved as a part of his case.[1]

§ 2503. **Same**: (2) **Confidential Relations of Grantee or Other Beneficiary.** Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or

spectively in the following cases, although their language is not always precise:

(1) *First view:* 1896, Jones *v.* People, 23 Colo. 276, 47 Pac. 275 (the duty of going forward is on the defendant, but the general burden of persuasion is on the State); 1897, State *v.* Lee, 69 Conn. 186, 37 Atl. 75; 1892, Armstrong *v.* State, 30 Fla. 170, 196, 11 So. 618; 1896, Ford *v.* State, 73 Miss. 734, 19 So. 665 (but the Court says the sanity-presumption suffices if the defendant does not offer, not "any testimony," but "sufficient to raise a reasonable doubt"); 1898, Coffey *v.* State, — id. —, 24 So. 315; 1898, Snider *v.* State, 56 Nebr. 309, 76 N. W. 574 (presumption of sanity ceases when any evidence to the contrary is offered); 1892, Faulkner *v.* Terr., 6 N. M. 464, 36 Pac. 905 (burden of persuasion is on the prosecution, but of producing evidence on the defendant); 1895, Davis *v.* U. S., 160 U. S. 469, 16 Sup. 353 (leading opinion, by Harlan, J.: "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Given to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged").

(2) *Second view:* 1896, Nino *v.* People, — N. Y. —, 43 N. E. 853; 1897, People *v.* Koerner, 154 id. 355, 48 N. E. 730.

(3) *Third view:* 1893, People *v.* Bemmerly, 98 Cal. 299, 304, 33 Pac. 263; 1897, People *v.* Allender, 117 id. 81, 48 Pac. 1014; 1898, People *v.* Barthleman, 120 id. 7, 52 Pac. 112; 1855, Graham *v.* Com., 16 B. Mour. 587 (leading opinion, by Stites, J.); 1895, Phelps *v.* Com., — id. —, 32 S. W. 470; 1898, Portwood *v.* Com., 104 id. 496, 47 S. W. 339; 1897, State *v.* Scott, 49 La. An. 253, 21 So. 271, Breaux, J., diss. (overruling prior precedents, in which the defendant had been required to prove beyond a reasonable doubt); 1896, Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816; 1897, Clawson *v.* State, 59 id. 434, 36 Atl. 886; 1898, Winters *v.* State, 61 id. 613, 41 Atl. 220; 1896, Kelch *v.* State, 55 Oh. St. 146, 45 N. E. 6 (same; disapproving a charge which required the jury to be "satisfied" of the insanity, and treating this as requiring more than a mere "preponderance" making insanity probable but leaving it open to doubt); 1895, Com. *v.* Berchine, — Pa. —, 32 Atl. 110; 1892, King *v.* State, 91 Tenn. 617, 647, 20 S. W. 169.

Compare also the following: 1897, Scheerer *v.* Agee, 113 Ala. 383, 21 So. 79; 1897, Ryder *v.* State, 100 Ga. 528, 28 S. E. 246; 1903, State *v.* Shuff, — Ida. —, 72 Pac. 664; 1892, Hornish *v.* People, 142 Ill. 620, 626, 32 N. E. 677; 1896, State *v.* Wright, 134 Mo. 404, 35 S. W. 1145; 1896, State *v.* Lewis, 136 id. 84, 37 S. W. 807; State *v.* Bell, ib. 120, 37 S. W. 823.

[1] The following cases represent both views: 1838, Barry *v.* Butlin, 2 Moore P. C. 480; 1896, McLellan's Estate, 28 N. Sc. 226; 1892, Bulger *v.* Ross, 98 Ala. 267, 271; 1903, Latour's Estate, 140 Cal. 414, 73 Pac. 1070; 1901, Mallow *v.* Walker, 115 Ia. 238, 88 N. W. 452; 1902, Marshall *v.* Hanby, ib. 318, 88 N. W. 801; 1897, King *v.* King, — Ky. —, 42 S. W. 347; 1897, Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628 (repudiating the language in Maynard *v.* Vinton, 29 id. 139, 26 N. W. 401, and Severance *v.* Severance, 90 id. 417, 52 N. W. 292); 1896, Sheehan *v.* Kearney, — Miss. —, 21 So. 41 (Whitfield, J.: "It is not only necessary that the testator shall have testamentary capacity, but that capacity shall be exercised freely and voluntarily. If either its existence or the freedom of its exercise is wanting, the instrument is not the alleged testator's will. Both are essential parts of the proponent's case. The issue is single, — will or no will"); 1896, Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. 504; 1897, McFadin *v.* Catron, 138 id. 197, 38 S. W. 932; 1898, Salter *v.* Ely, 56 N. J. L. 357, 39 Atl. 365.

advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied. But it is not possible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case.[1]

§ 2504. **Same**: (3) **Fraudulent Conveyances against Creditors.** Conveyances by debtors are attended by circumstances which are often said to raise a presumption of an intent to defraud creditors; but here the distinction between circumstances constituting *per se* a fraud under the substantive law and circumstances merely evidential of fraud makes the subject inseparable from the whole law of fraudulent conveyances. It is to be noted that at least three distinct presumptions may be involved: (*a*) the presumption of the grantee's title, from his possession (*post*, § 2515), (*b*) the presumption of the debtor's fraudulent intent, from his retention of possession,[1] and (*c*) the presumption of the buyer's good faith, from his payment of value.[2]

§ 2505. **Marriage**; (1) **Consent, from Cohabitation or Ceremony.** The conduct of a man and a woman as husband and wife, *i. e.* their "habite" or cohabitation, together with their local repute as married, are not only admissible in evidence (*ante*, §§ 268, 1602, 2083), but also are regarded as sufficient to create a presumption that a *marriage* took place, — whether by mere consent or by ceremony, according as the local law requires.[1]

[1] Cases illustrating the various situations are as follows: *Eng.*: 1838, Barry *v.* Butlin, 2 Moore P. C. 480 (leading case); 1894, Tyrrell *v.* Painton, Prob. 151 (commenting on Barry *v.* Butlin); *Can.*: 1893, Adams *v.* McBeath, 3 Br. C. 513; 1884, McEwan *v.* Milne, 5 Ont. 100; 1901, Collins *v.* Kilroy, 1 Ont. L. R. 503; *U. S.*: 1891, Little *v.* Knox, 96 Ala. 179, 11 So. 443 (attorney purchasing from an estate managed by him); 1892, Garrett *v.* Heflin, 98 id. 615, 618, 13 So. 326 (residuary legatee who wrote the will himself); 1898, Coghill *v.* Kennedy, 119 id. 641, 24 So. 459 (drafter of a will); 1901, McQueen *v.* Wilson, 131 id. 606, 31 So. 94; 1903, Harraway *v.* Harraway, 136 id. 499, 34 So. 836 (husband and wife); 1890, Richmond's Appeal, 59 Conn. 226, 22 Atl. 82 (will); 1901, Lewis *v.* McGrath, 191 Ill. 401, 61 N. E. 135 (gift); 1901, Blanchard *v.* Blanchard, ib. 450, 61 N. E. 481 (deed); 1902, Michael *v.* Marshall, 201 id. 70, 66 N. E. 273 (will); 1896, Teegarden *v.* Lewis, 145 Ind. 98, 44 N. E. 9 (action by an administrator for money of the deceased received as a gift, through undue influence, by the defendants, his daughter and son-in-law, by whom he was supported and with whom he lived; held, that "one who challenges the mental capacity of a testator or donor has the burden of establishing the absence of the particular capacity in issue," and that though ordinarily a presumption of undue influence would be created in the plaintiff's favor by a fiduciary position of the defendants, yet the caretaking by a child of the parent does not create that presumption, and did not here, although the father was aged, feeble, and of unsound mind); 1898, Slayback *v.* Witt, 151 id. 376, 50 N. E. 389 (parent and child; this relation ordinarily overturns the presumption); 1901, Good *v.* Zook, 116 Ia. 582, 88 N. W. 376 (clerical adviser); 1893, Hill *v.* Miller, 50 Kan. 659, 663, 32 Pac. 354 (a brother in fiduciary relations with aged and infirm grantor); 1897, Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628 (the burden of persuasion is on the contestant, but the legatee's drawing of the will shifts the duty of going forward); 1862, Delafield *v.* Parish, 25 N. Y. 9, 35 (will); 1893, Barnard *v.* Gautz, 140 id. 249, 256, 35 N. E. 430 (deed of an aged woman to a son and son-in-law); 1898, Ten Eyck *v.* Whitbeck, 156 id. 341, 50 N. E. 963 (deed); 1901, Doheny *v.* Lacy, 168 id. 213, 61 N. E. 255; 1898, Barney's Will, 70 Vt. 352, 40 Atl. 1027 (confidential relations by a beneficiary drawing the will and excluding "near, needy, and deserving relatives"; the burden on the beneficiary-proponent to disprove undue influence).

[1] 1898, Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426; 1893, First National Bank *v.* Lowrey, 36 Nebr. 290, 298, 54 N. W. 568; 1886, Bindley *v.* Martin, 28 W. Va. 773, 789. Compare § 1086, *ante*.

[2] 1895, Peterson Co. *v.* Steiner, 108 Ala. 629, 18 So. 688; 1893, Treusch *v.* Ottenburg, 4 C. C. A. 629, 54 Fed. 867.

The opinion of Pigott, J., in Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653 (1900), contains a useful analysis.

[1] The cases already cited in the sections above noted almost all declare this; the following also emphasize the rule of presumption:

(2) Where one of the parties to a cohabitation was at its inception incapable (for example, by existing coverture) of a valid marriage, and the impediment is subsequently removed, and the parties continue to cohabit, in a jurisdiction where a ceremonial marriage is not required, the *renewal of marriage consent* as husband and wife may be presumed; although there has here been occasionally an unjust and quibbling hesitation in some Courts, based on refinements of speculation as to the party's knowledge of the removal of the impediment, and the like.[2]

(3) Where a *ceremonial marriage* is essential, the performance of the ceremony with the appearauces of validity may create a presumption as to the lawfulness of the form, the authority of the celebrant, the issuance of a license, and the like; although here much may turn on the circumstances of each case and the additional evidence offered or available.[3]

§ 2506. **Same: (2) Capacity, as affected by Intervening Death, Divorce, or Marriage.** Supposing a party to a marriage to appear to have been a party to a former marriage with another person, the validity of the later marriage will depend upon whether the prior marriage had been in the meantime somehow dissolved, or whether it was itself void; this will raise the question, for example, whether there has been a death or divorce intervening, or whether the other party to the prior marriage was incapable. In thus determining the validity of the later marriage, will one or another of the above facts be presumed to have existed, so as to throw upon the opponent of the later marriage the burden of producing evidence (or even the risk of non-persuasion) of the non-existence of those facts? In issues of bigamy and of legitimacy, there is a special temptation thus to aid the later marriage. The situation may be additionally complicated by the invocation of the so-called presumption of innocence (*post*, § 2511) and of the presumptions of death or of life

1876, De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686; 1898, Moore *v.* Heineke, 119 Ala. 627, 24 So. 374 (presumption here removed by a subsequent separation); Cal. C. C. P. 1872, § 1963, par. 30; 1903, Ferrell *v.* State, — Fla. —, 34 So. 220; 1896, Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; 1853, Nossaman *v.* Nossaman, 4 Ind. 648, 651 (presumption rebutted by the absence of a record of license in the proper office, such a record being required); 1843, Young *v.* Foster, 14 N. H. 114; 1897, Stevens *v.* Stevens, 56 N. J. Eq. 488, 38 Atl. 460; 1850, Clayton *v.* Wardell, 4 N. Y. 230; 1897, Durning *v.* Hastings, 183 Pa. 210, 38 Atl. 627; 1902, Rhode Island H. T. Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873; 1896, State *v.* Sherwood, 68 Vt. 414, 35 Atl. 352 (to show a previous marriage, relied upon to show a later one no bigamy, the presumption was not applied).

[2] Some of the cases on both sides are as follows: 1867, The Breadalbane Case (Campbell *v.* Campbell), L. R. 1 Sc. App. 182 (leading case); 1876, De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686; 1898, Poole *v.* People, 24 Colo. 510, 52 Pac. 1025; 1876, Blanchard *v.* Lambert, 43 Ia. 228; 1894, Barnes *v.* Barnes, 90 id. 282, 57 N. W. 851; 1898, Reed *v.* Moseley, 76 Miss. 1, 23 So. 451; 1890, Collins *v.* Voorhees, 47 N. J. Eq. 315, 555, 20 Atl. 676, 22 Atl. 1054 (leading case); 1899, Atlantic C. R. Co. *v.* Goodin, 62 N. J. L. 394, 42 Atl. 333; 1902, Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124, 129 (Breadalbane Case followed).

[3] With the following, compare the cases cited *ante*, § 1644 (certificate of marriage), *ante*, § 2085 (proof by eye-witnesses), and *post*, § 2535 (presumption of office): 1849, Piers *v.* Piers, 2 H. L. C. 331; 1817, Warner *v.* Com., 2 Va. Cas. 95 (good opinion); 1897, Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575.

In still other issues a rule of presumption relating to marriage may be recognized: 1861, Erskine *v.* Davis, 25 Ill. 251, 256 (ejectment, by one showing a deed from H. C., said to be a *feme sole*; proof of her singleness, held sufficient to raise a presumption of continuance, not overcome by proof of coverture six years later; obscure); 1893, Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669 (necessaries furnished to wife; plaintiff must prove not only the marriage but also the separation without fault of the wife). Compare the citations *ante*, § 382, note 7.

(*post*, § 2531). Whether the successive shiftings of the burdens should be worked out with mathematical nicety according to the various presumptions applicable, or whether all should be merged in a general presumption in favor of the later marriage, is a knotty question; and no successful generalization is yet accepted.[1] But it may be noted that the peculiar force of a presumption as merely affecting the opponent's duty to produce some evidence (*ante*, § 2490) is not always observed in the judicial discussion of the problem.

§ 2507. **Negligence and Accident; (1) Contributory Negligence.** The fact of contributory negligence, sufficient in law to defeat a plaintiff, is regarded by the orthodox rule as a part of the defendant's burden (or risk of non-persuasion), except in a few important jurisdictions; like so many other instances of that burden, however, this is in reality a question of pleading (*ante*, § 2485). Yet even by the orthodox rule, the second burden, or duty of producing evidence, may be shifted by facts which raise a presumption of negligence, and these facts may appear (*ante*, §§ 2489, 2490) from the testimony adduced by the plaintiff himself, or even from the allegations of his declaration, especially under the modern looseness of pleading. Hence it happens that even in the jurisdictions maintaining the orthodox rule, the burden is sometimes said to be upon the plaintiff in certain exceptional cases of the above sort, — the distinction between the two burdens not being strictly observed.[1]

[1] Some of the more complicated and interesting cases are as follows: 1848, Lapsley *v.* Grierson, 1 H. L. C. 498; 1881, R. *v.* Willshire, L. R. 6 Q. B. D. 366; 1891, Banks *v.* State, 96 Ala. 78, 11 So. 404 (adultery of a woman; after the defendant's proof of a formal marriage to the man, it is for the prosecution to show his prior marriage and her knowledge); 1896, Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756 (the defendant married M. in 1858, being then a minor; was taken away after a few days by her parents; on July 3, 1862, married the plaintiff; in 1883 heard that M. was living, and procured in 1894 a judgment by default annulling the marriage with M.; in 1894 brought but afterwards dismissed an action against the now plaintiff to have the second marriage declared void; in the present suit for the same purpose by the plaintiff (the judgment of divorce and the defendant's action against the plaintiff being held not to be conclusive as to the fact of M.'s being her lawful husband at the time of the second marriage), held, that as the second marriage during M.'s coverture involved a crime or wrong, the burden was upon the plaintiff to show that the first marriage had not been ended in 1862 by M.'s death or divorce); 1892, Erwin *v.* English, 61 Conn. 502, 23 Atl. 753; 1893, Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525 (bill for partition; issue whether defendants were legitimate children of N. B., by M. H., married in 1876; N. B. had in 1872 married B. A., and had separated, B. A. being alive in 1876; held, that the second marriage raised a presumption of divorce from the first; and that the petitioner's evidence sustained their burden and restored it to respondent to give evidence of the divorce); 1903, Potter *v.* Clapp, 203 id. 592, 68 N. E. 81 (collecting the Illinois cases); 1874, Squire *v.* State, 46 Ind. 459 (bigamy); 1895, Wenning *v.* Teeple, 144 id. 189, 41 N. E. 600; 1876, Blanchard *v.* Lambert, 43 Ia. 228; 1895, Leach *v.* Hall, 95 id. 611, 64 N. W. 791; 1903, Casley *v.* Mitchell, — id. —, 96 N. W. 725; 1859, Harrison *v.* Lincoln, 48 Me. 205; 1881, Hyde Park *v.* Canton, 130 Mass. 505; 1890, State *v.* Plym, 43 Minn. 385, 45 N. W. 848 (bigamy; whether there was a duty for the prosecution directly to evidence the first wife's continued life; leading opinion, by Mitchell, J.); 1901, Alabama & V. R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660; 1898, Rash's Estate, 21 Mont. 170, 53 Pac. 312 (action for a widow's share of an estate; the plaintiff married the intestate in 1858, left him in 1864, married X in 1872; the intestate married Y in 1894, and died in 1895; the last marriage was presumed legal, and the plaintiff required to prove it illegal by showing that no prior divorce existed); 1899, Reynolds *v.* State, 58 Nebr. 49, 78 N. W. 483 (bigamy; the defendant married F. in 1895 and C. in 1897; F. was previously married to P.; held, no presumption of law as to the innocence of F. and therefore as to P.'s death); 1900, Palmer *v.* Palmer, 162 N. Y. 130, 56 N. E. 501; 1899, Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778.

[1] Some of the illustrative cases under both rules are as follows: 1886, Wakelin *v.* London & S. W. R. Co., L. R. 12 App. Cas. 41 (orthodox rule); 1894, Morrow *v.* Canadian P. R. Co., 21 Ont. App. 149 (orthodox rule); 1893,

§ 2508. **Same**: (2) **Loss by a Bailee.** Where goods have been committed to a bailee, and have either been lost or been returned in a damaged condition, and the bailee's liability depends upon his negligence, the fact of negligence may be presumed, placing on the bailee at least the duty of producing evidence of some other cause of loss or injury; but the application of this presumption cannot be said to have received definite phrasing for the different kinds of bailees.[1] Where the bailee is a common carrier, acting

Southern P. R. Co. *v.* Tomlinson, — Ariz. —, 33 Pac. 710 (orthodox rule); 1877, Railroad Co. *v.* Kenney, 58 Ga. 485, 489 (Bleckley, C. J.: "Concerning one class of cases, viz. that class in which, as in the instance before us, the injured party shared directly in the act which resulted in his own wounding, the rule as to the burden of proof is as follows: After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that in order to make a *prima facie* case, and change the onus, he need not go further than to show by evidence one or the other of these two propositions, — either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition"); 1895, Johnston *v.* R. Co., 95 id. 685, 22 S. E. 694; 1891, North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451 (burden is on the plaintiff); 1893, Cincinnati I. St. L. & C. R. Co. *v.* Grames, 136 Ind. 39, 42, 34 N. E. 714 (burden is on the plaintiff); 1895, Engrer *v.* R. Co., 142 id. 618, 42 N. E. 219; 1895, Baltimore Traction Co. *v.* Appel, 80 Md. 603, 31 Atl. 965 (orthodox rule); 1861, Gahagan *v.* R. Co., 1 All. 187 (burden is on the plaintiff); 1893, Lillstrom *v.* R. Co., 53 Minn. 464, 468, 55 N. W. 624 (same); 1894, Union S. Co. *v.* Conoyer, 41 Nebr. 617, 625, 59 N. W. 950 (same); 1896, Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 677 (same); 1893, Baker *v.* Gas Co., 157 Pa. 593, 601, 27 Atl. 789 (same); 1896, Stewart *v.* Nashville, 96 Tenn. 50, 33 S. W. 613 (same; except that "whenever plaintiff's own case, or the evidence of the defendant or of both, raises a presumption of negligence on his part, the burden of repelling it is at once placed on him"; as here, where the plaintiff was blind and unattended and knew of the dangerous place; good opinion by Beard, J., on the policy of the rule); 1895, Gulf, C. & S. F. R. Co. *v.* Shiedsr, 88 Tex. 152, 30 S. W. 904 (Denman, J.: "To the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence there appear to be, in the very nature of things, two well-defined exceptions: First, Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a *prima facie* defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the Court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's cars while on the track, under circumstances which in law would make him a trespasser *prima facie*, then the law would raise a presumption of contributory negligence against him, for which his petition would be bad on demurrer; and it would be necessary for him to plead some fact or circumstance rebutting such presumption, — such as that he was, after going upon the track, stricken down by some providential cause, — in order to save his petition, and on the trial the burden would be upon him to establish such cause. Second, When the undisputed evidence adduced on the trial establishes *prima facie* as a matter of law contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case may find him free from negligence; otherwise the Court may instruct a verdict for defendant, there being no issue of fact for the jury"); 1893, Washington & G. R. Co. *v.* Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. 557 (burden on the defendant remains the same, though the plaintiff's evidence may disclose facts tending to help the defendant's burden); 1893, Texas & P. R. Co. *v.* Volk, 151 id. 73, 78, 14 Sup. 239; 1893, The Charles L. Jeffrey, 5 C. C. A. 246, 55 Fed. 685 (in admiralty, the burden is on the plaintiff); 1893, Welsh *v.* Argyle, 85 Wis. 307, 311, 55 N. W. 412 (orthodox rule).

[1] In the following illustrations, it will be seen that there may be a further variance as to successive shiftings of the burden: 1896, Higman *v.* Camody, 112 Ala. 267, 20 So. 480 (after the bailor shows the loss, the bailee must show *vis major* or the like, and then the bailor must show a negligence in not avoiding the *vis major*); 1898, First Nat'l Bank of B. *v.* First Nat'l Bank of N., 116 id. 520, 22 So. 976 (loss of certificates left with a bank; showing the loss raises a presumption of negligence); 1822, Nicholls *v.* Roland, 11 Mart. La. o. s. 190; 1897, Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059 (the risk of non-persuasion is on the bailor to show culpable loss, but proof of demand and

under the customary exemptions as to *vis major* and the like, or under express contractual exemptions, it is generally conceded that the carrier has even the first burden (or risk of non-persuasion) of establishing the fact constituting the exemption;[2] but this involves the analogy of the contract-rule (*post*, § 2537).

§ 2509. **Same**: (3) **Defective Machines, Vehicles, and Apparatus.** With the vast increase, in modern times, of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed "accident," by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. "*Res ipsa loquitur*" is the phrase appealed to as symbolizing the argument for such a presumption. In England, a rule of that sort has for a generation been conceded to exist, for some classes of cases at least.[1] In the United States, the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope; as against a common carrier, the presumption against a bailee (*ante*, § 2508) has perhaps helped to confirm the rule where injury to goods or passengers is involved.[2] What its final

refusal without explanation of the loss shifts to the bailee the duty of producing evidence); 1897, Knights *v.* Piella, 111 Mich. 9, 69 N. W. 92 (the risk of non-persuasion is on the bailor throughout; but proof of failure to deliver shifts to the bailee the duty of offering evidence); 1897, Davis *v.* Printing Co., 70 Minn. 95, 72 N. W. 814 (book-plates); 1896, Donlan *v.* Clark, 23 Nev. 203, 45 Pac. 1; 1871, Collins *v.* Bennett, 46 N. Y. 490 (horse); 1900, Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145.

[2] 1895, Shea *v.* R. Co., 63 Minn. 228, 65 N. W. 458 (the carrier must show no negligence, although the loss occurred from an excepted cause); 1893, The Beeche Dene, 5 C. C. A. 207, 55 Fed. 525 (bill of lading with exceptions; vessel libeled for damage to cargo; vessel-owner must prove the case to be within an exception, after the fact of damage is shown); 1897, The Majestic, 166 U. S. 375, 17 Sup. 597 (the carrier must show *vis major*).

[1] *Eng.:* 1863, Byrne *v.* Boadle, 2 H. & C. 722 (passer-by injured by a barrel falling from a shop-window; Pollock, C. B.: "There are many accidents from which no presumption of negligence can arise"; but on the facts the occurrence was held "*prima facie* evidence of negligence"); 1865, Scott *v.* London & St. K. Docks Co., 3 H. & C. 596 (injury to a passer-by, from the falling of goods from a crane; Erle, C. J.: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care"; Blackburn, J.: "Is not the fact of the accident sufficient evidence to call upon the defendants to prove that there was no negligence?"); 1870, Kearney *v.* London B. & S. C. R. Co., L. R. 5 Q. B. 411, 6 id. 759 (injury to a passer-by from the fall of a brick from a bridge; it was held "incumbent on the defendants to give evidence rebutting the inference"; but perhaps the actual decision was merely that the fact was "some evidence to go to the jury"). *Can.:* 1892, Dubé *v.* R., 3 Exch. Can. 147, 151 (railway accident).

[2] Some of the cases are as follows: *Ark.:* 1893, Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 435, 21 S. W. 1059 (falling of a telephone wire so as to frighten a horse); *Cal.:* 1892, Bush *v.* Barnett, 96 Cal. 202, 204, 31 Pac. 2 (common carrier); 1893, Dixon *v.* Pluns, 98 id. 384, 388, 33 Pac. 268 (falling of a workman's chisel from a scaffold); 1895, Judson *v.* Giant Powder Co., 107 id. 549, 40 Pac. 1020 (powder explosion; cases cited fully); 1901, Foerst *v.* Kelso, 131 id. 376, 63 Pac. 681 (street railway); 1903, Kahn *v.* Triest-Rosenberg Cap. Co., 139 id. 340, 73 Pac. 164 (boiler explosion); *Conn.:* 1895, Donovan *v.* R. Co., 65 Conn. 201, 32 Atl. 352; *Ga.:* 1898, Augusta South R. Co. *v.* McDade, 105 Ga. 134, 31 S. E. 420; 1903, Chenall *v.* Palmer B. Co., 117 id. 106, 43 S. E. 443 (fall of a brick arch; leading opinion, by Lamar, J.); *Ill.:* 1901, Springer *v.* Ford, 189 Ill. 430, 59 N. E. 953 (breaking of a passenger-elevator appliance); 1903, Chicago City R. Co. *v.* Carroll, 206 id. 318, 68 N. E. 1087 (passenger on a street railway); *Ia.:* 1897, Faust *v.* R. Co., 104 Ia. 241, 73 N. W. 623 (owner riding with his stock; ordinarily there is no presumption, but where he rode in another car, it was enough to show that the destroying fire

accepted shape will be can hardly be predicted. But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.

In some jurisdictions there is a rule of substantive law to be distinguished for some classes of injuries. For example, the setting of fire to adjacent property by the emission of sparks from a railway locomotive may be deemed to raise a presumption, by the present rule (either under statute or by judicial decision); but it may also be made *per se* a cause of action, irrespective

was not caused by himself); *Kan.:* 1900, St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439 (passenger); *Ky.:* 1902, Davis *v.* Paducah R. & L. Co., — Ky. —, 68 S. W. 140; *La.:* 1902, LeBlanc *v.* Sweet, 107 La. 355, 31 So. 766 (passenger); *Me.:* 1851, Church *v.* Cherryfield, 33 Me. 460 (highway-defect); *Md.:* 1894, Howser *v.* R. Co., 80 Md. 146, 30 Atl. 906 (passer-by injured by the fall of ties from a freight-car; leading case; useful opinions by Roberts, J., and by McSherry, J., diss.); *Mass.:* 1894, Uggla *v.* R. Co., 160 Mass. 351, 35 N. E. 1126 (breaking of ear and guy used by electric railway); 1894, Carmody *v.* Gaslight Co., 162 id. 539, 39 N. E. 184; 1903, Wadsworth *v.* R. Co., 182 id. 572, 66 N. E. 421 (sawdust falling from an elevated railway structure); 1903, Cassady *v.* Old Colony St. R. Co., — Mass. —, 68 N. E. 10 (explosion of electric railroad fuse); *Mo.:* 1895, Och *v.* R. Co., 130 Mo. 27, 31 S. W. 962 (passenger; useful opinion); *Nebr.:* 1893, Union P. R. Co. *v.* Porter, 38 Nebr. 226, 235, 56 N. W. 808 (here a statute makes the carrier absolutely liable for injury to a passenger, irrespective of the former's negligence); 1895, Spears *v.* R. Co., 43 id. 720, 62 N. W. 68 (finding a person dead on the railroad); 1896, Lincoln R. Co. *v.* Cox, 48 id. 807, 67 N. W. 740; 1899, Chicago R. I. P. R. Co. *v.* Young, 58 id. 678, 79 N. W. 556 (passenger); *N. J.:* 1894, Excelsior Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553; 1897, Trenton P. R. Co. *v.* Cooper, 60 id. 219, 37 Atl. 730 (escape of electricity from street-railway rails); 1898, Newark E. L., & P. Co. *v.* Ruddy, 62 id. 505, 41 Atl. 712 (broken wire in highway); *N. Y.:* 1901, Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925 (passenger-elevator accident by the falling of the weights); *N. C.:* 1894, Haynes *v.* Gas Co., 114 N. C. 203, 207, 19 S. E. 344 (guy-wire of electric light, hanging from a tree and charged from a trolley-wire); *Oh.:* 1896, Pennsylvania Co. *v.* McCann, 54 Oh. 10, 42 N. E. 768 (under statute); *Or.:* 1902, Chaperon *v.* Electric Co., 41 Or. 39, 67 Pac. 928 (contact with an electric wire); *Pa.:* 1892, Herstine *v.* R. Co., 151 Pa. 244, 252, 25 Atl. 104 (shock by careless coupling); 1893, Fleming *v.* R. Co., 158 id. 130, 27 Atl. 858 (rock falling on a train); 1895, Shafer *v.* Lacock, 168 id. 497, 32 Atl. 44; 1897, O'Connor *v.* Traction Co., 180 id. 444, 36 Atl. 866; 1899, Alexander *v.* Steel Co., 189 id. 582, 42 Atl. 286 (workman on a scaffolding); 1902, Baron *v.* Reading Iron Co., 202 id. 274, 51 Atl. 979 (boiler explosion); *S. C.:* 1899, Steele *v.* R. Co., 55 S. C. 389, 33 S. E. 509 (passenger); *S. D.:* 1894, Saunders *v.* R. Co., 6 S. D. 40, 60 N. W. 148; *Tenn.:* 1898, Mitchell *v.* N. C. & St. L. R. Co., 100 Tenn. 329, 45 S. W. 337 (blowing a whistle); *Tex.:* 1894, Mexican C. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277; 1895, Gulf, C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902; *U. S.:* 1897, Pittsburg & W. R. Co. *v.* Thompson, 27 C. C. A. 333, 82 Fed. 720 (Ohio statute applied, regarding defective railway cars); 1897, The Joseph B. Thomas, 81 Fed. 578 (injury at a ship's hatchway); 1902, Bradford Glycerine Co. *v.* Kizer, 51 C. C. A. 524, 113 Fed. 894 (explosion of nitroglycerine); *W. Va.:* 1897, Snyder *v.* Electr. Co., 43 W. Va. 661, 28 S. E. 733 (falling of a wire); *Wis.:* 1889, Koenig *v.* Arcadia, 75 Wis. 62, 67, 43 N. W. 734 ("there can be no proof so conclusive that the hole was a dangerous defect as that it did actually cause injury"; this is unsound; whether it was the cause may be the disputed question); 1884, Cummings *v.* Furnace Co., 60 id. 603, 18 N. W. 742, 20 N. W. 665 (highway); 1898, Carroll *v.* C. B. & R. Co., 99 id. 399, 75 N. W. 176 (applying the Cummings case rule to the fall of a window).

of actual negligence;[3] and the course of legislation in the different jurisdictions has to be discriminated.[4] So, too, the killing of live-stock by a railroad train has been the subject of statutory rules.[5]

§ 2510. **Same**: (4) **Death by Violence.** Where a person is found dead by violent injury, two questions of presumption as to his conduct may be raised. (*a*) If the death has been caused (for example) by a railway train, may it be presumed, where no other circumstances appear, that he was *exercising due care* at the time of the injury?[1] This presumption will be of most consequence in those jurisdictions (*ante*, § 2507) which place on the plaintiff the first burden of proof (risk of non-persuasion) as to contributory negligence. (*b*) If death by any cause but suicide or extreme negligence has been *insured* against, where is the burden of proof as to the accidental nature of death? Here, on the contract-principle (*post*, § 2537), it would seem that the first burden of proof (risk of non-persuasion) is on the insurer to show the excepted cause.[2]

§ 2511. **Crimes**: (1) **Innocence, Malice, Intent, etc.** (*a*) The "*presumption of innocence*" is a term which has been the subject of two special fallacies, namely, (1) that it is a genuine addition to the number of presumptions, and (2) that it is *per se* evidence. 1. As to the first of these fallacies, it is to be noted that the "presumption of innocence" is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i. e.* the rule that it is for the prosecution to adduce evidence (*ante*, § 2487), and to produce persuasion beyond a reasonable doubt (*ante*,

[3] That such statutes are constitutional is noticed *ante*, § 1354. For the rule as to the admissibility of *other fires*, see *ante*, § 454.

[4] Some of the illustrations are as follows: *Ala.*: 1896, Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33; 1902, Louisville & N. R. Co. *v.* Marburg L. Co., 132 id. 520, 32 So. 745; *Conn.* Gen. St. 1887, § 1096 (injury by locomotive fire; communication of fire by locomotive is *prima facie* evidence of negligence); *Ga.*: 1892, East Tennessee V. & G. R. Co. *v.* Heskers, 90 Ga. 11, 15 S. E. 828 (under Code § 3033); 1892, East Tennessee V. & G. R. Co. *v.* Hall, ib. 17, 16 S. E. 91 (same); 1897, Gainesville J. & S. R. Co. *v.* Edmondson, 101 id. 747, 29 S. E. 213 (that the fire was set by the defendant must first be proved); *Ill.*: 1903, Cleveland C. C. & St. L. R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052 (applying Rev. St. c. 114, § 123); *Ia.*: 1897, Hemmi *v.* R. Co., 102 Ia. 25, 70 N. W. 746; *Minn.*: 1895, Solum *v.* R. Co., 63 Minn. 233, 65 N. W. 443; *N. C.*: 1898, Hygienic P. I. M. Co. *v.* R. Co., 122 N. C. 881, 29 S. E. 575; 1902, Raleigh Hosiery Co. *v.* R. Co., 131 id. 238, 42 S. E. 602; *N. D.*: 1897, Mathews *v.* R. Co., 7 N. D. 81, 72 N. W. 1085; 1899, McTavish *v.* R. Co., 8 id. 333, 79 N. W. 443 (in spite of the overthrow of the presumption by evidence of proper construction, the fact of repeated fires may suffice for going to the jury): *Tex.*: 1899, Gulf C. & S. F. R. Co. *v.* Johnson, 92 Tex. 591, 50 S. W. 563; *U. S.*: 1900, McCullen *v.* C. & N. W. R. Co., 41 C. C. A. 365, 101 Fed. 66; 1900, Garrett *v.* Southern R. Co., ib. 237, 101 Fed. 102; *Va.*: 1896, Patteson *v.* R. Co., 94 Va. 16, 26 S. E. 393 (repudiating Bernard *v.* R. Co., 85 id. 792); 1897, Kimball *v.* Borden, 95 id. 203, 28 S. E. 207.

[5] 1892, Birmingham M. R. Co. *v.* Harris, 98 Ala. 326, 330, 13 So. 377 (analyzing preceding rulings and the statutory changes); 1895, Savannah F. & W. R. Co. *v.* McConnell, 94 Ga. 352, 21 S. E. 568; N. C. Code 1883, § 2326 (killing or injury of live-stock by railroad engines or cars, raises a presumption of negligence).

For the question whether a presumption applies in the case of an *injured employee*, see the following cases: 1892, Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 237, 31 N. E. 956; 1898, Hesse *v.* C. S. & H. R. Co., 58 Oh. 167, 50 N. E. 354; 1897, Peirce *v.* Kile, 26 C. C. A. 201, 80 Fed. 865.

[1] The following illustrate the question: 1886, Wakelin *v.* London & S. W. R. Co., L. R. 12 App. Cas. 41; Cal. C. C. P. 1872, § 1963, par. 4 (it is presumed "that a person takes ordinary care of his own concerns"); 1903, Cogdell *v.* R. Co., 132 N. C. 852, 44 S. E. 618; 1896, Sullivan *v.* R. Co., 175 Pa. 361, 34 Atl. 798. 1903, Baltimore & P. R. Co. *v.* Landrigan, 191 U. S. 461, 24 Sup. 137. Compare the doctrine of *judicial notice by the jury* (*post*, § 2570), where a related question arises.

[2] 1900, Jenkin *v.* Ins. Co., 131 Cal. 121, 63 Pac. 180; 1893, Sutherland *v.* Ins. Co., 87 Ia. 505, 508, 54 N. W. 453; 1894, Keene *v.* Acc. Ass., 161 Mass. 149, 150, 36 N. E. 891.

§ 2497). As to this latter part, the measure of persuasion, the "presumption" says nothing. As to the former part, the "presumption" implies what the other rule says, namely, that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; *i. e.*, to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it. But in a criminal case the term does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i. e.*, no surmises based on the present situation of the accused, — a caution particularly needed in criminal cases.[1] So far, then, as the "presumption of innocence" adds anything, it is merely a warning not to treat certain things improperly as evidence. 2. As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf,[2] declaring that "this legal presumption of innocence is to be regarded by the jury, in every case, as *matter of evidence*, to the benefit of which the party is entitled." But it cannot be regarded as "matter of evidence." No presumption can *be* evidence; it is a rule about the duty of producing evidence (*ante*, § 2490). This is, in itself, only a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words, — of the way of phrasing a rule upon the substance of which there is no dispute. But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice.[3]

[1] 1877, Scintillæ Juris, 28: "The truth is that, although the law pays a prisoner the compliment of supposing him to be wrongly accused, it nevertheless knows very well that the probabilities are in favor of the prosecutor's accusation being well founded. . . . Those who think thus [that a prisoner is more likely to be acquitted than a civil defendant, because of the reasonable-doubt rule] have failed to notice that it is more important to a man to look innocent than to be *prima facie* thought so. No [civil] defendant is brought through a hole in the floor; he is not surrounded by a barrier, nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the jail of his county." Compare Stephen, History of the Criminal Law, I, 397.

[2] Evidence, § 34.

[3] A glaring instance of this fault is to be found in the decision of Coffin *v.* U. S., 156 U. S. 432, 162 id. 664, 15 Sup. 394, 16 Sup. 943 (1896), where the opinion of the Court, proceeding upon the above phrase of Greenleaf as a leading authority, declares this "presumption" to be "evidence in favor of the accused." This opinion received apparent sanction in the later case of Allen *v.* U. S., 164 id. 492, 7 Sup. 154 (1896). But in Agnew *v.* U. S., 165 id. 36, 51, 17 Sup. 235 (1897), its particularly objectionable sentence declaring that "legal presumptions are treated as evidence" is referred to as "having a tendency to mislead"; in this case the trial Court had refused to give an offered instruction copying that sentence, and the refusal was held proper; so that the Agnew decision may perhaps be taken as a recantation to this extent of the unfortunate heresy put forward in the Coffin

(*b*) The various acts constituting the outward part of a crime are sometimes said to constitute a presumption of *malice* or *criminal intent*. But most of these instances are to-day understood to be either "conclusive presumptions," *i. e.* rules of substantive law defining the criminal act (*ante*, § 2492), or else mere inferences of fact (*ante*, § 2491) not affecting the accused with a duty to produce evidence.[4]

§ 2512. **Same**: (2) **Self-defence, Alibi, etc.** It is generally said that in criminal prosecutions the burden of proof is on the prosecution for all the facts that are material to the crime; so that, whether or not a particular fact is one which would in a civil action be of the nature of an affirmative excuse, it is nevertheless in a criminal prosecution a part of the burden (in both senses) for the prosecution. The absence of any affirmative pleadings by the accused, and the general policy of caution in favor of accused persons, seem to have been the theoretical and practical reasons for this result. Nevertheless, some inroads have of recent times been made upon this ortho-

case. It is to be observed that the opinion in the Agnew case (in 1897) was published subsequently to a notable lecture on the Presumption of Innocence, apropos of the Coffin case, delivered by Professor Thayer, at Yale University (in 1896), in which the history of the presumption was carefully examined, its meaning acutely expounded, and the fallacies of the opinion in the Coffin case exposed in detail; this lecture was reprinted in the learned lecturer's Preliminary Treatise on Evidence (1898), Appendix B, p. 551.

The fallacy of Coffin *v.* U. S. is substantially repudiated in the following cases: 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (there is not a "two-ply presumption" in favor of one who is charged with wife-murder; repudiating State *v.* Leabo, 84 id. 168); 1900, State *v.* Kennedy, 154 id. 268, 55 S. W. 293 (refusal to instruct on the presumption of innocence is not error where an instruction on reasonable doubt has been adequately given); 1896, People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079 (similar). The common phrase about the presumption of innocence is illustrated in the following cases: 1898, Bryant *v.* State, 116 Ala. 445, 23 So. 40; 1897, People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145. The following series of rulings shows the influence of the Coffin case: 1898, Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744 (the phrase sanctioned; but an instruction omitting it is not held erroneous); 1898, Bartley *v.* State, 55 id. 294, 75 N. W. 832 (the Coffin case noted; question left undecided); 1899, McVey *v.* State, 57 id. 471, 77 N. W. 1111 (following Bartley *v.* State).

If a legitimate presumption is raised, so as to create a duty for the accused to produce some evidence to the contrary, and he does not do so, there is no reason why the jury may not be required to find according to the presumption (*ante*, § 2495); *e. g.*, 1897, Agnew *v.* U. S., 165 U. S. 36, 17 Sup. 235 (fraudulent intent presumed from false accounts, in the absence of evidence to the contrary sufficient to raise a reasonable doubt). But if the accused does adduce some evidence, and thus the case comes into the hands of the jury free from the presumption, the rule about persuasion beyond a reasonable doubt (*ante*, § 2497) is in force throughout for measuring their belief, and they must be so persuaded, in spite of the rule of presumption; this is sometimes incorrectly expressed by saying that the presumption of innocence *overcomes presumptions against the accused*: 1903, Walton *v.* State, — Ark. — , 75 S. W. 1 (seduction; chastity being presumed, "the presumption of innocence of the defendant overcomes the presumption of chastity"); 1896, People *v.* Sanders, 114 Cal. 216, 46 Pac. 153 (overcoming the presumption of regularity of official acts); 1897, Dunlop, *v.* U. S., 165 U. S. 486, 17 Sup. 375 (the rule does not apply where the other presumption "constitutes a link in the chain of evidence against the defendant"). Other examples are found under the presumption about marriage (*ante*, § 2506).

[4] Cases illustrating a presumption of *malice* from the *use of a deadly weapon*: 1892, Gilbert *v.* State, 90 Ga. 691, 16 S. E. 652; 1878, Farris *v.* Com., 14 Bush 362, 368; 1845, Com. *v.* York, 9 Metc. 93, 103; 1855, Com. *v.* Hawkins, 3 Gray 463 (leading opinion, by Shaw, C. J.); 1893, People *v.* Wolf, 95 Mich. 625, 630, 55 N. W. 357; 1898, Herman *v.* State, 75 Miss. 340, 22 So. 872; 1896, Territory *v.* Lucero, — N. M. — , 46 Pac. 18; 1676, Thomas *v.* People, 67 N. Y. 218, 224; 1892, State *v.* Whitson, 111 N. C. 695, 699, 16 S. E. 332; 1873, State *v.* Patterson, 45 Vt. 308. Cases illustrating a presumption of felonious intent from the *taking of goods*: 1902, Long *v.* State, — Fla. — , 32 So. 870; 1898, State *v.* Judd, 20 Mont. 420, 51 Pac. 1033. These and analogous rules can only be disentangled by a detailed consideration of the substantive law of the crime in question.

There is no real presumption of guilt from *flight*; compare the cases cited *ante*, § 276, and the following: 1899, Smith *v.* State, 106 Ga. 673, 32 S. E. 851; 1898, State *v.* Adler, 146 Mo. 18, 47 S. W. 794.

dox principle, and in many jurisdictions it is accepted that the burden of proof may for certain sorts of facts be upon the accused. Certainly, the second burden, *i. e.* the duty of producing some evidence (*ante*, § 2487), ought in many instances to be upon the accused. The absence of affirmative pleadings in defence is no insuperable objection to such a result. The judicial experience with certain issues on criminal trials has seemed to justify such exceptions; and the fixing of a particular fact on this or that party as a part of his case is in general only a question of sound policy as based on experience (*ante*, § 2486).

(*a*) A few Courts seem in general to place on the accused some sort of burden of proof for any fact in the nature of *excuse* or *mitigation*.[1] (*b*) A few Courts seem to place upon the accused the burden of showing that he acted in *self-defence*.[2] (*c*) It is generally conceded that the accused does not have the burden of proving an *alibi*.[3] (*d*) In sundry other instances, a naturally affirmative defence is sometimes apportioned to the accused's burden.[4]

[1] For example: 1899, Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811 (risk of non-persuasion of guilt is always on the prosecution, but the defendant has a duty to produce evidence of any justification; the opinion is not entirely clear); 1897, State *v.* Byrd, 121 N. C. 684, 28 S. E. 353 (burden is on the defendant to show excuse or mitigation). *Contra*, to some extent: 1898, Appleton *v.* People, 171 Ill. 473, 49 N. E. 708 (under Cr. Code § 155, it is not necessary for a defendant to "satisfactorily establish his defence"); 1898, Herman *v.* State, 75 Miss. 340, 22 So. 872 (the burden of proving an excuse is not on the defendant).

[2] The judicial language is seldom entirely clear as to the nature of the burden. The following cases illustrate both views: 1892, Roden *v.* State, 97 Ala. 54, 57, 12 So. 419 (assault with intent; the burden is on the defendant); 1893, Boulden *v.* State, 102 id. 78, 83, 15 So. 341 (similar); 1895, Dent *v.* State, 105 id. 14, 17 So. 94 (the burden is on the prosecution); 1896, Scheerer *v.* Agee, 113 id. 383, 21 So. 79 (the risk of non-persuasion beyond reasonable doubt is on the prosecution); 1898, People *v.* Milner, 122 Cal. 171, 54 Pac. 833 (the burden is on the defendant); 1898, State *v.* Shea, 104 Ia. 724, 74 N. W. 687 (the burden is on the prosecution, nor has the defendant a duty of producing evidence); 1899, Tucker *v.* State, 89 Md. 471, 43 Atl. 778 (the burden is on the defendant to persuade by a preponderance); 1897, Strother *v.* State, 74 Miss. 447, 21 So. 147 (the burden is on the prosecution); 1897, King *v.* State, ib. 576, 21 So. 235 (same); 1894, Gravely *v.* State, 38 Nebr. 871, 57 N. W. 751 (the burden is on the prosecution, without shifting); 1894, State *v.* Barringer, 114 N. C. 840, 19 S. E. 275 (the defendant must prove it "to the satisfaction of the jury"); 1895, Com. *v.* Mika, 171 Pa. 273, 33 Atl. 65 (if a killing by the defendant is proved, the prosecution has the burden of raising it to the first degree, and the defence that of reducing it below the second degree); 1899, State *v.* Yokum, 11 S. D. 544, 79 N. W. 835 (the burden is on the defendant); 1903, Rutherford *v.* Foster, 60 C. C. A. 129, 125 Fed. 187 (in a civil case, the burden is on the defendant); 1894, Vance *v.* Com., — Va. — , 19 S. E. 785; 1894, Myers *v.* Com., 90 id. 705, 19 S. E. 881; 1895, State *v.* Zeigler, 40 W. Va. 593, 21 S. E. 763 (doubtful).

[3] 1896, Towns *v.* State, 111 Ala. 1, 20 So. 598 (the defendant must produce evidence, but the prosecution has the risk of non-persuasion beyond reasonable doubt); 1897, Pickens *v.* State, 115 id. 42, 22 So. 551; James *v.* State, ib. 83, 22 So. 565; 1898, Schultz *v.* Terr., — Ariz. — , 52 Pac. 352 (the defendant has no burden); 1898, People *v.* Roberts, 122 Cal. 377, 55 Pac. 137 (the burden is on the prosecution); 1899, People *v.* Winters, 125 id. 325, 57 Pac. 1067 (the defendant must introduce evidence, but need not persuade by preponderance); 1897, McNamara *v.* People, 24 Colo. 61, 48 Pac. 541 (the burden is on the prosecution); 1897, State *v.* Ardoin, 49 La. An. 1145, 22 So. 620 (similar); 1895, State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110 (similar); 1899, State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (the duty of production, but not the risk of non-persuasion, is on the defendant); 1897, Beck *v.* State, 51 Nebr. 106, 70 N. W. 498 (the defendant need not persuade by a preponderance); 1898, Peyton *v.* State, 54 id. 188, 74 N. W. 597 (burden of proof remains on prosecution throughout); 1896, Borrego *v.* Territory, 8 N. M. 446, 46 Pac. 349 (the defendant need not persuade by a preponderance); 1897, Wright *v.* Terr., 5 Okl. 78, 47 Pac. 1069 (the burden is on the prosecution); 1897, State *v.* Thornton, 10 S. D. 349, 73 N. W. 196 (the defendant has the duty of producing evidence; but the prosecution's case must still be made out to the jury beyond a reasonable doubt).

[4] For example, in the *illegal sale of liquor*, the defendant must prove a *license:* 1896, Hornberger *v.* State, 47 Nebr. 40, 66 N. W. 23; 1897, Durfee *v.* State, 53 id. 214, 73 N. W. 676 (the

§ 2513. **Same: (3) Possession of Stolen Goods.** One of the most troublesome and fruitless controversies has been whether under certain circumstances the accused's possession of stolen goods raises a presumption that he was the thief. It had long been customary in England to use the language of presumptions for such a situation;[1] but whether the language was intended merely to mean that the specific fact alone was sufficient evidence on which the jury *might* reach a conviction if they desired (*ante*, § 2494), or whether it meant that the specific fact alone created a presumption, *i. e.* placed on the accused a duty of producing evidence, so that if he failed to do so (that is, to offer any "explanation") the jury *must* convict (*ante*, § 2490), was seldom made clear. This obscurity has continued in the judicial rulings in the United States;[2] but among the numerous precedents most seem to repudiate any rule of presumption in the strict sense.[3]

mere possession, irrespective of explanation, raises a presumption of guilt, and shifts the "burden . . . to establish" lawful possession); 1898, Parker *v.* State, 61 N. J. L. 308, 39 Atl. 651; 1897, State *v.* Shelton, 16 Wash. 590, 48 Pac. 258. In some cases, the burden is clearly stated to be merely the second kind, *i. e.* the duty of producing evidence: 1897, State *v.* Lee, 69 Conn. 186, 37 Atl. 75 (under a statute making an abortion criminal, unless necessary to save life, the necessity must be evidenced by the defendant).

[1] 1836, R. *v.* Cockin, 2 Lew. Cr. C. 235, and note by the Reporter; 1845, R. *v.* Dredge, 1 Cox Cr. 235; 1854, R. *v.* Burton, Dears. Cr. C. 282; 1860, R. *v.* Harris, 8 Cox Cr. 333; 1866, R. *v.* Exall, 4 F. & F. 925 (leading case); 1878, R. *v.* Hughes, 14 Cox Cr. 223.

[2] 1902, Weaver, J., in State *v.* Brady, — Ia. —, 91 N. W. 801: "The use of the terms 'presumption of guilt' and '*prima facie* evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. In a civil proceeding, when a plaintiff makes a *prima facie* case, the burden is shifted, and, in the absence of any countershowing, he is entitled to recover as a matter of law. This rule is understood by the average intelligent layman as well as by those learned in the law; and when, in a criminal case, an instruction is given that the showing of a specific fact is *prima facie* evidence of guilt, jurors may very naturally conclude that the establishment of such fact has the effect to cast upon defendant the burden of proving his innocence of the charge against him. . . . 'Presumptions' of guilt and '*prima facie*' cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with which he is charged."

[3] The following cases illustrate the bearings of the question in most jurisdictions; compare the cases cited *ante*, § 152; *Ala.:* 1898, Bryant *v.* State, 116 Ala. 445, 23 So. 40; 1899, Hale *v.* State, 122 id. 85, 26 So. 236; 1902, Smith *v.* State, 133 id. 145, 31 So. 806; *Ariz.:* 1901, Taylor *v.* Terr., — Ariz. — 64 Pac. 423; *Cal.:* 1898, People *v.* Luchetti, 119 Cal. 501, 51 Pac. 707 (an explanation entitles the matter to be left to the jury); 1901, People *v.* Jay, 135 id. xix, 66 Pac. 964; 1902, People *v.* Wilson, ib. 331, 67 Pac. 322; *Colo.:* 1897, Brooke *v.* People, 23 Colo. 375, 48 Pac. 502 (the defendant must explain, but not as a rule of going forward; and the prosecution's general burden remains); 1899, Van Straaten *v.* People, 26 id. 184, 56 Pac. 905; *Fla.:* 1895, Leslie *v.* State, 35 Fla. 171, 17 So. 555; 1899, Williams *v.* State, 40 id. 480, 25 So. 143; *Ga.:* 1892, Cornwall *v.* State, 91 Ga. 277, 281, 18 S. E. 154; 1895, Brooks *v.* State, 96 id. 353, 23 S. E. 413; 1898, Davidson *v.* State, 104 id. 761, 30 S. E. 946; 1898, Jones *v.* State, 105 id. 649, 31 S. E. 574; 1898, Sharpe *v.* State, ib. 588, 31 S. E. 541; 1901, Turner *v.* State, 114 id. 45, 39 S. E. 863; *Ida.:* 1901, State *v.* Sanford, — Ida. —, 67 Pac. 492; *Ill.:* 1896, Keating *v.* People, 160 Ill. 480, 43 N. E. 724; 1902, Williams *v.* People, 196 id. 173, 63 N. E. 681; 1903, Watts *v.* People, 204 id. 233, 68 N. E. 563; *Ind.:* 1866, Doan *v.* State, 26 Ind. 495 (it is not his failure to explain "where it is in his power to do so," because if he was able to explain innocently, though he did not choose to, by hypothesis he is not guilty; but his ability to explain *if* he were innocent and his then failure); 1897, Pfau *v.* State, 148 id. 539, 47 N. E. 926; 1898, Campbell *v.* State, 150 id. 74, 49 N. E. 905 (it is a "strong presumption of fact," *i. e.* in the absence of satisfactory explanation, "the jury were legally bound to find him guilty"; but the Court erroneously declares that a "strong presumption of fact" would have the same effect as a rebuttable presumption of law; the preceding authorities reviewed); *Ind. T.:* 1896, Oxier *v.* U. S., 1 Ind. T. 85, 38 S. W. 331; *Ia.:* 1895, State *v.* LaGrange, 94 Ia. 60, 62 N. W. 664; 1899, State *v.* Miner, 107 id. 656, 78 N. W. 679; 1903, State *v.* Williams, 120 id. 36, 94 N. W. 255; 1903, State *v.* King, — id. —, 96 N. W. 712; *Kan.:* 1894, State *v.* Hoffman, 53 Kan. 700, 708, 37 Pac. 138 ("if

If no rule of presumption is to be accepted, specific limitations are hardly of any consequence, for the sufficiency of the evidence to go to the jury will usually depend on the variant circumstances of each case. But the following considerations have been emphasized, from the point of view of a definite rule: (*a*) The possession must be *unexplained* by any innocent origin;[4] (*b*) the possession must be fairly *recent*;[5] (*c*) and the possession must be *exclusive*.[6] Furthermore, if there is any rule at all, it is generally conceded to apply also on a charge of *knowing receipt* of stolen goods,[7] and of *burglary* or the like.[8]

In many additional instances, by statute, a rule of presumption or of "*prima facie* evidence" has been declared against persons found in possession of forbidden articles, such as game or liquor;[9] but these rules involve closely the substantive law of the respective crimes.

unexplained, may be sufficient"); 1899, State *v.* Powell, 61 id. 81, 58 Pac. 968; 1902, State *v.* Herron, 64 id. 363, 67 Pac. 861; *La.:* 1898, State *v.* Kelley, 50 La. An. 597, 23 So. 543 (possession of recently stolen property, not accounted for, raises the presumption); *Mass.:* 1869, Com. *v.* Bell, 102 Mass. 165; 1875, Com. *v.* Randall, 119 id. 107; *Mo.:* 1897, State *v.* Wilson, 137 Mo. 592, 39 S. W. 80; *Nev.:* 1898, State *v.* Mandich, 24 Nev. 336, 54 Pac. 516; *N. D.:* 1900, State *v.* Rosencrans, 9 N. D. 163, 82 N. W. 422; *Okl.:* 1897, Johnson *v.* Terr., 5 Okl. 695, 50 Pac. 90; 1898, Douthitt *v.* Terr., 7 id. 55, 54 Pac. 312 (it is "a circumstance" only); *Or.:* 1896, State *v.* Pomeroy, 30 Or. 16, 46 Pac. 797 (it depends on "the character of the property, the nature of the possession, and its proximity in time with the theft"); *U. S.:* 1901, Considine *v.* U. S., 50 C. C. A. 272, 112 Fed. 342; *Vt.:* 1898, State *v.* Peach, 70 Vt. 283, 40 Atl. 732 (unexplained possession may be considered); *Wash.:* 1893, State *v.* Walters, 7 Wash. 246, 257, 34 Pac. 938, 1098 (no presumption; but the Court whimsically treat a charge calling such possession "a criminating circumstance tending to show" guilt as if it laid down a rule of law; this is strange distortion of words); 1902, State *v.* Bliss, 27 id. 463, 68 Pac. 87; *Wyo.:* 1903, Younger *v.* State, — Wyo. — , 73 Pac. 551.

[4] This is noted in many of the cases *supra*.

[5] 1836, R. *v.* Cockin, 2 Lew. Cr. C. 235 (sacks stolen in February were found in the defendant's possession some twenty days after; Coleridge, J.: "If I was now to lose my watch, and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it. But if a month hence it were to be found in your possession, the presumption of your having stolen it would be greatly weakened; because stolen property usually passes through many hands"); 1845, R. *v.* Hall, 1 Cox Cr. 231 (possession of a shirt, six months after it was missed; Pollock, C. B., and Coleridge, J.: "There is a certain period after which I should think it very unfair to assume theft from mere possession, even where the property is proved *aliunde* to have been stolen"); 1898, State *v.* Foulk, 59 Kan. 775, 52 Pac. 864.

[6] 1896, Moncrief *v.* State, 99 Ga. 295, 25 S. E. 735 (the possession of the house must be exclusive); 1892, State *v.* Owsley, 111 Mo. 450, 455, 20 S. W. 194 (goods found in a house of the defendant's wife where he did not live; not sufficient). Compare the following: 1900, Sparks *v.* State, 111 Ga. 830, 35 S. E. 654 (what constitutes possession, examined).

[7] 1864, R. *v.* Langmead, Leigh & C. 427 (Blackburn, J.. "I should have said that recent possession was evidence either of stealing or receiving according to circumstances. . . . When it has been shown that property has been stolen and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances"); 1899, State *v.* Guild, 149 Mo. 370, 50 S. W. 909 (overruling State *v.* Bulla, 89 id. 595, 1 S. W. 764).

[8] 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (if a breaking and entering at the time of taking is shown); 1899, Lester *v.* State, 106 Ga. 371, 32 S. E. 335 (admissible, if the fact of breaking and entering is first shown); 1902, State *v.* Brady — Ia. — , 91 N. W. 801 (burglary; local rulings reviewed); 1902, State *v.* Brundige, 118 id. 92, 91 N. W. 920 (breaking and entering with intent to steal); 1903, State *v.* Swift, 120 id. 8, 94 N. W. 269; 1893, State *v.* Moore, 117 Mo. 395, 404, 22 S. W. 1086; 1898, State *v.* Hodges, 144 id. 50, 45 S. W. 1093 (forged articles); 1902, State *v.* Yandle, 166 id. 589, 66 S. W. 532; 1897, Johnson *v.* Terr., 5 Okl. 695, 50 Pac. 90; 1896, Wilson *v.* U. S., 162 U. S. 613, 16 Sup. 895 (fruits of any crime; here money and clothes of the deceased); 1900, Henderson *v.* Com., 98 Va. 794, 34 S. E. 881. Compare the following: 1894, People *v.* Hart, 10 Utah 204, 207, 37 Pac. 330 (mere recent possession with no other circumstance, insufficient, on a charge of burglary; misapplying the rule of § 2273, *ante*, that failure to testify creates no inference); 1897, Kibler *v.* Com., 94 Va. 804, 26 S. E. 858 (no presumption from possession of the fruits of a crime).

[9] *E. g.:* Mass. Pub. St. 1882, c. 94, § 4 (possession of timber with the marks cut out, etc.,

§ 2514. **Same**: (4) **Capacity (Infancy, Intoxication, Coverture)**. Capacity is naturally a part of the first burden of proof for the prosecution, although the second burden might well be aided, in the appropriate classes of cases, by a presumption of capacity (*ante*, § 2487). For *infancy*, the so-called conclusive presumption of incapacity of criminal intent under the age of seven is of course genuinely a rule of substantive law that the infant "cannot be guilty of felony," as Blackstone correctly puts it.[1] The rule that incapacity is presumed between the ages of seven and fourteen, for sundry crimes,[2] and for rape in particular,[3] is more correctly stated as a presumption of capacity above the age of fourteen. For *insanity*, the incidence of the burdens has already been considered (*ante*, § 2501). For *intoxication*, no doubt the second burden (of producing some evidence) is on the accused;[4] though the first burden (or risk of non-persuasion) remains on the prosecution.[5] For *coverture*, the coercion of the husband, which in Blackstone's correct phrase may be "an excuse for criminal misconduct" of the wife, may be presumed from the husband's presence; this then creates for the prosecution a duty of adducing evidence of the wife's willing participation; the risk of non-persuasion remaining throughout upon the prosecution.[6]

§ 2515. **Ownership**; (1) **Possession of Land and Personalty**. Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership;[1] the emphasis being on the occupation, or appearance of ownership, and not on the documentary sources of claim;[2] and the rule serving merely to shift to the opponent the second burden, or duty of producing some evidence to the contrary.[3] The same rule serves in

raises a presumption of the possessor's unlawful cutting). For instances of the *admissibility* of this class of evidence, see *ante*, §§ 149, 153, 154.

[1] Commentaries, III, 23. For rape and kindred crimes, the age of fourteen was taken: 1839, R. *v.* Philips, 8 C. & P. 736; 1839, R. *v.* Jordan, 9 id. 118; but a distinction may be made as to assault with intent: 1824, Com. *v.* Green, 2 Pick. 380.

[2] 1848, State *v.* Goin, 9 Humph. 174.

[3] 1893, Sutton *v.* People, 145 Ill. 279, 286, 34 N. E. 420 (rape; defendant must offer evidence that he is under 14 years of age).

[4] 1894, State *v.* Hill, 46 La. An. 27, 14 So. 294.

[5] 1898, Davis *v.* State, 54 Nebr. 177, 74 N. W. 599 (burden of proof remains on prosecution throughout).

[6] 1886, Com. *v.* Flaherty, 140 Mass. 454, 5 N. E. 258; 1887, Com. *v.* Hill, 145 id. 305, 307, 14 N. E. 124; 1891, State *v.* MaFoo, 110 Mo. 7, 19 S. W. 222; 1880, Goldstein *v.* People, 82 N. Y. 231; 1886, Franklin's Adm'r's Appeal, 115 Pa. 534, 538, 6 Atl. 70.

[1] The inference rests on the general principle of Relevancy examined *ante*, § 148. To the following cases, add those cited *ante*, § 1789, where this presumption comes into play: Cal. C. C. P. 1872, § 1963, par. 11, 12 (it is presumed "that things which a person possesses are owned by him," and "that a person is the owner of property, from exercising acts of ownership over it, or from common reputation of his ownership"); 1903, Cahill *v.* Cahill, 75 Conn. 522, 54 Atl. 201 (land); 1893, Teass *v.* St. Albans, 38 W. Va. 1, 22, 17 S. E. 400 (land); Sedgwick & Wait, Trial of Title to Land, § 717.

Distinguish the presumption of a *lost grant* from long-continued possession (*post*, § 2522).

[2] 1897, Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922 (deed from grantor, without possession by grantor or grantee, raises no presumption of ownership); 1899, Glos *v.* Huey, 181 id. 149, 54 N. E. 905 (similar); 1895, Newcastle *v.* Haywood, 68 N. H. 179, 44 Atl. 132 (similar).

[3] This is connected with other rules of substantive law, such as the rule that in ejectment the claimant must recover on the strength of his own title and not the weakness of his opponent's.

There are also occasional rules as to the shifting of the second burden in evidencing the various elements under an *adverse possession*: 1842, Brown *v.* King, 5 Metc. 173 (writ of entry; a title by disseisin being set up, held, that mere possession by the claimant did not suffice to put the burden of proof on the titular owner to show that possession to be permissive; the burden of showing adverseness was on the claimant throughout); 1894, Skinner *v.* Skinner, 38 Nebr. 756, 766, 57 N. W. 534 (the exclusive possession of land with the titular owner's knowledge may create a presumption of his permission); 1866,

the evidencing of ownership of personalty, particularly in cases of larceny or robbery, where a real dispute of ownership is rare.[4]

§ 2516. **Same**: (2) **Possession of Negotiable Instrument.** Subject to some discriminations, the same presumption may be applied to the possession of a negotiable instrument, especially to one indorsed in blank or to bearer.[1]

§ 2517. **Payment**: (1) **Lapse of Time.** The discharge of a claim by payment is often said to be presumed after a lapse of time depending on the circumstances of the particular case; the inference being based on the principle of Relevancy already examined (*ante*, § 159). But the multiplied statutes of limitation have reduced the occasions for invoking any other rule, and it is not frequent that a real rule of presumption is intended to be laid down.[1]

§ 2518. **Same**: (2) **Possession of Instrument or Receipt.** A *receipt* is only an ordinary admission of payment, and is therefore not conclusive (*ante*, § 2432); but it is of course the strongest evidence, and some Courts seem to give it the force of a real presumption.[1] The *obligor's possession of the instrument* after maturity is usually said to raise a presumption of payment;

Leport *v.* Todd, 32 N. J. L. 124 (a plaintiff in ejectment resting on adverse possession has the burden of showing that a possession originally permissive became adverse).

[4] Add some of the cases cited *ante*, § 1789: 1896, People *v.* Oldham, 111 Cal. 648, 44 Pac. 312 (robbery or larceny); 1901, Howard *v.* People, 193 Ill. 615, 61 N. E. 1016 (robbery); 1867, Sullivan *v.* Goldman, 19 La. An. 12 (presumption of plaintiff's continued ownership of a horse, held not overturned by presumption of ownership from defendant's possession); 1866, Vining *v.* Baker, 53 Me. 544 (trover); 1851, Magee *v.* Scott, 9 Cush. 148; 1865, Currier *v.* Gale, 9 All. 522; 1892, Com. *v.* Blanchette, 157 Mass. 486, 489, 32 N. E. 658 (obtaining goods by false pretences); 1900, Liscomb *v.* R. Co., 70 N. H. 312, 48 Atl. 284 (gift of decedent); 1877, Rawley *v.* Brown, 71 N. Y. 85 (replevin).

For the application of this rule to property in possession of *husband* or *wife*, see the following cases: 1893, Farwell *v.* Cramer, 38 Nebr. 61, 66, 56 N. W. 716; 1886, Kingsbury *v.* Davidson, 112 Pa. 383, 4 Atl. 33.

Sometimes a reverse presumption may be invoked, of *possession from ownership:* 1896, Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940 (that a wagon was owned by defendant shows *prima facie* that his servant was in control).

[1] The following cases illustrate the scope of the rule: 1894, National Bank *v.* Emmitt, 52 Kan. 603, 35 Pac. 213; 1897, Jones *v.* Jones, 102 Ky. 450, 43 S. W. 412 (rule not applied to an unindorsed note held adversely to the payee's representatives); 1901, Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760; 1898, Saunders *v.* Bates, 54 Nebr. 209, 74 N. W. 578; 1898, New England L. & T. Co. *v.* Robinson, 56 id. 50, 76 N. W. 415; 1893, Halsted *v.* Colvin, 51 N. J. Eq. 387, 398, 26 Atl. 928.

[1] Examples of the use of such a term are as follows: 1786, Oswald *v.* Leigh, 1 T. R. 270 (the defendant showed that he "had an estate in the plaintiff's neighborhood, and was constant and regular in all his payments"); 1829, Sellen *v.* Norman, 4 C. & P. 80 (presumption of wages paid, "if a servant has left a considerable time"); 1864, McCormick *v.* Evans, 33 Ill. 328 (after twenty years; here, money due under a contract to convey); 1879, Locke *v.* Caldwell, 91 id. 417, 421 (presumption not raised for a mortgage debt, where the statutory time of limitation had not run); 1898, Hollenbeck *v.* Ristine, 105 Ia. 488, 75 N. W. 355 (account stated); 1877, Jarvis *v.* Albro, 67 Me. 310, 313 (mortgage); 1894, Cox *v.* Brower, 114 N. C. 422, 423, 19 S. E. 365 (legacies; nor is it material that the legatees were non-residents, the domestic Courts being open to them); 1897, Young *v.* Doherty, 183 Pa. 179, 38 Atl. 587 (action on a note; the plaintiff's failure to mention it in the defendant's testator's lifetime, though "given to boasting of his means and the people in his debt," and his failure to bring suit on it, not received to show a presumable payment); 1898, Devereux's Estate, 184 id. 429, 39 Atl. 225 (the insolvency of the debtor alone does not rebut the presumption); 1893, King *v.* King, 90 Va. 177, 17 S. E. 894 (after twenty-seven years, a tender being originally made, and the parties living near each other).

[1] 1897, Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591; 1872, Guyette *v.* Bolton, 46 Vt. 228, 234. *Contra:* 1897, Terryberry *v.* Woods, 69 Vt. 94, 37 Atl. 246 (on a plea of payment, proof of a receipt does not shift the duty of going forward).

Such a presumption is sometimes applied to include *prior instalments* of the same obligation. Cal. C. C. P. 1872, § 1963, par. 10 (it is presumed "that former rent or installments have been paid when a receipt for later is produced"); 1853, Hodgdon *v.* Wright, 36 Me. 326, 336, *semble;* 1823, Brewer *v.* Knapp, 1 Pick. 337.

the inference being based on the principle of Relevancy already considered (*ante*, § 156); but there are various limitations laid down, in particular, concerning the obligor's opportunity of surreptitious access to the obligee's papers.[2]

§ 2519. **Execution and Contents of Document**: (1) **Letters and Telegrams.** The act of writing a letter or sending a telegram, and the addressee's receipt of the letter or telegram, give rise to questions both of the admissibility and the sufficiency of evidence. The same evidence is also sometimes said to raise a presumption. It is probable that no real presumption is meant to be predicated in the majority of these instances. For example, the receipt by Doe of an answer, through the mail or the telegraph, to his prior communication to Roe, is usually treated as sufficient evidence of Roe's *authorship* of the answer (*ante*, §§ 2153, 2154); and the mailing or depositing of Doe's letter or telegram to Roe is usually treated as sufficient evidence of Roe's *receipt* of it (*ante*, § 95); but it is seldom, except in the latter class of cases, that a burden of proof is deemed to be affected.[1]

§ 2520. **Same**: (2) **Execution of Deeds (Delivery, Date, Seal, Consideration).** (*a*) In view of the importance, in early times, of the formality of *delivery* for a deed (*ante*, §§ 2405, 2408, 2426), it was natural that the evi-

[2] With the following examples compare the cases cited *ante*, § 156: 1816, Gibbon *v.* Featherstonhaugh, 1 Stark. 225 (drawee's possession of a bill, held to be sufficient evidence); 1816, Brembridge *v.* Osborne, ib. 374 (possession of a note, said to "turn the scale"); 1816, Shepherd *v.* Currie, ib. 454 (possession of an order to deliver goods to bearer, held to shift the burden); 1894, Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 563, 25 S. W. 868 (presumption applied to a note possessed after maturity); Cal. C. C. P. 1872, § 1963, par. 9, 13 (it is presumed "that an obligation delivered up to the debtor has been paid," and "that a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly"); 1894, Grimes *v.* Hilliary, 150 Ill. 141, 149, 36 N. E. 977 (maker having access to payee's papers as member of the family; no presumption); 1893, Erhart *v.* Dietrich, 118 Mo. 418, 428, 24 S. W. 128 (son taking care of demented payee-father; presumption not applied); 1893, Smith *v.* Gardner, 36 Nebr. 741, 55 N. W. 245 (maker's possession of a note does not raise a presumption, but is merely sufficient evidence); 1832, Alvord *v.* Baker, 9 Wend. 323 (like Shepherd *v.* Currie, *supra*); 1898, Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951 (presumption applied to a note); 1902, Vann *v.* Edwards, 130 id. 70, 40 S. E. 853 (bond found after the death of the payee's administrator in the maker's possession, presumed paid); 1893, Collins *v.* Lynch, 157 Pa. 246, 256, 27 Atl. 721 (joint occupation of land by husband and wife; presumption not applied); 1899, Wilkinson's Est., 192 id. 117, 43 Atl. 466 (check and note of deceased husband found in a wife's possession; that she was executrix, held to raise no presumption that she had taken them from his possession after death and therefore that they were paid); 1898, Bates *v.* Cain's Estate, 70 Vt. 144, 40 Atl. 36 (possession of a note by a joint promisor is not presumptive of sole payment by him); 1893, First National Bank *v.* Harris, 7 Wash. 139, 143, 34 Pac. 466 (presumption applied to a maker's possession of a note after its issue into circulation).

[1] The cases are collected in the places above cited. Compare also § 2135, *ante* (authentication as a rule of presumption). The following cases illustrate the judicial looseness of language: 1828, McCourry *v.* Suydam, 10 N. J. L. 245 (mailing a notice of trial raises a presumption and "stands for proof" of service; but an affidavit of non-receipt "destroys the presumption"); 1897, State *v.* Howell, — id. — , 38 Atl. 748 (notice of claim; the above language quoted, with the extraordinary addition: "Of course, if there is such a presumption as is assumed, it is one of fact for the jury," and then declining to hold that a refusal to charge such a presumption is erroneous, but recommending attention to "the foregoing deliverance in this Court"; if they had recommended a page from the Sibylline books, they could not have left the trial judge in greater perplexity); 1899, Fairfield P. Co. *v.* Ins. Co., — Pa. — , 44 Atl. 317 (no presumption of receipt ordinarily from the mailing of a letter; but the opinion inconsistently says that (1) there is no presumption except for notices of commercial paper, and (2) there is no presumption for a notice of insurance loss, if there is rebutting evidence; is there then a presumption, or no presumption, where there is no rebutting evidence?).

dence of it should be strictly insisted on.[1] But there came gradually to be conceded some sort of rule of sufficiency or presumption, based on evidence of the signing only;[2] the inference being based on principles of Relevancy already considered (*ante*, §§ 92, 102). But the diminished importance of delivery as a formality has also been marked by other rules, more genuinely rules of Presumption, and resting on a somewhat different principle of Relevancy (*ante*, §§ 148, 157); the *grantee's possession* may raise a presumption of delivery,[3] and the *registration* of the deed may also raise it.[4]

(*b*) The *date* of the *signing* may be presumed from the purporting date of the document,[5] as also the date of the *delivery*;[6] though this might not always be made a rule of presumption.

(*c*) The *official seal* on a document is not only evidence of the authenticity of the seal and the authority of the person affixing it, but is commonly held to create a presumption of these facts (*ante*, §§ 2161–2169), and sometimes even an *official signature* alone is given the same effect (*ante*, § 2167). Whether a *certified copy* of an official or registered document can raise a presumption that the original bore a seal is a question which has led to difference of judicial opinion (*ante*, § 2108).

(*d*) Whether a *negotiable instrument* raises a presumption of a *consideration*,[7] and whether a subsequent *recorded deed* raises a presumption of *purchase for value without notice* of a prior unrecorded deed,[8] are questions which are inextricably entangled with the substantive law.

§ 2521. **Same**: (3) **Ancient Documents.** The authentic execution of a

[1] *Ante*, 1726, Gilbert, Evidence, 99 ("unless the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witness who saw the delivery").

[2] 1792, Grellier *v.* Neale, Peake 146 (proof of handwriting raises a presumption of sealing and delivery); 1840, Burling *v.* Paterson, 9 C. & P. 570, 572 (the witness could recollect seeing the signing only; an inference of sealing and delivery was allowed). This was applied also to an act of *criminal publication:* 1839, R. *v.* Lovett, 3 State Tr. 1177, 1181 (seditious libel; proof of handwriting is presumptive evidence of publication). Conversely, a *forging* may be presumed from an uttering: 1899, State *v.* Williams, 152 Mo. 115, 53 S. W. 424.

[3] Compare with the following the cases cited *ante*, § 157: 1893, Campbell *v.* Carruth, 32 Fla. 264, 271, 13 So. 432; 1896, Rohr *v.* Alexander, 57 Kan. 381, 46 Pac. 699; 1897, Jones *v.* N. Y. L. Ins. Co., 168 Mass. 66, 47 N. E. 92 (life insurance policy found among the intestate's papers, evidence of valid delivery). *Contra:* 1897, Bergere *v.* U. S., 168 U. S. 66, 18 Sup. 4 (possession of papers of grant by a grantee, held not to raise a presumption of delivery by the official having authority to grant).

[4] 1897, Davis *v.* Improvement Co., 118 Cal. 45, 50 Pac. 7; 1901, Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246. Compare the cases cited *ante*, § 1654 (admissibility of the registry of a deed); the substantive law, and statutory regulations, are here much involved.

So, too, the registration may raise a presumption of *execution generally;* compare the cases cited *ante*, §§ 1651, 1676, with the following: 1898, Anderson *v.* Cuthbert, 103 Ga. 767, 30 S. E. 244; 1898, Flynn *v.* Sullivan, 91 Me. 355, 40 Atl. 136.

[5] 1834, Smith *v.* Battens, 1 Moo. & R. 341; 1834, Hunt *v.* Massey, 5 B. & Ad. 902; 1837, Goodtitle *v.* Milburn, 2 M. & W. 853; 1838, Sinclair *v.* Baggaley, 4 id. 312 (leading opinion); 1840, Anderson *v.* Weston, 6 Bing. N. C. 300; Cal. C. C. P. 1872, § 1963, par. 23 (it is presumed "that a writing is truly dated"); 1898, McFarlane *v.* Louden, 99 Wis. 620, 75 N. W. 394. Compare the rule for *indorsements of payment* as statements against interest (*ante*, § 1466).

[6] 1898, Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460 (though acknowledged later); 1895, Kendrick *v.* Dellinger, 117 N. C. 491, 23 S. E. 438; 1873, Smiths *v.* Shoemaker, 17 Wall. 630, 637 (rule held not applicable to a letter whose admissibility depended on its actual date of delivery).

[7] 1881, Ames' Cases on Bills & Notes, II, 641, note 2; 1887, Perley *v.* Perley, 144 Mass. 104, 10 N. E. 726. The presumption of *consideration* from a *seal* is of course only a rule of substantive law: 1895, Ames, Specialty Contracts and Equitable Defences, Harvard Law Review, IX, 49; 1901, Harriman, Contracts, 2d ed., § 142.

[8] 1897, Gratz *v.* Land & R. I. Co., 27 C. C. A. 305, 82 Fed. 381.

specific document produced is also to be evidenced by the antiquity and custody of the document. With certain conditions, this is universally regarded as sufficient evidence for the jury (*ante*, §§ 2137–2146); and the language of presumption is also frequently applied by Courts to the same group of circumstances.[1]

§ 2522. **Same: (4) Lost Grant; Lost Documents in general.** (*a*) When a specific document not produced is offered to be proved by copy, the fact of *loss* may be evidenced in various ways, and occasionally the force of a presumption is attributed to some of them (*ante*, § 1196).

(*b*) When a *title to land* is to be proved, the *execution*, *contents*, and *loss* of the appropriate document of grant may be presumed from certain circumstances; the inference resting on a principle of Relevancy already considered (*ante*, §§ 148, 157). Those circumstances are the long-continued *possession* of the land (or an appurtenant right) by a party claiming as owner, the non-claim of possible opponents, and such other varying circumstances of the particular case as increase the probability of an origin of grant for the situation as a whole.[1] The situation is in essence the same as that for which the statutes of limitation have been provided. But these statutes did not wholly obviate the occasion for such a presumption, partly because they were at first limited in the scope of rights barred by them and were extended only by gradual stages, and partly because their originally lengthy periods still left room for a presumption based on a shorter period of possession. For appurtenant rights (such as easements or fisheries), and rights transferable at common law by deed of grant without livery, this presumption had formerly a great vogue; and it remained supplementary to statutes of limitation. But the systematic extension of the principle of acquisition by limitation, the reduction of the required possession to short periods, and (in the United States) the practice of compulsory registration of deeds of conveyance, have left little scope for the presumption. How far it had progressed as a rule of presumption is not always clear; in some opinions it appears as merely a rule of sufficiency of evidence for the jury (*ante*, § 2494), in others it is a genuine presumption (*ante*, § 2490), and in still others it is apparently a rule of substantive law equivalent to a statute of limitation. Its bearings in a given jurisdiction are more or less dependent on the analogies of the local statutes.[2]

[1] The cases are collected at the place above cited.

[1] 1818, Johnson, J., in Howell *v.* House, 2 Mill Const. 80, 85 ("It has been shown that a title may be presumed from length of possession alone; and why? Because it is improbable that a man of common sense and prudence would set down upon and improve lands to which he had no title, and more so that he who was the rightful owner would quietly stand by and see such a wrong done to himself").

[2] The following cases will illustrate its treatment by different Courts: *Eng.*: 1774, Eldridge *v.* Knott, Cowp. 214, Mansfield, L. C. J.: 1799, Roe *v.* Reade, 8 T. R. 118 (conveyance of a trust estate); 1829, Doe *v.* Cooke, 6 Bing. 174 (surrender of a term); 1867, Bryant *v.* Foot, L. R. 6 Q. B. 161 (customary marriage fee; leading opinions, by Blackburn, J., and Cockburn, C. J.); 1903, Brocklebank *v.* Thompson, 2 Ch. 344, 350; *Can.*: 1879, Pugsley *v.* Ring, 2 Pugs. & B. 303, 316; *U. S.*: 1899, Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008; 1830, Melvin *v.* Whiting, 10 Pick. 294 (fishery); 1839, Valentine *v.* Piper, 22 Pick. 85, 93 (shore land; leading opinion by Shaw, C. J.); 1867, Nichols *v.* Boston, 98 Mass. 39, 41 (shore land); 1892, Claflin *v.* R. Co., 157 id. 489, 499, 32 N. E. 659 (easement to cross a railway); 1894, Brown *v.* Oldham, 123 Mo. 621, 630, 27 S. W. 409; 1844, New Boston *v.* Dumbarton, 15 N. H. 201 (town charter); 1879, State *v.* Wright, 41 N. J. L.

§ 2523. **Same**: (5) **Will (Execution and Revocation)**. (*a*) The *execution* of a will may be evidenced by the testimonial assertion of the attesters, implied from their signatures, even when they themselves cannot be brought to the stand (*ante*, §§ 1511, 1512). This is often spoken of as a presumption, though probably no more than a rule of sufficiency of evidence is intended.[1]

(*b*) The *revocation* of a will by destruction may be inferred, on a principle of Relevancy already considered (*ante*, § 160), from the fact that it once existed but cannot be found at the testator's death. Whether this circumstance, with or without others, should create a rule of presumption, or of sufficiency of evidence, has been much debated.[2] Other inferences, or rules of presumption, concerning an implied intention to revoke, are closely connected with the substantive law of revocation.[3]

§ 2524. **Same**: (6) **Spoliation or Suppression of Documents**. The opponent's spoliation or suppression of evidential facts (*ante*, § 278), and particularly of a document (*ante*, § 291), has always been conceded to be a circumstance against him, and in the case of a document, to be some evidence that its contents are as alleged by the first party. But that a rule of presumption can be predicated is perhaps doubtful.[1]

§ 2525. **Same**: (7) **Alteration of Documents**. It used to be sometimes said that an alteration (*i. e.*, by erasure or interlineation), if apparent on the face of an instrument, placed on the offering party the burden of explanation by evidence. It was also (but inconsistently) said by some that the alteration was to be presumed innocent, *i. e.*, made before execution, unless particular circumstances of suspicion were apparent. For wills, again, it was sometimes maintained that, by exception, alterations should be presumed to have been made after execution. But the modern tendency is to avoid stating the problem in the form of such rules with exceptions, and, in particular, to abandon the so-called presumption against fraud and in favor of innocence, by which the alteration of a deed is presumed to have been made before execution; and to raise no genuine presumption in that regard (*ante*, § 2485). The

478 (tax exemption); 1875, Carter *v.* Tinicum Fishing Co., 77 Pa. 310, 315 (fishery); 1818, Howell *v.* House, 2 Mill Const. 80, 85 ("I know of no rule which has been established in this State fixing the minimum"); 1820, Duncan *v.* Beard, 2 N. & McC. 400, 406; 1849, Stockdale *v.* Young, 3 Strobh. 501 (land); 1860, Marr's Heirs *v.* Gilliam, 1 Coldw. 488, 501 (pointing out the distinction between this rule and a statute of limitations); 1893, Dunn *v.* Eaton, 92 Tenn. 743, 753, 23 S. W. 163; 1822, Ricard *v.* Williams, 7 Wheat. 59, 109 (opinion by Story, J.); 1859, Townsend *v.* Downer's Adm'r, 32 Vt. 183, 191, 204 (leading opinion, by Aldis, J.).

[1] The cases are collected at the place above cited.

[2] The following cases illustrate the different views: 1858, Brown *v.* Brown, 8 E. & B. 876; 1868, Sprigge *v.* Sprigge, L. R. 1 P. & D. 608; 1900, Allan *v.* Morrison, App. Cas. 604; 1901, Scott *v.* Maddox, 113 Ga. 795, 39 S. E. 500; 1886, *Re* Page, 118 Ill. 576, 580, 8 N. E. 852; 1895, Boyle *v.* Boyle, 158 id. 228, 233, 42 N. E. 140; 1903, Hamilton *v.* Crowe, — Mo. —, 75 S. W. 389; 1903, Williams *v.* Miles, — Nebr. —, 94 N. W. 705; 1830, Betts *v.* Jackson, 6 Wend. 173 (leading opinion, by Walworth, C.); 1903, McElroy *v.* Phink, — Tex. —, 76 S. W. 753; and a note to *Re* Augur (1899), 9 Yale Law Journal 259.

[3] For the mode of proof of a *lost will*, see *ante*, §§ 2052, 2106.

[1] The cases are collected in the places above cited. The following illustrate the use of language of presumption: 1895, Fox *v.* Mining Co., 108 Cal. 369, 41 Pac. 308 (the method of a trespasser's dealing with ore wrongfully mined was held not to be such as to raise this presumption against him so as to entitle the plaintiff to reckon the value by a particular standard); 1857, Thompson *v.* Thompson, 9 Ind. 323, 331 (presumption not conclusive); 1856, Hunt *v.* Collins, 4 Ia. 56, 62; 1896, Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073 (books of account).

first burden would thus be determined by the pleadings; and the question would usually go to the jury, upon all the evidence, whether the party claiming a specific tenor for the document has proved his case; although the second burden (*ante*, § 2487), *i. e.*, of producing evidence, might be shifted by particular circumstances, under the ruling of the judge as to a sufficiency of evidence or a presumption.[1]

[1] The following cases illustrate the rules; the older forms of statement are now seldom found; for the older law, now generally modified or abolished, that any material alteration of an instrument, by any person whatever, after its execution, made the instrument void, see the exhaustive citations in Professor Williston's article, Discharge of Contracts by Alteration, 1904, Harv. L. Rev., XVIII, 105: *England:* 1818, Johnson *v.* Duke of Marlborough, 2 Stark. 313 (date of a bill of exchange); 1844–6, Cooper *v.* Bockett, 4 Moore P. C. 419, 449 (will; leading opinion, by Lord Brougham); 1851, Doe *v.* Catomore, 16 Q. B. 745 (deed); 1851, Doe *v.* Palmer, ib. 747, 755 (will); 1851, Simmons *v.* Rudall, 1 Sim. N. S. 115 (will); 1860, Williams *v.* Ashton, 1 Johns. & Hem. 115 (will; good opinion by Page-Wood, V. C.); 1868, Cadge's Goods, L. R. I P. & D. 543 (will); *Canada:* 1874, Doe *v.* Daniel, 15 N. Br. 372 (will); 1893, *Re* Lawson, 25 N. Sc. 454 (will); 1870, Northwood *v.* Keating, 17 Grant U. C. 347, 18 id. 643 (mortgage); 1899, Graystock *v.* Barnhart, 26 Ont. App. 545 (registered deed); *United States: Ala.:* 1898, Ward *v.* Cheney, 117 Ala. 238, 22 So. 996 (assignment used by the plaintiff to show title; whether interlineations were apparent and suspicions were sufficiently explained, held a question for the trial Court); *Cal.:* C. C. P. 1872, § 1982 ("The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made by the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do this, he may give the writing in evidence, but not otherwise"); *Colo.:* C. C. P. 1891, § 357; *Conn.:* 1872, Hayden *v.* Goodnow, 39 Conn. 164 (the party producing does not necessarily account for alterations; each case depends on its own circumstances); *D. C.:* 1894, Peugh *v.* Mitchell, 3 D. C. App. 321 (action to annul a deed for alteration, the material alterations being in a different hand and ink; not presumed made before execution); *Ga.:* 1892, Bedgood *v.* McLain, 89 Ga. 793, 796, 15 S. E. 670 (defendant claiming under sheriff's deed interlined by the sheriff; presumed to exist before execution); 1893, Westmoreland *v.* Westmoreland, 92 id. 233 (deed offered to show color of title; alterations presumed prior to execution, on the facts); 1896, Winkles *v.* Guenther, 98 id. 472, 25 S. E. 527 (Code § 3835 applied); 1903, Heard *v.* Tappan, 116 id. 930, 43 S. E. 375; *Haw.:* 1890, Kahai *v.* Kamai, 8 Haw. 694; *Ida.:* 1897, Mulkey *v.* Long, 5 Ida. 213, 47 Pac. 949 (held sufficient to show that the alteration in a note had not been made since it came into the offeror's hands); *Ill.:* 1899, Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214 (deed offered in a chain of title; no presumption declared as to time of alterations; the question being one of fact, and the party producing the document being called upon to explain; precedents reviewed); 1901, Merritt *v.* Boyden, 191 id. 136, 60 N. E. 907; *Ia.:* 1890, Hagan *v.* Merchants' Ins. Co., 81 Ia. 321, 46 N. W. 1114 (action on an insurance policy; held that the mere fact of alteration furnished no presumption as to the time of making it or the authority for it, and that the burden of producing evidence that it was made after delivery was on the defendant); 1895, McGee *v.* Allison, 94 id. 527, 63 N. W. 323 (the burden is on the party attacking the instrument); 1903, Rambousek *v.* Supreme Council, 119 id. 263, 93 N.W. 277; *Mass.:* 1840, Davis *v.* Jenney, 1 Metc. 221 (bill of exchange); 1850, Wilde *v.* Armsby, 6 Cush. 314 (contract of guarantee); 1856, Ely *v.* Ely, 6 Gray 439 (mortgage; good opinion by Dewey, J.); *Mich.:* 1873, Comstock *v.* Smith, 26 Mich. 306 (deed; good opinion by Graves, J.); *Mo.:* 1898, Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300 (specific performance of an agreement to sell land; burden placed on the plaintiff); *Nebr.:* 1894, Courcamp *v.* Weber, 39 Nebr. 533, 537, 58 N. W. 187 (foreclosure with a note bearing material alterations; plaintiff required to show their authenticity); 1896, Stough *v.* Ogden, 49 id. 291, 68 N. W. 516 (the question is "in the end, one of fact for the jury, upon all of the evidence adduced"; here, an action on a note according to the altered form); 1903, Brown *v.* Kennedy, — id. —, 93 N. W. 1073; *Nev.* Gen. St. 1885, § 3450; *N. H.:* 1840, Hills *v.* Barnes, 11 N. H. 395 (note); *N. J.:* 1871, Hunt *v.* Gray, 35 N. J. L. 227 (the mere fact that a writing of contract shows a change does not of itself create a presumption of alteration after execution); 1802. Ward *v.* Wilcox, 64 N. J. Eq. 303, 51 Atl. 1094 (will; the burden is on the contestant); *N. Y.:* 1884, Crossman *v.* Crossman, 95 N. Y. 145 (will); *Pa.:* 1893, Nesbitt *v.* Turner, 155 Pa. 429, 436, 26 Atl. 750 (action against a woman as bond-surety; the date was altered from time during coverture to time after coverture; the burden placed on the plaintiff to show alteration before execution); *S. D.:* 1897, Moddie *v.* Breiland, 9 S. D. 506, 70 N. W. 637 (after proof of signature, the duty of producing evidence that the alteration was before delivery rests on the maker, and, *semble*, also the burden of persuasion); 1897, Foley-

§ 2526. **Gifts and Trusts (Wife's Separate Estate, Child's Advancement, Child's Services, etc.).** The pecuniary transactions between members of a family are sometimes made the subject of presumptions, based on the probable motive and intent. It can hardly be said that these rules are uniform, or are universally recognized. Examples of them are the presumption of a *gift* (instead of a trust) of separate estate handed by a wife to her husband;[1] of an *advancement* (in anticipation of succession after death) in a transfer from a parent to a child;[2] of a gift, or mere performance of duty, in *services rendered by a child* to a parent;[3] of *community-ownership* of property acquired during marriage;[4] of *intent to defraud creditors* in a transfer to a wife by an insolvent husband;[5] and of *fraudulent concealment* by a husband in an ante-nuptial agreement *barring dower.*[6]

§ 2527. **Legitimacy.** That a child born of a married woman during wedlock is presumed to be the child of her then husband is uniformly conceded. The only doubt has been whether and how far this presumption is conclusive; *i. e.*, to what extent it is a fixed rule of substantive law defining the legal quality of legitimacy. Here there have been stages of doctrine.[1] At the outset of the law, it appears to have allowed no dispute, except by the fact

Wadsworth Co. *v.* Solomon, ib. 511, 70 N. W. 639 (apparently the same, but putting it that the alteration — here in a contract — is presumed to be made before execution, unless there are circumstances of suspicion; opinion by a different judge); *Tex.:* 1896, House *v.* Robertson, — Tex. —, 34 S. W. 640 (alteration in a deed, presumed to be before execution, under Civ. Stats. § 2257); *U. S.:* 1826, U. S. *v.* Amedy, 11 Wheat. 392, 408 (certified copy of an act of incorporation); 1896, Rosenberg *v.* Jett, 72 Fed. 90 (bill to foreclose a mortgage; claim of homestead set up; the burden placed on the defendant to show that the words "and homestead," interlined in the mortgage, were inserted after execution); *Utah:* Rev. St. 1898, § 3411; *Va.:* 1902, Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879 (contract); *Wash.:* 1893, Wolferman *v.* Bell, 6 Wash. 84, 32 Pac. 1017 (action on a note; no presumption or burden prescribed); 1893, Yakima N. Bank *v.* Knipe, ib. 348, 33 Pac. 834 (action on a note bearing an alteration; received, the defendant to show change since execution); 1900, Blewett *v.* Bash, 22 id. 536, 61 Pac. 770; *Wis.:* 1896, Klatt *v.* Lumber Co., 92 Wis. 622, 66 N. W. 791 (the possibility of alteration of a document since original siguing does not exclude it; compare § 2134, *ante*); 1897, Rollins *v.* Humphrey, 98 id. 66, 73 N. W. 331 (alteration held not suspicious); 1899, Maldaner *v.* Smith, 102 id. 30, 78 N. W. 140 (action by the assignee of a mortgage to foreclose; "or order" was interlined in the deed; presumption of innocence applied).

[1] 1893, Clark *v.* Patterson, 158 Mass. 388, 391, 33 N. E. 589 (bonds); 1892, Bennett *v.* Bennett, 37 W. Va. 396, 406, 16 S. E. 638.

[2] 1892, Culp *v.* Wilson, 133 Ind. 294, 296, 32 N. E. 928 (conveyance); 1894, Phillips *v.* Phillips, 90 Ia. 541, 543, 58 N. W. 879; 1895, West *v.* Beck, 95 id. 520, 64 N. W. 599 (paying a son's debt); 1897, Finch *v.* Garrett, 102 id. 381, 71 N. W. 428 (deed). So, also, in a transfer to a nominal purchaser for a consideration paid by a near relative: Ames, Cases on Trusts, 1st ed., 276–286, 293.

[3] 1893, Donahue *v.* Donahue, 53 Minn. 560, 55 N. W. 602; 1898, Kloke *v.* Martin, 55 Nebr. 554, 76 N. W. 168; 1892, Ulrich *v.* Ulrich, 136 N. Y. 120, 123, 32 N. E. 606.

[4] 1896, Boody's Estate, 113 Cal. 682, 45 Pac. 859 (with a requirement for clear evidence to countervail).

[5] 1898, Stockslager *v.* M. L. & S. Institution, 87 Md. 232, 39 Atl. 742.

[6] 1897, Hessick *v.* Hessick, 169 Ill. 486, 48 N. E. 712 (bill for partition by heirs, making the widow a defendant and alleging an ante-nuptial agreement as harring dower, etc.; held, that on proof by the defendant that the sum accepted was disproportionately small, the presumption of fraudulent concealment is raised, and the husband must show knowledge by the wife of his estate's extent).

The large subject of *resulting trusts*, presumed where a transfer is made without consideration, under certain circumstances (Ames, Cases on Trusts, 1st ed., 262, 291), belongs also in this place.

[1] These have been carefully examined, for England, in an exhaustive treatise by Sir H. Nicolas (1836), on Adulterine Bastardy; Mr. Hubback has also considered them in his treatise (1840) on Succession, part II, c. 5, and Mr. Hargrave, in his Note 189 to Coke on Littleton.

The best opinions on the policy of the rule are those of Lord Erskine, in the Banbury Peerage Case, *infra* (at pp. 466, 470), and of Martin, J., in Matthews' Estate, N. Y., *infra*.

of the husband's absence "beyond the four seas" of England during the appropriate period: but after a gradual relaxation during five centuries the conclusive feature has in English law been almost entirely removed, so that it seems now to occur only when actual intercourse of the husband has been established; *i.e.*, the fact of "non-access" may always be disputed.[2] In the United States, the Courts have probably not all reduced the rule to this attenuated form.[3]

§ 2528. **Chastity; Child-bearing.** It is sometimes said that there is a presumption of *chastity*, or of chaste character.[1] But commonly in such cases the result is really determined by the incidence of the first burden of proof (*ante*, § 2485); for example, it falls to a party impeaching a witness' or complainant's character for chastity to prove the unchastity, and it falls to a party alleging the seduction of a woman of chaste character to prove that character.[2]

There is in the law of real property a rule by which, for the purpose of dealing with estates of remainder and the like, a woman past some limit of age (usually fifty years or more), is regarded as *incapable of bearing children*, or before that age will not be considered as incapable; it is often spoken of as a conclusive presumption; but no fixed age is taken as the standard.[3]

[2] The following are the leadiug modern English cases: 1810, Banbury Peerage Case, in App. to LeMarchant's Gardner Peerage Case, 435, 489; 1825, Gardner Peerage Case, Le Marchant's Rep. 232; 1827, Morris *v.* Davies, 3 C. & P. 215, 217; 1903, Gordon *v.* Gordon, P. 141 (the passage from Nicolas approved, and said "to represent accurately the law").

[3] Besides the following cases, compare the rules of evidence as to the parentage of a *bastard* (*ante*, §§ 137, 166, 2063); a collection of cases is made in a note to 56 American Decisions 451: 1892, Bullock *v.* Knox, 96 Ala. 195, 198, 11 So. 339 (white wife and husband, child a mulatto; legitimacy may be questioned); Cal. C. C. P. 1872, § 1963, par. 31; 1859, Baker *v.* Baker, 13 Cal. 87, 99; 1902, Mills' Estate, 137 id. 298, 70 Pac. 91; 1883, Hopkins *v.* Chung Wa, 4 Haw. 650; 1889, Orthwein *v.* Thomas, 127 Ill. 554, 562, 21 N. E. 430; 1902, Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 67 Pac. 848; 1895, Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498; 1897, Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242 (action against B. for the seduction of plaintiff, who married R. before the child was born; B.'s admission of his paternity, received); 1839, Randolph *v.* Easton, 23 Pick. 242, 243; 1897, Matthews' Estate, 153 N. Y. 443, 47 N. E. 901 (decree of Surrogate's Court as to "children" entitled to share; H. S. having been proved a child, the burden was upon those opposing her interest to show illegitimacy); 1899, Bell *v.* Terr., 8 Okl. 75, 56 Pac. 853 (non-access must be proved by "distinct, strong, satisfactory, and conclusive evidence"); 1891, Robb's Estate, 37 S. C. 19, 38, 16 S. E. 241 (recognition by parents, with other facts, may after lapse of time raise the presumption without specific evidence of marriage); 1902, Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124; 1903, Bunel *v.* O'Day, 125 Fed. 303; 1886, Pittsford *v.* Chittenden, 58 Vt. 49, 52.

In Louisiana, the rule has an independent history: 1895, McNeely *v.* McNeely, 47 La. An. 1321, 17 So. 928 (holding that the provisiou of Code Arts. 188, 191, allowing the presumption of legitimacy to be contested where the child is born 300 days after separation, merely fixes the extreme period which must elapse before the presumption becomes disputable at all; and for children born later it is essential for the disputability that suit be brought; so that if the parent dies without beginning suit the presumption continues indisputable).

[1] 1894, Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; 1895, State *v.* Bauerkemper, 95 Ia. 562, 64 N. W. 609; 1873, People *v.* Brewer, 27 Mich. 134, 138. *Contra:* 1901, Harvey *v.* Terr., 11 Okl. 156, 65 Pac. 837.

[2] Compare the rules of evidence applicable where chastity becomes material (*ante*, §§ 75, 79, 205–213, 924, 2061).

[3] 1864, Groves *v.* Groves, 9 L. T. R. N. S. 533; 1881, *Re* Taylor's Trustees, 21 id. 795 (here fifty-two years, and during twenty-four a widow); 1871, *Re* Widdows' Trusts, L. R. 11 Eq. 408 (a widow of fifty-five years four months, and a spinster of fifty-three years nine months); 1872, *Re* Millner's Estate, L. R. 14 Eq. 245 (a wife of forty-nine years nine months, never having borne children, married twenty-six years, presumed childless by that marriage); 1876, Maden *v.* Taylor, 45 L. J. Ch. 569, 573 (a spinster over sixty); 1881, Davidson *v.* Kimpton, 18 Ch. D. 213, 217 (a spinster of fifty-four years); 1898, *Re* Hocking, 2 Ch. 567; 1901, *Re* White, 1 Ch. 570; 1903, Ricards *v.* Safe Deposit & T. Co., — Md. — , 55 Atl. 384 (incapacity of child-bearing,

§ 2529. **Identity of Person (from Name, etc.).** In regard to the supposed presumption of *identity of person* from *identity of name*, three things are to be premised. (*a*) "A concordance in name alone is always some evidence of identity; and it is not correct to say with the books that, besides proof of the facts in relation to the persons named, their identity must be shown, implying that the agreement of name goes for nothing; whereas it is always a considerable step towards that conclusion."[1] (*b*) In the greater number of cases the ruling is merely that identity of name, with or without other evidence, is or is not sufficient evidence to go to the jury or sufficient to support a verdict, on the general principle of sustaining the duty of producing evidence (*ante*, § 2494). The oddness of the name, the size of the district and length of the time within which the persons are shown to have coexisted, and other circumstances, affect this result differently in different cases. (*c*) Often a genuine presumption is enforced by the Courts, in the sense that the duty of producing evidence to the contrary is thrown upon the opponent (*ante*, § 2487). But these rulings cannot be said to attach a presumption to a definite and constant set of facts; they apply the presumption upon the circumstances of the particular case.

It is thus necessary, in ascertaining the state of the law in a given jurisdiction, to examine the facts in each case. There is, moreover, some difference in the strictness with which the evidence of identity is treated for different sorts of documents or persons. There was perhaps a greater traditional strictness shown in dealing with the identity of a person named as the signer of an *answer* or *affidavit* in chancery,[2] or as the object of a *conviction for*

not allowed to be investigated, on the ground that "it would be exceedingly unsafe to permit property-rights to depend upon so precarious a basis"; "the single fact to which the law looks is death"); 1883, Apgar's Case, 37 N. J. Eq. 502 (collecting the cases in a note).

[1] 1840, Hubback, Succession, 444. This principle of Relevancy has already been considered (*ante*, §§ 411–413); other instances are found under the Hearsay rule (*ante*, §§ 1494, 1791).

[2] *England:* 1701, Hurly's Trial, 14 How. St. Tr. 433 (the deposition of a witness Carty before L. C. J. Pyne was offered, but its authenticity was denied: "Court: Calaghan Carty, pray were you examined before any of the judges as to that matter? Carty: No, my lord, never in my life. Sol.-Gen.: Never in his life. There is no proving it but by my lord chief-justice, and to prove that this is the man; for a man may come in the name of another person and swear, and the man he personates know nothing of the matter. Court: . . . If the person does not own it now, it must be proved upon him"); 1729, Anon., 3 Mod. 116 (perjury; whether the return of commissioners in chancery that the person named made oath is sufficient with other evidence of identity; the Court was divided); 1761, R. *v.* Morris, 1 Leach 3d ed. 60 (evidence of the handwriting of the answer being the defendant's, with proof of the *jurat*, sufficient); 1809, Salter *v.* Turner, 2 Camp. 87 (an answer in chancery purporting to be signed by the person charged, sufficient); 1812, Lady Dartmouth *v.* Roberts, 16 East, 334, 340 (an answer in chancery in a suit between other parties; Le Blanc, J.: "It seems that no line of distinction is drawn except in criminal proceedings, or in those which are in their nature criminal, as the case of an action for malicious prosecution; in other cases it is sufficient to produce an examined copy of the answer without proving the handwriting of the party"); 1813, Hodgkinson *v.* Willis, 3 Camp. 401 (answer in chancery; "some evidence of the identity" was required, but nothing as to handwriting, etc.); 1817, Hennell *v.* Lyon, 1 B. & Ald. 185 (Ellenborough, L. C. J., receiving *prima facie* an answer sworn in another suit by one Charles Lyon, alleged to be the present defendant: "It is said that the evidence wants a further link to connect it with the defendant, and that it ought to be shown that the Charles Lyon in the answer is the present litigant. I do not know any way by which that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shewn that he is not the same person. The question then is, whether public convenience requires that the proof should be given by the plaintiff or the defendant; and I rather think that public convenience is in favour of the admissibility of this proof. . . . Such appears to

crime,[3] or as a party to a *marriage* evidenced by a register or certificate.[4] But where an identity of names is found in *deeds, letters, negotiable instruments,* or the like, or in *tracing title* from ancestors and grantors,[5] the Courts

have been the the general practice, except in criminal cases"); 1823, Studdy *v.* Sanders, 2 Dowl. & R. 347 (answer in chancery, offered by copy, the names of the signer and the defendants apparently corresponding; no further proof of identity needed; following Hennell *v.* Lyon); 1824, Burnand *v.* Nerot, 1 C. & P. 578 (an office copy of an answer in chancery rejected, on the trial of an issue in the Common Pleas ordered by the Vice-Chancellor; because the office copy does not prove the identity of the party); *Ireland:* 1847, Garvin *v.* Carroll, 10 Ir. L. R. 323, 330 (affidavit in Chancery by "John Garvin"; the name with other evidence, held sufficient, even when offered by copy); *United States:* 1796, Ellmore *v.* Mills, 1 Hayw. 359 (deposition; John Archelaus Elmore and John Ellmore, presumed the same person).

[3] Compare the statutes cited *ante*, § 1270, which sometimes include this point: *England:* 1843, R. *v.* Tissington, 1 Cox Cr. 51 (a certificate of former conviction of one G. L. being offered against the defendant, the circumstance that the defendant was in the jail during the exact term mentioned was held not sufficient); 1858, R. *v.* Levy, 8 id. 73 (identity of the defendant with a person alleged to have been convicted of an offence; identity in all particulars of the magistrate's certificate of conviction of that person and of the warrant of commitment, by the same magistrates, under which the defendant was held, admitted); *United States:* 1882, People *v.* Rolfe, 61 Cal. 540, 543 ("Frank H. Rolfe" shown to be a person formerly convicted as "Frank Rollins"); 1897, Bayha *v.* Munford, 58 Kan. 445, 49 Pac. 601 ("ordinarily" in a record of conviction, identity of name suffices); 1885, State *v.* McGuire, 87 Mo. 642 (former conviction of crime; sameness of name is *prima facie* sufficient); 1896, Eifert *v.* Lytle, 172 Pa. 356, 33 Atl. 572 (the issue being whether a witness had been sent to the penitentiary for a certain offence from a certain county, evidence was received that a person of the same name had been sent for the same offence, that the witness "was missing for about a year" thereafter, and that he was the only one of that name in the region).

[4] Compare the cases on the admissibility of such documents (*ante*, §§ 1644, 1677) and the rule for proof by eye-witnesses (*ante*, § 2082); *England:* 1718, Draycott *v.* Talbot, 3 Bro. P. C. 564, 567 (register-entries of a marriage being shown, the mere correspondence of names must be followed by other evidence of identity, etc., to show marriage); 1779, Birt *v.* Barlow, 1 Doug. 171 (if a register-entry is used, as being the hearsay testimony of the celebrant, some evidence of identity of the persons named in it and the parties in the cause must be additionally offered; but "whatever is sufficient to satisfy a jury is good evidence of this," as the payment of the bell-ringers by these parties, their presence at a wedding-dinner, the identity of their handwriting, the woman being thereafter called by the man's name, etc.); 1784, Hemmings *v.* Smith, 4 id. 33 (to show that the woman debauched by the defendant was the plaintiff's wife, the fact that fourteen years before a marriage had been celebrated between the plaintiff and a certain woman, and that she was still living with him as wife five years before, was held sufficient to go to the jury); 1830, R. *v.* Drake, 1 Lew. Cr. C. 116, 125 ("on an indictment for bigamy, proof must be given that the person who the prisoner is alleged to have married was in fact such person"); 1848, Parke, B., in Sayer *v.* Glossop, 2 Exch. 409, 411 ("James Glossop"; name held sufficient); 1873, R. *v.* Weaver, L. R. 2 C. C. R. 85 (child named "Jane Watkins" in a birth-register; the name and other circumstances, sufficient to identify); *United States:* 1831, Wedgwood's Case, 8 Greenl. 75 (adultery; besides the certificate of marriage of the person named, other evidence of identity is necessary); 1882, People *v.* Broughton, 49 Mich. 339, 13 N. W. 621 ("possibly not sufficient by itself in a criminal case"); 1886, Durfee *v.* Abbott, 61 id. 471, 475, 28 N. W. 521 (baptism record; other evidence is necessary); 1871, Morrissey *v.* Ferry Co., 47 Mo. 521, 525 (identity of the plaintiff with a person whose birth-entry was offered; identity must be established); 1875, State *v.* Moore, 61 id. 276, 278 (marriage; sameness of name of the woman married and the woman in court, sufficient); 1838, State *v.* Wallace, 9 N. H. 515 (adultery; other evidence is necessary).

[5] Compare the principles for authentication of documents (*ante*, §§ 2130, 2156); this question is usually presented in that relation:

ENGLAND: 1800, Barber *v.* Holmes, 3 Esp. 190 (to show J. H. living, the occurrence of a J. H. on the muster-roll of a frigate "proves nothing as to the fact of whether J. H. whose name is there found" was the one in issue); 1813, Smith *v.* Fuge, 3 Camp. 456 (shipping-register purporting to be granted on F.'s oath as owner; rejected, because identity of the oath-taker was not shown); 1814, Middleton *v.* Sandford, 4 id. 34 (the attesting witness knew only that a person calling himself T. S. had signed; held, "some evidence of identity was indispensably necessary"); 1816, Hughes *v.* Wilson, 1 Stark. 179 (entry in a custom-house book of a copy of a bill said to have been made by the plaintiff, not received without evidence to show that it was "made or presented" by him or his agent); 1817, Nelson *v.* Whittall, 1 B. & Ald. 19 (to prove execution, identity of name, with the fact that defendant was present in the room at the time, was held sufficient); 1824, Bulkeley *v.* Butler, 2 B. & C. 434 (to prove the genuineness of an indorsement by "Edward Shanahan" of a bill payable to such a person, evidence that it

are more frequently found enforcing a genuine presumption. Beyond this no

was indorsed by a person calling himself E. S., bringing the bill, and presenting a letter of introduction for E. S. signed by proper persons, was held sufficient to go to the jury); 1833, Whitelocke *v.* Musgrove, 1 Cr. & M. 522 (Bayley, B.: "I quite agree that it is not necessary to prove the handwriting of the defendant; but if you do not prove that, you must prove something else to connect the party sued with the instrument. . . . In most cases you can either show some acknowledgment, or prove that the party from his residence or other circumstance answers the description on the face of the note, or you can establish the identity of the party in some other mode"); 1833, Corfield *v.* Parsons, 1 Cr. & M. 730 (to prove that certain statements were the defendant's, the fact that a clerk went to the plaintiff's residence and had the conversation with a person in a dressing-gown who opened the door, was held not erroneously rejected; evidence being given, in opposition, that the plaintiff was then out of town and that his brother also lived there part of the time and wore a dressing-gown); 1839, Warren *v.* Anderson, 8 Scott 384 ("J. C. Anderson" as acceptor of a bill; evidence that a person calling himself "Sir J. C. A., Bart." had entered his name as "J. C. A." at a banking-house, of a similarity of handwriting, and of the drawing of checks so signed, held sufficient to go to the jury); 1841, Simpson *v.* Dinsmore, 9 M. & W. 47 (to identify an apothecary's license, the fact that the plaintiff was in that business, bearing the same surname and christian name, was held sufficient for the jury); 1841, Jones *v.* Jones, ib. 75 (mere coincidence of the name "Hugh Jones," held not sufficient to charge the defendant as maker of a note, where the name "Hugh Jones" was a common one in the region; *semble*, that the additional coincidence of residence would have sufficed; and that, if the name had not been common in the neighborhood, the coincidence of name alone would have sufficed); 1841, Greenshields *v.* Crawford, ib. 314 (to identify "C. B. Crawford," an acceptor of a bill directed to "Charles Banner Crawford, East India House," the fact of the signature being that of a person of that description, without any further evidence to connect it with the present defendant, was held sufficient); 1842, Smith *v.* Henderson, ib. 798 (action against W. H., a pilot; a man rose in Court who answered to the name of H., and was a pilot on board the ship in question; held sufficient to justify a finding of identity; Parke, B.: "Similarity of name and residence, or similarity of name and trade, will do"); 1843, Sewall *v.* Evans, 4 Q. B. 626, 632 (Lord Denman, L. C. J.: "In cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only John Smith, which is of very frequent occurrence, there might not be much ground for drawing the conclusion"; Williams, J.: "That it is a person of the same name is some evidence till another party is pointed out who might have been the acceptor"); 1844, R. *v.* Dalmas, 1 Cox Cr. C. 96 (conversations between the deceased and one alleged to be the defendant were received, after "a correspondence in dress and in general appearance" had been shown); 1844, R. *v.* O'Connell, ib. 405 (to prove against "C. G. Duffy, late of the Rathmines," an admission in writing of the authorship of a newspaper signed by "C. G. Duffy of the Rathmines and Trinity-street," it was held that "some evidence of identity must be given"; but under St. 6 & 7 Wm. IV, c. 76, § 8, concerning newspaper publishers, the admission was subsequently held receivable without such proof).

CANADA: *Man.:* 1894, Simpson *v.* Stewart, 10 Manit. 176, 181 (grantee and teatator); *Ont.:* 1859, Wilson *v.* Thorpe, 18 U. C. Q. B. 443 (affidavit in malicious arrest); 1861, Nicholson *v.* Burkholder, 21 id. 108 (grantor and grantee); 1870, Brown *v.* Livingstone, 29 id. 520 (grantee and ancestor); 1873, Wallbridge *v.* Jones, 33 id. 613 (grantee and ancestor); 1875, Gallivan *v.* O'Donnell, 36 id. 250 (same).

UNITED STATES: *Ark.:* 1899, Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816 ("Felix R. Lanier," in two actions, presumed the same person); *Cal.:* C. C. P. 1872, § 1963, par. 25 ("identity of person from identity of name" is presumed); 1897, Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549 (mortgagee and notary, "W. H. Lee," in the same county, presumed the same); 1900, Woolsey *v.* Williams, 128 id. 552, 61 Pac. 670 ("William Frederick Williams"; two persons presumed the same, on the facts); *D. C.:* 1893, Scott *v.* Hyde, 21 D. C. 531, 535 (grantee and ancestor; John Willis, presumed the same, there being no evidence of another person); 1902, Crandall *v.* Lynch, 20 D. C. App. 74, 84 (deeds); *Ga.:* Code 1895, § 5178 ("concordance of name alone" is some evidence of identity); 1883, Mullery *v.* Hamilton, 71 Ga. 720 (identity of a legatee said to have survived the testatrix; sameness of name, his conversation and knowledge of family affairs, etc., held sufficient under the circumstances); 1890, Swicard *v.* Hooks, 85 id. 580, 11 S. E. 863 (deed); *Ill.:* 1864, Brown *v.* Metz, 33 Ill. 339 (identity of name of grantor and succeeding grantee; identity of person presumed); 1884, Heacock *v.* Lubukee, 108 id. 641 (a plaintiff relying on a title established in a former suit; identity shown by a correspondence of all the other features of the suits except that the name of the plaintiff was "Lubeke" instead of "Lubukee"); *Ind.:* 1883, Aultman *v.* Timm, 93 Ind. 158 (identity of a maker of a note and an intestate whose property the defendants had received; correspondence of name held *prima facie* sufficient); 1896, Mode *v.* Beasley, 143 id. 306, 42 N. E. 727 (the presumption not held to apply where J. S. testified that he had not signed a petition which bore his name, but two or three thousand in all had signed and they were not so classified as to "reduce the probability of any persons of the same name"); *Ia.:* 1889, Gilman *v.* Sheets, 78

general rules or tendencies seem traceable; except that where the two persons

Ia. 499, 502, 43 N. W. 299 (identity of name of grantee and next grantor, *prima facie* sufficient); *Ky.:* 1805, Nicholas *v.* Lansdale, Litt. Sel. C. 21 (to show the identity of S. N., a plaintiff, said to be dead, the fact of the death of one S. N. who had sailed from Baltimore and died in Madagascar, was held insufficient); 1847, Cobb *v.* Haynes, 8 B. Monr. 137, 138 (William Haynes, defendant and surety on a bond, presumed the same on the facts); 1820, Cates *v.* Loftus, 3 A. K. Marsh. 202 (two land-certificates in the same name; identity presumed); *Mass.:* 1862, Webber *v.* Davis, 5 All. 393, 396 (magistrate's surname with initials of the first names, sufficient); 1899, United States N. Bank *v.* Venner, 172 Mass. 449, 52 N. E. 543 ("United States National Bank" and "United States National Bank of New York, N. Y.," sufficiently shown the same); 1899, Dolan *v.* M. R. F. Life Ass'n, 173 id. 197, 53 N. E. 398 (identity of name, with description of person, *prima facie* evidence of identity of person); *Mich.:* 1881, Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432 (foreign judgment; identity of names sufficient); *Minn.:* 1888, State *v.* Sannerud, 38 Minn. 229, 36 N. W. 447 ("Bert Samrud" and "Bernt Sannerud," in a liquor license, sufficient evidence on the facts); *Mo.*. 1833, Birch *v.* Rogers, 3 Mo. 227 (assignment of a note; "Charles R. Rogers" and "C. R. Rogers," some evidence of identity); 1853, Flournoy *v.* Warden, 17 id. 435, 441 (title-deeds of "John Smith"; sameness of names sufficient to go to the jury, and sufficient to create a presumption, *semble*, if no evidence is opposed; the mere fact that there is another person of the same name in the region does not prevent the question from going to the jury); 1853, Gitt *v.* Watson, 18 id. 274, 276 (title-documents; sameness of names puts on the opponent the duty of "showing" that they are not the same); 1885, Long *v.* McDow, 87 id. 197, 202 (grantee and ancestor, "Ira Nash" and "H. San Ari," presumed the same on the facts); *Nebr.:* 1892, Rupert *v.* Penner, 35 Nebr. 587, 594, 53 N. W. 598 ("Arch. T. Finn" and "Archibald T. Finn," in a deed, presumed the same); *N. H.:* 1849, Jones *v.* Parker, 20 N. H. 31 (action on a contract; there were two persons of the name of the promisor; the correspondence of the defendant's name, and other circumstances, held sufficient to "put the burden on the defendant" and sustain a verdict for the plaintiff); 1854, Mooers *v.* Bunker, 29 id. 420, 432 (title; "a jury is not at liberty to presume that a person of even so peculiar a name as Timothy Mooers is the same person as a man of the same name"); *New Jersey:* 1849, West *v.* State, 22 N. J. L. 212, 238 (whether a witness' name was forged; testimony that the "C. S." was not the writing of a certain C. S., received, its weight depending on the subsequent evidence of identity); 1899, Green *v.* Heritage, 63 id. 455, 43 Atl. 698 (judgment debtors, presumed the same); *New York:* 1816, Jackson *v.* Goes, 13 John. 518 (land-patent to "Peter Schultze," said to be the plaintiff's lessor; the sameness of name taken as *prima facie* evidence of identity of person, *semble;* evidence admitted to show that the patent was really given to another than the plaintiff's lessor); 1825, Jackson *v.* King, 5 Cow. 237 (land-patent to "William Appel," said to be the ancestor of the plaintiff's lessor; *per Curiam:* "I have never known a case where a plaintiff having the name of a patentee or grantee was required to go farther than the production of his deed or patent"; the defendant having "the burthen of disproving" identity; *semble*, that to show the existence of another person of the same name would lift the defendant's burden of going forward); 1828, Jackson *v.* Cody, 9 id. 140, 148 (land-patentee "William Patterson" and grantor "William Petterson," presumed the same, no other person of the same name and description being shown to exist; so also for "John Blanchard"; but an intimation is made that mere identity of name creates a presumption, which stands till another person of that name is shown not only to have existed but to have been the patentee); 1830, Jackson *v.* Christman, 4 Wend. 278, 283 (an obligor of a bond and a subscribing witness, of the same name, not presumed identical); 1838, Kimball *v.* Davis, 19 id. 437, 442 ("Francis Legge," patentee and grantor, presumed the same); 1839, Cunningham *v.* Bank, 21 id. 561, *semble* (here the name was "S. A. Cunningham" in New York City, and the defendant was Samuel A. Cunningham of that place; the lack of other persons of the name must be shown); 1840, Brown *v.* Kimball, 25 id. 259 (same as Kimball *v.* Davis, *supra*, on error from the Supreme Court; judgment reversed, 11 to 9, apparently on the ground that while the sameness of name raises a presumption, yet suspicious circumstances about the documents, or other evidence, may remove the presumption, and that in this case there was not sufficient evidence of identity to sustain the burden of proof); 1858, Hatcher *v.* Rochelean, 18 N. Y. 87, 92 ("Joseph Rochelean," defendant in the case and in a foreign judgment, presumed the same person, in the absence of evidence of two such persons); *Or.:* C. C. P. 1892, § 776, par. 25 (like Cal. C. C. P. § 1963, par. 25); *Pa.:* 1845, Sailor *v.* Hertzogg, 2 Pa. St. 182 ("Jacob Sailor," said to be the defendant's grantor; Gibson, C. J.: "Identity of name is ordinarily, but not always, *prima facie* evidence of personal identity"; and because of the lapse of time, and in spite of the oddness of the name, he required "some preliminary evidence, however small," for going to the jury); 1854, Balbec *v.* Donaldson, 2 Pa. 459 ("Mrs. Eliza Braceland," said to be the plaintiff's mother-in-law; case given to the jury with additional evidence, and no rule laid down); 1865, Philadelphia *v.* Miller, 49 Pa. St. 440, 448 (evidence for the identity of assessed land); 1866, Burford *v.* McCue, 53 id. 427, 431 ("Patrick O'Neil" and "R. P. O'Neil" as grantee and grantor; the identity held not sufficiently evidenced to go to the jury); 1867, Lyman *v.*

of the same name are *father and son*, the name is commonly presumed to have been used of the father.[6]

The identity of *objects or persons* from clothes, features, marks, and the like, may become the subject of a real presumption, though rarely. What is usually signified is either that the evidence is on the whole sufficient to go to the jury (*ante*, § 2494), or that specific facts are admissible.[7]

§ 2530. **Continuity: (1) in general (Ownership, Possession, Residence, Insanity, etc.).** It is often said that when a person, or object, or relation, or

Philadelphia, 56 id. 488, 499, 503 (like Philadelphia *v.* Miller); 1868, Glass *v.* Gilbert, 58 id. 266, 290 (same; the question how uncertain a description must be to avoid an assessment is the main one in these preceding three cases); 1871, McConeghy *v.* Kirk, 68 id. 200 ("John J. Kirk" as indorser of a note to "J. J. Kirk"; the correspondence held *prima facie* evidence of identity); 1871, Brotherline *v.* Hammond, 69 id. 128, 133 ("Daniel Kladder" and "Daniel Kritler"; the identity not sufficiently evidenced to go to the jury); 1884, Sitler *v.* Gehr, 105 id. 577, 601 ("Conrad Gehr," claimed as identical with the defendant's ancestor in 1739; the rule in Sailor *v.* Hertzogg, *supra*, approved; here the lapse of time was held to require additional evidence before going to the jury); 1895, Mason F. J. Co. *v.* Paine, 166 id. 352, 31 Atl. 98 (one uttering an admission must be identified); *R. I.*: 1852, Kinney *v.* Flynn, 2 R. I. 319 ("Bridget Flynn," said to be the defendant's wife; mere sameness of name not sufficient to show that the person was unavailable through interest); 1897, Liscomb *v.* Eldredge, 20 id. 335, 38 Atl. 1052 ("Harriet Richmond Eldredge," presumed identical with "Harriet R. Eldredge"); *U. S.*: 1892, Taussig's Ex'rs *v.* Glenn, 2 C. C. A. 314, 51 Fed. 381 (identity of a stock subscriber); *Vt.*: 1857, Bogue *v.* Bigelow, 29 Vt. 179, 182 ("Aaron I. Boge," said to be the plaintiff's ancestor "Aaron Jordan Bogue"; Redfield, C. J.: "In tracing titles . . . it is always regarded as *prima facie* evidence of identity, while in cases involving charges of crime . . . some further proof is required"); 1873, Cross *v.* Martin, 46 id. 14, 18 (grantee and grantor, E. G., but living in different States and thirty years apart; "parties in successive deeds constituting a chain of title, of the same name, are presumptively the same person"); *Va.*: 1847, Pollard *v.* Lively, 4 Gratt. 73, 76 ("Benjamin Pollard," grantee and ancestor, presumed the same; evidence of the existence of two persons, received in rebuttal); *W. Va.*: 1897, Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352 ("John S. Sweetland" and "J. S. Sweetland," presumed the same); *Wis.*: 1902, Sandberg *v.* State, 113 Wis. 578, 89 N. W. 505 ("probably neither rule is universal").

[6] 1849, Stebbing *v.* Spicer, 8 C. B. 827 (promissory note payable to J. H., and indorsed by J. H. to the plaintiff; plea, that J. H. did not indorse it; there were two persons, father and son, of that name; the indorsement was by the son; upon the question whether the real payee was the father or the son, held that the defendant could employ the presumption that it was the father, and the plaintiff had the burden of giving evidence that it was the son, but that there was some evidence to go to the jury upon that point); 1878, Graves *v.* Colwell, 90 Ill. 612, 615 (ejectment by one claiming through T. C. Sr. against one claiming through T. C. Jr., the grantee in the deed being described as T. C.; held, that the presumption gave the plaintiff a *prima facie* case, that the defendant had removed it by counter-evidence, and that the case was properly before the jury, but in their doubt the legal presumption should prevail); 1838, Stats *v.* Vittum, 9 N. H. 519 (indictment for adultery with L. W.; the father presumed). Similarly, the following rule has been declared: 1873, Cross *v.* Martin, 46 Vt. 14, 18 (grantor and grantee of a deed, E. G., and E. G., Jr., presumed to be father and son).

[7] The following are not all genuinely rulings of presumption: 1858, R. *v.* Britton, 1 F. & F. 354, Watson, B. (highway robbery; correspondence of boot-impressions, being "the main evidence," held not sufficient); 1853, Campbell *v.* State, 23 Ala. 44, 48, 68 (that shoes taken from the feet of the horse ridden by the defendant on the morning of the killing "seemed to fit in every particular" the tracks near the place of killing, admitted); 1867, Com. *v.* Bentley, 97 Mass. 552 (identity of a bottle of liquor sent and a bottle received and testified to; similarity as to size, wrappings, seal, label, and time of sending, held sufficiently shown to authenticate the bottle testified to); 1876, Com. *v.* Tolliver, 119 id. 312, 316 (identity of bank bills charged as stolen; partial correspondence with bills found on the defendant, held sufficient to go to the jury); 1883, Com. *v.* Nefus, 135 id. 534 (in authenticating a cipher-letter alleged to have been written by the defendant, the fact that his cipher-key fitted it, and that it contained expressions peculiar to the defendant and his situation, were regarded as sufficient); 1889, Com. *v.* Finnerty, 148 id. 165, 19 N. E. 215 (authenticating beer-bottles found in a yard as the defendant's; similarity of marks to those of bottles within her building, and absence of liquor in adjacent houses, sufficient); 1895, People *v.* Cleveland, 107 Mich. 367, 65 N. W. 216 (the condition and doings of one of three robbers, of whom defendant was alleged to be one, after the robbery, admitted as a means of identifying the defendant).

The rules of admissibility of evidence of Identity have been already considered (*ante*, §§ 410–416).

state of things, is shown to have existed at a given time, its continuance is presumed. In reality, however, a genuine rule of presumption is seldom found; the rulings usually declare merely that certain facts are admissible,[1] or that they are sufficient evidence for the jury's finding (*ante*, § 2494).[2]

§ 2531. **Same: (2) Life and Death.** It is not possible to say that there is a genuine presumption of *life*, with a uniform application. The state of the pleadings will show whose duty it is to prove life at a certain time; and upon his showing life at a preceding time, the Court will usually leave it to the jury to say whether he has proved his case, but may sometimes apply a genuine presumption, shifting the duty of producing evidence, upon the circumstances of the particular case.[1]

[1] The rulings plainly of this sort are placed under the various topics of Relevancy (*ante*, §§ 51–464).

[2] The following are instances under different subjects:

Ownership (compare § 382, *ante*): 1894, Brown *v.* Castellaw, 33 Fla. 204, 214, 14 So. 822 (title by tax-deed, presumed to continue two years later); 1898, Coleman & Burden Co. *v.* Rice, 105 Ga. 163, 31 S. E. 424 (title sometime previous to a judgment, presumed to continue); 1901, State *v.* Dexter, 115 Ia. 678, 87 N. W. 417 (personalty; ownership not presumed at an earlier time); 1893, Lind *v.* Lind, 53 Minn. 48, 54 N. W. 934 (ownership of land in 1874, presumed to continue to death in 1888); 1893, Chapman *v.* Taylor, 136 N. Y. 663, 32 N. E. 1063 (ownership of bonds, presumed to continue from 1881).

Possession (compare § 382, *ante*): 1893, Hollingsworth *v.* Walker, 98 Ala. 543, 13 So. 6 (possession of land, presumed to continue during a gap of two years).

Authority (compare § 377, *ante*): 1893, Hensel *v.* Maas, 94 Mich. 563, 568, 54 N. W. 381 (authority as agent to sell land six months before, presumed to continue).

Insanity (compare §§ 233, 1671, *ante*): 1895, People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204 (different phrasings cited); 1892, Armstrong *v.* State, 30 Fla. 170, 204, 11 So. 618 (permanent insanity, presumed to continue); 1894, Taylor *v.* Pegram, 151 Ill. 106, 119, 37 N. E. 837 (similar); 1903, Kirsher *v.* Kirsher, 120 Ia. 337, 94 N. W. 846; 1896, Rodgers *v.* Rodgers, 56 Kan. 483, 43 Pac. 779 (the presumption of insanity from an adjudication for commitment in 1883, held overthrown in 1886 by the other evidence); 1815, Lessee *v.* Hoge, 1 Pet. 183 (general insanity, presumed to continue).

Residence (compare §§ 89, 94, 377, 382, *ante*): 1893, Botna V. S. Bank *v.* Silver C. Bank, 87 Ia. 479, 54 N. W. 472 (residence presumed to continue; here, for nine days); 1872, Ripley *v.* Hebron, 60 Me. 379, 393 (in establishing a continuous residence of a pauper for five years, as legally required, an interval of some weeks' absence appeared; held, that the burden of explaining this absence remained on the party alleging the settlement); 1841, Kilburn *v.* Bennett, 3 Metc. 199 (assumpsit for taxes; residence before the assessment date being shown, it was the defendant's duty to show a removal before the date arrived); 1893, Price *v.* Price, 156 Pa. 617, 626, 27 Atl. 291 (domicile presumed to continue fifteen years till death); 1877, Rixford *v.* Miller, 49 Vt. 319 (plea of Statute of Limitations; reply, non-residence of defendant; evidence offered of non-residence at the time of origin of the cause of action; the duty held to fall on the defendant to show cessation of non-residence).

Sundry instances (compare § 437, *ante*); 1840, Scales *v.* Key, 11 A. & E. 819, 822 (a custom of election shown to exist in 1689, presumed in law to continue, there being no evidence to the contrary); Cal. C. C. P. 1872, § 1963, par. 32 (it is presumed "that a thing once proved to exist continues as long as is usual with a thing of that nature"); 1863, Murphy *v* Orr, 32 Ill. 489 (a decree of chancery presumed to continue in force, until shown to be overturned); 1898, McCraw *v.* McGraw, 171 Mass. 146, 50 N. E. 526 (divorce; confirmed habits of intoxication five years before, presumed to continue); 1848, Mullen *v.* Pryor, 12 Mo. 307 (action by an indorsee against an indorser, alleging insolvency of the maker of the note; upon a showing of insolvency at maturity, the presumption of continuance applied).

[1] 1802, Wilson *v.* Hodges, 2 East 313 (death of a debtor before return of the *capias:* Ellenborough, L. C. J., said that "where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death"); 1869, Phené's Trusts, L. R. 5 Ch. D. 139 (whether N. P. M., a legatee, had survived the testator, F. P., so as to be entitled to share in the estate; F. P. died on Jan. 5, 1861, and N. P. M. was last heard of in New York on June 16, 1860; held that the burden of proving N. P. M.'s life on Jan. 5, 1861, was on his representative, and was here not sustained); 1867, Whiting *v.* Nicholl, 46 Ill. 230 (instructive case; apparently sanctioning a real presumption); 1900, Chicago & Alton R. Co. *v.* Keegan, 185 id. 70, 56 N. E. 1088 (deed by E., of June 15, 1865, under power of attorney from A. dated April 3, 1860; A. presumed to have been alive at the former date); 1844, Gilleland *v.* Martin, 3 McLean, 490 (declaring a real presumption upon proof of life within seven years).

But there is a genuine presumption, of long standing and of universal acceptance, to aid proof of *death*. It is generally said to arise from the fact of the person's continuous absence from home, for seven years, unheard of by the persons who would naturally have received news from the absentee. The phrasings differ, however; sometimes the absence is stated to be from the jurisdiction; sometimes the element of non-receipt of news is not noticed;[2] moreover, the practice is not uniform in defining the precise point, or combination of facts, at which the burden of producing evidence shifts to the opponent. But the general presumption is unquestioned.[3] The rule of the

[2] As in some of the statutes *infra*.

[3] The early history of the presumption is given in Thayer's Preliminary Treatise, 319. *England:* 1763, Rowe *v.* Hasland, 1 W. Bl. 404, Lord Mansfield, C. J. (ejectment; to prove a branch of a family to be extinct, evidence was received, as to a person alive sixty years before, that he "has not been heard of for many years"; which would be sufficient "to put the opposite party upon proof that he still exists"); 1802, Bailey *v.* Hammond, 7 Ves. Jr. 590 (bequest of money on the death of a brother, who had not been heard of for twenty years; bequest paid over); 1805, Doe *v.* Jesson, 6 East 80, 84 (ejectment; the plaintiff's lessor claimed under a deceased brother; she was required by law to enter within ten years of his death and the removal of her disability; he was last heard from in 1778; the presumption of death applied in 1785; her disability ceased in 1792; thus an ejectment in 1804 was too late; but it was apparently not held necessary for the jury to apply the presumption; the case at most decides that the burden of conviction, not the duty of going forward, was on the lessor; there was "fair ground for the jury to presume" death after seven years from being last heard of, in the absence of later evidence of life); 1821, Doe *v.* Deakin, 4 B. & Ald. 433 (ejectment; T., born in 1759, had been absent from his relatives from 1787 to 1804, when he returned and shortly departed again; since then he had not been seen in the neighborhood; the jury were told that this was "*prima facie* evidence from which they might presume T.'s death"; the defendant contended "that this was not even *prima facie* evidence"; *per Curiam:* "The evidence unanswered was sufficient to found a presumption of T.'s death," approving the seven-year presumption laid down in Doe *v.* Jesson); 1844, Watson *v.* England, 14 Sim. 28 (a young person abroad, not presumed dead after seven years); 1844, Dowley *v.* Winfield, ib. 277 (presumption in a similar case, apparently enforced); 1877, Prudential Assurance Co. *v.* Edmonds, L. R. 2 App. Cas. 487 (presumption applied; the element as to "not being heard from," examined).

United States: Ark. Stats. 1894, § 2903 (absence "for five years successively" raises a presumption); Cal. C. C. P. 1872, § 1963, par. 26 (it is presumed "that a person not heard from in seven years is dead"); 1897, Posey *v.* Hanson, 10 D. C. App. 497, 506; Del. Rev. St. 1893, c. 82, § 6 (on absence from the State "for seven years together, and no evident proof be made of his life in any inquest," "he shall be accounted dead"); 1898, Watson *v.* Adams, 103 Ga. 733, 30 S. E. 574; 1867, Whiting *v.* Nicholl, 46 Ill. 230 (dower); 1897, Hitz *v.* Algreen, 170 id. 60, 48 N. E. 1068 (mere absence is not sufficient; diligent inquiry at the last place of residence and among those likely to hear from him is necessary); 1897, Hoyt *v.* Beach, 104 Ia. 257, 73 N. W. 493; Ky. Stats. 1899, § 1639 (the fact of a resident's leaving the State and not returning for seven successive years, raises a presumption of death; compare id. § 1609); 1900, Mutual B. L. I. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694 (the seven years dates from the last hearing from the person); 1831, King *v.* Fowler, 11 Pick. 302 (writ of right, one claiming under S. K. produced deeds from one of the six children of S. K., and offered evidence that the other five had not been heard of for over seventy years; the jury were instructed that the plaintiff was "entitled to recover"; held, that "the legal result was such as the jury have found," "especially as there was no evidence to rebut that evidence," on the part of the defendant); 1840, Loring *v.* Steineman, 1 Metc. 204, 211 (administration of an estate); 1881, Bowditch *v.* Jordan, 131 Mass. 321 (a plaintiff proving title through D.; evidence that D. sailed for foreign parts in 1840, and nothing had since been heard of the vessel, "justified and required the inference of her death"); Miss. Annot. Code 1892, § 1737; 1896, Manley *v.* Patterson, 73 Miss. 417, 19 So. 236 (rule held not to apply to children of seven years and under who were under the control of adults and had not volition as to their movements); Mo. Rev. St. 1899, §§ 265, 3144; N. Y. C. C. P. 1877, § 841 (remaining without the United States, or absenting himself anywhere, for seven years together, is sufficient); N. D. Rev. C. 1895, § 5701; 1897, Francis *v.* Francis, 180 Pa. 644, 37 Atl. 120 (W. had gone to live in a colony in Patagonia, and was there heard from in 1876, but not since; held, that no absence from his last known domicile was shown, and thus a party claiming that his wife in Pennsylvania in 1884 was single, at the time of making a will, had raised no presumption); S. D. Stats. 1899, § 6543; 1903, Latham *v.* Tombs, — Tex. Civ. App. —, 73 S. W. 1060 (absence of news is essential); 1894, Scott *v.* McNeal, 154 U. S. 34, 41 (here the presumption was not allowed to prevent the overthrow of a probate decree based on it, where the

presumption, however, extends merely to the *fact of death* from and after the end of the period; it is not understood to specify anything further, — for example, the *time* of death within that period,[4] or the *celibate* or *childless* condition of the person at the time.[5]

On similar considerations of experience, the *loss of a ship*, in insurance cases or the like, may become the subject of a presumption or a *prima facie* ruling, after a long absence from port without news.[6] Moreover, there is a distinct presumption of death from *lapse of lifetime*, — not reducible to a fixed period, but exempt from any requirement as to absence from home or lack of news.[7]

supposed deceased afterwards returned alive); 1902, Fidelity Mutual L. Ass'n *v.* Mettler, 185 id. 308, 22 Sup. 662; Va. Code 1887, § 3373 (the departure from the State and failure to return within seven successive years, by a person residing in the State, raises a presumption of death); W. Va. Code 1891, c. 130, § 44 (like the Virginia statute); 1898, Boggs *v.* Harper, 45 W. Va. 554, 31 S. E. 943; 1900, Wisconsin Trust Co. *v.* Wisconsin M. & F. I. Co. Bank, 105 Wis. 464, 81 N. W. 642.

[4] 1837, Nepean *v.* Knight, 2 M. & W. 894 (ejectment, for property held by long adverse possession, the plaintiff claiming under M. K.; the question being whether the plaintiff's lessor had begun the action, under St. 3 & 4 W. IV, c. 27, within twenty years since his right accrued, *i. e.* since the death of M. K., it was held that the plaintiff had the burden of evidencing this; M. K. having gone to America in 1806 or 1807, and being last heard from by a letter received in May, 1807, and the suit having been begun on Jan. 18, 1834, less than seventeen years later, it was held that there was no presumption that M. K. died not before the end of the seven years, or died at any specific time; and that the plaintiff's burden had therefore not been sustained); 1880, Corbishley's Trusts, L. R. 14 Ch. D. 846; 1902, *Re* Benjamin, 1 Ch. 723; 1848, Doe *v.* Strong, 4 U. C. Q. B. 510, 518, 8 id. 291 (good opinions); 1897, Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443 (property went by S.'s will in remainder to his four children; one of them C., married K., and had a son, who disappeared in 1881, C. dying in 1888; C.'s administrator was sued by the other three children for her share, their inheritance depending on whether her son predeceased her; held, that the burden of showing his predecease rested on the plaintiffs, a part of whose case it was; that the seven years' presumption had not begun to operate; and that, thus there was no aid to be had from it in determining that the son had died at any particular time, so that the duty of producing evidence of survival did not shift to the defendant); 1878, Davie *v.* Briggs, 97 U. S. 628, 634 (leading opinion, by Harlan, J.).

So, also, in an action for *death by wrongful* act, the burden of showing the death to have been within the statutory period in said to be on the claimant: 1903, Poff *v.* N. E. Tel. & Teleg. Co., — N. H. — , 55 Atl. 891.

[5] 1812, Doe *v.* Griffin, 15 East 293 (ejectment; the plaintiff's lessor, who claimed through the same collateral ancestor as the defendant, was held to have the burden of proving that the ancestor had died without issue, but was held to have placed upon the defendant the duty of going forward by evidence that the ancestor had never been heard of as married); 1897, Still *v.* Hutto, 48 S. C. 415, 26 S. E. 713 (no presumption that a man, unmarried when last heard from, died childless).

[6] 1777, Green *v.* Brown, 2 Str. 1199 (insurance; a ship sailing to America in 1739 had never been heard from; the defendant objected "that as captures and seizures were excepted" from the policy, "it lay upon the assured to prove the loss happened in the particular manner declared on," *i. e.* by foundering; but "the Chief Justice said it would be unreasonable to expect certain evidence of such a loss," and left it to the jury); 1809, Twemlowe *v.* Oswin, 2 Camp. 85 (insurance; a ship sailing from Liverpool April 14, 1807, to the Gulf of St. Lawrence and thence to Hayti; evidence that she had not been heard from up to March 1, 1809, was admitted, but held not sufficient); 1815, Watson *v.* King, 1 Stark. 121 (trover; a ship carrying M., one of the owners, last seen in a hurricane on March 7, 1814, near Jamaica, sailing from England; several others of the fleet foundered, and this one had never been heard from up to Dec. 14, 1815; Ellenborough, L. C. J., told the jury "it might be assumed that at that time M. was dead; but that it was for their consideration whether he was dead on the 8th of June, 1814," when his share of the ship was sold); 1816, Houstman *v.* Thornton, Holt N. P. 242 (insurance; a ship leaving Havana in August, 1815, bound to Holland or Flanders; up to Easter, 1816, she had not been heard from; Gibbs, C. J., "There is no fixed rule of law upon this subject"; and he left the case to the jury, expressing an opinion that the ship was lost); 1826, Koster *v.* Reed, 6 B. & C. 19 (insurance; a ship sailing from Leghorn to Lisbon in April, 1821; evidence that she never arrived; held, that the fact that she had been rumored of as foundered was equivalent to "never having been heard of," and that in any case there was sufficient evidence to go to the jury).

[7] 1901, Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135 (a person acknowledging a deed in 1817, presumed dead).

In evidencing the *lack of news*, under the

§ 2532. **Same: Survivorship.** Where two or more persons have perished in the same calamity, there is no presumption of law that either survived the other, or that all perished at the same time.[1] The burden of proving that one survived another will commonly be on any claimant for whom that fact is essential to his own chain of title.[2] If there is evidence, from the age, sex, or physical condition of the persons who perished, or from the nature of the accident and the manner of death of the parties, which tends to show that some one did in fact survive the others, the whole question is one of fact, to be decided in each case by the jury, according to the incidence of the first burden of proof (*ante*, § 2485); but without any rule of presumption.

But in escaping the artificial rules prescribed by the Continental law, and by a few of our own Codes,[3] our Courts have left many difficulties unsolved, and have created new artificialities capable of doing inordinate violence to a testator's intentions. For example, the supposed logic which has sometimes permitted the identical devisee of two co-perishing testators to be, after all, judicially deprived of the estate is as unnecessary in legal principle as it is shocking to good sense;[4] and a fairer solution for this frequent problem is a present desideratum in the law.[5]

§ 2533. **Seaworthiness.** In actions on insurance policies, the insurer will usually have the first burden of proof (*ante*, § 2485) of the unseaworthiness of the vessel, though the circumstances of the loss may afford *prima facie* evidence (*ante*, § 2494), or even raise a presumption, of the fact of unseaworthiness.[1] Yet there may be issues in which the vessel-owner will have the first burden of proof of seaworthiness.[2]

above rules, the use of rumors or reports, or their absence, is not a violation of the *Hearsay rule:* 1858, State *v.* Wentworth, 37 N. H. 217 (the fact that on inquiry no one in a certain neigborhood knew of a man whose existence was material); and cases cited *ante*, § 1789; the doubt expressed in Nehring *v.* McMurrian, 1900, 94 Tex. 45, 57 S. W. 943, was unnecessary.

[1] 1860, Wing *v.* Angrave, 8 H. L. C. 183; 1866, Hartshorne *v.* Wilkins, 6 N. Sc. 276; 1902, Middeke *v.* Balder, 198 Ill. 590, 64 N. E. 1002 (collecting cases); 1897, Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; 1878, Newell *v.* Nichols, 75 N. Y. 78; 1897, *Re* Wilbor, 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863; 1903, Young Women's Christian Home *v.* French, 187 U. S. 401, 23 Sup. 184.

[2] The various classes of cases, and the special modifications of principle, have been elaborately treated by Professor C. B. Whittier, in an article which makes further examination of them here unnecessary: "Problems of Survivorship," 1904, Green Bag, XVI, 237; the precedents are there fully collected.

[3] *E. g.*, Cal. C. C. P. 1872, § 1963, par. 40.

[4] As in Wing *v.* Angrave and Newell *v.* Nichols, *supra*. The decision in Young Women's Christian Home *v.* French, *supra*, is a commendable instance of a refusal to accept such a result.

[5] In view of these sinister possibilities of judicial decision, and of the contingencies created by the transmarine voyage annually taken by thousands of families, it may be suggested that the only safe form of will, for a married pair having identical testamentary wishes, must consist in a devise to a trustee, in trust, first, to accumulate the income for six months, next, to transfer the estate to the wife (or husband) *if living at the expiration of the six months*, and next, if not then appearing to be living, to the desired secondary devisees.

[1] 1878, Pickup *v.* Thames Ins. Co., L. R. 3 Q. B. D. 594 (insurance policy; a direction to the jury that a speedy return to port would shift the burden of proof by raising a presumption, held improper; "as a matter of reasoning and inference" only, the jury might so conclude); 1900, Allan *v.* Morrison, App. Cas. 362; 1893, Broadnax *v.* R. Co., 157 Pa. 140, 150, 27 Atl. 412 (the burden of persuasion is on the party affirming unseaworthiness; speedy return to port, etc., raises a presumption thereof).

[2] 1894, The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. 823 (action for goods lost, on a warranty of seaworthiness; the burden is on the owner to prove seaworthiness).

§ 2534. **Regularity: (1) Performance of Official Duty and Regularity of Proceedings.** The general experience that a rule of official duty, or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise occasionally to a presumption of due performance. This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability.[1]

The same principle has sometimes been extended to acts which ought to have been done by a *private person* in the course of business;[2] but this seems unlikely to be common. Furthermore, it has been often extended to include the *truth of an official certificate* or other assertion;[3] but although

[1] The following are illustrations: Cal. C. C. P. 1872, § 1963, par. 15; 1893, American M. Co. *v.* Hill, 92 Ga. 297, 18 S. E. 425 (a verdict as the foundation of a judgment, the minutes being lost; regularity presumed); 1840, Eyman *v.* People, 6 Ill. 4, 8 (use and recognition of a highway; presumed duly laid out); 1840, Nealy *v.* Brown, ib. 10, 13 (same); 1875, Goldie *v.* McDonald, 78 id. 605, 607 (defendant's residence in the county, as affecting service of process, presumed); 1827, Hathaway *v.* Clark, 5 Pick. 490 (notice of adjudication of insanity, not presumed, the record of it being lacking and the papers apparently entire); 1893, State *v.* Lord, 118 Mo. 1, 23 S. W. 764 (regularity of an indictment, presumed); 1894, State *v.* Hoyt, 123 id. 348, 355, 27 S. W. 382 (correctness of a tax-bill, presumed); 1895, State *v.* David, 131 id. 380, 33 S. W. 28 (coroner's mode of taking a deposition; regularity presumed); 1896, Greeu *v.* Barker, 47 Nebr. 934, 66 N. W. 1632 (chairman of a city board of trustees; his duty as to matters preceding a conveyance, presumed done); 1826, Bishop *v.* Coue, 3 N. H. 513, 516 (legality of a town meeting, presumed); 1895, Fisher *v.* Kaufman, 170 Pa. 444, 33 Atl. 137 (correctness of an old survey in a land-office, presumed); 1895, Altoona *v.* Bowman, 171 id. 307, 33 Atl. 187 (a requirement that municipal ordinances shall not be passed to enactment on the day of introduction or reporting; regularity not presumed); 1896, Harkrader *v.* Carroll, 76 Fed. 474 (proceedings of the land-office in issuing a patent, presumed); 1901, New River Mineral Co. *v.* Roanoke C. & C. Co., 49 C. C. A. 78, 110 Fed. 343 (that an undated sheriff's return was made within the due period, presumed).

The regularity of a *tax-title* has been a frequent field of controversy under this presumption, depending more or less on the requirements of the local statute: 1894, Clarke *v.* Mead, 102 Cal. 517, 519, 36 Pac. 862 (tax-deed; presumption made by statutes of regularity of steps in prior proceeding); 1826, Waldron *v.* Tuttle, 3 N. H. 340, 344 ("Very few of those sales have been found to be legal; the presumption is in fact against their validity; . . . in all cases enough of the proceedings should be shown to render it not improbable that the proceedings may have been regular," and this, with possession, may suffice); 1889, Blackwell, Tax Titles, 5th ed., §§ 1098, 1140.

[2] 1802, Ellenborough, L. C. J., in Williams *v.* E. I. Co., 3 East 199 ("Where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary — that is, in such case, of proving a negative — on the other side"; here, in an action by a ship-owner against a charterer for placing an explosive on board without notice, the burden was placed on the plaintiff to show the defendant's failure to give notice).

[3] 1885, Patterson *v.* Collier, 75 Ga. 419, 428 (an executive certificate that a person is not justice of the peace is "conclusive," "without rebutting evidence"); 1898, Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1002 (the commissioners' certificate of benefit under Rev. St. 1874, c. 24, § 147, raises a presumption); 1896, Albany Co. S. Bank *v.* McCarty, 149 N. Y. 71, 43 N. E. 427 (a certificate of acknowledgment creates a presumption, under C. C. P. § 935, when nothing more is offered, of the truth of the facts stated; when disputed by evidence, the jury is to decide; here the question was whether the deeds were in fact signed or executed; the opinion collects the cases); 1898, Rogers *v.* Pell, 154 id. 518, 49 N. E. 75 (a certificate of acknowl-

this consideration serves in part to justify for such statements the exception to the Hearsay rule (*ante*, § 1630), it is only occasionally (as in a certificate of acknowledgment) that the force of a real presumption can be expected.

§ 2535. **Same: (2) Appointment and Authority of Officers; Incorporation.** There is a rule of substantive law that for some legal purposes a *de facto* incumbency of a public office suffices; the *de jure* appointment would then not be in issue. But supposing that it is, the rule of evidence, requiring production of documentary originals (*ante*, § 1178), would call for the original document of appointment; unless, under that rule, an exception can be found for them. Such an exception, for reasons already noticed (*ante*, § 1228), is recognized for many classes of cases.[1]

Assuming, then, that the *de jure* incumbency of office by a particular person is to be shown, and that the document of appointment need not be produced, there may then come into play a well recognized presumption of incumbency, based on the person's prior *notorious action* as such officer. In strictness, there are here two elements, the course of action and its notoriety;[2] but the former alone is commonly mentioned. For *public officers*, the scope of the presumption depends more or less on the issue of substantive law involved, because other evidence may be demanded where the title to the office is the essence of the controversy; moreover, the rule of the sufficiency in substantive law of a *de facto* incumbency (above noted) tends to be confused with the present evidential rule of presumption.[3] Occasionally the rule is

edgment, on the fact of its venue, goes to the jury "against evidence in rebuttal, whatever it may be"); 1903, Pine Tree L. Co. *v.* Fargo, — N. D. —, 96 N. W. 357 (a city treasurer's credit of assessment-receipts, presumed correct).

Compare the cases cited *ante*, §§ 1347–1344 (conclusive documents) and §§ 1630–1684 (admissibility of official documents), where the statutes often declare such a rule for those documents.

[1] 1789, R. *v.* Gordon, 2 Leach 3d ed. 581 (murder of a constable; production of the appointment not needed); 1805, Kirwan *v.* Cockburn, 5 Esp. 233 (appointment in the army; the commission itself should be produced); 1883, James *v.* State, 41 Ark. 451, 453 (road-overseer; production not required); 1881, Hall *v.* Bishop, 78 Ind. 370, 372 (deputy auditor and assessor; production not required); 1899, State *v.* Haskins, 109 Ia. 656, 80 N. W. 1063 (production not required).

[2] The latter is nearly the same as using a *reputation* of appointment (*ante*, § 1626); the former rests on a principle of Relevancy (*ante*, § 272).

[3] Examples are as follows: *England:* 1791, Berryman *v.* Wise, 4 T. R. 366 (action of slander by an attorney); 1796, Cross *v.* Kaye, 6 id. 663 (attorney as defendant); 1826, Pearce *v.* Whale, 5 B. & C. 38 (attorney suing for services); 1833, Butler *v.* Ford, 1 Cr. & M. 662, 669 (police officers); 1835, Cannell *v.* Curtis, 2 Bing. N. C. 228 (assistant overseer of a parish); 1836, M'Gahey *v.* Allston, 2 M. & W. 206 (vestry-clerk's action on a bond); 1845, Doe *v.* Young, 8 Q. B. 63 (commissioners of land-tax; Coleridge, J.: "It is an admitted point that acting in an office is proof of being officer. . . . The inference may be carried upwards as well as downwards"; L. C. J.: "If it was within a reasonable time of the act done, that is sufficient"); 1846, Doe *v.* Barnes, ib. 1037, 1042 (church-wardens and overseers of a parish; Patteson, J.: "The fact [of acting] does not of itself prove any title, but only that the person fills the office"; but Denman, L. C. J., and Williams, J., rather take the view that the course of action indicates a title); *United States: Ark.:* 1859, State *v.* Stroope, 20 Ark. 202 (road-overseer indicted); 1866, Hardage *v.* Coffman, 24 id. 256 (trover; plea of taking while army-officer; notorious action as such, sufficient); *Cal.* C. C. P. 1872, § 1963, par. 14; 1903, Monterey *v.* Jacks, 139 Cal. 542, 73 Pac. 436 (city trustees); *Ga.:* 1857, Allen *v.* State, 21 Ga. 217, 219 (constable); Code 1895, § 5168 (an "officer *de facto* may be proved by his acts," without producing his appointment); *Ill.:* 1883, Golden *v.* Bressler, 105 Ill. 419, 428 (trustees of a bank appointed by the Governor); *Ia.:* 1855, Gourley *v.* Hankins, 2 Ia. 75, 77 (as between third persons, a *de facto* showing suffices); 1870, Londegan *v.* Hammer, 30 id. 508, 515 (justice of the peace); *Kan.:* 1889, State *v.* Crowder, 41 Kan. 101, 112, 21 Pac. 208 (government detective); *La.:* 1847, Planters' Bank *v.* Bass, 2 La. An. 430, 437; *Me.:* 1852, Hutchings *v.* Van Bokkelen, 34 Me. 126, 132 (arrest by a lieuten-

applied to prove a *private authority*,[4] but usually only in connection with the authentication of documents (*ante*, § 2124). By an extension of the principle the due *incorporation* of a company is often presumed from its course of action as such, together (in some cases) with a notoriety or repute;[5] and the statutory admissibility of reputation alone (*ante*, § 1625) would probably be deemed also to create the force of a presumption.

It may be added that many instances, in which this presumption might be brought into question, are otherwise disposed of through the rule of *authentication of documents under seal*, presuming the incumbency of the sealing

ant); 1867, New Portland *v.* Kingfield, 55 id. 172, 174 (overseers of the poor, furnishing pauper-supplies); *Mass.:* 1862, Webber *v.* Davis, 5 All. 393, 396 (magistrate); 1871, Com. *v.* Kane, 108 Mass. 423 (indictment for assault upon a police officer); 1893, Com. *v.* Wright, 158 id. 149, 157, 33 N. E. 82 (illegal resistance to the police; the person's own testimony to his office, without evidence of public acting; undecided); *Mich.:* 1843, Scott *v.* D. Y. M. Society, 1 Doug. 119, 152 (reputation and acting, sufficient; here, of judges); *Mo.:* 1837, Hart *v.* Robinett, 5 Mo. 11, 16 (constable and deputy; acting is sufficient); 1858, Eads *v.* Woodbridge, 27 id. 251 (district school trustee; acting is sufficient); 1885, State *v.* Holcomb, 86 id. 371, 377 (murder of a policeman; action and recognition are sufficient); 1890, State *v.* Findley, 101 id. 217, 222, 14 S. W. 185 (tax-collector; acting is sufficient); *N. H.*. 1872, State *v.* Roberts, 52 N. H. 492, 495 (collector of taxes); *N. J.:* 1798, Gratz *v.* Wilson, 6 N. J. L. 419, 420 (judge of the Federal Supreme Court); *N. Y.:* 1830, Wilcox *v.* Smith, 5 Wend. 231, 234 (constable; "there must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment"); 1831, Ring *v.* Grout, 7 id. 341, 344 (repute and conduct; applied to school-trustees; the repute being as to the *de facto* and not the *de jure* exercise of office); 1832, McCoy *v.* Curtice, 9 id. 17 (same); *N. C.:* 1844, Burke *v.* Elliott, 4 Ired. 355, 359 (besides the *de facto* exercise, there must be "at least some colourable election and induction into office *ab origine*, or so long an exercise of the office and acquiescence therein of the public authorities as to afford to the individual citizen a presumption strong" of appointment; here, a constable); *Tenn.:* 1809, State *v.* Manley, 1 Overt. 428 (acting is sufficient, except where the officer justifies or sues as such); *Tex.:* 1902, De Lucenay *v.* State, — Tex. Cr. —, 68 S. W. 796 (county judge); *U. S.:* 1819, Sawyer *v.* Steele, 3 Wash. C. C. 464, 468 (officers of a revenue cutter, suing for penalty; acting as such is sufficient); 1821, Jacob *v.* U. S., 1 Brockenb. 520, 528 ("acting notoriously" suffices; here, a revenue collector); 1827, Bank *v.* Dandridge, 12 Wheat. 64, 70 (cashier of the U. S. Bank, acting and recognized as such, assumed to be properly appointed); 1830, Ronkendorff *v.* Taylor, 4 Pet. 349, 359 (assessors; action under authority is sufficient); *Vt.:* 1827, Adams *v.* Jackson, 2 Aik. 145 (constable); 1856, State *v.* Abbey, 29 Vt. 60, 64 (justice performing a marriage); 1862, Briggs *v.* Taylor, 35 id. 57, 67 (deputy sheriff); 1898, State *v.* Taylor, — id. —, 39 Atl. 447 (constable making an arrest).

[4] 1837, Campbell *v.* Bank, 2 Ill. 423 (authority of an attorney to give a supersedeas bond); 1871, Druse *v.* Wheeler, 22 Mich. 439, 444 (trustees of a church, in an action for trespass). *Contra:* 1853, Bryan *v.* Walton, 14 Ga. 185, 192 (not applicable to a private trust, *e. g.* a guardian); 1857, Gilbert *v.* Boyd, 25 Mo. 27, *semble* (private trustees; rule not applicable).

The following ruling perhaps belongs here: 1898, Baxter *v.* Camp, 71 Conn. 245, 41 Atl. 803 (whether the defendant's cancellation of his signature to a contract was authorized; his admission of the cancellation, held not to put on him the duty of producing evidence of authority).

[5] Compare the cases on *judicial notice* of charters (*post*, § 2575); *Del.:* Rev. St. 1893, c. 107, § 12 (bank's incorporation, provable in criminal proceedings by reputation or by the issuance of notes as a bank); *Ill.:* 1858, President, etc. of Mendota *v.* Thompson, 20 Ill. 197 (here a peculiarly strict rule; the production of the charter, and proof of acts done under and in conformity with it, suffices); 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 id. 617, 625 (similar); Rev. St. 1874, c. 38, § 486, St. 1889, June 3 (user is to be *prima facie* evidence of corporate existence, in criminal prosecutions); *Mass.:* 1876, Merchants' National Bank *v.* Glendon Co., 120 Mass. 97 (banking corporation, in an action on a note); *N. H.:* Pub. St. 1891, c. 274, § 7 (offences involving counterfeit bank-notes; currency of the notes, "or other proof," is sufficient to show the bank's establishment); *Tenn.:* 1900, State *v.* Missio, 105 Tenn. 218, 58 S. W. 216 (larceny; example of the doctrine of the sufficiency in substantive law of a *de facto* corporation); *U. S.:* 1827, Bank of U. S. *v.* Dandridge, 12 Wheat. 64, 71, per Story, J.; *Vt.:* 1834, Barnes *v.* District, 6 Vt. 388, 393 (organization of a school district, proved by action as such and reputation); *Wash.:* 1893, Yakima Nat'l Bank *v.* Knipe, 6 Wash. 348, 350, 33 Pac. 834 (national bank).

The incumbency of a *corporate officer* will sometimes be noticed: 1870, State *v.* Cleavland, 6 Nev. 181, 185 (forgery); 1827, Bank of U. S. *v.* Dandridge, 12 Wheat. 64, 70, per Story, J.

officer (*ante*, §§ 2161–2169), and by the doctrine of *judicial notice* of *public officers* (*post*, § 2576).[6]

§ 2536. **Similarity of Foreign Law.** Whether a foreign rule of law is to be adopted as applicable to any part of the litigation before the Court, depends upon principles of substantive law. Supposing the foreign rule to control, then it is to be noted, with reference to ascertaining the terms of the foreign rule, that the Court does not know it judicially,[1] and that it must therefore be proved like any *factum probandum*,[2] and that in aid of such proof a presumption may within certain limits be resorted to. (1) If it is the law of a State possessing the English common law as the foundation of its system, in particular, *one of the United States*, it is generally said to be presumed to be the same as that of the forum;[3] even if it involves the existence of a statutory enactment, the same rule is often applied,[4] though many Courts draw a distinction here and confine the presumption to the common or judicially-declared law.[5] (2) If the *foreign State* is not one whose system is

[6] For the rule of presumption as to the incumbency of the *celebrant of a marriage*, see *ante*, § 2505; the question is complicated by two additional ones, namely, whether a *de facto* clergyman sufficed at common law, and whether the opponent by his conduct has admitted the legality of the celebrant's appointment.

[1] *Post*, § 2573.

[2] Whether to the Court or to the jury is another question (*post*, § 2558).

[3] *Ga.:* 1895, Pattillo *v.* Alexander, 96 Ga. 60, 22 S. E. 646 ("as to such matters concerning which there is no such recognized variance . . . as will afford a basis for judicial cognizance of such difference"; here the nature of an indorser's contract); *Ia.:* 1896, Goodwin *v.* Assurance Soc., 97 Ia. 226, 66 N. W. 157; *Nebr.:* 1894, Fitzgerald *v.* F. & M. C. Co., 41 Nebr. 374, 472 (rate of interest); 1897, East Omaha St. R. Co. *v.* Godola, 50 id. 906, 70 N. W. 491; 1902, People's Building L. & S. Ass'n *v.* Backus, — id. —, 89 N. W. 315 (usury); 1903, Staunchfield *v.* Jutter, — id. —, 96 N. W. 642 (waste by mortgagee of property); *Pa.:* 1896, Musser *v.* Stauffer, 178 Pa. 99, 35 Atl. 709; *S. D.:* 1897, Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894; *Tex.:* 1895, Tempel *v.* Hunter, 89 Tex. 69, 33 S. W. 222.

Sometimes the rule is applied even to the law of Louisiana: 1868, Simms *v.* Express Co., 38 Ga. 129, 132.

[4] *Cal.:* 1895, Cavallaro *v.* R. Co., 110 Cal. 348, 42 Pac. 918; *Ga.:* 1903, Welle *v.* Gress, — Ga. —, 45 S. E. 418 (warranty of a chattel's quality; the sale being made in Wisconsin, and the Georgia Code sanctioning an implied warranty, it was held that, even supposing that the common law did not imply such a warranty, yet "the legal presumption is that the *lex loci* is the same as our own"); *Ia.:* 1903, Barringer *v.* Ryder, 119 Ia. 121, 93 N. W. 56 (dower rule); *Kan.:* 1901, Woolacott *v.* Case, 63 Kan. 35, 64 Pac. 965; 1903, Poll *v.* Hicks, 67 id. 191, 72 Pac. 847 (Ohio judgment; Ohio statute presumed the same, as to a supersedeas bond); 1903, Heim B. Co. *v.* Gimber, ib. 834, 72 Pac. 859 (contributory negligence, while injured in Missouri; neither decision nor statute of Missouri judicially noticed, *i. e.* they were presumed to be the same); *Mo.:* 1898, Burgess *v.* Tel. Co., — Mo. —, 46 S. W. 794; *Nebr.:* 1893, Scroggin *v.* McClelland, 37 Nebr. 644, 646, 56 N. W. 208 (period of limitation); 1899, Fisher *v.* Donovan, 57 id. 361, 77 N. W. 778 (law of beneficiary corporations); *Pa.:* 1903, Adams Paper Co. *v.* Cassard, 206 Pa. 179, 55 Atl. 949 (contract of a wife made in New York; the contract being void by statute if made in Pennsylvania, "the Court will presume the wife's disability is the same in New York as here"); *Wis.*. 1903, Second Nat'l Bank *v.* Herman and Smith, 118 Wis. 18, 94 N. W. 664 (sufficiency of notice of dishonor).

The apparent ruling in New Jersey (1902, Coler *v.* Tacoma R. Co., 64 N. J. Eq. 117, 53 Atl. 680; 1903, Dittman *v.* Distilling Co., ib. 537, 54 Atl. 570) that a statute of another State will be presumed the same is really a ruling that a corporation chartered in one State may exercise its powers in another State unless the other State expressly prohibits it, and hence the burden of proving this exceptional prohibition is on the party who would profit by it.

[5] *Ala.:* 1897, Louisville & N. R. Co. *v.* Williams, 113 Ala. 403, 20 So. 938; 1899, Birmingham Waterworks Co. *v.* Hume, 121 id. 168, 25 So. 806; *Ark.:* 1893, Brown *v.* Wright, 58 Ark. 20, 22 S. W. 1022 (but the unwritten law is not presumed to be the same where the common law of England was not the foundation of jurisprudence, as in Texas); *Ga.:* 1898, Pattillo *v.* Alexander, 96 Ga. 60, 30 S. E. 644; *Ill.:* 1893, Miller *v.* Wilson, 146 Ill. 523, 531, 34 N. E. 1111 (statute of frauds, not presumed); 1899, Schlee *v.* Guckenheimer, 179 id. 593, 54 N. E. 302 (assumpsit on contract made in Ohio, but legal in Illinois; presumed valid as at common law in Ohio); *La.:* 1895, Roehl *v.* Porteous, 47 La. An. 1582, 18 So. 645; *Mass.:* 1894, Kelley *v.* Kelley, 161 Mass. 111, 112, 36 N. E.

founded on the common law the presumption will probably not be made, unless the principle involved is one of the law merchant common to civilized countries.[6] It has been suggested that in reality there is no presumption, and that the true process is merely that of refusing to recognize a presumption that the foreign State has a different law;[7] and no doubt this will sufficiently describe the situation in many cases; but the ordinary mode of stating the question seems correct enough in most instances. The proper phrasing depends upon the state of the burden of proof in the case in hand; though the doctrine of judicial notice of law (*post*, § 2573) tends to be here confused.

§ 2537. **Contracts.** In evidencing the issues of fact arising under a contract right or liability, the first burden of proof (*ante*, § 2485) is almost always determined by the rules of pleading, or is directly deducible therefrom; the chief class of questions here, the *performance of a condition*, is included plainly, in common law tradition, within the sphere of pleading;[1] though in more recent times, under looser methods of procedure, the relaxation of boundaries between affirmative and negative pleas has tended to obscure the old landmarks of discussion. So, too, under the second burden of proof (*ante*, §§ 2487, 2494), so far as there are rules of *prima facie* sufficiency or of presumption, relieving or shifting the duty of producing evidence, they seldom concern facts peculiar to the domain of contracts alone; and any of the preceding presumptions may become applicable.[2]

§ 2538. **Statute of Limitations.** The first burden of proof (*ante*, § 2485), affecting the loss of a right by limitation, was at common law usually placed upon the plaintiff, *i. e.* to show that the period of limitation had not elapsed

837 (divorce jurisdiction); *Minn.:* 1898, Pardoe *v.* Merritt, 75 Minn. 12, 77 N. W. 552; *N. Y.:* 1894, Vanderpoel *v.* Gorman, 140 N. Y. 563, 568, 35 N. E. 932 (assignment by corporation); 1898, First National Bank *v.* Broadway N. Bank, 156 id. 459, 51 N. E. 398 (statutory change in another State not presumed); *S. D.:* 1898, Meuer *v.* R. Co., 11 S. D. 94, 75 N. W. 823; *Tex.:* 1899, Blethen *v.* Bonner, 93 Tex. 141, 53 S. W. 1016 (*semble*); *Vt.:* 1897, State *v.* Shattuck, 69 Vt. 403, 38 Atl. 81.

[6] Compare with the following some of the cases cited *supra*, notes 3–5, on the law of Texas and Louisiana: 1899, Aslanian *v.* Dostumian, 174 Mass. 328, 54 N. E. 845 (common law merchant, if it applies in Turkey, must be shown to do so, by the party wishing to prove it); 1901, Mexican C. R. Co. *v.* Glover, 46 C. C. A. 334, 107 Fed. 356 (Mexican law as to employers' liability, presumed the same as that of Texas). The presumption of *continuance* (*ante*, § 2530) is sometimes here invoked: 1880, Hynes *v.* McDermott, 82 N. Y. 43, 57 (whether the law of France, as proved for 1862, would be presumed to continue until 1871, not decided).

[7] 1898, Corson, P. J., in Meuer *v.* R. Co., 11 S. D. 94, 75 N. W. 823. Compare Story, Conflict of Laws, 8th ed., 1883, § 637, note by Professor Bigelow.

[1] The following are examples of the commoner problems of this sort: *Warranties* or *conditions in an insurance policy:* 1902, Hennessy *v.* Ins. Co., 74 Conn. 699, 52 Atl. 490; 1903, Supreme Tent *v.* Stensland, 206 Ill. 124, 68 N. E. 1098 (life); 1896, Penn. M. L. Ins. Co. *v.* M. S. B. & T. Co., 19 C. C. A. 286, 72 Fed. 413, 441 (the burden is on the insurer to show materiality and fraudulent intent of a false representation; nor does knowledge of the falsity of the same representation in another policy raise a presumption as to knowledge on this occasion); *Exemptions in a bailee's contract:* *ante*, § 2508; *Reservations in a deed:* 1897, Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601 (deed with reservations; the claimant must prove that the land claimed is not within the reservations).

[2] The following are some of the rare instances: *Shipper's assent to the terms of a bill of lading received:* 1896, Chicago & N. W. R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596 (the carrier must show that limitations of his common-law liability are brought to the shipper's notice); 1866, Boorman *v.* Express Co., 21 Wis. 152, 158 (delivery to the shipper raises a presumption of assent); *Partnership books:* 1897, Wilson *v.* Potter, — Ky. —, 42 S. W. 836 (partnership books are presumed correct; and in attacking them the specific items must be pointed out beforehand).

between the accrual of his right and the institution of his suit;[1] this seems to have been due to the peculiar wording of the earliest statutes, whose analogies were afterwards repeated. But the more natural and just view is to treat the fact as one of defeasance, like a release, and thus to place on the opponent the burden of establishing it; this is the result accepted in probably most jurisdictions to-day, either by statute[2] or at common law;[3] in any event, it is in strictness a question of the law of pleading, not of evidence. Where the plaintiff's declaration exhibits in itself the lapse of the barring period, a further question arises (not necessarily dependent on the rule for burden of proof) as to the mode of taking advantage of this admission; in some cases a demurrer, or its equivalent, may suffice;[4] in a jurisdiction where the burden is on the defendant, it would be proper to raise thereby a presumption in his favor, shifting to the plaintiff the duty of producing evidence of some exception;[5] though here again the rules of pleading should furnish the proper mode of determination.

§ 2539. **Malicious Prosecution.** In an action for malicious prosecution, the plaintiff is anomalously required to plead and to prove facts which are otherwise regarded as matters of excuse or privilege, *i. e.* the termination of the prior proceeding in his favor, the lack of probable cause for it, and the malice;[1] this being prescribed for him by the rules of pleading. In the course of sustaining this first burden (*ante*, § 2485), he may sometimes avail himself of rules of presumption or *prima facie* sufficiency (*ante*, §§ 2487, 2497) or be met by counter-presumptions for the defendant; for example, by a rule that the magistrate's discharge,[2] or the suffering of a nonsuit,[3] is *prima facie* evidence, or raises a presumption, of lack of probable cause, or that the defendant's receipt of advice from counsel is sufficient evidence of probable cause. But in these and other instances the rule is frequently intended to be one of substantive law, *i. e.* that the fact in question is or is not *per se* probable cause; and the details of substantive law thus become inextricably mingled with the rules of presumption.

§ 2540. **Sundry Burdens and Presumptions.** In sundry multifarious cases, more or less casual, rules of presumption have been recognized;[1] and experi-

[1] 1817, Hurst *v.* Parker, 1 B. & Ald. 92 (trespass to a mine); 1837, Nepean *v.* Knight, 2 M. & W. 894 ("the *onus* is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued"); 1897, Leigh *v.* Evans, 64 Ark. 26, 41 S. W. 427 (administrator's account); 1897, Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122.

[2] Cal. C. C. P. 1872, § 458; 1896, Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652 (under Comp. L. 1888, § 3244).

[3] 1895, Goodell's Ex'rs *v.* Gibbons, 91 Va. 608, 22 S. E. 504; Wood on Limitations, 1901, 3d ed., by Gould, § 7.

[4] 1879, Hutchinson *v.* Hutchinson, 34 Ark. 164 (provided also the facts in the complaint negative any ground of avoidance); 1876, People *v.* Herr, 81 Ill. 125 (but not in an action on a penal statute); 1895, Fulton *v.* Northern Ill. College, 158 id. 333, 336, 42 N. E. 138; 1879, Lewis *v.* Alexander, 51 Tex. 578, 588.

[5] 1879, Hines *v.* Potts, 56 Miss. 346, 352; 1895, Gross *v.* Disney, 95 Tenn. 592, 32 S. W. 632; Wood on Limitations, *ubi supra*.

[1] 1883, Abrath *v.* Northeastern R. Co., L. R. 11 Q. B. D. 440; 1858, Barron *v.* Mason, 31 Vt. 189 (leading opinion, by Redfield, C. J.).

[2] *Contra:* 1860, Israel *v.* Brooks, 23 Ill. 526 [575]; *accord:* 1893, Barhight *v.* Tammany, 158 Pa. 545, 28 Atl. 135.

[3] 1902, Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800 (collecting the cases *pro* and *con*).

[1] The following are illustrations: 1897, Kansas City, F. S. & M. R. Co. *v.* Becker, 63 Ark. 477, 39 S. W. 358 (a common employment of plaintiff and the defendant's servant having been shown, a presumption arises that they were fel-

ence will doubtless and justly continue to develop new ones. The various burdens of proof of the first class fall properly within the domain of the rules of pleading (*ante*, § 2486).

low-servants); 1895, Levy *v.* Chicago N. Bank, 158 Ill. 88, 42 N. E. 129 (when things are done on the same day, they are presumed to have been done at the same time); 1897, Crane *v.* People, 168 id. 395, 48 N. E. 54 (Rev. St. c. 38, § 12, relating to adultery, applied); 1896, Mutual Life Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996 (the taking of morphine by the insured's own hand does not create a presumption of suicide, and the burden of proof to show suicide remains on the insurer); 1848, Brown *v.* Burnham, 28 Me. 38 (procedure in taking a deposition); 1839, Randolph *v.* Easton, 23 Pick. 242 (a pauper woman's settlement in E. being shown, the defendants showed a marriage; held, that the burden was still upon them to show that the husband had a settlement elsewhere than at E., and not on the plaintiffs to show that he was settled at E.); 1896, State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783; State *v.* Rogers, ib. 793, 26 S. E. 142 (the sworn examination of a bastard's mother raises a presumption); Cook *v.* Guirkin, ib. 13, 25 S. E. 715 (payment admitted by payee; application of it to other lawful debts alleged in defence; the duty to produce evidence is on the payee); 1897, Foster *v.* Crawford, 80 Fed. 991 (levy of execution on sufficient assets raises a presumption of satisfaction); 1901, U. S. *v.* Chun Hoy, 50 C. C. A. 57, 111 Fed. 899 (under St. May 5, 1892, § 3, a Chinese person has the burden of showing his right to remain in the United States); 1895, Witz *v.* Fite, 91 Va. 446, 22 S. E. 171 (where a higher security is given for the same debt, there is a presumption of merger).

BOOK III: TO WHOM EVIDENCE MUST BE PRESENTED (LAW AND FACT; JUDGE AND JURY).[1]

CHAPTER LXXXVIII.

§ 2549. **Functions of Judge and Jury; General Principles.** As a part of the larger procedure of jury trial, the question arises, To whom must evidence be presented for persuasion? To the judge, or to the jury? Before examining the answer to this question, certain principles, superficially related, must be discriminated. (*a*) *The judge's control over the burden of proof.* As a part of the rules regulating the burden of proof, the party on whom rests for the time being the duty of coming forward with evidence may be required to offer not merely any evidence whatever, but a sufficient amount to be worth considering, before he is regarded as satisfying this rule; in other words, he cannot go to the jury unless his evidence is sufficient, by this test; and it is the judge that applies the test. In this sense, then, the judge may be called upon to rule whether the evidence is sufficient, *i. e.* sufficient to go to the jury; if it is, they then solely determine whether it is sufficient, *i. e.* to convince them. This has been already examined (*ante*, §§ 2487, 2494). (*b*) *The judge's discretion*, or final determination of a question either of fact or of law (*ante*, § 16). The ruling of a trial Court on preliminary questions of fact relating to admissibility is often held to be not subject to review, *i. e.* the trial Court is said to have "discretion"; the instances have been mentioned under the various heads of evidence. (*c*) *The judge's application of a rule defining the legal consequences of a fact.* So far as the substantive law gives certain facts *per se* a legal consequence (as when it makes, for example, the consultation of counsel *per se* sufficient for good faith, in an action for malicious prosecution), the judge applies the rule, and the case is in this respect beyond the control of the jury. This principle becomes especially important in issues of negligence (*post*, § 2552). (*d*) Finally, the present subject, *i. e. the respective functions of judge and jury, in the ultimate decision of the different issues that arise;* upon this apportionment of function depends the question, To whom is the evidence to be regarded as offered by the parties?

[1] EXPLANATORY NOTE. The explanations made *ante*, § 2499, note 1, apply to this Chapter also.

Taking up the last question, then, we find it usually said that *questions of fact are for the jury;* or in the Latin phrase employed by Coke,[2] *Ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores.* But this cannot be taken as a trustworthy guide to the solution of any particular controversy on the subject:

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 185, 202: "Courts pass upon a vast number of questions of fact that do not get on the record or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the Courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact. . . . The allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact, or facts which form part of the issue." [3]

It is therefore of little service to seek for guidance as to the limits of these questions by defining "law" and "fact"; the inquiry is rather as to the kinds of questions of fact which are to be determined by the judge. Moreover, this inquiry in effect concerns the respective division of functions between judge and jury, — a larger subject, and one not so much a part of the law of evidence as of the law of trial-procedure in general; and the matter is thus complicated by other inquiries as to the general powers of the judge in supervising and controlling the jury, — inquiries which must be distinguished from the specific one whether the evidence on a certain point is to be addressed to the judge or to the jury as the functionary immediately concerned with its determination. It is here possible only to indicate the trend of some of the main subjects of controversy or difficulty.

§ 2550. **Admissibility of Evidence.** The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; its application to the various kinds of evidence — qualifications of witnesses, absence of a hearsay deponent, voluntariness of a confession, condition of a dying declarant, and so on — has already been considered under the various heads of evidence. It follows that, so far as the admissibility in law depends on some incidental question of fact — the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like — this also is for the judge to determine, before he admits the evidence to the jury.[1] This principle, one of the foundation-stones of our

[2] 1613–14, Isaack *v.* Clark, Rolle, I, 132, 2 Bulstr. 314.

[3] On the whole subject of this chapter, the reader should consult the masterly historical and analytical survey by Professor Thayer, in his Preliminary Treatise, c. 5, pp. 183–262; or his Law and Fact in Jury Trials, Harvard Law Review, IV, 147.

[1] 1843, Bartlett *v.* Smith, 11 M. & W. 483 (whether a document is inadmissible through default of stamps; leading case); 1847, Doe *v.* Davies, 10 Q. B. 314, 323; 1881, Fairbank *v.* Hughson, 58 Cal. 314 (qualifications of an expert); 1855, Miller *v.* Metzger, 16 Ill. 390, 393 (necessity of calling an attesting witness); 1888, Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452 (leading opinion, by C. Allen, J.); 1877, Holly *v.* State, 55 Miss. 424, 430 ("It may in short be stated as a universal rule that the Court always decides whether there has been any evidence upon a particular point, when there exists a legal necessity to produce such evidence in order to warrant the introduction of evidence upon some other point; to this extent the Court decides questions of fact"; here said of an overt act, preceding evidence of

law, has countless applications under the various rules of admissibility.[2] In more recent times, however, a heterodox practice has appeared, in places, of leaving some questions of admissibility to the jury.[3] No doubt the judge, after admitting evidence, leaves it to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration (*post*, § 2551). But to leave the fact to them, to be rejected or accepted according to some legal definition, and not according to its intrinsic value to their minds, is to commit a grave blunder. It is an error of policy (as well as a deviation from orthodox principle) for several reasons; in the first place, it is a needless abdication of the judicial function, — of which humility we have already too much; furthermore, it adds another to the exceptions to the general rules; and finally, it cumbers the jury with legal definitions and offers an additional opportunity for quibbling over the tenor of the instructions.

In the appurtenant corollaries of this function of the judge, it may be noted that he may of course *hear evidence on both sides* for determining the facts on which the rule of admissibility turns;[4] that during this process the *jury may be retired* out of hearing;[5] and that the judge's determination on this question ought to be *final*, beyond review by appeal, and is so by the wholesome rule of a few Courts.[6]

§ 2551. **Sufficiency of Evidence.** When evidential facts are once admitted by the judge, their individual and total weight or probative value is for the jury. This signifies, first, that there are no rules of law to bind them on the subject, though Courts occasionally attempt to formulate some,[1] and, secondly, that the judge's own view of the weight of the evidence is not to be stated to the jury; though the latter rule (which obtains by Constitution or

the deceased's threats); 1898, Semple *v.* Callery, 184 Pa. 95, 39 Atl. 6 (good faith of a release of interest).

[2] The detailed applications of it are more conveniently considered under the various rules; in particular, compare the following places: *ante*, § 487 (testimonial qualifications in general), § 497 (insanity of a witness), § 508 (infancy), § 561 (expertness), § 587 (interest), § 861 (confessions), § 1192 (production of documentary originals), § 1385 (cross-examination), § 1451 (dying declaration), § 1820 (capacity to take an oath), § 1883 (order of evidence), § 2020 (genuineness of handwriting-specimens), § 2060 (accomplice's corroboration), §§ 2271, 2322 (privilege).

[3] 1877, Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502, 504 (the trial Court allowed to leave to the jury to exclude communications if they believed that the relation of legal adviser existed; "it does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict"); 1856, Bartlett *v.* Hoyt, 33 N. H. 151, 165 ("whether a witness is interested upon this or that given state of facts is a question of law for the Court; whether the facts exist as claimed by one party or the other is a question of fact, which, when presented in the form of the preliminary inquiry as to the competency of witness, may be determined by the Court, or, in the exercise of their discretion, by the jury"). Other examples may be seen in the various passages cited *supra*, note 2, especially in §§ 487, 497, 587, 861, 1385, 1451.

[4] 1852, Parke, B., in Cleave *v.* Jones, 7 Exch. 421, 425; and cases cited *ante*, § 497 (insanity), § 861 (confessions), § 1385 (cross-examination).

[5] 1893, State *v.* Shaffer, 23 Or. 555, 558, 32 Pac. 545 (dying declarations); and cases cited *ante*, §§ 861, 1451, 1808.

[6] 1844, Foster *v.* Mackay, 7 Metc. 531, 537; 1888, Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452; and cases cited *ante*, §§ 16, 496, 507, 561, 862, 1194, 1312.

The rule of *reasonable doubt* (*ante*, § 2497) has here no possible application; though such a notion has been advanced: 1898, Lipscomb *v.* State, 75 Miss. 559, 23 So. 210 (the facts must be proved to the judge beyond reasonable doubt; said here as to dying declarations, but the majority do not entirely agree on the doctrine); *contra:* 1888, Com. *v.* Robinson, Mass., *supra*.

[1] This question has been considered *ante*, §§ 29, 1013, 2033, 2034, 2498, in various aspects.

statute in almost every State, but not in the Federal Courts [2]) is an unfortunate departure from the orthodox common-law rule, and has done much to introduce fruitless quibbles and to impair the general efficiency of jury trial as an instrument of justice.

§ 2552. **Negligence.** The application of the general principle (*ante*, § 2549) suffers a few apparent or real exceptions in certain kinds of issues; and in particular, in an issue of negligence.

When the question is whether a person has been guilty of *negligence*, *i. e.* whether he has used due care under the circumstances, or has acted as a prudent man would have acted, or whatever the form of phrase may be, the evidence is to be addressed to the jury, as upon other issues, because the question is for them to determine. But from this rule must be distinguished three kinds of judicial utterances, closely connected in practice, and superficially though not in truth involving an inconsistency with this principle or a limitation of it. (*a*) Where for the kind of case in hand a definite *rule of law*, more precise and concrete, has been framed for determining the effect of the person's conduct, this rule of law may, in the hands of the judge, conclude the question, and it may cease to be a question of fact for the jury to the extent that the rule of law applies. Thus, a defendant's conduct in carrying a loaded gun on his shoulder in a city street may be ruled by the Court to be "negligence *per se*," or, in a common phrase, he may be held to have acted "at peril" of answering for the harmful consequences; so that the question of fact for the jury is merely whether he carried the gun in that way, and the question whether he acted with due care ceases to be a question for them, because it is covered by a specific and concrete rule of law. Similar rules are constantly laid down for various situations, — leaving a horse unhitched in a street, running a train at a speed in excess of a statutory limit, storing gunpowder in a populous quarter, and the like. So, also, a concrete rule of this sort may be laid down for a plaintiff whose contributory negligence is pleaded, and it may be ruled that his conduct in thrusting his head out of a railway car-window, or in failing to stop, look, and listen at a railway crossing, is "negligence *per se*." Whether such a rule should be laid down is a question of the detailed substantive law appropriate to the situation; and, wherever such a rule of law appears, the matter ceases, as of course, to that extent, to be a question of fact for the jury.[1] (*b*) In pursuance of the rules regarding the burden of producing evidence, and of the judicial function thus called into play (*ante*, §§ 2487, 2494), it is in every case for the Court to say whether there was *sufficient evidence to go* to the jury; and so also in a case of negligence. Thus the Court has constantly, in revising the results of a trial, to ask whether there was any evidence of negligence proper to be left to a jury;

[2] 1886, Vicksburg R. Co. *v.* Putnam, 118 U. S. 545, 553, 7 Sup. 1. The veteran Chief Justice Ruffin, in State *v.* Moses, 2 Dev. 452, 458 (1830), comments on this degenerate rule with his usual keenness; it seems to have originated in his State. Compare the remarks in Thayer's Preliminary Treatise, 188.

[1] The nature of such rules is explained in Holmes, Common Law, 150, 152; and in an article on An Analysis of Tort Relations, Harvard Law Review, VIII, 389.

and occasionally a more detailed test is attempted for thus exercising this power of revision and determining whether the party has fulfilled the duty of producing sufficient evidence.[2] (*c*) Another form of utterance, sometimes and properly treated[3] as another way of phrasing the preceding principle, but often treated as if independent of it and as if forming an exception to the first general principle above stated, is that the question of negligence goes to the jury *unless the facts are undisputed and fair-minded or reasonable men could draw but one inference from them.*[4] So far as this phrase (almost universally used, in one form or another) is intended to mean that the Court would, if the above condition were fulfilled, either declare the evidence of negligence insufficient to go to the jury (if that were the Court's interpretation of the conduct), or set aside, as against the weight of evidence, a verdict finding no negligence and order a new trial or even cause a new verdict to be entered (if that were the Court's interpretation), the phrase is in effect only a more detailed statement of the test to be adopted by the Court in its supervisory right, just alluded to, to say whether there is or is not sufficient evidence for the jury or whether a verdict is or is not against the weight of evidence (*ante*, § 2494). But so far as the phrase is intended to mean that, if the specified condition is fulfilled, the Court will take the question into its own hands and say, as a matter of fact to be decided by the Court itself, that there was or was not negligence, upon facts undisputed and inferences alone conceivable,[5] then the result seems to be in effect an exception to the general principle first above stated, *i. e.* it defines an excepted case in which the question of negligence is to be determined, for that litigation, by the judge and not by the jury. It is often difficult to ascertain what is the precise nature of the principle involved in this phrasing.[6]

§ 2553. **Reasonableness.** There are many situations in which the issue of *reasonableness* of conduct presents itself; and in general it is recognized as an issue of fact for the jury.[1] There has been a more or less definite change

[2] See the citations in the next notes.

[3] *E. g.:* 1874, per Brett, J., in Bridges *v.* R. Co., L. R. 7 H. L. 213.

[4] This is sometimes expressed in the disjunctive, *i. e.* facts undisputed *or* open to one inference only.

[5] *E. g.:* 1897, Brawley, J., in Patton *v.* R. Co., 27 C. C. A. 287, 82 Fed. 979.

[6] The following will serve as illustrations: 1877, Metropolitan R. Co. *v.* Jackson, L. R. 3 App. Cas. 193; 1878, Dublin, etc. R. Co. *v.* Slattery, ib. 1155; 1886, Metropolitan R. Co. *v.* Wright, 11 id. 152; 1898, Herbert *v.* R. Co., 121 Cal. 227, 53 Pac. 651; 1889, Terre Haute & I. R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20; 1896, Stroble *v.* New Albany, 144 Ind. 695, 42 N. E. 806; 1897, Young *v.* R. Co., 148 id. 54, 47 N. E. 142; 1903, Blumenthal *v.* R. Co., 97 Me. 255, 54 Atl. 747; 1895, Spears *v.* R. Co., 43 Nebr. 720, 62 N. W. 68; 1897, Goldsboro *v.* R. Co., 60 N. J. L. 49, 37 Atl. 433; 1880, Stackus *v.* R. Co., 79 N. Y. 464; 1896, Tillett *v.* R. Co., 118 N. C. 1031, 24 S. E. 111; 1897, White *v.* R. Co., 121 id. 484, 27 S. E. 1002; 1898, Ward *v.* Odell Mfg. Co., 123 id. 248, 31 S. E. 495; 1893, Gates *v.* R. Co., 154 Pa. 566, 572, 26 Atl. 598 (omitting the second clause); 1898, Boyle *v.* Mahanoy City, 187 id. 1, 40 Atl. 1093; 1888, Kane *v.* R. Co., 128 U. S. 91, 9 Sup. 16; 1891, Delaware L. & W. R. Co. *v.* Converse, 139 id. 469, 11 Sup. 569; 1893, Washington & G. R. Co. *v.* Harmon's Adm'r, 147 id. 571, 580, 13 Sup. 557; 1893, Richmond & D. R. Co. *v.* Powers, 149 id. 43, 45, 13 Sup. 748; 1893, Gardner *v.* M. C. R. Co., 150 id. 349, 361, 14 Sup. 140; 1893, Northern P. R. Co. *v.* Peterson, 5 C. C. A. 338, 55 Fed. 940; 1897, Pyle *v.* Clark, 25 id. 190, 79 Fed. 744; 1892, Hanley *v.* Huntington, 37 W. Va. 378, 16 S. E. 807; 1893, Salladay *v.* Dodgeville, 85 Wis. 318, 328, 55 N. W. 696 (omitting the first clause); 1893, Hart *v.* R. Co., 86 id. 483, 490, 57 N. W. 91 (omitting the second clause); 1897, Morrison *v.* Madison, 96 id. 452, 71 N. W. 882.

[1] 1894, Gerdes *v.* Iron & F. Co., 124 Mo.

from an earlier attitude of the Courts, when such questions were usually treated as questions of law, in the sense that the judge determined whether the conduct under all the circumstances was reasonable, or gave instructions to be applied by the jury to the facts that might be found by them; and instances of this older treatment are to be found to-day.[2] Moreover, an intermediate form appears, reserving the question for the judge where the facts are undisputed.[3] But from these real variations in the attitude toward the present subject are to be distinguished the instances of the Court's resort to the two other principles already noted in speaking of the question of negligence; (*a*) the question may, by the development of the substantive law, have ceased to be a broad and open one of reasonableness and have become reduced to detailed and concrete rules of thumb, — as in several instances in the law of negotiable instruments;[4] here there is a rule of law, more or less definite, and the jury are to that extent limited in their inquiry; (*b*) the Court's supervisory right, upon the present issue as upon others, to declare that there is not evidence sufficient to go to a jury or that a verdict is against evidence (*ante*, § 2494), may be exercised by ordering a nonsuit or setting aside a verdict, without denying the general question to be one of fact for the jury.

§ 2554. **Same: Malicious Prosecution.** The question whether a defendant in a case of *malicious prosecution* or *false arrest* had "reasonable and probable cause" for the suit or arrest, although it may be in the broader sense a question of fact, has nevertheless been retained in the hands of the Court as a matter for its determination.[1] The Court should properly instruct the jury "in the concrete and not in the abstract," by instructions adapted to cover the possible findings of fact.[2] It is sometimes said that the question is for the judge if the facts are undisputed and are open to but one inference;[3] but this fails to recognize the right of the judge, even

347, 25 S. W. 557 (obstructions to highway by merchandise for an unreasonable time); 1898, Chesterfield *v.* Ratliff, — S. C. —, 30 S. E. 593 (discharging firearms "without a reasonable excuse"); 1897, White *v.* Pease, 15 Utah 170, 49 Pac. 416 (delivery of goods within a reasonable time under a sale in fraud of creditors).

[2] 1824, Facey *v.* Hurdom, 3 B. & C. 213 (reasonable time; here left to the jury); 1832, Mellish *v.* Rawdon, 9 Bing. 416 (Tindal, C. J.: "whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case"); 1843, Burton *v.* Griffiths, 11 M. & W. 817 (reasonable time; here left to the jury); 1810, Chesapeake Ins. Co. *v.* Starke, 6 Cr. 268, 278 (whether an abandonment of a vessel was within a reasonable time is for the jury under the Court's direction); 1894, Joyner *v.* Roberts, 114 N. C. 389, 392, 19 S. E. 645 (whether a register of deeds made reasonable inquiry as to age before giving a marriage license is for the Court).

[3] 1896, Comer *v.* Way, 107 Ala. 300, 19 So. 966 (time); 1892, Earnshaw *v.* U. S., 146 U. S. 60, 67, 13 Sup. 14 (notice); 1896, American Surety Co. *v.* Pauly, 18 C. C. A. 644, 72 Fed. 470 (time of sending notice).

[4] So, too, in other subjects; *e. g.:* 1868, Ryder *v.* Wombwell, L. R. 4 Exch. 32 (necessaries for an infant).

[1] 1841, Panton *v.* Williams, 2 Q. B. 169; 1870, Lister *v.* Perryman, L. R. 4 H. L. 521; 1894, Olsen *v.* Lantalum, 32 N. Br. 526; 1896, Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089; 1893, White *v.* McQueen, 96 Mich. 249, 254, 55 N. W. 843 (facts conceded; taken from the jury); 1893–94, Filer *v.* Smith, ib. 347, 102 id. 98, 55 N. W. 999, 60 N. W. 297; 1897, Hess *v.* Oregon G. B. Co., 31 Or. 503, 49 Pac. 803; 1892, Mahaffey *v.* Byers, 151 Pa. 92, 96, 25 Atl. 93; 1893, Sanders *v.* Palmer, 5 C. C. A. 77, 55 Fed. 217.

[2] Hess *v.* Bank, *supra*.

[3] 1895, Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722; 1891, Wass *v.* Stephens, 128 N. Y. 123, 28 N. E. 21.

where the facts are disputed, to submit instructions appropriate to the possible findings.[4]

§ 2555. **Facts Judicially noticed; Trial by Inspection; Nul Tiel Record.** (*a*) On such matters as the Court *notices judicially* (*post*, § 2567), it would seem that the judge's ruling does not determine the matter, and the jury need not take it from him as a decided point, unless it concern something that would otherwise not come to them as matter of fact.

(*b*) There was once recognized a form of trial *by inspection*, *i. e.* by the judge's own observation of the fact in court.[1] But this is rather to be considered as a survival, in distorted form, of some of the earlier methods of proof prevailing before jury-trial;[2] and no recognition would probably be given to it to-day,[3] except in the ensuing instance.

(*c*) A *judicial record*, when its existence in a certain tenor is denied, was said to be tried *by inspection* of the judge, on production of the alleged original record before him; and the plea of *nul tiel record* was coextensive with this class of cases.[4] A foreign judgment, however, being evidenced by copy only, fell without this rule.[5]

§ 2556. **Construction of Documents.** The construction of all *written instruments* belongs to the Court.[1] It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as of any local or commercial meanings attached to particular words by usage (*ante*, §§ 2461–2478); and the ascertainment of this is for the jury.[2]

[4] 1894, Schattgen *v.* Holnback, 149 Ill. 646, 652, 36 N. E. 969 (if there are disputed facts, it is to be submitted under instructions).

[1] 1768, Blackstone, III, 331 ("Trial by inspection . . . [is when the issue] being evidently the object of sense, the judges of the Court, upon the testimony of their own senses, shall decide the point in dispute; . . . when the fact from its nature must be evident to the Court, either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone"; the instances given being non-age of an infant, life and identity of a party alleged to be dead, idiocy on appeal to the chancellor, mayhem, and a date as appearing in the almanac); so for non-age: Co. Litt. 380 *b*.

[2] Thayer, Preliminary Treatise, 19–24.

[3] 1831, Morton *v.* Fairbanks, 11 Pick. 368, 370 (whether certain things were shingles or mere chips; "it was ruled that, as the point was clear upon inspection, it was to be decided by the Court"; ruling held improper). One of the rare instances is the following, which however falls rather under the principle for documents (*post*, § 2556): 1836, Cromwell *v.* Tate's Ex'r, 7 Leigh 301, 303 ("the existence or non-existence of the seal [on a deed] is to be ascertained by an appeal to the senses; and when that is the case, the judges of the Court shall decide"; citing Blackstone).

[4] 1628, Co. Litt. 260 *a* ("If such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by itselfe"); 1768, Blackstone, Commentaries, III, 330 ("Where a matter of record is pleaded in any action — as, a fine, a judgment, or the like — and the opposite party pleads *nul tiel record*, . . . the trial therefore of this issue is merely by the record; . . . it shall not receive any trial by witness, jury, or otherwise, but only by itself"); *accord:* 1824, State *v.* Graton, 3 Hawks 187; 1824, State *v.* Isham, ib. 185; 1833, Adams *v.* Betz, 1 Watts 425, 427.

[5] 1778, Walker *v.* Witler, 1 Doug. 1, 7, per Buller, J. ("It is to be tried by the country . . . and not by the Court"); 1804, Collins *v.* Mathew, 5 East 473; 1820, Baldwin *v.* Hale, 17 John. 272.

The exception for judgments of *another of the United States* "proved the rule": 1818, Mills *v.* Duryee, 7 Cr. 481, 485 (under the constitutional clause requiring full faith for a judgment of another of the United States, *nul tiel record* becomes the proper plea of denial; "it may be proved in the manner prescribed by the Act, and such proof is of as high a nature as an inspection by the Court of its own record"; Johnson, J., diss.); *accord:* 1828, Hall *v.* Williams, 6 Pick. 232, 237 (useful opinion); *contra:* 1835, Carter *v.* Wilson, 1 Dev. & B. 362.

[1] 1806, Stammers *v.* Dixon, 7 East 200, 209; 1866, Lyle *v.* Richards, L. R. 1 H. L. 222, 241; 1873, Betts *v.* Venning, 14 N. Br. 267, 270; 1889, Hamilton *v.* Ins. Co., 136 U. S. 242, 255, 10 Sup. 945.

[2] 1903, State *v.* Brown, 171 Mo. 477, 71

But, subject to the amplification or precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court.[3] Where a contract is entirely oral, or partly in writing and partly oral, it is usually said that its terms, if disputed, are to be tried by the jury as a question of fact, subject to instructions as to the legal effect of the words.[4]

§ 2557. **Criminal Intent.** In the definition of crime, certain more detailed rules have from time to time been laid down, as rules of law, defining the nature of malice and of the other states of mind that are to be taken as constituting that criminal intent which is one of the elements of the offence. So far as limited by these rules, the question of intent ceases to be one of fact and is one of law.[1] A chief controversy, which in the course of this development brought into competition and collision the respective functions of judge and jury, was the question whether, in a criminal prosecution for *libel*, the malicious or seditious intent was an inference of law to be made from the words published and the averments and innuendoes, as found by the jury and spread upon the record, or whether it remained as an inference of fact to be found by the jury. The practice of the English judges in the eighteenth century had not been entirely consistent in maintaining the former view,[2] and the latter view was finally after much popular agitation sanctioned by the Legislature.[3]

S. W. 1031 ("the interpretation of writings is always for the Court except when they are ambiguous"); 1898, Ricketts *v.* Rogers, 53 Nebr. 477, 73 N. W. 946; 1894, Meeks *v.* Willard, 57 N. J. L. 22, 25, 29 Atl. 318; 1879, West *v.* Smith, 101 U. S. 263, 270 (whether a letter amounted to an admission; "where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the paper must be left to the jury"); 1898, M'Namee *v.* Hunt, 30 C. C. A. 653, 87 Fed. 298; 1903, Rankin *v.* Fidelity Ins. T. & S. D. Co., 189 U. S. 242, 23 Sup. 553 ("Although [the question of] the construction of written instruments is one for the Court, [yet] where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury").

[3] 1839, Hutchison *v.* Bowker, 5 M. & W. 535, 541 (meaning of the words "fine barley" and "good barley"; Parke, B.: "The law I take to be this, that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was"); 1845, Alderson, B., in Robertson *v.* Showler, 13 M. & W. 609, 612 ("The jury are only to find facts, and leave the Court to judge of their meaning").

[4] 1896, Nash *v.* Classen, 163 Ill. 409, 45 N. E. 277 (a document forming part of a series of acts alleged to indicate an agency-relation); 1893, Eureka F. Co. *v.* B. C. S. & R. Co., 78 Md. 179, 188, 27 Atl. 1035; 1896, Gassett *v.* Glazier, 165 Mass. 473, 43 N. E. 193 ("where a contract is to be gathered from talk between the parties, and especially from talk on more than one occasion, the question what the contract was, if controverted, must usually be tried by the jury as a question of fact"); 1891, Spragins *v.* White, 108 N. C. 449, 13 S. E. 171 (absolute or conditional effect of an oral agreement to deliver).

For the practice in determining the meaning of a *libel*, see Capital & Counties Bank *v.* Henty, L. R. 7 App. Cas. 741 (1882).

[1] Distinguish here such legal definitions of "malice," etc., from ordinary presumptions affecting the production of evidence (*ante*, § 2511).

[2] The arguments and opinions in the great Trial of the Dean of St. Asaph's, 21 How. St. Tr. 946, 968, 978, 1039, 3 T. R. 428 (in which Erskine was of counsel for the defendant, and Lord Mansfield delivered the opinion), contain the data on both sides; the answer of the Judges to the Lords, in 1789, 22 How. St. Tr. 296, 301, finally dealt with the matter.

[3] 1792, St. 32 G. III, c. 60, known as Fox's Libel Act. For the law in the United States, see Thompson on Trials, § 2025; 1885, Shaw, C. J., in Com. *v.* Anthes, 5 Gray 185 (giving the history in England); 1902, Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981. Distinguish here, also, however, the question (*ante*, § 2494) whether in a civil case there is any evidence

§ 2558. **Foreign Law.** In only a few instances has it been thought that a matter of the sort strictly termed "law" should be left with the jury for determination. It is more generally held that a *foreign law* is a matter of "fact," *i. e.* its existence is to be determined by the jury. But the better view is that it should be proved to the judge, who is decidedly the more appropriate person to determine it.[1]

§ 2559. **Local Law.** The doctrine has obtained in a few jurisdictions that the jury, in dealing with the *local law* applicable to the case, have a legal right to repudiate the instructions of the judge and to determine the law for themselves;[1] but this ill-advised doctrine, defiant of the fundamentals of law, has only a narrow acceptance.

upon which a jury might find a libel: 1882, Capital & Counties Bank *v.* Henty, L. R. 7 App. Cas. 741.

[1] The decisions seldom lay down either rule absolutely, owing in part to the desire to retain the principle of the Court's construction of documents (*ante*, § 2556) while recognizing the jury's function of crediting the evidence; but there is no necessity for here conceding anything to the latter; with the following rulings compare those cited *post*, § 2573 (judicial notice of foreign law), and *ante*, §§ 1271, 1953 (expert testimony to foreign law): 1868, Kline *v.* Baker, 99 Mass. 253 (foreign law is matter of fact, except for the construction and effect of a written document forming the entire evidence); 1887, Gibson *v.* Ins. Co., 144 id. 81, 10 N. E. 729 (same); 1898, Hancock Nat'l Bank *v.* Ellis, 172 id. 39, 51 N. E. 207 (a question of law when consisting entirely of statutes or decisions; of fact, where decisions are conflicting or inferences of fact are to be drawn); 1901, Cook *v.* Bartlett, 179 id. 76, 61 N. E. 266 (the tenor of the law is a question of fact, but the construction of the language in statutes and decisions not conflicting is for the Court); 1857, Charlotte *v.* Chouteau, 25 Mo. 465, 473 (for the Court, so far as it is a statute, or decisions, experts, or writers resorted to for interpretation; but perhaps for the jury where it is merely unwritten); 1862, Charlotte *v.* Chouteau, 33 id. 194, 200, 201 (unwritten law proved to the jury; English decisions, etc., read to them); 1852, Pickard *v.* Bailey, 26 N. H. 152, 169 (for the Court, where merely preliminary to the legality of a document); 1902, Mexican N. R. Co. *v.* Slater, 53 C. C. A. 239, 115 Fed. 593, 606 (expert testimony to the construction of a foreign statute, held to be "addressed to the judge to aid him in his rulings"); 1888, Lycoming Ins. Co. *v.* Wright, 60 Vt. 522, 12 Atl. 103.

[1] For the jurisdictions in which this view is taken, see Thompson on Trials, §§ 2132–2148; for a vindication of its orthodoxy and an examination of the rule in the various jurisdictions, see the opinion of Gray, J., in Sparf *v.* U. S. (1895), 156 U. S. 51, 110, 15 Sup. 273; for an examination of its probable origin, see Thayer, Preliminary Treatise, 253; leading opinions are the following: 1838, Best, C. J., in Levi *v.* Mylne, 4 Bing. 189, 195; 1835, Story, J., in U. S. *v.* Battiste, 2 Sumn. 243; 1846, Shaw, C. J., in Com. *v.* Porter, 10 Metc. 263; 1869, Doe, J., in State *v.* Hodge, 50 N. H. 510, 522; 1902, Hamersly, J., in State *v.* Gannon, 75 Conn. 206, 52 Atl. 727; and the earlier authorities are collected in Mr. Hargrave's note 276 to Co. Lit. 155 *b*.

BOOK IV: OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED.

TITLE I: JUDICIAL NOTICE.

CHAPTER LXXXIX.

1. General Principles.

§ 2565. **Theory of Judicial Notice.**[1] Of the propositions involved in the pleadings, or relevant thereto, proof by evidence may be dispensed with in two situations: (1) where the opponent by a solemn or infra-judicial admission has waived dispute, and (2) where the Court is justified by general considerations in assuming the truth of the proposition without requiring evidence from the party. The former is considered under the head of Judicial Admissions (*post*, §§ 2588–2596). The latter is the process most commonly meant by the term Judicial Notice.

There are various senses in which the term Judicial Notice is used. In the orthodox sense above noted, it signifies that there are certain *facta probanda* (*ante*, § 2), or propositions in a party's case, as to which he will not be required to offer evidence; these will be taken for true by the tribunal without the need of evidence. This general principle of Judicial Notice is simple and natural enough. As to the scope of such facts, they include (1) matters which are so notorious that the production of evidence would be unnecessary; (2) matters which the judicial function supposes the judge to be acquainted with, either actually or in theory; (3) sundry matters not exactly included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor

[1] The most learned discussion of the subject, and its history, is found in Professor J. B. Thayer's Preliminary Treatise on the Law of Evidence, c. 7.

bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary. It is hardly feasible, however, in enumerating these matters, to follow strictly this or any other classification.

§ 2566. **Anomalous Meanings of the Term Judicial Notice.** The term Judicial Notice has many applications, distinct from those peculiar to the present purpose. Some of these are traditional, and therefore perhaps not to be termed incorrect; others are merely loose ways of naming some process or rule already properly known under another name. The essential thing is to distinguish these applications from the chief one, here involved, *i. e.* the acceptance of a matter as proved without requiring the party to offer evidence of it.

(1) A usage extending far back in our annals is to apply the term where the question is whether a certain pleading, or a certain *averment in a pleading*, or greater particularity of averment, *is necessary*.[1] (2) Whether a Court, for the purposes of ordering a new trial or otherwise, may *give effect to a matter capable of being judicially noticed* — *i. e.* assumed without evidence — but not referred to in the record,[2] or falsely alleged in the pleading,[3] is a question of the power and duty of the Court; but this term has been applied to it. (3) Whether a Court will take judicial notice of the *existence of a foreign State* is really a question whether, as a matter of substantive law and judicial functions, a foreign State will in domestic Courts be treated as existing only so far as the Executive so treats it; here it is conceded that the Executive's recognition is the determining element.[4] (4) Certain *rules of evidence*, usually

[1] Thayer, *ubi supra*, pp. 281-286; 1899, Nichols *v.* Bardwell Lodge, 105 Ky. 168, 48 S. W. 426, 1091 (under C. C. P. § 119 and Rev. St. c. 35, § 1); 1897, Wikel *v.* Board, 120 N. C. 451, 27 S. E. 117 (declaring unnecessary a supplemental plea alleging the repeal of an act); 1897, Douglass *v.* K. & M. R. Co., 44 W. Va. 267, 28 S. E. 705 (holding it unnecessary to allege the defendant to be a corporation).

In such cases, a ruling that no averment is necessary would usually imply a judicial notice of the fact if it were averred in pleading, and in the ensuing topics are instances of this; but it does not follow that a ruling requiring an averment implies that the fact would not be noticed if only averred.

[2] Thayer, *ubi supra*, pp. 283, 288; 1897, Steenerson *v.* R. Co., 69 Minn. 353, 72 N. W. 713 (the Supreme Court, reviewing a finding of the Railroad Commission as to reasonable rates, conceded some weight to the experience of the Commission; Canty, J.: "[The Commission] should be thoroughly familiar with the many financial and economic problems which enter into the business of constructing and operating railroads. How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. . . . We see no way of disposing of this question except to hold that on appeal from the commission the Courts should, to the best of their ability, take judicial notice of all such technical learning, knowledge, and information of a general character as should be known and understood by the commission").

[3] 1828, Taylor *v.* Barclay, 2 Sim. 213 (where a pleading alleged that a certain government was recognized by H. M. government, and the Court treated this as incorrect; "notwithstanding there is this averment in the bill [demurred to], I am bound to take the fact as it really exists, and not as it is averred to be"); 1897, People *v.* Oakland Water-Front Co., 118 Cal. 234, 50 Pac. 305 (declaration alleging title in certain lands; demurrer; a statute incorporating a city declared its title to lands alleged in the declaration as the plaintiff's; the Court took "judicial notice" that this allegation was incorrect; but either it was a question of law, in which case a demurrer does not admit propositions of law, or it was a question whether certain statutory boundaries included the plaintiff's private land, in which case the ruling seems wrong as a matter of judicial notice).

[4] *England:* 1894, Mighell *v.* Sultan of Johore, 1 Q. B. 149, 158 (certificate of the Secretary of State for Colonies as to defendant's being an in-

known under other names, are frequently referred to in terms of judicial notice. Thus, the admissibility of *almanacs* is mainly a question whether an exception to the Hearsay rule can be made in their favor;[5] but a Court occasionally makes this exception by saying that the almanac is to be judicially noticed; although the term is properly applicable only where the Court declares the day of the month, or other fact, not to need evidence,[6] and then consults the book to inform itself; the practical difference being that in the former case it goes to the jury, but in the latter not.[7] Again, it has been said that judicial notice will be taken of the correctness of the *photographic process*;[8] which is merely another way of saying that properly verified photographs are admissible evidence.[9] In the same way, to take notice that "mere pasturage upon these western lands is very slight evidence of possession,"[10] is to measure evidence; and the so-called judicial notice of certain *seals*[11] is merely a rule that the production of something purporting to be a seal shall be in these cases sufficient evidence of genuineness to go to the jury or shall suffice to raise a presumption of genuineness. Whether a Court will take judicial notice of the contents of *legislative proceedings* may be properly a question of the present sort;[12] but the same form of expression is also occasionally used where the real inquiry is whether, as evidence of the statute's terms, or of its passage, the journals are to be preferred to the official certifi-

dependent sovereign power; "this letter is conclusive"); 1900, Foster *v.* Globe Venture Synd., 1 Ch. 811 (boundary of a foreign State); in Taylor *v.* Barclay, *supra*, note 3, it was decided merely that the allegation in a declaration that a certain foreign State was recognized as such by the King could be found untrue by reference to the Foreign Office; in Yrisarri *v.* Clement, 1825, 2 C. & P. 223, 225 ("If a foreign State is recognized by this country, it is not necessary to prove that it is an existing State; but if it is not so recognized, such proof becomes necessary"), the latter clause seems misleading; *United States:* the doctrine of the following cases is that a foreign State will or will not be so considered by the Court according as it is or is not recognized by the Executive: 1817, U. S. *v.* Hutchings, 2 Wheel. Cr. C. 543; 1808, Rose *v.* Himely, 4 Cr. 241, 272; 1818, Gelston *v.* Hoyt, 3 Wheat. 246, 324; 1821, The Nueva Anna, 6 id. 193; 1839, Williams *v.* Suffolk Ins. Co., 13 Pet. 415, 421; 1852, Kennett *v.* Chambers, 14 How. 38, 51; 1889, *Re* Baiz, 135 U. S. 403, 431, 10 Sup. 854; 1890, Jones *v.* U. S., 137 id. 202, 212, 11 Sup. 80 (conclusive); 1897, Underhill *v.* Hernandez, 168 id. 250, 18 Sup. 83; 1891, U. S. *v.* Trumbull, 48 Fed. 99, 104; 1893, The Itata, 56 id. 505, 510; Story on the Constitution, II, §§ 1566, 1567. In U. S. *v.* Palmer, 3 Wheat. 610, 634 (1818), the ruling seems merely to concede (and properly) that a defendant denying a piratical intent may plead the authority of a revolutionary government having a colorable existence, in which case its actual recognition is immaterial.

[5] *Ante*, § 1698.

[6] *Post*, § 2581, where instances are collected.

[7] The following instances show the correct treatment: 1792, Attorney-General *v.* Cast-plate Glass Co., *post*, § 2569; 1898, Louisville & N. R. Co. *v.* Brinckerhoff, 119 Ala. 606, 24 So. 893 (here the Court intimated that an almanac, offered to show the time of sunset, was not improperly excluded, as there was no need of evidence).

So also *mortality tables* are sometimes said to be judicially noticed: 1894, Lincoln *v.* Power, 151 U. S. 436, 441, 14 Sup. 387 (notice taken of Carlisle Tables, in estimating length of life, whether offered in evidence or not); although in strictness they are evidence admissible under an exception to the Hearsay rule (*ante*, § 1698); the following case shows the correct treatment: 1901, Western & A. R. Co. *v.* Hyer, 113 Ga. 776, 39 S. E. 446 (on exceptions, a statement in the brief of evidence that a mortality table was introduced does not authorize the Court to notice it, though it is stated to have been published in a volume of official reports; Simmons, C. J., and Lewis, J., diss.); furthermore, it seems equally incorrect to notice the duration of life without some evidence from tables or the like, but this was done in Nelson *v.* Bradford L. & W. Co., 75 Conn. 548, 54 Atl. 303 (1903).

Again, certain official *interest tables* are sometimes made evidence by statute (*ante*, § 1672); but this does not signify that they are to be judicially noticed: 1886, Camp *v.* Randle, 81 Ala. 240, 2 So. 287.

[8] 1874, Udderzook *v.* Com., 76 Pa. 340, 352.

[9] *Ante*, § 792.

[10] 1897, Whitney *v.* U. S., 167 U. S. 529, 546, 17 Sup. 857.

[11] *Ante*, §§ 2161–2169.

[12] *Post*, § 2577.

cate appended to the enrolled act.[13] (5) Other loose applications of the term, sometimes dealing with matters of substantive law,[14] sometimes with matters of procedure, will occasionally be found. It is unfortunate that the phrase should be so often loosely employed, especially as the legitimate doctrine "is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be."[15]

§ 2567. **Effect of Judicial Notice; (1) not Conclusive.** (*a*) That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable.[1] It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary;[2] but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a Court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called.

(*b*) The process of taking judicial notice often may imply incidentally a ruling as to the respective functions of judge and *jury*. Does it signify that the settlement of the matter rests with the judge and not with the jury, that the jury are to accept the fact from the judge, and that so far as any further investigation is concerned, it is for the judge alone? Such is the view sometimes found, in decisions[3] as well as statutes.[4] Yet it seems rather that the jury are not concluded; that the process of notice is intended chiefly for expedition of proof; and that since the fact is disputable by the opponent (*supra*, par. *a*), it remains possible for the jury to negative it. In those

[13] *Ante*, § 1350.

[14] *E. g.:* 1896, Southern R. Co. *v.* Covenia, 100 Ga. 46, 29 S. E. 219 (the declaration in an action for loss of a child's services alleged the services specifically, and gave the age of the child as 1 year, 8 months, and 10 days; the Court took "judicial cognizance of the fact that a child of this tender age is incapable of rendering such services" as justify recovery).

[15] Thayer, *ubi supra*, p. 309.

[1] 1896, People *v.* Mayes, 113 Cal. 618, 45 Pac. 860; and this seems implied throughout, particularly by the doctrine of § 2569, *post*.

Since judicial notice is an expedient for hastening the trial and eliminating superfluities, it would be proper to prevent the *party in whose favor* the fact is noticed from offering evidence of it: 1898, State *v.* Chingren, 105 Ia. 169, 74 N. W. 946 (that it is customary to mark up the price of land to be sold, not noticed).

[2] *E. g.:* 1889, Com. *v.* Marzynski, 149 Mass. 68, 72, 21 N. E. 228 (indictment for illegally selling cigars on Sunday; "the Court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinions of witnesses who offer to testify that they are").

[3] *Conn.:* the first case is presumably now not law; 1841, Kilgore *v.* Bulkley, 14 Conn. 362, 387 (conflicting decisions in another State, submitted to the jury); 1843, Hale *v.* N. J. S. N. Co., 15 id. 539, 549 (by statute, reports of decisions in other States are to be judicially noticed; a Court therefore may hold the law to be as therein decided without submitting it to the jury); 1847, Lockwood *v.* Crawford, 18 id. 361, 370 (same); 1897, State *v.* Main, 69 id. 123, 37 Atl. 80 (excluding from the jury's consideration certain evidence as to a contagious tree-disease; leading opinion, by Baldwin, J.); *Minn.:* 1893, Thomson-Houston El. Co. *v.* Palmer, 52 Minn. 174, 177, 53 N. W. 1137 (proof of foreign law; official copies of decisions of foreign Court not received, the question being for the Court).

[4] Alaska C. Cr. P. 1900, § 156 (like Or. Annot. C. 1892, § 1374); C. C. P. § 233 (like ib. § 242); Cal. C. C. P. 1872, § 2102 ("whenever the knowledge of the Court is by this code made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it"); Or. Annot. C. 1892, § 242 (like Cal. C. C. P. § 2102, adding, "as conclusive"); § 1374 (same); Utah Rev. St. 1898, § 3479 (like Cal. C. C. P. § 2102).

classes of facts, however, in which the judge has the function of decision and not the jury (*ante*, §§ 2549–2559), it would be true, so far as any such facts were capable of notice, that the judge's determination is exclusive; but this would not be by virtue of the doctrine of judicial notice.[5]

§ 2568. **Same: (2) Notice must be requested; Pleading a Statute.** Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it.[1] Upon this request, the Court is bound, it is sometimes said, to declare the fact noticed,[2] or at least to make that investigation (*post*, § 2569) which it deems necessary. No doubt, in most instances, the rule of law has the plain consequence of compelling the judge to declare the dispensation; not to do so would be to err, precisely as under any other rule of law. But it must not be supposed that this is universally true; the decisions demonstrate that there are numerous topics, near the line of doubt in their feature of notoriety, of which the Court may, but not must, take notice. No definite distinction is recognized; but it is plain that many of the rulings merely authorize the Court to notice a fact, without requiring it.[3]

§ 2569. **Same: (3) Judge's Private Knowledge; Judge may Investigate.** (*a*) There is a real but elusive line between the judge's *personal knowledge* as a private man and his knowledge as a judge. The latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man, and contrariwise.[1] The dilemma sometimes thus presented has given rise to much discussion over extreme cases, — particularly the celebrated problem once put by a King of England, whether a judge could lawfully respite a convicted person whom he personally knew to be innocent.[2] But it

[5] Thus most of the above rulings in n. 3 are referable rather to the doctrine (*ante*, § 2558) that foreign law should be evidenced to the Court.

[1] 1902, Amundson *v.* Wilson, 11 N. D. 193, 91 N. W. 37.

Distinguish the question (*ante*, § 2566) whether the party must have *pleaded* the fact; this arises frequently for the case of a *statute*; *e. g.*, 1898, Nichols *v.* Bardwell Lodge, 105 Ky. 168, 48 S. W. 426, 1091.

[2] 1899, State *v.* Magers, 35 Or. 520, 57 Pac. 197 (time of sunset).

[3] *E. g.*: 1889, Hunter *v.* N. Y. O. & W. R. Co., 116 N. Y. 615, 621, 23 N. E. 9 ("Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case"); 1902, *Re* Osborne, 52 C. C. A. 595, 115 Fed. 1 (a court's own records; the Court is not obliged to notice them).

[1] The following joke of Lord Eldon's illustrates this: 1782 (?), Lord Eldon, in Twiss' Life, I, 130: "We had an amusing case at York. Stakes for a race had been deposited in the hands of one party, to be paid to the owner of the horse that won; but then there was a condition that each horse was to be ridden by a 'geutleman'; and it was disputed whether the horse that did win was ridden by a 'gentleman' or not. This action was to ascertain this point. . . . Well, we had a great deal of evidence, and then we came to the summing up of the judge, who addressed the jury in these words: 'Gentlemen of the jury, when I see you in the box, I call you "gentlemen," for I know you are such; custom has authorized me; and from your office there I know you are entitled to be called "gentlemen." But, out of that box, I do not know what may be deemed the reqnisites that constitute a "gentleman"; therefore I can give you no direction.' The jury returned a verdict that he was not a 'gentleman.' Well, the next morning he challenged both Law and me, who were conducting the cause against him, for saying that he was no gentleman; we sent him this answer, that we could not think of fighting one who was pronounced by a solemn verdict of twelve of his countrymen to be no gentleman."

[2] 1406, Y. B. 7 H. IV, 41, pl. 5 (in arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case: "Sir, let us put the case that one man kills another in your presence, you observing it, and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death; you ought to respite the judgment against him, for you are knowing to the contrary, and should make further report to the King, to give him pardon; no more should

is now well enough understood that there is here no impracticable dilemma. If the judge, as a man and an observer, has any personal knowledge, he may (and sometimes morally must) utilize it by taking the stand as a witness and telling in that capacity what he knows (*ante*, § 1909); this solves the dilemma without either injuring justice or violating principle.[3] It is therefore plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer.[4] The former is in truth "known" to him merely in the peculiar sense that it is known and notorious to all men, and the dilemma is only the result of using the term "knowledge" in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain.

(*b*) But the subjects of knowledge which raise the foregoing problem are obviously those "facts," in the ordinary sense, which are ascertainable by personal observation; belonging as they do to the jury's ultimate determination, it is obvious that the judge must in their regard be merely an ordinary witness to the jurors. There are, however, facts of "law" which are for the *judge's own ultimate determination*, — such as the tenor of foreign or local law (*ante*, §§ 2558, 2559) and the meaning of a document (*ante*, § 2556).

you give judgment in this case, before causing those to appear by whose hands the King was paid"; Gascoigne, C. J.: "Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so"); 1578, Plowden's Commentaries, Partridge *v.* Strange, Plowd. 83 (mentioning, in Saunders' argument, the case in 7 H. IV with apparent approval); 1588, Coke, as counsel in Marriot *v.* Pascal, 1 Leon. 159, 161 (re-stating the case from the Year-book: "The judge he ought not to carry himself according to his private knowledge which he hath of the said fact, *scil.* to acquit the prisoner, but all that he can do is to respite judgment"; it may be noted that Coke mistranslates the word *veiant* in the original, and the story has been sometimes mistold, through him).

Professor Thayer (Preliminary Treatise, 291) has an interesting note on the earlier literature of this problem.

[3] 1696, Sir John Fenwick's Trial, before the House of Commons, 13 How. St. Tr. 663, 667 (Mr. Hawles, Sol. General, on Mr. Newport having cited the above story of Gascoigne: "It is said, though a judge do think in his conscience a person guilty, yet he ought not to make use of that private knowledge; and a case was quoted out of Henry IV. But I think that judge might have behaved himself something better than he did; and sure I am, now he would be blamed. I do not say that a judge upon his private knowledge ought to judge; he ought not. But if a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate, and go to the bar and give evidence of his knowledge; and so the judge in Henry IV's time ought to have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business").

[4] 1851, Fox *v.* State, 9 Ga. 373, 376 (refusing a continuance; the judge's personal knowledge of a witness' lack of credit, held improper to be used; good opinion, by Nisbet, J.); 1854, State *v.* Edwards, 19 Mo. 675, 676 (conviction of a witness before the same judge in another county; notice not taken); 1809, Rosekraus *v.* Antwerp, 4 John. 239 (a statute forbade an appearance by attorney in a justice's court, unless the party was prevented by sickness or by absence from the county, of which proof was to be made; "the justice cannot act from his own knowledge and call that knowledge proof"); 1870, State *v.* Horn, 43 Vt. 20, 23 (marriage certificate by a justice in another domestic State; judge's own knowledge of law of that State not to be used); 1900, Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409 (a witness to a bridge's bad condition was excluded by the trial judge, because the offer was "contrary to what I know to be the fact from my own personal knowledge"; held erroneous).

Occasionally, however, this is allowed to slip in: 1880, Wisconsin Central R. Co. *v.* Cornell Univ., 49 Wis. 162, 164 (condemnation of right of way; the trial judge's "great familiarity with that portion of the State," considered in not reversing the judgment); 1881, Halaska *v.* Cotzhausen, 52 id. 624, 9 N. W. 401 (action for services as counsel, tried before a judge; the judge's observation of the services as he "saw and knew" them, allowed to be used). The following statute is peculiar: Conn. Gen. St. 1887, § 689 (justice of peace's "personal knowledge" of commission of offences of drunkenness, etc., sufficient).

Since these are to be decided by the judge, he is at liberty to *investigate the facts* for himself, in addition to receiving the evidence which the parties may offer. This is done, however, not by virtue of the doctrine of judicial notice, but by virtue of the judge's exclusive function, as against the jury, to try the fact (*ante*, § 2549). These investigations are frequently to be observed in rulings upon the recognition of a foreign State,[5] the tenor of foreign law,[6] and the meaning of words.[7]

(*c*) Finally, there is a process of *investigation* by the judge *prior to a ruling of judicial notice upon a question of fact* determinable by the jury. For example, when the Court is asked to dispense the party from evidencing the fact that the Mississippi joins the Missouri above the city of St. Louis, or that the first of January, 1904, fell on a Friday, *i. e.* to take judicial notice of these facts, he may resort to a map or a calendar, before making the ruling. This process is common enough;[8] but it is distinct from the two preceding ones. It is not a search for evidence to establish the fact; because the fact is plainly of a kind within the province of the jury, not of the judge. Nor is it a contribution of personal testimony, for the judge does not know it by his own observation, nor need he take the stand to testify. It is merely an occasional measure, taken in discretion, to satisfy the judge that he is justified in making the desired ruling for dispensing with evidence. He perceives that the fact probably cannot need evidence; he merely seeks to define the precise tenor of the fact about which he will make his ruling. The fact will still be in theory disputable before the jury (*ante*, § 2567); the judicial investigation is made, not in order to establish the fact in their stead, but to make a ruling dispensing one party from offering to them evidence of the fact. This process, moreover, though permissible, is not compulsory upon the judge,[9] inasmuch as judicial notice at large is itself more or less optional (*ante*, § 2568).

[5] 1828, Taylor *v.* Barclay, 2 Sim. 213 ("In consequence of the arguments in this case, I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized"); 1900, Foster *v.* Globe Venture Synd., 1 Ch. 811 (boundaries of a foreign State); 1897, Underhill *v.* Hernandez, 168 U. S. 250, 18 Sup. 83 (the Court may consult the Department of State for information as to the Executive recognition of a foreign civil war and *de facto* government, and may find the fact upon such information).

[6] 1898, Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524 (extradition); 1903, Wells *v.* Gress, — id. — , 45 S. E. 418 (law of another of the United States); and cases cited *ante*, § 2567, note 3.

[7] 1789, Answer of the Judges to the House of Lords, 22 How. St. Tr. 302 (judges may resort to grammars and lexicons); 1792, Eyre, C. B., in Attorney-General *v.* Cast-plate Glass Co., 1 Anstr. 39, 44 ("On demurrer, a judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion"); 1902, Hilton *v.* Raylance, 25 Utah 129, 69 Pac. 660 (certain works on the Mormon religion having been excluded in the trial below, the Court held that it was entitled to refer to them nevertheless, as a matter of judicial knowledge, "to ascertain the particular meaning" of the Mormon doctrine of "sealing"); and instances cited *ante*, § 2556 (construction of documents) and §§ 1699, 1700 (dictionaries, etc., in evidence).

[8] 1896, People *v.* Mayes, 113 Cal. 618, 45 Pac. 861 ("he is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses"); and many instances *passim*, *post*, §§ 2572–2582.

[9] *E. g.*: 1853, Littlehale *v.* Dix, 11 Cush. 364 (magistrate's certificate that a deponent lived more than thirty miles from the place of trial, and no contrary evidence; the Court held not bound to learn what the distance was).

§ 2570. **Judicial Notice by the Jury's Own Knowledge.** In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds. This doctrine, of course, has several aspects. From the point of view of the jury's duty, it appears as an exception to the rule that they must act only upon what is presented to them at the trial. From the point of view of the Hearsay rule, it may also be thought of as a partial exception to that.[1] But additionally it must be considered from the present point of view, for it authorizes the party to ask the *jury to refer to their general knowledge* upon the matter in question, and thus in effect and to that extent makes it unnecessary for the party to offer such evidence.

But the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life.[2] Thus, the natural instincts of human conduct, with reference to care or negligence at the time of danger, may be considered,[3] the dangerousness of smoking a pipe in a barn near the straw,[4] the conditions affecting the

[1] *Ante*, § 1900 (jurors having personal knowledge must take the stand and state it publicly as witnesses subject to cross-examination). Distinguish, however, the propriety of *knowledge acquired at a view* (*ante*, § 1168).

[2] In the palmy days of special juries (Thayer, Preliminary Treatise, pp. 94–97) this class of facts must obviously have been of broad range. But their gradual disuse seems to have been marked by a judicial inclination to disparage a resort to even that special knowledge for which they were first sought: 1836, R. *v.* Rosser, 6 C. & P. 648 (value of a watch; Vaughan, J.: "Any knowledge you may have on the subject you may use; some of you perhaps may be in the trade"; Parke, B.: "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn").

[3] With the following cases, compare the *presumption of carefulness* (*ante*, § 2510): 1874, Bridges *v.* R. Co., L. R. 7 H. L. 213 (Pollock, B.: "It appears to me that the jurors were entitled to assume that *prima facie* the deceased would conduct himself with ordinary prudence and discretion"); 1902, Chicago & E. I. R. Co. *v.* Beaver, 119 Ill. 34, 65 N. E. 144 (jury may consider the natural instinct to preserve life and avoid danger); 1894, Hopkinson *v.* Knapp Co., 92 Ia. 328, 60 N. W. 653 (jury may consider the natural instinct to avoid danger); 1899, Ellis *v.* Leonard, 107 id. 487, 78 N. W. 246 (the natural instinct of self-preservation from danger is not to be considered, if the plaintiff himself testifies); 1885, Chase *v.* Maine Central R. Co., 77 Me. 262 (death by a train; the jury having been instructed that they might consider their knowledge of "the habits of thought and mind and the natural instincts of men" to preserve themselves from injury, held, that on the facts the idea was "presented too prominently"); 1896, Manning *v.* R. Co., 166 Mass. 230, 44 N. E. 135 (injury by the fall of a trolley; to the objection that there was no evidence of negligence, it was said "the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen, unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was negligence in the particular case"); 1897, Lamoureux *v.* R. Co., 169 id. 338, 47 N. E. 1009 (ordinary conduct at a railroad crossing may be noticed); 1899, Leary *v.* Fitchburg R. Co., 173 id. 373, 53 N. E. 817, *semble* ("common experience" as to the mode of alighting from cars, proper to be considered); 1890, Huntress *v.* R. Co., 66 N. H. 185, 34 Atl. 154 (Doe, C. J.: "When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk").

[4] 1898, Lillibridge *v.* McCann, 117 Mich. 84 75 N. W. 288 (fire set in a barn by smoking a pipe in the straw; no evidence of dangerousness needed).

various kinds of values,[5] the intoxicating nature of a certain liquor,[6] and even (though this illustrates how local conditions may affect the application) that a game played with bone-counters was played for money;[7] but such a matter of private and variable belief as the character of a particular witness cannot be so taken into consideration by the jury.[8] The range of such general knowledge is not precisely definable;[9] but in these days when too much

[5] With the following cases compare those cited *ante*, § 1168 (jury's knowledge acquired at a view): 1881, Green *v.* Chicago, 97 Ill. 370, 372 (jury's "own knowledge of values" may be considered); 1898, Springfield C. R. Co. *v.* Hoeffner, 175 id. 634, 51 N. E. 884 (damages for personal injuries; general knowledge allowed to be used); 1900, Rock Island & E. I. R. Co. *v.* Gordon, 184 id. 456, 56 N. E. 810 (value of land; "your own general knowledge of matters and affairs," being struck from the instruction, was held to be mere surplusage); 1893, Chicago K. & W. R. Co. *v.* Parsons, 51 Kan. 408, 410, 32 Pac. 1083 (personal knowledge as to value of land is not to be considered); 1834, Parks *v.* Boston, 15 Pick. 198, 209 (eminent domain; in judging damages, the jury should "take counsel of their own experience and knowledge of like subjects"); 1839, Murdock *v.* Sumner, 22 id. 156 (value of goods converted; Shaw, C. J.: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry"); 1888, Bradford *v.* Cunard Co., 147 Mass. 55, 16 N. E. 719, *semble* ("common experience" is usable in finding values); 1902, De Gray *v.* N. Y. & N. J. Telephone Co., 68 N. J. L. 454, 53 Atl. 200 (jurors' experience as to the detriment of telephone structures to the value of property, not allowed to be considered); 1881, Head *v.* Hargrave, 105 U. S. 45, 49 ("their own general knowledge and ideas" are available in weighing expert testimony to value); 1818, Cummings *v.* Com., 2 Va. Cas. 128 (larceny of a bank-note; the defendant's passing it off in payment relieved from any further evidence of value); 1884, Washburn *v.* R. Co., 59 Wis. 364, 371, 18 N. W. 328 (land damages; the jury may use their general knowledge of "the elements affecting the assessment," but their verdict must be supported by the testimony; leading opinion, by Lyon, J.).

[6] 1854, Com. *v.* Peckham, 2 Gray 514.

[7] 1840, Stevens *v.* State, 3 Ark. 66 (gambling; though there was no evidence that the play was for value, yet the jury was allowed to use its "experience" to infer that the bone-counters represented money).

[8] 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448 (jurors may use general experience in judging of witnesses' credibility; good opinion, by Hackney, J.); 1854, Schmidt *v.* Ins. Co., 1 Gray 529 (jurors may act on information which may "fairly be supposed to be within the common knowledge of all the jurors"; but "any particular knowledge of any facts, such as respecting the general infamous character of any of the defendant's witnesses, . . . not being open to comment on the part of the defendant's counsel or to instruction on the part of the Court, but which was in possession merely of some one or more, but not the whole of the jury, could not fairly be taken into view by the jury"); 1876, Wharton *v.* State, 45 Tex. 2, 4 (the jury asked the trial judge: "Can we judge a witness just by what he says on the stand, and not by what we know of him privately?" held, that the answer should have been in the affirmative); 1895, Johnson *v.* R. Co., 91 Wis. 233, 64 N. W. 753 (the jury's knowledge of character of a particular witness is not to be used).

In *Georgia*, this result was at first not accepted: 1881, Anderson *v.* Tribble, 66 Ga. 585, 589 (a charge that a witness' character for veracity, if they knew it, might be considered, was approved); 1881, Head *v.* Bridges, 67 id. 227, 237 (same; the ruling defended in an able opinion by Crawford, J.); 1884, Howard *v.* State, 73 id. 83 (same ruling); 1892, Chattanooga R. & C. R. Co. *v.* Owen, 90 id. 265, 284, 15 S. E. 853 (preceding cases overruled; similar charge disapproved); 1894, Collins *v.* State, 94 id. 394, 19 S. E. 243 (same).

In *South Carolina* the earlier theory of a jury's knowledge long persisted: 1834, M'Kain *v.* Love, 2 Hill 506 (the jury may act, "in some degree, from their own knowledge of the character of the parties and their witnesses; it is for this reason that the jurors are drawn from the vicinage").

[9] The following illustrate its further scope: 1852, Houston *v.* State, 13 Ark. 66 (larceny of a horse; though there was no evidence of its value, the jury's "knowledge and experience" was held to justify inferences that the defendant would not have borrowed it, as alleged, if valueless, etc.); 1834, Parks *v.* Boston, 15 Pick. 198, 199, 209 (a fact personally known must be testified to; but this does not include the knowledge obtained by a view, nor the common experience of judicial notice); 1898, McGarrahan *v.* R. Co. 171 Mass. 211, 50 N. E. 610 (the jury may employ "their knowledge and experience of affairs"); 1897, Illinois Central R. Co. *v.* Greaves, 75 Miss. 360, 22 So. 792 (principle acknowledged; but a general instruction, without specifying the matter so to be known, was held improper); 1896, Wills *v.* Lance, 28 Or. 371, 43 Pac. 487 (whether a meteorological wind-record should be believed, against numerous eye-witnesses; jurors may use "such general practical knowledge as they may have upon the subject").

The following ruling would probably not be accepted to-day: 1816, R. *v.* Sutton, 4 M. & S. 532, 537, 542 (riots against weaving machines; the judge told the jury that they might refer to their personal knowledge of the riotous acts; held not improper, because he "did not advise

emphasis is placed, in the selection of jurors, on the blankness of their mental tablets, there can be no harm in the liberal application of the present principle. As a natural part of its doctrine, of course, these matters may be referred to by counsel in their arguments.[10]

2. Specific Facts Noticed.

§ 2572. **Laws: (1) Domestic Statutes and Ordinances.** A Court may be expected to dispense with evidence of the law of its own sovereignty; for it must be credited with a knowledge of it, or at least with the most competent knowledge where to search for it. No evidence of it need therefore be offered; and the counsel's reference during a trial to the text, or a copy, of the statute, for informing the judge, must be regarded as a judicial license to counsel to employ that evidence which the judge (*ante*, § 2569) would in theory seek for himself.[1]

There are, however, certain natural limitations, by which Courts customarily abdicate their responsibility of knowing or of seeking for themselves:

(*a*) In the first place, the doctrine applies in strictness to *public or general statutes* of the Legislature only.[2] But the distinction between a public or general act and a *private or special act* is, in the United States at least, not always easy to make. It may be said that a restriction of locality does not prevent an act from being public, provided the law is general in its application to persons; *e. g.*, a law regulating within certain districts the right of fishing,[3] or the right of navigation,[4] or the lumber trade,[5] or the sale of liquor.[6] Acts incorporating municipal corporations, even by special charter, are usually regarded as public,[7] as also acts incorporating State banks,[8] and acts incorporating railways by general provisions,[9] though not by special charter.[10] Moreover,

them to rely on that as a source of information on which they were to found their verdict, but only that it might make the proof more satisfactory to their minds if they knew what had passed").

[10] 1895, State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 837 (counsel allowed to call the jury's attention to inquest methods, etc.).

[1] 1840, Baron Parke, in Frost's Trial, Gurney's Rep. 168, to counsel: "For the future, it would save time if, when you founded an objection upon an Act of Parliament, you had the Act here; for, though we are supposed to keep the statutes in our heads, we do not."

For the *authentic text* of a statute, when its contents are disputed, see *ante*, § 1350 (enrolled copy preferred to legislative journals).

[2] 1900, State *v.* H. & C. Turnpike Co., 65 N. J. L. 97, 46 Atl. 700; 1832, Leland *v.* Wilkinson, 6 Pet. 317, 319 (proceedings of the Legislature on petitions for relief by individuals, not to be noticed or read as public laws).

[3] 1809, Burnham *v.* Webster, 5 Mass. 266, 269.

[4] 1853, Hammond *v.* Inloes, 4 Md. 138, 172.

[5] 1832, Pierce *v.* Kimball, 9 Greenl. 54, 56.

[6] 1855, Levy *v.* State, 6 Ind. 281, 283; 1888, State *v.* Cooper, 101 N. C. 688, 8 S. E. 134.

[7] 1877, Albrittin *v.* Huntsville, 60 Ala. 486, 492; 1850, Alderman *v.* Finley, 10 Ark. 423, 428; 1860, Payne *v.* Treadwell, 16 Cal. 220, 232; 1878, Doyle *v.* Bradford, 90 Ill. 416 (statute applied, on special facts); 1894, Jones *v.* Lake View, 151 id. 663, 675, 38 N. E. 688; 1862, Macey *v.* Titcombe, 19 Ind. 135, 137; 1875, Stier *v.* Oskaloosa, 41 Ia. 353, 355; 1871, Prell *v.* McDonald, 7 Kan. 426, 446; 1868, State *v.* Sherman, 42 Mo. 210, 214; 1835, Briggs *v.* Whipple, 7 Vt. 15, 19; 1864, Swain *v.* Comstock, 18 Wis. 463, 468; 1901, Davey *v.* Janesville, 111 id. 628, 87 N. W. 813 (the adoption of a general charter law by a particular city, noticed, as well as amendments thereto).

[8] 1860, Davis *v.* Bank of Fultou, 31 Ga. 69; 1862, Gordon *v.* Montgomery, 19 Ind. 110; 1855, Bank of Newbury *v.* R. Co., 9 Rich. L. 495; 1861, Buell *v.* Warner, 33 Vt. 570, 578.

[9] 1861, Heaston *v.* R. Co., 16 Ind. 275, 278.

[10] 1876, Perry *v.* R. Co., 55 Ala. 413, 426; 1839, Ohio etc. R. Co. *v.* Ridge, 5 Blackf. 78; 1872, Atchison T. & S. F. R. Co. *v.* Blackshire, 10 Kan. 477, 487. *Contra:* 1866, Wright *v.* Hawkins, 28 Tex. 452, 471.

The principle is often liberally treated: 1898, Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176 (notice taken of a statute chartering a company to be sole surety on official bonds). But

an act declared by the Legislature itself to be deemed a public act will be so treated;[11] and of course an amendment of a private act by a public one,[12] or any amendment of a public one,[13] will be noticed. Occasionally, too, statutes require all private acts to be noticed.[14]

(*b*) The *ordinances* and regulations of *local boards* and councils are not noticed.[15] The regulations of *executive departments* or bureaus are sometimes, but not always, noticed.[16]

§ 2573. **Same**: (2) **Foreign Law.** The laws of other nations and States — not being laws of the forum at all, except by casual adoption — will not be noticed.[1] But here some further discriminations are necessary:

(*a*) Relatively to each other, the *States of the United States* are independently sovereign, and for the present purpose foreign; hence their laws, equally with the laws of other nations, will not be noticed by the Courts of any one of the United States.[2]

in theory no private corporate charter need be noticed; 1866, Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420, 428 (corporate name).

[11] 1834, Beaumont *v.* Mountain, 10 Bing. 404; 1896, Missouri, K. & T. R. Co. *v.* Colburn, 90 Tex. 230, 38 S. W. 153; 1830, Beaty *v.* Knowler, 4 Pet. 152, 167.

[12] 1880, Lavalle *v.* People, 6 Ill. App. 157.

[13] 1863, Parent *v.* Walmsly's Adm'rs, 20 Ind. 82, 86; 1879, Belmont *v.* Morrill, 69 Me. 314, 317.

[14] *E. g.:* Conn. Gen. St. 1887, § 1087 ("private or special acts"); 1878, Doyle *v.* Bradford, 90 Ill. 416; 1861, Eel River D. Ass'n *v.* Topp, 16 Ind. 242.

[15] 1857, Case *v.* Mobile, 30 Ala. 538 (city); 1899, Moore *v.* Jonesboro, 107 Ga. 704, 33 S. E. 435 (city); 1857, Indianapolis & C. R. Co. *v.* Caldwell, 9 Ind. 397 (county board); 1859, Garvin *v.* Wells, 8 Ia. 286 (city); 1899, Watt *v.* Jones, 60 Kan. 201, 56 Pac. 16 (city, in civil cases); 1901, Horne *v.* Mehler, — Ky. —, 64 S. W. 918 (city); 1852, Hassard *v.* Municipality, 7 La. An. 495 (city); 1895, Shaufelter *v.* Baltimore, 80 Md. 483, 31 Atl. 439 (city); 1898, Field *v.* Malster, 88 id. 691, 41 Atl. 1087; 1876, Winona *v.* Burke, 23 Minn. 254 (city); 1854, Mooney *v.* Kennett, 19 Mo. 551, 555 (city); 1877, Porter *v.* Waring, 69 N. Y. 250, 254 (city); 1898, Stittgen *v.* Rundle, 99 Wis. 78, 74 N. W. 536. But the following distinction seems sound: 1899, Scranton *v.* Danenbaum, — Ia. —, 80 N. W. 221 (a municipal Court must notice municipal ordinance).

[16] 1893, Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388 (internal revenue regulations as to oleomargarine, not noticed); 1893, Campbell *v.* Wood, 116 Mo. 196, 202, 22 S. W. 796 (surveyor general's instructions to deputies, noticed); 1902, Larson *v.* First Nat'l Bank, — Nebr. —, 92 N. W. 729 (regulations of the Indian bureau in the Interior Department, noticed); 1899, U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398 (Interior Department regulations for license to cut timber, noticed); 1894, Caha *v.* U. S., 152 U. S. 211, 221, 14 Sup. 513 (Interior Department regulations for land-office suits, noticed); 1896, Dominici *v.* U. S., 72 Fed. 46 (Treasury Department regulations, etc., noticed); 1893, The Clara, 5 C. C. A. 390, 55 Fed. 1021 (marine inspectors' regulations, not noticed); 1899, Smith *v.* Shakopee, 38 C. C. A. 617, 97 Fed. 974 (regulations of Federal lighthouse board, not noticed); 1901, Whitney *v.* Spratt, 25 Wash. 62, 64 Pac. 919 (rules and decisions of U. S. land-office, noticed).

[1] 1718, Fremoult *v.* Dedire, 1 P. Wms. 429 (Holland); 1884, Board *v.* Estrella, 5 Haw. 211, 214 (law of Portugal); 1832, Strother *v.* Lucas, 6 Pet. 763, 768; 1872, The Pawashick, 2 Lowell 142; 1875, Dainese *v.* Hale, 91 U. S. 13, 18.

But *Admiralty* law, so far as in effect international and common to all, may be noticed: 1801, Talbot *v.* Seeman, 1 Cr. 1, 37 (French marine decrees as to neutral commerce, noticed as laws); 1871, The Scotia, 14 Wall. 170, 188; 1899, The New York, 175 U. S. 187, 20 Sup. 67 (Canadian statute adopting Revised International Regulations for Navigation, noticed). *Contra:* 1872, The Pawashick, 2 Lowell 142, *semble*.

By statute sometimes the rule is changed: W. Va. Code 1891, c. 13, § 4 (foreign law, "statutory or other" is to be noticed).

[2] In some Courts, a distinction is made between statute and common law; *Ala.:* 1889, Insurance Co. *v.* Forcheimer, 86 Ala. 541, 5 So. 870; *Ark.:* 1901, Louisiana & N. W. R. Co. *v.* Phelps, 70 Ark. 17, 65 S. W. 709 (but here a statute of 1899 changed the law); *Cal.:* 1854, Cavender *v.* Guild, 4 Cal. 250, 253; *Colo.:* 1886, Polk *v.* Butterfield, 9 Colo. 326, 12 Pac. 216; *Conn.:* 1823, Brackett *v.* Norton, 4 Conn. 517, 520; 1827, Hempstead *v.* Reed, 6 id. 480, 486; 1837, Dyer *v.* Smith, 12 id. 384, 390; 1843, Hale *v.* S. N. Co., 15 id. 539, 549; *Fla.:* 1893, Sammis *v.* Wightman, 31 Fla. 10, 30, 12 So. 526; 1896, Duke *v.* Taylor, 37 id. 64, 19 So. 172 (here the law of organization of corporations); *Ga.:* 1868, Simms *v.* Express Co., 38 Ga. 129; *Ill.:* 1860, Chumasero *v.* Gilbert, 24 Ill. 293; 1895, Ferris *v.* Bank, 158 id. 237, 41 N. E. 1118 (the authority of a foreign notary to administer an oath); *Ind.:* 1859, Johnson *v.* Chambers, 12 Ind. 102, 105; *Ind. T.:* 1900, Hockett *v.* Alston, — Ind. T. —, 58 S. W. 675 (law of Cherokee

(*b*) The *Federal laws* of the United States are equally the laws of *each State*, and hence the Courts of one of the United States notice them, whether ordinary public acts of Congress [3] or treaties; [4] and they are of course noticed by the Federal Courts. [5]

(*c*) Since the judicial powers of the Federal Courts extend to many cases arising under the laws of the various States of the Union, such *State laws* are for the purpose in hand part of the law of the *Federal Courts*, and will therefore be noticed by them; [6] though the Federal Supreme Court, on the somewhat scholastic theory that it cannot know on appeal what the Court below could not know, declines, on writ of error to a State Supreme Court, to notice what the latter could not notice, *i. e.* the law of a sister State.[7] Extending this principle, it has been held by State Courts that in cases where appeal may be made to the Federal Courts on questions of Federal law, — *e. g.* the effect of a judgment in another State Court, — the law of such other State may be noticed.[8]

(*d*) So far as by subdivision or amalgamation the former laws of another sovereignty have to any extent become a part of the law of the forum, such *former law* of the other sovereignty may properly be noticed. This principle

Indian tribes in the Territory, not noticed); 1902, Sass *v.* Thomas, — id. —, 69 S. W. 893 (Chickasaw law); 1903, Rowe *v.* Henderson, — id. —, 76 S. W. 250 (suit between Chickasaw Indians concerning land in the Chickasaw Nation; the Chickasaw law not noticed); *Kan.:* 1900, Alexandria A. & F. S. R. Co. *v.* Johnson, 61 Kan. 417, 59 Pac. 1063; *La.:* 1902, Rush *v.* Landers, 107 La. 549, 32 So. 95; *Md.:* 1867, Baltimore & O. R. Co. *v.* Glenn, 28 Md. 287, 323; *Mass.:* 1868, Kline *v.* Baker, 99 Mass. 253; 1893, Chipman *v.* Peabody, 159 id. 420, 423, 34 N. E. 563; *Minn.:* 1901, Crandall *v.* R. Co., 83 Minn. 190, 86 N. W. 10; *Mo.:* 1857, Charlotte *v.* Choutean, 25 Mo. 465, 473; *N. J.:* 1868, Condit *v.* Blackwell, 19 N. J. Eq. 193, 196; *N. C.:* 1857, Hooper *v.* Moore, 5 Jones L. 130, 132; *Okl.:* 1900, Greeusville N. Bank *v.* Evans, S. B. Co., 9 Okl. 353, 60 Pac. 249 (laws of Arkansas, as extended by Federal Act to Indian Territory, not noticed; leading opinion); *R. I.:* 1898, Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001; *Tex.:* 1859, Anderson *v.* Anderson, 23 Tex. 639; *Vt.:* 1899, Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752; *Va.:* 1817, Warner *v.* Com., 2 Va. Cas. 95, 98.

In *Canada*, the intercolonial laws are by statute to be noticed: Dom. St. 1893, c. 31, § 7 (specified kinds of British imperial, provincial, and colonial laws, to be noticed); B. C. Rev. St. 1897, c. 71, § 8 (like Can. St. 1893, c. 31, § 7); Man. Rev. St. 1902, c. 57, § 7 (like Can. St. 1893, c. 31, § 7, specially mentioning "this Province").

Sometimes a similar statute has done the same for noticing the laws of others of the United States: 1854, Bates *v.* McCully, 27 Miss. 584; 1895, Lockhead *v.* B. S. W. & I. Co., 40 W. Va. 553, 21 S. E. 1031.

A statute sometimes regulates the mode of evidencing: Tenn. Code 1896, § 5586 (a statute read in evidence in a lower Court will be noticed in a Superior Court, without transcription).

[3] 1873, Morris *v.* Davidson, 49 Ga. 361; 1832, Chesapeake & O. Canal Co. *v.* B. & O. R. Co. 4 G. & J. 1, 63; 1872–3, Mims *v.* Swartz, 37 Tex. 13; 1871, Bird *v.* Com. 21 Gratt. 800, 808.

[4] 1860, Carson *v.* Smith, 5 Minn. 78 (Indian treaty); 1854, Montgomery *v.* Deeley, 3 Wis. 709 (Ashburton treaty).

[5] 1850, U. S. *v.* Reynes, 9 How. 127, 147 (Louisiana treaties of cession); 1896, Callsen *v.* Hope, 75 Fed. 758, 761 (the Treaty of cession of Alaska, March 30, 1867, the protocol of transfer, and the inventories and map attached).

[6] 1835, Owings *v.* Hall, 9 Pet. 607, 624; 1888, Liverpool & G. W. S. Co. *v.* Ins. Co., 129 U. S. 397, 445, 9 Sup. 469; 1893, Loree *v.* Abner, 6 C. C. A. 302, 57 Fed. 159 (Pennsylvania before 1788); 1894, Merchants Exch. Bank *v.* McGraw, 8 C. C. A. 420, 59 Fed. 972 (Wisconsin); 1894, Western & A. R. Co. *v.* Roberson, 9 C. C. A. 646, 61 Fed. 592 (Georgia and Tennessee); 1901, Barry *v.* Snowden, 106 Fed. 571. *Contra:* 1898, Wilson *v.* Owens, 30 C. C. A. 257, 86 Fed. 571 (notice of the law of the Chickasaw nation in the Indian Territory, not taken).

[7] 1885, Hanley *v.* Donoghue, 116 U. S. 1, 6 Sup. 242.

[8] 1863, Butcher *v.* Bank of Brownsville, 2 Kan. 70 (Pennsylvania judgment); 1871, Shotwell *v.* Harrison, 22 Mich. 410, 414 (certified copy of a Massachusetts deed); 1856, Ohio *v.* Hinchman, 27 Pa. 479, 482 (Ohio judgment; leading opinion, by Woodward, J.); 1876, Paine *v.* Schenectady Ins. Co., 11 R. I. 411, 415 (New York judgment); 1900, Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 124 (jurisdiction of a city court of St. Louis, Mo., noticed); 1867, Jarvis *v.* Robinson, 21 Wis. 523 (Michigan judgment).

has been applied to the laws of another of the United States from which that of the forum was formed by subdivision,[9] to the laws of Mexico,[10] to the laws of the British colony of Pennsylvania,[11] and to the laws of England before the American Revolution; but is, of course, not applicable to the laws of England since that time.[12]

But in many instances where the law of another of the United States is involved, the *presumption of similarity* of the foreign law (*ante*, § 2536) may render assistance. The Courts have failed to work out a theory of the relation between that presumption and the present principle of judicial notice.[13] There is much apparent inconsistency, and yet both principles have a legitimate bearing.

§ 2574. **Political Facts**: (1) **International Affairs**; **Seals of State.** The external political facts of international affairs, as distinguished on the one hand from the common international law (*ante*, § 2573) and on the other hand from the domestic political facts of the forum of the Court (*post*, § 2575), cannot be said to be made the subject of judicial notice.[1] In the chief instance likely to come into litigation, namely, the *existence of a particular foreign State* as independent among nations, the Court follows the action of the Executive of the forum; it recognizes that action, not as an international fact, but as a domestic political fact (*ante*, § 2566, par. 3). In another instance sometimes considered to fall under this head, namely, the *authenticity of a purporting seal* of a foreign State or judge, the process is in truth one of presuming genuine the specific seal-impression offered (*ante*, §§ 2163–2166); for although it might be possible to predicate judicial knowledge of a seal's design, it is preposterous to say that a judge can know whether a specific impress is genuine or who affixed it. Still another fact sometimes here classed, namely, the existence or effect of a *foreign judgment* is either a question of substantive law, not of evidence (*ante*, § 1347), or a question of proving the foreign record by ordinary means (*ante*, § 1681).

§ 2575. **Same**: (2) **Domestic Political Organization**; **Boundaries, Capitals, etc.** So far as the facts of political organization and operation of the State are determined in the law, they are judicially noticed as a part of the law (*ante*, § 2572). The chief difficulty comes in distinguishing between what is contained solely and abstractly in the law, and what depends more or less on specific official acts done under the law or upon the application of the descrip-

[9] 1822, Henthorn *v.* Doe, 1 Blackf. 157, 161, 163 (printed statute book of Virginia judicially noticed as of a State originally sovereign in Indiana).

[10] 1895, U. S. *v.* Chaves, 159 U. S. 452, 16 Sup. 57 (the laws and regulations of Mexico pertaining to land-grants made prior to the cession of 1848).

[11] 1893, Loree *v.* Abner, 6 C. C. A. 302, 57 Fed. 159 (statutes of the colony of Pennsylvania and of the State under the articles of Confederation).

[12] 1888, Liverpool & G. W. S. Co. *v.* Ins. Co., *supra*, note 6.

[13] For a good exposition of the distinction between noticing the domestic law, proving the foreign law, and presuming it, see Hooper *v.* Moore, 5 Jones L. 132.

[1] Except such facts as fairly fall within the principle of common notoriety (*post*, § 2580) or Executive action (*ante*, § 2566); *e. g.*, a *state of war:* 1797, Maclane's Trial, 26 How. St. Tr. 797; 1805, Dolder *v.* Lord Huntingfield, 11 Ves. Jr. 283, 292 ("that France is now at war with Austria," not noticed; otherwise of being at war with England); 1814, R. *v.* De Berenger, 4 M. & S. 67, 69 (Ellenborough, L. C. J., said "there were so many statutes which spoke of a war with France that it was impossible for the judges not to take judicial notice of it").

tive terms of the law to concrete things. Courts are apt to be extremely liberal in drawing the line so as to favor judicial notice.

In regard to the *territorial descriptions* in political law — boundaries, capitals, surveys, roads, and the like —, it is difficult to make any generalization; in the liberal application of the principle, exact consistency is hardly possible.[1]

[1] The following are illustrations: *Eng.:* 1721, Fazakerley *v.* Wiltshire, 1 Stra. 462, 469 (per Eyre, J.: "We must take notice of the extents of ports"); 1821, Deybel's Case, 4 B. & Ald. 242, 246 ("the general division of the kingdom into counties," noticed); 1842, Brunt *v.* Thompson, 2 Q. B. 789 (that a certain part of the Tower of London was within the boundary of the city of London, not noticed); 1856, Cooke *v.* Wilson, 1 C. B. N. S. 153, 163 (that the colony of Victoria is out of England, noticed); *Ala.:* 1857, King *v.* Kent's Adm'r, 29 Ala. 542, 552 (the location within the State of certain lands defined by statute, noticed); 1858, Lewis *v.* Harris, 31 id. 689 (that lands of F. Co. were held under U. S. government title, noticed); 1872, Smitha *v.* Flournoy's Adm'r, 47 id. 345 (that Eufaula is a city, in Barbour Co., etc., noticed); 1898, Waters *v.* State, 117 id. 189, 23 So. 28 (location of a public road in H. Co., not noticed); *Ark.:* 1895, *Re* Independence Boulevard — Ark. — , 30 S. W. 773 (limits of a municipality, noticed); 1900, St. Louis Iron M. & S. R. Co. *v.* Cady, 67 id. 512, 55 S. W. 929 (that "Glenwood" was in a certain county, not noticed); 1900, St. Louis I. M. & S. R. Co. *v.* Magness, 68 id. 289, 57 S. W. 933 (that a town is in a certain county, noticed); *Cal.:* 1893, People *v.* Etting, 99 Cal. 577, 579, 34 Pac. 237 (that a certain town is within a county and is its county-seat, noticed); 1894, Rogers *v.* Cady, 104 id. 288, 38 Pac. 1 (government survey, noticed); 1895, DeBaker *v.* R. Co., 106 id. 257, 39 Pac. 610 (the course of a river frequently mentioned in statutes, and the boundary of a city, noticed); 1895, Schwerdtle *v.* Placer Co., 108 id. 589, 41 Pac. 448 (that certain land is within the public domain, not noticed); 1895, Diggins *v.* Hartshorne, id. 154, 41 Pac. 283 (that a mapped space is correctly located, *i.e.* that boundaries actually run at a given spot, not noticed); 1896, People *v.* Faust, 113 id. 172, 45 Pac. 261 (that a town is a county seat, noticed); *Conn.:* 1856, State *v.* Powers, 25 Conn. 48 (that Stonington is in New London county, noticed); *Ga.:* 1901, Perry *v.* State, 113 Ga. 936, 39 S. E. 315 (on evidence that a town is in the State, the county of its location will be noticed); *Ill.:* 1832, Ross *v.* Reddick, 2 Ill. 73 (the boundaries of a county, noticed); 1873, Gooding *v.* Morgan, 70 id. 275 (similar); 1876, Gardner *v.* Eberhart, 82 id. 316 (the subdivision of town and city property into blocks and lots, etc., noticed); 1897, Sever *v.* Lyon, 170 id. 395, 48 N. E. 926 (a homestead covering more than one lot; notice taken of the block and lot subdivision); 1898, Gilbert *v.* Nat'l C. R. Co., 176 id. 288, 52 N. E. 22 (that an incorporated town is in a given county, noticed); 1900, McCoy *v.* World's Columbian Exposition, 186 id. 356, 57 N. E. 1043 (location of the Exposition in Chicago, noticed); 1901, Gunning *v.* People, 189 id. 165, 59 N. E. 494 (that the "Reliance Building" is located in the town of South Chicago, not noticed); *Ind.:* 1877, Steinmetz *v.* Versailles & O. Turnpike Co., 57 Ind. 457 (that a road between two towns would lie within a county, noticed); 1877, Murphy *v.* Hendricks, ib. 593 (Congressional survey of Northwest Territory, noticed); 1897, Board *v.* State, 147 id. 476, 46 N. E. 908 (the area and boundaries of a county, noticed); *Me.:* 1855, Ham *v.* Ham, 39 Me. 263 (county lines, and the towns therein, noticed); 1863, Martin *v.* Martin, 51 id. 366 (that a town is within a certain county, noticed); 1897, State *v.* Simpson, 91 id. 83, 39 Atl. 287 (the town of Waterville, noticed to be in the county of Kennebec); *Mass.:* 1869, Com. *v.* Desmond, 103 Mass. 445 (that Suffolk county is a county of Massachusetts, noticed); 1894, Com. *v.* Wheeler, 162 id. 429, 38 N. E. 1115 (the county within which a town lay, not noticed); *Mich.:* 1864, Cummings *v.* Stone, 13 Mich. 70 (that not all of the St. Clair river is in Michigan, noticed); *Minn.:* 1888, Quinn *v.* Champagne, 38 Minn. 323, 37 N. W. 451 (the general system of governmental surveys, noticed); 1896, Baumann *v.* Trust Co., 66 id. 227, 68 N. W. 1074 (location of a city within a given county, noticed); 1898, Kretzschmar *v.* Meehan, 74 id. 211, 77 N. W. 41 (that a piece of land is in a certain county, not noticed); *Mo.:* 1894, State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106 (county-seat, noticed); *N. H.:* 1860, Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420, 429 (counties and towns, noticed); *N. C.:* 1896, State *v.* Snow, 117 N. C. 774, 23 S. E. 322 (county-names, noticed as such); *R. I.:* 1855, State *v.* Dunwell, 3 R. I. 127 (the boundaries of the State as claimed by it, recognized, but not the boundary *de jure*); *Tex:* 1866, Wright *v.* Hawkins, 28 Tex. 452, 472 (county-boundaries, noticed); 1880, Solyer *v.* Romanet, 52 id. 562, 568 (that the city of Galveston is in the county of Galveston in Texas, noticed); 1896, Hambel *v.* Davis, 89 id. 256, 34 S. W. 439 (that a town is the county-seat, noticed); Whitner *v.* Belknap, ib. 273, 34 S. W. 594 (same); *U. S.:* 1824, The Apollon, 9 Wheat. 362, 374 ("public facts and geographical positions" are to be noticed); 1833, Peyroux *v.* Howard, 7 Pet. 324, 342 (that the port of New Orleans was within the jurisdiction, as depending on the ebb and flow of tide at that point, noticed); *Utah:* 1898, McMaster *v.* Morse, 18 Utah 21, 55 Pac. 70 (that a certain city was surveyed into lots, blocks, and streets, noticed); *Va.:* 1902, Anderson *v.* Com., 100 Va. 860, 42 S. E. 865 (unincorporated town, not noticed); *Wis.:* 1859, Atwater *v.* Schenck, 9 Wis. 160 (the legal subdivisions of public lands, noticed).

Distinguish the question whether the fact will be noticed that there is *only one town* of a given name in existence or in a particular country:

§ 2576. **Same: (3) Domestic Officials, their Identity and Authority; Genuineness of Official Documents.** It is the law that creates certain offices, and attributes certain duties and authorities to the incumbents; but whether the incumbent at a given time and place is a specific person depends on external political action, sometimes recorded or notorious, but sometimes neither. Courts have solved this application of the principle by considerations of practical good sense and convenience; which are, however, difficult to reduce to a definite rule. All that can be said is that the incumbencies of the more important and notorious offices are judicially noticed, and that many of the lesser and local ones are not.[1]

But the field for the present principle, applied without other complications, is after all limited. In the first place, the *authentication of official documents* involves usually the additional element of the presumption of genuineness of the seal or signature; this has been elsewhere dealt with (*ante*, §§ 2161–2167); the pure question of judicial notice arises here only when the signature or seal is otherwise evidenced and the incumbency of the person remains alone to be proved. Again, the *presumption of office* from a notorious acting of a person in the office (*ante*, §§ 2168, 2535) does not rest on the present principle; it is invoked only when the present principle fails to aid the purpose.

§ 2577. **Same: (4) Official Acts; Elections, Census, Legislative Proceedings, etc.** It can seldom happen that the doing of an official act can properly

1819, Kearney *v.* King, 2 B. & Ald. 301 (bill of exchange, declared on as drawn and accepted at Dublin for £542; the question being whether it was drawn for Irish or English money, the Court declined "to take judicial notice that there is only one Dublin in the world"; this was correct; but the Court should have presumed that a bill purporting to be in Dublin was in the Dublin of Ireland, on the same principle as the presumption of dating (*ante*, § 2520); this result is plain, and it is curious that the Court could not find a principle on which to reach it); 1849, Andrews *v.* Hoxie, 5 Tex. 171, 182 (promissory note payable in New Orleans; that this was in Louisiana, probably not noticed; here the proper solution was the same as in the preceding case).

[1] To the following cases add most of those cited *ante*, §§ 2163–2168, where the same principle is involved; some of the following cases belong there also, but are here placed as illustrations of the usage: 1705, Elderton's Case, 2 Ld. Raym. 978, 980, *semble* (the authority of certain officers as justices of the peace, noticed); 1809, R. *v.* Jones, 2 Camp. 131 (the signatures being proved, the incumbency of persons signing as lords Commissioners of the Treasury was presumed); 1855, Ingram *v.* State, 27 Ala. 17, 20 (sheriffs of the several counties, noticed); 1874, Thielmann *v.* Burg, 73 Ill. 293 (jurat of a notary public, without seal; his incumbency noticed); 1900, Crawford *v.* State, 155 Ind. 692, 57 N. E. 931 (whether a person was a deputy of the attorney-general, not noticed); 1842, Walden *v.* Canfield, 2 Rob. La. 466, 469 (Edward Livingston's office as Senator, etc., noticed); 1857, Lindsey *v.* Attorney-General, 33 Miss. 508, 528 (changes in the governorship, noticed); 1900, State *v.* Mason, 155 Mo. 486, 55 S. W. 636 (number of members of the Legislature, noticed); 1866, Wells *v.* Jackson I. M. Co., 47 N. H. 235, 260 (that D. L. M. was governor in 1826, noticed); 1827, Bennett *v.* State, Mart. & Y. 133, 135 (that T. B. C. was attorney-general, noticed); 1854, Major *v.* State, 2 Sneed 11 (the incumbency of one signing as clerk of court, noticed, as being a public officer); 1847, State *v.* Evans, 8 Humph. 110 ("John P. Campbell, attorney-general"; notice taken of the district for which he was officer; also that N. B. had resigned that office before the term ended, and that J. P. C. had been appointed); 1849, State *v.* Cole, 9 id. 626 (*venire* signed "B. H. G."; notice taken that he was clerk of the issuing county); 1874, Currey *v.* State, 7 Baxt. 154, 156 (that J. M. T., signing an indictment, was attorney-general, noticed); 1870, Dewees *v.* Colorado Co., 32 Tex. 570 (that H. was Governor of the State, noticed); 1854, York & M. R. Co. *v.* Winans, 17 How. 30 (the incumbency of the acting commissioner of patents, noticed); 1899, Smyth *v.* New Orleans C. & B. Co., 35 C. C. A. 646, 93 Fed. 899 (signature of the government secretary of the Spanish colony of Louisiana, noticed); W. Va. Code 1891, c. 130, § 3 (the signature of any domestic judge or of the governor is to be noticed); 1865. Ward *v.* Henry, 19 Wis. 76, 81 (the incumbency of a deputy marshal, not noticed).

be judicially noticed; it must usually be evidenced in the ordinary ways.[1] Perhaps an Executive *proclamation* should be noticed.[2] All Courts take notice, in one or another aspect, of facts concerning *public elections*,[3] though this often involves rather the use of official reports as evidence (*ante*, §§ 1351, 1672). The acts of the *census* officials, in returning the data of population, are commonly said to be judicially noticed;[4] though this is almost always a misnomer for their admissibility in evidence (*ante*, § 1671). The *proceedings* of the Legislature, as shown in its *journals*, are by some Courts noticed;[5] but this is an artificial theory; on principle, the proceedings as contained in the journal are evidenced by a printed copy or by a certified copy (*ante*, §§ 1662, 1680, 1684).[6]

§ 2578. **Judicial Proceedings: (1) Officers and Rules of Court.** Under the general principle for domestic officials (*ante*, § 2576), notice is taken of the incumbency of other *officers of Courts*; although here, as there, some uncertainty exists as to the extent to which this will include the inferior and more numerous officers, particularly justices of the peace and attorneys.[1]

[1] In particular, by the official's statements (*ante*, §§ 1630–1684).

[2] But this usually involves rather the offer of the proclamation as evidence to a fact recited (*ante*, § 1662).

[3] 1897, State *v.* Downs, 148 Ind. 324, 47 N. E. 670 (that at a recent election a "Republican Ticket" was submitted, noticed); 1901, *Re* Denny, 156 id. 104, 59 N. E. 359 (number of votes cast for a constitutional amendment, noticed); 1863, State *v.* Minnick, 15 Ia. 123, 125 (that a general election was held on a certain date, and that certain officers were to be voted for, noticed); 1873, Ellis *v.* Reddin, 12 Kan. 306 (similar); 1895, Whitman *v.* State, 80 Md. 410, 31 Atl. 325 (the result of a local-option election, not noticed); 1898, State *v.* Stearns, 72 Minn. 200, 75 N. W. 210 (reference had to election returns, etc., to determine whether a proper majority voted for a law); 1896, Jackson Co. *v.* Arnold, 135 Mo. 207, 36 S. W. 662 (the date of election to be held for President of the United States, noticed); 1898, Kokes *v.* State, 55 Nebr. 691, 76 N. W. 467 (result of State and county elections, noticed); 1893, Thomas *v.* Com., 90 Va. 92, 95, 17 S. E. 788 (that a certain district voted against licensing the sale of liquor, noticed).

[4] 1883, People *v.* Williams, 64 Cal. 87, 91 (Federal census results); 1880, Worcester National Bank *v.* Cheney, 94 Ill. 430 (county population by the census, noticed as not being within the first class); 1898, Huntington *v.* Cast, — Ind. — , 48 N. E. 1025 (the Federal census, as determining a city's population); 1893, State *v.* Braskamp, 87 Ia. 588, 54 N. W. 532 (the population of a county as shown by the last national census); 1898, Bennett *v.* Marion, 106 id. 628, 76 N. W. 844 (population of a city by the Federal census); 1895, State *v.* Marion Co. Court, 128 Mo. 427, 30 S. W. 103 (Federal census); 1893, Brown *v.* Lutz, 36 Nebr. 527, 530, 54 N. W. 860 (that a city is of the second class as to population); 1898, Kokes *v.* State, 55 id. 691, 76 N. W. 467 (the Federal census and the State school census); 1900, Stratton *v.* Oregon City, 35 Or. 409, 60 Pac. 905 (population of a city by the Federal census).

[5] 1895, State *v.* Hocker, 36 Fla. 358, 18 So. 767; Ga. Code, 1895, § 5210 (legislative journals, recognized without proof); 1899, Dane Co. *v.* Reindahl, 104 Wis. 302, 80 N. W. 438. *Contra:* 1867, Illinois C. R. Co. *v.* Wren, 43 Ill. 17; 1867, Bedard *v.* Hall, 44 id. 91; 1867, Grob *v.* Cushman, 45 id. 119, 125; 1856, Coleman *v.* Dobbins, 8 Ind. 156, 161 (the legislative journals will not be searched by the Court, but must be laid before the Court like any other record); 1884, Burt *v.* R. Co., 31 Minn. 472, 477 (they must be put in evidence in order to overthrow the enrolled statute); 1856, Green *v.* Weller, 32 Miss. 650, 686, 711 (Smith, C. J., diss.); 1890, *Re* Duncan, 139 U. S. 449, 457, 11 Sup. 573.

[6] The question usually arises in determining whether the journals overthrow the enrolled act (*ante*, § 1350).

[1] 1705, Elderton's Case, 2 Ld. Raym. 978 (cited *ante*, § 2576); 1737, Skipp *v.* Hooke, 2 Stra. 1080 (that Sir John Willes was Chief Justice of the Common Bench; apparently not decided); 1845, Van Sandau *v.* Turner, 6 Q. B. 773, 786 (that Sir G. R. was a judge of the Court of Review in Bankruptcy; not decided); 1858, *Ex parte* Peterson, 33 Ala. 74 (resignation of a circuit judge, noticed); 1899, McCarver *v.* Herzberg, 120 id. 523, 25 So. 3 (notice taken that T. G. W. was probate judge of P. Co.); 1898, Clark *v.* Morrison, — Ariz. — , 52 Pac. 985 (notice not taken of attorneys of a district Court not members of the Supreme Court bar); 1899, Webb *v.* Kelsey, 66 Ark. 180, 49 S. W. 819 (justice of the peace, noticed); 1892, San Joaquin Co. *v.* Budd, 96 Cal. 47, 51, 30 Pac. 967 (the acts of judges, noticed; but not the identity of a defendant having the same name as a judge); 1898, People *v.* Ebanks, 120 id. 626, 52 Pac. 1078 (notice taken that a person had ceased to be judge of a Superior Court); 1898, State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465

Under the general principle for domestic laws (*ante*, § 2572), notice is commonly taken of the various elements of *jurisdiction* as fixed by law,[2] of the *terms* of Court,[3] and perhaps in general of the *rules* of superior Courts, though not those of inferior Courts.[4]

§ 2579. **Same: Records of Proceedings.** The proceedings in a Court are constituted by the record, and this record originally took its name from the judicial memory (*recordari*) which could be appealed to for recalling those prior proceedings.[1] Nevertheless, it seems to-day unreasonable, having regard to the general principle of judicial notice (*ante*, § 2565), to predicate an actual judicial knowledge of the proceedings in specific prior litigations (for they are commonly neither notorious, nor within the judge's duty of knowledge),

(whether a party is a citizen of the U. S., not noticed); 1867, Graham *v.* Anderson, 42 Ill. 514 (the justices of the peace in the county where the Court is sitting, noticed); 1895, People *v.* McConnell, 155 id. 192, 40 N. E. 608 (resignation of a circuit judge, noticed); 1895, Ferris *v.* Bank, 158 id. 237, 41 N. E. 1118 (that a person appearing as attorney is regularly licensed, noticed); 1898, Gilbert *v.* Nat'l C. R. Co., 176 id. 288, 52 N. E. 22 (justice of the peace in the same county, noticed); 1880, Kennedy *v.* Com., 78 Ky. 447 (that S. E. D. was a circuit judge, noticed); 1825, Despau *v.* Swindler, 3 Mart. N. S. 705 (magistrates of the parishes, noticed); 1842, Follain *v.* Lefevre, 3 Rob. La. 13 (N. J., noticed as not being the name of any associate judge of a city Court); 1824, Ripley *v.* Warren, 2 Pick. 592, 596 ("It is at least questionable whether we have any judicial knowledge of the fact" that J. M. W. was not the first justice of the Common Pleas Court); 1890, Davis *v.* McEnaney, 150 Mass. 451, 23 N. E. 221 *semble* (that E. B. G. was clerk of the Police Court of H. at the time of complaint filed, not noticed); 1858, Kilpatrick *v.* Com., 31 Pa. 198 (that neither J. R. L. nor J. A. was president of the Court of Common Pleas, noticed; leading opinion, by Strong, J.); 1900, Baruwell *v.* Merion, 58 S. C. 459, 36 S. E. 818 (that a judge was in a certain judicial circuit, that he was assigned to a certain session, that a certain day was the first day of the session, and that a county was in the circuit, noticed); 1898, Sutton *v.* R. Co., 98 Wis. 157, 73 N. W. 993 (notice not taken that an attorney had removed from the State).

Compare the cross-references noted *ante*, § 2576.

[2] 1697, Tregany *v.* Fletcher, 1 Ld. Raym. 154 (that "the Exchequer in Wales is a Court," noticed); 1835, Chitty *v.* Dendy, 3 A. & E. 319, 324 ("that the County Court had no authority to give leave to plead double," noticed); 1851, March *v.* Com., 12 B. Monr. 25 (city ordinances, as affecting the jurisdiction of a City Court, exceptionally noticed, because the case came up for review on a writ of error); 1830, Newell *v.* Newton, 10 Pick. 470 (jurisdiction of a foreign Court, not noticed on a plea of abatement for *lis pendens*; otherwise, of a Court of the same government); 1896, Chicago, B. & Q. R. Co. *v.* Hyatt, 48 Nebr. 161, 67 N. W. 8 (boundaries of a judicial district, noticed).

[3] The following facts were noticed, except as otherwise noted: 1874, Rodgers *v.* State, 50 Ala. 103 (that the fall term of the Circuit Court of L. Co. begins on the fourth Monday of October and may last three weeks, etc.); 1852, Ross *v.* Anstill, 2 Cal. 183, 191 ("the times and places of holding the Courts," noticed, in particular aspects); 1877, Dorman *v.* State, 56 Ind. 454 (that a grand jury drawn for the January term was also for the preceding September term); 1877, Spencer *v.* Curtis, 57 id. 221, 227 (that the March term of a trial Court began on Mar. 1 and ended on Mar. 20); 1893, Rogers *v.* Venis, 137 id. 221, 223, 36 N. E. 841 (that the first day of the September term of a circuit Court in 1891 was Sept. 7); 1895, Anderson *v.* Anderson, 141 id. 567, 40 N. E. 131 (the time of a circuit Court term); 1858, Kidder *v.* Blaisdell, 45 Me. 461, 470 (that a session of Court before which a deposition was returnable was a Court of the proper county and State); 1859, Fabyan *v.* Russell, 38 N. H. 84 (attendance fees; the number of days of a Court's session at each term, etc.); 1894, State *v.* Toland, 36 S. C. 515, 523, 15 S. E. 599 (that the November term was the only remaining term for the year); 1870–71, Davidson *v.* Peticolas, 34 Tex. 27, 35 (that a term of the District Court was held in Victoria Co. on the third Monday of February, etc.); 1893, Thomas *v.* Com., 90 Va. 92, 94, 17 S. E. 788 (that a June term is not a quarterly term); 1894, Donovan *v.* Terr., 3 Wyo. 91, 2 Pac. 532 (that the first day of a term of a county Court was Sept. 17, 1883, and that a jury-drawing on that date could have taken place in that Court only).

[4] 1845, Van Sandau *v.* Turner, 6 Q. B. 773, 784 (even assuming that the practice and rules of the long established Courts are to be noticed, held that the rules of a Court of Review in Bankruptcy, recently created by statute, would not be noticed); 1897, Kindel *v.* LeBert, 23 Colo. 385, 48 Pac. 641 (rules of a district Court, not noticed); 1897, Cornelieson *v.* Foushee, 101 Ky. 257, 40 S. W. 680 (rules of a circuit Court, not noticed); 1860, Scott *v.* Scott, 17 Md. 78, 90 (that a cause was not regularly set for hearing under the rules of a circuit Court; the rules not noticed).

[1] *Ante*, § 2426, p. 3422, § 2450; Pollock & Maitland, History of the English Law, II, 666.

or to expect the Court to make its own researches into the mass of the records for the purpose of informing itself. Accordingly, it may be said generally that a Court is not by any rule bound to take notice of the tenor of any legal proceedings (other than those transacting at the moment in its presence). Indeed, this much is assumed in the conceded rules of law which require the original of a judicial record to be produced in proof, and define the exceptions by which a copy is allowed to to be used instead (*ante*, §§ 1215, 1216).

However, for reasons of convenience, where controversy is unlikely and the expense of a copy would be disproportionate, Courts are often found taking notice of the tenor or effect of some part of a judicial proceeding, without requiring formal evidence. Since this dispensation is not obligatory on the part of the Court, and since it must depend more or less on the practical notoriety and certainty of the fact under the circumstances of each case, little uniformity can be seen in the instances. It is often done for a part of the record in the *same proceeding*, or in a *prior stage of the same controversy;* less often for the record of a *distinct litigation*, especially when in another Court.[2]

§ 2580. **Notorious Miscellaneous Facts**: (1) **Commerce, Industry, History, Natural Science, etc.** Applying the general principle (*ante*, § 2565), especially in regard to the element of notoriousness, Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science.[1] It is unprofit-

[2] 1866, Lake Merced W. Co. *v.* Cowles, 31 Cal. 215 (petition for land-condemnation; notice not to be taken of the pendency of another petition in the same Court by another party for the same land); 1894, Lester *v.* People, 150 Ill. 408, 37 N. E. 1004, *semble* (in contempt proceedings arising out of a civil case, the record of the original cause, if properly incorporated, may be considered on appeal); 1899, Bailey *v.* Kerr, 180 id. 412, 54 N. E. 165 (application to compel execution of a deed by an assignor for benefit of creditors; notice taken of an order approving the sale); 1899, Crawford *v.* Duckworth, — Ind. T. —, 53 S. W. 465 (that the defendant had in another proceeding in a Federal Court been declared not a Cherokee citizen, noticed); 1862, Baker *v.* Mygatt, 14 Ia. 131, 133 (that an affidavit offered was duly executed, as known to the judge by its filing in another suit not between these parties; not noticed); 1899, Lawless *v.* Stamp, 108 id. 601, 79 N. W. 365 (recitals in a deed of a receiver appointed in another suit, not noticed); 1877, National Bank of Monticello *v.* Bryant, 13 Bush 419 (litigation over a judgment; the records of other connected suits, not noticed); 1876, State *v.* Bowen, 16 Kan. 475 (new trial, with plea of former jeopardy; the prior proceedings, noticed); 1860, Pagett *v.* Curtis, 15 La. An. 451 (title to slaves; an order of Court pertaining to them, noticed); 1897, Anderson *v.* Cecil, 86 Md. 490, 38 Atl. 1074 (petition for a receiver against a buyer under judicial sale; the record in the suit for sale, not noticed); 1899, Olson Co. *v.* Brady, 76 Minn. 8, 78 N. W. 864 (garnishment proceedings; the judgment against the principal defendant, noticed); 1875, Banks *v.* Burnam, 61 Mo. 76 (specific performance of a contract; a former suit for its rescission, not noticed); 1897, State *v.* Electric Co., 61 N. J. L. 114, 38 Atl. 818 (contempt for disregarding a stay implied in a certiorari writ; notice not taken of the writ or other proceedings in certiorari, the present proceeding being "quasi-criminal"); 1900, State *v.* Bates, 22 Utah 65, 61 Pac. 905 (proceedings in the same cause, noticed).

[1] Some of these instances, in which notice was taken, are to be accounted for by their close approximation to facts of *law* (*ante*, § 2572); compare also the instances of a *jury's* judicial notice of matters of common knowledge (*ante*, § 2570): *Eng.:* 1761, Edie *v.* East India Co., 2 Burr. 1216, 1228 (the custom of merchants is to be noticed, so far as it is "part of the law," per Wilmot, J.; but here the question was whether a special usage amounted to law); 1846, Brandao *v.* Barnett, 3 C. B. 519, 530 ("The general lien of bankers is part of the law merchant, and is to be judicially noticed, — like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years"); 1902, Edelstein *v.* Schuler, 2 K. B. 144, 155 (negotiable character of certain bonds, in trade usage, noticed); *Ala.:* 1867, Modawell *v.* Holmes, 40 Ala. 391, 405 (depreciation of the

able, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with differences

currency during the war, not noticed); 1870, Buford *v.* Tucker, 44 id. 89, 91 (that contracts were made generally, at a certain period, with reference to Confederate currency, noticed); 1898, Mobile & O. R. Co. *v.* Postal T. C. Co., 120 id. 21, 24 So. 408 (that a telegraph line of a certain sort is a public improvement, noticed); *Cal.:* 1859, Dutch Flat W. Co. *v.* Mooney, 12 Cal. 535, *semble* (mining customs, not noticed); 1873, Goldsmith *v.* Sawyer, 46 id. 209 (rules of the San Francisco board of stock-brokers, not noticed); 1893, Benson *v.* R. Co., 98 id. 45, 48, 32 Pac. 809 (the usual speed of trains, away from towns, noticed); 1895, Fox *v.* Mining Co., 108 id. 369, 41 Pac. 308 (the nature of the relation between broker and customer in a certain class of transactions as shown by frequent decisions, noticed); 1898, Scanlan *v.* R. Co., — id. — , 55 Pac. 694 (the art of mensuration as applied to railroad embankments, noticed); *Colo.:* 1874, Sullivan *v.* Hense, 2 Colo. 424, 429 (mining rules and customs, sanctioned in mass by a statute, not noticed); 1893, Atchison T. & S. F. R. Co. *v.* Headland, 18 id. 477, 483, 33 Pac. 185 (custom of separation of passenger and freight trains, noticed); *Conn.:* 1897, State *v.* Main, 69 Conn. 123, 37 Atl. 80 (that "peach yellows" was a tree-disease, of a baneful and contagious nature, noticed); 1899, Knowlton *v.* R. Co., 72 id. 188, 44 Atl. 8 (that the railroad between New Haven and New York was opened by Jan. 1, 1849, noticed as an "historic fact"); *D. C.:* 1894, Metropolitan R. Co. *v.* Snashall, 3 D. C. App. 420, 433 (that passengers are commonly allowed to ride on the platform of a street-car, noticed); *Ga.:* 1897, Southern R. Co. *v.* Hagan, 103 Ga. 564, 29 S. E. 760 (notice not taken of the duties of a railway superintendent in a particular town); *Ill.:* 1898, Cleveland C. C. & St. L. R. Co. *v.* Jenkins, 174 Ill. 398, 51 N. E. 811 (notice taken of a railroad custom in regard to clearance-card); *Ind.:* 1867, Neaderhouser *v.* State, 28 Ind. 257, 267 (the navigability of the Ohio River, etc., noticed); 1892, Matchett *v.* R. Co., 132 id. 334, 31 N. E. 792 (a brakeman's duties in general); *Ky.:* 1827, Feemster *v.* Ringo, 5 T. B. Monr. 336 (the value of paper of the State bank at a particular time, not noticed); *Md.:* 1894, State *v.* Fox, 79 Md. 514, 528, 29 Atl. 601 (that glanders is for human beings contagious, not noticed); *Mass.:* 1889, Com. *v.* King, 150 Mass. 221, 224, 22 N. E. 905 (that the Connecticut river at a certain place was not a navigable water under Federal jurisdiction, noticed); St. 1895, c. 419, § 2 (notice allowed of the methods of various specified lotteries and gambling businesses); *Mich.:* 1897, Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126 (notice not taken that certain lake navigation would be closed on April 1); *Minn.:* 1899, Rosted *v.* R. Co., 76 Minn. 123, 78 N. W. 971 (that exposure to cold is likely to cause inflammatory rheumatism, noticed); *Miss.:* 1854, Turner *v.* Fish, 28 Miss. 306, 311 (the Choctaw custom as to family headship, not noticed); *Mo.:* 1893, Atkeson *v.* Lay, 115 Mo. 538, 557, 22 S. W. 481 (that a newspaper is published in a certain county, not noticed); *Nebr.:* 1899, Shiverick *v.* Gunning Co., 58 Nebr. 29, 78 N. W. 460 (destruction of a sign-painting of a bull; notice not taken that it was so indecent as to be a nuisance); 1901, Erickson *v.* Schmill, 62 id. 368, 87 N. W. 166 (that gestation may exceed 280 days, not noticed); 1902, Meyers *v.* Menter, 63 id. 427, 88 N. W. 662 (that potatoes, sugar-beets, and turnips are not the spontaneous product of the soil, noticed); *N. J.:* 1894, Meyer *v.* Krauter, 56 N. J. L. 696, 29 Atl. 426 (that trolley-lines had not in 1884 or 1885 superseded horse-cars, noticed); *N. Y.:* 1889, Hunter *v.* New York O. & W. R. Co., 116 N. Y. 615, 621, 23 N. E. 9 (injury at a tunnel; that the sitting height of a man could not be four feet seven inches, noticed); 1893, Rowland *v.* Miller, 139 id. 93, 34 N. E. 765 (that the business of an undertaker in a certain locality was offensive, noticed); 1898, Baxter *v.* McDonnell, 155 id. 83, 49 N. E. 667 (the legal nature and powers of the Holy Roman Catholic Church, not noticed); *N. D.:* 1897, Mathews *v.* R. Co., 7 N. D. 81, 72 N. W. 1085 (notice taken of a general custom to pasture on unsurveyed public lands); *Okl.:* 1898, Goodson *v.* U. S., 7 Okl. 117, 54 Pac. 423 (that in certain Indian reservations there are no resident freeholders qualified as jurors, noticed); *Or.:* 1880, Lewis *v.* McClure, 8 Or. 273 (local customs as to irrigation, given the force of law in mass by Federal statute, not noticed); *R. I.:* 1893, State *v.* South Kingston, 18 R. I. 258, 273, 27 Atl. 606 (that many Seventh Day Baptists lived in a town S. H., and that they would not vote at an election held on Saturday, noticed); *Tenn.:* 1898, Austin *v.* State, 101 Tenn. 563, 48 S. W. 305 (that tobacco in cigarette form is deleterious for smoking, noticed; they "are inherently bad, and bad only"); 1898, Kerns *v.* Perry, — id. —, 48 S. W. 724 (that certain lowlands were overflowed by freshets, noticed); *U. S.:* 1875, Brown *v.* Piper, 91 U. S. 37 (patent for a freezing mixture to preserve fish; the method used in an ice-cream freezer, noticed, as "a thing in the common knowledge and use of the people throughout the country"); 1893, Lyon *v.* U. S., 5 C. C. A. 359, 55 Fed. 964 (the usual existence of hair along with sheep-fleece, noticed); 1897, Railroad & Tel. Cos. *v.* Board, 85 Fed. 302, 308 (notice taken of an assessors' custom to rate property at a percentage of actual value); 1898, Von Mumm *v.* Wittemann, 85 Fed. 966 (notice taken that labels of champagne, as ordinarily served from a cooler, disappear before the bottle is shown to the customer); 1899, Smyth *v.* New Orleans C. & B. Co., 35 C. C. A. 646, 93 Fed. 899 (existence noticed, as a matter of history, of a certain ancient Spanish land-register); 1899, Cushman P. B. M. Co. *v.* Goddard, 37 C. C. A. 221, 95 Fed. 664 (notice taken of the state of an art of manufacturing, on a matter of general interest, as shown by the Court's prior records); 1899, United States *v.* Rio Grande D. & I. Co., 174 U. S. 690, 19 Sup. 770 (that the Rio Grande

of period and of place. It is even erroneous, in many if not in most instances, to regard them as precedents. It is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance.

§ 2581. **Same**: (2) **Times and Distances.** Among the common instances, under this miscellaneous class, are the facts of time or season [1] and of distance;[2] though here also the quality of notoriousness will naturally vary with the place and the epoch, as well as with the greater or less accuracy involved in the facts desired to be noticed.

§ 2582. **Same**: (3) **Meaning of Words; Intoxicating Liquors.** Another common class of instances, subject to the foregoing general considerations (*ante*, § 2580), is that of the meanings of words and phrases and written symbols. So far as these are notorious and unquestioned, they are constantly found noticed. Here, too, the local circumstances and the usage of the time must more than ever control the ruling. The popular familiarity with the fable of the Frozen Snake, and therefore the general understanding of the meaning of that epithet, may well be noticed in one period and community,[1] yet not in another. So much of special usage in commerce, religion, and

river at a particular place ceased to be navigable, not noticed); 1900, Austin *v.* Tennessee, 179 id. 343, 21 Sup. 132 (*contra* to Austin *v.* State, Tenn., *supra*); *Wash.:* 1896, Mullen *v.* Sackett, 14 Wash. 100, 44 Pac. 136 (that there are always taxes remaining unpaid, noticed); 1898, Bartholomew *v.* Bank, 18 id. 683, 62 Pac. 239 (notice not taken of the presence or absence of a bank in a town); 1899, Prescott Irrig. Co. *v.* Flathers, 20 id. 454, 55 Pac. 635 (that ordinary sagebrush soil needs irrigation to produce crops, noticed); 1899, Hill Estate Co. *v.* Whittlesey, 21 id. 142, 57 Pac. 345 (vestry powers in the Protestant Episcopal Church, not noticed); *W. Va.:* 1876, Simmons *v.* Trumbo, 9 W. Va. 358, 364 (that Confederate notes were currency in the South during the war, that they were but little depreciated at a certain time, and were never made legal tender by the Confederacy, noticed); *Wis.:* 1899, Katzer *v.* Milwaukee, — Wis. —, 79 N. W. 745 (rules of the Catholic Church, not noticed).

[1] In some of these instances, the evidential admissibility of the record of the official meteorological bureau (*ante*, § 1639), or of histories and almanacs (*ante*, §§ 1698, 1699), was the real effect of the ruling: 1705, Harvy *v.* Broad, 2 Salk. 626 (that the calendar day for a writ being returnable fell on Sunday, noticed); 1705, Davies *v.* Salter, ib. 626 (similar); 1859, Sprowl *v.* Lawrence, 33 Ala. 674, 684 (that the first Monday of August, 1853, was August 1, noticed); 1876, Tomlinson *v.* Greenfield, 31 Ark. 557 (that a crop of cotton named in a mortgage of January could not have been planted or in being at that time, noticed); 1896, People *v.* Mayes, 113 Cal. 618, 45 Pac. 860 (time of moon-rising, noticed); 1879, State *v.* Morris, 47 Conn. 179 (coincidence of days of the month and week, noticed, by refreshment of memory from the almanac); 1851, Dawkins *v.* Smithwick, 4 Fla. 158, 162 (that a day of the month fell on Sunday, noticed); 1903, Dorough *v.* Equitable M. Co., — Ga. —, 45 S. E. 22 (coincidence of the days of week and month, noticed); 1866, Dixon *v.* Niccolls, 39 Ill. 372, 385 (the time of maturity of grain crops in a certain region, not noticed); 1877, Ross *v.* Boswell, 60 Ind. 235 (that the use of a farm in cropping season is more valuable than in winter, noticed); 1881, McIntosh *v.* Lee, 57 Ia. 358, 10 N. W. 895 (that March 10, 1878, was Sunday, noticed); 1853, Sasscer *v.* Farmers' Bank, 4 Md. 409, 420 (that Dec. 26 fell on Sunday, and that by commercial usage the day of payment of a note is in such cases anticipated, noticed); 1881, Philadelphia, W. & B. R. Co. *v.* Lehman, 56 id. 209, 226 (that July 28, 1878, was Sunday, noticed); 1894, Morgan *v.* Burrow, — Miss. —, 16 So. 432 (day of the month, noticed); 1879, Reed *v.* Wilson, 41 N. J. L. 29, 32 (that the day of a note's maturity fell on Sunday, noticed, and also the law merchant as to days of grace); 1901, Payne *v.* McCormick Harvesting M. Co., 11 Okl. 318, 66 Pac. 287 (time of planting and harvesting annual crops, noticed).

[2] 1893, Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118 (that East Portland, Oregon, is distant 2398 miles from Crawfordsville, a place of trial in Indiana, noticed); 1893, Mutual Ben. L. Ins. Co. *v.* Robison, 7 C. C. A. 444, 58 Fed. 723 (that the distance between Dubuque, Ia., and Asheville, N. C., exceeds 100 miles, noticed); 1895, Blumenthal *v.* Meat Co., 12 Wash. 331, 41 Pac. 47 (the distance between two towns, noticed); 1876, Siegbert *v.* Stiles, 39 Wis. 533, 536 (that two towns in the State were separated only by a river and were mutually accessible across the ice, noticed).

[1] 1848, Hoare *v.* Silverlock, 12 Q. B. 624 (defamation for applying to the plaintiff the "fable of the Frozen Snake"; held, that no innuendo was necessary, and that, in arrest of judgment, the jury might justly attribute a libellous sense; per Erle, J., that their well-known application in a libellous sense could be noticed).

industry, and of social life in general, is involved in the meanings of words, that no generalizations are practicable. The rulings must depend upon good sense rather than upon precedent.[2]

A difficult case is presented when the word in question is used in more than one notorious meaning, particularly when it has by custom come to be applied artificially or evasively to objects not strictly entitled to it. Common instances of this sort are the names of intoxicating liquors. The true solution here is rather to be found in the theory of presumptions (*ante*, § 2490); first, because judicial notice becomes inappropriate as soon as a fact is in any manner practically dubitable, and, next, because the fact really sought in many such instances is the meaning or use in a concrete instance which could not be notorious. Of various possible meanings, one may be presumed to apply. There is naturally some variance of ruling. Apart from particular local circumstances, it would seem to be proper to hold that "whiskey" or "gin" may be assumed to signify an intoxicating liquor,[3] and that a liquor termed "brandy" is intoxicating,[4] and even that "wine,"[5] or malt or hop liquors,[6] are intoxicating. But "beer" is a term applied to so many non-intoxicating drinks that evidence of its qualities in a given instance may well be required.[7]

[2] The following are examples: 1809, Clementi *v.* Golding, 2 Camp. 25 (it was held that "book" in a copyright act might apply to a single printed sheet); 1861, Moseley's Adm'r *v.* Mastin, 37 Ala. 216, 221 (that "adm'r" signified "administrator," noticed); 1893, Edwards *v.* Publishing Soc., 99 Cal. 431, 435, 34 Pac. 128 (that "sack," in discussing electoral corruption, means a corruption-fund, noticed); 1895, Sinnott *v.* Colombet, 107 id. 187, 40 Pac. 329 (meaning of "kindergarten" in a resolution of a school-board); 1898, Hines *v.* Miller, 122 id. 517, 55 Pac. 401 (meaning of "shafts," "tunnels," etc., noticed); 1867, Hill *v.* Bacon, 43 Ill. 477 (that the S. E. forty of a quarter-section signified one of four forties, noticed); 1877, Hart *v.* State, 55 Ind. 599, 601 (that "bills" testified to were bank-bills, not presumed; on the theory that the Court would notice the existence of other kinds of "bills"); 1827, Jones *v.* Overstreet, 4 T. B. Monr. 547 ("money," noticed); 1838, Com. *v.* Kneeland, 20 Pick. 206, 239 (the meaning of "blasphemy," examined); 1879, State *v.* Johnson, 26 Minn. 316, 3 N. W. 982 (the orthography or pronunciation of Polish names, not noticed); 1902, Martin *v.* Eagle Creek D. Co., 41 Or. 448, 69 Pac. 216 (technical meanings are not noticed); 1849, U. S. *v.* Burns, 5 McLean C. C. 23 ("fifty-cent pieces," etc., noticed).

The rules about *expert opinion* of the meaning of words (*ante*, § 1955) and about the use of *dictionaries* in evidence (*ante*, § 1699) serve to dispose of many of these questions.

[3] 1877, Schlicht *v.* State, 56 Ind. 173, 176 (whiskey); 1854, Com. *v.* Peckham, 2 Gray 514 (gin); 1901, Peterson *v.* State, 63 Nebr. 251, 88 N. W. 549 (whiskey).

[4] 1893, State *v.* Tisdale, 54 Minn. 105, 55 N. W. 903 (that California brandy is intoxicating, noticed); 1893, Thomas *v.* Com., 90 Va. 92, 94, 17 S. E. 788 (that apple-brandy is intoxicating, noticed).

[5] 1901; Caldwell *v.* State, 43 Fla. 545, 30 So. 814 (that wine is intoxicating, noticed); 1897, Starace *v.* Rossi, 69 Vt. 303, 37 Atl. 1109 (Italian "sour wine," noticed as intoxicating). Otherwise, where the description implies different ingredients: 1898, Loid *v.* State, 104 Ga. 726, 30 S. E. 949 (that home-made blackberry wine is intoxicating, not noticed).

[6] *Contra:* 1877, Shaw *v.* State, 56 Ind. 188 (malt liquors); 1894, People *v.* Rice, 103 Mich. 350, 61 N. W. 540 ("hop pop").

[7] Differing views have been judicially expressed, but usually declining notice: 1876, Adler *v.* State, 55 Ala. 16, 23 (that lager beer is a malt liquor, noticed); 1892, Bell *v.* State, 91 Ga. 227, 231, 18 S. E. 288 (that rice-beer is intoxicating, not noticed); 1902, Du Vall *v.* Augusta, 115 id. 813, 42 S. E. 265 (that beer is intoxicating, not noticed); 1886, Hansberg *v.* People, 120 Ill. 21, 23, 8 N. E. 857 (similar); 1883, Kerkow *v.* Bauer, 15 Nebr. 150, 155, 18 N. W. 27 (that beer is intoxicating, not noticed; except so far as defined by statute); 1901, Peterson *v.* State, 63 id. 251, 88 N. W. 549 (that whiskey and beer are intoxicating, noticed); 1889, Blatz *v.* Rohrbach, 116 N. Y. 450, 22 N. E. 1049 (that beer is intoxicating, not noticed; Bradley, J., diss.); 1877, State *v.* Goyette, 11 R. I. 592 (that lager bier is a malt liquor, noticed); 1881, State *v.* Beswick, 13 id. 211, 220 (that beer is intoxicating, not noticed); 1894, State *v.* Sioux Falls Brewing Co., 5 S. D. 39, 45, 58 N. W. 1 (that beer is a malt or intoxicating liquor, not noticed; because there are many sorts); 1894, State *v.* Church, 6 id. 89, 60 N. W. 143 (that lager beer is intoxicating, noticed).

TITLE II: JUDICIAL ADMISSIONS.

CHAPTER XC.

§ 2588. **Theory of Judicial Admissions.** An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn — *i. e.* ceremonial or formal — or judicial admission, and is, in truth, a substitute for evidence, in that it does away with the need for evidence.[1]

This judicial admission is sharply marked off from the ordinary or quasi-admission, — which indeed does not deserve to bear the same name. The latter is merely an item of evidence, available against the party on the same theory on which a self-contradiction is available against a witness. The distinctions between the two have already been examined (*ante*, §§ 1048, 1057). It is enough to note that, as to the effect, the latter is not conclusive; while as to its form, it may be either implied or express, and need not be either written or made in open court.

§ 2589. **Distinction between Judicial Admissions, Pleadings, Demurrers to Evidence, and Estoppels.** The effect which a judicial admission produces is of course an effect shared in common with certain other legal acts. In the first place, a *pleading* may by confessing a fact place it beyond the range

[1] *Ante* 1726, Gilbert, Evidence, 103 ("The consent of the parties concerned must be sufficient and concluding evidence of the truth of such fact, for they [the jury] are only to try the truth of such facts wherein the parties differ"); 1896, Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "Agreements of this character, intelligently and deliberately made, — whether made by the parties in person, or by their attorneys or solicitors of record, — are encouraged and favored. Their purpose, generally, is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant"); 1855, Com. *v.* Desmond, 5 Gray 80, 82 (Thomas, J., referring to the prosecuting attorney's admission on trial that a witness was an accomplice: "Admissions made in the course of judicial proceedings are substitutes for, and dispense with, the actual proof of facts"). In Louisiana the Continental law has left its mark: La. Rev. Civ. C. 1888, § 2291 ("Judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding. It amounts to full proof against him who has made it. It cannot be divided against him. It cannot be revoked," unless made through error of fact, but not for error in law).

either of needing evidence or of permitting dispute; and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading; that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time, form, amendment, and the like, which govern the allegations of pleading.

Furthermore, a *demurrer to evidence*, the object of which is to raise a question of law, will like other demurrers have the effect of admitting the facts conclusively (*ante*, § 2495). It has the further common feature, frequent in a judicial admission, that it is made after issues formed and trial begun; but nevertheless it is in this respect, like a motion to arrest judgment, merely a postponed pleading.

Finally, an *estoppel* has the similar effect of concluding all dispute of the fact. But here the distinction is that the estoppel is an obligation made by a rule of substantive law, of the same general class as contracts and representations;[1] that it requires some additional act of detriment on the part of the obligee; and that it is absolute as regards the permanent legal relations of the parties, and not merely hypothetical or relative to the procedure of a particular litigation between them.

§ 2590. **Effect of Judicial Admissions; (1) Conclusive upon the Party making.** The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i. e.* the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it.[1] In view, however, of the commendable purpose which leads (or ought to lead) to the voluntary making of admissions, it is always

[1] Harriman on Contracts, 2d ed., § 618.

[1] Cases cited *ante*, § 2588, and the following: 1896, Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "Such agreements are sometimes made to avoid continuances, or for some specific purpose, and, by their terms, are limited to the particular occasion or purpose, and, of course, lose all force when the occasion has passed, or the purpose has been accomplished. But if by their terms they are not limited, and are unqualified admissions of facts, the limitation is not implied, and they are receivable on any subsequent trial between the parties. And when made in open court, and reduced to writing, intended to be used, and used, as an instrument of evidence, and is without limitation as to time or occasion, it cannot be withdrawn or retracted at the mere will of either party. The presence of witnesses to prove the facts stated is waived. If the witnesses had been produced and testified, and they died, or became insane, or removed without the jurisdiction of the court, on a subsequent trial evidence of their testimony would be admissible. The admission of the facts dispensing with evidence, if it could be disregarded by either party on any subsequent trial, in the event of inability to produce witnesses to establish them, would often convert such admissions into instruments of fraud and injury. When they are made deliberately and intelligently, in the presence of the Court, and reduced to writing, they are of the best species of evidence; and parties cannot be permitted to retract them, as they are not permitted at pleasure to retract admissions of fact made in any form. If they are made improvidently and by mistake, and the improvidence and mistake be clearly shown, the Court has a discretion to relieve from their consequences, — a discretion which should be exercised sparingly and cautiously"); 1868, Paige *v.* Willet, 38 N. Y. 28, 31 ("A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be sufferced to deny its existence or to prove any state of facts inconsistent with that admission"); 1880, Oscanyon *v.* Arms Co., 103 U. S. 261, 263 ("Any fact, bearing upon the issue involved, admitted by counsel, may be the ground of the Court's procedure equally as if established by the clearest proof"; here the counsel's opening statement of the issues was taken as sufficient for directing a verdict for the defendant).

and properly said that the trial Court may in discretion relieve from this consequence.[2]

§ 2591. **Same: (2) Exclusive of Evidence by the Party benefiting.** A fact that is judicially admitted needs no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, will even be excluded;[1] first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy (*ante*, § 2); next, because it is superfluous and merely cumbers the trial (*ante*, §§ 1863, 1904); and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be entitled to.

§ 2592. **Same: (3) Validity as a Waiver of Unconstitutionality or other Illegality.** The effect of an admission being to remove the fact from controversy, precisely as if no plea or demurrer had raised the issue, it follows that any fact whatever may be the subject of an admission, provided only that the fact does not require the Court to violate those rules of public policy which even a contract could not override or displace.[1] Consequently, the admission may relate to a fact proved by *evidence otherwise inadmissible* (by virtually waiving objection to it);[2] or to a fact which the Court might have

[2] Prestwood *v.* Watson, Ala., *supra*, note 1; Seely *v.* Cole, Oh., *post*, § 2594, note 2.

Under the Louisiana Code, quoted *ante*, § 2588, the rule may be different: 1842, Kohn *v.* Marsh, 3 Rob. La. 48, 49 (consent to an order appointing experts; opinion not clear).

[1] 1890, Dean *v.* State, 89 Ala. 46, 8 So. 38 (absent witness' testimony). *Contra: Me.:* 1897, Dunning *v.* M. C. R. Co., 91 Me. 87, 39 Atl. 352 (Savage, J.: "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts, — to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight"); *Mass.:* 1849, Com. *v.* Miller, 3 Cush. 243, 250 (other forged notes, to show guilty knowledge, the knowledge being admitted); 1876, Com. *v.* Costello, 120 Mass. 358, 364, 369 (an admission in Court of the fictitious nature of a name on an appeal bond); 1896, Stetson's Will, — id. —, 44 N. E. 1085 (admission of a will's execution does not prevent the calling of the subscribing witnesses as such); 1898, Whiteside *v.* Lowney, 171 id. 431, 50 N. E. 930 (in the trial Court's discretion the evidence may be excluded).

If admitted, however, it may of course not be sufficient ground for a new trial: 1898, Davis *v.* Emmons, 32 Or. 389, 51 Pac. 652.

[1] 1885, New York, L. & W. R. Co.'s Petition, 98 N. Y. 447, 453 (stipulation as to commissioners of valuation; Earl, J.: "Parties by their stipulations . . . may stipulate away statutory, and even constitutional rights; . . . all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct or the control of their rights, in the trial of a cause or the conduct of a litigation, are enforced by the Courts. . . . So it is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the Courts").

[2] 1896, Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547, 549 (the argument that "in view of the conclusive nature of the presumption that the written agreement embraced the entire contract, the parol evidence, although received by consent, cannot overcome that presumption," rejected); 1903, Thompson *v.* F. W. & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29 (hearsay admitted by stipulation); and the statutes for depositions (*ante*, §§ 1380, 1411) frequently assume this.

In Shaw *v.* Roberts (1818), 2 Stark. 445, Abbott, C. J., acknowledged that an "admission of particular facts" was to be enforced; his further remark, that "it was the business of the Court to guard against the reception of improper evidence, independently of any admissions whatever, and it was the duty of the Court to reject illegal evidence, although the parties on both sides should agree to it," was ill-worded or ill-reported; what he meant was that one counsel's introduction of improper evidence was not such an acknowledgment of its propriety as disentitled him to object to further inquiries on that subject; *i. e.*, the principle of curative admissibility (*ante*, § 15).

noticed as non-existent;[3] or to a rule of evidence *constitutionally sanctioned* for the benefit of the waiving party;[4] or to some other rule constitutionally protected, in particular, to the failure to observe the requirements for *legislative proceedings in a statute's enactment.*[5] Any other result would seem to be inconsistent with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly raised by one of them. Moreover, unless the admission is expressly rejected at the outset by the opponent, the judicial refusal to recognize it would often permit unseemly breaches of faith by counsel who have agreed to the admission.

§ 2593. **Same**: (4) **Effect on Subsequent Trials.** Whether a judicial admission continues to have effect for a subsequent part of the same proceedings, including a new trial, has been the subject of some opposition of rulings, although the orthodox English practice plainly answered in the affirmative.[1]

[3] *Contra:* 1887, Attorney-General *v.* Rice, 64 Mich. 385, 391, 31 N. W. 203 (admission that a mere title, with no bill, was introduced cannot avail if the Court sees the fact to be contrary).

[4] Cases cited *post*, § 2595, note 5.

[5] 1892, Norman *v.* Kentucky Board, 93 Ky. 537, 547, 563, 20 S. W. 901 (by demurrer; Pryor, J., diss.). *Contra:* 1873, Happel *v.* Brethauer, 70 Ill. 166 (stipulation for trial, that a statute was not constitutionally passed); 1899, State *v.* Aloe, 152 Mo. 466, 54 S. W. 494 (similar); 1884, Passaic Co. *v.* Stevenson, 46 N. J. L. 173, 186, 193 (admission of lack of notice of a bill, as making an act unconstitutional, not received); 1895, Carr *v.* Coke, 116 N. C. 223, 239, 22 S. E. 16 (admission of fraud in enrolment, not received); 1901, Commissioners *v.* De Rosset, 129 id. 275, 40 S. E. 43 (legislative journals); 1833, Allen *v.* McKean, 1 Sumner 276, 314 (Story, J.: "The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers; and no private arrangements between such parties can supersede them"; treating as null the acquiescence of a board of trustees in an unconstitutional act). It would seem that in such a case the Court does not have to commit itself to a ruling of unconstitutionality; it can merely ignore the statute for the case in hand. Compare the cases on the conclusiveness of enrolled statutes (*ante*, § 1350).

Judicial admissions are of course equally effective in *criminal cases* as in civil cases (apart from such questions as the waiver of jury trial): 1901, Com. *v.* McMurray, 198 Pa. 51, 47 Atl. 952; the contrary has been declared: 1878, Clayton *v.* State, 4 Tex. App. 515, 519; but this is carrying tenderness for criminals too far.

[1] *England:* 1832, Elton *v.* Larkins, 1 Mo. & Rob. 196 (Tindal, C. J., reserved the point, but thought that such an admission "applies to every trial which may take place by direction of the Court"); 1835, Doe *v.* Bird, 7 C. & P. 6 (receivable on a new trial, unless there was a limitation to the particular trial); 1836, Langley *v.* Oxford, 1 M. & W. 508 (debt on a bond, with a new special plea; the prior admission as to handwriting, received, the issue as to handwriting being not altered; "the admission is to be used on the trial of the cause, whenever the trial takes place; no matter whether it be the first or the second trial"); *Canada:* 1884, McDonald *v.* Murray, 5 Ont. 559, 575 (copy agreed to be used instead of the original, admitted on a second trial, per Wilson, C. J.); *United States:* 1896, Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600 (usable on a new trial; quoted *ante*, § 2590); 1873, Perry *v.* Simpson W. M. Co., 40 Conn. 313 (admitted on a second trial; yet allowed to be disputed by denying their correctness); 1897, Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46 (an agreed statement of facts used at a former trial; admissible, unless otherwise expressly provided; but conclusive only for the trial in hand); 1898, King *v.* Shepard, 105 id. 473, 30 S. E. 634 (usable on the second trial, but not binding); 1878, Holley *v.* Young, 68 Me. 215 (the admission binds for a new trial, unless the judge sees fit to relieve; "it would be wiser to adopt some rule by which more admissions could be obtained, than to allow parties at their own will and pleasure to withdraw the few now made"); 1860, Central B. Co. *v.* Lowell, 15 Gray 106, 128 (an agreement for the use of certain computations by an expert accountant, held to apply by intention to a second trial); 1901, Gallagher *v.* McBride, 66 N. J. L. 360, 49 Atl. 582 (stipulation as to the manner of payments for property, effective on a second trial); 1885, New York, L. & W. R. Co.'s Petition, 98 N. Y. 447, 453 (stipulation as to commissioners of valuation, enforced for a new appraisal after an appeal reversing the original award); 1902, Cutler *v.* Cutler, 130 N. C. 1, 40 S. E. 689, *semble* (excluded on a second trial; but here the admission had been conditioned on another fact, which no longer existed); 1899, Consolidated S. & W. Co. *v.* Burnham, 8 Okl. 514, 58 Pac. 654 (agreed statement of facts, effective for a second trial); 1900, Acme Mfg. Co. *v.* Reed, 197 Pa. 359, 47 Atl. 205 (stipulation as to a deposition, not binding in a second action after a non-suit in the first); 1898, Scaife *v.* Land Co., 33 C. C. A. 47, 90 Fed. 238 (admission in a bill of excep-

It is true that the pleadings of the parties continue to be binding (subject only to the usual rules for amendment); but the very distinction between pleadings and judicial admissions is that the latter are not subject to the fixed requirements of the former (*ante*, § 2589). On the other hand, a regard for fairness of practice indicates the opposite result; for after the case of the party benefiting by the admission has been exposed at the first trial, the party making the admission may discover that the proof of the fact would have been difficult or onerous, and by withdrawing the admission he may thus obtain a factitious advantage which the law hardly contemplates as the consequence of a new trial. Moreover, the ignorance which may have led to an ill-advised admission is no more a cause for revoking it at the second trial than at the first; and in any event the judge's discretion may grant relief (*ante*, § 2590) in the one instance as well as the other. It would seem, having regard to the voluntary and contractual nature of the act, that the duration of its effect, no less than its scope, depends, after all, on the intent of the parties; that this implied intent may vary with the circumstances; and that where no special circumstances indicate the contrary, the intention should be implied to extend the effect of the admission to all subsequent parts of substantially the same litigation between the same parties, including a new trial.[2] Such seems to be the general trend of the rulings.

§ 2594. **Form of the Admission; Who is Authorized.** (1) It is sometimes declared, in statute, court-rule, or decision, that all agreements between attorneys or counsel, including presumably judicial admissions, must be in writing, in order to obtain enforcement from the Courts;[1] and no doubt, for admissions made out of court, or at least prior to trial and out of court, the rigid policy of the law should look only at written admissions, even though professional honor could not suffer such a distinction. But that policy need not apply to admissions made in court, where the memory of the judge and the presence of other members of the bar could be trusted for verification in

tions in a former trial, received); 1800, Pearl *v.* Allen, 1 Tyl. 4 (admission of execution on a former trial, "when not attached to the record," insufficient).

Whether, though not binding, they are at least receivable as *ordinary admissions* (as laid down in some of the rulings above) depends on the general principles applicable to the use of pleadings as ordinary admissions (*ante*, §§ 1063–1067).

[2] Of course the admission would not bind between *other parties:* 1847, Holman's Heirs *v.* Bank of Norfolk, 12 Ala. 369, 408 (admission by stipulation of the present complainant's counsel in a prior suit over the same mortgage on a bill by other parties against the present complainant, held not binding here; "it would be a most alarming doctrine that an admission made by counsel in the progress of a cause was proof of the fact so admitted through all future time"); 1863, Wilkins *v.* Stidger, 22 Cal. 231, 238 (action for medical services to an injured person; defendant's attorney's admission of the correctness of the plaintiff's bill, in an action by the defendant against the tortfeasor before arbitrators for the injury, excluded).

The following ruling seems unsound: 1857, Thompson *v.* Thompson, 9 Ind. 323, 333 (conclusiveness not given to those made "pending the suit," but only to those "made in court for the purposes of the trial").

[1] Cal. C. C. P. 1872, § 283 ("An attorney or counselor shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise"); 1878, Holley *v.* Young, 68 Me. 215 ("reduced to writing or incorporated into a record of the case"); Mass. Rev. L. 1902, c. 173, § 70 ("All agreements of attorneys relative to an action or proceeding shall be in writing").

The *authentication of the attorney's signature* may be aided by principles already considered (*ante*, §§ 2167, 2578).

case of misunderstanding and the oral habit of the proceedings is inconsistent with such an exception.[2]

(2) It is of the nature of an admission, plainly, that it be by intention an act of waiver, relating to the opponent's proof of the fact, and not merely a statement of assertion or concession, made for some independent purpose;[3] in particular, a statement made for the purpose of *giving testimony* is not a judicial admission.[4]

(3) Judicial admissions are usually made by the party's *attorney or counsel.* It is settled that the general authority to conduct the trial implies the authority to make such admissions.[5]

§ 2595. **Avoiding a Continuance by Judicial Admiasion; Testimony of an Absent Witness of the Opponent.** When a continuance, or postponement, of the trial is applied for on the ground of the present impossibility of securing the attendance of a material witness, the granting of the application, by orthodox practice, lies in the Court's discretion, *i. e.* subject to no mandatory rules, provided certain fundamental conditions exist as to materiality, diligence, and the like. Assuming, however, that they exist, and that the Court would by them be justified in ordering the continuance, the opponent may attempt to remove these grounds for granting it, by making a judicial admission either that the witness *would if present testify* as affirmed by the applicant, or that the *tenor of the desired testimony is true.* The earlier practice

[2] 1896, Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "That the agreement was not signed by the parties or by the counsel was not of importance. Their signatures were not necessary to impart to it validity. Private agreements between parties or their attorneys, relating to the proceedings in a pending cause,— agreements not made in the presence of the Court,— the rules of practice require, shall be in writing, and signed by the party to be bound thereby. The rule has never been supposed to have any application to agreements or admissions made in the presence of the Court. Upon such agreements or admissions, made verbally, every court is necessitated to act daily. The refusal to recognize and act upon them would delay the transaction of business, and entail upon counsel and parties much unnecessary labor. The purpose of the rule is to relieve such admissions or agreements from the infirmative considerations attaching to mere oral admissions of facts imputed to the one party or the other, and to avoid the unseemly wrangles, disputes, and contradictions which would ensue if they rested only in memory. Where the agreement or admission is made in the presence of the Court, it is without the purpose or reason, if not without the letter, of the rule"); 1834, Seely *v.* Cole, Wright Oh. 681 (an oral admission, made in court on the opponent's offer of a witness, not allowed to be retracted, unless by leave of Court). An admission made in the counsel's *statement of the case* is always treated as binding: 1895, Lake Erie & W. R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470 (the incidental statement of counsel, in opening, that he intended to prove the fact in question); 1880, Oscanyon *v.* Arms Co., 103 U. S. 261, 263 (cited *ante*, § 2590). Sometimes a larger scope may be conceded: 1892, Smith *v.* Whittier, 95 Cal. 279, 287, 30 Pac. 529 (an oral stipulation, not filed or entered under C. C. P. § 283, *supra*, is nevertheless binding if it has been so acted upon that it would be inequitable to disregard it).

[3] 1901, Cramer *v.* Truitt, 113 Ga. 967, 39 S. E. 459 (admission of attorney in private conversation with the judge out of Court, not sufficient).

[4] 1900, Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969 (a party testifying at a former trial, the brief of evidence therein having been agreed to by counsel and approved by Court, is not estopped from testifying contrary thereto); 1898, Smith *v.* Olsen, 92 Tex. 181, 46 S. W. 631 (answer by way of discovery). *Contra*, but unsound, 1901, Feary *v.* R. Co., 162 Mo. 75, 62 S. W. 452 (a statement made on the stand while testifying, held conclusive; Valliant, J., diss.).

That the "*proofs of loss*," in insurance, are judicial admissions has sometimes been argued, but not with good reason (*ante*, § 1073).

The *payment of money into court* was formerly a common type of judicial admission, more allied to a pleading; it is briefly noticed *ante*, § 1061, and more fully in Greenleaf, Evidence, § 205; statutes and rules of court often regulate it.

[5] Cases cited *ante*, § 1063; 1859, Rosenbaum *v.* State, 33 Ala. 361; 1847, Greenlee *v.* McDowell, 4 Ired. Eq. 481, 484.

A *change of attorneys* does not abrogate an admission originally binding: 1892, Smith *v.* Whittier, 95 Cal. 279, 289, 30 Pac. 529.

seems for a time to have left in the Court's discretion the propriety of recognizing this as sufficient to avoid the continuance. But statutes have now come, in most jurisdictions, to prescribe a rule, declaring that one or the other kind of these admissions will *per se* avoid the continuance, and (sometimes) that, conversely, an application based on specified grounds shall be granted unless one or the other of these admissions is made.[1]

For the *opponent* of such an application, *i. e.* the party making the admission, the difference between the two kinds (so far as concerns the rules of evidence) is that the first kind still leaves it open to him to impeach the credit of the absent witness, just as he could that of a deponent,[2] except that the rule for self-contradictions raises here a special problem;[3] but the second kind obviously precludes him from any impeachment of credit, since

[1] The following list is not exhaustive; typical statutes are set out in full: *Ariz.* Rev. St. 1887, §§ 752, 753; *Ark.* Stats. 1894, § 5797; *Cal.* C. C. P. 1872, § 595, as amended by St. 1880 ("The Court may require a moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered, or overruled as improper, the trial must not be postponed"); *Colo.* C. C. P. 1891, § 177; *D. C.* Comp. St. 1894, c. 55, § 120; *Ill.* Rev. St. 1845, Rev. St. 1874, c. 110, § 43 (in asking a continuance "on account of the absence of testimony," the party's or his agent's affidavit stating the facts expected to be proved thereby, etc., must be offered); § 44 ("if the other party will admit the affidavit in evidence, the cause shall not be continued"); § 45, Laws 1867, p. 157 ("When the affidavit is concerning the evidence of a witness, the party admitting such affidavit shall be held to admit only that if the absent witness were present he would testify as alleged in the affidavit, and such admission shall have no greater force or effect than if such absent witness were present and testified as alleged in the affidavit, leaving it to the party admitting such affidavit to controvert the statements contained therein, or to impeach said witness, the same as if such witness were present and examined in open court"); c. 38, § 428 *a*, St. 1885, June 26, p. 73 (on such affidavits in a criminal case, neither party shall be "required to admit the absolute truth of the matter set up in the affidavit for continuance, but only that such absent witness, if present, would testify as alleged in the affidavit; and if it is so admitted, no continuance shall be granted, but the case shall go to trial, and the party admitting the evidence shall be permitted to controvert the statements contained in such affidavit by other evidence, or to impeach such absent witness the same as if he had testified in person; provided that the Court may in its discretion require the opposite party to admit the truth absolutely of any such affidavit when, from the nature of the case, he may be of opinion that the ends of justice require it"; the act not to apply to applications at the same term of Court when the indictment, etc., is found); *Ind.* St. 1881, Rev. St. 1894, § 413 (civil cases; if "the adverse party will consent that on the trial the facts shall be taken as true, if the absent evidence is written or documentary, and, in case of a witness, that he will testify to said facts as true, the trial shall not be postponed for said cause; and in such case the party against whom such evidence is used shall have the right to impeach such absent witness, as in case where the witness is present or his deposition is used"); § 1850 (criminal cases; if "the prosecuting attorney will admit the truth of the facts which the defendant in his affidavit for a continuance alleges that he can prove by the absent witness, or by the written or documentary evidence therein specified and described, the trial shall not be postponed for that cause"); § 1851 ("If the defendant will admit that the facts which the prosecutor states he expects to prove are true, the trial shall not be postponed for that cause"); *Iowa* Code 1897, § 3665 (if an application for continuance is sufficient, "the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the Court to be properly stated"); *La.* St. 1894, No. 84, Wolff's Rev. L. p. 277, Code Pr. 1894, § 466; *Mo.* Rev. St. 1899, §§ 687, 3980; *Nev.* Gen. St. 1885, § 3182; *N. M.* Comp. L. 1897, §§ 2986, 2987; *Utah* Rev. St. 1898, §§ 3133, 3712; *Wyo.* Rev. St. 1887, § 3397.

Distinguish those statutes by which a continuance is granted on condition that the applicant assent to the taking and using of *depositions of witnesses now present* for the opponent; *e. g.* Cal. C. C. P. 1872, § 596; Utah Rev. St. 1898, § 3134; these merely avoid the necessity of notice and other conditions precedent ordinarily to the use of the deposition (*ante*, §§ 1378, 1415).

[2] 1881, Powers *v.* State, 80 Ind. 77 (the truth of an absent witness' testimony admitted by the prosecution to avoid postponement; impeachment forbidden; but not in civil cases, where merely the fact of testifying is admitted); 1878, State *v.* Miller, 67 Mo. 604, 608 (by statute); 1878, State *v.* Thomas, 68 id. 605, 615. The statutes frequently declare this expressly.

[3] The authorities are collected *ante*, § 1034.

the facts to be testified to are judicially admitted.[4] But he cannot be *forced* to make either kind of admission (by an order directing the trial to proceed and receiving in evidence the applicant's statement of the testimony or the facts); for this would be to deprive the opponent of his right to cross-examination.[5] The opponent, however, even though a defendant in a criminal case, may of course waive this right, by a *voluntary* admission of the testimony or the facts.[6]

For the *applicant*, who is refused a continuance when the opponent makes one of these admissions, the difference between the two kinds is obviously a radical one. Whether the Court should require the more stringent of the admissions, *i. e.* of the facts as established, not merely of the testimony as uttered, and should, in default of it, as a rule of law grant a continuance otherwise sufficiently grounded, has been one of the controverted questions in judicial opinion.[7] Regarded as a matter of common-law practice or of legislative policy, it seems to rest ultimately on local experience. If either rule is found, in a particular community, to work detriment to the safety of innocent accused persons in general or of the State's justice in general, it should be abandoned. Thus far the common experience has been that the requirement of an admission of facts, not merely of testimony, has served to add a powerful weapon of chicanery to the armory of unscrupulous counsel defending hardened villains.[8] The constitutional objection, it is true, has been raised against the use of the less stringent form of admission, *i. e.* the objection that to refuse a continuance, if the prosecution admits merely that the proposed testimony would have been given, would deprive the accused of his right (*ante*, § 2191) to compulsory process for his witnesses. In spite of the sanction given by some Courts to this objection, it seems to be totally devoid of grounds.[9] The constitutional provision for compulsory process, as the history of that right shows, was designed merely to give equally to the accused (beyond the power of legislative change) the aid of the State's subpœna. The contrast marked by that right is that, without it, the accused must depend (as at common law) solely on his own persuasion and the witness' choice, for securing his witnesses' attendance, but that, with it, the accused, like the prosecution and like civil parties, may invoke the State's compulsive power, whatever that may avail. But the constitutional provi-

[4] *Supra*, note 2.

[5] *Ante*, § 1384; 1882, Wills *v.* State, 73 Ala. 362 (leading case). This would be equally true in civil cases; unless a statute prescribed a contrary rule; for no constitutional clause would prevent such a statute.

[6] 1884, State *v.* Fooks, 65 Ia. 452, 21 N. W. 773; 1875, U. S. *v.* Sacramento, 3 Mont. 239; 1903, State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, and cases cited *ante*, § 1398, note 9.

[7] 1856, People *v.* Diaz, 6 Cal. 248; 1871, Van Meter *v.* People, 60 Ill. 168; 1866, Wassels *v.* State, 26 Ind. 30; 1855, Trulock *v.* State, 1 Ia. 515, 519; 1896, Adkins *v.* Com., 98 Ky. 539, 33 S. W. 948 (leading case); 1902, State *v.* Fairfax, 107 La. 624, 31 So. 101; 1887, State *v.* Berkley, 92 Mo. 41, 4 S. W. 24 (leading case); 1901, Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; 1827; People *v.* Vermilyea, 7 Cow. 369, 388, 394, 399 (leading case); 1867, DeWarren *v.* State, 29 Tex. 464, 481.

Of course an admission of the truth of the facts would suffice: 1889, Pace *v.* Com., 89 Ky. 204, 207, 12 S. W. 271 (leading case); 1857, Browning *v.* State, 33 Miss. 47, 71. *Contra*, but anomalous: 1838, Goodman *v.* State, Meigs 195.

[8] The opinion of Grace, J., in Adkins *v.* Com., *supra*, forcefully shows this for Kentucky. In Illinois and Indiana the same stages of experience have developed.

[9] The opinion of Grace, J., in Adkins *v.* Com., Ky., *supra*, best expounds this.

sion does not have anything to say about the time of holding trial; which is the only question here involved. Much less does it pledge absolutely to the accused the presence of all desired persons, or any other superhuman feat. The Constitution cannot raise witnesses from the dead, nor spirit them from beds of illness or kennels of concealment. To interpret the Constitution into any such pledge is to invent (as experience has shown) a guarantee that no determined offender shall be tried for his crime until he himself pleases. Whether the one or the other kind of admission should be required may depend on the circumstances of each community and each case; but it is impossible to regard the constitutional clause as being in any way involved.

§ 2596. **Admissions of the Genuineness of a Document.** In probably most instances where a document is material under the pleadings, or is evidentially used, its genuineness is not doubtful. Yet the proof of that genuineness may be onerous and expensive. The opponent's admissions, judicial or extrajudicial, are receivable for the purpose (*ante*, §§ 2131, 2132), and may suffice; but it is only casually and seldom that they would be available to the party desiring to make the proof; and for lack of them at common law, the usual evidence must be resorted to, however needless. It would therefore be the part of common sense to recognize the needs of the situation by some expedient for facilitating the proof. The appropriate remedy seems naturally to lie in securing some sort of judicial admission, by rule of pleading or otherwise, where the circumstances justify it. It was Bentham (as usual, one might say) who seems first to have proposed this measure.[1] Almost immediately his proposal bore fruit in one of the Hilary Rules of 1834. By this Rule the opponent was made to take the risks of paying the costs of proof, if after having a prior opportunity to satisfy himself he declined to admit judicially in writing the document's genuineness.[2] This rule was preserved in later English legislation,[3] and furnished one of the two chief types for statutes in the United States.

The other common expedient, now in vogue in perhaps the majority of jurisdictions of the United States, takes the form of a rule of pleading,[4] by

[1] 1827, Bentham, Rationale of Judicial Evidence, b. VII, c. V. (Bowring's ed., vol. VII, pp. 185–188).

[2] Rules of Practice, Hilary Term, 4 Wm. IV (set out in 10 Bing. 456), No. 20 ("Either party, after plea pleaded, and a reasonable time before trial, may give notice of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified," the offering party may move that the opponent show cause, and "the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or presiding officer, shall be paid by the party so required, whatever may be the result of the cause"; provided that the judge "may give time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit"; and no costs of proving a document shall be allowed "to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have neglected or refused to make such admission" or the judge have indorsed the application as not reasonable to be granted); 1841, Rutler *v.* Chapman, 8 M. & W. 388 (Rule 20 held to apply to any document, and not merely one in the possession or power of the party seeking to offer it).

[3] 1853, Report of the Commission on Common Law Procedure, I, 44; 1852, St. 15 & 16 Vict. c. 76, §§ 117–119; 1854, St. 17 & 18 Vict. c. 125, § 25; 1883, Rules of Court, Order 32, rule 2.

[4] It is sometimes miscalled a rule of evi-

requiring a special denial on oath (either in the formal plea or in a separate affidavit) of the genuineness of the document; in default of this denial, the genuineness cannot be put in issue. This form is adapted especially to documents named in the pleadings as a foundation of the claim or defence; the other is applicable to any document whatever. In a few jurisdictions, both measures have been separately recognized; in others, the statute combines features of both.[5]

There are also occasional other expedients for applying the principles of pleading or of judicial admissions to facilitate the proof of documents, but they are of only local vogue or narrow scope.[6] There is still room for

dence; *e. g.*, 1867, Joynes, J., in James R. & K. Co. *v.* Littlejohn, 18 Gratt. 53, 76.

[5] The following list is not exhaustive; typical statutes are set ont in full: *Ala.* Code 1897, § 1801; *Ariz.* Rev. St. 1887, § 1877; *Ark.* Stats. 1894, § 2929; *Cal.* C. C. P. 1872, § 447, as amended by St. 1874 ("When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified"); § 448 ("When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant"); § 449, as amended by St. 1880 ("But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is upon demand refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case"); *Colo.* C. C. P. 1891, § 62; *Fla.* Rev. St. 1892, § 1073; *Ill.* Rev. St. 1874, c. 110, § 34, Rev. St. 1845, p. 415, § 14 ("No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit, and if plaintiff shall file his affidavit denying the execution or assignment of such instrument; provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party"); *Ind.* Rev. St. 1897, § 491; *Kan.* Gen. St. 1897, c. 95, § 379; *La.* C. Pr. 1894, § 324; *Mass.* Pub. St. 1882, c. 167, § 21, Rev. L. 1902, c. 173, § 86 ("Signatures to written instruments declared on or set forth as a cause of action, or as a ground of defence or set-off, shall be taken as admitted, unless the party sought to be charged thereby files in Court, within the time allowed for an answer, a special denial of the genuineness thereof, and a demand that they shall be proved at the trial"); *Miss.* Annot. Code 1892, §§ 1797–1800; *Mo.* Rev. St. 1899, § 742 (for any material paper); §§ 746, 6762 (for an instrument on which pleading is founded); *Nebr.* Comp. St. 1899, § 5967; *Nev.* Gen. St. 1885, § 3557; *N. M.* Comp. L. 1897, § 2685, sub-sec. 123, §§ 2977, 2984; *N. Y.* C. C. P. 1877, § 735 ("The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party a paper material to the action, and request a written admission of its genuineness. If the admission is not given, within four days after the request, and the paper is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial and paid by the party refusing the admission; unless it appears, to the satisfaction of the Court, that there was a good reason for the refusal"); *N. D.* Rev. C. 1895, § 5643; *Okl.* Stats. 1893, § 4257; *S. D.* Stats. 1899, § 6481; *Tex.* Rev. Civ. Stats. 1895, § 2318; *Utah* Rev. St. 1898, § 3473; *Wash.* C. & Stats. 1897, § 6048; *Wis.* Stats. 1898, §§ 4184, 4192; *Wyo.* Rev. St. 1887, § 2636.

[6] In *Minnesota*, a statnte which in literal reading declares a genuine *presumption of authentication* (*ante*, §§ 2130, 2132) has been judicially construed apparently into one of the above sort: Minn. Gen. St. 1894, § 5751 ("Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit"; except where the purporting person "shall have died previous to the requirement of such proof"); 1860, Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36, 40 (statute applied to articles of partnership); 1862, Turrell *v.* Morgan, 7 id. 368, 372 (held not to apply to unsigned indorsements on a note); 1878, Brayley *v.* Kelly, 25 id. 160 (printed notice in plaintiff's name; genuineness not presumed); 1883, Mast *v.* Matthews, 30 id. 441, 16 N. W. 155 (the statnte applies only in actions against the maker of the instrument or to defences or counterclaims against him); 1897, Moore *v.* Holmes, 68 id. 108, 70 N. W. 872 (distinguishing this rule from that which requires a specific traverse of execution in order to put execution in issue; Canty, J., diss., on the ground that the signature purported to be by an

improvement and expansion. Here, as everywhere, the time has hardly come when the law can afford to consider as closed that great period of rational advance which owed its first marked impulse to the caustic preaching of Bentham.

agent, and that the authority of an agent could not be presumed); 1898, Fitzgerald *v.* English, 73 id. 266, 76 N. W. 22 (does not apply where the alleged signer is dead or is not a party).

In *Georgia* and in *Texas* a statute forbids the use of *deed-copies from the registry* if an affidavit denying the original's genuineness is made; but this is construed as still permitting a forgery to be shown, even though the sworn denial is omitted (*ante*, § 1651).

In several jurisdictions there are statutes exempting from proof of deeds prior to a *common source of title*, unless the opponent makes a sworn denial; *e. g.*, 1884, Thatcher *v.* Olmstead, 110 Ill. 26; compare *ante*, § 2132, note 6.

THE END.

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